Georgetown Environmental Law and Policy Institute's
Takings-Net

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To provide timely information about regulatory takings litigation, the Georgetown Environmental Law & Policy Institute provides brief summaries of recently issued decisions and other important case developments. Past snapshots are collected on the GELPI website (http://www.law.georgetown.edu/gelpi). As in the past, the cases are organized in rough order of their importance and interest value.

1. Casitas Municipal Water District v. United States, 556 F.3d 1329 (Fed. Cir., Feb. 17, 2009) (the U.S. Court of Appeals for the Federal Circuit denied the application of the United States for rehearing or rehearing en banc in this controversial case in which a panel of the Federal Circuit, in a 2 to 1 decision (see Takings Net, Vol. 92), ruled that a requirement that a dam operator pass water through a fish ladder in order to mitigate the dam's adverse effects on public fisheries should be evaluated as a per se physical appropriation of private property; Judge Moore, the author of the original panel decision, filed a concurring opinion, joined by Judges Rader and Schall; Judge Gajarsa filed an opinion dissenting from the order denying rehearing, joined by Chief Judge Michel and Judge Dyk; Judge Linn also dissented from the order denying rehearing) (GELPI filed an amicus brief on behalf of the Natural Resources Defense Council in support of the U.S. application for rehearing, which is available on the GELPI website).

2. Rose Acre Farms, Inc. v. United States, 2009 WL 615449 (Fed. Cir., March 12, 2009) (in major decision, the U.S. Court of Appeals for the Federal Circuit reversed a claims court ruling that the U.S. Department of Agriculture effected a taking by requiring an industrial eggs farm to temporarily shut down and clean its facilities after it was identified as the source of salmonella poisoning that rendered members of the public seriously ill; the Federal Circuit ruled that the trial court erred in measuring the economic impact of the regulation by focusing on the plaintiff's lost profits rather than the reduction in value of its eggs; the Court also ruled, on the basis of a comprehensive analysis of the implications of the Supreme Court's Lingle decision, that the fact that the regulation was designed to protect public health weighed heavily against the claim) (GELPI filed an amicus brief in support of the United States on behalf of the Hoosier Environmental Council and the Sierra Club, which is available on the GELPI website).

3. St. John's River Water Management District v. Koontz, 2009 WL 722016 (Fl. Ct. App., Mar. 20, 2009) (after ruling that the Nolan/Dolan tests apply where a local government proposes to impose an exaction on a property owner but, in response to the owner's objection, does not do so and instead denies the development application altogether (Takings Net, Vol. 93), the Florida Court of Appeals certified the following question to the Florida Supreme Court as one of "great public importance:" "Where a landowner concedes that permit denial did not deprive him of all or substantially all economically viable use of the property, does Article X, Section 6(a) of the Florida Constitution recognize an exaction taking under the holdings of Nollan and Dolan where, instead of a compelled dedication of real property to public use, the exaction is a condition for permit approval that the circuit court finds unreasonable?").

4. Building Industry Association of Central California v. City of Patterson, 2009 WL 215144, as modified by 2009 WL 725103 (Cal. App., Jan 30 2009, as modified March 2, 2009, as further modified March 20, 2009) (reversing the trial court's rejection of plaintiff's claim, the California Court of Appeals ruled that a development agreement between a city and a developer should be read as incorporating constitutional takings standards and that under that reading of the development agreement the city breached the agreement by imposing a low-income housing fee on the developer; apparently proceeding on the assumption that the burden of proof was properly placed on the city rather than the plaintiff, the Court ruled that the city failed to demonstrate that the housing fee was "reasonably related" to any deleterious impact caused by the plaintiff's development).

5. Merrill v. Summit County, 2009 WL 530569 (D. Utah, March 2, 2009) (in a novel ruling with potentially significant implications for the prosecution of regulatory takings claims against local governments in federal court, the federal District Court for the District of Utah declined to dismiss plaintiff's federal taking claim after the county defendant removed to federal court the plaintiff's state court lawsuit alleging that various development restrictions constituted a taking under the U.S. and Utah Constitutions; the Court interpreted the Supreme Court's 2005 San Remo decision as authorizing plaintiffs to simultaneously prosecute federal and state takings claims in state court and reasoned that, since the defendant had removed the action to federal court, it could not complain about being subjected to these claims in federal court).

6. Peterson v. Riverton City, 2009 WL 564392 (D. Utah, March 5, 2009) (another case applying the same reasoning as Merrill v. Summit County).

7. Tennessee Scrap Recyclers' Ass'n v. Bredesen, 556 F.3d 442 (6th Cir., Feb. 13, 2009) (the U.S. Court of Appeals for the Sixth Circuit affirmed the district court's rejection of a motion for a preliminary injunction seeking to enjoin enforcement of a city ordinance requiring metal scrap dealers to "tag and hold" metal scrap they acquire for a period of ten days and to allow victims of metal theft and law enforcement officials to inspect the metal; the Court rejected plaintiff's argument that enforcement of the ordinance resulted in a per se physical taking or a regulatory taking of their private property).

8. Ramsey Winch Inc. v. Henry, 555 F.3d 1199 (10th Cir., Feb. 18, 2009) (the U.S. Court of Appeals for the Tenth Circuit rejected a taking claim based on an Oklahoma statute barring employers from imposing bans on storage of fire arms locked in vehicles on their property; the Court ruled that the statue did not effect a per se physical taking and that plaintiffs also failed to demonstrate a taking under the multi-factor Penn Central analysis).

9. Zaid v. United States, 85 Fed. Cl. 404 (Ct. Fed. Cls., Jan 22, 2009) (the U.S. Court of Federal Claims rejected a taking claim by an attorney who was denied the benefit of a one-third contingency fee arrangement by the terms of private congressional legislation granting relief to his clients on the condition that attorneys' fees be capped at $100,000 for each client; the Court relied on venerable Supreme Court and claims court precedents upholding the ability of Congress to attach conditions to private bills limiting attorney's fees without producing governmental takings liability; these precedents appear to turn on the notion that Congress has

broad discretion about whether to waive the sovereign immunity of the United States, including broad authority to attach conditions to such waivers).

10. Fauvergue v. United States, 2009 WL 484602 (Ct. Fed. Cls., Feb. 24, 2009) (in a follow up to the Supreme Court's 2008 decision in JR Sand and Gravel, holding that the U.S. Court of Federal Claims' statute of limitations, 28 USC Section 2501, is jurisdictional in nature, the Court of Federal Claims ruled that where a class action claim is filed before the expiration of the statute of limitations, but opt-in class members are not identified until after the statute has run, the claims of the opt-in members are time-barred).

11. Cwik v. Topinka, 2009 WL 605376 (Ill. App., Mar. 9, 2009) (the Appellate Court of Illinois rejected a taking claim based on the state's retention of interest allegedly earned on plaintiffs' funds while they were being held under the Illinois Unclaimed Property Law, ruling that the plaintiffs' claims failed because they had not asserted that they suffered any compensable injury; specifically, they had not alleged that they were receiving or expected to receive interest payments from the funds when they were seized by the state).

13. Ciampi v. Zucek, 2009 WL 367284 (D. R.I., Feb. 12, 2009) (the federal District Court for Rhode Island declined to dismiss a taking claim based on the city's construction of a rainwater drainage ditch across the plaintiff's property; the Court ruled that the claim might not be time-barred, because (1) the plaintiff acquired the property during the prescription period which allegedly vested title to the right-of-way in the city, and/or (2) the city's actions resulted in a physical flooding of the plaintiff's property after the plaintiff acquired the property; the Court assumed the taking claim was brought under the state constitution because the case was originally filed in state court, the city removed this case to federal court, and any federal claim would not have been ripe in federal court unless and until the state law claim had been resolved).

14. Strategic Housing Finance Corp. v. United States, 2009 WL 661364 (Ct. Fed. Cls., Feb. 27, 2009) (in a lengthy and complex opinion, the U.S. Court of Federal Claims dismissed takings claims by a local government entity that issues tax exempt bonds seeking a refund of a so-called "arbitrage rebate" which the claimant had been required to pay to the Internal Revenue Service; the Court rejected the plaintiff's takings claims because (1) the premise of the plaintiff's claim was that the IRS had acted illegally and an illegal government action cannot provide the basis for a taking claim, (2) a condition attached to the privilege of gaining an exemption from federal taxation cannot provide the basis for a federal takings claim, and (3) the imposition of an obligation to pay money cannot support a takings claim).

15. Energy Security of America Corp. v. United States, 2009 WL 779333 (Ct. Fed. Cls., Feb. 27, 2009) (the U.S. Court of Federal Claims rejected a taking claim based on the theory that the Department of Energy took plaintiffs' property interest in patent rights in a coal gasification technology by declining to award plaintiffs a grant to demonstrate the commercial feasibility of their patented technology; the Court ruled that the claim was time-barred because plaintiffs' claim accrued more than six years prior to the filing of the lawsuit, and in any event plaintiffs' claim failed, as a matter of law, because they cannot claim a property interest in the possibility of commercial success based on their patented technology, much less where such success was dependent on the award of a discretionary federal grant).

16. Kottschade v. City of Rochester, 2009 WL 305077 (Minn. App., Feb. 10, 2009) (in this long running takings battle, the Court of Appeals of Minnesota reversed the district court's dismissal of plaintiff's taking claim based on the applicable statute of limitations; the appeals court ruled that plaintiff's claim based on various regulatory restrictions limiting townhouse development did not accrue until the City Council disposed of the plaintiff's objections to the terms of the development permit; the appeals court also reversed the district court's dismissal of the claim on mootness grounds, ruling that the expiration of the general development plan for the property did not render the claim moot).

17. Carroll v. Township of Mount Laurel, 2009 WL 524720 (3rd Cir., March 3, 2009) (the U.S. Court of Appeals for the Third Circuit affirmed a District Court order dismissing a taking claim on ripeness grounds, ruling that the extent of the township's regulatory restrictions, if any, on the use of plaintiff's property was not clear from the township's mere adoption of a policy statement declaring its intention to keep an area free from commercial and other non-residential development).

18. Hensley v. City of Columbus, 2009 WL 425973 (6th Cir., Feb. 23, 2009) (the U.S. Court of Appeals for the Sixth Circuit affirmed dismissal of takings claims based on the applicable statute of limitations; the plaintiffs claimed takings of their well water as a result of dewatering activity associated with a city sewer project; the Court ruled that the statute of limitations began to run when the injury became apparent in 1991, and that the running of the statute of limitations on the plaintiffs' federal claims was not delayed until plaintiffs pursued state compensation procedures because until 1994 Ohio had no adequate just compensation procedures which plaintiffs could have pursued; the Court also rejected the plaintiffs' argument that the statute of limitations did not bar the claims because the plaintiffs' injuries were continuous, ruling that the injury was complete at the time of the initial dewatering and did not depend on any continuing activity on the part of the city).

19. Bloomingdale Development LLC v. Hernando County, 2009 WL 347786 (M. D. Fl., Feb. 11, 2009) (in apparently the first ever Bert Harris Act case in Federal Court, the federal District Court for the Middle District of Florida ruled that plaintiffs' claim based on the county's change in the terms of a master plan for a property could proceed under the Bert Harris Act because the plaintiff met the pre-notification requirements under the Act and the claim was ripe; however, the Court also ruled that disputed issues as to whether the master plan had expired precluded resolution on summary judgment of whether plaintiff enjoyed an "existing use" of the property and whether the county had "inordinately burdened" this use).

20. State v. Beasley, 2009 WL 564371 (Ohio, March 5, 2009) (the Ohio Supreme Court, with two justices dissenting, ruled that the State Highway Department was liable for a taking when its contractors operated and parked heavy equipment on plaintiff's property and the state acted with substantial certainty that its actions would cause injury to plaintiffs' property interests).

21. W/G Kristina 123 LLC v. Malena, 2009 WL 249414 (N.D. Ill., Feb. 3, 2009) (in a suit challenging a city's actions in barricading most of the entrances to plaintiff's residential development in order to control criminal activity, the federal District Court for the Northern

District of Illinois interpreted plaintiff's substantive due process claims to be, in reality, takings claims and, based on that understanding, dismissed the claims as not ripe given that plaintiff had not pursued available state compensation procedures).

22. State v. Kimco of Evansville, Inc., 2009 WL 580341 (Ind., March 4, 2009) (reversing the intermediate court of appeals, the Indiana Supreme Court held that the state's construction of a highway median strip and various other highway reconfigurations did not result in a taking of plaintiff's access rights to its shopping center but instead caused a mere non-compensable encumbrance of traffic flow to the center; the decision rests in part on the principle that a mere reduction in automobile traffic flow past a parcel of private property does not infringe on a protected property interest).

23. Third Street Sanitation Corp. v. Louisville & Jefferson County Metropolitan Sewer District, 2009 WL 512079 (W.D. Ky., March 2, 2009) (the federal District Court for the Western District of Kentucky ruled that plaintiff's federal taking claim was barred under the Supreme Court's 2005 San Remo decision where the Kentucky Courts had previously rejected plaintiff's state law takings claim on the ground that plaintiff lacked a protected property interest in various sewage pipes).

24. Houston v. Township of Davison, 2009 WL 763503 (Mich. App., March 24, 2009) (unpublished opinion) (the Michigan Court of Appeal affirmed the trial court's entry of judgment for the defendant township on a jury verdict rejecting plaintiff's taking claim; the appeals court ruled that the jury's rejection of plaintiff's taking claim based on the city's enforcement of parking requirements at a commercial development was not contrary to the great weight of the evidence; the court also rejected the plaintiff's challenge to the jury instructions on the meaning of the Penn Central character factor, ruling the trial court did not err in instructing the jury that the ordinance was "reasonable" as a matter of law).

25. Busse v. Lee County, 2009 WL 549782 (11th Cir., Mar. 5, 2009) (the U.S. Court of Appeals for the Eleventh Circuit affirmed dismissal of plaintiffs' takings claims because they failed to seek compensation in state court prior to filing the taking claim in federal court).

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