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. Severance v. Patterson, 2009 WL 1089440 (5th Cir., April 23, 2009) (in a remarkably expansive 2 to 1 ruling, the U.S. Court of Appeals for the Fifth Circuit, while upholding the dismissal of a taking claim based on the Texas Open Beaches Act, ruled that plaintiff's allegations, based on the provision of the Act granting the public access to the ocean beach up to the vegetation line, potentially supported a claim for an unreasonable seizure under the Fourth Amendment; however, the Court ruled that it could not resolve the Fourth Amendment claim without a definitive interpretation of the Open Beaches Act, and therefore certified several questions about the scope of the Act to the Texas Supreme Court; the vigorous dissent argued that the panel's decision "needlessly obscures the line between the Fourth and Fifth Amendments as carefully constructed by the framers and spuriously opens the Fourth Amendment as an avenue for property-rights activists to attack the exercise of constitutionally-permissible powers of eminent domain").

2. Adams v. City of Weslaco, 2009 WL 1089442 (Tex. Ct. App., April 23, 2009) (in another problematic decision, the Texas Court of Appeals reversed a trial court's dismissal of takings and other claims based on a municipality's adoption of an ordinance establishing an exclusive franchise for grease-trap cleaning at local restaurants and for disposal of grease trap waste; the ordinance had the effect of abrogating the plaintiff's existing contracts with several restaurants in the community; first, the appeals court ruled that the ordinance violated a state statute authorizing persons in need of solid waste disposal services to "opt out" of local franchise requirements; the Court then ruled that the city was liable for an "unlawful taking" because the city had "appropriated" the plaintiff's property (i.e., its contract rights) "for its own public use"; the opinion appears to ignore the large body of authority holding that government regulatory policies interfering with the implementation of private-private contracts generally do not give rise to valid takings claims, as well as the voluminous authority holding that a legally valid governmental action is a prerequisite for a viable taking claim).

3. Jacksonville v. Coffield, 2009 WL 886214 (Fla. Ct. App., April 3, 2009) (in an important decision interpreting Florida's Bert J. Harris Act, the Florida Court of Appeals reversed a trial court ruling that the City of Jacksonville was liable under the Act based on its decision to officially close a public roadway bisecting plaintiff's property; the plaintiff acquired an option to purchase the property for an eight-unit subdivision and, after learning of the proposal to close the road, which would have precluded the proposed subdivision, the plaintiff still proceeded to acquire the property and seek to develop it; the Court ruled that, once plaintiff became aware of

the proposal to close the road, the subdivision proposal was no longer a "reasonable, non-speculative" use of the property within the meaning of the Act and therefore plaintiff was not entitled to relief; apparently reflecting some hostility toward the Harris Act, the Court observed that "[f]ew cases interpret the substantive provisions of the Act," and noted that it had "found no case in which an appellate court affirmed relief granted pursuant to the Act").

4. Citrus County v. Halls River Development, 2009 WL 722053 (Fl. Ct. App., March 20, 2009) (in another Bert Harris Act case, the Florida Court of Appeals reversed a trial court ruling in favor of a developer under the Act; the County, five years before the plaintiff purchased the property for a condominium development, amended the County comprehensive plan to permit no more than one residence per 20 acres; however, the County failed to amend the zoning ordinance, which permitted the condominium project, to conform to the revised plan, and County officials also informed plaintiff that it could proceed with the condominium project; after local citizens successfully blocked the development on the ground that, under Florida law, the plan trumped the inconsistent zoning, the developer sued under the Bert Harris Act; the appeals court ruled that any claim based on the plan accrued years earlier when the plan was adopted and therefore was barred by the applicable one year statute of limitations; the appeals court also ruled that the erroneous statements by County officials did not estop the County from denying the developer vested rights, because estoppel does not apply to actions that are forbidden by law or contrary to public policy).

5. Hauselt v. County of Butte, 91 Cal.Rptr. 3d 343 (Cal. Ct. Apps., March 23, 2009) (in an interesting inverse condemnation case in the flood-control context, the California Court of Appeals affirmed a trial court ruling rejecting a taking claim based on the theory that the County effected a taking by increasing water flow through a slough on plaintiff's property, which in turn increased the frequency of flooding of plaintiff's property; the plaintiff alleged that the County caused the increased flooding by authorizing nearby development, by constructing a bridge over the slough, and by "sponsoring" restoration of a nearby creek; the Court ruled that the taking claim had to be evaluated based on "the rule of reasonable conduct" under which "the public agency is liable if its conduct poses an unreasonable risk of harm to the plaintiff, the unreasonable conduct is a substantial cause of the damage to the plaintiff's property, and the plaintiff has taken reasonable measures to protect his property;" the Court explained that the reasonableness test "involves a balancing of public need against the gravity of private harm;" on this understanding of the applicable law, the Court ruled that the County was entitled to prevail because, though plaintiff presented facts and arguments in support of its theory of per se taking liability, plaintiff "has not challenged the trial court's findings that the County acted reasonably").

6. Ingrum v. United States, 560 F.3d 1311 (Fed. Cir., March 25, 2009) (in an instructive opinion, the U.S. Court of Appeals for the Federal Circuit affirmed the trial court's dismissal, based on the applicable six-year statute of limitations, of a taking claim based on the Department of Defense's removal of fill material from a hillside on plaintiff's property for a road repair project; the property was a remote 3,300-acre tract along the Mexican border accessible only by a dirt road and the claimant argued that the inaccessibility of the property excused his delay in filing the claim; the Court explained that the "accrual suspension" rule only comes into play when the defendant has concealed its actions giving rise to the taking or when the property injury

was "inherently unknowable;" the Court ruled that the plaintiff could not invoke these exceptions because the government was entirely open about its activities and the effects of its activities were perfectly obvious on the ground, and the remoteness of the property did not excuse the plaintiff's delay in filing suit; the Court explained that "a landowner is on inquiry notice as to open and notorious activities conducted on his property," and "that principle applies regardless of how far the landowner resides from the disputed property").

7. Palmyra Pacific Seafoods, LLC v. United States, 2009 WL 941062 (Fed. Cir., April 9, 2009) (affirming a ruling by the U.S. Court of Federal Claims Court (see Takings Net Vol. 89, March 6, 2008), the U.S. Court of Appeals for the Federal Circuit rejected a taking claim by a commercial fishing company alleging that the United States' establishment of a wildlife refuge around the Palmyra Atoll resulted in a taking of its contractual right to use the island as the base for a commercial fishing operation; the Court ruled that the government did not take plaintiff's contract rights because the government merely affected the value of plaintiff's contract and did not attempt to step into plaintiff's shoes under the contract; the Court also ruled that the government did not take any property belonging to plaintiff because plaintiff had no protected property right to use the area surrounding the island for commercial fishing purposes).

8. Tristani v. Richman, 2009 WL 799747 (W.D. Penn., March 25, 2009) (in a case bristling with questions about how application of the Takings Clause might vary with plaintiffs of different economic status, the federal District Court for the Western District of Pennsylvania rejected claims by Medicaid recipients asserting that they were subjected to takings by enforcement of a regulation requiring them to use a portion of malpractice awards to reimburse the government for the value of medical services they received under the Medicaid program; after rejecting the defendants' Eleventh Amendment defense (on the questionable ground that the action was against the defendants in their personal as opposed to official capacities), and after bypassing the question of whether the claims were ripe in federal court and whether plaintiffs had actually suffered takings, the Court ruled that plaintiffs had not suffered *uncompensated* takings because "Every penny that they paid to the [state] has been accounted for in terms of medical assistance provided under the Medicaid program;" the Court continued, "[Plaintiffs] were not compelled to apply for medical assistance. They made voluntary choices to do so. Having received in the form of medical services the full value of the money taken from their settlement awards, [plaintiffs] cannot reasonably contend that [the state] has effected uncompensated takings in violation of the Fifth and Fourteenth Amendments").

9. Cummins v. Robinson Township, 2009 WL 1363409 (Mich. Ct. App., May 12, 2009) (in one more in the long series of incredible takings claims, the Michigan Court of Appeals, reversing a trial court ruling, rejected plaintiff homeowners' claim that they suffered a taking because, after their property was more than fifty-percent destroyed by flooding, the local township required that any new construction on the property conform to modern flood-proofing standards; the Court rejected plaintiffs' "de facto" taking claim because plaintiffs made no allegation nor produced any evidence in support of the argument that action by the township reduced the value of their property; the Court rejected the claim that the availability of a voluntary FEMA buy-out program effected a taking, observing that property must actually be taken "to invoke constitutional just compensation;" the Court rejected the claim that the plaintiffs suffered a categorical taking, observing that, even though plaintiffs alleged that they

had a negative equity in the property as a result of their voluntary decision to rebuild, the property still retained "some value;" finally the Court rejected plaintiffs' regulatory taking claim because they never obtained a final decision within the meaning of Williamson County, given that that they had not pursued an available administrative variance procedure).

10. Jacobsville Developers East, L.L.C. v. Warrick County, 2009 WL 1227899 (Ind. Ct. App., May 5, 2009) (in a useful illustration of the procedural complexities sometimes involved in challenging a development exaction, the Indiana Court of Appeals affirmed rejection of a takings challenge based on the property owner's failure to exhaust administrative remedies; the property owner filed an application for subdivision approval, the planning commission rejected the application because the plat did not include a dedicated right of way for a road across the property as mandated by the County comprehensive plan, the owner sued (and then abandoned) a certiorari proceeding to challenge the validity of the dedication requirement, the owner then filed a new subdivision application that included the required dedication, and then the owner sued for inverse condemnation based on the exaction; the appeals court (without extensive analysis) concluded that under these circumstances the taking claim was properly dismissed given plaintiff's failure to pursue the certiorari proceeding to a resolution).

11. Sullivan v. Pender County, 2009 WL 1188750 (N.C. Ct. App., May 5, 2009) (affirming a trial court's dismissal of a pro se action, the Court of Appeals of North Carolina ruled that a property owner could not pursue a taking claim based on the theory that ad valorem property taxes constituted a compensable taking of private property, observing "Plaintiff cites no authority for his assertion that local property taxes are an unconstitutional 'taking,' and we find none").

12. Oddo Development Co. v. City of Leawood, 2009 WL 975139 (D. Kan. April 9, 2009) (applying Tenth Circuit precedent, the federal District Court for Kansas dismissed as unripe a taking claim based on a rezoning because the plaintiff had not pursued available state compensation procedures, and the Court also ruled that because plaintiff's substantive due process, procedural due process, and equal protection claims rested "on the same facts" as the taking claim, they were subject to "the same ripeness requirement" and therefore also had to be dismissed).

13. Primetime Hospitality, Inc. v. City of Albuquerque, 206 P.3d 112 (N.M., Feb. 20, 2009) (in an interesting decision addressing the measure of damages in an inverse condemnation case, the New Mexico Supreme Court, reversing the intermediate court of appeals, ruled that the plaintiff was entitled to lost profits as well as its extra construction costs; the City conceded liability for a taking based on its construction of water lines across plaintiff's property, which plaintiff ruptured in the course of a construction project, causing substantial delays and additional costs; while recognizing that lost profits are generally not recoverable in an inverse condemnation case, the Court ruled that, "under the unique circumstances of this case," lost profits was an appropriate measure of just compensation).

14. Kiriakides v. School District of Greenville County, 675 S.E.2d 439 (S.C., March 30, 2009) (affirming a circuit court ruling, the South Carolina Supreme Court rejected an inverse condemnation claim based on the theory that alleged stigmatization of plaintiff's property by the threat of a condemnation amounted to a regulatory taking; the County served a notice of condemnation on the plaintiff but, after plaintiff filed suit challenging the County's right to

condemn the property, the County decided not to initiate formal condemnation proceedings and purchased another property instead; the Court ruled that plaintiff failed to establish an inverse condemnation, ruling that mere fluctuations in property value during the course of government decision making do not amount to takings, and observing that plaintiff established neither unreasonable delay nor bad faith conduct on the part of the County and that plaintiff presented no evidence of actual damages).

15. Nikolas v. City of Omaha, 2009 WL 529226 (D.Neb., March 2, 2009) (the federal District Court for Nebraska rejected plaintiff's taking claim based on the City's enforcement of its zoning provision barring more than a single residential unit on a site; the City determined that plaintiff illegally converted his garage into a second residential unit and placed a placard on the property prohibiting any further occupancy of the garage on pain of fines or imprisonment; the Court rejected the plaintiff's regulatory taking claim, observing that plaintiff never pursued his right to appeal the placarding of his property; the Court also stated, "A constitutional challenge under the Fifth Amendment's Taking Clause is not a proper substitute for an appeal of the City's application of its zoning ordinance. Instead, the Supreme Court has concluded that the application of the Takings Clause 'in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land ...' is inappropriate as the Supreme Court 'has upheld land-use regulations that destroyed or adversely affected recognized real property interests,'" quoting Penn Central).

16. CRV Enterprises, Inc. v. United States, 2009 WL 1220579 (Ct. Fed. Cls., April 30, 2009) (the U.S. Court of Federal Claims dismissed, for lack of jurisdiction, a taking claim based on the EPA's development of a plan to clean up a contaminated superfund site in a slough connected to the San Joaquin River in California; the Court ruled that plaintiff's allegations of denial of riparian access to the slough and impairment of their littoral rights raised a regulatory taking claim, rather than a physical taking claim; the Court then ruled that it lacked jurisdiction over the taking claim, based on the applicable six-year statute of limitations, because plaintiff filed suit more than six years after EPA issued its Record of Decision on its cleanup plan; the Court also ruled that, in any event, plaintiff did not own the property on the date of the alleged taking, and the original owners' attempt to assign the claim to plaintiff was ineffective under the Assignment of Claims Act, which prohibits the voluntary assignment of takings claims against the United States).

17. Alto Eldorado Partners v. City of Sante Fe, 2009 WL 1232091 (D.N.M. March 11, 2009) (in an opinion packed with useful research material, the federal District Court for New Mexico dismissed for lack of jurisdiction a suit by a developer challenging a County's inclusionary housing ordinance as a taking; first, the Court rejected (almost certainly erroneously) the County's argument that the claim was not ripe because plaintiff had failed to pursue available state compensation procedures, reasoning that the state-compensation prong of Williamson County does not apply to facial as opposed to as applied takings claims; second, the Court did dismiss the action on the ground that the plaintiff was seeking an injunction against the ordinance, reasoning that equitable relief is generally not available to a plaintiff when, as in this case, compensation procedures are available).

18. Barrett Ellis Properties, L.L.C v. City of Ecorse, 2009 WL 1262860 (Mich. Ct. App., May 7, 2009) (the Michigan Court of Appeals reversed the trial court's summary dismissal of plaintiff's taking claim where there were unresolved disputes about the merits of plaintiff's factual allegations that city officials barred plaintiff from either maintaining the existing use of a building as a non-conforming multi-family dwelling, or renovating the building as a single family residence, or allowing the owner to tear down the existing building and build a new single family residence on the property).

19. Kalos v. United States, 2009 WL 1164560 (Fed. Cl. April 27, 2009) (in a factually messy case, the U.S. Court of Federal Claims granted the United States' motion to dismiss a taking claim based on the theory that the United States effected a taking when it called a surety bond designed to guarantee performance by plaintiffs' company on a federal construction contract; the plaintiffs alleged that calling the bond led to plaintiffs losing two properties to the surety company; the Court reasoned that the federal government did not "take" plaintiffs' properties because their properties were seized by a private party (the surety company) as a result of the termination of the construction contract for default and the consequent calling of the performance bond by the United States).

20. VanWulfen v. Montmorency County, 2009 WL 723806 (Mich. Ct. App., March 19, 2009) (the Michigan Court of Appeals affirmed a lower court's rejection of plaintiff's taking claim based on the County's management of a lake, concluding that the trial court did not "clearly err" in making the factual determination that the County's decision to maintain the lake at an elevated level did not cause damage to plaintiff's lakeside property).

21. Serpentfoot v. Rome City Commission, 2009 WL 915248 (11th Cir., April 7, 2009) (unpublished) (affirming a District Court order dismissing a taking claim, the U.S. Court of Appeals for the Eleventh Circuit rejected plaintiff's taking claim based on a city requirement that plaintiff "make repairs to bring her home into compliance with the building code," ruling that these allegations supported neither a physical taking claim nor a claim that plaintiff had been denied all economic use of the property).

22. Houston v. Township of Davison, 2009 WL 763503 (unpublished) (Mich. Ct. App., March 24, 2009) (the Michigan Court of Appeals upheld a jury verdict rejecting plaintiff's claim that the township's method of calculating the number of parking spaces required at plaintiff's commercial developments constituted a regulatory taking; the Court rejected the argument that there was insufficient evidence to support the jury's rejection of the taking claim; the Court also rejected the plaintiff's objection to the jury instructions with regard to the character factor under Penn Central, ruling that the trial court properly instructed the jury that the court had previously concluded, as a matter of law, that the parking ordinance was a reasonable ordinance).

23. County Concrete Corp. v. Township of Roxbury, 2009 WL 872215 (D.N.J., March 30, 2009) (unpublished) (the federal District Court for New Jersey declined to grant summary judgment to the Township defendant because there were disputed issues of material fact about whether the zoning amendment proscribing the current sand and gravel operations on the property effected a facial taking by denying the owner all economically viable use of the property; the Court appears not to have considered whether the claim was properly filed in federal court under Williamson County).

24. Goodman v. City of Tucson, 2009 WL 1066147 (D.AZ., April 21, 2009) (the federal District Court for Arizona dismissed a developer's various challenges to the city's rejection of an application for a small residential development, ruling that plaintiff's vested rights claim was unripe because the local zoning board of appeals had never addressed the vested rights argument; the Court also ruled that plaintiff's Fifth Amendment taking claim lacked merit and in any event was not ripe because plaintiff had not pursued available state compensation procedures).

25. Rifkin Scrap Iron & Metal Co. v. Ogemaw County, 2009 WL 1034886 (E.D.Mich., April 17, 2009) (in a long-winded decision discussing the acrimonious relations between a scrap dealer and local regulators, the federal District Court for the Eastern District of Michigan ultimately dismissed plaintiff's taking claim for failure to pursue available state compensation procedures).

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