

Takings Snapshots, Volume 61, July 30, 2003

1. *Pascoag Reservoir & Dam, LLC v. State of Rhode Island*, <http://www.ca1.uscourts.gov> (1st Cir., July 28, 2003) (in a significant ruling, the U.S. Court of Appeals for the 1st Circuit declined to endorse a (surprising) trial court ruling that a state can be held liable under the Takings Clause for its acquisition of private property through adverse possession; the Rhode Island Supreme Court had ruled that the State had acquired a prescriptive easement on behalf of the public to use a reservoir for recreational purposes; the federal district court rejected the subsequent taking claim filed by the former owner seeking compensation for a taking, ruling that governmental acquisition of private property through adverse possession can result in a compensable taking, but that this particular claim was barred by the statute of limitations and/or laches; on appeal, the court of appeals affirmed the trial court's rejection of the claim, but on the ground that the claimant, in violation of Williamson County, had not exhausted available state procedures for seeking compensation before filing suit in federal court; the court of appeals declined to address the merits of the district court's novel theory that governmental acquisition of property through adverse possession can support a claim under the Takings Clause.)

2. *Cane Tennessee, Inc. v. United States*, 2003 WL 21525610 (Fed. Cl. June 27, 2003) (in a very thorough and thoughtful decision, the Court of Federal Claims (Hewitt, J.) rejected permanent and temporary takings claims by two property owners (Cane and Colton) based on the designation of their properties as unsuitable for coal mining under the Surface Mining Control and Reclamation Act; as to Cane, the court first ruled that the non-contiguosity of several of the plaintiff's properties did not preclude application of the parcel as a whole rule, given that all of the properties were acquired as a single investment; applying the Penn Central analysis to Cane's permanent taking claim, the court concluded that the United States was entitled to summary judgment, ruling that the mere 49% reduction in the value of the property based on a before and after comparison weighed against the taking claim; also with respect to the economic impact factor, the court recognized that the owner's

ability to recoup its original investment can be a relevant consideration, but that this approach was not particularly relevant in this case because the plaintiff had over paid for the property; the court also ruled that the expectations factor weighed against the claim because, even though the plaintiff had no actual knowledge of the potential for an unsuitability designation under SMCRA, a “reasonable” multi-million dollar investor in the position of plaintiff should have investigated this possibility; finally, the court concluded that the character factor was neutral, observing that the importance of the environmental goals served by SMCRA were irrelevant to the takings analysis, but that, unlike some other government activities, this governmental program did not “unnecessarily target a small group to bear the burden of the regulatory regime”; as to plaintiff Colton, who presented an even smaller reduction in property value as a result of the unsuitability designation, the court ruled that rejection of the Penn Central claim followed a fortiori from rejection of Cane’s Penn Central claim; finally, the court rejected plaintiffs’ temporary takings claims based on the alleged delays in the process leading up to the unsuitability designation; the court ruled, based on the federal circuit decisions in Wyatt and Cooley, that only “extraordinary delay” can support a finding of a temporary taking based on regulatory delay and the plaintiffs could not show that the government’s extension of the NEPA process to accommodate public comments represented in extraordinary delay; the court also rejected plaintiff’s attempt to rely on a “rolling moratorium” theory, mentioned in dictum by the Supreme Court in Tahoe-Sierra.)

3. Royal World Metropolitan, Inc. v. City of Miami Beach, 2003WL 21658283, (Fl. Ct. App. July 16, 2003) (in an important case, the Florida Court of Appeals, reversing a trial court decision, ruled that the Bert Harris Act (the Florida private property protection statute) did not preserve the immunity of Florida’s municipalities from claims for money damages; the court ruled that, in order to give effect to the legislative intent underlying the Bert Harris Act, it had to ignore the “literal language” of the Act, including the statement that “this section does not affect the sovereign immunity of government.”)

4. *Houthoofd v. Tuscola County Road Commission*, 2003 WL 21434932 (E.D.Mich., June 18, 2003) (in an action by a landowner to block the reopening of an allegedly public road over the plaintiff's property, the plaintiff claimed that the government's attempt to reopen the road represented an unconstitutional taking; focusing on the threshold property question, the federal district court rejected the plaintiff's argument that any property interest the public had in the road had been lost through abandonment; but the court ruled that disputed issues of fact precluded a grant of summary judgment for the government on whether a public road had been established by prescription; interestingly, in contrast to the decision in *Pascoag* (see above) the district court assumed that if the public had acquired the right-of-way by adverse possession, a subsequent taking claim would necessarily fail; although this case in federal court appears subject to a potential motion to dismiss under *Williamson County*, apparently no party raised the issue.)

5. *Weissinger v. Matthies*, 2003 WL 21524746, (Conn. Super. Ct., June 18, 2003) (Connecticut Superior Court rejected a taking claim based on a decision of a town's inland wetlands commission denying an application to fill wetlands in order to construct a house on a 26-acre parcel; the court ruled that the claim was not ripe because the commission had indicated in its ruling that an alternative plan of development might be approved; the court also observed that the plaintiff's alleged burden might have been partly self-inflicted, given that "the applicant may have created the wetlands problem for the subject property by conveying his adjacent land without reserving a right-of-way for access to the subject parcel.")