'Takings' Snapshots Volume 22, June 8, 1999

1. City of Monterey v. Del Monte Dunes Ltd., U.S. No. 97-1235 (May 24, 1999) (the U.S. Supreme Court affirmed a $1.45 jury verdict in favor of a developer against the City of Monterey; the Court ruled that the Dolan intermediate scrutiny/rough proportionality test was inapplicable to a permit denial; the Court upheld a finding of a taking based on the Agins failure to substantially advance test, given the city*s failure to object to the proposed jury instructions, but reserved the fundamental issue of whether this test actually represents a due process issue rather than a takings issue; and the Court ruled that the plaintiff was entitled to a jury trial in this particular type of section 1983 action in federal court).

2. Hendler v. United States, 1999 LW 294710 (Fed.Cir., May 11, 1999) (court of appeals affirmed trial court ruling awarding $0 in compensation for physical per se taking as a result of EPA installation of test wells on private property adjacent to superfund site; court ruled that value of easement taken was outweighed by increase in value of remaining portion of the property benefited from government testing of groundwater for chemical contamination; court of appeals also affirmed rejection of severance damages claim).

3. Forest Properties, Inc. v. United States, 1999 WL 311246 (Fed.Cir., May 19, 1999) (court of appeals affirmed rejection of regulatory takings challenge to Army Corps of Engineers* denial of permit to fill 9 acres of submerged lands as part of a 62 acre development; applying traditional parcel as a whole rule, court rejected plaintiff*s effort to separate off the 9 acres of wetlands, and found no taking based on Penn Central factors).

4. Dayalji v. City of Compton 1999 WL 273160 (unpublished decision) (9th Cir., March 11, 1999) (court of appeals affirmed rejection of a takings challenge to an ordinance requiring amortization of a non-conforming use using a 35-year amortization period; under the takings clause, the court said, *implementation of a reasonable amortization period is a valid method for eliminating nonconforming uses.*)

5. Beluga Mining Co. v. State of Alaska, 973 P.2d 570 (Alaska, February 19, 1999) (Alaska Supreme Court affirmed trial court*s rejection of takings challenge based on alleged taking of a vested right to mine gold as a result of temporary injunction which blocked commencement of mining; court held that plaintiff had no property right because mining claim was subject to other existing claims; in any event, court also held that there was no total taking because restriction was only temporary, and that plaintiff could not establish a taking under multi-factor test, distinguishing court of federal claims* decisions in Eastern Minerals and Conoco.

6. Kinross Copper Corp. v. State of Oregon, 1999 WL 314096 (Oregon Court of Appeals, May 19, 1999) (the court of appeals affirmed rejection of a mining company*s takings challenge based on the State environmental agency*s denial of an NPDES permit for operation of a mine on federal public lands; court held that company had no *property right* to discharge wastewater into *publicly owned* waters without State permission).

7. Kanna v. Benton County, 1999 WL 219783 (Wash.App.Div, April 15, 1998) (in an interesting unpublished decision, the Washington Court of Appeals affirmed dismissal of a taking and due process challenge to rejection of a residential subdivision application; in a replay of Miller v. Schoene with shades of the Iowa Supreme Court*s Bormann decision, the county rejected the development application because of potential health risks to future residents of the subdivision from adjacent agricultural activities; court rejected plaintiff*s taking claim because they failed to address relevant factors under Washington State takings test; court also rejected due process claim which was subsumed by taking claim under Armendariz.)

8. WJF Realty Corp. v. Town of Southampton, No. 98- 00965 (N.Y. Sup. Ct -- Appellate Division, May 24, 1999) (appellate division reversed $14,000,000 judgment against town based on equal protection challenge to town building moratorium designed to protect the Long Island Pine Barrens; court ruled that trial court failed to consider whether property was similarly situated to other properties, and the evidence did not support the plaintiffs* contention that the town*s objective was not in furtherance of a legitimate governmental purpose).

9. Pannone v. Brisbane, 1999 U.S. Dist. Lexis 7350 (N.D. Cal., May 12, 1999) (federal district court dismissed section 1983 regulatory taking and other related claims for lack of subject matter jurisdiction under the Rooker- Feldman doctrine, where state court had previously dismissed plaintiff*s regulatory taking challenge to municipal restrictions on development as not ripe for adjudication).

10. Suitum v. Tahoe Regional Planning Agency (according to a report in The Los Angeles Times, the TRPA reportedly has settled Ms. Suitum's regulatory taking claim for $600,000, in exchange for conveyance of the lot to TRPA).

11. Mongrue v. Monsanto Co., 1999 WL 219774 (E.D.La., April 9, 1999) (district court rejected motion to dismiss taking claim based on state-authorized underground injection of wastewater which allegedly migrated under plaintiff*s property; court stated that a permanent (as opposed to temporary) physical occupation of plaintiff*s property by Monsanto*s wastewater might constitute a per se taking; court also denied motion to dismiss trespass and unjust enrichment claims).

12. Conklin Street Ltd. v. Town of Babylon, 38 F.Supp. 228 (E.D.N.Y., March 9, 1999) (in a suit challenging municipal regulation of adult businesses, in addition to addressing First Amendment issues, the court rejected takings challenge to municipal ordinance providing for amortization of non-conforming uses).

13. Wyer v. Board of Environmental Protection, No. CV- 92-1091 (Maine Superior Court, May 7, 1999) (trial court rejected takings claim by owner of coastal lot denied permission to build under Maine Coastal Sand Dunes Rules; court ruled that plaintiff failed to demonstrate a taking under either Lucas or Penn Central because property was only reduced in value by 50% (from $100,000 to $50,000) due to significant interest by abutting owners in purchasing the lot as a buffer, for parking, and for recreational purposes; because court found no taking it did not address the State*s potential nuisance defense).