

Takings Snapshots, Volume 3, December 9, 1997

1. Brunelle v. Town of South Kingston, 700 A.2d 1075 (RI July 31, 1997). Rhode Island Supreme Court reversed trial court award of "taking" damages under 42 USC 1983 based on town's refusal to correct erroneous zoning designation and permit construction of self-storage warehouse. Court held denial of rezoning did not effect a taking because (1) claim of arbitrary and capricious conduct raised due process, not taking issue, (2) action did not deny owner all economically beneficial use of land, and (3) there was no taking under Penn Central, because economic impact was not "significant enough," and because owner lacked sufficient expectations, given that owner purchased land subject to erroneous zoning designation and in any event lot was substandard and proposed warehouse would not have been a permitted use even with zoning change. Court rejected due process claim because town action was not "clearly arbitrary and unreasonable," given, among other things, town's "good faith" and legitimate concern for abutting landowners.

2. Broadwater Farms Joint Venture v. United States, 121 F.3d 727 (Fed. Cir. July 31, 1997) (unpublished disposition). U.S. Court of Appeals for the Federal Circuit vacated and remanded court of claims judgment denying just compensation in wetlands taking action on the ground that the economic impact of Army Corps' refusal to allow filling of certain lots in large-scale development was "insignificant." Court of Appeals ruled that it was error to dispose of taking claim without also considering two other Penn Central factors, character of government action and the extent to which the action interfered with reasonable investment-backed expectations.

3. Macri v. King County, 126 F.3d 1125 (9th Cir. April 21, 1997, as amended on denial of rehearing September 17, 1997) U.S. Court of Appeals for the Ninth Circuit affirmed dismissal of due process claim based on allegation that denial of subdivision application because of access concerns failed to substantially advance legitimate state interests and denied owners economically viable use of property. Court ruled that, under 9th Circuit *Armendariz* precedent, taking clause provides a more explicit constitutional protection against alleged misconduct than the due process clause. Affirming dismissal of taking claim as not ripe because of failure to pursue adequate state remedies.

4. Hendler v. United States, 38 Fed.Cl. 611 (July 16, 1997) On remand and following liability phase of trial, Federal Court of Claims concluded plaintiffs were not entitled to compensation for physical occupation resulting from installation of test wells adjacent to superfund site. Court ruled that under California nuisance law owners had duty to provide access to allow abatement of the nuisance. Court also ruled that plaintiffs were entitled to no compensation because special benefits -- the increase in the land's value as a result of the EPA investigations and remediation work, and the savings to the owner as a result of avoiding the need to conduct his own study of groundwater contamination -- exceeded the value of the easement that was physically occupied.

5. Christianson v. Snohomish Health District, 1997 WL 702737 (Wash. November 13, 1997) Washington State Supreme Court affirmed lower court decisions affirming denial

of permission to construct an addition to a lakeside cabin. Court held that U.S. Supreme Court's Dolan decision does not require shifting of burden of proof to government in substantive due process challenge to permitting decision. Court also ruled that, under Washington's 3-prong substantive due process standard for challenges to regulation, denial of permission to construct addition was not unconstitutional. In a concurring opinion, Justice Talmadge argued that, following Armendariz, Washington Supreme Court should abandon due process theory and instead analyze case under taking clause.

6. U.S. West Communications, Inc v. City of Longmont, 1997 WL 706439 (Colo. Nov. 1997) Colorado Supreme Court rejected taking challenge to municipal ordinance requiring telephone company to bear cost of moving telecommunications equipment underground, relying on general rule authorizing cities and towns to impose such a requirement without effecting a taking, and on the extensive, long history of regulation of telephone company property interests.

7. SDDS, Inc. v. State of South Dakota, 569 N.W.2d 289 (SD Sept.17, 1997) In a taking suit arising out of a complicated prior history of litigation, and despite the South Dakota Supreme Court's apparent discomfort with the decision on the merits, the Court ruled that a prior Eighth Circuit decision was res judicata on the question of whether plaintiffs had a vested property right to construct a solid waste landfill facility that could be threatened by an unconstitutional taking. Remanded for a determination of damages.

8. California Coastal Commission v. Buckley, 68 Cal.Rptr. 146 (Cal.App. October 15, 1997) California appeals court rejected taking challenge based on Coastal Commission's erroneous assertion of jurisdiction over a portion of building lot, because action did not interfere with owner's ability to construct house on property and therefore did not deny owner economically viable use of land.

9. Juliano v. Montgomery-Ostego-Schoharie Solid Waste Management Authority, 1997 WL 726024 (NDNY Nov. 3 1997). Federal District Court granted in part and rejected in part motion for summary judgment in physical taking and regulatory taking challenge to actions of public solid waste management authority relating to testing and designation of plaintiff's land as possible site for solid waste facility. Regulatory taking claim based on "cloud" allegedly placed on property by designation as potential facility held not ripe because there was no final siting decision. Physical taking claim held ripe because physical taking "by definition" is final and plaintiffs have no state remedy. Denying authority's motion for summary judgment on physical taking claim after concluding, following lengthy analysis, that alleged physical taking was sufficiently "permanent," and based on disputed issues as to whether plaintiffs' alleged consent to occupation was compelled.

10. Mekuria v. Washington Metropolitan Area Transit Authority, 975 F.Supp. 1 (DDC June 30, 1997). Rejecting transit authority's motion to dismiss taking claim under Penn Central based on allegations that subway construction activities caused small business owners severe economic losses.