

## **'Takings' Snapshots Volume 73, September 28, 2004**

1. *Kelo v. City of New London*, No. 04-108 (in an order handed down today, the U.S. Supreme Court GRANTED certiorari in this widely publicized eminent domain case).
2. *DAX, Inc. v. Commonwealth of Kentucky*, 2004 WL 1899871 (6th Cir., Aug. 26, 2004) (in a rich and fascinating decision, the U.S. Court of Appeals for the Sixth Circuit ruled that a federal taking claim against the Commonwealth of Kentucky based on denial of a permit to mine coal under an ecologically valuable woodland was barred by the 11th Amendment; the suit was filed in federal district court after the plaintiff initially filed a taking claim under the state constitution (along with an England reservation of its federal taking claim) in state court and that case was dismissed for failure to exhaust administrative remedies; the federal appeals court rejected the district court's dismissal of the case based on the Rooker-Feldman doctrine, reasoning that the federal court case did not directly challenge the state court's reliance on the state exhaustion rule; the appeals court also rejected the district court's ruling that the claim was not ripe for failure to exhaust state remedies under *Williamson County*, reasoning that the plaintiff had exhausted its state remedies to the extent possible and its claim had been definitively rejected; the appeals court also ruled that the claim was not barred by claim preclusion, agreeing with the majority of courts that have addressed the issue that the filing of an England reservation in an initial state court proceeding bars application of claim preclusion in a subsequent federal court taking case (but the court did not reach the separate issue of whether issue preclusion should also apply); nonetheless, following the majority view on the issue, the appeals court held that the taking claim had to be dismissed because a federal claim against a state is barred in federal court under the 11th Amendment; at the same time, the court opined in dictum that a state would not enjoy immunity from a federal taking claim in state court; Judge Ballock filed an opinion concurring in the judgment only, arguing that the claim was barred under the Rooker-Feldman doctrine and that the claim was barred by claim preclusion because an England reservation should only be available when a claim is initially filed in federal court and the federal court abstains from exercising its jurisdiction).

3. *Manning v. Mining & Minerals Division of the Energy, Minerals, & Natural Resources Department of the State of New Mexico*, 90 P.3d 506 (N.M. Ct. App., Jan. 28, 2004), cert. granted by the New Mexico Supreme Court, 92 P.3d 11 (May 11, 2004) (in another important entry in the debate over the intersection between the Takings Clause and state sovereign immunity, the New Mexico Court of Appeals ruled that a taking claim under the 5th Amendment in state court against a state agency based on enforcement of environmental regulations was barred by the New Mexico doctrine of sovereign immunity; the appeals court relied heavily on the U.S. Supreme Court decision in *Alden v. Maine* and disagreed with certain contrary precedent, such as the Oregon Court of Appeals decision in *Boise Cascade*; the New Mexico Supreme Court has granted review in this case).

4. *Grainier v. Zoning Board of Appeals of Chatham*, 2004 WL 2066580 (Mass.Ct.App., Sept. 17, 2004) (providing a potentially valuable precedent, the Massachusetts Court of Appeals, affirming a trial court decision, ruled that a town's refusal to allow construction of a single family home on a 1.6 acre lot did not effect a taking, given that the lot retained a residual value of \$22,000 for recreation and conservation purposes or for sale to an abutter to enhance the value of the abutter's property; the appeals court rejected claims both under the *Lucas* and *Penn Central* tests; with respect to the *Penn Central* claim, in addition to relying on the fact that the property retained substantial value, the court reasoned that the plaintiffs lacked reasonable investment-backed expectations because they owned the property for a decade before the new restrictive regulations went into effect and had not sought approval for development during that period).

5. *Animas Valley Sand & Gravel, Inc. v. Board of County Com'rs of the County of La Plata*, No. 96CV45 (unreported, available from GELPI) (Colo.Dist.Ct., Sept. 2, 2004) (on remand from a major decision of the Colorado Supreme Court (reported at 38 P.3d 59) the Colorado district court, following a trial, rejected takings claims under the Colorado and U.S. Constitutions based on restrictions on sand and gravel mining operations on a 41-acre riverside parcel that left the owner with only limited residential and certain other uses; the court ruled that while the investment expectations factor supported

the claim, a diminution in value of 71% was not sufficient to support a finding of a taking under the Penn Central test).

6. *Arthur v. District of Columbia*, 2004 WL 2034142 (D.C., Sept. 9, 2004) (the District of Columbia Court of Appeals, in a complex case arising from a dispute over the disposal of marital property, ruled that, under the U.S. Supreme Court decisions in *Phillips* and *Brown* (dealing with a takings challenge to state IOLTA programs), former spouses who owned funds that had been held in escrow by the D.C. Treasury were entitled to any net interest that was earned by the funds).

7. *Franconia Associates v. United States*, 2004 WL 1941215 (Ct.Fed.Cls., Aug. 30, 2004) (in a decision providing useful guidance on the overlap between contract and takings claims, on remand from the U.S. Supreme Court's 2002 decision in this case (addressing a statute of limitations issue), the Court of Federal Claims ruled that enactment of federal legislation prohibiting the prepayment of mortgage promissory notes breached the United States' contractual promise to allow plaintiff housing developers to prepay the mortgages (and avoid rent cap limitations); however, the court rejected plaintiffs' takings claims on the grounds that (1) plaintiffs retained, following the enactment of the legislation, all of their contract rights, including a cause of action for breach of contract, and (2) in any event, a breach of contract cannot provide the basis for a claim of a taking for public use).

8. *Board of Managers of Soho International Arts Condominium v. City of New York*, 2004 WL 1982520 (SDNY, Sept. 8, 2004) (in an interesting case, the federal district court denied cross-motions for summary judgment on a claim by a condominium board that the New York City Landmarks Preservation Commission effected a physical occupation-type taking by prohibiting plaintiff from removing a prominent work of art from the exterior of its historic building; the court ruled that actual ownership of the art had to be determined in order to resolve the taking claim (on the theory that if the plaintiff building owner actually owned the art, requiring it not to destroy its own art could not be characterized as a physical occupation), but the record did not disclose the identity of the actual owner; the decision includes no

discussion about what this taking claim was doing in federal court).

9. *Travis v. County of Santa Cruz*, 94 P.3rd 538 (Cal., July 29, 2004) (in a case focusing on a statute of limitations issue, and involving a county ordinance governing the construction of second dwelling units by owners of residential properties which restricted both the income of second-unit tenants and the rent they could be charged, the California Supreme Court ruled that a takings challenge to this alleged “exaction” was time-barred insofar as plaintiffs sought to challenge the ordinance itself; but, the court ruled, the claim was not time-barred insofar as plaintiffs challenged specific conditions based on the ordinance which were attached to permits issued to plaintiffs authorizing construction of second dwelling units).

10. *Abney v. Alameida*, 2004 WL 1926210 (S.D.Cal., Aug. 20, 2004) (a federal district court rejected a taking claim by a state prisoner based on the state’s monetary deductions from plaintiff’s prisoner trust account in order to pay restitution fines, ruling that the government’s actions to enforce a monetary liability could not be characterized as a taking of private property for a public use).