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CITY OF HALF MOON BAY

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOYCE YAMAGIWA, Trustee of the Trust Created Under Trust Agreement dated January 30, 1980, by Charles J. Keenan, III and Anne Marie Keenan, for the benefit of Charles J. Keenan IV, as to an undivided 50% interest, and Trustee of the Trust Created Under Trust Agreement dated January 30, 1980, by Charles J. Keenan III and Anne Marie Keenan for the Benefit of Ann Marie Keenan, as to an undivided 50% interest,

Plaintiff,

v.

CITY OF HALF MOON BAY, COASTSIDE COUNTY WATER DISTRICT and DOES 1-50,

Defendants.

Case No.: C 05-04149 VRW

DEFENDANT CITY OF HALF MOON BAY'S MOTION TO MAKE NEW FINDINGS AND TO ALTER OR AMEND THE JUDGMENT (FRCP Rules 52(b) and 59(e))

Trial Date: June 6, 2007
Complaint Filed: September 8, 2005
Action Removed: October 13, 2005
Hon. Vaughn R. Walker

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

In ruling on this case, the Court adopted, nearly verbatim, the proposed findings of fact and conclusions of law ("Findings") proposed by Plaintiff Joyce Yamagiwa ("Yamagiwa"). The Finding, however, omit findings on important issues and contain a number of errors of fact and law as well as internal inconsistencies that undermine the Court's conclusions regarding liability and damages. Defendant City of Half Moon Bay ('City") makes this motion under Federal Rules of Civil Procedure Rules 52(b) and 59(e) to provide the Court with the opportunity to correct these errors.

II. STANDARD OF REVIEW

Federal Rules of Civil Procedure Rule 52(b) provides:

> On a party's motion filed no later than 10 days after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

Similarly, Federal Rules of Civil Procedure Rule 59(e) provides:

> A motion to alter or amend a judgment must be filed no later than 10 days after the entry of judgment.

A Rule 59(e) motion to amend judgment is proper "if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Dixon* v. *Wallowa County*, 336 F.3d 1013, 1022 (9th Cir.2003). A Rule 52(b) motion is available on similar grounds. See *Pro Edge L.P.* v. *Gue*, 377 F.Supp.2d 694, 698 (N.D.Iowa 2005).

III. THE FINDINGS REFLECT "CLEAR ERROR" ON THE APPLICABLE "STATUTE OF LIMITATIONS"

A. Applicable Statute of Limitations

The term "statute of limitations" is commonly applied to a great number of acts that prescribe the periods beyond which lawsuits may not be brought. *Utah Property & Cas. Ins. Co. v. United Services Assn.*, 230 Cal.App.3d 1010, 1025 (1991). In this case, irrespective of when or how the wetlands formed on the Property, the statute of limitations (and whether Yamagiwa waited too

long before filing her lawsuit) has always been a threshold issue to resolution of the case on the merits.

The law is clear: in an action for "inverse condemnation" alleging a "physical taking" of real property, if the property is "damaged," the 3-year statute of limitations under Code of Civil Procedure Section 338(j) applies (see *Smith v. Los Angeles*, 66 Cal.App.2d 562, 586 (1944)); if, on the other hand, the government has taken a legal interest in property, the 5-year statute of limitation applies. See *Ocean Shore R. Co. v. Santa Cruz*, 198 Cal.App.2d 267, 270 (1961).

The law is also clear on when a claim "accrues under the applicable statute of limitations where the alleged physical damage to property occurs over a period of time: "Where alleged damage to private property results from a "continuous process of physical events," rather than a single event, a claim accrues when the taking has "stabilized." *U.S.* v. *Dickinson*, 331 U.S. 745, 749 (1947). It is not necessary that the damages from the alleged taking be complete and fully calculable before the cause of action accrues, rather, claims accrue when a taking becomes readily apparent. *Boling* v. *U.S.*, 220 F.3d 1365 (Fed. Cir. 2000). Thus, in *Boling*, where plaintiffs' alleged damage was based erosion to their property caused by an Army Corps of Engineer's project, the court stated that "stabilization occurs when it becomes clear that the gradual process set in motion by the government" has caused permanent damage, "not when the process has ceased or when the entire extent of the damage is determined." *Id*. at 1370 -1371.

As set forth below, the unrefuted evidence at trial shows that the court erred in its interpretation of the "stabilization" principle.

B. The Distinction Between Yamagiwa's Claim for a "Physical Taking," which She Attempted to Prove at Trial, and a "Regulatory Taking," Which She Waived Before Trial, is Critical to Determining the Timeliness of the Lawsuit

In general terms, in the law of "inverse condemnation," an alleged "physical taking" is where a landowner claims that a public improvement has caused damage to (or resulted in a "taking" of) his/her property. An alleged "regulatory taking," on the other hand, is where a landowner claims that a public entity's land use regulation has resulted in a "taking" of his/her property. The Findings err by blurring the lines between "physical takings," which Yamagiwa attempted to prove at trial, and "regulatory takings" which Yamagiwa waived in an earlier

settlement agreement. The City filed Motions in Limine in an attempt to exclude facts and arguments related to regulatory takings issues from trial, but they were admitted nonetheless. Doc. #130 [Second Motion in Limine]. The Court allowed Yamagiwa to dodge the applicable statute of limitations through an irrelevant regulatory takings analysis.

1. The City's Sewer Moratorium was Irrelevant to Finding a Physical Taking of the Property

Yamagiwa spent considerable effort proving facts which only had evidentiary value to a regulatory takings claim. Most notably, the Findings include numerous references to the City's exercise of its police power to place a moratorium on development due to the lack of adequate sewer capacity.[1] The Findings would make it appear as though Yamagiwa had sued the City for a regulatory taking. In fact, at trial, Mr. Crowell, the owner of the Property when the sewer moratorium began, admitted that he never attempted to sue the City based upon the sewer moratorium. Trial Transcript, pp. 765:20 – 766:12. Yamagiwa's own wetlands expert, Dr. Josselyn, admitted at trial that the sewer moratorium had no bearing on the issue of whether wetlands existed on the Property prior to the Terrace Avenue Assessment District ("TAAD") improvements. Trial Transcript, p. 1051:6-16; Doc. #202, p. 9, fn. 1. As a result, Yamagiwa's complaints about the sewer moratorium were not at issue for purposes of this trial. While the Findings may be intended to cast the City in a bad light in regards to its prior land use decisions, the City's sewer moratorium is irrelevant to any physical takings analysis - - including, but not limited to, the applicable statute of limitations.

2. No Case Holds That "Wetlands" are a "Damage" to Property

Yamagiwa's efforts to prove a physical taking that accrued within the limitations period were also complicated by the fact that Yamagiwa could cite to no case law holding that the mere

[1] The Findings devote over 10 full pages to the City's "Sewer Moratorium" (Doc. #211, pp. 42-53, ¶¶ 102-129) calling the Property owner's inability to develop during the moratorium "a Catch-22 of the City's making." *Id*. at p. 43:10. "[T]hus began a period of over seven years, during which time the sewer moratorium was extended a total of 11 times (*id*. at p. 44:23-25); "[t]he City's repeated extensions of the sewer moratorium, combined with its refusal to reserve sewer connections until the building permit stage, disabled Beachwood's owners from obtaining a CDP and building the subdivision" (*id*. at p. 45:4-8); and "Crowell was unable to outlast the City's continuously extended sewer moratorium." *Id*. at pp. 46:28-47:1.

presence of wetlands on property constitutes a claim in inverse condemnation for physical damage to property. Instead, Yamagiwa argued that the City's denial of her application for a Coastal Development Permit ("CDP") was the "manifestation of constitutional damages" of a physical takings claim. See Doc. #80, pp. 13. The Findings agreed stating that the City's definition of wetlands is "unique" (Doc. #211, pp. 59-62, ¶¶142-150), and holding that "Yamagiwa suffered no damages until, at the earliest, May 2, 2000, when governmental action impeded her right to use the Property." Doc. #211, pp. 148-150, ¶¶ 347-352. This holding, however, necessarily ties Yamagiwa's "damage" to the City's "regulatory" act of denying Yamagiwa's CDP based upon a "unique" definition of wetlands, rather than to a physical change in the Property.

C. For Purposes of the Statute of Limitations, Knowledge of the Alleged Unwanted Water Intrusion Put the Owners on Notice of Potential "Damage" to Property

The reason the Findings must undertake these verbal gymnastics is that if Yamagiwa's claims were based on a physical change to the Property – i.e. that wetlands could, in and of themselves, constitute physical damage – then the undisputed evidence shows that the Property owners were on notice of potential physical damage caused by clear changes to the Property well outside the limitations period.

Yamagiwa herself argues that it is the surface water which allegedly used to flow off the Property but, as a result of the TAAD Project, became trapped on the Property that caused the "damage." According to the Findings, "[t]he TAAD Project totally altered the typography of Beachwood and consequently affected the flow of surface water onto and off of the Property." Doc. #211., pp. 31-33, ¶¶ 74-80. Also, according to the Findings, the reason the TAAD Project caused wetlands to form on the Property was "water was impounded in excavations and depressions that did not exist on Beachwood before the TAAD Project, and hydrophytic vegetation eventually developed in these areas" (*id*. at pp. 67-68, ¶ 161); "the City's lack of a plan of maintenance" allowed storm drains and inlets to clog (*id*. at pp. 71-72, ¶ 168); and "the construction of the Northern Drain [adjacent to the Glencree Property north of Beachwood] blocked the flow of surface water that pre-TAAD had flowed northwesterly off of the Property.

The Northern Drain acted as a dam," whereby water was essentially trapped on the Beachwood Property. *Id*. at pp. 71-72, ¶ 168.

Based on her own argument, the idea that Yamagiwa had to wait until the City denied her CDP based upon a "unique" definition of wetlands before the Property suffered "damage" does not "hold water." If, for instance, unwanted off-site surface water runoff suddenly started to flow onto the Property, and (due to man-made street cut-outs, depressions, and/or a "damning effect") the water had nowhere to go and ponded, then a sophisticated owner/developer[2] would know of the potential for damage. At a minimum, if the landowner had wanted to sell the Property, he would have to disclose the water problem and either pay to fix the problem or sell the property at a discount.

There are numerous cases finding unwanted surface water run-off intruding upon the property caused by a public improvement resulted can lead to "damage" of property. See, e.g., *Keys v. Romley*, 64 Cal.2d 396 (1966); *Burrows v. State*, 260 Cal.App.2d 29 (1968); *Sheffet v. County of Los Angeles*, 3 Cal.App.3d 720 (1970); and *Mehl v. People ex rel. Dept. Pub. Wks.* 13 Cal.3d 710 (1975). In *Mehl*, the California Supreme Court held that the statute of limitations for a "physical takings" action based on unwanted water intrusion from a drainage system project started to accrue when "the Mehl's first became aware of the drainage system" and "then visited the property, inspected the state's culvert, and observed evidence of drainage flow onto his property during recent heavy rains." 13 Cal.3d at 717. This conclusion also applies here.

Moreover, as Yamagiwa's wetlands expert Dr. Josselyn testified, digging holes in the Property and allowing them to fill with water is a recognized method for creating wetlands. Trial Transcript, pp. 1036:9 – 1037:3. Thus, once unwanted intrusion of water was impounded on the Property in the holes formed during the construction of the TAAD improvements, the Property owners were on notice that this water would lead to the formation of wetlands.

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[2] There is no dispute that Yamagiwa and her predecessors-in-interest (William Lyons Development Company and Bill Crowell of Inwood Corporation and Pilantos Valley Associates) were all sophisticated developers.

1. Yamagiwa's Predecessors Knew of the Water Intrusion onto the Property Allegedly Caused by the TAAD Improvements

a. Yamagiwa's Hydrology Expert, Dr. Weirich, Acknowledged That Water Intrusion Caused by an Alleged "Damming" Effect Would Have Occurred by 1984-1985

Evidence of the impounding of water on the Property immediately following TAAD construction was supplied by Yamagiwa's expert hydrologist, Dr. Weirich, who opined that the TAAD improvements dammed surface and subsurface flow of water off of the Property to the north. This damming, however, would have occurred, and according to Dr. Weirich did occur immediately following completion of the construction of the northern drain in 1984:

> Q. [By Mr. Skinner] With regard to the berm effect along Bayview Drive, when exactly did that happen? When did that damming affect start, based on your analysis?
>
> ….
>
> A. Summer of '84, into the Fall of '84, somewhere in that general range.
>
> Q. So by the Winter of '84, this damming effect from this berm is in place and there would have been flooding out there as a result of it?
>
> A. Probably. And there's discussions of that in some of the reports.
>
> Q. With the berming effect that you describe along the northern portion of the Property, would that mean less water from the Beachwood site would flow onto the Glencree Property because it's not able –
>
> A. Escape?
>
> Q. -- To reach the Glencree Property?
>
> A. Yes. This process would have trapped direct runoff onto the Beachwood Property and prevented or limited its ability to leave the Property the way it had done pre-TAAD and gone onto Glencree.

Trial Transcript, pp. 958:18 – 960:2. Thus, according to Yamagiwa's own expert, the unwanted intrusion of water onto the Property occurred well outside the three-year limitations period.

b. Former City Employee Gary Whelen Testified that, after the Fill was taken from the Beachwood Property, he Discussed the Water Intrusion and Ponding Problem with a William Lyon Representative, Who, in Turn, said "It's our property. We will deal with it"

Former City employee Gary Whelen is quoted extensively in the Findings. What is not mentioned is his testimony regarding a discussion he had with a representative of William Lyon (Yamagiwa's predecessor-in-interest) on or around July 1984 after observing "standing water" on the Property:

Q. [By Mr. Skinner] As an employee for the City, and being concerned about the standing water that you observed, did you ever tell anybody from [former Property owner] William Lyon Company that:

"Hey, you should come out and deal with this water, it's your property?"

A. [By Mr. Whelen] I remember talking to – it was a superintendent for William Lyon, and I can't recall his name, and I mentioned to him that there was a concern about the standing water.

Q. And what did he say?

A. That it's their property, and they will handle it. Basically, you know, the City has no involvement.

Q. When did this discussion occur?

A. It was towards the end of the project. Well, when the water started – first showed up. I'm not sure of the exact date on that.

Q. Was it in and around the time that you first observed the standing water in July of 1984?

A. It's possibly around that time, yes.

Q. And who was the superintendent from William Lyon?

A. I don't recall his name.

Q. But you recall having a discussion with him where you raised the issue of standing water?

A. That's correct.

Q. And your recollection is his response was:

"It's our property. We will deal with it"?

A. That's right.

Trial Transcript, pp. 162:7 – 163:7; Doc. #202, pp. 5-6. Again, this testimony, ignored in the Findings, shows both that unwanted water was being trapped on the Property in 1984 and that the Property owners were aware of the ponding and chose not to do anything about it.

c. Shortly After Bill Crowell/Pilarcitos Valley Associates Acquired the Property in 1989, They Knew that Hydrophytic Vegetation Existed on the Property Outside of the Southeast Corner

Even if the unwanted intrusion of water immediately following construction of the TAAD improvements didn't serve as notice of damage to the Property, the Property owners were aware of the potential of damage from actual wetlands when the April 1990 Harding Lawson Report documented the presence of hydrophytic vegetation on the Property outside the southeast corner. According to the Findings, the Harding Lawson Report "was not admitted into evidence" and "cannot be used as substantive evidence." Doc. #211, p. 80, ¶ 188. At a minimum, however, the Harding Lawson report provided the Property owners notice that wetlands growth on the Property may be an issue. Both Inwood Corporation[3] employee Beth Bartlett, who was responsible for facilitating Inwood's environmental review of a proposed residential subdivision, and Inwood Corporation head, Mr. Crowell testified that Inwood had retained Harding Lawson to perform the required analysis and had actually received the report. Trial Transcript, pp. 758:23 – 762:21, 1616:19 – 1617:7; Doc. #211, p. 6. Clearly, the Property owners admittedly had knowledge of the contents of the 1990 Harding Lawson Report in 1990 and, therefore, knowledge of the presence of wetlands on the Property, though the Findings neglect to include this evidence.

The Findings' dismissal of the Harding Lawson Report also directly contradicts the testimony of Yamagiwa's wetlands expert, Dr. Michael Josselyn, who also relied on the Harding Lawson report as a part of his analysis of historical conditions on the Property. In fact, on cross-examination, Dr. Josselyn admitted that - - based on the 1990 Harding Lawson Report - - there was evidence that hydrophytic vegetation existed on the Property outside the southeast corner:

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[3] The Findings reference the owner of record as PVA, though most of the work to develop the Property was done through Inwood Corporation. See Doc. #211, p. 40, fn. 3. Ms. Bartlett was employed by Inwood Corporation.

Q. [By. Mr. Skinner] If there was no hydrophytic vegetation on the Beachwood Property prior to the TAAD improvements, when, in your opinion, is the first time, first point in time that wetlands formed on the Beachwood Property?

A. [By Dr. Josselyn] Well, obviously at the point where I did my studies in 1999, we did observe areas of predominance of hydrophytic vegetation. Prior to that, a study done by Harding Lawson found some areas where hydrophytic vegetation of the facultative nature was found. This is plants which are found equally in uplands as well as in wetland areas. And so, that is an indication that at least at that point, some hydrophytic vegetation was beginning to develop on the Property.

Q. So, the Harding Lawson Report that you referenced provided information to you that there was hydrophytic vegetation outside of the areas W1A, W1B and W2 of the Beachwood Property where there's hydrophytic vegetation, correct?

A. Right. Of a facultative nature.

Trial Transcript, p. 1066:1-18, Doc. #202, p. 6. Together all of these facts show knowledge by the Property owners of both the ponding of water and the presence of wetlands vegetation on the Property well outside the applicable statute of limitations.

2. Keenan and Yamagiwa Were Privy to the Same Information Concerning the Physical Conditions of the Property as Crowell, who Recommended Purchase of the Note on the Property

The Findings state:

> On June 7, 1993, PVA lost the property in foreclosure to the Peppers, who held a junior deed of trust on the Property. (Ex. 745; Crowell, 660:23 – 661:11.) Plaintiff Yamagiwa, in her role as trustee of the Keenan Family Trusts, acquired the senior note on the Beachwood Property in June 1993. She then foreclosed on the Peppers and became the owner of Beachwood on December 10, 1993. (Ex. 657; Yamagiwa: 1183:19-184:10.) Crowell was a long-time friend of Charles J. Keenan, one of the Trustees of the Keenan Trusts.

Doc. #211, p. 47:1-10.

What the Findings omit, however, is critical unrefuted evidence demonstrating the close relationship between a mutual reliance on Mr. Crowell and Mr. Keenan:

- It was Charles ("Chop") J. Keenan who initially assisted Crowell in attempting to purchase the Beachwood Property back in 1989. Trial Transcript, pp. 738:3 – 740:8; Ex. 1116;
- In 1993, with Crowell close to losing the Property in foreclosure to the Peppers, Crowell recommended to Keenan that the purchase of a note on the Property, advising him that it would be a "good investment;" Trial Transcript, p.773:1 – 8.

- When Yamagiwa acquired the $2.5 million note on the Property for only $1 million in 1993, then foreclosed on the note and purchased the Property from herself, as the sole bidder, at the foreclosure sale, she effectively purchased the Property for $1 million. *Id*. at pp. 1209:1 – 1213:11; and

- Yamagiwa then relied on Crowell to play the lead role in the development of the Property. *Id*. at p. 1026:10 – 23. In return Keenan promised Crowell 25% of the proceeds from the development. *Id*. at pp. 773:15-774:16, Doc. #202, p. 8.

Thus, Crowell's knowledge of the Property, including the presence of wetlands vegetation in 1990, can be imputed to Yamagiwa when she purchased the Property in 1993. Moreover, the knowledge of the condition of the Property is reflected in the extremely low purchase price Yamagiwa paid for the Property and the fact that there were no other bidders for the Property.

In sum, whether through the intrusion of unwanted water or the presence of wetlands on the Property, the sophisticated landowners/developers, including Yamagiwa, had actual knowledge of these "damages" to the Property well outside the applicable limitation period.[4]

D. The Court's Interpretation of *Bolsa Chica* is Irreconcilably Inconsistent with Its Ruling on the Applicable Statute of Limitations

The Findings' treatment of *Bolsa Chica Land Trust v. Superior Court, 71 Cal. App. 4th 493 (1999)* evidences the fundamental problem with the regulatory/physical takings distinction. See Doc. #211, pp. 152 – 155. On the one hand, to avoid the fact that the Property owners had notice of

[4] The Findings also note that in 1990, the City approved a Vesting Tentative Map ("VTM") for the then Property owners and describes the map by stating that, with the exception of lots 19A, B and C of Block 3 and Lots IA and B of Block 3 "[a]ll other areas of Beachwood were approved for development, either as residential lots or streets." Doc. #211, pp. 81 – 82, ¶ 191. This description, however, omits the fifteen-foot wide conservation easement depicted on the VTM along the southern boundary of the Property. Exhibit 147; Doc. #202, p. 6. Unrefuted evidence shows that this conservation easement was required by the California Department of Fish and Game pursuant to a Streambed Alteration Agreement to mitigate the loss of riparian wetland vegetation that would have been caused by the construction of the subdivision. Trial Transcript, pp. 759:21 – 761:6; Doc. #202, p. 6. Neither the VTM's conservation easement nor the Streambed Alteration Agreement is mentioned in the Findings despite the fact that this evidence shows that wetlands vegetation had formed on the Property in 1990. The Findings should be amended to include all evidence regarding the existence of the VTM's conservation easement and the Streambed Alteration Agreement. If the Findings continue to accept that no wetlands existed on the Property outside of the southeast corner before TAAD, then these wetlands must have formed at some point between the completion of the TAAD improvements in 1985 and 1990, and thus manifested damage at some point outside of the statute of limitations period.

physical damage to the Property well outside the limitations period, the Findings conclude that there could be no damage until 2000 when the City denied her CDP because Yamagiwa could not have known that she would have been harmed by the presence of "unique" wetlands on the Property until such time as the City denied Yamagiwa's application. *Id*. at pp. 149 – 150, ¶¶ 351 – 352. On the other, the Findings determined that *Bolsa Chica* did not "change the law" regarding the Coastal Act's prohibition on residential development of wetlands.

If *Bolsa Chica* did not change the law, and the presence of wetlands on the Property would have, at all times relevant to this case, prohibited residential construction on the Property, then the Property must have been "damaged" the first time evidence of new wetlands was discovered.[5] For example, those wetlands noted by Dr. Josselyn and CDFG in 1990 would have prevented the Property owners from obtaining the necessary CDP from the Coastal Commission under the interpretation of *Bolsa Chica* announced in the Findings and begun running the clock on the statute of limitations period. If *Bolsa Chica* did change the law, then the real impact to the Property was due to changes in the regulatory and legal environment and not from any physical impacts.

The Findings should be amended to reflect a clear theory regarding the accrual of Yamagiwa's physical takings claims in light of the Findings' interpretation of the *Bolsa Chica* decision. Either the Coastal Act always prohibited residential development of wetlands and, therefore the physical takings claims accrued when wetlands formed, or *Bolsa Chica* did change the way regulatory agencies interpreted the Coastal Act and Yamagiwa's damages arise, if at all from the regulations. The Findings can't have it both ways.

IV. THE FINDINGS REFLECT "CLEAR ERROR" ON WHETHER THE TAAD IMPROVEMENTS WERE A "SUBSTANTIAL CAUSE" OF THE FORMATION OF WETLANDS ON THE PROPERTY

In order to prove that the City created wetlands on the Property, Yamagiwa needed to show that new wetlands formed on the Property after the TAAD improvements were constructed and that the City's actions were responsible for the formation of those wetlands. See Doc. #211,

[5] The prohibition would have also included the 100-foot buffer zones around the wetlands. Exhibits 863, 864, 866, 867; Trial Transcript pp. 1014:6 – 11; 1-19:6 – 21; 1041:19-24; Doc. #202, p. 33.

p. 67, ¶ 160. Yamagiwa bore the burden of proof for each element of her claims. *Olson* v. *County of Shasta*, 5 Cal.App.3d 336, 340 (1970); see also Doc. #211, p. 111, ¶ 256. It was agreed by both sides that wetlands existed on the Property in the southeastern corner of the Property pre-TAAD. The parties disputed whether wetlands existed anywhere else on the Property pre-TAAD. The Findings concluded that no wetlands existed on the site pre-TAAD outside the southeastern corner. Doc. #211, p. 93, ¶ 216.

The Findings relied heavily on the fact that the City failed to maintain the storm drain inlet in the southeastern corner of the Property as evidence of the causation of the formation of wetlands. While the City acknowledges the lack of maintenance of this inlet, there is no evidence before the Court that the Property owners at any time complained about the condition of the storm drain inlet until 1999. See Trial Transcript, p. 190:11 – 15. As the City's maintenance supervisor testified, the City's maintenance of storm drains is mainly directed by citizen complaints. *Id*. at p. 188:5 – 189:7. In fact, the last evidence of any communication between a City employee and any representative of the Property owners prior to 1999 was the 1984 conversation between Mr. Whelen and the Lyon representative where the Lyon representative informed Mr. Whelen that the Property owners would take care of any drainage issues on the Property. *Id*. at pp. 162:7 – 163:7.

The City also acknowledges that the wetlands on the Property are not static and, indeed have increased over time. Trial Transcript, p. 1506:8 – 18 (testimony of Dr. Huffman noting increase in wetlands on Property between 1999 and 2006). However, the increase in the presence of wetlands does not relieve Yamagiwa of her burden of proving that the wetlands did not exist on the Property pre-TAAD. As the evidence shows, wetlands did exist on the Property pre-TAAD and thus, Yamagiwa cannot meet her burden.

A. <u>The Findings Ignore the "Seasonal" Nature of the Wetlands at Issue</u>

The Findings err in failing to acknowledge that the wetlands on the Property are "seasonal" in nature. As Dr. Huffman testified:

> Q. [By Mr. Skinner] You testified you believe there was hydrophytic vegetation prior to TAAD on the Beachwood Property, correct?
>
> A. [By Dr. Huffman] Yes.

Q. You see in this photograph that there's been apparently disking on the Property?

A. Yes.

Q. Correct? Okay. And does hydrophytic vegetation, in your experience, does it get dry in the dry season, and can it become a fire hazard?

A. Yes. This type of wetland, exclusive of the willows that occur in the drainways where it's wetter longer, if there's flowing water moving through the site, the areas adjacent to that in the formerly plowed field and so on, those are what are known as seasonal wetlands. They are driven by surface water.

Q. What season are we talking?

A. It's the rainy season.

Q. What does the term "seasonal wetlands" mean?

A. It means wetlands that form during the rainy season. Then when the rainy season subsides and the summer begins, they turn brown. The plants die.

Q. Is hydrophytic vegetation a seasonal wetland?

A. It can be.

Trial Transcript pp. 1480:15 – 1481:13, 1488:14 – 1489:5, see also *id*. at p. 1299:22-25 (testimony of Dr. Coats); Doc. #202, p/ 20. This evidence was unrefuted by Yamagiwa and the Findings should be amended to include this evidence.

B. The Findings Ignore Unrefuted Evidence that Hydrophytic Vegetation Does Not Need "Long-Standing Water" or "Closed-Loop Depressions" to Form

The Findings also pay considerable attention to the question of whether ponding and "closed-loop" depressions existed on the Property pre- and post-TAAD. According to the June 1974 Preliminary Soil Investigation Report by Harlan Engineers, and a September 1975 Initial Study concerning the Possibility of Environmental Impact by Jones-Tillson & Associates, there was a central depression on the Property in which water ponded. Exhibits 1113, 1384. The Findings, however, reject these reports as "not reliable." Doc. #211, p. 13, ¶¶ 27-28. Instead, the Findings conclude, relying largely on a pre-TAAD topographic map depicting 1-foot contour intervals, that the Property, pre-TAAD had an "absence of closed-loop depressions" and was a "gently sloping" property with "no barriers to flow preventing the surface flows on Beachwood

from reaching the low point and continuing off the property." Doc. #211, pp. 4-5, ¶ 9, p. 5, ¶10, pp. 7-8, ¶ 18. The Findings also state that "two witnesses with percipient knowledge" did not observe "long-term ponding of water" on the Property. Doc. #211, pp. 9-10, ¶¶ 22, 24.

Even if there was no "central depression" or "long-standing water" on the Beachwood Property, the Findings do not address the more important question: does any of this evidence matter for purposes of determining the existence of hydrophytic vegetation prior to TAAD? The answer, based on the irrefutable evidence presented at trial, is a resounding "no."

1. Both side's experts agree that that Seasonal Hydrophytic Vegetation Does not Need "Long-Standing Water" to Grow

The City's expert hydrologist, Dr. Coats, testified that long-standing water is not required for seasonal hydrophytic vegetation, only seasonal soil saturation:

Q. [By Mr. Skinner] Does the soil need to be saturated year-round in order to support hydrophytic vegetation?

A. [By Dr. Coats] No, but only for a period of time during the growing season.

Trial Transcript, p. 1267:12 – 14; Doc. #202, pp. 20 - 21. Dr. Josselyn, Yamagiwa's expert biologist, concurred with Dr. Coats' assessment:

Q. [By Mr. Skinner] Let me go through them first, but before I do, in order for hydrophytic vegetation to grow, to become present, do you need to have ponding on property?

A. [By Dr. Josselyn] No, doesn't have to be ponded.

Q. Okay. You made reference to some photographs where ponding has occurred as a result of the TAAD improvements in your opinion, correct?

A. That's correct.

Q. But in fact, in order for hydrophytic vegetation to grow, you don't need ponding, true?

A. Ponding, you need either ponding or saturation. As the definition states, either inundation, which is ponding, or saturation in the upper foot of the soil.

Trial Transcript, p. 1062:11 – 23; Doc. #202, pp. 20 - 21. Thus, based on the conclusions of experts on both sides of this case, ponding is not required for the growth of hydrophytic vegetation – only soil saturation is necessary.

2. Soil Saturation was Present on the Property Pre-TAAD

The Findings also err by ignoring several pieces of unrefuted evidence that soil saturation existed on the Property pre-TAAD and could support hydrophytic vegetation. For instance, Dr. Coats (the City's expert hydrologist) and Dr. Huffman (the City's wetlands expert) both testified that the conditions necessary for seasonal hydrophytic vegetations - - micro depressions in which soil saturation can occur - - existed on the Beachwood Property prior to TAAD. Trial Transcript, pp. 1264:11 – 14, 1264:23 – 1265:1, 1267:4 – 21, 1429:23 – 1430:8, 1506:19 – 1508:8; Doc. #202, p.19. Significantly, neither Dr. Wierich (Yamagiwa's expert hydrologist) nor Dr Josselyn (Yamagiwa's wetlands expert) refuted this testimony.

Similarly, on the question of the pre-TAAD topography of the Property, while the 1-foot contour map may have depicted a "gently sloping" property with no "depressions" or "barriers" in excess of 1-foot, the Property was not a smooth surface without any barriers or depressions. Even Yamagiwa's experts admitted that the 1-foot contours contained on the pre-TAAD topographic map only showed areas with depressions of 1-foot or greater. Trial Transcript, pp. 940:7 – 941:16. Nor was the site untouched prior to the TAAD improvements. The unrefuted photographic evidence shows that unsuccessful attempts were made to farm the Property in the 1940's and 1950's. *Id*. at 1448:22 – 152:21; see also *id* at 941:17-19. Finally, pre-TAAD soil saturation was evidenced by the testimony of former City employee Mr. Whelen who, though he testified that he did not observe "long standing water" on the Property, also testified that he did observe standing water in the winter months. Trial Transcript, pp. 153:13 – 154:14. This is entirely consistent with the seasonal nature of hydrophytic vegetation - - i.e., it grows during the winter and spring months, and can be a fire hazard in need of disking during the summer months.

C. Not Only Did the Physical Conditions Necessary for Hydrophytic Vegetation Exist on the Beachwood Property Prior to TAAD, But Dr. Huffman's Expert Aerial Photographic Interpretation of Wetlands "Indicators" Demonstrated its Actual Existence

1. Dr. Huffman's Expert Qualifications

Dr. Huffman's expert qualifications are beyond reproach. Dr. Huffman is one of the preeminent authorities on the question of wetlands delineation. His training in interpretation of

aerial photographs began as a Combat Engineer in the Army Corps of Engineers in 1972. Trial Transcript, pp. 1418:18 – 1419:12. Later, Dr. Huffman served as a civilian employee of the Army Corps and was tasked with developing the Army Corps' definition of wetlands. *Id*. at pp. 1419:22 – 1420:9. The definition developed by Dr. Huffman is still in use today by the Army Corps and the EPA. *Id*. at p. 1420:10 – 18. Following his departure from the Army Corps, over the last twenty-five years Dr. Huffman has performed numerous analyses and delineations of historic wetlands in California and throughout the country. *Id*. at pp. 1421:1 – 1426:18.

2. Aerial Photographic Interpretation is an Accepted Wetlands Science Method of Determining the Presence of Wetlands

Despite Dr. Huffman's extensive credentials, the Findings state that Dr. Huffman's "methods and conclusions" are "implausible." Doc. #211 pp. 72-73, ¶¶ 171-172. In fact, Dr. Huffman's unrefuted expert testimony is that aerial photographic interpretation is an accepted wetlands science method of determining the presence of wetlands on property. Trial Transcript, pp. 1423:8 – 1424:4. Dr. Huffman further testified that he has employed this methodology on several occasions. *Id*. at pp. 1423:15 – 1426:1. Yamagiwa's experts did not refute this; indeed, Dr. Josselyn, admitted that he, too, employed this methodology. *Id*. at pp. 1064:9 – 1065:10. Moreover, in a recent published decision, *U.S.* v. *Fabian*, --- F.Supp.2d ---, 2007 WL 1035078 at *11 (N.D.Ind. 2007), the federal court, in a case involving prosecution by the EPA for alleged unpermitted filling of wetlands in violation of the Clean Water Act, accepted expert testimony that relied on aerial photographic interpretation to determine whether the filled areas historically were, in fact, wetlands. Thus, to the extent the Findings reject interpretation of aerial photographs as an acceptable tool for determining the historic presence of wetlands, the Findings erred.

3. Dr. Huffman More Than Adequately Explained the "Wetlands Indicators" Shown on the Aerial Photographs

To the extent that the Findings summarily reject Dr. Huffman's analysis based on the determination that Dr. Huffman did not adequately explain how or why the aerial photographs were useful in showing the presence of wetlands on the Property prior to TAAD, the Findings erred by simply ignoring Dr. Huffman's trial testimony. Doc. #211, p. 73, ¶ 172. Dr. Huffman testified that expert wetlands delineators "go out and collect data" on three types of wetlands

indicators: vegetation indicators, soil indicators and hydrology indicators. Trial Transcript, pp. 1430:21 – 1431:7. Dr. Huffman acknowledged in both his written report and in his testimony that determining the exact composition of a vegetative community from aerial photographs was not possible because many of the plants are too small to appear on those photographs. *Id*. at pp. 1437:23 – 1438:19. Instead, Dr. Huffman testified that the aerial photographs told him that Property was generally flat and would be subject to periodic ponding and flooding and that historic boring logs told him that the Property has soils that are not very permeable to water, which could lead to soil saturation at the surface, a necessary prerequisite for wetlands formation. *Id*. at pp. 1438:25 – 1440:7. Dr. Huffman than used this information in combination with the vegetation he could identify from aerial photographs: willows indicating the presence of wetlands and coyote brush, a non-wetland plant only occurring on certain portions of the Property, to determine that wetlands did exist on the Property pre-TAAD. *Id*. at pp. 1453:16 – 1459:11. The Findings do not explain why Dr. Huffman's reliance on these other tools for determining the historic presence of wetlands was improper.

Other aspects of Dr. Huffman's testimony regarding the historic presence of wetlands on the Property were also improperly ignored. Specifically, the Findings did not cite any evidence refuting Dr. Huffman's testimony that pre-TAAD wetlands existed on both sides of the boundary between the Property and the property immediately adjacent to north, known as Glencree, as evidenced by the fact that wetlands still exist on Glencree. Trial Transcript, pp. 1457:4 – 1458:2. The Findings do not explain how wetlands could exist on Glencree in this location if the northern border of the Property has been dammed to surface and subsurface water flow by the construction of the northern storm drain along the property line. See Doc. #211, pp. 31 – 32, ¶ 75. Since Dr. Huffman's testimony that wetlands exist on the Glencree property is unrefuted the Findings should be amended to include this evidence.

D. The Fact that the City and Other Regulatory Agencies Approved Certain Development-Related Activities on the Property Is Not Evidence of the Lack of Wetlands on the Property

The Findings accurately state that it was not until the spring of 1996 that "the City's entire Local Coastal Program was approved and certified by the Coastal Commission," and that "[t]his

transferred authority to issue CDP's from the Coastal Commission to the City." Doc. #211, p. 48, ¶ 114. The Findings also note that "[d]ifferent regulatory agencies use different definitions of wetlands" and that only with the certification of the City's Local Coastal Program ("LCP") did the City's, what the Findings characterize as "unique," definition of wetlands take effect. *Id*. at pp. 59-60, ¶¶ 142-147, 62, fn. 7. But, the Findings also state that "[t]he development history of this Property has been marked by a long series of approvals by the City, the California Coastal Commission and the California Department of Fish & Game." *Id*. at p. 75, ¶ 177. The Findings state that "[a]ll the forgoing actions by various government entities show an absence of wetlands on Beachwood, outside its southeast corner, into the late 1990's." *Id*. at p. 88, ¶ 205. Specifically, the Findings refer to: the City Council's approval of a 97-lot tentative map in 1976 and negative declaration (pp.75-76), ¶¶ 178-180); the Coastal Commission and City approval of the TAAD storm drainage improvements in 1983 (pp. 77-78, ¶ 183); the approval for removing 13,000 cub yards of fill in 1984-1985 (p. 789, ¶ 185); the City Council's approval of an 83-lot tentative map in July 1990 (pp. 78-83, ¶¶ 186-193); Coastal Commission and City permits to import 1,000 cubic yards of fill (p. 83, ¶ 194); Coastal Commission and City approval to import 32,000 cubic yards of fill (pp. 83-83, ¶¶ 195-199); and the assessment district for Sanitary Sewer Project 1994-1 in July 1994 (pp. 85-87, ¶¶ 200-203.)

Of these approvals, however, not one took place under the City's LCP, using the LCP's definition of wetlands. In fact, there is no evidence that anyone even looked for wetlands prior to the 1990 Harding Lawson Report (which did find wetlands and for which an appropriate mitigation plan was required). See also Trial Transcript, p. 1044:2 -5, (Dr. Josselyn admitting that no wetlands delineation was performed prior to the TAAD improvements). The absence of studies identifying wetlands on the Property is only evidence of a lack of information, not evidence of a lack of wetlands. Simply stated, when the aforementioned approvals were granted, there is no evidence that anyone was even looking for - - or that anyone was legally obligated to look for - - the seasonal hydrophytic vegetation protected under the City's LCP. The aforementioned approvals did not, and could not address the issue of wetlands under the City's LCP.

V. THE FINDINGS ALSO COMMIT "CLEAR ERROR" REGARDING THE CITY'S AFFIRMATIVE DEFENSES

A. Under the "Consent Doctrine," the City Cannot be Held Liable in Inverse Condemnation Where Yamagiwa's Predecessor-in-Interest Requested the TAAD Improvements, Requested the Removal of 13,000 Cubic Yards of Fill, and then Told the City that It Would take Responsibility for Any Drainage Issues on the Property

The Findings err in rejecting the City's arguments regarding the Property owner's consent to the damage to the Property. The unrefuted evidence shows that: 1) William Lyon specifically petitioned the City for creation of the TAAD improvements (Trial Transcript, p. 331:9 - 333:6; Exhibits 117, 1008); 2) William Lyon agreed to, and paid for the removal of 13,000 cubic yards of fill from the Property (Exhibit 43; Trial Transcript, pp. 330:18-331:18); and 3) following evidence that water had become impounded on the Property following the construction of the TAAD improvements told City employee Mr. Whelen "It's our Property. We'll take care of it." Trial Transcript, pp. 162:7 – 163:7.

Contrary to the Findings' conclusions, these facts do not place this case on par with the situation in *Albers* v *County of Los Angeles*, 62 Cal 2d 250 (1965). The obvious consequence of consenting to having 13,000 cubic yards of fill removed from one's property is that the areas where fill is removed will pond when it rains. As Dr. Josselyn testified, the "natural, necessary, and reasonable incident" to consenting to the ponding, as Lyon did, would be the growth of wetlands on the Property. Trial Transcript 1036:9-1037:3. Thus, the Findings made a clear error of law in likening this case to *Albers*.

B. Under a Landowner's "Duty to Mitigate," the City Cannot be Held Liable for Over $36 Million Where Yamagiwa's Predecessor-in-Interest (Mr. Keenan's "long-time friend") Could have Filled in the Street Cut-Outs for $485,000

The Findings err in the discussion of the doctrine of a property owner's duty to mitigate damage caused by government action. First, in paragraph 355, the Findings state:

> To the extent the City claims that Yamagiwa had a duty to fill the street depressions that had been cut by the City's contractor beginning in July 1984, that is not "mitigation." No case holds that a property owner has the duty to un-do a public work, or that the failure to do so eliminates the constitutional protection guaranteed to property owners by Art 1 Sec 19. Indeed, if that were the law, no landowner could ever recover damages for inverse condemnation, as the public entity could simply blame the owner for the owner's failure to fix the mess created by the public project. That is precisely the essence of the City's misguided argument here.

This conclusion mistakenly interprets the duty to mitigate as an issue of liability when the doctrine actually concerns damages. The statement "no landowner could ever recover damages for inverse condemnation, as the public entity could simply put the blame on the owner for the owner's failure to fix the mess created by the public project" is exactly wrong. From as far back as *U.S.* v. *Dickenson*, the case law clearly states that if the damage to property "was in fact preventable by prudent measures, the cost of that protection is a proper basis for determining the *damage*." *U.S.* v. *Dickinson*, 331 U.S. 745, 751 (1947) (emphasis added). The Federal Circuit Court further explained in *Boling* v. *U.S.* – a case concerning erosion to the plaintiff's property caused by the government's project – that the issue was not whether the government was liable for the erosion, but rather what was the proper measure of damages for that liability. As the *Boling* court stated "[s]ubstantial encroachment of the parcel also puts a duty on the landowner to take reasonable steps to protect the property from further erosion damage, such as by the construction of revetments. If the cost of these protections would have been less than the value of the property lost to such preventable erosion, then the government's damages, if any, are limited to the cost of protection." *Boling*, 220 F.3d at 1373, n. 5.

The California Supreme Court similarly explained in *Locklin* v. *City of Lafayette,* 7 Cal.4th 327, 352 (1994) "[i]t is equally the duty of any person threatened with injury to his property . . . to take reasonable precautions to avoid or reduce any actual or potential injury." Thus, the duty to mitigate would not prevent an owner from recovering damages. Moreover, the property owner would not be required to "un-do" the public improvements, merely take reasonable steps to protect the land from the harm caused by those improvements.

Here, assuming, *arguendo*, that the City was responsible for damage to the Property, the Property owners had a duty to take reasonable steps to minimize the damage to the Property. If, under the Court's interpretation of *Bolsa Chica*, any formation of wetlands at any time would have prevented residential development and if, as Yamagiwa's wetlands expert Dr. Josselyn testified, digging holes in the Property and allowing them to fill with water is a recognized method for creating wetlands, then the Property owners were on notice that leaving these holes on the Property and allowing them to fill year after year with water would eventually lead to the

formation of wetlands, which, in turn would result in an inability to develop the Property. Trial Transcript, pp. 1036:9 – 1037:3; Doc. #211, pp. 71, ¶ 167; pp. 153 – 154, ¶¶ 360 – 361.

As noted above, the Property owners were on notice, and indeed had actual notice, from as early as 1984, when Mr. Whelen testified he informed the Property owner's representative of the issue of ponding on the Property, that a prudent and reasonable defensive measure would have been to import fill onto the Property to fill in the depressions that were ponding with water. Mr. Crowell, a later owner of the Property, also realized that the depressions needed to be filled and retained engineers who concluded that the cost of filling in the depressions holes on the Property would have been $485,000 in 1991. Trial Transcript, pp. 689:4 – 690:19, 692:3 – 693:13. Mr. Crowell actually obtained permission from both the Coastal Commission and the City to import some of this fill onto the Property in 1991 at a reduced cost, but the fill was never imported because of concerns with the "quality" of the fill. Doc. #211, pp. 83 – 85, ¶¶ 195 – 199.

Thus, the reasonable steps to defend the Property from damage caused by the TAAD improvements would have been to import fill to the Property and fill in the depressions, at a cost of $485,000. According to the Findings, however, since this action was never taken the depressions became wetlands resulting in a total taking of the Property. This result is exactly what the doctrine of the duty to mitigate seeks to avoid. A landowner cannot simply sit back and watch as his property moves from slightly damaged to totally damaged when reasonable measures exist to prevent that damage from happening. *Albers*, 62 Cal.2d 250 at 272. The public policy grounds for this doctrine are clear:

> the owner, who is ordinarily in the best position to learn of and guard against danger to his property, would thereby be encouraged to attempt to minimize the loss inflicted on him by the condemnation rather than simply to sit idly by and watch otherwise avoidable damages accumulate.

Id. Thus, paragraph 345 should be stricken as contrary to law.

The Findings also make an error of fact in the statements that the City has prevented any reasonable efforts from defending the Property. All of the instances cited in the Findings occurred in 1999, fourteen years after completion of the TAAD improvements and the same year as studies conducted by both Dr. Josselyn and Dr. Huffman concluded that wetlands existed on

the Property.[6] Doc. #211, pp. 93 – 96, ¶¶ 217 – 222; pp. 150 – 151, ¶ 354. Thus, the City's prevention of Mr. Crowell from draining water from the Property after the wetlands had formed is irrelevant, and should be stricken from the Findings.

The Findings should be amended to correctly state the doctrine of the duty to mitigate and, if the Court continues to conclude that the City is liable for the creation of the wetlands on the Property, the City's liability should be limited to the costs of the reasonable measures to defend the Property from the formation of wetlands. Here, those costs would be $485,000 for the placement of imported fill to fill in the depressions on the Property.

VI. THE FINDINGS REFLECT "CLEAR ERROR" AND "MANIFEST INJUSTICE" ON THE QUESTION OF DAMAGES

The Findings note that "the range of appraisal testimony using the property October 2006 date of value is between $25,620,000 (Carney's appraisal, for the City) and $36,795,000 (Gimmy's appraisal, for Yamagiwa)." Doc. #211, p. 165, ¶ 377. The Findings state that "[b]ased on a careful review of the appraisals of Gimmy and Carney . . . the court concludes that the proper amount of damages using the October 2006 date of value is $36,795,000." *Id*. at ¶ 379. These Findings reflect clear error.

As noted above, the cost of filling the construction depressions on the Property would have been $485,000 in 1981. See part V.B, above. It would be "manifest injustice" here to allow Yamagiwa, who obtained the Property in foreclosure on a debt for which she paid only $1 million in 1993, and who could have herself remedied the construction depressions, to recover $36,795,000 from the City. See Trial Transcript, pp. 1209:1 – 1213:11.

Even assuming the correct measure of damages is the fair market value on the date of valuation, the Court's use of the October 2006 "date of value" is clearly erroneous as a matter of law. The term "hardship," as referenced in *Leaf v. City of San Mateo*, 150 Cal.App.3d 1184 (1984) and related cases, does not arise any time property has appreciated over time. Here, Yamagiwa

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[6] Dr. Josselyn's studies did not actually conclude that the physical conditions on the site met the legal definition of wetlands, a conclusion ultimately rejected by the California Court of Appeals. The rejection of Dr. Josselyn's legal interpretation, however, does not change Dr. Josselyn's findings concerning the physical condition of the Property, only the legal conclusion that those physical conditions constituted wetlands.

purchased the property in foreclosure in 1993, bidding the $2.5 million note which she had purchased for $1 million. Trial Transcript, pp. 1209:1 – 1213:11. Whether using the City's appraised value (over $12,000,000) or Yamagiwa's appraised value (over $19,000,000) using a date of value of March 2000, it cannot be said that Yamagiwa would suffer "hardship" by using that date of value.[7]

VII. THE FINDINGS REFLECT CLEAR ERROR ON THE QUESTION OF FEDERAL SUBJECT MATTER JURISDICTION

A. The Timing of the City's "Lack of Jurisdiction Argument" is Appropriate

The Findings emphasize the timing of the City's "Lack of Jurisdiction" Argument. Doc. #211, p. 155, ¶ 363, pp. 159-161, ¶¶ 367-368. It is true that it was the City that removed the case. *Id*. at p. 156:6-7. It is also true that the City did not argue against federal jurisdiction prior to its post-trial briefing. *Id*. at p. 155:14-18. Contrary to the suggestion in the Findings, however, the reason the City waited was certainly not that "things didn't go so well after removal." *Id*. at p. 160:22-28. Nor was it that the City acted in "bad faith." *Id*. at pp. 160:28 – 161:4. In fact, the City did not know until Yamagiwa filed its post-trial brief that Yamagiwa would not try to assert or resurrect a federal *Furey* claim, or, for that matter, any other viable federal claim. Only when the Court pointed out that Yamagiwa had completely failed to address any federal claim in her extensive post-trial documents was the Court and the City presented with the need to re-examine the exact nature of federal jurisdiction in this matter. See Doc. #205.

Moreover, the City was justified in raising the issue during post-trial briefing for at least two reasons: (1) the absence of federal subject matter jurisdiction may be raised at any time, even for the

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[7] The Findings also misstate the evidence regarding the treatment of one of the five comparable sales used by Yamagiwa's appraiser (Gimmy), and one of the seven comparable sales used by the City's appraiser (Carney).[7] In fact, Gimmy admitted that the sale was not comparable, and he should not have used it. Trial Transcript, pp. 1159:16 – 1160:1. The only error which Mr. Carney made, on the other hand, was to use the wrong photograph for one of his comparable sales. (The second "error" noted by the Findings was simply that the photograph used by Mr. Carney for his fifth comparable sale contained only a portion of the subject property. Trial Transcript, p. 1692:21 – 25.) It is understandable why Mr. Carney did not change his opinions or conclusions even after acknowledging the wrong photograph. It is not at all understandable why Mr. Gimmy did not substantially lower his opinion of value after conceding for the first time in cross-examination that his Palo Alto sale should not have been used.

first time on appeal (*Rains v. Criterion Systems, Inc.*, 80 F.3d 339, 342 (9th Cir. 1996)); and (2) the district court has an independent obligation to examine whether removal jurisdiction exists before deciding any issue on the merits - - even if the merits could be readily resolved (*University of Alabama v. American Tobacco Co*., 168 F.3d 405, 410-411, (11th Cir. 1999).) [8]

B. The Court Lacks Jurisdiction to Resolve This Matter

The City has argued previously that the Court cannot exercise federal jurisdiction over this case based solely on Yamagiwa's federal inverse condemnation claims. See Doc. #207 [City's brief re: Yamagiwa's federal claims] pp. 16 – 18; Doc. #210 [City's brief re federal jurisdiction] pp. 3 – 10. Such claims are not ripe unless and until Yamagiwa has attempted to recover under available state law remedies and been denied compensation. *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172, 194 - 195 (1985) ("*Williamson County*").) The Findings address at length the City's liability for a taking under federal law stating that "[f]or substantially the same reasons, Yamagiwa prevails on her federal inverse condemnation claim, under the Fifth Amendment of the United States Constitution." Doc. #211, pp. 130 – 138, ¶¶ 300 – 319. This discussion is directly contrary to the Supreme Court's holding in *Williamson County* and, moreover, represents a misunderstanding of the law regarding jurisdiction over takings claims. Under *Williamson County*, because this Court found liability under state law for Yamagiwa's inverse condemnation claims, there are no federal claims on which Yamagiwa may prevail. As explained by the Supreme Court, the Fifth Amendment does not prevent takings, it prevents takings without compensation. *Williamson County*,473 U.S. at 194. Here, the available state law proceedings, as adjudged by this Court, provided Yamagiwa compensation for the City's taking. Thus, there can be no violation of the Fifth Amendment. Consequently paragraphs 300 – 319 of the Findings addressing Yamagiwa's federal inverse condemnation claims should be stricken. Additionally, there are two errors in the Findings' discussion of Yamagiwa's fourth and fifth causes of action. First, the City argued that the law of the case doctrine held that Yamagiwa's fourth and fifth causes of action were not federal civil rights claims. Doc. #207, [City's brief re jurisdiction],

[8] See also Schwarzer, Tashima & Wagstaffe, *Federal Civil Procedure Before Trial* (The Rutter Group, 2007) 2:609.5, "Court's obligation to examine jurisdiction."

pp. 10 – 12. The Findings did not explain why the law of the case doctrine does not apply, and should be amended to at least respond to this argument.

Second, evidence before the Court shows that Yamagiwa waived her federal civil rights claims at the same time that she waived her regulatory takings claims. As noted in the City's motion for summary judgment, in 2003, before the case was removed Yamagiwa agreed to dismiss with prejudice the remaining causes of action in the CDP Denial/Regulatory Taking Case, "including all of Yamagiwa's damage claims for alleged takings and *violations of various civil rights*, and Yamagiwa shall take nothing by way of these claims." Doc. #47, [City's MSJ], p. 13; Doc. #70, [RJN, Exh. 4]; Stipulated Settlement/Order, p. 8 (emphasis added). The "various civil rights" claims were detailed earlier in the stipulated settlement and order as including a claim for damages and injunctive relief for alleged violations of Yamagiwa's rights to procedural due process, substantive due process, and equal protection. Doc. #70 [RJN, Exh. 4], p. 2.[9]

Thus, even if the Court's earlier interpretation of Yamagiwa's fourth and fifth causes of action was not controlling, since Yamagiwa had waived any federal civil rights claims, the fourth and fifth causes of action could not be construed here to allege federal civil rights claims which could be used as the basis of jurisdiction. The Findings should be amended to reflect the fact that Yamagiwa waived any claims based on due process or equal protection violations. In sum, with no federal claims upon which to base jurisdiction, the Court erred by finding federal jurisdiction here.

VIII. CONCLUSION

The Findings do not contain sufficient evidence to support the judgment. The errors and omissions outlined above should be corrected and the judgment modified accordingly.

Respectfully Submitted,

Dated: January 4, 2008

MEYERS, NAVE, RIBACK, SILVER & WILSON
By: /s/ David W. Skinner
David W. Skinner
Attorney for Defendant
CITY OF HALF MOON BAY

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[9] In fact, by attempting to reassert claims which she had explicitly waived, Yamagiwa committed a breach of the stipulated settlement and order.