30 ELR 10100 2-2000

ELR
NEWS & ANALYSIS

Del Monte Dunes, Good Faith, and Land Use Regulation

by Steven J. Eagle

The U.S. Supreme Court's property rights jurisprudence always has had a Delphic quality. During this century, its seminal expressions have been Justice Holmes' enigmatic "too far" language in *Pennsylvania Coal Co. v. Mahon*[1] and Justice Brennan's reliance on the amorphous conception of "investment-backed expectations" in *Penn Central Transportation Co. v. City of New York*.[2] The Court's 1999 decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*[3] does not depart from this pattern. Furthermore, just as supplicants to the Oracle at Delphi evaluated its pronouncements in light of their own preconceptions, modern commentators tend to view the Court's regulatory takings handiwork in the same manner.[4] Once again, *Del Monte Dunes* is no exception—indeed, it is a veritable Rorschach test. This is due largely to its heavily fact-bound nature, its implication of important constitutional issues aside from property rights, and the proclivity of the opinion writers to sweeping asides.

In particular, *Del Monte Dunes* creates a powerful temptation to comment on all of the things that the case does *not* say. But the law of the case did not leave the Court with the necessity of saying much. While there is some dicta and many implications that we should parse, the Court did not overreach by trying to do more than decide the case before it.[5]

Aside from dicta and speculation, there are several things that we *can* say with certainty. The first, and most important, is that the landowner won. *Del Monte Dunes* is the first case in which the Court has upheld the award of regulatory takings damages. The city of Monterey will now have to pay $1.45 million plus interest and costs. That certainly will give land use regulators pause in the future.

Second, *Del Monte Dunes* emphatically states that land use regulation is not immune to judicial review. In this same vein, many of the questions at oral argument and much in the Justices' opinions evince the Court's growing concern that governmental officials deal with property owners with good faith.

Finally, the Court has rebuffed the U.S. attempt as amicus to force a limitation (or even an explication) of the role of substantive due process in inverse condemnation cases. For now, the law of regulatory takings remains almost as elusive as ever.

Beyond these points, one might speculate that the Court's growing interest in fairness would lead to its increased utilization of substantive due process analysis, whether explicit or implicit, in regulatory takings cases. This Article discusses both what can be said with certainty and the matter for speculation.

The Background of *Del Monte Dunes*

The Facts

The focus of the *Del Monte Dunes* litigation was a 37.6-acre parcel located on the Pacific Ocean in the city of Monterey, California. It was far from pristine, having been used by an oil company as an oil terminal and tank farm for many years. It contained industrial debris, illegally dumped trash, oil-soaked sand, and was crossed by a sewer line covered with jute matting. The site was partially covered with ice plant, which had been introduced to control soil conditions around the oil tanks. The ice plant was not compatible with native vegetation and was driving it from the parcel.[6]

One of the plants encroached upon by the ice plant was buckwheat, which was the natural habitat of the endangered Smith's Blue Butterfly. As Justice Kennedy's opinion for the Court noted:

> The butterfly lives for one week, travels a maximum of 200 feet, and must land on a mature, flowering buckwheat plant to survive. Searches for the butterfly from 1981 through 1985 yielded but a single larva, discovered in 1984. No other specimens had been found on the property, and the parcel was quite isolated from other possible habitats of the butterfly.[7]

The author is a Professor of Law at George Mason University. This Article is based on a paper delivered in October 1999 by the author at the Regulatory Takings Conference held at the Georgetown University Law Center.

1. 260 U.S. 393, 415 (1922) ("The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").
2. 438 U.S. 104, 124, 8 ELR 20528, 20533 (1978) ("The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment backed expectations are of course relevant considerations.").
3. 119 S. Ct. 1624, 29 ELR 21133 (1999). *See* John D. Echeverria, *Revving the Engines in Neutral:* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 29 ELR 10682 (Nov. 1999).
4. To give but one example, Professor Epstein saw Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 22 ELR 21104 (1992) as creating a "rickety" structure for the protection of property rights, while Professor Sax saw it as akin to a neutron bomb, cleverly devised to preclude the comprehensive protection of ecosystems while leaving the edifice of suburban zoning unharmed. *See* Richard A. Epstein, Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1370 (1993); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1438 (1993).
5. *See* 119 S. Ct. at 1631, 29 ELR at 21134:

   > We need not decide all of the questions presented by the petitioner, nor need we examine each of the points given by the Court of Appeals in its decision to affirm. The controlling question is whether, given the city's apparent concession that the instructions were a correct statement of the law, the matter was properly submitted to the jury. We conclude that it was, and that the judgment of the Court of Appeals should be affirmed.

6. *Id.* at 1631, 29 ELR at 21134.
7. *Id.* at 1631-32, 29 ELR at 21134.

In 1981, Del Monte submitted a development application that was in conformity with the city's zoning and general plan requirements.[8] The plan was limited to the construction of 344 residential units, although the zoning requirements would have permitted in excess of 1,000 units. In 1982, the Monterey plan commission denied the application but indicated that it would look favorably on one for 264 units. Del Monte developed and submitted a revised plan for 264 units. This also was denied. A subsequent proposal for 224 units was denied as well. Thereafter Del Monte appealed to the city council, which instructed the plan commission to consider a plan for 190 units. The developer prepared four specific, detailed site plans for 190 units, but the plan commission rejected all of them. It appealed to the city council again, which conditionally approved one of them and granted an 18-month conditional use permit for it.[9]

Del Monte spent the next year revising the plan to conform to the conditional approval and undertaking other costly and time-consuming steps to develop the project. Its final plan was painstakingly designed to meet the requirements, with most of the parcel devoted to meeting one or another city requirement and only 5.1 of the 37.6 acres devoted to buildings and patios.[10] After more reviews and hearings, the plan commission staff found the conditions satisfied and recommended approval. However, the plan commission rejected the recommendation. Subsequently, the city council denied the permit.[11] The Court noted:

> In January 1986, less than two months before the landowners' conditional use permit was to expire, the planning commission rejected the recommendation of its staff and denied the development plan. The landowners appealed to the city council, also requesting a 12-month extension of their permit to allow them time to attempt to comply with any additional requirements the council might impose. The permit was extended until a hearing could be held before the city council in June 1986. After the hearing, the city council denied the final plan, not only declining to specify measures the landowners could take to satisfy the concerns raised by the council but also refusing to extend the conditional use permit to allow time to address those concerns. The council's decision, moreover, came at a time when a sewer moratorium issued by another agency would have prevented or at least delayed development based on a new plan.
>
> The council did not base its decision on the landowners' failure to meet any of the specific conditions earlier prescribed by the city. Rather, the council made general findings that the landowners had not provided adequate access for the development (even though the landowners had twice changed the specific access plans to comply with the city's demands and maintained they could satisfy the city's new objections if granted an extension), that the plan's layout would damage the environment (even though the location of the development on the property was necessitated by the city's demands for a public beach, view corridors, and a buffer zone next to the state park), and that the plan would disrupt the habitat of the Smith's Blue Butterfly (even though the plan would remove the encroaching ice plant and preserve or restore buckwheat habitat on almost half of the property, and even though only one larva had ever been found on the property).[12]

After 5 years of administrative review had gone by, after no fewer than 19 different site plans had been submitted, and after 5 formal decisions had been obtained, Del Monte filed suit in 1986 in a federal district court under 42 U.S.C. §1983.[13] It alleged that the city deprived it of due process of law, equal protection of the law, and effected a regulatory taking or otherwise injured the property by unlawful acts, without paying compensation or providing an adequate post-deprivation remedy for the loss.[14] The court found that Del Monte's claims were not yet ripe under the *Williamson County Regional Planning Commission v. Hamilton Bank*[15] doctrine. Tracking *Williamson County*'s two prongs, the trial court concluded that Del Monte had not obtained a definitive decision on what development the city would allow and that it had not sought compensation in state court.[16] The Ninth Circuit reversed, finding that given the history of its efforts, a requirement that Del Monte make additional proposals would be repetitive and unfair.[17] It also found that, at the time of the city's final denial, California did not provide a compensation remedy for temporary takings. Thus, Del Monte was allowed to press its takings claim in federal court.[18]

On remand, the district court found for the city on Del Monte's substantive due process claim and, over the city's objection, permitted the jury to ascertain liability under Del Monte's takings claim. It instructed the jury to find for Del Monte if it "found either that Del Monte Dunes had been denied all economically viable use of its property or that 'the city's decision to reject the plaintiff's 190 unit development proposal did not substantially advance a legitimate public purpose.'"[19] The jury found for Del Monte in the amount of $1.45 million and the Ninth Circuit affirmed.[20]

8. *Id.* at 1632, 29 ELR at 21134.
9. *Id*.
10. *Id.*

> The[ ] final plan . . . devoted 17.9 . . . acres to public open space (including a public beach and areas for the restoration and preservation of the buckwheat habitat), 7.9 acres to open, landscaped areas, and 6.7 acres to public and private streets (including public parking and access to the beach). Only 5.1 acres were allocated to buildings and patios. The plan was designed, in accordance with the city's demands, to provide the public with a beach, a buffer zone between the development and the adjoining state park, and view corridors so the buildings would not be visible to motorists on the nearby highway; the proposal also called for restoring and preserving as much of the sand dune structure and buckwheat habitat as possible consistent with development and the city's requirements.

11. *Id*.
12. *Id.* at 1632-33, 29 ELR at 21134.
13. *Id.* at 1633 (citing 42 U.S.C. §1983).
14. *Id*.
15. 473 U.S. 172 (1985) (establishing "final decision" and "denial of just compensation" requirements for the adjudication of landowners' "as applied" regulatory takings challenges in federal court). *See also* Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1, 2 (1992) (noting "a special ripeness doctrine applicable only to constitutional property rights claims."). The literature on ripeness is extensive. *See, e.g.*, Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1 (1995).
16. 119 S. Ct. at 1633, 29 ELR at 21135.
17. *Id.* (citing MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 350 (1986)). *See* Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496 (9th Cir. 1990).
18. *Id.* (citing First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 17 ELR 20787 (1987)). During the pendency of the litigation the state of California had acquired the parcel. *Id*. at 1634, 29 ELR at 21135.
19. *Id*. at 1634, 29 ELR at 21135.
20. *Id*. Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996).

Concerns About Good Faith and Fairness

The oral argument in *Del Monte Dunes* began with the following colloquy between the city's attorney and the Court:

> Mr. Yuhas: First and most important the constitutional standard for review of a city's land use decision does not allow the imposition of takings liability based upon a de novo second guessing of the city's policy and factual determinations.
> * * *
> This case is not atypical in some respects. The city was faced with a complex decision it had to reconcile competing interests, sift through facts, and exercise its discretion and judgment, and it did so.
> Question [by Justice Scalia, with patent incredulity]: Five times.[21]

It is unclear whether the city meant its argument about freedom from judicial accountability to be taken very literally. In any event, this proposition clearly has never been the law. The Court first gave its imprimatur to comprehensive zoning in 1926, in *Village of Euclid v. Ambler Realty Co*.[22] While *Euclid* involved a facial challenge to an ordinance as a whole, the Court anticipated future challenges to zoning ordinances as applied to particular parcels. These ordinances would indeed be second-guessed by courts, and "some of them, or even many of them, may be found to be clearly arbitrary and unreasonable."[23] Only two years after *Euclid*, in *Nectow v. City of Cambridge*,[24] the Court held that a challenged ordinance must substantially advance a legitimate state interest. In *Dolan v. City of Tigard*,[25] the Court had ruled that, at least in some circumstances, the regulator has the burden of justifying its factual determinations and permit exactions.[26] As Justice Kennedy summed up the matter: "To the extent the city argues that, as a matter of law, its land-use decisions are immune from judicial scrutiny under all circumstances, its position is contrary to settled regulatory takings principles. We reject this claim of error."[27]

Justice Kennedy's summary of the facts seemingly incorporated Del Monte's view that it attempted to accommodate the city's legitimate concerns at every turn, only to be toyed with as an element of Monterey's plan to acquire its parcel at a bargain-basement price.

> Del Monte Dunes emphasized the tortuous and protracted history of attempts to develop the property, as well as the shifting and sometimes inconsistent positions taken by the city throughout the process, and argued that it had been treated in an unfair and irrational manner. Del Monte Dunes also submitted evidence designed to undermine the validity of the asserted factual premises for the city's denial of the final proposal and to suggest that the city had considered buying, or inducing the State to buy, the property for public use as early as 1979, reserving some money for this purpose but delaying or abandoning its plans for financial reasons. The State of California's purchase of the property during the pendency of the litigation may have bolstered the credibility of Del Monte Dunes' position.[28]

The Court's growing concern about fairness also was crucial in a takings and due process case decided in 1998, *Eastern Enterprises v. Apfel*.[29] There, Justice O'Connor's plurality opinion likened the imposition of an unfair liability with a taking:

> When [a remedial pension scheme] singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause. Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised. Accordingly, in the specific circumstances of this case, we conclude that the Coal Act's application to Eastern effects an unconstitutional taking.[30]

An even more recent indication of the Court's increased concern about fairness is its recent grant of certiorari in *Olech v. Village of Willowbrook*,[31] in which a homeowner sought damages against the village and two of its officials. Olech alleged that as part of the city's installation of a water line to her home it demanded an easement to widen a road more extensive than easements sought from others under similar circumstances. She also alleged a deprivation of water service for several months. She attributed all of this to malice resulting from a lawsuit in which she had recovered for the flooding of her land caused by the village's negligent installation and enlargement of culverts.[32] The Seventh Circuit opinion that Olech's complaint stated a cause of action under the Equal Protection Clause was written by Chief Judge Richard Posner, who generally has been resistant to federal lawsuits asserting takings issues.[33]

21. City of Monterey v. Del Monte Dunes at Monterey, Ltd., Official Transcript, October 7, 1998, 1998 WL 721087 *3 (George A. Yuhas, on behalf of the Petitioner). The city's assertion was phrased less bluntly in its brief: "Recognizing that federal courts are not to become federal land use planners, courts have consistently refused to second-guess the wisdom or factual correctness of local land use decisions. Instead, they have accorded deference to determinations made by local legislative and administrative bodies." Brief of Petitioner at 14-15, 1998 WL 457674 (1998).
22. 272 U.S. 365 (1926).
23. *Id.* at 395.
24. 277 U.S. 183, 188 (1928).
25. 512 U.S. 374, 24 ELR 21083 (1994).
26. *Id.* at 391 & n.8, 24 ELR at 21087 & n.8.
27. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S. Ct. at 1624, 1637, 29 ELR 21133, 21136 (1999).
28. *Id*. at 1634, 29 ELR at 21135 (internal citation omitted).
29. 118 S. Ct. 2131 (1998). For additional discussion, *see infra* note 68 and accompanying text. An analysis of the extent to which *Eastern Enterprises* affects the retroactive application of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405, is found in Lawrence A. Salibra II, Eastern Enterprises v. Apfel *and the Retroactive Application of CERCLA*, 29 ELR 10695 (Nov. 1999).
30. 118 S. Ct. at 2153.
31. 160 F.3d 386 (7th Cir. 1998), *cert. granted*, 120 S. Ct. 10 (1999). The issue presented is: "Whether the Equal Protection Clause gives rise to a cause of action on behalf of a "class of one" where the Respondent did not allege membership in a vulnerable group, but that ill will motivated the government to treat her differently than others similarly situated."
32. *Id.* at 387.
33. *See*, *e.g.*, Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988) (holding rejection of site plan not deprivation of substantive or procedural due process) ("This case presents a garden-variety zoning dispute dressed up in the trappings of constitutional law . . . ."). *Id*. at 467.

The *Dolan* Dicta: Much Ado Over Little

The Dolan *Dicta in* Del Monte Dunes

One of the issues upon which certiorari was granted in *Del Monte Dunes* was "whether the Court of Appeals erred in assuming that the rough-proportionality standard of *Dolan v. City of Tigard* applies to this case."[34] The Supreme Court found *Dolan* "inapposite,"[35] i.e., not on point. Nevertheless, on the slender reed of some sketchy dicta, some early commentators have asserted that the Court "stated,"[36] or even "ruled,"[37] that *Del Monte Dunes* limits *Dolan* to decisions conditioning development approvals upon the imposition of exactions or the dedication of interests in land to public use. The New York Court of Appeals almost instantly pronounced that *Del Monte Dunes* "finally resolved" not only that *Dolan* was limited to exactions, but that the *Nollan v. California Coastal Commission*[38] "essential nexus" test was similarly limited as well.[39] Affirmative language limiting the expansion of *Dolan* also is found in the opinion of Justice Souter: "I agree in rejecting extension of 'rough proportionality' as a standard for reviewing land-use regulations generally and so join [that part] of the majority opinion."[40]

Justice Kennedy's opinion for the Court in *Del Monte Dunes* says the following:

> Although in a general sense concerns for proportionality animate the Takings Clause . . . we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use. The rule applied in *Dolan* considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts. It was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development. We believe, accordingly, that the rough-proportionality test of *Dolan* is inapposite to a case such as this one.[41]

Before parsing Justice Kennedy's language, it is important to note that the landowner did not ask the trial court to adopt the "rough proportionality" standard. The jury was not charged on rough proportionality. There is no evidence that the trial decision was in any way affected by rough proportionality. Apparently the Ninth Circuit panel, which was familiar with *Dolan* partly through chronological and geographical propinquity,[42] thought that the "nature of th[e] reasonableness determination [faced by the jury] was clarified by the Supreme Court in its most recent venture into the issue before us[,] *Dolan v. City of Tigard* . . . ."[43]

In short, the federal appellate consideration of *Dolan* in *Del Monte Dunes* was strictly sua sponte. As the Deputy Solicitor General conceded in oral argument, "the Ninth Circuit, without any prompting by the parties, brought this Court's decisions in *Nollan* and *Dolan* into this case."[44] Justice Kennedy, writing for the Court, reiterated that the Ninth Circuit had elaborated sufficient justification to uphold the jury's verdict prior to its discussion of *Dolan*.[45]

> The instructions given to the jury, however, did not mention proportionality, let alone require it to find for Del Monte Dunes unless the city's actions were roughly proportional to its asserted interests. The Court of Appeals' discussion of rough proportionality, we conclude, was unnecessary to its decision to sustain the jury's verdict.[46]

Dolan *and Prudential Policy*

Although it is clear that Justice Kennedy's treatment of *Dolan* is explicitly dicta and technically of no precedential value,[47] it still is very useful to consider whether the Court intends by it to serve notice, as the Souter opinion would have it, that it "reject[s] extension of 'rough proportionality' as a standard for reviewing land-use regulations generally . . . ."[48]

Justice Kennedy wrote that the Court has "not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use."[49] But even this statement of past conduct has an important gloss.

On the very day that *Dolan* was decided, the Court took up a California Court of Appeal decision upholding permit conditions in *Ehrlich v. City of Culver City*.[50] A developer had sought a permit to demolish an unprofitable private recreational facility that was open to the public and to replace it with an office building.[51] The city insisted on the payment of

34. 119 S. Ct. at 1635, 29 ELR at 21135 (citing *Dolan*, 512 U.S. 374, 24 ELR 21083 (1994)).

35. *Id*.

36. *See, e.g.*, *Liability in Takings Case Properly Presented to Jury:* City of Monterey v. Del Monte Dunes at Monterey, Ltd., Nat'l Envtl. Enforcement J., July 1999, at 19 (declaring that the case "*stated* that the rough proportionality rule of *Dolan* is applicable only to the special context of land-use decisions conditioning approval on development exactions or the dedication of property to public use") (emphasis added).

37. *See* Echeverria, *supra* note 3, 29 ELR at 10689 ("As to the *Dolan* issue, the Court *decided* that the *Dolan* 'rough proportionality' standard does not apply in a suit such as *Del Monte Dunes* involving a challenge to the denial of development approval.") (emphasis added).

38. 483 U.S. 825, 17 ELR 20918 (1987).

39. Bonnie Blair Syndicate, Inc. v. Town of Mamaroneck, 1999 WL 1061494 (N.Y. Nov. 23, 1999) (citing *Nollan*).

40. 119 S. Ct. at 1650, 29 ELR at 21142 (Souter, J., concurring in part and dissenting in part) (joined by O'Connor, Ginsburg, Breyer, JJ.).

41. *Id*. at 1635, 29 ELR at 21135 (internal citations omitted).

42. *Dolan*, which came up through the Oregon courts, was decided by the Court in June 1994. *Del Monte Dunes* was argued and submitted to the Ninth Circuit in November 1995. One member of the panel, Senior Judge Edward Leavy, is an Oregonian who sits in Portland, of which Tigard is a suburb.

43. Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422, 1429 (9th Cir. 1996).

44. City of Monterey v. Del Monte Dunes at Monterey, Ltd., Official Transcript, October 7, 1998, 1998 WL 721087 *21 (Edwin S. Kneedler, on behalf of the United States, as amicus curiae, supporting the Petitioner).

45. 119 S. Ct. at 1635, 29 ELR at 21135-36.

46. *Id*.

47. *See, e.g.*, Bank of America Nat'l Trust & Savings Ass'n v. 203 N. Lasalle St. Partnership, 119 S. Ct. 1411, 1425 (1999) (Thomas, J., concurring) (dicta "bind[s] neither this Court nor the lower federal courts").

48. 119 S. Ct. at 1650, 29 ELR at 21142 (Souter, J., concurring in part and dissenting in part) (joined by O'Connor, Ginsburg, Breyer, JJ.).

49. *Id*. at 1635, 29 ELR at 21135.

50. 19 Cal. Rptr. 2d 468 (App. Div. 1993), *vacated & remanded*, 512 U.S. 1231 (1994).

51. *Id.* at 470-72.

cash fees, rather than on the dedication of land or easements to the public as in *Dolan*. These fees included a $280,000 "mitigation fee" to provide substitute public recreation,[52] and a $33,220 fee in lieu of the requirement that art be placed on the development project.[53] The Court granted certiorari in *Ehrlich*, vacated the judgment of the California Court of Appeal, and remanded with instructions to review the case "in light of" *Dolan*. Ultimately the California Supreme Court "reject[ed] the proposition that *Nollan* and *Dolan* are entirely without application to monetary exactions," and found that, at least in the case of individual and discretionary exactions, "the heightened standard of judicial scrutiny of *Nollan* and *Dolan* is triggered."[54] Had the Court believed that *Dolan* referred only to the dedication of interests in real property, it simply should have denied certiorari, thus not disturbing the judgment below.

Beyond the issue of the nature of the exactions that might trigger rough proportionality, we next must ask whether *Dolan* should be applicable to landowner challenges based on the denial of development permits. Justice Kennedy noted that *Dolan* was not designed to address, and is not readily applicable to, this issue. However, while the concepts of exactions and denial of development seem fundamentally different, there is no magical bright-line test that gives them functionally independent significance.

Consider, for instance, a development permit application denied solely because the landowner refused to deed an easement-of-way to the municipality. Are the factors governing the constitutionality of the government's action there different from those in a case in which the landowner would have granted the easement under protest, received the permit, and then brought an inverse condemnation suit? What if a permit is denied because the proposed development did not fit in with the locality's comprehensive plan, but the plan commission had informed the developer in writing that a cash exaction might "mitigate" the problem so as to allow approval? We might assume that in this hypothetical situation Justice Kennedy would have in mind that under *Dolan* the enactment of a comprehensive plan or zoning ordinance would be "legislative" and thus outside *Dolan*'s ambit. Even so, should that be the Court's full response in a mixed-motive situation? The individual bargaining with the landowner, in which "mitigation" of the exaction might play an important or even determinative role, would make the municipality's subsequent decision seem "adjudicative" under *Dolan*.[55]

In order to decide the significance of "mitigation" under *Dolan* we would need to know the significance of "mitigation" in takings law generally. The Court has not spoken directly on whether the conference of Transferable Development Rights (TDRs) in conjunction with the imposition of stringent regulations constitutes (sufficient) mitigation to avoid a constitutional taking or (inadequate) compensation for the taking.[56] This is in spite of the fact that it has been more than 20 years since Justice Brennan raised the issue in dicta in *Penn Central*.[57]

While the Court has not yet dealt satisfactorily with mitigation, the rough proportionality problem raises issues that are richer, more subtle, and more difficult. In addition to dedications of land versus cash exactions, there is the potential issue of what it means to say that *Dolan* is limited to the "adjudicative decision."[58] As Justice Thomas has pointed out, "[t]he distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference."[59] Even if the Court is not inclined to accept this view, it may well have to deal with regulators attempting opportunistically to shelter their actions under *Dolan*. They might, for instance, adopt microzoning legislation for particular neighborhoods, blocks, or parcels in order to replace equivalent administrative adjudicative determinations that might seem vulnerable under *Dolan.*

All of these variations on the *Dolan* theme would present courts attempting to protect both local autonomy and private-property rights with very difficult choices. It seems highly unlikely that the Supreme Court would unanimously declare through dicta in *Del Monte Dunes* that the *Dolan* "rough proportionality" principle should not develop to meet the exigencies of cases as they arise, much less to deal with deliberate municipal circumventions. In addition to its implicit concerns about proportionality in *Eastern Enterprises*,[60] the Court in *United States v. Bajakajian*[61] recently held the Excessive Fines Clause of the Eighth Amendment[62] violated "because full forfeiture of respondent's currency would be grossly disproportional to the gravity of his offense."[63]

Finally, when Justice Kennedy wrote that "the rough-proportionality test of *Dolan* is inapposite to a case such as *this*

52. Presumably the city believed that the public "owned" the amenity of recreation provided for a time by a private club in the same way that the people of New York City "owned" the beauty of the beaux arts Grand Central Terminal in Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 8 ELR 20528 (1978).

53. Here, too, the city's justification seems facile. *See* Gideon Kanner, *Tennis Anyone? How California Judges Made Land Ransom and Art Censorship Legal*, 25 Real Est. L.J. 214, 231 (1997) ("Just how construction of new housing and businesses diminishes the availability of artistic resources no one has bothered to explain.").

54. Ehrlich v. City of Culver City, 911 P.2d 429, 444 (Cal. 1996).

55. Dolan v. City of Tigard, 512 U.S. 374, 24 ELR 21083 (1994). For elaboration of this point, *see infra* note 58 and accompanying text.

56. The Court had a chance to take up this issue in Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 27 ELR 21064 (1997), where it held a agency action to be a final determination for ripeness purposes without the need for a further determination of the cash value of TDRs that had been issued to the landowner. Justice Scalia (joined by O'Connor and Thomas, JJ.) would have none of this, deeming the TDRs irrelevant to the issue. He referred to the marketable TDR as a "clever, albeit transparent, device" for transmuting a "chit" from an element on the just compensation side of the equation to the takings side. *Id.* at 747-48, 27 ELR at 21068 (Scalia, J., concurring in part and concurring in the judgment).

57. *Penn Central*, 438 U.S. at 137, 8 ELR at 20536 (asserting that TDRs might "undoubtedly mitigate whatever financial burdens the law has imposed" thereby precluding a taking).

58. 512 U.S. at 385, 24 ELR at 21085.

59. Parking Ass'n of Georgia, Inc. v. City of Atlanta, 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting from denial of certiorari) (The city, desirous of downtown beautification, imposed by ordinance onerous burdens on parking lot operators only. Justice Thomas further observed that the adoption of a legislative classification affecting numerous persons did not provide immunity from constitutional challenge. "If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property."). *Id.*)

60. 118 S. Ct. at 2131.

61. 118 S. Ct. 2028 (1998).

62. U.S. Const. amend. VIII.

63. 118 S. Ct. at 2031. Respondent violated 18 U.S.C. §982(a)(1), which required reports for transportation of currency in excess of $10,000 out of the United States, by transporting without report $357,144 in currency he legally owned.

one,"[64] he might have been emphasizing that *Del Monte Dunes* involves intent. In effect, he might have distinguished between the municipal disingenuousness that is the leitmotiv of *Del Monte Dunes* and a case where an administrative official arguably miscalculates the remedy corresponding to the harm generated by a new land use. This is another reason why it hardly is likely that the Court would be disposed to use an aside in *Del Monte Dunes* to truncate its *Nollan-Dolan* doctrine.

In short, *Dolan* is "unnecessary" and "irrelevant"[65] to *Del Monte Dunes* and should be treated accordingly. Does this mean than the Court's dictum betrayed eagerness to apply rough proportionality in future cases? No. As Justice Kennedy wrote with decided understatement, the Court has not provided a "definitive statement" of its temporary takings jurisprudence (or, for that matter, its permanent takings jurisprudence).[66] Obviously, the Court may develop better tools to readily deal with the problem of the constitutionality of ordinances or administrative practices that either prohibit or impose heavy exactions on development on a large scale. Even so, "rough proportionality" may be an extremely useful concept in many cases.

Good Faith and Due Process: The Court's Inadequate Jurisprudence

Questions about fairness and good faith are closely connected with the substantive content of due process of law. The role of substantive due process in regulatory takings cases is an important issue that has received inadequate and, I believe,[67] incoherent consideration by the Supreme Court. That situation is highlighted, but not changed, by the Court's decision in *Del Monte Dunes*.

The unsettled relationship between due process and takings recently came to the fore in *Eastern Enterprises*.[68] That case involved a challenge to the federal Coal Act[69] under the Due Process and Takings Clauses of the Fifth Amendment. The Act imposed heavy and retroactive obligations on mining companies to pay for the health care of miners that had been employed by the companies many years earlier and their dependents. The Court split 4-1-4. The plurality opinion, by Justice O'Connor, found the law unconstitutional under the Takings Clause.[70] The principal dissenting opinion, by Justice Breyer, deemed the Act constitutional under the Due Process Clause.[71] Justice Kennedy's swing opinion deemed the Act unconstitutional under the Due Process Clause. Thus, five Justices (including Kennedy) found the Act unconstitutional. Five Justices (including Kennedy) stated that, at least with respect to the issue of retroactivity, the Due Process Clause was the "natural home" for the Court's analysis.[72] Under these circumstances, the importance accorded by the Court to substantive due process is evident. Indeed, one might plausibly assert that Justice Kennedy's view *is* that of the Court.[73]

Whereas in *Eastern Enterprises* the focus was on retroactivity, in *Del Monte Dunes* it was on good faith and fairness. No one disputes that the city of Monterey accorded Del Monte procedural fairness.[74] The central focus in the case was whether it had accorded the substance of *fairness* as well. *Del Monte Dunes* raises important issues of what constitutes fairness when an owner alleges deprivation of property rights, what standards are to be employed in adjudicating such claims, and, whether the decision should be made by a judge or jury.

Justice Kennedy's *Del Monte Dunes* opinion recognized these concerns, conceded that the Court had not addressed them adequately in the past, and proceeded to find sufficient grounds not to address them adequately once again.

The Court's current stance toward substantive fairness in takings cases is one I would call "circuitous recursion." It is substantive due process, nested inside takings, nested inside substantive due process.[75] The outer legal structure is the Due Process Clause of the Fourteenth Amendment. In 1897, in *Chicago, B. & Q. Railroad v. City of Chicago*,[76] the Court held that states may not take private property for public use without just compensation. However, its theory was substantive due process[77] (although it now is melded into the doctrine of incorporation). Likewise, as Justice Stevens noted, Justice Holmes' seminal opinion in *Pennsylvania Coal* is based on substantive due process.[78]

64. 119 S. Ct. at 1635, 29 ELR at 21135 (emphasis added).
65. *Id*., 29 ELR at 21136.
66. *Id*. at 1636, 29 ELR at 21136.
67. For an elaboration of some of the points made here, see Steven J. Eagle, Eastern Enterprises*, Substantive Due Process, and a Coherent View of Regulatory Takings*, 51 Ala. L. Rev. (forthcoming Apr. 2000) (Court of Federal Claims Symposium).
68. 118 S. Ct. at 2131.
69. The Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§9701-9722 (1994 ed. and Supp. II).
70. 118 S. Ct. at 2131 (O'Connor, J., joined by Rehnquist, C.J. and Scalia and Thomas, JJ.).
71. *Id.* at 2161 (Breyer, J., dissenting) (joined by Stevens, Souter, and Ginsburg, JJ.).
72. *Id*. at 2162.
73. An analogy would be the manifesto of 29 leading constitutional scholars interpreting Justice Powell's swing opinion in Regents of the University of California v. Bakke, 438 U.S. 265, 269 (1978) (Powell, J., announcing judgment) as the Court's view on affirmative action in higher education. *See Scholars' Reply to Professor Fried*, 99 Yale L.J. 163, 164, 166 (1989) (characterizing Powell's opinion as binding authority).
74. The city would have been delighted to give the developer as much process as it would tolerate. It originally convinced the district court that 5 years of review, 19 site plans, and 5 formal decisions were not process enough. *See supra* note 8 and accompanying text.
75. *See* Douglas R. Hofstadter, Godel, Escher, Bach: An Eternal Golden Braid 127-52 (1979) ("What is recursion? It is . . . nesting, and variations on nesting. The concept is very general. (Stories inside stories, movies inside movies, paintings inside paintings, Russian dolls inside Russian dolls (even parenthetical comments inside parenthetical comments!)—these are just a few of the charms of recursion.").
76. 166 U.S. 226 (1897).
77. *Id.* at 236

> If, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law, as enjoined by the fourteenth amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the state to public use, and without compensation, of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation.

78. *See infra* note 84 and accompanying text. Substantive due process with respect to property rights was one example of the fact that "federal and state courts relied on a substantive interpretation of due process in the nineteenth and early twentieth centuries to vindicate economic liberty" generally. *See* James W. Ely Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 Const. Comm. 315, 315 (1999).

The issue of whether judicial review of governmental actions in regulatory takings cases is an application of the Takings Clause or the Substantive Due Process Clause came up in *Dolan*.[79]

In his dissent,[80] Justice Stevens claimed that *Chicago, B. & Q.* "applied the same kind of substantive due process" as gave rise to *Lochner v. City of New York*.[81] While finding "nothing problematic" about the later practice of selective incorporation of the Fifth Amendment Takings Clause in the case of "actual physical invasions" of property,[82] he warned about the incorporation doctrine in the context of regulatory takings:

> Justice Holmes charted a significant new course, however, when he opined that a state law making it "commercially impracticable to mine certain coal" had "very nearly the same effect for constitutional purposes as appropriating or destroying it." *Pennsylvania Coal Co. v. Mahon*. The so-called "regulatory takings" doctrine that the Holmes dictum kindled has an obvious kinship with the line of substantive due process cases that *Lochner* exemplified. Besides having similar ancestry, both doctrines are potentially open-ended sources of judicial power to invalidate state economic regulations that Members of this Court view as unwise or unfair.[83]

The middle layer of the Court's analysis has been the Takings Clause. Chief Justice Rehnquist, rising to defend this understanding in *Dolan*, would have no part in indulging Justice Stevens' essentially accurate (if embellished) history. Responding curtly for the Court, he said "there is no doubt that later cases have held that the Fourteenth Amendment does make the Takings Clause of the Fifth Amendment applicable to the States. Nor is there any doubt that these cases have relied upon *Chicago, B. & Q. R.R. Co. v. Chicago* to reach that result."[84]

The federal Courts of Appeals have adhered to this orthodox view that regulatory takings come under the ambit of the Takings Clause. Indeed, some of them have held that substantive due process claims are subsumed within the Takings Clause.[85] In one important case, *Armendariz v. Penman*,[86] the Ninth Circuit rejected a claim that overzealous housing code enforcement and police sweeps intended to drive out criminals deprived neighborhood residents of their homes under color of law. It declared that a Fourth Amendment case, *Graham v. Connor*,[87] "dictates" that the more explicit Takings Clause should guide its analysis, and not the more general Due Process Clause.[88] In *Marci v. King County*,[89] the Ninth Circuit subsequently rejected the landowners' argument that the denial of their plat application was not a taking but solely the result of the denial's failure to substantially advance a legitimate government purpose as an attempt to "sidestep" *Armendariz*[90] and to circumvent the *Williamson County* ripeness doctrine.[91]

The third nested concept, again substantive due process, appears within Takings Clause jurisprudence in the form of the first prong of the two-prong test adopted by the Supreme Court in *Agins v. City of Tiburon*.[92] "The application of a general zoning law to particular property effects a taking if the ordinance *does not substantially advance legitimate state interests*, or denies an owner economically viable use of his land."[93]

The first prong of *Agins* suggests that a taking that *does* substantially advance the public interest might not, for that reason, be compensable. But that would be silly, since both historic and modern notions of eminent domain are predicated on the expectation that the sovereign would condemn private property precisely to advance the common weal. As Justice Holmes said in *Pennsylvania Coal*, the Takings Clause "presupposes that [the property] is wanted for public use."[94] The better approach is to recall that *Agins* has its roots not in the Takings Clause, but in substantive due process. The cases that support it are the Supreme Court's only two zoning cases for a 50-year period, *Euclid*[95] and *Nectow*.[96] The Court in *Agins* cited *Nectow* for its proposition in chief, that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . ."[97] It also noted that in *Euclid* the restrictions "bore a substantial relationship to the public welfare, and their enactment inflicted no irreparable injury upon the landowner."[98]

In *Del Monte Dunes*, the substantive due process question was highlighted by the district court's bifurcation of the landowner's causes of action. The trial judge reserved Del Monte's substantive due process claim for the court, but, over the city's objections, submitted its takings and equal protection claims to the jury.[99] The jury instruction included the following language:

> Now, if the preponderance of the evidence establishes that there was no reasonable relationship between the

79. 512 U.S. at 374, 24 ELR at 21083.

80. *Id.* at 405, 24 ELR at 21091 (Stevens, J., dissenting) (asserting that shift of burden to municipalities to justify administrative exactions from landowners represented a "resurrection of a species of substantive due process analysis").

81. *Id*. at 405-07, 24 ELR at 21091 (citing Lochner v. New York, 198 U.S. 45 (1905)).

82. *Id.* at 406, 24 ELR at 21091 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427-33 (1982); Kaiser Aetna v. United States, 444 U.S. 164, 178-80, 10 ELR 20042, 20046 (1979)).

83. *Id.* at 406-07, 24 ELR at 21091(quoting *Pennsylvania Coal*, 260 U.S. 393, 414 (1922) (internal citation omitted)).

84. *Id*. at 384 n.5, 24 ELR at 21085 n.5.

85. *See, e.g.*, South County Sand & Gravel Co. v. Town of S. Kingstown, 160 F.3d 834, 29 ELR 20321 (1st Cir. 1998) (equating under the facts the tests for a taking or a substantive due process violation); Bickerstaff Clay Prods. Co. v. Harris County, 89 F.3d 1481 (11th Cir. 1996) (same); Doherty v. City of Chicago, 75 F.3d 318 (7th Cir. 1998) (stating substantive due process claim must be predicated on substantive right).

86. 75 F.3d 1311 (9th Cir. 1996) (en banc).

87. 490 U.S. 386, 395 (1989) ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.").

88. 75 F.3d at 1320.

89. 126 F.3d 1125 (9th Cir. 1997).

90. *Id*. at 1129.

91. *Id.* at 1128-29 (citing Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

92. 447 U.S. 255, 10 ELR 20361 (1980).

93. *Id.* at 260, 10 ELR at 20362 (emphasis added; citations omitted).

94. 260 U.S. at 415.

95. 272 U.S. at 365.

96. 277 U.S. at 183.

97. 447 U.S. at 260, 10 ELR at 20362 (citing *Nectow*, 277 U.S. at 188).

98. *Id.* (citing *Euclid*, 272 U.S. at 395-97).

99. 119 S. Ct. at 1633, 29 ELR at 21135.

> city's denial of the . . . proposal and legitimate public purpose, you should find in favor of the plaintiff. If you find that there existed a reasonable relationship between the city's decision and a legitimate public purpose, you should find in favor of the city. As long as the regulatory action by the city substantially advances their legitimate public purpose, . . . its underlying motives and reasons are not to be inquired into.[100]

The jury delivered a general verdict on the takings claim and awarded $1.45 million. Thereafter, the district court ruled for the city on the substantive due process claim and said that this ruling was not inconsistent with the verdict.[101]

The Demand for Explication of the "Substantially Advance" Test

Although the questions submitted in the city's petition for certiorari[102] did not refer to the first prong of *Agins*, the Solicitor General's amicus brief in support of the city presented the following additional question: "Whether a land-use restriction that does not substantially advance a legitimate public purpose can be deemed, on that basis alone, to effect a taking of property requiring the payment of just compensation."[103]

The Solicitor General's brief rehearsed the substantive due process roots of *Agins* in *Euclid* and *Nectow*,[104] and then launched into a frontal assault on the first prong of *Agins* as a component of the Takings Clause:

> The Court's regulatory takings jurisprudence . . . reflects a determination that certain forms of land-use regulation are, from the owner's perspective, sufficiently similar to the direct appropriation of property as to trigger the Fifth Amendment requirement that just compensation be paid. By contrast, regulation that involves neither a physical occupation nor a denial of all economically beneficial use, and is objectionable only because it fails to advance a legitimate governmental interest, cannot plausibly be regarded as the functional equivalent of a direct appropriation of land.
> * * *
> [T]he constitutional requirement that just compensation be paid in order for a taking to be lawful is not intended to prevent or deter the government from adopting irrational regulatory schemes. Rather, the just compensation requirement addresses the quite different concern that the costs of legitimate public programs not be concentrated unfairly on discrete individuals. In determining whether particular regulatory measures effect a taking of property, this Court has accordingly looked principally to the nature of the burden placed upon individual landowners. Where the burden is functionally comparable to that attendant upon a direct appropriation of property, the Court has held that just compensation is required in order for the regulation to be lawful. By contrast, a claim that government regulation fails substantially to advance legitimate state interests has no logical relevance to the question whether the burdens of that regulation have been unfairly concentrated on particular individuals.[105]

The Court's Limited Response

Given the law of the case, Justice Kennedy was able to deflect the U.S. demand for a holding explicating the *Agins* "substantially advance" test:

> In any event, although this Court has provided neither a definitive statement of the elements of a claim for a temporary regulatory taking nor a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions, we note that the trial court's instructions are consistent with our previous general discussions of regulatory takings liability. The city did not challenge below the applicability or continued viability of the general test for regulatory takings liability recited by these authorities and upon which the jury instructions appear to have been modeled. Given the posture of the case before us, we decline the suggestions of *amici* to revisit these precedents.[106]

In a similar vein, Justice Kennedy's opinion for the Court also parried the substantive due process issue with respect to the role of the jury.[107]

The Propriety of Trial by Jury in Regulatory Takings Cases

The issue that most engaged the Supreme Court in *Del Monte Dunes* was whether the district court properly submitted Del Monte's regulatory takings claim to a jury trial over the objection of the city and, if so, which issues the jury properly could consider.

The Propriety of a Jury Trial

Although Justice Kennedy's opinion was in other respects written for a unanimous Court, the Justices split 4-1-4 on the issue of whether a jury trial could be granted over the city's objection. Justice Kennedy's plurality opinion said that it could, given the nature of Del Monte's §1983 claim.[108] Justice Scalia wrote that a jury trial always is available for §1983 claims.[109] Justice Souter dissented, concluding that there was neither a statutory nor a constitutional basis for a jury trial.[110]

Writing now for the plurality, Justice Kennedy averred that the authorization in §1983 for "an action at law" did not itself guarantee a jury trial in a civil action.[111] Thus he reached the constitutional inquiry of whether the takings claim was a cause of action "'that either was tried at law at

100. *Id.* at 1634, 29 ELR at 21135.

101. *Id*.

102. The questions were (1) whether issues of liability were properly submitted to the jury on Del Monte Dunes' regulatory takings claim, (2) whether the Court of Appeals impermissibly based its decision on a standard that allowed the jury to reweigh the reasonableness of the city's land-use decision, and (3) whether the Court of Appeals erred in assuming that the rough-proportionality standard of *Dolan* applied to this case. 119 S. Ct. at 1635, 29 ELR at 21135.

103. Brief for the United States as Amicus Curiae Supporting Petitioner, Part *1 (Questions Presented), 1998 WL 308006.

104. *Id.* at 22-24.

105. *Id.* at 27-28.

106. 119 S. Ct. at 1636, 29 ELR at 21136 (citations omitted).

107. *See infra* note 121 and accompanying text.

108. 119 S. Ct. at 1637-42, 29 ELR at 21136-40.

109. *Id*. at 1645-49, 29 ELR at 21140-42 (Scalia, J., concurring in part and concurring in the judgment).

110. *Id*. at 1650-59, 29 ELR at 21142-47 (Souter, J., concurring in part and dissenting in part).

111. *Id*. at 1637-38, 29 ELR at 21137.

the time of the founding or is at least analogous to one that was.'"[112] He determined that Del Monte sought damages for the denial of its constitutional right to just compensation, which sounds in tort, offers legal relief, and thus is analogous to cases tried at law at the time of the founding.[113]

In his concurring opinion on this point, Justice Scalia went further. He asserted that all §1983 actions are entitled to a jury trial if money damages are sought. "[Section] 1983 establishes a unique, or at least distinctive, cause of action, in that the legal duty which is the basis for relief is ultimately defined not by the claim-creating statute itself, but by an extrinsic body of law to which the statute refers . . . ."[114] Justice Souter, on the other hand, found neither a statutory nor a constitutional right to trial by jury.[115] "[A]t the time of the framing the notion of regulatory taking or inverse condemnation was yet to be derived, the closest analogue to the then-unborn claim was that of direct condemnation, and the right to compensation for such direct takings carried with it no right to a jury trial . . . ."[116] There is substantial evidence, however, that Justice Souter's view on the last point is incorrect.[117]

The Allocation of Issues Between Judge and Jury

In order for the jury's general verdict to be sustained, it would have had to have an adequate basis to find for Del Monte Dunes on the basis either of a lack of reasonableness or a complete deprivation of economically viable use. The Ninth Circuit held that sufficient evidence had been presented to the jury to allow it to decide each point in Del Monte's favor.[118]

Dissenting on the jury issue, Justice Souter raised what he termed the "anomaly" of juxtaposing the common-law rule leaving direct condemnation cases to judges with the Court's holding allowing juries to decide liability in inverse condemnation cases.[119]

> The inconsistency of recognizing a jury trial right in inverse condemnation, notwithstanding its absence in condemnation actions, appears the more pronounced on recalling that under *Agins* one theory of recovery in inverse condemnation cases is that the taking makes no substantial contribution to a legitimate governmental purpose. This issue includes not only a legal component that may be difficult to resolve, but one so closely related to similar issues in substantive due process property claims, that this Court cited a substantive due process case when recognizing the theory under the rubric of inverse condemnation. Substantive due process claims are, of course, routinely reserved without question for the court. Thus, it would be far removed from usual practice to charge a jury with the duty to assess the constitutional legitimacy of the government's objective or the constitutional adequacy of its relationship to the government's chosen means.[120]

To fortify Justice Souter's point with a more practical question: How could it be that the judge would come out one way on the substantive due process question and the jury the other way on reasonableness?

Justice Kennedy adopted a three-fold response. First, he noted that the city had waived whatever rights it had to compel the Court to further explicate its takings jurisprudence. The city had not objected to the trial court's statement of the law, and indeed had propounded the essence of the jury instructions itself.[121] Second, he observed that the trial court's general statement of the law was not inconsistent with those principles that had been propounded by the Court.[122]

Third, focusing now on the specific role assigned the jury in *Del Monte Dunes*, Justice Kennedy constructed what amounts to a dichotomy between fairness in the macro sense of the city having fair principles in its zoning ordinance and fairness in the micro sense of the city's fair dealings with Del Monte in its attempt to develop its parcel. As a matter of sound trial strategy, Del Monte was explicit that it was attacking the fairness of the city's actions but not the fairness of the city's principles. Adumbrating the same point, the trial judge had charged the jury that the general purposes of the ordinance were reasonable and that the jury should focus on application.

The Court affirmed the ruling of the Ninth Circuit on the jury issue, notion that the case turned on factual findings, which are the proper domain of a jury. In particular, the jury was not asked to rule on the reasonableness of the ordinance nor of the particular conditions imposed on Del Monte per se.[123]

> Rather, the jury was instructed to consider whether the city's denial of the final proposal was reasonably related to a legitimate public purpose. Even with regard to this issue, however, the jury was not given free rein to second-guess the city's land-use policies. Rather, the jury was instructed, in unmistakable terms, that the various purposes asserted by the city were legitimate public interests.
>
> The jury, furthermore, was not asked to evaluate the city's decision in isolation but rather in context, and, in particular, in light of the tortuous and protracted history of attempts to develop the property.
>
> . . . .
>
> [D]espite the protests of the city and its *amici*, it is clear that the Court of Appeals did not adopt a rule of takings law allowing wholesale interference by judge or jury with municipal land-use policies, laws, or routine regulatory decisions.[124]

112. *Id.* at 1638, 29 ELR at 21137 (quoting Markman v. Westview Instruments, Inc., 512 U.S. 370, 376 (1996)).

113. *Id.* at 1639, 29 ELR at 21137.

114. *Id*. at 1645, 29 ELR at 21140 (Scalia, J., concurring in part and concurring in the judgment).

115. *Id*. at 1650, 29 ELR at 21142 (Souter, J., concurring in part and dissenting in part).

116. *Id*. at 1653, 29 ELR at 21143.

117. *See* De Keyser's Royal Hotel, Ltd. v. The King, [1919] 2 Ch. 197, 222 (stating that from 1708 through 1798, condemnation cases were tried to juries on demand). *See also* Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144 (1996).

118. 119 S. Ct. at 1634, 29 ELR at 21135.

119. *Id*. at 1659, 29 ELR at 21146.

120. *Id*. at 1659-60, 29 ELR at 21146 (citing *Agins*, 447 U.S. at 260, 10 ELR at 20632; Nectow v. City of Cambridge, 277 U.S. 183 (1928) (other cases and citations are omitted)).

121. *Id*. at 1627-28, 29 ELR at 21136.

122. *Id.* at 1628, 29 ELR at 21136. In a sense, Justice Kennedy rejected the city and the Solicitor General's global attack on the use of substantive due process in the Takings Clause in the same way that Justice Sutherland in *Euclid* rejected the general facial attack on comprehensive zoning by Ambler Realty and its allies. 272 U.S. at 388-90. The failure of Monterey to object to the Court's characterization of the law below made its task all the more difficult.

123. 119 S. Ct. at 1636, 29 ELR at 21136.

124. *Id*. at 1636-37, 29 ELR at 21136.

This analysis, which reflects practical wisdom, adopts a scheme incorporated in *Dolan*.[125] The Court there adjudicated the constitutionality of permit exactions only after bifurcating them into two tiers. Under this arrangement, the more comprehensive governmental schemes for mandating permissible land uses continue to enjoy the Court's post-*Euclid* deference. These macro-controls, established through municipal zoning ordinances, were deemed "legislative determinations"[126] and not then (nor yet) subjected to real scrutiny in most instances.[127] Micro-scale controls, such as determinations made by zoning inspectors and planning staff in applying the zoning ordinance to individual permit requests, were deemed "adjudicative."[128] It was in the context of those determinations that "rough proportionality" and the burden of demonstrating it were imposed on municipalities.[129]

In *Del Monte Dunes*, the Court applies the same technique. Review of macro-decisions—the comprehensive statements of community aspirations and perceived evils embodied in the zoning ordinance—are to be left to judges under the heady rubric of "substantive due process." The micro-scale decisions on application, on the other hand, may permissibly be passed on to juries, who will decide them as a matter of "reasonableness" in the context, as Justice Kennedy described it, "as a mixed question of fact and law."[130]

There is nothing very new in all of this. The classic macro-micro distinction is present in the myriad of decisions adjudicating so-called spot zoning.[131] Whether any significance should be accorded the macro-micro dichotomy reflects the debate at the state level as to whether less-than-comprehensive rezoning ordinances should be given deference as "legislative" or given more meaningful review as "quasi judicial."[132] Predicting the complete equilibrium effects of bifurcation is a difficult matter. Localities may respond to *Dolan* by increasing the specificity of their ordinances and leaving less to the discretion of zoning and building code administrators. But this does not mitigate the danger of favoritism implicit in micro-land use regulation; it merely repackages the problem.[133]

In fact, Justice Souter's dissent on the jury question in *Del Monte Dunes* is very similar to Justice Thomas' attack on the *Dolan* legislative-adjudicative dichotomy in *Parking Ass'n of Georgia, Inc. v. City of Atlanta*.[134] There, Justice Thomas recognized that whether a property owner is deprived of his rights is not a function of the mechanism by which government imposes its set of restrictions. The diminution in rights is a unitary concept not affected by whether a zoning inspector orders downtown parking lots to devote considerable money and space to beautification or whether the city council imposes the same rule by ordinance. Similarly, the determination of whether the imposition of a burden on the owner of a given parcel is unfair must take into account all of the facts and circumstances. Alas, these do not always break down neatly into "rule" and "application," or, for that matter, "theory" and "fact." Inevitably evaluations of whether a "valid" governmental purpose is enhanced by one action or another with respect to a given parcel must reflect on, and place a gloss on, the governmental ends sought.

None of this is to suggest that substantive fairness is out of place in takings determinations. Fairness always is crucial, especially in dealing with what many, including the Framers, believe to be the fundamental right to private property.[135] As even critics have been forced to conclude, property rights were their "great focus."[136]

As the Supreme Court has decided once again in *Del Monte Dunes*, the formation of its own view of the matter shall have to await another day. It is impossible to have an adequate theory of takings without having a clear understanding of "property" and a careful delineation of the "police power." We must recognize that the Takings Clause cannot provide a complete answer to the problem of unjust deprivations of property rights. Even under the best of circumstances, "just compensation" rarely is "full compensa-

125. 512 U.S. at 374, 24 ELR at 21083.

126. *Id.* at 385, 24 ELR at 21085.

127. Judicial deference to land use planning was present from the beginning. *Euclid*, 272 U.S. at 395 ("The reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."). This has not stopped the Court from actually testing the rationality of the regulation through the application of "covert heightened scrutiny" in cases where the subject matter or characteristics of the litigants gave it a serious interest in securing justice. *See, e.g.*, City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (invalidating a zoning ordinance as applied to a group home for the mentally retarded). If *Euclid* had not given comprehensive zoning an enthusiastic carte blanche, it would be easier for the contemporary Supreme Court to treat alleged deprivations of property rights in more the same manner as it treats alleged deprivations of other aspects of the Bill of Rights. *See* Steven J. Eagle, Regulatory Takings §5-2 (1996).

128. 512 U.S. at 385, 24 ELR at 21085.

129. *Id.* at 391 & n.8, 24 ELR 21087 & n.8.

130. 119 S. Ct. at 1644, 29 ELR at 21139.

131. *See, e.g.*, Rodgers v. Village of Tarrytown, 96 N.E.2d 731 (N.Y. 1951) (defining "spot zoning" as designating a small parcel by a land use classification totally different from the classification of surrounding lands). For an illustration, *see* City of Virginia Beach v. Virginia Land Investment Ass'n No. 1, 239 Va. 412, 389 S.E.2d 312 (1990) (stating that when aggrieved landowner makes a prima facie showing that since enactment of the prior ordinance there has been no change in circumstances substantially affecting the public health, safety or welfare, the burden of going forward with evidence of such mistake, fraud or changed circumstances shifts to the governing body.).

132. *See* Fasano v. Board of Comm'rs of Wash. County, 507 P.2d 23 (Or. 1973) (holding small-scale rezoning quasi judicial); Board of County Comm'rs v. Snyder, 627 So. 2d 469 (Fla. 1993) (same); Arnel Dev. Co. v. City of Costa Mesa, 620 P.2d 565 (Cal. 1980) (holding all zoning to be legislative in nature); Bell v. City of Elkhorn, 364 N.W.2d 144 (Wis. 1985) (same). *Fasano* remains emblematic of the attempt to prevent favoritism and corruption likely in spot zoning, although legislatively superseded. *See* Neuberger v. City of Portland, 607 P.2d 722, 725 (Or. 1980).

133. *See* Amoco Oil Co. v. Village of Schaumburg, 661 N.E.2d 380, 390 (Ill. App. 1995) ("A municipality should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property.").

134. 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting from denial of certiorari).

135. *See, e.g.*, 6 The Works of John Adams 280 (Charles Francis Adams ed., 1850) *quoted in* Jean Edward Smith, John Marshall: Definer of a Nation 388 (1996) ("Property must be secured or liberty cannot exist.").

136. *See, e.g.*, Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism 92 (1990) ("The great focus of the Framers was the security of basic rights, property in particular, not the implementation of political liberty.").

tion."[137] For the owner losing a property interest for reasons not comporting with substantive due process, the only complete remedy is restitution, not compensation.

Del Monte Dunes is a "temporary" takings case only because the owner saw the futility of continuing ownership and sold its land to the state of California. The decision is an illustration of how, through the pragmatic application of "substantive due process" by judges and (now under the style "reasonableness") by juries, the Takings Clause can achieve a rough approximation of justice in the absence of the Court's adoption of a more fundamental substantive due process doctrine.

137. *See* United States v. General Motors Corp., 323 U.S. 373 (1945)

> ([C]ompensation . . . does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue [upon] the sale of the property to someone other than the sovereign. No doubt all these elements would be considered by an owner in determining whether, and at what price, to sell. No doubt, therefore, if the owner is to be made whole for the loss consequent on the sovereign's seizure of his property, these elements should properly be considered. But the courts have generally held that they are not to be reckoned as part of the compensation for the fee taken by the Government.).

Id. at 379.