City of Monterey v. Del Monte Dunes at Monterey: Drawing the Battle Lines Clearly

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I. INTRODUCTION

Recently, there has been a nationwide increase in concern over urbanization and its negative effects. As a result, legislators and politicians have increasingly regulated land use to address issues such as urban sprawl and conservation. The resulting governmental measures frequently conflict with landowners’ freedom to use their property as they wish. Consequently, the competing interests of the government and landowners will be presented in the courtroom. As this legal issue presents itself with more frequency, the law of regulatory takings will become an increasingly critical area of the law. The law in this area should be as clear as possible so that governments can draft sound legislation to protect against the negative effects of irresponsible land use. At the same time, regulatory takings law should be unambiguous so that the rights of landowners are protected and development decisions can be planned with certainty.

The basis of regulatory takings law is contained in the Fifth Amendment of the United States Constitution, which states that private property shall not “be taken for public use, without just compensation.” The Supreme Court recognized early that the Constitution would not support a law that purported to take land from one person and give it to another. It is clear that “unambiguous governmental seizure of private property for public use—a sufficiently clear laying-on of official hands followed by a transfer of possession and title to the general public—is unconstitutional unless followed by payment to the former owner of the fair market value of what was taken.” This quote illustrates the common conception of what constitutes a taking—a physical invasion of property that alters the owner’s relationship to the thing, preventing him or her from using it. In contrast, a regulatory taking occurs when the government, through regulation, exercises too much control over a person’s property.

The Supreme Court’s seminal decision involving regulatory takings is Pennsylvania Coal Co. v. Mahon. In Pennsylvania Coal, Justice Holmes stated that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” These words placed before the Court an issue that has “plagued [it] for over six decades”—how far is too far?

Copyright 2000, by LOUISIANA LAW REVIEW.
1. See Dwight H. Merriam & Gurdon H. Buck, Smart Growth, Dumb Takings, 29 ELR 10746 (1999) (discussing the concerns of Vice President Al Gore and President Bill Clinton concerning urbanization).
2. U.S. Const. amend. V.
5. See id. at 592.
6. Id. at 593.
8. Id. at 415, 43 S. Ct. at 160.
Recently, the Supreme Court dealt with the issue of regulatory takings in *City of Monterey v. Del Monte Dunes at Monterey*, but failed to clarify its prior takings jurisprudence. This note discusses the Supreme Court’s opinion in *Del Monte Dunes*, focusing on the standard used by the Court in its regulatory takings jurisprudence.

II. FACTS OF *DEL MONTE DUNES*

*Del Monte Dunes* involved a 37.6-acre tract of oceanfront property owned by respondent, Del Monte Dunes, and zoned for multifamily residential use under the city’s general zoning ordinance. In 1981, Del Monte Dunes submitted an application to the Monterey planning commission in order to develop the land in conformance with the city’s zoning and general plan requirements. The plan submitted by the landowners proposed development of 344 residential units. The planning commission denied Del Monte Dunes’ proposal, indicating that a plan to develop 264 rather than 344 units would be acceptable. Responding to this recommendation, Del Monte Dunes submitted a proposal to develop 264 residential units. Again, the planning commission denied the proposal, stating that an application to build 224 units would be approved. Del Monte Dunes followed the instructions of the planning commission and submitted a 224 unit development plan. Once more, the commission refused to approve the proposal for development.

After the denial of its third proposal to develop the land, Del Monte Dunes appealed to the city council, which overruled the denial of the planning commission and gave the project back to the commission with instructions to consider a plan for 190 units. Subsequently, Del Monte Dunes submitted to the planning commission detailed site plans for 190 units. The planning commission rejected these plans. Del Monte Dunes once again appealed to the city council, which again overruled the planning commission’s decision, conditionally approved Del

11. *Id.* at 694, 119 S. Ct. at 1631.
12. The land was not in good condition when Del Monte Dunes decided to begin development of the property: a sewer line, surrounded by manmade dunes and fencing, traversed the property. Also, due to prior use, ice plant had taken over 25% of the parcel and threatened to overtake the remaining natural vegetation, including the buckwheat plant. The buckwheat plant is the natural habitat of the Smith’s Blue Butterfly, a protected species. However, evidence that the property was home to the butterfly was scarce. *Id.* at 695, 119 S. Ct. at 1632.
13. *Id.* at 695, 119 S. Ct. at 1632. The city’s zoning regulations allowed for the development of over 1,000 units on the property. *Id.*
14. *Id.* at 695-96, 119 S. Ct. at 1632.
15. *Id.* at 696, 119 S. Ct. at 1632.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
Monte Dunes' plans, and granted an eighteen-month use permit for the proposed development.22

Almost a year later, Del Monte Dunes submitted its final plan.23 The city's architectural review committee approved the plan, as did the planning commission's professional staff.24 However, in January 1986, the planning commission again rejected the proposed development plan.25 Del Monte Dunes appealed to the city council and requested an extension of their use permit in order to allow them time to satisfy any additional requirements that the council might impose.26 The council granted a temporary extension of the use permit in anticipation of a hearing on the matter.27 Nevertheless, after the hearing, the city council rejected the final plan without specifying possible remedial measures and denied a further extension of Del Monte Dunes' use permit.28 After five years, five formal decisions, and nineteen different site plans, Del Monte Dunes filed suit in the United States District Court for the Northern District of California under 42 U.S.C. § 1983 alleging that the city's denial of the final development proposal was, among other things, an uncompensated, and therefore, unconstitutional regulatory taking.29

The district court dismissed the claims as unripe.30 However, the court of appeals reversed and remanded.31 On remand, Del Monte Dunes argued that,
although the city had the power to regulate the property, the city's actions effectively denied them any opportunity to develop the parcel. Del Monte Dunes buttressed its argument with a detailed history of its attempts to develop the property. It emphasized the fact that the city had continually changed its requirements for development.

The district court submitted the parties' claims to a jury. The court instructed the jury to find for Del Monte Dunes if it found either that Del Monte Dunes had been denied all economically viable use of the property, or that the city's denial of the landowners' final proposal "did not substantially advance a legitimate public purpose." The jury returned a general verdict for Del Monte Dunes on its takings claim.

The city appealed the decision, claiming: (1) the issue should not have been submitted to a jury and (2) the jury instructions were improper. The appellate court affirmed. It held that allowing the jury to decide Del Monte Dunes' regulatory takings claim was proper because the plaintiff had a right to a jury trial under §

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32. 920 F.2d at 1506-07; 526 U.S. at 699, 119 S. Ct. at 1636.

33. Del Monte Dunes also introduced evidence that suggested that the city actually denied the landowners' proposals because it wished to own the property. 526 U.S. at 699-700, 119 S. Ct. at 1633-34.

34. The substantive due process claim was reserved for decision by the court. Id. Concerning the first issue, the jury was instructed as follows:

For the purpose of a taking claim, you will find that the plaintiff has been denied all economically viable use of its property, if, as the result of the city's regulatory decision there remains no permissible or beneficial use for that property. In proving whether the plaintiff has been denied all economically viable use of its property, it is not enough that the plaintiff show that after the challenged action by the city the property diminished in value or that it would suffer a serious economic loss as the result of the city's actions.

Concerning the second issue, the jury received the following instruction:

Public bodies, such as the city, have the authority to take actions which substantially advance legitimate public interest[s] and legitimate public interest[s] can include protecting the environment, preserving open space agriculture, protecting the health and safety of its citizens, and regulating the quality of the community by looking at development. So one of your jobs as jurors is to decide if the city's decision here substantially advanced any such legitimate public purpose.

The regulatory actions of the city or any agency substantially advance[e] a legitimate public purpose if the action bears a reasonable relationship to that objective.

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

Id. at 700-01, 119 S. Ct. at 1634.

35. The jury rendered a separate verdict for Del Monte Dunes on its equal protection claim and awarded damages of $1.45 million. The court ruled for the city on the substantive due process claim (stressing that its ruling was not inconsistent with the jury verdicts). Id.

36. Del Monte Dunes at Monterey v. City of Monterey, 95 F.3d 1422, 1425 (9th Cir. 1996).
1983. Further, whether the landowners had been denied all economically viable use of the property and whether the city’s denial of the final proposal advanced legitimate public interests were suitable jury questions. The court reasoned that these inquiries fell within a category of essentially factual questions and thus could be submitted to the jury. The court also based its approval of the district court’s jury instructions partly on Dolan v. City of Tigard. The court of appeals used the “rough proportionality” test articulated in Dolan to decide whether a taking had occurred.

The court of appeals found that the jury instruction mirrored the “rough proportionality” test, reasoning that the jurors were left with a reasonableness test that had been described in Dolan as “essentially factual.” Although it may have been a mixed question of fact and law, the issue of whether the government’s actions were “reasonable” was the type that could be put to the jury. The court of appeals then concluded that sufficient evidence had been presented to the jury to support a finding for Del Monte Dunes.

In its petition for certiorari, the city limited its questions to three: (1) whether the court of appeals erred in applying the “rough proportionality” test from Dolan to the case, (2) whether the court of appeals incorrectly based its decision on a standard that allowed the jury to re-weigh the reasonableness of the city’s land-use decision, and (3) whether issues of liability were properly submitted to the jury.

III. HOLDING IN DEL MONTE DUNES

A. Discussion of the Regulatory Takings Standard From Dolan

The Court first held that the Ninth Circuit’s use of the “rough proportionality” standard from Dolan was misplaced and did not apply to the Del
Monte Dunes case. It refused to extend the "rough proportionality" test beyond the context of exactions, the type of taking that had occurred in Dolan. The Court defined exactions as land-use decisions where approval of development depended upon the landowner dedicating a part of his property to public use. However, the jury instructions relied upon by the lower courts were found to be sound because at no point did they mention proportionality or require that the jury find for Del Monte Dunes because the city's actions were "roughly proportional" to its asserted interests. The Court concluded that the appellate court's discussion of rough proportionality was unnecessary to its decision and therefore, irrelevant to the disposition of the case.

B. Examination of Public Land-Use Policy

The Court then dismissed the city's argument that the court of appeals' decision allowed the jury to second-guess public land-use policy. The Court reasoned that the judgment of the district court did not address the reasonableness of the city's general zoning laws or land-use policies because the jury instructions addressed only the city's decision to deny Del Monte Dunes' development proposal. "In short, the question submitted to the jury on this issue was confined to whether, in light of all the history and the context of the case, the city's particular decision to deny Del Monte Dunes' final development proposal was reasonably related to the city's proffered justifications." Therefore, the jury was not given the opportunity to second-guess the city's land-use policy, but constrained to examine a particular zoning decision.

The Court underscored the fact that the city itself had proposed the essence of the instructions given to the jury and as such, the city could not contend that those instructions did not provide an accurate statement of the law. It went on to explain that it had "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 dedications or exactions . . . ." The Court concluded that the jury instructions were consistent with previous Supreme Court discussions of general regulatory
takings liability and, because the city did not challenge the validity of the prior jurisprudence upon which the instructions were based, the Court refused to revisit the precedents. 59

C. The Role of the Jury

The Court then addressed whether it was proper for the district court to submit the question of liability on Del Monte Dunes' regulatory takings claim to the jury. 60 According to the Court, the issue initially depended on whether Del Monte Dunes had a statutory or constitutional right to a jury trial. 61 The first step in the Court's analysis examined the statute to determine whether it granted a jury right, thus avoiding the constitutional question. 62 Del Monte Dunes argued that § 1983 granted a right to a jury trial because the statute authorized a party who had been deprived of a federal right under color of state law to seek relief through "an action at law." 63 It further asserted that the phrase "action at law" implied a jury right. 64 The Court disagreed, concluding that the statute did not confer upon the plaintiff the right to a jury trial. 65 The Court then moved to the second part of its analysis: examination of the Seventh Amendment to determine whether the right to a jury was granted by the Constitution. 66

The Seventh Amendment provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved . . . ." 67 The Court held that "a § 1983 suit seeking legal relief is an action at law within the meaning of the Seventh Amendment." 68 It reasoned that the jury guarantee of the Seventh Amendment extended to statutory claims unknown at common law, as long as the claims could be said to "soun[d] basically in tort,'

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61. Id.


63. 526 U.S. at 707, 119 S. Ct. at 1637.

64. Id.

65. Id. at 708, 119 S. Ct. at 1637.

66. Id., 119 S. Ct. at 1638.

67. U.S. Const. amend. VII. The Court's interpretation of the Seventh Amendment was guided by historical analysis consisting of two questions: (1) was the cause of action tried at law at the time of the founding or is it analogous to one that was, and (2) must the decision fall to the jury in order to preserve the substance of the common-law right as it existed in 1791. Id., 119 S. Ct. at 1638.

68. Id. at 709, 119 S. Ct. at 1638.
and seek legal relief.” The Court concluded that a suit brought under § 1983 met both of these requirements.

The Court then focused on whether the particular issues of liability were proper for determination by the jury. It examined this issue in much the same way as it had the previous questions: by undertaking an historical analysis to determine whether the particular issues, or analogous ones, were decided by judge or by jury in suits at common law at the time the Seventh Amendment was adopted. “Where history did not provide a clear answer, [the Court] looked to precedent and functional considerations.” Using this analysis, the Court found no exact analogue to Del Monte Dunes’ suit at common law, or a precise analogue for the test of liability submitted to the jury. The Court then looked to precedent to decide the issue, noting that it had never specifically addressed the issue of proper allocation of liability determinations between judge and jury in the regulatory takings context. Therefore, it examined procedural and functional considerations.

The Court reasoned that predominantly factual issues are, in most cases, given to the jury to decide. Specifically, in the context of regulatory takings, the Supreme Court has often held that the determination of whether a regulation of property goes so far that the eminent domain power should be invoked and compensation paid, depends on the particular facts involved. Therefore, the issue of whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question, which should be left to the jury. However, the Court added that the question of whether a land-use decision substantially advances legitimate public interests within the meaning of Supreme Court regulatory takings doctrine is a more difficult determination; the question

69. Id. (quoting Curtis v. Loether, 415 U.S. 189, 94 S. Ct. 1005 (1974)).
70. The Court recognized that a § 1983 claim sounded in tort. 526 U.S. at 709, 119 S. Ct. at 1638. See Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364 (1994); Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 106 S. Ct. 2537 (1986); Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473 (1961); and Monell v. New York City, 436 U.S. 658, 98 S. Ct. 2018 (1978). The Court found that the second requirement, that the plaintiff seek legal relief, was met in Del Monte Dunes because the constitutional injury alleged by the landowners was not that the property was taken, but that the property was taken without compensation (because the State of California did not provide a compensatory remedy). Therefore, Del Monte Dunes sought not only compensation but also damages for the unconstitutional denial of these damages (damages for a constitutional violation are a legal remedy). 526 U.S. at 710, 119 S. Ct. at 1638-39. See Teamsters v. Terry, 494 U.S. 558, 110 S. Ct. 1339 (1990).
71. 526 U.S. at 718, 119 S. Ct. at 1642.
72. Id., 119 S. Ct. at 1643.
73. Id. (quoting Markman v. Westview Instruments, Inc., 517 U.S. 370, 116 S. Ct. 1384 (1996)).
74. 526 U.S. at 718, 119 S. Ct. at 1643.
75. Id. at 719, 119 S. Ct. at 1643.
76. Id. at 720, 119 S. Ct. at 1643.
77. Id.
79. 526 U.S. at 720, 119 S. Ct. at 1644.
contains a legal aspect and should be understood as a mixed question of fact and law. Avoiding the creation of a general rule, the Court held that the specific jury instruction in Del Monte Dunes was properly submitted to the jury because it was submitted narrowly—to wit: "whether, when viewed in light of the context and protracted history of the development application process, the city’s decision to reject a particular development plan bore a reasonable relationship to its proffered justifications." The Court’s approval was based on the reasoning of the court of appeals that the jury instruction was "essentially fact-bound [in] nature." After reaching this conclusion, the Court limited its holding. It stated that it was not addressing the role of the jury in an ordinary inverse condemnation proceeding; it was not providing a precise demarcation of the areas allotted to judge and jury; and it was not defining the elements of a temporary regulatory takings claim. Instead, the holding was expressly limited to an action brought under § 1983.

IV. ANALYSIS

A. The Right To A Jury

The bulk of the Del Monte Dunes opinion was spent discussing the existence of a jury right. The issue was a prerequisite to its approval of the lower court’s holding that the city’s action was a regulatory taking. The decision could not have been upheld unless the landowners had a right to a jury trial on the issue. A question left unanswered is what impact might the Del Monte Dunes decision have in the courts in the future?

One possible concern is the complexity of regulatory takings jurisprudence. Judges are better able than juries to properly apply the intricate analysis involved in deciding whether a taking exists. Juries might also be more sympathetic to landowners, thereby increasing the cost of government through large awards. Additionally, the number of regulatory takings cases could increase because of the perceived advantage bestowed on plaintiffs by jury trials.

Working against the above concerns is the narrowness of the Court’s holding.
in *Del Monte Dunes*. Nevertheless, a clarification of the standard used in regulatory takings cases would help resolve the possible problems presented by the Court's finding of a jury right. If the legal analysis used in regulatory takings cases was clearly defined, the concerns raised by jury participation might be alleviated by the proper allocation of legal and factual questions between the judge and the jury.

**B. The Regulatory Takings Standard**

1. **Background**

The Supreme Court upheld the test contained in the jury instructions in *Del Monte Dunes* and cited with approval the precedents upon which the jury instructions were based. These cases, cited by the Court in *Del Monte Dunes* as "previous general discussions of regulatory takings liability," are useful in illustrating some general guidelines evident in regulatory takings jurisprudence. The following discussion utilizes, for the most part, the same cases.

### a. Regulations that Compel a Physical Invasion

Courts will usually find that a taking has occurred if the regulation at issue requires that the landowner suffer a physical invasion of his property. *Loretto v. Teleprompter Manhattan CATV Corp.* is an example of a case involving such a regulation. In *Loretto*, a New York law forced landlords to permit a cable television company to install its cable on their properties. The Supreme Court ruled that this physical occupation of property was a taking. It reasoned that a permanent physical invasion would be considered a taking "without regard to the public interests that it may serve." "In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation."

The Court in *Loretto* posited, in dicta, that temporary physical invasions should

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88. See supra notes 85-87 and accompanying text.
89. 526 U.S. at 704, 119 S. Ct. at 1636.
90. Id. The jury instruction at issue in the *Del Monte Dunes* case was based on this line of cases and was upheld by the Court.
91. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164 (1982) was not cited by the Court in *Del Monte Dunes* as a "previous general discussion[ ] of regulatory takings liability." 526 S. Ct. at 704, 119 S. Ct. at 1636.
93. 458 U.S. 419, 102 S. Ct. 3164 (1982); see also *Lucas*, 505 U.S. at 1015, 112 S. Ct. at 2893.
94. 458 U.S. at 421, 102 S. Ct. at 3168.
95. Id. at 421, 102 S. Ct. at 3168.
96. Id. at 426, 102 S. Ct. at 3171.
97. Id. at 441, 102 S. Ct. at 3179.
be subjected to a balancing test that takes into account the state's interest. However, the balance should be pre-weighted in favor of the landowner because a court should more readily find a taking when the interference can be characterized as a physical invasion.

b. Regulations that Destroy All Economic Use

Lucas v. South Carolina Coastal Council illustrates a type of regulation that deprives the landowner of all economic use of his or her property. In Lucas, the plaintiff purchased two lots on which he intended to build single-family homes. Two years later, the South Carolina Legislature enacted a law that prohibited Lucas from placing any permanent habitable structures on either of his two tracts.

The Court likened this type of regulation to a physical invasion of property. It stated that, like regulations compelling physical invasions, regulations that denied all economic use of land were usually found to involve takings without a "case-specific inquiry into the public interest advanced in support of the restraint." A regulation that prohibited "all economically beneficial use of land" would effect a taking unless "the proscribed use interests were not part of [the owner's] title to begin with." Therefore, according to the Court, a regulation that deprived a landowner of all economic use of his or her property should "do no more than duplicate the result that could have been achieved in the courts by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance . . . ."

c. Regulations that Condition Approval on Exactions

The Court examined another aspect of regulatory takings in Nollan v. California Coastal Commission. In Nollan, the California Coastal Commission said it would approve the plaintiffs' building plan only if the plaintiff transferred to the public an easement across their property. The Court recognized that if the regulation did not deny the landowners "economically viable use" of their land, the state could regulate the use of the plaintiff's land in order to "substantially advance [a] legitimate state interest." Therefore, the city could deny the plaintiffs' proposal if there was a legitimate state interest and the denial did not interfere too

98. Id. at 432, 102 S. Ct. at 3174.
99. Id. at 426, 102 S. Ct. at 3171.
101. Id. at 1007, 112 S. Ct. at 2889.
102. Id.
103. Id. at 1029, 112 S. Ct. at 2900.
104. Id. at 1015, 112 S. Ct. at 2893.
105. Id. at 1027, 112 S. Ct. at 2899.
106. Id. at 1029, 112 S. Ct. at 2900.
108. Id. at 827, 107 S. Ct. at 3143.
109. Id. at 834, 107 S. Ct. at 3147.
drastically with the landowners' use of the property. Although the Court stated that there was no set formula to decide whether a legitimate state interest existed, it recognized scenic zoning, landmark preservation, and residential zoning to be legitimate state interests.

The Court added a stipulation. If the city conditioned its approval on an exaction, "[t]he evident constitutional propriety disappear[ed] . . . if the condition substituted for the prohibition utterly fail[ed] to further the end advanced as the justification for the [denial]." This relationship between the state interest and the condition was described by the court as an "essential nexus."

The Court expanded on the Nollan reasoning in Dolan v. City of Tigard. In Dolan, the city conditioned its approval of the petitioner's application to expand her store and pave her parking lot upon her dedication of part of her land for (1) a public greenway along a creek that ran across the property and (2) a pedestrian/bicycle pathway. The Supreme Court used the case as an opportunity to examine the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development. The Court used a two-part test to evaluate the petitioner's claim: (1) did an "essential nexus" exist between the "legitimate state interest" and the condition exacted by the city and (2) was the required degree of connection present. The Court adopted what it termed a "rough proportionality" test that called for the municipality to show a "reasonable relationship" between the required dedication and the impact of the proposed development. "[T]he city must [have made] some sort of individualized determination that the required dedication [was] related both in nature and extent to the impact of the proposed development." The Court held that the city did not meet its burden of demonstrating that its requirements reasonably related to the impact of the proposed development.

110. Id. at 835-36, 107 S. Ct. at 3148.
111. Id. at 835, 107 S. Ct. at 3147-48.
112. Id. at 837, 107 S. Ct. at 3148.
113. Id.
115. Id. at 380, 114 S. Ct. at 2314.
116. Id. at 377, 114 S. Ct. at 2312.
117. The first part of the test came from Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S. Ct. 3141 (1987). Dolan, 512 U.S. at 385, 114 S. Ct. at 2317. The Court developed the second part of the test by examining several approaches taken by a number of states. Id., 114 S. Ct. at 2318-20.
118. 512 U.S. at 391, 114 S. Ct. at 2319.
119. Id. at 391, 114 S. Ct. at 2319-20.
120. The Court found that although increasing the amount of impervious surface would increase the amount and rate of storm water flow into the creek from petitioner's property, the city did not show that its requirement of a public greenway would remedy the possible flood problem. Id. at 392-93, 114 S. Ct. at 2320-21. Regarding the bicycle/pedestrian pathway, the Court found that increasing the size of the store would certainly increase the amount of traffic in the area but that the dedication of the bicycle/pedestrian easement was not proven to be an effective solution. Id. at 395, 114 S. Ct. at 2321-22.
d. Regulations that Merely Interfere with Property Rights

A landowner may be entitled to compensation if the regulation does not prevent all economic use of the land, but instead creates a lesser infringement of property rights. The Court addressed such a situation in *Agins v. City of Tiburon.* In *Agins,* a modification of the city's zoning requirements placed restrictions on the number and type of dwellings that the plaintiffs could develop on their land. The landowners claimed that the city's re-zoning effected a taking of their property without just compensation because it prevented development of the parcel and "destroyed the value [of the land] . . . for any purpose or use whatsoever." The Court did not examine specifically whether a taking had occurred on the plaintiffs' property because at the time of the suit the landowners had not submitted a plan for development of their property. Instead, the Court examined the facial validity of the statute and determined that its mere enactment did not constitute a taking.

The Court stated that there was no precise rule to be used in this situation to determine when a taking had occurred, but the inquiry called for a "weighing of private and public interests" to determine whether "the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest." Under this analysis, "[t]he application of a general zoning law to particular property effect[ed] a taking if the ordinance d[id] not substantially advance legitimate state interests . . . or denie[d] an owner economically viable use of his land." Specifically, the Court found no taking in *Agins* because the zoning requirements substantially advanced legitimate governmental goals by protecting the public from the harms of urbanization. Because the landowners had not submitted a plan for approval, their specific interests were not placed on the scale.

The Supreme Court again addressed the invasion of property rights by regulation in *Keystone Bituminous Coal Association v. DeBenedicts.* In *Keystone,* the plaintiffs challenged a Pennsylvania statute that required fifty percent of the coal beneath certain structures remain in place in order to support the surface. The Court held that the plaintiffs did not meet their burden in attempting to prove that the statute amounted to a taking. The Court examined the two key factors from *Agins* in determining whether a taking had occurred: (1) did the regulation substantially advance a legitimate state interest and (2) did the regulation

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123. Id. at 257, 100 S. Ct. at 2140.
124. Id. at 258, 100 S. Ct. at 2140.
125. Id. at 260, 100 S. Ct. at 2141.
126. Id. at 260-63, 100 S. Ct. at 2141-43.
127. Id. at 260-61, 100 S. Ct. at 2141.
128. Id. at 260, 100 S. Ct. at 2141.
129. Id. at 261, 100 S. Ct. at 2142.
130. Id. at 260, 100 S. Ct. at 2141.
132. Id. at 476-78, 107 S. Ct. at 1237-38.
133. Id. at 473-98, 107 S. Ct. at 1236-48.
deny the owner economically viable use of his land.\footnote{134} In examining the state’s interest, the Court emphasized the necessity of determining the nature of the interest.\footnote{135} The Court underscored the importance of the state’s power to “preserv[e] the public weal [by] restricting the uses individuals can make of their property.”\footnote{136} Therefore, scrutiny of the state’s interest should not be a judgment of the effectiveness of the legislation, but should focus on the “operative provisions” of the regulation, not just its stated purpose, in assessing its true nature.\footnote{137} To facilitate this analysis, the Court looked to the balancing test from\footnote{138} Agins to determine who should bear the “burden of an exercise of state power.”\footnote{139} The Court ruled that the statute in\footnote{140} Keystone sought to prevent public nuisance, an interest which satisfied its test for validity.\footnote{141}

The Court then examined the economic aspect of the regulation.\footnote{142} In this context, the Court discussed the importance of the posture of the particular claim, recognizing that this could affect the analysis.\footnote{143} If the plaintiff challenged the specific application of a regulation, the Court would follow no “set formula” to determine whether a taking had occurred.\footnote{144} Rather, the Court would “examine[] the ‘taking’ question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation [and] its interference with reasonable investment backed expectations . . . .”\footnote{145} If, on the other hand, the issue before the court was the facial validity of a regulation, the enactment of the regulation would constitute a taking if it denied the owner economically viable use of his land.\footnote{146} The Court determined that the posture of the case in\footnote{147} Keystone presented a challenge of the facial validity of the statute and the plaintiffs did not meet their burden of proving that they had been denied the economically viable use of their property.\footnote{148}

2. Generally

Supreme Court jurisprudence dealing with takings has been called a “bewildering array of rules.”\footnote{149} Commentators blame this confusion on the Supreme Court’s refusal to adopt a clear test to guide its takings cases.\footnote{150} In\footnote{151} Del
Monte Dunes, the entire Court agreed that the "rough proportionality" standard from Dolan did not apply to the situation involved in Del Monte Dunes. The cynical reader might conclude that the Court denied the possibility of a clear standard in order to perpetuate the confusion that surrounds regulatory takings jurisprudence. However, the lack of a clear standard is a symptom, not the generator, of the confusion. This lack of uniformity comes from the nature of regulatory takings cases.

Evidence of the cause of confusion can be seen in the Del Monte Dunes opinion. In denying the extension of the Dolan test, the Court stated that the test was designed to determine whether dedications demanded "as conditions of development [were] proportional to the development's anticipated impacts." This test was not appropriate in Del Monte Dunes because it was not "readily applicable to the much different questions arising where . . . the landowner's challenge [was] based not on excessive exactions but on denial of development." Herein lies the problem; the analysis used in one case is often inapplicable in another because it is tailored to the particular facts presented in each situation. Many cases involving regulatory takings, by their nature, can only be determined after examination of their "particular facts." In order to decide whether a taking exists in these cases, the court must employ a balancing test, taking into account the interests of the property owner and the state. The Court must place the facts on either side of the scale in order to weigh the interests of the public and the landowner to decide who should bear the cost of the regulation. In an evolving society, the need for a unique test in each case is further bolstered by the fact that the importance of each fact may change, giving more or less weight to some interests. Indeed, the choice of where to place the fact on the scale will also be affected because "circumstances may so change in time . . . as to clothe with such a [public] interest what at other times . . . would be a matter of purely private concern."

3. Guidelines

Even though the nature of a regulatory taking defies the creation of a specific test for its existence, some guidelines are evident in the Court's analyses. The analysis is generally a balancing test. On one side of the scale rest the interests of the landowner. The competing interests of the state are placed on the other side of the balance. The character of the regulatory taking can be used to determine the default setting of the balance.

If the taking involves a compelled physical invasion or deprives the landowner
of all economic use of his or her property, the scale will be heavily pre-weighted in favor of the landowner. In this situation, a determination that the regulation compels a physical invasion of property will usually conclude the balancing test in favor of the landowner without a consideration of state interests. A similar determination that the regulation deprives the landowner of all economic use of his or her property will usually tip the scale in favor of the landowner as well, unless the state’s interest is one inherent in the title to the property in question.

Likewise, if the regulation is conditioned upon an exaction of property, the scale’s default setting will tip in favor of the landowner (although much less so than if the regulation caused a physical invasion or deprivation of economic use of the property). The state interest involved in the dispute should first be examined to discern whether it is legitimate. If the interest is valid, the regulation must be determined to be sufficiently connected to it to substantially advance the interest involved. If the preceding requirements are met, the interest will be placed on the scale. On the other side of the scale, the landowner’s interest will be examined to determine whether the regulation has denied him or her economically viable use of the land.

If the regulation involved in the dispute concerns a lesser deprivation of property rights, the scale should be evenly set at the start. In this situation, the broad questions are the same: (1) does the regulation advance a legitimate state interest and (2) does the regulation deny the landowner economic use of his or her land. This situation is unique because of the weighing process itself. Because the balance is set evenly, the process is more complex—focusing, with greater emphasis, on the specific facts of each case.

4. The Del Monte Dunes Decision In This Context

Although the Court in Del Monte Dunes found that the lower court should not have used the Dolan test, it approved the court’s final decision. The above discussion is helpful in clarifying this ruling.

The district court instructed the jury to find in favor of Del Monte Dunes if it found that (1) Del Monte Dunes had been denied all economically viable use of its land or (2) the city’s rejection of Del Monte Dunes’ development proposal did not substantially advance a legitimate public purpose. If the jury found the former

155. See supra notes 99-112 and accompanying text.
156. Id.
157. Id.
158. See supra notes 113-124 and accompanying text.
159. Id.
160. Id.
161. Id.
162. See supra notes 125-150 and accompanying text.
164. Id. at 700, 119 S. Ct. at 1634; City of Monterey v. Del Monte Dunes at Monterey, 95 F.3d 1422, 1425 (9th Cir. 1996).
to be true, the case would have fallen into the category of regulatory takings in which the scale is weighted heavily in favor of the landowner because the landowner had been denied all economic use of his or her land. 165

In that situation, a finding in favor of Del Monte Dunes would have been proper because the city presented no interest that would have been inherently present in the landowners' title. Therefore, the scale should have tipped in favor of Del Monte Dunes.

In the alternative, if the jury found that the city's denial of the development proposal did not substantially advance a legitimate public purpose, the case would have been categorized as one involving mere interference with property rights. 166 In this circumstance, the interests of the landowner and the city would have been weighed on an evenly set scale. However, the city's interests would not have been placed on the scale if they were not advanced by the regulation. 167 Such a finding would have tipped the scale in favor of Del Monte Dunes. Therefore, the Del Monte Dunes Court correctly upheld the decision of the lower court because an affirmative answer to either of the jury questions could have been supported by the evidence and such an answer would have compelled a finding for Del Monte Dunes.

V. CONCLUSION

Although the generalities discussed above are helpful, they hardly take the place of a clear set of standards. The Del Monte Dunes case and the authority contained therein illustrate the difficulty of fashioning a specific test to deal with regulatory takings. However, the Supreme Court should be mindful that the general principles involved in these cases should be clearly articulated in order to guide analysis. As concerns over the use of property move to the forefront, the need for clarity in the area of regulatory takings will become increasingly crucial. For this reason, Del Monte Dunes should be considered a missed opportunity. The Court should endeavor to fashion a clear, workable test—soon.

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165. See supra notes 106-112 and accompanying text.
166. See supra notes 127-152 and accompanying text.
167. Id.