

A Preliminary Analysis of Del Monte Dunes

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This is a first-cut analysis of the significance and lessons of the U.S. Supreme Court's May 24 decision in *Del Monte Dunes*. This analysis is necessarily tentative and preliminary. Plumbing the depths of the Court's highly fractured decision will bear more than a few readings. Ultimately, the significance of *Del Monte Dunes* will be determined by what state and lower federal courts, and finally the U.S. Supreme Court, make of the somewhat contradictory signals emanating from this case.

The bottom line is that the U.S. Supreme Court has continued its seemingly relentless string of recent rulings against state and local governments in regulatory takings cases. While the Court's decision is limited in scope, it is hard to avoid the conclusion that a majority of the Court (based on an arguably one-sided understanding of the facts) was determined to uphold the finding of liability in this case, even if at a fairly high cost in terms of logical or doctrinal coherence. Viewed as an expression of the present Court's general attitude toward local government regulation of real estate development and closer judicial scrutiny of local government decision-making, the result is a setback for local governments.

At the same, on a doctrinal level, the Court's decision contains at least one definite positive step for government defendants in regulatory takings cases. The Court also appears to have more openly acknowledged than at any other time in recent memory the deep incoherence of the Court's modern regulatory takings doctrine. The unfortunate upshot for all concerned with the takings issue is that the Court seems to have succeeded in the seemingly impossible -- making the confusing doctrine of regulatory takings even more confusing than it already was.

I. The Non-applicability of Dolan.

On the positive side for government defendants, the Court ruled "without dissent" that the "rough proportionality" test established in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), is irrelevant in a regulatory takings case challenging the denial of a development permit. *Dolan* involved a takings challenge to a city's requirement, as condition of approving expansion of a plumbing store, that the owner permit public access to a portion of her property for use as a public green way and bike path. The Court, emphasizing the particular concerns raised by government actions which effect a "physical occupation" of private property, ruled that these types of conditions could only be upheld if the conditions were "roughly proportional" to the impacts of the proposed development activity. The Court acknowledged that this standard, along with allocation of the burden of proof to the government, imposed a relatively more stringent standard than that normally applied to local land use decisions.

In the aftermath of this decision, regulatory takings plaintiffs routinely have attempted to convince lower courts to apply the *Dolan* rough proportionality standard in regulatory takings cases generally. *Del Monte Dunes* rejects that broad reading of *Dolan*. It establishes, at a very minimum, that *Dolan* is not applicable to permit denials. It also is most accurately read, I believe, to establish that the "rough proportionality" standard does not apply outside the exactions context. See Justice Kennedy opinion ("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"); see also Justice Souter opinion (concurring in the rejection of the rough proportionality standard "for reviewing land-use regulations generally"). The Court's refusal to extend the *Dolan* "rough proportionality" standard to land use regulations also repudiates the more general argument which some plaintiffs have advanced that *Dolan* calls for more demanding judicial scrutiny under the taking clause of all types of land use regulations.

One issue that is likely to be hotly debated after *Del Monte Dunes* is whether the "rough proportionality" standard should be applied to development impact fees. The Court's reference in *Del Monte Dunes* to the "questions" *Dolan* was "designed to address" arguably refers to the

Court's discussion in *Dolan* of the special problems raised by exactions involving physical occupations. If so, this language in *Del Monte Dunes* supports the argument that *Dolan* should not be extended to monetary fees either. In any event, as Professor Bosselman has persuasively pointed out in a recent article in the *Land Use Law and Zoning Digest*, the Supreme Court decision last term in *Eastern Enterprises* appears to provide more useful guidance on this question. As he points out, the rejection of the taking claim in that case by Justice Kennedy and four other Justices appears to reflect the view that assessments of financial liability (such as fees) raise lesser concerns under the takings clause than actual physical occupations of real property, and accordingly do not call for the same type of demanding review as *Dolan* establishes for conditions involving physical occupations.

II. The Uncertain *Agins* Means-Ends Test.

On the existence *vel non* of a regulatory taking claim based on the alleged failure of government action to further a legitimate government purpose, the Court's decision in *Del Monte Dunes* points in completely opposite directions at the same. On the one hand, the Court, for the first time ever outside the specialized exactions context, has affirmed a finding of a taking based on the "substantially advance" prong of the two-part takings test first articulated *Agins v. City of Tiburon*, 447 U.S. 255 (1980). Specifically, the Court upheld a finding of a taking on the theory that the City's action in rejecting this development application was not "reasonably related" to the justifications proffered by the City. Inevitably, therefore, *Del Monte Dunes* will be cited as precedent to support future claims based on the same means-ends theory of takings liability.

On the other hand, the Court agreed unanimously that it would apply this standard of liability in this case without questioning its validity only because the City's attorney did not object to the jury instructions incorporating this theory. Moreover, the Court explicitly indicated that it was reserving the ultimate question of whether the ostensible "substantially advance" takings test actually represents a takings test at all. See Opinion of Justice Kennedy ("As the city itself proposed the essence of the instructions given to the jury, it cannot now contend that the instructions did not provide an accurate statement of the law;" "Given the posture of the case before us, we decline the suggestions of amici to revisit these precedents.") See also opinion of Justice Souter, n. 12 ("I offer no opinion here on whether *Agins* was correct in assuming that this prong of liability was properly cognizable as flowing from the Just Compensation Clause of the Fifth Amendment, as distinct from the Due Process Clauses of the Fifth and Fourteenth Amendments."); opinion of Justice Scalia, n.2 ("As the Court explains, petitioner forfeited any objection to this standard,.... and I express no view as to its propriety.").

The basic underlying issue which the Court declined to resolve in this case is whether the alleged failure of a government action to substantially advance a legitimate government purpose actually represents a due process claim rather than a taking claim. There are strong reasons to believe that this claim in fact does represent a due process issue, not a taking issue, including because the *Agins* decision establishing this ostensible takings test itself relied upon due process precedent, and because this ostensible theory of takings liability contradicts the established principle that a taking claim presupposes that the government is acting for a valid public purpose. (These arguments are set forth in detail in the Brief of the United States filed in the *Del Monte Dunes* case, as well as the Environmental Policy Project's amicus brief filed on behalf of the League for Coastal Protection and others (available on the EPP website)). The difference between calling this a taking claim or a due process claim lies in the ability of a taking plaintiff to seek "just compensation" under First English for the temporary imposition of a regulation declared to effect a taking, and the fact that recasting the claim as a takings issue encourages judicial disregard of the substantial body of precedent calling for deferential judicial review of government action when the claim is advanced under the due process clause. By explicitly raising "but not resolving" the issue of whether the "substantially advance" test actually represents an independent takings test, or instead represents a due process issue, the Court has in effect

invited state and lower federal courts to reexamine this fundamental question pending ultimate resolution of the issue by the Supreme Court itself.

In addition to relying on the fact that the City waived any objection to application of the Agins "substantially advance" test by failing to object to the jury instructions, the Court stated that it was sanctioning reliance on this standard only in a very narrow context. The Court emphasized that it was not authorizing a general "reasonableness" review of the City's "general zoning laws or land use policies." Nor was it sanctioning open-ended review of any of the actual conditions imposed on the property's development. Rather, the Court said, the only issue being addressed was whether the City's particular decision to deny the developer's final application was "reasonably related" to any of the legitimate justifications advanced by the City. Confined to this context, the Court said, application of the reasonable relationship test did not "allow[] wholesale interference by judge or jury with municipal land-use policies, laws, or routine regulatory decisions."

At the end of the day, the Court's discussion in *Del Monte Dunes of the Agins* "substantially advance" standard could mean everything or nothing. It could be the harbinger of relatively free-wheeling means-ends review of local land use decisions under the takings label. Or it may simply be a transitional ruling leading to ultimate recognition that the Agins test is not a takings test at all. Time will tell.

III. The New Right to a Jury Trial.

Finally, the decision in *Del Monte Dunes* is significant because it recognizes that, at least in some limited circumstances, a plaintiff asserting a section 1983 regulatory takings claim in federal court is entitled under the Seventh Amendment to have a jury hear at least a portion of her claim. The recognition of this new right to a jury trial grants developers and other plaintiffs a valuable new tool in regulatory takings litigation. At the same time, there are numerous doctrinal and practical obstacles to the assertion of this new jury right which may limit the actual significance of the Court's ruling.

The Court approached the jury question by asking whether Congress had conferred a right to a jury trial by statute and, if not, whether the Seventh Amendment conferred a right to a jury in this case. Disagreeing with the reasoning of the Ninth Circuit, the Court concluded that section 1983 does not itself grant a right to a jury trial. Accordingly, the Court focused on the question of whether there was a right a jury under the Seventh Amendment. To resolve that issue, following the two-step analysis laid out in *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), the Court asked, first, whether the case involved a cause of action that "either was tried at law at the time of the founding or is at least analogous to one that was" and, second, whether the particular issue requiring resolution was properly resolved by a jury rather than the court.

The Court resolved the first issue in relatively straight forward fashion by concluding that a section 1983 suit seeking legal relief is an action "at law" within the meaning of the Seventh Amendment. The Court acknowledged that there was no action equivalent to a section 1983 suit at the time of the founding, but stated that a section 1983 action is analogous to a tort action seeking legal, i.e., monetary, relief, which is jury triable under the Seventh Amendment.

Justice Kennedy discussed at great length an alternative basis for concluding that a section 1983 regulatory takings action is an action "at law" within the meaning of the Seventh Amendment. However, since this alternative reasoning failed to gain the support of Justice Scalia (who otherwise joined in the majority opinion), and was criticized by Justice Souter, who was joined by three other dissenting Justices, this alternative rationale has no precedential weight. In brief, Justice Kennedy argued that, apart from whether the claim is asserted under section 1983, a regulatory takings claim is a type of tort action analogous to common law actions for damages for interference with property interests. In dissent, Justice Souter fundamentally disagreed with the

tort analogy, pointing out that Justice Kennedy's view "that liability flows from wrongful or unauthorized conduct is at odds with the modern view of acts effecting inverse condemnation as being entirely lawful."

Finally, the Court addressed whether the particular liability issues in this case were proper for determination by the jury. First, the Court determined that the issue of "whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question" which is properly submitted to the jury.

Second, the Court said that it was a "more difficult" question whether the jury should decide if a regulation "substantially advances a legitimate public interest." The Court concluded that, at least in the circumstances of the Del Monte Dunes case, the issue was properly submitted to the jury. The Court expressly distinguished a case involving a broad challenge to the constitutionality of a city's general land-use ordinances or policies, and indicated that a regulatory taking claim of that type "might well fall within the province of the judge." The Court also emphasized that it was not deciding the proper allocation of decision-making responsibility between judge and jury in a case involving a challenge to the application of general regulations to a particular property owner. Ultimately, the Court said, it was upholding reliance on a jury to evaluate the "reasonableness" of the government's action only in the context of a suit where it was being alleged that the city was "acting outside the bounds of its authority."

While Del Monte Dunes recognized the plaintiff's entitlement to a jury trial under the circumstances of this particular case, there are numerous important limitations on this new right. Without any pretension to having exhausted all of the possibilities, I list below at least ten qualifications or limitations on this new right, as follows:

1. It does not apply in a regulatory takings action against the United States.
2. It does not apply in a regulatory takings action against a State.
3. It does not apply in a regulatory takings action in which the plaintiff is seeking injunctive relief.
4. It does not apply in suits filed in State courts (where the Seventh Amendment does not apply).
5. It would not come into play unless and until a plaintiff suing a local government has exhausted available state remedies, as required under Williamson County.
6. If a plaintiff has exhausted available state remedies as required by Williamson County, there is likely to be a substantial question whether assertion of the same claims again in federal court is barred by principles of res judicata or collateral estoppel.
7. If a plaintiff has exhausted available state remedies there also is likely to be a substantial question whether assertion of the same claims again in federal court is barred by the Rooker-Feldman doctrine, which generally bars the lower federal courts from sitting in appellate review of state court decisions.
8. Justice Kennedy's opinion (and Justice Souter's opinion) both indicate that the right to a jury trial recognized in Del Monte Dunes depended at least in part the non-availability of a State forum to hear the plaintiff's claim, and therefore support an argument that the same right to a jury trial does not exist if (as is now true in California and all or virtually all other States) a State forum is available to hear the regulatory taking claim.
9. If the Agins "substantially advance" test turns out to actually be a due process issue, then at least that type of taking claim would apparently not be jury triable under any circumstances based on the longstanding precedent that due process claims must be resolved by the court rather than a jury.
10. Finally, even if the "no reasonable relationship" test actually represents a jury triable takings issue, the Del Monte Dunes decision indicates that plaintiffs may be able to demand a jury only if they are asserting that the local government acted unreasonably in the sense that the government was "acting outside the bounds of its authority."

IV. Future Litigation Steps.

What are the implications of Del Monte Dunes for ongoing and future regulatory takings litigation?

1. One clear lesson is that government defendants should vigorously contest whether the claim that a government action fails to ("substantially" or "reasonably") further a legitimate government purpose actually represents a valid Fifth Amendment taking claim. The Court in Del Monte Dunes declared, in effect, that it is a wide open question whether the Agins means-ends test really is a takings test at all. The Court has invited the state courts and lower federal courts to seek to resolve the issue themselves pending further guidance from the Court. Thus, in newly filed cases government defendants would be well advised to file motions to dismiss such allegations for failure to state a claim under the takings clause, and to continue to press the issue through each level of appeal. And defendants should also vigorously contest the issue in already pending cases including, if necessary, raising the question for the first time based on the authority of Del Monte Dunes.

2. The Court's ruling that Dolan is inapplicable to ordinary land use regulatory decisions supports a strong argument that the type of heightened, intermediate-level review established by that case is inapplicable in challenges to ordinary land use regulations. In other words, in addition to establishing that the specific "rough proportionality" standard established by Dolan does not apply outside the exactions context, Del Monte Dunes also apparently teaches that the heightened standard of review implicit in that standard is irrelevant in ordinary land use cases.

3. Finally, the new "right" to a jury established by Del Monte Dunes is obviously qualified in a number of important respects, and government defendants have a number of arguments for limiting plaintiffs' ability to shop for the most favorable trier of fact (judge or jury) in the particular case. Plaintiffs will undoubtedly seek out creative new theories for evading Williamson County and bypassing the state court systems in order to take advantage of the new jury right in federal court. But these efforts will derive little support from Del Monte Dunes itself. Indeed, Del Monte Dunes, which repeatedly cites Williamson County with approval, reinforces the Court's traditional view that regulatory takings claims arising from local government action should generally be resolved by the state courts.

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