City of Monterey v. Del Mont Dunes: Did the Supreme Court Needlessly Complicate Land Use and Property Standards by Not Taking the Opportunity to Develop Its Holding

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"Property, like liberty, has been taught that some of its most cherished immunities are not absolute, but relative." 1 Justice Cardozo made this comment regarding the volatility of property rights in 1929, yet, if this comment was made today, it would still be just as timely and poignant. 2 Courts, the legislature, local planning commissions, and professional developers are struggling to find a balance between the rights of private property owners and the government’s ability to regulate land use for the benefit of the community and the surrounding environment. 3 Urban sprawl, land use development, and community planning are rapidly becoming some of the nation’s most prevalent environmental concerns. 4 Accordingly, takings law, the legal arena charged with striking that critical


2. See generally David L. Callies, Regulatory Takings and the Supreme Court: How Perspectives On Property Rights Have Changed From Penn Central to Dolan, and What State and Federal Courts are Doing About It, 28 STETSON L. REV. 523 (1999) (discussing categorical rules for takings claims, nuisance, government interests, investment-backed expectations, permit conditions and exactions). In this article, Callies discusses how the law pertaining to property rights and land use is in a constant state of flux:

It is, of course, possible that these rules will change. In Eastern Enterprises v. Apfel, the U.S. Supreme Court sent a lot of mixed signals over the application of takings jurisprudence to various interests in property. The Court presently has before it the . . . case of Del Monte Dunes. Ostensibly merely a conflict of circuits over matters for a jury versus matters for a judge, the Court could easily signal (or decide) with respect to a host of regulatory takings issues (citations omitted).

Id. at 575-76.

3. See Philip Weinberg, Del Monte Dunes v. City of Monterey: Will the Supreme Court Stretch the Takings Clause Beyond the Breaking Point?, 26 B.C. ENVTL. AFF. L. REV. 315, 336 (1999) (discussing current development and expansion of Takings doctrine). Weinberg discusses the increased difficulties and complications in community zoning and development: “The courts should strike an appropriate balance between owners’ property rights and the responsibility of the state and local governments to control land use in order to avoid sprawl and safeguard water supply, wetlands and historic landmarks.” Id.

4. For further discussion of the current state of urban sprawl and its consequences, see infra notes 179-82 and accompanying text.
balance between property owners and the government, must achieve doctrinal clarity and produce proportional growth in relation to the increasing level of importance this area of law is generating. In the past fifteen years, and in several of the recent Supreme Court sessions, takings cases have occurred on a consistent basis, demonstrating that the takings doctrine has not been adequately developed to handle the renewed reliance upon it. As courts and legislatures review current takings jurisprudence and the emerging property challenges created by today's society, they will continue to be presented with new questions that test the limits and scope of the Takings doctrine.

*City of Monterey v. Del Monte Dunes* involved local agencies and landowners seeking not only direction from the Court, but also a reconciliation with current takings precedent. In *Del Monte Dunes*,

5. See Weinberg, *supra* note 3, at 336 (commenting on recent expansions and applications of Takings Clause and its effectiveness).

6. See Callies, *supra* note 2, at 523-25 (discussing this century's development of takings law). Callies noted in his article:

Much has been made of the terrible state of takings jurisprudence since the U.S. Supreme Court recommenced deciding takings cases twenty-five years ago. It was left to the states to interpret—and generally to erode—regulatory taking doctrine. Sorting out what aspects of zoning, subdivision and other public land use controls were legal, when, and why. Erode they did. Regulatory takings were virtually moribund by the time the Court re-examined the concept in the past two decades. *Id.*

7. See generally Ronald L. Weaver & Nicole S. Sayfie, 1999 Update on the Bert J. Harris Private Property Rights Protection, 73 FLA. B.J. 49 (1999) (discussing potential future expansion and restructuring of takings law). The authors suggested:

As... population grows, land use laws will be required to respond to corresponding pressures on public facilities. Three trends will emerge. First, local governments will be unable to address problems with origins and cures beyond their jurisdiction, as regionalism develops to meet unique needs in areas connected by culture, environment, and infrastructure. Second, current land use exactions and mitigation will be replaced. Third, performance, prepayment, and prohibition standards for various utilities will emerge. These trends will result in numerous land use repercussions, including but not limited to, the continued development of "land use courts" to balance higher land use priorities with evolving property rights. Bike paths, environmental protection, and coastal protection will go on, but with a restored balance of a little closer scrutiny of the effects of such regulations on landowners compared to government benefits... *Id.* at 57-58.


9. See Weinberg, *supra* note 3, at 315 (discussing that *Del Monte Dunes* could provide Supreme Court with forum to reevaluate current state of Takings Clause); see also *Del Monte Dunes*, 119 S. Ct. at 1625 (stating property owner brought section 1983 action against city, claiming that city's repeated denials of owner's development proposals had violated its equal protection and due process rights in addition to constituting regulatory taking).
the Supreme Court addressed: (1) whether a Takings claim brought under 42 U.S.C section 1983 confers a statutory right to a jury trial; (2) if there is no existing statutory right, whether a section 1983 action is an “action at law” within the Seventh Amendment right to a jury trial; and (3) whether questions of the property’s economic viability and the reasonableness of the City’s development rejections were properly submitted to a jury.10 The Supreme Court limited its decision to the context and history of Del Monte’s development application process.11 The Supreme Court ultimately held that a section 1983 claim that seeks legal relief is an “action at law” under the Seventh Amendment, and that the questions presented to the jury in this case were proper.12

This Note reviews takings jurisprudence, specifically those issues considered by the Supreme Court in Del Monte Dunes.13 Part II chronicles the development of the Takings Clause and its application to precedent.14 Part II also discusses how a takings claim is asserted under section 1983, as opposed to a direct constitutional action.15 Part III details the facts, procedural history and holding of Del Monte Dunes.16 Part IV sets forth the analysis the Supreme Court followed in Del Monte Dunes.17 Part V proposes that the Supreme Court too strictly confined its section 1983 analysis to the procedural and statutory aspects, while overlooking the resulting judicial and policy implications. Finally, Part VI suggests that the Supreme Court failed to create any meaningful, applicable precedent because it declined to establish distinct, broad-based guidelines.18 Guidelines regarding what recovery methods are available to plaintiff landowners and under what circumstances, or specifically defining regulatory and temporary regulatory takings, which would have provided the lower courts with standards necessary in

10. See Del Monte Dunes, 526 U.S. at 694 (considering whether discretion of local municipality can be subjected to judgment by jury).
11. See id. at 721-22.
12. See id.
13. For a full discussion of the issues that went before the Supreme Court in this case, see infra notes 120-72 and accompanying text.
14. For a full discussion of the historical development of the Takings Clause, see infra notes 19-83 and accompanying text.
15. For a further discussion of section 1983 claims, see infra notes 78-83 and accompanying text.
16. For a full discussion of the facts and procedural background of Del Monte Dunes, see infra notes 84-120 and accompanying text.
17. For a full discussion of the Supreme Court’s analysis in Del Monte Dunes, see infra notes 120-171.
18. For a discussion of the current state of takings jurisprudence, see infra notes 172-198 and accompanying text.
deciding today's complex land use questions. In refusing to create this necessary precedent, the Supreme Court has simply added to the multitude of non-applicable takings case law.

II. BACKGROUND

The Takings Clause is derived from the Fifth Amendment requirement that private property can be taken "only for public use" with "just compensation." In turn, the Fourteenth Amendment subjects the states to the requirements of the Fifth Amendment and the Takings Clause.

Although takings law is historically based on the Takings Clause of the Fifth Amendment, takings jurisprudence has developed into two separate theories of applicability: physical occupations and regulatory takings. While the Framers may not have initially anticipated the non-physical utilization of the Takings Clause, "with the rise of the regulatory state,. . . courts began to recognize that the government could 'take' property without actually physically occupying it."

The Takings Clause may be violated in two ways: (1) by direct government land acquisition without payment of just compensation to the property landowner; or (2) by government regulation of pri-

19. See U.S. CONST. amend. V.
20. See U.S. CONST. amend. XIV. The Fourteenth Amendment states, in pertinent part:
   No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
   Id.
21. See Juliano v. Montgomery-Otsego-Schoharie Solid Waste Management Auth., 983 F. Supp. 319, 323 (1997) (holding that government can accomplish taking through legislation without ever being physically present on property). The Framers of the Fifth Amendment were most likely referring to "the formal exercise of the power of eminent domain by government to take land for public projects" when constructing the Takings Clause, rather than the more abstract regulatory taking, which has developed as a second type of government action that constitutionally must also be compensated for. See generally Morton J. Horwitz, The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy, 91 MICH. L. REV. 1315 (1992).
22. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414-15 (1922) (discussing expansion of takings doctrine beyond physical occupations). This landmark case first used the takings doctrine to invalidate a state statute depriving the owner of its underground coal mining rights. See id. at 421-22. The statute was intended to prevent the sinking of surface land as a result of coal mining, and prohibited the owner of the subsurface rights from mining underneath any dwelling. See id. at 413-14. Justice Holmes concluded that the statute made it "commercially impracticable to mine," which "has very nearly the same effect for constitutional purposes as appropriating or destroying it." Id. at 414.
vate property whereby the property owner is deprived use of his or her property. 23

A. Judicial Development of the Takings Clause

1. The Rise of the Regulatory Taking

Three takings cases, Pennsylvania Coal Co. v. Mahon, 24 Village of Euclid v. Ambler Realty Co., 25 and Nectow v. City of Cambridge, 26 decided contemporaneously in the 1920s, together established the foundation of regulatory takings law. 27 In Pennsylvania Coal, the inaugurating case for the notion of a regulatory taking, 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." 28


27. See Callies, supra note 2, at 523 (discussing takings doctrine’s early development). Callies overviews how takings jurisprudence came to include zoning and land use regulations:

In the 1920’s, the U.S. Supreme Court decided, in quick succession, Pennsylvania Coal Co. v. Mahon, Village of Euclid v. Ambler Realty Co., and Nectow v. City of Cambridge, creating regulatory takings, validating the technique of zoning, then holding zoning can be a Fourteenth Amendment taking as applied. After thus holding zoning facially or generally constitutional on the one hand, but susceptible of being unconstitutionally applied on the other, the Court then abandoned the field to the States. . . . It was left to the States to interpret—and generally to erode—Holmes’s regulatory taking doctrine over the intervening half-century, sorting out what aspects of zoning, subdivision and other public land use controls were legal, when, and why. Id. at 523-24; see also Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (deciding that overregulatory government action is a taking even if there is no physical encroachment); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (developing theory of regulatory taking); Nectow v. City of Cambridge, 277 U.S. 183 (1928) (holding that certain land use stipulations rise to level of regulatory taking).

28. Pennsylvania Coal, 260 U.S. at 415 (holding that just compensation is required by Constitution for regulatory takings as well as physical takings). But see John F. Hart, Colonial Land Use Law and Its Significance For Modern Takings Doctrine, 109 Harv. L. Rev. 1252, 1258 (1996) (arguing that Framers never intended just compensation to be applied to regulatory takings). Hart contends that land regulation did exist at the time of the Fifth Amendment’s inception:

Today’s doctrine of regulatory takings only makes sense as a reading of the Takings Clause if, as the Court has said, land use regulation was confined to injurious uses of land when the Fifth Amendment was adopted, with regulations of non-injurious uses coming much later. The history presented in this Article shows, to the contrary, that regulation of non-injurious uses of land was very common at the time of the nation’s founding. This prevalence implies that the Framers did not address regulation
The Pennsylvania Coal Court mandated, for the first time, that the government must compensate a private citizen for the taking of that citizen's property through regulation. In Euclid and Nectow, the Court further validated its decision in Pennsylvania Coal, establishing zoning as a sound municipal mechanism, but noting that if used improperly, zoning can rise to the level of a Fourteenth Amendment regulatory taking.

Prior to the Pennsylvania Coal decision, the Court would only recognize land use regulation as a taking under two conditions: (1) when the regulation had an improper purpose; or (2) when a regulation's implementation was not rationally related to effectuating its intended purpose. Decades later, the Court conclusively delineated the parameters of a taking through excessive regulation in Penn Central Transportation Co. v. City of New York. Penn Central set forth important factors in determining whether a regulation is a taking, including: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct, investment-backed expectations; and (3) the character of the government action. Justice Brennan stated, however, that while no "set formula" exists, the test of excessiveness is whether

in the Takings Clause because they did not regard regulation as a form of taking.

Id.


30. For further discussion of the Court's decisions in Euclid and Nectow, see supra note 27 and accompanying text.

31. See Henderer, supra note 29, at 412-14 (discussing Lucas' logically antecedent inquiry where Court determines scope of property owner's interest).


33. See Penn Central, 438 U.S. at 124 (discussing factors that determine regulatory takings, including economic restrictions in relation to purpose of government action); see also Henderer, supra note 29, at 416 (commenting on which government actions rise to level of taking and which actions are not compensable because they are insignificant occurrences). Henderer highlights the Penn Central decision as an example of how courts have addressed the problem of what determines whether a regulation is a taking:

[T]he Court considered the character of the government action; it held that when the regulation can be characterized as a physical invasion of the property, the Court will be more willing to find a taking. ... [T]he Court determined whether the regulatory impact was an exercise of a permissible generalized power—taxing and zoning for example—or an exercise of governmental power that impacted individuals or groups. It stated that virtually all government activity will impact property and its
under an "essentially ad hoc, factual inquiry," a regulation may or may not establish a taking.\textsuperscript{34} Nonetheless, in enumerating a specific test, Brennan ensured that a slight reduction in the value of land resulting from regulation would not be sufficient to sustain a takings claim.\textsuperscript{35}

2. The Ripeness Requirement

In 1985, the Court in \textit{Williamson County Regional Planning Commission v. Hamilton Bank}\textsuperscript{36} furthered takings jurisprudence by constructing a mandatory ripeness requirement for all takings challenges against land use regulations.\textsuperscript{37} Consequently, before ad-

\begin{quote}
As Justice Brennan noted, the question of what constitutes a regulatory takings... for the purposes of the Fifth Amendment "has proved to be a problem of considerable difficulty" and the Court "quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."
\end{quote}

\textit{Id.} at 518.

\textsuperscript{34} See \textit{Penn Central}, 438 U.S. at 124; see also Douglas T. Kendall & Charles P. Lord, \textit{The Takings Project: A Critical Analysis and Assessment of the Progress So Far}, 25 B.C. ENVTL. AFF. L. REV. 509, 517-18 (1998) (discussing that just compensation requirement, as applied to regulatory takings, results in tying up valuable property in agency red tape). Kendall and Lord emphasize the need for a bright-line delineation of what establishes a regulatory taking:

\begin{quote}
As Justice Brennan noted, the question of what constitutes a regulatory takings... for the purposes of the Fifth Amendment "has proved to be a problem of considerable difficulty" and the Court "quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."
\end{quote}

\textit{Id.} at 518.

\textsuperscript{35} See Weinberg, \textit{supra} note 3, at 325 (discussing development of takings doctrine and limitations to definition of regulatory taking). Weinberg noted:

The Court in \textit{Penn Central} held that the city's denial of permission to build an office tower atop New York's Grand Central Terminal, a historic landmark, was not a taking since it left the owner with the parcel intact, which was found to be capable of earning a reasonable return. Thus the owner's reasonable investment-backed expectations were not destroyed. The Court went on to reject the owner's claims that its air rights had been taken and that the landmark law was unconstitutional as spot zoning.

\textit{Id.}; see also \textit{Agins v. City of Tiburon}, 447 U.S. 255, 261 (1980) (reiterating \textit{Penn Central}'s test, holding that plaintiffs had failed to allege sufficient facts which would establish unconstitutional taking of private property).

\textsuperscript{36} 473 U.S. 172 (1985).

\textsuperscript{37} See id. (holding that for land regulation decision to be judicially reviewed, it must be final decision); see also \textit{Del Monte Dunes}, 526 U.S. at 719-21 (citing \textit{Williamson} in discussion of whether lower court was proper in reviewing \textit{Del Monte Dunes}'s taking claim). The \textit{Del Monte Dunes} Court referenced the \textit{Williamson} decision in its discussion:

\begin{quote}
In \textit{Williamson}, we did review a regulatory takings case in which the plaintiff landowner sued a county planning commission in federal court for money damages under [section] 1983. Whether the commission had denied the plaintiff all economically viable use of the property had been submitted to the jury. Although the Court did not consider the point, it assumed the propriety of this procedure.
\end{quote}
dressing any aspect of a plaintiff’s claim, a court must first determine whether the questions are ripe for federal court review. The first prong of the Williamson two-prong ripeness test requires that a “final decision” be rendered by the government entity charged with enforcing the challenged regulation. The second prong mandates that the plaintiff seek compensation from the state if the state provides a “reasonable, certain and adequate provision for obtaining compensation.”

The critical analysis of the Williamson test turns on the particular circumstances of each case. Until a property owner has “obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property,” it is extremely difficult to accurately evaluate “[w]hether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests have been destroyed.”

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38. See Juliano v. Montgomery-Otsego-Schoharie Solid Waste Management Auth., 983 F. Supp. 319, 323 (1997) (referencing Williamson final decision inquiry). In Juliano, landowners filed suit seeking just compensation for damage created by monitoring wells and piezometers remaining on their land after the property had been tested as a possible landfill site by the government. See id. at 321-22. The State argued that the owners’ regulatory taking claim was not ripe for review and moved for summary judgment. See id. at 323. Relying on Williamson, the court stated:

If the Court were to find Plaintiffs’ regulatory takings claim—i.e., MOSA’s [Montgomery-Otsego-Schoharie Solid Waste Management Authority] designation of Plaintiffs’ property as a potential site for a proposed sanitary landfill—ripe for judicial review, every property holder in the fourteen preliminary siting areas could sue MOSA for the alleged diminution in property value resulting from the possibility that the property might ultimately be acquired by MOSA for use as a landfill. This is far too speculative. In addition to the important policy implications of opening the courthouse doors to this flood of potential litigants, certain practical concerns also caution against a finding of ripeness. Without such a final decision, a court cannot determine adequately the economic loss—a central factor in the inquiry—occasioned by the application of the regulatory restrictions. Unless a final decision has been rendered, it remains unclear just how far the regulation goes. (internal citations omitted)

Id. at 324.

39. See Williamson, 473 U.S. at 185-86 (noting that final decision means no possibility that revised plan would be approved).

40. Id. at 194 (quoting Regional Rail Reorganization Act Cases, 419 U.S. 102, 124-25 (1974)) (noting requirement that before plaintiff can seek federal relief, he or she must first pursue state compensation mechanisms).

41. Id. at 190 (emphasizing that final decision determination is dependent upon specific facts of each case). The Williamson Court also struggled with drawing a clear line as to what constitutes a regulatory taking and what does not:

[T]he difficult problem [is] how to define “too far,” that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. . . . [R]esolution of that question depends, in sig-
The following term in 1986, the Supreme Court reiterated its *Williamson* decision in *MacDonald, Sommer & Frates v. County of Yolo*. In *MacDonald*, the Supreme Court upheld the Ninth Circuit's holding in which the lower court sustained a demurrer to a complaint due to appellant's insufficient factual allegations. The Ninth Circuit's holding was based on the fact that because only one development proposal had been submitted, the record could not definitively establish that the property at issue had been taken.

The Court stated that in accordance with *Williamson*, the facts in *MacDonald* "leave open the possibility that some development will be permitted." For this reason, a determination as to whether a taking has occurred, or whether the county failed to provide just compensation, could not be made until the County Planning Commission rendered a final decision regarding the regulatory applications to the property in question.

### 3. Further Development

As takings jurisprudence continued to develop, the 1992 *Lucas v. South Carolina Coastal Council* decision determined whether a state can claim the need to protect public safety as a defense for a regulation that denies a property owner all economic value of his significant part, upon an analysis of the effect of the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to the respondent's property.

*Id.* at 199-200.

42. 477 U.S. 340, 340-44 (1986) (holding that ripeness of claim had to be demonstrated by adequate evidence).

43. *See id.* at 342 (holding that submitting one rejected development proposal does not support classification of final decision).

44. *See id.* (deciding that final decision cannot occur without rejection of numerous proposals on record).

45. *Id.* at 351-52. For further discussion of what establishes a takings claim as ripe, see *supra* notes 37-41 and accompanying text.

46. *See id.* (reiterating exact holding of *Williamson*). Both the *Williamson* and *MacDonald* decisions emphasize that a taking analysis is inappropriate until a planning commission's decision is unambiguously conclusive:

Absent a final and authoritative determination by the County Planning Commission as to how it will apply the regulations at issue to the property in question, this Court cannot determine whether a "taking" has occurred or whether the county failed to provide "just compensation" without knowing the nature and extent of permitted development, this Court cannot adjudicate the constitutionality of the regulations that purport to limit it.

*Id.* at 340; *see also* *Williamson*, 473 U.S. at 198-200.

investment. The Lucas Court held that when the state implements a regulation that dispossesses property of an economically beneficial use, the regulation is a taking, regardless of whether it was enacted to provide a public benefit or to restrain a harmful application. The material factor in determining whether a regulation constitutes a taking is not the motivation for the regulation, but whether it abates a part of the "bundle of rights" that the purchaser receives with the land.

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48. See id.; see also Weinberg, *supra* note 3, at 330 (stating that in *Lucas*, challenged statute prohibited construction of any permanent structure on South Carolina's beachfront areas due to problems of coastal flooding and dune erosion). Lucas had purchased two beachfront properties just two years before the statute at issue was enacted. *Lucas*, 505 U.S. at 1003. Lucas claimed that the regulation deprived him of all reasonable investment-backed expectations and thus constituted a taking, and the trial court agreed. See id. The South Carolina Supreme Court ruled, however, that even though Lucas lost all economic property value because of the State's regulation, it was not a taking because the regulation was a valid use of the state's police power "to enjoin a property owner from activities akin to public nuisances." See id. at 1022. As a result of this decision, the U.S. Supreme Court had to determine whether "a valid distinction existed between laws to protect esthetic values as in *Penn Central* or socially desirable public access as in *Nollan* and those aimed at curbing 'harmful or noxious uses.'" Weinberg, *supra* note 3, at 331.

49. See Weinberg, *supra* note 3, at 331 (citing *Lucas*, 505 U.S. at 1004) (discussing whether protection of public safety can be state defense for regulatory taking); see also Henderer, *supra* note 29, at 410-11 (noting U.S. Supreme Court's decision to overrule Supreme Court of South Carolina's holding that had denied takings claim in which state restrictions on coastal development had devalued landowner's property). In his article, Henderer discussed the varied reactions which the *Lucas* decision elicited:

For private property owners, the *Lucas* decision appeared to represent some vindication for their contention that the Fifth Amendment protected their property against such government regulation. Environmentalists, on the other hand, feared that *Lucas* would provide a foundation for more frequent findings of compensable takings and result in drastic limitations on natural resource protection.

*Id.*; see Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. 1411, 1425 (1993) (claiming that *Lucas* decision probably "reflects the high-water mark for constitutional protection of private property").

50. See *Lucas*, 505 U.S. at 1029-30 (defining ways regulation can also be a taking); see also Weinberg, *supra* note 3, at 332 (discussing *Lucas* decision). Weinberg agreed with the *Lucas* Court's economic approach:

*Lucas* eminently makes sense. An alternative ruling would compel the courts to engage in hair-splitting distinctions between legislation aimed at furnishing benefits and laws designed to prevent harms. Further, this would merely encourage states and localities to employ semantics to shoe-horn regulations into the latter category. . . . Where a property owner's total economic value is obliterated, it matters little whether the state was fostering a public good or averting public harm.

*Id.* at 331-32.
B. The Continued Expansion of the Regulatory Takings Doctrine in Takings Jurisprudence

1. Cornerstone Decisions

The 1987 decision of *Nollan v. California Coastal Commission* marked the beginning of the Supreme Court's recent expansion of the takings doctrine. The Nollans applied for a permit to build a new home on their beachfront property. Their building permit was granted, but was conditioned upon the requirement that the Nollans provide public beach access across their private property. In this case, the Supreme Court established the first element of a two-prong standard, later known as the *Nollan/Dolan* essential nexus/rough proportionality test. The *Nollan* prong determines a regulation's validity by evaluating whether the exaction had an essential nexus to the governmental purpose the restriction was designed to serve. *Nollan* recognized that "[l]and use regulations do influence the value of property, but to be constitutional, they must do so in a manner that substantially furthers a legitimate gov-

52. See Weinberg, *supra* note 3, at 329. Weinberg discusses recent trends in modern takings jurisprudence:
Three major Supreme Court decisions in the last twelve years [*Nollan, Lucas, and Dolan*] have shown the Supreme Court's zeal to expand the takings doctrine. While all three decisions reached appropriate results, language in these opinions might, unless limited by future decisions, open the takings door wider than the Framers of the Constitution intended.

Id.
53. See *Nollan*, 483 U.S. at 827 (describing California Coastal Commission actions which were held to constitute taking of Nollans' property).
54. See *id.* at 834 (conditioning permit on Nollans' grant of public easement). The Nollans owned a beachfront property, and wished to replace the existing cottage with a three-bedroom house. See *id.* at 825.
56. See Tahoe–Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp.2d 1226, 1239 (D. Nev. 1999) (discussing *Nollan/Dolan* standard as applied to takings). The *Tahoe Sierra* decision relied upon, and further clarified the application of the *Nollan/Dolan* test in regulatory takings cases:
The Supreme Court has developed a test to make this determination in its "unconstitutional exactions" cases, *Dolan v. City of Tigard* and *Nollan v. California Coastal Commission* the "essential nexus" / "rough proportionality" test. That is, first it must be determined whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition enacted by the city," and then whether some "rough proportionality" exists between the condition enacted and the "impact of the proposed development."

*Id.* (citations omitted).
ernment interest.” Then, in *Dolan v. City of Tigard,* the Court established the second prong of this test when it held that the necessary connection required by the Fifth Amendment between a government’s justifications and the conditions imposed must be “roughly proportional.” While no specific calculation is required, the regulation must be related both in nature and extent to the proposed development’s impact. This test was applied to many subsequent takings decisions where courts faced the difficult task of evaluating the weight of the government’s interest in relation to the importance of property owners’ ability to utilize their land.

Fundamentally, *Lucas, Nollan and Dolan* involved balancing the authority of state and local governments to engage in land use planning against the property rights of individuals. The critical question regarding landowners’ rights is whether the individual is to receive just compensation. Like *Nollan, Dolan* also involved a physical invasion. In order for the storeowner in *Dolan* to obtain a permit to expand, she had to dedicate a portion of her property for a bicycle and pedestrian path to help with flood drainage and traffic problems. As in *Nollan,* the Court held that if the city wanted to exact an easement, it would have to compensate the storeowner. By allocating a portion of her property to the public, the

57. *Nollan,* 483 U.S. at 834; see also Henderer, *supra* note 29, at 417-18 (discussing final component of takings analysis—whether government has enacted regulation for proper, legitimate purposes, or as pretext to take private property). Quoting Justice Scalia, Henderer discussed the nexus that must exist between a state interest and the means the state employs in order to carry out that interest: “Justice Scalia noted in *Nollan v. California Coastal Commission* that a land use restriction must ‘substantially advance’ the legitimate state interest behind a piece of legislation. If the condition restricts the use of property but does not advance such interest, then compensable taking may be found.” *Id.*


59. See *id.* at 375 (establishing second element of *Nollan/Dolan* essential nexus/rough proportionality test). *Dolan* held that the importance of the government’s interests must be “roughly proportional” to the impact of the imposed regulation. See *id.*

60. See *id.* (explaining degree of nexus required between government regulation’s impact and significance of its justification).


62. See *Dolan,* 512 U.S. at 383-86 (holding land use regulation does not effect taking if it substantially furthers legitimate state interest and does not deny landowner economically viable use of his land).

63. See *Dolan,* 512 U.S. at 375.

64. See *id.* (describing property exaction).

65. See *id.* (noting Court’s holding that landowners must be compensated for easements); see also Henderer, *supra* note 29, at 418 (stating, “Nollan reinforces the
owner loses her ability "to exclude others," which is recognized as an essential and protected right. 66 Nollan and Dolan follow the principle articulated in Penn Central Transportation Co. v. City of New York, that a property use restriction will be considered a taking if not reasonably necessary to accomplish a substantial public purpose. 67 For the government to avoid creating compensable takings in scenarios similar to Nollan and Dolan, the permit condition and the governmental rationale must be linked in "rough proportionality," and must further a legitimate state interest. 68

For takings jurisprudence, 1987 proved to be a notable year for the Supreme Court, 69 because, in addition to Nollan, the Court handed down two other decisions: Keystone Bituminous Coal Ass'n v. DeBenedictis, 70 and First Evangelical Lutheran Church v. County of Los

idea that the government is not permitted to implement any prohibition or property restriction it desires simply to promote the "health, safety, morals, or general welfare").

66. See Weinberg, supra note 3, at 332-33. Emphasizing the validly of the rational basis analysis, Weinberg stated:

Nollan and Dolan are certainly correct if limited to mandated easements or similar dedications. Though each decision contains broad language as to the required nexus and rough proportionality, the courts should resist the temptation to apply those doctrines to conventional land use regulation. . . . Only in the most extraordinary cases should a land use control that does not amount to a physical invasion be set aside as not linked to the government goal, or grossly disproportionate to it. In those unusual situations the time-honored requirement that a land use regulation must have a rational basis, that it "substantially advance legitimate state interests," should suffice to overturn controls that lack that basis.

Id. (citations omitted).

67. See Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978) (discussing link between public purpose and land restriction); Dolan, 512 U.S. at 386-97 (recognizing that ability to determine who can and cannot enter property is essential to landowner); Nollan, 483 U.S. at 834 (holding that public easements on private property must be compensated).

68. See Dolan, 512 U.S. at 391 (noting that government action must be proportionally linked to restriction imposed); see also Buckles v. King County, 191 F.3d 1127, 1131 (9th Cir. 1998) (noting difficulty in evaluating importance of governmental interest as compared to individual property rights). The Buckles court noted:

On the "more difficult question" of who decides whether a land use decision substantially advances a legitimate government interest, in Del Monte Dunes the Supreme Court noted that "[a]lthough our cases make clear that this inquiry involves an essential factual component, it no doubt has a legal aspect as well, and is probably best understood as a mixed question of fact and law."

Id. at 1140 (citations omitted).

69. See Callies, supra note 2, at 533 (discussing major takings decisions handed down in 1987); Michael Berger, The Year of the Taking Issue, 1 BYU J. PUB. L. 261, 261-63 (1987) (discussing regulatory takings cases which appeared before United States Supreme Court in 1987, and how they changed doctrine and area of law).

Angeles. In *Keystone*, the Court utilized the *Penn Central* investment-backed expectation standard, but it also relied upon the state’s showing of a strong need for safety-based regulation, an element that was absent in *Penn Central*.

Any uncertainty as to whether or not a regulatory taking is within the ambit of the Takings Clause was resolved with the Supreme Court’s holding in *First English Evangelical Lutheran Church v. County of Los Angeles*. This decision stated that the Fifth Amendment requires payment of just compensation for regulatory, as well as physical, takings. This is a greater obligation than the state practice, which simply set aside the invasive regulation without ever allocating compensation.

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72. *See Keystone*, 480 U.S. at 470 (holding where government action is not physical and permanent, multi-factor balancing test is used to determine if compensation is required); *see also Penn Central*, 438 U.S. at 124. Justice Brennan stated that while no set formula exists, the test used in all the leading cases is whether the regulation deprived the owner of all reasonable investment-backed expectations. *See id.* A mere reduction in land value is not sufficient to pass this test. *See id.; Weinberg*, *supra* note 3, at 334 (discussing what factors establish regulatory takings).
73. 482 U.S. 304 (1987); *see Henderer*, *supra* note 29, at 420-21 (discussing how *Lucas* holding established compensation of regulatory takings). Henderer notes that the *First English* Court was one of the first courts to award just compensation for a regulatory taking:

In the landmark case of *First English Evangelical Lutheran Church v. County of Los Angeles*, the Court decided that a property owner could recover monetary damages for the interim period between the time of government action and the time when a court declares that the government action is a compensable taking . . . . This was the first time that the Supreme Court declared monetary damages to be an appropriate remedy for a government taking.

*Id.* (citations omitted).

74. *See First English*, 482 U.S. at 304 (establishing that Constitution requires payment of just compensation for government regulatory takings as well as physical encroachments).

75. *See Weinberg*, *supra* note 3, at 315. Weinburg discussed the controversy that initially surrounded the *First English* holding:

This decision overruled state court rulings that a successful owner was only entitled to have the offending regulation set aside. The view that regulatory takings should be compensable was the subject of intense criticism, but is now accepted as gospel. The critics feared that requiring states and municipalities to pay for land use controls deemed unconstitutional would inhibit them from adopting such regulations—a fear unwarranted at the time and certainly not borne out by events since.

*Id.* at 327 (citations omitted); *see also Eberle v. Dane County Board of Adjustment*, 595 N.W. 2d 780 (Wis. 1999) (demonstrating that twelve years later, courts still rely on *First English* as support for compensating governmental regulatory takings). The *Eberle* court noted:

Once there has been a taking, it is clear that just compensation is constitutionally required. . . . The United States Supreme Court indicated its agreement with these principles in *First English*, in which the Court stated
The *First English* Court conceded that its holding, to some extent, restricted the discretion of planning commissions and municipal agencies. However, it still defended its decision. The *First English* court referenced Justice Holmes statement made in *Pennsylvania Coal*, "'a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.'" 77

"We merely hold that where the government activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of its duty to provide compensation for the period during which the taking was effective."

Id. at 742-43 (citations omitted); *see also* Karena Anderson, *Strategic Litigating in Land Use Cases: Del Monte Dunes v. City of Monterey*, 25 ECOLOGY L.Q. 465, 477 (1998) (discussing compensation options created by *First English*). Anderson noted that the *First English* holding created two compensatory possibilities:

First English does not, however, dictate that every taking will produce money damages in lieu of injunctive relief; rather the opinion vests that option in the defendant. A governmental entity can either invalidate the offending regulation as applied to the plaintiff and pay any interim compensation due, or it can continue the force of the regulation and pay compensation for a permanent taking.

Id. at 321-22 (noting that holding may impinge upon agency discretion).

The *First English* Court stated in its holding:

We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of government authorities, and the Just Compensation Clause of the Fifth Amendment is one of them.

Id. at 321; *see also* *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1992) (discussing constitutional restrictions on government agencies); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F. Supp.2d 1226 (D. Nev. 1999) (explaining further how holding of *First English* should be applied). The *Tahoe-Sierra* court noted:

It has often been stated in regulatory takings cases involving temporary takings that the government retains a choice once a regulation has been proven to effect a taking—either to retain the regulation in force and pay just compensation for the total value of the property, or to repeal the regulation and only face damages for the temporary period in which the regulation was enforced. The Supreme Court has been careful not to allow property owners to be able to "force" the government to exercise its power of eminent domain.

Tahoe-Sierra, 34 F. Supp.2d at 1247.

After *First English*, cases such as *Tahoe-Sierra* demonstrated the courts' recognition and validation of the notion that takings could occur through regulations as well as physical invasions. *See id.*
C. The Development of 42 U.S.C Section 1983 Claims in Land Use Cases

In addition to establishing the essential nexus/rough proportionality test, the cornerstone *Dolan* decision was critical because it clarified aspects of the judicial process surrounding takings claims. The *Dolan* Court explained that takings claims are often brought under section 1983 as a violation of the Fifth Amendment, and that the Takings Clause is applicable to the states through the Fourteenth Amendment.78

Section 1983, the federal civil rights statute did not emerge as a device for asserting constitutional violations in the land use context until roughly thirty years ago.79 Prior to 1978, two circumstances procedurally restricted landowner plaintiffs to direct constitutional actions for Fifth and Fourteenth Amendment violation claims against local agencies.80 First, most of the agencies were protected defendants, immune from suit under the federal civil rights statute; second, courts had not yet interpreted section 1983 to extend to landowner interests.81 Today, however, more and more litigants are utilizing section 1983 claims as an effective way to remedy governmental regulation rising to the level of a taking.82 Specifically, tort claims brought pursuant to section 1983 grant plaintiffs the right to seek relief through an “action at law,” or other proper proceeding for redress.83

78. *See Dolan*, 512 U.S. at 383 (explaining how takings claims are brought and how they are enforced upon states). For further discussion of section 1983, see infra notes 183-95 and accompanying text.


> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.


82. *See* Anderson, *supra* note 75, at 495 (acknowledging that use of section 1983 claims is increasing in takings cases).

83. *See* 42 U.S.C. § 1983; *see also Del Monte Dunes*, 526 U.S. at 710 (explaining that just compensation for governmental taking of property is different from equitable restitution and other monetary remedies available in equity because in just compensation, courts ask what owner has lost instead of what owner has gained).
III. FACTS

The focus in *Del Monte Dunes* is a 37.6 acre oceanfront property, generally referred to as "Del Monte Dunes," located in the city of Monterey, California. See *Del Monte Dunes at Monterey v. City of Monterey*, 920 F.2d 1496 (N.D. Cal. 1990) (stating property is at or near city's boundary to north, where Highway One enters); *Del Monte Dunes* 526 U.S. at 694 (describing location of property and surroundings).

Environmentally, the property had severe damage resulting from previous owners who utilized the land as a petroleum tank storage facility. See *Del Monte Dunes*, 920 F.2d at 1499 (explaining prior to Del Monte, Ponderosa Homes owned property). Ponderosa Homes also sought to build a residential community on the property. See *Del Monte Dunes*, 920 F.2d at 1499. In 1981, Ponderosa Homes applied to the City for permission to develop the land into 344 residential units. See *Del Monte Dunes*, 920 F.2d at 1499. The City rejected this request, and subsequently, Ponderosa Homes submitted three more applications for 264, 224, and 190 units, respectively. See *Del Monte Dunes*, 920 F.2d at 1499. The City rejected all three proposals even though they conformed with the City's land use policy and zoning ordinances. See *Del Monte Dunes*, 526 U.S. at 694 (stating Del Monte was not proposing any development land was not already zoned for).

Other than the ocean and a state park located to the northeast, the property was surrounded by a railroad right-of-way and land devoted to industrial, commercial and multi-family residential uses. See *Del Monte Dunes*, 920 F.2d at 1499. Under the City's general zoning ordinance, this parcel was zoned for multifamily residential use. See *Del Monte Dunes*, 920 F.2d at 1499 (describing prior use of property); *Del Monte Dunes*, 526 U.S. at 695 (stating prior owner was industrial corporation who transported and processed oil). The sewer line was housed in a fifteen-foot, man-made dune structure that was covered with jute matting and surrounded by snow fencing. See *Del Monte Dunes*, 920 F.2d at 1499. Seven tank pads, an industrial complex, a sewer line, accumulated trash, pieces of pipe, broken concrete, and oil-soaked sand were left behind on the property by the petroleum company. See *Del Monte Dunes*, 920 F.2d at 1499.

Just compensation is similar to ordinary monetary damages, a compensatory remedy. See *id.* (stating damages for constitutional violation are legal remedy and monetary relief is classified as legal, not equitable remedy).

84. *See Del Monte Dunes at Monterey v. City of Monterey*, 920 F.2d 1496 (N.D. Cal. 1990) (stating property is at or near city's boundary to north, where Highway One enters); *Del Monte Dunes* 526 U.S. at 694 (describing location of property and surroundings).

85. *Del Monte Dunes*, 920 F.2d at 1499 (explaining prior to Del Monte, Ponderosa Homes owned property). Ponderosa Homes also sought to build a residential community on the property. See *id.* In 1981, Ponderosa Homes applied to the City for permission to develop the land into 344 residential units. See *id.* The City rejected this request, and subsequently, Ponderosa Homes submitted three more applications for 264, 224, and 190 units, respectively. See *id.* The City rejected all three proposals even though they conformed with the City's land use policy and zoning ordinances. See *id.* Ponderosa Homes modified its plan for the development of 190 residential units and reapplied. See *id.* While this application was pending, Del Monte purchased the property and pursued the application. See *id.*; see also *Del Monte Dunes*, 526 U.S. at 694 (stating Del Monte was not proposing any development land was not already zoned for).

86. *See Del Monte Dunes*, 920 F.2d at 1499 (describing prior use of property); see also *Del Monte Dunes*, 526 U.S. at 695 (stating prior owner was industrial corporation who transported and processed oil). The sewer line was housed in a fifteen-foot, man-made dune structure that was covered with jute matting and surrounded by snow fencing. See *Del Monte Dunes*, 920 F.2d at 1499. Seven tank pads, an industrial complex, a sewer line, accumulated trash, pieces of pipe, broken concrete, and oil-soaked sand were left behind on the property by the petroleum company. See *id.*

87. *See Del Monte Dunes*, 526 U.S. at 695 (stating ice plant secretes substance that forces out other plants and is not compatible with property's native vegetation).
fauna, thus attaching a serious environmental concern to any future site plans. 88

Del Monte's proposed development application process spanned five years, five formal decisions, and nineteen different site plans. 89 Zoning on the property allowed for up to twenty-nine housing units per acre, or more than 1,000 units for the entire property. 90 The landowner's initial proposal, however, was for only 344 residential units. 91 In 1982, this plan was rejected by the Monterey Planning Commission. 92 As a requirement of the application process, Del Monte was prohibited from developing the property until the Planning Commission approved a tentative map. 93 Once this map was approved, Del Monte could implement a final map and begin building. 94

88. See id. (explaining state that property was in at time of initial ownership). The ice plant was growing out of control throughout most of the property, overtaking much of the natural fauna. See id. Left untouched, the ice plant would continue to spread, encroaching on and possibly eliminating the parcel's remaining natural fauna, including the buckwheat plant, which is natural habitat of endangered Smith's Blue Butterfly. See id. The Smith’s Blue Butterfly lives for one week, travels a maximum of 200 feet, and in order to survive, must land on a mature, flowering Buckwheat plant. See id. During the landowner’s development application process, wildlife experts conducted butterfly searches on the property from 1981-1985. See id. No butterflies were ever discovered, except for a single larva encountered in 1984. See id. That larva was the only specimen ever found, and the property is significantly isolated from other possible butterfly habitats. See id.

89. See id. at 695 (noting that original 1981 application to develop property was within City’s zoning and general planning requirements).

90. See id. at 696-97 (discussing City’s documented zoning requirements for property).

91. See Del Monte Dunes, 920 F.2d at 1502 (noting Planning Commission requested from developers that environmental impact report be prepared to assess potential affects on environment). By January of 1982, the environmental impact report for the 344-unit plan was completed. See id. (explaining environmental impact report process).

92. See id. at 1499 (discussing rejection of preliminary development plans); see also Del Monte Dunes, 526 U.S. at 695 (describing Del Monte’s adjustment of first development proposal). The Commission informed the developers that a 264 unit, or a 7 units per acre plan, would be permitted. See id. at 696. The landowners reapplied, submitting a proposal for the suggested 264 unit project. See id.

93. See Del Monte Dunes, 920 F.2d at 1499 (noting, under California law, Del Monte had to obtain City’s authorization of tentative map in order to begin development process). See generally CAL. GOV'T CODE §§ 66410-66499.58 (West 1983 & Supp. 1990) (explaining specific tentative map regulations as applied to land developers). A tentative map is a precise drawing detailing the design of a project and the conditions on and around the proposed development site that must be met before a final map can be approved, and actual development can begin. See id. § 66452.1 (noting tentative map allows for careful, detailed project review before cost or effort goes into construction).

94. See Del Monte Dunes, 920 F.2d at 1500 (stating advisory board, such as local or regional Planning Commission, initially reviews developer’s application and recommends to City Council whether tentative map should be accepted or rejected).
The developers’ modified plan for 264 units was subsequently denied by the Commission in December of 1983, as was the ensuing 1984 plan for 224 units.95 In March of 1984, the City Council overruled the Planning Commission’s decision and remanded the project with a request that the Commission consider a development of 190 units on the property.96 The developers once again reduced the scope of their project to comply with the City’s request and submitted four detailed site plans, each for a total of 190 units for the entire parcel.97 The Planning Commission denied the revised application in July of 1984, and Del Monte appealed to the City Council a second time.98

On September 13, 1984, the City Council again overruled the Planning Commission and approved Del Monte’s plan for the development of 190 units.99 Del Monte modified the project to com-
ply with the City Council’s requests, and in July of 1985, the Architectural Review Committee approved its site plan. 100

The landowner’s final site plan, submitted in 1985, devoted 17.9 acres of the 37.6 acres to public open space. The open space included areas for the restoration and preservation of the buckwheat plant, 7.9 acres to open, landscaped areas, and 6.7 acres to public and private streets that included public parking and access to the beach. 101 Only 5.1 acres were allocated to buildings and patios. 102 More specifically, the plan provided a public beach access, a buffer zone between the development and the adjoining state park, and view corridors so that the building would not be visible to motorists on nearby highways. 103 Additionally, the development plan included accommodations for the restoration and preservation of as much of the sand dune structure and buckwheat habitat as was feasible. 104

In January of 1986, less than two months before Del Monte’s 18-month use permit expired, the Planning Commission, against the recommendations of the Professional Planning Staff, denied the tentative map for the proposed 190 unit plan. 105 The property owner immediately appealed to the City Council, which subsequently denied Del Monte’s final plan and refused to further extend the conditional use permit. 106

100. See id. (discussing Architectural Review Committee’s evaluations of Del Monte’s site proposals). In its critique of Del Monte’s site plan, the Architectural Review Committee concentrated on specific details of the proposed residential units, such as: number of bedrooms in each unit, exterior design, square footage of each building, size and shape of roadways, and the number, size, and shape of parking facilities. See id. at 1503-04.

101. See Del Monte Dunes, 526 U.S. at 696-97 (describing acreage allocation in development plan, including parking, open space beach access, and structures).

102. See id. at 696 (noting that large percentage of property was developed to benefit public and not for increased profit of developers).

103. See id. at 697 (noting view corridors allowed motorists to have uninhibited sight line to ocean).

104. See Del Monte Dunes, 920 F.2d at 1504 (stating that in August of 1985, Planning Commission held hearing on Del Monte’s tentative map for 190-unit project report from Professional Planning Staff, recommending approval of project). The Professional Planning Staff stated, in its recommendation report, that it appeared as if conditions of approval had been addressed and substantially met by the applicant’s tentative map. See id. The Professional Planning Staff advised the Planning Commission to find in favor of the developers since they had satisfied all the City’s conditions. See id.

105. See id. (noting this decision prompted Del Monte to appeal because Professional Planning Staff had informed Del Monte that it was in compliance).

106. See Del Monte Dunes, 526 U.S. at 697 (noting that Commission declined to extend permit, thus depriving Del Monte opportunity to address Commission’s concerns).
The Council did not specify any measures the landowner could take in order to meet the Council’s approval.\textsuperscript{107} Moreover, the Council’s decision was not based on any failure by Del Monte to comply with the specific City requirements.\textsuperscript{108} Instead, the Council stated the landowner’s plan had not provided adequate beach access, would damage the environment, and would disrupt the habitat of the Smith’s Blue Butterfly.\textsuperscript{109} This decision led Del Monte to conclude that the City was not going to permit development of the property under any circumstances.\textsuperscript{110}

Del Monte then commenced suit against the City in the United States District Court for the Northern District of California under 42 U.S.C section 1983, alleging that the City Council’s denial of its final development proposal plan was a violation of the Due Process

\textsuperscript{107} See id. (noting that all residential plumbing work on property would have been halted until moratorium was lifted). In conjunction with the Council’s decision, a sewer moratorium was issued by another agency, which would have further restricted, or, at the very least, severely delayed development for Del Monte. See id. (noting that sewer moratorium was issued by agency independent from Planning Commission, and was not Commission’s order).

\textsuperscript{108} See id.; see also Del Monte Dunes, 920 F.2d at 1504. The City Council’s decision of June 1986 was set forth in Resolution No. 86-96. See id. This resolution stated that the project was not physically suitable for this type of development, that the project would result in significant environmental impacts which have not been properly mitigated, the site did not provide adequate access or use of public easement, and that the development would substantially injure the habitat of the endangered Smith’s Blue Butterfly. See id. at 1504-06. This resolution directly contradicted the City Council’s September 13, 1984 Resolution No. 84-160, where the Council made findings that the design of the project was consistent with the City’s general plan for land use, that the site was physically suitable for that type of development, the proposed subdivision was not likely to cause substantial environmental harm or injure wildlife and their habitats, and that the proposed design would not conflict with easements for public access. See id. at 1503.

\textsuperscript{109} See id. at 1504-05. In court, Del Monte contended that the Council’s findings in Resolution No. 86-96 were inconsistent with their findings in Resolution No. 84-160, and that denial was arbitrary, capricious, and unreasonable. See id. Del Monte further argued that it spent 20 months working with the City’s Professional Planning Staff in order to comply with the building conditions set forth by the City, and that the City rejected its tentative plan for reasons that contradicted their previous findings without an additional factual basis for this new decision. See id. at 1505. Del Monte also contended that it was nonsensical to find adequate access and environmental protection in September of 1984, but not find it now, especially since the landowner had twice changed the specific access plans to comply with the City’s demands and had established the public beach, view corridors, and buffer zone the city requested. See id. Additionally, the plan incorporated the removal of most of the ice plant, and preserved over half the property for the buckwheat plant. See id. at 1505-06. Del Monte also asserted that the Council’s underlying intent in denying the application was its plan to regulate the property as open space or quasi-open space without paying Del Monte the required just compensation. See id. at 1505. Del Monte argued that the City acted upon regulatory pretext or motive. See id.

\textsuperscript{110} See Del Monte Dunes, 526 U.S. at 698.
and Equal Protection Clauses of the Fourteenth Amendment, as well as an uncompensated, unconstitutional regulatory taking.\textsuperscript{111} Reversing the district court, the Ninth Circuit held that the City’s decision was sufficiently final to render Del Monte’s claim ripe.\textsuperscript{112} It also concluded that because the State of California had not provided a compensatory remedy for temporary regulatory takings when the City issued its final denial, Del Monte was relieved of any requirement to seek relief in state court prior to seeking federal relief.\textsuperscript{113}

Overcoming the ripeness challenges, Del Monte’s takings claim was submitted to a jury.\textsuperscript{114} At the close of arguments, the

\textsuperscript{111} See id. (noting Del Monte brought constitutional as well as tort claim against City); see also 42 U.S.C. § 1983. For the text of section 1983, see supra note 79.

Landowners can bring a section 1983 action against government agencies and their implementation of land regulation policy, claiming that they have been deprived of their substantive due process rights under the Fourteenth Amendment of the United States Constitution. See, e.g., Dolan v. City of Tigard, 512 U.S. 374 (1994); Nectow v. Cambridge, 277 U.S. 183 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Through the Fourteenth Amendment, landowners can allege violations of the Takings Clause of the Fifth Amendment. See, e.g., Dolan, 512 U.S. 374. The Fourteenth Amendment states that “[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV. The Takings Clause states, “[n]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

\textsuperscript{112} See Del Monte Dunes, 526 U.S. at 698-99 (overruling district court’s decision that Del Monte’s case was unripe under Willamson County Reg’l Planning Comm’n v. Hamilton Bank, 473 U.S. 172 (1985)). The district court dismissed Del Monte’s claims as unripe on the grounds that Del Monte had not obtained a final decision regarding a development plan that the City would allow, nor had it sought just compensation in the state court. See id. at 698.

\textsuperscript{113} See id. (noting that Planning Commission was definite enough in its plan rejections that Court could assume Planning Commission would not have permitted any development proposals submitted by Del Monte); see also Del Monte Dunes, 920 F.2d at 1506-07 (discussing whether Commission’s conduct was sufficient to characterize its denial as final decision). In the Court’s discussion of whether the City’s decision was final, and whether Del Monte had to first seek state relief, the Court stated that at the time of the appellant’s last application, California law did not permit landowners to seek compensation for a regulatory taking through an inverse condemnation. See id. at 699. Therefore, their only remedy was through injunctive relief or mandamus. See id. The Court further noted that, at the time of the alleged taking, California’s compensation procedures were inadequate, and as a result, the appellant established the ripeness of the compensation element of its regulatory taking claim. See id.; see also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) (holding that Fifth Amendment requires states to compensate regulatory takings); Macdonald, Summer, & Frates v. Yolo Co., 477 U.S. 340 (1986) (holding that Court was concerned that protracted application process to meet final decision requirement would result in repetitive and unfair procedures).

\textsuperscript{114} See Del Monte Dunes, 526 U.S. at 699 (noting City strongly objected to district court’s decision to submit Del Monte’s claims to jury). On remand, the district court submitted Del Monte’s taking and equal protection claims to a jury, but reserved the substantive due process claims for a decision by the court. See id.
district court instructed the jury that it should find for Del Monte if it concluded either that Del Monte had been denied all economically viable use of its property, or that the City's decision to deny the landowner's 190 unit proposal plan did not substantially advance a legitimate public purpose. The jury delivered a general verdict for Del Monte on its takings claim. The Ninth Circuit affirmed the decision, stating that the district court did not err in presenting the regulatory takings claim to the jury.

115. See id. at 700 (regarding whether Del Monte had been denied all economically viable use of its property, jury was given specific instructions). The jury instructions included:

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.

Id. The second jury instruction pertaining to whether the City's decision advanced a legitimate public purpose was as follows:

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.

Id.

116. See id. at 701 (holding that City had deprived landowner economically viable use of its property without reasonably related justifications, and thus, effected a taking). In addition to the general verdict for Del Monte on its takings claim, a separate verdict for Del Monte was granted on its equal protection claim, along with a damages award of $1.45 million. See id. In addition to the jury's verdict, the district court found for the City on the substantive due process claim, and further stated that this ruling was not inconsistent with the jury's equal protection and takings verdicts. See id. The Court later denied the City's motions for a new trial or judgement as a matter of law. See id.

117. See id. (explaining Ninth Circuit's decision to affirm district court's holding). The Ninth Circuit also noted that because the verdict on the regulatory takings claim was sufficient to support the award of damages, it did not have to address the equal protection claim. See Del Monte Dunes, 920 F.2d at 1430. The Ninth Circuit stated, "[e]ven if the City had a legitimate interest in denying Del Monte's development application, its action must be 'roughly proportional' to furthering that interest. . . . That is, the City's denial must be related 'both in nature and extent to the impact of the proposed development.'" Id. (quoting Dolan v. City of Tigard, 512 U.S. 374, 391). The Ninth Circuit was referring to the rough-proportionality standard of Dolan; the City, however, later argued that this was an improper application of the Dolan standard. See Del Monte Dunes, 526 U.S. at 702 (holding that rough-proportionality standard does not apply in this case).
The Supreme Court of the United States granted the City's petition for certiorari. The three questions that the Supreme Court addressed were (1) whether issues of liability were properly submitted to the jury on Del Monte's regulatory takings claim, (2) whether the Ninth Circuit improperly utilized a standard that allowed the jury to evaluate the discretion and reasonableness of the City's land-use decision, and (3) whether the Ninth Circuit erred in determining that the rough-proportionality standard of *Dolan v. City of Tigard* applied to this case.

**IV. NARRATIVE ANALYSIS**

In *Del Monte Dunes*, the Supreme Court emphasized that instructions were properly submitted to the jury because, despite the contentions offered by the City, (1) the Ninth Circuit did not err in discussing the *Dolan* standard, because the jury was not instructed to follow or apply it; (2) the jury did not reweigh the reasonableness of general land use policies set forth by local planning commissions; and (3) the jury instructions asked for an assessment of "an action at law," seeking a legal remedy in tort based on a factual issue, and therefore, was an entirely proper jury issue.

**A. *Dolan* Rough Proportionality Standard**

The Court agreed with the City of Monterey that the rough-proportionality test of *Dolan* should not be expanded beyond the specific context of "exactions-land-use decisions conditioning approval of development on the dedication of property to public use." The Court held that *Dolan* should not be applied to cases such as *Del Monte Dunes*, where the landowner's challenge is not based on an excessive exaction, but rather on a denial of his or her right to develop.

118. See id. at 703 (holding that misapplication of this standard does not affect decision because language was not included in jury instructions).

119. See id. (upholding district court's jury decision). For further discussion of the *Dolan* standard, see supra notes 59-68.

120. See *Del Monte Dunes*, 526 U.S. 705-11, 716-22.

121. Id. at 702; see also *Dolan*, 512 U.S. at 385; Nollan v. California Coastal Commission, 483 U.S. 825, 841 (1987) (stating that *Dolan* standard evaluates whether government-imposed dedications as conditions of development permits are proportional to anticipated impacts of developer's proposed plan).

122. See *Del Monte Dunes*, 526 U.S. at 703 (referencing *Dolan* case); see also *Dolan*, 512 U.S. at 374 (holding that conditioning of permits by planning agencies can establish taking). For a discussion of *Dolan*, see supra notes 59-68 and accompanying text.
Further, the Supreme Court determined, based on two significant reasons, that the Ninth Circuit did not make any materially erroneous holdings. First, the Court pointed out that the jury instructions did not include the language of the proportionality standard, nor did they direct the jury to find for the City if the jury perceived that the City's actions were "roughly proportional" to the City's professed interests. Therefore, the Supreme Court stated that even though the Ninth Circuit discussed the *Dolan* standard, the incorporation was unnecessary and irrelevant to the disposition of this case. Second, the Supreme Court explained that the jury decision could be upheld on other grounds, irrespective of any dicta concerning the rough proportionality standard of *Dolan*.

B. Scope of Jury Review

The City also contended that the Ninth Circuit "adopted a legal standard for regulatory takings liability that allows juries to second-guess public land use policy." The Supreme Court stated that it was unreasonable for the City to argue that the jury instructions did not accurately reflect the law, when the City itself composed the core instructions given to the jury. The Court noted that "[t]his question was couched, moreover, in an instruction that had been proposed in essence by the city, and as to which the city made no objection." Regarding the City's claim that municipal land use policies and regulatory decisions are exempted from judicial review, the Court concluded that the City's assertion was in opposition to regulatory takings standards.

123. *See Del Monte Dunes* 526 U.S. at 703. The Court stated: 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 a denial of development.

124. *See id.* (mentioning that *Dolan* standard did not invalidate Ninth Circuit's decision).

125. *See id.* (stating that rough-proportionality reference was nonessential to sustain jury's verdict, taking into account Ninth Circuit's holding that Del Monte had provided substantial evidence which refuted City's rationale for not accepting Del Monte's development plan).

126. *Id.* at 704 (stating City argued jury review undermines agency policy making).

127. *See id.*

128. *Id.* at 706 (explaining, constitutionally, when right to trial is guaranteed).

129. *See Del Monte Dunes*, 526 U.S. at 706-07 (rejecting City's immunity claims as erroneous). The Supreme Court stated that "despite the protests of the city and
The Supreme Court acknowledged that there has never been a "definitive statement" as to specific elements for a temporary regulatory takings claim, nor a clear definition as to the applicability of the "substantially advance legitimate public interests" requirement. The Court explicitly declined, however, to define these elements or explain the nature of their applicability in this context. The Supreme Court did note that the trial court's liability instructions were in accordance with previous regulatory takings opinions, and that the City was not challenging the general test for a regulatory taking cited by those authorities.

In support of its argument, the City further claimed that the Ninth Circuit's judgment was erroneous because it was based upon a jury decision that assessed the reasonableness of the City's general zoning laws and land use policies. The Supreme Court determined that this claim was without merit. The Court emphasized that the jury instructions did not ask for a determination as to whether the City's zoning scheme was reasonable, but whether the City's decision to reject Del Monte's 190 unit plan was reasonably related to, or advanced, a legitimate public purpose.

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." Id.

130. See id. at 704 (citing Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)) (stating Court's requirement that regulation must substantially advance legitimate public interests outside context of required dedications or exactions).

131. See id. (noting Court's references to previous opinions included landmark cases of Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Agins v. City of Tiburon, 447 U.S. 255 (1990); and Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987)).

132. See Del Monte Dunes, 526 U.S. at 704 (stating that City argued jury determination of reasonableness of zoning and development plans allows juries to second-guess land use policy).

133. See id. at 704-05 (discussing scope of reasonableness inquiry). Moreover, Del Monte's attorneys were definitive in acknowledging that their contention in this case is not directed at the right of a City to regulate land. See id. at 705. The Court quoted Del Monte's lawyers who stated: "They have the right to set height limits. They have the right to talk about where they want access. That's not what this case is about. We all accept that in today's society, cities and counties can tell a land owner what to do to some reasonable extent with their property." Id. The Court also noted that the instructions did not present an opportunity for the jury to consider the reasonableness of the specific conditions exacted on the property's development. See id. Additionally, the attorneys for Del Monte did not question those conditions; in fact, they were quick to point out that these factors were not the basis of the case either:

'Del Monte Dunes partnership did not file this lawsuit because they were complaining about giving the public the beach, keeping it [the development] out of the view shed, devoting and [giving] to the State all this habitat area. One third [of the] property is going to be given away for public use forever. That's not what we filed the lawsuit about.'
noted that in addition to the specific instructions regarding reasonable legitimate public purposes, the Ninth Circuit further limited the jury's inquiry by expressly informing it that the City's asserted public purposes were within the definition of legitimate public interests. The Supreme Court concluded that the question submitted to the jury was sufficiently narrow since the jury was asked to consider the history and context of the case and to determine whether the City's denial of Del Monte's plan was reasonably related to the City's stated justifications.

C. Liability Issues and The Role of The Jury

The City's third inquiry, whether it was proper for the district court to submit to the jury the question of liability on Del Monte's regulatory takings claim, began with the Supreme Court investigating whether Del Monte had a statutory or constitutional right to a jury trial, and if so, what the nature and extent of that right should be.

1. Does Section 1983 Itself Confer a Right to a Jury Trial?

The Court reiterated Del Monte's claim that its right to a trial by jury is supported by section 1983 and the Seventh Amendment. Reviewing precedent and dictating statutory analysis prior to reaching the constitutional question, the Supreme Court addressed possible statutory interpretations of section 1983. The Court stated that its finding of a statutory right was in part based upon the language of section 1983 that authorized "legal relief," but the finding was also supported by the statute's specific incorporation of procedures from the Fair Labor

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Id. Del Monte's counsel further contended that the City "may ask an owner to give away a third of the property without getting a dime in compensation for it and providing parking lots for the public and habitats for the butterfly, and board-walks." Id.

134. See id. at 706 (noting Court did not give free reign to jury because its decision was limited to narrow questions with instructions as to which factors within questions were to be considered).

135. See id. (stating that context of case was "tortuous and protracted" history of development attempts).

136. See id. (holding that prior to addressing constitutional issue, Court must determine if interpretation of statute is feasibly permissible).

137. See Del Monte Dunes, 526 U.S. at 707 (noting that preliminary inquiry into permissibility of statute's construction is also technique to possibly avoid any constitutional questions).

138. See id. at 707-08 (acknowledging that while section 1983 does grant right to seek relief through action at law or other proper proceeding, this alone cannot establish right to jury trial). Del Monte relied upon the statutory language, which stated that a party can seek relief through "an action at law." See id. at 708. Del Monte argued that "action at law" is a term of art, which implies a right to a jury trial. See id. The Supreme Court refused to make this implication. See id. The Court stated that its finding of a statutory right was in part based upon the language of section 1983 that authorized "legal relief," but the finding was also supported by the statute's specific incorporation of procedures from the Fair Labor
Court determined that section 1983 alone does not contain any language indicating congressional intent to confer jury rights through the utilization of the statute. Once the Court established that it would be legally impermissible to interpret the statute as independently authorizing jury rights, it addressed the constitutional question.

2. Seventh Amendment Analysis

In addressing the constitutional question, the Court began its analysis by quoting the Seventh Amendment language pertinent to this issue: "'[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . .'

The Supreme Court stated that there are two inquiries relevant to determining whether the right of trial by jury shall be preserved. First, the Court examined whether this claim is an "action at law" under the Seventh Amendment, or an analogous claim existing at the time of the Amendment's creation. Second, the Court inquired whether the specific trial decision must go before a jury in order to uphold common law protected rights.

a. Was this an action at law?

In discussing why it determined that Del Monte's claim was an "action at law," the Supreme Court began by explaining that the Seventh Amendment applies to common law claims, as well as to statutory claims that were unanticipated at common law, provided that the statutory claims meet two criteria: (1) that they are either traditional tort claims or an analogous tort action; and (2) that the

Standards Act, which has been interpreted to guarantee trial by jury in private actions. See id.

139. See id. at 707 (noting Seventh Amendment could not be applied to this claim but for mechanism of section 1983 action; however, section 1983 action cannot exclusively establish right to jury trial). Further into its analysis, however, the Court held that while section 1983 cannot solely confer a right to a jury trial, in this particular case, a Seventh Amendment analysis incorporates section 1983 and grants a right to a jury trial. See id. at 708.

140. See id. at 710 (explaining that monetary damages are equivalent to legal relief and thus constitute action at law). For further discussion of what establishes an action at law, see infra notes 145-56 and accompanying text.

141. U.S. Const. amend. VII.

142. See Del Monte Dunes, 526 U.S. at 708.

143. See id.

144. See id. (discussing extent that historical analysis influences judicial interpretation of Seventh Amendment right to trial by jury).
claims seek legal relief. The Supreme Court held in *Del Monte Dunes* that a section 1983 suit seeking legal relief is an action at law within the parameters of the Seventh Amendment. "[W]e have stated repeatedly that [section] 1983 'creates a species of tort liability'. . . . Our settled understanding of [section] 1983 and the Seventh Amendment thus compel the conclusion that a suit for legal relief brought under the statute is an action at law." The Court further noted that even though Del Monte sought just compensation, any damages for a constitutional violation are a legal remedy. Consistent with this reasoning, the Court acknowledged the general rule that monetary relief is legal relief. In conclusion, the Supreme Court determined that because Del Monte's statutory suit sounded in tort and sought legal relief, it was an action at law.

Next, the Court rejected the petitioner's argument that takings violations are analogous to eminent domain proceedings, where courts have consistently held there is no constitutional right to a jury trial. The Court conceded that parties bringing condemnation

145. See id. at 709 (quoting Curtis v. Loether, 415 U.S. 189, 195-96 (1974)). The Court further stated that "suits at common law" were not limited solely to claims which the common law recognized and addressed, but also suits in which legal rights were to be confirmed and decided. See id. The Seventh Amendment jury guarantee extends to statutory claims unknown at common law as long as those claims are tortious in nature and seek legal relief. See id.

146. See id. Justice Scalia, in his concurrence, further analyzed the relationship between section 1983 actions and traditional tort claims by noting: There is no doubt that the cause of action created by [section] 1983 is, and was always regarded as, a tort claim. . . . [T]orts are remedies for invasions of certain rights, such as rights to personal security, personal liberty and property. . . . [Section] 1983 assuredly fits that description. Like other tort causes of action, it is designed to provide compensation for injuries arising from the violation of legal duties . . . and thereby, of course, to deter future violations.


148. See id. at 710 (distinguishing just compensation from other equitable monetary remedies, such as restitution, because in just compensation determinations, material issue is not what government took, but rather what owner lost). See generally Boston Chamber of Commerce v. Boston, 217 U.S. 189 (1910) (stating that as name implies, just compensation remedy is compensatory, and therefore historically considered legal relief); see also Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 345 (1998).

149. See *Del Monte Dunes*, 526 U.S. at 710-11.

150. See id. at 711 (holding that Del Monte's claim was "action at law" and eligible for monetary, legal relief).

151. See id. at 711-12 (distinguishing between eminent domain claims, inverse condemnation claims, and takings actions).
tion proceedings are not entitled to a jury trial, but distinguished such an action from a just compensation claim, noting:

Although condemnation proceedings spring from the same Fifth Amendment right to compensation which, as incorporated by the Fourteenth Amendment, is applicable here . . . a condemnation action differs in important respects from a [section] 1983 action to redress an uncompensated taking. Most important, when the government initiates condemnation proceedings, it concedes the landowner's right to receive just compensation and seeks a mere determination of the amount of compensation due. Liability simply is not an issue. As a result, even if condemnation proceedings were an appropriate analogy, condemnation practice would provide little guidance on the specific question whether Del Monte Dunes was entitled to a jury determination of liability. 152

The City further contended that the Constitution allows the government to take property for public use. 153 The Court recognized that right, but emphasized that the Constitution also attaches a duty to provide just compensation. 154 The government violates that duty when it denies compensation and does not provide an avenue through which a remedy can be sought. 155

Once the Court established that Del Monte's section 1983 suit was an "action at law" within the meaning of the Seventh Amend-

152. Id.; see also First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987) (stating that Court's determination was supported by precedent in that right to jury has never been granted to condemnation action because this type of action does not involve analysis of legal rights since liability was never in controversy). Unlike condemnation proceedings, a landowner in an action for compensation has the burden of challenging the government taking, whereas in a condemnation suit, the initiative lies with the condemning authority. See Del Monte Dunes, 526 U.S. at 712. Moreover, in just compensation cases, the landowner is at a much greater disadvantage. See id. As a result of this disadvantage, the Court stated that it was unfair and inaccurate to compare condemnation actions with just compensation suits. See id.

153. See Del Monte Dunes, 526 U.S. at 707 (noting that government's ability to take land is not in question). The Court stated: "The constitutional injury alleged, therefore, is not just that property was taken but that it was taken without just compensation. Had the city paid for the property or had an adequate postdeprivation remedy been available, Del Monte Dunes would have suffered no constitutional injury from the taking alone." Id. at 710.

154. See U.S. CONsT. amend. V. For the language of the Takings Clause, see supra note 19. For the language of the Fourteenth Amendment, see supra note 20.

155. See Del Monte Dunes, 526 U.S. at 718. The Court additionally stated that circumstances such as these are not only unlawful, but tortious as well. See id.
ment, the Court progressed to the second inquiry, whether these specific liability issues could be properly submitted to a jury.\textsuperscript{156}

D. Were Issues of Liability in This "Action at Law" Properly Before the Jury?

When determining if the particular issues in this context can be appropriately submitted to a jury, the Court noted that it first looks to the historical background of takings law, and then, if history does not provide an unambiguous answer, to precedent and functional considerations.\textsuperscript{157} Finding that history provided no comparable common law cases, and that there was little existing precedent addressing liability allocations between judge and jury, the Court turned to process and function considerations.\textsuperscript{158} Additionally, however, the Court did recognize that questions of liability in tort generally do go before a jury.\textsuperscript{159}

1. Is Determining if There Has Been a Regulatory Taking a Factual Inquiry?

The notion that primarily factual issues are appropriated to a jury is incorporated in the Seventh Amendment preservation of the right to an ultimate jury resolution.\textsuperscript{160} In applying this notion to regulatory takings cases, the Supreme Court reiterated the principle...

\begin{footnotes}
\item[156] See id. at 718 (discussing whether Del Monte's claim was required to be submitted to jury in order to "preserve the right to a jury's resolution of the ultimate dispute").
\item[157] See id. at 720-21.
\item[158] See id. at 721 (discussing general common law procedures regarding liability decisions by juries versus judges, and noting that while history does provide some guidance, it does not provide clear answer or test). In the Court's examination of current precedent, it faced some difficulty due to the fact that the majority of regulatory takings cases involve the United States as defendants, and in those cases, the Seventh Amendment did not apply. See id. in Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), the Court heard a case where a landowner sought money damages under section 1983 against a county planning commission, but since Williamson was not a direct holding, it could not provide adequate support for the present case. See id. at 1643.
\item[159] See id. at 709 (noting that traditionally questions of tort liability are considered appropriate for jury review). The Court stated: It is undisputed that when the Seventh Amendment was adopted there was no action equivalent to [section] 1983, framed in specific terms for vindicating constitutional rights. It is settled law, however, that the Seventh Amendment jury guarantee extends to statutory claims unknown to the common law, so long as the claims can be said to 'sound[d] basically in tort,' and seek legal relief.
\item[160] See Del Monte Dunes, 526 U.S. at 721 (noting it was proper to submit factual questions to jury); see also Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935) (discussing jury questions and what may be presented).
\end{footnotes}
ple of Pennsylvania Coal Co. v. Mahon, which states that the determination of whether a regulation of property goes too far is evaluated on the particular facts of each case.\textsuperscript{161}

Referencing \textit{Lucas v. South Carolina Coastal Council} and \textit{Penn Central Transportation Co. v. City of New York}, the Court concluded that determinations of liability in regulatory takings cases were "essentially ad hoc, factual inquiries."\textsuperscript{162} The \textit{Lucas} Court held that a regulation "takes" property when the landowner is left with no economically beneficial use of the land.\textsuperscript{163} This decision was consistent with the \textit{Penn Central} Court's holding that while no set formula has been developed, significant factors to assess include: (1) the economic impact of the regulation, and (2) the character of the government action.\textsuperscript{164} The \textit{Del Monte Dunes} Court relied on these cases as support for its decision that the issue of whether a landowner has been deprived of all economically viable use of his property is mainly a factual one.\textsuperscript{165} The Court recognized, however, that presenting a jury with the question of whether a land-use decision substantially advanced legitimate public interests within the parameters of the regulatory takings doctrine is more ambiguous.\textsuperscript{166} The Court noted that "[a]lthough our cases make clear that this inquiry involves an essential factual component, . . . it no doubt has a legal aspect as well, and is probably best understood as a mixed question of fact and law."\textsuperscript{167} The Court held instead that the questions presented to the jury were narrow enough in scope, and sufficiently

\begin{itemize}
\item \textsuperscript{161} See \textit{id.}; see also Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); Keystone Bituminous Coal Ass'n v. DeBendictis, 480 U.S. 470, 473-74 (1987) (discussing section 1983 claim-related questions).
\item \textsuperscript{163} See \textit{Lucas}, 505 U.S. at 1003 (proposing narrow rule that regulation which removes all productive or economically beneficial use from land is taking, requiring compensation under Fifth Amendment).
\item \textsuperscript{164} See \textit{Penn Central}, 438 U.S. at 124 (holding that whether specific regulation will require government compensation depends largely upon particular circumstances of that case). For further discussion of \textit{Penn Central}, see \textit{supra} notes 32-35 and accompanying text.
\item \textsuperscript{165} See \textit{Del Monte Dunes}, 526 U.S. at 721 (questioning what constitutes economically viable use).
\item \textsuperscript{166} See \textit{id.}
\item \textsuperscript{167} \textit{Id.}; see also \textit{Yee}, 503 U.S. at 523 (establishing that takings claims are often questions of law and fact).
\end{itemize}
factual in nature, that it was proper to submit Del Monte’s issues of liability to a jury. 168

E. Limitation of The Holding

The Supreme Court intentionally limited the conceptual reach of its holding, stating that it would not attempt to make any bright-line separation between the respective roles of judge and jury in determining whether a land use or zoning policy decision substantially advances legitimate governmental interests. 169 The Court, ignoring the broader policy questions, stated that a judge/jury issue demarcation was unnecessary to the posture of this particular case because when the City approved the submitted jury instructions, it waived its ability to challenge them. 170 The Court then interpreted Del Monte’s section 1983 claim, viewed solely in light of the context and history of Del Monte’s development application process, as presenting the narrow question of whether the City demonstrated a reasonable relationship between its decision to reject the development plan and that decision’s justifications. 171

V. CRITICAL ANALYSIS

In Del Monte Dunes, the Supreme Court decided, in a two part holding, that while section 1983 does not itself confer a right to a

168. See Del Monte Dunes, 526 U.S. at 721. For further discussion of the jury instructions, see supra notes 114-19 and accompanying text.

169. See id. (stating that holding has no real consequential effects because Court limited its applicability to specific facts of this case). The Court stated: The City and its amici suggest that sustaining the judgement here will undermine the uniformity of the law and eviscerate state and local zoning authority by subjecting all land-use decisions to plenary, and potentially inconsistent, jury review. Our decision raises no such specter .... As is often true in § 1983 actions, the disputed questions were whether the government had denied a constitutional right in acting outside the bounds of its authority, and, if so, the extent of any resulting damages. These were questions for the jury. Id. at 722.

170. See id. at 721 (emphasizing limits of its holding). The Court reiterated that it will not “define with precision” the elements of what constitutes a regulatory taking, and thus leaves that decision to the jury. See id. Additionally, the Court stated that because of the City’s approval of the jury instructions and Del Monte’s characterization of the issues, it is not necessary for the Court to decide all the surrounding broader questions, and merely holds that both jury instructions were valid. See id.

171. See id. at 722 (describing Court’s interpretation and limitation of section 1983 questions presented to jury). The Supreme Court established that the question of whether a landowner has been deprived of all economically viable use of his property, entitling him to just compensation, is a predominantly factual one and, therefore, is an action at law within the scope of the Seventh Amendment right to trial by jury. See id.
jury trial, a regulatory takings action under section 1983 is an "action at law" within the meaning of the Seventh Amendment.\textsuperscript{172} Part two of the decision concerned the scope of the specific questions put before the district court jury.\textsuperscript{173} The Court held that questions concerning the economic viability of the land and the reasonableness of the City's justifications for denying development were narrow enough that submitting them to a jury was not improper.\textsuperscript{174}

Although the Supreme Court's interpretation of section 1983 is legally correct and in accordance with historical precedent and legislative intent, the Court did not thoroughly address the secondary policy issues arising from the allowance of section 1983 takings actions.\textsuperscript{175} Part two of the Court's decision is also lacking in comprehensiveness and thus further perpetuates the ambiguity already present in takings jurisprudence.\textsuperscript{176} In refusing to expand its holding, the \textit{Del Monte Dunes} Court disregarded the opportunity to ad-

\textsuperscript{172} See id. at 710 (holding that section 1983 action is within Seventh Amendment claim limitations).

\textsuperscript{173} See \textit{Del Monte Dunes}, 526 U.S. at 707-11, 716-22.

\textsuperscript{174} See id. at 720.

\textsuperscript{175} See George W. Miller, \textit{National Resources Development and Takings Litigation}, SD40 ALI-ABA 33, 37 (Jan. 7, 1999) (discussing congressional intent). Miller states:

"The Private Property Rights Implementation Act of 1997", 105th Cong. 1st Sess., which was passed by the House of Representatives on October 22, 1997, would reverse Hamilton Bank insofar as that case held that a federal court was without jurisdiction to hear a federal taking claim against a state entity pursuant to 42 U.S.C. § 1983 where the state's law recognized an action for inverse condemnation. The legislation was considered by the Senate on July 13, 1998. The Senate rejected a cloture motion, and the legislation therefore did not reach the floor. The Clinton administration had threatened to veto the bill if passed.

\textit{Id.; see also Del Monte Dunes}, 526 U.S. at 712-13 (discussing that early opinions from time of Bill of Rights interpreted government's taking of property without compensation resulted in action which sounded in tort); Lindsay v. East Bay Street Comm'rs, 2 S.C.L. 38, 61 (2 Bay 1796) (discussing manner in which suit could potentially be brought). The \textit{Lindsay} court stated:

But suppose they could sue, what would be the nature of the action? It could not be founded on contract, for there was none. It must then be in tort; it must be an action of trespass, in which the jury would give a reparation in damages. Is this not acknowledging that the act of the legislature [in authorizing uncompensated takings] is a tortious act?

\textit{Id.; see also Gardener v. Village of Newburgh}, 2 Johns. Ch. 162, 164, 166 (N.Y. Ch. 1816) (stating uncompensated governmental interference with property right would support tort action at law); Richards v. Washington Terminal Co., 233 U.S. 546 (1914) (stating as matter of historical practice, when government has taken property without providing adequate means for obtaining redress, suits to recover just compensation have been framed as common law torts).

\textsuperscript{176} See Anderson, \textit{supra} note 75, at 495 (discussing current confusion in area of takings law). For further discussion of the current state of takings jurisprudence, see \textit{infra} notes 179-83 and accompanying text.
dress current discrepancies in takings jurisprudence. It left critical questions unanswered. Confusion surrounds such issues as the specific test of what constitutes a regulatory taking, what inquiries are proper for a jury and what should be limited to a judge's discretion, what types of claims can arise, and in what context, and what damages are available under these claims. This ambiguity has been the foremost challenge in the area of takings law. There is a severe lack of clearly delineated standards. This lack of set standards is especially problematic because land use and development are becoming increasingly critical environmental issues. Planning commissions, lower courts, and developers are looking to the courts for clear decisions that can be interpreted and applied.

The Supreme Court's holding was too narrow. While it allowed the jury's decision to stand, it limited its holding specifically to the facts and exact questions presented to the jury. This decision unfortunately failed to clarify the pertinent policy questions surrounding the takings doctrine, and as a result, provided little, if any, direction to courts and municipalities across the country which face the same development issues, and are desperately in need of clear, consistent guidelines.

177. For a further discussion of the problems surrounding current takings jurisprudence, see infra notes 184-85, and supra note 2 and accompanying text.

178. For a discussion of the lack of clear standards, see supra note 176 and accompanying text.

179. See Sierra Club, Sierra Club Stop Sprawl Campaign: Sprawl, Roads, Livable Communities, and Resources (visited Jan. 9, 2000) <http://www.sierraclub.org/sprawl/index.asp>. The Sierra Club is of the position that: "[P]oorly planned development is threatening our environment, our health, and our quality of life. In communities across America 'sprawl'—scattered development that increases traffic, saps local resources and destroys open space—is taking a serious toll." Id.

180. For a further discussion of the problems surrounding current takings case law, see infra notes 184-85, and supra note 2 and accompanying text.

181. See Del Monte Dunes, 526 U.S. at 721-22.

182. See Donella H. Meadows, So What Can We Do—Really Do—About Sprawl (visited Jan. 9, 2000) <http://www.sierraclub.org/sprawl/sprawl/meadows3.asp> (commenting on need for sprawl management and smart growth solutions). Meadows contends that our current methods for addressing the problem of sprawl are inadequate:

We have planning boards. We have zoning regulations. We have urban growth boundaries and "smart growth" and sprawl conferences. And we still have sprawl. Between 1970 and 1990 the population of Chicago grew by four percent; its developed land area grew by 46 percent. Over the same period Los Angeles swelled 45 percent in population, 300 percent is settled area.

Id.
A. Interpretation of Section 1983

The Supreme Court detailed a legally sound and meticulously chronicled description of the analysis it followed to reach its conclusion that Del Monte did retain the right to litigate its section 1983 claim in a trial by jury. The Court, however, neglected to evaluate how this interpretation might alter the character of regulatory takings claims.\textsuperscript{183} The Court focused its discussion on the procedural aspects of its interpretation without considering the more substantive ramifications.\textsuperscript{184}

By allowing landowners to utilize a section 1983 claim as a recovery mechanism for a regulatory taking, the Court may be encouraging landowners to become more litigious and strategic in the development of their claims.\textsuperscript{185} Under direct constitutional takings

\textsuperscript{183} See Del Monte Dunes, 526 U.S. at 709 (stating that Seventh Amendment right to jury trial includes common law causes of action, but also statutory causes of action that are parallel to common law claims and can be said to sound in tort and seek legal relief). Section 1983 claims seeking legal relief are tort actions at law and within the scope of the Seventh Amendment right to trial by jury. See id. The Supreme Court held that because this was a tort action, which sought legal relief, it was parallel to the types of claims that the Framers of the Constitution intended to come within the protection of the Seventh Amendment. See id. The Court noted that to determine whether a particular cause of action is a suit at common law, within the description of the Seventh Amendment, the Court must examine whether it was the type of action tried at law in 1791, or if the present claim was analogous to such a cause. See id.; see also Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989) (discussing what establishes Seventh Amendment claim); Tull v. United States, 481 U.S. 412, 421 (1987) (stating that to be action within meaning of Seventh Amendment, it must seek relief that is legal or equitable in nature). But see Weinberg, supra note 3, at 325 (agreeing with position of City and its amici). In contrast, Weinberg argues that takings claims are inappropriate for jury review:

There is no basis in either history or legal principle for jury trials of taking claims. Under the Seventh Amendment, preserving the right of jury trial in "[s]uits at common law" in the federal courts, parties are entitled to a jury if "the right. . .existed under the English common law when the [a]mendment was adopted" in 1791. This is determined with respect to the particular cause of action, or if it did not then exist, an "appropriate analog[y]." At common law, juries never decided whether a taking by eminent domain was necessary for a public use, as mandated by the Fifth Amendment. This was so because condemnation was a special proceeding, not an action at common law. In contrast, the issue of just compensation was, and is, triable by a jury. Since the time a taking, or inverse condemnation, has existed as a claim, its propriety has been decided by courts, not juries. No jury was employed in Penn Central, Lucas, Loretto, Goldblatt, Nollan, Agins, Dolan, Eastern or Phillips. This is because in the end, takings doctrine is an offshoot of eminent domain—not a determination of just compensation.

Id.

\textsuperscript{184} See Del Monte Dunes, 526 U.S. at 707-22.

\textsuperscript{185} See Poyner & Spruill, Supreme Court Affirms Right to Jury Trial in Takings Case, 10 N.C. ENVTL. L. LETTER 7 (June 1999, issue 1) (stating, "A recent U.S. Supreme Court decision has found that a jury can determine damages in a takings
claims, courts limit recovery to the value of the property interest taken, whereas a section 1983 claim increases a litigant’s potential recovery. Actions initiated as section 1983 claims require recovery under the tort principle of returning an injured party to the position it was in prior to injury. Thus, a plaintiff would be entitled to recover attorney’s fees, punitive damages, and consequential damages, in addition to the fair market value of the property loss. Landowner plaintiffs may increasingly bring section 1983 claims against local government agencies, believing that a jury determination may prove more favorable and profitable. This case; therefore, landowners with takings claims... may have the ability to obtain larger monetary awards than typically awarded by judges); see also American Political Network, Property Rights: Supreme Court Hears land Use Case, Greenwire, October 8, 1998, vol. 7 (commenting on consequences of allowing takings claims to go before juries; “thousands of citizens would be encouraged to sue local governments over zoning regulations... It’s going to clog the courts and make unbearable judicial problems”).

186. See Anderson, supra note 75, at 481 (discussing how plaintiff’s relief “under § 1983 may dramatically differ from that under a direct constitutional theory”). Anderson further stated that while under a section 1983 claim, a plaintiff could possibly recover lost profits, lost opportunities, attorney’s fees, relocation costs etc., “a direct Fifth Amendment claim would probably not require proof of actual damages because Takings clause compensates for property value, not for the landowner’s injury. To require demonstration of actual loss would ignore [ ] the self-executing character of the Fifth Amendment’ relied upon by the First English Court.” Id.; see also Margaret Tretbar, Calculating Compensation for Temporary Regulatory Takings, 42 U. Kan. L. Rev. 201, 238 (1993)(evaluating potential problems associated with section 1983 takings claims).

187. See Anderson, supra note 75, at 481.

188. See id. at 479-80 (discussing availability of various types of relief under area of tort law as opposed to more restricted recovery under direct constitutional claim). Anderson stated: The availability of a [section] 1983 relief ‘levels the playing field’ by making damages available to litigants suing under either constitutional theory. The statute is modeled on traditional tort law principles and, thus, opens the door to a broad spectrum of tort-style damages. Most importantly, these may include consequential damages, punitive damages, and attorney’s fees—presumably none of which are available under a direct Fifth or Fourteenth Amendment suit.

Id.; see also Tretbar, supra note 186, at 238-39 (detailing aspects of section 1983 takings claims).

189. See Douglas Kmiec, Property and Economic Liberty as Civil Rights: The Magisterial History of James W. Ely, Jr., 52 Vand. L. Rev. 737, 743 (discussing Del Monte Dunes case and section 1983 claims; “[a] landowner frustrated by ‘environmental politics’ turns to his fellow citizens on the jury for help”); see also Anderson, supra note 75, at 483-84 (describing damages possibilities). Anderson, discussing the various motives plaintiffs have in pursuing their claims, stated: Some plaintiffs may prefer money, others invalidation. Importantly, the substantive due process claim holds more promise of offering both forms of remedy. If a plaintiff wants more than invalidation, she will have to pursue her substantive due process claim under a statutory mechanism. Section 1983 offers just that—a viable source of damage recovery. By contrast a plaintiff pursuing a takings claim will ostensibly receive some form
monetary incentive, however, could be misleading and may further entangle the already complex recovery process in takings claims.

While not obvious to potential litigants, a plaintiff may actually have a more difficult time proving injury under a tort action.\textsuperscript{190} Under a direct takings claim, a plaintiff is constitutionally mandated to receive "just compensation," whereas under a section 1983 claim, a plaintiff may have to demonstrate actual harm resulting from the unconstitutional regulation.\textsuperscript{191} Actual injury may be a more rigorous burden, especially in situations where the property was not in use at the time the questionable regulation was enacted.\textsuperscript{192} This "actual harm" loophole could create a situation where local agencies carefully plan the implementation of land regulations around liability potential, rather than as part of a community planning scheme.

Section 1983 claims may also have the undesired effect of conflicting with state laws and, as a result, further complicate the application of takings jurisprudence at the state and local level.\textsuperscript{193} As part of a litigant's case preparation, state tort law and the extent to

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\textsuperscript{190} See Anderson, supra note 75, at 482 (discussing that under direct constitutional approach, plaintiff will at least recover fair market value as just compensation, but section 1983 plaintiff may theoretically recover nothing until actual injury from alleged unconstitutional regulation can be established).

\textsuperscript{191} See id. (noting procedural differences between bringing constitutional takings claim and section 1983 claim).

\textsuperscript{192} See id. (stating that actual harm may be arduous to prove in cases where property was not in use at time that regulations were legislated). "Thus, despite the broader potential scope of damages under § 1983, actual recovery under the statutory approach could prove lower than that under the direct constitutional approach." Id.

\textsuperscript{193} See id. at 480 (discussing possible discrepancies between state and federal courts). But see Del Monte Dunes, 526 U.S. at 721 (arguing decision will have little effect on relationship between state and federal court systems). The Court stated:
which it differs from comparable federal standards, especially with regard to the types of damages that can be recovered, may impact a plaintiff's decision as to what claims to plead. 194 Where state practices diverge from those followed in federal courts, there is a potential for not only confused litigants but, even more detrimental, inconsistent results among state courts. 195

B. Del Monte Dunes: Too Narrow a Decision

In its Del Monte Dunes decision, the Supreme Court failed to recognize the significance of the jury issue beyond the specific factual parameters of that case. 196 For district and circuit courts, state and local agencies, developers and landowners, the jury issue presented to the Supreme Court was tightly tied to questions regarding the appropriate level of deference to be given to a local decision making entity. 197 This case presented the opportunity to

A federal court, . . . cannot entertain a takings claim under [section] 1983 unless or until the complaining landowner has been denied an adequate postdeprivation remedy. Even the State of California, where this suit arose, now provides a facially adequate procedure for obtaining just compensation for temporary takings such as this one.

Id.


195. See Del Monte Dunes v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996) (discussing state versus federal laws in reply brief of appellant claiming different jury rules in state and federal courts will produce "anomalous results").

196. See Del Monte Dunes, 526 U.S. at 721-22 (stating, "[T]he posture of this case does not present an appropriate opportunity to define with precision the elements of a temporary regulatory takings claim. . . . We do not attempt a precise demarcation of the respective provinces of judge and jury in determining whether a zoning decision substantially advances legitimate governmental interests").

197. See Anderson, supra note 75, at 745 (articulating disappointment over narrowness of Supreme Court holding); see also Ronald L. Weaver & Nicole S. Sayfie, 1999 Update on the Bert J. Harris Private Property Rights Protection, 73 Mar. FLBJ 49 (1999) (discussing unfolding of modern takings jurisprudence). Weaver and Sayfie make reference to the lack of applicable takings precedent:

Case law contemplating when government regulations so restrict property use as to constitute compensable takings will continue to evolve, as will test cases under the act. Landowners who have previously been denied an effective forum in which to redress their regulatory grievances will likely weigh these competing paths to possible relief, as takings jurisprudence continues to unfold on a case-by-case basis. Current case law seems to represent a judicial trend to develop a few per se or categorical rights allowing landowners to recover from affected governments where all economic use is lost to government regulations; insulation for governments where the government demonstrates the proposed use is a "nuisance"
address and clarify current takings law, in addition to potentially establish a platform that the Court could have utilized to establish doctrinal boundaries providing litigants and lower courts with clear direction as to when various claims are available, and how to properly resolve them. The Supreme Court, however, chose not to dispense any guidance, but instead limited its holding to a very narrow application.

VI. IMPACT

The Supreme Court’s narrow holding resulted in further confusion and frustration for lower courts looking to the Supreme Court for some kind of meaningful precedent. Buckles v. King County is a poignant example of the confusion the Del Monte Dunes decision has caused within the circuit courts. In Buckles, decided shortly after the Supreme Court handed down Del Monte Dunes, the Ninth Circuit struggled to apply the Supreme Court’s decision. The Ninth Circuit noted, “[f]rankly, we have some difficulty parsing the distinctions laid out by the Supreme Court concerning when a jury trial is required. We find ourselves in uncharted territory with a map for related, but different waters.”

Similarly, in Eberle v. Dane County Board of Adjustment, a development permit denial case, the Supreme Court of Wisconsin differed over what constitutes a temporary regulatory taking, in light under prior law even if a landowner lost all use; and a resistance for courts to conclude that “government can do no wrong” or that admittedly laudable purposes can be fulfilled without careful review of the effects on landowners.

198. See Anderson, supra note 75, at 469 (discussing what Supreme Court could accomplish in review of Del Monte Dunes case). Anderson stated: “Perhaps the Court will articulate doctrinal boundaries between takings and substantive due process, clarifying the nature of the protection and the corresponding level of scrutiny that each claim provides.” Id. Anderson also discussed the potential impact the Supreme Court could have made with this decision: The Supreme Court’s grant of certiorari “reflects the importance of resolving this confusion and creates an opportunity to clarify the muddle and provide lower courts with guidance.” Id. at 495.

199. See, e.g., Buckles v. King County, 191 F.3d 1127 (9th Cir. 1998) (demonstrating that Del Monte Dunes decision left lower courts uncertain as to what law is and how to apply it); Eberle v. Dane County Bd. of Adjustment, 595 N.W.2d 730 (Wis. 1999) (demonstrating further confusion regarding Del Monte Dunes decision).

200. 191 F.3d 1127 (9th Cir. 1998).

201. See id. (referencing Del Monte Dunes decision).

202. Id. at 1127 (stating that in light of Del Monte Dunes, Court will consider whether landowner’s takings claim should be tried before jury).

203. 595 N.W.2d 730 (Wis. 1999).
of the *Del Monte Dunes* decision. The majority held that a city's "repeated refusals to approve development plans deprive a landowner of all economically viable use of the land" and, therefore, the court found a temporary regulatory taking, citing *Del Monte Dunes* and *First English* as support. The dissent, written by the Chief Justice, argued that *Del Monte Dunes* is not applicable to the *Eberle* case, and that the Supreme Court never established what constitutes a temporary taking. The dissent noted:

This was a [section] 1983 case and most of the discussion in the U.S. Supreme Court opinion involves the right to jury trial. *First English* is cited in the *Del Monte* opinion merely for the proposition that when a government condemns property for public use, it must provide a forum for seeking just compensation. . . .

The dissent contended that the majority misapplied the discussion in *Del Monte Dunes*, as well as the Supreme Court's reliance on *First English*.

This discrepancy within the *Eberle* court on how to interpret *Del Monte Dunes* could have been anticipated. The *Del Monte Dunes* Court recognized that the question of what qualifies as a temporary regulatory taking was a prevalent issue, but chose not to address it in the opinion. The *Del Monte Dunes* Court stated, "[t]he posture of the case does not present an appropriate occasion to define with precision the elements of a temporary regulatory takings claim. . . ."

The Takings doctrine has historically lacked structure, consistency, and straightforward rules of application, in part due to courts' reluctance to promulgate judicial limitations and articulate parameters. An expanded holding by the Supreme Court in *Del

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204. See id. at 732 (discussing whether denial of permit constituted temporary regulatory taking).
205. See id. at 742 (stating that *Del Monte Dunes* defines temporary regulatory taking as repeated permit denials).
206. See id. at 743 (discussing dissent's interpretation of *Del Monte Dunes* decision).
207. Id. at 748.
208. See id. at 749 (arguing majority misunderstood Supreme Court's *First English* reference).
209. See *Del Monte Dunes*, 526 U.S. at 721-22 (noting limitations of holding).
210. Id. at 721.
Monte Dunes may have encouraged a restructuring of takings law. This restructuring would have aided communities, developers, and local agencies in their efforts to cooperatively work toward legal, effective, and environmentally educated planning decisions and policies.  

The most significant impact of the Supreme Court's Del Monte Dunes decision may be what the Court chose not to address. The Court was presented with a myriad of issues, all of which were important, and unanswered questions within modern takings jurisprudence. The Court could have discussed what level of deference a municipal decision should receive, and when it is appropriate to submit those decisions to a jury. This analysis would have required the Court to note the benefits of subjecting agencies to jury accountability, therefore providing communities with a very compelling incentive to develop clear regulatory plans and consistent permit review procedures. These benefits could have been compared and weighed against the disadvantages of limiting the discretion of a policy-making entity to promulgate decisions in the best interests of the local community. This balancing determination would not only have highlighted the current problems with planning commissions throughout the country, but would have also emphasized the importance of their role and their need for an unencumbered ability to carry it out.

The Court also could have addressed the distinctions between the various recovery methods now available to landowner plaintiffs. Little case law exists detailing which recovery claims are appropriate for certain agency action. Lower courts are not certain as to what differentiates a regulatory taking, a temporary regulatory taking, and an action that is not a taking.

For decades, landowners and governmental agencies have debated over the compensation of property owners affected by land-use regulations. As development issues become increasingly themselves—cannot clearly understand the extent of their respective rights and responsibilities under the Clause." Id.

212. For a further discussion of the problems surrounding current takings case law, see supra notes 2, 175-80 and accompanying text.

213. For a further discussion of the issues the Court failed to answer, see supra notes 2, 181-95 and accompanying text.

214. For further discussion of the lack of clear standards that currently exist in takings jurisprudence, see supra note 2 and accompanying text.

215. For further discussion of the confusion that exists among the different types of takings, see supra notes 199-210 and accompanying text.

216. See Weaver & Sayfie, supra note 7, at 53 (discussing current and future state of takings law).
complicated due to the decline of open space, the upsurge of urban sprawl, environmental concerns, and more elaborate community zoning plans, agencies, developers, and courts will be in dire need of consistent and directive standards to apply.\textsuperscript{217} As Justice Cardozo stated, property rights are relative to the changing priorities of a growing society.\textsuperscript{218} It is essential that our judicial system reflect the values of the society it serves to protect. In its \textit{Del Monte Dunes} opinion, the Supreme Court disregarded the need for applicability in its decisions. By doing so, the Court further frustrated an already inadequately developed area of law.

\textit{Danielle Monnig}

\textsuperscript{217} For further discussion of the need for clear standards to apply, see supra notes 2, 175-80 and accompanying text.

\textsuperscript{218} See Goldstein, supra note 1, at 354 (quoting Benjamin N. Cardozo, \textit{The Paradoxes of Legal Science} 131 (1928)).