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Jonathan M. Davidson

Ronald H. Rosenberg
William & Mary Law School, rhrose@wm.edu

Michael C. Spata

Recent Developments in Land Use, Planning and Zoning Law

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Jonathan M. Davidson

Attorney and Mediator, Tallahassee, Florida;
J.D., Washington University (St. Louis), 1978;
M.R.P., University of North Carolina at Chapel Hill, 1973;
A.B., Case Western Reserve, 1970.

Ronald H. Rosenberg

Professor of Law, College of William and Mary, Williamsburg, Virginia;
J.D., University of North Carolina, 1975;
M.R.P., University of North Carolina, 1974;
B.A., Columbia University, 1971.

Michael C. Spata

Deputy County Counsel, Tulare County, California;
L.L.M., University of San Diego, 1990;
J.D., Western State University, 1976;
B.A., University of Maryland, 1973.

THE UNITED STATES SUPREME COURT ANSWERED "YES" to the $1.45 million over-exaction question for 1999. In *City of Monterey v. Del Monte Dunes at Monterey Ltd.*,[1] a unanimous court extended the scope of compensatory takings review beyond land dedication conditions into the realm of regulatory denial. Justice Kennedy's opinion vitalized the "legitimate state interests" test from *Agins v. City of Tiburon*[2] to sustain an inverse condemnation conclusion and damage award to the frustrated developer.[3] A majority of the court also concurred that the trial court may delegate this takings conclusion to the jury under federal civil rights law.[4] The activation of *Agins'* substantive takings test in such challenges and the prospect of continued lay application of con-

1. __ U.S. __; 119 S. Ct. 1624 (1999).
2. 447 U.S. 255, 260 (1980).
3. 119 S. Ct. at 1645.
4. *Id.* at 1642–45 (Kennedy, J., Rehnquist, J., Stevens, J., and Thomas, J., concurring), 1645–50 (Scalia, J. concurring in result).

stitutional law to development restrictions add uncertain dimensions to exactions litigation at the millennium.

In *Del Monte Dunes,* the Court also distinguished the instant development denial of an inverse condemnation claim from the land dedication conditions at issue in *Dolan v. City of Tigard.*[5] This distinction enabled the unanimous Court to uphold the trial verdict based on *Agins* and avoid elements of the Ninth Circuit's reasoning invoking the *Dolan* rough proportionality test. Other recent federal and state decisions also decline to extend *Dolan's* applicability beyond individual land dedication development conditions to other forms of economic exactions. This year's exactions and impact fee report focuses on *Del Monte Dunes,* namely its effects on negotiated development, trial practice, and on regulatory takings doctrine as defined by judges and juries in civil rights litigation.

I. The Regulatory Exactions Issues Before the Supreme Court in *Del Monte Dunes*

To provide a context for *Del Monte Dunes* regulatory takings issues, this section reviews the local record and circumstances, the extended litigation path through federal courts, and the Supreme Court's declarations regarding applicable facts and law.

A. *The Local Record: Negotiation, Promises, and Ultimate Frustration (1981–86)*

The convoluted Monterey trail toward development denial winds from a 1981 proposal for 344 units[6] through the city commission's rejection of a 190-unit site plan in mid-1986. Following negotiations with planning staff over the original environmental impact report, the developer resubmitted a revised tentative map and planned-unit development application for 264 units.[7] The planning commission rejected this application in December 1983.[8] At that time, staff indicated that a 224-unit development would be more favorably considered.[9] On appeal to the city council in March 1984, the "suggested" number was reduced to 190, including a series of conditions, which the city council approved

5. *Id.* at 1635. *See also* Dolan v. City of Tigard, 512 U.S. 374 (1994).

6. This initial plan's density was well within the permitted 1,000-unit zoning standards. 119 S. Ct. at 1632. *See also* Del Monte Dunes at Monterey Ltd. v. City of Monterey (II), 95 F.3d 1422, 1425 (9th Cir. 1996); Del Monte Dunes at Monterey Ltd. v. City of Monterey (I), 920 F.2d 1496, 1501–07 (9th Cir. 1990).

7. 119 S. Ct. at 1632.

8. *Del Monte Dunes v. Monterey I,* 920 F.2d at 1502.

9. *Id.*

as a concept plan.[10] In January 1986, the planning commission ignored staff recommendations to approve this resubmitted Tentative Subdivision Map.[11] The city commission affirmed this denial in June 1986, citing environmental impact on the dunes, effect on vegetation and habitat for the Smith's Blue Butterfly, and adequate access.[12]

As noted in the Supreme Court's recitation of facts, the 37.6-acre coastal property was far from pristine. The site had been used for many years as an oil company terminal and tank farm.[13] Its vegetation was nearly one-fourth covered by invasive non-native ice plant (used for erosion control), which without intervention would be expected to overtake the diminishing natural buckwheat habitat of the Smith's Blue Butterfly.[14] This unflattering description of the pre-application site and repeated re-negotiations of the site plan established a local record open to question on good faith, fair treatment, and regulatory takings bases.

B. *The Judicial Record in* Del Monte Dunes *(1986 to 1999)*

After rejection of the revised 190-unit subdivision plan, the developer initiated a thirteen-year course through federal courts culminating in the May 24, 1999, Supreme Court decision. The original civil rights action in federal district court was dismissed, then remanded for trial on appeal by the Ninth Circuit Court of Appeals in 1990.[15] At the subsequent trial, the judge instructed the jury to evaluate the merits of the § 1983 takings claim and to determine a damage award.[16] The Ninth Circuit affirmed this verdict in 1996, applying the rough proportionality test from *Dolan v. City of Tigard.*[17]

At the remanded trial, the plaintiff land developer successfully brought a § 1983 action against the City of Monterey and recovered a jury award of $1.45 million in damages.[18] The trial judge sent the inverse condemnation or takings question to the federal jury to be ana-

10. Nearly half of the negotiated 190-unit plan for the 37.6-acre site was devoted to public open space; 7.9 additional acres to open landscaped areas, and only 5.1 acres to buildings. 119 S. Ct. at 1632. The 17.9 acres for open space included a public beach and areas for the restoration of the buckwheat habitat.

11. 119 S. Ct. at 1632.

12. *Del Monte Dunes v. Monterey I*, 920 F.2d at 1504–05.

13. Tank pads, pieces of pipe, broken concrete, oil-soaked sand, trash, and a sewer line housed in 15-foot man-made dunes were present on the site. *Monterey v. Del Monte Dunes*, 119 S. Ct. at 1631; *Del Monte Dunes v. Monterey I*, 920 F.2d at 1499.

14. *Monterey v. Del Monte Dunes*, 119 S. Ct. at 1631–32.

15. *Del Monte Dunes v. Monterey I*, 920 F.2d at 1508.

16. *Del Monte Dunes v. Monterey II*, 95 F.3d at 1422, 1425.

17. *Id.* at 1429–30.

18. 119 S. Ct. at 1634.

lyzed under the two-prong *Nollan v. California Coastal Commission* takings test.[19] This was the same test recognized by the Supreme Court in *Agins*. The unchallenged jury instructions referenced environmental protection, open space agricultural protection, "protecting the health and safety of its citizens, and regulating the quality of the community by looking at development" as illustrations of legitimate public purposes.[20] The trial judge stated further: "So one of your jobs as jurors is to decide if the city's decision here substantially advanced any such legitimate public purpose."[21] The instructions then specified the legal standard as a reasonable relationship between the city's decision and the regulatory purpose.[22] The jury returned a verdict for the plaintiff without specifying the grounds for its decision.[23]

On appeal of this jury verdict, the Ninth Circuit Court of Appeals addressed two issues: whether the takings issue was properly before the jury, and whether the evidence supported the finding that the city had affected a taking under the *Nollan* (*Agins*) test.[24] On the first question, the court concluded that the takings issue was properly before the jury as either a factual question or a mixed question of fact and law.[25] This holding placed the jury in the position of determining whether the regulatory action of the city "advances a legitimate public purpose" with the ultimate question being whether these actions—the plan denials—bear a "reasonable relationship" to these public purposes.[26] The consequence of the jury's finding in the negative on this question was that the city had taken the plaintiff's property.

Regarding the second issue, the Ninth Circuit examined the adequacy of the evidence supporting the jury's positive finding and found that

19. Under the dual takings test, Del Monte had to show that the city's actions either (1) did not substantially advance a legitimate public purpose or (2) denied it economically viable use of its property. *See Nollan*, 483 U.S. 825, 834 (1987). Usually said to have been articulated in *Agins v. Tiburon*, 447 U.S. 255 (1980), the two-prong test has been repeated in a number of subsequent Supreme Court decisions including *Nollan, Lucas, Dolan,* and *Del Monte Dunes.* Some commentators have objected to the transfer of the *Nectow/Euclid* substantive due process test into the *Agins* takings formulation, but it has persisted in the Supreme Court jurisprudence. *See* J. JUERGENSMEYER & T. ROBERTS, LAND USE PLANNING AND CONTROL LAW 427–28 (1998).

20. *Monterey v. Del Monte Dunes*, 119 S. Ct. at 1634.

21. *Id.*

22. *Id.*

23. *Del Monte Dunes v. Monterey II*, 95 F.3d at 1425; *Monterey v. Del Monte Dunes*, 119 S. Ct. at 1634.

24. 95 F.3d at 1426.

25. *Id.* at 1429–30. The Supreme Court would later affirm and concur with this characterization of the takings question. *See City of Monterey v. Del Monte Dunes*, 119 S. Ct. at 1643–44.

26. 95 F.3d at 1429.

Del Monte Dunes had provided sufficient evidence to rebut each of the six reasons given by the city to justify its permit denials.[27] Curiously, Judge Wallace's opinion added an interpretive wrinkle that combined the "substantially advances legitimate state interests" takings test of *Nollan* with the rough proportionality requirement derived from *Dolan*.[28] He stated that even if the city had legitimate reasons for denying the permits, "its action must be 'roughly proportional' to furthering that interest."[29] The court conceded that the city's stated interests for its denials were "legitimate" in a traditional substantive due process sense, but that there needed to be a correlation between the permit denial and the nature and extent of the impact of the proposed development. In reviewing the evidence, Judge Wallace concluded that Del Monte Dunes had sufficiently rebutted the city's proposed reasons for denying the permit with superior data or evidence of the city's inconsistent positions regarding the project.[30]

Although announcing a novel standard of review for local government land-use regulation, the court's approach seemed to maintain the traditional allocation of the burden of proof on the challenger. This intermediate decision also confirmed an evidentiary showing successfully attacking the city's development denial under a rational basis due process standard. However, without any particular analysis, the court concluded that "[s]ignificant evidence supports Del Monte's claim that the City's actions were disproportional [sic] to both the nature and extent of the impact of the proposed development."[31] This conclusion suggests a willingness to extend the *Dolan* land-use exaction-based rough proportionality rule to purely regulatory actions of government.

C. *The Supreme Court Decisions in* Del Monte Dunes

On certiorari, the Supreme Court sustained the verdict and damage award. All justices agreed that the intermediate court's application of the *Dolan* test was not essential to sustaining the trial court's delegation of law. This consensus extended to reliance on a more substantive standard articulated in *Agins,* and restated in *Nolan,* that the decision be

27. *Id.* at 1431.

28. The City of Monterey's Supreme Court brief indicates that this argument was not raised by the parties but rather *sua sponte* by the Ninth Circuit itself. *See* Brief for the Petitioners, 1997 U.S. Briefs 1235, *43 n.10.

29. *Del Monte Dunes v. Monterey II*, 95 F.3d at 1430.

30. *Id.* at 1431.

31. *Id.* at 1432.

supportive of "legitimate state interests."[32] However, only five justices concurred on sustaining the trial court's delegation of the takings conclusion to the jury.[33] The unanimous Court provided a brief yet direct rejection of the Ninth Circuit's position on whether the rough proportionality test applies to the denied development. It clarified that the court had not extended applicability of the *Dolan* test beyond the special context of required land dedications as conditions for approving development.[34] Justice Kennedy carefully added that this rule "was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development."[35] Rather, the Court affirmed the *Agins/Nollan* test as the applicable standard.

The Supreme Court also critiqued the city commission's reasons for denying the permit rather than specifying conditions for what would be an approvable site plan:

> The council did not base its decision on the landowners' failure to meet any of the specific conditions earlier prescribed by the city. Rather, the council made general findings that the landowners had not provided adequate access for the development *(even though the landowners had twice changed the specific access plans to comply with the city's demands and maintained they could satisfy the city's new objections*

32. The two-pronged test emanating from Justice Brennan's summary comments in *Penn Central* quickly took on a life of its own and was expressed as general constitutional law theory in the 1981 case of *Agins v. City of Tiburon,* 447 U.S. 257, 261 (1980). Argued as a case alleging that a zoning ordinance took the plaintiff's property without just compensation, Justice Powell articulated the takings test in the following terms: "The application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land. . . ." 447 U.S. at 260. The inclusion of the due process prong has been severely criticized by academic commentators. *See, e.g.,* R. CUNNINGHAM ET AL., THE LAW OF PROPERTY 519 (2d ed. 1993), and JUERGENSMEYER & ROBERTS, *supra* note 19, at 427–28 (West 1998). *See also* Michael J. Davis & Robert L. Glicksman, *To the Promised Land: A Century of Wandering and a Final Homeland for the Due Process and Taking Clauses,* 68 OR. L. REV. 393 (1989). However, the *Agins* test has been consistently restated, without much analysis, in the line of Supreme Court takings cases decided throughout the 1980s and 1990s. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). Ironically, substantive due process judicial review of social and economic laws has become increasingly less frequent and usually unsuccessful as the federal courts have been reluctant to revive the intrusive review associated with the *Lochner* era. However, the substantive due process "takings" argument, with its recent Supreme Court approval, has found its way into modern land-use cases including the *Del Monte Dunes* litigation where it was central to the jury's verdict that the city had taken the plaintiff's property.

33. *City of Monterey v. Del Monte Dunes,* 119 S. Ct. at 1642–45 (Kennedy, J., Rehnquist, J., Stevens, J., and Thomas, J., concurring), 1645–50 (Scalia, J., concurring in result).

34. *Id.* at 1634.

35. *Id.* To reinforce this point, the unanimous portion of the opinion added that the rough proportionality test of *Dolan* was "inapposite to a case such as this one." *Id.*

> *if granted an extension),* that the plan's layout would damage the environment *(even though the location of the development on the property was necessitated by the city's demands for a public beach, view corridors, and a buffer zone next to the state park),* and that the plan would disrupt the habitat of the Smith's Blue Butterfly *(even though the plan would remove the encroaching ice plant and preserve or restore buckwheat habitat on almost half of the property, and even though only one larva had ever been found on the property).*[36]

While Justice Kennedy did not specifically link these parenthetical rebuttals to the city's reasons for denial to the *Agins* standard, it is evident that they could bolster a jury's determination that frustrated negotiations and the ultimate development denial could be found insufficiently supportive of legitimate state interests.

When addressing the verdict finding a regulatory taking, the Supreme Court selectively affirmed the Ninth Circuit's reasoning. Since the trial court instructions did not mention proportionality, the high court averted supporting the applicability of the *Dolan* test.[37] Rather, the unanimous Court relied on the appellate conclusion that a reasonable jury could find that a nexus was lacking between the development denial and the legitimate public interests of local land-use regulation.[38] Justice Kennedy's opinion stated further that it was not the city's general zoning powers, but rather the particular zoning decision that was at issue.[39] A majority of the Court then concluded that the trial judge's instructions correctly limited the jury's scope of inquiry to *not* "consider the reasonableness, per se, of the customized, ad hoc conditions imposed on the property's development."

> Rather, the jury was instructed to consider whether the city's denial of the final proposal was reasonably related to a legitimate public purpose. Even with regard to this issue, however, the jury was not given free rein to second-guess the city's land-use policies. Rather, the jury was instructed, in unmistakable terms, that the various purposes asserted by the city were legitimate public interests.
>
> The jury, furthermore, was not asked to evaluate the city's decision in isolation but rather in context, and, in particular, in light of the tortuous and protracted history of attempts to develop the property.
>
> In short, the question submitted to the jury on this issue was confined to whether, in light of all the history and the context of the case, the city's particular decision to deny Del Monte Dunes' final development proposal was reasonably related to the city's proffered justifications. This 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.[40]

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36. *Id.* at 1633 (emphasis added).
37. *Id.* at 1635.
38. 119 S. Ct. at 1635.
39. *Id.*
40. *Id.* at 1636–37 (citations omitted). The Supreme Court majority also referenced a trial statement from developer's counsel:

> 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,

These validated instructions provide conflicting messages: the matter is confined first to the specific municipal decision to deny the development; however, this ultimate denial may be linked to the entire record of city-developer interactions. With these dual directives, the jury could reason a regulatory takings conclusion incorporating substantive inquiry into the fairness of the entire development review process.

II. *Nollan/Dolan* Decisions Continue to Limit Rough Proportionality to Land Use

Decisions through mid-1999 continue to limit *Nollan* and *Dolan's* applicability to land-use exactions. A follow-up Eighth Circuit federal appeals decision reaffirmed *Dolan's* applicability to a mandatory land dedication condition for road improvements. Two Washington appellate decisions apply high scrutiny to onsite and offsite road exactions. The Maine Supreme Court applied this two-part test with greater deference to local decision-making, while California's *Landgate* decision found the test inapplicable to coastal development permit denial. Other recent cases reinforce *Dolan's* limitation to physical dedications, and therefore inapplicable to economic exactions in the contexts of relocation assistance exactions and rent control.

A. Dolan *Rough Proportionality Applied to Conditional Development Approvals*

In its second review of a case remanded for application of the *Dolan* test,[41] the federal Eighth Circuit sustained the district court's conclusion that the city failed to sustain its burden to show rough proportionality. In *Goss v. City of Little Rock* (II),[42] the city had denied a commercial rezoning application when the property owner refused to accept a required dedication of 22 percent of his land for expansion of an adjacent highway.[43] In the remanded trial, the district court concluded that a taking occurred due to the government's failure to make an "individualized determination that the required dedication is related both in nature and scope to the proposed development."[44]

devoting and [giving] to the State all this habitat area. One-third [of the] property is going to be given away for the public use forever. That's not what we filed the lawsuit about (conceding 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 boardwalks").

119 S. Ct. at 1636 (citations omitted).

41. *See* Goss v. Little Rock, 90 F.3d 306, 310 (8th Cir. 1996).
42. 151 F.3d 861 (8th Cir. 1998).
43. *Id.* at 862.
44. *Id.* (citing *Dolan,* 512 U.S. at 391).

The Eighth Circuit sustained the trial court holdings that: the city did meet the *Nolan* nexus requirement based on its interest in preventing increased traffic that could result from commercial use,[45] but did not sufficiently prove a rough proportionality between the dedication and speculative traffic impacts.[46] The appellate court also dismissed a substantive due process claim as irrelevant to the takings issue,[47] and sustained the district court's denial of compensatory damages.[48] However, it reversed the district court's remedy commanding a rezoning without the required dedication,[49] and enabled a partial award of attorney fees commensurate with the property owner's limited success in litigation.[50] Ironically, the court notes that the city could deny the rezoning outright, i.e., without the dedication condition.[51] Since *Goss II* pre-dates the Supreme Court's *Del Monte Dunes* decision, future denials or conditions could be affected by evolving takings doctrine and potential jury determination of appropriate remedies.

Two Washington Division Two Court of Appeals decisions apply substantial detail to invalidate development conditions. *Burton v. Clark County*[52] found that the county had not sustained its burden of proof under *Dolan* in conditioning approval of a three-lot short plat on dedicating a right-of-way and building a road, curbs, and sidewalks. While the court accepted the legitimate governmental purpose for street connectivity within the county,[53] it found that the record lacked a basis for inferring that the exacted road would connect to a nearby avenue in the foreseeable future. Thus, the county had failed in its burden to show that the exaction would solve or even alleviate the traffic problems it identified.[54]

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45. *Id.* at 863.

46. The city's witness referred to traffic impacts that could "conceivably" be generated if a strip mall were erected, but could not refer to any plans or reason to expect one to be built. 151 F.3d at 863.

47. *Id.*

48. *Id.* at 864.

49. *Id.* at 863–64.

50. *Id.* at 864–66.

51. 151 F.3d at 864.

52. 958 P.2d 343 (Wash. Ct. App. 1998), *pet. for rev. denied,* 978 P.2d 1097 (Wash. 1999).

53. *Id.* at 349.

54. The *Burton* court identified four elements in *Nollan, Dolan,* and Washington courts:

> First, when the government conditions a land-use permit, it must identify a public problem or problems that the condition is designed to address. . . . Second, the government must show that the development for which a permit is sought will create or exacerbate the identified public problem. . . .
>
> Third, the government must show that its proposed condition or exaction (which in plain terms is just the government's proposed solution to the identified public

In *Benchmark Land Co. v. City of Battle Ground,*[55] the city required a proposed twenty-acre subdivision to pay for constructing half-street improvements to an adjoining, but unconnected street.[56] The court rejected the defenses that *Dolan* would not apply because the ordinance applied to all new subdivisions,[57] or that it involved a fee rather that direct land dedication.[58] Both the town's and Benchmark's traffic studies concluded that traffic increases on this street would be minimal.[59] The appellate court concluded that the city's ordinance failed to meet the requirement of rough proportionality because there was "no necessary correlation between the extent a development borders a street and the extent to which residents of the development will actually use the street."[60]

The Maine Supreme Court applied the two-part *Nollan/Dolan* test less demandingly to sustain a subdivision approval condition requiring a fire protection easement and construction of a fire pond.[61] Its review of the record granted initial deference to the town's legislative program, but noted that the rough proportionality standard cannot be satisfied by a conclusory statement made by the government authority.[62] The court then considered how the ordinance was applied to the property and held

problem) tends to solve, or at least to alleviate, the identified public problem. In other words, the government must show a relationship ("nexus") between the proposed solution and the identified problem, and such relationship cannot exist unless the proposed solution has a tendency to solve or alleviate the identified problem.

Fourth, the government must show that its proposed solution to the identified public problem is "roughly proportional" to that part of the problem that is created or exacerbated by the landowner's development.

When combined, these four propositions boil down to two relationships: a relationship between the project and the identified public problem, and a relationship between the identified public problem and the proposed solution to that problem. The required relationship between project and problem is shown by establishing the first and second propositions set forth above, while the required relationship between problem and solution is shown by establishing the third and fourth propositions set forth above. The ultimate goal is to show that the proposed condition or exaction (i.e., the proposed solution to an identified public problem) is reasonably related to all or part of an identified public problem that arises from (i.e., is created or exacerbated by) the development project. Unless the government makes this showing, it lacks a "legitimate state interest" or a "legitimate public purpose" in imposing the condition or exaction.

Id. at 353–55.

55. 972 P.2d 944 (Wash. Ct. App. 1999).

56. *Id.* at 946.

57. *Id.* at 949.

58. *Id.* at 949–50. The court relied on the reasoning from the remanded California decision in *Ehrlich v. Culver City*, 911 P.2d 429 (Cal. 1996), *on remand from* Ehrlich v. City of Culver City, 512 U.S. 1231 (1994).

59. Benchmark v. City of Battle Ground, 972 P.2d at 949.

60. *Id.*

61. Curtis v. South Thomaston, 708 A.2d 657, 658–59 (Me. 1998).

62. *Id.* at 659.

that a "more than sufficient proportionality exists between the fire protection demands created by the subdivision plan and the easement requirement designed to meet these demands."[63]

In *Landgate, Inc. v. California Coastal Commission,*[64] the California Supreme Court held in a closely divided four-to-three decision that *Nollan/Dolan* was inapplicable to a temporary takings claim arising out of a denial of a development permit.[65] The case involved denial of a coastal development permit to build a single-family residence in the City of Malibu.[66] These permits are required in addition to any municipal land-use approvals.[67] The commission denied the permit and an application for a lot line adjustment upon the grounds of excessive building height and grading.[68] The ultimate result for the landowner was a two-year delay in the permit approval process.[69] The trial court entered judgment in an inverse condemnation action in favor of the plaintiff, and awarded damages in excess of $155,000.[70] The intermediate appellate court affirmed this judgment; but the Supreme Court reversed and remanded to the trial court, with directions to grant the commission's motion for summary judgment on the takings claim and plaintiff's motion for summary adjudication.[71]

Against this factual and procedural background, the Supreme Court initially held that the commission's denial of the permit application advanced legitimate governmental interests in minimizing erosion and unsightly development in the coastal area.[72] In addition, the California high court held that a legally erroneous decision of a government agency during the development approval process does not result in the sort of delay which constitutes a temporary taking. After conducting an extensive survey of applicable law, the court concluded that a regulatory mistake resulting in delay does not, by itself, amount to a taking of property.[73] In this case, the two-year time loss was characterized as

63. *Id.* at 660.
64. 953 P.2d 1188 (Cal. 1998).
65. *Id.* at 1198.
66. *Id.* at 1189–94.
67. *Id.* at 1198.
68. *Id.* at 1191–92.
69. *Landgate,* 953 P.2d at 1193.
70. *Id.*
71. *Id.* at 1204.
72. *Id.* at 1191–92.
73. *Id.* at 1195–98. In reaching this decision, the California high court observed that recent cases suggest that judicial review of governmental conditions imposed upon development will be more deferential when "the conditions are simply restrictions on land use" rather than "requirements that the property owner convey a portion of his property" or "pay development fees imposed on a property owner on an individual and discretionary basis." *Id.* at 1198–99.

a "normal delay"[74] countenanced in *First English Church v. Los Angeles County.*[75] Viewed within this perspective, the Supreme Court rejected the application of *Nollan* and *Ehrlich* because the instant case neither embraced compulsory conveyances of land nor the imposition of individualized development fees.[76] Instead, the case involved the *denial* of a permit without these kinds of exactions.[77]

Consequently, *Landgate* indicates that *Nollan/Dolan* will be applied in a California takings challenge only when the conditions of development approval encompass conveyances or monetary exactions, and in the case of monetary exactions, they must be adjudicatively imposed, instead of legislatively imposed.[78] Any other condition of development approval will be viewed as a "land use restriction" which will cause a regulatory taking only when the effect of the restriction is to deprive the property owner of all economically viable, beneficial, or productive use.[79] The *Landgate* case is also interesting from a *Nollan/Dolan* standpoint because the court held that the proper judicial inquiry is an objective one: whether there is a "sufficient connection" between the land-use regulation and a legitimate governmental purpose so that the former may be said to substantially advance the latter.[80]

B. Dolan *Test Held Inapplicable to Non-Land Use Economic Regulations*

In *Garneau v. City of Seattle,*[81] the Ninth Circuit Court of Appeals held that the *Nollan/Dolan* heightened scrutiny standard of review does not apply to facial taking claims against a Tenant Relocation Assistance Ordinance.[82] Pursuant to Washington State's Growth Management Act, the Seattle law required landlords to pay to displaced tenants the sum of $1,000 upon demolition, substantial rehabilitation, change of use, or restriction removal of low-income rental units located within the city.[83] Owners of rental units within the city brought a takings claim on the ground that the forced relocation payment amounted to an unconstitu-

74. *Landgate,* 953 P.2d at 1193–95.
75. 482 U.S. 304 (1987).
76. 953 P.2d at 1198–99.
77. *Id. But see* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 34 F. Supp. 2d 1226, 1234–35, 1255 (Nev. 1999) (interim damage awards for building moratorium ordinances and continued staff development denials for the period from 1981 through 1986).
78. *Landgate,* 953 P.2d at 1198–99.
79. *Id.* at 1199.
80. *Id.*
81. 147 F.3d 802 (9th Cir. 1998).
82. *Id.* at 808–11.
83. *Id.* at 804.

tional exaction in violation of the *Dolan* standard of review. Plaintiffs' argument was based on the $1,000 per tenant monetary exaction being "not roughly proportional to the harm caused by their proposed redevelopment project."[84]

Plaintiff property owners asserted both facial and as-applied regulatory takings claims grounded in the *Nollan/Dolan* analytical approach.[85] The majority through Judge Brunetti initially concluded that the *Nollan/Dolan* cases do not apply to a facial attack on a monetary exaction ordinance.[86] Consequently, the majority affirmed the district court's summary judgment on the grounds that (1) the *Nollan/Dolan* cases did not apply to facial claims, only to as-applied claims; (2) the plaintiffs voluntarily dismissed their as-applied claims; and (3) the plaintiffs willfully refused to produce any evidence of economic impact.[87] In a sober conclusion to this case, the majority observed that it was forced to uphold the city's ordinance in large part because evidence of economic impact of the ordinance was relevant to plaintiffs' takings claims, yet the plaintiffs steadfastly refused to produce such evidence.[88] A concurring opinion decided that the *Dolan* case did not apply because the owners did not put forth any argument that the ordinance dispossessed them of any property or impaired the development potential (or

84. *Id.* at 806. The plaintiffs also asserted claims based upon the Substantive Due Process Clause; however, these claims were rejected summarily based upon *Macri v. King County,* 126 F.3d 1125, 1129 (9th Cir. 1997), because the Takings Clause provides an explicit source of constitutional protection against the challenged governmental conduct, in which case, a substantive due process claim under these circumstances is no longer recognized by the Ninth Circuit as a matter of law. *See also* Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) (*en banc*), and Patel v. Penman, 103 F.3d 868 (9th Cir. 1996), which manifest the law of the circuit that the Substantive Due Process Clause may not be used as a substitute for a regulatory takings claim grounded in the Fifth and Fourteenth Amendments. For discussion, *see* Michael C. Spata, *Armendariz v. Penman: The Ninth Circuit's Requiem for the Substantive Due Process Clause as an Alternative to a Regulatory Takings Claim,* 1997 CAL. ENVT'L. L. REP. 251, 257–59 (Oct. 1997), *cited in* CURTIN'S CALIFORNIA LAND USE PLANNING LAW 179 n.9 (18th ed. 1998).

85. *Garneau,* 147 F.3d at 805. Following the close of discovery and the submittal of a lengthy stipulation of facts, the district court granted the city's motion for summary judgment against the facial takings claims on the ground that the ordinance reasonably related to a legitimate state interest. *Id.* at 806. The district court also dismissed the substantive due process claims for relief. *Id.*

86. *Id.* at 806–07. The court reasoned that the nucleus of facts did not present a categorical or per se taking under *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1016 (1992), in which case, the multi-factor test announced in *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104 (1978), was applicable, which required, in part, that the aggrieved party show the economic impact of the regulation and the extent to which the regulation interfered with distinct investment-backed expectations. *Id.* at 807.

87. *Garneau,* 147 F.3d at 807–13.

88. *Id.*

value) of the property.[89] Interestingly, this opinion stated that the *Dolan* analysis is better rooted in a substantive due process and equal protection analysis rather than a takings analysis.[90] Judge O'Scanlain dissented on the ground that the *Nollan/Dolan* cases should apply.[91]

In *Santa Monica Beach, Ltd. v. Superior Court (Santa Monica Rent Control Board),*[92] a divided California Supreme Court held that the general application of a rent control ordinance to a particular individual was not subject to the heightened scrutiny test articulated in the *Nollan/Dolan* decisions.[93] The plaintiff landlord sought an adjustment under a local rent control law for a twelve-unit apartment building.[94] Following administrative proceedings held pursuant to the local ordinance, a hearing examiner issued a ruling allowing a modest rent increase.[95] The rent control board affirmed this ruling, and the landlord filed a mandamus action and a complaint for inverse condemnation under the United States and California Constitutions.[96]

In its complaint, Santa Monica Beach, Ltd. contended that the application of the city's rent control law constituted a taking because the application of the ordinance did not substantially advance its stated goals to produce affordable housing for the poor and elderly.[97] The plaintiff contended further that the ordinance did not substantially mitigate the purported social harm that would otherwise result from the unregulated use of rental property because the ordinance's effect was to *reduce* affordable rental housing rather than to *increase* its supply. Based upon this reasoning, the plaintiff contended that, under the heightened scrutiny test, the ordinance did not substantially advance its stated purpose.[98] On appeal of the trial court's dismissal, the appellate

89. *Id.* at 819.
90. *Id.* at 819–21.
91. *Id.* at 813 (O'Scanlain, J., concurring in part and dissenting in part). His dissenting view reasoned that under *Nollan/Dolan*: (1) the exactions were not roughly proportional to the harm caused by the landlords; (2) the Supreme Court's vacating and remanding of *Ehrlich v. City of Culver City,* 512 U.S. 1231 (1994), to the California Supreme Court suggests that the *Dolan* "rough proportionality" test applies to monetary exactions; and (3) the exaction was tantamount to a physical occupation because it deprived the owners of their right to exclude the tenants. *Id.* at 813–17.
92. 968 P.2d 993 (Cal. 1999). For discussion of Santa Monica Beach, Ltd., see Daniel J. Curtin & M. Johanna Sherlin, *California Supreme Court Rejects Higher-Scrutiny Standard for Takings Claim Based on Rent Control Law, Adopts "Hands-Off" Policy For Land Use Legislation,* MCCUTCHEN UPDATE (Jan. 8, 1999); Michael M. Berger, Golden State of Confusion, S.F. DAILY J., Jan. 28, 1999, at 4, col.2; and Susannah T. French, *Commentary—Heightened Scrutiny Inapplicable to Claims of Taking by Rent Control,* 1999 CAL. ENVT'L. L. REP. 54 (Feb. 1999).
93. *Santa Monica Beach,* 968 P.2d at 1005–06.
94. *Id.* at 996.
95. *Id.*
96. *Id.* at 996–97.
97. *Id.* at 997.
98. *Santa Monica Beach,* 968 P.2d at 997–98.

court directed that the complaint for inverse condemnation be reinstated, and that the *Nollan* standard be applied to the city's rent control law.[99] Shortly thereafter, the Supreme Court granted review, and held that "the heightened intermediate scrutiny standard articulated in *Nollan* and *Dolan* does not apply" to a rent control challenge.[100] Instead, the standard of review for generally applicable rent control laws must be at least as deferential as for generally applicable zoning laws and other legislative land-use controls; and as such, the party challenging rent control must show that the application of the law constitutes "an arbitrary regulation of property rights."[101] The California high court further stated that heightened scrutiny is more appropriate for adjudicatory decisions involving land dedications and development fees that are imposed on an individualized basis.[102]

A novelty in the *Santa Monica* takings challenge was that the landlord conceded the validity of the rent control ordinance adopted many years earlier, but with the passage of time, the purposes of the ordinance were not accomplished. After considering this factual paradigm, the majority stated that there is no constitutional requirement that legislation substantially serve stated goals.[103] The majority concluded by saying that the plaintiff was still free to pursue its administrative mandamus claim on the grounds that the city exceeded its legal authority under its local charter, and that the board's ruling deprived the plaintiff of a fair return on investment.[104]

A concurring opinion in the *Santa Monica* rent control as illegal exactions challenge indicated that there were two questions raised by the *Nollan/Dolan* cases which produced a great deal of uncertainty; namely, (1) What is the meaning of the "substantially advance" test outside the scope of *Nollan/Dolan* cases? and (2) Outside the *Nollan/Dolan* context, is a means-end test an appropriate measure of whether a regulatory taking has occurred?[105] Although Justice Kennard was inclined to interpret the "substantially advance" test as a "rational relationship" test consistent with traditional substantive due process analysis, she urged the United States Supreme Court to resolve these questions when the next opportunity arises.[106]

99. *Id.* at 998.
100. *Id.* at 1001.
101. *Id.*
102. *Id.* at 1001–02.
103. *Santa Monica Beach*, 968 P.2d at 1004.
104. *Id.* at 1007.
105. *Id.* at 1008.
106. *Id.* at 1008–09.

The dissenting opinions would find *Nollan/Dolan* applicable to rent control. Justice Baxter strongly asserted that the trial court should have been allowed to carry out its constitutionally mandated judicial obligation to determine, on the basis of evidence to be presented, whether application of the Santa Monica ordinance has taken property from the plaintiff without just compensation.[107] He concluded that the ordinance in question forces owners of rental property to bear a public burden for which the takings clause mandates just compensation under a *Nollan/Dolan* analytical framework.[108]

Justice Chinn also criticized that the majority "inappropriately conflates takings jurisprudence with due process jurisprudence. . . ."[109] He noted that even if the court was skeptical about plaintiff's ability to prove its case, it should be given the chance to try without having to prove a due process case when it initiated a takings case.[110] A dissenting opinion by Justice Brown challenged the majority's assertion that the heightened intermediate scrutiny standard articulated in *Nollan/Dolan* did not apply as more "wish than fact."[111] She concluded by stating that if rent control measures are capable of withstanding a *Nollan*-inspired takings analysis, then the U.S. Supreme Court "ought to tell us so, preferably sooner than later."[112]

III. Impact Fee Case Law Update

In contrast to potential volatility in current exactions law, impact fee cases continue predictably to address threshold and administrative issues. Colorado's statewide school impact fee may be administered by individual school districts. The Michigan Supreme Court distinguished a stormwater regulatory charge as a tax subject to voter approval requirements. Other cases address issues in impact fee administration including standing,[113] notice of appeal rights,[114] and refunds.[115]

107. *Id.* at 983–1018.
108. *Santa Monica Beach,* 968 P.2d at 1016.
109. *Id.*
110. *Id.* at 1040.
111. *Id.* at 1047.
112. *Id.*
113. *See, e.g.,* Barnhart v. City of Fayetteville, 977 S.W.2d 225, 227–28 (Ark. 1998) (affirming dismissal of challenge to city's sanitation charge based on claim of contract); Building Industry Ass'n v. Mannheim Township, 710 A.2d 141, 147 (Pa. Cmmwth. 1998) (Building Association lacked standing to seek refund of impact fees paid by its members).
114. *See* St. Charles Assocs. v. County Comm'rs, 1998 Md. Tax LEXIS 3 (Md. Tax Ct. 1998) (remanding impact fee assessment notice that did not indicate process for appeals).
115. *See id.* at *1–2; *Building Industry Ass'n,* 710 A.2d at 147.

The Colorado Supreme Court sustained a constitutional amendment establishing a statewide school impact fee against a single-subject state constitutional challenge.[116] Under this new provision, local school districts may implement the fee of up to $7,500 per newly constructed housing unit through initiative or referendum. Collected funds are required to be "used for public school facilities necessitated by the increased student population. . . ."[117]

Michigan's Supreme Court proposed a strict standard for permissible regulatory charges:

> Where the charge for either storm or sanitary sewers reflects the actual costs of use, metered with relative precision in accordance with available technology, including some capital investment component, sewerage may properly be viewed as a utility service for which usage-based charges are permissible, and not as a disguised tax. . . .[118]

The court found that while the charge would be applied equally to all ratepayers, 75 percent were already served by a separated storm and sanitary sewer system, many of which were financed through special assessments.[119] Under Michigan law, the court concluded that this was "an investment in infrastructure as opposed to a fee designed simply to defray the costs of a regulatory activity."[120] Once characterized as a tax rather than regulation, the stormwater charge could not be enacted without prior voter approval.[121]

IV. Concluding Observations

As the litigation record in *Del Monte Dunes* indicates, the initiative to extend the constitutional meaning and effect of the Takings Clause can originate in the lower federal courts without suggestion from the parties themselves. These doctrinal extensions make it possible for a federal judge or a jury to weigh the constitutionality of land-use regulatory actions under the Takings Clause while using due process concepts. Such possibilities of federal court intervention become even more disturbing to state and local government when the constitutionally mandated compensation remedy of the Takings Clause is considered. Even in the heyday of substantive due process judicial review symbolized by *Lochner v. New York,*[122] the federal courts could only invalidate state legis-

116. Howes v. Hayes, 962 P.2d 927 (Colo. 1998).
117. *Id.* at 928.
118. Bolt v. City of Lansing, 587 N.W.2d 264 (Mich. 1998), *reh'g denied,* 459 Mich. 1233 (1999).
119. *Id.* at 266.
120. *Id.* at 270.
121. *Id.* at 266, 268–74.
122. 198 U.S. 45, 64–65 (1905) (invalidating state labor law limiting work week to sixty hours on due process grounds).

lation. The *Del Monte Dunes* case sets the stage for even more sweeping court review under the Takings Clause as interpreted by juries.

The Supreme Court's decision not to extend *Dolan* rough proportionality analysis into review of regulatory discretion denying a development permit has been heralded as a victory for land-use control agencies. Rejection of the Ninth Circuit's adoption of a novel, unargued constitutional rule may also send a thwarting message toward judicial activism in the lower federal courts. However, the *Del Monte Dunes* decision clearly opens the door in property-based civil rights actions for takings and substantive due process claims emanating from development denials. Furthermore, the Court has already ruled in *Dolan* that "disproportionate" land-use conditions may be invalidated. Any of these regulatory challenges could reach a federal or state jury if they survive preliminary challenges as takings cases with potentially serious compensation at issue. These are all potential consequences of implementing the *Agins* definition of an unconstitutional taking by way of § 1983 and constitutional actions.

Thus, the millennium brings an era of jury empowerment to determine legitimacy of governmental purpose, reasonable relationships between regulatory intent and individual development conditions or denials, and valuations for compensatory takings. Inquiries into whether a regulated landowner has been deprived of all economically viable use involves such quantitative analysis, doctrinal inquiries, and discernment that Professor Haar has compared them to the physicist's search for the quark.[123] Justice Kennedy also acknowledged that this task presents juries with a "more difficult question."[124] Future cases will determine the wisdom of extending jury resolution of these complex land-use issues. Hopefully, the Supreme Court will also clarify the confusing overlap between the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth and for once explain why the Constitution mandates that a violation of substantive due process must be remedied by Fifth Amendment compensation.

123. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 199 (1985); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 650 (Brennan, J., dissenting). "The attempt to determine when regulation goes so far that it becomes, literally or figuratively, a 'taking' has been called the 'lawyer's equivalent of the physicist's hunt for the quark.' C. HAAR, LAND-USE PLANNING 766 (3d ed. 1976)." *Williamson County*, 473 U.S. at 199, n.17.

124. *Monterey v. Del Monte Dunes*, 119 S. Ct. at 1644.