A PRIMER ON TAKINGS LAW

PRIVATE PROPERTY AND THE PUBLIC GOOD:
Achieving a Balance for Utah

Michael M. Berger
Berger & Norton
1620 26th Street
Suite 200 South
Santa Monica CA 90404

Ogden Eccles Conference Center
Ogden, Utah
October 4, 2000

I. Introduction

Some people have opined that the U.S. Supreme Court's recent land use decisions can be viewed as involving a "conservative constitutional agenda." While "conservatives" may generally applaud those decisions, that generalization may not be very useful.

Loose talk about "property rights," for example, tends to misfocus and obscure the issues. The rights of property owners receive constitutional protection not because there is anything particularly sacred about property per se, but because of the impact on individuals of the curtailment of rights associated with the property they own. [1/] As the Supreme Court put it:

> "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." [2/]

These are not "property rights" decisions we are analyzing; they are "individual rights" decisions:

> "The real meaning of *First English* lies in governmental accountability to the individual because that is what the Bill of Rights is truly about. *First English* is controversial for many precisely because it subordinates political expediency for constitutional principle, just as *Brown v. Board of Education* did in the 1950s, *Miranda v. Arizona* did in the 1960s and *Roe v. Wade* in the 1970s. Under the United States Constitution, the end does not justify the means when it comes to clashes between individual and state. The Constitution was never

---

[1/] As Justice Holmes put it, "[p]roperty is protected because such protection answers a demand of human nature, and therefore takes the place of a fight." (*Davis v. Mills*, 194 US 451, 457 [1904]) *See generally*, Berger, To Regulate, or Not to Regulate — Is That the Question? Reflections on the Supposed Dichotomy Between Environmental Protection and Private Property Rights, 8 Loy. L.A.L. Rev. 253, 263-267 (1975); Radin, Property and Personhood, 34 Stan. L. Rev. 957 (1982).

[2/] *Lynch v. Household Fin. Corp.*, 405 US 538, 552 (1972) (citing numerous authorities). If nothing else, recent developments in the Soviet Union and its east European satellites seem to bear out the basic truth of this conclusion.

> meant to make things easy but to make them hard. . . . [T]he Bill of Rights is not just words deserving facile respect; it has teeth." [3/]

Thus, it may be well at the outset to set aside the notion that the Supreme Court's property decisions can be analyzed as "liberal" or "conservative." Rather than the traditional, linear, spectrum (with liberals on one end and conservatives on the other) with which analysts traditionally deal, the property cases sometimes bend that spectrum into a circle, with liberals and conservatives joining forces to protect individual rights.

[3/] Bauman, The Supreme Court Becomes Serious About Takings Law: The *First Church*, *Keystone* and *Irving* Cases, 10 Zon. & Plan. L. Rep. 145, 151 (1987).

For example, in *First English Evangelical Lutheran Church v. County of Los Angeles*, [4]/ the majority which ruled in favor of the property owner consisted of six Justices whose views span the entire philosophical spectrum of the Court. They were the Court's most conservative members (Chief Justice Rehnquist and Justice Scalia), its most liberal members (Justices Brennan and Marshall), and two of its centrists (Justices Powell and White).

The voting blocs continually shift. The conservative Chief Justice Rehnquist wrote the majority opinion which turned down a challenge to a California rent control ordinance. [5]/ In the three major 1987 decisions, [6]/ Justice White was the only one always in the majority. Chief Justice Rehnquist and Justices Brennan, Marshall, Powell, and Scalia were in the majority twice, while the views of Justices Stevens, Blackmun, and O'Connor prevailed only once. No Justice dissented in all three cases. In *Golden State Transit Corp. v. City of Los Angeles*, [7]/ in which the Court declared that a taxi corporation had the right to sue a city for damages under §1983, the majority consisted of the four liberals plus Justices White and Scalia. If you've lost count, Chief Justice Rehnquist and Justices Kennedy and O'Connor voted against this corporate remedy.

Even with a scorecard, it's a little difficult to keep the players straight. The message of all this is that things are still in great flux, with the Supreme Court acting as a latter day Delphic oracle, issuing vague pronouncements with which lower courts and ordinary citizens must struggle. The Supreme Court of Washington made the point succinctly and poignently:

> "Despite these attempts [i.e., *First English*, *Nollan*, and *Keystone*], the definitive answers, so necessary for state courts to make reasoned determinations concerning minimum federal due process requirements, remain unavailable. Our task is complicated further by the ambiguities contained in recent Supreme Court decisions and by the fact that despite a three-month separation, recent cases do not cite each other. As Justice Stevens observed, '[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of takings jurisprudence." [8]/

II. THE UNDERLYING CONCEPTS

---

[4]/ 482 US 304 (1987).

[5]/ *Pennell v. City of San Jose*, 485 US 1 (1988).

[6]/ *First English*; *Nollan v. California Coastal Commn.*, 483 US 825 (1987); and *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 US 470 (1987).

[7]/ 493 US ___, 107 L Ed 2d 420 (1989).

[8]/ *Orion Corp. v. State*, 109 Wash 2d 621, 653 (1987).

The first thing to understand about Fifth Amendment taking law is that there are no precise rules. The Supreme Court has repeatedly concluded that it is unable to come up with a single litmus test for what constitutes a taking and that each case must be examined on an "ad hoc, factual" basis to see how the facts comport with Fifth Amendment concepts. [9]/ As a Court of Appeals noted, this ad hoc analysis requires particular care not to prematurely dismiss taking cases on their pleadings:

> "This admonition is perhaps nowhere so apt as in cases involving claims of inverse condemnation where the Supreme Court itself has admitted its inability 'to develop any "set formula"' for determining when compensation should be paid . . . While dismissal of a complaint for inverse condemnation is not always inappropriate, such a dismissal must be reviewed with particular skepticism to assure that the plaintiffs are not denied a full and fair opportunity to present their claims." [10]/

Even the "rules" which have been provided have not been sufficiently fleshed out to provide clear guidance. In its recent "takings" cases, the U.S. Supreme Court has indicated that a taking occurs if a regulation deprives a property owner of "economically viable use" of his land, [11]/ and that a property owner's "reasonable, investment-backed, profit expectations" are protected against confiscation by state and local government land use regulations. [12]/ The problem is that in no case has the Court made any effort to either define these terms or to give guidance to lower courts in determining their meaning. As one commentator summed it up:

> "In 1978, the Supreme Court, after 91 years of producing nearly all the leading police power taking decisions, essentially gave up. Viewing the facts of Penn Central . . . as presenting a question of police power takings, the Supreme Court announced that there was no 'set formula' to resolve the question. Rather, said the Court, different fact patterns require different approaches for solution." [13]/

---

[9]/ *E.g.*, *Ruckelshaus v. Monsanto Co.*, 467 US 986, 1005 (1984); *Kaiser Aetna v. U.S.*, 444 US 164, 175 (1979); *Penn Central Transp. Co. v. City of New York*, 438 US 104, 124 (1978).

[10]/ *Hall v. City of Santa Barbara*, 813 F 2d 198, 201-202 (9th Cir 1986).

[11]/ *E.g.*, *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 94 L.Ed.2d 472, 488 (1987).

[12]/ *E.g.*, *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

[13]/ Stoebuck, Police Power, Takings, and Due Process, 37 Wash. & Lee L. Rev. 1057, 1068 (1980).

Thus, lower courts have generally sought to determine these issues by doing what judges and lawyers are most comfortable doing: examining the diminutions in value in earlier cases [14]/ which were held not to constitute a taking.

That creates another problem: the older cases were all decided before the Court announced either the concept of economically viable use or the concept of reasonable, investment-backed, profit expectations, [15]/ not to mention the rules announced or emphasized in *First English* and *Nollan*. Moreover, the Supreme Court cases in this group were either decided at a significantly earlier and less complicated time in the Nation's economic history, or were decided in the context of pleadings or proof which did not raise the issue of whether the questioned regulation was confiscatory.

A. The Bundle of Sticks

Because of its view that there is no precise formula for testing the constitutionality of property regulations and that, as a consequence, each case turns on an examination of its own ad hoc factual nature, the Supreme Court has regressed in its analysis to early precepts developed by property law professors trying to inculcate the concept of property into first year law students: the bundle of sticks analogy. As anyone who has suffered through the first year of a typical law school curriculum knows, property is not a thing, but a group of rights. That group of rights can be visualized as a bundle of sticks, with each stick representing an interest which is "property" (e.g., the right to use, possess, or transfer). The Fifth Amendment protects each of these interests as property. The Supreme Court's recent taking decisions have increasingly fallen back on the use of this analytical tool to either determine or explain why a taking has or has not occurred. [16]/

B. Economically Viable Use

---

[14]/ *E.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *William C. Haas Co. v. City of San Francisco*, 605 F.2d 1117 (9th Cir. 1979).

[15]/ Neither concept appears in land use cases — either state or federal — until after the Supreme Court's 1978 decision in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), in which they were first mentioned by the Supreme Court.

[16]/ For a critical analysis of some applications of this concept, *see* Berger, Anarchy Reigns Supreme, 29 J. Urb. & Contemp. L. 39, 48 (1985).

A formulation frequently stated by the Supreme Court is that a land use regulation effects a taking if it denies the owner "economically viable use" of his land. [17/] However, beyond stating the standard, the Supreme Court has not provided much specific guidance as to its meaning. That is undoubtedly a function of the cases with which the Court has chosen to work.

For example, in *Penn Central*, which involved the question of the construction of an office tower above New York's Grand Central Terminal, the owner conceded that the use then being made of the property provided it with a reasonable return. [18/] In *Agins*, *Hamilton Bank*, and *MacDonald*, the Court concluded that it could not expound on the issue, because it did not know what uses might be permitted by the local regulatory agency.

We do know that a deprivation of all use violates the standard. [19/] Beyond that, however, we are reduced to logic. The High Court must have had something in mind in coining the phrase "economically viable use."

Historically, the Court has been sensitive to the common sense notion that the right to use property is fundamental. (Real estate appraisers know that. They treat as axiomatic the concept that the value of land is determined by its use. [20/]) Most

---

[17/] *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 14 (1984); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Kaiser Aetna v. United States*, 444 U.S. 164, 174 n. 8 (1979); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 653 (dissenting opinion); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987); *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *Williamson County Regional Planning Commn. v. Hamilton Bank*, 473 U.S. 172 (1985); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

The test is usually framed in the alternative, *i.e.*, a taking occurs if either the regulation fails to substantially advance a legitimate state interest or it denies a property owner economically viable use of his land. For purposes of this discussion, it will be assumed that the regulation substantially advances a legitimate state interest. If it did not, then the regulation would be an invalid taking regardless of its economic impact. (*E.g.*, *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1274-75 [9th Cir. 1986].)

[18/] *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978).

[19/] *First English*, 482 U.S. at 321.

[20/] *E.g.*, American Institute of Real Estate Appraisers, **The Value of Real Estate** 11-27 (7th ed. 1978). *See* J. Shonkwiler & T. Morgan, 1 **Land Use Litigation** 179 (1986):

"Most regulations which are challenged as confiscatory result in restriction of the uses formerly permitted on the property.

recently, this received judicial recognition in *Nollan*, when the Court concluded that the right to use property inheres in the ownership and is not a governmentally conferred benefit. [21]/ The thought has earlier antecedents:

> "We have little difficulty accepting the theory that the use of valuable property . . . is itself a legally protectible property interest. Of the aggregate rights associated with any property interest, the right of use of property is perhaps of the highest order. One court put it succinctly:
>
> > ' "Property" is more than just the physical thing—the land, the bricks, the mortar—it is also the sum of all the rights and powers incident to ownership of the physical thing. It is the tangible and the intangible. Property

---

> Generally, there is a close correlation between depreciation in the fair market value of the property and change in the authorized uses."

[21]/ 483 U.S. at 833 n. 2.

> is composed of constituent elements and of these elements the right to use the physical thing to the exclusion of others is the most essential and beneficial. Without this right all other elements would be of little value.' " [22]/

When modified by the term "economically viable," the word "use" must mean more than some theoretically possible "use" which costs more to develop than the developer can recoup. It should not even take reference to a dictionary to conclude that "economically viable" means a use which is capable of producing a present (or at least foreseeable) income. [23]/ A "use" which engenders a loss (or which lacks even the possibility of producing a gain) cannot be considered to be "economically viable." [24]/ If anything, such a "use" is economically moribund. A recently published text put it succinctly: "Mere provision in the land use regulation for arguably beneficial and economically viable uses is insufficient to avoid a determination that the regulation effects a taking as applied to the property." [25]/

---

[22]/ *Dickman v. Commissioner*, 465 U.S. 330, 336 (1984). (Initial emphasis added; final emphasis in original.) *See also First English*, 96 L. Ed. 2d at 266; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

[23]/ *See Orion Corp. v. State*, 109 Wash. 2d 621 (1987) ("some present, possible, and reasonably profitable use" [*id.* at 642]; "denial of any profitable use" [*id.* at 664]); *Ranch 57 v. City of Yuma*, 152 Ariz. 218, ___, 731 P.2d 113 (1986) ("a use is not reasonable unless the landowner can make it economically productive"); *Kempf v. City of Iowa City*, 402 N.W.2d 393 (Iowa 1987).

[24]/ *Sheer v. Township of Evesham*, 184 N.J. Super. 11, 445 A.2d 46 (1982); *Kasparek v. Johnson County Bd. of Health*, 288 N.W.2d 511, ___ (Iowa 1980):

> "Where it appears that under existing zoning restrictions property must remain for an unpredictable future period unimproved, unproductive and a source of expense to the owners from heavy taxes, the zoning ordinance is unreasonable as to such property. A zoning of land [for a particular purpose] is unreasonable and confiscatory and therefore illegal where it is practically impossible to use the land in question for [that purpose]." (Quoting with approval; brackets, the court's.)

[25]/ J. Shonkwiler & T. Morgan, *supra* at 181.

Unfortunately, because of the Supreme Court's lack of guidance on the issue, lower courts have floundered in their attempts to make sense of the Court's pronouncements. A recent decision of the Ninth Circuit notes with understatement that, ". . . the precise meaning of 'economically viable use' of land is elusive and has not been clarified by the Supreme Court." [26]/ As a consequence, many lower courts refer simplistically to cases decided before *Agins* and the rest of the recent line of cases. Some of those earlier cases (such as *Euclid*, [27]/ *Hadacheck*, [28]/ and *Haas* [29]/) approved regulations which reduced the value of property by substantial amounts (up to 95% [*Haas*]).

The problem with simply importing those results into current cases to determine whether a regulation effects a taking is that none of those earlier cases examined the facts to determine whether the uses which remained to the property owner were "economically viable." Remember, that is a concept which wasn't even mentioned by the Court until *Penn Central*. Yet, because lower courts feel the need of something which looks like higher court authority, they latch onto these earlier cases and cite them as though they shed light on the viability issue. [30]/ They shed only confusion. In *Hadacheck*, for example, the Court concluded that a reduction in value from $800,000 to $60,000, as a result of an ordinance which compelled the closure of a brick manufacturing facility in favor of residential development, was insulated from attack because it was enacted for a proper public purpose. Because the Constitutional test in use at that time contained only that single requirement, rather than the alternative of deprivation of economically viable use, the current standard received no

---

[26]/ *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872, 877 (9th Cir. 1988)(amended opinion). *See also Ranch 57 v. City of Yuma*, 152 Ariz. 218, ___, 731 P.2d 113 (1986) ("Seemingly little has been done by the Court to clarify the statement of Justice Holmes 'that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'") Note, Hall v. City of Santa Barbara: The "Taking" of Property Through Rent Control, 1 B.Y.U.J. Pub. L. 363, 371-72 (1987); Comment, Land Use Takings and the Problem of Ripeness in the United States Supreme Court Cases, 1 B.Y.U.J. Pub. L. 375, 380 (1987); Comment, A New Approach to Regulatory Taking Analysis, 1 B.Y.U.J. Pub. L. 399, 400 (1987).

[27]/ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

[28]/ *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

[29]/ *William C. Haas Co. v. City of San Francisco*, 605 F.2d 1117 (9th Cir. 1979).

[30]/ *E.g.*, *Park Avenue Tower Associates v. City of New York*, 746 F.2d 135, 139-40 (2d Cir. 1984); *Pompa Constr. Corp. v. City of Saratoga Springs*, 706 F.2d 418, 425 (2d Cir. 1983); *MacLeod v. County of Santa Clara*, 749 F.2d 541, 548 (9th Cir. 1984); *Pace Resources, Inc. v. Shrewsbury Tp.*, 808 F.2d 1023, 1031 (3d Cir. 1987); *Ranch 57 v. City of Yuma*, 152 Ariz. 218, ___, 731 P.2d 113 (1986); *Oceanic California, Inc. v. City of San Jose*, 497 F. Supp. 962, 976 (N.D. Cal. 1980); *Nasser v. City of Homewood*, 671 F.2d 432, 438 (11th Cir. 1982); *Land Associates v. Metropolitan Airport Auth.*, 547 F. Supp. 1128, 1137 (M.D. Tenn. 1982); *Jackson v. City Council,* 659 F. Supp. 470, 476 (W.D. Va. 1987).

discussion. The opinion thus has no value in the current context. Yet it continues to be cited, for lack of any other guidance from the Court.

It would not only be nice, but helpful, if there were more. But the Supreme Court has refused to elaborate further and, thus far, has refused to accept additional cases in which it might further explain this precept.

C. Investment-Backed Expectations

The Supreme Court has repeatedly noted that a land use regulation's interference with a property owner's "reasonable, [or distinct] investment-backed expectations" can constitute a taking. [31]/ More recently, the High Court has added the word "profit" to that formulation, [32]/ thus clearly stating that reasonable profit expectations, backed by investment, are protected against governmental destruction by the just compensation clause of the Fifth Amendment.

Here, also, the High Court has provided scant guidance as to the meaning and application of this term. [33]/ While we know that, to be protected, the expectation must be more than a "unilateral expectation or an abstract need" [34]/ and that the

---

[31]/ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Andrus v. Allard*, 444 U.S. 51 (1979); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Hodel v. Virginia Surface Min. & Recl. Assn.*, 452 U.S. 264 (1981); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1 (1984); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *United States v. Locke,* 471, U.S. 84 (1985); *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987).

[32]/ *E.g., Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172, 200 (1985).

[33]/ It is important to note that the concept of investment-backed expectations is different from that of economically viable use. Expectations may be sufficiently interfered with to require compensation even though some (even substantial) beneficial use remains. (J. Shonkwiler & T. Morgan, supra at 182.)

[34]/ *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). The Court blurred the concept from the outset when it noted, in *Penn Central*, that ". . . the submission that [the property owners] may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest they heretofore had believed was available for development is quite simply untenable." (438 U.S. at 130.) How that differs from a reasonable, investment-backed expectation has never been articulated.

concept has its basis in ideas of ". . . justice and fairness . . ." [35]/ the Court has told us little else.

[35]/ *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 14 (1984).

Lower courts have attempted, with varying degrees of success, to fill that void. The easiest part of the phrase for courts to address is the word "reasonable," a concept with which courts feel comfortable, by employing seemingly objective criteria. [36]/ Thus, the following factors have been utilized (individually or in combination) in determining whether a property owner's expectations were reasonable: the severity and extensiveness of regulations at the time the property was purchased, [37]/ the past regulatory history of the specific property, [38]/ the degree of impairment of the uses of the property, [39]/ the uses available before enactment of the challenged regulation, [40]/ the novelty or expectedness of the governmental action, [41]/ whether specifically (and

---

[36]/ *See* J. Shonkwiler & T. Morgan, *supra* at 182.

[37]/ *Silverman v. Barry,* 727 F.2d 1121 (D.C. Cir. 1984); *Sadowsky v. City of New York*, 732 F.2d 312, 318 (2d Cir. 1984); *Traweek v. City and County of San Francisco*, 659 F.2d 1012, 1026 (9th Cir. 1984) (". . . plaintiffs bought into a heavily regulated situation . . ."); *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1383 (Fla. 1981); *Parkway Bank & Trust Co. v. County of Lake*, 71 Ill. App. 3d 421, 389 N.E.2d 882 (1979); *Howard v. State*, 198 Mont. 470, 647 P.2d 828 (1982); *County of Ada v. Henry*, 105 Idaho 263, 668 P.2d 994 (1983); *Claridge v. New Hampshire Wetlands Bd.*, 125 N.H. 745, 485 A.2d 287 (1984); *Orion Corp. v. State*, 109 Wash. 2d 621, 641 (1987).

[38]/ *Habersham at Northridge v. Fulton County*, 632 F. Supp. 815, 823 (N.D. Ga. 1985) (buying property which the county had already twice refused to rezone did ". . . not evidence a reasonable investment-backed expectation but, rather, a business gamble"); *900 G Street Associates v. Department of Housing & Com. Dev.*, 430 A.2d 1387, 1390 (D.C. 1981); *Kempf v. City of Iowa City*, 402 N.W.2d 393 (Iowa 1987); *Levy v. City of Cherry Hills Village*, 666 F. Supp. 201, 203 (D. Colo. 1987).

[39]/ *Deltona Corp. v. United States*, 657 F.2d 1184, 1192 (Ct. Cl. 1981); *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 242 (1983), *aff'd* 765 F.2d 159 (Fed. Cir. 1985); *United Nuclear Corp. v. United States*, 12 Cl. Ct. 45, 55 (1987); *Kasparek v. Johnson County Bd. of Health*, 288 N.W.2d 511, ___ (Iowa 1980).

[40]/ *Orion Corp. v. State*, 109 Wash. 2d 621, 659 (1987).

[41]/ *Deltona Corp. v. United States*, 657 F.2d 1184, 1192 (Ct. Cl. 1981); *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 242 (1983), *aff'd* 765 F.2d 159 (Fed. Cir. 1985) ; *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 14 (1984); *Tirolerland, Inc. v. Lake Placid 1980 Olympic Games, Inc.*, 592 F. Supp. 304 (N.D.N.Y. 1984); *Russ Building Partnership v. City and County of San Francisco*, 44 Cal.3d 839 (1988). *But see Nemmers v. City of Dubuque*, 716 F.2d 1194, 1200 (8th Cir. 1983); *Kasparek v. Johnson County Bd. of Health*, 288 N.W.2d 511, ___ (Iowa 1980). As a respected scholar expressed it:

> "[W]hat one primarily has a right to is the maintenance of the conditions of one's fair and effective participation in the constituted order, as an individual no less entitled than others to the respect and concern of the community, and also no more entitled than [others] to any particular outcomes save those that [bear on] the conditions of continued effective participation. Loss — even great loss — of

traditionally) recognizeable "sticks" were removed from the owner's bundle of property rights, [42]/ whether any rights (like the transferable development rights in *Penn Central*) were substituted for those impaired, [43]/whether existing uses were permitted to continue, [44]/ whether government representations were formal or informal, [45]/ the ability to sell the property to others at a fair price, [46]/ the general power of government to regulate, [47]/ and the harshness of the local regulatory and legal climate. [48]/

"Investment-backed expectations" has been a more troublesome concept. The problem probably begins with semantics. Courts have not traditionally looked with favor on things identified merely as "expectations." Indeed, the term is often used

---

> economic value of one's [holdings may] not as such violate those conditions. What does, perhaps, violate them is exposure to sudden changes in the major elements and crucial determinants of one's established position in the world, as one has come . . . to understand that position." (Michelman, Property as a Constitutional Right, 38 Wash. & Lee L. Rev. 1097, 1112-13 [1981], quoting Michelman, Mr. Justice Brennan: A Property Teacher's Appreciation, 15 Harv. Civ. Rts.–Civ. Lib. L. Rev. 296, 306 [1980] [brackets in original].)

[42]/ *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1276 (9th Cir. 1986); *Gregory v. City of San Juan Capistrano*, 142 Cal. App. 3d 72, 88, 191 Cal. Rptr. 47 (1983); *Hornstein v. Barry*, 530 A.2d 1177 (D.C. App. 1987).

[43]/ *Deltona Corp.*, 657 F.2d at 1192; *Shanghai Power Co.*, 4 Ct. Cl. at 242.

[44]/ *MacLeod v. County of Santa Clara*, 749 F.2d 541, 547 (9th Cir. 1984).

[45]/ *Oceanic California, Inc. v. City of San Jose*, 497 F. Supp. 962, 974 (N.D. Cal. 1980).

[46]/ *Florida Rock Indus., Inc. v. United States,* 791 F.2d 893 (Fed. Cir. 1986); *Park Ave. Tower Associates v. City of New York*, 746 F.2d 135, 139 (2d Cir. 1984); *Pompa Construction Corp. v. Saratoga Springs*, 706 F.2d 418, 424 (2d Cir. 1983); *Orion Corp. v. State*, 109 Wash. 2d 621, 665 (1987); *Luf v. Zoning Commn.*, No. 074890 (Conn. Super. Ct. 1987) (". . . property is not marketable at all . . .") (Emphasis, the Court's.)

[47]/ *Pace Resources, Inc. v. Shrewsbury Tp.*, 808 F.2d 1023, 1033 (3d Cir. 1987). *Contra Nemmers v. City of Dubuque*, 716 F.2d 1194, 1200 (8th Cir. 1983); *Kasparek v. Johnson County Bd. of Health*, 288 N.W.2d 511, ___ (Iowa 1980). Note that if this idea is taken seriously, it means that there can never be any "reasonable" expectations, as the very existence of the power to regulate renders unreasonable any thought of future utility. Professor Mandelker is apparently an advocate of this factor. (*See* Mandelker, Investment-Backed Expectations: Is There a Taking? 31 J. Urb. & Contemp. L. 3, 22 n. 84 [1987] ["Under my view, the speculator loses taking clause protection when he enters a land market in which the land use regulation system places him at risk."].)

[48]/ *Sucesion Suarez v. Gelabert*, 541 F. Supp. 1253, 1260 (D.P.R. 1982); *Oceanic California, Inc. v. City of San Jose*, 497 F. Supp. 962, 974 (N.D. Cal. 1980).

derisively as connoting something less than a "right." [49]/ Commentators sometimes disparage those who invest in real estate as "speculators," concluding that such people are disfavored and less deserving of protection than others.

The most troublesome concept, however, has been profitability. In *Penn Central*, the regulation was upheld because it permitted the property owner, "not only to profit from the Terminal, but also to obtain a 'reasonable return' on its investment." [50]/ And, as noted earlier, in *Williamson County* the Court spoke in terms of ". . . investment-backed profit expectations." [51]/ The same is true of *Keystone*, in which the Court upheld the regulation because there was not even "a single mine that could no longer be mined for profit," there was no evidence that "mining in any specific location . . . ha[d] been unprofitable," and "petitioners may continue to mine coal profitably." [52]/

---

[49]/ *See Deltona Corp. v. United States*, 657 F.2d 1184, 1193 (Ct. Cl. 1981) ("no assurance that the permits would issue, but only an expectation"); *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1383 (Fla. 1981) (developer ". . . had only its own subjective expectation that the land could be developed in the manner it now proposes"); *Dean Tarry Corp. v. Friedlander*, 826 F.2d 210, 213 (2d Cir. 1987); *Yale Auto Parts v. Johnson*, 758 F.2d 54, 59 (2d Cir. 1985).

[50]/ 438 U.S. at 136. *See also Amberhill Properties v. City of Berkeley*, 814 F.2d 1340, 1341 (9th Cir. 1987).

[51]/ 473 U.S. at 200. (Emphasis added.)

[52]/ 480 US at 496.

Lower courts, however, have been slow to accept the notion of profitability as a test for determining whether a taking has occurred. Some have flatly rejected the idea, [53]/ while others have expressed a willingness to determine from the evidence whether the uses permitted by the regulation permit the owner to obtain a reasonable return. [54]/ The Ninth Circuit Court of Appeals recently questioned whether the concept had any place in this type of litigation at all, citing the Supreme Court's decisions in *Williamson County* and *Keystone* as the source of its uncertainty. [55]/

The Supreme Court itself is thus an important, if inadvertant, source of confusion. While the Court's "ad hoc" standard is theoretically workable, trial court judges have been trained, like the Light Brigade, "not to reason why." Turned loose with such scant guidance, they latch onto outmoded, unrelated, or confusing precedents or they flounder — or some combination of the above.

A primary culprit in this confusion is *Andrus v. Allard*. [56]/ *Andrus* was a personal property case, rather than a real property case. However, its principal impact seems to have been in the field of land use. *Andrus* involved the sale of bird parts and feathers which were protected by Federal statute and treaty. The statute did not require confiscation of the feathers, nor did it preclude their use. It did, however, prohibit their sale. In upholding the statute against a takings challenge, the Court expressed the now familiar litany that a property owner is not Constitutionally entitled to the <u>most</u> profitable use of his property, and that reduction in value, standing alone, is not sufficient to establish a taking. [57]/ Had the Court stopped there, there would have been no confusion. But it went further. In a seemingly unnecessary portion of the

---

[53]/ *E.g., Park Avenue Tower Associates v. City of New York*, 746 F.2d 135 (2d Cir. 1984); *William C. Haas Co. v. City of San Francisco*, 605 F.2d 1117 (9th Cir. 1979); *MacLeod v. County of Santa Clara*, 749 F.2d 541 (9th Cir. 1984).

[54]/ *E.g., Florida Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986); *Northern Westchester Professional Park Associates v. Town of Bedford*, 60 N.Y.2d 492, 458 N.E.2d 809 (1983); *Orion Corp. v. State*, 109 Wash. 2d 621, 642 (1987) ("present, possible, and reasonably profitable use"); *Ranch 57 v. City of Yuma*, 152 Ariz. 218, ___, 731 P.2d 113 (1986) ("reasonable return on the property"); *Hornstein v. Barry*, 530 A.2d 1177, ____ (D.C. App. 1987) ("reasonable financial return"); *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 271 (11th Cir. 1987) (". . . the landowner's loss takes the form of an injury to the property's potential for producing income or an expected profit"); *Nemmers v. City of Dubuque*, 764 F.2d 502, 504-05 (8th Cir. 1985) (reasonable return on the difference in value with and without the offending regulation).

[55]/ "Some controversy exists concerning the appropriateness of considering a land owner's 'profit expectations' in determining on a facial challenge whether a regulation denies the land owner the 'economically viable use' of the owner's property." (*Lake Nacimiento Ranch Co. v. County of San Luis Obispo,* 841 F.2d 872, 878 n. 4 [9th Cir. 1988][amended opinion].)

[56]/ 444 U.S. 51 (1979).

[57]/ *Id.* at 66.

opinion, written after the direct issue in the case had already been dealt with (i.e., the existence of other viable uses had been shown), the opinion continued:

> "At any rate, loss of future profits — unaccompanied by any physical property restriction — provides a slender reed upon which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform." [58]/

Andrus has given fits to property owners in land use cases ever since. It appears to be a continuing source of friction on the Court, as well. In the midst of the high profile takings cases decided in 1987, the Court issued its decision in *Hodel v. Irving*. [59]/ While *Andrus* received scant mention in the majority opinion, it was the subject of two peculiar concurring opinions, which are here reprinted side-by-side so the reader can make his own evaluation. The opinion on the left was written by Justice Scalia, and concurred in by the Chief Justice and Justice Powell. The opinion on the right was written by Justice Brennan, and concurred in by Justices Marshall and Blackmun:

. . . the present statute is	"I find nothing in today's
ndistinguishable from the	opinion that would limit
tatute that was at issue	Andrus v. Allard . . . to
n Andrus v. Allard . . . [O]ur	its facts . . . Accordingly
ecision [today] effectively	I join the opinion of the
imits Allard to its facts." [60]/	Court." [61]/

All of this might be limited to academic interest or, at worst, intramural squabbling among the members of the Court. However, it is causing real distress in the dealings of property owners with regulators and with the litigation of this issue in the lower courts. All concerned need to know how the "profit" concept fits into the takings analysis. Should a substantial aspect of the Constitutional rights of property owners in land use regulation cases be made to depend on the outcome of a dispute over feathers!?!

As with the case of "economically viable use," this concept needs to be given further judicial explication which is related to the real world of land use. It is simply

---

[58]/ *Id.* at 66.

[59]/ 481 U.S. 704 (1987).

[60]/ *Id.* at 719. (Scalia, J., concurring.)

[61]/ *Id.* at 718. (Brennan, J., concurring.)

preposterous to intone the phrase "reasonable, investment-backed profit expectations" and then search for reasons to disregard the way in which the market functions.

III. CONSTITUTIONAL TAKINGS THEORIES

Working those concepts into understandable litigational theories isn't always easy. As often as not the courts have defined rights in negative ways by, for example, holding that the governmental action in question is not a taking because it does not interfere with some protected right. From this collection of negatives, we must divine constitutional theories.

The fundamental protection, whether the direct subject of suit or the basis for a §1983 action, is the Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation. How to determine whether a taking has occurred, however, is not quite so easy. As noted earlier, the Supreme Court's most consistent statement about the law of takings is that it has been unable to develop any specific test which will answer the question in all cases. The Court is essentially still stuck in the half-century old test developed by Justice Holmes, "if regulation goes too far, it will be recognized as a taking." [62]/ Thus, each case must be tested on its own.

Although the Court could have been more helpful than it has been, it has presented us with a number of tests and concepts which help to flesh out the bare words of the Fifth Amendment.

1. The 3 Part "Penn Central" Test

In 1978, when the Supreme Court was just getting started on its re-entry into taking law [63]/ it was asked to determine the validity of New York City's landmark preservation law in the context of a plan to build a large office building over Grand Central Terminal.

After stating what has now become the hard-and-fast non-rule, that there is no set formula for describing a Fifth Amendment taking, the Court identified several factors which it said must be analyzed:

- the economic impact of the regulation on the property owner;

---

[62]/ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415. The vitality of *Pennsylvania Coal* was called in question by the majority decision in *Keystone*, but the "too far" passage was revived by later quotation by the majority in *First English*.

[63]/ After approving the general concept of zoning in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Supreme Court abandoned the field for half-a-century, leading some to observe that some of the strange formulations which the Court has come up with since its re-entry were caused by its lengthy absence from (and consequent lack of familiarity with) the field.

- the extent to which the regulation interferes with the property owner's distinct, investment-backed expectations; and

- the character of the governmental action. [64]/

2. The 2 Part "Agins" Test

[64]/ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). The "character of the governmental action" criterion generally refers to whether the action is physically invasive. As *Penn Central* notes, a taking "may more readily be found when the interferance with property can be characterized as a physical invasion by government." (*Id.* at 125.) Likewise, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court found a *per se* taking because the governmental action authorized a physical invasion of private property.

Shortly after *Penn Central*, the Court announced a somewhat different way of looking at takings when it declared a 2 part test in *Agins*. A government regulation is a taking either if it fails to substantially advance a legitimate state interest or if it deprives the property owner of economically viable use of his land. [65]/

The "economically viable use" branch of the formulation is discussed earlier.

The "substantially advancing" branch has caused a bit of confusion among the commentators. It seems more like a standard for adjudicating the validity of governmental action in general, rather than a standard for when a taking occurs. It also smells like a substantive due process test. In *Nollan*, however, the Court explained that it is not the same as the test for substantive due process:

> "Contrary to Justice Brennan's claim . . . , our opinions do not establish that these standards [i.e., for determining whether a governmental action substantially advances a legitimate state interest] are the same as those applied to due process or equal protection claims [applying a substantive due process test]. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved [citation], not that 'the State "could rationally have decided" the measure adopted might achieve the State's objective.' [Citation.]" [66]/

Later, however, in *Pennell v. City of San Jose*, [67]/ the Court upheld a municipal rent control regulation against a taking challenge without subjecting it to the heightened scrutiny announced in *Nollan* — and without mentioning *Nollan*.

3. "Regulatory" v. "Physical" Takings

In *Penn Central*, the Supreme Court noted that, although physical invasion is not an essential element of a taking, [68]/ a taking ". . . may more readily be found . . ." when a physical invasion has occurred. [69]/ Then, in *Loretto*, the Court concluded that a permanent physical occupation would result in a *per se* taking, [70]/ even though the space occupied was no ". . . bigger than a breadbox." [71]/

---

[65]/ *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

[66]/ 483 U.S. at 834 n. 3. (Emphasis, the Court's.)

[67]/ 485 U.S. 1 (1989).

[68]/ 438 U.S. at 122 n. 25.

[69]/ *Id.* at 124.

[70]/ 458 U.S. at 434-35.

[71]/ *Id.* at 438 n. 16.

But, aside from the supposed ease of determining that a physical occupation has occurred, there is no reason in eminent domain theory to distinguish between government actions which have the same impact on the property owner — *i.e.*, stultification — but which are accomplished by different means (*i.e.*, regulatory v. physically invasive).

From earliest times, the Supreme Court has insisted that both the fact and extent of a taking must be determined from the viewpoint of the property owner. As put in a classic formulation, ". . . the question is, What has the owner lost? not, What has the taker gained?" [72]/ Nor is the government's intent to take a relevant consideration. The question is the factual impact on the property owner. [73]/ As Justice Brennan analyzed it in *San Diego Gas*:

> "Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it." [74]/

Since *First English*, with the majority's explicit and repeated reliance on Justice Brennan's reasoning in *San Diego Gas,* the stature of that dissent acquires heightened importance. One of its first post-*First English* uses was by the Supreme Court of Washington:

---

[72]/ *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910). *See also First English*, 482 U.S. at 319; *United States v. Causby*, 328 U.S. 256, 261 (1946); *United States v. Miller*, 317 U.S. 369, 372 (1947); *United States v. New River Collieries Co.*, 262 U.S. 341, 343 (1923); *Seaboard Airline R. Co. v. United States*, 261 U.S. 299, 304 (1923).

[73]/ *Davis v. Newton Coal Co.*, 267 U.S. 292, 301 (1925); *Hughes v. ashington*, 389 U.S. 290, 298 (1967)(Stewart, J., concurring); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 652-53 (1981)(Brennan, J., dissenting). As the Court put it in *First English*:

> "We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." (482 U.S. at 321)(Emphasis added.)

[74]/ 450 U.S. at 652-653 (Brennan, J., dissenting).

> "If the City were to take a portion of certain properties for the purpose of building a road, clearly we would hold that the City must pay for the land so taken. Likewise where, as here, the City takes a portion of certain properties for the purpose of preserving greenbelts, the City must pay for the land taken. To permit the City to accomplish the same purpose under the guise of a zoning regulation would be inequitable and would constitute an unconstitutional taking of private property without just compensation." [75]/

Nor should this be a problem of serious philosophical dispute. Scholars whose philosophical inclinations are as varied as Professor Richard Epstein and Professor Laurence Tribe agree that the term "taking" requires a broad reading, and that whether there has been a taking depends on the impact of the governmental action on the rights of the individual, regardless of the nature of the questioned governmental conduct. Professor Epstein concluded quite simply, "What stamps a government action as a taking is what it does to the property rights of each individual who is subject to its actions: nothing more or less is relevant . . ." [76]/ Professor Tribe was no less direct:

> ". . . forcing someone to stop doing things with his property — telling him 'you can keep it, but you can't use it' — is at times indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else. Thus a 'taking' occurs in this ordinary sense when government controls a person's use of property so tightly that, although some uses remain to the owner, the property's value has been virtually destroyed." [77]/

Thus, while some may find it easier to recognize a taking if they can visualize the presence of government troops, or bulldozers on private property, that distinction has little to do with the theory and intended operation of the just compensation clause. As one commentator noted, ". . . the constitutional guarantee of compensation does not extend only to cases where the taking is cheap or easy. . . . If one must make a choice between the government's convenience and the citizen's constitutional rights, the conclusion should not be much in doubt." [78]/

It may thus be appropriate to suggest to the Court that it take this bull by the horns and admit that its attempted distinction between physical invasions and other types of invasions of property interests is not worth the candle. [79]/ It provides grist for

---

[75]/ *Allingham v. City of Seattle*, 109 Wash. 2d 947, 957 (1988).

[76]/ R. Epstein, Takings: Private Property and the Power of Eminent Domain 94 (1986).

[77]/ L. Tribe, **American Constitutional Law** 593 (2d ed. 1988).

[78]/ W. Stoebuck, Nontrespassory Takings in Eminent Domain 135 (1977).

[79]/ *See Hall v. City of Santa Barbara*, 833 F.2d 1270, 1275 n. 13 (9th Cir. 1986).

the scholarly mills, but causes nothing but hardship for real people, by needlessly complicating the relationship between citizens and government and giving overburdened trial courts additional amorphous issues with which to deal. The real issue in takings cases is the impact of the government's action on private citizens. The mode by which such an invasion may be implemented is not relevant.

4. Temporary Takings

First English was the Court's first recognition that, as there is substantively no difference between physical takings and regulatory takings, a temporary taking accomplished by any means invokes the Fifth Amendment's just compensation guarantee.

This idea had been forcefully urged before, but only in dissent. [80]/ Now it is a holding of the Court:

> ". . . 'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation. . . It is axiomatic that the Fifth Amendment's just compensation clause is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'. . . The United States has been required to pay compensation for leasehold interests of shorter duration than this. The value of a leasehold interest in property for a period of years may be substantial, and the burden on the property owner in extinguishing such an interest for a period of years may be great indeed." [81]/

The importance of the concept of temporary taking to the growth control movement is that a substantial delay in the ability of a property owner to productively use his property may render the enacting entity liable for compensation for that period:

> · If a court were to invalidate the restriction at some later date, compensatory damages would be due:
>
> "Here we must assume that the Los Angeles County ordinance denied appellant all use of its property for a considerable period of years, and we hold that invalidation of the ordinance

---

[80]/ *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 656-659 (1981) (Brennan, J., dissenting); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 362-363 (1986) (White, J., dissenting).

[81]/ 482 U.S. at 318-319.

without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy." [82]/

- Even if a court were not to invalidate the restriction, compensation may be due if the effect of the ordinance is to take property:

". . . the [Fifth] Amendment . . . is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise

[82]/ 482 U.S. at 322.

proper interference amounting to a taking." [83]/

The effect of *First English* on the "slow growth" movement is this: If growth is slowed to such an extent that individual property owners are denied the right to make economically viable use of their property, then those owners will have causes of action against the government for the time during which the use of their land was denied.

IV. STARTING TO LOOK BETTER: THE END OF THE MILLENNIUM

A. *Dolan v. City of Tigard*

"We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."[84]

Honest, while I wish I had a pipeline to the Supreme Court, I did not set this up. However, for some time, the author of this material has questioned why the Fifth Amendment guarantee against uncompensated seizure of land has often received shorter judicial shrift than its sibling First Amendment right to make all manner of expressions[85] or even the due process right to the return of deadly weapons.[86]

It was nice to see a majority of the U.S. Supreme Court pose the same question. It was even nicer to see the Court respond that the Fifth Amendment rights of property owners are entitled to the same protection as other rights protected by the first ten amendments.

But that gets ahead of the story. The facts of *Dolan* are generally known. To recap, Florence Dolan owns a 1.67 acre parcel of land in Tigard, Oregon, on which she operates an electrical and plumbing supply store. She wanted to replace the store with a larger one and expand the parking lot. The property was properly zoned for the expanded use. Instead of simply stamping her building permit, however, the City conditioned her expansion project on making a "gift" of about 10% of her land to the City. The land would be used to expand a flood control channel on the border of Mrs. Dolan's property, to provide a public "greenway" alongside the channel, and to construct a public bikepath beside that.

---

[83]/ 482 U.S. at 315. (Emphasis added; Court's emphasis deleted.)

[84] *Dolan v. City of Tigard*, 129 L.Ed.2d 304, 321 (1994).

[85] Berger, "Wet T-Shirts, Property Rights: A Constitutional Conundrum," Los Angeles Daily Journal, p. 7 (May 11, 1994).

[86] Berger, "Some Pigs Are More Equal Than Others, Continued," Daily Journal, p. 7 (June 6, 1994).

Mrs. Dolan protested, contending that the City had no basis for taking her land without payment. The City's only response was that the condition was justified because the larger store "might" cause an increase in traffic which the bikepath "might" help to alleviate. (Justice Scalia's caustic comments at oral argument about the likelihood of someone carrying off plumbing fixtures on a bicycle telegraphed the Court's eventual response to that rationalization.) The city made the same tepid sort of "finding" (which the Court characterized as "rather tentative") in support of the flood control channel in the neighboring creek.

In its most narrow sense, the decision was a follow-up to the seven-year-old decision in *Nollan*. The Court held in *Nollan* that property could not be exacted as a condition to the issuance of development permission unless there was an essential nexus between the condition imposed and the anticipated public burden to be caused by the project. The Court found it unnecessary to discuss the nature of that nexus in *Nollan* because it concluded that the Coastal Commission's justification for demanding an easement over the Nollans' beach failed to meet any standard of which the Court could conceive. As the Court noted, that "left the Coastal Commission in the position of simply trying to obtain an easement through gimmickry, which converted a valid regulation of land use into an 'out-and-out plan of extortion.' "[87]

In *Dolan*, the Court acknowledged that it must answer the question of how close the nexus must be. The Court began this process by examining the decisions of a large number of state courts which had reviewed the validity of land use permit conditions. In its analysis, the Court concluded that the state court decisions fell into three different groups. It gave them a Goldilocks and the Three Bears sort of critique.

The first group of cases permitted government to exact land dedications with only "very generalized statements" of the connection between the project's impacts and the demanded quid pro quo. The standard was found to be too soft.

The second group of cases required a very precise fit between the impact of the project and the proposed solution. The standard was found to be too hard.

The final group of cases adopted an intermediate position, requiring the government to demonstrate a "reasonable relationship" between the dedication and the project's expected impact. This standard was found to be just about right, but the Court didn't like the label. Instead of "reasonable relationship," the Court announced a standard of "rough proportionality."[88]

The reason for avoiding the term "reasonable relationship" was that the Court intended to elevate the 5th Amendment protection of property owners to that provided by the rest of the Bill of Rights. "Reasonable relationship," said the Court, sounds too much like "rational basis." Rational basis has, for years, been used as a sort of judicial code for approving virtually anything done by a legislative body. All the courts

---

87 129 L.Ed.2d at 317-318.

88 129 L.Ed.2d at 320.

have required to uphold legislation as having a rational basis is the possibility that a court, after-the-fact, could conjure a reason which legislators might have used.

Plainly, that is not what the *Dolan* court had in mind. Although eschewing a mandate of absolute mathematical conformity, the High Court required far more than rationalization. In the Court's words, "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."

Significantly, the Court buttressed its holding with 1st Amendment decisions. The decision invoked the doctrine of unconstitutional conditions: the concept that, in order to exercise one right, a person may not be required to sacrifice another right. In the Supreme Court, this doctrine has been a 1st Amendment doctrine involving, for example, cases in which public employees were disciplined for exercising their right to speak out on public issues. The Court has consistently held that the right to continued employment (even if termed a discretionary benefit) cannot be conditioned on the sacrifice of the right to speak.[89]

In *Dolan*, the doctrine operated to preclude the city's demand for sacrifice of the right to compensation for property taken for public use in exchange for permission to expand a store.

The Court's determination to restore the Takings Clause of the 5th Amendment to its rightful place in the Constitutional pantheon is an important step in the development of takings law. It will undoubtedly be said by some governmental spokesman or environmental activist that the decision somehow elevates property rights above the rights of society. Actually, what the decision does is enforce a protection which has been part of our Constitutional heritage from the days of the Nation's founding. The Fifth Amendment has always "elevated" the interests of individuals over those of society — that's what the entire Bill of Rights is all about. As the Supreme Court said seven years earlier, "many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them."[90]

Each of the constituent parts of the Bill of Rights elevates individual interests over those of the collective state. The First Amendment, for example, has been used to protect the rights of nude dancers, flag burners, and political protesters of all stripes. What the Supreme Court said expressly in this case is that the Fifth Amendment rights of property owners are entitled to no less protection than the First Amendment rights of draft protesters, adult theaters and newspapers.

Of at least equal importance is the Court's holding that, when government wants to impose a condition, government bears the burden of proving the necessity for

---

[89] *Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Board of Education*, 391 U.S. 563 (1968).

[90] *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

it. That idea appears to have caught a lot of people by surprise. I'm not sure why. The burden of proof is always on the party who wants to do something. It is reasonable to have placed on Mrs. Dolan the burden of proving that her property was properly zoned and located for the proposed project, that her new building was properly sited and designed, and the like. But it was the city that wanted to impose a severe condition on development: dedication of 10% of the land. To justify that, the city needs to do more than demand it. That much is obvious to anyone who does not work for a government agency. It's one of those blind spots, however, that folks in our nation's capital call the Beltway Mentality — politicians and bureaucrats being oblivious to the world as seen by ordinary citizens.

By requiring the government to justify imposition of exactions, the Court eliminated some of the favorite rationalizations put forth to justify stringent conditions. These are catalogued in Justice Stevens' dissent (as evidence of the harm he perceived to be done by the majority). Many state court decisions, for example, have justified the imposition of extreme conditions on the ground that the property owner would receive some benefit from project approval (typically, the benefit is said to be the right to make more money by selling subdivided lots). Justice Stevens says that theory cannot be squared with the *Dolan* rule of rough proportionality. He's right. Other courts have justified extreme conditions by saying that the conditions were brought about by the property owner. If he or she had not sought to develop the land, no conditions would have been imposed. (This is akin to the once-trendy "Menendez defense" in criminal law that the victim was the one that caused the defendant's violent acts.) That excuse has always irked property owners who know that the reason they bought property was to put it to use, and that the value of owning property lies in being able to use it. The justification seemed hollow and tautological. Justice Stevens says it is dead. Right again.

Another holding of the Court is that owners of businesses have rights. A major disagreement between Justice Stevens and the majority is Justice Stevens' belief that business regulation was entitled to even greater deference than other kinds of regulation. The majority insisted on viewing the impact of the regulation, rather than the identity of those on whom it was imposed.

In a possible follow-up to 1992's decision, the Court found a taking because of the impact on the property owner of dedicating 10% of her land. This builds on another aspect of *Lucas*, in which the Court expressed the view that taking all rights in a discrete portion of the property (even though substantially less than all) could be a taking. *Dolan* dropped the other shoe. Justice Stevens expressed great indignation.

The significance of *Dolan* transcends its factual context.[91] That much is evident from the bitter nature of Justice Stevens' dissent (not to mention his insistence on reading it aloud from the bench). The Takings Clause of the 5th Amendment has

---

[91] A brief factual update seems appropriate, however. After remand, as Mrs. Suitum's case was being presented to a jury, the case settled. The city gave Mrs. Suitum cash, building permission, and the right to install a plaque on the pathway commemorating her Supreme Court victory.

come of age. It is time for state courts to afford the protection it vouchsafes property owners.

B. *Suitum v. Tahoe Regional Planning Agency*

Ever since the U.S. Supreme Court granted certiorari in *Suitum v. Tahoe Regional Planning Agency*,[92] those who toil in the vineyard of regulatory takings law held their collective breath. One of the most difficult issues in such cases (as noted earlier) is determining the "ripeness" of cases in which property owners claim that a governmental land use regulation is so stringent that it has taken their land. An "unripe" case never gets to trial.

During the better part of the last two decades, the Supreme Court has written opinions on this issue like so many pronouncements from the fabled Oracle at Delphi: either unintelligible to those who need to work with them or capable of multiple meanings leading to inconsistent results.

The optimists at the bar consoled themselves that the ripeness lore in this field was developed unintentionally. That is, the Court didn't take any of the cases to issue holdings about ripeness. Rather, in deciding not to decide cases it had accepted on the merits, the Court held that the cases weren't seasoned enough to be dealt with. They needed further aging or processing. Thus, as the Court remarked in *Suitum*, "[w]ithout employing the term 'ripeness,' "[93] the ripeness doctrine was born and nurtured.

Suppose, these optimistic lawyers mused, that the Court actually granted certiorari in a case that contained no issues other than ripeness; perhaps then it would provide a light to guide us from the wilderness.

Suitum was that case. It contained only the ripeness issue and cert was granted to resolve that issue.[94]

Oral argument whetted the appetite. The Justices held the ripeness concept up to the light and they seemed concerned about what they saw. Justice Souter suggested the government was being "manipulative" in seeking to delay a decision on the merits.[95] Justice Scalia, noting that ripeness "just adds another layer of litigation,"[96] asked counsel for the government if he really wanted to talk about "hardship" when his opponent was an 82 year old woman who had already been litigating this case for 6 years on a procedural issue.[97] And Justice O'Connor finally burst out, "I mean, why not give this poor, elderly woman the right to go to court and have her takings claim

---

92 137 L.Ed.2d 980 (1997).

93 137 L.Ed.2d at 991.

94 137 L.Ed.2d at 989.

95 Tr. of oral arg., p. 36.

96 Tr. of oral arg., p. 37.

97 Tr. of oral arg., p. 37-38.

heard?"[98]

Anticipation was running high. And then the opinion came down. With all due respect, it appears to say (paraphrasing Justice O'Connor's query) that elderly widows in wheelchairs have the right to go through the courthouse door. Presented with the opportunity to unravel some of the needless confusions and complexities in regulatory takings ripeness jurisprudence, the Supreme Court stopped well short. Five times in its relatively brief opinion, the Court expressly left questions unanswered. Only time will tell how many others can benefit from Mrs. Suitum's victory.

The facts of the case are not particularly complicated. From the property owner's perspective, they illustrate a recognizable pattern of governmental regulatory action designed to stultify property use; while, from the governmental perspective, they demonstrate an innovative attempt to deal with ecological issues.

Bernadine Suitum and her late husband bought a vacant lot near Lake Tahoe in 1972. When she sought to build a home on her lot 17 years later, she was told by the Tahoe Regional Planning Agency (a bi-state agency created by a treaty between California and Nevada, blessed by Congress, and known to locals as TRPA) that her lot was located in an area where development was prohibited.

---

[98] Tr. of oral arg., p. 46.

One would have thought that categorical answer would lead to a resolution short of the courthouse. No one doubted that TRPA would not permit Mrs. Suitum to use her land. And one of the things the U.S. Supreme Court has consistently held is that governmental regulation that denies a property owner all economically viable use of land is a taking that requires compensation.[99] Plainly, as this regulation forbade all use, TRPA should simply have paid for it, right?

That's not what TRPA thought. The use prohibition, it said, was not the whole story. The rest of the story is "transferable development rights" (or TDRs, as the insiders call them). The regulation didn't merely prohibit land use; it provided the owner with TDRs to "replace" the lost use. Those TDRs could be sold to other land owners in the area who could thereby increase the development potential of their own lots. Third parties would thus compensate Mrs. Suitum for her loss.

Therefore, said TRPA, until Mrs. Suitum tries to sell her TDRs, it is impossible to know whether the regulation has caused her harm and, if so, its extent. In a word, the matter is not ripe for litigation. Both the District Court and the Ninth Circuit Court of Appeals agreed. The Supreme Court reversed.

The kind of ripeness which almost overcame Mrs. Suitum sprang from *Williamson County*'s "final" decision prong. The Ninth Circuit had found a lack of finality because, without an attempt by Mrs. Suitum to transfer her TDRs to someone else, there would be no final application of the regulations to the property.[100]

Many people found the Ninth Circuit's analysis difficult to accept — even people who believed for other reasons that the case was not ripe. After all, the use prohibition was as final as it was clear; no TDR transfer could change that. Indeed, when the case was briefed for the High Court, TRPA refused to defend the Ninth Circuit's reasoning. The majority opinion laid it to rest, noting "we think it important to emphasize that the rationale adopted in the decision under review is unsupported by our precedents."[101]

The Supreme Court had no difficulty with the narrow question it chose to address. All nine Justices agreed that TRPA's absolute use prohibition was a final decision that could not be administratively altered and that the matter could proceed to a consideration of the merits.

---

99 E.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

100 80 F.3d at 362-363.

101 137 L.Ed.2d at 991.

The Court detected a bit of gamesmanship in TRPA's insistence that Mrs. Suitum proceed through the TDR gauntlet that had been set up before her taking case would be ripe. Part of the system required Mrs. Suitum to participate in a lottery to obtain one of the few building allocations available each year. Although TRPA insisted that she was sure to obtain an allotment, the Court focussed on the larger, more general, picture that would emerge if its opinion agreed with TRPA. Viewed from that perspective, the Court concluded that "if the odds of success in the Allocation lottery were low, Suitum's taking claim could be kept at bay from year to year until she actually won the drawing; such a rule would allow any local authority to stultify the Fifth Amendment's guarantee."[102] Plainly, that prospect did not please the Court.

Justice Scalia filed a separate concurring opinion, joined by Justices O'Connor and Thomas. They had only one point of divergence from the majority. One of the questions the majority would not address was whether the existence of the TDRs should be considered in determining whether a taking had occurred.[103] Justice Scalia thought they should decide that issue and conclude that the existence of TDRs bears on whether the taking was accompanied by just compensation, not whether it occurred.[104]

It would have been preferable if the Court had taken Justice Scalia's forthright approach, rather than leaving the issue unsettled. And it would have been nice if other ripeness issues had been decided, rather than ducked. In the end, however, the importance of *Suitum* is in the music, rather than the words. The music says that lower courts should stop spending so much time squeezing cases like so many melons on a fruit wagon in a fruitless search for ripeness.

The broad meaning of the case is that it is possible to ripen regulatory taking cases, and the Supreme Court expects to see some of them go to trial. That is a message regulatory agencies need to take to heart. Under the world before *Suitum*, they spent much litigational energy convincing courts that property owners' claims were not ripe. If there is a message being delivered from the Supreme Court, it must be that too much time has been wasted in that endeavor, and it is time to resolve these cases on the merits. Justice O'Connor's plea that "this poor, elderly woman [should have] the right to go to court and have her takings claim heard" applies to more than widows in wheelchairs.

C. *City of Monterey v. Del Monte Dunes*

---

102 137 L.Ed.2d at 994.

103 137 L.Ed.2d at 986-987.

104 137 L.Ed.2d at 998.

City of Monterey v. Del Monte Dunes,[105] is a fact-intensive case. That's not unusual. The Court has been saying for years that each regulatory taking case is unique, and must be decided "*ad hoc*," on its own facts.[106] Indeed, that's one of the things that has generally driven the land use bar (at least that part of the bar representing private property owners) nuts: there is no way to tell whether your complaint even states a cause of action until you litigate the pleading issues through the highest court that will grant discretionary review. Because each case is decided under the umbrella of *ad hocery*, this basic pleading question can take a case all the way to Washington, D.C. That's what happened in virtually all of the regulatory taking cases decided by the High Court since 1978.

We'll get to the facts in a moment. First, however, there are two important things to remember about *Del Monte Dunes*. The first is what the Court *did*; the second is what it *didn't* do. What it did, for the first time in this sort of litigation, was to affirm a judgment awarding compensation to a property owner for a regulatory taking of property. The fact that, after years of fits and starts, the U.S. Supreme Court announced its willingness to affirm a judgment that compelled the government to pay seven figures' worth of compensation is a welcome message that was a long time in coming. Hopefully, government regulators will take it to heart. What it didn't do was to give municipal regulators the free pass that Monterey asked for. As we'll discuss presently, the frightening thing about the city's petition was that it asked the Court to decree that municipalities should not have to suffer anyone — judge or jury — "second guessing" decisions made by the experts at city hall.

Here are the facts. The property is a roughly rectangular parcel of land on the Pacific Ocean coast at the northern end of the City of Monterey. For many years (dating back to before World War II), it was a Phillips Petroleum Co. terminal and tank farm where large quantities of oil were delivered, stored, and re-shipped. When Phillips ceased using the property, it removed its large oil storage tanks, but left behind pieces of pipe, broken concrete, and oil that had soaked into the sand. It was, in short, an abandoned industrial site that would need cleaning and restoration before it could be used for anything. Although the City and some of its *amici* sought to cloak it in environmentally attractive descriptions, that remains the undeniable fact.[107]

In addition to the post-industrial debris (and trash that local citizens

---

[105] 119 S.Ct. 1624 (1999)

[106] E.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

[107] Giving an environmental slant to the facts has become a favored tactic of pro-regulation advocates these days. See, e.g., Lazarus, *Litigating Suitum v. Tahoe Reg'l Planning Agency in the United States Supreme Court*, 12 J. Land Use & Env'tl Law 179 (1997), in which counsel for the government in *Suitum* describes the way he spun the issue away from the constitutional issues at its heart and toward paeans to the beauty of Lake Tahoe.

surreptitiously dumped on the site), Phillips Petroleum had left behind non-native ice plant, planted to prevent erosion around its oil tanks. As ice plant covers the ground, it secretes a substance that forces out other plants, including the native buckwheat, the only known habitat for an endangered insect known as Smith's Blue Butterfly. There were scattered buckwheat plants on the property but, absent human intervention, the ice plant would wholly displace them. Although buckwheat is the natural habitat of the Smith's Blue Butterfly, no eggs, larvae, or adults of the species were found during extensive searches of this property in 1981, 1982, 1983, and 1984; one larva was found late in 1984; none in 1985. Smith's Blue Butterfly lives for only one week, travels 200 feet (maximum) and must land on a mature, flowering buckwheat plant in order to survive. The site is quite isolated from other possible habitats, so that travel to or from this property (for a butterfly with limited range) is unlikely, if not impossible. Ironically, without Del Monte's project (that would remove all ice plant and sow additional buckwheat) the putative Smith's Blue Butterfly habitat was about to be overrun and eliminated by ice plant.

Since before 1981, the property had been zoned for multi-family residential use, in keeping with the commercial, industrial, and multi-family residential uses virtually surrounding it — 29 units per acre, or more than 1,000 homes for the entire parcel. But the owners didn't ask for 1,000 units. Or anything close. Rather, in 1981, they submitted an application for only a 344-home development. The City's Planning Commission rejected the proposal. But the City went beyond mere denial, saying that a plan with only 7 units per acre, or 264 units, "would be received favorably."

So the owners, at considerable expense, accepted this illegal *de facto* downzoning and redesigned the project accordingly, keeping in constant contact with the City's planners to ensure that their new plan would be appropriate. In 1983, they submitted their plan for the 264 units the City said it wanted. However, the City Planning Commission turned down the application. This time, the planners said that a 224-unit proposal "would be received favorably."

The owners then complied with the City's 224-home demand. But when they took that one to City Hall, in early 1984, the same Planning Commission that solicited this proposal said "no." The owners appealed to the City Council, which remanded the matter to the Planning Commission with directions to consider a 190-unit development, representing a further 15% reduction in homes and a corresponding 15% reduction in ground coverage.

Back the owners went. Another redesign; another resubmittal; another Planning Commission denial; another administrative appeal to the City Council. The City Council again overruled the Planning Commission and approved the 190-unit development, using a plan that showed the size and shape of buildings, roads and open spaces, but with a surprise or two up the municipal sleeve.

The plan ostensibly approved by the City Council for this 37.6 acres had buildings and patios on only 5.1 acres, with another 6.7 acres in public and private streets (including public parking and accessways to the beach). The remainder was to be left open: 17.9 acres in public open space, and another 7.9 acres in landscaped

areas. The City insisted that Del Monte "give" it a large portion of the property for use as a public beach (including public access and parking), preserve the sand dunes to hide the homes from passing motorists, and provide a buffer to separate the homes from a neighboring state beach.

But the City Council's approval knowingly forced development into the "bowl" (or depressed) area in the property's center, that would have to be graded even deeper in order to comply with the City's order that no buildings be visible to motorists on the nearby highway. There were buckwheat plants in the bowl that would thus be destroyed.

Then came the *coup de grace*. The City announced that the very place it had earmarked for the homes was also the *only* place to create a butterfly preserve for Smith's Blue Butterfly, even though none actually lived on the property. The City believed that if the remnants of the Phillips Petroleum tank farm were removed from the property, and the property cleaned, and the invasive ice plant removed, and the area seeded with buckwheat, then possibly some of those endangered butterflies would decide to live there.[108] However, in a classic Catch-22 move, the City refused to permit Del Monte to shift its development to any of the other parts of the property because the City had already earmarked the rest for public use or nonuse or acquisition (i.e., the beach, the dunes, and the State park buffer). That left no place on the 37.6 acres on which to build *anything*. The wipeout was total. As the Court of Appeals would later summarize it, the City progressively denied use of portions of the Dunes until no part remained available for a use inconsistent with leaving the property in its natural state.

These facts are ugly. And they are important. But the reason they are important is not to narrow the scope of what the Supreme Court decided. They are important because if this property owner could not recover compensation on these facts, then the odds of anyone ever recovering would become astronomical. I firmly believe that, if the city had convinced the Supreme Court to rule in its favor (whether on substantive or procedural grounds is, in my view, irrelevant), landowners' constitutional rights would have shrunk to an unattainable platitude. It would be foolhardy for lawyers to continue advising clients to file such suits if not even those facts could yield compensation.

The important thing to remember about the *Del Monte Dunes* decision is that the Supreme Court of the United States looked at those facts and blanched. The one thing that was clear from the questions posed at oral argument was that the Justices
were not pleased with the city's actions. And it didn't matter how they felt about the substantive issue that later occupied most of their written output (i.e., whether the property owner was entitled to have a jury examine the city's actions). It came as no surprise when Justice Scalia opened the questioning by hotly criticizing the fact that the city ran the developers through five different plans (each successively smaller) before finally turning them down. His comment that, after the third denial, one might begin to

---

[108] The City simply ordered it prepared on the if-you-build-it-they-will-come theory of the movie "Field of Dreams." But this isn't Hollywood, it's real life, and this is an abandoned petroleum tank farm.

"smell a rat" was vintage Scalia. Nor was it surprising that the Chief Justice and Justice Kennedy both commented on the evident bad faith displayed by the city's actions. The surprises came when two of the Justices who would later dissent (on the jury trial issue) also chimed in. Justice Breyer suggested that the "extreme runaround" that the city gave Del Monte Dunes could amount to a temporary taking. And Justice Souter queried whether bad faith, by itself, could be a significant determinant that a taking had occurred.

Although the Court split 5-4 on whether a jury was appropriate (it was), all nine agreed with the majority's statement of facts, a factual statement that many have viewed as very pro-developer and that, in fact, came largely from the developer's brief. In fact, my reading of the opinions reveals a broad hint that the dissenters fully expected that, if their view on the jury issue had prevailed, the trial judge would have reached the same result on remand. The concluding lines of Justice Souter's dissent read this way:

> "I would therefore remand the case. There would be no need for a new trial; the judge could treat the jury's verdict as advisory, *so long as he recorded his own findings consistent with the jury's verdict*."[109]

Knowing that a process that puts a developer through that kind of sausage grinder is not favorably received ought to send a clear message. Some people are a hard sell, however. After the Supreme Court handed down its opinion and affirmed a million and a half dollar judgment against the City of Monterey for a temporary taking of the property (with interest and attorneys' fees to be added later), the Monterey City

---

[109] 119 S.Ct. at 1661, fn. 14; emphasis added.

Attorney reacted by saying, "Will it change anything? No. It was clear we complied with the law then. We comply with the law now."[110] Hopefully, others will react more reasonably. Otherwise, litigation will multiply. Count on it.

The next important thing about the case is to remember what was at stake. Some commentators (demonstrating a municipal sympathy) have sought to minimize the impact of the decision by noting that the developer did not push the Court into establishing any new (and, presumably, draconian) rules for cities to live with. What those spinmeisters overlook, however, is that this developer was playing defense, not offense. In contrast to the more typical U.S. Supreme Court regulatory taking case, the developer *won* both at trial and on appeal and was trying to protect that victory. It was the city and its allies that sought a revolutionary holding from the Court. And they didn't get it.

What the government side asked the Supreme Court to do was to essentially immunize regulatory bodies from judicial review — either by a judge sitting alone or by a jury. The city presented this issue to the Court in its Petition: "Whether liability for a regulatory taking can be based upon a standard that allows a jury or court to reweigh evidence concerning the reasonableness of the public entity's land use decision." What the government asked the Court to do was to recognize the "expertise" of regulatory bodies and keep others from "second guessing" or "looking over their shoulders" in land use matters. It didn't work. And for good reason.

This country was founded by people who revolted against a governing class that thought its actions were not reviewable. As the Supreme Court of Pennsylvania once put it, "The genius of our democracy springs from the bedrock foundation on which rests the proposition that office is held by no one whose orders, commands or directives are not subject to review."[111]

The U.S. Supreme Court has hewed to that line in its regulatory taking decisions. When, for example, the Court ended years of confusion and held that the remedy for a regulatory taking was compensation (rather than mere invalidation of the regulation), it concluded with the recognition that "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 . . . ."[112]

---

[110] Belcamino, "Monterey loses long court battle," The Herald (Monterey County), May 25, 1999, p. A1 at p. A10.

[111] *Winger v. Aires*, 89 A.2d 521, 522 (Pa. 1952).

[112] *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

And who can forget the Court's recognition that so-called "legislative findings" are actually the product of back room staffers, rather than the officials doing the public voting, when it declared that such "findings" will always support what the regulators did unless they have "a stupid staff"?[113] Because of that, the Court demanded that regulations be supported by solid evidence, not mere conclusory "findings," in order to pass constitutional muster.

But the city and its supporters sought to change that. They wanted either complete immunity or a deferential threshold so low that any regulation would pass constitutional muster. They got neither. The Court's response was curt and to the point: "To the extent the city argues that, as a matter of law, its land-use decisions are immune from judicial scrutiny under all circumstances, its position is contrary to settled regulatory takings principles. We reject this claim of error."[114]

By far the greatest part of the majority opinion (and all of Justice Scalia's concurring opinion and Justice Souter's dissent) dealt with the question of whether the city's actions should have been reviewed by the trial judge alone or by the jury under proper judicial instructions. The majority chose the jury.

It was actually an interesting spectacle to watch the city and its supporters betraying their fear of submitting the reasonableness of municipal action to a jury. They acted as though trial by jury were some sort of social evil, rather than the bulwark of American liberties. They patronizingly claimed that planning and zoning and permit issues are far too complex for ordinary citizens to understand. Hogwash. The real "problem" from the municipal viewpoint is that juries understand the issues far too well. The fact is that juries leaven such proceedings by injecting common sense into the process — and the jury that heard this case demonstrated its displeasure with the city's actions, just as the Supreme Court would later.

It seemed particularly disingenuous for the city to seek refuge from a jury on the ground of overcomplexity in the field of planning and zoning, where so-called "ballot box zoning" has become increasingly common. Indeed, it has mushroomed in California, the source of this lawsuit. If the California populace at large is deemed competent to make and enact complex land use decisions within the confines of a voting booth, how could it be argued with a straight face that specific members of the California public who are carefully selected, instructed, and supervised by a federal judge, somehow lose that ability when seated in a jury box?

---

[113] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003m 1025, fn. 12 (1992).

[114] 119 S.Ct. at 1637.

Moreover, municipalities have survived juries in civil rights cases examining policies related to such diverse (and important and invasive) subjects as city budget policy,[115] county law enforcement policy,[116] municipal policy governing the use of force during arrests,[117] county road acquisition policy,[118] municipal employment policy,[119] city medical care policy,[120] school district sexual abuse policy,[121] the conflict between a police department's chain-of-command policy and a township's sexual harassment policy,[122] and even the question whether "extortion of outsiders, businessmen, or developers . . . was ' the way things are done and have been done' in the Town."[123] We have all seen (or at least seen reports of) federal judges adjudicating local matters such as local housing plans, local jail conditions, whether to bus children to local schools, how many Chinese students can attend Lowell High School in San Francisco, what kind of schools a local district must build, how many people may live in one house and to what extent their relationship may be regulated, whether local zoning must give way to housing the mentally handicapped in a residential area, how Los Angeles' transit authority must divide its favors between buses and subway lines and even how many new buses it must acquire, or whether the State can build a freeway through South Pasadena.

The dispute between the majority and the dissent quickly devolved into a historical dispute over how things were done in England at the time the 7th Amendment (the one that guarantees Americans the right to a jury trial) was adopted. (It has always been a mystery to me why we would tie such an important thing as the right to trial by jury to pre-revolutionary English practice. I thought that, at least by 1776, we had decided to throw off the shackles of English practice and start fresh. But, in a number of legal fields, the courts have limited our rights to those enjoyed in eighteenth century England. Go figure.)

Aside from the fact that the Supreme Court doesn't understand English legal history on this point (a subject for another time and place), the majority at least reached the right conclusion. Recognizing that the case before the Court was a federal civil rights action (42 U.S.C. § 1983), and that such actions are akin to tort actions, the majority concluded that tort actions for damages were entitled to juries in England, and are so entitled here, as well.

That being so, the Court examined what the jury did here, and concluded

---

115 *Berkley v. Common Council*, 63 F.3d 295 [4th Cir. 1995] (*en banc*).

116 *Turner v. Upton County*, 915 F.2d 133 (5th Cir. 1990).

117 *Beck v. City of Pittsburgh*, 89 F.3d 966 (3d Cir. 1996), *cert. denied* 117 S.Ct. 1086 (1997).

118 *Hammond v. County of Madera*, 859 F.2d 797 (9th Cir. 1988).

119 *Richardson v. Leeds Police Dept.*, 71 F.3d 801 (11th Cir. 1995).

120 *Simmons v. City of Philadelphia*, 947 F.2d 1042 (3d Cir. 1991).

121 *Gonzalez v. Ysleta Ind. School Dist.*, 996 F.2d 745 (5th Cir. 1993).

122 *Gares v. Willingboro Twp.*, 90 F.3d 720 (3d Cir. 1996).

123 *Roma Constr. Co. v. aRusso*, 96 F.3d 566 (1st Cir. 1996).

that it properly applied the standards for regulatory takings that the Court has been laying down for the past two decades. In affirming the judgment, the Court had to find sufficient evidence to sustain a judgment against the city because its actions either failed to substantially advance a legitimate state interest and that those actions denied the developer economically productive use of the land. It plainly found the evidence sufficient.

We all seem to have survived *Del Monte Dunes*. The landowner's compensatory judgment was affirmed. A horrendous factual situation was righted. To the extent that *Dolan* created confusion, it has been clarified. And courts and juries are free to examine the constitutionality of municipal land use regulation. That last point is the key, and it is one that the planning community should not fear. All the Court is requiring of planners and regulators is that they act fairly and honestly. If development isn't wanted, then that should be said up front, not after "considering" and rejecting five different concepts and 19 different site plans. If property is coveted for public use as a public park or as a public butterfly preserve, then it should be purchased, not regulated to death. Those are simple precepts. If adhered to, we can all spend out time doing other things than litigating.

CONCLUSION

It's been a long, tedious series of battles. And it's far from over. While the Supreme Court has provided some answers, it has left far more issues unsettled. In a sense, it's what keeps lawyers going. If all the questions were answered, we'd have nothing to do. On the other hand, the questions that remain open in this field — like the particularly vicious ones in the "ripeness" arena — cause such anguish for so many that I, for one, would gladly retire from the fray in exchange for some simple rules for people to follow. That, after all, is what is needed here. The issues are complex only because they go to the heart of serious human needs.[124] They arouse fierce emotions on all sides. But the issues are, in fact, simple; and all would benefit from some clear answers.

---

[124] See generally Berger, *To Regulate, or Not To Regulate — Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights*, 8 Loy. L.A.L. Rev. 253, 263-267 (1975).