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Paving a Road, Reaffirming a Roadblock: City of Monterey v. Del Monte Dunes at Monterey, Ltd.

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Notes

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I. INTRODUCTION

> *Question: So that's why this whole 1983 jury trial or not seems to me largely academic, not having any continuing importance.*
> *Mr Berger: It could have little continuing importance, I would - -*
> *Question: It's certainly not academic in your case, though, is it?*
> *Mr Berger: In this case it was the heart of the case.*[1]

In 1999, the United States Supreme Court handed down the much anticipated[2] regulatory taking decision of *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* Remarkably, for the first time the Court affirmed a jury's verdict finding a regulatory taking and awarding just compensation to a property owner.[3] Normally a regulatory taking decision receives a great deal of attention; however, the Court's decision in *Del Monte Dunes* and the issues it addressed received little attention.[4]

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1. United States Supreme Court Official Transcript at 31-32, City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) [hereinafter *Del Monte Dunes*].

2. *See* Philip Weinberg, *Del Monte Dunes v. City of Monterey: Will the Supreme Court Stretch the Takings Clause Beyond the Breaking Point?*, 26 B.C. ENVTL AFF. L. REV. 315 (1999).

3. The compensation awarded to the property owner amounted to $1,450,000.

4. Michael M. Berger, counsel for Del Monte Dunes remarked on the reaction to the decision by stating that: "I think it's important to note the interesting governmental spin that's been following this decision. The party line that is coming from the regulators is that the property owners failed to make any huge advances in this case. What they overlook is that we weren't trying to change the law, or to get the Supreme Court to acknowledge precepts we always thought were the law but that were not yet spelled out clearly. Unlike the usual case that has been in the Supreme Court during the past couple decades, the property owners were playing defense. What we were trying to do was to hold on to the positive law that the Supreme Court has laid down. It was the City that was trying to change the law. The City wanted to establish a general rule of immunity from courts reviewing the merits of regulatory actions. If the City and its amici had been able to establish that, it would have been big news indeed. But don't be misled by the governmental down-playing of the what the owners did or did not accomplish here. What we accomplished was to preserve the concept of regulatory takings." Dwight H. Merriam, *The United States Supreme Court's Decision in Del Monte Dunes: The Views of two Opinion Leaders*, SE18 A.L.I.-A.B.A. 297, 315 (1999).

Justice Kennedy,[5] writing the 5-4 decision for the Court, addressed three issues: 1) whether questions of liability in an inverse condemnation action brought under 42 U.S.C. § 1983[6] can properly be submitted to a jury, 2) whether the United States Court of Appeals for the Ninth Circuit impermissibly based its decision on a standard that allowed a jury to reweigh the reasonableness of a city's land use decision, and 3) whether the Ninth Circuit erred in assuming that the rough proportionality standard announced in *Dolan v City of Tigard*[7] applied to the facts presented for review.[8]

As the above quoted excerpt from oral argument indicates, the controlling issue in *Del Monte Dunes* was whether under § 1983 the case was properly submitted to a jury. Due to the unusual Seventh Amendment[9] character of the controlling issue, a student, professor or practitioner interested in the regulatory takings doctrine may at first disregard the decision as mere Seventh Amendment precedent;[10] however, the Court's decision in *Del Monte Dunes* should not be ignored. Particularly important in *Del Monte Dunes* is the Court's reasoning in deciding the controlling issue. Specifically, the Court's underlying reasoning focused on two regulatory taking decisions: *First English Evangelical Lutheran Church v County of Los Angeles,*[11] and *Williamson County Regional Planning Commission v Hamilton Bank.*[12] Because the Court's reasoning specifically implicates the ripeness doctrine, the Court's holding in *Del Monte Dunes* may be academically important, but practically irrelevant.

Section II of this note examines both the factual and procedural background of *Del Monte Dunes*. Section III discusses the Court's reasoning and holding on all three issues presented for review. Section IV focuses on the Court's

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5. Joining Justice Kennedy were Chief Justice Rehnquist, Justice Thomas, Justice Stevens, and Justice Scalia. Justice Scalia filed an opinion concurring in part and concurring in the judgment. The dissenting opinion was written by Justice Souter who was joined by Justice O'Connor, Justice Ginsberg, and Justice Breyer. *Del Monte Dunes*, 526 U.S. at 692.

6. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. 42 U.S.C. § 1983 (1994).

7. 512 U.S. 374 (1994).

8. *Del Monte Dunes*, 526 U.S. at 702.

9. In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law. U.S. CONST. amend. VII.

10. *See generally The Supreme Court, 1999 Term -- Leading Cases*, 113 HARV. L. REV. 200, 296-306 (1999) (explaining the Seventh Amendment precedential value of *Del Monte Dunes*).

11. 482 U.S. 304 (1987).

12. 473 U.S. 172 (1985).

decision on the controlling issue as it relates to the ripeness doctrine, the Rooker-Feldman doctrine and concerns for res judicata and collateral estoppel. Section V concludes that while the Court's decision in *Del Monte Dunes* was a victory for the regulatory takings doctrine, it will further complicate an area of the law already compounded by a set of complex legal principles.

II. BACKGROUND

A. *Factual Background*

The property at issue in *Del Monte Dunes* consists of a 37.6 acre ocean front parcel located in the city of Monterey, California.[13] With the exception of the Pacific Ocean and a state beach park located to its northeast, the property was surrounded by a railroad right of way and properties devoted to industrial, commercial, and multifamily residential uses.[14] The property was zoned under the city's general zoning ordinance for multifamily residential use, which allowed twenty-nine units per acre, or more than 1,000 units for the entire parcel.[15]

Since before the Second World War, the property was used by the Phillips Petroleum Company (Phillips) as a terminal and tank farm where large quantities of oil were delivered, stored, and shipped.[16] When Phillips ceased using the property it left behind several tank pads, an industrial complex, pieces of pipe, broken concrete, oil soaked sand, and trash.[17] In addition, a sewer line housed in a 15-foot man-made dune, covered with jute matting and surrounded by snow fencing, occupied the property [18] By the early 1980s, the property was essentially an abandoned industrial site that needed cleaning and restoration before it could be developed.

Phillips also introduced the non-native ice plant to the property to prevent erosion and control soil conditions around its oil tanks.[19] As the ice plants covered the property they secreted a substance that forced out other native plants, including the buckwheat plant, the only known habitat for an endangered insect known as Smith's Blue Butterfly [20] The butterfly lives for one week, travels a maximum of 200 feet, and must land on a mature flowering buckwheat plant to survive.[21] From 1981 through 1985 only a single larva of the butterfly was discovered on the property [22]

In 1981, Ponderosa Homes applied for permission to develop the property

13. *Del Monte Dunes*, 526 U.S. at 694.
14. *Id.*
15. *Id.*
16. *Id.* at 695.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*

in accordance with the city's zoning and general plan requirements.[23] The original proposal was limited to a development of 344 residential units.[24] The city's planning commission requested that an Environmental Impact Report (EIR) be prepared to assess the potential effects the residential development would have on the environment.[25] The draft of the EIR for the 344-unit development was completed in January 1982.[26] In August 1982, the city's planning commission denied the application, but stated that a proposal for a 264-unit development would receive favorable consideration.[27] Ponderosa then submitted a proposal for a 264-unit development. However, in December 1983 the planning commission denied the application again.[28] The planning commission requested another reduction in the scale of the development, stating that a proposal for a 224-unit development would be received with favor.[29] But in early 1984, the planning commission also denied the application for the 224-unit development.[30] Ponderosa then appealed to the city council, which in March 1984 overruled the planning commission's denial of the 224-unit development and referred the project back to the planning commission, with instructions to consider a proposal for a 190 unit development plan.[31]

Ponderosa again reduced the scope of the development to comply with the city's request, and submitted four detailed site plans, each consisting of 190 units.[32] While the 190 unit development plan was pending, Del Monte Dunes at Monterey, Ltd. purchased the property from Ponderosa for $3,700,000. In July 1984, the planning commission rejected the application for the 190-unit development.[33] Del Monte appealed to the city council, which in September 1984 overruled the planning commission and in Resolution Number 84-160[34]

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23. *Id.* at 695.

24. *Id.*

25. Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496, 1502 (1990) [hereinafter *Del Monte I*].

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. WHEREAS, the Planning Commission having previously denied the proposed site plan for a 190 unit condominium project at 2301 Del Monte Avenue, the City Council did entertain an appeal therefrom; and WHEREAS, the City Council does find that the site plan as proposed is conceptually satisfactory and is in conformance with previous decisions of this Council regarding density, number of units, location on the property, and in other respects; NOW THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF MONTEREY that the decision of the Planning Commission denying the site plan for this development is hereby overruled, and the site plan known as Scheme D dated August 30, 1984, is hereby approved subject to the conditions of approval attached hereto and incorporated by reference as Exhibit A.

The conditions set forth on Exhibit A were as follows:

1. Conditions mandating conformity with scheme D

2. Submission to the Architectural Review Committee

approved the 190- unit development plan subject to fifteen conditions, including the dedication of a large portion of the property to public use.

Del Monte then spent the next year revising the 190-unit development plan, as well as taking other steps to fulfill the city's conditions.[35] Del Monte's final 190-unit development plan devoted 17.9 acres to public open space, 7.9 acres to open, landscaped areas, 6.7 acres to public and private streets, and 5.1 acres to buildings and patios.[36] In July 1985, the city's Architectural Review Committee (ARC) gave concept approval for the 190-unit development plan.[37]

In January 1986, less than two months before the expiration of Del Monte's conditional use permit, the planning commission acted against the ARC's recommendation and denied the 190-unit development plan.[38] Again, Del Monte appealed the decision to the city council and sought a twelve month extension of the conditional use permit to allow time to comply with additional requirements that might be imposed.[39] The conditional use permit was extended until a hearing could be held before the city council in June 1986.[40] After the June hearing, the city council denied the 190 unit development plan, not only declining to specify measures Del Monte could take to satisfy the city council's concerns, but also refusing to extend the use permit to allow time to address the concerns.[41] The city council did not base its decision on Del Monte's failure to meet any of the specific conditions prescribed by the city in Resolution Number 84-160. Rather, the city council stated generally in Resolution Number 86-96[42] its reasoning why the 190-unit development plan

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3. Approval of Smith's Blue Butterfly habitat preservation by California Department of Fish and Game and U.S. Fish and Wildlife
4. Protection of rare plants
5. Approval of Access
6. Approval of Fencing
7. Approval of Grading
8. Underground Utilities
9. Approval by Fire Department
10. Approval by Department of Public Works
11. Approval of Homeowners Association Agreement
12. Soundproofing between units
13. Payment of Park Dedication Fee
14. Provision of moderate income housing
15. Duration of Use Permit

Del Monte I, 920 F.2d at 1503.

35. *Id.*
36. *Id.*
37. *Id.* at 1503.
38. *Id.* at 1504.
39. *Id.*
40. *Id.*
41. *Del Monte Dunes*, 526 U.S. at 697.
42. *Del Monte I*, 920 F.2d at 1503. NOW, THEREFORE, BE IT RESOLVED THAT THE COUNCIL OF THE CITY OF MONTEREY FINDS: 1. The site is not physically suitable for the type and density of development proposed, in that sand relocation and grading necessary for construction of the project results in significant environmental impacts that are not mitigable nor adequately addressed given the current size of the project. 2. The site is further not physically suitable for the type and density of development proposed in that significant impacts upon the native flora and fauna habitat will result which are not adequately mitigated in this proposal. 3. The site is further not physically suitable for the project proposed in that the

was not approved. Some of the proffered reasons for denying the extension were that the site was not physically suitable for the level of development and that the development was likely to cause substantial environmental damage and substantial injury to the SBB. The denial of the 190-unit development plan came at a time when a sewer moratorium from another agency would prevent development based on new plans.[43]

In 1986, after five years, five formal decisions, and nineteen different site plans submitted by Del Monte and its predecessor in interest Ponderosa, Del Monte decided the city would not permit development of the property under any circumstances, and did not submit another development plan. Instead, Del Monte submitted a complaint in court. In December 1991, while still fighting the city in court, Del Monte finally sold the property to the state of California to be used as a park. It received $4,500,000 for the property, only $800,000 more than the property was purchased for seven years earlier.[44]

B. *Procedural History*

1. Del Monte I

In 1986, Del Monte commenced suit against the city of Monterey in the United States District Court for the Northern District of California.[45] Del Monte asserted that the city council's findings in Resolution Number 86-96 (resolution not allowing time extension for the use permit) were in direct contradiction to those previously made in Resolution Number 84-160 (resolution approving development subject to fifteen conditions), and the denial of the 190-unit development plan was arbitrary, capricious, and unreasonable.[46] Del Monte alleged that the purported reasons for denying the 190-unit development plan did not reflect the city's real motivation, which Del Monte argued was the city's intent to preserve the property and devote it to open space without paying just compensation.[47]

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design of the subdivision does not provide adequate access to and from the property over lands owned or controlled by the developer, and as proposed the project fails to provide adequate easements or other legally acceptable means of insuring access to this project in the future. 4. The design of the subdivision, as noted in 2 and 3 above, is likely to cause substantial environmental damage and substantially injure the habitat of the endangered Smith's Blue Butterfly. 5. The project as submitted is not in conformance with the General Plan, in that it fails to protect important native flora and fauna as required in Policy 10, page B-6. 6. The project will have a significant effect on the environment, and no demonstration of overriding considerations has been made which would support approval of this project. *Id.*

43. *Del Monte Dunes*, 526 U.S. at 697.

44. Dwight H. Merriam, *Will this Mouse Roar? United States Supreme Court Takes a Takings Case*, SE18 A.L.I.-A.B.A. 297, 301 (1999).

45. *Del Monte I*, 920 F.2d at 1496.

46. *Id.* at 1505.

47. *Id.*

Del Monte's complaint set out eight separate counts,[48] five of which were substantive claims based on the Fifth Amendment's taking clause as incorporated to the states through the Fourteenth Amendment, the due process and equal protection provisions of the Fourteenth Amendment, and common law principles of estoppel and unjust enrichment.[49] In the remaining three counts, Del Monte requested an injunction against the city, declaratory relief under 28 U.S.C. §§ 2201-02, and relief from civil rights violations under 42 U.S.C. § 1983.[50]

The city moved to dismiss Del Monte's complaint or in the alternative moved for summary judgment.[51] Del Monte responded with an amended complaint and filed its own motion for summary judgment with extensive affidavits supporting the factual allegations of the complaint.[52]

The district court dismissed Del Monte's taking claim as unripe for review because Del Monte had "shown nothing more than the uncertainty of California's compensation procedures for regulatory takings."[53] Relying on *Williamson County Regional Planning Commission v. Hamilton Bank*[54] the district court held that Del Monte had to return to state court and test state procedures before the taking claim would be ripe for federal review.[55] The district court then dismissed Del Monte's unjust enrichment claim as an impermissible variant of the taking claim.[56] The district court also held that Del Monte's due process and equal protection claims were unripe, but alternately dismissed the claims for failure to state a claim.[57] The district court also dismissed the estoppel claim for failure to state a claim.[58] Finally, the district court determined that "the remedial claims had no basis independent of the five substantive claims and dismissed the entire complaint."[59]

On appeal to the Ninth Circuit, the decision was reversed in part.[60] The Ninth Circuit considered all of Del Monte's claims as having been disposed of by summary judgment, requiring de novo review.[61] The appellate court initially addressed whether Del Monte's taking claim was ripe for review and determined that the finality requirement of the taking claim was satisfied

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48. *See generally* Karena C. Anderson, *Strategic Litigating in Land Use Cases: Del Monte Dunes v. City of Monterey*, 25 ECOLOGY L.Q. 465 (1998) (explaining the strategic advantage to property owners who assert several claims by combining their regulatory takings claim with challenges under alternative constitutional theories such as the equal protection and due process clauses).

49. *Del Monte Dunes*, 920 F.2d at 1500.

50. *Id.*

51. *Id.* at 1499 n.1.

52. *Id.*

53. *Id.* at 1507.

54. 473 U.S. 172 (1985).

55. *Del Monte I*, 920 F.2d at 1506-07.

56. *Id.* at 1500.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 1509.

61. *Id.* at 1499 n.1.

because the city essentially reached a final decision.[62] The Ninth Circuit relied on *MacDonald, Sommer & Frates v County of Yolo*[63] and the United States Supreme Court's acknowledgment that the finality requirement does not compel a property owner to pursue a development application through piecemeal litigation or unfair procedures.[64] The court also determined that the compensation requirement of the taking claim was ripe for review because at the time the city rejected Del Monte's last development application, "California law did not permit property owners to seek compensation for a regulatory taking through an action for inverse condemnation" in state court.[65]

Next, the Ninth Circuit determined that Del Monte's due process and equal protection claims were ripe for review because Del Monte showed that it would have been futile to seek approval of another development plan.[66] The Ninth Circuit also found that Del Monte's due process and equal protection claims stated claims for which relief could be granted.[67] The court held that Del Monte's due process claim needed to be determined after a trial on the merits because there was a question of fact whether the city's actions were arbitrary and irrational.[68] The appellate court also held that Del Monte's equal protection claim needed to be determined after a trial on the merits because there was a question of fact whether the city had imposed the same environmental and access conditions on similarly used property surrounding the 37.6 acre parcel.[69]

Following this analysis, the Ninth Circuit reversed the dismissal of the remedial claims for injunctive relief, declaratory relief under 42 U.S.C. §§ 2201-02, and relief from civil rights violations under 42 U.S.C. § 1983.[70] Finally, the appellate court affirmed the dismissal of the estoppel and unjust enrichment claims and remanded the case for a trial on the merits.[71]

2. Del Monte II

On remand, the district court ordered that the takings and equal protection claims be tried to a jury, but reserved the substantive due process claim for a decision by the court because it was a question of law [72] At the close of trial, the district court instructed the jury, with written instructions essentially pre-

62. *Id.* at 1501-06.
63. 477 U.S. 340 (1986).
64. *Del Monte I*, 920 F.2d. at 1501-07.
65. *Id.* at 1507.
66. *Id.* at 1507-09.
67. *Id.* at 1509.
68. *Id.* at 1508.
69. *Id.* at 1509.
70. *Id.*
71. *Id.*
72. Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422, 1425 (9th Cir. 1996) (hereinafter *Del Monte II*).

pared by the city, that it should find for Del Monte if it found that Del Monte had been denied all economically viable use of the property or if it found that the city's decision to reject Del Monte's 190-unit development plan did not substantially advance a legitimate public purpose.[73] The jury delivered a general verdict in favor of Del Monte on the taking claim, a separate verdict for Del Monte on the equal protection claim and a damage award of $1,450,000.[74] After the jury's verdict, the district court held that the city did not violate Del Monte's substantive due process rights because the city asserted valid regulatory reasons for denying Del Monte's 190-unit development plan.[75] The district court reasoned that its ruling on the substantive due process claim was not inconsistent with the jury's verdict. The district court then denied the city's motions for a judgment as a matter of law and a new trial on both the takings and equal protection claims.[76]

On appeal to the Ninth Circuit, the jury verdict was affirmed. The Ninth Circuit stated that the jury verdict could be affirmed if substantial evidence supported either the taking claim or the equal protection claim.[77] The Ninth Circuit upheld the jury verdict solely on the taking claim and therefore did not reach the equal protection claim.[78]

The Ninth Circuit first addressed the city's argument that Del Monte had no right to a jury trial in an action for inverse condemnation pursuant to either 42 U.S.C. § 1983 or the Seventh Amendment.[79] The Ninth Circuit reasoned that because § 1983 grants a party the right to bring an "action at law" or a "suit in equity," a party who brings an "action at law" under § 1983 has a right to a jury trial.[80] The Ninth Circuit then determined that an inverse condemnation

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73. The district court's jury instruction with regard to the economically viable use inquiry read as follows: "For the purpose of a taking claim, you will find that the plaintiff has been denied all economically viable use of its property, if, as the result of the city's regulatory decision there remains no permissible or beneficial use for that property. In proving whether the plaintiff has been denied all economically viable use of its property, it is not enough that the plaintiff show that after the challenged action by the city the property diminished in value or that it would suffer serious economic loss as the result of the city's actions."The district court's jury instruction with regard to the substantially advance inquiry read as follows: "Public bodies, such as the city, have the authority to take actions which substantially advance legitimate public interest and legitimate public interests can include protecting the environment, preserving open space agriculture, protecting the health and safety of its citizens, and regulating the quality of the community by looking at development. So one of your jobs as jurors is to decide if the city's decision here substantially advanced any such legitimate public purpose. The regulatory actions of the city or any agency substantially advance a legitimate public purpose if the action bears a reasonable relationship to that objective.
Now, if the preponderance of the evidence establishes that there was no reasonable relationship between the city's denial of the... proposal and legitimate public purpose, you should find in favor of the plaintiff. If you find that there existed a reasonable relationship between the city's decision and a legitimate public purpose, you should find in favor of the city. As long as the regulatory action by the city substantially advances their legitimate public purpose... its underlying motives and reasons are not to be inquired into." *Del Monte Dunes*, 526 U.S. at 700-01.

74. *Del Monte II*, 95 F.3d at 1425.

75. *Id.*

76. *Id.*

77. *Id.* at 1426.

78. *Id.*

79. *Id.*

80. *Id.* at 1427.

action was an "action at law," analogous to a "suit at common law" because legal relief was available and legal rights were asserted.[81]

Next, the Ninth Circuit rejected the city's argument that even if § 1983 grants a right to a jury trial, the district court should not have submitted the issue of liability on the inverse condemnation claim to the jury because it presented a question of law.[82] The Ninth Circuit held that it was permissible to submit the inverse condemnation claim to the jury on the theories explained in the jury instructions because the theories required factual determinations.[83]

Finally, the Ninth Circuit considered the district court's denial of the city's motion for judgment notwithstanding the verdict on the inverse condemnation claim. In reasoning why the denial of the city's motion was not error, the Ninth Circuit relied on *Dolan v. City of Tigard*[84] to support the conclusion that substantial evidence was presented to support a finding that the City's actions did not substantially advance a legitimate public purpose.[85] The court also relied on *Dolan* in stating that "[even if the City had a legitimate interest in denying Del Monte's development application, its action must be 'roughly proportional' to furthering that interest That is, the City's denial must be related 'both in nature and extent to the impact of the proposed development.'"[86]

The Ninth Circuit also rejected the city's argument that because Del Monte sold the property to the state for $800,000 more than it paid, economically viable use of the property existed.[87] The Ninth Circuit reasoned that liability in inverse condemnation actions based on a denial of economically viable use focuses on the use of the property, not its value.[88] The Ninth Circuit then concluded that substantial evidence supported a finding that the City's actions denied Del Monte economically viable use of the property.[89]

III. THE UNITED STATES SUPREME COURT'S REASONING AND HOLDING IN *DEL MONTE DUNES*

The Court's decision in *Del Monte Dunes* addressed three issues: 1) whether questions of liability in an inverse condemnation action brought under 42 U.S.C. § 1983 can properly be submitted to a jury, 2) whether the United States Court of Appeals for the Ninth Circuit impermissibly based its decision on a standard that allowed a jury to reweigh the reasonableness of a city's land

81. *Id.*
82. *Id.* at 1428.
83. *Id.*
84. 512 U.S. 374 (1994).
85. *Del Monte II*, at 1430.
86. *Id.*
87. *Id.* at 1432.
88. *Id.* at 1433.
89. *Id.* at 1434.

use decision, and 3) whether the Ninth Circuit erred in assuming that the rough proportionality standard announced in *Dolan v. City of Tigard* applied to the facts presented for review [90]

In writing the 5-4 opinion for the Court, Justice Kennedy addressed the issues in reverse order and stated that the Court "need not decide all of the questions presented nor need we. examine each of the points given by the Court of Appeals in its decision to affirm."[91] Instead, Justice Kennedy stated that the controlling issue was "whether the matter was properly submitted to the jury "[92] Justice Scalia wrote a special concurring opinion on the first and controlling issue and joined in all other parts of Justice Kennedy's opinion. Justice Souter joined in all aspects of Justice Kennedy's opinion, but filed a dissenting opinion on the first and controlling issue.

A. *Issue One: May Questions of Liability in an Inverse Condemnation Action Brought under 42 U.S.C. § 1983 Properly be Submitted to a Jury?*

According to the Court, the answer to the first and controlling issue depended on whether the property owner had a statutory right under § 1983 or a constitutional right under the Seventh Amendment to a jury trial, and if it did, what was the nature and extent of the right.[93] The Court first addressed whether the phrase "action at law" contained in § 1983 was a term of art implying a right to a jury trial.[94] The Court stated that based solely on the phrase "action at law" the property owner did not have a statutory right to a jury trial under § 1983.[95]

The Court then focused on the Seventh Amendment and stated that its interpretation of the Seventh Amendment has been guided by a historical analysis comprised of two requirements: 1) whether the Court was dealing with a cause of action that was either tried at law at the time of the founding or is at least analogous to one that was, and 2) whether the particular trial decision must fall to the jury in order to preserve the substance of the common law right as it existed in 1791.[96]

With respect to the first inquiry, the Court stated that it has recognized that "suits at common law" include not just those suits which the common law recognized among its old and settled proceedings, but also those "suits in which legal rights were to be ascertained and determined."[97] The Court then concluded that the Seventh Amendment applies "not only to common-law causes of action but also to statutory causes of action analogous to common law causes of action ordinarily decided in English law courts in the late 18th

90. *Del Monte Dunes*, 526 U.S. at 702.
91. *Id.* at 694.
92. *Id.*
93. *Id.* at 707.
94. *Id.* at 707-08.
95. *Id.* at 708.
96. *Id.* (quoting Markmon v. Westview Instruments Inc., 517 U.S. 370, 376 (1996)).
97. *Id.* (quoting Parsons v. Bedford, 3 Pet. 433, 447 (1830)).

century, as opposed to those customarily heard by courts of equity or admiralty "[98]

The Court concluded that the property owner brought its suit pursuant to § 1983 to vindicate its constitutional rights. The Court then held that a "§ 1983 suit seeking legal relief is an action at law within the meaning of the Seventh Amendment."[99] Specifically, the Court stated that the property owner had sought legal relief and that "[i]t was entitled to proceed in federal court under § 1983 because, at the time of the city's actions, the State of California did not provide a compensatory remedy for temporary regulatory takings."[100] To support this statement, the Court referred to the mandate of *First English* which requires states to provide a monetary remedy for regulatory takings.[101] The Court reasoned that the constitutional injury alleged by the property owner was that the property was taken without just compensation and had the city paid for the property or had an adequate post-deprivation remedy been available, the property owner would have suffered no constitutional injury from the taking alone.[102]

The Court then addressed the city's suggestion that it look at the underlying constitutional right asserted by the property owner, rather than the statutory basis for asserting the right.[103] The city argued that because there is not a constitutional right to a jury trial in a formal condemnation action, there should not be one in an inverse condemnation action. The Court rejected this argument by stating that "a condemnation action differs in important respects from a § 1983 action to redress an uncompensated taking."[104] Most importantly the Court noted that when the government initiates condemnation proceedings, liability is not an issue because the government "concedes the landowner's right to receive just compensation and seeks a mere determination of the amount of compensation due."[105] The Court concluded its initial inquiry

98. *Id.* at 708-09 (quoting Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 348 (1998))

99. *Id.* at 709.

100. *Id.* at 710.

101. *Id.* (citing *First English*, 482 U.S. at 308-11).

102. *Id.* (Citing *Williamson County*, 473 U.S. at 194-95) (articulating the finality and exhaustion requirements of the ripeness doctrine).

103. *Id.*

104. *Id.* at 711-12.

105. *Id.* at 712. The regulatory takings doctrine is based on the distinction between an eminent domain (condemnation) proceeding and an action for inverse condemnation. The phrase eminent domain "refers to a legal proceeding in which a government asserts its authority to condemn property." Agins v. City of Tiburon, 447 U.S. 255, 258 n.2 (1980) (citing United States v. Clarke, 445 U.S. 253, 255-58 (1980)). Eminent domain has also been defined as the "power inherent in a sovereign state of taking or of authorizing the taking of any property within its jurisdiction for a public use or benefit." Boise Cascade Corp. v. Board of Forestry, 935 P.2d 411, 414 n.1 (Or. 1997) (quoting GTE Northwest, Inc. v. Public Util. Comm n, 900 P.2d 495, 500 (Or. 1995)).

By contrast, inverse condemnation is a "shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been

by reasoning that historically, "when the government has taken property without providing an adequate means for obtaining redress, suits to recover just compensation have been framed as common-law tort actions."[106]

With respect to the second inquiry of whether the decision must fall to the jury in order to preserve the substance of the common law right, the Court asked whether particular issues of liability in an inverse condemnation action can properly be determined by a jury To answer this question the Court stated that it must first look to history for guidance and then to precedent and functional considerations.[107] Finding no guidance from history or precedent, the Court focused on considerations of process and function. The Court stated that "[i]n actions at law predominantly factual issues are in most cases allocated to the jury "[108] In applying this principle the Court recognized that regulatory taking cases depend on the particular facts. Finally, the Court held that the question of whether a property owner has been deprived of all economically viable use of his property is predominantly factual in nature and the jury's role in determining whether a land use decision substantially advances a legitimate public interest is best understood as a mixed question of fact and law [109] Accordingly, the Court held it was proper to submit the "narrow, factbound" issue to the jury [110]

B. *Issue Two: Did the United States Court of Appeals for the Ninth Circuit Impermissibly Base its Decision on a Standard that Allowed a Jury to Reweigh the Reasonableness of a City's Land Use Decision?*

In deciding the second issue, the Court addressed the city of Monterey's

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instituted." *Agins* 447 U.S. at 258 n.2 (quoting *Clarke*, 445 U.S. at 255-58). Essentially, inverse condemnation refers to a claim against a governmental agency to recover the value of the property taken by the agency although no formal exercise of the power of eminent domain has been completed by the taking agency. *Boise Cascade Corp.*, 935 P.2d at 414 n.1 (citing Lincoln Loan v. State Hwy. Comm., 545 P.2d 105, 106 n.1 (Or. 1976)).

Thus, eminent domain is the power of the government to take private property for public use by paying the property owner just compensation, whereas inverse condemnation is a descriptive term describing the legal action a property owner initiates when the government has taken her private property for public use without paying the required just compensation. One final distinction between eminent domain and inverse condemnation is that in a condemnation proceeding the government does not contest the property has been taken, whereas in an inverse condemnation action the property owner must prove the property was taken as a condition precedent to recovering just compensation.

Further, the essence of the regulatory takings doctrine is based on the distinction between a physical taking and a regulatory taking. A physical taking is where the government actually physically intrudes upon property. Waste Management Inc. v. Metropolitan Gov't of Nashville & Davidson County, 130 F. 3d 731, 737 (6th Cir. 1997). A regulatory taking is when a regulatory or administrative action places such burdens on the ownership of private property that essential elements of ownership must be viewed as having been taken, even if the regulatory or administrative action has not deprived the owner of title or possession. Hendler v. United States, 36 Fed. Cl. 574, 585 (1996).

106. *Del Monte Dunes*, 526 U.S. at 715.
107. *Id.* at 718.
108. *Id.*
109. *Id.* at 720-21.
110. *Id.* at 721.

challenge to the "Court of Appeals' holding that the jury could have found the city's denial of the final development plan not reasonably related to legitimate public interests."[111] The Court thought the argument "obscure" because the city did not challenge the sufficiency of evidence, but instead argued that "as a matter of law, its land use decisions are immune from judicial scrutiny under all circumstances."[112] The Court focused on the legal theories contained in the jury instructions, the essence of which were proposed by the city, and stated that the legal theories were consistent with the Court's previous discussions of regulatory takings liability [113] The Court explicitly declined to accept the suggestion of the city and its amici to reconsider the Court's prior decisions developing the regulatory takings doctrine. The Court rejected this argument and disposed of the issue by holding that it was "contrary to settled regulatory takings principles."[114]

C. *Issue Three: Did the United States Court of Appeals for the Ninth Circuit Err in Assuming that the Rough Proportionality Standard Announced in Dolan v City of Tigard Applied to the Facts Presented for Review?*

In disposing of the third issue, the Court stated that, although in a general sense concerns for proportionality animate the takings clause, it has not extended the rough proportionality standard announced in *Dolan* beyond exaction cases or those cases involving land-use decisions conditioning approval of development on the dedication of private property to public use.[115] The Court stated that the rough proportionality standard announced in *Dolan* was inapposite to the property owner's challenge of a denial of a development

111. *Id.* at 703-04.

112. *Id.* at 707.

113. *Id.* at 706. The legal theory used in the jury instructions in Del Monte Dunes originated from the Court's decision in Agins v. City of Tiburon 447 U.S. 255 (1980). In *Agins*, relying in part on the regulatory taking cases of Nectow v. Cambridge, 277 U.S. 183, 188 (1928), and Penn Central Transp. Co. v. New York City, 483 U.S. 104, 138 n.6 (1978), the Court stated that the "application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land." 447 U.S. at 260. Some scholars have pointed out that the Court's decision in *Nectow* does not refer to the Fifth Amendment, but to the Fourteenth Amendment. Based on this observation these scholars argue that the "substantially advance a legitimate state interest" prong as set forth in *Agins* and followed in *Del Monte Dunes* should be regarded as a substantive due process test rather than a regulatory takings standard. David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights have Changed from Penn Central to Dolan, and What State and Federal Courts are Doing About It*, 28 STETSON L. REV. 523, 524 n.4 (1999); *see also* John D. Echeverria, *Revving the Engines in Neutral: City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 29 ENVTL. L. REP. 10682, 10686-87 (1999); Steven J. Eagle, *Del Monte Dunes, Good Faith, and Land Use Regulation*, 30 ENVTL. L. REP 10100 (2000).

114. *Del Monte Dunes*, 526 U.S. at 707.

115. *Id.* at 702.

plan.[116] However, the Court held that the "the Court of Appeals' discussion of rough proportionality was unnecessary" and irrelevant to the Court's disposition of the case.[117]

D. *Justice Scalia's Concurring Opinion*

Justice Scalia began his concurring opinion by stating that all § 1983 "actions must be treated alike insofar as the Seventh Amendment right to jury trial is concerned."[118] According to Justice Scalia, the Court's Seventh Amendment analysis should focus on the nature of the statutory action, not the claim that may be brought under it.[119] Disagreeing with Justice Souter, Justice Scalia argued that § 1983 is "a prism through which many different lights may pass... [and] in analyzing this cause of action for Seventh Amendment purposes, the proper focus is on the prism itself, not on the particular ray that happens to be passing through."[120]

According to Justice Scalia, the fact that a violation of the Fifth Amendment may give rise to another action other than a § 1983 suit, namely an inverse condemnation suit is irrelevant. The critical question, he claimed is whether a § 1983 suit is entitled to a jury [121] Relying on *Wilson v. Garcia*[122] for the proposition that all § 1983 actions should be characterized as tort actions for the recovery of damages, Justice Scalia reasoned that there is no doubt that the cause of action created by § 1983 is currently, and was always, regarded as a tort claim.[123]

However, Justice Scalia also pointed out that to say that the property owner in *Del Monte Dunes* had a right to a jury trial on the § 1983 claim is not to say that the property owner was entitled to have the jury decide every issue.[124] Justice Scalia relied on Justice Kennedy's methodology which focused on the historical practice that juries make primarily factual determinations and judges

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116. One author argues that the Court's holding on the third issue in *Del Monte Dunes* leaves the following issue unresolved: "the extent to which the 'rough proportionality' test established by the Supreme Court in *Dolan v. City of Tigard* and found not applicable in *Del Monte Dunes*, will be applied to land-use exactions other than land dedications." Nancy E. Stroud, *A Review of Del Monte Dunes v. City of Monterey and its Implications for Local Government Exactions*, 15 J. LAND USE & ENVTL. L. 195 (1999). While addressing this unresolved issue is beyond the scope of this note, the Court in Del Monte Dunes did not hold that the rough proportionality standard announced in Dolan would never apply to land-use exactions other than land dedications. In fact that question was effectively answered in the positive by Ehrlich v. City of Culver City, 12 Cal. 4th 854 (1996), *cert. denied*, 519 U.S. 929 (1996). What the Court was saying in *Del Monte Dunes* was that the *Dolan* rough proportionality standard is not applicable to a property owner's challenge not based on excessive exactions. Because the property owner in *Del Monte Dunes* did not plead or challenge the excessive exactions imposed by the city, the *Dolan* rough proportionality test could not be applied to the facts presented for review.

117. *Del Monte Dunes*, 526 U.S. at 703.

118. *Id.* at 723 (Scalia, J., concurring).

119. *Id.* at 724.

120. *Id.*

121. *Id.*

122. 471 U.S. 261 (1985).

123. *Del Monte Dunes*, 526 U.S. at 726.

124. *Id.* at 731.

resolve legal questions. Applying this reasoning to the facts of *Del Monte Dunes*, Justice Scalia focused on the two questions presented to the jury: 1) whether the property owner was deprived of all economically viable use of the property, and 2) whether the city's 1986 rejection of the property owner's building plans substantially advanced a legitimate public interest.

Justice Scalia agreed with the majority that the first question presented primarily a question of fact appropriate for consideration by a jury [125] The second question, according to Scalia, required division into two subquestions: a) whether the government's asserted basis for its challenged action represented a legitimate state interest, and b) whether that legitimate state interest was substantially furthered by the challenged government action.[126] According to Justice Scalia, the subquestion presented a question of law and was properly removed from consideration by the jury on the court's instruction. Justice Scalia then agreed that the second issue "at least in the highly particularized context" of *Del Monte Dunes* was a question of fact for the jury [127]

E. *Justice Souter's Dissenting Opinion*

In his dissenting opinion, Justice Souter agreed with the majority that the appropriate considerations in *Del Monte Dunes* were: 1) whether the cause of action in question was tried at law at the time of the founding or was at least analogous to a traditional at law action and; 2) whether the particular trial decision must fall to the jury in order to preserve the substance of the common law right as it existed in 1791.[128] Justice Souter's disagreement with the majority as to how this standard applied to the facts presented for review was based on his agreement with the city that the "analogy of inverse condemnation proceedings to direct ones is intuitively sensible, given their common Fifth Amendment constitutional source and link to the sovereign's power of eminent domain."[129] According to Justice Souter, the ultimate issue in both direct and inverse condemnation actions is identical- a determination of the fair market value of the property taken.[130] From this single premise, Justice Souter concluded that an inverse condemnation action at common law was analogous to a direct condemnation action, and accordingly, that the right to compensation for a direct taking carried with it no right to a jury trial.[131]

IV ANALYSIS

The Court's decision in *Del Monte Dunes* represents a synthesis of several

125. *Id.* at 732.
126. *Id.* at 732.
127. *Id.*
128. *Id.* at 733 (Souter, J., dissenting) (quoting majority opinion at 708) (internal quotations omitted).
129. *Id.* at 734.
130. *Id.*
131. *Id.* at 739-40.

issues that animate the Fifth Amendment's takings clause.[132] The case implicates the range of takings issues including the ripeness doctrine, the history of the regulatory takings doctrine[133] and Court's exaction jurisprudence.[134] However, because the ripeness doctrine is a hurdle that every property owner must leap,[135] the Court's decision in *Del Monte Dunes* will further compound the frustration property owners experience when they find they can't jump high enough. While the Court's decision in *Del Monte Dunes* did not specifically address the issue of ripeness,[136] the Court's reasoning was premised on the reality that granting a right to a jury trial in a inverse condemnation suit brought pursuant to § 1983 may be practically irrelevant due to the ripeness doctrine. Not only did the Court create a right to a jury trial and then reaffirm a roadblock, the Court's decision will further complicate the extent to which the Rooker-Feldman doctrine and concerns for res judicata and collateral estoppel will limit a property owner's right to a jury trial upon satisfying the ripeness doctrine.

A. *The Ripeness Doctrine*

Ripeness is a threshold determination and a specific category of justiciability that requires federal courts to determine whether a case has matured or ripened into a controversy worthy of adjudication.[137] The ripeness doctrine "is generally viewed as being both constitutionally required [by Article III's case or controversy mandate] and judicially prudent."[138] According to the ripeness doctrine, a federal court cannot reach the merits of a property owner's regulatory taking claim unless the property owner can satisfy the following two requirements: 1) that the government's decision regarding the application of

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132. The Fifth Amendment guarantees that private property shall not "be taken for public use, without just compensation." U.S. CONST. amend. V The Fifth Amendment applies to the states through the Fourteenth Amendment. Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897). Further, the Fifth Amendment's guarantee was "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." Armstrong v. United States, 364 U.S. 40, 49 (1960). When it is determined that government action violated that Fifth Amendment, it is a "determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest." Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

133. *See supra* note 113.

134. The two cases comprising the Court's exaction jurisprudence are Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), and Dolan v. City of Tigard, 512 U.S. 374 (1994).

135. *See generally* Michael M. Berger *Del Monte Dunes: A View from the Owner's Perspective*, SD40 A.L.I.-A.B.A. 497, 499 (1999) (stating that "[t]hose familiar with regulatory taking cases... know that the most difficult part of the case is not proving either the taking or that amount of damage to the jury. The hardest part of the case is proving to the court that the case is 'ripe' enough to go to trial at all"); Nancie G. Marzulla & Roger J. Marzulla, PROPERTY RIGHTS: UNDERSTANDING GOVERNMENT TAKINGS AND ENVIRONMENTAL REGULATION 143-55 (1997) (discussing the practical difficulties and heavy burden the ripeness doctrine places on property owners asserting a regulatory taking claim).

136. This issue was decided by the Ninth Circuit four years after Del Monte Dunes brought suit in *Del Monte I*. *Del Monte I*, 920 F.2d at 1501-07.

137. BLACK'S LAW DICTIONARY 1328 (6th ed. 1990).

138. Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 11 (1995).

the regulation to the property was final, which is determined by application, administrative, and reapplication thresholds; and 2) that the property owner sought and was denied just compensation through the state's inverse condemnation procedures, or is able to show that the state's procedures are inadequate on their face or are not available by judicial or administrative means.[139] However, the ripeness doctrine does not apply to all regulatory taking claims.[140] Generally, the ripeness doctrine only applies to as-applied challenges, or those challenges asserting that a regulation as it is applied to a particular piece of property constitutes a taking.[141] The ripeness doctrine is not generally applicable to facial regulatory taking challenges, or those challenges asserting that the adoption of the regulation itself constitutes a taking.[142]

B. *The Supreme Court's Development of the Ripeness Doctrine*

The United States Supreme Court's development of the ripeness doctrine, much like its development of the regulatory takings doctrine, has been piecemeal at best.[143] The Court's most recent pronouncement of the ripeness doctrine was its 1997 decision of *Suitum v Tahoe Regional Planning Agency.*[144] In *Suitum*, the Court specifically addressed the development of the ripeness doctrine. The Court stated that there are two independent hurdles to a regulatory taking claim brought against a state in federal court.[145] The Court stated that a property owner must: 1) demonstrate that she has received a final decision from the governmental entity charged with applying the challenged regulation to the affected property; and 2) have sought compensation "through the procedures the state has provided for doing so."[146] The Court explained that the first requirement follows from the principle that "only a regulation that goes too far results in a taking under the Fifth Amendment."[147] The second requirement stems from the Fifth Amendment's provision that only takings without just compensation violate the Constitution.[148]

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139. Brian W. Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 HOFSTRA PROP L.J. 73, 77-83 (1988).

140. *See* Michalel K. Whitman, *The Ripeness Doctrine in the Land-Use Context: The Municipality s Ally and the Landowner s Nemesis*, 29 URB. LAW. 13, 24-25 (1997).

141. *Id.*

142. *Id.*

143. *See generally*, James E. Krier, *The Takings-Puzzle Puzzle*, 38 WM. & MARY L. REV. 1143, 1150 (1997).

144. 520 U.S. 725 (1997) (because the property owner had effectively received a final decision from the government, even though she did not attempt to sell the transferable development rights available to her under the challenged land use regulation, the Court remanded the case for the lower court to determine if a taking occurred).

145. *Id.* at 733-34.

146. *Id.* at 734 (quoting Williamson County Reg'l Planning Comm n v. Hamilton Bank, 473 U.S. 172, 186, 194 (1985)).

147. *Id.* (internal citations omitted).

148. *Id.* at 734 (quoting *Williamson County*, 473 U.S. at 195).

While the Court's articulation of the ripeness doctrine seems clear, determining what is a final decision and what state court procedures are required to be satisfied is a difficult task. The development of the final decision prong proceeded with the Court deciding that a property owner must: a) reapply for approval upon being turned down; b) actually submit a development plan; and c) apply for any available variances.[149] The development of the state procedure or exhaustion prong proceeded with the Court deciding that states have to provide a monetary remedy for a (temporary) regulatory taking.[150]

1. *Final Decision*

a. *Re-Application*

While not explicitly labeling it as such, the Court's first expression of the ripeness doctrine was in *Penn Central Transportation Co. v. New York City.*[151] In *Penn Central*, the Court addressed the validity of New York City's Landmarks Preservation Law which placed restrictions on the development of individual historic landmarks and prohibited the construction of a fifty-five story tower atop Grand Central Station because it had been designated a landmark.[152] After reaching the merits of the case and rejecting the property owner's regulatory taking claim, the Court turned to the property owner's argument that New York City's Landmarks Preservation Law prohibited it from occupying any portion of the airspace above Grand Central Station.[153] The Court rejected this argument by stating that "nothing suggests an intention to prohibit *any* construction above the Terminal" and "[s]ince appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal."[154]

Nearly a decade after the Court's decision in *Penn Central* and its suggestion of a reapplication threshold, the Court decided *MacDonald, Sommer & Frates v. Yolo County.*[155] In *MacDonald*, a property owner asserted a regulatory taking claim after one tentative subdivision map proposal for 159 single-family and multi-family residential lots was rejected by the Yolo County Planning Commission.[156] The Court suggested that its takings jurisprudence reflects an insistence on knowing the nature and extent of the permitted development before adjudicating the constitutionality of the regulations that purport to limit it.[157] The Court held that the taking claim was not ripe because the property owner could have reapplied to the planning commission with another

149. *See id.* at 735-39..
150. *Id.* at 739-40.
151. 438 U.S. 104 (1978).
152. *Id.* at 107, 115-18.
153. *Id.* at 135-38.
154. *Id.* at 137.
155. 477 U.S. 340 (1986).
156. *Id.* at 342, 348.
157. *Id.* at 348-49 (citations omitted).

development plan, and there was a possibility that some development of the property would be approved.[158] The Court stated that the "rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews."[159] However, the Court did acknowledge that a property owner is not required to resort to futile, piecemeal litigation or otherwise unfair procedures in order to obtain approval or disapproval of a development plan.[160]

b. *Application*

In 1980, the Court decided *Agins v City of Tiburon*.[161] In *Agins*, the Court addressed the validity of a zoning ordinance imposing density restrictions which allowed only the construction of one to five single-family residences on an individual tract.[162] Because the property owner asserted a facial challenge to the zoning ordinance, the Court stated that the question before it was whether the mere enactment of a zoning ordinance constituted a taking.[163] The Court in *Agins* stated that for a takings claim to be ripe for review at least one development plan needs to be submitted for review at the local level.[164] The Court held that because the property owners had failed to even apply for development approval, they were free to pursue their reasonable investment expectations by submitting a development plan to local officials.[165] The Court further reasoned that without at least one application, the Court could not determine whether the impact of the general land use regulation denied the property owners the "justice and fairness" guaranteed them by the Fifth Amendment.[166]

In *San Diego Gas & Electric Co. v San Diego*[167] the Court dismissed the company's regulatory taking claim on appeal. Important to the Court was the fact that the company had not submitted a development plan to the city; therefore, it did not appear that the city's rezoning and adoption of an open space plan had deprived the company of all beneficial use of its property [168] The Court dismissed the appeal for want of jurisdiction because the lower court failed to decide if a taking had occurred.[169] Specifically, the Court noted that federal law permits the Court to only review final judgments and decrees of a state court, and because the Court determined that the lower court's decision

158. *Id.* at 352-53.
159. *Id.* at 353 n.9.
160. *Id.* at 350 n.7.
161. 447 U.S. 255 (1980).
162. *Id.* at 257.
163. *Id.* at 260.
164. *Id.*
165. *Id.* at 262.
166. *Id.* at 262-63 (quoting *Penn Central*, 438 U.S at 124).
167. 450 U.S. 621 (1981).
168. *Id.* at 631 n.12.
169. *Id.* at 631-33.

was not final, it lacked jurisdiction and dismissed the suit.[170]

c. *Application For Variances*

In *Williamson County Regional Planning Commission v. Hamilton Bank*[171] the Court squarely addressed when an inverse condemnation suit brought pursuant to § 1983 was ripe for review [172] In *Williamson County*, the Court overturned a jury's verdict determining that there had been a temporary regulatory taking and awarding compensation to the property owner in the amount of $350,000.[173] The Court held that even though the property owner had submitted a plan for development, it did not seek variances authorized by the subdivision and zoning ordinances and therefore had not obtained a final decision regarding the application of the ordinances.[174] The Court stated that a taking of property "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."[175] The Court held that the taking claim was not ripe due to the property owner's failure to seek a variance available under the regulation.[176]

2. *Exhaustion of State Procedures*

The Court's decision in *Williamson County* also set forth the requirement that a property owner must seek and be denied just compensation through state procedures before a taking claim will be ripe for federal review In *Williamson County* the Court stated that the "Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."[177] The Court stated that a taking claim is not complete until a state "fails to provide adequate compensation for the taking."[178] The holding in *Williamson County* was based on the availability of a Tennessee statute that provided procedures to obtain just compensation for a regulatory taking under "certain circumstances."[179] Tennessee case law held that the "certain circumstance" under the statute included a circumstance where a taking was affected by restrictive zoning laws or development regulations.[180] Therefore, the Court stated that there was a failure of proof on the property owner's part because the owner failed to show that an inverse condemnation procedure was unavailable or inadequate at the state level.[181] Subsequently, the Court held that the property

170. *Id.* at 633.
171. 473 U.S. 172 (1985).
172. *Williamson County*, 473 U.S. at 186-87.
173. *Id.* at 175, 200.
174. *Id.* at 186-87.
175. *Id.* at 186.
176. *Id.* at 190.
177. *Id.* at 194.
178. *Id.* at 195.
179. *Id.* at 196.
180. *Id.*
181. *Id.* at 196-97.

owner's taking claim was not ripe for review because the property owner did not seek compensation through the procedures provided by the state.[182]

In 1987, the Court decided *First English Evangelical Lutheran Church v. County of Los Angeles*.[183] In *First English*, the Court addressed the validity of a zoning ordinance that prohibited the property owner from constructing anything on its property [184] The Court held that the Fifth Amendment requires a state to provide a monetary remedy for regulatory takings in order to insure just compensation.[185] The Court stated that temporary takings which "deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires a remedy based on compensation."[186]

C. Del Monte Dunes, *Rooker-Feldman, Res Judicata and Collateral Estoppel*

Del Monte Dunes is a regulatory takings case frozen in time. The original development application was submitted in 1981, the original proceeding commenced in 1986, the first decision of the Ninth Circuit was issued in 1990, the second decision of the Ninth Circuit was issued in 1996, and the final decision of the United States Supreme Court was handed down in 1999 Because the original proceeding was commenced in 1986, the property owner in *Del Monte Dunes* was required to satisfy the ripeness requirements of *Williamson County*; however, at the time *Del Monte Dunes* was filed, the state of California did not provide a compensatory remedy for temporary regulatory takings. Due to the lack of a compensatory remedy the property owner in *Del Monte Dunes* was only required to satisfy the finality requirement of *Williamson County* before commencing an action in federal court pursuant to § 1983. The Court in *Del Monte Dunes* specifically points out that the property owner "was entitled to proceed in federal court under § 1983 because, at the time of the city's actions, the State of California did not provide a compensatory remedy for temporary regulatory takings."[187] Therefore, the property owner in *Del Monte Dunes* was not faced with the requirement that it exhaust procedures provided by the state before commencing an action in federal court. If the property owner in *Del Monte Dunes* would have been required to exhaust procedures provided by the state before commencing an action in federal court, the property owner's regulatory takings claim might have been precluded by the Rooker-Feldman

182. *Id.* at 194.
183. 482 U.S. 304 (1987).
184. *Id.* at 306-07.
185. *Id.* at 314-15.
186. *Id.* at 318.
187. *Del Monte Dunes*, 526 U.S. at 710.

doctrine or concerns for res judicata and collateral estoppel.[188]

The Rooker-Feldman doctrine, derived from the United States Supreme Court cases of *Rooker v. Fidelity Trust Co*,[189] and *District of Columbia Court of Appeals v. Feldman*,[190] provides: 1) that only the United States Supreme Court has the authority to review the final decisions of a state's highest court when that court determines a federal constitutional claim; and 2) that "lower federal courts have no jurisdiction to hear 'challenges to state court decisions in particular cases arising out of judicial proceedings' or to decide questions 'in-extricably intertwined' with state court judgements."[191] The Rooker-Feldman doctrine "bars only claims actually litigated or claims 'inextricably intertwined' with those actually litigated."[192] While the Rooker-Feldman doctrine has received little academic attention[193] it has been used as a basis by lower federal courts in over 500 cases to dismiss for lack of jurisdiction.[194]

Unlike the Rooker-Feldman doctrine, which bars only the claims actually litigated, the doctrine of res judicata (claim preclusion) bars all claims arising from the same action, whether or not addressed in the state court.[195] In addition to res judicata, the doctrine of collateral estoppel (issue preclusion) bars the re-litigation of a final determination of a legal issue or determinative fact.

When these three doctrines are applied in conjunction with the ripeness doctrine to regulatory taking claims, the conclusion is counter-intuitive: a private property owner ripens a case in order to get to federal court, but once in federal court his case is dismissed because it was ripened. The Court's decision in *Del Monte Dunes* further compounds this illogical conclusion because private property owners with regulatory taking claims, and normally egregious facts, will pound on the federal court door and assert their right under § 1983 to a jury trial. The question of whether the Rooker-Feldman doctrine or concerns for res judicata and collateral estoppel will deny a private property owner the right to enter the federal court house and present a case to

188. This note does not address the three abstention doctrines that may be applicable to regulatory taking cases, which are: 1) the *Burford* abstention doctrine derived from Burford v. Sun Oil Co., 319 U.S. 315 (1943); 2) the *Pullman* abstention doctrine derived from Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941); and 3) the *Younger* abstention doctrine derived from Younger v. Harris, 401 U.S. 37 (1971).

189. 263 U.S. 413 (1923)

190. 460 U.S. 462 (1983)

191. Suzanna Sherry, *Judicial Federalism in the Trenches: The Rooker-Feldman Doctrine in Action*, 74 NOTRE DAME L. REV. 1085, 1087 (1999) (quoting District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 486, 483 (1983)).

192. *Id.* at 1097.

193. Thomas D. Rowe, Jr., *Rooker-Feldman: Worth Only the Powder to Blow it up?* 74 NOTRE DAME L. REV. 1081, 1083 n.9 (1999).

194. Sherry, *supra* note 196, at 1088.

195. *Id.* at 1097.

a jury has not been squarely addressed.[196] The future viability of the regulatory takings doctrine will be determined by the answer to this question, which in turn requires a reexamination of the ripeness doctrine.

V CONCLUSION

Del Monte Dunes was a victory for the regulatory takings doctrine. The Court in *Del Monte Dunes* focused on the facts presented for review and ruled accordingly in order to preserve the regulatory takings doctrine and provide Del Monte with just compensation. However, by deciding the case on an issue that Court thought was "largely academic, not having any continuing importance"[197] it has done the regulatory takings doctrine a disservice. The Court has raised new issues by failing to resolve old ones. The Court's decision in *Del Monte Dunes* is to be commended for paving a road to a jury trial, but should be challenged for reaffirming a roadblock along the way

196. *See* Fields v. Sarasota Manatee Airport Auth., 953 F.2d 1299 (11th Cir. 1992) (discussing res judicata and the possibility of reserving the ability to appeal to a federal court pursuant to Jennings v. Caddo Parish Sch. Bd., 531 F.2d 1331 (5th Cir. 1976), *cert. denied*, 429 U.S. 897 (Oct. 18, 1976); Wilkinson v. Pitkin Bd. of County Comm'rs, 142 F.3d 1319 (10th Cir. 1998) (discussing res judicata and collateral estoppel); Dodd v. Hood River County, 136 F 3d 1219 (9th Cir. 1998), *cert. denied*, 525 U.S. 923 (U.S. Oct. 5, 1998) (discussing collateral estoppel); Agripost, Inc. v. Miami-Dade County, 195 F 3d 1225 (11th Cir. 1999) (discussing res judicata, collateral estoppel, and the Rooker-Feldman doctrine).

197. *See supra* note 1.