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United States Supreme Court Amicus Brief.

CITY OF MONTEREY, Petitioner,

v.

DEL MONTE DUNES AT MONTEREY, LTD., and Monterey-Del Monte Dunes Corporation, Respondents.

No. 97-1235.
October Term, 1997.
July 31, 1998.

On Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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*1 INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit, public interest law center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. Central to the mission of the Institute for Justice is strengthening the ability of individuals to control and transfer property and demonstrating that property rights are inextricably connected to other civil rights.

The Institute's brief is co-authored with Professor Richard Epstein of the University of Chicago School of Law, one of the nation's leading authorities on property law. The Institute also filed an *amicus curiae* brief in *Dolan v. City of Tigard*, among other important takings cases before this Court. The Institute's brief focuses on the proper standard of review when government regulations fully or partially restrict the rights of property owners.

The Institute has obtained the consent of the parties to the filing of this brief, and letters of consent have been filed with the clerk. [1]

STATEMENT OF FACTS

This lawsuit reaches the Supreme Court after a protracted dispute between the Respondent Del Monte Dunes and the Petitioner City of Monterey ("the City") over the development of a 37.6-acre plot of oceanfront property located adjacent to a multi-family development, a railroad right-of-way, and a state beach park. [2]

***2** The subject parcel had once been used as a petroleum tank farm, and seven tank pads and other equipment had remained on the site. In 1981, Respondent's predecessor in title, Ponderosa Homes, sought the City's permission to build a 344-unit residential development on the site. As part of its application, Ponderosa had to submit for City approval a tentative map outlining in detail its planned-unit-development. *See* Cal. Gov't Code, §§ 66410 to 66499.58 (Deering 1997).

Ponderosa's initial 344-unit proposal "was within the residential density allowed on the site by the existing zoning and general plan designations." *Del Monte I*, 920 F.2d at 1502. Nonetheless the City's planning staff then asked for an environmental impact statement, duly submitted in January 1982. The planning commission then rejected Respondent's permit request, but invited submission of a plan for a project with 264 units. That proposal was in turn rejected in December 1983, when the commission suggested a project with 224 units. Respondent submitted a proposal to that effect in early 1984, which was rejected first by the commission and then by the City Council in March, 1984. The Council then instructed the planning commission to consider a 190-residential-unit development. In July 1984, the planning commission denied Respondent's site plan for 190 units, but its decision was overruled by the City Council in September 1984. The Council did not grant final permission to build but did give Ponderosa an eighteen-month conditional use permit for the proposed site development. One of the fifteen required conditions demanded assurance of habitat preservation for the Smith's Blue Butterfly. This assurance had to meet the approval of the California Department of Fish and Game (DFG) and the United States Fish and Wildlife Service (USFWS). Other conditions required the approval of the Architectural Review Committee of the actual plans; still ***3** others pertained to access, fencing, grading, underground utilities, provision of moderate income housing, and sound-proofing between units. *See Del Monte I*, 920 F.2d at 1503. In late 1984 Ponderosa sold its interest to the Respondent, Del Monte Dunes.

By August 1985, the professional planning staff had recommended approval of the project, noting that "the proposed subdivision [was] not likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat." *Id.* at 1504. But the planning commission turned down the proposal in January, 1986, and in June 1986, the City Council affirmed the denial of the planning commission, noting that the site was "not physically suitable for the type and density of the 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." *Id.* at 1504. The

City Council also found that there was inadequate access to the project and that an inadequate habitat had been supplied for the Smith's Blue Butterfly. *See id.*

Thereafter the landowners brought suit against the City in Federal Court for inverse condemnation. The City defended on the ground that the action was not ripe, but in 1990, the Ninth Circuit ruled for the landowner, and remanded the case for trial. *See Del Monte I,* 920 F.2d 1496. In September 1994, the City again approved Del Monte's proposed 190-unit development, conditional on its ability to provide adequate mitigation for adverse environmental impacts. Negotiations dragged on for another eighteen months between Del Monte, the City, the USFWS, the California DFG, and other interested experts and members of the public. Before the planning commission, Del Monte introduced expert testimony to show that it had met the appropriate environmental concerns; that conclusion was disputed by USFWS and the California DFG. The building permit was again rejected. Thereafter, Del Monte again sued in District Court, and during the pendency of the case sold its land to the state of California for $4.5 ***4** million, or $800,000 more than its purchase price. That decision left unaffected Del Monte's suit against the City of Monterey. When that case was tried, the jury awarded Del Monte $1,450,000, and that decision was affirmed again by the Ninth Circuit in September, 1996, fifteen years after the original application was filed. In its decision, the Ninth Circuit noted that the jury passed on *both* relevant questions: was there a legitimate public reason that justified the restrictions in question, and did the restrictions in question deprive the landowner of all viable economic use. The Court then examined *both* these claims and found that each was supported by sufficient evidence. *See Del Monte II,* 95 F.3d at 1429-32 (legitimate justification) and *id.* at 95 F.3d at 1432-34 (economic use). In April 1998 a writ for certiorari was granted.

SUMMARY OF ARGUMENT

This inverse condemnation case raises both procedural and substantive issues.

Procedurally, the District Court allowed the jury to decide (1) whether the City had legitimate public reasons to restrict Del Monte's use of its own property, and (2) whether those restrictions had deprived it of all economic value. That standard makes sense under Section 1983, which distinguishes between actions at law and suits in equity. An action for damages for what would otherwise be an unlawful taking more closely resembles a common law suit for trespass or conversion than it does a suit in equity for specific performance or an injunction. Absent any intention by Congress to displace the ordinary division of labor between court and jury, such as that governing federal condemnation actions under Fed. R. Civ. P. 71A(h), the decision of the District Court, as affirmed by the Ninth Circuit, was correct.

Wholly apart from its soundness, the critical issue in this case is the standard of review that is brought to the takings claim. The Ninth Circuit carefully reviewed both parts of the takings issue. It first held that the jury had ample reason to find that the City did not meet the "rough proportionality" standard of *Dolan v. City of Tigard,* 512 U.S. 374 (1994) in ***5** advancing its public justifications for the restrictions that it imposed. It also held that the evidence supported the jury's determination that the regulations and conditions deprived Del Monte of all economically viable use of the property.

The judgment below is easily defensible when both these facts are found *in conjunction.* The total wipeout of all economic use has been held by this Court in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992) to be tantamount to a physical taking. Just as with physical takings, the City cannot expect the deference of the rational basis test to evaluate the reasons for its actions. Rather, it must meet the higher level of scrutiny enunciated in *Dolan's* rough proportionality test. The size of the wipeout inflicted and the danger of abusive, factional behavior within local government poses too great a risk for government decisions that work a massive deprivation of constitutional rights.

The rough proportionality standard in *Dolan* should apply even if the City's restriction had worked only a partial restriction of land use. As articulated in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), the takings clause contains a specific substantive protection for private property that cannot be overridden on a deferential rational basis standard, such as that applicable to substantive due process or equal protection claims. With partial restrictions, as with total wipeouts, the dangers of faction, abuse and delay militate against a deferential rational basis test that allows too much abuse for too little sensible public

gain. Local and state governments often oppose development for reasons that are parochial, anticompetitive and isolationist. Democratic measures of self-correction often fail because bodies frequently give short shrift to the legitimate expectations of developers and their potential customers who do not live and vote within the state or its political subdivision.

This pattern of abuse and delay is evident in this lawsuit, which has bounced back and forth through the courts for nearly eighteen years. The rough proportionality standard only requires courts to review public restrictions of private ***6** development under the same type of standards that they have long used in private disputes. In the short term, the rough proportionality standard might increase the fraction of land use planning decisions subject to judicial challenge. But in the long run it should help reduce the frequency of litigation by making state and local planning commissions fearful of putting pointless obstacles in the path of ordinary development that by no stretch of the imagination constitute a common law nuisance or an unreasonable burden on public facilities.

ARGUMENT

I. Section 1983 Entitles Aggrieved Landowners to A Jury Trial on the Basic Elements of Liability in a Regulatory Takings Claim.

A. The Basic Structure of Section 1983 Contemplates Jury Trials for Money Damages in State Regulatory Takings Cases.

The first question presented in this case is whether a plaintiff who brings an action under 42 U.S.C. § 1983 is entitled to have the basic issues of liability determined by a jury rather than by a court. Regulatory takings disputes usually raise two related questions. First, has the landowner been denied all economically viable use of the property? If that question is answered in the affirmative, then the inquiry shifts to whether the rejection of the landowner's development application has substantially advanced a legitimate public purpose. *See Del Monte II,* 95 F.3d at 1426. The Ninth Circuit held that both these issues raised mixed questions of fact and law which fell into the province of the jury, subject to review by the court to correct against manifest error. The division of fact-finding power between court and jury in regulatory takings cases follows the conventional pattern that has served well in countless other contexts, ranging from ordinary tort decisions to statutory causes of action under the antidiscrimination laws. *See, e.g., Lorillard v. Pons,* 434 U.S. 575 (1978) (jury trial in age discrimination actions).

***7** The advantages of this customary division of responsibility are well understood and widely accepted. Using juries allows members of the community to bring their own sense of fairness to matters that turn heavily on the reasonableness of government action, which is so central to this case. *See Del Monte II,* 95 F.3d at 1430. The judicial override offers a check against runaway juries moved by passion and prejudice. The court first sets the applicable legal standard; then the jury makes the initial factual determination; finally, trial and appellate courts set aside verdicts when juries reach manifestly indefensible decisions. Regulatory takings cases offer no special reason to displace this time-honored division of power as a matter of policy. Nor does anything in this Court's decision in *United States v. Reynolds,* 397 U.S. 14 (1970) require the contrary. That decision only dealt with the division of responsibility between judge and jury under rule 71A(h) of the *Federal Rules of Civil Procedure,* which governs federal condemnations in federal court, but which has no impact on inverse condemnation proceedings brought against state governments in federal court. *Reynolds,* 397 U.S. at 20.

B. This Court Should Decide the Important Substantive Question of Constitutional Law even if it Rules that the Trial Judge Should Resolve all Questions of Liability in Regulatory Takings Disputes.

The central issue in this case is not whether juries should be excluded from any role in determining government liability in land use cases. Rather, it concerns the substantive standards by which these government decisions will be judged. The Court will surely have to face this critical issue sooner or later, for even if the Ninth Circuit erred on this procedural point, the substantive issue remains central to the case on remand. Rather than allow that trial to take place in ignorance of the applicable standard of review, it is better to resolve the issue now on the strength of a detailed factual record that permits full consideration of the

relevant factors. The implications of this issue are so profound for the health ***8** of the nation as a whole that any delay in passing on the question will unnecessarily allow uncertainty to fester in countless other land use and permit disputes that raise similar questions. A clear statement on the matter is required.

II. The "Rough Proportionality" Standard of Dolan Clearly Applies to Government Regulations that Deprive Landowners of All Economically Viable Use of their Property.

A. The Questions Presented Implicitly Address Situations in which State Regulations Have Deprived Landowners of All Economically Viable Use of Their Property.

The second and third questions presented in the City's petition for certiorari place in sharp relief the standard of review for government action in inverse condemnation cases. Question Two asks "whether liability for a regulatory taking can be based on a standard that allows a jury or court to reweigh the evidence concerning the reasonableness of a public agency's land use decision." The presumed answer to this question is "no," which in effect allows government agencies a free pass whenever they make individualized decisions that restrict the use of private lands. Question Three asks "whether the reasonable proportionality standard established by this Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), in the context of property exactions can be properly applied to an inverse condemnation claim based upon a regulatory denial."

As formulated, the questions presented elide a critical point about the position of this case on appeal. The judgment below must be sustained either (1) narrowly, that the *Dolan* standard applies in all cases where the state seeks to justify land use restrictions that totally destroy all economically viable use *or*, (2) if this Court decides, broadly, that the *Dolan* standard applies to all partial land use restrictions. Amicus Curiae believes that the narrow proposition is already well established as a matter of law, and that the broader proposition is sound as a matter of constitutional principle. ***9** Accordingly, this brief first addresses the more limited question of the application of *Dolan* to cases of total wipeouts, and then the broader issue of whether the *Dolan* standard applies to State justifications for partial land use restrictions.

In dealing with this case, the City's proposed answer is that the state may be asked to justify its actions when it conditions the issuing of a building permit on the surrender of a possessory interest in property (a fee interest, or an easement) but not for any "mere" restrictions on land use, even those that deprive the landowner of all economically viable use of the land. Thus the Petitioner and the various Amici claim that *Dolan's* rough proportionality standard is limited to cases of permanent physical occupation of once private lands. In support of that position they point to the conclusion found in such decisions as *Clajon Production Corp. v. Petera*, 70 F.3d 1566 (10th Cir.1995): "Based on a close reading of *Nollan* and *Dolan*, we conclude that those cases (and the tests outlined therein) are limited to the context of development exactions where there is a physical taking *or its equivalent.*" *Id.* at 1578. (emphasis added).

Ironically the last clause of this sentence in *Clajon* clearly supports the Respondent's judgment below: the only "equivalent" to a physical taking is an economic regulation that deprives land of all beneficial economic use, which is precisely the situation present in this case. Given the factual posture of this case, the City's position embraces an indefensible anomaly. Generally speaking, the complete loss of all economic use is treated like the physical dispossession of private property because it is its functional equivalent. *See San Diego Gas and Electric Co. v. City of San Diego*, 450 U.S. 621 (1981) (Brennan, J. dissenting); *see also*, Lawrence Tribe, *American Constitutional Law* § 9-3 (2d ed. 1988) ("Thus a taking occurs ... when government controls a person's use of property so tightly that, although some uses remain to the owner, the property's value had been virtually destroyed"). If the rough proportionality standard holds for an exaction that leaves a landowner with many beneficial uses of property, then it must surely apply to the *greater* loss of rights that flow from the complete loss of all viable economic use. ***10** Accordingly, the correct analysis of this case requires an understanding of the two key elements of a regulatory takings case: (1) did the government action deprive the landowner of all viable economic use, and (2) was there a legitimate public purpose that supported the state's action.

B. The State Deprives An Owner of Vacant Land All Beneficial Economic Use When the Totality of its Permit Conditions and Restrictions Render Economically Unviable Even the Ideal Development Program.

The issue of whether government action has deprived a landowner of all viable economic use arises in two separate contexts. The first of these involves cases where the landowner is *already* making productive use of his property, but wishes to make more intensive use of the land in question. In *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978), the owners of the Grand Central Terminal sought to construct a major new structure in its upper air space, which was denied under New York's landmark preservation ordinance. This Court refused to award Penn Central compensation in part because Penn Central had not been deprived of all economically viable use of its property. The revenue from the land and building covered its costs and allowed the owner a profit even in its current configuration.

The maintenance of the status quo does not offer the government an escape hatch for land that has *no* current productive use. To require land to remain vacant necessarily strips away its entire economic use and thus rises to the level of a compensable taking. That was the clear import of *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), where South Carolina prohibited all new construction on a buildable beachfront lot. But constitutional obligation to compensate is not limited only to cases that explicitly prohibit any development of the land. A formal permission to build, coupled with a set of restrictions that in combination make building unprofitable, has the same practical effect as the ***11** absolute prohibition. Accordingly, it has been treated in the same fashion.

Thus, in *Bowles v. United States,* 31 Fed. Cl. 37 (1994), the Army Corps of Engineers denied the landowner a permit to fill his land for a septic tank, and required him (alone among his neighbors) to "build a house on stilts and install a holding tank sewer system without filling Lot 29 [his building plot]." *Id.* at 44. The sole use of the land was for a single family residence, and the Court ordered compensation by crediting the landowner's evidence and by disregarding the contrary evidence of the government. The Court found that meeting the Corps's requirements of an above-ground sewage system gave the lot a negative value. *Id.* at 44. In contrast, the cases that have refused to find a total deprivation of economic use have typically involved situations where the regulation itself explicitly preserved some profitable land use to its owner. Thus, the landowner was not deprived of all economic value in *Outdoor Systems v. City of Tucson,* 997 F.2d 604 (9th Cir.1993), when the City's sign ordinance conditioned the issuance of a valuable building permit on the dismantling of any billboard on the land. Nor was a landowner deprived of all economic use when prohibited from hunting "surplus game" on its own property, although allowed to continue with all of its other previously profitable activities. *See Clajon Prod. Corp. v. Petera,* 70 F.3d 1566, 1575 (10th Cir.1995). In all these cases the residual uses allowed the owner to market the land at a positive market value. Not so with the restrictions imposed on Del Monte: once the conditions were imposed, any further development of its land would only add to its financial losses.

C. The City of Monterey Has Not Shown that the Total Deprivation of Viable Economic Use is Necessary to Prevent any Nuisance-Like Harms to Others.

The City of Monterey does not necessarily lose a regulatory taking case simply because a landowner has been deprived of all economically viable use. But within that ***12** confined context, it no longer suffices for the City to show that the restrictions in question advance some broad objectives of land use planning such as the preservation of open spaces, *see Agins v. City of Tiburon,* 447 US. 255 (1980), or growth control, *see Schenck v. City of Hudson,* 114 F.3d 590 (6th Cir.1997). Rather, the City is put to a higher test in light of the greater devastation that its regulations have wreaked. Now it must show that this set of provisions was justified in order to prevent nuisance-like harms to others. *See Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992).

Notwithstanding their formal equivalence, the examination of the relevant justifications for government action does, however, raise distinctive issues when the landowner's takings claim rests on a complete loss of economic use as opposed to the permanent occupation of land. Only in extraordinary cases could a state justify the complete occupation as necessary to prevent the occurrence of a common law nuisance. Except in extraordinary cases, some lesser restriction on land use could achieve that same

end. But that less-restrictive alternative is not obviously available when government land use regulations force a landowner to suffer a total loss of economic use: in principle, these restrictions could be the least restrictive means of preventing nuisance-like harm to strangers, in which case they do not run afoul of the takings clause.

D. Only Anti-Nuisance Justifications Suffice in Cases Where Regulation Strips a Landowner of All Economically Viable Use.

Lucas itself makes clear the limited types of justification made available to the state when land use regulations work a total taking. Thus this Court held that the state "may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas v. South Carolina Coastal Council,* 505 U.S. at 1027. This Court made the point still more explicit when it said:

> ***13** [a] law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts-by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

Lucas, 505 U.S. at 1029.

In light of that standard, this Court remanded the case to the South Carolina Courts to decide whether a total prohibition on new construction on plaintiff's beachfront lots was consistent with the common law of nuisance (which contains the implicit limitations on use inherent in fee simple ownership). The South Carolina Court held it did not. *See Lucas v. South Carolina Coastal Council,* 309 S.C. 424, 424 S.E. 2d 484 (1992).

Lower court decisions have then held that the state bears the burden of proof on this critical question of nuisance prevention:

> When a total regulatory taking occurs the government can resist compensation only if the nature of the owner's estate shows that the proscribed use was not part of the owner's property right to begin with.... In the case of a fee simple estate in land *the government has the burden of proof* to demonstrate that the prohibited use of the property constitutes a nuisance under state common-law doctrine. It cannot hide behind conclusory legislative findings that simply characterize land use restrictions as harm-preventing.

Bowles v. United States, 31 Fed. Cl. 37, 45 (1994). (emphasis added).

Bowles then applied this test by holding that "building a house" is not a common law nuisance. *Id.* at 49. The same logic applies in this case. There is simply no credible argument that the construction of a housing complex on a dune near the beachfront is a nuisance. That was the conclusion in ***14** *Lucas* and it has to be the conclusion here. The state may want to preserve land in its natural state, whether for tourism or for needed habitat, but if so the condemnation option always remains open to it. The power of eminent domain confers on the state the extraordinary power to take private property without the consent of its owner. But it authorizes only condemnation, not public theft. Ordinary individuals who obtain consent must pay for what they take. All the more reason why the state must pay for what it takes *without consent.* That extraordinary government power to take without landowner's consent cannot under our Constitution be transmuted into the tyrannical power to take without compensation. Confiscation is not allowed when the government permanently occupies land. It should not be allowed here with its functional equivalent-the stripping away of all economic use of the property. The short, simple truth is that the state's own preferred justifications for its actions fall short of what *Lucas* requires of it. For these reasons alone the decision of the Ninth Circuit should be affirmed.

E. The Dolan Rough Proportionality Standard Governs State Justifications for Total Land Use Wipeouts.

At present this Court has adopted a strict scrutiny standard whenever the government takes permanent physical possession of private property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). That rule holds whether the government occupies the land or authorizes private parties to occupy it, as was the situation in *Loretto* when the cable company's box was placed on the roof of the landowner's apartment building. As noted earlier, *Lucas* expressly adopted the language of strict scrutiny when it examined the state's justification for imposing land use restrictions.

The applicable standard of review in *Lucas* stands in sharp opposition to that used with partial restrictions on land use, i.e. those that do not deprive the landowner of all economically viable use of his property. *See* ***15** *Dolan*, 512 U.S. at 385, n. 6. Historically, the rational basis standard of review dominated takings cases under the jurisprudence of this Court. That standard (although not those exact words) governed this Court's initial foray into zoning law in *City of Euclid v. Ambler*, 272 U.S. 365 (1926). It was more consciously applied in *Goldblatt v. City of Hempstead*, 369 U.S. 590 (1962). *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), marked a self-conscious retreat from the earlier trend and the acceptance of a higher standard of review.

Nollan addressed the situation in which the state was willing to issue a building permit if the landowner was prepared to submit to the exaction of a lateral easement across its land. This Court rejected the state's effort to bundle the easement with the building permit when the easement was unrelated to the state's asserted interest in preserving a viewing easement from the public highway over Nollan's land to the Pacific Ocean. In so doing, *Nollan* explicitly rejected any assimilation of takings cases to the lower rational basis standard, which has long been the norm in equal protection or due process challenges to state regulation of ordinary economic liberties (chiefly to buy and sell goods and services at unregulated prices or wages). *See Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955). Thus *Nollan* states (in language that supports both Respondent's broad and narrow claims) that

> there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical.

483 U.S. at 836, n. 3.

Thereafter the Court limited *Goldblatt* by noting that it does "appear to assume that the inquiries are the same, but ***16** that assumption is inconsistent with formulations of our later cases." *Id.*

The exact level of the increased scrutiny required under the takings clause was not fully settled in *Nollan* because of the utter lack of any nexus between the lateral beachfront easement and the viewing easement. It fell to *Dolan* to test the closeness of the relationship between the exactions demanded and the state justifications for their use. In *Dolan*, the plaintiff wished to double the size of her plumbing supply store, but was told by the City that she could obtain the necessary permits only by deeding over portions of her land for use as a flood plain and a pedestrian/bicycle pathway. This Court recognized that these restrictions in principle could be related to legitimate public ends, but steadfastly refused to defer to the City's judgment on the closeness of that connection. In remanding the case, this Court held that the state must demonstrate a "rough proportionality" that linked the exactions imposed to the ends they served.

In articulating this rough proportionality standard, this Court reviewed the decision standards of state courts to decide whether the findings made in *Dolan* "are constitutionally sufficient to justify the conditions imposed by the city on Petitioner's building permit." *Dolan*, 512 U.S. at 389. More specifically, the Court first rejected a rational basis standard of review under which "very generalized statements as to the necessary connection between the required dedication and the proposed development

seem to suffice." *Id.* at 389. At the opposite extreme, this Court also rejected a "very exacting correspondence, described as the 'specifi[c] and uniquely attributable' test." "We do not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved." *Id.* at 389-90.

This Court then opted for the rule adopted in the majority of states that "have taken an intermediate position, requiring the municipality to show a 'reasonable relationship' between the required dedication and the impact of the proposed development." *Id.* at 390. Nonetheless this Court was uncomfortable with this verbal formulation.

> ***17** We think the 'reasonable relationship' test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term 'reasonable relationship' seems confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but 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.

Id. at 391.

At this juncture *Euclid*, with its rational basis approach, was explicitly distinguished on the ground that it involved "generally applicable zoning regulations," in contrast to the city's "adjudicative decision to condition Petitioner's application for a building permit on an individual parcel," where "the burden properly rests on the city." *Id.* at 391, note 8. *See also id.* at 385 (contrasting the "essentially legislative determinations classifying entire areas of the city," with the "adjudicative decision" involved in passing on Dolan's application). The clear import of these passages is that rough proportionality is tantamount to intermediate scrutiny in the choice of means to reach the set of antinuisance objectives.

The rejection of rational basis review applies with undiminished force in the current case. No one doubts that Del Monte had complied with all general zoning ordinances in its initial permit application. All the objections to its proposed plan of construction rested alleged defects in that program that depended on conditions that apply to every coastal dune in the United States. All dunes contain high and ***18** low points. How easy it is to allege that building on the high ground blocks views over the land, while building on the low portions could have some impact on drainage; or that each plot of undeveloped land could in principle serve as habitat for some species, endangered or otherwise, of interest to the state.

We are far from suggesting that the state is incapable of acting when it is prepared to compensate for the losses that it wishes to impose on the landowner and his potential purchasers. In this case, however, these concerns have been invoked to delay for years development on this parcel and this parcel only. Yet the City's reasons for denying a building permit contained only cookbook responses that could have been drafted in complete ignorance of the evidence gathered in this case. Indeed, if anything, the "findings" here were less informative than those rejected as insufficient in *Dolan*, for there at least flood plain and traffic control counted as unquestionable ends of the state's police power. In contrast, the stylized responses offered by the City of Monterey did not reveal any discernible harm to public lands or waters; nor did they show any harm to the property of any neighbors; nor did they show any excessive demands on infrastructure that have been the concern in recent federal appellate opinions; *see, e.g.*, *Schenck v. City of Hudson*, 114 F.3d 590 (6th Cir.1997), or state court opinions, *see Sprenger, Grubb & Associates, Inc. v. City of Hailey*, 127 Idaho 576, 903 P.2d 741(1995). At most they demonstrated an awareness of the inevitable environmental change that accompanies any development anywhere. If the rough proportionality standard carries over to this case, then the decision of the Ninth Circuit must stand.

***19 III. Even in Cases of Partial Land Use Restrictions The Rough Proportionality Standard Should be Adopted.**

A. Rough Proportionality Reconciles the Need to Curb the Sum of Private and Public Abuse.

The broad version of the question presented in this case is whether the rough proportionality standard should be applied to review government justifications for partial land use restrictions. Legal authority on this point is surely divided. This Court's decision in *Nollan* points to the general rejection of a rational basis standard in connection with specific substantive guarantees, such as the takings clause. But the Circuit Court and state court decisions distinguished above, all take the position that the rough proportionality standard of *Dolan* only applies to exaction or dedication cases. Amicus Curiae submits that the higher standard of rough proportionality review is appropriate with regard to the full range of land use restrictions.

The Constitution and Bill of Rights contain a large number of individual guarantees, but they contain no explicit instructions on the standard of scrutiny that should be used. The various government parties attacking the Ninth Circuit decision write as though the only real issue at stake involves preserving the "flexibility" of government to make land use decisions, including those relevant to the preservation of endangered species. *See, e.g.,* Amicus Curiae Brief for the United States, supporting the Petitioner in Part, at 1. In so doing, they act as though the only goal is to preserve the appropriate sphere of action for virtuous and informed government action. Our Constitution takes a different view of government action. On the one hand it obviously authorizes official action at all levels, but it does so with a keen appreciation of the abuses that can subvert its sound operation. Ever since Federalist No. 10 articulated the danger of faction, the theory of constitutionalism poses a more complex inquiry than Petitioner's one-sided account acknowledges. The issue is not merely how to preserve government flexibility for constructive ends. Rather, it is how to preserve government flexibility for constructive ends *without giving* the state carte ***20** blanche to perform destructive actions. Our Constitution thus always performs the balancing act of both authorizing and limiting government action. So the real question is how is that best done?

The problem is best understood by linking the choice of standard to the costs of an erroneous decision under conditions of uncertainty. Any judicial judgment on constitutionality is subject to two types of errors. *See generally* David C. Baldus & James W.L. Cole, *Statistical Proof of Discrimination* 291-92 (1980). Type I error is to uphold a constitutional challenge to lawful government action that should be allowed. Type II is to permit a government action that should be prohibited. It is impossible to eliminate both types of error simultaneously since they are inversely related. The only way to eliminate the last bit of one type of error is to increase substantially the error rate of the other type. If both forms of error were weighted equally, then the ideal strategy would be simply to reduce the sum of the errors, without regard to their direction-which offers a sensible interpretation of the standard of rough proportionality (or intermediate scrutiny) under *Dolan.* But let one type of error be weighted more heavily then the other, and the balance shifts accordingly. Greater attention should be paid to eliminate those errors that carry with them the more serious negative consequences.

The various standards of constitutional law respond to these different weights of error. A strict scrutiny standard is used when this Court adjudges the errors of commission to be far greater than the errors of omission. The rational basis standard is used when this Court adjudges the errors of omission to be far greater than the errors of commission, leaving intermediate scrutiny to cover those cases where errors are of roughly equal weight. An intelligent program of constitutional adjudication necessarily makes rule-of-thumb estimations of the gravity of error in certain well-established categories. It is not possible at this juncture to analyze how this framework applies to the various freedoms protected by the Bill of Rights, or to the various classifications (race, sex, age, alienage, wealth) that could be challenged under the equal protection clause. But in the takings area, it is clear that ***21** the strict scrutiny standard requires the state to pay compensation when it permanently dispossesses the owner of private land.

The situation is more complex when land use regulation is at stake, for the difficulties with harmful spillovers are no longer so easily dismissed. It is this reason that best explains *Dolan's* rejection of the strict scrutiny standard adopted in some states. *See Pioneer Trust & Savings Bank v. Mount Prospect,* 22 Ill. 2d 375, 380, 176 N.E.2d 799, 802 (1961). The construction of a hard surface covering in one area could lead to dangerous runoff in other areas. The construction of a new shopping center or apartment complex will increase the demands of roads and infrastructure. A strict scrutiny standard could easily be held to frustrate the efforts of the state to make sure that the actions of some individuals do not impose untoward costs on nearby

property, public or private. *Dolan* thus treats the risk of private abuse as too great to justify strict scrutiny, at least under *federal* constitutional law-leaving open the possibility that state constitutions might impose higher standards of review on their own legislative and administrative processes.

If private abuse (such as harmful spillovers) were routinely curbed by well designed state regulation, then the error minimization framework could justify the rational basis standard of review. State and local governments could never be faulted for their dubious motivation or their insufficient knowledge. Since the risk of official misconduct is nil, the vast deference required under the rational basis standard would provide the proper theoretical norm. But the question of abuse of state and local power cannot be dismissed cavalierly. Even in those cases that do *not* result in a total deprivation of economic value, a landowner could suffer the loss of seventy-five or eighty percent of land value, amounting in individual cases to millions of dollars of loss. In those situations, it is easy to recognize that vast powers of state and local government operate as a two-edged sword, capable of being turned to parochial as well as public-spirited ends. It was just that concern with arbitrary state and local power that led Madison to trumpet the virtues of the extended republic in ***22** Federalist No. 10. The dangers and vagaries of any system of political logrolling lay at the root of the public choice movement. *See generally* James Buchanan & Gordon Tullock, *The Calculus of Consent* (1962). And F.A. Hayek has exhaustively demonstrated the dangers and inevitable impossibility of central planning. *See, e.g., The Road to Serfdom* (1944); *The Constitution of Liberty* (1960); *The Fatal Conceit: The Errors of Socialism* (1989). No one can deny that local governments often have superior knowledge of local conditions. But, by the same token, no one can deny that the virtues of community participation and reasoned deliberation often yield to the dangers of political faction and legislative or administrative capture. Here, as in other contexts, the law of diminishing returns sets in. The last bit of private abuse that is ferreted out by public agencies operating under the rational basis test paves the way for substantial amounts of public abuse committed by state and local governments whose activities are, under that test, virtually immunized from constitutional scrutiny.

The risk of government misconduct is serious and endemic, and it reaches partial land use restrictions with the same fury as total wipeouts. It stems from the frequent mismatch between private landholdings and political power. An individual owns a valuable parcel in a given community, but has few, if any, votes to protect him from the restrictions imposed by a determined majority. Worse still is the position of individuals who live outside the local community and own no property within it, for they cannot register their preferences in the political process, for they cannot identify themselves until the project is ready for sale or lease.

This fuller picture of state and local government therefore reveals substantial costs to *both* kinds of error. In the exaction context, a rational basis test outweighs the fears of excessive private misbehavior relative to the equal risks of excessive localism and protectionism. Rough proportionality, with its appeal to intermediate scrutiny, recognizes the approximate parity in the two forms of error. It does not fixate on private misconduct while allowing government abuse to multiply free of judicial review.

***23** This rough proportionality standard does not eliminate all prospect of abuse, but it helps achieve the right legal objective, which is to minimize the expected costs of the two forms of error. In particular, the intermediate scrutiny standard takes into account the obvious point that more state and local land use regulation does not necessarily lead to better state and local land use regulation. It may be relatively easy to eliminate the most obvious forms of error by taking some simple steps, such as imposing restrictions against pollution, discharge, and other common law nuisances. Any effort to insulate all state and local actions from constitutional scrutiny ushers in, however, the endless rounds of official obstruction that mark and mar the record in this case.

Any other result would be unwise because it would erect an unnecessary categorical divide between easements (that allow entry that would otherwise constitute a trespass) and restrictions (that prohibit uses that would otherwise be lawful) that destroy or impair economic viability. But the political forces that lead to local abuse are equally powerful in both these situations. Any legal regime that guarded against exactions while allowing land use restrictions to impose total wipeouts would lead to perverse economic results. The Constitution would prevent local governments from imposing easements that cost $100 as a condition to exercise development rights worth $1,000. But the Constitution would stand mute as state and local governments condition development on accepting land use conditions that reduce those same development rights by $500, if they don't wipe them out altogether.

B. The Need for Judicial Oversight is as Great in Land Use Restriction Cases as it is in Exaction Cases.

Judicial scrutiny of government behavior in exaction cases ultimately rests on the awareness of the inherent limitations of the political process. The same concerns carry over to state and local land use restrictions that impose substantial economic losses.

***24** First, *Dolan* stressed the great dangers of individualized exactions, as opposed to generalized zoning ordinances. *See Dolan,* 512 U.S. at 385 and 391, n. 8, discussed *supra* at 22. This last worry is fully vindicated here since Del Monte had satisfied all general zoning requirements but was tormented for years with an endless array of individualized planning reviews that resulted in a complete rebuff of its ability to build on its own tract of land.

Second, the same constellation of state and local political forces are at work with these ad hoc land use restrictions as with exactions and dedications. Local residents and planning commissions could easily vote against a proposed project that promises large gains for its potential residents because it imposes some small loss or inconvenience on local residents. But a rational basis test will not uncover these abusive restrictions because the state can always show some reason for the action, namely, that it will benefit the majority who voted for it. Only the standard of reasonable proportionality can examine the purported reasons for the decision and expose the parochial interests that led to its passage.

Third, this case shows that it is unwise to assume that the use of a rough proportionality standard heralds a return to the *Lochner* era in which the economic and social decisions of state legislatures were constantly second-guessed by courts. *See* U.S. Amicus Curiae Brief at 13, n. 6, claiming that closer review would turn the federal courts into super-zoning boards. *See also Schenck,* 114 F.3d at 593. But these fears are quite groundless. The question in this case is whether the state can point to some legitimate interest that justifies the restriction in question.

On this score it makes good sense to ask about the legitimacy of the ends and the appropriate nature of the means. On the first point, the concerns with habitat preservation may be honored by condemnation, but they should never be respected as the grounds for a simple declaration that a parcel of land is off-limits for all forms of development. The simple reason is that this purported justification places no limit on state appetites. First, one level of government could insist that portions of the land be set aside for habitat to ***25** "mitigate" the harms from development. But in the next breath, another state or federal agency could find yet another environmental peril that requires still more land to be set aside. And then a third. The combined effect of these attacks is to wipe out all value of land because the landowner cannot by agreement with any single agency obtain the clarity of title needed for ordinary development. The land will be taken little by little, and each government agency will hide behind the actions of the others. The rough proportionality standard blocks these dubious stratagems by looking both at public ends and the public means. So implemented, that standard prevents the endless train of public misconduct that has festered under the rational basis test, without hamstringing public efforts at environmental protection.

The common law baselines in *Lucas* thus work to stabilize relations between the multiple layers of the government and an individual landowner. With the police power ends of the government properly defined, the only factual questions at hand are those already identified in *Lucas:* does a neighbor (or the public as an agent) have reason to enjoin the development. That standard will reduce (for good reason) the levels of government activity, which in turn should lead to a reduction in the level of administrative and judicial action in land use matters. The City simply has no case to impose these restrictions on Del Monte under California's definition of nuisance law. *See* Cal. Civ. Code § 3479 (West 1998) (Nuisance Defined):

> Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary matter, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

A close look at this record shows the evident virtues of this state law standard. The City for over a dozen years used a combination of exactions and restrictions to foil routine ***26** beachfront development, which by no stretch of the imagination constitutes a nuisance at common law. The first wave in its assault was the demand that Del Monte set aside the western third of its land for public beach use and access. That demand simply imitates on a grander scale the lateral easements that the California Coastal Commission claimed in *Nollan* and the bike and pedestrian path claimed in *Dolan.* Next the City imposed on Del Monte a requirement that it take active steps to preserve the buckwheat habitat for the Smith's Blue Butterfly (only one of which was observed on the property in 1984. *See Del Monte II,* 95 F.3d at 1431.) The decision could be treated as a simple land use restriction, yet on the other hand it also looks very much like a special tax for the privilege of real estate construction that should also be caught under the *Dolan* rationale.

Any requirement that certain portions of land be left in its natural state verges on a demand that the property be conveyed to the government for use as a nature preserve. But one great advantage of a unified approach to land use regulation is that courts no longer have to ask the question of whether this government action amounts to a possessory taking when the landowner may exclude all others, but cannot enter or use the land himself, and thus is forced to stand in the same distant relationship to his land as a total stranger. Why should the government reap the benefits of fee ownership without having to go through the usual formalities of taking title to the property? *See Pumpelly v. Green Bay Co.,* 80 U.S. 166 (1871).

More generally, exactions segue into land use restrictions on the remaining portions of Del Monte's parcel. As mentioned previously, dunes always have high and low points. So it is an easy maneuver for the state to claim that it is improper to fill in the low, or "bowl" areas on the land because that will create environmental hazards. It is then just as easy to claim that it is also impossible to build on the high portions of the ***27** land because the development might block a view corridor to the ocean, or might be seen from public highways or other public lands. Under the rational basis test advocated by the City, the state can multiply without end the permissible objectives of land use regulation and then choose the broadest possible means to achieve them. Each individual restriction is looked at in isolation even when in combination they wreak devastation on any and all development programs.

IV. State and Local Governments Have Taken Advantage of Judicial Deference to Frustrate The Reasonable Expectations of Property Owners.

The level of deference demanded by the City and its numerous Amici must fall given the long-track record of government planning abuse that it fosters. One lesson that state and local governments learned after *Lucas* was that a simple outright prohibition on new development could expose them to liability for hefty sums from the land rendered worthless by their decisions. The political dynamics of state and local governments, however, quickly resulted in the erection of partial barriers to either delay or block the development of land. Just that result happened in South Carolina after *Lucas,* when the state's original flat prohibition against all beachfront development was scrapped once it became clear that it was vulnerable to takings challenges. In its place came a far more complex statutory framework with more elaborate special permitting provisons. *See* S.C. Code Ann. § 48-39-290(D) (Law Co-op. 1997). Yet the new procedures contain no limitations that force decisions to be made within some reasonable time after the application has been made. Rather the systems allow local planning commissions to take advantage of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985), which holds that judicial review of planning commission action is normally precluded until a final judgment has been entered against the landowner.

***28** Unfortunately, *Williamson* became an open invitation for planning commissions to kill land use development by plying developers with endless opportunities to be heard. Traditionally government was feared for its arbitrary decisions made without hearings and notice to the parties. The new wave of abuse, so clearly evident in this case, features endless inspections, reports, filings and hearings whose sole purpose is coldly calculated to block access to the courts by postponing finality until the will of the landowner is broken. The late Grant Gilmore could well have had planning commissions in mind when he wrote: "The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed." Grant Gilmore, *The Age of Anxiety,* 84 Yale L.J. 1022, 1044 (1975). Procedural Hell also has its unintended ironies. In this

very case, the planning commission received five separate proposals for real estate development and then had the temerity to argue (unsuccessfully) in federal court that Del Monte's compensation claim was not yet ripe for adjudication. *See Del Monte Dunes I,* 920 F.2d 1496 (9th Cir.1990).

Planning commissions have also resorted to endless litigation to subvert this Court's holding in *First English* that compensation must be paid for final decisions that lead to regulatory takings that deprive a landowner of all economically viable use for a limited period of time. *First English* carved out an apparently innocent exception for cases "of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." *First English Evangelical Lutheran Church of Glendale v. Los Angeles County,* 482 U.S. 304, 321 (1987). Yet once again the definition of a "normal delay" has been stretched beyond all recognition by the California Supreme Court, which denied compensation for interim losses when the delay issuing a development permit took place "partly owing to the mistaken assertion of jurisdiction by a government agency." *See Landgate, Inc. v. California Coastal Comm'n,* 17 Cal. 4th 1006, 953 P.2d 1188 (1998). The landowner has to pay for the mistakes of the planning agency, which of course gives that agency painless incentives to make aggressive assertions of ***29** jurisdiction. To date, the instant case has resulted in 17 years of wrangling and confusion. How much better it is for the City to be put to a clear choice: condemn the land or have your planning restrictions subjected to a rough proportionality standard.

No one can claim that rough proportionality to evaluate state justifications for land use restrictions will solve all the problems of real estate development in California or anywhere else. But here is a case where the consistent application of sound constitutional principles should not be deterred by cries of wolf from local governments who claim that the takings clause constrains their prerogatives. That it will indeed do as noted by this Court in *First English,* 482 U.S. at 321. But it will do so for sound constitutional reasons. The decision of the Ninth Circuit sends a much needed message to local governments that their stubborn disrespect for the property rights of local landowners carries with it a price.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be affirmed, and the judgment of $1,450,000 in favor of Del Monte should be affirmed.

Footnotes

FN

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1 Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* Institute for Justice, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

2 The full statement of facts is drawn both from the decision below, *Del Monte Dunes at Monterey, Ltd. v. City of Monterey,* 95 F.3d 1422 (9th Cir.1996), [hereinafter Del Monte II] and from the fuller description of the facts found in the earlier Ninth Circuit decision holding that respondent's constitutional challenge was ripe for adjudication. *See Del Monte Dunes at Monterey, Ltd. v. City of Monterey,* 920 F.2d 1496 (9th Cir.1990), [hereinafter *Del Monte I*].

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