

Court of Appeals
of the
State of New York

BONNIE BRIAR SYNDICATE, INC.,

Plaintiff-Appellant,

-- against --

THE TOWN OF MAMARONECK; THE TOWN BOARD OF THE TOWN OF
MAMARONECK, ELAIN PRICE, Supervisor, KATHY O'FLINN, PAUL RYAN, VALIERIE
O'KEEFE, and BARRY WEPRIN, as Members of the Town Board,

Defendants-Respondents.

**AMICUS CURIAE BRIEF OF THE AMERICAN
PLANNING ASSOCIATION IN SUPPORT OF
DEFENDANTS-RESPONDENTS**

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TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST OF AMICUS CURIAE	1
PRELIMINARY STATEMENT	2
ARGUMENT	4
I. THE CAUSAL NEXUS SCRUTINY OF <i>NOLLAN</i> , <i>SEAWALL</i> AND <i>MANOCHERIAN</i> DOES NOT APPLY TO THIS CASE	5
A. The <i>Dolan/Nollan</i> Standard Applies only when the Government Compels a Property Owner to Dedicate Property to the Public as a Condition of a Development Permit	5
B. <i>Seawall</i> and <i>Manocherian</i> ’s “Close Causal Nexus Scrutiny” Is Properly Limited to Regulations Imposing Physical Occupations on Property Owners	12
II. THE REASONABLENESS OF ZONING SHOULD BE EVALUATED UNDER THE DUE PROCESS CLAUSE, NOT THE TAKINGS CLAUSE	15
A. Five Justices of the Supreme Court Have Abandoned the <i>Agins</i> Means-End Inquiry as a Standard of Takings Liability	15
B. In the Nearly Twenty Years since the <i>Agins</i> Ruling, the Supreme Court and Virtually All Lower Courts Have Never Used the <i>Agins</i> Means-End Inquiry to Award Compensation under the Takings Clause	20
C. The Text and History of the Takings Clause Preclude the Use of a Means-End Inquiry to Identify a Compensable Taking	22
III. THE ZONING ORDINANCE AT ISSUE EASILY SURVIVES REVIEW UNDER THE DUE PROCESS CLAUSE	31
IV. THIS COURT SHOULD DECLINE PLAINTIFF’S INVITATION TO RECAST <i>SEAWALL</i> AND <i>MANOCHERIAN</i> AS INTERPRETIONS OF THE NEW YORK CONSTITUTION	32
CONCLUSION	35

TABLE OF AUTHORITIES

CASES	Page
<i>Agin v. City of Tiburon</i> , 447 U.S. 255 (1980)	3, 17, 22
<i>Arcadia Dev. Corp. v. Bloomington</i> , 552 N.W.2d 281 (Minn. App. 1996), review denied, 1996 Minn.LEXIS 795 (Minn. Oct. 29, 1996).....	10
<i>Berman v. Parker</i> , 348 U.S. 26 (1954)	32
<i>Chicago, B. & Q. R. Co. v. Chicago</i> , 166 U.S. 226 (1897)	28
<i>City of Monterey v. Del Monte Dunes at Monterey, Ltd.</i> , 119 S. Ct. 1624 (1999).....	passim
<i>Clajon Prod. Corp. v. Petera</i> , 70 F.3d 1566 (10th Cir. 1995).....	9,10
<i>Commercial Builders of Northern California v. City of Sacramento</i> , 941 F.2d 872 (9th Cir. 1991), cert. denied, 504 U.S. 931 (1992)	6
<i>Day-Brite Lighting, Inc. v. Missouri</i> , 342 U.S. 421 (1952)	32
<i>Del Monte Dunes at Monterey, Ltd. v. City of Monterey</i> , 95 F.3d 1422 (9th Cir. 1996).....	10
<i>Dolan v. City of Tigard</i> , 512 U.S. 374 (1994)	passim
<i>Eastern Enterprises v. Apfel</i> , 118 S. Ct. 2131 (1998).....	passim
<i>Federal Home Loan Mortgage Corp. v. Division of Hous. and Community Renewal</i> , 87 N.Y.2d. 325, 639 N.Y.S. 2d 293 (1995).....	14
<i>Ferguson v. Skrupa</i> , 372 U.S. 726 (1963)	32
<i>First English Evangelical Lutheran Church of Glendale v. County of Los Angeles</i> , 482 U.S. 304 (1987).....	22, 25, 28, 29, 30
<i>Fred R. French Investing Co. v. City of New York</i> , 39 N.Y.2d 587, 385 N.Y.S.2d 5 (1976), cert. denied, 429 U.S. 990 (1976).....	28
<i>Garneau v. City of Seattle</i> , 147 F.3d. 802 (9 th Cir. 1998).....	9
<i>Goldblatt v. Town of Hempstead</i> , 369 U.S. 590 (1962).....	5, 28
<i>GST Tucson Lightwave, Inc. v. City of Tucson</i> , 949 P.2d 971 (Ariz. App. 1997), review dismissed, 1997 Ariz. LEXIS 110 (Ariz. Aug. 22, 1997).....	10
<i>Harris v. Wichita</i> , 862 F.Supp. 287 (D. Kan. 1994), aff'd 74 F.3d 1249	

(10th Cir. 1996)	9
<i>Hawaii Hous. Auth. v. Midkiff</i> , 467 U.S. 229 (1984).....	26, 32
<i>Hodel v. Indiana</i> , 452 U.S. 314 (1981).....	32
<i>Home Builders Ass'n of Cent. Arizona v. Scottsdale</i> , 930 P.2d 993 (Ariz. 1997), <i>cert. denied</i> , 521 U.S. 1120 (1997).....	9-10
<i>J.E.D. Assocs., Inc v. Town of Atkinson</i> , 432 A.2d 12 (N.H. 1981)	13
<i>Joint Ventures, Inc. v. Department of Transp.</i> , 563 So. 2d 622 (Fla. 1990).....	25
<i>Keystone Bituminous Coal Ass'n v. DeBenedictis</i> , 480 U.S. 470 (1987).....	20
<i>Lochner v. New York</i> , 198 U.S. 45 (1905).....	34
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982).....	23
<i>Loveladies Harbor, Inc. v. United States</i> , 15 Cl. Ct. 381 (1988).....	20
<i>Lucas v. South Carolina Coastal Council</i> , 505 U.S. 1003 (1992).....	20, 23, 24
<i>Manocherian v. Lenox Hill Hosp.</i> , 84 N.Y. 385, 618 N.Y.S.2d 857 (1994), <i>cert. denied</i> , 514 U.S. 1109 (1995).....	passim
<i>McCarthy v. City of Leawood</i> , 894 P.2d 836 (1995)	9
<i>Metromedia, Inc. v. City of San Diego</i> , 453 U.S. 490 (1981).....	28
<i>Moore v. City of East Cleveland</i> , 431 U.S. 494 (1977)	28
<i>Nectow v. City of Cambridge</i> , 277 U.S. 183 (1928)	22
<i>Nollan v. California Coastal Comm'n</i> , 483 U.S. 825 (1987).....	passim
<i>Pennsylvania Coal Co. v. Mahon</i> , 260 U.S. 393 (1922).....	23
<i>Rostker v. Goldberg</i> , 453 U.S. 57 (1981)	28
<i>S.E.Cass Water Res. v. Burlington</i> , 527 N.W.2d 884 (N.D. 1995).....	10
<i>Schad v. Borough of Mount Ephraim</i> , 452 U.S. 61 (1981).....	31
<i>Seawall Associates v. City of New York</i> , 74 N.Y.2d 92, 544 N.Y.S.2d 542 (1989), <i>cert. denied</i> , 493 U.S. 976 (1989).....	passim

<i>Sproles v. Binford</i> , 286 U.S. 374 (1932).....	5
<i>Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.</i> , 640 So. 2d 54 (Fla. 1994)	26
<i>Texas Manufactured Hous. Ass'n v. Nederland</i> , 101 F.3d 1095 (5th Cir. 1996), <i>cert. denied</i> , 521 U.S. 1112 (1997).....	9
<i>Tilles Inv. Co. v. Town of Huntington</i> , 74 N.Y.2d 885, 547 N.Y.S.2d 835 (1989)	5
<i>Town of Orangetown v. Magee</i> , 88 N.Y.2d 41, 643 N.Y.S.2d 21 (1996)	21
<i>United Artists' Theater Circuit, Inc. v. City of Philadelphia</i> , 635 A.2d 612 (Pa. 1993)	33
<i>United States v. Carolene Prods. Co.</i> , 304 U.S. 144 (1938)	31
<i>United States v. Riverside Bayview Homes, Inc.</i> , 474 U.S. 121 (1985).....	20
<i>Unity Real Estate Co. v. Hudson</i> , 178 F.3d 649 (3d Cir. 1999)	18
<i>Vernon Park Realty v. City of Mount Vernon</i> , 307 N.Y. 493 (1954).....	30
<i>Village of Euclid v. Ambler Realty Co.</i> , 272 U.S. 365 (1926)	4, 28
<i>Waters v. Montgomery County</i> , 650 A.2d 712 (Md. App. 1994)	10
<i>Williamson County Regional Planning Comm'n v. Hamilton Bank</i> , 473 U.S. 172 (1985)	23, 25
<i>Williamson v. Lee Optical Co.</i> , 348 U.S. 483 (1955)	31
<i>Yee v. City of Escondido</i> , 503 U.S. 519 (1992).....	9

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V	22-23
N.Y. Const. Article XIV § 4	33

STATUTORY PROVISIONS

42 U.S.C. § 1983.....	30
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TREATISES

Fred Bosselman, et al., <i>The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control</i> (1973)	23
Julian C. Juergensmeyer & Thomas E. Roberts, <i>Land Use Planning and Control Law</i> (1998).....	4

LAW REVIEW ARTICLES

Douglas W. Kmiec, <i>The Original Understanding of the Takings Clause is Neither Weak Nor Obtuse</i> , 88 Colum. L. Rev. 1630 (1988)	6
Frank I. Michelman, <i>Takings, 1987</i> , 88 Colum. L. Rev. 1600 (1988).....	6
John D. Echeverria & Sharon Dennis, <i>The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion</i> , 17 Vt. L. Rev. 695 (1993).....	16
John F. Hart, <i>Colonial Land Use Law and its Significance for Modern Takings Doctrine</i> , 109 Harv. L. Rev. 1252 (1996)	23
Judith S. Kaye, <i>Dual Constitutionalism in Practice and Principle</i> , 61 St. John's L. Rev. 399 (1987).....	33
Michael J. Davis & Robert L. Glicksman, <i>To the Promised Land: A Century of Wandering and a Final Homeland for the Due Process and Takings Clauses</i> , 68 Or. L. Rev. 393 (1989)	16
Norman Williams, et al., <i>The White River Junction Manifesto</i> , 9 Vt. L. Rev. 193 (1984).....	28
Patrick Wiseman, <i>When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System with Integrity</i> , 63 St. John's L. Rev. 433 (1988).....	16
William M. Treanor, <i>The Original Understanding of the Takings Clause and the Political Process</i> , 95 Colum. L. Rev. 782 (1995)	23

MISCELLANEOUS

Brief for the United States as Amicus Curiae Supporting Petitioner in Part, <i>City of Monterey v. Del Monte Dunes at Monterey, Ltd.</i> , 119 S. Ct. 1624 (1999) (No. 97-1235) (available at 1997 U.S. Briefs 1235 (LEXIS))	27
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Petition for a Writ of Certiorari for City of Monterey, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624 (1999) (No. 97-1235) (available at 1997 U.S. Briefs 1235 (LEXIS))..... 11

Webster's Encyclopedic Unabridged Dictionary (1996) 23

www.census.gov/population/estimates/nation/popclockest.txt (Internet release date: June 4, 1999) (U.S. Census Bureau statistics)..... 4

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Planning Association (APA) is a private, nonprofit educational research organization designed to advance local land-use planning. It is the oldest and largest organization in the United States devoted to fostering livable communities through comprehensive planning. Its 30,000 members work in local government, federal and state agencies, private consulting firms, and universities. The APA has chapters representing all fifty states and more than 1600 members who reside in New York.

APA members serve government officials as well as private property owners. Consequently, the APA seeks to preserve both the proper role of government in protecting local communities and constitutional protections for property owners. The APA promotes rational land-use planning consistent with the public interest and the rights of property owners.

In 1995, the APA adopted a policy guide on takings challenges to land-use regulations designed to implement comprehensive plans for local communities. One of the APA's principal concerns is that undue expansion of takings law will result in severe harm to the majority of our nation's citizens. Because land-use planning protects the overwhelming majority of property owners and enhances property values, undue expansion of the rights of any single property owner could threaten most property owners and the public interest. This case, which involves a takings challenge to a local zoning ordinance that furthers a comprehensive land-use plan, falls squarely within the APA's policy concerns.

The APA submits this brief as part of its continuing effort to promote the development of a coherent takings jurisprudence. The APA has engaged Community Rights Counsel -- a nonprofit law firm that defends reasonable land-use controls and other community protections -- to assist in responding to the issues in this case.

PRELIMINARY STATEMENT

Plaintiff-Appellant Bonnie Briar Syndicate, Inc. (Plaintiff) asks this court to reverse the unanimous rulings of the five lower court judges in this case and order the Town of Mamaroneck to pay substantial just compensation under the Takings Clause of the Fifth Amendment. Plaintiff has abandoned its earlier allegation that the Town's zoning deprives it of all economically viable use of its property (Plaintiff's Brief at 5 n.2), an unsurprising concession given that it may continue profitably to operate a golf course and other recreational facilities on the property, the historic use of the property for more than 70 years. Instead, Plaintiff's takings claim for compensation rests on an allegation that the zoning ordinance at issue does not adequately advance the Town's legitimate interests in reducing flood risks, preserving wildlife habitat, protecting open space, and enhancing recreational opportunities.

It is difficult for Plaintiff to argue credibly that the Town's zoning decision completely fails to advance a legitimate interest. After all, preserving the property for recreational use surely enhances recreational opportunities, protects open space, and advances the Town's other interests. Plaintiff evidently realizes as much, and thus spends the vast majority of its brief arguing (or assuming) that some sort of "heightened judicial scrutiny" should apply to this and every other land-use decision made by a local government in this state.

In the courts below, Plaintiff argued that the appropriate standard of review is the "rough proportionality" test of *Dolan v. City of Tigard*, 512 U.S. 374 (1994). With the U.S. Supreme Court's unanimous rejection of this argument in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624 (1999), Plaintiff now evidently concedes that standard is no longer available. See Plaintiff's Brief at 29-30. Plaintiff instead suggests to this Court that the "causal nexus" test of *Dolan's* conceptual companion, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), is the appropriate standard.

Plaintiff fundamentally misreads *Dolan* and *Del Monte Dunes*. As demonstrated in Section I of this brief, the language and logic of the two opinions demonstrate beyond legitimate debate that both *Nollan* and *Dolan* apply in the specific context of dedication requirements and not outside that context. Even before *Del Monte Dunes*, the vast majority of courts limited *Nollan* and *Dolan* in this fashion (see pp. 9-10, below).

In addition to clarifying that *Dolan* and *Nollan* are limited to dedication requirements, the Supreme Court has backed away from the notion that takings analysis requires courts to evaluate the "fit" between the legislatively chosen means and ends to determine whether regulation adequately advances a legitimate state interest. Section II describes how this notion -- first advanced in *Agins v. City of Tiburon*, 447 U.S. 255 (1980) -- has been cast aside through both desuetude and, more recently, disavowal by five Justices of the U.S. Supreme Court. In *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998), a case nowhere cited in Plaintiff's opening brief, five Justices rejected the contention that this "means-end" scrutiny has an appropriate role in takings analysis. They concluded that the reasonableness of socioeconomic regulation should be analyzed under the Due Process Clause, not the Takings Clause.

In view of the Supreme Court's recent clarifications, this court should reexamine its treatment of this issue, particularly *Manocherian v. Lenox Hill Hosp.*, 84 N.Y.2d 385, 618 N.Y.S.2d 857 (1994), *cert. denied*, 514 U.S. 1109 (1995) and *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 544 N.Y.S.2d 542 (1989), *cert. denied*, 493 U.S. 976 (1989). As shown below, these cases were issued prior to, and conflict with, *Del Monte Dunes* and *Eastern Enterprises*. At a minimum, this court should reject Plaintiff's invitation to radically expand their application to cover zoning laws like those at issue here, which are entitled to the strongest presumption of validity.

ARGUMENT

Seventy five years ago, the Supreme Court recognized that zoning is indispensable to the ability of local communities to address the problems that attend "the great increase and concentration of population." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926). Since that time, our Nation's population has more than doubled,¹ and our understanding of the harm caused by uncontrolled growth has greatly increased. The Court recently reaffirmed that due to this continuing growth, local governments by necessity "have long engaged in the commendable task of land use planning." *Dolan*, 512 U.S. at 396. Reasonable land-use controls promote public health, traffic safety, property values, the quality of our life in our neighborhoods, and a host of other important public interests.

The zoning ordinance at issue is a quintessential, workaday land-use control. Indeed, although zoning began nearly 100 years ago, "zoning remains the core tool of land use control." Julian C. Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Control Law* 41 (1998). Local Law 6 is "use zoning," *i.e.*, zoning designed to promote the welfare of the community by prohibiting uses of property that would harm community interests. *Id.* at 79. Unlike more intrusive forms of land-use control, use zoning does not compel a landowner to dedicate a portion of the land to the public, suffer a physical invasion of the property, or forgo all use of the land. Moreover, Local Law 6 is the product of 30 years of comprehensive land-use planning by local, regional, state, and federal officials.

While land-use controls must comply with constitutional requirements, it is critical that courts apply the appropriate standard of constitutional review so that local officials, in conjunction with our nation's land-use planners, retain the flexibility to address the increasingly

¹ From 1926 to 1998, the population of the United States increased from 117,397,000 to 270,298,000. See <http://www.census.gov/population/estimates/nation/popclockest.txt> (Internet release date: June 4, 1999) (U.S. Census Bureau statistics).

complex challenges of modern society. As the Supreme Court noted long ago in affirming a ruling of this court, in assessing the legitimacy of zoning and other land-use controls under the Due Process Clause, "debatable questions as to reasonableness are not for the courts, but for the Legislature * * *." *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 595 (1962) (quoting *Sproles v. Binford*, 286 U.S. 374, 388 (1932)); accord, *Tilles Inv. Co. v. Town of Huntington*, 74 N.Y.2d 885, 888, 547 N.Y.S.2d 835, 836 (1989) (zoning is constitutional where the zoning classification is "fairly debatable"). We show below that nothing in the Takings Clause requires a different result.

I. THE CAUSAL NEXUS SCRUTINY OF *NOLLAN*, *SEAWALL* AND *MANOCHERIAN* DOES NOT APPLY TO THIS CASE.

A. The *Dolan/Nollan* Standard Applies only when the Government Compels a Property Owner to Dedicate Property to the Public as a Condition of a Development Permit.

Plaintiff's assertion that the "causal nexus" test established by the Supreme Court in *Nollan, supra*, should apply to this case reflects a profound misreading of the Supreme Court's recent regulatory takings decisions. The Court in *Dolan, supra*, and *Del Monte Dunes, supra*, has clearly limited both *Nollan* and *Dolan* to the "special context of exactions." *Del Monte Dunes*, 119 S.Ct. at 1635.

Nollan addressed the relatively rare case where a government agency demands the deed to a portion of a landowner's property as a condition of receiving a development permit. The California Coastal Commission granted a development permit on the condition that the Nollans give the Commission an easement to allow the public to pass across their property. 483 U.S. at 828. To permit such a condition -- which effectively allowed California to obtain an interest in land without paying compensation -- the Court ruled that there must be an "essential nexus" between the harm attributable to the development and the condition demanded. *Id.* at 837. The Court tied this essential nexus requirement to the specific facts of the case:

We are inclined to be particularly careful * * * where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.

Id. at 841.

Dictum in *Nollan* created uncertainty concerning whether *Nollan's* essential nexus test could be applied more broadly to all regulations challenged under the Takings Clause. In a footnote in his opinion for the Court, Justice Scalia suggested that the Court might carefully look at the connection between the regulation and the state interest in all future takings cases. 483 U.S. at 835 n.3. This dictum cracked the door for an argument that *Nollan's* "essential nexus" test should be applied in all takings claims. Compare Douglas W. Kmiec, *The Original Understanding of the Takings Clause Is Neither Weak Nor Obtuse*, 88 Colum. L. Rev. 1630, 1648-54 (1988) (arguing that *Nollan* should apply to any land-use restriction that disproportionately burdens landowners) with *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872, 874 (9th Cir. 1991) (*Nollan's* essential nexus test limited to the context of required dedications) and Frank I. Michelman, *Takings*, 1987, 88 Colum. L. Rev. 1600, 1608-16 (1988) (same).

While *Nollan* cracked the door for broad application of the essential nexus test, subsequent Supreme Court cases have slammed that door shut.

The Court revisited the subject of compelled physical dedications in *Dolan*. *Dolan* resolved a question the Court considered to be left open by *Nollan*, “the required degree of connection between exactions imposed by the city and the projected impacts of the proposed development.” 512 U.S. at 377. The Court ruled that the degree of connection required was “rough proportionality.” *Id.* at 391. Thus, after *Dolan*, a local government seeking a dedication of land in exchange for a development permit must demonstrate that the dedication demanded is related to and proportional with the harm attributable to the proposed development. *Id.*

The language and logic of *Dolan* limit the *Dolan/Nollan* test to compelled dedication cases. As in *Nollan*, the *Dolan* Court emphasized its unique concern with dedication requirements. The Court distinguished general land-use planning requirements, which have routinely withstood constitutional scrutiny, from restrictions that are “not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.” *Id.* at 385. The Court also reiterated its concern that government agencies were using dedication requirements to avoid the need to pay compensation for physical takings, stressing that “had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred.” *Id.* at 384.

More importantly, the Court in *Dolan* grounded the *Dolan/Nollan* test in the unconstitutional conditions doctrine. In the Court’s words:

In *Nollan*, supra, we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-

settled doctrine of “unconstitutional conditions,” the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for public use – in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.

Id. at 385 (citations omitted). By rooting *Nollan* and *Dolan* in the doctrine of unconstitutional conditions, the Court provided a more secure doctrinal home for the *Dolan/Nollan* test than the now-discredited *Agins* means-ends inquiry (*see* Section II, below).

At the same time, by placing *Dolan/Nollan* within the confines of the doctrine of unconstitutional conditions, the Court limited the application of the nexus/proportionality test to cases where the government action constitutes a per se taking. The reason is simple. Unconstitutional conditions cases involve a two step inquiry into (1) whether a government benefit is being conditioned on the relinquishment by the claimant of a constitutional right and (2) whether the burden on the constitutional right is justifiable or amounts to an unconstitutional condition. There were unconstitutional conditions in *Nollan* and *Dolan* because in both cases the landowners were asked to relinquish a clear constitutional right – the right to receive compensation for per se takings -- in exchange for receipt of a government benefit -- a permit to develop their property. *See Nollan*, 483 U.S. at 831; *Dolan*, 512 U.S. at 384.

It is nonsense to use a test designed to determine whether a constitutional right was improperly conditioned to determine whether a constitutional right is being infringed in the first place. Thus, zoning laws and other land-use regulations that simply limit the potential uses of property and do not require that a landowner relinquish a per se right to compensation cannot be the subject of an unconstitutional conditions claim.

The Supreme Court’s opinion in *Yee v. City of Escondido*, 503 U.S. 519 (1992), illustrates this point. After rejecting the Yees’ claim that Escondido’s mobile home statute

effected a permanent physical occupation, the Court addressed the Yees' unconstitutional conditions claim:

Petitioners argue that if they have to leave the mobile home park business in order to avoid the strictures of the Escondido ordinance, their ability to rent their property has in fact been conditioned on such a forfeiture. This argument fails at its base, however, because there has simply been no compelled physical occupation giving rise to a right to compensation that petitioners could have forfeited.

Id. at 531-32. Citing and distinguishing *Nollan*, the Court noted that had the city physically occupied the Yees' property, then the city might "lack the power to condition petitioners' ability to run a mobile home park on their waiver of this right." *Id.* at 532. Because the ordinance "does not effect a physical taking in the first place," the Yees' unconstitutional conditions argument failed. *See also, Garneau v. City of Seattle*, 147 F.3d 802, 809-10 (9th Cir. 1998) (Brunetti J.); *Manocherian*, 618 N.Y.2d at 414, 618 N.Y.S. 2d at 873 (Levine J. dissenting).

Following *Dolan*, numerous lower federal courts and state courts ruled that both *Nollan* and *Dolan* are properly limited to cases involving dedication requirements. *See e.g. Texas Manufactured Hous. Ass'n v. Nederland*, 101 F.3d 1095, 1105 (5th Cir. 1996); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1578-79 & 1579 n.21 (10th Cir. 1995); *Harris v. Wichita*, 862 F.Supp. 287, 294 (D. Kan. 1994); *McCarthy v. City of Leawood*, 894 P.2d 836 (1995); *Home Builders Ass'n of Cent. Arizona v. Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997); *GST Tucson Lightwave, Inc. v. City of Tucson*, 949 P.2d 971, 978 -79 (Ariz. App. 1997); *Waters v. Montgomery County*, 650 A.2d 712, 724 (Md. App. 1994); *Arcadia Dev. Corp. v. Bloomington*, 552 N.W.2d 281, 286 (Minn. App. 1996); *S.E.Cass Water Res. v. Burlington*, 527 N.W.2d 2d 884, 896. (N.D. 1995). The Tenth Circuit's discussion in *Clajon* captures the force of the arguments for so limiting *Dolan/Nollan*:

In our judgment, both *Nollan* and *Dolan* follow from takings jurisprudence's traditional concern that an individual cannot be forced to dedicate his or her land to a public use without just compensation. That is, *Nollan* and *Dolan* essentially view the conditioning of a permit based on the transfer of a property interest--i.e., an easement--as tantamount to a physical occupation of one's land. (Citations omitted.) Thus, we believe that *Nollan* and *Dolan* are best understood as extending the analysis of complete physical occupation cases to those situations in which the government achieves the same end (i.e., the possession of one's physical property) through a conditional permitting procedure. (Citations omitted.) Given the important distinctions between general police power regulations and development exactions, and the resemblance of development exactions to physical takings cases, we believe that the "essential nexus" and "rough proportionality" tests are properly limited to the context of development exactions. (Citation omitted.)

70 F.3d at 1578-79.

One of the few courts not following this overwhelming trend was the Ninth Circuit, which in *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1430 (9th Cir. 1996), applied *Dolan*'s rough proportionality to a decision by Monterey to deny a development permit.

The Supreme Court unanimously overruled this portion of the Ninth Circuit's ruling in its decision this Term in *Del Monte Dunes*. The Court confirmed that *Dolan*'s rough proportionality test does not apply "beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use." *Del Monte Dunes*, 119 S.Ct. at 1635. *Dolan* addressed "dedications demanded as conditions of development," not "the much different questions arising where, as here, the landowner's challenge is based * * * on denial of development." *Id.*

Plaintiff argues that *Del Monte Dunes* nonetheless permits a broad application of *Nollan*'s essential nexus test. Plaintiff's Brief at 30-31. Indeed, Plaintiff goes so far as to suggest that the *Del Monte Dunes* Court "embraced the intermediate level of scrutiny which equates to the 'close nexus' test." *Id.* at 30. This is not a plausible interpretation of *Del Monte Dunes*.

As an initial matter, *Dolan*'s rough proportionality is a refinement of *Nollan*'s essential nexus test, not a stand-alone test. *Dolan* resolved "a question left open by our decision in *Nollan* * * * the required degree of connection." *Dolan*, 512 U.S. at 377. The cases and the test they articulate are inextricably linked. By unanimously limiting *Dolan*, the *Del Monte Dunes* Court strongly implied that *Nollan* was also limited in application.

Moreover, even though the *Del Monte Dunes* Court was not asked to address the application of *Nollan* outside of dedication cases, see Petition for a Writ of Certiorari for City of Monterey at i, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624 (1999) (No. 97-1235) (available at 1997 U.S. Briefs 1235 (LEXIS)), the Court went out of its way to tie *Nollan* with *Dolan* and to stress the unique factual setting of both cases. The Court cites both *Nollan* and *Dolan* for the proposition that *Dolan* addresses only "the special context of exactions." 119 S.Ct. at 1635 (citing *Nollan*, 825 U.S. at 841). The cited passage of *Nollan* highlights the Court's unique concerns "where the actual conveyance of property is made a condition to the lifting of a land-use restriction." *Nollan*, 825 U.S. at 841.

The Court returned to *Nollan* later in its opinion. As discussed below in Section II.A, all nine Justices in *Del Monte Dunes* expressly left open the question of whether any general means-ends inquiry was appropriate under the Takings Clause. In doing so, the Court made it clear that *Nollan* addressed only required dedications and *did not* address the question of what test should apply outside that context:

this Court has [not] provided * * * a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions, cf., e.g., *Nollan*, 483 U.S. at 834-835, n.3.

119 S.Ct. at 1636.

The significance of the Court's treatment of *Nollan* in these two portions of *Del Monte* is unmistakable. *Nollan*, like *Dolan*, addressed the unique concerns arising from dedication

conditions. *Nollan*'s essential nexus does not apply to the much different questions arising in cases like this one where the landowner's challenge is based on denial of development.

Plaintiff's assertion that "nothing in *Del Monte* casts doubt on the continuing viability of *Nollan*'s "essential nexus" test * * * in actions such as the instant case, challenging land use regulations," (Plaintiff's Brief at 30), is thus hard to fathom. *Del Monte Dunes* not only casts doubt about the application of *Nollan* to general land-use decisions; coupled with the Court's earlier ruling in *Dolan*, *Del Monte Dunes* ends legitimate debate on the topic.

B. *Seawall and Manocherian*'s "Close Causal Nexus Scrutiny" Is Properly Limited to Regulations Imposing Physical Occupations on Property Owners.

This Court has never applied *Nollan*'s essential nexus test to a case involving a generally applicable zoning law, and its holdings to date have been factually consistent with the Supreme Court's limitation of *Nollan* to cases involving dedication requirements and per se takings. However, this Court's opinions in *Seawall* and *Manocherian* suggest that *Nollan*'s nexus can be applied broadly to all regulations challenged under the Takings Clause, a reading of *Nollan*'s dicta that cannot be squared with more recent Supreme Court precedent. This Court should therefore use this case to clarify that the "close causal nexus scrutiny" of *Seawall* and *Manocherian*, like the *Dolan/Nollan* test, are limited to cases involving compelled dedications and per se takings.

In *Seawall*, this Court struck down a New York City law imposing stringent requirements on owners of single-room occupancy (SRO) properties. The Court found the law constituted a taking of the landlord's property for three alternative reasons. The regulation constituted a forced physical occupation of plaintiff's property. 74 N.Y.2d at 106, 544 N.Y.S.2d at 548. The regulation denied the owners "economically viable use of their property." 74 N.Y.2d at 110, 544

N.Y.S.2d at 551. Finally, and most relevant here, the regulation failed to substantially advance a legitimate state interest. 74 N.Y.2d at 112-16, 544 N.Y.S.2d at 551-53.

In reaching this third conclusion, the *Seawall* court held that there was not the “required ‘close nexus’” between the burdens of the statute and the end advanced as the justification for this burden. 74 N.Y.2d at 112-13, 544 N.Y.S.2d at 552. The Court applied *Nollan*’s nexus test based on an analogy to the facts of *Nollan*. The Court described the local law as offering landowners the “stark alternatives” of “either submit[ing] to an uncompensated and, therefore, unconstitutional appropriation of your properties or pay the price (in cash or in replacement units).” 74 N.Y.2d at 114, 544 N.Y.S.2d at 543. The law was “just the sort of exaction which could be classified * * * ‘an out and out plan of extortion.’” *Id.* (quoting *J.E.D. Assocs., Inc. v. Town of Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)).

In *Manocherian*, this Court again addressed a statute imposing unique and oppressive burdens on property owners. *See* 84 N.Y.2d at 389-92, 618 N.Y.S.2d at 858-59. Again the Court found that the law failed to substantially advance a legitimate state interest. 84 N.Y.2d at 394, 618 N.Y.S.2d at 861. Like in *Seawall*, the *Manocherian* Court emphasized the analogy to required dedication cases, noting that “[t]he statute vests renewal rights in an entity of unlimited existence,” 84 N.Y.2d at 399, 618 N.Y.S.2d at 864, and finding that “the statute transferred significant, distinctive, apartment ownership prerogatives [to defendant, Lenox Hill Hospital] without its having to endure the burdens and costs of ownership.” 84 N.Y.2d at 391, 618 N.Y.S.2d at 859. *See also* *Federal Home Loan Mortgage Corp. v. Division of Hous. and Community Renewal*, 87 N.Y.2d 325, 335, 639 N.Y.S. 2d 293, 298 (1995) (distinguishing *Manocherian* as a case involving a law that “resulted in near-perpetual occupation of property by the hospitals”).

While premised upon per se takings facts, *Manocherian* read *Seawall* and *Nollan* more broadly. This Court found “no basis in *Nollan* itself for concluding that the Supreme Court decided to apply different takings tests, dependant on whether the takings were purely regulatory or physical” and concluded that *Nollan* “promulgated a principle for all property and land use regulation matters.” 84 N.Y.2d at 393, 618 N.Y.S.2d at 861. The Court therefore asserted that the state must demonstrate a “close causal nexus” for any challenged regulatory enactment to survive scrutiny under the takings clause. 84 N.Y.2d at 400, 618 N.Y.S.2d at 865.

The *Manocherian* decision brought a spirited dissent from Judge Levine. After reading *Dolan*, Judge Levine agreed with “scholars interpret[ing] *Nollan* as limiting its close causal nexus scrutiny to the regulatory imposition of conditions of permanent physical occupation which would otherwise constitute a per se taking.” 84 N.Y.2d at 413, 618 N.Y.S.2d at 872. Judge Levine concluded that “the *Nollan* and *Dolan* heightened close causal nexus judicial scrutiny is really a judicial response to the special dangers in development permit cases of abuse of the regulatory process to achieve a physical taking of an applicant’s property without just compensation.” 84 N.Y.2d at 414, 618 N.Y.S.2d at 873. Judge Levine called upon the Supreme Court to “speak definitively” on the application of *Dolan/Nollan* outside the context of required dedications and for this Court to “reappraise its reading of *Nollan*.” *Id.*

The Supreme Court spoke definitively in *Del Monte Dunes*. This Court should use this case to reappraise its reading of *Nollan* and clarify that the “close, causal nexus scrutiny” of *Seawall* and *Manocherian* apply only to regulations that result in a permanent physical occupation of land. Such a holding would be consistent with the factual holdings of *Seawall* and *Manocherian* -- both of which involved regulatory impositions that this court declared to be the equivalent of permanent physical occupations -- and with the Supreme Court’s latest pronouncements on *Dolan/Nollan*.

II. THE REASONABLENESS OF ZONING SHOULD BE EVALUATED UNDER THE DUE PROCESS CLAUSE, NOT THE TAKINGS CLAUSE.

A. Five Justices of the Supreme Court Have Abandoned the *Agin*s Means-End Inquiry as a Standard of Takings Liability.

Regulatory taking cases "are among the most litigated and perplexing in current law." *Eastern Enterprises*, 118 S. Ct. at 2155 (Kennedy, J., concurring in the judgment and dissenting in part). A particularly vexing issue has been whether the Takings Clause allows courts to reexamine the reasonableness and validity of regulation in determining whether the regulation constitutes a compensable taking (as opposed to a violation of due process).²

Much of the confusion stems from *Agin*s, *supra*, where the Court stated for the first time that a taking may occur where government action "does not substantially advance legitimate state interests." 447 U.S. at 260. *Agin*s thus suggests that taking analysis requires courts to evaluate the "fit" between the legislatively chosen means and legitimate ends, an evaluation referred to in this brief as the "*Agin*s means-end inquiry." As shown in sections II.B & II.C, however, this means-end inquiry conflicts with both the text and history of the Takings Clause, and the Supreme Court and the overwhelming majority of lower courts have never applied it to award compensation for a taking.

² E.g., John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 Vt. L. Rev. 695, 695 (1993) (inquiries into the reasonableness of government action confuse takings analysis and have no proper role in takings jurisprudence); Michael J. Davis & Robert L. Glicksman, *To the Promised Land: A Century of Wandering and a Final Homeland for the Due Process and Takings Clauses*, 68 Or. L. Rev. 393, 394 (1989) ("[T]he nature of the difficulty plaguing Court decisions on this issue is substantial and fundamental: It stems from a continuous failure to articulate a consistent view of the relationship between 'deprivations' and 'takings' when considering attacks on the constitutionality of state and local regulations restricting private property rights."); Patrick Wiseman, *When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System with Integrity*, 63 St. John's L. Rev. 433, 439 (1988) ("The failure to distinguish between [takings and due process violations] has contributed to the confusion and apparent incoherence of takings law.").

Fortunately, the U.S. Supreme Court recently has clarified this area of the law. One year ago, in *Eastern Enterprises*, five Justices of the Supreme Court distanced themselves from the *Agins* means-end inquiry as a standard of takings liability. The case involved the constitutionality of the federal Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"). A four-Justice plurality concluded that the Coal Act effected a taking because it imposed an extreme, retroactive financial burden on the claimant. 118 S. Ct. at 2149-53.

Although the plurality did not discuss *Agins*, the other five Members of the Court expressly considered and rejected the *Agins* means-end inquiry as a theory of takings liability. Justice Kennedy wrote a separate opinion concurring in the judgment but dissenting from the plurality's takings analysis, which he characterized as "incorrect and quite unnecessary for decision of the case." *Id.* at 2154. Concluding that the reasonableness of the Coal Act should be evaluated under the Due Process Clause, not the Takings Clause, Justice Kennedy explained that the Takings Clause presumes the reasonableness and validity of government action, and merely conditions otherwise permissible government action on the payment of compensation. *Id.* at 2157. In other words, *Agins* was wrong to suggest that the Takings Clause operates as a substantive limitation on the reasonableness of regulation:

[The *Agins* means-end inquiry] is in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the Government's power to act.

Id. Justice Kennedy criticized *Agins* directly, stressing that its means-end inquiry results from "[t]he imprecision of our regulatory takings jurisprudence," not from any coherent explication of the Takings Clause. *Id.* He concluded that to evaluate the reasonableness of legislative judgments, "the more appropriate constitutional analysis arises under general due process principles rather than the Takings Clause." *Id.*

Similarly, Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, concluded in dissent that the reasonableness of the Coal Act was governed by the Due Process Clause, not the Takings Clause:

[T]he plurality views this case through the wrong legal lens. The Constitution's Takings Clause does not apply.

Id. at 2161. Agreeing with Justice Kennedy, these four Justices emphasized that "at the heart of the [Takings] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good." *Id.* (emphasis in original). There was "no need to torture the Takings Clause to fit this case" because issues regarding the reasonableness of the Coal Act "find[] a natural home in the Due Process Clause, a Fifth Amendment neighbor." *Id.* at 2163. They stressed that it is the Due Process Clause, not the Takings Clause, that "safeguards citizens from arbitrary or irrational legislation." *Id.* It is the Due Process Clause, not the Takings Clause, that promotes the "*fair application of law*, which purpose harkens back to the Magna Carta." *Id.* at 2164 (emphasis in original).

In short, five Justices rejected the *Agins* means-end inquiry as a proper standard of takings liability, and they disavowed the plurality's reliance on the Takings Clause to evaluate the reasonableness of the law at issue. As stated by the United States Court of Appeals for the Third Circuit, in *Eastern Enterprises* "[t]here are five votes against the plurality's Takings Clause analysis," and lower courts "are bound to follow the five-four vote against the takings claim * * *." *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 658-59 (3d Cir. 1999).

Just weeks ago, the *Agins* means-end inquiry took another direct hit when every Member of the Court refused to endorse it. In *Del Monte Dunes*, a jury awarded just compensation based on instructions derived from *Agins*, including its "substantially advance" means-end inquiry. 119 S. Ct. at 1634. Various amici requested the Court to clarify whether such an inquiry is an

appropriate part of takings jurisprudence. *Id.* at 1636. The Court refused to do so, however, because the defendant had failed to challenge the jury instruction in question. *Id.* The Majority noted that the jury instruction relied on the *Agins* formulation (*id.*), and it recognized that it has never given "a thorough explanation of the nature or applicability" of the role of the *Agins* means-end inquiry in takings jurisprudence. *Id.* Yet, despite a clear opportunity to explain and reaffirm *Agins*, a case that has been on the books for nearly twenty years, the Court refused to do so.

In a separate concurrence, Justice Scalia (author of *Nollan*) stressed that the Majority had declined to approve the *Agins* means-end inquiry and that he too wished to "express no view as to its propriety." *Id.* at 1649 n.2. Justice Souter, writing for himself and three other Justices in dissent, similarly refused to endorse *Agins*:

I offer no opinion here on whether *Agins* was correct in assuming that this [means-end] prong of liability was properly cognizable as flowing from the Just Compensation Clause of the Fifth Amendment, as distinct from the Due Process Clauses of the Fifth and Fourteenth Amendments.

Id. at 1660 n.12.

In sum, not a single sitting Justice endorsed the *Agins* means-end inquiry in *Del Monte Dunes*, and five Justices expressly disavowed it as a standard of takings liability in *Eastern Enterprises*. A Majority of the Court thus has concluded that the Takings Clause does not require, or even permit, an *Agins*-type inquiry into the reasonableness of regulation or a normative judgment as to whether regulation adequately promotes the public interest. Rather, such inquiries find their "natural home" in the Due Process Clause. Outside the *Dolan/Nollan* context of compelled dedications of property, regulatory takings analysis should focus on the economic impact of the challenged regulation.

B. In the Nearly Twenty Years since the *Agins* Ruling, the Supreme Court and Virtually All Lower Courts Have Never Used the *Agins* Means-End Inquiry to Award Compensation under the Takings Clause.

The recent disavowal of the *Agins* means-end inquiry by five Justices of the Supreme Court follows nearly twenty years of widespread judicial neglect of the inquiry. Although the Supreme Court has quoted the *Agins* "substantially advance" language over the years,³ it has never endorsed the *Agins* means-end theory to justify an award of compensation under the Takings Clause in a challenge to a land-use restriction.⁴

Lower courts likewise have largely ignored the *Agins* means-end inquiry as a theory of compensation under the Takings Clause. The U.S. Court of Federal Claims -- the court with jurisdiction over takings claims against the United States -- canvassed the case law a full eight years after the *Agins* ruling and concluded: "[N]o court has ever found that a taking has occurred solely because a legitimate state interest was not substantially advanced." *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 390 (1988). Not surprisingly, Plaintiff fails to cite a single case in which a court endorsed the *Agins* means-end inquiry to uphold an award of compensation under the Takings Clause.

In this Court, although *Seawall* and *Manocherian* cite *Agins*,⁵ neither case relies exclusively on an *Agins* means-end inquiry to find a taking. In *Seawall*, the court referred to the means-end inquiry as a mere tertiary rationale, only after finding that the challenged law effected a physical taking and denied economically viable use. 74 N.Y.2d at 102-110, 544 N.Y.S.2d at

³ *E.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985).

⁴ As explained above, in *Del Monte Dunes* the Court refused to endorse the *Agins* means-end test. *Nollan* and *Dolan* are not to the contrary because they are rooted in the doctrine of unconstitutional conditions and limited to the narrow context of compelled dedications of property (see Section I, above).

⁵ *Manocherian*, 84 N.Y.2d at 392-93, 618 N.Y.S.2d at 860-61; *Seawall*, 74 N.Y.2d at 107, 111, 544 N.Y.S.2d at 549, 551.

545-51. *Manocherian* is virtually *sui generis* because the law there was special interest legislation that could not "masquerade as general welfare legislation." 84 N.Y.2d at 395, 618 N.Y.S.2d at 861. In its more recent rulings, this Court appears to have anticipated the *Eastern Enterprises* clarification, suggesting that courts should use takings analysis to review the economic impact of regulation while reserving due process analysis to review arbitrariness. *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 50-51, 643 N.Y.S.2d 21, 26-27 (1996) (ripeness requirements differ for takings and due process claimants because takings claimants contend that regulation denies economically beneficial use, whereas due process claimants contend that regulation is arbitrary and capricious). Like the five Justices who rejected the takings claim in *Eastern Enterprises*, the *Magee* court appears to have recognized that it is the Due Process Clause, not the Takings Clause, that protects "the right to be free from arbitrary or irrational municipal actions" *Id.* at 53, 643 N.Y.S.2d at 28.

Because both *Manocherian* and *Seawall* were decided prior to the Supreme Court's clarifications in *Eastern Enterprises*, they warrant reexamination. Certainly, Plaintiff has offered no reason to extend the reach of those cases to justify an award of compensation in a takings challenge to a zoning ordinance that furthers a comprehensive land-use plan.

C. The Text and History of the Takings Clause Preclude the Use of a Means-End Inquiry to Identify a Compensable Taking.

The widespread disregard of the *Agins* mean-end inquiry in the lower courts and its recent disavowal by five Supreme Court Justices reflect its deep analytical flaws and its fundamental inconsistency with the Takings Clause itself.

Agins is a terse, unanimous ruling that upheld a zoning ordinance against a takings challenge. In *Agins*, for the first time, the Court stated that a taking occurs where government action "does not substantially advance legitimate state interests." *Agins*, 447 U.S. at 260. In articulating this "substantially advance" test, *Agins* did not rely on the Takings Clause or takings

case law, but instead cited a single case decided under the Due Process Clause of the Fourteenth Amendment: *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). *Nectow* could not be clearer that the plaintiff there claimed that the regulation at issue "deprived him of his property without due process of law in contravention of the Fourteenth Amendment." *Id.* at 185. There is no indication in *Agins* that the Court desired to create an entirely new standard of liability under the Takings Clause.

The dubious derivation of the *Agins* means-end inquiry should not surprise us because the inquiry, in the words of Justice Kennedy, is very much "in uneasy tension" with the purpose of the Takings Clause. The Takings Clause is not designed to "limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church of Gendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (emphasis in original). This purpose is apparent from the language of the Clause itself, which provides: "nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V. The word "take" suggests a physical expropriation of property,⁶ and the Supreme Court has acknowledged that the Takings Clause originally was understood as applying only to actual dispossessions of property.⁷ Historical scholarship bears this out.⁸

⁶ *E.g.*, *Webster's Encyclopedic Unabridged Dictionary* at p. 1936 (1996) ("take" means "to get into one's hold or possession").

⁷ *E.g.*, *Lucas*, 505 U.S. at 1014 (for the first 150 years of our Nation's history, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property or the functional equivalent of a 'practical ouster of [the owner's] possession.'"; citations omitted, alteration in original); *id.* at 1028 n.15 ("early constitutional theorists did not believe that the Takings Clause embraced regulations of property at all * * *").

⁸ *E.g.*, John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 Harv. L. Rev. 1252 (1996); William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782 (1995); Fred Bosselman, et al., *The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control* 238-255 (1973).

To be sure, the Court has extended the application of the Takings Clause to regulations, but it continues to use physical expropriation as the benchmark for regulatory takings liability. In the first regulatory takings case -- *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) -- the Court found a taking because the regulation in question had "very nearly the same effect for constitutional purposes as appropriating" the support estate at issue. *Id.* at 414. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court held that a permanent physical occupation of property is a per se taking because a permanent invasion "amount[s] to an appropriation of, and not merely an injury to, the property", and is a loss "as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it." *Id.* at 428, 430 (citations omitted). In *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), the Court stated that in regulatory takings cases, its task is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical appropriation." *Id.* at 199. The Court again emphasized such functional equivalency in *Lucas*, stating that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Lucas*, 505 U.S. at 1017.

The *Agins* means-end inquiry flies in the face of this consistent use of physical expropriation as a benchmark for regulatory takings. Regulation that is impermissible only because it does not adequately advance a legitimate interest is not the functional equivalent of an expropriation of land. Because a means-end standard of takings liability would result in automatic compensation where the government acts irrationally, it would apply to all manner of government action that has no similarity to expropriation. Indeed, it would require compensation

(in the form of market value for the "taken" property interest) no matter how insignificant the actual economic impact on the claimant.

Suppose, for example, a state agency issues a land-use regulation that slightly reduces the value of thousands of parcels of land throughout the state. Suppose further that the regulation is based on a mistaken interpretation of the agency's authority. The affected property owners could, of course, seek invalidation of the ordinance as an unlawful exercise of the agency's power. But if a means-end inquiry were an appropriate standard of takings liability, they also could seek compensation for the time during which the restriction was in effect, arguing that the regulation failed to advance a legitimate state interest. Because the regulation exceeds the agency's legislatively conferred authority, by definition it fails to advance a legitimate legislative goal. But it would make no sense to allow the landowners to seek compensation in the face of such a small reduction in the value of their property. The litigation floodgates would open whenever regulation of property is subsequently deemed by a court to be arbitrary or unauthorized, no matter how slight the economic impact.

Not only would litigation increase, but the required compensation often would be greatly disproportionate to the claimant's out-of-pocket expenses. Successful due process claimants generally seek actual, out-of-pocket expenses, whereas successful takings claimants seek fair market value for the "taken" property interest. *Williamson County*, 473 U.S. at 197 (discussing the difference between remedies under the Due Process and Takings Clauses). If a takings claimant were to prevail on a means-end theory, it could claim full rental value for the time during which the regulation was in effect,⁹ even if the claimant suffered no actual damage or out-of-pocket expenses. Although full rental value might be appropriate for other temporary

⁹ *First English*, 482 U.S. at 319, 322 (just compensation for a temporary taking is the "fair value for the use of the property" during the period of the taking).

takings (because the claimant effectively cedes the property to the public for that period of time), it is illogical where regulation is impermissible solely because it fails to advance a legitimate interest (because the public gains nothing and the claimant often loses far less than the rental value of the property.)

This scenario is no academic hypothetical. In *Joint Ventures, Inc. v. Department of Transp.*, 563 So. 2d 622 (Fla. 1990), the Supreme Court of Florida invalidated state land-use restrictions because they were not a proper means to effectuate a legitimate state interest. Many of the affected landowners then sued for compensation for a temporary taking for the period of time during which the statute had been in effect. Various lower courts sustained these compensation claims because they construed *Joint Ventures* as having found a taking. On appeal, however, the Supreme Court of Florida rejected the claims by distinguishing between due process and takings analysis. See *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54 (Fla. 1994). After lamenting the confusion caused by the failure to differentiate between the two Clauses (*id.* at 57), the court ruled that takings analysis should be reserved for allegations that a regulation has deprived the landowner of economically viable use of the land. *Id.* In contrast, the *Joint Ventures* "analysis with respect to whether the statutory subsections provided a proper means to a valid end exposes a standard due process inquiry." *Id.* at 58. Thus, the statute's means-end failure did not give rise to takings claims. *Tampa-Hillsborough* illustrates not only the risk of debilitating compensation claims that may result from conflation of due process and takings analysis, but also the proper resolution of such claims by limiting means-end inquiries to the Due Process Clause.

The *Agins* means-end inquiry conflicts not only with the meaning and history of the word "take," but also with the Clause's requirement that a taking be for a "public use." In *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984), the Court made clear that where a taking does not

adequately advance the public interest, the proper remedy is invalidation under the Public Use Clause for failing to meet the public use requirement. *Id.* at 245 ("the Constitution forbids even a compensated taking of property when executed for no reason other than to confer a private benefit on a particular private party. A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."). *Midkiff* further holds that the judicial role in enforcing the public-use requirement is "an extremely narrow one" (*id.* at 241-42), and that the standard of judicial review of an asserted public purpose is comparable to the highly deferential "rational basis" test used to evaluate substantive due process claims. *Id.* at 241 (a taking survives a challenge under the public use requirement where it is "rationally related to a conceivable public purpose").

It is flatly inconsistent with *Midkiff* and the public use requirement of the Takings Clause to award compensation for a taking based solely on the failure of regulation to advance the public interest. From an analytical perspective, it would be anomalous in the extreme to consider a regulation's means-end "fit" twice under the same clause but using differently phrased standards: *i.e.*, first to determine if the regulation is rationally related to a conceivable public purpose under the Public Use Clause, and then to examine whether it substantially advances a legitimate interest to determine liability under *Agins*. It makes even less sense that the remedies under these two inquiries would be different and that a landowner would be entitled to compensation under *Agins* where a regulation does not advance a public interest, but simply invalidation under *Midkiff* where a regulation fails to advance a public use. Finally, from a policy perspective, it is unfair to require taxpayers to pay "just compensation" to a property owner for government action that fails to advance the public interest in any way.

Due to these and other conceptual defects in the *Agins* means-end inquiry, the Solicitor General of the United States similarly takes the position that land-use regulation that fails

adequately to advance a legitimate government interest "cannot be said (on that basis alone) to effect a compensable taking of property." Brief for the United States as Amicus Curiae Supporting Petitioner in Part, at 28, *City of Monterey v. Del Monte Dunes of Monterey, Ltd.*, 119 S. Ct. 1624 (1999) (No. 97-1235) (available at 1997 U.S. Briefs 1235 (LEXIS)).

How is it that due process and takings analysis became confused? Prior to 1987, many commentators and courts believed that invalidation was a sufficient remedy for a regulatory taking of property.¹⁰ Thus, there often was little need to distinguish between due process and takings analyses because violations of both Clauses led courts to strike down the offending law. The Supreme Court frequently mixed the terminology of the clauses, often referring to "a taking of property without due process."¹¹ Such fusion was particularly commonplace in zoning cases because in the landmark *Euclid* ruling, the Court combined takings and due process analysis into a single standard:

[*Euclid*] fused the two express constitutional restrictions on any state interference with private property -- that property shall not be taken without due process nor for a public purpose without just compensation -- into a single standard: [B]efore [a zoning] ordinance can be declared unconstitutional, [it must be shown to be] clearly arbitrary and unreasonable, *having no substantial relation to the public health, safety, morals, or general welfare.*"

Moore v. City of East Cleveland, 431 U.S. 494, 514 (1977) (Stevens, J., concurring in the judgment) (emphasis and alteration in *Moore*). To further confuse the issue, the Takings Clause

¹⁰ *E.g.*, Norman Williams, et al., *The White River Junction Manifesto*, 9 Vt. L. Rev. 193 (1984) (invalidation is an adequate remedy for violations of the Takings Clause); *Fred R. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 593-95, 385 N.Y.S.2d 5, 8-10 (1976), (absent physical invasion or dispossession of property, unreasonable regulation is a non-compensable violation of due process, not a compensable taking), *cert. denied*, 429 U.S. 990 (1976).

¹¹ *E.g.*, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 498 n.7 (1981) (describing various claims as alleging "takings of property without due process"); *Rostker v. Goldberg*, 453 U.S. 57, 61 n.2 (1981) (same); *Goldblatt*, 369 U.S. at 591 (same).

applies to state and local governments through the Due Process Clause of the Fourteenth Amendment,¹² which similarly encourages a blurring of standards and phraseology.

In 1987, however, takings jurisprudence experienced a sea change with the Court's ruling in *First English*, which makes clear that the government must pay just compensation for a taking, regardless of whether the taking occurs directly through the power of eminent domain or inversely through regulation that denies land economically viable use. 482 U.S. at 314-22. Although the government may limit its liability to temporary damages by rescinding the offending regulation (*id.* at 321), just compensation must be paid.¹³ Since the *First English* ruling, it has become far more important to distinguish between due process and takings analysis. *Eastern Enterprises* constitutes the first clear step toward repudiating the *Agins*-type due process analysis that crept into in takings jurisprudence prior to *First English*.

The serious practical consequences of failing properly to distinguish between due process and takings analysis is illustrated by this case. Assume *arguendo* that the Town's zoning ordinance fails completely to advance a legitimate interest (an assumption refuted by the record). If the zoning ordinance were deemed a taking on that basis, the Town of Mamaroneck would have two options under *First English*. First, it could keep the law in place and pay Plaintiff up to \$6 million,¹⁴ a grossly illogical burden to impose on town taxpayers for regulation that fails to advance the public interest.

¹² *E.g., Dolan*, 512 U.S. at 383-84 & n. 5 (citing *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897)).

¹³ There may be a narrow exception to the obligation to pay compensation for a taking where the challenged government action requires the claimant to pay money to a third party. *Eastern Enterprises*, 118 S. Ct. at 2145 (plurality). This potential exception is inapplicable here.

¹⁴ See Plaintiff's Brief at 17 (asserting that the zoning reduced the value of the property by nearly \$6 million).

Alternatively, the Town could repeal the zoning and limit its damages to the fair market value of a temporary easement for the time during which the zoning has been in effect. In essence, the court would be ruling that the Town bought the easement in 1994, and now owes Plaintiff fair rental value for this temporary restriction.¹⁵ An award of fair rental value makes sense where it is based on a temporary denial of all economically viable use of land because owner is effectively ceding the prohibited uses to the public. Such an award makes no sense, however, where it is based on the irrationality of government action because rental value would be wholly unrelated to the economic harm (if any) to the claimant and the benefit (none) to the public. If Plaintiff received such an award here, it could then sell the property for its full fair market value (without the recreational zoning restriction) and pocket a windfall to the extent of the just compensation award.

The Takings Clause should not be read to require such an absurd result. By limiting the means-end inquiry to the Due Process Clause, damages for means-end violations would be limited to actual, out-of-pocket expenses under 42 U.S.C. § 1983, a far more just disposition given that the public gains nothing in return.

* * * * *

In sum, the *Agins* means-end inquiry has no appropriate role in takings analysis, as evidenced by the five-Justice disavowal of the inquiry in *Eastern Enterprises*, the virtual disregard of the inquiry by lower courts in identifying compensable takings, and its fundamental

¹⁵ *First English*, 482 U.S. at 319, 322 (just compensation for a temporary taking is the "fair value for the use of the property" during the period of the taking).

inconsistency with the text and history of the Takings Clause. The issue of whether zoning adequately advances the public interest should be evaluated under the Due Process Clause.¹⁶

III. THE ZONING ORDINANCE AT ISSUE EASILY SURVIVES REVIEW UNDER THE DUE PROCESS CLAUSE.

Since the demise of the discredited "*Lochner* era" of exacting means-end scrutiny,¹⁷ socioeconomic regulation comports with the Due Process Clause so long as it has a rational basis. *E.g.* *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."). Such regulation survives substantive due process review where any state of facts either known or reasonably assumed supports the legislative judgment. *E.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

With respect to zoning in particular, the Supreme Court has stressed the tremendous deference afforded local governments under the "rational basis" test:

The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities. * * *

Where property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of his property.

Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981); *accord*, *Euclid*, 272 U.S. at 388 (even if the validity of zoning is "fairly debatable, the legislative judgment must be allowed to control.").

¹⁶ Plaintiff's reliance on *Vernon Park Realty v. City of Mount Vernon*, 307 N.Y. 493 (1954), is likewise unavailing. That case turned on the severe economic impact of the ordinance in question, which worked "to destroy the greater part of the value of the [claimant's] property." *Id.* at 499. Plaintiff has abandoned its claim that Local Law 6 worked a taking due to its economic impact. Plaintiff's Brief at 5 n.2.

¹⁷ See generally *Seawall*, 74 N.Y.2d at 117, 544 N.Y.S.2d at 555 (Bellacosa, J., dissenting).

The Plaintiff does not challenge the legitimacy of the Town's goals, nor could it.¹⁸ As the lower courts convincingly demonstrated, the zoning ordinance plainly advances the Town's legitimate interests in preserving open space, enhancing recreational opportunities, and reducing flood risks. As noted above, the ordinance is a quintessential land-use control. It is the fruit of 30 years of comprehensive land-use planning by local, regional, state, and federal officials. Even where there is some question whether a zoning ordinance would achieve the government's goals, all that is necessary to survive due process review is that the local government could have rationally believed that it will do so. Debates over the wisdom of socioeconomic legislation are for the state legislatures and town councils, not the courts.¹⁹ A fortiori, because the Town's zoning ordinance so plainly reduces flood risk, protects open space, and enhances recreational opportunities, the APA agrees with the Town that the ordinance easily meets "rational basis" review under the Due Process Clause.

IV. THIS COURT SHOULD DECLINE PLAINTIFF'S INVITATION TO RECAST *SEAWALL* AND *MANOCHERIAN* AS INTERPRETIIONS OF THE NEW YORK CONSTITUTION.

In *Seawall*, the Court based its "close causal nexus" entirely upon federal precedent and expressly declined an invitation to consider arguments under the New York State Constitution.

74 N.Y.2d at 1071 n.15, 544 N.Y.S.2d at 554. In *Manocherian*, the Court made no reference to a

¹⁸ See *Midkiff*, 467 U.S. at 239 ("Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation * * *.", quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954)).

¹⁹ *Hodel v. Indiana*, 452 U.S. 314, 333 (1981) (Due Process Clause does not empower a court to sit as a "superlegislature" and review the wisdom of socioeconomic legislation); *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (same); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 423 (1952) (same).

state constitutional claim and based its opinion entirely on the “twin temples of the Supremacy Clause flowing from pertinent United States Supreme Court precedents and the stare decisis import [of *Seawall* and subsequent cases].” 84 N.Y.2d at 393, 618 N.Y.S.2d at 860.

Nonetheless, recognizing the disconnect between *Dolan*, *Eastern Enterprises*, *Del Monte Dunes* and this Court’s interpretation of *Nollan* in *Manocherian*, Plaintiff suggests that this Court recast *Seawall* and *Manocherian* as interpretations of New York’s State Constitution. Plaintiff’s Brief at 31-32.

While this Court may interpret a similarly worded provision of the New York Constitution more broadly than the federal Constitution, “[a]n argument for a broader construction under a state constitution than that established under the federal Constitution requires more than merely urging that some other result is preferred.” Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 St. John’s L. Rev. 399, 418 (1987). Plaintiff has not begun to meet its burden of demonstrating the “history, tradition, policy and other special state concerns” that would justify a broad interpretation of the New York State Constitution in this case. *Id.* at 421; *see also*, *United Artists’ Theater Circuit, Inc. v. City of Philadelphia*, 635 A.2d 612, 615 (Pa. 1993) (listing relevant factors in evaluating an argument for interpretation of a state takings clause beyond federal precedent). Nor does Plaintiff explain how interpreting New York’s Takings Clause beyond the federal Takings Clause in this instance could be reconciled with Article XIV, § 4 of the New York Constitution, which establishes state policy to “conserve and protect its natural resources and scenic beauty” and requires the legislature to “include adequate provision for * * * the protection of agricultural lands, wetlands and shorelands.” *See also United Artists*, 635 A.2d at 620 (rejecting a broad interpretation of Pennsylvania’s Takings Clause in part because of state policy as reflected in a environmental protection amendment of Pennsylvania Constitution).

The Supreme Court is far from hostile to the Fifth Amendment rights of property owners. Cf. *Seawall*, 74 N.Y.2d at 118, 544 N.Y.S.2d at 555 (Bellacosa J. dissenting) (“[e]ighty five years after *Lochner* [*v. New York*, 198 U.S. 45 (1905)], we observe property rights, like the contract rights of that bygone era, being exalted over the Legislature’s assessment of social policy”). Instead, the Supreme Court is backing away from *Agins*’ means-ends inquiry because it is unworkable, unwise, and stands “in uneasy tension with our basic understanding of the Takings Clause.” *Eastern Enterprises*, 118 S.Ct. at 2157 (Kennedy, J., concurring in the judgment and dissenting in part). These same concerns weigh heavily against an interpretation of the New York Constitution that imposes unique and onerous burdens on local government land-use authority.

CONCLUSION

For all the foregoing reasons, this Court should affirm the order of the Appellate Division, Second Department.

Respectfully submitted,

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