CHAPTER 12

JURY TRIALS IN TAKINGS CASES

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I. Introduction

Does a claimant have a right to a jury to determine liability and damages in a regulatory takings case? This chapter turns to that question. The chapter begins with a discussion of the Supreme Court's recent decision in *City of Monterey v. Del Monte Dunes, Ltd.*, 119 S. Ct. 1624 (1999) and the right to a jury trial in federal court. The Court ruled in *Del Monte Dunes* that a landowner has a Seventh Amendment right to a jury trial in a takings claim for money damages filed in federal court under 42 U.S.C. § 1983.

The practical impact of the ruling in *Del Monte Dunes* is quite limited. Because the vast majority of takings cases are resolved in state court, the right to a jury in federal court rarely arises.[180] Even as

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[180] *See* Ch. 4, Section II.A – C (discussing *Williamson County's* state compensation requirement). As noted in Chapter 4, one exception to the general rule against litigating takings claims in federal court arises in the Ninth Circuit under Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401, 406-07 (9th Cir. 1996), *cert. denied*, 523 U.S. 1059 (1998), which holds that a takings claimant need not file in state court

to the limited category of takings cases properly in federal court, the jury trial right applies only where the issue is factbound and thus proper for jury determination. Many liability issues in takings cases are properly viewed as legal issues inappropriate for jury resolution.

The chapter then turns to the critical issue of whether the Supreme Court's ruling in *Del Monte Dunes* might convince state courts to find a right to a jury trial in a state court takings case. Most state courts that have addressed the issue to date have refused to let juries decide liability issues in takings cases. Although counsel for developers will surely use *Del Monte Dunes* in arguing for an analogous jury trial right in state court, this section explains why this analogy fails.

II. The Right to a Jury in Federal Court Takings Actions

A. *Del Monte Dunes*

The right to a jury to determine liability in a § 1983 action in federal court is now controlled by *Del Monte Dunes*. In that case, the Supreme Court resolved a conflict in the circuit courts as to whether a property owner seeking compensation under § 1983 for a regulatory taking is entitled to a jury on the issue of the liability.[181] The *Del Monte Dunes* Court found that a jury may decide liability, depending on the nature of the takings claim.

In *Del Monte Dunes*, the City of Monterey objected to the use of a jury to determine liability. *See* 119 S. Ct. at 1633. Once its

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first where the claimant alleges that government action is a taking because it does not adequately advance a legitimate government interest. As noted in Chapter 8, however, recent rulings seriously undermine the notion that takings liability should be based exclusively on the failure of government action to adequately advance a legitimate state interest.

[181] *Compare* Del Monte Dunes, Ltd. v. City of Monterey, 95 F.3d 1422, 1428 (9th Cir. 1996) (jury appropriately determined liability for taking), *aff'd*, 119 S. Ct. 1624 (1999), *with* New Port Largo, Inc. v. Monroe County, 95 F.3d 1084, 1092 (11th Cir. 1996) (no right to a jury on questions of liability).

objection had been overruled, however, the city agreed to an instruction that allowed the jury to consider whether the city's denial of a permit deprived the owner of all economically viable use of the property and whether "there was no reasonable relationship between the city's denial of the . . . proposal and legitimate public purpose . . . ." *Id.* at 1634, 1636.

The Seventh Amendment preserves the right to a jury trial "in suits at common law" where the value in controversy exceeds $20. U.S. CONST. amend. VII. The Amendment applies not only to common-law actions, but also to statutory actions that sound in tort and seek legal relief. *See Del Monte Dunes,* 119 S. Ct. at 1638. *Del Monte Dunes* holds that a § 1983 action sounds in tort, and thus the Seventh Amendment requires a jury trial for a § 1983 suit filed in federal court that seeks monetary damages or other legal relief, including inverse condemnation actions brought under § 1983. *See id.*

This seemingly broad ruling is limited, however, by the Court's reliance on the unique procedural posture of the case. The Court emphasized that Del Monte Dunes was allowed to proceed in federal court under § 1983 only because, at the time it filed suit, California did not provide a compensation remedy for inverse condemnations. *See id.* at 1638-39. The Court also observed that because California did not provide such compensation, Del Monte Dunes "sought not just compensation *per se* but rather damages for the unconstitutional denial of such compensation." *Id.* at 1639. The Court expressly declined to "address the jury's role in an ordinary inverse condemnation suit." *Id.* at 1644.

As demonstrated in Chapter 4, under the "state compensation" prerequisite for federal court jurisdiction of a regulatory takings claim, a takings claimant must seek compensation in state court before prosecuting a takings claim in federal court under 42 U.S.C. § 1983. After litigating a takings claim in state court, preclusion and the *Rooker-Feldman* doctrine will prevent re-litigation in federal court. *See* Text Block 4.2: *Del Monte Dunes* and Preclusion (rebutting the likely developer argument that the Seventh Amendment right

recognized in *Del Monte Dunes* should affect the application of claim and issue preclusion).

A claimant is not required to go to state court if the state does not provide a postdeprivation remedy that could result in an award of money damages. However, with the advent of *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), all 50 states now appear to afford a monetary remedy in takings claims. *See* Chapter 4, Section II.A. Thus, after *First English*, there should be very few takings claims against state and local governments that are litigated in federal court. The Court again expressly recognized this critical limitation on its holding:

> A federal court, moreover, cannot entertain a takings claim under § 1983 unless or until the complaining landowner has been denied an adequate postdeprivation remedy. Even the State of California, where this suit arose, now provides a facially adequate procedure for obtaining just compensation for temporary takings such as this one.

Del Monte Dunes, 119 S.Ct. at 1644.

B. What Issues May the Jury Decide?

Having decided that a § 1983 claimant has a right to a jury trial in federal court, the *Del Monte Dunes* Court then turned to the issue of what specific issues the jury could properly address. According to the Court, the propriety of submitting questions of liability for a regulatory taking to a jury turns on whether the issues to be adjudicated are primarily factual or legal. *See id.* at 1643.

The Court then applied this test to the specific issues the district court put to the jury. With respect to the question under *Lucas* of whether a regulation deprives a landowner of all use or value of the property, the Court opined that a determination of whether a regulation effects a taking has historically been viewed as a question of fact:

> Almost from the inception of our regulatory takings doctrine, we have held that whether a regulation of property goes so far that "there must be an exercise of eminent domain and compensation to sustain the act . . ." depends upon the particular facts. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); accord *Keystone Bituminous Coal*, 480 U.S. at 473-474. Consistent with this understanding, we have described determinations of liability in regulatory takings cases as "'essentially ad hoc, factual inquiries,'" *Lucas*, *supra*, at 1015 (quoting *Penn Central Transp. Co. v. New York City*, 438 US. 104, 124 (1978)), requiring "complex factual assessments of the purposes and economic effects of government actions," *Yee*, 503 U.S., at 523.

Id. at 1644. The Court thus concluded that the issue whether a landowner has been deprived of all economically viable use of his property "is a predominantly factual question. . . . [T]his question is for the jury." *Id.*

The Court then turned to the question of whether a jury could determine whether a regulation "substantially advanced a legitimate state interest."[182] The Court recognized that this was "a more difficult question" because the issue "is probably best understood as a mixed question of fact and law." *See id.* at 1644. The Court stressed that whether a jury is allowed to determine liability under the substantially advance standard depends on whether the specific claim at issue is factbound:

> In this case, the narrow question submitted to the jury was whether, when viewed in light of the context and protracted history of the development application process, the city's

[182] As discussed in detail in Chapter 8, five Justices have concluded that the substantially advance test has no appropriate role in takings jurisprudence. If the Court formally abandons the test, this portion of *Del Monte Dunes* will become moot.

> decision to reject a particular development plan bore a reasonable relationship to its proffered justi-fications.

Id. The Court concluded: "Under these circumstances, we hold that it was proper to submit this narrow, factbound question to the jury." *Id.* The Supreme Court also emphasized that it did "not attempt a precise demarcation of the respective provinces of judge and jury in determining whether a zoning decision substantially advances legitimate government interests." *Id.*

The Court dismissed the concerns raised by the City of Monterey and *amici* that permitting a jury to decide liability under the "substantially advances" test "will undermine the uniformity of the law and eviscerate state and local zoning authority by subjecting all land-use decisions to plenary, and potentially inconsistent, jury review." *Id.* at 1644. The Court responded:

> Our decision raises no such specter. . . . [O]ur holding does not extend to a challenge . . . of [the constitutionality of the city's general land-use ordinances or policies] . . . [T]he determination whether the statutory purposes were legitimate, or whether the purposes, though legitimate, were furthered by the law or general policy . . . might well fall within the province of the judge.

Id. at 1644-45.

Thus, the Court has probably excluded from a jury's purview the entire class of "general policies," which would include zoning regulations and other statutory and adjudicatory regulations that apply to a broad class of property owners.

The Court then described the narrow factual issue that was appropriate for a jury to decide:

> Del Monte Dunes' argument, in short, was not that the city had followed its zoning ordinances and policies but rather

> that it had not done so. As is often true in § 1983 actions, the disputed questions were whether the government had denied a constitutional right in acting outside the bounds of its authority, and, if so, the extent of any resulting damages. These were questions for the jury.

Id. at 1645.[183]

The *Del Monte Dunes* Court did not address the right to a jury to determine other substantive liability issues. For example, it is unsettled as to whether a jury in a § 1983 case would apply the three *Penn Central* factors. Given the Court's reasoning in *Del Monte Dunes* that a jury is permitted to decide factual issues, a jury would likely be allowed to determine the economic impact of the regulation on the owner, an issue predominantly of fact. However, a jury would not be appropriate to decide the primarily legal questions of whether any investment-backed expectations of the owner were objectively reasonable in light of existing or reasonably anticipated restrictions on the property, or how the character of the government action should affect the takings analysis. Similarly, questions regarding the definition of the relevant parcel and the effect of background principles of law should be viewed as legal issues inappropriate for jury resolution.

C. *Del Monte Dunes* Applied: *Buckles v. King County*

In one of the few detailed discussions of *Del Monte Dunes* to date, *Buckles v. King County*, 191 F.3d 1127, 1140-41 (9th Cir. 1999), the Ninth Circuit confirmed that the ruling in *Del Monte Dunes* is exceedingly narrow. In *Buckles*, landowners brought takings and due process challenges to a zoning decision under the Washington

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[183] In his concurring opinion, Justice Scalia endorsed the same distinction: "[I]n cases asserting municipal liability for harm caused by unconstitutional polices, judges determine whether the alleged policies were unconstitutional, while juries find whether the policies in fact existed and whether they harmed the plaintiff." *Id.* at 1649 (Scalia, J., concurring).

Growth Management Act of 1990. *See id.* at 1130. The Ninth Circuit affirmed the lower court's grant of summary judgment, holding that the landowners were not entitled to a jury trial on their takings claim, emphasizing "that the facts and procedural posture in *Del Monte Dunes* were extreme . . . ." *Id.* at 1141. Unlike the claimant in *Del Monte Dunes*, which argued that the decision by the city was inconsistent with the city's own regulations, the Ninth Circuit stressed that the Buckles' claim was in essence a spot zoning claim, more akin to an argument that the municipal rules were unreasonable as applied, an issue not addressed in *Del Monte Dunes. See id.*

Finally, the *Buckles* court concluded that *Del Monte Dunes* does not alter traditional standards of summary judgment, and that because there were no genuine issues of material fact, summary judgment for the county was appropriate. *See id.* at 1141-42.

III. The Right to a Jury in State Takings Actions

As described above, *Del Monte Dunes* establishes a jury trial right in an extremely narrow category of federal court takings cases. As a result, perhaps the greatest concern for government counsel is not the ruling itself, but the potential that, in the wake of *Del Monte Dunes*, state courts will decide that there is also a right to a jury trial in takings cases litigated in state court.[184] This section turns to the question of the right to a jury trial in state court. It first outlines the state court judgments on the jury trial issue that pre-dated *Del Monte Dunes* and then refutes the likely argument of developers that *Del Monte Dunes* should trigger a reconsideration of these rulings.

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[184] The Seventh Amendment is one of the few provisions of the Bill of Rights that the Supreme Court has declined to incorporate through the Due Process Clause of the Fourteenth Amendment and make applicable against the states. *See* Del Monte Dunes, 119 S.Ct. at 1643; Curtis v. Loether, 415 U.S. 189, 192 (1974) ("The Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment."). Therefore, even if a takings claimant can bring state and federal takings claims simultaneously in state court, *see* Chapter 4, Section II.C, *Del Monte Dunes* does not entitle the state court claimant to a jury trial.

A. State Court Rulings on Jury Trials in Takings Cases

Most states courts that have considered the issue have refused to let a jury determine liability for a regulatory taking.[185] While other states have reported cases in which a jury was permitted to determine liability for a regulatory taking, these decisions do not expressly address the issue of the right to a jury for the liability phase.[186] The remaining states do not appear to have addressed this issue.

Some states with no case law regarding the right to a jury for regulatory takings liability do report cases in which a jury determined liability for a physical occupation taking,[187] but this practice sheds no light on whether that state would allow a jury for liability in a regulatory takings case. The use of a jury in a physical invasion case stems from the fact that a physical invasion taking claim is analogous to

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[185] *See* Hensler v. City of Glendale, 876 P.2d 1043, 1052 (Cal. 1994) (California); Department of Agric. Consumer Servs. V. Mid-Florida Growers, Inc., 521 So.2d 101 (Fla. 1988) (Florida); Metropolitan Atlanta Rapid Transit Auth. v. Fountain, 352 S.E.2d 781, 783 (Ga. 1987) (Georgia); Tibbs v. City of Sandpoint, 603 P.2d 1001, 1004 (Idaho 1979) (Idaho); Jenkins v. Board of County Comm'rs, 698 N.E.2d 1268 (Ind. Ct. App. 1998) (Indiana), *reh'g denied,* 1999 Ind. LEXIS at 22 (Jan. 7, 1999) *transfer denied*, 714 N.E.2d 174 (Ind. 1997); Universal Motor Fuels, Inc. v. Johnston, 917 P.2d 877, 880 (Kan. 1996) (Kansas); Kentucky Transp. Cabinet, Dept. of Highways v. Comer, 824 S.W.2d 881, 882 (Ky. Ct. App. 1991) (Kentucky); Van Dissel v. Jersey Central Power & Light Co., 438 A.2d 563 (N.J. Super. Ct. App. Div. 1981) (New Jersey), *vacated on other grounds*, 465 U.S. 1001 (1984); Gissel v. Kenmare Township, 512 N.W.2d 470, 474 (N.D. 1994) (North Dakota); City of Sioux Falls v. Kelley, 513 N.W.2d 97, 102 (S.D. 1994) (South Dakota).

[186] *See* Drake v. Town of Sanford, 643 A.2d 367, 369 (Me. 1994) (Maine); North Amber Meadows Homeowners Ass'n, Inc. v. Haut Enters., 647 A.2d 127, 133 (Md. Ct. Spec. App. 1994) (Maryland); City of Gulfport v. Anderson 554 So.2d 873, 876 (Miss. 1989) (Mississippi); Corey v. Town of Merrimack, 666 A.2d 1359, 1360 (N.H. 1995) (New Hampshire); Finch v. City of Durham, 384 S.E.2d 8, 21-22 (N.C. 1989) (North Carolina); Sintra, Inc. v. City of Seattle, 935 P.2d 555, 558 (Wash. 1997) (Washington); *see also* City of San Antonio v. Guidry, 801 S.W.2d 142, 145 (Tex. App. 1990) (Texas) (ruling that liability in takings cases is generally an issue of law for the court, but "when the lawsuit challenges not the policy decision of a legislative body but, as in this case, the care and diligence with which that decision has been carried out," a jury is appropriate).

[187] *See, e.g.*, Barber v. Alabama, 703 So.2d 314, 321, 322 (Ala. 1997) (jury can determine causation for physical invasion taking).

nuisance and negligence claims, which commonly present questions of fact appropriate for resolution by a jury.[188] In contrast, liability for regulatory takings often raise questions of law for the court. Allowing a jury to determine liability for a physical invasion taking thus provides no justification for referring questions of law regarding regulatory takings liability to a jury.

Finally, all 50 states appear to allow a jury to decide the amount of damages for an inverse condemnation case of either type if the court has determined that the agency is liable.

B. *Del Monte Dunes* and State Court Jury Trials

Government counsel can anticipate that the plaintiffs' bar will argue that state courts should use the Seventh Amendment ruling in *Del Monte Dunes* by analogy to read comparable state constitutional provisions as requiring a jury trial for inverse condemnation cases in state court. In so arguing, a claimant might cite Justice Kennedy's observation that regulatory takings claims are analogous to common law torts against property that were tried by juries when the Seventh Amendment was ratified. *See Del Monte Dunes*, 119 S.Ct. at 1639-42. This observation came in response to the dissent's position that a regulatory takings claim is akin to an eminent domain proceeding, and that because the latter carries no jury trial right, neither should the former. *See id.* at 1639.

Government attorneys have at least two responses. First, Justice Kennedy's comparison of inverse condemnation claims to torts does not represent binding precedent, but only the plurality view of four Justices (because Justice Scalia did not join this portion of the opinion).

Second, the plurality tied this discussion to the unique, pre-*First English* posture of the case, stating that "Del Monte Dunes was

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[188] *See, e.g.*, Fairbanks North Star Borough v. Lakeview Enters., Inc., 897 P.2d 47, 52 (Alaska 1995) ("Lakeview and the Borough tried the inverse condemnation, nuisance and negligence claims to a jury."); Carter v. City of Oklahoma City, 862 P.2d 77, 78, 80 (Okla. 1993) (jury decided whether city was liable for a physical invasion taking due to odors from waste water treatment plant).

denied not only its property but also just compensation or even an adequate forum for seeking it." *Id.* at 1641. According to the plurality, early opinions established that "when the government took property but failed to provide a means for obtaining just compensation, an action to recover damages for the government's actions would sound in tort." *Id.* Where the government fails to provide an adequate post-deprivation remedy, the landowner suffers procedural disadvantages greater than those in the ordinary direct or inverse condemnation case. *See id.* at 1640. The plurality concluded that in light of these disadvantages, "[a]t least in these circumstances, the analogy to ordinary condemnation procedures is simply untenable." *Id.*

This discussion suggests that where state law does provide a compensation remedy for inverse condemnation, the analogy to direct condemnation (which carries no jury trial right) might well be appropriate, an inference significantly strengthened by the majority's assertion that its ruling does "not address the jury's role in an ordinary inverse condemnation suit." *Id.* at 1644. Municipalities thus should argue that the plurality's analogy to common law torts is inapplicable where state law provides a compensation remedy for a regulatory taking, which is now routinely the case in the wake of *First English*.

IV. Summing Up

Del Monte Dunes suggests the following regarding the role of a jury in takings cases:

(1) Virtually all takings challenges to local or state regulation will be adjudicated in state court and nothing in *Del Monte Dunes* should change the generally held opinion of state courts that there is no right to a jury trial in state court. Therefore, the ruling in *Del Monte Dunes* allowing a jury to decide liability in a federal court takings case under 42

U.S.C. § 1983 is of minor overall importance to takings jurisprudence.

(2) In the rare event that a takings claim under § 1983 may be properly litigated in federal court, the Seventh Amendment affords the property owner a right to a jury for trial of the following issues, assuming there is a disputed issue of fact concerning:

(a) Whether the regulation deprives the owner of all economically viable use; and

(b) Whether the regulation substantially advances a legitimate state interest, but only where the inquiry is factbound (as was the case in *Del Monte Dunes*).

(3) A claimant is not entitled to a jury in a § 1983 takings action to determine that the purpose of the challenged regulation is legitimate, whether the regulation furthers that purpose, or whether the regulation as applied to the owner is unreasonable.

Recommended Reading

John D. Echeverria, *Revving the Engines in Neutral: City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 29 ELR 10682 (Nov. 1999).