

# Latest Supreme Court Regulatory Takings Case Protects Expectations

by Aaron N. Gruen

In the latest significant regulatory takings case, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, the Supreme Court upheld a jury finding of a regulatory taking of private property and the award of just compensation of \$1.45 million to the developer. In *Del Monte Dunes*, a denial of a development proposal, constituting an "abrupt change in course" could not be anticipated given the following: (1) 20 months of continuous work by the developer with city staff to meet all prior conditions, resulting in the satisfaction of all conditions; (2) five separate applications for the development of the property, including the significant reduction in density in each subsequent application to meet city council objections; (3) the city council included the same members which had initially approved the project; and (4) the proposed project complied with the applicable zon-

ing and general plan requirements. While the zoning of the 37.6 acres of an abandoned petroleum tank farm allowed for up to 29 units of multi-family housing, or more than 1,000 units, the development application last rejected was for only 190 units.

A reading of Supreme Court tea leaves suggests that one factor used to evaluate regulatory takings claims, the extent to which a "regulation has interfered with distinct investment-backed expectations" will now protect expectations dashed by regulations that can not be reasonably anticipated. The investment-backed expectations test however, will not protect risk from regulatory restrictions which can be assessed before the investment is made. This distinction reflects the difference between risk that can be predicted or measured by some probability and uncertainty, which covers the portion of the future that can not be assigned a probability. For example, investors who purchase restricted property that precludes the intended use assume a business risk if permission to change the use is denied. Such risk takers can estimate in advance the alternative cash flows and property values that result under varying regulatory conditions (e.g., permission to rezone versus no approval for the rezone). Therefore, because risk-taking investors can take into account the potential distribution of out-

comes when deciding how much to pay for the property, the investment-backed expectations factor does not serve to protect them from reasonably anticipated regulatory restrictions or denials.

The developer in *Del Monte Dunes*, however, could not estimate ahead of time the value of the property under a project denial scenario because its reasonable investment-backed expectations were interfered with by unforeseeable government action. A significance of the *Del Monte Dunes* holding is that it gives incentives to developers to conduct due diligence concerning entitlement as well as market and physical feasibility factors. A developer will need to be able to show that at the onset, the developer reasonably anticipated approval of a specific, feasible project that was subsequently subject to unexpected regulatory change and long (or permanent) delays. Unilateral or abstract expectations will not be protected. The *Del Monte Dunes* decision also gives equal incentives to municipalities to adhere to and consistently apply zoning and development regulations.

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## Biennial Congress

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afternoon to allow time to explore the area on your own. You can find more about Philadelphia attractions such as the Rodin Museum and the U.S. Mint on [www.gophila.com](http://www.gophila.com), [www.pcvb.org](http://www.pcvb.org), or one of the many other websites about the City of Liberty.

Rooms are blocked for LAI until September 13 at the Hyatt Regency Philadelphia at Penn's Landing, our headquarters hotel. The rate is \$175 single or double occupancy. Call the Hyatt at 215-928-1234 to make your reservation.

Corporate sponsors contribute greatly to the success of the event. If you'd like to pledge a sponsorship, please contact the LAI International Office at 312-644-0828.

Plan now to experience the "Waterfront Renaissance" with your fellow members. Registration information will be provided shortly by mail, email, and on the web.

## LAI Hires New Management

Effective March 1, management of LAI and LEF transferred to Bostrom Corporation. The office relocation to 230 East Ohio Street, Suite 400, Chicago, IL 60611, was announced to members and Chapters via letter earlier this year. Bostrom Corporation



**LAI Executive Director Cindy Clark**

has been in business for more than 35 years, providing management services to multiple client associations from its offices in Chicago, Washington, DC, and Monterey, CA. Executive Director Cindy Clark has worked with professional organizations for more than 20 years, including 14 years as Managing Director of the Real Estate Educators Association.

"We are still on the learning curve," says Clark, "but Bostrom has the staff, resources, and technology to help Lambda Alpha carry out its vision for the future. We're excited about the opportunity and appreciate the support and good wishes received from the leadership."