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The Limits of Land Use Regulation

Senate Committee on Local Government

CALIFORNIA LEGISLATURE

SENATE COMMITTEE ON LOCAL GOVERNMENT

SENATOR MARIAN BERGESON, CHAIRMAN

Interim Hearing on

THE LIMITS OF LAND USE REGULATION

The Effects of the U.S. Supreme Court's First Lutheran Church and Nollan Decisions on California's Local Governments

SUMMARY REPORT

AUGUST 13, 1987
STATE CAPITOL
SACRAMENTO, CALIFORNIA

California Legislature

Senate Committee on Local Government

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Summary Report From The Hearing

of the

Senate Committee on Local Government

August 13, 1987
State Capitol
Sacramento

nexus n, pl nexuses or nexus [L, fr. nexus, pp. of nectere to bind] 1: CONNECTION, LINK 2: a connected group or series

- Webster's Seventh New Collegiate Dictionary

87-11-215

THE LIMITS OF LAND USE REGULATION

On Thursday, August 13, 1987, the Senate Local Government Committee held a special hearing to review how two recent United States Supreme Court decisions affect California's local governments.

During June 1987, the Supreme Court handed down two land use cases which originated in California. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles involved the issue of a temporary regulatory taking. In Nollan v. California Coastal Commission the Court struck down a public access condition on a coastal permit.

Senator Marian Bergeson, Committee Chairman, presided over the hearing which was also attended by Senator Quentin Kopp, Senator Cecil Green, and Senator Newton Russell. Approximately 125 people joined the four legislators to hear 17 witnesses discuss the cases. The hearing began just after 10:00 a.m. and concluded at 4:30 p.m.

This staff summary reports who spoke and summarizes their views. In addition, the report reprints the written materials submitted by the witnesses.

WITNESSES

Professor Joseph L. Sax*
Boalt Hall, School of Law
University of California, Berkeley

Michael M. Berger
Fadem, Berger & Norton
Plaintiff's Attorney in First Lutheran Church

Charles J. Moore*
Principal Deputy County Counsel
County of Los Angeles

Timothy A. Bittle*
Pacific Legal Foundation
Plaintiff's Attorney in Nollan

Richard M. Frank*
Deputy Attorney General
Department of Justice

Dean J. Misczynski
Principal Consultant
Senate Office of Research

Don V. Collin*
General Counsel and Legislative Advocate
California Building Industry Association

Christian W. H. Solinsky*
Resources Director
California Chamber of Commerce

Jack Shelby
Legislative Advocate
California Association of Realtors

Mark A. Wasser
McDonough, Holland & Allen
County Supervisors Association of California

Brent P. Harrington*
Calaveras County Planning Director
County Planning Directors Association

Katherine E. Stone*
Burke, Williams & Sorensen
League of California Cities

Alan R. Pendleton*
Executive Director
San Francisco Bay Conservation and Development Commission

Ralph Faust*
Chief Counsel
California Coastal Commission

E. Clement Shute, Jr.*
Shute, Mihaly & Weinberger

J. Laurence Mintier*
Mintier & Associates
American Planning Association - California Chapter

Daniel J. Curtin, Jr.
McCutcheon, Doyle, Brown & Enerson

[* - See written material reprinted in this report.]

INTRODUCTORY COMMENTS

Senator Bergeson opened the Committee's hearing by drawing attention to 11 questions she had sent to the invited witnesses. (A copy of her comments and questions are reprinted in this report.) She had asked the witnesses to address these issues, realizing that not everyone would be able to comment on each point.

The Senator then expressed her concern over the conflicting interpretations of the Supreme Court's June decisions. "Some commentators hailed the cases as a complete triumph of private property rights," she said. In contrast, Senator Bergeson added that "columnist Neal Pierce said it was 'Black Tuesday at the Supreme Court' for environmental laws."

Senator Bergeson noted that she had invited two special guests to join the Committee for its hearing. **Joseph L. Sax** is a law professor at the University of California, Berkeley's Boalt Hall and is nationally known for his work on land use and environmental law. **Daniel J. Curtin, Jr.** is a Walnut Creek attorney who is well known for his observations and explanations of California land use law and practice. The Senator invited Sax and Curtin to participate throughout the day, asking questions of the other witnesses and helping the legislators understand these issues.

She asked the witnesses to place the cases in context for the Legislature which "has a clear duty to help sort out these issues. Legislators need to understand if these cases are the end of a regulatory era or just narrow legal interpretations."

AN OVERVIEW

The Committee's first witness was Professor **Joseph L. Sax** from Boalt Hall. Professor Sax explained that the First Lutheran Church decision dealt with temporary takings. But it is purely a "constitutional remedy case," not a decision on what constitutes a taking of property. As such, the case shifts the economic burden from private landowners to government agencies.

The Nollan decision arose from a controversy over coastal access which is most easily understood as a "subdivision exaction problem." Exactions must be related to the purpose of the regulation. Justice Scalia's majority opinion stands for a federal "nexus rule". Anything else is, in Scalia's term, "extortion."

Sax told the Committee members that Nollan and First Lutheran Church raised two questions:

1. Are these cases the leading edge of a fundamental revision in property rights?

2. Will these cases change the way California local governments and the Coastal Commission will have to do business?

"Plainly we have a more conservative, property-oriented U.S. Supreme Court than we have had in many decades, and plainly property is on the Court's agenda in a way it has not been for more than half a century," Sax said. But he added that "what is perhaps most striking about these cases is how little they have changed mainline property law, and how little disagreement there is between the Court's liberals and conservatives on the most important features of property law."

To support his view, Sax identified 20 recent property cases, 60% of which were decided unanimously. "The Court has not cut back on the scope of permissible regulation," Sax concluded. "No revolution in property (rights) is on the horizon."

In summary, Sax explained that the "Court saw Nollan as a coerced contribution of a public easement, government 'extortion,' which the Court has always condemned. It did not see the case as a conventional subdivision dedication of roads or parklands, where the contribution is meant to remedy a problem the development itself has created."

By way of contrast, Sax held that "First Lutheran Church **does** significantly change the rules of property/taking law, by imposing the economic burden of unconstitutional regulation on the government, rather than the landowner, for the period during which constitutionality is being litigated. But since not many regulations **are** found unconstitutional, its practical impact is likely to be slight [emphases in original]."

In response to a question from **Senator Bergeson,** Professor Sax explained that the cases were probably "forward looking" and that their retroactive application was not likely. As to the need for legislation after First Lutheran Church, Sax suggested that the Legislature could limit the statute of limitations, i.e., the deadline by which lawsuits must be filed alleging takings. A prompt deadline would limit governments' economic exposure to claims that temporary takings have occurred. With respect to Nollan, Professor Sax said that placing a nexus test in the statute may not be needed. The Court's message is that "you must not make exactions which are not related." Because exactions cannot be revenue raising devices, further explanation is not needed.

Senator Kopp explored with Sax whether the two recent cases could allow property owners to allege impairment of their contract rights. In response, Sax discussed other recent cases, especially the Keystone Bituminous Coal Association decision and concluded that the Supreme Court is "unwilling to intrude on the basic management of the economy" by elected officials.

THE LITIGANTS' VIEWS

The Committee next heard from four attorneys who represented the parties in the two Supreme Court cases. The first was **Michael M. Berger** of the Los Angeles law firm of Fadem, Berger & Norton who represented the First English Evangelical Lutheran Church of Glendale in its suit against the County of Los Angeles.

"These are not isolated cases," according to Berger who predicted that property owners will flood the courts with cases if public officials persist in conducting "business as usual." "To continue 'business as usual' is to court disaster," Berger announced. Responding to Senator Bergeson's earlier question and disagreeing with Professor Sax, Berger declared that both cases are retroactive not prospective in their application. The Supreme Court has announced "what the law has always been." He added that the cases do not tell public officials what not to do, "they merely tell us where the price tag lies."

With respect to local moratoria on development, Berger said that they must be short, specific, and respect private property rights. For that reason, he believes that Government Code §65858 (urgency zoning ordinances) is appropriate and should be extended when its "sunset clause" comes due in 1988. The courts will strike down regulations, Berger said, that serve no public purpose. They will also strike down takings without compensation.

Following his prepared presentation, Berger responded to several questions from Committee members and from **Daniel J. Curtin** who had been invited to participate as an official observer. They explored how the cases might apply to different types of moratoria: those imposed by local voters, those resulting from water shortages, those triggered by traffic congestion, and those with specific limits on developments. Berger reminded his questioners that First Lutheran Church "didn't tell us what a taking was. It was just a remedy case." But he concluded by warning that the "consequences (of ignoring these cases) might be quite severe. Governments are going to have to pay the price."

The second litigation specialist to discuss First Lutheran Church was Los Angeles County Principal Deputy County Counsel **Charles J. Moore.** Moore's perspective is unique in that he drafted the

original 1978 ordinance which affected the church camp and then defended the County against the Church's lawsuit.

Moore contended that the case would have little effect in the real world of land use development. "Developers don't want monetary damages. Developers want to build projects," Moore said. Compensation for temporary regulatory takings is the "wrong remedy for builders."

Referring to earlier judicial standards, Moore reminded the Committee that diminution of property values is not a taking. He believed that the courts may find that a temporary delay in a developer's plans is a mere diminution and therefore not a taking at all. These "temporary interferences" are just the price of developing in complex urban areas like Los Angeles. In fact, the courts may start to look at the purpose of land use ordinances. If they do, judges may find that governments are protecting public values and not attempting to take away private property rights.

Moore discounted the possibility of an explosion in land use litigation. Answering a later question by **Senator Kopp,** Moore said that projects, not monetary damages, are developers' goals. "They won't rush to the courts" because they want to build not sue. However, **Senator Bergeson** observed that "developers want to develop. But when they can't develop, they litigate." But if an explosion of lawsuits does occur, Moore suggested that the Legislature may want to revise the "private attorney general rule" as agencies are forced to defend themselves.

Responding to a question from **Professor Sax,** Moore conceded that First Lutheran Church will have a "chilling effect" on county supervisors and planning commissioners. He agreed with Sax that the two cases are "symbolic slaps on the (government's) wrist."

The Pacific Legal Foundation represented the plaintiffs in the Nollan case and **Timothy A. Bittle** spoke to the Committee regarding PLF's views. Bittle opened his remarks by noting that California stands apart from other states in the amount of land use cases reaching the appellate courts. "I sense a certain amount of schizophrenia in this state," he said. State statutes emphasize the need for affordable housing yet public officials place many hurdles in the way of those who want to build.

While other lawyers may say that the Supreme Court adopted a traditional nexus test, Bittle disagreed. "It took me a while to understand it," he said, but Justice Scalia pushed aside the attorneys' arguments and wrote his own opinion. Regulation standing by itself is wrong.

The Court's decision assumes that the Coastal Commission could have denied the Nollans' permit and still left them with a reasonable use of their property. This approach constitutes a trade: government can give up its right to say "no" to the permit and property owners can give up their right to say "no" to the dedication exaction. But if there is no trade, there can be no exaction, Bittle said. If government has no power to trade, then it has no power to ask for dedications. This conclusion shows what Bittle called the "critical difference" between restrictions on use and exactions. Bittle admitted that his argument may not be clear yet to everyone, but PLF will be presenting this theory in future cases.

Is the Nollan decision retroactive, asked **Senator Bergeson.** Bittle replied that many of the Coastal Commission's past requirements have been in error. "There will be some litigation to try to turn the clock back on those regulations," he predicted. Statutes of limitation may prevent some property owners from filing lawsuits, while others who have not yet started construction may reject their permits and re-file with the Commission. Still others may find that public agencies have yet to accept their offers of dedication and they may be able to withdraw them.

Governments cannot just deny applications for development permits without reasons, Bittle continued. Arbitrary or discriminatory reasons can invalidate public officials' denials. An agency's actions must be based on a legitimate state interest and it must be articulated. Further, exactions must be related to the reason for which the permit could have been denied. "But isn't that a nexus test?" asked **Senator Russell.** Bittle replied that it was, but it was different from Professor Sax's explanation. Exactions cannot occur for just any reason; they must be for the same reason.

Representing the Attorney General, **Richard M. Frank** told the Senators that "land use planning is alive and well in California." There is a difference between perception and reality in understanding the First Lutheran Church and Nollan decisions. Initial reactions included hyperbole, but in Frank's view there would be "no radical change."

Conceding that there has been an "explosion" of land use cases brought by developers, Frank said that the federal courts have engaged in "California bashing." California's land use planning has been viewed by some as being on the fringe of legal theory. But as crowding continues to get worse, there will be a growing need for more complex laws that attempt to balance competing interests. When it comes to coastal access, Frank asserted that other states like Oregon, Texas, and New Jersey have been even more aggressive than California.

The Legislature could help resolve some of the uncertainty generated by the Nollan decision by providing a statute of limitations which would be short and clear. Pointing to the 60-day deadlines in the legislation governing the Tahoe Regional Planning Agency and the Coastal Commission, Frank recommended that the Legislature take its own earlier work as a model for responding to Nollan.

Adjustments to the private attorney general theory in Code of Civil Procedure §1021 and §136 may be needed, according to Frank. He noted that federal law allows agencies to recover their own costs when they further the law. Specifically, he mentioned 42 USC 1983. When **Senator Russell** inquired about making proportional private attorney general awards, Frank answered that there are substantial California and federal precedents for this practice. New legislation may not be needed.

Paraphrasing Mark Twain, Frank suggested that reports of the death of land use planning are greatly exaggerated. Because of First Lutheran Church, there will be more lawsuits filed in state courts instead of in federal district courts. Frank predicted, however, that public agencies will still continue to win the bulk of them.

If courts begin to award monetary judgements against public agencies, it may prompt a legislative response, according to Frank. Answering a question from **Senator Kopp,** he pointed to the separation of powers issue in Mandel v. Myers and noted that the Legislature may have to revisit this issue. A claims bill may be needed after a court enters its judgement against a state agency. Senator Kopp disagreed with Frank. Planning may be alive and well, he said, but public officials are going to be more cautious.

Will it be business as usual, inquired **Senator Russell.** No, conceded Frank, that would be too complacent. Because the nexus concept is critical, both Nollan and Keystone will require more detailed administrative records of findings to justify public officials' actions.

Earlier, Frank had branded as "a false issue" the contention that temporary regulatory takings would result from long delays in processing permits. He asserted that the existing Permit Streamlining Act eliminates that issue. **Dan Curtin** challenged Frank, noting that many cases fall outside the Act. What happens then, he asked. Frank agreed with Curtin that this can happen. Even when the developer is not at fault, delays happen anyhow. As an example, Frank pointed to delays caused by the federal district court in reviewing the Tahoe regional plan.

VIEWS FROM INTEREST GROUPS AND AGENCIES

Following a lunch break, the Committee listened to 11 representatives from a wide variety of special interest groups and public agencies. Their comments have been combined in this section to show common themes.

The beginning of a trend? Sounding more hopeful than convinced, representatives from the building and real estate industries saw the First Lutheran Church and Nollan decisions as a welcome beginning of a new trend in land use litigation and practice. **Don Collin,** representing the California Building Industry Association told the Committee that opponents of development have been trying to load-up proposed projects with expensive exactions, hoping to drive away the applicants with economic pressure. Local officials may be more reluctant to take this approach, especially after Nollan. Saying he was "glad that the case was won," the California Association of Realtors' **Jack Shelby** applauded the Nollan decision. If there's now a public price-tag for exactions, then maybe public officials will find them less desirable because they are too expensive.

If these cases do represent a trend, **Dean Misczynski** of the Senate Office of Research recommended that public officials treat compensation as they treat public works projects, not like tort claims. Torts result from accidents and exactions are no accident, they are planned. Instead of paying damages, officials ought to repay exactions with assessments and taxes levied on those who benefit from them.

Most of the afternoon witnesses took a contrary position on the "trend" issue. **Brent Harrington,** speaking for the County Planning Directors Association, said that early news reports had left "erroneous interpretations" in the public's mind. As the American Planning Association's representative **Larry Mintier** put it, there is "more smoke than fire in these two court decisions."

Indeed, according to the Coastal Commission's **Ralph Faust,** there has been a perception of abuses by his agency. But the push for coastal access has been rooted in state statute and the California Constitution, consistent with private property owners' rights. The Commission's decisions had been routinely upheld by the California courts. Speaking for CSAC, **Mark Wasser** contended that the cases are neither "the end of land use planning as we know it" nor do they represent "business as usual." Although Wasser sees the cases as marking a shift in the venue of litigation, he disagreed that they indicate a change in the basic flow of the law itself.

More litigation? By invalidating the Agins remedy, the First Lutheran Church decision will promote the filing of more land use cases in state courts instead of before federal judges, according to **Mark Wasser**, CSAC's former general counsel. Lawyers can better manage their cases in the California courts than under the federal system and this will influence their legal strategies. More control over jury selection and the speed at which trials are set will encourage plaintiffs' attorneys to file more land use cases in state courts.

Speaking on behalf of the League of California Cities, **Kathy Stone** agreed that more state suits were now likely. County planners representative **Brent Harrington** also saw the "potential for significantly increased numbers of court cases." But CBIA's lobbyist **Don Collin** disagreed. Asked if the two cases would spawn more lawsuits, Collin answered, "Not yet."

Planning practices already changing. Witnesses representing planners and public agencies agreed that state and local planning practices were already changing in response to the federal decisions. **Larry Mintier** from APA explained local officials' five possible responses, including spending more time and money documenting their actions. In one recent example reported by Mintier, a county allocated an additional $100,000 for additional legal review of its proposed new general plan.

Himself a local planning director, **Brent Harrington** said, "There is some thought that the court was trying to send a message to land use decision makers that we must carefully consider and ponder our actions and their implications." As a city attorney, **Kathy Stone** has been telling her municipal clients to document their findings and exactions on the public record. She conceded that some city decisions need better justification to document the nexus required for dedications.

State agencies have already changed their administrative practices in light of the two federal cases. **Alan Pendleton** from the San Francisco Bay Conservation and Development Commission reported that in searching for the nexus, he has asked his staff for more information on why an application might be denied. Pendleton then cited two specific examples. Responding to an application for a single-family house in Tiburon, BCDC did not impose its previously usual public access requirement. But the Commission did require public access to the bayshore for an industrial park. In short, he and his staff are being more careful to find the appropriate nexus. They are not recommending access requirements when the nexus cannot be found.

At the Coastal Commission the cases have had a "significant effect" on the staff, according to its chief counsel **Ralph Faust.** He reported that staff members are now making explicit the linkage between their recommended exactions and the permits before them. This is a real change, he said, but one with limited effects.

Influence on ballot box planning? A growing local political phenomenon is the use of initiatives and referenda on growth management policies. Some of these measures have been challenged on procedural grounds and additional challenges seem likely after First Lutheran Church and Nollan. Cities and counties may now welcome "pre-election challenges" to sort out these cases before their voters pass the measures, according to the CBIA's **Don Collin.** Identifying flawed ballot measures may save local officials from having to defend poorly drafted propositions once they pass, Collin said.

Clem Shute, whose law firm has drafted and defended several ballot box planning measures, responded by saying that pre-election challenges are an "attractive idea." But because these cases are "highly fact-oriented" they may take several years to resolve. Shute predicted that the local political coalitions supporting the propositions may disperse during the time it takes to hold trials and pursue appeals. Who then will finance the adversaries, Shute asked.

The Legislature's response. The witnesses were divided on both the efficacy and the desirability of a statutory reaction by the Legislature. From the development industry there were three conflicting views. **Don Collin** thought that legislation would be premature, as more work and understanding is needed. But **Kip Solinsky** from the California Chamber of Commerce endorsed specific bills worthy of attention. Solinsky pointed to bills sponsored by the Chamber as models for future efforts. He specifically noted Assembly Bill 1915 (Harris, 1987) and Senate Bill 1833 (Seymour, 1986). In contrast, the Realtors' **Jack Shelby** thought that the Legislature's responses would probably narrow the Supreme Court's decisions. Therefore, Shelby recommended against any bills.

The most extensive list of suggestions came from the CSAC testimony delivered by **Mark Wasser** who suggested six actions:

- Promote "predictablility for both sides" but avoid a statutory definition of what constitutes a taking.

- Require that attorneys' fees be "reciprocal and proportional," with the Legislature setting the standards.

- Impose a statute of limitations which should be clear and "reasonably short."

- Enact a new procedure in the Code of Civil Procedure for handling takings claims, modelled after Senate Bill 1833.

- Enact standards for calculating damages when takings are found, allowing judges and juries to measure damages.

- Require applicants to inform public agencies of their projects' work and then allow applicants to file claims in the variance process.

Speaking later, **Clem Shute** liked Wasser's last suggestion of a variance process but suggested that it ought to occur very early in the permit process. An early declaration by a project's applicant of the economic stakes would put the public agency "on notice" of the potential risks involved and avoid later, unpleasant surprises.

Additional specific suggestions came from the League's **Kathy Stone** who recommended three items for legislative action:

- Clarify that timely administrative and traditional mandamus are the appropriate state forums for resolving disputes seeking compensation for land use regulations.

- Create administrative and court procedures to ensure that public agencies can reach early resolution of the issues.

- Enact short statutes of limitation for filing claims for compensation.

BCDC's **Alan Pendleton** concurred in Wasser's and Stone's calls for a short statute of limitations for compensation claims. As an administrator, Pendleton also recommended that the Legislature or some other agency provide technical assistance to smaller public agencies to help them interpret these complex issues.

But perhaps the most telling comment came from **Brent Harrington,** the county planner. He noted that the recommendations for legislative action focus exclusively on legal procedures. No one suggested reworking the basic laws on planning practices. No one suggested changes to the Planning and Zoning Law, to the California Environmental Quality Act, or to the Permit Streamlining Act.

A CONCLUDING VIEW

Invited by the Committee to sum up the day's testimony, the final witness was **Dan Curtin** from the firm of McCutcheon, Doyle, Brown & Enerson. After listening to the previous speakers, Curtin distilled their comments.

The cases mean this: The First Lutheran Church case means that if there has been a taking, then money damages must be paid. This decision overrules the earlier Agins case. The Nollan decision stands for the proposition that there must be a nexus. This is the same approach used in Associated Homebuilders and the "governmental benefit" rule applied in Grupe and Whalers Village is out.

What the cases didn't do: They say nothing about downzoning. They say nothing about the "proper fit" of the nexus.

Seven effects on cities and counties:

- There will be little effect on agencies that follow the law and "plan right."
- "Knee-jerk cities" that impose exactions and dedications without documentation are "in jeopardy."
- Officials must do their homework: "think, study, analyze."
- If a planning practice was wrong before these cases, it's still wrong but now the clock (compensation claims) is ticking.
- The decisions will get rid of "planning by guess."
- The decisions will stop the use of "boilerplate" conditions that are not well thought out. That will promote good planning.
- More local agencies will be working harder to get their plans up to date so they can defend challenges. This will be especially true of the bigger cities.

The power to plan is still there: The two federal decisions do not stop good comprehensive planning.

Legislative changes: The Legislature should wait a while before deciding on its response; it is too early yet to determine the real effects of the cases. However, some ideas are worth considering:

- Adopting a statute of limitation might be a good idea, but legislators should wait until practical effects are known.

- Allowing early vesting of development rights for those who install infrastructure for public use might be a good idea.

- Permitting local officials to place competing initiatives on the ballot without first complying with CEQA could help.

- Allowing longer times for pre-election challenges.

OPENING STATEMENT BY SENATOR MARIAN BERGESON
"THE LIMITS OF LAND USE REGULATION"
THURSDAY, AUGUST 13, 1987

GOOD MORNING AND WELCOME TO THE SENATE LOCAL GOVERNMENT COMMITTEE'S SPECIAL HEARING CALLED "THE LIMITS OF LAND USE REGULATION." I AM SENATOR MARIAN BERGESON, CHAIRMAN OF THE COMMITTEE.

WE ARE HERE TODAY TO REVIEW THE EFFECTS OF THE TWO LAND USE CASES DECIDED BY THE UNITED STATES SUPREME COURT IN JUNE: THE "FIRST LUTHERAN CHURCH" CASE AND THE "NOLLAN" DECISION. WE ARE PARTICULARLY INTERESTED IN HOW THE COURT'S ACTIONS MAY AFFECT CALIFORNIA'S LOCAL GOVERNMENTS.

BEFORE I GO ANY FARTHER, I WANT TO INTRODUCE SEVERAL PEOPLE TO YOU, DESCRIBE THE FORMAT FOR TODAY'S HEARING, AND THEN MAKE A BRIEF STATEMENT ABOUT OUR TOPIC.

WITH ME THIS MORNING ARE TWO OTHER STATE SENATORS WHO ARE MEMBERS OF THE LOCAL GOVERNMENT COMMITTEE. SENATOR NEWTON RUSSELL IS FROM GLENDALE AND SENATOR QUENTIN KOPP REPRESENTS SAN FRANCISCO AND SAN MATEO COUNTY.

JOINING US THIS MORNING ARE TWO SPECIAL GUESTS: JOSEPH SAX TEACHES AT U.C. BERKELEY'S BOALT HALL SCHOOL OF LAW. PROFESSOR SAX IS NATIONALLY KNOWN FOR HIS SCHOLARSHIP IN LAND USE AND ENVIRONMENTAL LAW. DANIEL CURTIN IS AN ATTORNEY AND CLOSE OBSERVER OF LAND USE LAW AND PRACTICE. MR. CURTIN WAS THE LONG-TIME WALNUT CREEK CITY ATTORNEY AND FORMERLY WAS THE CONSULTANT TO THE ASSEMBLY LOCAL GOVERNMENT COMMITTEE. JOE WILL BE OUR FIRST WITNESS AND DAN OUR FINAL WITNESS TODAY.

I HAVE INVITED THEM TO JOIN US AND PARTICIPATE THROUGHOUT THE DAY. THEY WILL BE ASKING QUESTIONS OF THE OTHER WITNESSES AS WE GO ALONG.

WHEN I INVITED THE WITNESSES TO TESTIFY, I SENT EACH OF THEM THREE PAGES OF QUESTIONS. I ASKED THEM TO FOCUS THEIR COMMENTS ON THESE POINTS, REALIZING THAT NOT EVERYONE WILL BE ABLE TO COMMENT ON EACH QUESTION.

NOW TO THE SUBSTANCE OF WHY WE'RE HERE TODAY. LIKE MANY OF YOU, I WAS VERY CONCERNED WITH THE CONFLICTING INTERPRETATIONS OF THE SUPREME COURT'S JUNE DECISIONS. SOME COMMENTATORS HAILED THE CASES AS A COMPLETE TRIUMPH OF PRIVATE PROPERTY RIGHTS. OTHERS, LIKE COLUMNIST NEAL PIERCE, SAID IT WAS "BLACK TUESDAY AT THE SUPREME COURT" FOR ENVIRONMENTAL LAWS.

BECAUSE CALIFORNIA HAS SOME OF THE MOST INTRICATE AND CONTROVERSIAL LAND USE LAWS IN THE COUNTRY, MY COLLEAGUES AND I WANT TO SEE HOW FAR THESE CASES REALLY GO. PRIVATE PROPERTY RIGHTS NEED PROTECTION FROM REGULATIONS THAT GO TOO FAR. BUT WE ALSO NEED TO SEE IF LOCAL OFFICIALS CAN STILL USE LAND USE REGULATIONS TO PROTECT THE PUBLIC'S SAFETY AND WELL-BEING.

LANDOWNERS AND PUBLIC OFFICIALS NEED TO RE-EXAMINE THEIR RESPONSIBILITIES IN LIGHT OF THESE CASES. AND THE LEGISLATURE HAS A CLEAR DUTY TO HELP SORT OUT THESE ISSUES. LEGISLATORS NEED TO UNDERSTAND IF THESE CASES ARE THE END OF A REGULATORY ERA OR JUST NARROW LEGAL INTERPRETATIONS. I WANT THIS TO BE A FORUM WHERE EVERYONE CAN GET THE ANSWERS THEY NEED.

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California Legislature

Senate Committee on Local Government

MARIAN BERGESON
CHAIRMAN

QUESTIONS FOR WITNESSES

"THE LIMITS OF LAND USE REGULATION"

AUGUST 13, 1987 --- SACRAMENTO

1. Early press reports characterized the First Lutheran Church and Nollan decisions as signalling a major change in land use law. Do you agree?

2. How will these cases change public officials' practices?

a. What can't they do now that they used to do before?

b. Will these cases slow down land use decisions as public officials become more cautious about lawsuits?

c. Some suggest that local officials will be more reluctant to amend general plans to designate more land for development until it is clear that the project is ready to begin. They fear that early planning will give rise to later taking questions. Do you agree?

d. Will officials change their practices regarding access to navigable waterways, particularly in the Delta, at Lake Tahoe, and along the coast?

3. California's 80 charter cities have constitutional authority over their "municipal affairs." Will either of these cases affect charter cities differently than they affect counties and general law cities?

4. In First Lutheran Church, Chief Justice Rehnquist said that the Court was not deciding "whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations."

California law often justifies regulations in the name of public health, safety, and welfare but Rehnquist only mentioned "safety." Does this suggest that health or welfare considerations may not be sufficient to justify regulations that deny all use of property? Is public safety the only acceptable justification?

5. Government Code §65858 sets out the procedures that counties and most cities must follow when adopting temporary zoning moratoria. The Legislature adopted the current section in 1982 and it will "sunset" on January 1, 1989 unless reauthorized. The earlier version of the section will then apply.

a. Does the current language avoid the kind of temporary regulatory taking discussed in First Lutheran Church?

b. Should the Legislature renew the current language?

c. Are further amendments needed? Should the Legislature require city councils and county boards of supervisors to better define the public health, safety, or welfare conditions that the moratorium is meant to resolve?

d. Should the Legislature amend other statutes to conform to this approach? If so, which ones?

6. Courts traditionally defer to the policies set by elected legislatures. If state statutes, local ordinances, or local initiatives recite public health, safety, or welfare problems as justification for new regulations, will that influence how the courts will apply First Lutheran Church or Nollan?

7. Do landowners now have a better chance of attacking regulations which fail to recite the public health, safety, or welfare conditions that they are meant to resolve?

a. Will landowners pay more attention statutory findings and declarations of legislative intent?

b. Will local officials ask the Legislature to strengthen the statements of legislative intent in statutes that permit local regulations?

c. Will drafters of local initiatives and referenda strengthen their statements of intent to immunize them from possible legal challenges?

8. Under First Lutheran Church, when does a temporary regulatory taking start?

a. How can landowners and public officials distinguish between "normal delays" in the land development process and delays that lead to regulatory takings?

b. Is state legislation needed to define when a temporary regulatory taking starts? Or should this issue be left to the courts to interpret?

c. Is state legislation needed to guide the courts in how to calculate a landowner's loss which occurs during a temporary regulatory taking?

9. If a state regulation is found to be a temporary regulatory taking, what is the State General Fund's exposure?

a. If a local regulation, adopted to implement state law, is found to be a temporary regulatory taking, what is the State General Fund's exposure?

b. What is the process for recovering damages?

10. Will Nollan influence the current debate over charging fees for off-site improvements? In particular, what about school developer fees?

11. The traditional test of levying benefit assessments is that landowners must pay in proportion to the benefit conferred on their property by the facility or service being financed.

a. Is the "nexus" discussed in Nollan any different?

b. What can landowners and land use regulators learn from assessment practices that will help them find this nexus?

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Nollan No Bombshell

Property Rights in the Supreme Court

by Joseph L. Sax

OF COURSE it didn't happen this way, but the headlines last month should have read: "Don't Panic, Experts Say. Nollan Case No Bombshell." And in smaller type underneath, there would have been a subheading: "Temporary Taking Case Also Overrated; Planners Urged To Calm Down." Instead, the message generally sent out was that the Supreme Court had decided two of the most important property cases of the last 50 years, and was fomenting a revolution in land use control.

"Hang the flags at half-mast for the environment."
—David Brower

"Potentially, the Nollan case is a pit bull at the throat of the Coastal Act."
—Duane Garrett,
attorney, Coastal Commission member

What really happened is that in *Nollan v. California Coastal Commission*, the Supreme Court did little more than to reaffirm the standard rules of land law that have long governed the country, and to bring California back in line with mainstream legal doctrine. It hasn't abolished the public trust, and it hasn't crushed coastal zone management. To understand both what the Supreme Court did, and what it didn't do, a quick summary of the rules of the property game is necessary.

Put as simply as possible, it goes like this: Government has very broad authority to regulate land use, not only for traditional health and safety reasons, but for environmental and aesthetic purposes too. In so regulating, it can cause considerable reductions in value (by reducing the permissible density of development, for example) without having to pay the owners compensation. But one thing it cannot do is to require an owner to give all or part of its land to the government to serve as a public facility. A landowner cannot be required to donate her house to be the mayor's residence, or to permit the public to picnic in her back yard. There is, however, one exception to this prohibition. Landowners *can* be required to donate some of their property to the public if in doing so they are simply solving a problem they have created. For example, if they want to build a residential subdivision in what was formerly a pasture—thus creating a problem of traffic access—they can be required to donate land for public streets within their subdivision.

Nollan Dispute

The question in the *Nollan* case was how the California Coastal Commission's beach access policy fit within these rules. To obtain a permit to enlarge their home on the beach in Ventura, James and Marilyn Nollan were required to permit public access across the sand beach between their seawall and the high tide line. Since that part of the beach is privately owned property, the case at first seems a clear example of a legally forbidden demand: requiring owners to give part of their land to the government to serve as a public facility (in this case, a public walkway). But if the required donation of the right-of-way was intended to solve a problem the Nollans created by enlarging their

house, then the requirement would be a permissible exception to the no-donation rule.

The Nollans said their building proposal created no problem relating to public access. They said there was no right to public access across their beach before they rebuilt, and no lessening of access there or elsewhere after they rebuilt. In the Nollans' view, the Coastal Commission was simply using its power to grant or withhold a permit (a power it got only for controlling misuse of the coast), to coerce them to grant a right-of-way to the public. Conceding that the goal was highly desirable, the Nollans insisted it should be accomplished by paying the beachfront owners, just as landowners are paid when government acquires parklands or hiking trails.

Commission's Stand Questioned

It weakened the case of the Coastal Commission that it made no claim that the Nollans were violating any existing public right-of-way under California law. It asserted solely that beachfront development was having the following adverse impacts: (1) Larger structures (such as the Nollans' new house) were reducing "visual access" by the public from the coastal highway to the ocean; (2) there was a loss of psychological access as the view of people on the beach was cut off and thereby the sense of the ocean as a public place was reduced; and (3) developmental activity was increasing private use by beachfront owners, which was somehow intruding on public access. The Commission argued that the new right-of-way across the beach was a substitute of one kind of ocean access for another.

The majority of the Supreme Court flatly rejected the substitute access claim as a mere play on the word "access." The principal problem created by the Nollans, as the Court saw it, was the possible reduction of visual access. If that was the problem the Commission wanted to remedy, the majority said, it could have imposed conditions on the Nollans calculated to solve that problem. The Commission could, for example, have mandated a height limit, or required open space to be left between buildings to preserve visual access to the ocean. It might even have been able to deny altogether a permit to build a house that blocked visual access. But, the Court asked, what did the demand for a right-of-way across the sand beach have to do with the loss of visual access? Nothing, according to the majority. The Court virtually accused the Commission of having invented the loss of visual access and other losses as excuses to justify its real goal—creating a public walkway across private beachfront land.

"It's not going to keep surfers out of the water... It's unfortunate that the majority on the Supreme Court does not realize that beaches belong to the ocean."
—Tom Pratte, Surfrider Foundation

If one accepts the factual presuppositions and conclusions of the Court majority—that is, that the real goal of the Commission was not to solve the problem of lost visual access, and that there was no real relationship between any problem the Nollans had caused and the "solution" imposed by the Commission—then the case is really quite a conventional one. The Commission had a program of creating public access across the dry sand beaches, a goal of the California Coastal Act of 1976, and it used its permitting power to expropriate that right from beachfront landowners. Seen in those terms, the majority opinion simply reiterates the standard rule that government cannot force private donations of public rights-of-way, except

where in doing so a problem caused by the landowner-donor is being solved. It is true, as the four dissenting Justices pointed out, that the majority went out of its way to determine for itself what the real facts were, rather than deferring to the State's view. But even a sympathetic observer of the Coastal Commission program must feel a bit uneasy about the Coastal Commission's claim that the Nollans were simply being required to make up for a loss of visual and/or psychological access.

State Powers Affirmed

What, then, is the broader significance of this case on the authority to regulate land use? Not much. Though the Court says that it will factually examine cases to assure that government is using its power substantially to advance a legitimate state interest, it makes clear that it continues to hold a very broad view of state regulatory authority. The majority explicitly reiterates the authority to regulate, without compensation, for historic preservation, for open space, for traditional urban zoning, and for environmental protection, reaffirming decisions that had very broadly granted such powers to government.

Even as far as coastal regulation is concerned, the majority indicates that if it can be shown that there is some relationship—a nexus—between a restriction government imposes on coastal landowners and an impact of their developmental activity, then the restriction will be upheld, and compensation will not be required. If, for example, the Coastal Commission had predicated its regulation on a showing of longstanding public use, and some evidence that development was deterring that use, a regulation or exaction designed to mitigate that effect would likely have been upheld.

"This will undoubtedly spur lawsuits."
—Robert Best,
attorney with the Pacific Legal Foundation, who represented the Nollans

Access Rights

What all this means is that even in California, and even as to beach access, the Court has left open the possibility of a public right across the beach, based on grounds other than the dubious substitution of physical access for alleged loss of visual or psychological access. Indeed, Justice Brennan, in his dissent, expressly invited a renewed effort to obtain public access. He said, "In the future, alerted to the Court's apparently more demanding requirement [for proof of a nexus, the State] need only make clear that a provision for public access directly responds to a particular type of burden on access created by a new development. . . .[T]he record's documentation of the impact of coastal development indicates that the Commission should have little problem presenting its findings in a way that avoids a takings problem." Whether or not this is a too-optimistic view, it nonetheless emphasizes that (1) the majority opinion does not work a fundamental change in the broad scope of allowable regulation, and (2) *Nollan* itself turns on the majority's view of the factual situation of that particular case where the asserted relationship between harm caused and remedy imposed was seen as implausible.

Unlike *Nollan*, the "temporary taking" case decided by the Supreme Court two weeks earlier (*First English Evangelical Lutheran Church v. County of Los Angeles*) does significantly change a rule of constitutional law, but its practical impact will also be a good deal less than most news reports have suggested. The rule the Court laid down was that *if* a regulatory law is found to be a taking of property, then government must compensate the owner for the loss sustained between the time the invalid restraint was imposed, and the time it is held invalid, and is lifted.

Using the facts of the *Nollan* case as an example, if the sand beach had been opened to the public during the period of the litigation over the validity of the requirement to open it, the Nollans would be entitled to compensation for the loss of their right to exclude the public from that area for that time. In the past, the only remedy available to a landowner who won such a case was that the restriction would be lifted for the future; the loss sustained during the pendency of the controversy would fall on the owner. Now, the Supreme Court has

said, it must fall upon the government that imposes the restriction.

The key to understanding the *First English* case is a recognition that it does not in any way change the law as to what restrictions are valid or invalid. Communities may continue to impose the same kind of regulation as in the past. Whatever regulation was permissible will still be permissible, and no compensation, temporary or permanent, will be required. As long as the no-donation rule is not violated, regulations are permissible so long as they do not entirely "prevent economically viable use of the land." And the Court has made clear that very rarely is regulation so restrictive that it will be found to prevent "economically viable use." In fact there has been *no* recent case in which the Supreme Court invalidated a regulation on the ground that it prevented all economically viable use, despite frequent evidence by owners of very severe economic losses (as in the *Penn Central* case, where the Court sustained a refusal to allow a high-rise tower to be built above New York's landmark Grand Central Station).

What, then, is the "bottom line"? If regulatory and planning officials do not panic, they will realize that they can continue imposing the great majority of land use controls that have grown up over the years. As to subject matter, the Court has been generous in approving environmental and aesthetic regulation. It recently sustained very broad-ranging wetland regulation; in *Nollan* itself, it assumed the validity of coastal regulation to protect visual amenities; and it has recently sustained the propriety of billboard regulation, open space zoning, historic landmark designation, strip-mine contour restoration requirements, pesticide regulation, and endangered species protection.

A Warning

Nollan does warn against requiring landowners to open their land to public use. But that is not a novelty. Such demands by government have always been at the heart of the constitutional prohibition against uncompensated takings. The Court had made this clear in the Hawaii Kai Marina case (*Kaiser Aetna*) eight years earlier, and it had been emphasized in the leading Tudor City case (*Fred F. French Investing*) in New York a dozen years ago, when private land in Manhattan had been rezoned as a park open to the public.

The *First English* case does, of course, expose governments to economic liability when they regulate at the outer edges of the constitutionally permissible area; and while—as has been emphasized here—the permissible area is broad, it is not unlimited. Sophisticated regulatory officials will not cut back on existing types of regulation. They will not even have to avoid innovative approaches, so long as they avoid forced donations lacking a cause nexus, and regulations that totally prevent economic uses. That gives ample room for maneuvering, even to very cautious officials. Moreover, even at the innovative edge, there are techniques cities can use to hedge their losses, so the risk will be very small. But that is the subject for another article. □

"It's like putting a lock on the national museum of art."
—Huey Johnson,
former state Secretary of Resources

"We can live with it."
—Louise Renne,
San Francisco City Attorney

References

1. *Nollan v. California Coastal Commission*, 55 U.S.L.W. 5145 (1987).
2. *First English Evangelical Lutheran Church v. Los Angeles County*, 55 U.S.L.W. 4781 (1987).
3. *Fred French Investing Co. v. New York City*, app. dis. 429 U.S. 990 (1976).
4. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).
5. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

Joseph L. Sax is professor of law at the University of California, Berkeley, and an internationally recognized authority on environmental law. He has written widely on environmental protection and conservation issues. His latest book, Mountains Without Handrails *(1980), received the University of Michigan Press Biennial Award.*

STATEMENT OF PROFESSOR JOSEPH L. SAX
BOALT HALL (LAW SCHOOL)
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Senate Committee on Local Government

Special Hearing: THE LIMITS OF LAND USE REGULATION
August 13, 1987

....

Two questions are raised by Nollan (the coastal access case) and First Lutheran Church (the temporary taking case): (1) Are these cases the leading edge of a fundamental revision in property rights? (2) Will these cases change the way California local governments, and the Coastal Commission, will have to do business?

....

Plainly we have a more conservative, property-oriented U.S. Supreme Court than we have had in many decades, and plainly property is on the Court's agenda in a way it has not been for more than half a century. From the 1920's until the last half-dozen years, we averaged not more than one "taking" cases every few years. Since first validating zoning in the 1920's, the U.S. Supreme Court had virtually refused to concern itself with local land use cases. One can literally count on a single hand the zoning-related cases that had--until very recently--reached the Supreme Court since 1928. Then, beginning with the Penn Central case in 1978 (prohibiting a high rise tower on top of N.Y.'s historic Grand Central Station), the Court has decided some twenty cases involving versions of the "taking" problem.

What is perhaps most striking about these cases is how little they have changed mainline property law, and how little disagreement there is between the Court's liberals and conservatives on the most important issues of property law. It comes as a surprise to many people to learn that there is more unanimity in the current Supreme Court on property than on any other constitutional question. Of 20 recent cases, 12 were decided unanimously, and two others were decided 8-1 and 7-1.

The Court has not cut back on the scope of permissible regulation. It has recently approved regulation of billboard regulation for aesthetic purposes, open space zoning, historic landmark protection, zoning to protect community character, strip mine contour restoration, pesticide regulation, wetland development restriction, and endangered species protection. In Nollan, it assumed the validity of protecting visual easements,

and it cast no doubt on the use of subdivision exactions and dedication requirements so long as there exists a causal relation between the problem created and the exaction demanded.

....

In a series of recent cases involving business regulation, most of them decided unanimously, the Court has sustained legislation that is very costly to property owners, is retroactive in its application, invalidates contractual arrangements, and plainly disappoints well-established economic expectations. These uncontroversial cases signal that the Court has no inclination to challenge the extensive regulatory schemes in effect in a wide swath of areas such as pension benefits, home ownership, employee medical coverage, water pollution control, nuclear industry liability, social security and pesticide regulation.

This is not as surprising as it might at first seem. In an economy like ours, where the assumption, virtually across the political spectrum, is that government has a role to play in dealing with issues like unemployment, interest rates, money supply, labor-management disputes, toxic wastes, and so on, a substantial amount of public involvement in shaping and management of the economy is inescapable. And that means a good deal of law that changes the rules of the game and affects the value of property. It is not easy to imagine even the most property-oriented Court holding regulation of toxics, limiting compensation for a nuclear accident, or regulating pension benefits, unconstitutional. So long as government is a major player in the management of the economy, judicially-imposed constitutional limits on property regulation are destined to be marginal matters. No revolution in property is on the horizon.

....

How then explain the results in Nollan and First Lutheran Church? The Court saw Nollan as a coerced contribution of a public easement, - government "extortion", which the Court has always condemned. It did not see the case as a conventional subdivision dedication of roads or parklands, where the contribution is meant to remedy a problem the development itself has created.

First Lutheran Church does significantly change the rules of property/taking law, by imposing the economic burden of unconstitutional regulation on the government, rather than the landowner, for the period during which constitutionality is being litigated. But since not many regulations are found unconstitutional, its practical impact is likely to be slight.

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O = WROTE MAJORITY OPINION
N = NOT A TAKING
Y = YES, A TAKING
X = NOT PARTICIPATING

VOTE			WHITE	POWELL	REHNQUIST	O'CONNOR	SCALIA	BURGER	BLACKMUN	BRENNAN	MARSHALL	STEVENS	STEWART
9-0	1.	CONNOLLY (PENSION WITHDRAWAL)	(N)	N	N	N		N	N	N	N	N	
7-1	2.	MONSANTO (PESTICIDE REGULATION)	X	N	N	Y		N	(N)	N	N	N	
6-3	3.	SECURITY INDUSTRIAL (BANKRUPT'S DEBT)	Y	Y	(Y)	Y		Y	N	N	N	Y	
9-0	4.	ANDRUS v. ALLARD (EAGLE FEATHER)	N	N	N			N	N	(N)	N	N	N
6-3	5.	LORETTO (TV CABLE)	N	Y	Y	Y		Y	N	N	(Y)	Y	
8-0	6.	HAWAII HOUSING ("PUBLIC USE")	N	N	N	(N)		N	N	N	X	N	
9-0	7.	AGINS (OPEN SPACE ZONING)	N	(N)	N			N	N	N	N	N	N
6-3	8.	PENN CENTRAL (HISTORIC PRESERV.)	N	N	Y			Y	N	(N)	N	Y	N
9-0	9.	PRUNEYARD (ACCESS, SHOPPING CENTER)	N	N	(N)			N	N	N	N	N	N
5-4	10.	KAISER AETNA (ACCESS, MARINA RESORT)	Y	Y	(Y)			Y	N	N	N	N	Y
5-4	11.	KEYSTONE (COAL MINING, SUBSIDENCE)	N	Y	Y	Y	Y		N	N	N	(N)	
9-0	12.	HODEL v. VA. SURF. MINING (STRIP MINE RECLAM)	N	N	N			N	N	N	(N)	N	N
9-0	13.	HODEL v. IRVING (INDIAN INHERITANCE—SMALL ALLOTMENTS)	Y	Y	Y	(Y)	Y		Y	Y	Y	Y	
6-3	14.	FIRST ENLISH EVANGELICAL (TEMPORARY TAKING)	Y	Y	(Y)	N	Y		N	Y	Y	N	
9-0	15.	DUKE POWER (NUCLEAR LIAB—ABOL VICTIMS TORT RIGHTS)	N	N	N			(N)	N	N	N	N	N
9-0	16.	TEXACO v. (DORMANT MINERAL SHORT REVERSION)	N	N	N	N		N	N	N	N	(N)	
9-0	17.	U.S. v. RIVERSIDE BAYVIEW (WETLANDS REGULATION)	(N)	N	N	N		N	N	N	N	N	
	18.	KIRBY FOREST INDUSTRIES (DATE OF TAKING)											
5-4	19.	NOLLAN v. CAL. COASTAL COMMN (PUBLIC ACCESS ACROSS BEACH)	Y	Y	Y	Y	(Y)		N	N	N	N	
	20.	PENNELL v. SAN JOSE (LOW INCOME TENANT RENT CONTROL)											
9-0	21.	BOWEN v. PUBLIC AGENCIES OPPOSED (STATE WITHDRAWAL FROM SOC. SECURITY)	N	(N)	N	N		N	N	N	N	N	
6-3	22.	FIRST ENGLISH EVANGELICAL (TEMP. LUTH. CHURCH v CO. OF L.A (TAKING)	Y	Y	(Y)	N	Y		N	Y	Y	N	
9-0	23.	FCC v FLORIDA POWER (POLE ATTACH-RATE REG)	N	N	N	N	N		N	N	N	N	
8-1	24.	FRESH POND ETC. v. CALLAHAN (EVICTION CONTROL; REVIEW)	N	N	(Y)	N	N		N	N	N	N	

DENY REVIEW

STATEMENT OF
PROFESSOR JOSEPH L. SAX
BOALT HALL (LAW SCHOOL)
UNIVERSITY OF CALIFORNIA (BERKELEY)

before the
California Legislature
Senate Committee
on
Local Government

Special Hearing
THE LIMITS OF LAND USE REGULATION
August 13, 1987

To help understand the significance of the U.S. Supreme Court's recent decisions in Nollan v. California Coastal Commission[1] and First English Evangelical Lutheran Church of Glendale v. County of Los Angeles[2], some background on the modern history of property cases in the Court may be useful to you. Because I am the first witness today, I shall, before providing that background, briefly summarize the Nollan and First Lutheran Church cases.

A SUMMARY OF THE TEMPORARY TAKING CASE (First Lutheran Church)

In First Lutheran Church, the church owned land in a flood plain. Following a flood which destroyed the church's buildings, the County adopted an ordinance prohibiting reconstruction within a designated flood protection area that included First Lutheran Church's land. First Lutheran Church claimed that it had been denied all use of its property, and that the ordinance therefore constituted a taking of its property. It sought just compensation measured from the day the ordinance had been adopted. The question before the U.S. Supreme Court was not whether such regulation did or did not constitute a taking. The Court decided only a constitutional remedy question. The issue in the case was whether--assuming that the regulation in question constituted a taking because it was so restrictive--the church was entitled to be compensated for the time the ordinance was in effect, or whether it was sufficient for the County to simply withdraw the ordinance upon being told by a court that it was invalid.

The Court held (in a 6-3 decision) that if a land use regulation is found to be invalid as a constitutional "taking" of property, then "just compensation" must be paid for the period of

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1. 55 U.S. Law Week 5145 (June 26, 1987).

2. 55 U.S. Law Week 4781 (June 9, 1987).

time that the regulation was in effect. Ordinarily this period would run from the date the regulation was imposed to the time the court finds it unconstitutional, and the local government withdraws it.

What First Lutheran Church does is to shift the economic burden for the time a controversial ordinance's constitutionality is being litigated from the landowner to the government entity that imposes the regulation. While it has always been understood that a regulation could be so restrictive that it was constitutionally invalid, in effect a taking of property, previously the government would simply lift such a regulation upon being told by a court that it was excessive, and the economic loss, if any, sustained during the period the regulation was in effect was borne by the landowner.

The Court has not, however, changed the rules as to what makes an ordinance so restrictive as to constitute a taking. Indeed, the Court went out of its way to say that it was not even deciding that the ordinance in First Lutheran Church was excessive. It simply assumed an unconstitutional ordinance for the purpose of deciding what remedy was required in cases where an ordinance was invalidated. Thus there is nothing in the Supreme Court's decision that decides, or even suggests, that the flood control ordinance in First Lutheran Church itself is unconstitutional.

A SUMMARY OF THE COASTAL ACCESS CASE (NOLLAN)

In Nollan the owners of a beachfront lot in Ventura County sought a development permit from the Coastal Commission for demolition of an existing bungalow and replacement with a larger house. The Commission granted the permit subject to the condition that Nollan give the public an easement laterally across the beach on their property between the high tide line and their seawall. Nollan claimed that the requirement constituted a taking for which compensation was due, and the U.S. Supreme Court agreed with him, by a vote of 5-4.

In effect the Court viewed this as a subdivision exaction case, and it adopted the so-called nexus test of land use law as the constitutional test of a taking. Government has authority to prohibit or limit use of property in order to safeguard certain public interests, such as the public health or (in this case, at least arguably) a public view of the beach. That authority limits and defines the scope of conditions and exactions government may impose on the grant of a permit. Only conditions that serve the protection of those interests are permissible. For example, to protect the public view the Commission could impose height limitations on building in the coastal zone. But it could not condition its grant of a building permit in order to demand a contribution to the state treasury, even if the cost of the contribution would be less than the loss sustained by limiting

the height of a building.

As the Court put it, "...unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an out and out plan of extortion."[3] The Court then turned to the factual question which underlay its constitutional law rule: Was there a nexus of purpose between some problem the Nollan proposal would create and the remedy the Commission proposed? The Court emphatically denied the presence of any such nexus. It said it could not see any relation between a claimed right to view the beach that Nollan might block, or a psychological barrier coastal homeowners might be imposing by making the beach seem closed to the public, and a public easement across the beach. The Commission did not seem to the Court to be dealing with the problem Nollan was creating; it seemed rather to have seized on those problems as an excuse to exact something else it wanted all along, a public pathway along the beach above the high tide line.

NOLLAN AND FIRST LUTHERAN CHURCH IN CONTEXT

Two questions are raised by Nollan and First Lutheran Church: (1) Are these cases the leading edge of a fundamental revision, favorable to landowners, of property rights after decades of judicial neglect? (2) Will these cases fundamentally change the way California local governments, and the Coastal Commission, will have to do business?

No one can give an unambiguous answer to these questions. But some informed judgements can be made about where the Court is going, and how local governments and states should respond. Here are the points to which I would call attention.

Plainly we have a more conservative, property-oriented U.S. Supreme Court than we have had in many decades, and plainly property is on the Court's agenda in a way it has not been for more than half a century. From the 1920's until the last half-dozen years, we averaged not more than one "taking" cases every few years. Since the famous Euclid[4] and Nectow[5] cases in 1926 and 1928 the Court had virtually refused to concern itself with local land use cases. One can literally count on a single hand the zoning-related cases that had--until very recently--reached the

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3. 55 U.S. Law Week, at 5148.

4. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

5. Nectow v. City of Cambridge, 277 U.S. 183 (1928).

Supreme Court since the 1920's.[6] Then, beginning with the Penn Central case in 1978,[7] the Court has decided some twenty cases involving versions of the taking problem.[8]

What is perhaps most striking about these cases is how little they have changed mainline property law, and how little disagreement there is between the Court's liberals and conservatives on the most important issues of property law. It comes as a surprise to many people to learn that there is more

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6. Berman v. Parker, 348 U.S. 26 (1954); James v. Valtierra, 402 U.S. 137 (1971); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Moore v. City of East Cleveland, 431 U.S. 494 (1977).

7. Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

8. Among them are the following cases: Federal Communication Commission v. Florida Power Corp., 55 U.S.L.W. 4236 (1987); Connolly v Pension Benefit Guarantee Corp., 106 S.Ct. 1018 (1986); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); United States v. Security Industrial Bank, 459 U.S. 70 (1982); Andrus v. Allard, 444 U.S. 51 (1979); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Keystone Bituminous Coal Association v. DeBenedictis, 55 U.S.L.W. 4326, 94 L.Ed.2d 472 (1987); Hodel v. Virginia Surface Mining & Reclamation Association, 452 U.S. 264 (1981); Duke Power Co. v. Carolina Env. Study Group, Inc., 438 U.S. 59 (1978); Texaco Inc. v. Short, 454 U.S. 516 (1982); Agins v. Tiburon, 447 U.S. 255 (1980); PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980); Nollan v. California Coastal Commission, op. cit. supra.; First English Evangelical Lutheran Church v. County of L.A., op. cit. supra; Bowen v. Public Agencies Opposed, 106 S.Ct. 2390 (1986); Hodel v. Irving, 55 U.S.L.W. 4653 (1987); Bowen v. Gilliard, 55 U.S.L.W. 5079 (1987); United States v. Cherokee Nation of Oklahoma, 55 U.S.L.W. 4403 (1987).

Most of the cases turn on the question whether there was a taking for which compensation must be paid. But the Court from time to time does decide other taking issues, most notably the question "what is a public purpose?", Hawaii Housing Authority v. Midkiff, 104 S.Ct. 2321 (1984). The Court has also recently decided the date of a taking for purpose of determining value. It is the date on which compensation is paid, not the date of filing a condemnation action. Kirby Forest Industries v. United States, 104 S.Ct. 2187 (1984). They also decided that an undisputed physical taking of Indian tribal land by the Congress was indeed a "taking" for purposes of just compensation. United States v. Sioux Nation of Indians, 100 S.Ct. 2716 (1980).

unanimity in the current Court on property than on any other constitutional question. Out of nearly 20 recent cases, 12 were decided by unanimous votes, and two others were decided 8-1 and 7-1.[9]

As to the permissible subjects of regulation, the Court has reiterated recently the propriety of regulation of billboard regulation for aesthetic purposes,[10] open space zoning, historic landmark protection, safeguarding traditional community character, strip mine contour restoration, pesticide regulation, wetland development restriction and endangered species protection. In Nollan, it assumed the validity of protecting visual easements, and it cast no doubt on the use of subdivision exactions and dedication requirements so long as there exists a nexus between the problem created and the exaction demanded.

It has also reiterated the economic viability test, which has always been interpreted to permit very considerable diminutions of value. In one modern case after another--Penn Central, Goldblatt and Andrus v. Allard--to take but three examples, very considerable diminutions of value were held to be constitutionally permissible. Moreover, the majority of the Court has this term cited with approval the century-old decision in Mugler v. Kansas[11], which is usually understood to permit unlimited diminution of value in order to serve a legitimate police power purpose.

In the Hawaii Housing case[12] a few years ago, the Court unanimously sustained an extremely broad public purpose test.

In a series of usually unanimous cases involving business regulation, the Court has sustained legislation that is very costly to property owners, is retroactive in its application, often invalidates contractual arrangements, and plainly

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9. Unanimous cases: PruneYard; Texaco v. Short; FCC v. Florida Power; Hodel v. Virginia Surface Mining; Connolly v. Pension Benefit; Duke Power; U.S. v. Riverside Bayview; Hawaii Housing Authority; Agins v. Tiburon; Hodel v. Irving; Andrus v. Allard; Bowen v. Gilliard; Ruckelshaus v. Monsanto, (7-1, partial dissent only); Fresh Pond, (denying review of a rent control case, 8-1, Rehnquist dissenting).

10. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)("In my view, the aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community", Rehnquist, dissent).

11. Keystone Bituminous Coal Association v. DeBenedictis, 55 U.S.Law Week 4326, 4337 (1987).

12. Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).

disappoints well-established economic expectations.[13] These uncontroversial cases signal that the Court has no inclination to challenge the extensive regulatory schemes in effect in a wide swath of areas such as pension benefits, employee medical coverage, water pollution control, nuclear industry liability, social security and pesticide regulation.[14]

This is not as surprising as it might at first seem. In an economy like ours, where the assumption, virtually across the political spectrum, is that government has a role to play in dealing with issues like unemployment, interest rates, money supply, strikes, toxic wastes, and so on, a substantial amount of public involvement in shaping and management of the economy is inescapable. And that means a good deal of law that changes the rules of the game and affects the value of property. It is not easy to imagine even the most property-oriented Court holding regulation of toxics, limiting compensation for a nuclear accident, regulating pension benefits, or changing the rules of bankruptcy, unconstitutional. So long as government is a major player in the management of the economy, judicially-imposed constitutional limits on property regulation are destined to be marginal matters. No revolution in property is on the horizon.

Where is the new, more conservative Supreme Court, going? The one area in which it speaks out strongly is where government effectively demands that an owner who is seen as minding his own business and causing no harm must contribute something to the public. That was certainly Justice Scalia's portrait of Nollan; and it is revealing in this respect that he described what was occurring there as "not a valid regulation of...use but an out and out plan of extortion." That was also the picture the Court painted in Kaiser Aetna, where the developer of a private marina was being required to open to public use the property he had effectively created.[15] The Court has--not surprisingly in this respect--focused on cases where there is a physical occupation

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13. Connolly, supra; Ruckelshaus v. Monsanto Co., supra; Turner Elkhorn Mining Co. v. Ussery, 428 U.S. 1 (1976); Keystone, supra .

14. Why then was Keystone a 5-4 decision? It would have been an easy 9-0 case in favor of regulation if there had not been an agreement by the surface owners to submit to the damage. The question is whether a surface owner should be able to collect twice in effect, first getting paid by the mine company to give up its claim to support, and then getting the benefit of regulation. That of course was the same issue that troubled Justice Holmes in Pennsylvania Coal Co. v. Mahon, the earlier version of Keystone.

15. Kaiser Aetna v. United States, 444 U.S. 419 (1979).

demanded of the owner's premises.[16] This perspective also explains the deep split in the Court in the Penn Central case, where the minority, led by Justice Rehnquist, insisted that the owners were in effect being required to contribute their air rights to the public, rather than being prevented from causing some harm.

To anyone who saw the Court's taking cases evolving as I have just described them, the Nollan case was not a surprise. The only question was whether the Court would buy the Coastal Commission's nexus argument, bringing the case within the mainstream of subdivision exaction cases. Once it became clear they would not, Nollan became a conventional "invasion" case, doomed to defeat.

This reading of Nollan suggests that it is not the leading edge of a significant reordering of property rights, but one more of the fairly standard "anti-invasion" doctrine cases that are a staple of Supreme Court property law.

There is, to be sure, another possible reading of the case. Both Justice Rehnquist in the recent Keystone case[17] and Justice Scalia in Nollan have intimated that the Court is going to be less deferential than it has in the past in accepting state or local government justifications for regulation. Obviously Nollan itself is an example of such increased judicial scrutiny, for Justice Scalia simply would not accept the Coastal Commission's assertion that lateral access was a suitable substitute for loss of visual access. Such heightened judicial inquiry into an essentially factual and judgmental area was one ground for the vigorous dissent in that case.

It would indeed be a dramatic change if the Supreme Court began to give detailed scrutiny to the justifiability of various state and local land use regulations. I doubt that such a change is in the offing. My own reading of the Scalia opinion is that he found the Coastal Commission's claim simply unbelievable. He thought that if they wanted to protect visual access, they could and should have done so directly. He believed, I think, that they simply were determined to create a public right-of-way along the beach, and had invented visual and psychological access as a nexus when challenged.

Even if I am wrong, and there is an incipient majority that believes greater judicial scrutiny is needed, I predict that such a position will not last long. Once the Court opens the door to

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16. Loretto v. Teleprompter Manhatten CATV Corp., 458 U.S. 419 (1982).

17. 55 U.S. Law Week, at 4337 ("...legitimacy of this purpose is a question of federal, rather than state, law, subject to independent scrutiny by this Court.").

review of the justification for zoning/land use regulations, it will be inundated with a virtually endless number of variations based on infinitely detailed and variegated facts. No U.S. Supreme Court is likely to get itself involved in being a supreme zoning review board. Whatever the 'promise' of Nollan to those who have been awaiting a revolution in property law, and whatever the sympathy for restoring greater status to property by the Scalia-Rehnquist wing of the Court, the simple overwhelming and trivial detail in land use cases will, I predict, defeat the promise.

This view of Nollan, if correct, tells also the fate of First Lutheran Church. That is, so long as there is no notable increase in the number of regulations held to be compensable takings, there will be no notable increase in the number of cases for which temporary taking damages, as just compensation, is required. Indeed, it remains to be seen whether the regulation in First Lutheran Church itself, barring reconstruction within a flood damaged area, will be found a taking.

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DE WITT W. CLINTON, COUNTY COUNSEL

August 6, 1987 (213) 974-1845

California Legislature
Senate Committee on
Local Government
Room 2080 State Capitol
Sacramento, California 95814

Attention: Kaye Packard, Committee Secretary

Re: Recent Land Use Opinion of the
United States Supreme Court

Dear Senators:

On behalf of the County of Los Angeles, we are submitting a paper entitled "The First English Evangelical Lutheran Church Case: What Did It Actually Decide?" for consideration by the Senate Local Government Committee during its review of California land use regulations on August 13, 1987.

Very truly yours,

DE WITT W. CLINTON
County Counsel

By
CHARLES J. MOORE
Principal Deputy
County Counsel

CJM/fsl

Enclosure

THE FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH CASE: WHAT DID IT ACTUALLY DECIDE?

BY JACK R. WHITE*

INTRODUCTION

On June 9, 1987, the United States Supreme Court issued its decision in the case of First English Evangelical Lutheran Church of Glendale v. The County of Los Angeles. By a margin of 6-3, the Court reversed a California state court judgment in favor of the County in an inverse condemnation action in which the Church claims that its property was "taken" without payment of just compensation by a temporary County flood protection zoning ordinance. The decision has been described in most news media reports as a "landmark decision" and "major victory" for landowners which is likely to have an enormous impact on local governments.

Unfortunately, the media descriptions of the case were not always accurate and many were so cryptic as to be

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*/ The author argued the First English case on behalf of the County of Los Angeles in the United States Supreme Court. He is a partner in the Los Angeles law firm of Hill, Farrer & Burrill. The firm has represented the County in numerous land use and zoning litigation matters, but it also regularly represents private property owners and real estate developers in such matters.

misleading. As a result, a great deal of misinformation has been circulated and much confusion and misunderstanding prevails as to what the Court actually decided and, equally as important, what it did not decide. For example, an article about the case appearing in the Los Angeles Herald Examiner on June 10, 1987, stated,

> "Zoning laws that restrict landowners' use of their property, even temporarily, are the equivalent of a 'taking' of private land for public use, 'for which the Constitution clearly requires compensation,' the court said."

Taken literally, that would mean that compensation is now constitutionally required for virtually all zoning measures. That is not what the Court held. Nor did the Court hold that flood protection and other health and safety restrictions on land use constitute a taking for which compensation must be paid, as some other reports have suggested.

What the Court did decide was a narrow point of constitutional law which now requires the California courts to reconsider the Church's inverse condemnation claim, but which ultimately should have no effect at all on the result. In a nutshell, the Court concluded that the California courts had incorrectly interpreted the Constitution when they established a rule to the effect that a landowner who claims his property has been "taken" by a zoning or other land use regulation, may not sue for compensation in inverse

condemnation, but must instead seek judicial invalidation of the offending regulation. Chief Justice Rehnquist and the five Justices who joined with him disagreed with that rule and held that the Fifth and Fourteenth Amendments to the United States Constitution require that the landowner be permitted to sue for damages suffered during the time the offending regulation is in effect before it is finally determined by the courts to be a "taking." This period of time during which the offending regulation is in effect before it is declared to be a taking, was characterized by the Supreme Court majority as a "temporary taking." Hence, the case firmly establishes the precedent that damages may now be recovered for so-called "temporary regulatory takings."

Before I attempt to explain what I think this means, or we engage in any speculation as to what the ruling's actual impact may be on zoning policies and practices, I believe it will put everything into better perspective if we first examine the history of the temporary taking/remedy issue and see how it came before the Court in this particular case.

PREVIOUS UNITED STATES SUPREME COURT DECISIONS CONCERNING REGULATORY TAKINGS AND CALIFORNIA'S AGINS RULE.

(a) Regulatory Takings In General.

The notion that a land use regulation may constitute a "taking" of property within the meaning of the Fifth Amendment is, of course, nothing new. Since its decision in Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922), the Supreme Court repeatedly has said that a state (or federal) police power regulation of property which "goes too far" will be recognized as an unconstitutional "taking" of such property.[1/] It is equally well-established, however, that not every destruction or injury to property by governmental action results in a "taking" in the constitutional sense.[2/]

1/ E.g. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. ___, 91 L.Ed.2d 285 (1986); Williamson County Reg. Plan. Comm. v. Hamilton Bank, 473 U.S. ___, 87 L.Ed.2d 126 (1985); Kaiser Aetna v. United States, 444 U.S. 164 (1979).

2/ Pruneyard Shopping Center v. Robins, 447 U.S. 74, 83 (1980); Andrus v. Allard, 441 U.S. 51, 65 (1979).

In numerous decisions preceding the First English case, the Court acknowledged that the difficult problem always is how to define "too far," that is, "to distinguish the point at which a regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession."[3/] The Court further admitted that it has thus far been unable to develop any "set formula" for the resolution of this issue. Instead, the answer depends largely upon the particular circumstances of each case and calls for essentially ad hoc factual inquiries to balance public and private interests. The bottom line question has been said to be whether, under all of the circumstances, the particular restriction on private property forces some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

In its 1978 decision in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), the Court identified what it called three "relevant considerations" for this ad hoc factual inquiry: (a) the "character of the governmental action"; (b) the "economic impact of the

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3/ Williamson County Reg. Plan. Comm. v. Hamilton Bank, supra, 87 L.Ed.2d at 147.

regulation on the claimant"; and (c) the "extent to which the regulation has interfered with distinct investment-backed expectations." In subsequent decisions, the Court has consistently reiterated what it said in Penn Central and has tried to apply those three factors to the particular facts and circumstances of the case.

In Agins v. City of Tiburon, 447 U.S. 255 (1980), the Supreme Court repeated much of what I have said above, but also expressed a simplified version of the rule to be applied when there is a mere facial attack on a particular zoning ordinance - that is, where it is claimed that the mere enactment of the ordinance effects a taking of a landowner's property. That rule is, "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land . . . ." While the opinion itself does not make it entirely clear what the Court meant by "economically viable use," when the result in that case is considered along with other decisions of the Court, most legal commentators have interpreted this to mean that substantially all economically feasible use must be denied before it can be found that there has been a taking. In Agins, the Court held that a zoning ordinance which, on its face, allowed some development of the plaintiff's property (at least one single

family dwelling on a five acre parcel) was not a taking. This was consistent with other decisions which have long recognized that a mere diminution in value resulting from a land use restriction, even if the diminution in value is substantial, is not enough to constitute a taking.[4/]

(b) The Remedy Question.

The case of Agins v. City of Tiburon requires further discussion, of course, because it was the California Supreme Court's decision in that case which established the California rule rejected by the majority opinion in First English. In Agins, a property owner brought an inverse condemnation action, alleging that a zoning ordinance amounted to a taking of his property because it limited development of his five acre parcel to from one to five single family dwellings. The property owner had not applied for a development permit, but simply sued to recover the value of his property claiming that the mere enactment of the

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4/ See Agins v. City of Tiburon, supra, 447 U.S. at 260-261; Keystone Coal Association v. De Benedictis, 480 U.S. ___, 94 L.Ed.2d 472, 493-496 (1987); Penn Central Transportation Co. v. New York City, supra, 438 U.S. at 131; Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

ordinance was a taking. The California Supreme Court held that the property owner could not bring an inverse condemnation action under such circumstances because requiring the local government to pay for the property (if the ordinance was held to a taking) would have the effect of forcing the local government to exercise its power of eminent domain. The California Supreme Court felt that it was improper for courts to interfere with the local government's prerogative in that fashion. Accordingly, the court held that the property owner's remedy for the claimed taking was limited to bringing a declaratory relief or mandamus action to have the ordinance declared invalid and unenforceable, if it amounted to a taking in violation of the Fifth Amendment.5/

Thus, it is important to note that the California Supreme Court did not hold that a public entity may take private property by regulatory action and keep it without paying for it, as some commentators have suggested. Rather, the clear effect of the decision was that if the regulation was found to go "too far" and was declared to be a taking, it could not thereafter be enforced unless the public entity elected to exercise its power of eminent domain and pay

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5/ Agins v. City of Tiburon (1979) 23 Cal.3d 266, 157 Cal.Rptr. 372.

compensation to the property owner.

In Agins, the property owner did also assert a claim for declaratory relief, by which he sought to have the zoning ordinance declared invalid. Because of the presence of that claim, the California Supreme Court went on to discuss the merits of the alleged taking. The court rejected the claim on the ground that the ordinance merely caused a diminution in the value of the property, at the most, and did not amount to a taking.

As mentioned previously, when the case reached the United States Supreme Court on appeal, that Court agreed with the California Supreme Court that no taking had been adequately alleged because the ordinance, on its face, showed that some development of the property was permissible. The Court also observed that because the property owner had not sought any development permit, it was impossible to know what the ultimate economic impact of the ordinance on the property owner would be. In any event, since it agreed there was no regulatory taking, the Supreme Court said it was unnecessary to consider whether the California Supreme Court's holding limiting the remedy for a regulatory taking was constitutionally correct.

In three subsequent decisions coming before the United States Supreme Court, the remedy question was presented again, but not decided for various procedural

reasons which the Court said prevented it from knowing whether a taking had actually occurred. However, in the first of those cases, San Diego Gas & Electric Company v. San Diego, 450 U.S. 621 (1981), Justice Brennan wrote a dissenting opinion which was joined by three other justices. In his dissent, Justice Brennan expressed the view that the Agins rule limiting a property owner's remedy to invalidation of a regulation which amounts to a taking was constitutionally inadequate because it did not compensate the property owner for his loss of the use of his property during the time the regulation was in effect before it was declared to be valid. It is essentially that view that the six justice majority adopted in the First English case.

In the two cases that followed San Diego Gas in the United States Supreme Court, Williamson County Reg. Plan. Comm. v. Hamilton Bank, supra, and MacDonald Sommer & Frates v. County of Yolo, supra, there were again dissenting opinions by various combinations of justices who wished to reach the remedy question and who expressed the view that the Agins rule was incorrect. By the time the First English case reached the Court, Chief Justice Rehnquist and Justices Brennan, White, Powell, and Marshall had all voted against the Agins rule in various dissenting opinions, though not all in the same case. Thus, unless one of those justices changed his mind, it appeared that the Agins rule would be held

invalid if they all agreed that the remedy issue should be decided. But in each of the four previous cases beginning with Agins, a majority of the justices had exhibited an extreme reluctance to reach the remedy issue until the Court was presented with a case which involved an actual taking by regulatory action. Unfortunately, that judicial restraint did not carry over to the First English case.

THE FIRST ENGLISH CASE

(a) The Subject Property And Its Destruction By Flood.

The Church's property consists of 21 acres of land in the mountains north of the City of Los Angeles, about 23 miles from the suburban City of Glendale. The property lies within a national forest but it is privately owned and subject to the jurisdiction of the County of Los Angeles for building permit and zoning purposes. It is situated in a very narrow canyon known as Mill Creek Canyon. Mill Creek, which is a natural water course, flows through the canyon.

The property is zoned "R-R" (Resort and Recreation), which is a classification established to provide for outdoor recreation and agricultural uses suitable for development without significant impairment to the resources of the area. The property is designated on the County's

General Plan maps as being reserved for open space purposes including outdoor recreation and resource production and preservation. The Church has never challenged these classifications.

The Church acquired the property in 1957 and over the next 20 years built various structures and recreational facilities on the premises using mostly donated labor and services. The property, which was known as "Lutherglen," was used as a weekend retreat and summer camp for Church members and their guests and as a year-around camping facility for handicapped children and adults of all denominations. All of the structures except for some water tanks were located on 12 acres of relatively flat land at the bottom of the canyon, along both sides of Mill Creek. The remainder of the Church's 21 acres has higher elevations with varying degrees of slope, most of which probably would be too steep to be suitable as building sites unless cost was no object. The structures on the canyon bottom consisted of a single cabin which served as the residence of the caretaker; a main lodge used for dining and recreation; a dormitory or bunk house divided into two sections with attached shower and restroom facilities; a swimming pool, volleyball court, outdoor chapel, and a footbridge across the creek. There were also some moveable trailers on the property which were used to house the camp's staff.

It is important to note, then, that the available uses for Lutherglen were quite limited because of its location, topography and the underlying zoning, even before the County adopted the flood protection ordinance which the Church contends was a taking of the property. Unfortunately, even those limited uses proved to be very dangerous.

It is common knowledge in California that flash floods occur in the mountain canyons during periods of heavy rains and that such floods represent a serious hazard to human life and property. Indeed, when the structures were constructed on Lutherglen, the County required the Church to do a number of things to protect against flooding and erosion. This included the construction of a floodwall along one side of the property and the construction of the footbridge as a "breakaway bridge" which would separate easily from its foundation in the event of a flood. This was to prevent the bridge from building up a large volume of water before finally giving way, thereby causing a sudden surge of water downstream. Despite these precautions, several of the structures on Lutherglen were severely damaged, though not destroyed, when a flood occurred in the canyon in 1969. At that time, the County allowed the Church to rebuild the damaged structures.

In late July of 1977, a fire occurred in the Angeles National Forest causing a major loss of watershed

which, in turn, magnified the already existing danger of flooding in the Mill Creek area. Shortly after the fire, the Los Angeles County Flood Control District warned all of the property owners in the area that there was a significant flood hazard. The predicted flash flood came between 1:30 to 2:30 in the morning of February 10, 1978, after two days of very heavy rain. It was devastating. A massive wall of water, mud and debris rushed down Mill Creek Canyon destroying all of the camps and other properties in the canyon bottom. Lutherglen's structures were totally obliterated. Ten people were killed on adjacent property. It was only through sheer fortuity that no deaths occurred at Lutherglen. Lutherglen had been scheduled to be used on February 10, 1978, by a group of handicapped children, but their camping trip had been postponed for one week.

(b) The County's Flood Protection Ordinances.

On January 11, 1979, the County adopted the temporary flood protection ordinance which was the subject of the Church's suit. The ordinance recited that it was "[a]n interim ordinance temporarily prohibiting the construction, reconstruction, placement or enlargement of any building or structure within any portion of the interim flood protection area delineated within Mill Creek, vicinity of Hidden

Springs." It took effect immediately as an urgency measure, "required for the immediate preservation of the public health and safety." In fact, at the time of the flood, the County was already in the process of mapping and evaluating flood data for various areas of the County, including Mill Creek Canyon, in order to comply with federal regulations under the National Flood Insurance Program.[6/] The ordinance recited that studies were underway to develop permanent flood protection areas for Mill Creek and other specific areas as part of a comprehensive floodplain management project. It further recited that the restrictions which it imposed were necessary to prevent encroachments within the limits of the permanent flood protection area which would be "incompatible with the anticipated uses to be permitted within the permanent flood protection area."

The ordinance was enacted under certain statutory

6/ The National Flood Insurance Program makes federally subsidized insurance available to landowners of parcels located in flood prone areas, if adequate local floodplain management laws have been enacted to minimize flood losses. 42 U.S.C. §4001, et seq.; 44 C.F.R. §§60.1, 60.2, 60.3. The federal regulations require local agencies to adopt floodplain management regulations which, inter alia, "[p]rohibit encroachments, including fill, new construction, substantial improvements, and other development within the adopted regulatory floodway that would result in any increase in flood levels within the community during the occurrence of the base flood discharge." 44 C.F.R. §60.3(d)(3).

provisions of California law applicable to "interim zoning ordinances" which take effect immediately as an urgency measure "to protect public safety, health and welfare." Such measures expire automatically after four months unless they are extended in accordance with certain statutory procedures. The maximum period of time such an ordinance could remain in effect, if so extended, was two years. The County Board of Supervisors did extend the ordinance for the maximum period. A permanent "flood protection district" was then established and added to the County's zoning code by an ordinance adopted on August 11, 1981.

The geographical boundaries of the permanent flood protection district were identical to those of the interim flood protection ordinance which it superseded. The flood protection area consisted of a linear shaped parcel approximately 250 feet in width and 3600 feet in length which followed the course of the existing creek channel and included additional area on both sides of the channel to provide reasonable protection from overflow of flood waters, bank erosion and debris deposition. Because of the narrowness of the Canyon at the Church's property, all of the Church's twelve acres of flat land were included within the flood protection area. The provisions of the permanent ordinance were drafted to comply with the federal flood insurance regulations and have been accepted by the federal

government as being in compliance with those regulations.

The provisions of the permanent flood protection ordinance are not as restrictive as were those of the interim ordinance, but there is no doubt that they would prohibit the Church from rebuilding Lutherglen the way it was before the flood.[7/] Since the Church has never applied for permission to build anything on the property under the permanent ordinance, we do not know what kinds of structures would be permitted by the County Engineer. I am informed by the County's engineers, however, that they are of the opinion that some structures could safely be constructed on the property under the permanent ordinance, but they acknowledge that it could be more costly than if the Church was permitted to build the way it did before; and it is not likely that the Church would be able to build all of the structures that

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7/ The permanent ordinance states that the area within the flood protection district has been designated by the County Engineer and the Los Angeles County Flood Control District as being subject to "substantial flood hazard." The ordinance prohibits the construction or reconstruction of any building or structure within the boundaries of the district except as specified therein. One of the exceptions permits "accessory buildings or structures that will not substantially impede the flow of water, including sewer, gas, electrical and water systems, approved by the County Engineer" pursuant to certain specific provisions of the County Building Code. Those provisions of the Building Code prohibit any construction in a severe flood hazard area, if such construction would increase the flood hazard to adjacent properties.

existed before. Despite these restrictions, which the County believes are essential for safety purposes, the County contends the property is still usable for recreation and camping purposes consistent with its underlying zoning classification. Many campgrounds are used in California with no structures at all; or with only restroom and shower facilities, which the County would probably permit the Church to build on Lutherglen, if adequate safety precautions were taken.

(c) The Church's Suit And The Proceedings In The State Court.

The Church did not wait to find out what type of structure might be permitted on Lutherglen under the permanent flood protection ordinance. Instead, the Church commenced its lawsuit on February 21, 1979, a little over a month after the temporary ordinance was first enacted. The Church sued both the County and the Los Angeles County Flood Control District, which was then a separate governmental entity, claiming that they were responsible for the damage caused by the February 10, 1978 flood under a variety of different legal theories, including inverse condemnation and tort liability. In addition, the Church asserted an inverse condemnation claim against the County based on the allegation

that the temporary flood protection ordinance effected a taking of the property without just compensation, because it "denied all use" of Lutherglen.

While the case was still in the pleading stage, the County (which at that time was being ably represented by the County Counsel's Office) moved to strike the allegations of the Church's complaint pertaining to the temporary flood protection ordinance, based on the Agins rule discussed above. Agins had just been decided by the California Supreme Court some three months prior to the making of this motion, and the County argued that the Agins remedy rule barred the Church from suing in inverse condemnation for monetary damages for the alleged regulatory taking. Under Agins, the correct remedy was to sue to invalidate the ordinance in a declaratory relief or mandamus action, which the Church had not done.

The trial court agreed with County's position and struck the allegations of the complaint dealing with the temporary flood protection ordinance as being irrelevant, based on Agins. The case was not appealed immediately, because of the presence of the Church's other claims against the County and the Flood Control District. Eventually, after a trial on one of the other claims, a judgment was entered for the County and the Flood Control District on all of the Church's various theories of liability and the case was then

appealed to the California Court of Appeals.

By the time the case reached the California Court of Appeals, Agins had been affirmed by the United States Supreme Court without reaching the remedy question and the San Diego Gas case had been decided, also without reaching the remedy question. But because of Justice Brennan's dissent in San Diego Gas, the Church argued to the California Court of Appeals that the Agins remedy rule was incorrect and should not be followed. The California Court of Appeals disagreed and held that until the United States Supreme Court finally decided the question, it was obligated to follow the California Supreme Court's Agins decision. Based on that ruling, the appellate court affirmed the lower court's order striking the regulatory taking claim.

It is important to note that neither the lower court nor the Court of Appeal ever discussed the sufficiency of the Church's allegations to state a claim for a regulatory taking.[8/] Likewise, they did not address the health and

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8/ Since the Church never sought to amend its complaint to state a claim for declaratory relief or mandamus, as permitted under the Agins rule, the California courts were not required to consider whether the Church had alleged sufficient facts to establish a regulatory taking, as the courts did in Agins. Nor did the Church ever amend its complaint to claim a regulatory taking based on the County's permanent flood protection ordinance. At all stages of the proceeding, the suit was based solely on the temporary ordinance.

safety justification for the County's temporary flood protection ordinance. In essence, both courts regarded the Church's allegations as being irrelevant regardless of whether they were sufficient to state a meritorious claim, because the Church had sought an impermissible remedy. It was this procedural quirk that the United States Supreme Court majority siezed upon to justify reaching the remedy question in this case after it had ducked the issue in four previous cases.

(d) The Appeal To The United States Supreme Court And The Issues And Contentions Of The Parties.

After the Church's petition for a hearing in the California Supreme Court was denied, leaving the decision of the California Court of Appeals to stand as the final state court ruling in the matter, the Church then appealed to the United States Supreme Court, invoking the Court's appellate jurisdiction rather than certiorari jurisdiction.[9/] Whereas certiorari jurisdiction is entirely discretionary with the Court, it must hear appeals if the requisite conditions for

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9/ I and my firm were engaged to represent the County in this case when it reached the United States Supreme Court.

appellate jurisdiction are present. In essence, appellate jurisdiction exists whenever a state statute or local government ordinance is challenged as being repugnant to the United States Constitution and is upheld by a state court as being constitutional.

In its jurisdictional statement to the United States Supreme Court, the Church claimed that all of the requisites for appellate jurisdiction were present. Yet, the thrust of the Church's arguments were not really aimed at challenging the validity or constitutionality of the County's temporary flood protection ordinance at all. Rather, the Church aimed all of its guns at the claimed invalidity of the Agins rule. One of the arguments we made on behalf of the County in the Supreme Court was that the jurisdictional requirements for appellate jurisdiction were not present here, as the Church claimed, but the Supreme Court majority disagreed. We believe the Court's reasoning on that point (as well as on several others) was incorrect, but that is now ancient history.

In view of the fact noted previously that five of the present Supreme Court justices had already indicated their disagreement with the Agins rule in various dissenting opinions, it appeared that the Court would probably decide that the Agins rule was incorrect if a majority of the justices voted to reach the remedy issue. But it also

appeared to the County that this case was not the proper vehicle for the Court to decide what the proper remedy should be for a regulatory taking for many of the same reasons given by the Court for not reaching that question in the previous four cases. In addition, of course, the ordinance in this case was strictly a health and safety measure, unlike the more traditional zoning ordinances involved in the previous four cases.

Accordingly, the County's strategy, and that of all of the numerous amici curiae who filed briefs supporting the County's position, was to devote most of the effort to attempting to persuade the Court that it should affirm the decision of the California courts without deciding the remedy issue. In addition to making various jurisdictional and procedural arguments which probably are not of general interest, the County and its amici argued forcefully that because the County's flood protection ordinance, on its face, only prevented a hazardous use of property, there could be no unconstitutional taking as a matter of law. We argued that the safety purpose for the ordinance was well established by facts in the record and by other facts which the Court could properly consider by way of judicial notice, including the provisions of the temporary and permanent ordinances themselves, and the findings by the County Planning Commission supporting the permanent ordinance. We observed

also that the Court itself had recognized in previous decisions that such ordinances are entitled to special consideration and carry with them a presumption of validity which can be overcome only by a showing that the ordinance was actually adopted for some other improper purpose, or that it imposes restrictions which are more onerous than what is reasonably necessary to meet the particular peril. In the instant case, the Church alleged no facts which would overcome this presumption of validity. At no time has the Church ever contended that the flood protection ordinance was adopted for an improper purpose or that the restrictions imposed are more onerous than what is reasonably necessary to protect against the hazard of future flooding.

We further pointed out in our arguments to the Court that under these precedents going back at least 100 years, reasonable regulations prohibiting only dangerous uses of property are not considered to be takings for a public purpose in the constitutional sense, and compensation to the affected property owner is not required.[10/]

10/ The cases we relied upon are all cited with approval in footnote 4 of the dissenting opinion by Justice Stevens in First English. The most recent case on the subject, Keystone Coal Association v. De Benedictis, supra, was decided only three months prior to First English, and fully supports the County's position, just as Justice Stevens states in his dissent.

Another major argument advanced by the County and its amici was that the County had not in fact denied all use of the property to the Church. The Church sued solely on the temporary ordinance which did no more than temporarily prohibit the building of any structures in the canyon bottom until the matter could be studied and a permanent ordinance adopted. The Church did not allege any facts to show why its property could not still be used for recreational purposes, including camping, without structures. Furthermore, the permanent ordinance, which the Church has never challenged, plainly allows some structures to be built if the County Engineer is satisfied that adequate safety measures can be employed. The Church has never even tried to see what would be permitted under the permanent ordinance.

In contrast with these arguments, most of the arguments advanced by the Church and its many amici curiae challenge the correctness of the Agins remedy rule without regard to the actual facts of this particular case. They argued that the Court could and should decide the remedy issue without deciding whether there was actually a taking in this case, because the California courts had done so. Our answer to that was that even though the California courts had not decided whether there was a taking, the Supreme Court could see for itself, as a matter of law, that no taking was properly alleged; and the question of what the proper remedy

should be for a regulatory taking should not be decided in a case where no taking could possibly have occurred under the facts appearing in the record. To decide the remedy question under such circumstances would be the equivalent of rendering an advisory opinion, in a vacuum, which could only cause further confusion and uncertainty.

Finally, the County urged that if the Court should decide to reach the remedy question in this case, it should hold that the Agins rule was correct. We argued that a property owner should not be able to sue immediately for compensation in inverse condemnation for an alleged regulatory taking, but rather he should be required to sue to have the regulation invalidated for all of the reasons given by the California Supreme Court. We also pointed out that the question of whether a property owner should be able to recover some compensation for the claimed loss of use of his property during the period the regulation was in effect prior to its being declared invalid, was never actually raised or decided in Agins or in the present case. The County, and all of its amici curiae, argued that it is a misnomer to call that temporary loss of use of the property a "temporary taking," because it is not really a "taking" at all under the Court's many earlier precedents.

Based on those existing precedents, the County argued that a zoning ordinance or other land use regulation

should not be regarded as having gone "too far" so as to amount to a taking unless it denies substantially all use of the land to the property owner permanently. Anything short of that is a mere diminution in value and not the equivalent of an appropriation of the property for a public purpose. The temporary loss of use of the property during the time an excessive regulation is in effect imposes no economic burden on the landowner different from the numerous other kinds of delays in development which are inherent in the regulatory process. Delays of that nature have never been considered to rise to the level of a taking - again, because, at the most, they represent a mere diminution in the value of the property, as distinguished from a total destruction of all value.

(e) The Supreme Court's Decision And Rationale And The Unanswered Questions Which Remain

The Supreme Court's majority opinion agreed with the Church's argument that the remedy question was ripe for decision in this case even though the California courts did not decide whether a taking had occurred. The Court rejected our argument that the Court should itself evaluate the allegations of the complaint to determine whether a "taking" had been adequately alleged. The Court reasoned that because

the California courts had relied on the Agins rule as the sole basis for their decision, they apparently assumed that the Church's bare allegation of a denial of all use of Lutherglen sufficiently alleged a taking to at least raise the remedy question. The Supreme Court felt that it could do the same thing. It then proceeded to decide that the Agins rule was incorrect.

In so doing, however, the opinion by Justice Rehnquist makes it abundantly clear that the majority was not deciding whether the County's temporary flood protection ordinance actually denied all use of the property - i.e., whether it actually effected a taking. The Court further stated that it was not deciding whether the ordinance was insulated from the taking claim as part of the County's

authority to enact safety regulations.[11/] We interpret that as being an acknowledgement by the majority of the correctness of the County's legal argument that a regulation which prevents a dangerous use of property is not a compensable taking. The court simply felt it could ignore that point and proceed to decide the remedy question because of the manner in which the case had been decided by the California courts. In essence, the Court obviously believed it was presented with a golden opportunity to put the remedy question to rest once and for all, without actually having to

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11/ The exact language of the Court's opinion on this point reads as follows:

> "We reject appellee's suggestion that, regardless of the state court's treatment of the question, we must independently evaluate the adequacy of the complaint and resolve the takings claim on the merits before we can reach the remedial question. However 'cryptic' - to use appellee's description - the allegations with respect to the taking were, the California courts deemed them sufficient to present the issue. We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the County might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the state's authority to enact safety regulations. See e.g., Goldblatt v. Hemspead, 369 U.S. 590 (1962); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Mugler v. Kansas, 123 U.S. 623 (1887). These questions, of course, remain open for decision on the remand we direct today." (slip op. at 7-8)

find fault with the County's ordinance.[12/]

In deciding the remedy issue, the Supreme Court first interpreted the California Court of Appeals' decision in this case as holding that a landowner who claims his property has been taken by a land use regulation may not recover damages for the time before it is finally determined that the regulation constitutes a taking of his property. Actually, as I have already mentioned, that precise question was not presented or decided in the lower courts in this case, nor was it presented or decided in Agins. In both this case and Agins, the landowners sought compensation only for an alleged permanent taking of their property without ever specifically asking for damages limited to the time prior to the court's ruling on whether there was a taking. Nor was there any discussion in either case as to whether a

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12/ In contrast, the dissent by Justices Stevens, O'Connor and Blackmun was extremely critical of the majority's decision precisely because the majority decided the remedy issue in a case where it was clear that no taking could possibly have occurred. As Justice Stevens put it,

> "Even though I believe the Court's lack of self restraint is imprudent, it is imperative to stress that the Court does not hold that appellant is entitled to compensation as a result of the flood protection regulation the County enacted. No matter whether the regulation is treated as one that deprives appellant of its property on a permanent or temporary basis, this Court's precedents demonstrate that the type of regulatory program at issue here cannot constitute a taking."

"temporary taking" could have occurred during that interim period of time.

Nevertheless, the Supreme Court considered that to be the real issue - i.e., whether the Agins rule was wrong on the ground that the constitution mandates the payment of compensation for the period of time prior to a judicial determination that the permanent regulation (if allowed to stand) would effect a taking. On that issue, the Court rejected all of our arguments as to why there should be no taking at all where nothing more has occurred than a temporary loss of use of the property, or a delay in development of the property. The majority said it could see no difference between a temporary denial of all use of the property and a permanent taking. The Court reasoned that if compensation was required for a temporary physical taking, then compensation must also be paid for a temporary regulatory taking.[13/]

The majority concluded, however, by saying that

13/ The dissenting opinion by Justice Stevens agreed with the County's argument that there is a significant difference between a physical taking of property and one which occurs solely by virtue of restraints on the use of property imposed under a land use regulation; and that no regulatory taking should be found to occur where there has merely been a diminution in value caused by a temporary loss of all use of property, as distinguished from a total destruction of value which would result from a permanent loss of all use.

"[w]e limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." What this means is anything but clear, since the Court had already said earlier in its opinion that it was not deciding whether there was a taking in this case.

One possible interpretation of the majority opinion would be that any temporary denial of all use of property can be regarded as a taking for which compensation must be paid, no matter how short in duration the loss of use may be or what it is that causes the temporary loss of use. If that is what it means, it would seem that every legitimate building moratoria and other kinds of proper interim ordinances restricting land use might be vulnerable to attack and could result in liability for the adopting public entity. But I do not think that is what the Court would actually hold if it were faced with such a question. Once the Court is put in a position of having to deal with whether a taking has actually occurred in a particular situation, I think it is likely that the Court will modify, or at least clarify, some of the overbroad language it used in this case to bring the decision more in line with some of the Court's previous holdings on the subject of regulatory takings.

Assuming there is a legitimate purpose for a temporary land use restriction, and that the restriction is not to remain in effect for an undue length of time or for an indefinite period, the Court should hold that there is no taking because nothing more than a diminution in value has occurred. Since there is no total destruction of the value of the property, the public interest should be deemed to outweigh the private interest. In essence, this should be regarded as a "normal delay" in the right to develop property of the type that must be expected in a regulated society. Certainly, this should be the result in any case where the Court considers the three factors first identified in the Penn Central case, discussed above.

On the other hand, unless the Court modifies its opinion in a subsequent case, it clearly must be read to stand for the proposition that if a permanent regulation goes too far and would amount to a taking if it is allowed to stand, the landowner will then be entitled to recover damages for the interim period of time that the regulation is in effect before it is judicially declared to be a taking and is abandoned by the public entity. Accordingly, something like a permanent open space zoning ordinance which denied a property owner any economical viable use of his land would almost certainly result in some monetary award against the local government that adopted it. How that amount would be

determined will have to await further judicial explanation, however, since the Court gave no guidance on that point.

To conclude, then, it is my prediction that the First English case ultimately should not result in actual liability being imposed on local governments in any but the most egregious cases of over zealous zoning. So long as some economically viable use is available to a landowner, he should have no taking claim for zoning changes, including down zoning, if legitimate reasons exist for such changes. I see nothing in the First English case which indicates that the Court is going to be any more willing to second guess the decisions of land use planners as to what constitutes a legitimate zoning purpose than it was before First English. The Court has only said if you go too far, you will have to pay for it. No new light has really been shed on when or how that might occur.

The principal danger from the First English decision is that it may well set off the litigation explosion predicted by Justice Stevens' dissent. The threat of having to defend against such suits and the exposure to possible liability may cause land use planners to be so timid that planning is inadequate to meet the public's legitimate needs.

Hopefully, some of the unanswered questions and uncertainties created by the majority opinion will be resolved in later court rulings. In the meantime, land use

planners certainly must be more circumspect about the consequences of their actions, but at the same they should guard against becoming overly cautious. Good zoning practices which did not "take" property prior to the First English case should remain perfectly safe, as well as desirable, in the aftermath of that decision.

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August 12, 1987

California Legislature
Senate Committee on
Local Government
Room 2080 State Capitol
Sacramento, CA 95814

Attention: Kaye Packard, Committee Secretary

Re: Committee Hearing on Land Use Regulation

Dear Senators:

On behalf of the County of Los Angeles, we are submitting an additional paper entitled "Suggestions For Revisions to California's Private Attorney General Statute" for consideration by the Senate Local Government Committee during its review of California land use regulations on August 13, 1987.

Very truly yours,

DE WITT W. CLINTON
County Counsel

By
CHARLES J. MOORE
Principal Deputy
County Counsel

CJM:vab

Enc.

LTR-37

SUGGESTIONS FOR REVISIONS TO CALIFORNIA'S PRIVATE ATTORNEY GENERAL STATUTE

The principal danger from the case of First English Evangelical Lutheran Church of Glendale v. The County of Los Angeles decision is that it may well set off the litigation explosion predicted by Justice Stevens' dissent. The threat of having to defend against such suits, most of which will be unproductive, is causing cities and counties to reflect upon the inadequate California laws concerning attorneys' fees awards.

We believe that California's statutory authority for awards of attorneys' fees should be revised, in light of the predicted and unproductive litigation explosion, although the three revisions which we suggest in the following pages are already overdue.

The Private Attorney General theory, as codified in Code of Civil Procedure Section section 1021.5, authorizes an award of attorneys' fees when an applicant meets the following general criteria:

(1) the plaintiff must vindicate an important right affecting the public interest; (2) the results must confer a signficant benefit on the public; (3) the issue must involve the necessity and burden of private enforcement; and (4) the plaintiff must be successful to receive an award. See, e.g., Serrano v. Priest (1977) 20 Cal. 3d 25; Serrano v. Unruh (1982) 32 Cal. 3d 621. With respect to actions involving public entities,

the statute does not authorize allowances in favor of public entities.

First, the degree of success achieved by the plaintiff should be made a specific component in the evaluation of attorneys' fees. The statute should be revised so that the degree of the applicant's success is measured by its success in achieving its goals and in prevailing on the distinct issues it asserted.

The California courts have not directly grappled with the attorneys' fees issue in cases where there is an enormous disparity between the plaintiff's original objectives and the results achieved.

The statute should be revised to reduce awards and apportion attorneys' fees based upon limited success relative to original objectives and the amount of effort that cities and counties are forced to expend to successfully defend against a large a array of unmeritorious issues.

A workable test has evolved under federal law for excluding hours spent in pursuit of unsuccessful claims.

Unlike California courts, the federal courts have been forced to confront the concept of fee reduction for unsuccessful claims in the context of awarding a reasonable fee. The result is the United States Supreme Court's opinion in Hensley v. Eckerhart (1983) 461 U.S., 424, 103 S.Ct. 1933 76 L. Ed. 2d 40. In Hensley, the respondent challenged the inclusion of hours spent in pursuit of unsuccessful claims which the petitioners

had refused to eliminate, claiming they had nevertheless obtained relief of significant import. In fashioning a test to limit hours spent on losing issues, the Court wrote:

> If ... a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained. 461 U.S. at 436, emphasis added.

The Private Attorney General statute should be amended to suggest a similar unwillingness to award potentially unlimited fees for limited results. Without such limitations, there is a counterproductive incentive to assert random claims in the hopes some issue might endure, rather than a stimulus to evaluate each issue and assert only meritorious claims which carry some possibility of success.

The Hensley test requires a two-step analysis. First, the Court must assess whether the plaintiff failed to prevail on claims that were unrelated to the claims on which he succeeded.

If such unrelated issues exist, hours spent on those claims must be eliminated from any recovery. 461 U.S. at 435. Next, with regard to related claims, the Court focuses on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation. 461 U.S. at 435. If less than excellent results were achieved on related claims, the court should reduce the award accordingly. 461 U.S. at 436.

Federal circuit court cases also demonstrate that the amount of a plaintiff's fee award is related to and a direct result of what the plaintiff actually accomplished or achieved. See, e.g., Sisco v. U.S. Alberici Construction Co. Inc., 733 F.2d. 55 (8th Cir. 1984), Sierra Club v. EPA, 769 F.2d 796 (D.C. Cir. 1985), v. Argento, 808 F. 2d 1242 (7th Cir. 1987), Foster v. Board of Commissioners, 810 F.2d 1021 (11th Cir. 1987) Spanish Action Committee of Chicago v. City of Chicago, 811 F.2d 1129, 1135 (7th Cir. 1987).

The Private Attorney General statute should specify that plaintiffs' requests for attorneys' fees which seek recovery for time spent on all of their general claims, only some of which were partially successful, are likewise excessive.

The Private Attorney General statute should be amended so that unrelated legal claims are treated as if they had been raised in separate lawsuits and therefore no fee may be awarded for services on the unsuccessful claims. The statute should prohibit fees for unsuccessful claims which are carried by

unrelated, successful claims.

Second, any enhancement of a base fee award is wholly unwarranted. Although California courts have not recently addressed this issue, the United States Supreme Court has virtually eliminated the use of a fee multiplier in federal cases.

In considering the issue of enhancement of a base fee or lodestar figure (i.e., the number of hours actually worked times a reasonable hourly rate), the California courts traditionally have considered whether (1) some enhancement of the historical rate is necessary to account for the delay in payment and (2) whether an additional multiplier is warranted because of certain factors like the risk involved, the skill of the attorneys, the novelty or complexity of issues, and the results achieved. We contend that no enhancement is warranted on either issue and the statute should be amended to prohibit such enhancements or multipliers of a base fee or lodestar figure.

Moreover, the trend in the law is away from awarding any multiplier. Intangibles like the contingent nature of the case and the skill of the attorney involved are accounted for in the reasonable hourly rate, and the United States Supreme Court has concluded that such factors present inappropriate incentives which the law should not encourage.

In Blum v. Stenson, 465 U.S. 886, 79 L.Ed. 2d 891, 104 S.Ct. 1541 (1984), the United States Supreme Court considered whether, and under what circumstances, an upward adjustment of an

attorneys' fees award under 42 U.S.C. Section 1988 is appropriate. In reversing the District Court's fifty percent upward adjustment, the Supreme Court held that novel or complex issues, quality of representation, or the results achieved, do not provide independent bases for augmenting the award of attorneys' fees. The Court concluded by holding that the basic fee award, or lodestar figure, is presumed to be the reasonable fee to which counsel is entitled. 465 U.S. at 897; also see Pennsylvania v. Delaware Valley Citizens Council for Clean Air, 478 U.S._____, 92 L.Ed.2d 439, 106 S.Ct. 3088(1986).

No California case has considered these issues relating to enhancements and multipliers of base fee awards; the California Legislature should act to prohibit application of multipliers creating windfalls for which the federal courts have said there is no justification.

Third, the statutory prohibition against allowance of attorneys' fees for successful public entities should also be repealed. Such a prohibition currently creates a counterproductive incentive to litigate unmeritorious claims which carry little, if any, possibility of success. The taxpayers who finance the public entities' legal defense should benefit from a revised statute which authorizes a successful public entity to recover its attorneys' fees where an important right affecting the public interest is vindicated and the litigation results achieved by the public entity confer a significant benefit on the public.

PACIFIC LEGAL FOUNDATION

HEARING BEFORE THE SENATE COMMITTEE
ON LOCAL GOVERNMENT

COMMENTS OF TIMOTHY A. BITTLE
REGARDING NOLLAN v. CALIFORNIA COASTAL COMMISSION

August 13, 1987

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STEP 1

The constitutional analysis, or "test" if you prefer, employed by the United States Supreme Court in Nollan v. California Coastal Commission, begins at Section II of the opinion. The Court begins with a fundamental premise. The premise is that uncompensated dedication requirements, standing alone, are unconstitutional:

> "Had California simply required the Nollans to make an easement across their beachfront available to the public ... rather than conditioning their permit ... we have no doubt there would have been a taking."

Next, the Court poses a question:

> "Given, then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land use permit alters the outcome."

The Court then assumes a set of facts that would alter the outcome. Specifically, the Court assumes that the Coastal Commission could have denied the Nollans' permit outright without violating the Constitution. In other words, the Court assumes that an outright denial would leave the Nollans with a viable economic use (their old house) and would not

substantially interfere with their reasonable investment-backed expectations.

> "We assume, without deciding, that ... the Commission ... would be able to deny the Nollans their permit outright ... unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking."

I refer to the above as the "first step" of the Nollan analysis. For a dedication condition to be lawful, it must first pass this step. That is, the governmental agency must have the lawful right to deny the permit being applied for. I look at it this way: since dedication requirements, standing alone, are unconstitutional, the owner has a right to resist the dedication condition. When the agency has a lawful right to deny the owner's permit, then the owner and the agency may "trade" their rights. That is, the agency can agree to issue a permit for the owner's project provided the owner accepts a dedication requirement. Rather than referring to it as a "trade," the Supreme Court says that dedication requirements can be constitutional where they are merely a substitute for denial.

> "The Commission argues that a permit condition that serves the same legitimate police power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree."

The Court's characterization provides an easy transition into the "second step" of the Nollan analysis.

STEP 2

Having determined that a permit denial would still leave the owner with a viable economic use, and would not substantially interfere with his reasonable investment-backed expectations, it does not necessarily follow that his permit can therefore be denied for any reason. For example, an agency could not deny a permit because the applicant was black. Nor could the agency deny a permit for purely arbitrary reasons, such as a feeling by the agency that the applicant was already rich enough and did not need the profits that would be generated by this project. Rather, a denial must substantially advance a legitimate state interest.

> "We have long recognized that land use regulation does not effect a taking if it 'substantially advance!sl legitimate state interests' and does not 'den!yl an owner economically viable use of his land,' .... Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter. They have made clear, however, that

> a broad range of governmental purposes and regulations satisfies these requirements."

In the Nollan case the Court assumed that among these permissible purposes was the state's desire to protect public views of the ocean.

Since dedication requirements are constitutional only when they are a substitute for a lawful denial, then the dedication requirement must substantially advance the same state purpose that would justify an outright denial. So, in the Nollan case, the Supreme Court conceded that, if the Nollans' permit could have been denied because their new house would block public views, a dedication condition that preserved public views would be constitutional.

> "Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding constuction of the new house--for example, a height limitation, a width restriction, or a ban on fences--so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. ... The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end

> advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury."

Thus, to pass the "second step" of the Nollan analysis, the agency imposing the permit condition must identify a legitimate state interest that would justify denial of the permit. The dedication requirement must substantially advance the same state interest. In the Nollan case, since providing people already on the beach a broader beach to walk on in no way solved the problem of motorists whose ocean views were blocked by the Nollans' new house, the dedication condition did not substantially advance the state's interest in view protection. The condition therefore failed.

CONCLUSION

The "first step" of the Nollan analysis is brand new law. It means that if an agency cannot say "no" to a permit application, then it may require no dedication conditions (or fee in lieu thereof) whatsoever. A common situation is as follows: an applicant owns one single-family lot. Because of its small size, it is unsuitable for any purpose other than residential development. It is zoned exclusively for single-family residential use. When he applies for a permit to build a single-family home, the one use his property is zoned for and

suitable for, the permitting agency does not have a lawful right to say "no" to that permit application. To do so would leave the owner with no viable economic use for his land. Since the agency does not hold the right to deny the permit, it has nothing to trade with. Therefore, the agency cannot require a dedication from the owner for park purposes, street-widening purposes, or any other purpose. Fees in lieu of a dedication cannot be imposed either.

The "second step" of the Nollan analysis also dramatically alters the law, at least in California. Whereas in Grupe v. California Coastal Commission, 166 Cal. App. 3d 148 (1985), the California Court of Appeal held that dedication requirements were lawful even if the project standing alone had not created the need for the dedication, and even if there was only an indirect relationship between the dedication condition and a need to which the project contributed. Now the dedication condition must substantially advance some state interest which is strong enough to justify denial of the permit altogether.

TESTIMONY OF ATTORNEY GENERAL JOHN VAN DE KAMP

BEFORE THE SENATE COMMITTEE ON LOCAL GOVERNMENT[1/]

AUGUST 13, 1987

"THE LIMITS OF LAND USE REGULATION"

Thank you for the opportunity to testify before your committee today. The decisions of the United States Supreme Court in its most recently-concluded term on the issues of land use planning and "regulatory takings" raise important questions for government at all levels. As counsel to a variety of state agencies with land use regulatory authority, the Attorney General has a direct and continuing interest in the application of constitutional principles to land use planning. Nevertheless, primary responsibility for most land use regulation falls to local government under California law. It is therefore particularly appropriate that the Senate Committee on Local Government has directed its attention to this important subject matter.

This hearing is especially welcome in light of the confusion that has followed the Supreme Court's recent decisions in First English Evangelical Lutheran Church of Glendale and Nollan v. California Coastal Commission. News accounts and comments of interested observers alike have provided widely disparate interpretations of these cases. It is therefore not surprising that substantial confusion has been created among those charged

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1. Testimony presented by Deputy Attorney General Richard M. Frank.

with responsibility for conforming to the Court's constitutional mandates. This hearing provides a most useful opportunity for some much-needed objective analysis to overcome that confusion.

Before turning to the specific questions posed by your committee, two general points should be stressed. First, the Supreme Court in recent months has issued three opinions of major importance to the land use community. The committee and interested observers should consider not only the First Lutheran and Nollan decisions, but also the Court's March 1987 opinion in Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S.__, 107 S.Ct. 1232. In Keystone, the Supreme Court upheld against constitutional challenge a state statute requiring coal companies to leave sufficient coal deposits in the ground to prevent subsidence of the overlying surface areas. Keystone specifically rejected the argument that such a safety-based regulation could constitute an unconstitutional taking of private property.

While the particular facts of Keystone have little applicability to California, and although that decision has received considerably less publicity than First Lutheran and Nollan, the former decision is very significant. Of the three opinions, Keystone deals most directly with the paramount question of when an unconstitutional "regulatory taking" will be found to exist. Keystone is especially pertinent in those cases where government regulation is based on public health and safety--as opposed to purely aesthetic--concerns. (An article which addresses the

Keystone decision in considerably more detail is attached as exhibit "A" to this testimony.)

A second and related point is that land use planning remains alive and well in California. Contrary to published reports, neither First Lutheran nor Nollan have made radical changes to the permissible scope of land use regulation. We believe the vast majority of current state and local regulations are unaffected by these decisions and will continue to pass constitutional muster. Perhaps the most important point to be stressed here today is that First Lutheran, Nollan and Keystone represent evolution in land use regulation and constitutional takings analysis, not revolution.

We now turn to the specific topics raised by the committee.

1. Early press reports characterized the First Lutheran Church and Nollan decisions as signalling a major change in land use law. Do you agree?

Response: No, as indicated above. First Lutheran certainly represents a significant change from existing law in California concerning constitutional remedies. Since at least 1979, when the California Supreme Court decided Agins v. City of Tiburon, 24 Cal.3d 266, California law explicitly provided that monetary damages were an unavailable remedy in actions challenging so-called temporary "regulatory takings" of property. First

Lutheran effectively overrules this aspect of the Agins decision and requires California to adopt the damages rule previously embraced by some other state and federal courts.

Contrary to some press accounts, First English does not call into question state and local governments' basic land use authority. The decision says nothing whatsoever about the constitutional limits of land use regulation. (Cf. Keystone.) This is due to the simple fact that this latter issue was not presented to the Supreme Court for resolution in the First English case.

Nollan represents a less substantial change in land use law. In that case the Supreme Court held that a dedication condition must relate to the same kind of impact caused by the proposed development, whether that impact is caused individually or cumulatively. The Supreme Court in Nollan found that the access condition imposed was not sufficiently connected to the harm caused by the residential redevelopment project. (Previous California state court decisions involving coastal access had upheld access conditions bearing a somewhat less direct connection to the development than countenanced in Nollan.)

2. How will these cases change public officials' practices?

   a. What can't they do now that they used to do before?

Response: The substantive principles of constitutional law set forth in First Lutheran and Nollan require little change in the

practices of land use officials. How those individuals will perceive the mandate of those decisions is more uncertain. Most fundamentally, under First Lutheran public officials will henceforth be unable to err on the side of "overregulation" of land--however innocently--without being liable for money damages.

As noted in response to the previous question, following Nollan planning officials will be required to predicate project conditions on findings that the development has impacts somewhat more directly related to the conditions imposed. A clearer nexus may thus be required than was previously thought necessary by some planners. A collateral point is that public agencies may attempt to adopt more specific findings to support project conditions than were developed in the past.

b. Will these cases slow down land use decisions as public officials become more cautious about lawsuits?

Response: It is simply too early to answer this question with any certainty. The State of California noted in its friend-of-the-court brief supporting the County of Los Angeles in First Lutheran the possibility that creation of a damages remedy for interim regulatory takings would have a chilling effect on the ability and willingness of public officials to make land use decisions. In the two months since First Lutheran was decided, we are already seeing some instances of this occurring. (It is interesting to note that some of the same advocates of a damages

remedy in First Lutheran who disputed this "chilling phenomenon" now acknowledge that this is likely to occur--and suggest that this is a favorable implication of the decision.) We are nonetheless hopeful that the majority of state and local government officials will continue to base their land use decisions on the merits rather than on concerns related to the availability of a damages remedy under First English.

As noted previously, it is possible that these cases will result in some slow down in land use decisions as planning officials weigh the potential consequences of their actions and undertake additional hearings, studies, etc. to support their ultimate decisions.

c. Some suggest that local officials will be more reluctant to amend general plans to designate more land for development until it is clear that the project is ready to begin. They fear that early planning will give rise to later taking questions. Do you agree?

Response: Given the uncertainty raised by First Lutheran as to when a regulatory taking commences (see below), such delays in amending general plans may occur in some circumstances. Again, this is more a matter of public perception than any substantive requirement of the recent Supreme Court decisions.

d. Will officials change their practices regarding access to navigable waterways, particularly in the Delta, at Lake Tahoe, and along the coast?

Response: It is of course too early to determine with any certainty whether the recent Supreme Court decisions will have a major impact on government efforts to promote public access to California's navigable waterways. Given state constitutional (Art. X, §4), statutory (e.g., Gov. Code §§ 66478.4, 66478.5, 66478.8 (Subdivision Map Act access requirements)) and common law (Gion v. City of Santa Cruz, 2 Cal.3d 29 (1970)) provisions which explicitly require government to preserve and promote public access to waterways, government officials are not likely to ignore this important objective. Indeed, past experience demonstrates that government will face legal challenge if it attempts to abdicate its responsibility in this area. (E.g., Kern River Public Access Committee v. City of Bakersfield, 170 Cal.App.3d 1205 (1985).) On the other hand, public officials will likely pay far more attention to developing an administrative record that will support any decision to require access in a particular case. Agencies can additionally be expected to focus on non-regulatory means to promote public access to navigable waterways--such as the public trust doctrine--which do not raise the same takings issues presented in First English and Nollan.

3. California's 80 charter cities have constitutional authority over their "municipal affairs." Will either of these cases affect charter cities differently than they affect counties and general law cities?

Response: In light of the federal constitutional dimensions of the recent Supreme Court decisions, it seems that charter cities will not be affected by the cases in a significantly different manner than counties or general law cities.

4. In First Lutheran Church, Chief Justice Rehnquist said that the Court was not deciding "whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations."

California law often justifies regulations in the name of public health, safety, and welfare but Rehnquist only mentioned "safety." Does this suggest that health or welfare considerations may not be sufficient to justify regulations that deny all use of property? Is public safety the only acceptable justification?

Response: No. The court's recent takings cases appear to give somewhat greater judicial deference to regulations based on health and safety considerations than those predicated exclusively on aesthetic grounds. This point is further

developed in Keystone. Too much should not be read into the above-quoted language from First Lutheran; after all, the case involved a safety-based regulation and it is likely that the Chief Justice was simply responding to the facts presented.

5. Government Code § 65858 sets out the procedures that counties and most cities must follow when adopting temporary zoning moratoria. The Legislature adopted the current section in 1982 and it will "sunset" on January 1, 1989, unless reauthorized. The earlier version of the section will then apply.

a. Does the current language avoid the kind of temporary regulatory taking discussed in First Lutheran Church?

Response: Current section 65858 sets forth rather stringent procedures local government must follow should it choose to adopt certain types of interim zoning ordinances. Any such ordinance adopted pursuant to section 65858 would likely pass constitutional muster. Perhaps a more important question is whether interim zoning measures of this type are inherently suspect under First Lutheran. Contrary to the stated view of some observers, we believe that the answer to this question is no. First Lutheran in no way stands for the proposition that, e.g., interim grown control measures are constitutionally defective. (Such ordinances must of course be based on an adequate administrative record.)

b. Should the Legislature renew the current language?

Response; We express no opinion on this point.

c. Are further amendments needed? Should the Legislature require city councils and county boards of supervisors to better define the public health, safety, or welfare conditions that the moratorium is meant to resolve?

Response: The recent Supreme Court decisions do not compel any such amendments. As Keystone and a variety of California court decisions make clear, however, state and local entities desiring to adopt such measures should develop an ample factual record and detailed findings to support their actions.

d. Should the Legislature amend other statutes to conform to this approach? If so, which ones?

Response: For the above-stated reasons, we believe that no such amendments are necessary.

6. Courts traditionally defer to the policies set by elected legislatures. If state statutes, local ordinances, or local initiatives recite public health, safety, or welfare problems as justification for new regulations, will that influence how the courts will apply First Lutheran Church or Nollan?

Response: Yes. Again, however, it is the Keystone decision rather than First Lutheran and Nollan that most strongly suggests that detailed legislative findings will generally be respected by the courts. (See exhibit "A", attached.) Conversely, the absence of detailed findings supporting the imposition of the access condition in Nollan was one basis upon which the Court based its decision invalidating the condition.

7. Do landowners now have a better chance of attacking regulations which fail to recite the public health, safety, or welfare conditions that they are meant to resolve?

Response: The clear import of both Keystone and Nollan is that land use regulations which fail to contain detailed findings are far more vulnerable to constitutional takings claims than those that incorporate such findings.

a. Will landowners pay more attention [to] statutory findings and declarations of legislative intent?

Response: We are not in a position to answer this question.

b. Will local officials ask the Legislature to strengthen the statements of legislative intent in statutes that permit local regulations?

Response: Again, this is a questions that must be directed to other witnesses. It is likely, however, that local officials will be more concerned about findings in state statutes which compel local action than those which simply authorize local land use regulation.

c. Will drafters of local initiatives and referenda strengthen their statements of intent to immunize them from possible legal challenges?

Response: Quite likely. The committee should recognize, however, that such findings are not required for such initiative measures under state law. (Building Industry Assn. v. City of Camarillo, 41 Cal.3d 810, 823-824 (1986).)

8. Under First Lutheran Church, when does a temporary regulatory taking start?

Response: This is one of the most critical, unanswered questions of First Lutheran. The Supreme Court's recent pronouncements in such cases as Keystone; MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. __, 106 S.Ct. 2561 (1986); Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985); and Agins v. City of Tiburon, 447 U.S. 255 (1980) require landowners to obtain a final administrative decision as a condition precedent to filing a regulatory takings challenge. It therefore seems reasonable to conclude that a

temporary taking cannot be deemed to commence prior to the time of such administrative action.

a. How can landowners and public officials distinguish between "normal delays" in the land development process and delays that lead to regulatory takings?

Response: The Supreme Court was careful in First Lutheran to stress that conventional delays attendant to review of often-complex development proposals are not the stuff of which constitutional takings claims are made. Furthermore, it must be kept in mind that it is government's denial of substantially all economic use of private property which forms the necessary prerequisite for a viable takings claim. A temporary taking under First English principles would therefore seem to require both such a deprivation and unreasonable delays in securing governmental action.

One way to distinguish between normal and abnormal delay is to focus on whether such delay is the product of legitimate and necessary administrative review as opposed to malevolent or callous disregard of the landowner's application by government officials.

Actually, this issue would seem to be less of a problem in California than in other jurisdictions, inasmuch as the state Permit Streamlining Act (AB 884) requires governmental agencies

to process and resolve development applications under quite stringent time deadlines. (Gov. Code § 65920 et seq.)

Finally, the constitutional "ripeness" doctrine developed by the Supreme Court in Keystone, MacDonald, Williamson County, Agins, and related cases requires that a landowner actively seek a final administrative action on his or her proposal before a taking claim may be deemed to commence.

b. Is state legislation needed to define when a temporary regulatory taking starts? Or should this issue be left to the courts to interpret?

Response: Ultimately, the courts will have to decide such principles of constitutional law irrespective of legislative attempts to address the issue. Moreover, the Permit Streamlining Act (addressed immediately above) already serves to limit the debate. Should the courts fail to resolve this question satisfactorily in coming years, the Legislature may then find it appropriate to address the issue. At this point, however, state legislation seems premature.

c. Is state legislation needed to guide the courts in how to calculate a landowner's loss which occurs during a temporary regulatory taking?

Response: See response to question 8(b) above. Certain aspects of the state Eminent Domain Law (Code of Civil Procedure § 1230.010) may prove relevant. Reliance on that statute should not be overstressed, however, since conventional condemnation principles are often not applicable in the regulatory takings context.

9. If a state regulation is found to be a temporary regulatory taking, what is the State General Fund's exposure?

Response: Like any judgment entered against the state, a damages award based on a regulatory takings claim would require a specific legislative appropriation for payment. While many such claims have been brought against the State of California over the years, to our knowledge no regulatory takings judgments have ever been entered against the state, its agencies or officials. All such prior cases have either been settled or won by the state on the merits.

While it can be anticipated that the number of such lawsuits seeking damages will increase in the wake of First Lutheran, we do not believe that the state's financial exposure will be substantially increased as a result.

a. If a local regulation, adopted to implement state law, is found to be a temporary regulatory taking, what is the State General Fund's exposure?

Response: If a state-mandated local program resulted in a judgment for damages against local government, presumably a claim would be pressed against the state under Article XIII B(6) of the California Constitution and Government Code section 17500 et seq. The more difficult question is whether a given state law mandates a local program or simply authorizes local action. How the courts will address this question will depend largely on the facts of the particular case.

b. What is the process for recovering damages?

Response: Government Code section 905.1 exempts landowners from the obligation to submit their financial claims to the state (i.e., the Board of Control) prior to filing an inverse condemnation action. As noted above, however, any such court judgment would require a legislative appropriation before the judgment could be satisfied.

10. Will Nollan influence the current debate over charging fees for off-site improvements? In particular, what about school developer fees?

Response: Inasmuch as the Nollan decision took pains to sustain the general legitimacy of exaction fees and land dedications, and since Nollan involved quite different facts from those presented above, that case has little bearing on the question of developer fees. Nevertheless, it has become apparent in the wake of Nollan

that the building industry sees this as an opportune time to challenge such fees. A number of lawsuits challenging school developer fees, for example, have been filed in the last two months.

Perhaps the sole relevance of Nollan to these cases will be to encourage public officials to document further the connection between the exaction fee imposed and impacts attributable to a particular development.

11. The traditional test of levying benefit assessments is that landowners must pay in proportion to the benefit conferred on their property by the facility or service being financed.

a. Is the "nexus" discussed in Nollan any different?

Response: Yes. The existing statutory scheme for benefit assessments contains its own set of standards and limitations. As a general principle, the connection between such assessments and a particular development must be quite direct. (See, e.g., McLain Western #1 v. County of San Diego, 146 Cal.App.3d 772 (1983).) The nexus required under Nollan and similar cases is less direct and may be predicated upon the cumulative as well as individual effects of a given project.

b. What can landowners and land use regulators learn from assessment practices that will help them find this nexus?

Response: The analogy to be drawn between conventional assessment practices and development exactions/dedications is rather limited for the reasons suggested above. Experience gained developing an administrative record in the former context may provide land use officials with guidance in preparing the type of record suggested by Keystone and Nollan.

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Thank you again for the opportunity to present our views on these important topics. We would be please to answer any questions that the committee may have. Additionally, please feel free to call on us if we can provide any further assistance in the future.

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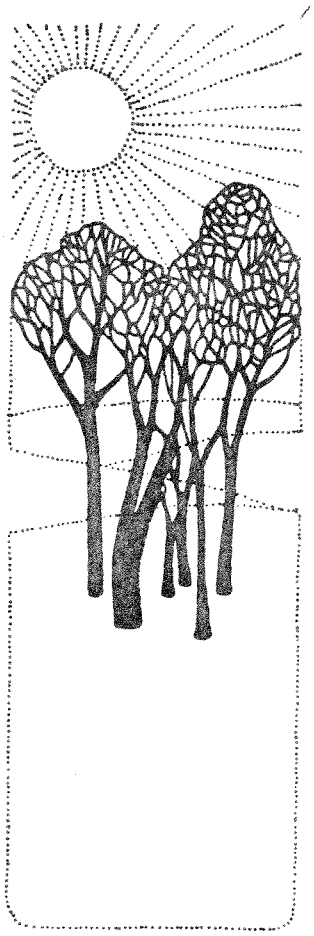
From Pennsylvania Coal to Keystone: The Supreme Court's Evolving View of "Regulatory Takings"

by Richard M. Frank

Over the past decade, no issue of environmental law has so captured the attention of the United States Supreme Court as has "regulatory takings." The Court has issued over a dozen opinions during that period which seek to clarify the slippery concept of when a regulation becomes so excessive as to result in an uncompensated taking of private property in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. The results of that judicial effort have been decidedly mixed. But with the Court's recent decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, _____ U.S. _____, 55 U.S.L.W. 4326 (March 9, 1987), some much-needed clarification may be at hand. At a minimum, *Keystone* provides government with welcome legal support in its efforts to contain some of the more dramatic threats to our environment.



The Origins of "Regulatory Takings"

It was 65 years ago that the U.S. Supreme Court first articulated the notion that excessive government restrictions could run afoul of the Takings Clause of the Fifth Amendment. Justice Holmes wrote in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) that "If regulation goes too far it will be recognized as a taking." In *Pennsylvania Coal*, the Court struck down as such a taking a Pennsylvania statute which had prohibited coal mining in a manner which caused subsidence of land on which certain structures were located. Three generations later, *Pennsylvania Coal* was still characterized as the "cornerstone" of federal takings jurisprudence—at least until *Keystone*.

The other crucial Supreme Court precedent in this field is *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *Penn Central* provided for the first time an analytical framework in which to view claims that governmental regulation effect an unconstitutional taking. There the Court identified as the relevant factors "[t]he economic impact of the regulation on the claimant, . . . the extent to which the regulation has interfered with investment-backed expectations, [and] the

character of the governmental action." 438 U.S. at 124. In *Penn Central* the Court upheld a municipal landmark ordinance that precluded the owners of Grand Central Station from building a modern office building atop that venerable site.

The criteria identified in *Penn Central* seems fairly straightforward. Yet they have done little to clarify that illusory line which separates legitimate exercises of the police power from unconstitutional "takings" of private property. Attesting to that fact are the plethora of regulatory takings cases finding their way to the Supreme Court docket (four in the 1986-87 term alone), as well as the growing number of such disputes clogging the state and lower federal courts.

The Supreme Court's decision in *Keystone* represents the latest chapter in this complex tale.

Keystone—The Factual Background

In 1966, the Pennsylvania Legislature enactecd the Bituminous Mine Subsidence and Land Conservation Act. The Act was a reaction to a rather dramatic environmental and safety hazard emanating from the bituminous coal fields of western Pennsylvania. Underground coal mining often causes ground subsidence of devastating proportions. It results in structural damage to buildings, makes vacant land impossible to develop, destroys groundwater and surface ponds and—given its unpredictable nature—can even threaten human life. Recognizing the potential for such damage, coal companies purchased access and mining rights from thousands of Pennsylvania surface owners many years ago.

The Pennsylvania statute attempts to minimize the threat of subsidence in a variety of ways. Most important are two requirements: the first prohibits mining that causes subsidence damage to public buildings, private dwellings and cemetaries that were in place when the Act was passed. (Pennsylvania has interpreted this provision to require 50 percent of the coal beneath such structures or areas to remain in place as a means of providing surface support.) The second provision requires a coal company to forfeit its mining permit if its removal of coal causes damage to these protected sites for which the company has not promptly compensated the surface owner.

If this statute sounds vaguely familiar, it should. The 1966 Act is very similar to the Pennsylvania statute invalidated by the Supreme Court decades earlier in the *Pennsylvania Coal* decision. Relying on that precedent, major bituminous coal operators filed suit in federal court in 1982. They mounted a facial challenge to the Act, claiming that it violated both the Takings Clause and the Contracts Clause of the U.S. Constitution. The stipulated facts in the case revealed that the Act required plaintiff companies to leave an aggregate 27 million tons of coal in the ground, but that figure averaged only 2 percent of the available coal deposits in individual mines.

Understandably, plaintiffs based their constitutional claim first and foremost upon *Pennsylvania Coal*. Nevertheless, both the District Court and the Court of Appeals upheld the Act, finding that case distinguishable. The coal companies were successful in obtaining Supreme Court review, with former U.S. Solicitor General Rex Lee serving as their counsel of record.

The Supreme Court's Decision in Keystone

In a 5-4 decision authored by Justice Stevens, the Supreme Court sustained the lower court rulings and upheld the Act. The manner in which the majority reached that result suggests that *Keystone* may be the most important takings precedent since *Penn Central*. It also calls into serious question the primacy of the *Pennsylvania Coal* decision.

Justice Stevens first treated and distinguished *Pennsylvania Coal*. He noted that the earlier case involved a private property dispute between a coal company and a surface landowner; no governmental entity was named as a party. While the *Pennsylvania Coal* decision contains language concerning the alleged public purpose of the statute involved, *Keystone* characterizes this "uncharacteristic . . . advisory opinion" by Justice Holmes. 55 U.S.L.W. at 4330. Relying on the stated public purpose of the 1966 Act to distinguish it from the private controversy at the heart of *Pennsylvania Coal*, Justice Stevens concluded that "the similarities [between the two cases] are far less significant than the differences, and that *Pennsylvania Coal* does not control this case." 55 U.S.L.W. at 4329. Thus Justice Stevens effectively transforms the "cornerstone" of takings jurisprudence into mere dictum.

The *Keystone* decision next proceeded to apply the *Penn Central* criteria to the stated facts. It is here that *Keystone* takes on its greatest significance. Whereas property owners (and some courts) had generally considered the economic impact of the contested regulation on the property owner to be the key variable, the Court for the first time in *Keystone* elevated the "character of the governmental action" criterion to primary significance.

The Court pointed out that the 1966 Subsidence Act was predicated upon detailed legislative findings, and that the legislative purposes involved "were genuine, substantial and legitimate . . . ." The majority opinion notes:

> [T]he Commonwealth is acting to protect the public interest in health, the environment, and the fiscal integrity of the area. That private individuals [who previously contracted away their surface rights to the coal companies] erred in taking a risk cannot estop the State from exercising its police power to abate activity akin to a public nuisance.

55 U.S.L.W. at 4331. *Keystone* relies on several pre-*Pennsylvania Coal* cases that upheld government's power to terminate commercial operations found to be offensive, e.g., breweries, brothels, etc. Many property owners and commercial interests had argued that this line

of cases had been effectively overruled by *Pennsylvania Coal* and *Penn Central*. The Supreme Court expressly rejected this interpretation in *Keystone:*

> Under our system of government, one of the state's primary ways of preserving the public wealth is restricting the uses individuals can make of their property . . . . These restrictions are "properly treated as part of the burden of common citizenship" . . . . Long ago it was recognized that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community" . . . . [T]he Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it."

55 U.S.L.W. at 4332.

While the Court in *Keystone* hinted that it could have rested its decision on this "character of the governmental action" factor alone, it chose not to do so. Instead, it relied on the other *Penn Central* criteria and found them no more helpful to the mining companies.

The majority opinion found, for example, that the companies had failed to demonstrate that they had suffered a severe economic impact resulting from the Act. This, in turn, was in large part attributable to the fact that they had chosen to mount a *facial* challenge to the statute rather than an "as applied" attack. The Supreme Court in recent years has repeatedly spurned such facial takings challenges as lacking a concrete set of facts against which the Court can apply the *Penn Central* analysis with precision. "[W]e have recognized an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of governmental action on a specific piece of property requires the payment of just compensation." 55 U.S.L.W. at 4333. Stating what by now should be obvious to property owners, the Court concluded this portion of its analysis by stating that property owners "face an uphill battle in making a facial attack on [statutes] as a taking." *Id.*

The coal companies' case was made even more difficult in the eyes of the Court, given the relatively small economic impact the Subsidence Act had on their aggregate operations: "The hill is made especially steep because petitioners have not claimed, at this stage, that the Act makes it commercially impracticable for them to continue mining their bituminous coal interests . . . ." *Id.*

The majority's analytical framework for this issue is critical. Justice Stevens refused to consider the 27 tons of unexploited coal in isolation; instead, he opined, it had to be viewed in conjunction with the companies' property interest as a whole:

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction."

Id.

Having construed the "denominator" in the broadest possible manner, Justice Stevens' conclusion was not surprising:

> The 27 tons of coal do not constitute a separate segment of property for takings law purposes . . . . There is no basis for treating the less than 2 [percent] of petitioners' coal as a separate parcel of property."

55 U.S.L.W. at 4334. The majority opinion concluded its takings analysis by noting that the coal companies retain the ability to mine coal profitabley, even if they may not destroy or damage surface structures at will in the process.

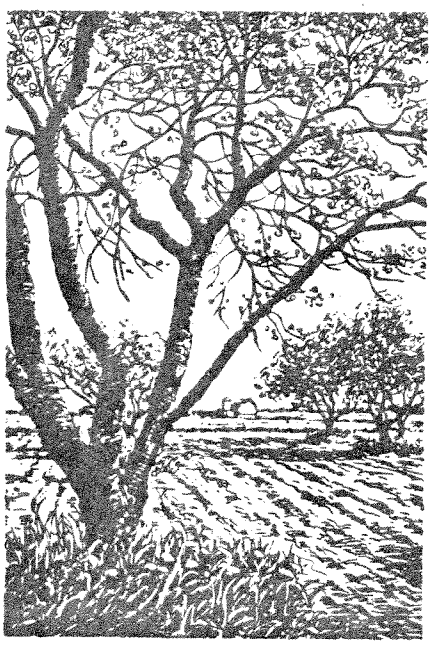
The Court then briefly addressed and disposed of the companies' Contracts Clause argument. The Court first noted that it has traditionally viewed regulation which implements the

general police power in a more deferential light for Contracts Clause purposes than governmental acts which attempt to relieve government of its own proprietary contractual responsibilities. The statute challenged in *Keystone* indisputedly fell into the former category.

The majority opinion conceded that the Subsidence Act works a substantial impairment of a private contractual relationship. Nonetheless, observed Justice Stevens, Pennsylvania's action was based on its strong public interest in preventing widespread environmental damage, an interest which the Court felt transcended any private agreement between contracting parties. The Act, furthermore, represents a reasonable and appropriate response to the threatened danger. Thus Justice Stevens concluded that "the Commonwealth's strong public interests in the legislation are more than adequate to justify the impact of the statute on petitioners' contractual agreements." 55 U.S.L.W. at 4335.

The Keystone Dissent

Chief Justice Rehnquist wrote a dissent in *Keystone,* in which he was joined by Justices Powell, O'Connor and Scalia. Rehnquist was most troubled by the majority's treatment of *Pennsylvania Coal.* The Chief Justice disparaged the distinctions cited by the majority between that case and the operative facts of *Keystone.* He rather clearly perceived *Pennsylvania Coal* to be controlling. "Examination of the relevant factors presented here convinces me that the differences between them and those in *Pennsylvania Coal* verge on the trivial." 55 U.S.L.W. at 4337.



Chief Justice Rehnquist did not disagree with the notion that there exists a "nuisance exception" to the constitutional proscription against government takings without compensation. "[A] taking does not occur where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use." *Id.* This conclusion is not surprising in light of Rehnquist's statement of the same principle in his earlier dissent in *Penn Central.* 438 U.S. at 144-146.

The Chief Justice *did* part company with the *Keystone* majority in two important respects. First, he would read the "nuisance exception" far more narrowly to encompass only private "misuse or illegal use" of property, and even then only when the regulation does not completely extinguish the value of the property.

Second, Rehnquist disagreed with the "denominator" of the takings equation selected by the majority. He would find it necessary to treat the 27 million tons of coal left unexploited by the Act as a discrete property interest for purposes of the Takings Clause. Since that property interest is effectively destroyed by the Subsidence Act, Rehnquist concluded, an unconstitutional takings has occurred.

In light of this conclusion, Chief Justice Rehnquist found it unnecessary to address the companies' Contracts Clause argument in his dissent.

The Broader Implications of Keystone

What, then, are the significance and implications of *Keystone* for the future? The most pronounced impact of the decision is on *Pennsylvania Coal,* a precedent that has occupied case books and the attention of law students for decades. *Keystone appears to relegate Pennsylvania Coal* to its specific facts. The only ongoing significance of Justice Holmes' landmark decision is its creation of the notion of "regulatory takings," a concept over which the Court has equivocated in recent years but with which it now seems comfortable. *See Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S 172 (1985); and *Riverside Bayview Homes v. United States,* ____U.S.____, 106 S.Ct. 455 (1985).

Perhaps more significant is what *Keystone* portends for the future of government's exercise of the police power. Environmental regulation can be divided into two basic categories: the first is the more traditional type which seeks to prevent or minimize harmful private conduct. Hazardous waste, air pollution and water quality laws are prominent examples. The second category seeks primarily to promote aesthetic values important to a well-ordered community. Planning and zoning laws most typically embody these concerns.

Keystone strongly suggests that for purposes of analysis under the Takings Clause, the former type of government activity will be treated with more deference by the courts. Given the broad language of *Keystone,* it will be difficult for plaintiffs to overcome the presumption of validity that attaches to such measures. (This assumes, of course, that government can justify its regulatory actions on the basis of strong findings and an ample record—factors which the majority found to exist in *Keystone.)*

That *Keystone*'s significance extends far beyond the coal fields of western Pennsylvania can be seen from one local example. California and Nevada have adopted a bistate compact which creates the Tahoe Regional Planning Agency (TRPA) and gives that agency broad authority to

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control development in the Lake Tahoe Basin. TRPA accumulated ample evidence that private development on fragile lands was generating enormous sediment runoff which was in turn polluting Lake Tahoe and gradually causing it to lose the pristine clarity for which the lake is world-renowned.

In response to those facts, TRPA adopted a revised Regional Plan in 1984 that sought to limit substantially private development on fragile lots within the Tahoe Basin. Private homeowners filed suit against TRPA, California and Nevada in federal court, challenging the plan as an unconstitutional taking of their property in violation of the Takings Clause.

A principal justification advanced by the defendants was that the Regional Plan constituted a measured response to an amply documented record of Lake Tahoe's environmental decline. Accordingly, they argued, the Regional Plan is valid irrespective of the economic impact on plaintiffs' property. Adopting the logic of an earlier trial court decision, they argued that private landowners simply have no constitutional right to turn Lake Tahoe brown.

While defendants prevailed in the district court on other theories, *see Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,* 631 F.Supp. 126 (D.Nev. 1986), the court did not directly adopt the above theory. To do so, mused the district judge at oral argument, could violate prior "regulatory takings" decisions of the U.S. Supreme Court.

That decision has now been appealed to the Ninth Circuit Court of Appeals. It would appear that the intervening *Keystone* decision strongly enhances the defendants' chances of victory in the Tahoe litigation. The legal argument they advanced in the district court is certainly consistent with the Court's broad reading of the "nuisance exception" to the Takings Clause in *Keystone.*

Other likely applications of the Keystone decision are easily conjured up. A state or local government, for example, could shut down a commercial facility found to be emitting hazardous substances regardless of the firm's culpability or the economic impact upon it of the plant's closure. The constitutionality of floodplain zoning measures is also assured to a far greater degree by the *Keystone* opinion.

Conclusion

The long-term significance of the Supreme Court's decision in *Keystone* cannot easily be overstated. The broad language employed in the majority opinion should prove of substantial assistance to governmental officials as they grapple with an ever-growing list of complex environmental problems. The latitude the Court confers in *Keystone* upon reasonable exercises of the police power will prove especially helpful in those cases where government acts to prevent a private party from "externalizing" the negative effects of its conduct so as to harm its neighbors. Conversely, the *Keystone* decision increases significantly the legal burden on those who seek to strike down environmental regulation in reliance upon the Takings Clause.

Richard M. Frank is a Deputy Attorney General with the California Department of Justice. He received his J.D. from U.C. Davis School of Law in 1974. Rick co-authored the amici curiae brief filed on behalf of 26 states in the Keystone case supporting the Commonwealth of Pennsylvania. The views expressed in this article are the author's and do not necessarily reflect those of the Attorney General.

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Remarks Prepared For The Senate Local Government Committee
August 13, 1987 Sacramento CA

Subject: Effects of the U.S. Supreme Court's Decisions in *First Lutheran Church* and *Nollan* on Limiting Local Governments Land Use Regulations

It is not my purpose to bring you a comprehensive review of the two Supreme Court decisions on California land use practices. Your witnesses earlier today had both that task and the credentials for that assignment.

My purpose is to bring you some observations on how the decisions might impact a few areas of land use which might not come readily to mind.

First, if those who say the decisions are "not going to have any effect at all" are correct, they are correct in that the *results* of the land use process may not change, but they are not correct in suggesting the process to obtain those results will not change.

There will be more discipline in the process, the record will be better to support the result, and, now that there are limits which may expose the public entity to monetary damages, there should be more concern about testing the line between a valid regulation and a taking.

It will be much more difficult to initiate reformation of obsolete planning on an ad hoc basis as property owners come forward with development applications. One situation which comes to mind is the provision in the Subdivision Map Act which requires maximizing passive solar opportunities in the subdivision. (1) However, in maximizing the solar opportunities there is to be no diminution of allowable densities at the time of the tentative map is initially filed. If the subdivider files a tentative map maximizing solar opportunities and the map is approved at less than the maximum densities, has there been a "taking" of those lots deleted from the approved map? There is no answer absent a lot of other facts, but the record should show the conflicting policies which justify the reduction of densities.

Second, the land use process is a political process. It has been observed that "pressure from all sides keeps a politician an upright." One source of that pressure comes from project opponents. They want the project killed or, at worst, approved with crippling conditions in hopes the applicant will abandon the project. It will be more difficult for elected officials to cater to that pressure in the absence of legal reasons to deny the project or to impose conditions unrelated to eliminating the problems which would justify denial. In the past, actions to satisfy the opponents would, at their worst, subject the city or county to a lawsuit and the

invalidation of the unlawful action. Now, to satisfy the opponents the elective officials may be opening their city or county to a taking claim during the time the unlawful action is in place.

This uncertainty as to the limits of denial or conditions may temper the elected officials' response to project opponents. It is the loss of this "anything goes" attitude by project opponents which may be the real reason for the outcry against these decisions by those who, in the name of the "public interest", are, in reality, just against the project.

Third, cities and counties may welcome pre-election challenges to land use initiatives.

If a pre-election challenge invalidates the initiative then they won't face temporary taking claims from those land owners adversely affected during the time the initiative would have been in effect. A successful pre-election challenge would avoid those taking claims.

Cities and counties may find it more risky to blunt the effect of an initiative by the technique of putting on the ballot an alternative to the initiative. The risk, other than the ploy may not work, is drafting the alternative to avoid potential taking issues while maintaining its political attractiveness as an alternative to the initiative.

Another reason a pre-election challenge might be welcome by a city or county is to avoid temporary taking claims between the passage of an initiative and the repairs made to the land use policies affected by the initiative. This could occur where the initiative is what I call "the incomplete general plan initiative." This is the initiative that makes a general plan change without regard to the plan as a whole and thereby creates an internal inconsistency in the general plan which is prohibited by law. (2) During the time there is an inconsistency in the general plan, certain land use decisions are forbidden. (3) The initiative created the circumstances which puts a temporary halt to land use actions, or a kind of moratorium. That moratorium and implications of a temporary taking could be avoided by a successful pre-election challenge to the incomplete general plan initiative.

Senate Local Government Committee
August 13, 1987
Court Decisions Effect on Land Use Regulations

Fourth, a most encouraging part of the *Nollan* decision is the signal of another reversal(4) of California judicial doctrine -- that development is a privilege, not a right. This has given rise to the notion that the conditions imposed in return for the development approval are almost limitless. This judicial doctrine no doubt is the biggest contributor to the phrase the "vanishing fee" to describe the loss of property owners' rights in the state.

This change in California law derives from footnote 2 in the *Nollan* decision. The pertinent part reads as follows:

> *But the right to build on one's own property -- even though its exercise can be subjected to legitimate permitting requirements -- cannot remotely be described as a "government benefit." And thus the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary "exchange" that we found to have occurred in* Monsanto.

As frequently occurs with footnote pronouncements in Supreme Court opinions, their significance shows up in a later opinion. If this signal is ignored by those who want to retain the upper hand this state court-made doctrine has given them in the past, the landowners will seek U.S. Supreme Court review in a future case to establish this change in state decisional law.

(1) Government Code Section 66473.1
(2) Government Code Section 65300.5
(3) Government Code Sections 65860 and 66474 (a)
(4) *First English Church* changed the *Agins* remedy for an unlawful land use regulation from invalidation to compensation for the time the regulation was in effect.

Don V. Collin

STATEMENT OF THE CALIFORNIA CHAMBER OF COMMERCE
BEFORE THE SENATE LOCAL GOVERNMENT COMMITTEE
CALIFORNIA STATE SENATE
"THE LIMITS OF LAND USE REGULATIONS"
THE HONORABLE MARIAN BERGESON, CHAIRMAN
August 13, 1987

Mr. Chairman:

My name is Christian W.H. Solinsky. I am the Resources Director of the California Chamber of Commerce. The California Chamber is a voluntary business organization with over 3,500 members, 160 trade associations and some 400 affiliated local chambers in California.

We appreciate this opportunity to comment on the two recent decisions of the U.S. Supreme Court on property rights, Nollan v. California Coastal Commission and First English Evangelical Lutheran Church of Glendale v. County of Los Angeles. My comments will just address the legislative repercussions of the First English Church case which reversed a decision of the California Supreme Court of Agins v. City of Tiburon, 24 Cal 3rd 266 (1979). The Agins decision had for all practical purposes eliminated the use of "inverse condemnation" for legal claims that a land use regulation was excessive and deprived the property owner of any reasonable economic use of the land. The California Supreme Court ruled the agreived property owner must first file an action to invalidate the ordinance and compensation was not available for the inability to use the property while the regulation was in effect.

The U.S. Supreme Court in First English Church decided the "just compensation" clause of the Fifth Amendment allows the landowner to claim the property has in affect been taken by excessive land use regulation and allows the property owner to receive compensation for this "inverse condemnation" even if the taking is for a short period of time, such as interim or temporary ordinances or until the

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Presented by C.W.H. Solinsky, Resources Director of the California Chamber of Commerce in Sacramento, CA on August 13, 1987.

ordinance is invalidated.

The California Chamber of Commerce for a number of years since the Agins decision and its predecessor cases in the California Court system has supported legislation to reverse the Agins decision and restore the inverse condemnation cause of action as a remedy for excessive land use regulatory policies of government. In the last session of the Legislature, Senator John Seymour introduced SB 1833 and the Senate Judiciary Committee identified the following "key" issue in the bill: **SHOULD PROPERTY OWNERS BE ENTITLED BY STATUTE TO INTERIM DAMAGES FOR THE EXERCISE OF A REGULATING POWER BY A PUBLIC ENTITY WHICH IS DETERMINED TO BE A "TAKING?"** Even though representatives of the League of California Cities and other governmental agencies were involved in extensive negotiations on the bill, it did not pass the Legislature. All parties recognise that the Agins decision was not satisfactory to the extent that parties with an excessive land use regulation claim were excluded from using the Calfornia Court System to obtain compensation.

What First English Church clearly provides is an affirmative answer to that "key" question in the Senate Judiciary Committee Analysis -- that property owners will be entitled to compensation for excessive regulations even if they are temporary in nature. We submit that all levels of government in California need a method to process compensation claims at the least expense to the taxpayers. One of the methods to carry out the First English Church decision and to possibly limit the liability of government for compensation for excessive land use regulation is to allow property owners to protest the excessive regulation but proceed with construction of their project during the time when the court is asked to adjudicate the protest of whether the regulation is excessive or not.

For several years now the California Chamber has supported and sponsored legislation to allow landowners to protest excessive land use exactions and

development fees and go forward with construction of the project while the protest is litigated.

The Legislature has enacted at least three statutes allowing a protest of excessive exactions imposed by local agencies (See Government Code Sections 65913.5, 65958, and 66475.4). This year Assembly Member Elihu Harris introduced AB 1915 which proposes that the protest procedure for excessive exactions and development fees be extended to state agencies that issue land use permits. When the bill was introduced at the request of the Chamber the purpose was to allow the landowner to put the property into productive use and set aside for later court resolution any dispute over the amount of land, money, or other exactions that must be given to the government as a condition for obtaining the building permit.

The bill has been structured in a way that guarantees the government agency will receive the benefit of every exaction condition if and when the protest is unsuccessful. The government may actually receive a performance bond or title to the land in question before the protest process can be used. The government may also make findings that the exaction conditions are so necessary for the public health, safety or welfare that the entire protest procedure can be set aside and the approval of the building permit suspended pending resolution of the protested condition.

Since the First English Church decision we believe state agencies should support the proposed protest procedure in AB 1915 as a method of reducing the state's liability to landowners for excessive regulation claims. AB 1915 will be heard in Senate Natural Resources and Wildlife Committee next Monday, August 17, 1987. The reason AB 1915 will reduce the liability of governments for inverse condemnation is the property owner will be making some productive use of the

land during the litigation over whether or not the exaction condition is excessive. In most situations the protest procedure would allow sufficient economic use of the land to make the First English Church compensation standards inapplicable.

One other point we would like to make in closing is it might be useful for your committee to review the statutes for protesting local government exactions to make sure the legislation which was passed in recent years is adequate in light of First English Church.

We thank you for allowing us to testify today and I would be happy to answer any questions.

Report to the Senate Local Government Committee

SUBJECT: Impact of U.S. Supreme Court Decision in First English and Nollan

Presented by Brent Harrington on behalf of the California County Planning Directors Association

Presented August 13, 1987

Good afternoon

My name is Brent Harrington. I'm currently Planning Director for Calaveras County, but today I am representing the California County Planning Directors Association. Our Association, which represents the 58 County Planning Directors of California is vitally interested in the impact of the U.S. Supreme Court's recent decisions regarding the First English and Nollan cases. We met as an organization last month to discuss the implications of these two cases, and our organization's response to them. After considerable deliberation, we would like to offer our comments at this time.

Our purpose in speaking today is to give a general overview of the cases and how they affect decisions that we are involved with on a daily basis. Our purpose is neither to recite chapter and verse of the cases nor to restate the facts of the cases. We leave that analysis to the many other speakers we're certain you'll hear today. Instead we'd like to discuss the reaction to the cases and how that reaction impacts upon General Plans and the land use decision making process on the County level.

The California County Planning Directors Association summarizes its concerns in four main points, as follows:

1. It is our belief that while any Supreme Court decision regarding land use is important, the two recent cases will not generate the far reaching changes in land use planning that some would have us believe. The two cases will not create fundamental changes in legal theory as it has been practiced in all counties. In particular, First English said that to not allow any use of land is a "taking". This concept has been long understood by land use planners and was not a new revelation. Nollan may have greater implications due to some of the unanswered questions that it raises, but the Court's conclusion that there must be a solid connection and reasoning between a land use problem and the conditions used to correct the problem is commonly understood by land use planners. The ability of a jurisdiction to impose reasonable conditions on new development to mitigate needs and problems created by the development is unchanged. In sum, the First English and Nollan cases are important, but do not change the basic concepts of land use planning in California.

2. There is a significant need to educate all concerned parties about the real implications of these cases. There has been much made in the popular press about the implications of these deci-

sions. The cases were on the front page of most newspapers and were lead stories on the 6 O'clock News. Many early news accounts were making liberal and erroneous interpretations of the cases, but left a strong impression with some parties that these cases would significantly change the land use planning process. On the local level, we as planning directors have received numerous inquiries from property owners, developers, environmental groups and homeowner associations asking or asserting what these cases mean. Questions have been raised at public hearings, and our respective Boards and Planning Commissions are searching for answers. We are concerned that the cases themselves may not be as important as the potentially incorrect reaction they may cause for apprehensive decision makers. Clearly, there is a need to reach a well considered conclusion on the implications of these decisions, and to readily disseminate that information to all concerned parties.

3. We do expect that there is a potential for significantly increased numbers of court cases resulting from First English and Nollan. Our review to date indicates that most experienced land use attorneys realize that the two cases are not as significant as some parties may want to believe. While we may not like it, we do realize that more court action and expense will be needed to better define the implications of First English and Nollan. We do hope that by educating all parties, good land use decisions will be made, and many potentially frivolous cases, which will cost local government significant time and money to defend, will be prevented.

4. The First English and Nollan cases do confirm the need to ensure that the land use planning process is logical and well reasoned in action. There is some thought that the court was trying to send a message to land use decision makers that we must carefully consider and ponder our actions and their implications. Sound land use planning has always followed this premise, with the need to properly balance private property rights and public land use policy. California has established itself as a national leader in land use planning by using tools such as the General Plan and Zoning Codes, the Subdivision Map Act and the California Environmental Quality Act. Nothing in these recent Court decisions alters the effectiveness of these valuable tools. Yes, we must carefully consider and record the basis for our decisions, and those decisions must be based upon proper findings and sufficient supporting data. But, these concepts were sound before First English and Nollan and they will be sound for a very long time.

I want to end my comments on behalf of our organization by stating that we appreciate the Local Government Committee's keen and swift interest in these topics, and our opportunity to speak to you. We look to you as the logical beginning point to address the points we have named today. We would also like to recommend that this Committee publish its summary and conclusions from these deliberations, which would greatly aid the educational process relative to these cases. Our organization would like to actively participate in your delibera-

tions and followup action, and we offer our services to you as you see fit.

Are there any questions?

Submitted by Brent Harrington representing The California County Planning Directors Association

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BEFORE THE

SENATE COMMITTEE ON LOCAL GOVERNMENT

THE LIMITS OF LAND USE REGULATION

August 13, 1987
Room 112
State Capitol

TESTIMONY OF KATHERINE E. STONE
On Behalf of the
League of California Cities

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*PROFESSIONAL CORPORATION

August 13, 1987

Senator Marian Bergeson
Chairman and Members of
Senate Committee on Local Government
Room 2080
State Capitol
Sacramento, CA 95814

Re: "The Limits of Land Use Regulation"
Hearing, August 13, 1987

Dear Senator Bergeson:

On behalf of the League of California Cities, I would be happy to assist the Committee with understanding the impact of these important land use decisions from the perspective of local government.

Attached hereto are responses to the specific questions you have posed (tab 1), my paper on the three major land use decisions decided by the Supreme Court this term (tab 2), an outline for analyzing takings claims (tab 3), and my statement of qualifications (tab 4).

At this time there are some procedural areas where legislation might be helpful in expeditiously resolving the uncertainties caused by the Supreme Court's decisions in First English and Nollan.

1. Legislation clarifying that administrative and traditional mandamus are the appropriate state forums for resolving disputes over land use regulations in the first

instance and that a timely action in mandate (or possibly declaratory relief) is a prerequisite to an action for just compensation.

2. Administrative and court procedures to ensure that the public agency defendant is able to insure early resolution of the issues.

3. Short statutes of limitations for just compensation claims.

Very truly yours,

Katherine E. Stone

Katherine E. Stone
Of Burke, Williams & Sorensen

KES/cdh
Encls.

cc: Connie H. Barker
Peter Detweiler

RESPONSES TO PREPARED QUESTIONS

QUESTION 1. Early press reports characterized the First Lutheran Church and Nollan decisions as signalling a major change in land use law. Do you agree?

RESPONSE: No. Neither First Lutheran Church nor Nollan changed established land use rules. The United States Supreme Court reaffirmed these rules in another case this term, Keystone Bituminous Coal Association v. De Benedictis. In Keystone the Court upheld a regulation almost identical to the one struck down sixty-five years ago in Pennsylvania Coal Co. v. Mahon, where Chief Justice Oliver Wendell Holmes invoked a constitutional debate by stating: "If a regulation goes too far it will be recognized as a taking." The Court held just that in First Lutheran, but did not decide what is "too far," when a taking would start, or the measure of damages for a temporary taking. However, the Supreme Court's decision did end the debate in the federal courts. The result will be to shift the cases back to the state courts to decide what constitutes a taking under state law. This will mean changes in trial tactics.

In Nollan, the Court held that a land dedication imposed as a condition of development must relate to the

same impacts caused by the development, but did not decide how close the relationship must be.

In both Nollan and First Lutheran the Court reaffirmed prior cases including Agins v. Tiburon upholding land use regulations for a wide variety of purposes and which, in some cases, severely impact land values. For a more complete analysis of this question, see my paper entitled, "Has the Supreme Court Cast an Instant Pall on Land Use Controls?", which is attached under tab-2.

QUESTION 2. How will these cases change public officials' practices?

RESPONSE: As a practical matter, First Lutheran will probably have a chilling effect on some public agencies' land use practices. Developer attorneys may threaten large damage suits and suggest that planning officials may be personally liable for all manner of land use planning errors. Smaller cities with limited budgets may shy away from making tough land use decisions. Individual officials may fear personal monetary ruin.

a. What can't they do now that they used to do before?

Response: Nothing. The substantive rules have not changed--only the remedy.

b. Will these cases slow down land use decisions as public officials become more cautious about lawsuits?

Response: They could. Especially as lawyers inevitably become more involved in planning and planners attempt to interpret and predict the law.

c. Some suggest that local officials will be more reluctant to amend general plans to designate more land for development until it is clear that the project is ready to begin. They fear that early planning will give rise to later taking questions. Do you agree?

Response: This effect on local officials is an unfortunate possibility. Although California law is now clear that early planning does not give rise to a property right which can be "taken", this "vested rights" rule is strongly criticized by developers and could be changed by the new State Supreme Court. Some city planners are considering avoiding up-zoning property for development and instead generally indicating that the area may be designated for development in the future. As a matter of good planning procedures it is preferable that land use policies be established early in the process.

d. Will officials change their practices regarding access to navigable waterways, particularly in the Delta, at Lake Tahoe, and along the coast?

Response: Although public officials may do so, the Nollan decision on access should be pretty much limited to its facts--the impacts of replacement of a small single family home with a larger home. The impacts of larger developments of unimproved lands bordering navigable waterways on access to such public trust lands should not be difficult to show.

QUESTION 3. California's 80 charter cities have constitutional authority over their "municipal affairs." Will either of these cases affect charter cities differently than they affect counties and general law cities?

RESPONSE: No. The cases involve limits imposed by the United States Constitution, which applies equally to both charter and general law cities and counties. It is important, however, to note that not every planning error will rise to a claim under the constitution. Delays occasioned by violations of planning requirements imposed by statute (e.g., general plan consistency) would not amount to a taking under the Fifth Amendment.

QUESTION 4. In First Lutheran Church, Chief Justice Rehnquist said that the Court was not deciding "whether the county might avoid the conclusion that a compensable taking

had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations." California law often justifies regulations in the name of public health, safety, and welfare but Rehnquist only mentioned "safety." Does this suggest that health or welfare considerations may not be sufficient to justify regulations that deny all use of property? Is public safety the only acceptable justification?

RESPONSE: Justice Rehnquist may have only referred to "safety" regulations because the facts of First Lutheran give rise to safety concerns (a fire and flood with the loss of 10 lives). Certainly public safety can justify severe land use regulations. However, the cases cited by Justice Rehnquist for this point were not limited to public safety justification, but instead, involved nuisance-like activities and an analysis similar to Justice Stevens' opinion in Keystone.

QUESTION 5. Government Code §65858 sets out the procedures that counties and most cities must follow when adopting temporary zoning moratoria. The Legislature adopted the current section in 1982 and it will "sunset" on January 1, 1989 unless reauthorized. The earlier version of the section will then apply.

a. Does the current language avoid the kind of temporary regulatory taking discussed in First Lutheran Church?

Response: I think so. More analysis may suggest some precautionary amendments. Temporary zoning moratoria should not give rise to a taking claim in any event because they do not purport to deprive a landowner of all use for a substantial period of time and because a claim ordinarily would not become ripe under Williamson County Regional Planning Comm'n v. Hamilton Bank, 450 U.S. 172 (1985) within the moratorium period.

b. Should the Legislature renew the current language?

Response I think so.

c. Are further amendments needed? Should the Legislature require city councils and county boards of supervisors to better define the public health, safety, or welfare conditions that the moratorium is meant to resolve?

Response: No. The nexus required by Nollan is not substantially different from that which local governments are accustomed. The substance and nature of these findings should be left to the local governments which are familiar with the property and the circumstances necessitating the moratorium.

d. Should the Legislature amend other statutes to conform to this approach? If so, which ones?

Response: More analysis needed to fully respond.

QUESTION 6. Courts traditionally defer to the policies set by elected legislatures. If state statutes, local ordinances, or local initiatives recite public health, safety, or welfare problems as justification for new regulations, will that influence how the courts will apply First Lutheran Church or Nollan?

RESPONSE: It would appear so. In Keystone the Court relied on detailed legislative findings and deferred to the State's actions to arrest what the State perceived to be a threat to the common welfare. By contrast, sixty-five years earlier, in Pennsylvania Coal v. Mahon, the Court held that almost identical legislation lacked sufficient public purpose justification. Legislative findings at both the state and local level are very helpful to convince courts that the regulation is designed to address public health, safety and welfare concerns. For example, in Agins v. Tiburon, cited with approval by the majority in both Nollan and First Lutheran, the unanimous Court relied on

legislative findings by both the state and local legislative bodies.

In Nollan, Justice Scalia did not discuss the legislative findings contained in the Coastal Act. However, Nollan did not invalidate any part of the Coastal Act or the regulations enacted pursuant to the Act. It was an "as applied" case where the trial court reviewed the Coastal Commission's administrative findings and the evidence pursuant to Code of Civil Procedure §1094.5. The trial court, like the U.S. Supreme Court found the evidence did not support the findings and the findings did not support the access condition. This is standard case by case analysis of application of permit conditions.

QUESTION 7. Do landowners now have a better chance of attacking regulations which fail to recite the public health, safety, or welfare conditions that they are meant to resolve?

RESPONSE: The Court seems to scrutinize land use regulations more closely. It is usually easier to explain and justify legislation that recites the reasons why it was enacted.

a. Will landowners pay more attention to statutory findings and declarations of legislative intent?

Response: I don't know.

b. Will local officials ask the Legislature to strengthen the statements of legislative intent in statutes that permit local regulations?

Response: Perhaps.

c. Will drafters of local initiatives and referenda strengthen their statements of intent to immunize them from possible legal challenges?

Response: Findings are not required in initiatives even where otherwise required by statute. (BIA v. Camarillo (1986) 41 Cal.3d 810.) Statements of intent are helpful to show what information was before the electorate. Proponents of initiatives may lack the sophistication to draft detailed findings and City Councils cannot change an initiative before putting it on the ballot. The Supreme Court in BIA v. Camarillo had difficulty with the concept of findings being made before the measure had been submitted to the electorate.

QUESTION 8. Under First Lutheran Church, when does a temporary regulatory taking start?

RESPONSE: Justice Rehnquist did not say, but stated: "We do not deal with the quite different questions that would arise in the case of

normal delays in obtaining building permits, changes in zoning, ordinances and variances and the like, which are not before use."

Just a year ago, in City of Renton v. Playtime Theatres, Inc., Justice Rehnquist writing for the majority stated "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." Previously, in Williamson County Regional Planning Comm'n v. Hamilton Bank, the Court held that even an eight-year application process did not present a "ripe" taking claim. Before a ripe taking issue could be presented the land owner must reapply for a development permit and make a "meaningful application." In MacDonald, Sommer & Frates v. Yolo County, the Court required the developer to seek a variance before considering the taking claim.

a. How can landowners and public officials distinguish between "normal delays" in the land development process and delays that lead to regulatory takings?

Response: The delay itself doesn't lead to the taking; it is the deprivation of all use that is the taking. If a landowner has some reasonable use (e.g., 1 unit per 5 acres (Agins v. Tiburon)) then there is no taking and delays while the developer seeks a higher use are not compensable. If the regulation denies the landowner all use, without justification, then the taking would appear to

start when the regulation is "applied" to the land. In First Lutheran the court indicated that a permanent deprivation of all use might be justified for safety reasons. A temporary deprivation for welfare reasons, such as general plan revisions would also be justified. In any event, the landowner would normally be required to seek administrative relief before the claim would be ripe or considered "applied."

b. Is state legislation needed to define when a temporary regulatory taking starts? Or should this issue be left to the courts to interpret?

Response: Legislation is not needed. The courts will decide the constitutional issue in any event.

c. Is state legislation needed to guide the courts in how to calculate a landowner's loss which occurs during a temporary regulatory taking?

Response: No. The loss protected by the constitution is a judicial determination which cannot be limited by legislation. It is important to distinguish temporary takings of all use from permanent takings and temporary takings which affect title, physical integrity or some other vested interest. Eminent domain law is not necessarily relevant to valuation of temporary takings by overregulation because a landowner generally does not have a vested right or reasonable expectation in a particular use.

QUESTION 9. If a state regulation is found to be a temporary regulatory taking, what is the State General Fund's exposure?

RESPONSE: It may be exposed.

a. If a local regulation, adopted to implement state law, is found to be a temporary regulatory taking, what is the State General Fund's exposure?

Response: Under the state constitution as interpreted in the County of Los Angeles case, the State is required to provide reimbursement if the State imposes a mandate which applies uniquely to local government. Therefore if a local government is directly or indirectly required to adopt a regulation which is found to constitute a taking. The State must fully reimburse the local government.

b. What is the process for recovering damages?

Response: The State should be a necessary party to suits involving state mandated programs.

QUESTION 10. Will Nollan influence the current debate over charging fees for off-site improvements? In particular, what about school developer fees?

RESPONSE: Nollan may require a higher scrutiny in local dedication situations; this same scrutiny would not seem to apply to development fees. The nexus required by Nollan does not seem to be more stringent than the familiar Associated Homebuilders v. Walnut Creek test.

QUESTION 11. The traditional test of levying benefit assessments is that landowners must pay in proportion to the benefit conferred on their property by the facility or service being financed.

a. Is the "nexus" discussed in Nollan any different?

Response: The nexus discussed in Nollan is less direct than that required of benefit assessments. Nollan says the exaction must relate to the same impacts caused in the development; i.e., if the development will cause more traffic, an off-site road widening condition may be appropriate, but not off-site low income housing. Under Nollan the exaction need not be related to any special benefit conferred or proportionally related to the impact.

b. What can landowners and land use regulators learn from assessment practices that will help them find this nexus?

Response: The type of engineering analysis used for benefit assessments is a conservative way to

analyze development impacts and appropriate mitigation measures.

HAS THE SUPREME COURT CAST AN INSTANT PALL ON LAND USE CONTROL?

By

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HAS THE SUPREME COURT CAST AN INSTANT PALL ON LAND USE CONTROLS?

By Katherine E. Stone

THE SUPREME COURT'S RECENT DECISIONS SHOULD NOT INHIBIT REASONABLE LAND USE REGULATION.

The editors of the Los Angeles Times characterized the Supreme Court's decision in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles [1] ("First Lutheran Church") that the constitution requires just compensation for overregulation, as casting an "instant pall on state and local land use controls at a time when such controls are critical to the orderly development and protection of the environment."[2] The Times editorial worries that planning agencies may be paralyzed by fear of facing huge monetary judgments and suggests that the validity of routine land use regulations may be put in doubt by the Supreme Court's ruling. Other newspapers echoed the Times pessimism.[3]

Developers' attorneys jubilantly pronounced Nollan v. California Coastal Commission[4] the death knell to the Commission's beach access program and predicted an end to "extortions" for development permits.

In contrast to these two well publicized opinions, a third land use case decided by the Supreme Court this term went almost unnoticed. In Keystone Bituminous Coal Association v. De Benedictis,[5] ("Keystone Coal") the court upheld a regulation almost identical to the one struck down sixty five years ago in Pennsylvania Coal Co. v. Mahon[6], where Chief Justice Oliver Wendell Holmes, Jr. invoked a constitutional debate by stating "If regulation goes too far it will be recognized as a taking".

The "taking" debate has pitted the reserved power of state and local government to exercise the police power for health, safety and welfare[7] against the just compensation clause of the fifth amendment to the United States Constitution. For the last sixty-five years government lawyers have argued that a sufficient remedy for

a land use regulation that goes too far is invalidation of the regulation under the due process clause of the Constitution. First Lutheran Church has settled that debate. Developer and landowner attorneys have now persuaded a majority of the court that just compensation is required by the fifth amendment for even a temporary taking.

While the constitutional debate has ended, the high court's opinions this term do not in any way suggest that reasonable land use regulations will subject local government to damages or that government should refrain from conditioning development on the provision of land dedications, impact fees, and other exactions.

On the contrary, government may still prohibit citizens from raising livestock in their backyards,[8] prohibit citizens from running businesses in residential areas,[9] require exactions to mitigate impacts of development and put a temporary hold on development. The court's prior decision in Agins v. Tiburon[10] limiting a developer to one house for every one, two or five acres was not overruled, but affirmed in First Lutheran Church and Nollan. Government may still prohibit all use of,[11] or even destroy property that is dangerous.[12] But if a regulation denies a landowner all use of his or her property without valid justification, or if a dedication condition is not reasonably related to the impacts caused by the development, the government may be required to pay compensation.

The Ruling In First Lutheran Church Is No Big Surprise.

It is not surprising that the United States Supreme Court has ruled that the fifth amendment just compensation clause[13] of the United States Constitution obligates the payment of interim damages if a government regulation amounts to a temporary taking of property. Before 1979, when the California Supreme Court in Agins v. Tiburon [14] held that "inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged," most government lawyers assumed damages might be awarded in a proper case. Since at least 1981, when five justices of the United States Supreme Court in San Diego Gas & Electric Co. v. San Diego[15] indicated compensation might be constitutionally required and Justice Brennan stated "[a]fter all, if a policeman must know the Constitution then why not a planner?,"[16] we have been expecting a ruling to that effect from the high court.[17]

What is surprising is the vehicle the court chose to make its pronouncement--a case where the regulation appears to be clearly justified on its face. In First Lutheran Church, Chief Justice Rehnquist, joined by Justices Brennan, White, Marshall, Powell and Scalia, reached the remedy without finding a wrong. The Court expressly did not decide whether Los Angeles County's interim flood ordinance (enacted as an urgency measure after a fire and flash flood destroyed a camp for handicapped children) actually denied the church "all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations."[18] As stated by Justice Stevens, dissenting:

> "[I]t is imperative to stress that the court does not hold that appellant is entitled to compensation as a result of the flood protection regulation that the county enacted. No matter whether the regulation is treated as one that deprives appellant of its property on a permanent or temporary basis, the court's precedents demonstrate the type of regulatory program at issue here cannot constitute a taking."[19]

Only A Narrow Issue Was Decided In First Lutheran Church

The issue decided by the Supreme Court in First Lutheran Church is very narrow:

> "Where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." (Emphasis added).[20]

It is apparent that Chief Justice Rehnquist was frustrated with the Court's repeated failure to reach the taking question. Four times in the last six years, after assuming jurisdiction, the Court ruled that either the regulation did not constitute a taking, as in Agins v. Tiburon[21], or that factual disputes might still lead to the conclusion that no taking had occurred, as in MacDonald, Sommer & Frates v. Yolo County,[22] Williamson County Regional

Planning Comm'n. v. Hamilton Bank[23] and San Diego Gas & Electric Co. v. San Diego.[24]

This term the Court accepted three cases where a taking was claimed: First Lutheran Church, Nollan and Keystone Coal. As none of the cases presented facts sufficient to actually constitute a compensable taking, the Chief Justice had to decide the remedy in a vacuum, or "leave it for another day."[25]

Curiously, the Court selected from the three potential taking cases before it this term the case which most observers viewed as the least likely to constitute a taking. First Lutheran Church involved a challenge to Los Angeles County's interim flood ordinance adopted as an urgency measure after a devastating flood destroyed lives and property, including a retreat and a camp for handicapped children owned by the First Lutheran Church. The camp was situated along Mill Creek, a natural drainage channel in Los Angeles County. Only the low lying portion of the Church's property was affected by the ordinance.

The majority of the Court in First Lutheran Church limited its discussion and its holding to the remedy available if a temporary taking is found. The Court specifically did not address whether the ordinance in question actually effected a taking. Nor did it alter the tests generally employed by the Court for determining whether a taking has occurred.

Chief Justice Rehnquist emphasized that for purposes of his opinion only, the court assumed that the moratorium had deprived the church of all use of its property for a considerable period of time. He also emphasized that even if this were true, compensation would not be required if the regulation was justified for safety reasons.[26] As examples of such justification, the Chief Justice referred to cases upholding the exercise of the police power prohibiting excavations below two feet above maximum ground water level,[27] brick yards in certain areas[28] and a distillery.[29]

Justice Rehnquist repeatedly emphasized his assumption that the church was deprived of all use of its property, and did not suggest that something less would amount to a taking. Significantly, the court stated that the regulation in Agins, where property was downzoned to 1-5 units per five acres "did not effect a taking."[30]

Since at least 1926 when the Supreme Court decided Euclid v. Ambler Realty Co.,[31] it has been established that (1) a regulatory program does not constitute a taking unless it destroys all reasonable use of the property; (2) state law defines property rights; and (3) government may, in a proper exercise of its police power, substantially interfere with even vested property rights to prevent harm. The Court's decision in First Lutheran Church does not change these established land use rules.

The Nollan Case Did Not Significantly Alter Land Uses Rules

In Nollan, a 5-4 decision authored by Justice Scalia, joined by Rehnquist, White, Powell and O'Connor, the Court held invalid as applied to the Nollan's property the Coastal Commission's requirement that a permit to build a new beachfront house be conditioned on providing public access along that beach. Although the Court stated that in this circumstance, if the State wanted to provide for public access it would have to pay for it, there was no taking because the Nollans had built their house without complying with the condition.

The Court observed that conditioning development on dedication of land is constitutional if the condition is designed to serve the same purposes for which the Commission could deny the permit, but ruled:

> "The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."[32]

The Court recognized that the Commission's goal to ensure adequate public access to the public tidelands was valid, but held that there was an insufficient "nexus" between this purpose and the condition imposed. In other words, the Commission did not show that the new house would burden public access to the beach. Nor did the evidence show that the dedication condition would relieve the impacts the Commission advanced as justification for the condition. The Court did say, however, that assuming the Commission could have exercised its police power to deny the permit because of impacts caused by the development, alone or in conjunction with other similar developments, conditions related to those impacts such as height limitations, width restrictions, a ban on fences, or even

requiring a "viewing spot" on the Nollan's property for passersby would be constitutional.[33]

Like the decision in First Lutheran Church, the Court's holding in Nollan is narrow and reaffirmed traditional land use rules. The majority cited to the downzoning in Agins v. Tiburon as an example of a valid land use regulation, as it had in First Lutheran Church.

The practical effect of the Nollan decision is to require state and local governments to make clear findings that link conditions requiring dedications and other exactions to the burdens caused by the development.

The Court Reaffirmed Government Power To Control Land Use In Keystone Coal

State and local governments' power to enact and enforce reasonable land use regulations without liability for damages was reaffirmed earlier this term in Keystone Coal. The case arose out of a challenge to a Pennsylvania statute which requires coal mine operators to leave a certain amount of coal in the ground to prevent land subsidence. The Pennsylvania State Legislature based its decision to implement the support requirement on detailed findings that the legislation was important for the protection of public health and safety, preservation of affected municipalities' tax bases and land development.[34]

Sixty-five years ago, in Pennsylvania Coal Company v. Mahon,[35] the Supreme Court held that a similar regulation was not properly justified. This time, however, in an opinion written by Justice Stevens a majority of the Court held that the regulation was a valid exercise of the police power and not a taking of property within the meaning of the fifth amendment taking clause. The Court held that the mine operators had not sustained their heavy burden of showing that the statute on its face effects a taking. The Court emphasized that the record showed that (1) the state had acted to arrest what it perceived to be a significant threat to the common welfare; and (2) the statute did not make it impossible for the mine operators to profitably engage in their business or unduly interfere with the operator's investment-backed expectations.

The Court further held that the coal left in the ground is not a separate segment of property for purposes of the taking clause, and that the requirement that the coal be left in place did not effect a physical taking.[36]

THE CASES SHOULD NOT INHIBIT REASONABLE LAND USE REGULATION

Although as a practical matter the First Lutheran Church and the Nollan cases may temporarily have a chilling effect on local land use planning, the Supreme Court's opinions this term do not in any way suggest that reasonable land use regulations will subject local government to damages. This is evidenced by the Keystone Coal decision, which applied the traditional taking analysis and upheld the Pennsylvania statute, and the Nollan decision where the Court stated:

> "Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter. They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements."[37]

The Court then cited as examples of valid land use regulations cases upholding scenic zoning[38], landmark preservation[39] and residential zoning.[40]

Thus, although the Court's three "taking" decisions this term may result in closer judicial scrutiny of land use regulations, local government may continue to enact moratoriums, rezone property, prohibit development in setback areas and greenbelts, control growth, preserve historical landmarks, prevent noxious uses of property and require land dedications and other exactions to mitigate the impacts of development, so long as the regulation does not amount to a compensable "taking" under the traditional taking analysis.

QUESTIONS LEFT UNANSWERED BY THE COURTS DECISIONS

What Is A Taking?

This term the Supreme Court did not add any new insights on what might constitute a taking. The Court has often stated that there are no hard and fast rules for determining when a taking has occurred, and that such a decision must be made on an ad hoc, case-by-case basis.[41] In PruneYard Shopping Center v. Robins[42], the Court stated:

> "It is well established that not every destruction or injury to property by governmental action has been held to be a taking in the constitutional sense. Rather, the determination whether state law unlawfully infringes on a landowner's property in violation of the taking clause requires an examination of whether the restriction on private property forces some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

In Nollan, the majority relied on the Court's opinion in Agins v. Tiburon as expressing the test for a taking as follows:

> "A land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land', Agins v. Tiburon, 447 U.S. 255, 260 (1980)."[43]

In analyzing a taking claim the Court has traditionally focused on two primary factors. The first is the character of the state action. As a rule, it is more difficult to establish a taking when the interference with property is characterized as regulatory as opposed to actual physical occupation[44], and harder still when the interference is necessary for the promotion of the health and safety of the general public[45]. The more substantial the public interest, the less likely it is that a taking will be found. Local entities have broad discretion to eliminate noxious uses of property, or uses which constitute a public nuisance, even if the exercise of such discretion substantially interferes with an individual's use of his or her property.[46] In First Lutheran Church, the Court recognized that even all use might be prohibited in a flood zone for safety reasons.

The second primary factor is the impact of the regulation on protected property interests.[47] In Keystone Coal, the Court noted that the statute did not make it impossible to engage in the coal mining business or unduly interfere with investment-backed expectations. When analyzing these kinds of factors it is important to remember that property interests are created and defined by state laws, not the Constitution.[48]

Any "taking" analysis should start with the questions: (1) what alleged property interest has been "taken"; and (2) is it a protected interest under California law? For example, in California development is a privilege, not a right, and a developer cannot have a reasonable investment-backed expectation (a protected property interest) in a particular development until he has gained a vested right.[49]

The right to develop a particular project generally does not vest until there has been substantial detriment in good faith reliance on a validly issued building permit.[50] There is no right to a higher or even to the existing zoning classification.[51] It is not until a protected property right has been "taken" that the question of compensation arises, and before a landowner can claim a denial of all use he must apply for a "reasonable use" of the land.[52] These well-established rules have not been affected by the Court's decision in First Lutheran Church or Nollan, and are reaffirmed in Keystone Coal. It is important to be aware, however, that rights may vest earlier pursuant to a development agreement,[53] a vesting tentative map[54] or automatic approval under the Permit Streamlining Act.[55]

If A Taking Has Occurred, When Did It Start?

In First Lutheran Church, Justice Rehnquist assumed that the county's moratorium had denied the church of all use of its property from the outset for a substantial period of time, and included litigation delays in the calculation. This is disturbing because litigation delays can be substantial, and such delays are often beyond the control of defendant government agencies.

The opinion did not explain when such delays might become a taking, but stated:

> "We . . . do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances and the like, which are not before us."[56]

Just a year ago, in City of Renton v. Playtime Theatres, Inc.,[57] Justice Rehnquist writing for the majority stated "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." Previously, in Williamson County Regional Planning Comm'n v. Hamilton Bank,[58] the Court held that even an eight-year application process did not present a "ripe" taking claim. Before a ripe taking issue could be presented the land owner must reapply for a development permit and make a "meaningful application." In MacDonald, Sommer & Frates v. Yolo County,[59] the Court required the developer to seek a variance before considering the taking claim.

These cases show that what constitutes a substantial period of time in the view of the Supreme Court needs clarification.

What Is Just Compensation?

The Court only briefly discussed the question of the measure of damages for regulatory takings in First Lutheran Church. In its discussion, the Court relied on physical taking cases arising out of the government's temporary appropriation of private property during World War II. The Court noted that in these cases, the measure of damages was based on the value of the use of the land during the period of time the land was used by the government. "'It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken.'"[60]

Questions remain as to the standard for measuring the owner's loss, e.g., is it the minimum constitutional use? Other issues such as the owner's duty to mitigate, offsets for increases in value and many other well-recognized rules for valuing property damage remain to be litigated.

What Nexus Is Constitutionally Required For Development Conditions?

The dedication condition in Nollan was held invalid because the majority felt it "utterly fails to further the end advanced."[61] But the Court did not clarify what type of connection is constitutionally required. It has always been the rule in California and elsewhere that there must be a reasonable relationship between the development impacts and exactions.

The landowner in Nollan argued that there must be a direct connection between the condition and the burdens created by the development.[62] Since Associated Homebuilders v. Walnut Creek,[63] California courts have held that only an indirect nexus is required. The Coastal Commission cases prior to Nollan have all relied on this "indirect nexus" test.[64]

Although the Court characterized the California rule as the minority position, it did not accept the plaintiff's proffered direct nexus test. Instead the majority used the terms "substantially advancing a legitimate state interest" and "serves the same governmental purpose."[65] The majority also recognized that the cumulative impacts of similar developments could be a legitimate government basis for imposing exactions.[66]

Justice Brennan, dissenting, interpreted the standard articulated by the majority to be the familiar rule that there must be a "reasonable relationship" between the impacts of the development and the condition imposed.

After the Supreme Court's decision in Nollan, it is somewhat uncertain precisely what sort of nexus will pass constitutional muster. As a practical matter, this is generally not a problem because statutes such as Government Code Section 65959 require a close nexus for monetary exactions imposed as conditions of development approval. Exactions imposed under the Subdivision Map Act also require a fairly close nexus. More exotic conditions are generally only imposed on larger developments as a result of negotiations.

CONCLUSION

Although the United States Supreme Court has held that compensation may be required for a regulatory taking in certain circumstances, the lower federal courts and the California courts have seldom found that a local land use regulation on its face or as applied constitutes a taking, and to date no appellate court has awarded compensation for over-regulation of land.

FOOTNOTES

1. 55 U.S.L.W. 4781 (June 9, 1987).

2. Los Angeles Times, June 11, 1987, Part II, p. 4.

3. The Los Angeles Herald Examiner opined that "The effect of the ruling could be far reaching. Officials who previously would have taken the broad public interest into account in enacting new regulations might now back off for fear of being sued by landowners. Zoning, health and safety regulations and other rules curbing the use of property for public interest are essential in modern society. Until the court puts some sharper boundaries on its decision, necessary controls may be put on hold." (Reprinted in the Los Angeles Daily Journal, June 22, 1987, Part I, p. 4, col. 1.)

4. 55 U.S.L.W. 5145 (June 26, 1987).

5. ____ U.S. ____, 94 L.Ed.2d 472 (1987).

6. 260 U.S. 393, 415 (1922).

7. See, e.g., Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

8. Reinman v. Little Rock, 237 U.S. 171 (1915).

9. Zahn v. Board of Public Works, 274 U.S. 325 (1927).

10. 447 U.S. 255 (1980).

11. Goldblatt v. Hempstead, 369 U.S. 590 (1962).

12. Miller v. Schoene, 276 U.S. 272 (1928).

13. U.S. Const. amend. V (". . . nor shall private property be taken for public use, without just compensation").

14. 24 Cal.3d 266, 275 (1979).

15. 450 U.S. 621 (1981).

16. Id. at 661, n. 26.

17. An even earlier indication from the Court that damages might be available in regulatory taking cases is dicta from Goldblatt v. Hempstead, 369 U.S. 590 (1962), where the Court stated that governmental action in the form of regulation may "be so onerous as to constitute a taking which constitutionally requires compensation." Id. at 594.

18. First Lutheran Church, 55 U.S.L.W. 4781 (because the case went up to the Supreme Court on a motion to strike certain allegations from the complaint, the facts were never considered by either the trial court or the appellate court).

19. Id. at 4787.

20. Id. at 4786.

21. 447 U.S. 255 (1980).

22. ___ U.S. ___, 91 L.Ed.2d 285 (1986).

23. 473 U.S. ___, 87 L.Ed.2d 126 (1985).

24. 450 U.S. 621 (1981).

25. Williamson Co. v. Hamilton Bank, 87 L.Ed.2d at 138.

26. First Lutheran Church, 55 U.S.L.W. at 4784.

27. Goldblatt v. Hempstead, 369 U.S. 590.

28. Hadacheck v. Sebastian, 239 U.S. 394 (1915).

29. Mugler v. Kansas, 123 U.S. 623 (1887).

30. First Lutheran Church, 55 U.S.L.W. at 4783.

31. 272 U.S. 365 (1926).

32. Nollan, 55 U.S.L.W. at 5148.

33. Id. at 5147.

34. Keystone Coal, 94 L.Ed.2d at 481.

35. 260 U.S. 393 (1922).

36. Keystone Coal, 94 L.Ed.2d at 498.

37. Nollan, 55 U.S.L.W. at 5147.

38. Agins v. Tiburon, 447 U.S. 255.

39. Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

40. Euclid v. Ambler, 272 U.S. 865.

41. Penn Central, 438 U.S. 104.

42. 447 U.S. 74, 82-83 (1980).

43. Nollan, 55 U.S.L.W. at 5147.

44. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

45. Goldblatt v. Hempstead, 369 U.S. 590.

46. Miller v. Schoene, 276 U.S. 272.

47. Penn Central, 438 U.S. 104.

48. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

49. Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal.3d 785 (1976).

50. Id.

51. Oceanic California, Inc. v. North Central Coast Regional Comm'n, 63 Cal.App.3d 57 (1976).

52. MacDonald, Sommer & Frates v. Yolo County, ___ U.S. ___, 91 L.Ed.2d 285 (1986).

53. Gov't Code § 65866.

54. Gov't Code § 66498.1 et seq.

55. Gov't Code § 65956.

56. First Lutheran Church, 55 U.S.L.W. at 4786.

57. ____ U.S. ____, 89 L.Ed.2d 29 (1986).

58. 450 U.S. 172 (1985).

59. ____ U.S. ___, 91 L.Ed.2d 285 (1986).

60. First Lutheran Church, 55 U.S.L.W. at 4786.

61. Nollan, 55 U.S.L.W. at 5148.

62. Id. at 5145.

63. 4 Cal.3d 633 (1971).

64. See, e.g., Grupe v. California Coastal Comm'n, 166 Cal.App.3d 148 (1985).

65. Nollan, 55 U.S.L.W. at 5147.

66. Id.

August 13, 1987

When Has City Regulatory Action Gone Too Far: What Is A Taking?

Peter M. Thorson
Benjamin Kaufman
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A land use regulation is not a taking if:

1. The regulation substantially advances a legitimate governmental interest;

and

2. The regulation does not deny claimant economically viable use of his land.

(Nollan v. California Coastal Commission, No. 86-133, slip opinion at page 8 (June 26, 1987); Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. ___, ___, 94 L.Ed.2d 472, 488 (1987); Agins v. Tiburon, 447 U.S. 255, 260 (1980).)

When Has City Regulatory
Action Gone Too Far:
What Is A Taking?

1. Does the regulation substantially advance a legitimate governmental interest?

   (a) What is the identified governmental interest behind the regulation?

   (b) How important is the identified state interest: Is it health and safety related, or just related to the general welfare? For permits, is the identified governmental purpose sufficient to justify denial of the application?

   (c) Does the project or the activity sought to be regulated impose a burden on the identified governmental interest?

      (i) Direct

      (ii) Indirect/cumulative

   (d) Does the regulation alleviate the burden imposed on the identified state interest?

   (e) To what extent does the regulation single out the project to bear a disproportionate share of the burden?

2. Does the regulation deny claimant economically viable use of his land?

Looking at the specific facts on a case by case basis, consider the following factors:

(a) Economic impact of the regulation

$$\frac{\text{Bundle of sticks remaining}}{\text{Parcel as a whole}}$$

(b) Interference with reasonable investment-backed expectations

- No reasonable expectation of a zoning classification unless a vested right.

(c) Character of the governmental action.

Testimony of

ALAN R. PENDLETON
EXECUTIVE DIRECTOR
SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

before the

CALIFORNIA SENATE COMMITTEE ON LOCAL GOVERNMENT
MARIAN BERGESON, CHAIRMAN

at the

Hearing on the Limits of Land Use Regulation
Sacramento, California

August 13, 1987

You have asked me to present my views on how the U.S. Supreme Court's recent First Lutheran[1/] and Nollan[2/] decisions will affect land use regulation and, particularly, the regulatory program of the San Francisco Bay Conservation and Development Commission. I believe the committee and land use regulators ought also to be as interested in Keystone Coal[3/], the much less discussed case that was also decided this term so I will also refer to the lessons that case has to teach us as well. Although the Commission has been briefed on these cases by the Attorney General's staff and has discussed the cases, the Commission has not adopted any formal position on this matter. Therefore, the comments I am presenting today are mine and do not necessarily reflect our Commission's views.

1/First English Evangelical Lutheran Church of Glendale v. County of Los Angeles (85-1199)
2/Nollan v. California Coastal Commission (86-133)
3/Keystone Bituminous Coal Assn. v. DeBenedictis, 107 S. Ct. 1232 (1987)

In a nutshell I think First Lutheran and Nollan will impact most Californians because their local governments will be less able and willing to address the many and serious problems that beset our rapidly growing state. Smaller local governments will be particularly affected because they may not have either the legal or planning resources to take risks in the land use mine field that the Court has laid in these two cases. On the other hand the three cases taken together reaffirm the Fifth Amendment "taking" rules first established in 1922 by Justice Holmes. They do not help us identify what governmental action is a "taking". Larger agencies will be able to better cope with the increased risk; they will also be better equipped to analyze the burdens of projects on the general public.

First Lutheran sets aside the California rule that improper regulations should be invalidated rather than money damages awarded. So if a city or county faces a difficult problem of public health, safety or welfare and devises land use regulations to address the problem, it risks second guessing by the United States Supreme Court and, if its regulations are found wanting, payment of money damages. Now if we knew what governmental regulations went too far this remedy would not make a lot of difference since most agencies are only interested in solving society's problems in a legally sound manner. But even Justice Holmes could not inform us when a regulation goes too far. He said "[T]his is a question of degree -- and therefore cannot be disposed of by general propositions."[4/] If the best legal minds in the country, which the Supreme Court should certainly represent, cannot tell ahead of time what goes too far, how will the planning director of Weed Patch know?

4/Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922)

Nollan complicates current regulatory approaches that help assure that the public can get to and along the state's shorelines but the case leaves the regulatory door ajar enough so that with increased agency staff and very careful attention to the project's impacts on access we may be able to meet the tighter "nexus" requirement in most cases involving new shoreline development. But the decision puts the so-called "rationally based and in the general public interest test" in a cocked hat.

Our Commission was granted land use authority under state law to prevent the unnecessary filling of San Francisco Bay and to increase public access to the Bay's shoreline. To accomplish these goals, a Commission permit is needed to place fill or otherwise develop the Bay or the near shoreline. Using this regulatory authority, I believe the Commission has been quite effective in achieving the Legislature's goals over the past two decades. Before 1965 about 2,300 acres of the Bay were being filled each year. Now only about 15 acres are filled annually--all for critical water-oriented needs. And even this small loss of water area is being mitigated by opening diked areas so that each year the Bay has been getting a bit larger.

When the Bay Commission was established in 1965, less than four miles of the Bay shoreline were open to public access. Today over one hundred miles of the shore are open and improved with pathways, landscaping and other public facilities. Much of this access is provided in the many beautiful shoreline parks that have been developed by the visionary park agencies that we are fortunate to have in the Bay Area. But large amounts of public access has been made available in public and private shoreline developments through the Commission's regulatory program.

To meet its legislative mandate[5/] for assuring that "maximum feasible public access to the shoreline" is provided as a part of shoreline projects, the Commission typically includes access conditions in its permits. These conditions usually require the developer to set aside a prescribed area, often along the entire shoreline of the project, for public access. The developer is also required to legally restrict this area for public use, improve the access area with pathways, benches and plants, maintain the access area, and remain legally responsible for damage or injuries in the public area. The approach we use has generally been well accepted by the developers and property owners in the Bay Area. It has made San Francisco Bay more attractive and useful to both the general public and private property owners. Arguably, it has also added value to many recent developments because the access encourages the public to go to, shop in and eat at the development.

While I point with pride to the accomplishments of the Commission, I must caution you that this record was achieved in the 22 years prior to the First Lutheran and Nollan decisions. At this point there is some debate and considerable confusion as to whether the Commission can continue its record of success in protecting San Francisco Bay's resources and opening public access to this public treasure.

5/ Section 66602 of the Government Code, in part, states: "The Legislature further finds and declares that ... existing public access to the shoreline and waters of the San Francisco Bay is inadequate and that maximum feasible public access, consistent with a proposed project, should be provided." Section 66632.4, in part, states: "Within any portion or portions of the shoreline band ... the commission may deny an application for a permit for a proposed project only on the grounds that the project fails to provide maximum feasible public access, consistent with the proposed project, to the bay and its shoreline."

The confusion arises from newspaper reports of the decisions which have not placed them in context and have often overstated the likely impact. The debate arises from the lack of guidance offered by the Court first on the issue of what is a taking and secondly on how close the "nexus" must be between the burdens imposed on the general public by a project and the conditions designed to alleviate or offset those burdens.

In First Lutheran the Court clearly states that the Fifth Amendment requires that the remedy of damages be available when a "taking" occurs. But the facts of the case -- an interim ordinance to preclude construction along a Creek after a devasting fire in the upper drainage area and a flash flood that killed ten people and destroyed the structures belonging to the Church -- strongly suggest that the County's action is not a "taking". The Court clearly states that it only assumed that the ordinance might be a taking and California courts will have to address that matter on remand. One wonders if the County chose to take no action after the fire and flood and rebuilding occurred pursuant to County approval and another flood destroyed structures and took lives, would we or the Court think that the County had acted prudently and with due regard for the safety of its citizens?

While a landowner has to be compensated if government deprives him of all use of his land, even for a temporary period of time, the Court exempted from this general rule what it described as "normal delays in obtaining building permits, changes in zoning ordiances, variances, and the like" without describing what is encompassed in a "normal delay" or what sorts of government activities generate normal delays as opposed to temporary takings. The Court then remanded the case to a lower court to figure out how to apply the new general rule on temporary takings to the facts in this case. For court buffs

it is interesting to note that Justices Brennan and Marshall joined the majority while Justice O'Connor dissented in this decision.

In the 5-4 Nollan decision, Justices Brennan and Marshall joined the dissenters while Justice O'Conner moved to the majority side. The majority restated the traditional two-pronged test that a land use regulation, including a dedication requirement, does not effect a taking if it (1) advances legitimate state interests and (2) does not deny an owner economically viable use of his land. It added the adjective, "substantial" to the legitimate state interest part of the test and suggested that close scrutiny will occur whenever physical property is at stake such as with a dedication requirement. It never reached the second part of the test because it found that requiring the Nollan's to provide an easement between the bluff and the mean high tide line did not substantially advance a legitimate state interest. While the court assumes that access along beaches is a legitimate state interest, it could find no rational connection between the impacts of the new, larger house and public use of the beach in front of the house. The Court states emphatically that there was no connection shown but gives no guidance as to what type of connection it is interested in seeing.

So the Court has reaffirmed our authority to impose conditions on permits to achieve legitimate purposes, but found that the Coastal Commission had not adequately demonstrated that the expansion of a beach cottage generated impacts justifying a condition requiring the property owners to allow the public to walk on the beach in front of the cottage. The Court also rhetorically suggested a few conditions that it would find acceptable, each seemingly far more onerous to the property owner than the condition imposed by

the Coastal Commission. So we can impose conditions, but not in the way the Coastal Commission did. As Justice Stevens said in his dissent, the decision leaves land use planners "guessing about how the Court will react to the next case, and the one after that."

In Keystone Coal the Court considered a Pennsylvania ordinance requiring mine owners to leave some coal in place so that subsidence wouldn't occur. The ordinance was not dissimilar from the Pennsylvania Coal case where Justice Holmes created the whole concept of "inverse condemnation" by his finding that "the general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[5/]

Ironically, the current court found the Pennsylvania ordinance to pass constitutional muster while Justice Holmes found the 1922 version wanting. The importance of this recent decision to us today is that it clearly reaffirms the Court's traditional approach for determining how far a regulation can go before it constitutes a "taking." It will continue to look at the character of the governmental action -- the "legitimate state interest". But it will look harder when land dedications are at stake. The Court will also look to the economic impact of the questioned regulation on the claimant. Generally, it has been fairly hard for claimants to satisfy the

5/ Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) p. 415

Court about either issue. So while the risk to government and the general taxpayer is greater, particularly to Californians who have enjoyed judges much less willing to jeopardize the treasuries of our cities when the complicated matter of land use is involved and mistakes are made, we are in no different place concerning what constitutes at taking after First Lutheran and Nollan than we were before. Unfortunately that has been and continues to be a very uncertain and undefined place. Until the Supreme Court provides further guidance through future decisions on land use regulation cases, we can only speculate on the long-term impact of the First Lutheran and Nollan decisions. For the immediate, I believe the decisions will have four major impacts on government regulation of development.

First, the cases will generate considerably more litigation challenging government land use permits. This litigation will be generated for a variety of reasons. Just as we in government are left with uncertainty about the limits of our authority to regulate land use, the private sector is left with equal uncertainty. To provide the Supreme Court with the opportunity to further clarify its views, I am certain there will be challenges to most every type of condition over the next few years. Furthermore, since the Court has opened the door to monetary payments for temporary takings, I suspect that some attorneys are now going to be willing to take inverse condemnation cases on a speculative fee basis much like they handle liability cases. If my suspicions are correct, this will encourage legal challenges that would not otherwise be financially prudent for private property owners. For all of these reasons, one of the main impacts of the First Lutheran and Nollan decisions will be that a lot more private and public money will be spent on lawyers fees over the next several years.

The second impact of the decisions will be that government in general--and local government in particular--will become far more cautious in its approach to land use regulation. This will hurt in California more than in many other states because of our rapid growth, our fiscal policy and our tradition of allowing local government a wide latitude in addressing the many urban and rural problems presented when great numbers of folks want to use the finite resources of our state.

According to what I have read in the press, private property interests see this new caution as welcome way of stemming what they view as overzealous regulation. In contrast, environmental interests have characterized this cautiousness as having a "chilling affect" on environmental protection programs. However this change is perceived, there is little doubt that government land use regulators have begun thinking and rethinking every condition they impose on development permits.

At this point, we do not know what access requirements will satisfy the Court. So we have to guess. And if we guess wrong, the Court has opened to remote possibility that we may have to pay for our error. As I have noted, this possibility is remote. But local elected officials who are finding it difficult enough to pay for police and fire protection, repair their streets and keep their playgrounds open, may not be willing to expose their public treasury to even the remote possibility of having to pay an inverse condemnation claim. I suspect that local officials who have been philosophically opposed to land use planning restrictions will now become particularly vocal in using fiscal prudence to justify their opposition to development approval conditions.

The third major impact of the Court's decisions is that it will become far more expensive for government agencies to carry out their land use regulatory functions. In Nollan, the Supreme Court reaffirmed government's authority to impose a permit condition, but only if the condition will overcome an impact that is serious enough to justify denying the permit. The Court also admonished us to make sure the specific condition relates directly to the specific impact.

In land use regulation, we often deal with complex projects that have many types of adverse impacts. A project may generate traffic, be partially within an environmentally sensitive area, attract workers whose children will overcrowd schools and cause a host of other problems. In the past, based on our experience and observations, we accepted that development in general brought with it a variety of problems in general. Unfortunately, we can no longer rely on empirical data in our regulation of development because the Court has now required that we document the cause and effect of these problems with analytical data, planning studies and other such information. Moreover, we must document each of the multiplicity of problems, demonstrate that the problem alone is serious enough to justify denying a project permit, and establish how a condition will directly address that particular problem. It will take enormous amounts of money to pay for all of the planning studies, legal support and permit analysis that will be needed to provide the record necessary to support permit conditions.

It will also be necessary for government to better coordinate its capital spending with its planning and land use regulatory programs. In Nollan, the Court acknowledged that the Coastal Commission's plan for providing public

access along the beach was acceptable, but that the access easement should be gained through acquisition rather than through a permit condition. If we have to purchase public rights to reach public tidelands, it is essential that the acquisition programs administered by the California Department of Parks and Recreation, the State Coastal Conservancy, local park districts and other public agencies be in full conformance with the planning goals of our Commission, the Coastal Commission, local governments and other planning and land use regulatory agencies. Achieving this coordination will take time, cost money, and may require additional Legislative direction. But this focused effort is needed if government is expected to address the impacts of private development that have in the past been handled through permit conditions.

Finally, although these decisions have been hailed by developers and private property owners, I believe that the decisions will cause as many problems for the private sector as they will for public agencies. The litigation that will be stimulated by these decisions will be initiated and paid for by private interests. The salaries of the public attorneys and planners who will be needed to defend the lawsuits and prepare analytical data to justify permit conditions will be paid with taxpayer dollars. Formulating conditions and documenting the need for the conditions will take time and delay the issuance of permits. And most importantly, the decisions will generate additional tension and frustration between development proponents and the general public.

Throughout California we are seeing ever greater numbers of of citizen initiatives being passed to stop or slow growth. Despite planners' best efforts to deal with the complex problems brought about by growth, the general public has become increasingly dissatisfied with the planners' solutions. Up until recently, land use regulators had considerable flexibility to deal with these complex problems. The adverse environmental impacts of a project could be weighed against the benefits provided by a van pool program sponsored by the project developer. It appears that in the Nollan decision the Supreme Court has deprived government of considerable flexibility to come up with creative, economical and politically acceptable solutions to complex problems. Each impact of each project will have to be addressed in isolation. If government chooses to impose the sort of onerous conditions the Court suggested would have been appropriate for the Nollan house permit, the applicant will be dissatisfied. If government chooses to conclude that the problem, by itself, does not justify imposing a condition, the general public will become further dissatisfied as the cumulative impacts of development problems become apparent. Instead of formulating effective solutions, government will have to choose between ignoring problems and imposing unacceptable and possibly unworkable conditions. The inevitable result of this situation will be even more popular dissatisfaction with government efforts to responsibly manage growth and more citizens efforts to stop growth entirely.

STATE OF CALIFORNIA—THE RESOURCES AGENCY

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Testimony Before the

Senate Committee

on

Local Government

Presented by: Ralph Faust, Chief Counsel, California Coastal Commission

August 13, 1987

Senator Bergeson, Members of the Committee. My name is Ralph Faust. I am Chief Counsel of the California Coastal Commission. In my role as Chief Counsel, I advise the Coastal Commission and the Commission staff on legal matters affecting the implementation of the Coastal Act. My comments to you today, while reflecting the advice that I am giving to the Commission regarding the decisions in Nollan v. California Coastal Commission and First English Evangelical Lutheran Church v. County of Los Angeles, do not necessarily reflect the views of the Commission itself.

As we have scrutinized and evaluated the Nollan and First English decisions, we have concluded that, contrary to many of the pronouncements in the press immediately following these decisions, they are limited in their decisional scope. Far from heralding the end of governmental regulation of

land use, the Nollan and First English decisions explicitly recognize government's authority to regulate the use of land, even to the extent of denial of the use of a substantial part of an individual's property.

The Supreme Court, in Nollan, invalidated a Coastal Commission permit decision which required the dedication, as a condition of permit issuance, of a strip of land for lateral access along the beach. The Court clarified the level of justification that government must provide when it requires the dedication for public use of part of an owner's interest in property as a condition of development. It held that the standard of review that will be applied to determine whether such regulation will pass constitutional muster is whether it substantially advances a legitimate state interest. The Court indicated that to meet the "substantial advancement" test, an agency must show that the development which it seeks to regulate would cause (either individually or cumulatively) the impact which the condition is designed to alleviate, and, conversely, that the condition directly responds to that impact of the development. That standard may be contrasted with the "rational basis" test that has previously been applied by the courts in reviewing regulatory actions of the Commission and other governmental agencies. Agencies were previously required only to demonstrate a rational relationship between the project's impacts and the condition imposed. In effect, the Court held that the Commission was improperly mixing apples and oranges by allowing a negotiative type of trade-off between impacts and unrelated conditions. The

Court's new test, while changing the standard of review of decisions in California, will not generally require a drastic change in governmental land use planning and regulatory practices.

Similarly, First English makes a real change in the law to be applied in California, but one which is limited in scope. Properly viewed, it is a remedies case. Prior to this decision, California agencies were, in effect, permitted to "cure" regulatory decisions subsequently found to be improper takings, because the courts required only that regulatory action later determined to be invalid be repealed or revised. The Court has now said that financial compensation is required even when the taking is not permanent. Thus, the holding of First English requires, as a matter of federal constitutional law, that government now assume a financial risk when its land use regulation is subsequently found to be a taking. Left entirely unaffected by this decision, contrary to many of the press reports following upon it, is the standard to be applied in determining whether a taking has in fact occurred. The change in law, though very real, is not very broad.

Unless one is willing to, as one expert put it, "read tea leaves", this is the limit of these two decisions. Although some might find language in these decisions which hints at future change, the actual holding of a Court decision is determined by examining the standards prescribed in relation to the facts recited in that decision. Lawyers and legal philosophers may spend many hours

debating, for example, esoteric applications of the standard of judicial review under the "substantial advancement" versus the "rational basis" test. The widespread speculation as to how the Court in future cases might answer those questions here left unanswered is exactly that.

As this debate continues the Coastal Commission will face the practical challenge of implementing the directives of the Nollan decision. Consistent with my reading of the Court's ruling in Nollan, I will advise the Commission that its permit decisions will be closely scrutinized. The decision re-emphasizes what government agencies have known since the Topanga decision: that agency findings must explain the agency's action. Findings must detail the agency's analytical process and explain why the agency reached the conclusion to which it came. Nollan reminds us that the Commission must detail in its findings the impacts of a particular project and explain how those impacts caused by the project can be mitigated by the specific conditions imposed. If the Commission finds that a project's impact is not consistent with Coastal Act policies, and yet cannot devise conditions which mitigate that impact, or explain exactly how these effects can be mitigated by conditions, it may be compelled by Nollan to deny permits which it has been its past practice to approve. This result is clearly contemplated by the Court in the Nollan decision.

In closing, I would like to note that the Commission's imposition of access conditions has to date been routinely upheld by the California appellate courts. Access to and along the shoreline is a state policy rooted in the Constitution and mandated by the access policies of the Coastal Act. The Commission has implemented that access mandate in a manner which it believed was fully consistent with both the state and federal constitutions, as well as the Coastal Act. As noted, California courts have routinely held that the Commission has appropriately exercised the authority granted to it in the Coastal Act by the Legislature. Now that the Supreme Court has indicated that the federal constitution requires a different analysis, the Commission will discharge its access mandate accordingly.

Thank you for the opportunity to present this testimony on this critical public policy issue.

Q&A: Commentary on Changes in California Land Use Planning Laws
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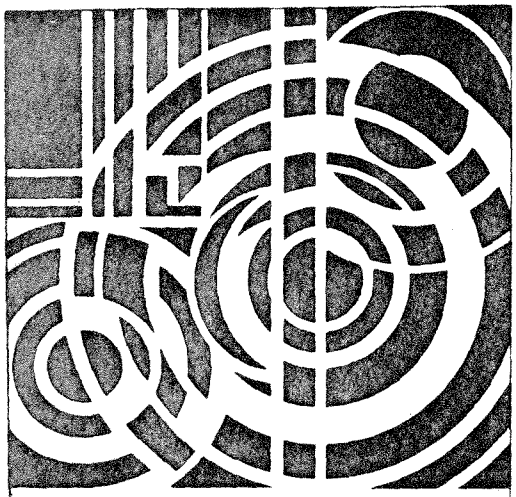

QUESTIONS & ANSWERS

DO THE DECISIONS HERALD A REVOLUTION IN LAND USE PLANNING AND REGULATION?

REGULATION OF LAND USE AFTER THE RECENT SUPREME COURT CASES

- *First English Evangelical Lutheran Church v. County of Los Angeles*
- *Nollan v. California Coastal Commission*

In June, the United States Supreme Court issued two major decisions concerning the regulation of land use by local governments:

- In *First English*, the Court said property owners are entitled to some compensation if their property has been "taken" by government regulation.
- In *Nollan*, the Court determined that a particular regulation requiring dedication of public access was in fact a taking because there was no relationship between the dedication and the project.

When first issued, these decisions were hailed by some as heralding a revolution in city and county land use planning and regulation. The two cases were seen by those observers as the most significant court decisions on private property rights since the early part of the century.

As land use decisionmakers, planners, and public attorneys have studied the opinions, however, a different view has emerged: neither Supreme Court decision alters government's fundamental power to regulate land use, and neither changes the basic rules defining when a land use regulation "goes too far" and violates the United States Constitution.

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This report was authored by Marc Mihaly and Clement Shute of the law firm of Shute, Mihaly and Weinberger, and by Larry Orman POS/GC Executive Director. The following persons served as advisors in reviewing the report, and their assistance is

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First English: The Remedy is Now Money

In *First English* 1/, a six-to-three vote of the Court decided a question lawyers have been quarreling over for several decades. The Supreme Court said that now, when a regulation is so oppressive that it crosses the constitutional line and becomes a taking, the landowner has a right to compensation for damages to the property during the time the offending regulation was in effect. Previously, the solution was to direct a local government to adopt a new regulation.

Contrary to early press reports about the case, the Court did not redefine where that constitutional line is; the Court did not hold that temporary ordinances or moratoria constitute a taking; and, the Court did not hold that landowners must be allowed to develop their land for its most profitable use. The decision leaves intact the traditional rule -- only regulations that deny a property owner all economic use and fail to advance clear public objectives will be overturned.

Nollan: The Development and the Dedication Must be Related

In *Nollan* 2/, the Supreme Court tested the California Coastal Commission's requirement that a beachfront property owner allow the public to use a portion of the beach for public access as a condition for building his house. On a close five-to- four vote, the Court reaffirmed a long-standing limit on actions by cities and counties which requires that conditions imposed on any development be designed to alleviate the problems created by that development.

The Supreme Court struck down the Coastal Commission's dedication requirement because the Court could not find any connection between the requirement and the problems to the public created by the Nollans' house. In doing so, however, the Court restated government's broad authority to regulate land for a wide variety of public purposes -- even when such regulations greatly reduce the value of private property.

Government Regulation and Private Property Rights: What is a "Regulatory Taking?"

These two recent Supreme Court decisions both deal with "regulatory takings." Governmental power to protect the public health, safety, and welfare (usually through zoning), and private property rights often conflict, and courts are called upon to adjudicate who wins. When courts side with the private property owner, they usually find that a "regulatory taking" has occurred. While such decisions are very rare, *the concept of regulatory taking defines the limits of what governments can do*, and is therefore of great importance to public decisionmakers and to professionals in the field of land use planning.

State, federal and local governments have the power through the exercise of "eminent domain" to take privately owned property for the use or benefit of the public. When the government exercises this power, it is constitutionally required to pay the property owner "just compensation" for the property taken.3/ For example, when government wants to acquire land for parks or highways, it must initiate condemnation proceedings to obtain title to the property in return for payment of the fair market value.

In contrast to a direct condemnation, an "inverse condemnation" may result when the government appropriates an interest in private property, or destroys or physically damages private property, without formally condemning the property and paying the property owner. Such governmental action is referred to as a "taking" of the property without just compensation. The property owner is entitled to damages in the amount of the fair market value of the property taken.

Neither decision alters government's fundamental power to regulate land use, and neither changes the basic rules defining when a regulation goes "too far"

Sometimes the taking is a *physical* invasion of property due to governmental action, such as inadvertent flooding from a nearby dam. However, a *regulatory* taking occurs if government oversteps its power to zone or plan.

Generally, government enacts such regulations to protect the public health, safety, and welfare. Land use controls and zoning ordinances which further these broad "police power" goals are presumed to be valid. Even land use regulations which drastically limit the activities that a private property owner can conduct on property, and substantially reduce the market value of the property, are usually not seen to be takings.4/

For example, single family zoning may make a parcel of land worth less than a quarter of what it would be worth if an apartment or a shopping center were allowed. Yet the single family zone does not constitute a taking. In fact, courts have upheld the validity of zoning ordinances that reduce the value of private property by as much as 90 percent.5/

Nonetheless, if a regulation "goes too far," it may become a regulatory taking.6/ The courts decide if a regulation amounts to a such taking on a case-by-case basis by looking at the following tests:

A taking has occurred if a regulation does not **substantially advance legitimate public interests** and deprives a property owner of **substantially *all* of the market value** or use of his land.7/ In this test, courts give wide

discretion to cities and counties to make judgments about what regulations are necessary.

A taking occurs if the regulation interferes with **"reasonable investment- backed expectations"** — a concept put forward by the United States Supreme Court but defined in relatively few cases. In fact, courts have been better at defining what does not constitute such expectations; for example, a landowner is not justified in expecting that the zoning on property will remain constant, and is not protected from changes in zoning laws.

A taking may occur when the regulation results in a **permanent physical occupation** of private property.8/ A physical occupation of property will, nonetheless, not be a taking if the physical occupation is a legitimate condition to a development permit — such as a requirement that a certain portion of a housing tract be dedicated to public park use. This is the test discussed in the *Nollan* case.

But despite much discussion in governmental and legal circles, the fact remains that only in extremely rare situations do courts find that zoning ordinances or other planning regulations actually step over the constitutional line and create a taking of private property.

FIRST ENGLISH :
What a Landowner Gets When a "Regulatory Taking" Has Occurred — The Rule Changes

What happens if a court determines that a state law or local ordinance fails these tests and that a regulatory taking of private property has occurred? Is the offensive ordinance simply invalidated, or must the government in addition pay damages to the property owner?

At least in California prior to *First English*, the only remedy available to a landowner for a regulatory taking was the invalidation of the unconstitutional regulation. Local government was not required to pay monetary compensation to the property owner.9/ In reaching this conclusion, the California Supreme Court weighed the benefits of compensating property owners against the chilling effect that rule could have on enactment of necessary measures to protect the public health, safety and welfare.

In *First English*, the Supreme Court changed this "no damages" rule. The *First English* case involved church property in a canyon that was subject to flooding. After a severe flood killed several persons and destroyed the buildings on the property, the County of Los Angeles enacted an interim ordinance creating a flood protection area and prohibiting rebuilding any structures there. The church sued the county, alleging that the regulation was a taking of its property. It did not request invalidation of the ordinance, but asked only that the Court award it damages.

The Court held that, when a land use regulation is a taking in violation of the constitution, the property owner is entitled to damages occurring from the time the unconstitutional ordinance is applied to his property until it is withdrawn by the public agency which enacted it.10/ If the agency chooses to keep the ordinance in effect, it has the option to use its power of eminent domain, pay the owner fair market value and acquire the property.

What the *First English* Case Did Not Say

The Court did not add any new law to the question of whether an ordinance constitutes a taking. The lower courts and the Supreme Court did not decide whether the flood protection ordinance destroyed the use or value of the property and did not decide whether it was a valid safety measure. The California courts, and therefore the Supreme Court, were concerned solely with the question of whether money damages would be available to the property owner if it were ultimately determined in a trial that a taking had occurred.11/ Ironically, it is unlikely that the Los Angeles ordinance is a taking under established law which is especially deferential to city and county ordinances enacted to protect life and safety.

A second misunderstanding about *First English* relates to the Court's use of the word "temporary." Some have taken the Court's opinion to mean that moratoria or interim ordinances constitute regulatory takings just because they are temporary prohibitions. While it so happened that the Los Angeles ordinance challenged in this case was a temporary ordinance, the Court's opinion would apply to any ordinance that violated the Constitution. In fact, temporary ordinances are not likely to violate the Constitution because they usually have a small effect on market value.

IN SUM: If -- and only if -- a taking by regulation can be proven, a landowner can now claim compensation for any value lost during the time the regulation affected his or her property.

NOLLAN :
The Supreme Court Decides That One Required Dedication Flunks the Constitutional Test

In *Nollan*, the Supreme Court looked at the constitutionality of one type of governmental regulation, namely, dedications of real property attached as conditions to development permits designed to lessen the adverse impacts of develop-

ment in the community. These dedications reflect the view that development should help take care of the increased burdens it places on society, such as increased traffic, need for park space, schools, police, and other services.

The Nollans are owners of beachfront property and wanted to replace a small cottage with a substantially larger and taller home. A state law, administered by the California Coastal Commission, requires public access to be a condition of permits under certain circumstances. The Commission, after reviewing the Nollans' application, determined that the larger home would block the public's view of the beach and diminish the public's awareness of the nearby coastline which is open to the public.12/

To offset these negative effects, the Commission required the Nollans to grant an easement to the public, consisting of a narrow strip of their oceanfront in between two adjoining public beaches. The Nollans sued, claiming that the permit condition was a taking.13/

By a five- to- four vote, the United States Supreme Court found that the permit condition constituted a permanent physical invasion of the Nollans' property rights which would constitute a taking unless the condition "substantially advanced" a "legitimate governmental interest." The Court concluded that the dedication didn't pass this test.

Nollan expressly affirms the validity of requirements for scenic protection, landmark preservation and zoning in general

The problem did not lie with the goal of increasing public access. The Court assumed that providing the public with visual and psychological connection to the beach was indeed a legitimate governmental goal. However, the Court concluded that requiring the Nollans' to dedicate an easement for public access along the beach had no relationship to any problems created by the new house they wished to build -- the Commission's condition "utterly failed" to address the problem of interference with the goal of public views to the ocean which might result from construction of the home.

The *Nollan* decision recognizes the broad scope of governmental authority to regulate land use. It expressly reaffirms, for example, the validity of requirements for scenic zoning, landmark preservation and zoning in general. It also strongly suggests (while not expressly deciding) that development near beaches could be denied altogether where it blocks views, or creates psychological barriers to beach access, or promotes congestion on public beaches so long as the denial does not deprive the owner of all economically viable use of the property.

Significantly, the *Nollan* Court even endorsed requirements for dedication where they do address the burden created by the particular project. The Court stated that the Commission could properly require dedication of a viewing area on the Nollans' property as a condition of permit approval since such a viewing area would substantially advance a legitimate governmental interest in preserving the view of the beach and ocean which might be wholly or partially blocked by the Nollans' home.

It is unclear whether the *Nollan* test applies to any conditions other than dedications of real property. The reasoning of the Court appears limited to physical appropriations of real property which eliminate the owner's right to exclude others. The opinion may not apply to requirements for in lieu fees or other exactions, such as payment for or construction of capital improvements. The test for such monetary exactions may remain as before *Nollan*. The remedy in the event such monetary exactions are judged irrational appears to remain invalidation.

IN SUM: Exactions on development must address a problem created or contributed to by the development, or the cumulative effects of development. The dedication in Nollan *failed the test because the Court could find no connection between the problem -- a large house blocking the public's views to the beach from the inland -- and the condition -- allowing the public already on the beach to walk in front of the house.*

Questions and Answers About the Cases

What Constitutes a Taking?

Q. What is an example of a regulation that would be a taking of private property without just compensation?

A. A zoning ordinance that made someone's property into a public park -- that is, that required the property owner to admit the public, without charge, to his or her property for recreational use.14/

Q. If a town enacts an emergency interim ordinance prohibiting certain uses of property, to protect against an immediate threat to the public health and safety, such as flood danger or other hazards, is that a taking of private property?

A. No. As discussed above, the interim nature of an ordinance does not lead to the conclusion that a taking has occurred. More important, actions taken to protect the public health and safety -- rather than the public "welfare" concerns

(such as density of housing) -- may be much more harsh if necessary to protect life and property. A fire department, for example, may in an emergency destroy a house to prevent the spread of the fire without paying for it. This stems from the legal concept that one may not use one's property in a manner that poses danger to life or property.15/

Q. If a local government enacts a temporary moratorium ordinance prohibiting the issuance of building permits to maintain the status quo for a reasonable period (for example, two years) and to enable the city or county to proceed with planning to address concerns about the impacts of increased development, is that a taking of private property rights?

A. No. *First English* did not single out temporary moratoria for special treatment. The usual takings tests apply, and it is unlikely that a temporary moratorium undertaken for planning purposes would meet the requirements for a taking.16/ Although a moratorium could temporarily depress property prices, such fluctuations usually fall far short of destroying "substantially all" the market value of property and are constitutionally permissible.

Q. If a local government enacts a slow-growth ordinance limiting the number of building permits to be issued per year, is that a taking of private property rights?

A. Not unless the "slow growth" ordinance is so restrictive as to constitute essentially "no growth." If an ordinance were so restrictive that a landowner could demonstrate that the waiting period for development was so long that the property had been deprived of substantially all its value, a taking could be established. Even if residential or commercial development were permanently prohibited but the property could be used for a beneficial use such as agriculture, a taking would not have occurred.

Q. If a local government enacts an ordinance halting development until a certain service level (such as sewer capacity, schoolroom capacity, street improvements) is attained, is that a taking?

A. Such ordinances should be carefully drafted and enacted only after thorough study. As long as there is a probability that development will be permitted in the short-term future and that the designated level of service goals are reasonable, the ordinance will survive a takings attack. A connection must also exist between the halted development and the stated community problem (e.g., traffic). In constrast , a development moratorium of indefinite duration attached to goals for community service levels that are obviously unlikely to be attained could constitute a taking.

Q. If the voters of a community pass an initiative measure to temporarily halt development in their area, is that a taking?

A. The fact that an ordinance is passed by initiative does not change the applicable constitutional standard. As discussed above, a temporary halt on development is unlikely to ever be a taking because it usually has only a small effect on market values.

Q. Is a down-zoning of land — such as from rural residential to exclusive agricultural, or from intensive residential to less intensive residential, or from commercial to residential uses — a taking?

A. Changing the zoning designation of a parcel does not become a taking simply because the designation is for a less intensive use. In order to constitute a taking, the new zone would have to be so restrictive as to violate one of the tests discussed above, including depriving the land of substantially all its value 17/.

What Are the Implications of First English?

Q. Does *First English* increase the likelihood that a land use regulation would be found to be a taking?

A. No. The case does not discuss the criteria for how to analyze whether a taking has occurred. It does not change the test for the validity of a regulation. In particular, California law holding that temporary interim regulations and downzonings are not takings is unaffected by the decision.

Q. Does *First English* mean that a local government must zone real property to allow the use potentially most profitable to the owner?

A. No. The test for a regulatory taking is still whether the governmental action deprives the owner of substantially all reasonable use of the property, or substantially all economic value. Unless there is a physical invasion, any regulation that leaves the owner some reasonable use or economic value will be upheld. The *First English* decision does not address this traditional test or change it in any way.

continued

How Will Damages For Takings Be Determined?

Q. Now that local governments are liable for damages for regulatory takings, will they face liability for damages for regulations already enacted?

A. Theoretically, governments would be liable for damages for an existing regulation if the property owner can prove in court that the regulation has deprived him or her of substantially all reasonable use of the property. In practice, it is likely that there will be some cases. However, statutes of limitations, which require litigants to bring their claims to court within a certain period of time after they learn they have a claim, may limit the amount of litigation over existing regulations. The more significant issue lies in the future, as landowners consider whether to challenge new regulations or permit conditions.

Q. What will be the basis for evaluating the amount of the interim damages required under *First English*?

A. Interim damages might be calculated according to traditional practices in eminent domain proceedings. For example, interim damages in condemnation proceedings often focus on the rental value of the property interest taken for the period of time in which it was occupied. The specific application of these principles to regulatory takings will have to evolve over time and may involve legislation specifying procedures to be used to determine any damage awards.

What Are the Implications of Nollan*?*

Q. Has *Nollan* changed government's ability to impose quid pro quo requirements in connection with land use development approvals?

A. No. The court reaffirmed the ability of government to impose conditions ("exactions") on development as long as those conditions address the problems that development creates. The development does not need to be the sole source of the problem, nor does the fit between the developer's contribution to the problem and the developer's contribution to the solution have to be precise. Sound planning would dictate that a staff report, an environmental impact report, or other document describe the nature and extent of the burden created by the development and the way in which any proposed exaction addresses the burden. Formal findings should be made to demonstrate the linkage between the the conditions imposed on and the impacts of development. After *Nollan*, it is important that these practices be followed carefully -- especially in connection with exactions involving dedications of real estate.

Q. Does *Nollan* affect the validity of governmental requirements other than the dedication of real property, such as the imposition of in lieu fees or the provisions of on- or off-site public facilities?18/

A. *Nollan* may not apply to exactions other than those requiring dedications of real property. If *Nollan* were to apply, an in lieu fee would be constitutional as long as it relates to a problem caused by the development and is in reasonable proportion to the impact of the development. In California, it is always advisable that fees which address community-wide problems be supported by documentation which connects the development project to those problems.19/

Q. Did *Nollan* change the law of takings?

A. Not significantly. As a result of *First English* , government must compensate a landowner for a regulation or exaction which "goes too far" for any damages to the property for the period of time that the regulation affected the property. *Nollan* applied the takings rule in a specific instance involving the dedication of real property. Under *Nollan*, when there is no clear connection between the public burdens imposed by a particular land use approval and the required dedication of real property, there may be a taking. Under *First English*, cities and counties would then be required to compensate the landowner for the damage to the property for the period of time that the dedication was actually in effect.

Q. Will the following types of dedications be valid after *Nollan* ?

...Roads in a subdivision?

A. Yes. Land dedications for such uses as roads, sidewalks, and schools should easily satisfy the requirement that they address a burden created or contributed to by the development.

...Public parks?

A. Yes. Park dedications inside a subdivision should easily pass the requirement. Dedication of park lands adjacent to a project or at some other location would be supportable as long as they are reasonably in proportion to the needs generated by the effects of the project. In lieu fee contributions are discussed in a question above.

...Viewing easements?

A. Yes. The *Nollan* court specifically mentioned the possibility of conditioning development approvals on the creation of a public viewing area on private property in order to protect the public's view. The court indicated that such a requirement would be valid even though it involved a conveyance of an interest in real property -- if it offset the obstruction of the view to the beach caused by the development.

...Open space easements which prevent development on portions of private property?

A. Yes. Dedications for either passive or active open space uses would survive the *Nollan* test as long as they meet open space needs created individually or cumulatively by the development. To the extent development would damage or destroy open space resources such as creeks, unique vegetation or wildlife habitat, dedications should be upheld if the owner is allowed a reasonable use elsewhere on the property or is able to transfer development rights. Likewise, where dedications are required to allow development on hazardous areas such as unstable slopes, areas prone to slide or earthquake faults, they should be sustained if the owner is otherwise allowed a reasonable use.

Q. Does *Nollan* affect the validity of assessment districts created for funding improvements such as flood control, drainage, or roads?

A. No. Again, *Nollan* may apply only to dedications of interests in real property. Even if *Nollan* were to apply to assessments or other fees in connection with districts, there is usually a very close connection required between the burdens imposed by the new development and the creation of an assessment district to pay for necessary improvements.

NOTES

1. *First English Evangelical Lutheran Church v. County of Los Angeles* 107 S.Ct. 2378 (1987).

2. *Nollan v. Coastal Commission* 55 U.S.L.W. 5145 (June 26, 1987).

3. United States Constitution, 5th Amendment. California Constitution, Article I, 19.

4. See, e.g., *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508 (1975).

5. *William C. Haas Co. v. City of San Francisco*, 605 F.2d 1117, 1120-1121 (9th Cir. 1979), cert. den. 445 U.S. 928 (1979).

6. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413-14 (1922).

7. *Agins v. Tiburon*, 24 Cal. 3d 266 (1979), aff'd *Agins v. Tiburon*, 447 U.S. 255 (1980).

8. See *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

9. *Agins v. City of Tiburon*, 24 Cal. 3d 266 (1979). See *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

10. The Court explicitly refrained from "resolv[ing] the takings claim on the merits." 107 S.Ct. at 2384. It "ha[d] no occasion to decide whether the ordinance at issue actually denied appellant all use of its property" or not. Id.

11. The Court did not explicitly state when the "taking" would begin. For example, where a procedure for receiving a permit is provided, a property owner would have to go through that process and be turned down before a taking could have occurred. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

12. The Commission also found that the larger residence would increase private use of the beach, contributing to the public beach users' impression that they had no right to use the strip of beach and tidelands seaward of the private property line. Increasing the size of the house could also create congestion on the public beaches. In addition, the Commission found that increased private use of the beach might fuel disputes between the public and the private owners over the boundary line. However, the Court's opinion does not focus on these findings.

13. Specifically, the Nollans argued that the dedication required them to give up the right to exclude others from the property, and that the condition could not be justified since the new home would do nothing to interfere with public access.

14. Zoning for commercial recreation areas is valid, however. Activities such as amusement parks, golf courses, tennis clubs, etc. may or may not be open to the public at the discretion of the owner, give land substantial economic value, and are not a taking. See *Freedman v. Fairfax*, 81 Cal. App. 3d 667 (1978).

15. See, e.g., *Turner v. County of Del Norte*, 24 Cal. App. 3d 311 (1972) (zoning restrictions that protect people and property from flooding are a proper exercise of the police power).

16. An interim measure restricting or halting construction pending further land use planning is not a taking. *State v. Superior Court*, 12 Cal. 3d 237, 254-55 (1974); *CEEED v. California Coastal Zone Conservation Commission*, 43 Cal. App. 3d 306, 314 (1974).

17. See for example, *Joyce v. City of Portland* 546 P.2d 1100 (Ct. App. Or. 1976) where 800 acres were downzoned from agricultural to residential; and *Gisler v. County of Madera*, 38 Cal. App. 3d 303, 112 Cal. Rptr. 919 (1974), where exclusive agricultural zoning was held not to be a taking.

18. For example, a local government may require developers to pay fees for school facilities as a condition of development of residential subdivision (see *Candid Enterprises, Inc. v. Grossmont Union High School Dist.*, 39 Cal. 3d 878 (1985)) or to pay special assessment for public improvements necessitated by new development (see *J.W. Jones Companies v. City of San Diego*, 157 Cal. App. 3d 745 (1984)).

19. Fees which fail that test could be held to be a special tax under Proposition 13 and related law.

continued from front page

gratefully acknowledged. Responsibility for the report's accuracy, however, rests solely with its authors.

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STATEMENT OF J. LAURENCE MINTIER
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ON BEHALF OF
THE CALIFORNIA CHAPTER
OF THE AMERICAN PLANNING ASSOCIATION

"The Limits of Land Use Regulation"
Senate Local Government Committee
August 13, 1987

Madame Chairman and members of the Senate Local Government Committee, I am Larry Mintier of Mintier & Associates, Planning Consultants. I am here representing the California Chapter of the American Planning Association. My comments principally concern the possible impacts popular perceptions of the First English and Nollan decisions will have on local planning and land use regulatory programs.

Based on my reading of the two decisions and numerous commentaries on the cases, it seems there is more smoke than fire in these two court decisions. But just as the smoke from a fire is more often fatal than the fire itself, the popular perception (or misperception) of these two decisions will have a greater impact on local planning and land use regulation than will the decisions themselves.

In a strictly legal sense, these two decisions do not appear to change the basic rules of local land use planning and regulation. The First English decision told us only the remedy for a taking; it did not redefine what

constitutes a taking. The Nollan decision told us little more than what we already knew, or should have known--namely, that development conditions must advance a legitimate public interest and logically relate to the identified problems they purport to address.

Again, in a strictly legal sense, nothing seems to have changed. Still, as before these decisions were handed down, governments can plan, zone (even downzone), control growth, abate nuisances, impose conditions on development approvals, and enact moratoria. To the extent that local planning and regulatory practices were in compliance with constitutional, statutory, and case law prior to these two decisions, no changes should be necessary as a consequence of these decisions.

Had these decisions not been so sensationally reported and misinterpreted by the press, local governments would have felt less compelled to change the way they were conducting business. The problem is that the decisions were given front page status and were generally misreported in the early days after they were announced.

Immediately following the announcement of these two decisions, local governments all over California began receiving letters and telephone calls from property owners, developers, and attorneys citing First English and Nollan and threatening legal action if their projects were not approved or if local plans and regulations affecting their property interests were not

changed. As lay people, property owners can be excused for misunderstanding what the Supreme Court said in these two cases. The attorneys know better--or at least should.

One of my client cities just completing a comprehensive general plan revision received a letter in early July in which an attorney representing a major property interest in the community cited both First English and Nollan in support of his claim that his client had not received fair treatment and had experienced major delays in the city's 2-1/2 year-long general plan revision process. He concluded that the city's general plan process had "severely compromised [his] client's development rights" and that "such extraordinary delays require monetary compensation because they represent a clear taking of private property". He went on to say that "[a]s the two recent U.S. Supreme Court cases regarding land use point out, public actions, such as scenic ridgeline [policies], can be justified only when the public pays for the development rights, which are restricted by such policies." Incidentally, the subject property is outside the city limits.

Most cities and counties in California have probably received similar letters in the past two months.

Without a doubt, the popular perception of the First English and Nollan decisions has had and will continue to have a major impact on local planning and land use regulation. Already, one northern California court has

required a city planning commission to make additional findings based on the Nollan decision supporting development conditions it had imposed on a project.

The Board of Supervisors of one California county in the final stages of a comprehensive general plan revision recently authorized a $100,000 supplemental general plan budget allocation for additional legal review of their draft general plan and for economic analysis of takings claims based on the First English and Nollan decisions.

Local officials are understandably nervous about the possibility that they may have to pay compensation for takings. The costs could be enormous and the impact on the local budgets disastrous. Local officials are probably just as concerned about the cost of the litigation itself. Win or lose, lawsuits are expensive for local governments. The City of Santa Cruz spent nearly a half million dollars defending its 1979 Measure O greenbelt initiative in federal court against a takings claim. The city won, but at a staggering cost to the city treasury.

Because of the lawsuits that will inevitably be filed based on the First English and Nollan decisions, local officials may be confronted with the choice of defending themselves in cases where they may prevail if they spend enough money or watering down regulations or making concessions to

property owners and developers who threaten litigation. This is a "lose-lose" proposition for both local governments and the citizens they represent.

Out of fear of litigation, local governments may respond in several ways:

1. Local governments will probably spend more time and money having their attorneys review land use plans and regulations before adoption to ensure compliance with constitutional and statutory requirements.

2. Elected officials, planning commissioners, local planners, and public agency attorneys will probably spend more time drafting findings and preparing documentation to support the conditions they impose on development approvals.

3. Local officials may not enact useful and needed land use regulations even where the community wants them and the local government has solid legal grounds for doing so.

4. Local governments may make greater concessions to property owners and developers in the development review and approval process. In some of these cases, local governments may assume a larger share of the responsibility for financing public services and improvements or simply settle for a lower level of service.

5. In some areas, local governments may substitute incentive programs for regulatory measures to secure needed or desirable services and facilities. For instance, a local government might grant a density bonus to residential projects that include child care facilities in lieu of requiring the developer to construct such facilities or to make an equivalent financial contribution. Local governments may also rely more on density techniques such as clustering and transfer of development rights.

While there are likely to be some positive results of the First English and Nollan decisions in terms of improving and tightening up the local land use planning and regulatory process, local governments will waste a tremendous amount of the agencies' time and the public's money defending themselves in court and trying to avoid litigation based on these two decisions.

In the First English and Nollan decisions, it is the smoke, not the fire, that we need to be concerned about.

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