

TAKINGS CLAUSE—TAKE THREE

BY DAVID L. CALLIES

... nor shall private property be taken for public use, without just compensation.

—First Amendment

Breaking a 65-year silence, the U.S. Supreme Court decided three cases this term construing the balance between private property rights and local land-use regulation under the Fifth Amendment.

The first, *Keystone Bituminous Coal Association v. DeBenedictis*, 107 S.Ct. 1232 (1987), deals solely with the "taking" issue and the heavy burden placed on a landowner who claims that a land-use regulation works an unconstitutional taking of property. The second, *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S.Ct. 2378 (1987), decided on very narrow grounds, skips over the "taking" issue altogether, but finds compensation potentially available for temporary regulatory takings in which all use of the land is prevented by governmental regulation.

The third, *Nollan v. California Coastal Comm'n.*, No. 86-133 (June 26, 1987), upheld fees, exactions and dedications levied by local government as conditions on land development, provided there was an "essential" or rational nexus between the condition and the development-caused problem which the condition addressed. In context, these three decisions represent a watershed in property rights under land-development regulations.

BACKGROUND

Since the U.S. Supreme Court's famous decision in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), federal and state courts have wrestled with the application of the Fifth Amendment to laws that restrict the use of land. In *Pennsylvania Coal*,

David L. Callies is professor of law at the University of Hawaii and vice chair of the ABA Section of Urban, State and Local Government Law.

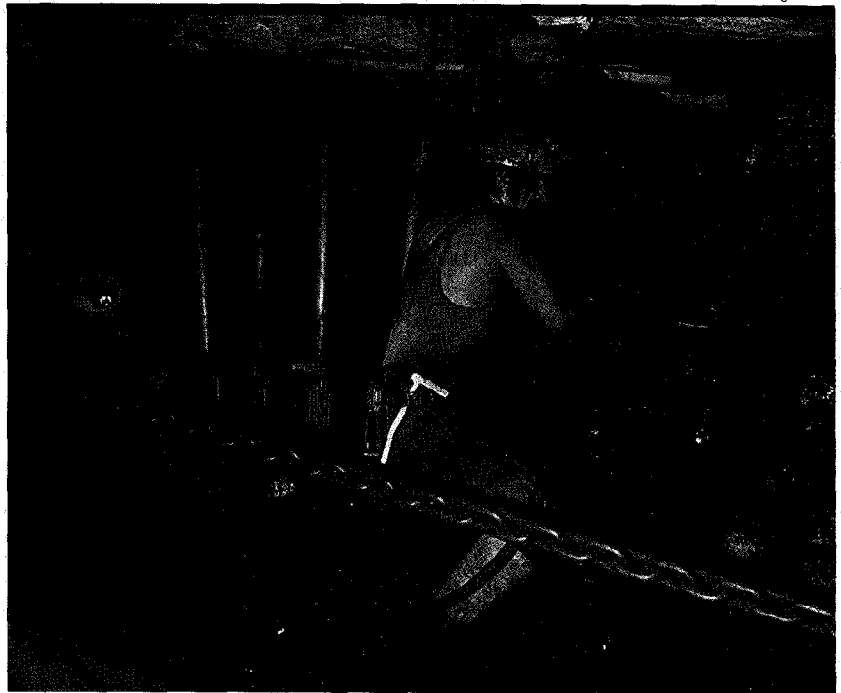


Image Bank

In Pennsylvania, half of coal beneath protected structures must be kept in place to provide support and cannot be mined.

Justice Holmes suggested that a regulation, if it goes too far, could amount to a taking.

Over the following half-century, when the Court heard no land-use cases of substance, state courts whittled away much of the decision's chilling effect on land-use regulation and concentrated on refining the regulation of land use approved by the Court in *Village of Euclid v. Ambler Realty Corp.*, 272 U.S. 365 (1926). However, beginning in 1978 the Court accepted a series of cases addressing the key issues raised in *Pennsylvania Coal*: (1) When has a regulation gone "too far"? and (2) Is compensation an appropriate remedy, once the "too far" has been reached?

Until this past term the Court consistently put off resolving either issue, erecting a formidable array of procedural and ripeness barriers to reaching the merits either of the taking issue or the compensation issue. In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the Court decided that there

was no "bright line" pointing the way toward a regulatory taking determination, and the process was entirely ad hoc. The test of *Pennsylvania Coal* weighed the public health, safety and welfare goals served against the degree of property value diminution.

In *Williamson Co. Regional Plan. Comm'n. v. Hamilton Bank*, 473 U.S. 172 (1985), the Court refused to reach the taking or compensation issues because the landowner failed to take advantage of state inverse condemnation procedures or to seek and be denied enough local land-use permits and permissions so as to permit an accurate assessment of how far local land-use regulations had devalued the property. And in *McDonald, Sommer & Frates v. County of Yolo*, 106 S.Ct. 2561 (1986), the Court characterized Holmes' "regulatory taking" language as a "notion" and affirmed that without a "final and authoritative determination by local government on the application of its land-use regulations to private

INTENTIONAL BLANK

INTENTIONAL BLANK

CompuLaw.

Fiscal fitness to help
make your firm
richer and more
rewarding.

Attorneys have perhaps the most complex billing and time management requirements of all professionals. Which is why so many law firms today rely on software from CompuLaw to help them take control of their time keeping and billing.

Designed expressly for lawyers by lawyers, the CompuLaw Client Management System™ will help your law firm to decrease unbilled time, increase billable time and cash flow, and improve record control and client relations. And that should make your firm richer.

This flexible system can store information for up to 40 attorneys, 40 case types and 200 service codes. And because the system is menu-driven and self-prompting, it's easy to learn and use.

CompuLaw also offers Legal Ledger™ software to computerize your general ledger, and Docket Calendar/Critical Dates™ software to computerize your calendar. And Remote Entry/More Reports™ software allows entry from multiple "remote" computers and offers 10 management reports critical to the efficient operation of your firm's billing.

Call 1-800-872-7022, ext. 716.

If you're the person responsible for your firm's financial performance, send for our free kit of CompuLaw sample reports. Call now 1-800-872-7022, ext. 716, or mail the attached postage-paid card. CompuLaw could make your firm more rewarding, too!

SEARS Business Systems Center



Circle 76 on Reader Service Card

Supreme Court Report

property" it could not reach either the taking or compensation issues.

But in 1987, the Court decided it finally had three cases in which it could address the merits of the taking and compensation issues.

THE TAKING ISSUE

Keystone Bituminous Coal Ass'n. v. DeBenedictis makes clear the extent to which the Court is rethinking *Pennsylvania Coal*. The majority relegates its precedential value to regulatory taking situations in which property values have been reduced virtually to nothing or in which legitimate investment-backed expectations have been wholly frustrated by exercises of the police power. Even then, the state may act to protect public health, the environment and "local fiscal policy."

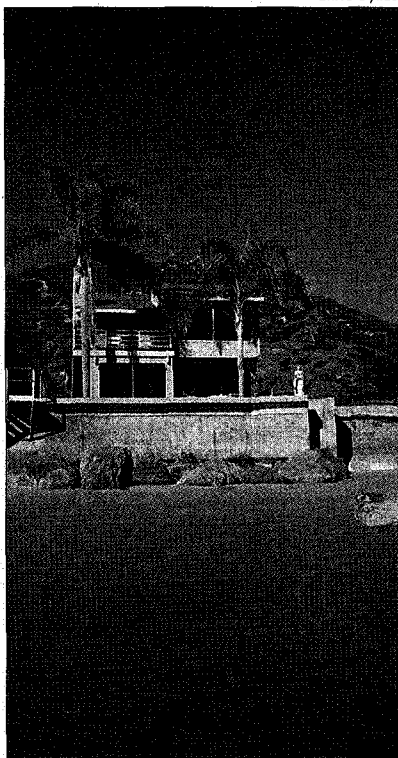
Since 1966, Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act has prohibited mining that causes subsidence damage to public buildings, homes and cemeteries. The State Department of Environmental Resources requires that 50 percent of the coal beneath such protected structures be kept in place in order to provide that support. Keystone Bituminous Coal Association alleged that the act takes their (private) property without compensation, in violation of the Fifth and 14th Amendments.

First, the Court distinguished *Pennsylvania Coal*. In that case, said the Court, Holmes was dealing with a 1921 statute designed to protect private property (a single home). The damage complained of was "not common or public," so could not be sustained as an exercise of the police power.

The Court then characterized Holmes' discussion of the general validity of the Act as an "advisory opinion." But here, said the Court, the 1966 Subsidence Act is directed at what Pennsylvania perceives to be a significant threat to common welfare, not the protection of a single private house.

Second, in acting to protect the public interest in health, the environment and the fiscal integrity of the area, the state is exercising its police power to abate activity akin to a nuisance.

The Court then cited *Mugler v. Kansas*, 123 U.S. 623 (1887), *Ply-*



Nollan beachfront home

mouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914), and *Miller v. Schoene*, 276 U.S. 272 (1928), as proof that the Supreme Court has repeatedly upheld regulations that destroy or adversely affect real property interests if the state's interest in the regulation was, as here, strong enough. Therefore, the Court said, *Pennsylvania Coal* was consistent with these cases.

Third, and most important, the Court characterized the association's deprivation of property rights as not sufficiently significant to satisfy the "heavy burden placed upon one alleging a regulatory taking." The plaintiffs claimed that the Subsidence Act forced them to leave 27 million tons of coal in place as support. Because they owned it but could not mine it, they claimed this resulted in an unconstitutional taking of private property. The Court rejected the claim on several grounds.

The coal in place does not represent a separate segment of property for takings law purposes, the Court said. It refused to concentrate on these separate pillars of coal as distinct property rights, observing

that it has consistently held that when an owner has a full bundle of rights, the destruction of one strand is not a taking. As the Court observed in *Penn Central Transportation Co. v. City of New York*, takings jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.

The record indicated that only 75 percent of plaintiffs' underground coal could be mined profitably. The Court found that the plaintiffs had not shown that their reasonable investment-backed expectations had been materially affected by the duty to retain the small percentage needed to support the structures protected by the act.

And even though Pennsylvania law apparently regards the support estate as a separate interest in land (and if so construed, the taking of property rights certainly appears to be greater) the Supreme Court is not bound by that construction: "Our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights."

In any event, the support estate only has value if viewed in conjunction with the rest of the estate. There was no indication that the plaintiffs could not mine profitably even if the Subsidence Act prevented them from destroying or damaging surface structures.

Even accepting the association's theory that the support estate should be viewed separately, the Court would reject the takings claim because it did not show what percentage of the support estate had been affected by the act. The Court found the coal companies retained far more support estate than they were required to leave in place under the Subsidence Act.

Under *Keystone*, then, in order to successfully challenge a land-use regulation on its face as a regulatory taking, a landowner must show (1) it is not merely difficult, but impossible to make a profit on the land as restricted, and (2) the regulation does not serve a legitimate, general and substantial public interest in the health, environment and fiscal integrity of the area.

In *First English Evangelical Lutheran Church v. County of Los*

Angeles, the church sued the county over an interim ordinance that prohibited most development on its property. Flooding had destroyed the church's summer camp, and the county had temporarily designated the property, located along a creek, as a flood protection area. The California courts held that the remedies available for deprivation of use of land by ordinance were declaratory relief or mandamus. The church sought only damages.

THE COMPENSATION ISSUE

The U.S. Supreme Court reversed. For the first time it held that compensation may be an appropriate remedy for total regulatory takings. But that's all it held: "We merely hold that where the government's activities *have already* worked a taking of *all 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.)

But that's enough to raise the decision to the status of landmark. The Court had never before decided that money was a potential landowner remedy when government regulations severely restrict private land use.

It is possible that the policy implications of the decision are as "obvious" and "far reaching" as the dissenting justices claim: "Cautious local officials and land-use planners may avoid taking any action that might later be challenged and thus give rise to a damage action. Much more important regulation will never be enacted, even perhaps in the health and safety area."

But that is not what the Court held. The Court did not grant money damages to anyone. It sent the case back to California simply because it interpreted the California courts to have forbidden money damages for government regulations that temporarily deny an owner all use of its property.

The Court did not say that floodplain controls—or any other land-use controls—take property. Therefore, this decision has no value in determining what is or is not a regulatory taking of property. It says only if an ordinance temporarily denies all use to a landowner—that is, assuming the

difficult ripeness and balancing barriers to proving a regulatory taking have been surmounted—and no use is left (a stricter standard than *Key-stone's* "all economic use," note) a state court may not forbid compensation as a remedy.

The Court did not say that, if

floodplain controls do take property, the owner is entitled to money damages: "We have no occasion to decide ... whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as part of the state's authority to enact

XEROX

When the evidence is overwhelming, turn the copying over to your local Xerox Reproduction Center

Cut excessive on-site copying costs. FREE copying analysis.

In-garage copying. Full confidentiality. Extraordinary service.

1-800-TEAM-XRX Ask for XRC

Supreme Court Report

safety regulations."

In other words, a court could still decide that even the most grievous effects on private property values are justifiable if the public need for the regulation is sufficiently dire, as the Court held in *Keystone*.

What are the implications for state and local government, now that state courts may not forbid compensation as a remedy for temporary regulatory deprivation of all private land use?

If a state or local government should zone land "park" and forbid all land use, then if (as is likely) a court should find the state or county regulation results in an unconstitutional taking, damages are available for the period from the application of the regulation to the property to the date of the court decision.

The finding of a regulatory taking is likely because, under *Keystone*, the Court sets great store by the health, environmental and safety

need for the regulation (and there is little of any of the above in the case of a park) and the extent of the economic use left, which, presumably, would be none in the case of a park.

Virtually all other land-use ordinances, plans and permit decisions are left intact by the *First Lutheran* decision, as the Court makes clear. "We limit our holding to the facts presented [Here we must assume that the Los Angeles County ordinances have denied appellant all use of its property for a considerable period of years, and we hold that invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy] and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, change in zoning ordinances, variances and the like which are not before us."

The U.S. Supreme Court appears

to have given its collective blessing to impact fees, dedications, exactions and other conditions on land development in *Nollan v. California Coastal Commission*. Typically, an impact fee, dedication or exaction is a condition imposed on a development to provide for public facilities, the need for which is generated by that development.

CONDITIONS ON DEVELOPMENT

If there is sufficient authority to impose a condition, courts commonly address the relationship between the development upon which the condition was placed and the purpose for which the condition was imposed. Generally, courts have used three approaches to weigh the reasonableness of this relationship:

▶ The "rational nexus" test, as applied in Florida and the majority of jurisdictions. This test has two parts. First, the particular develop-

THE 1099 B EXPRESS LTD.SM
P.C. COMPATIBLE 1099B SOFTWARE

• Prepare
1099 B In House
 and file directly with I.R.S.
 on standard 5¼" floppy disks

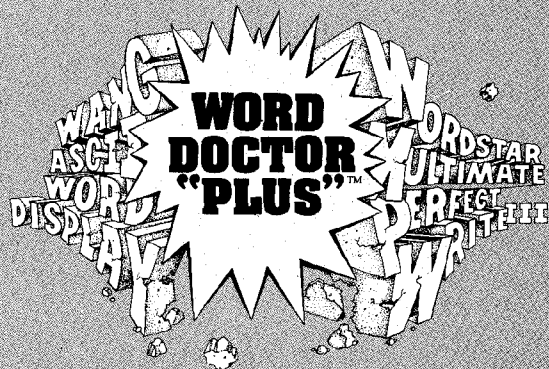
I.R.S. SPECIFIED FORMAT FOR MAGNETIC MEDIA COMPLIANCE
 AVOID EXPENSIVE SERVICE BUREAUS

TO ORDER CALL
1-800-225-5669
 7 DAYS A WEEK

\$99.95
COMPLETE
 plus \$7⁰⁰ S/H

THE 1099B EXPRESS, LTD.SM
 144 EAST CENTRAL AVENUE
 PEARL RIVER, NEW YORK, 10965

Circle 10 on Reader Service Card



BREAKTHROUGH IN DOCUMENT COMPATIBILITY!

Convert popular word processing documents cleanly and completely with **The Word Doctor "PLUS"**,™ the only conversion software that offers direct import into and out of Wang VS and OIS systems through Wang's new WITA structure. Wang, WordStar, MultiMate, WordPerfect, DisplayWrite III (DCA) and ASCII files are now compatible with each other. That's true document compatibility... and it's Wang approved!



MCS Group, Inc.

2463 W. Chicago
 Rapid City, SD 57702
 (605) 341-6755

Authorized **WANG**
 software developer

Circle 69 on Reader Service Card

ment must create a "need," to which the value of the exaction, dedication or fee bears some roughly proportionate relationship. Second, the local government must demonstrate that the exaction, dedication or fee will be used for the purpose levied.

▶ The more restrictive "specifically and uniquely attributable" test, used, for example, in Rhode Island and Illinois. The need for the exaction, dedication or fee must be "uniquely and specifically attributable to a particular developer or development, and no other factor."

▶ The least restrictive—indeed generous—"reasonable relationship" test, applied mainly by the California courts, who will generally uphold exactions, dedications and fees as a condition of land-use approval where: (1) the municipality is acting within its police power; (2) the conditions have a reasonable relation to the public welfare; and (3) the municipality does not act in an arbitrary manner.

Decided on the last day of the Court's 1986 term, *Nollan* deals ostensibly with beach access. The California Coastal Commission required that landowners dedicate to the public, for lateral beach access, much of their backyard before receiving a permit to rebuild a beach house into a permanent residence. The California Court of Appeal had held this was a valid exercise of the commission's police power under its statutory duty to protect the California coast.

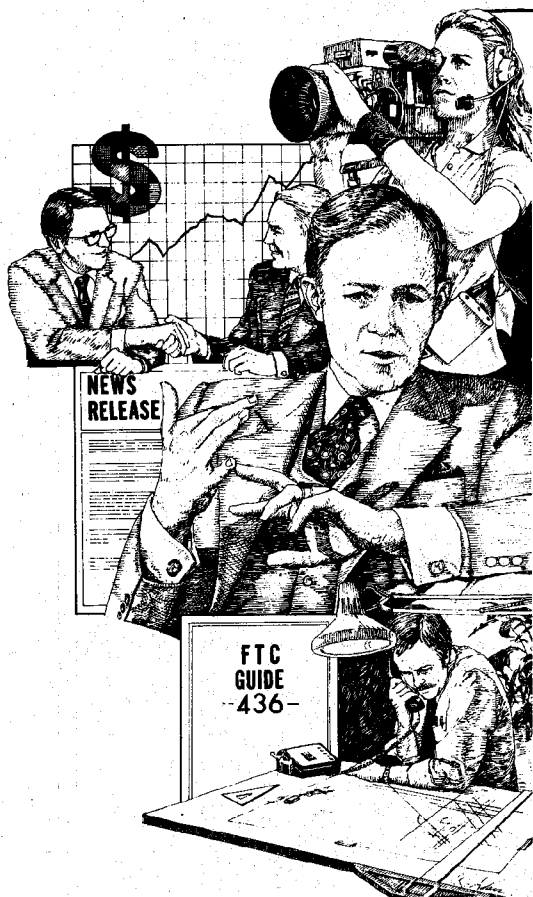
The Supreme Court reversed. Noting that the taking of such an access over private property by itself would require compensation, the Court examined whether the same requirement, imposed under the police or regulatory power of the commission rather than under its powers of eminent domain, would modify the "just compensation" requirement.

The direct holding of the Court was that in this case it did not and that compensation was required. The

rationale of the Court is critical.

The Court observed that land-use regulations do not affect takings if they substantially advance legitimate state interests and do not deny an owner the economically viable use of his land. Assuming that legitimate state interests include, in the commission's words, protecting public views of the beach and assisting the public in overcoming the psychological barrier to the beach created by overdevelopment, the Court could not accept the commission's position that there was a nexus between these interests and the condition attached to Nollan's beach house redevelopment.

"It is quite impossible," the Court said, "to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any 'psychological barrier' to using the public

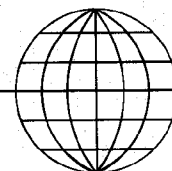


NATIONWIDE FRANCHISE MARKETING SERVICES

- Franchise development
- Feasibility studies
- Legal statements
- Marketing plans
- Public relations
- Advertising
- Financing plans
- Training manuals
- Audio-video presentations
- Architectural planning
- Marketing
- Consulting

12800 Hillcrest, Suite 112
Dallas, Texas 75230
(214) 980-7711

Marvin J. Migdol, Inc.



Supreme Court Report

beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house. We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land use power for any of these purposes."

However, said the Court, it is an altogether different matter if there is an "essential nexus" between the condition (impact fee, dedication, or exaction) and what the landowner proposes to do with the property.

"Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding the construction 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 assumed it could) to forbid construction of the house altogether, imposition of the condition

would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere.

"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. ... The lack of nexus between the condition and the original purpose of the building restriction converts that purpose into something other than what it was. The purpose becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of 'legitimate state interests' in the takings and land use context, this is not one of them."

In short, the Supreme Court appears to have adopted the Florida "rational nexus" test concerning exactions, dedications and impact fees rather than the broader "reasonable relationship" California rule. The decision also suggests that naked "linkage" programs that seek to impose fees, dedications and conditions on development merely because the developer needs a permit and the public sector needs an unrelated public project are probably also illegal.

Moreover, more "traditional" dedication and exaction requirements long presumed legal, such as public roads and parks inside a proposed development, may have to pass scrutiny under the Court's "essential nexus" test, and some may fail. There clearly will need to be a rational nexus between all of what is exacted from a landowner as a condition precedent to development and the public need for which the condition is attached or the fee levied. ■



Construction Dispute? Call an Expert!

When confronted with a construction claims case, put WHI's expertise to work for you in preparing a winning strategy.

WHI has successfully provided expert claims analysis/preparation services for attorneys, on settlements worth more than \$12 billion on both national and international construction projects. Call WHI today for an expert consultation.

wagner · hohns · inglis · inc.

100 High Street, Mount Holly, New Jersey 08060 • (609) 261-0100

Office Locations

Tampa, FL • Arlington, VA • Leawood, KS
Mandeville, LA • Pasadena, CA • San Francisco, CA

Please send more information on your claims services.
I have an immediate need. For reference.



Name _____
Company _____
Address _____
City _____ State _____ Zip _____

Circle 9 on Reader Service Card

Medical Experts Medical and Hospital Malpractice Personal Injury • Product Liability

2,500 Board Certified Medical Experts in all specialties, nationwide, to review medical records, prepare written reports and testify.

- Experience: 11 years and 14,000 cases for 5,000 attorney clients
- Reasonable fee options
- Financial Assistance: designed to be in conformity with ABA Informal Opinion #1375
- Local attorney references
- Free books, one with foreword by Melvin Belli
- Free Medical Malpractice Teaching Seminars
- Free telephone preliminary case evaluations



The Medical Quality Foundation
The American Board of
Medical-Legal Consultants
TOLL FREE:
1-800-336-0332

Circle 17 on Reader Service Card



THE OFFICE WILL COME TO ORDER.

Our thorough study of the law office has produced significant results: a total practice management system for the legal profession—hardware, software, support and service. In fact, CaseLode™ (formerly PROMIS) was the first software package that runs on a multi-user system to be approved by the American Bar Association. Which means that with CaseLode and an Alpha Micro system you have everything you need to

practice the law of order. To organize data and access data bases like WESTLAW® and LEXIS®. To schedule dates and prioritize tasks. It even provides sophisticated case by case trust accounting.

WE TIP THE SCALES IN YOUR FAVOR.

With our system, every lawyer, every paralegal and every secretary in the firm can perform their tasks simultaneously.

And adding more lawyers, paralegals or secretaries to the system is no problem. The Alpha Micro

system can expand to over 200 users without the inconvenience of changing software.

Maybe that's why so many lawyers use Alpha Micros with such conviction.

If you're interested in selling the best business management system for the legal profession, give us a call at 1-800-253-3434. We know the business of law.

CaseLode™ from ALPHA MICRO