environmental issues does not lie with the judges in the judicial system, but instead with the elected officials in our legislature and what they put in the legislation.

As a Supreme Court Justice, Kennedy will not make new law, but he will enforce existing statutes and regulations, which by itself could be a step forward.

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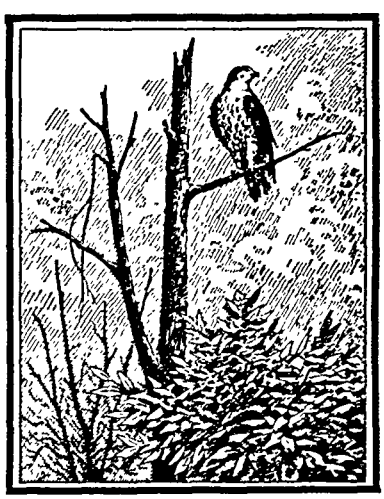


First English and Nollan: The takings hot seat has turned out lukewarm

By Cynthia Patton

Prominent environmentalist David Brower reacted, "Hang the flags at half-mast for the environment." Duane Garrett, attorney and California Coastal Commission member, stated, "Potentially, [Nollan] is a pit bull at the throat of the Coastal Act."

These statements demonstrate the initial shock resulting from First English and Nollan. Environmentalists and planners were stunned. After years of skirting the issue, the Supreme Court had altered, drastically it seemed, the balance between government regulation and private property rights. Many feared the balance had severely shifted in favor of the landowner.

Issued last July by the U.S. Supreme Court, First English Evangelical Luthern Church of Glendale v County of Los Angeles, __ U.S. __, 107 S.Ct. 2378 (1987) and Nollan v California Coastal Commission, __ U.S. __, 107 S.Ct. 3141 (1987), deal with the Takings Clause of the Constitution. These opinions were hailed as the most important property cases of the past 50 years. The message to land use planners was that a revolution in land use control had occurred and the era of private property rights had begun.

What really happened, however, is not nearly so drastic as many originally thought. Neither case is a land use bombshell and both were overrated in initial reports. First English changes the law on regulatory takings somewhat, but its practical impact will be minimal. Nollan does little

more than reaffirm this country's long standing rules of land use law. Both cases, however, bring California back to the mainstream of the takings doctrine.

First English:

First English involves the attempt of the First English Evangelical Luthern Church of Glendale to rebuild its camp after it was destroyed by a flood. The Church operated a camp for handicapped children called "Lutherglen" along the banks of Mill Creek in Tujunga Canyon. Much of Lutherglen's 21 acres is located on flatland which is the watershed for the surrounding forest. In July 1977, a fire denuded approximately 3,860 acres of forest upstream. Then, in February 1978, 11 inches of rain fell in two days, and the resulting flood destroyed Lutherglen.

Los Angeles County subsequently adopted an ordinance prohibiting future construction in the area to protect public health and safety. The Church sued Los Angeles County over the ordinance, but the trial court dismissed the Church's case at the close of its case in chief. The Court of Appeals affirmed the judgment, and the California Supreme Court denied review.

After granting certiorari, the U.S. Supreme Court ruled, in a 6-3 decision, that if a land use regulation is so restrictive that it amounts to a taking, the landowner is entitled to damages under the Fifth Amendment, even if that taking turns out to be only temporary. The majority based its decision on past precedent where the government had physically appropriated private property for temporary use during World War II. In those cases, there was no question that compensation was due to the propertyowner for his loss. The Court simply extended that reasoning to regulatory takings, holding "'temporary' takings which ... deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." 107 S.Ct. at 2388 (emphasis added).

If a regulatory taking is found, government must compensate the owner for any loss sustained during litigation. The Court did not, however, change agency discretion to rescind or amend a regulation that resulted in a taking. The landowner "has no right ... to insist that a 'temporary' taking be deemed a permanent taking." 107 S.Ct. at 2387. But, "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 its duty to provide compensation for the period during which the taking was effective." 107 S.Ct. at 2381. "Invalidation of the ordinance ... after [a] period of time, though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause."

107 S.Ct. at 2388.

What is especially interesting about First English is the lineup of the majority. Siding with Justice Rehnquist are two infrequent allies, Brennan and Marshall. Why would Brennan and Marshall side with private property interests? It might be that First English closely parallels Brennan's dissent in San Diego Gas & Electric Company v City of San Diego, 450 U.S. 621 (1981). There, Brennan introduced the concept of a temporary taking because he felt that merely granting injunctive relief was potentially unfair since government could merely impose a second regulation on the landowner in place of the first one. Brennan and Marshall could also be trying to establish a general principle that courts must provide a viable remedy whenever constitutional rights are violated.

First English does not change the law as to what types of regulations are valid or invalid. "Whatever regulation was permissible will still be permissible, and no compensation, temporary or permanent, will be required." Joseph Sax, p. 9 *(See Acknowledgements at end of article for full citation)*. The decision also does not change the basic rule that property owners are not entitled to the most profitable use of their land. Owners must still prove that all economically viable uses of their land have been denied before a taking will be deemed to have occurred. Previously in California, the only remedy available to the owner was declaratory or injunctive relief. The restriction would be lifted if a taking was found and any loss sustained by the owner during litigation would fall on him. Now, the loss must be compensated by the government which imposed the regulation.

First English does something else. The 6-3 majority affirmed the 65-year-old statement of Justice Holmes that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Company v Mahon, 260 U.S. 393, 416 (1922). This strong endorsement could foreshadow broader takings decisions in the future and give renewed meaning to the holding of that cornerstone case.

Nollan:

The second case, Nollan, was decided three weeks after First English. Nollan involves the California Coastal Commission's attempt to require owners of a beachfront lot to dedicate a lateral public access easement as a condition to granting a building permit. The Nollans own a beachfront lot in Ventura County, California. Public beaches are located on either side of their lot. The Nollans originally leased their property with an option to buy, and located on the parcel

was a small bungalow they rented out in the summer. After years of renting, however, the house had begun to show its age and could no longer be rented.

The Nollans' option was conditioned upon tearing down the bungalow and replacing it. In order to rebuild, however, the Nollans had to acquire a coastal development permit from the Commission. The Commission granted the permit with a condition that the Nollans grant a 10-foot wide easement along the edge of their parcel to provide access between the two public beaches. Since the time that the Commission had regulations allowing imposition of this condition, all shoreline properties in the same tract had had similar conditions imposed upon them. The Commission imposed the condition because the Nollans' new house would block "visual access" to the beach, and therefore, the Commission decided to substitute lateral access for the lost visual access.

The Nollans sued the Commission, and the trial court held for them because it felt that the record was factually inadequate to support the imposed condition. The Commission appealed, and while the appeal was pending, the Nollans invoked their option, tore down the bungalow, and built a new house without notifying the Commission. The Court of Appeals felt that there was no statutory or constitutional obstacle to imposition of the access condition and upheld the condition. The Nollans requested certiorari, raising only the constitutional takings issue.

In a 5-4 decision, the Supreme Court affirmed the Nollans' private property rights. It held that a direct nexus or relationship must exist between the condition imposed on the landowner and the legitimate government interest. The condition imposed must substantially advance the state's legitimate regulatory objectives. Without sufficient evidence that a nexus exists, the condition will be viewed as an "out-and-out plan of extortion." 107 S.Ct. 3148. The Court did not define a legitimate state interest because "[w]hatever may be the outer limits of 'legitimate state interests' in the takings and land use context, this is not one of them." 107 S.Ct. 3148.

The Coastal Commission argued in Nollan that it was merely substituting lateral access across the beach for reduced visual access. The majority flatly rejected this substitution claim as a mere play on the word access. "Rewriting the argument to eliminate the play on words makes clear that there is nothing to it." 107 S.Ct. 3149. The Court conceded that a "continuous strip of publicly accessible beach along the coast" may be a good idea, but concluded that if California "wants an easement across the Nollans' property, it must pay for it." 107 S.Ct. 3150.

The Court also signaled its intent

to more rigorously review land use regulations. In order to avoid a taking, a regulation must now pass a stricter standard than the former minimum rationality police power standard. While this heightened scrutiny is not intended to be a strict scrutiny test, it is an intermediate standard which is non-deferential and has some teeth to it. Local government must show that the regulation substantially advances a legitimate governmental interest which was arrived at through a fair regulatory process balancing competing interests. The Court wrote, "[w]e view the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it is to be more than an exercise in cleverness and imagination." 107 S.Ct. 3150.

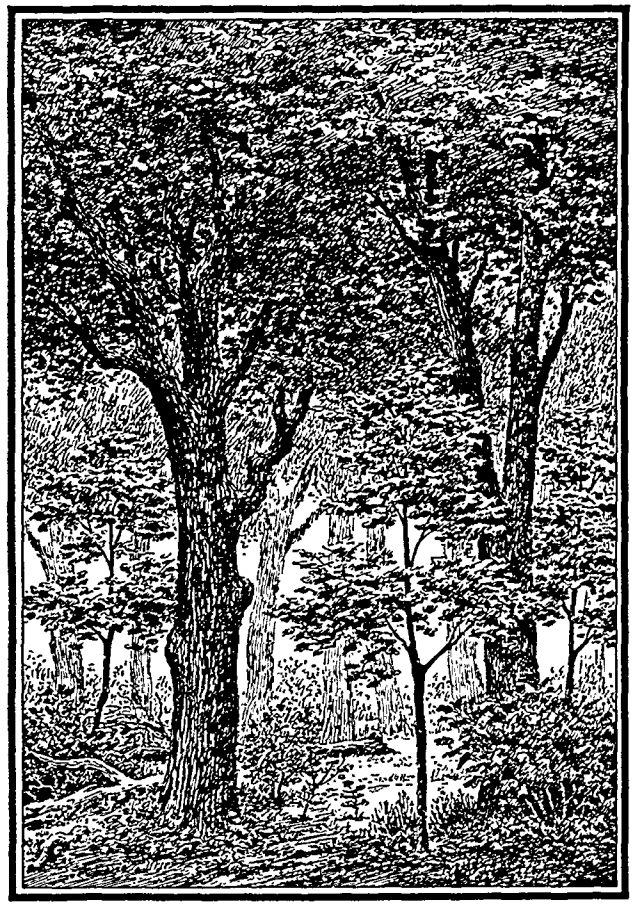
Although the Court will now examine cases with heightened scrutiny, it continues to hold a very broad view of state regulatory authority. "The majority explicitly [approved] authority to regulate, without compensation, for historic preservation, for open space, for traditional urban zoning, and for environmental protection, reaffirming decisions that had very broadly granted such powers to government." Joseph Sax, p. 8. Even in the case of coastal regulation, as long as there is a nexus between the restrictions imposed on landowners and the adverse impacts of their development, a taking will not be found and no compensation will be required.

Unanswered Questions:

The two decisions leave many unanswered questions. There are no guidelines to determine if either a permanent or a temporary taking has occurred. How are courts to distinguish between non-compensable, reasonable planning delays and compensable, unreasonable temporary takings? When does a building moratorium metamorphize from a reasonable planning tool to a temporary taking? How are temporary damages to be measured? All of the cases relied on by the Court to establish the concept of temporary takings were physical invasion cases. Thus, how are damages to be awarded for diminution of value rather than complete loss of value? When does the meter start running on these interim damages — when the ordinance is enacted or when all administrative remedies are exhausted and the suit is filed? What if land values increased dramatically during the litigation period — is offsetting possible? What is the definition of nexus and how can one determine if a condition meets this requirement? How much stricter will judicial scrutiny of land use regulations be in the future?

Questions regarding the fairness of awarding temporary damages also exist. The dissent in First English notes that the theory of temporary takings could lead to irreconcilable results. "Why should there be a

constitutional distinction between a permanent restriction that only reduces the economic value of the property by a fraction ... and a restriction that merely postpones the development of a property for a fraction of its useful life ...?" 107 S.Ct. 2393 (Stevens, J., dissenting). If the cases indicate the Court's changed attitude towards property rights, however, they are tremendously important and ominous. Traditionally, courts have granted a great deal of deference to land use regulations. Therefore, it is possible the cases are nothing more than two minor tremors designed to bring California back into the mainstream of land use law and alleviate some of the pressure on land use regulation. In order for developers and private property owners to have any real power, they need the Supreme Court to make a definitive statement on takings — something the Court has been unwilling to do so far. Since Nollan, the Court has refused to hear two



cases involving taking issues.

What can be said with some degree of certainty is that the Supreme Court seems willing to look at takings cases again. For many years, the Court did little more than skirt the issue. Yet in First English and Nollan, it acknowledged that regulatory takings exist. It also recognized that there is an inherent conflict between government's police power to regulate individuals' actions and private individuals' constitutionally protected property rights.

First English and Nollan by themselves will have little significant impact on land use regulation, but they will impact California law. First English overruled a line of California cases ending with Agins v City of Tiburon, 24 Cal.3d 266, 598 P.2d 25, 157 Cal.Rptr. 3721 (1979), aff'd on other grounds, 447 U.S. 255, 100 S.Ct.

2138 (1980). Agins held that the remedy for a taking is limited to declaratory or injunctive relief and non-monetary damages. Yet although California law has been changed somewhat, takings are no easier to prove. The number of regulatory takings is very small, and it is difficult to prove a taking, whether temporary or permanent. The Court made it clear that rarely will a regulation be so restrictive that it prevents all economically viable use, so First English has limited applicability.

Even under the Nollan nexus standard, it is uncertain First English Church will win its case on remand. "In light of the tragic flood and the loss of life that precipitated the safety regulations here, it is hard to understand how [the Church] ever expected to rebuild on Lutherglen." 107 S.Ct. at 2392 (Stevens, J., dissenting). Los Angeles can clearly exercise its police power to prevent construction on a floodplain. "[I]n order to protect the health and safety of the community, government may condemn unsafe structures ... and surely may restrict access to hazardous areas — for example, ... land in the path of a potentially life-threatening flood." 107 S.Ct. 2391-92 (Stevens, J., dissenting).

Nollan also has very limited applicability. By implication, Nollan overrules a line of California cases culminating in Grupe v California Coastal Commission, 166 Cal.App.3d 148 (1985) which held that imposition of an access condition on beachfront property was constitutional even if there was "only an indirect relationship between a proposed exaction and a need [for access] to which the [project] contributed" — indeed, even though the project alone had "not created the need for access." 166 Cal.App.3d 166-67 (emphasis added). Justice Scalia left wide latitude for government to impose permit conditions. He even suggests that the Commission could have legally required the Nollans to build a viewing platform on their lot in order to compensate for the lost visual access. The Court also reaffirmed many cases which broadly upheld the right of government to impose permit conditions for a broad range of issues including open space, historical preservation, and aesthetics.

The bottom line is, therefore, that governments can continue to impose most of the regulations which they have been using for years. The Court seems willing to continue approving most environmental and aesthetic regulations. By requiring conditions to be directly related to the project in question, however, Nollan shifts the burden of proof to those imposing the regulations. Therefore, extensive economic and statistical analysis, otherwise known as green-eyeshade planning, will be emphasized to meet this burden. Governments will also probably choose to purchase disputed property rather than risk dam-

ages at trial. In California, a $770 million bond proposal has been suggested as a means to help communities purchase environmentally sensitive lands. This idea would be particularly beneficial along the coast.

Regulatory officials still have plenty of room to maneuver. They will not have to change their regulatory strategies. They will not even have to avoid innovative approaches to land use controls. So long as regulations do not prevent all economic use or force donations of land to the public without substantially advancing legitimate state interests, land use planners have nothing to fear.

ACKNOWLEDGMENTS:

Joseph L. Sax, "Nollan No Bombshell: Property Rights in the Supreme Court" William Fulton, "A New Era For Private Property Rights" California Lawyer, Nov. 1987 (pp. 27-31) Pillsbury, Madison & Sutro, "The 'Taking' of Property without Just Compensation: A New Era?" Environmental, Health & mental Health & Safety Law Bulletin, Sept. 1987.

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