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Introduction

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A PRACTITIONER'S SYMPOSIUM ON THE RECENT SUPREME COURT TAKINGS CASES

INTRODUCTION

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The SUPREME COURT of the United States does not speak often on critical land use issues. Most of the controversies concerning permissible uses of privately owned real estate are resolved in state courts. Recently, however, two Supreme Court decisions were rendered which may have a considerable impact on the public regulation of private land. *First English Lutheran Church v. County of Los Angeles,* (often referred to as the "*First English*" case) was decided on June 9, 1987,[1] and *Nollan v. California Coastal Commission* was decided on June 26, 1987.[2]

As with many Supreme Court decisions, both *First English* and *Nollan* were rendered by a divided court. In the former, the majority decision was written by Chief Justice Rehnquist, and Justice Stevens wrote a dissent which was joined, in part, by Justices Blackmun and O'Connor. In the *Nollan* case the majority decision was by Justice Scalia. Justice Brennan wrote a dissent in which Justice Marshall joined, and Justices Blackmun and Stevens also wrote dissents.

The *First English* case involved a county ordinance which totally prohibited construction on canyon land owned by the plaintiffs and others. A creek in the canyon had overflowed its banks the year before the ordinance was enacted, flooding the plaintiff's property and destroying all of the buildings on it. The property had been used

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1. 107 S. Ct 2378 (1987).
2. 107 S. Ct 3141 (1987).

as a recreation area for handicapped children.

The Court did not invalidate the ordinance which, as the dissent noted, was almost certainly valid, nor did it determine that there had been an unconstitutional uncompensated "taking" of the church's land. In fact, there is considerable doubt whether the complaint in the case even alleged that such a taking had occurred. The decision only determined that *if* the ordinance did deny the church all use of its property, and *if* the church could prove the damages caused by such a temporary taking, then the plaintiff church was entitled to damages from the time the ordinance was enacted until the time it was determined that a taking had occurred. The case was then sent back to a lower court to determine whether, in fact, a taking had occurred, and if so, the amount of damage the plaintiff suffered because of the temporary loss of use.

It is fair to say that there is considerable doubt whether the plaintiff in *First English* will ever be entitled to a nickel as a result of the litigation. The general validity of zoning and other land use legislation was not questioned. Historically, since zoning was held to be constitutional in the Supreme Court's landmark 1926 decision in *Village of Euclid v. Ambler Realty Co.*,[3] litigants have had little success in showing that land use regulation constitutes "taking" of affected property. The *First English* decision only holds that if such a taking is found because the landowner is denied "all" use of the property, then compensation must be paid to the landowner for the period during which the invalid regulation prevented use of the land. The key issue is the requirement to pay temporary damages.

In the *Nollan* case, the vote on the Court divided 5 to 4. The Nollans owned a 504 square-foot beach house. They requested a permit from the California Coastal Commission to tear down the structure and build a new 1,674 square-foot house with an attached two-car garage. This would have resulted in development covering 2,464 square-feet of a 3,000 square-foot lot. Apparently the Commission could legally have denied the request but granted it instead, on the condition that the Nollans give the public an easement to walk across a ten-foot wide strip of beach in front of their property. A similar condition had been accepted by 43 neighboring property owners to facilitate access to nearby public beaches. The Nollans refused.

The majority of the Court supported the Nollans on the ground

3. 272 U.S. 365 (1926).

that the need for public access was not created by the construction of the larger house, and was totally unrelated to the building proposal. It did not serve the same "governmental purpose" as the restriction on development. The minority disagreed with this analysis and also pointed out that since the Coastal Commission had the power to deny the permit completely, the decision to grant it subject to a condition could not constitute an unconstitutional infringement of property rights. The *rule* of the Nollan case would, therefore, appear to be that conditions may be imposed when a land use permit is granted, as long as those conditions bear a relationship to mitigating the impact of the proposed development.

While the litigation was pending, the Nollans had proceeded with their construction without a permit. Thus the compensation issue raised in the *First English* case was not relevant.

It is, of course, too soon to evaluate the ramifications of these decisions. That has not, however, prevented many people from doing so. Some, for personal, political or economic reasons, have erroneously concluded that traditional zoning and other land use control ordinances are of doubtful validity, and that any "up-zoning" or increased restrictions will run afoul of the law. As a result, communities might have to make enormous compensation payments. (This latter argument against land use regulations was quick to be voiced on the Upper Delaware by the opponents of the Upper Delaware Management Plan. — Ed.) Others are simply confused by the complexity of the issues, or are basing their reaction on analysis of the decisions themselves.

Controversy is to be expected whenever important issues are decided by a narrowly divided Court. Even if one disagrees with a Supreme Court decision, however, it is the ultimate arbiter of the issues before it. The most important question, therefore, is what effect these decisions will have on the future governmental regulation of private property.

The initial perception has been that the impact will be substantial, yet a close reading of both the *First English* and *Nollan* cases indicates that this should not be so. While *Nollan* addresses the permissible boundaries of such regulation, and *First English* deals with the period for which compensation to the private owner is due if regulation oversteps its bounds, neither casts any doubt on the legality of limiting private property rights to achieve legitimate public objectives.

With the passage of time, we may discover that much of the

initial reaction to these decisions was erroneous or exaggerated. However, as Justice Stevens wrote in his dissent in the *First English* case, "One thing is certain. The Court's decision today will generate a great deal of litigation. Most of it, I believe, will be unproductive."[4]

4. 107 S. Ct. at 2389-90.