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COMMENTARY ON *FIRST ENGLISH*¹ AND *NOLLAN*²

*Dwight H. Merriam*³

I. *First Lutheran Church*

(a). *The Factual Background*

The plaintiff is a church which purchased a 21 acre parcel 30 years ago in a canyon on the banks of Mill Creek in the Angeles National Forest. Twelve of the acres were developed as a camp, "Lutherglen," for handicapped children. In July 1977 a forest fire denuded almost 4,000 acres of watershed area upstream from the camp. Early in February 1978, following cloud seeding operations by the Flood District, 11 inches of rain fell on the watershed, overflowing the banks of Mill Creek and destroying Lutherglen.

In January 1979, the County of Los Angeles adopted an interim ordinance to prohibit any building in the interim flood protection area. The ordinance, which became effective immediately, was expressly temporary to prevent development while there was mapping and evaluation of flood data. A month after the ordinance took effect, First Lutheran Church sued the County of Los Angeles and the Los Angeles County Flood Control District claiming:

1. A taking of its property by overregulation and liability for the creation of dangerous upstream conditions; and
2. Inverse condemnation and tortious injury arising from the Flood District's cloud seeding operations.⁴

1. *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378 (1987).

2. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987).

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4. The Church's original complaint also included a tort claim based on the county's alleged negligent installation of culverts that aggravated the flooding. This count was tried on the merits by the court, which ruled in favor of the county.

The defendants were successful in having the second cause of action dismissed by the trial court, but the California Court of Appeal reversed the trial court's ruling on the inverse condemnation theory of the second cause of action and the case was remanded to the trial court for further proceedings on that claim.

(b). *The Procedural Posture*

First Lutheran Church is somewhat unusual because it made its way up to the U.S. Supreme Court without a trial. The issue before the U.S. Supreme Court was whether it was proper for the California courts to prohibit the church from trying its claim for just compensation.

In its first cause of action the Church alleged a regulatory taking and sought only damages. Under California law and the Supreme Court of California's decision in *Agins v. Tiburon*,⁵ a landowner may not maintain an inverse condemnation suit in the courts of California on the theory of a regulatory taking. In California, all a landowner can do is seek to have the regulation or ordinance held excessive and invalidated. Then, if the government continues the regulation, in effect, compensation might be recovered but not before. In short, just compensation was not an available remedy for a temporary regulatory taking in California.

Based on the *Agins* decision, the trial court ruled that the church could not maintain its claim for money damages for a regulatory taking because California law did not allow the payment of just compensation for a temporary regulatory taking.

On appeal, the California Court of Appeal affirmed the trial court's decision preventing the church from proceeding with its claim for just compensation.

There never was a trial on the question of whether a taking occurred or whether the regulations might be justified on public safety grounds. This is a critically important fact about this case. In its decision, the U.S. Supreme Court has remanded the case for further proceedings:

We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property (footnote omitted) or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of

5. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

all use was insulated as part of the State's authority to enact safety regulations (citations omitted). These questions, of course, remain open for decision on the remand we direct today."⁶

(c). *The Holding*

The Supreme Court has decided four overregulation land use taking cases in recent years without ever reaching the issue of whether just compensation must be paid for temporary regulatory takings.⁷ None of the four prior cases were factually and procedurally "pure" enough for the Court to reach the issue.⁸

In a 6-3 decision, the Court reached the landmark holding:

We merely hold that 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. . . .

. . . .

Here we must assume 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 attainment of fair value for the use of the property during this period would be a constitutionally insufficient remedy.⁹

In short, the Court held that damages in the form of just compensation will be paid to landowners whose property is taken by overregulation, even on a temporary basis.

Limitations on the Holding and Undecided Issues

Although the holding is of great importance, the limitations on the holding and the many undecided issues are collectively, perhaps, even more important.

The *First Lutheran Church* case is going back to trial where the question of whether there ever was a taking will be decided. Was the delay from January 1979, when the interim ordinance was adopted, to October 17, 1985, when the Supreme Court of California denied a

6. *First Lutheran Church*, 107 S. Ct. at 2384-85.

7. *Agins v. Tiburon*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372, *aff'd on other grounds*, 447 U.S. 255 (1979); *San Diego Gas & Electric v. San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986).

8. Justice Stevens' dissent makes clear that *First Lutheran Church* was by no means an ideal case for the decision the Supreme Court sought.

9. *First Lutheran Church*, 107 S. Ct. at 2389.

hearing in the case, so long that this temporary restriction constituted a regulatory taking? During the period the interim ordinance was in place, was there any economic use available for any portion of the property? During that time did the property have any market value — that is, even though it was severely restricted in its use, did the prospect of a less restrictive, permanent ordinance allow the property to continue to have some value, enough to get over the taking threshold?

When the case goes back to trial, what will be the impact of the U.S. Supreme Court's decision in *Keystone Bituminous Coal Assn. v. DeBenedictis*?¹⁰ In that case the Supreme Court quoted *Mugler v. Kansas*: "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.'"¹¹ If there are serious public safety objectives to be achieved in prohibiting development in the floodway, then the county's action might be sustained, particularly given the U.S. Supreme Court's *Keystone Bituminous* decision.

The majority opinion in the First Lutheran Church case provided this further limitation to its holding: We 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.¹²

It's unclear what "normal delays" might include, but as the dissenters argue, the majority opinion does not seem to include lengthy litigation as part of a normal delay.¹³ In other words, the majority opinion suggests that a long delay caused by litigation concerning the taking issue, might itself trigger a taking from the moment the regulation was applied.¹⁴

The Court in its majority opinion makes clear that local governments retain all of the options already available to them to terminate the period of the temporary taking:

Once a court determines that a taking has occurred, the government retains the whole range of options already available - amendment of the regulation, withdrawal of the invalidated regulation, or

10. 107 S. Ct. 1232 (1987).

11. *Id.* at 1235 (quoting from *Mugler v. Kansas*, 123 U.S. 623 (1887)).

12. *First Lutheran Church*, 107 S. Ct. at 2389.

13. *Id.* at 2396 (Stevens, J., dissenting).

14. The delay involved in obtaining a court declaration that the regulation constitutes a taking. *Id.* at 2396.

exercise of eminent domain. Thus we do not, as the Solicitor General suggests, permit a court at the behest of a private person, to require the . . . Government to exercise the power of eminent domain. . . .'¹⁵

The question of whether the adoption of a moratorium constitutes a taking for which just compensation must be paid is undecided. Justice Stevens in his dissent offers an important analytic view which points to some of the weaknesses in the majority opinion:

Regulations are three dimensional; they have depth, width, and length. As for depth, regulations define the extent to which the owner may not use the property in question. With respect to width, regulations define the amount of property encompassed by the regulations. Finally, and for purposes of this case, essentially, regulations set forth the duration of the restrictions. It is obvious that no one of these elements can be analyzed alone to evaluate the impact of a regulation, and hence to determine whether a taking has occurred.¹⁶

The majority decision does not help to define the line between a taking and a permissible governmental regulation. As Justice Stevens writes in his dissent:

Some dividing line must be established between everyday regulatory inconveniences and those so severe that they constitute takings. The diminution of value inquiry has long been used in identifying that line. As Justice Holmes put it: 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.' *Pennsylvania Coal*, [sic.] 260 U.S., at 43, S. Ct. at 159 [(1978)]. It is this basic distinction between regulatory and physical takings that the Court ignores today.¹⁷

(d). *Questions Remaining*

Unfortunately, *First Lutheran Church* leaves many unanswered questions. Among them are:

1. *Will the decision encourage or discourage litigation?* The collective judgment appears to be that there will be more litigation, principally because landowners and developers may incorrectly believe the decision creates substantial new rights. Also, there is bound

15. *Id.* at 2389.

16. *Id.* at 2392-2394 (Stevens, J., dissenting).

17. *Id.*

to be more litigation because of the many unanswered questions posed by the decision. As noted above, all that has changed is that just compensation is now available in all states as a remedy for a temporary or permanent regulatory taking. A plaintiff in a case brought under *First Lutheran Church* must still prove a taking. The standard for proving a taking remains unaltered.

2. *How will new cases brought as a result of First Lutheran Church be decided?* Just as before *First Lutheran Church*, nearly all of the land use regulation taking cases are likely to be won by local governments at trial because of the very difficult threshold test for proving a taking. While local governments will continue to be successful in most taking cases, it should be remembered that most land use cases are decided on other constitutional grounds, such as procedural due process and the issues of rationality and reasonableness in the adoption and application of regulations.

3. *Will developers and landowners have any victories following First Lutheran Church and, if so, what financial burden will be imposed on local governments?* This question is at best difficult to answer. However, it does seem certain that there will be at least some cases in which temporary regulatory takings can be proved. In those instances, local governments will have to pay just compensation. It should be remembered, however, that just compensation under *First Lutheran Church* does not require paying the full value of the property, but only some measure of the loss from not having the property in economic use during the temporary period. In many instances, just compensation will be a fraction of the actual value of the property.

4. *Will there be any change in the demand for planners and planning consulting services?* There may be a tendency among local governments to make increased use of planners and planning consultants to ensure that regulatory programs and decisions do not inadvertently create temporary or permanent takings.

5. *Does First Lutheran Church prohibit the use of moratoriums?* As noted above, the *First Lutheran Church* decision is silent on the constitutionality of moratoriums. Justice Stevens' dissent suggests that in testing whether there is a taking, it is important to assess how much of the total area of property is regulated and how long that regulation is in effect. It should be added that it is equally important for the local government involved to lay an adequate foundation for the moratorium in terms of studies and evidence. We may be able to predict the outcome with some certainty only at the ex-

tremes. For example, a five year moratorium on all building in all zones of a given town could very well constitute a temporary regulatory taking. In addition a six month "planning pause" moratorium on multi-family development by special use permit in a zone which continues to allow single family detached development on half-acre lots might not be a temporary regulatory taking provided that there was a market for the single family homes.

6. *What will happen to "cutting edge" programs?* The *First Lutheran Church* decision does not change the definition of a regulatory taking. Consequently, there should be no change in the efforts by local governments to regulate at the "cutting edge" with such programs as those that protect natural resources and aesthetics and produce affordable housing. As with all regulation, however, it will be important to ensure that the regulation is reasonable and provides the landowner with an economically beneficial use.

7. *How Will Local Zoning Programs Be Affected?* Local zoning and other land use regulatory programs should not be affected since in most states, the decision does not affect liability. However, in some states, liability may be increased for a temporary period. In addition to the increased use of staff planners and planning consulting services, local governments may be encouraged by the decision to find ways to continue to regulate while preserving a reasonable, beneficial economic use for every property. One way to do this is to make increased use of density transfer techniques such as clustering and the transfer of development rights.

(e). *Conclusion*

Unfortunately, the *First Lutheran Church* decision was inaccurately reported by the press. The perceptions of its effects are far greater than the reality of its impacts. Liability may still be avoided or minimized through careful planning and artful regulation.

II. *Nollan v. California Coastal Commission*¹⁸

(a). *The Factual Background*

James and Marilyn Nollan had an option to purchase a 504 square foot beachfront cottage and lot in Ventura County, California. The option was conditioned on the Nollans' promise to demolish the dilapidated bungalow and replace it with a new home more consistent with the surrounding neighborhood.

18. 107 S. Ct. 3141 (1987).

The Nollans proposed to build a 2,464 square foot, 3-bedroom house and garage. The California Coastal Commission approved the Nollan's request for a coastal development permit, subject to the condition that the Nollans grant an easement to the public to pass along a portion of their property between the mean high water line and an existing sea wall. That public easement, depending upon the time of year and the location of the mean high water line, would vary in width from 0 to not more than 10 feet.¹⁹ The objective was to ensure that lateral access along the beach would be preserved to enable the public to walk along the beach from a park located a quarter-mile north of the property and a public beach area one-third mile south of the property. Similar specific deed restrictions had been imposed by the Commission since 1979 on 43 other new development projects in the same tract.

(b). *The Litigation*

The Nollans challenged the condition in the Superior Court. That court remanded the matter back to the California Coastal Commission for a full evidentiary hearing on the question of whether the single family home would have a direct adverse impact on public access to the beach.²⁰

The Commission reaffirmed its imposition of a finding that the house would increase blockage of a view of the ocean, thus contributing to the development of "a 'wall' of residential structures" that would prevent the public from having visual access to the ocean. The Commission also noted the cumulative impacts of other area development on public access and the "public's ability to traverse to and along the shore front."²¹

On return to the Superior Court, the Nollans filed a supplemental petition for a writ of administrative mandamus. That Court ruled in their favor, holding that the record did not provide an adequate basis for the alleged direct or accumulative burden on public access and the supposed need for the easement.

The Commission appealed to the California Court of Appeal. While the appeal was pending, the Nollans closed on their house,

19. See 107 S. Ct. at 3155.

20. *Id.* at 3143.

21. *Id.* at 3144 ("[The Commission] found that the new house would increase blockage of the view of the ocean, thus contributing to the development of 'a "wall" of residential structures' that would prevent the public 'psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit.'" (citation omitted).

tore down the old bungalow, and built the new house without notifying the Commission.

The Court of Appeal reversed the Superior Court, holding that it was sufficient to have only an indirect relationship between the access required to be given and the contribution by the project to the need for such access. In a 5-4 decision with three separate dissenting opinions, the U.S. Supreme Court reversed the California Court of Appeal, holding that the building restriction was not a valid regulation of land use.²²

(c). *The Supreme Court's Holding*

The Supreme Court held that the easement was a "permanent physical occupation" of their property. The Court indicated that the standard for determining when a land use regulation effects a taking had not changed: "We have long recognized that land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not den[y] any owner economically viable use of his land."²³ The California Coastal Commission relied on a lesser standard that such regulation need only be "reasonably related to the public need."²⁴ Even applying the Commission's standard, the Court found the Commission's imposition did "not meet even the most untailed standards."²⁵

Justice Brennan, joined by Justice Marshall in a dissent, characterized the majority's standard as one of requiring a "precise fit" between the condition and legitimate state interest.²⁶

(d). *The Decision's Reach*

The Supreme Court decision in Nollan has the potential to affect many types of development exaction programs including open space set asides in residential subdivisions, mandatory affordable housing linkage programs, and off-site infrastructure improvement requirements. This decision is troubling because it is not clear whether the Court imposes a new standard in land use law, or merely discusses the standard in dicta.²⁷ The Court seems to have

22. *Id.*

23. *Id.* at 3141.

24. *Id.* at 3146 (citing *Agins v. Tiburon*, 447 U.S. 255 (1979); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)).

25. *Id.* at 3148.

26. *Id.*

27. *Id.* at 3154.

expressly rejected the concept of a rational relationship between the condition and the governmental objective. The "new" standard appears to be that the regulation must "substantially advance" the "legitimate state interest," at least under the federal constitution.²⁸

It appears the Court may be more sensitive to those types of exactions that allow physical invasion, as with an easement or similar grant of a property interest that allows public access. With a single family home, like the Nollans', it may be very difficult to exact a public access easement as a condition of development approval. However, for larger construction projects involving multiple units and a self-generating demand for open space and access, it should not be difficult to fashion programs that will meet constitutional muster.

What the Court demands is a "nexus" between the condition and the potential restriction on development.²⁹

The practical effect of the Nollan devise for planners is that additional care will need to be taken to ensure that adequate evidence is provided on the connection between the condition and the legitimate governmental objective.

The Court does suggest one basic standard - a condition is permissible and will not be found to be a taking "if the refusal to issue the permit would not constitute a taking."³⁰ The Court assumed for purposes of argument that the Commission could have exercised its police power to forbid construction of the house altogether to preserve the public's visual access to the beach.

Similarly, with a special permit or conditional use, appropriate conditions can be imposed if, without the conditions, the proposed development could be denied without causing a taking. There are very few instances where denial of a special permit would constitute a taking. However, the denial of a permit or the attachment of conditions to the grant of a permit should be based upon factors specified in the applicable ordinance.

Similarly, as to conditions imposed on variances, if the variance could be constitutionally denied without the conditions, then conditions on their approval are likely to be upheld.

(e). *The Unknowns*

There are far more unknowns as a result of the *Nollan* decision

28. *Id.* at 3147, n.3.

29. *Id.* at 3148.

30. *Id.* at 3147.

than with *First Lutheran Church*. The challenge for planners and developers alike will be to ensure that the most flexible regulatory techniques, such as floating zones and planned unit development ordinances, are preserved, even though they almost always use numerous conditions to tailor developments to their sites. As with *First Lutheran Church*, there will be an increased need for more planning, both in the development of regulations and in the project review and approval process.

