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SUPREME COURT LAND USE RULINGS: RESPONSIBLE CONTROLS ARE NOT ENDANGERED

David Doheny & Paul W. Edmondson***

If you choose to believe the advocates of unrestrained development, two recent Supreme Court decisions have sounded a death-knell for land-use controls. The prospect of large damage awards for regulatory takings, it is said, will paralyze governmental efforts to enact or apply environmental protections, building height and density limits, and even public-safety restrictions on the use of land. Some have even suggested that local officials, fearing the invalidity of historic preservation controls, will be powerless to prevent the rampant destruction of important historic resources.

In reality, the only cause for alarm is that the holdings of the two cases have been so misrepresented that these predictions will become self-fulfilling. The two decisions are *First English Evangelical Lutheran Church v. County of Los Angeles*,¹ and *Nollan v. California Coastal Commission*.² The cases clearly *do* favor the interests of property owners and developers. But both cases are relatively limited in scope, and should also be limited in effect.

In *First English*, the Court addressed the narrow question of what remedy is available to a property owner, *assuming* that a governmental regulation has been invalidated as a taking "of all use" of his or her property.³ The word "assume" is Chief Justice Rehnquist's because the Court explicitly did not decide whether the specific governmental action challenged in the case (a temporary emergency ban

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1. 107 S. Ct. 2378 (1987).
2. 107 S. Ct. 3141 (1987).
3. 107 S. Ct. at 2389.

on construction in a floodplain area) actually resulted in a "taking of all use" of the plaintiff's property. The Court held that compensation is an available remedy *if* a regulatory taking of all use of property can be proved. The case has now been sent back to the California courts to decide the merits of the taking question. Most land-use experts believe that the California courts will have no difficulty under existing Court precedents in finding that there was in fact no taking.

It is essential to recognize that the *First English* decision in no manner addressed, much less changed, the law as to what types of land-use restrictions constitute takings of private property. This is a message lost on many. Opponents of governmental land-use controls, in describing the case, have conveniently forgotten that the courts have consistently been reluctant to strike down land-use ordinances under takings challenges. In particular, predictions of damage awards arising from judicial invalidation of historic preservation ordinances simply fly in the face of numerous court opinions upholding such controls, including the Supreme Court's "landmark" 1978 decision, upholding New York City's historic preservation ordinance under a takings challenge, *Penn Central Corp. v. New York City*.⁴ The real question then, is whether the second Supreme Court decision—the *Nollan* case—represents any major departure in the Court's view as to what types of governmental controls constitute takings of private property for public use. The answer appears to be that the case does *not* signal any major change in the law, although it indicates the Court's intention to take a closer look at whether land-use controls actually further the governmental interests it purports to promote.

In *Nollan*, the Court addressed the validity of a state requirement that, in return for permission to build on their property, landowners must grant the public a right of access over a beachfront portion of their land. The Court's inquiry focused on whether the particular restriction in the case actually furthered its stated governmental purpose. According to the view of the majority, the stated purpose of the restriction, improved access *to* the beach, was not substantially furthered by the permit's condition for an easement *along* the beach.⁵ The Court was careful not to back away from the basic principle, laid out in earlier decisions, such as *Penn Central*, that governmental controls on the use of land are not takings if they

4. 438 U.S. 104 (1978).

5. 107 S. Ct. at 3149.

substantially further legitimate governmental purposes and do not deny the owner the economically viable use of the land. If there is any departure from those earlier cases, it is only that the Court can no longer be expected to take at face value the statements of local government officials that the burdens imposed by land-use controls in any particular case are necessary to meet the burdens the development imposes on legitimate public interests. Nonetheless, this stricter scrutiny should *not* have an adverse effect on the overwhelming majority of land-use restrictions, including historic preservation ordinances. Unless controls have been imposed without adequate justification, they are unlikely to be successfully challenged.

I. UNITED STATES SUPREME COURT'S DECISION IN *First English* DOES NOT AFFECT VALIDITY OF HISTORIC PRESERVATION ORDINANCES

A). INTRODUCTION

On Tuesday, June 9, 1987, the United States Supreme Court issued its opinion in *First English Evangelical Lutheran Church v. County of Los Angeles*.⁶ The decision has important implications for all aspects of land use planning, but has no effect on the validity of historic preservation ordinances.

In *First English*, the Supreme Court addressed the narrow question of what remedy is available to a property owner, assuming that a governmental regulation has been invalidated as a taking of all use of his or her property. The Court held that the affected property owner has a right to be compensated for any temporary loss of "all use of property" between the time that the regulation results in a denial of all use and the time that the regulation is invalidated. The significance of *First English* relates to the fact that it expands the remedies available for governmental actions determined to constitute uncompensated takings of private property for public use. Consequently, it is likely to provide additional incentives for challenges to all types of land use regulation. Nonetheless, it is essential to recognize that the case does not in any manner change the law as to what types of actions constitute takings of private property. Because preservation ordinances have consistently been upheld by the courts (including the United States Supreme Court) against takings

6. 107 S. Ct. 2378 (1987).

challenges,⁷ the *First English* decision should not discourage local governments from enacting or applying such controls.

B). FACTS

In February 1978, Mill Creek Canyon in Los Angeles County was devastated by a flood, killing 10 people. The flood destroyed a substantial amount of property in the canyon, including "Lutherglen," a retreat center and recreational area for handicapped children. In response to the flood, the County of Los Angeles in early 1979 enacted a temporary emergency moratorium on construction or reconstruction in a designated flood protection area within the canyon. A permanent ordinance, enacted in 1981, maintained strict controls but permitted certain types of construction.

The First English Evangelical Lutheran Church of Glendale, the owner of Lutherglen, sued the county for damages, alleging among other things, that the county's ordinance had denied the church "all use" of its property. The County of Los Angeles responded that even if the challenged ordinance *had* denied the church all use of the property (without conceding that allegation to be true), the sole legal remedy was invalidation of the ordinance rather than compensation for the denial. Thus, the county argued that the compensation claim should be dismissed. The California courts agreed with this argument, based on an earlier decision of the California Supreme Court, *Agins v. Tiburon*,⁸ The plaintiffs eventually appealed to the United States Supreme Court. Before the Supreme Court, the church argued that the rule applied by the California courts was contrary to the fifth amendment to the United States Constitution. The fifth amendment, made applicable to the states through the fourteenth, provides that private property may not be taken for public use without just compensation. The county responded, first, that the actions taken with regard to the plaintiff's property had not constituted a taking of all use, and second that the proper remedy for a temporary regulatory taking—when proven—is invalidation, not damages. The county's position was supported by the National Trust and a number of other conservation and environmental groups, appearing as friends of the court. These parties also cited earlier court cases to the effect that, when required for reasons of health and safety, the government may prevent a property owner

7. See *Penn Central Trans. Co. v. New York City*, 438 U.S. 104 (1978).

8. 24 Cal. 3d. 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

from using his or her property without the requirement for compensation.

C). THE DECISION

The opinion of the Supreme Court was delivered by Chief Justice Rehnquist, joined by Justices Brennan, White, Marshall, Powell, and Scalia. As a preliminary matter (and one of critical importance), the decision makes it clear that the Supreme Court, like the California courts, did *not* decide whether the county's actions had amounted to a taking of all use of the property in question. According to the Court, the taking question was not at issue; the only issue was whether a compensation remedy is available *if* a taking of all use of property has taken place. Thus, the Court simply assumed that allegation to be true in order to reach the remedies question: "We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether . . . the denial of all use was insulated as a part of the State's authority to enact safety regulations."⁹

The Court proceeded to address whether the fifth amendment requires that a temporary regulatory taking of all use of property be compensated. Citing several earlier Supreme Court cases dealing with temporary appropriation of private property by the government during World War II,¹⁰ the Court concluded that takings denying a landowner "all use of his property" for a temporary period "are not different in kind from permanent takings, for which the Constitution clearly requires compensation."¹¹ While recognizing the need for flexibility in the regulatory process, the Court considered the fifth amendment compensation requirement to apply both to temporary regulatory takings of all use of property and to temporary physical appropriations of property by the government. Thus, the Court held that in *any* case, "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."¹²

Once again, it is important to stress that the Court's decision did *not* address whether the facts of the case constituted a taking of *all use of property*, for which compensation was required. The Court

9. 107 S. Ct. at 2384-85.

10. *Id.* at 2387.

11. *Id.* at 2388.

12. *Id.* at 2389.

itself emphasized this point before remanding the case to the California courts to decide that very issue:

We also point out that the allegation of the complaint *which we treat as true for purposes of our decision* was that the ordinance in question denied appellant *all use of its property*. 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."¹³

The dissenting opinion was authored by Justice Stevens, with whom Justices Blackmun and O'Connor joined in part. According to the dissenting opinion, the Court "unnecessarily and imprudently" assumed that the church had alleged an unconstitutional taking of its property. All three justices agreed that precedents of the Supreme Court made it clear that the type of regulatory program at issue in the *First English* case could not constitute a taking, particularly in the health and safety area: "[T]he claim that the ordinance was a taking of Lutherglen should be summarily rejected on its merits."¹⁴ All three Justices also argued that the plaintiff should have been required to pursue the invalidation claim in the California courts before seeking Supreme Court review of the California procedures. Justice Stevens also argued that the Court's opinion did not adequately distinguish between physical takings and regulatory takings, and failed to make clear that:

[A] regulatory program that adversely affects property values does not constitute a taking unless it destroys a major portion of the property's value. . . . Unlike physical invasions, which are relatively rare and easily identifiable without making any economic analysis, regulatory programs constantly affect property values in countless ways, and only the most extreme regulations can constitute takings."¹⁵

Justice Stevens expressed the view that, in the regulatory area, the duration of the interference with the owner's use of the property is only one factor among many that should be considered in determining whether a taking had taken place. According to Justice Stevens, short-term regulatory interferences in the use of property rarely rise

13. *Id.* (emphasis added.)

14. *Id.* at 2393.

15. *Id.* (citations omitted).

to the level of takings.¹⁶

D). EFFECT OF THE DECISION

A number of initial press reports concerning the *First English* decision indicated that the case would have an immediate and adverse effect on local land use regulation, including historic preservation. If this is true, however, it is only because of a public misperception of what the decision actually says. As indicated above, the case, while increasing the remedies available when governmental action results in a taking of all use of private property, does not in any way increase the possibility that a regulatory action *will* be construed by the courts to deny all use of property, thus constituting a taking.

The courts have consistently upheld historic preservation ordinances under takings challenges, both on their face and in their application to individual cases. The Supreme Court itself has ruled that preservation ordinances do not amount to a taking of private property.¹⁷ In *Penn Central* the Supreme Court found "untenable" the argument that a taking may be established simply by a property owner showing he or she had been denied the ability to exploit a property interest that had previously been thought to be available for development. The Court concluded that the denial of use of a portion of a property (the air rights over Grand Central Station in New York) did not prevent the landowner from using the remainder of the parcel "in a gainful fashion," and therefore did not amount to a taking. Recent cases in the Supreme Court indicate that the Court has not backed away from the rule laid down in the *Penn Central* decision. Even in the *First English* case, the Court emphasized several times that its conclusions there only related to takings "of *all* use of property" (emphasis added).¹⁸ In addition, in an important takings case this term the Court held that a land subsidence statute in Pennsylvania did not amount to a taking of property for public use, even though it required coal companies to leave a certain amount of coal in place to support land surfaces.¹⁹

E). CONCLUSION

While the Supreme Court's decision in *First English* will naturally instill a greater amount of caution among land use planners

16. *Id.* at 2398.

17. *See Penn Central v. City of New York*, 438 U.S. 104 (1978).

18. *E.g.*, 107 S. Ct. at 2385-89.

19. *See Keystone Bituminous Coal Association v. DeBenedictis*, 107 S. Ct. 1232 (1987).

and regulators, any fear of increased liability resulting from historic preservation regulations clearly appears to be unwarranted. As noted in one recent article concerning the decision, the impact of *First English* is "more psychological than actual." The article describes the reaction of urban planners and municipal law specialists as follows, "In the past, they note, developers have seldom been able to prove that a measure was so drastic as to effect a taking of property. The Supreme Court decision they say, has not increased the number who are likely to do so now."²⁰ Consequently, the *First English* decision should not discourage governments from enacting or applying historic preservation controls.

II. UNITED STATES SUPREME COURT DECISION IN *Nollan v. California Coastal Commission* IS UNLIKELY TO AFFECT HISTORIC PRESERVATION CONTROLS

A). INTRODUCTION

In the second major land-use decision issued within a three-week period, the United States Supreme Court again upheld a challenge by property owners to governmental regulation of their land. Once again, however, the Court's decision should have little effect on historic preservation controls.

In *Nollan v. California Coastal Commission*,²¹ the Court considered the validity of a state requirement that, in return for permission to build on their property, the landowners grant the public a right of access over a beachfront portion of their land. The Court held that permit conditions, like other types of regulatory controls, may be imposed by governments if they substantially further valid governmental purposes. The Court, however, took a fairly strict view as to whether the particular restriction in that case actually furthered the stated governmental purpose. It invalidated the permit condition, ruling that the stated governmental purpose, access to the beach, was not substantially furthered by the permit's condition for an easement *along* the beach. The *Nollan* case indicates the Court's intention to take a closer look at whether land-use controls actually further the governmental interests it purports to promote. Nonetheless, historic preservation controls, particularly demolition and alteration restrictions, are tied directly to governmental interests explic-

20. N.Y. Times, June 14, 1987, at 5, col. 1. (Week in Review).

21. 107 S. Ct. 3141 (1987).

itly recognized by the courts. Consequently, the case, like the Court's recent decision in *First English Evangelical Lutheran Church v. County of Los Angeles*,²² should not discourage the application or enactment of historic preservation controls.

B). FACTS

In early 1982, the Nollans decided to tear down a small bungalow on their beachfront lot in Ventura County, and replace the structure with a three bedroom house.²³ In accordance with California law governing development in coastal areas, they submitted an application to the California Coastal Commission for a building permit. The commission concluded that the new house, by increasing blockage of public view of the ocean, would discourage the public from using beaches along the shoreline. The commission also concluded that development along the beach would burden the public's right to travel along the beach, and that the easement would help to alleviate that burden. Consequently, the commission conditioned issuance of the building permit on the Nollans' agreement to allow the public an easement across a portion of their property along the high tide line (beach property below that line is already owned by the State). A similar condition had been imposed on 43 other properties along the same tract of shorefront.

The Nollans filed suit in the California courts, alleging that the imposition of the public access condition constituted a taking of their property for public purposes without compensation, in violation of the fifth amendment to the Constitution, made applicable to the states through the fourteenth. The lower court agreed, concluding that the California Coastal Commission had not produced sufficient evidence that the construction project would burden public access to the sea. The California Court of Appeals, however, sided with the California Coastal Commission. The court ruled that the proposed construction indirectly contributed to an increased need for public access to the beach, and that the permit condition was sufficiently related to the burden created by the project to withstand constitutional challenge. The Nollans appealed to the United States Supreme Court, arguing, among other things, that the permit condition was not reasonably related to the burden that construction on their

22. 107 S. Ct. 2378 (1987).

23. At the time the permit application was filed, the Nollans did not actually own the property, but leased it with an option to purchase. The Nollans exercised that option by the time their legal challenge was heard in the courts.

property would impose on public access to the beach. The California Coastal Commission in turn argued that the permit condition would ease the additional congestion caused by the construction.

C). THE DECISION

The opinion of the Supreme Court was delivered by Justice Scalia, joined by Chief Justice Rehnquist and Justices White, Powell, and O'Connor. The opinion began by exploring the nature of the restriction imposed on the Nollans. The Court concluded that the access requirement imposed by the California Coastal Commission would clearly have been a taking (as, in effect, a physical invasion of a portion of their land through denial of their exclusive occupation) *if* it had been imposed by the state directly, rather than in the context of a permit condition. The question raised in the *Nollan* case, however, was whether the restriction would constitute a taking if imposed as a permit condition.

In addressing this question, the Court took the position that permit conditions, even those that would effectively result in physical intrusions, are to be reviewed under the same general standards as are other types of regulatory controls: such restrictions are permissible if they substantially further legitimate governmental purposes and do not deny landowners the economically viable use of their property. The Court based its analysis on, and cited with approval, the 1978 decision of *Penn Central Transportation Co. v. New York City*,²⁴ [w]hich upheld the application of New York City's historic preservation ordinance, and *Agins v. City of Tiburon*,²⁵ a decision upholding a California open-space zoning ordinance. These decisions were also cited as illustrating governmental interests that had previously been recognized by the Court as clearly legitimate (specifically "landmark preservation," and "scenic zoning"). Turning to the circumstances of the Nollans' case, the court assumed as valid the state's asserted interest in overcoming the visual barrier to coastal access created by the Nollans' construction project. It then focused on a single question: Whether that governmental interest was in fact "substantially" furthered by the permit condition imposed on the Nollans.

The Court took the position that a permit condition, like an outright permit denial, would not be valid if it failed to further the gov-

24. 438 U.S. 104 (1978).

25. 447 U.S. 255 (1980).

ernmental interest used to justify it.²⁶ Thus, the court expressed the view that the public access condition imposed on the Nollans would have to reasonably relate to the burden imposed by their proposed construction. It was on these specific grounds that the Court invalidated the permit condition. According to the majority opinion, the burden imposed by the Nollans' development on access to the coast would not be alleviated by the requirement for "lateral access" across the Nollans' beachfront.²⁷ The Court found it "impossible to understand" how public access along the beach could help to remedy any additional congestion imposed by the Nollans' new house. The Court also stated that, if the condition could not be justified as responding to the burden imposed by the development, it could not be justified on the alternative grounds that it was a "good idea," or because the public interest would somehow be served.

There were three dissenting opinions. Justice Brennan, in a lengthy criticism of the majority opinion (joined by Justice Marshall), characterized the California Coastal Commission's permit condition as a "reasonable effort to respond to intensified development along the California coast."²⁸ He described the position taken by the majority as a "cramped" standard of "precision" for the exercise of a state's police power, and strongly denounced that standard as demanding "a degree of exactitude" stronger than that required in previous Supreme Court precedents concerning the reasonableness of state regulation. Justice Brennan also argued that, in fact, the condition imposed by the California Coastal Commission was properly designed to mitigate the encroaching nature of private use immediately adjacent to the public beach area. The Brennan view was echoed in a dissent by Justice Blackmun, which criticized the "eye for an eye" mentality of the majority opinion.²⁹ Justice Stevens, in a separate dissent joined by Justice Blackmun, took the opportunity to criticize once again the Court's opinion in *First English*. He expressed his discomfort with the combination of a strict standard of financial liability, as set out in *First English*, with the strict standard of review used in *Nollan*.³⁰

26. 107 S. Ct. at 3147.

27. *Id.* at 3149.

28. *Id.* at 3151.

29. *Id.* at 3162.

30. *Id.* at 3163.

D). EFFECT OF THE DECISION

The *Nollan* decision clearly validated the use of permit conditions as regulatory tools, even where those conditions would otherwise amount to physical intrusions. The limits applicable to such controls are the same limits laid down in previous decisions of the Court, including the "landmark" *Penn Central* case. The restrictions must substantially further valid governmental purposes, and may not deny the affected landowner the economically viable use of his or her land. At the same time, as is made clear in the dissenting opinions, the Court appears to be sounding a relatively strict standard of review in examining whether land-use controls meet these constitutional limitations. The review of the condition imposed on the Nollans required a close match between the burden imposed by the restriction and the developmental burden it was intended to offset. The Court's approach gives little or no deference to the judgment of state agencies responsible for determining what controls are reasonable in any given case.

Two factors indicate that the strict level of review used by the Court in *Nollan* may be limited to those cases in which the regulatory control involved would amount to a physical appropriation of property. First, the Court went out of its way in the beginning of the opinion to classify the permit condition as equivalent to a physical occupation of a portion of the Nollans' property; and second, the Court explicitly stated that it was "inclined to be *particularly* careful" (emphasis added) where a permit condition requires an actual "conveyance" of property (i.e. an easement), due to the increased risk that the restriction is, in effect, a subterfuge for an uncompensated taking of property. In any event, regardless of whether the strict standard of review used in the *Nollan* decision is to be applied to other regulatory devices, those responsible for enacting or applying historic preservation ordinances should not be greatly concerned. First, the *Nollan* decision itself reemphasized *Penn Central's* recognition of historic preservation as a legitimate governmental interest, for which regulatory controls are appropriate. Second, the controls included in historic preservation ordinances, generally those limiting demolition or alteration of designated properties without advance review and approval, are invariably tied closely to those legitimate governmental interests. The only note of caution that needs to be sounded is this: Where conditions are imposed on the approval of certificates of appropriateness or similar historic preservation controls, the applicable administrative body should ensure that those

conditions actually relate to the negative effect that the proposed alteration will have on the historic, architectural, or aesthetic character of the property or district involved. A common-sense approach to regulatory controls is likely to prevent the opportunity for legal challenges by property owners.

E). CONCLUSION

As noted by Justice Blackmun in his dissent, the *Nollan* decision, like the Supreme Court's decision on *First English*, is likely to discourage "creative" regulatory solutions to land-use problems.³¹ This is indeed unfortunate. As Justice Stevens writes, "the public interest is served by encouraging state agencies to exercise considerable flexibility in responding to private desires for development in a way that threatens the preservation of public resources."³² Nonetheless, the *Nollan* decision, again, like *First English*, should not have any major effect on the majority of land-use controls. Even under a relatively strict standard of review, such controls are unlikely to be successfully challenged, as they have been designed to meet specific burdens imposed on valid governmental interests. This is particularly true with respect to historic preservation controls which controls are designed to respond directly to activities that adversely affect interests recognized by the courts as substantial and legitimate.

31. *Id.* at 3154.

32. *Id.* at 3163.

