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# Money for the Taking: When Land Use Regulation Goes Too Far

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## I. INTRODUCTION

Cities[1] have the power to regulate the use of private property, pursuant to their inherent police powers, to prevent public harm and to achieve public benefits.[2] In exceptional cases, cities can even be entitled to destroy or prohibit the use of private property.[3]

However, a city's ability to enact land-use regulations under its police power is limited by the takings clause of the fifth amendment of the United States Constitution, as made applicable to the states by the fourteenth amendment. The takings clause protects private property rights against governmental action by providing that private property shall not be appropriated (taken) by the government for public use without compensating the owner of the property. Private property need not be physically seized to constitute a taking; regulation of property, such as land-use regulation, can constitute a taking if it is determined to be excessive. As Justice Oliver Wendell

1. When the words "city" or "cities" are used herein, they also mean "county" or "counties"; similarly, "city council" also means "board of supervisors."

2. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Berman v. Parker, 348 U.S. 26 (1954); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

3. Nectow v. City of Cambridge, 277 U.S. 183 (1928); Miller v. Schoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Mugler v. Kansas, 123 U.S. 623 (1887).

Holmes wrote sixty-five years ago in an opinion of the United States Supreme Court, "[t]he general rule . . . is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[4]

Justice Holmes said that "the question at bottom is on whom the loss of the changes desired should fall," and he warned "[w]e are in danger of forgetting 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."[5] The fifth amendment's guarantee is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[6]

While it is easy to say that a regulation can "go too far" and constitute a taking for which the fifth amendment commands just compensation, or to talk in terms of "justice and fairness," it is not so easy to propose any standard which, in any given case, would determine whether a regulation has gone "too far." Holmes himself admitted the necessary generality of his approach: "[T]his is a question of degree — and therefore cannot be disposed of by general propositions."[7]

## II. THE LAW OF TAKINGS

### A. *What Is A Taking?*

1. *Constitutional provision.*

> ". . . nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

The most important thing to note about the fifth amendment's "takings" clause is that the fifth amendment does not prohibit takings — it prohibits takings without "just compensation." If the government wants to take private property for public use, it can, but it must pay "just compensation" for the property. However, the fifth amendment itself is not of help in determining what constitutes a taking nor in determining what compensation would be "just."

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4. Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922).
5. *Pennsylvania Coal*, 260 U.S. at 416.
6. Armstrong v. United States, 364 U.S. 40, 49 (1960).
7. *Pennsylvania Coal*, 260 U.S. at 416.

2. *Judicial standards.*

a. *Early efforts.*

The courts, including the United States Supreme Court, have had a difficult time determining when a regulatory governmental action such as a land-use regulation amounts to a taking for which the fifth amendment requires the payment of just compensation. In *Pennsylvania Coal*, Justice Holmes told us that a land-use regulation could go "too far" and constitute a taking, but he did not tell us how far was too far. The Supreme Court has candidly admitted that it has never been able to develop a " 'set formula' to determine when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[8] Instead, the Court has observed that "whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.' "[9] The question of whether a regulation has gone too far and a taking has occurred has been an ad hoc, factual inquiry.[10]

In *Penn Central*, the Court considered the constitutionality of New York City's Landmarks Preservation Law as it had been applied to the Grand Central Terminal of Penn Central Transportation Company. The Landmarks Preservation Law prohibited the destruction or substantial alteration of buildings, such as the Grand Central Terminal, which were designated as landmarks. When New York City's Landmarks Preservation Commission rejected Penn Central's plan to build a 50-story office building above the Terminal as being destructive of the Terminal's historic and aesthetic features, Penn Central brought suit in state court alleging that the application of the Landmarks Law had taken its property without just compensation in violation of the fifth and fourteenth amendments.

In a 6-to-3 decision that included the current Chief Justice in the minority, the Supreme Court affirmed the lower court's ruling that the application of the Landmarks Law did not effect a "taking," holding that "[t]he restrictions imposed are substantially related to the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to

8. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

9. *Penn Central*, 438 U.S. at 124.

10. *Id.*

enhance not only the Terminal site proper but also other properties.[11]

The Court did not establish a test for determining when a taking has occurred; in fact it admitted that takings analysis proceeds on an essentially "ad hoc" basis. The Court did, however, identify "several factors" that have particular significance.

The first factor identified by the Court is the "economic impact of the regulation on the claimant" and, in particular, "the extent to which the regulation has interfered with distinct investment-backed expectations."[12]

The second factor is the "character of the governmental action." "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government [citation omitted] than when the interference arises through a public program's adjustment of the benefits and burdens of economic life to promote the common good."[13] This is the distinction drawn between "physical invasion" and "regulatory" takings.

The Court also noted in the opinion that "government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute 'takings.' "[14]

### b. *The Agins'-two-part test.*

In *Agins v. City of Tiburon,*[15] the Court was more specific in its articulation of the proper test for a taking. In two important takings decisions by the United States Supreme Court this term[16], *Agins* appears to remain the test for a taking. In the *Agins* dispute, the City of Tiburon adopted ordinances modifying existing zoning ordinances (which allowed five units to be built without further land use approval) and placed Agins' property in a more restrictive Residential Planned Development and Open Space Zone. The modified zoning permitted single family dwellings, accessory buildings and open space uses. Density restrictions would have permitted the Agins to build, with city approval, between one and five single family residences on their 5-acre tract, but the Agins never sought approval for

11. *Penn Central, Id.* at 138.
12. *Id.* at 124.
13. *Id* at 124.
14. *Id.* at 128.
15. 447 U.S. 255 (1979).
16. (Keystone Bituminous Coal Ass'n. v. De Benedictis, 107 S. Ct. 1232 (1987) and Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987)).

development of their land under the zoning ordinance, deciding instead to file suit in state court alleging a taking of their property, contending that the city had "completely destroyed the value of [Agins'] property for any purpose or use whatsoever . . . ."[17] The United States Supreme Court, affirming the decision of the California Supreme Court, held that the ordinances did not constitute a taking. The Court stated that the application of a general zoning law to a particular property becomes a taking if the ordinance either (1) "does not substantially advance legitimate state interests" or (2) "denies an owner economically viable use of his land."[18] The *Agins* Court held that the City of Tiburon's open space ordinances substantially advanced a legitimate governmental goal, that of discouraging premature and unnecessary conversion of open-space land to urban uses and was a proper exercise of the City's police power to protect its residents from the effects of urbanization.[19]

(1) *The regulation must substantially advance a legitimate state interest.*

In *Keystone Coal*, the Court acknowledged that the two *Agins* tests "have become integral parts of our takings analysis."[20] The Court, however, citing numerous precedents and several other "factors" important to the takings analysis, left an additional gloss to the first part of the test. It appears that even among those regulations which "substantially advance" a "legitimate state interest," some state interests are more "legitimate" than others, i.e., the more defensible the state's interest is in regulating property, the more likely the regulation will be upheld. The Court cited *Pennsylvania Coal* as recognizing that "the nature of the State's interest in the regulation is a critical factor in determining whether a taking has occurred, and thus whether compensation is required."[21]

The Court also noted another important factor:

> [T]he type of taking alleged is also often a critical factor. It is well settled that a "taking" may more readily be found when the interference with property can be characterized as a physical invasion by the government [citation omitted] than when interference arises from some public program adjusting the benefits and burdens of

17. *Agins*, 447 U.S. at 258.
18. *Id.* at 260.
19. *Id.* at 261-62.
20. *Keystone Coal*, 107 S. Ct. at 1242.
21. *Id.* at 1243.

economic life to promote the common good.[22]

The Court in the *Nollan* case, discussed below, also added some gloss to the first part of the test. In considering the constitutionality of a California Coastal Commission development permit condition requiring dedication of a lateral access easement along the Nollans' private beach, the Court reiterated the two-part test, finding that the lack of "nexus" between the burdens imposed by the Nollans' development and the condition caused the dedication requirement to fail the first part of the test, i.e., the dedication did not "substantially advance" a "legitimate state interest." Justice Scalia admitted that the Court had not been specific about what was needed to pass the first part of the test, but he noted that a wide variety of land-use tools had passed:

> Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter. They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements. See Agins v. Tiburon, supra at 260-262 (scenic zoning); Penn Central Transportation Co. v. New York City, supra (landmark preservation); [Village of] Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (residential zoning).[23]

The *Nollan* decision did not address the second part of the takings test; it merely embellished the first part of the test by adding a focus on "nexus." Many questions remain, both about the old standard and the new embellishment. (E.g., What is a legitimate state interest? When does the "nexus" analysis apply? How close must the nexus be?) These questions are taken up below.

### (2) *An owner may not be denied economically viable use of his land.*

Governmental regulations, by their very nature, have an impact on property values. Mere fluctuations in value are "incidents of ownership" and "cannot be considered a 'taking' in a constitutional sense."[24] The United States Supreme Court has continually "recognized, in a wide variety of contexts, that government may execute

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22. *Id.* at 1244.
23. *Nollan*, 107 S. Ct. at 3146.
24. Danforth v. United States, 308 U.S. 271, 285 (1939).

laws or programs that adversely affect recognized economic values."[25] In appropriate cases, the Court "has upheld land-use regulations that destroyed or adversely affected recognized real property interests."[26] Writing for the Court in *Pennsylvania Coal*, Justice Holmes explained:

> Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends on the particular facts.[27]

In *Penn Central* the Court noted that prior cases which have sustained land-use regulations which were reasonably related to the promotion of the general welfare:

> uniformly reject the proposition that diminution in property value, standing alone, can establish a "taking," see Village of Euclid v. Ambler Realty Co., 272 U.S. 365, [47 S. Ct. 114, 71 L. Ed. 303] (1926) (75% diminution in value caused by zoning law); Hadacheck v. Sebastian, 239 U.S. 394, [36 S. Ct. 143, 60 L. Ed. 348] (1915) (87-½% diminution in value); cf. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. at 674 n.8, [96 S. Ct. at 2362 n.8,] and that the "taking" issue in these contexts is resolved by focusing on the uses the regulations permit. See also Goldblatt v. Hempstead, supra. [369 U.S. 590, 82 S. Ct. 987, 8 L. Ed. 130 (1962)] [sic][28]

In *Keystone Coal*, the Court in determining whether the owners had been deprived of "economically viable use" looked to the value that was left in the owner's property, not the value that was taken. The plaintiffs and appellants in the case were an association of coal mine owners in Pennsylvania who brought suit alleging that the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act (the "Subsidence Act") constituted a taking of their property.

Although the association alleged that the Subsidence Act re-

25. *Penn Central*, 438 U.S. at 124.
26. *Id.* at 125.
27. *Pennsylvania Coal*, at 413.
28. *Penn Central*, 438 U.S. at 131.

quired them to forego mining almost 27 million tons of coal in their mines, the Court instead focused on the fact that the total coal in the 13 mines operated by the companies amounted to over 1.46 billion tons. Noting that the Subsidence Act affected less than 2 percent of the owners' coal, the Court said that the owners "have not shown any deprivation significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking."[29] "[T]here is no showing that petitioners' reasonable 'investment-backed expectations' have been materially affected . . . ."[30]

### c. *Property rights and vested rights.*

One reason why land-use regulations can withstand constitutional scrutiny, even when the value of the owners' property is substantially decreased, is the United States Supreme Court's repeated determination that the property rights protected by the takings clause of the fifth amendment are those property rights created by state law.[31] California courts, interpreting California state property law, have indicated there is no right to develop. "Development is a privilege, not a right."[32]

A developer can acquire a "vested right" to develop under certain circumstances. First, under the common law rule, a developer can acquire a vested right to build out a project if a building permit has been obtained and substantial work has been done and substantial liabilities have been incurred in good faith reliance upon the permit.

The current common law vested rights rule in California was established by the case of *Avco Community Developers, Inc. v. South Coast Regional Commission*,[33] The Court stated:

> It has long been the rule in this state and in other jurisdictions that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit. [citations omitted] Once a landowner has secured a vested right the government may not, by virtue of a change in the zoning laws, prohibit construction

29. *Keystone Coal*, 107 S. Ct. at 1246.

30. *Id.* at 1249.

31. Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984), Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980).

32. Trent Meredith, Inc. v. City of Oxnard, 114 Cal App. 3d 317, 328, 107 Cal. Rptr. 685 (1981).

33. 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976).

authorized by the permit upon which he relied.[34]

The *Avco* court stated further "neither the existence of a particular zoning nor work undertaken pursuant to governmental approvals preparatory to construction of buildings can form the basis of a vested right to build a structure which does not comply with the laws applicable at the time the building permit is issued."[35]

The California Legislature has provided two other ways a developer can obtain a vested right to develop: by entering into a development agreement with the city (pursuant to CAL. GOV'T CODE § 65866 (West 1983)) or by filing a vesting tentative map (pursuant to CAL. GOV'T CODE § 66498.1 (West 1987)).

Thus it follows from these California authorities that an owner's state-law-defined property rights — those rights which are protected from being taken for public use without just compensation — are severely limited by the "vested rights" doctrine. Until a property owner acquires a vested right to proceed with its project, the owner runs the risk that land-use regulations will change in a way which will substantially decrease the value of its property. This decrease in value is limited only by the second part of the takings test — that the owner not be denied "economically viable" use of its property — and the United States Supreme Court has interpreted that standard so as to uphold land-use regulations which have caused extreme reductions in property values. The Court has said that diminution in property value, standing alone, will not constitute a taking. The Court will look at what uses are left for the owner's property and will not look in isolation at injuries to specific parts of an owner's property or be swayed by the magnitude, in dollars, of the owner's loss.

### B. *Remedies For Excessive Land Use Regulation.*

#### 1. *Remedies for "Takings" under the fifth and fourteenth amendments.*

##### a. *Damages.*

Before the *First Lutheran Church* decision was handed down this June, the California rule was that monetary damages were not available as a remedy for a regulatory taking. As will be discussed in detail below, the *First Lutheran Church* decision reversed the Cali-

34. *Avco*, 17 Cal. 3d at 791, 553 P.2d at 550, 132 Cal. Rptr. at 389-390.
35. *Avco*, 17 Cal. 3d at 793, 553 P.2d at 551, 132 Cal. Rptr. at 391.

fornia rule, finding that damages are constitutionally-required for the taking of private property, even if the taking is only "temporary" because the offending regulation is subsequently rescinded.

Some commentators view the availability of damages as "a new weapon for developers," but others would argue that the decision is only the fair and natural result of a literal reading of the fifth amendment and will only apply in those rare cases where regulation goes so far as to constitute a taking. Both sides should agree that the *First Lutheran Church* decision does nothing to increase the likelihood that a regulation will be found to constitute a taking. Many questions remain as to how the remedy will be applied by the courts.

b. *Invalidation.*

Before *First Lutheran Church*, invalidation of the offending regulation was the only remedy available in California for a regulatory taking. Invalidation is still the only remedy for the prospective application of the unlawful regulation — the landowner cannot force the city to permanently acquire the property through eminent domain. When faced with the finding that one of its regulations constitutes a taking, a city has the choice of abandoning the offending regulation, or it may keep the regulation in place and pay for the property so taken.

2. *Other remedies.*

An aggrieved landowner is not limited to the remedies flowing from the takings clause of the fifth amendment. The landowner can make claims under the due process clause for unfair or illegally motivated governmental decision making. This approach has not been very successful unless an illegal motive can be shown. The landowner can also claim that a regulation which impacts his or her property in an apparently discriminatory manner is a violation of his or her rights to equal protection under the law. In California, the courts have not been very receptive to this challenge.[36] Actions pursuant to § 1983 are not procedurally limited by the burden of exhaustion of administrative remedies as are "takings" claims.

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36. See Candid Enter. v. Grossmont Union High School Dist., 39 Cal. 3d 878, 890, 705 P.2d 876, 218 Cal. Rptr. 303 (1985), wherein the California Supreme Court stated that "developers do not constitute a 'suspect class' and development is not a 'fundamental interest;' " therefore, the equal protection argument was not available. Claims for damages for both violations can be made under the Federal Civil Rights Act, 42 U.S.C. § 1983 (1982).

## III. THE THREE NEW CASES: *Keystone Coal, First Lutheran Church* AND *Nollan*

### A. *Introduction*

During the United States Supreme Court's 1986-1987 term, the Court issued three decisions on the law of takings which are of great importance to landowners, developers, planners, local legislators — in fact, everyone involved in the land-use regulation process.

The first case, the *Keystone Coal* case described above, received little fanfare in comparison with the other two cases, but it was important for several reasons. First, it reaffirmed, in practically the same judicial breath as the other two cases, the Court's standards for determining how far regulation can go before it constitutes a taking. It may serve as a rudder to keep the law of takings from veering too far off course from the impact of the other two cases. Also, the Court in *Keystone Coal* rejected a challenge that the Subsidence Act was unconstitutional on its face, even though the state statute and the facts of the case were quite similar to those of the landmark *Pennsylvania Coal* case. The reason for the difference in outcome probably is not so much because of differences in the facts or the statutes, but more because of a shift in societal values in the last 65 years and because the Subsidence Act was established with a better administrative record citing the public health, safety and welfare concerns involved.

The other two takings cases — *First English Evangelical Lutheran Church v. County of Los Angeles*,[37] and *Nollan v. California Coastal Commission*,[38] — were the ones which made the headlines. Both decisions increased the protection of private property rights against excessive governmental regulation. However, neither case gave any better definition of how far is "too far."

In the first case, *First Lutheran Church*, the Court held that monetary damages are available for regulatory takings, overturning the California rule. In the second case, *Nollan*, the Court invalidated a condition imposed by the California Coastal Commission on a development permit because of a lack of "nexus," i.e., the condition was not reasonably related to the public need or burden the development created (or to which it contributed). Both decisions are generally considered victories for California property owners, whose rights previously have received less protection from the California courts.

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37. 107 S. Ct. 2378 (1987).
38. 107 S. Ct. 3141 (1987).

### B. *First Lutheran Church — Money for the Taking.*

In *First Lutheran Church*, the United States Supreme Court, reversing the California rule, held that the "just compensation clause" of the fifth amendment, as applied to the States under the fourteenth amendment, mandates that a landowner may recover damages if the land use restriction constitutes a "taking" of his property.

Prior to *First Lutheran Church*, California courts had held that a landowner who had been denied all beneficial use of his property through unreasonable governmental regulation was not entitled to a damages award and could only seek a court order invalidating the regulation.[39] In overturning the California rule, the Court held that the Constitution requires compensation for any "temporary taking" that may occur while the regulation is in effect prior to the Court's taking determination.

The facts of the case are somewhat unlikely for such a landmark taking decision. In 1957, First English Evangelical Lutheran Church purchased a 21-acre parcel of land in a canyon along the banks of the Middle Fork of Mill Creek in the Angeles National Forest. The Middle Fork is the natural drainage channel for a watershed area owned by the United States Forest Service. The church operated a campground on the site, known as "Lutherglen," as a retreat center and a recreational area for handicapped children.

In July of 1977, a forest fire destroyed 3,860 acres of mountainous forest upstream from Lutherglen, creating a serious flood hazard. In February of 1978, in a flash flood that killed 10 people, the buildings on Lutherglen were destroyed.

In response to the flooding of the canyon, the County of Los Angeles adopted Interim Ordinance No. 11,855. The ordinance declared the area a flood zone and prohibited First Lutheran Church from rebuilding. The church sued, challenging the county's prohibition as a taking, and sought money damages. The trial court dismissed the claim, relying on *Agins* and finding that invalidation, and not money damages, was the only available remedy. The state court of appeal upheld this decision and the case was taken to the United States Supreme Court after the California Supreme Court had dismissed the claim on the damages issue alone.

The United States Supreme Court, addressing only the issue of

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39. Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372, *aff'd on other grounds*, 447 U.S. 255 (1979).

the availability of money damages, reversed the judgment of the California Court of Appeals. The Court held that invalidation of the ordinance, without payment of money damages for the use of the property during the period of time the appellant was denied all use of its property, would be a constitutionally insufficient remedy. The case was remanded to the trial court on the question of whether such a flood control ordinance actually amounted to a taking of property.

In holding that the remedy of money damages should be available in the case of a regulatory taking, the Court finally reached a decision it had been putting off for several years.[40] It is important to note that the Court only decided that damages were an available remedy if a taking is found; it did not address the more difficult question of whether Los angeles County's flood control regulation would constitute a taking (Justice Stevens, writing for the dissent, felt that the regulation clearly would not constitute a taking.) Instead, because of the nature of the appeal, the Court proceeded on the assumption that a taking had occurred, and the Court reasoned that the fifth amendment required just compensation for all takings, whether temporary or permanent.

The Court found that the *Agins* decision improperly held that the just compensation clause of the fifth amendment does not require compensation as a remedy for "temporary" regulatory takings, stating that the *Agins* decision "has truncated the rule by disallowing damages that occurred prior to the ultimate invalidation of the challenged regulation."[41] Citing a line of World War II cases where the Government had temporarily exercised its right to use private property and compensation was required, the Court concluded that "temporary" takings were not different from permanent takings, for which the Constitution clearly requires compensation.[41.1] Finding that the doctrine of inverse condemnation is predicated on the proposition that a taking may occur without formal governmental condemnation proceedings, the Court held that the government must award just compensation in such situations, as well as in the typical taking situation where the government actually condemns the property in eminent domain.

The Court limited its holding, however, to instances where the

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40. *See, e.g.*, San Diego Gas and Electric Co. v. City of 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).

41. *First Lutheran Church*, 107 S. Ct. at 2387.

41.1 *Id.* at 2388.

landowner was denied all use of its property. Further, the Court expressly did not deal with the "quite different" questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances and variances.

The decision leaves many important questions unanswered, not the least of which is whether the county's interim ordinance constituted a taking. The Court stated that "the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations."[42] That question will be discussed on remand to the California courts.

The Court also gave little guidance on other important questions such as to how the damages should be measured, when such a temporary taking period commences and what impact a plaintiff's burden of exhausting its administrative remedies will have on that period (a point the dissent stresses). These issues will have to be resolved in future litigation.

The *First Lutheran Church* case raises serious questions about the advisability of certain moratoria, interim ordinances and growth control ordinances which are not based on health or safety reasons. Because *First Lutheran Church* allows damages for "temporary takings," cities with regulations precluding all development of property while studies are conducted or safety concerns alleviated might run the risk of liability for monetary damages.

### C. *Nollan v. California Coastal Commission — the Nexus Requirement.*

In a decision long-awaited by property owners, builders, planners and government officials, the United States Supreme Court ruled that a beach access dedication requirement imposed by the California Coastal Commission as a condition to its approval to construct a beach house was an unconstitutional "taking" of private property without just compensation.[43] The decision has implications far beyond the issue of coastal access — virtually all conditions imposed by government in connection with permitting development must now be considered carefully in light of its holdings. But *Nollan*, like the *First Lutheran Church* decision, leaves many unanswered questions.

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42. *Id.* at 2384-85.
43. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987).

The facts of the dispute are as follows. In 1982, James and Marilyn Nollan sought a permit from the Coastal Commission to demolish their existing single story beachfront house and replace it with a two story, three bedroom house approximately 3 times larger than the existing structure. Public beaches are located within one-half mile to the north and south of the Nollans' property. Finding that the new house would increase blockage of the ocean view, increase private use of the shorefront and set up a "psychological barrier" by preventing the public from realizing the existence of the public beaches nearby, the Commission approved the construction subject to the condition that the Nollans allow the public an easement to cross the portion of their property lying between the high water mark and a sea wall approximately 10 feet inland. The Nollans unsuccessfully challenged this easement condition before the Commission and the California courts, and then appealed to the United States Supreme Court claiming that the condition violated the federal Constitution's prohibition against taking private property for public uses without just compensation.

The United States Supreme Court, in a five-to-four decision, reversed and held that the dedication amounted to a taking. Justice Scalia, writing for the majority, said that although the outright taking of an uncompensated, permanent, public access easement would violate the takings clause, conditioning the Nollans' rebuilding permit on their granting such an easement would be a lawful land-use regulation if it substantially furthered governmental purposes that would justify denial of the permit. Justice Scalia reasoned that the government's power to forbid particular land uses in order to advance some legitimate police-power purpose includes the power to condition such use upon some concession by the owner, even a concession of property rights, so long as the condition furthers the same governmental purpose advanced as justification for prohibiting the use.

Citing *Penn Central* and *Agins* for the proposition that land-use regulation (including a dedication condition) does not effect a taking if it (1) substantially advances legitimate state interests *and* (2) does not deny an owner economically viable use of his land, the Court held that the condition imposed in this instance failed to further the state interest advanced as the justification for the condition and, therefore, was not a valid regulation of land use, but "an out-and-out

plan of extortion."[44]

The Court assumed (for the purpose of the decision) that protection of the public's ability to see the beach was a legitimate state interest, but found nevertheless that because no "nexus" existed between the identified impact of the project (obstruction of the ocean view) and the easement condition (physical access across the beach), the exaction constituted a taking of private property without just compensation. In this case, Justice Scalia wrote, the Commission's imposition of the access-easement condition cannot be treated as an exercise of land-use regulation power since the condition does not serve the public purposes related to the permit requirement. None of the Commission's claims (protecting the public's ability to see the beach, assisting the public in overcoming a perceived "psychological barrier" to using the beach, and preventing beach congestion) were plausible. The Court held there was no connection or "nexus" between the condition imposed and the recognized burden created by the new construction, rejecting the notion that a nexus existed between visual access and actual access sufficient to meet constitutional requirements:

> 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 have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come close 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. Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the

44. *Id.* at 3148.

> owner an alternative to that prohibition which accomplishes the same purpose is not.[45]

The Court stated that in this case the condition substituted for the prohibition utterly failed 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 to something other than what it was. The Court held that, unless the permit condition serves the same governmental purpose as the development ban, the building restriction was not a valid land use regulation but "an out-and-out plan of extortion."

The Court further stated:

> It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles of viewing the beach created by the new house. It is also impossible to understand how it lowers any 'psychological barrier' to using the public 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.[46]

In summary, the United States Supreme Court through the *Nollan* case has tightened the nexus or connection rule between the dedication or fee condition and the burden being imposed. If there is no such nexus or connection, the decision to impose the conditions would not be a proper land-use decision and therefore could amount to a taking of property for which money must be paid pursuant to the protection of the fifth and fourteenth amendments to the United States Constitution as recently affirmed in *First Lutheran Church.*

The Court appears to quite clearly reject the very broad indirect nexus theory some California courts were following after the seminal nexus decision of *Associated Home Builders, Etc., Inc. v. City of Walnut Creek.*[47]

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45. *Id.* at 3147.

46. *Id.*, at 3149.

47. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971) (wherein the court rejected a direct nexus argument). *See*, especially, Whaler's Village Club v. California Coastal Com., 173 Cal. App. 3d 240, 220 Cal. Rptr. 2 (1985), cert. denied, 106 S. Ct. 1962 (1986) (dedication of a private beach as a condition to constructing a revetment to protect homes from wave action); Grupe v. California Coastal Comm'n., 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985) (dedication of two-thirds of an owner's property for lateral beach access as a condition to building a beach home).

However, whether or not the United States Supreme Court has imposed a strict nexus is still left up in the air. Apart from holding that the condition in question did not, for utter lack of the essential nexus, survive constitutional scrutiny, the Court did not decide how close the nexus must be for a regulation to "substantially advance" a "legitimate state interest."

The Court did say that its previous cases made clear "that a broad range of governmental purposes and regulations satisfied these requirements. *See Agins v. City of Tiburon*, supra, at 260-262 (scenic zoning); *Penn Central Transp. Co. v. New York City*, supra (landmark preservation); *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926) (residential zoning) [sic]."[48]

The *Nollan* case does not say that the dedication requirement may be upheld only if that particular subdivision creates the need for the dedication, which was the argument earlier rejected by the California Supreme Court in *Associated Homes Builders*.[49] It would appear that the law under *Nollan* is that the condition would be upheld if it substantially furthered a governmental purpose and the condition furthered the *same* governmental purpose advanced for regulating it. The Court did suggest that the constitutionally required nexus may be even tighter where exactions include the actual conveyance of property, therefore indicating that mitigation fees might not be subject to such a close scrutiny as would be an actual conveyance of property. The *Nollan* decision did not discuss in any fashion the nature, amount or size of an excessive dedication, and thus again the Court failed to reach the question of "how far is too far?"

### D. *Keystone Coal — Pennsylvania Coal Revisited.*

In *Keystone Coal*, the Court upheld a Pennsylvania statute that coal mine operators leave a certain amount of coal in the ground to prevent land subsidence. The Court held that the regulation was a valid exercise of the police power and not a taking of property within the meaning of the fifth amendment takings clause since the mine operators had not sustained their heavy burden of showing that the statute on its face effects a taking. The Court found that the record showed that the state had acted to arrest what it perceived to be a significant threat to the common welfare. Further, the record did not

48. *Nollan*, 107 S. Ct. at 3147.

49. 4 Cal.3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).

support a finding that the statute made it impossible for the mine operators to profitably engage in their business or unduly interfered with their investment-backed expectations. The Court in *Keystone Coal* also held that the coal left in the ground is not a separate segment of property for purposes of the takings clause and that the requirement that the coal be left in place did not effect a physical taking.

## IV. Impacts Of The New Cases On Land Use Planning

### A. *General Impacts.*

#### 1. *Chilling Effect.*

While the extent of the "chill" is uncertain, it is certain that the new takings cases — especially *First Lutheran Church*'s monetary damages remedy — will put some degree of chill on the land-use regulation process. The California Supreme Court in *Agins* was trying to avoid just such a chill. In justifying its decision that damages were not available for a regulatory taking, the court, quoting a commentator, warned that the utilization of the damages remedy:

> would have a chilling effect on the exercise of police regulatory powers at a local level, because the expenditure of funds would be, to some extent, within the power of the judiciary. 'This threat of unanticipated financial liability will intimidate legislative bodies and will discourage the implementation of strict or innovative planning measures in favor of measures that are less stringent, more traditional, and fiscally safe.'[50]

The majority in the *First Lutheran Church* acknowledged that their decision would have such an effect "undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land use regulations."[51]

Justice Stevens, writing for the dissent, felt that the damage remedy was inappropriate because, among other reasons, of its chilling effect:

> The policy implications of today's decision are obvious and, I fear, far reaching. Cautious local officials and land-use planners may avoid taking any action that might later be challenged and

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50. Agins v. City of Tiburon, 24 Cal. 3d 266, 276, 598 P.2d 25, 30, 157 Cal. Rptr. 372, 377 (1979).

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

> thus give rise to a damage action. Much important regulation will never be enacted . . . . It is no answer to say that '[a]fter all, if a policeman must know the constitution, then why not a planner?' San Diego Gas and Electric Company v. San Diego, 450 U.S. 621, 661, n. 26 (1981) (Brennan, J., dissenting). To begin with, the Court has repeatedly recognized that it itself cannot establish any objective rules to assess when a regulation becomes a taking . . . (citations omitted). How then can it demand that land planners do any better? However confusing some of our criminal procedure cases may be, I do not believe that they have been as open-ended and standardless as our regulatory takings cases are. As one commentator concluded: 'The chaotic state of taking law makes it especially likely that availability of the damages remedy will induce land-use planning officials to stay well back of the invisible line that they dare not cross.'[52]

Only time will tell the true extent of the "chill," but it seems certain that, to some extent, city planning officials will be more cautious in rejecting development plans and in requiring certain types of dedications and exactions. There also may be less innovation and flexibility in the planning process as they stick to "fiscally safe" land-use tools.

2. *Trend in the law of takings.*

The *First Lutheran Church* and *Nollan* cases seem to indicate the desire of the current majority of the Court to increase the protection of private property rights against excessive governmental regulation. But it remains unclear how far the majority intends to push its agenda. In the three cases the Court cited with approval a variety of land-use regulations. In *Keystone Coal*, the Court at least reaffirmed (and perhaps extended) existing law as to how far a regulation may go.

If these cases indicate a trend in the law of takings, it is possible that the Court may change the standard for determining when regulation "goes too far." Also, with the possibility that cities might be assessed monetary damages for regulatory excesses, one might hope that the Court would at least better articulate the standard.

3. *Applicability to initiatives and referenda.*

Although the Court did not specifically address the issue, nothing in the *First Lutheran Church* and *Nollan* cases would make

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52. *Id.* at 2399.

their decisions inapplicable to land-use regulations enacted through initiatives or referenda. The California Supreme Court in *Agins*, among its onslaught of reasons why damages should not be available, cited another commentator's warning "[a]re the voters, through the initiative power, also to have this unwelcome power to *inadvertently* commit funds from the public treasury? . . . The potential for fiscal chaos would be great if this were the result."[53]

In light of the fact that *First Lutheran Church* has overruled *Agins*' remedy limitation, opponents of land use regulation initiatives will almost certainly raise the spectre of damages in their campaigns. In other words, since it is clear that voters have no greater rights than a city council when enacting land use regulations, a voter-initiated measure could also amount to a *compensable* taking if it does not meet the two-part test.[54]

4. *Retroactivity.*

The holdings of the cases will probably be applied retroactively, that is to say, damages would be available for regulations enacted before *First Lutheran Church*. However, in many cases the applicable statute of limitations will bar any action.

### B. *Specific Impacts And Questions.*

1. *Temporary takings.*

The Court in *First Lutheran Church* declared that damages must be available for "temporary" takings of property. The temporary taking period encompasses the time between when the taking first occurred and when the offending regulation is repealed. This holding raises a number of questions.

#### a. *Delays.*

One question is whether delays in the planning process could be compensable. The *First Lutheran Church* majority indicated that "normal" delays in obtaining building permits, changing zoning ordinances, variances and the like were "quite different questions." Presumably these delays and others, such as compliance with CEQA (California Environmental Quality Act), will not be compensable, but instead will be seen as a normal and acceptable result of the

53. *Agins*, 24 Cal. 3d 266, 276, 598 P.2d 25, 30, 157 Cal. Rptr. 372, 377 (1979).

54. *See* Building Industry Assn. v. City of Camarillo, 41 Cal. 3d 810, 718 P.2d 68, 226 Cal. Rptr. 81 (1986).

planning process. Normal delays apparently need not necessarily be short, either. In *Williamson County Regional Planning Comm'n. v. Hamilton Bank*,[55] the Court reviewed a subdivision map application process which had spanned over eight years and nevertheless found that the plaintiff had not presented a "ripe" taking claim.

In *Guinnane v. City and County of San Francisco*,[55.1] the court, after reviewing the principles laid down in *Agins, supra*, and *First Lutheran Church, supra*, held that a year plus city study to consider possible acquisition of property as a city park did not amount to a taking. The court said that this delay was a normal one in the governmental decision-making process.

But what about delays which are not "normal"? Whether or not abnormal delays will be compensable probably depends on the type and length of delay and the ability of the owner to use his property during the delay. Most unintentional delays probably will not be compensable. Unintentional delays might include delays caused by governmental errors—such as delays caused by the failure of a city to follow the requirements, for example, of the General Plan laws or CEQA for a project[56] or failure of a city to obey the limitations of the Permit Streamlining Act, Governmental Code § 65920 et seq., resulting in litigation and further delay.[57] In cases where these delays are caused by good faith errors and the owner has some use of his property, the delays should not be compensable. The developer's claim against the city in these cases, if any, is really less in the nature of a takings claim and more in the nature of a negligence claim, from which the city would have the protection of governmental tort immunity. Moreover, the developer, in some cases, has the opportunity to at least try to prevent these mistakes from happening if they occur during the processing of the application.[58]

However, delays that prevent a developer from using his property at all because a city has failed to substantially follow the law could result in claims for money damages. For example, if a court has ordered a city to stop land-use processing during the period that the city's general plan is undergoing review and correction and if, as a consequence of this delay, the developer has no use of his property,

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55. 473 U.S. 172 (1985).

55.1 197 Cal. App. 3d 862, 241 Cal. Rpt. 787 (1987).

56. *See* San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino, 155 Cal. App. 3d 738, 202 Cal. Rptr. 423 (1984).

57. *See* Palmer v. City of Ojai, 178 Cal. App. 3d 280, 223 Cal. Rptr. 542 (1986).

58. *E.g., San Bernardino Valley Audubon.*

a court might find a temporary taking if the owner is damaged.

Intentional delays pose some tougher questions. Bad faith attempts to stall a project may well be compensable, if not as takings then at least as violations of the developer's rights to due process of law. Good faith intentional delays—such as interim ordinances, moratoria, and other such growth control measures—are somewhat different, however, as discussed below. Of course, these questions cannot be definitively answered until the California courts have had an opportunity to rule on them.

b. *Interim ordinances, moratoria and other growth control measures.*

Interim ordinances, moratoria, and other such growth control measures should continue to be lawful exercises of the police power, so long as they do not "go too far."

Interim ordinances pursuant to CAL. GOV'T. CODE § 65858 (West 1983) which prohibit new development plans so that a city can reevaluate its land-use policies should continue to be lawful, provided the period of delay is reasonable and there are valid reasons justifying the adoption of the interim ordinance. The length of delay which is reasonable will probably vary from case to case, and courts should recognize the fact that limited fiscal resources will necessarily slow the planning process. Developers may wish (or be asked) to help fund independent studies which otherwise would have to be delayed for lack of resources. As a preventive measure, a city should consider allowing some use during the interim period and not prohibit all uses of the property.

Moratoria and other growth control measures which are based on documented health and safety and general welfare concerns are more likely to withstand constitutional challenges. In cases where the perceived problems of development can be mitigated, those measures which relax restrictions upon attainment of realistic service level goals will be more likely to withstand attack. Also, properly documented growth control measures could withstand judicial scrutiny if they allow enough potential for eventual development or other fruitful use so that owners are not denied economically viable use of their property.

c. *Measurement issues.*

(1) *Measurement of damages.*

The Court in *First Lutheran Church*, with reference to the issue

of compensation for temporary takings, referred to three World War II cases where the government had exercised its power of eminent domain for a limited period of time.[59] In these cases, compensation was based on the value of a leasehold interest in the property taken. Even assuming this is the appropriate measure of damages, it is not clear how the rental value of the property should be determined. In the regulatory taking context, it would rarely make any sense to calculate the rental value on the basis of the use in existence at the time of the taking, because very often no use at all is being made of the property. Should the use for which the rental value is determined be the developer's planned use, or the "highest and best" use, if different? Or, since the developer is not necessarily entitled to use its property according to its desires, should the use used for calculation of the rental value be the most profitable use allowed under the most restrictive possible lawful restriction? These questions will have to be resolved in future litigation.

Perhaps rental value is not the appropriate measure of damages. The Court occasionally makes reference to the owner's "investment-backed expectations." Does this mean that the owner's damages should be based somehow on the owner's investment or on some kind of a return on that investment? This would tend toward the unlikely result of favoring those owners who have overpaid (or at least paid top dollar) for their property. Surely that cannot be the Court's intention. Indeed, there is an inherent ambiguity in the reference to interference with "investment-backed expectations." On one hand, the cases establish that even a substantial diminution in value due to a downzoning does not alone constitute a taking,[60] wherein the court upheld the validity of a zoning ordinance that reduced the value of private property by as much as 90 percent). On the other hand, such a downzoning will almost surely frustrate the investment-backed expectations of any recent purchaser of the property and probably result in a loss on the investment.

The Court's reference to "investment-backed expectations" probably is better interpreted as an admonishment. At some point in the process where the city has granted a certain amount of entitlements which the owner has relied on to exercise an option on the

59. Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945).

60. *See* William C. Haas Co. v. City and County of San Francisco, 605 F.2d 1117, 1120-21 (9th Cir.), *cert. denied*, 445 U.S. 928 (1979).

property or has incurred further expenses, the city may be precluded from taking an "about-face" direction at the direct expense of the owner's investment-backed expectations. At the same time, developers should be aware that because there is no right to develop in California, whether a developer's "expectations" will be found to be reasonable will remain an open question.

Basing an owner's damages on lost profits would be no easy task. In general, a plaintiff's damages must be susceptible of reasonable proof — they may not be speculative. Determining a developer's profits lost by virtue of a temporary taking would necessarily involve speculation as to the developer's cost and the feasibility and ultimate success of the project. Courts may well decide that these matters are too speculative to form the basis for an award of damages.

Another open question is whether consequential damages should be allowed to a victim of a regulatory taking. What if the delay causes the developer to lose a loan at a favorable interest rate, and the rates subsequently increase substantially? Should the added interest the developer will have to pay be part of its damages? What if the delay (including, perhaps, litigation over the regulation in controversy) causes the owner to be unable to carry the costs of the project and to lose the land to foreclosure? If the owner is forced into bankruptcy as a result of an unlawful delay, would the bankrupt's estate (or its creditors) have any claim against the city for damages from the insolvency? Again, these are questions with which future courts and commentators will wrestle.

### (2) *Measurement of the period of the temporary taking—ripeness issue.*

Another open question is how the period of the temporary taking will be measured. For one thing, it will be difficult to determine when the period of the temporary taking commences, especially given the Court's rulings in *Williamson County*, and *MacDonald, Sommer & Frates*, which require the submission and resubmission of development plans or the application for zoning amendments or variances before the taking claim will be "ripe."

In *MacDonald*, the Court held that a rejection of one development application, in that case, a subdivision map, did not constitute a taking since the Court reasoned that the county had not reached a final decision as to how the county's land use regulations would be applied and therefore the Court could not determine whether a taking had occurred.

In *Kinzli v. City of Santa Cruz*,[61] the property owner's claim of taking was dismissed by the federal appellate court because there had been no attempts to secure a development permit prior to bringing suit. Relying on *Williamson County, supra*, the Ninth Circuit court ruled that an inverse condemnation cause of action is not ripe until the landowner has secured a "final decision" on a permit application *and* on a request for a variance. This prerequisite could be waived only upon a showing that such requests would be "futile." *Kinzli*, citing *Norco Construction, Inc. v. King County*[62], held that futility involves the showing that it is " 'clear beyond peradventure that excessive delay in such a final determination [would cause] the present destruction of the property's beneficial use.' "[63] The *Kinzli* court suggested another test for futility, citing *American Savings & Loan Association v. Marin County*[64], " 'the submission of a plan for development is futile if a sufficient number of prior applications have been rejected by the planning authority.' "[65]

Of course, the ending of the period of the temporary taking should be more clear — it should be the date the unlawful restriction is lifted.

2. *Effect of the "nexus" requirement on specific land use tools.*

Whether *Nollan*'s "nexus" requirement will have much of an effect on most land use measures is questionable. The "nexus" requirement that the condition imposed relate to the burden created by the development will probably have little application outside of the setting of development conditions and exactions. Planning and zoning changes, preservation of open space, landmarks, and natural conditions such as coastal areas, wetlands, floodplains and hillsides should be considered on their own merits.

Many commonplace conditions such as the dedication of streets, curbs and gutters, sewers, parks and open space — where the dedication mitigates the recognized impact of that development on streets, sewers, parks, etc. — will have the necessary nexus and will survive. Other conditions, including exactions for public art, child day care and some in-lieu fees, may now be of doubtful validity if the city could not justify denying the development on those grounds.

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61. 818 F.2d 1449 (9th Cir. 1987).
62. 801 F.2d 1143 (9th Cir. 1986).
63. *Kinzli*, 818 F.2d at 1454 (citations omitted).
64. 653 F.2d 364 (9th Cir. 1981).
65. *Id.*

No doubt cities will make every effort to meet the *Nollan* nexus requirement in an effort to preserve such conditions.

### C. *Impacts On Development And Litigation Strategies.*

#### 1. *Development strategies.*

Developers will feel that they are now in a better bargaining position with the city, and they can be expected to flex their newfound muscles with warnings about potential damages liability and concerns for "nexus." But in light of the *Williamson County, MacDonald* and *Kinzli* cases, developers will have to have the patience to submit and resubmit development plans and to apply for plan and zoning amendments or variances to avoid "ripeness" problems.

Cities will have to ensure that the delays they impose are normal or, if abnormal, justifiable. Cities may be well advised to never prohibit all use of property for any substantial length of time; instead they should leave some economically viable use of the property, even if that use is one to which the developer might realistically never put the property. Cities should carefully identify local problems, establish regulations and development conditions with a logical nexus to those problems identified, and should be careful to create a good administrative record to support their actions. Cities should also, as before, be careful to follow proper procedures and to respect "vested rights."

#### 2. *Litigation strategies.*

Whether litigation strategies will change drastically is questionable. Of course, with the availability of damages, all plaintiffs can be expected to seek them. Since the takings meter will be ticking during the pendency of the litigation, cities should now avoid unnecessary delays and dilatory tactics, including unimportant procedural appeals.

## V. CONCLUSION

As can be seen from the discussion above, the courts, especially the United States Supreme Court, have not laid down any litmus test or any one set rule by which to measure when a land-use regulation "goes too far." The *First Lutheran Church* and *Nollan* cases make it quite clear that, first, if a land-use regulation goes so far as to amount to a taking, the fifth amendment demands compensation, not invalidation, and, second, that there must be a nexus between a condition and the approval of a development. If there is no nexus,

the condition amounts to a taking.

In the future, city officials, in exercising their police power in land-use regulations and issuing land-use decisions, must clearly practice preventive law in light of the above principles.