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# A MIRANDA CARD FOR PLANNERS

*Brian W. Blaesser\**

We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land use planners and governing bodies of municipal corporations when enacting land use regulations.

. . . .  
. . . Cautious local officials and land use planners may avoid taking any action that might later be challenged and thus give rise to a damage action. Much important regulation will never be enacted, even perhaps in the health and safety area.<sup>1</sup>

Assessments of the significance of the United States Supreme Court's decisions in *First English* and *Nollan*<sup>2</sup> for land-use planning practice and local government decision-making have resembled the mood swings that accompanied the October crash of the Stock Market.<sup>3</sup> Some public officials and planning professionals have echoed the lament of Justice Stevens in *First English* and predicted that the decisions will "chill" the will of planners to propose necessary land use regulations. Other observers have opined that land use regulation is no worse off than before and may even have gained an overall advantage in the long run.<sup>4</sup> Perhaps, however, the most important

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1. *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2389 (1987).

2. *Nollan v. California Coastal Commission*, 107 S. Ct. 3141 (1987).

3. Indeed, Professor Sax seemed to capture the mood of this past summer, remarking: "Of course it didn't happen this way, but the headlines last month should have read: 'Don't Panic, Experts Say. Nollan Case No Bombshell.' There would have been a subheading: 'Temporary Taking Case Also Overrated; Planners Urged To Calm Down.'"

Sax, *Property Rights in the Supreme Court*, 3 CAL. WATERFRONT AGE No. 3 (Summer 1987).

4. For example, one commentator has argued that the U.S. Supreme Court's emphasis in *First English* and *Nollan* on harm prevention, making compensation the remedy for a tak-

conclusion for planners and planning lawyers that can be drawn from "Black Tuesday"<sup>5</sup> is that while the field of land use regulation has been shaken, and there has indeed been a dramatic change in land use law, the underlying rationale for such regulation remains unimpaired. It is the rules that have changed. Planners, more than ever before, must heed Justice Brennan's exhortation to know the Constitution.<sup>6</sup> Considerations of policy must conform to the express provisions of the Constitution.<sup>7</sup> In effect, planners must carry their own *Miranda* card with the new rules clearly stated. The success of future planning and land use regulation depends upon how well planning professionals learn to play by those rules.

### THE NEW RULES

Eight new rules which should be etched on the *Miranda* cards of all land-use planners are:

1. The fifth amendment of the federal Constitution requires compensation for both permanent *and* temporary takings of private property.<sup>8</sup>
2. A valid land use regulation that results in a temporary taking of private property may require payment of compensation.<sup>9</sup>
3. The just compensation clause of the fifth amendment is self-executing.<sup>10</sup>
4. Once a court has determined that a land-use regulation has effected a taking, the local government, while required to pay compensation for the period of the regulatory taking, still retains the options of amending the regulation, withdrawing the invalidated regulation, or exercising its power of eminent domain.<sup>11</sup>
5. The development of one's property is a *right* (not a benefit con-

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ing (which may exclude damages, pain and suffering etc.) and the Court's apparent acceptance of development exactions as a regulatory technique, provided that a rational nexus is demonstrated, should be viewed as victory for local government in the long run. Freilich, "*Property Rights: Are There Any Left?*" unpublished paper delivered at the National ABA Convention, San Francisco, August 9, 1987.

5. Peirce, "*Disturbing Message in Land Use Ruling*," St. Louis Post-Dispatch, June 20, 1987.

6. "After all, if a policeman must know the Constitution, then why not a planner?" San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 655 n.26 (1981) (Brennan, J., dissenting).

7. *Id.*, 450 U.S. at 661 (Brennan, J., dissenting).

8. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378, 2386-88 (1987).

9. *Id.* at 2386.

10. *Id.*

11. *Id.* at 2389.

ferred by government) which may be subject to *reasonable* regulation.<sup>12</sup>

6. A land use regulation which requires the granting of a property interest to the government as a condition to the granting of a permit to make economic use of one's property is not a "voluntary" act by a property owner.<sup>13</sup>

7. A land use regulation which imposes an exaction upon a property owner as a condition to the granting of a permit to make economic use of property must be rationally related to the burden which the property owner's proposed project will cause.<sup>14</sup>

8. A land use regulation which imposes an exaction which is not rationally related to the burden which the property owner's project will cause is "an out-and-out plan of extortion."<sup>15</sup>

### EXCEPTIONS TO THE RULES

As with most rules, there are exceptions. In the land use context, important exceptions to the above rules for planning practice may be derived from reading *First English* and *Nollan* in conjunction with the Supreme Court's earlier 1986 term decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*.<sup>16</sup> In the *Keystone* decision, involving a challenge by coal companies to the Pennsylvania Subsidence Act which required that 50% of the coal beneath certain structures be kept in place to provide surface support, the Court underscored the important role that the *nature* of the governmental action plays in takings analysis. From that role is derived a critical exception to the takings rules summarized above. As the Court explained, it would hesitate to find a taking where the government "merely restrains uses of property that are tantamount to public nuisances . . ."<sup>17</sup> This view, the Court said, is "consistent with the notion of 'reciprocity' of advantage that Justice Holmes referred to in *Pennsylvania Coal*."<sup>18</sup> That is, while we may be burdened by restrictions, we also clearly benefit from the restrictions that are placed on others. For this reason, the Court reaffirmed the principle it had recognized 100 years ago in *Mugler v. Kansas*: "[A]ll property in this country is held under the implied obligation that the owner's use

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12. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3146 n.2 (1987) (emphasis added).

13. *Id.*

14. *Id.* at 3146-48, 3150.

15. *Id.* at 3148.

16. 107 S. Ct. 1232 (1987).

17. *Id.* at 1245.

18. *Id.*

of it shall not be injurious to the community.”<sup>19</sup>

Thus, despite the anguish expressed by Justice Stevens in *First English*, and some commentators, important regulation can and will continue to be enacted in the “health and safety area.” *First English* involved just such a health and safety area— floodplain controls. The majority did not hold that if floodplain controls take private property that money damages are due. Rather, the Court stated:

We have no occasion to decide . . . whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as part of the state’s authority to enact safety regulations.<sup>20</sup>

In addition, there will continue to be “normal delays” in the regulatory process which will not constitute takings. The court in *First English* was careful to distinguish such delays, saying:

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.<sup>21</sup>

Although the Court in *First English* did not offer any explanation of what it meant by “normal delays” it is important to note the majority in that case did not reject Justice Stevens’ suggestion that the validity of a regulation should be judged by its “depth [extent to which property cannot be used], width [amount of property affected] and length [duration of restriction].”<sup>22</sup> Using this analytical approach, absent clear evidence of governmental intent to delay, the types of regulatory delays alluded to by the Court would not constitute a taking. Indeed, neither *First English* nor *Nollan* should be viewed as casting any pall upon the use of moratoria, provided a moratorium is designed with Justice Stevens’ three factors in mind and is properly grounded in studies and evidence.

#### PLANNING IMPERATIVES AND OPPORTUNITIES

The best insurance against the inevitable regulatory taking claims that *First English* will spawn is quality planning. The challenge for planners is to apply planning principles in a manner that will ensure that no regulation is prepared that “goes too far”. This

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19. 123 U.S. 623, 665 (1887).

20. *First English*, 107 S. Ct. at 2384-85.

21. *Id.* at 2389.

22. *Id.* at 2394 (Stevens, J., dissenting).

means that competent planning analysis must precede the drafting of regulations. The planning analysis must address and reasonably accommodate competing interests such that both the process and the substance of the proposed regulation truly advance the stated governmental purpose.

In light of the ruling in *Nollan*, planners must devote their efforts to properly articulating, clarifying where necessary, and updating one of the principal sources of legitimate governmental interests—the comprehensive plan. A comprehensive plan must evidence the data and planning rationales that support the purposes to be achieved by the plan and must propose methods of implementation that are closely tailored to advance those purposes. Long-range planning must also be tied to capital improvements programming. Such programs address the financial impact of new development upon communities and provide the empirical basis for determining what exactions, if any, are needed to accommodate such development. Without such analysis, planners and local officials will be subject to a valid claim under the authority of *Nollan* that there is no demonstrated “fit” between the exaction imposed and the burden created by the proposed development.<sup>23</sup>

The planning profession frequently has been accused, sometimes rightly so, of pursuing planning abstractions without regard to the Constitutional rights of property owners. After all, until *First English*, there was a certain sense of financial untouchability in the face of litigation. If the property owner prevailed in litigation attacking a land use regulation, the local government could merely amend the regulation and start all over again!<sup>24</sup> *First English* changed all that. The new rules will force the planning profession not only to know the Constitution better than ever before, but also to do better

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23. *Nollan*, 107 S. Ct. at 3148.

24. In his dissent in *San Diego Gas & Electric v. City of San Diego*, 450 U.S. 621 (1981), Justice Brennan noted with dismay the city attorney's wry advice at the 1974 annual conference of the National Institute of Municipal Law Officers in California:

“IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.”

If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra ‘goodies’ contained in the recent [California] Supreme Court case of *Selby Realty Corp. v. City of San Buenaventura*, 10 C.3d 110, appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again.

450 U.S. 621, 655 n.22 (1981) (Brennan, J., dissenting).

and more responsible planning than ever before. It is a challenge that planners should welcome.