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Robert K. Best

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NEW CONSTITUTIONAL STANDARDS FOR LAND USE REGULATION PORTENTS OF NOLLAN AND FIRST ENGLISH CHURCH*

Robert K. Best**

The legal battleground for land use regulation disputes usually is inhabited by giants. Major developers fighting powerful governmental agencies is the common stuff of land use litigation. It is somewhat ironic, then, that the most significant developments in land use law in the last half century have resulted from the efforts of a church to restore a demolished youth camp and the desire of a family to replace an existing house with a new home on a single, tiny beachfront lot. But these ordinary plaintiffs had the inordinate stamina and luck necessary to persevere through years of litigation to ultimately present their cases to the United States Supreme Court. The resulting decisions imposed strict constitutional limits which will require the standards for land use regulations employed nationwide, to be reevaluated.

As with most constitutional pronouncements by the United States Supreme Court, the practical ramifications of these decisions will depend upon their interpretation and application by many lower courts. However, it is immediately clear that the rules of the game have changed substantially. Regardless of the varying interpretations that will undoubtedly arise from future litigation, the steady erosion of individual rights associated with the ownership of property which appeared but a year ago to be irresistible has been stopped. Justice Holmes' now ancient rubric that governmental interference with the

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** Robert K. Best is currently Director of the California State Department of Transportation; he is formerly Chief of Property Rights Litigation for Pacific Legal Foundation. J.D. 1970, McGeorge School of Law of the University of Pacific; A.B. 1961, Stanford University. The PLF provided representation to the Nollans throughout their dispute with the California Coastal Commission. Mr. Best prepared and argued the case before the United States Supreme Court. PLF also participated as an amicus curiae in the First English Church case.
individual rights of property owners must not go "too far" has been
given substance in the form of clear restraints on the exercise of gov-
ernmental power to regulate land use. As a result the focus of the
debate has been changed. In early 1987 the question was:

How much further can government go in restricting property use
and forcing property owners to fund community programs?

For the next several years the debate will be over how far govern-
ment must retreat from their excessive conduct of the past. For prop-
erty rights advocates, the assault on their position has been thwarted.
They have been given the high ground. Now, after years of losses in
defensive engagements they will likely be on the offensive.

The most wide-ranging effects are likely to flow from the Nollan
decision. Virtually all conditions imposed by government in con-
nection with permitting land use must now be considered. At issue in
Nollan were the constitutional limits on the ability of the California
Coastal Commission to impose a property exaction on the approval
of a building permit. Nationwide, 88% of all communities in the
United States employ some form of exactions as part of their regula-
tory program. The constitutional limitations established by the
Court in Nollan require an evaluation of the relationship between
any such exaction and the specific use proposed in each land use
application. The exaction must serve to reduce or eliminate adverse
effects of the proposed use of the property which effects by them-
selves could have justified denial of the permit. Even standard exac-
tions which may be reasonable in almost all circumstances could vio-
late this constitutional limit under the facts of a specific case. The
need to relate a proposed exaction to the proposed use on each parcel
of property suggests that prudent regulators all over the country will
be more conservative in the imposition of exactions. In the words of
a San Francisco city attorney, "[w]e are going to make decisions
with a little more fear."3

The Nollan decision also goes beyond the direct question of the
limitations on permit conditions and gives two important, favorable
rulings on related land use issues. First, the Court held that a devel-

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2. Brief Amicus Curiae of Council of State Governments, at 19, Nollan v. California
3. Soiffer, Court's Decision May Curb Cities' Land-Use Plans. San Francisco Chronicle
opment permit is not a governmental benefit. Second, the Court held that judicial review of land use regulations must include careful scrutiny to determine whether the regulation substantially advances legitimate state interests. These two holdings, particularly the requirement for closer judicial scrutiny, may be the most significant aspects of this decision in advancing the individual rights of property owners.

Although First English Church presented totally different issues from those before the Court in Nollan, the effects of the two cases are closely related. At issue in First English Church was the question of whether a local government could be required to pay compensation when an onerous regulation precluded all use of the property. The Court's decision overturned a 1979 ruling by the California Supreme Court in Agins v. City of Tiburon, which held that the property owner could only have the unconstitutional regulation invalidated. The focus of First English Church as it went before the Court was on the question of the availability of the compensation remedy. This remedy issue by itself had little practical effect outside of California, as the Agins rule has not been widely adopted. Undoubtedly the spread of the Agins rule has not been limited by Justice Brennan's famous dissent in San Diego Gas & Electric Co. If the Court in First English Church had gone directly to the remedy issue, held that the just compensation clause requires compensation whenever a taking has occurred, and stopped there, the decision would have left undisturbed the fertile ground surrounding the question of when a deprivation of use becomes a compensable taking. The Chief Justice's opinion, however, retreated a step and held that temporary deprivations of use, if sufficiently severe to constitute takings, "are not different in kind from permanent takings, for which the Consti-

5. Id. at 3146-47.
tution clearly requires compensation." Thus, *First English Church* has given significant new prominence to the concept of a compensable temporary taking while leaving open the question of exactly what actions constitute such a taking.

Both *Nollan* and *First English Church* stand as instructions to governmental agencies and to the lower courts throughout the country to reevaluate the reasonableness of local land use planning practices. The cases do not overlap but they do compliment each other. *First English Church* establishes significant consequences for a local agency which engages in excessive regulation and denies all economically viable use of property, or interferes with reasonable investment backed expectations. *Nollan*, on the other hand, applies when the property's requested use is approved, but burdened by excessive exactions. Thus the regulating entity is caught coming and going by these two decisions. Extreme regulatory conduct is at risk whether it is applied when denying or when approving a land use application.

*First English Evangelical Lutheran Church v. County of Los Angeles*

*Say Hello to the Temporary Taking*

In *First English Church*, the Supreme Court concluded that temporary takings are compensable by relying upon World War II cases where the temporary physical occupation of properties by agencies of the federal government was duly compensated. According to the Court the church had been denied all use of its property for a maximum of 6 years and 10 months. "The United States has been required to pay compensation for leasehold interests of shorter duration than this."

The use of the World War II precedents has significant implications. It is tempting to suggest that the Chief Justice, in *First English Church*, has equated temporary deprivations of all use by regulation with any type of temporary physical occupation. If this were the Court's intent, the ramifications on traditional land use planning procedures would be extremely serious. Physical takings of very short durations, even in the context of urgent public need, would re-

11. *Id.* at 2388.
quire the payment of compensation.\textsuperscript{12} Therefore, if a very brief delay in granting permission to make any use of the property is the same as a very brief physical taking, many "normal" planning actions would give rise to the obligation to pay compensation.

The Court expressly refused to decide whether temporary deprivations of use resulting from "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like" should be compensable.\textsuperscript{18} The strong implication at the heart of the opinion that there is no distinction between a short-term refusal to allow any use and a short-term physical taking, however, is not seriously undercut by the Court's express limiting of its decision "to the facts presented."\textsuperscript{14} Regulating entities should not expect to find a safe haven in this language for several reasons.

First there is nothing exceptional in the Court's limiting its opinion "to the facts presented" and refusing to issue pronouncements on the implications of the decision on different factual circumstances.

Second, the Court grants only a very narrow acknowledgment of this issue, apparently recognizing only normal processing time to respond to requests initiated by the landowner. Nothing in the Courts' language recognizes that a "different question" would arise when delays are imposed by the regulating entity for purposes other than processing requests of the landowner. Therefore, the constitutionality of such common land use planning devices as interim development restrictions or building moratoria of various types is now in serious question.

Third, the majority opinion contains one of those footnotes which may be destined to find a life of its own. Footnote No. 10 states that regardless of when the ultimate act occurs which consummates the taking, liability may extend to a "much earlier" date when the interference with the use of the property first began.\textsuperscript{15} Thus even those "normal delays" which might not be considered takings in and of themselves would be included in the period of time for which compensation is due if the application of the regulation ultimately results in a taking.

The last point to consider is the unsettling fact for the regulat-
ing entities that even the dissent, as strong as it is in its support for the regulation of land use, acknowledges that "[a] temporary interference with an owner's use of his property may constitute a taking for which the Constitution requires that compensation be paid."\textsuperscript{16} The theory of the dissent is that the invalidation of an unconstitutional regulation and the accompanying restoration of allowed uses will "mitigate the overall effect of the regulation so substantially that the slight diminution in value that the regulation caused while in effect cannot be classified as a taking of property."\textsuperscript{17} However, the dissent immediately acknowledges that this assumption may not always be true\textsuperscript{18} and later reaffirms that even under the more restrictive analysis proposed in the dissent;

some cases may arise in which a property owner can show that prospective invalidation of the regulation cannot cure the taking—that the temporary operation of a regulation has caused such a significant diminution in the property's value that compensation must be afforded for the taking that has already occurred.\textsuperscript{19}

The dissent proposes a "three dimensional" test to identify "whether a taking has occurred" on the facts of each case:
1. Depth: How severe are the restrictions?
2. Width: How much of the property is encompassed by the restrictions?
3. Length: What is the duration of the restrictions?\textsuperscript{20}

Thus, although the majority and dissenting opinions differ on the probability that a temporary taking will occur, they do not disagree on the key point that a temporary deprivation of all economically viable use of the property through land use regulation may result in a compensable taking. Since the majority opinion does not discuss the essence of the dissent, we cannot know at this time how wide the variance of opinions among the members of the Court is on the question of what manner of temporary interference with property use may trigger the compensation requirement. It is also clear that in many factual circumstances it can be proven that the economic effect of a planning delay of only one to two years is indeed substantial, and that restoration of an allowed use will not mitigate the

\textsuperscript{16} Id. at 2393 (Stevens, J., dissenting).
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id. at 2394.
\textsuperscript{20} Id.
losses suffered. Justice Stevens’ assumption that the invalidation of land use regulations will substantially eliminate the overall economic effect in “virtually all cases,” may have little validity in the real world of land development. Knowing that the justices on the Supreme Court may differ substantially in their opinions on this question offers little solace to those who must make regulatory decisions. The most that can be said is that the line between constitutional and unconstitutional temporary restrictions on land use is most uncertain.

An obvious question of immediate concern is whether any type of land use moratorium is valid under First English Church. The Court’s opinion does not begin to answer the question other than to raise what appears to be a fair implication that permissible delays are limited to those reasonably necessary to process applications filed by landowners. Most moratoria would not fall within this category. If we are to conclude that any form of moratorium can survive this decision, that conclusion must draw on Justice Stevens’ “three dimensional” test, which gives some indication as to the type of moratorium which is the safest or the riskiest. The longer a moratorium continues, the more likely it is to be excessive in “length.” The more comprehensive the prohibition (e.g., a total building ban), the more likely it is to be excessive in “depth.” The more property included, the more likely it is to be excessive in “width.” To these factors should be added the heightened concern established in Nollan for the demonstration of a legitimate state interest.

To the extent that any moratorium can now be considered “safe,” it probably should display the following characteristics:

1. A specific legitimate public purpose is identified which can only be achieved by imposing the moratorium.
2. The need for the moratorium arose from matters which were beyond the government agency’s control.
3. The moratorium contains a reasonable program to achieve its purpose in an expeditious manner.
4. The moratorium sets a specific expiration date with a provision for early termination if the public purpose is achieved sooner.
5. The breadth of the moratorium is limited in both the property included and restrictions imposed to that clearly necessary to achieve the legitimate public purpose.

Those moratoria which have been imposed for an indefinite period of time to achieve general planning purposes because of a sudden change in policy by the government agency would appear to be
the most susceptible to the charge that they are causing unconstitu-
tional temporary takings.

The broadest ramification of the First English Church case will
undoubtedly be its effect on the use of the moratorium as a land use
planning and regulation tool.

**Nollan v. California Coastal Commission**

*New Rules for the Exaction Game*

In *Nollan v. California Coastal Commission*, the Supreme
Court substantially rewrote land use law governing the imposition of
exactions on permit approvals. The Court severely restricted permis-
sible exactions by requiring that they serve the same public purpose
as would justify a denial of the requested use.\(^21\) This requirement,
that a nexus be demonstrated between the nature of the exaction and
a legitimate end which would justify the total prohibition of the pro-
posed use, will force reexamination of the legal standards employed
even by those jurisdictions which previously had required a close re-
lation to some effect of the proposed project itself. Not all "ef-
facts" are of sufficient moment to justify a total prohibition on the
requested use. Therefore, even in previously conservative jurisdic-
tions, many effects to which exactions may have been tied in the past
will no longer justify such regulatory conduct.

Unfortunately for the practitioner, the majority opinion does not
provide an easily quotable description of the characteristics of the
required "nexus." The lack of a precise description is certain to gen-
erate substantial controversy as both courts and government agencies
wrestle with the questions of the type and extent of allowable exac-
tions. However, the dissents go a long way toward filling the void.
They describe the required relationship as being a precise match be-
tween the exaction and burdens created by the proposed use.\(^22\) The
majority opinion's description of the nexus is more opaque because it
does not go directly from the exaction to the effects of the proposed
use. It interposes another step requiring an analysis of the public
purpose to be served by the exactions. The majority’s two step ap-
proach results from the decision to tie the result in this case to previ-
ous takings jurisprudence, specifically the requirement that a land
use regulation must "substantially advance legitimate state inter-

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\(^{21}\) *Nollan*, 107 S. Ct. at 3147.

\(^{22}\) *See infra* notes 29-33.
The rationale of the Court's opinion is the identification of "what type of connection between the regulation and the state interest satisfies the requirement." To answer this issue the Court established two criteria. First, the circumstances of the application must be such that the government agency could deny the proposed use altogether without that denial being a taking. The court "assume[d], without deciding," that this criterion was met under the Nollan facts. Second, if, and only if, the outright denial of the permit would not be a taking, then, instead of denying the request, the government may approve the permit with a condition which requires a property dedication. The condition is limited, however, to one which "serves the same legitimate police-power purpose" and on the facts of that case is "an alternative to [the possible] prohibition [and] accomplishes the same purpose." To consider whether a proposed use can be prohibited outright it is necessary to identify which of the actual adverse effects of that use, if any, are so severe as to justify prohibition. Then, to determine whether the exaction imposed as a condition on the approval accomplishes the same purpose, it is necessary to find a clear match between the exaction and the particular adverse effect which could have justified prohibition. Thus, Justice Brennan appears to have described accurately the required nexus as "a precise match between the condition imposed and the specific type of burden . . . created by the [proposed use]."

The dissents raise particularly vehement objections to the closeness of the relationship demanded by the majority. Justice Brennan criticized the new standard as requiring "a precise fit between the forms of burden and condition on each individual parcel," "a precise quid pro quo," and "a precise accounting system." Justice Blackmun refers to the new standard as "an 'eye for an eye'" requirement which demands a "close nexus between benefit and burden" and reflects a "rigid interpretation of the necessary correlation

25. Id.
26. Id.
27. Id.
28. Id. at 3148.
29. Id. at 3154 (Brennan, J., dissenting).
30. Id. at 3153.
31. Id. at 3160.
32. Id. at 3162.
between a burden created by development and a condition imposed."\textsuperscript{33}

Despite the fervid criticism in the dissents, the majority refused to relax the rigorous standard. To the contrary the Court indicated an intent to give close attention to the enforcement of the standard in exaction cases. "We are inclined to be particularly careful about the adjective ['substantial'] where the actual conveyance of property is made a condition to the lifting of a land use restriction."\textsuperscript{34}

The most startling aspect of the \textit{Nollan} decision is the colloquy between Justice Brennan\textsuperscript{35} and Justice Scalia\textsuperscript{36} on the question of the role of the Court in reviewing claims raised under the just compensation clause. The two Justices debate the meaning of the long-established, but infrequently applied, standard that a land use regulation must "substantially advance legitimate state interests." In his dissent Justice Brennan argues that this language means no more than the long recognized requirement under the due process and equal protection clauses that the state "'could rationally have decided' that the measure adopted might achieve the state's objective."\textsuperscript{37} He goes on to describe the majority's insistence on a higher standard as "a narrow conception of rationality [that] has long since been discredited as a judicial arrogation of legislative authority."\textsuperscript{38}

Justice Scalia's majority opinion \textit{expressly rejects} the dissent's assertion that the standard of review for claims under the just compensation clause is the same as for claims under the due process and equal protection clauses.\textsuperscript{39} It also \textit{expressly rejects} as "inconsistent with the formulations of our later cases" any language in \textit{Goldblatt v. Hempstead}\textsuperscript{40} which could be read to support the dissent's assertion.\textsuperscript{41} Instead, the majority opinion rules that the "substantially advance" standard is "quite different" requiring closer scrutiny by the courts of claims raised under the just compensation clause.\textsuperscript{42} Later in the opinion it is emphasized that a "condition for the abridgement of property rights through the police power [is] a 'substantial ad-

\textsuperscript{33} Id. (Blackmun, J., dissenting).
\textsuperscript{34} Id. at 3150.
\textsuperscript{35} Id. at 3151-3152 (Brennan, J., dissenting).
\textsuperscript{36} Id. at 3145-3146.
\textsuperscript{37} Id. at 3151. (Brennan, J., dissenting) (emphasis in original).
\textsuperscript{38} Id. at 3153.
\textsuperscript{39} Id. at 3147 n.3.
\textsuperscript{40} 369 U.S. 590 (1962).
\textsuperscript{41} See supra note 38.
\textsuperscript{42} Id.
vanc[ing]' of a legitimate state interest."

In the long term the Court's elevation of the standard of review to be applied in takings cases may rival in importance the new standards establishing limits on the use of exactions. The Court seems to have gone out of its way to reinforce the importance of the owner's rights in the land use regulation context. It extinguished the fire under a simmering dispute over the question of whether land use permits restrict an intrinsic property right to make use of the property or grant an extrinsic governmental benefit of use. "[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'" The Court has now made clear that the regulation of land use is a coercive, adverse governmental action which restricts the exercise of a right of use intrinsic in the ownership of property. As a "condition for abridgement" of the right of use through regulation, the government must demonstrate that it is substantially advancing a legitimate state interest.

This heightened recognition of the owner's rights is reflected in the Court's insistence that cases raising claims under the just compensation clause require a degree of scrutiny during judicial review which is closer than that applied under the due process clause to test the validity of general police power regulations. Property owners who are subjected to the land use regulation process will now be able to rely on both the strict limitations imposed on excessive exactions and on a closer scrutiny by the courts to ensure that an abuse of authority has not occurred.

Unlike First English Church where the Court expressly limited its holding "to the facts presented," the Nollan decision addresses the entire field of exactions. Since the Nollan facts involved the type of physical invasion which the Court had found to be a "per se" taking in Loretto v. Teleprompter Manhattan CATV the Court had a convenient hook on which to hang a narrow holding. How-

43. Id. at 3150. (emphasis in original).
44. Moore v. East Cleveland. 431 U.S. 494 (1977), is the only other opinion in which the Court appears to have in fact applied a form of close scrutiny in a land use case to the question of whether the regulation at issue served a legitimate governmental purpose. Only Justice Powell voted consistently for the use of close scrutiny in both cases. The other six Justices who participated in both cases, switched sides on this issue.
45. Nollan, 107 S. Ct. at 3146 n.2.
46. Id. at 3150.
47. 458 U.S. 419 (1982).
47.1. Nollan, 107 S. Ct. at 3145.
ever, after ruling that the Coastal Commission’s dedication requirement clearly resulted in a compensable taking in the absence of a permit application, the Court does not refer again to the physical invasion aspect of the case. Instead the analysis addresses any manner of “a permit condition.”

The *Nollan* decision has created a five-step process for determining the validity of the imposition of an exaction on a land use permit. If the condition imposed on the permit fails any one of the five steps it will violate the just compensation clause.

**STEP ONE: IDENTIFICATION OF A LEGITIMATE GOVERNMENTAL PURPOSE**

Has the government identified a legitimate governmental purpose which would justify the use of the police power to *prohibit* the use proposed by the property owner?

This analysis is not the traditional police power question of whether there is any rational basis to believe that the exaction may make a contribution to a legitimate governmental purpose. Rather, the analysis focuses on the proposed use of the property and those few reasons which might justify totally prohibiting that use. If no legitimate public purpose justifies an outright prohibition on the use, no exactions may be taken to make the use more pleasing or more acceptable to the public. Such public amenities can be achieved only through restrictive regulations or by the use of the power of eminent domain.

**STEP TWO: APPLICATION OF TRADITIONAL REGULATORY TAKING ANALYSIS**

Would the outright prohibition of the requested use pass the constitutional standards describing a “taking”?

It is well recognized that a restrictive regulation which is valid under a police power analysis may nonetheless violate the just compensation clause if “the interference with [the owner’s] property is of such a magnitude that ‘there must be an exercise of eminent domain and compensation to sustain [it]’.” The Court recognized that this underlying constitutional limitation on the power to prohibit property use applies to exaction cases. The Court also ruled that a

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48. *Id.* at 3148.
property exaction is valid only if it is "substituted for the prohibition."\textsuperscript{1} Therefore, if an absolute prohibition of the proposed use of the property would be invalid without compensation to sustain it, then any exaction imposed on approval of the same use would likewise require compensation to sustain it.

Prior to \textit{Nollan}, some jurisdictions appear to have believed that exactions could be used to salvage otherwise unconstitutional regulation. In circumstances where prohibiting the proposed use would be unconstitutional, the government agency would still demand substantial exactions of property in exchange for approval. Through these exactions the government would achieve most of its public purpose (\textit{e.g.}, open space) at the expense of the property owner. At the same time by allowing some use of the property it avoided, or at least substantially complicated, a claim that all economically viable use of the property had been denied. The \textit{Nollan} decision, however, does not rest on the economic use standard. It employs the separate constitutional requirement that a regulation, and therefore an exaction, must serve a legitimate public purpose which justifies the prohibition of the proposed use. Now, a property owner can never be required to buy with exactions, a permit to which he or she is otherwise entitled. Before exactions can be imposed it must first be established that the property owner is not otherwise eligible for the permit and that the application may be constitutionally denied in the absence of the exactions.

\textbf{STEP THREE: IDENTIFICATION OF ADVERSE EFFECTS}

What specific adverse effects of the proposed use could justify its prohibition?

Assuming the imposition of an exaction passes steps one and two of the analysis, it is then necessary to identify how the particular use proposed by the property owner triggers the police power concerns which would justify its prohibition. This requirement necessarily follows from the Court's recognition that the right to make reasonable use of the property is intrinsic in the ownership. To deny the exercise of that right, the government must show some degree of adverse effect on the community emanating from the specific action proposed by the property owner. The identification of the adverse effects of the proposed use is simply the necessary first step to identifying which legitimate public purposes could justify denial of the

\textsuperscript{51} \textit{Id.} at 3148.
application.

**STEP FOUR: MATCHING THE EXACTION TO THE ADVERSE EFFECTS**

Is the exaction which is being imposed limited to that which reduces or eliminates the specific adverse effects of the proposed use?

This step is the crucial identification of the "essential nexus" which must exist "between the condition and the original purpose of the building restriction." 52 The close fit required in this "nexus" is the point which gave the dissenting Justices their greatest concern over the "precise accounting system" required to identify such a "precise match." The rationale underlying the Court's opinion left no choice but to require this close relationship. The purpose of the Court's ruling is to ensure that the exaction is imposed only as an alternative form of "a valid regulation of land use." 53 The "exaction" must be only a different form of "regulation" and the only "regulation" which can be imposed on a permit for a particular piece of property is a restriction of the specific use proposed on that property. An exaction which serves to provide support for any other governmental purpose is simply imposed on the land use application as a convenient target of opportunity and is not a valid regulation of land use.

**STEP FIVE: CLOSE SCRUTINITY OF THE FAIRNESS OF THE EXACTION**

Does the exaction achieve a fair and just result by substantially advancing those particular legitimate state interests which would justify total prohibition of the specific proposed use?

The effect on exaction cases of the Court's recognition of a requirement of close scrutiny of the governmental action in all land use cases is to further tighten the relationship requirement. The Court's emphasis on the importance of this requirement was undoubtedly provoked by Justice Brennan's suggestion that there is always some old public purpose lying around which through clever wording can be made to attach to both a prohibitory regulation and a required dedication. 54 It would appear that the Court's basic holding that the purpose served by the exaction must be one which justifies an action "to forbid construction of the house altogether" 55 is strong enough to indicate that Justice Brennan's suggestion was not

52. *Id.*
53. *Id.*
54. *Id.* at 3161 (Brennan, J., dissenting).
55. *Id.* at 3148. (emphasis added).
well founded. Not any old public purpose justifies a total prohibition of a proposed use. The majority, however, decided to hedge its bet and ruled that if government agencies try that shell game, they are going to be subjected to closer scrutiny.

THE LAND USE GEMINI

What Do the Stars Foretell

The long-term combined effect of this pair of crucial decisions should be more self-discipline among regulating entities and a more reasonable land use process reflecting considered recognition of the individual rights of property owners whenever public needs require the regulation of those rights. We should see a rapid demise of the attitude which had germinated in too many locations that those who wish to make use of property are fair game to bear the costs of whatever community program is currently looking for funds. Substantial progress could be claimed if these cases were to achieve no more than a general recognition that each land use restriction embodies the sacrifice of the individual rights of the applicants for the sake of a benefit to be enjoyed by the other members of the community. But these cases go further. They require the decision to be narrowly focused on the interaction of the particular proposed use and the specific community needs being served. And they reaffirm the constitutional compensation penalty for failing to ensure a fair and just result.

The Nollan decision in particular is likely to produce wide-ranging effects. Since the Nollan facts did not involve an in lieu fee there is no direct mention of this concept of an exaction. However, an in lieu fee is clearly imposed as “a permit condition” and there is nothing in the Nollan decision to suggest that it excludes any particular form of permit condition. The exclusion of exactions in the form of fees from the reach of the Nollan decision would be an absurd result. Instead of requiring a dedication, the condition could simply demand a fee equivalent to the value of the desired dedication. The property could then be condemned and the owner paid with his or her own money obtained through the fee.68

The purpose underlying the just compensation clause is to protect the owner of property from bearing the costs of government acquisition of his property. The clause does not protect property itself from transfer to the government. Excluding in lieu fees from the

reach of the *Nollan* decision would leave open the possibility that unfair costs would be imposed on the property owner depriving him or her of any meaningful protection under the just compensation clause.

Some other immediate and more specific effects also seem likely. Established programs to require routinely the dedication of property for rights of way and other public use areas are in serious jeopardy. The public access program of the California Coastal Commission is an example. It is doubtful that under the California Coastal Act coastal development permits could be denied because of a preexisting lack of beach access in the area. The coastal access program was never envisioned as an effort to control loss of access. It was an add-on to create new access areas. It established a price to be paid for the benefit of receiving the coastal development permit. However, another result of *Nollan* is the demise of the concept of "benefit" to the landowner as a basis for rationalizing an exaction. Receipt of the permit itself cannot be considered a "benefit." Moreover, the requirement that the exaction must serve the same regulatory purpose as a restriction imposed on the use of the property forecloses the justification of exactions based on "benefits." "Restrictions" are not imposed on property to benefit the owner. Therefore, exactions can only be tied to the adverse effects of the proposed use of the property. There is no room in this rationale for accepting exactions which are designed to fulfill preexisting needs. Coastal access dedication requirements will now have to be limited to new developments which will obstruct in some way previously existing public access to or along the oceanfront at that site.

The heightened recognition of the individual rights of property owners reflected in these decisions suggests the need for reevaluation of at least three extreme judicial doctrines which have been applied to the review of land use decisions by some jurisdictions:

1. There is no inverse condemnation cause of action for denial of a building permit.
2. Judicial review of a permit denial or a permit condition is limited to the substantial evidence standard.
3. There is virtually no such thing as a vested right to build.

California courts, for example, have followed the advice in Longtin's thesis on California land use law that exactions may be

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57. *Nollan*, 107 S. Ct. at 3146 n.2.
58. *Longtin, California Land Use Regulation* (1977) (Longtin is the author who received notoriety in Justice Brennan's dissent in San Diego Gas & Electric v. City of San
imposed freely. "The concept is quite simple in theory. The subdi-
vider, in return for the privilege of developing his land, is required to
dedicate land to public use." This "concept" led the courts to the
principle that "[d]evelopment is a privilege not a right." The Cali-
ifornia Supreme Court followed this thinking to the conclusion that
development is not a 'fundamental interest.' The concept that
building on one's own property is a governmental benefit is so thor-
oughly established in California that a general demurrer will be sus-
tained to any inverse condemnation claim based on the denial of a
building permit. The remedy is limited to a writ of mandate charg-
ing the agency with arbitrary and capricious conduct. The identifi-
cation by the Supreme Court, in Nollan, of "the right to build on
one's own property" as being something more than a "'governmental
benefit'" coupled with the recognition, in First English Church, of
the compensable temporary taking, suggests that states like Califor-
nia will have to recognize a cause of action in inverse condemnation
for unlawful permit denials.

As the California Court of Appeal held in Nollan, the lack of
recognition of a fundamental interest has limited the review of per-
mit actions to the substantial evidence standard. However, the
United States Supreme Court's clear recognition in Nollan that a
permit condition requiring a property exaction may be a violation of
the just compensation clause makes the imposition of an exaction or
the denial of a permit because of a refusal to dedicate property a
"decision of the agency [which] substantially affects a fundamental
vested right" requiring a higher standard of review such as the inde-
pendent judgment review applied in fundamental rights cases by the
California courts.
"Vested rights" law also will be subject to reevaluation in light of *Nollan*. An extreme position such as that adopted by the California Supreme Court does not recognize a right to build even after an investment of approximately $3 million and actual grading of the property and installation of substantial subdivision improvements. The theory behind these cases is that the property owner has no right to build until a building permit is received. Until that point in time the ability to build on the property is a mere expectancy of a benefit which can be withheld by the government. The recognition by the Supreme Court that a right to build is intrinsic in the ownership of property, suggests the need to reevaluate the assumption underlyng much vested rights law that a building permit may always be withheld. Even if the estoppel theory on which California has limited vested rights survives without the assumption that the right to build is merely a privilege bestowed by government, the property owner will now stand a better chance of demonstrating the existence of "reasonable investment backed expectations" for a taking claim. Circumstances which will not estop the government may nonetheless "lead to the fruition of a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for." It is readily apparent that a property owner beseeching the government to grant a privilege has far less support for a claim of reasonable expectations than does one who is asserting an intrinsic right to build.

The *Nollan* decision also raises new questions concerning procedural requirements for decisions on land use applications, particularly if exactions are involved. Land use applications are commonly subjected to "public hearings" and informal administrative review. Truly adjudicative procedures are not commonly employed. Conclusions are drawn from all manner of undocumented and unsupported statements. There is little regard for the reliability of the fact-finding process. Such procedures may be acceptable for the agency's planning activities, but they offer little, if any, protection for the interests of the property owner.

In *Nollan* the Supreme Court identified a property interest in the right of use of the land. The Court also concluded that the loss

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68. Id. at 793, 553 P.2d at 553, 132 Cal. Rptr. at 393.
70. *Nollan*, 107 S. Ct. at 3146 n.2.
of property through an exaction is a taking which requires compensation unless the exaction is closely related to the adverse effects of the proposed use. These considerations demonstrate that the property owner has a substantial protected interest at stake in a permit application, particularly when exactions are involved. A strong argument could be made that this property interest is sufficient to trigger procedural due process requirements.

If procedural due process requirements must be met, the Court's holding that a close nexus must exist between the effects of the proposed use and any exactions provides a solid basis for a claim that each such application would have to follow a more careful and reliable fact-finding process. The risk of error is substantial in any attempt to identify the required nexus without accurate facts as to the effects of the proposed use. The substantial private interest involved and the value of additional procedures in reducing the risk of error suggest that due process would require a more formal adjudicative process for any land use application involving property exactions.71

Another immediate effect of Nollan and First English Church is a restructuring of the negotiating positions between landowner and land use regulator to restore a degree of parity. In the past when a property owner objected to permit conditions the community could put him to a forced election. Either accept the permit as is72 or challenge the condition in which case the permit is withheld during the challenge. If the property owner attempted to perform the conditions under protest and reserve a right to pursue a legal challenge, such actions would not be accepted as adequate to fulfill the condition and the permit would be withheld.73

71. Mathews v. Eldridge, 424 U.S. 319, 334 (1976), sets forth the factors which determine the procedures required to meet due process:
1. the private interest that will be affected;
2. the risk of error through the procedures used and the probable value of additional safeguards; and
3. the government interest.
Since Nollan directly influences two of these factors, it suggests that property owners are entitled to greater procedural protections.

72. It has been commonly argued that acceptance of a permit constituted a waiver of the right to challenge the conditions. See, e.g., Pfeiffer v. City of La Mesa, 69 Cal. App. 3d 74, 78, 137 Cal. Rptr. 804 (1977).

73. In Nollan the California Coastal Commission insisted that the Nollans had to submit a dedication "that does not contemplate a legal challenge to the commission's action on the permit." Memorandum from Michael L. Fischer, Executive Director, to State Commission and Interested Persons (May 24, 1983).
In the past the consequences to the government agency from this procedure were not significant because a temporary imposition of an unlawful land use condition was not a compensable taking. The agency had the distinct advantage of putting the property owner to a Hobson's choice. Either accept the permit and lose the exaction or fight the exaction and lose the use of the property. *First English Church* has now established that compensation must be paid for the period of time an unlawful regulation is in effect. *Nollan* has established that exactions must be treated as another form of regulation. Thus, if an exaction is declared unconstitutional and the permission to make use of the land was withheld pending that determination, a claim for compensation would clearly be appropriate. The availability of compensation makes the alternatives faced when an exaction is challenged more reasonable for the property owner and less attractive to the government agency.

The existence of more equal negotiating positions does not necessarily mean that all land use disputes can now be resolved by negotiations. Therefore, adopting procedures to allow the owner to proceed with the proposed use and to comply with exactions under protest whenever possible appears to be advantageous for all concerned. The property owner is able to proceed with his use and the community obtains its exaction if it is constitutional and avoids liability if it is not.

RETURN TO FAIRNESS AND JUSTICE

Both *Nollan* and *First English Church* are true to the underlying purpose of the just compensation clause to ensure a fair distribution of the burdens of governmental activities. For years the debate has raged whenever government action has affected property over whether the effect was compensable under the just compensation clause. With a few notable exceptions, the Supreme Court has eschewed technical rules to resolve the disputes and has employed "essentially ad hoc factual inquiries" of the circumstances of each case to balance the severity of the effect on the property owner against the purpose of the governmental actions. As a result "[e]ven the wisest lawyers would have to acknowledge great uncertainty about

74. State statutes currently provide for protest procedures for some land use applications. **CAL. GOV'T CODE** §§ 65913.5, 65958, and 66475.4 (West 1987).
the scope of this Court's takings jurisprudence." The uncertainty, however, is unavoidable if the great general principle underlying the fifth amendment is to remain flexible to be fit to the widely differing facts and circumstances presented in land use cases.

The just compensation clause is a barricade in the way of governmental action. It stands "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." The question presented is almost always, "Who is going to pay"? Are the costs to be focused on the property owner or distributed more broadly among the community? Neither the Nollan nor the First English Church opinions restricts the range of regulatory options available to control land use. Severe restrictions on use can still be imposed and extensive dedications can still be required. The clear intent of both decisions is not to deny the reasonable use of land use regulation tools but to focus more light on the question of who is to bear the burdens of the costs associated with harsh land use regulation. It is clear from the decisions, that the Court was convinced that regulatory practices associated with land use had gotten out of hand—that "fairness and justice" were no longer the guiding criteria for many land use decisions. Instead, the regulatory scheme was being employed to snare convenient prey on which to load whatever costs the unfortunate captive was able to bear. As the Court described it, such conduct was little short of a "'plan of extortion.'"

The teaching of these two cases is that a guiding principle of land use regulation must be a fair and just distribution of costs among the community as a whole. Earlier decisions of the Court, with but few exceptions, had largely assumed that governmental agencies were abiding by this principle. That assumption is noticeably missing from the majority opinions in these cases. Now the Court has unequivocally stated that a more disciplined and reasonable approach to land use regulation is mandatory. Moreover, Nollan has established that the courts will henceforth look more closely to ensure that the results of land use regulation reflect a reasonable accommodation of the individual rights of the owner with public concerns and that justice and fairness have been achieved. The tone of these two decisions clearly suggests that a number of years of profi-

77. Nollan, 107 S. Ct. at 3163 (Stevens, J., dissenting).
gate regulatory conduct has dissipated the credibility of land use regulators with the United States Supreme Court. The message of these decisions is that unreasonable regulatory conduct which fails to consider individual rights and does not distribute the economic burdens of a land use regulation in a fair and just manner will be called to account according to stricter standards now required under the just compensation clause.