UNITED STATES SUPREME COURT DECISIONS
IN
First English Evangelical Lutheran Church
of Glendale v. County of Los Angeles, California
Decided June 9, 1987
and
Nollan v. California Coastal Commission
Decided June 26, 1987

AN ANALYSIS

General Assembly of the Commonwealth of Pennsylvania
LOCAL GOVERNMENT COMMISSION
Harrisburg, Pennsylvania
October, 1987
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This Commentary was prepared by Local Government Commission Legal Counsel, Lee P. Symons, with assistance from the entire Commission staff. Ms. Sharon Dewalt was responsible for typing this document. Any questions regarding the contents of this commentary should be directed to Virgil F. Puskarich, Executive Director, or Lee P. Symons, Legal Counsel, of the Local Government Commission.

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INTRODUCTION

Few professionals involved in the various aspects of land use regulation are unfamiliar with First English and Nollan. These decisions generated a wave of articles in newspapers, magazines, newsletters, and professional journals. The familiar term "landmark decision" has been used in connection with each of these cases. However, after all the initial histrionics receded, a majority of land use professionals from various disciplines have generally concurred with Dwight H. Merriam, author of the American Planning Association's Commentary reprinted herein as Appendix "A."

Mr. Merriam notes on page 6 of appendix "A" that, although there may be more land use regulation litigation as a result of these decisions, litigation may occur "... principally because landowners and developers may incorrectly believe the decision creates substantial new rights ... [and] ... because of the many unanswered questions posed by the decision." With respect to First English, Mr. Merriam states, "The standard for proving a taking remains unaltered."

This analysis was prepared by the Local Government Commission partly because the General Assembly of the Commonwealth of Pennsylvania may shortly debate comprehensive amendments to the Pennsylvania Municipalities Planning Code (MPC), the statewide zoning and land use enabling legislation. First introduced in the Pennsylvania Senate on November 30, 1983, this proposed legislation has been reintroduced in subsequent legislative sessions and currently is embodied within the provisions of Senate Bill 535, Printer's No. 588, under consideration by the Pennsylvania Senate's Standing Committee on Local Government.

The analysis first provides a brief overview of both cases and then offers various perspectives on the ramifications of these decisions as they may pertain to units of local government throughout the Commonwealth in general and to Senate Bill 535 in particular. Following this, we present a more detailed analysis of both decisions by the traditional "law school methodology," i.e., facts, issues, holding, reasoning, and conclusion. Due to the length of the majority and dissenting opinions of the United States Supreme Court, we have not included copies of the actual opinions. Appendix "A" has been attached hereto with the permission and approval of the American Planning Association.
A. OVERVIEW OF THESE CASES

A.I. FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE V.
COUNTY OF LOS ANGELES, CALIFORNIA

First English Evangelical Lutheran Church of Glendale, hereinafter referred to as the "Church," purchased a 21-acre parcel of land in 1957 in a canyon along the banks of Mill Creek in the Angeles National Forest. On twelve flat acres of this parcel, the Church constructed several buildings incident to the Church's operation of a campground, retreat center and recreational area for handicapped children, known as "Lutherglen."

In 1977, a forest fire destroyed nearly 4,000 acres of watershed area denuding the hills upstream from Lutherglen and creating a serious flood hazard. Flooding occurred in February of 1978 when eleven inches of rain ran off the watershed, overflowed the banks of Mill Creek and destroyed the buildings in Lutherglen.

In an immediate response to the flooding, the County of Los Angeles, hereinafter referred to as the "County," enacted a public health and safety interim flood protection ordinance prohibiting construction of any buildings in the geographic region where Lutherglen once stood. Little more than a month later, the Church filed suit against the County alleging, among other things, that the flood protection ordinance denied the Church "all use of Lutherglen" for which monetary damages were demanded based upon the theory of inverse condemnation. The California courts agreed with the County's actions and dismissed the Church's complaint. However, the U.S. Supreme Court reversed that decision as set forth in greater detail herein (infra, page 7).

A.II. NOLLAN V. CALIFORNIA COASTAL COMMISSION

In the other case, James and Marilyn Nollan, hereinafter referred to as "Nollan," owned a beachfront lot in Ventura County, California, upon which was constructed a dilapidated bungalow. Nollan wanted to demolish this structure and replace it with a three bedroom house which would more closely resemble other homes in the neighborhood. Under the California Public Resources Code, Nollan was required to obtain a coastal development permit from the California Coastal Commission, hereinafter referred to as the "Commission."

According to the Commission's staff, Nollan's permit application could only be granted subject to the condition that Nollan allow the public an easement to pass across a portion of their property in order to maintain ingress and egress between two oceanside public beach areas located on either side of Nollan's property. Nollan protested the public access condition and sought a writ of mandamus from the Ventura County Superior Court to invalidate
the access condition, arguing that the Commission could not impose the condition absent evidence that Nollan's proposed development would adversely impact upon public access to the beach. The court agreed and remanded the case to the Commission for a full evidentiary hearing.

The Commission reaffirmed the access condition and the decision was ultimately upheld by the California Court of Appeal. Nollan appealed to the United States Supreme Court and the decision was reversed as detailed later herein (infra, page 11).

B. POSSIBLE RAMIFICATIONS OF THESE DECISIONS

Commission staff surveyed the responses of several knowledgeable members of the Local Government Commission Task Force which studied the Pennsylvania Municipalities Planning Code for proposed reenactment and amendment in 1985. Because of the informal nature of this survey, the Commission offers some commentary only as a means of assessing the impact of these decisions on Pennsylvania local government generally and, perhaps to some extent in a specific manner, with respect to the bill which the Task Force studied in 1985 (now contained within the provisions of Senate Bill 535 in the current legislative session).

B.I. TASK FORCE REVIEW TEAM COMMENTARY: A PENNSYLVANIA PERSPECTIVE

Among the initial responses of those surveyed subsequent to the First English decision were the following: "Much ado about nothing"; "not much has been changed as a result of this decision"; and "this decision really has only limited application." Therefore, while one may recall a rather vocal media blitz on these cases after these decisions were handed down, a reading of the opinions may lead one to conclude that this is not such a "big deal." Another important point is that both decisions and three of the four previous cases in which the Supreme Court had not been able to reach the remedial question in First English all arose in the State of California. This is significant with respect to the major differences in the Pennsylvania Municipalities Planning Code (MPC) and its counterpart statute under California law.

One of the Task Force members commented that California has much more of a "mandated" land use planning and regulation statute than the MPC. The California law contains many more "shall" provisions rather than the abundance of "may" provisions found in the MPC, and California is considered more of a "top-down" land use regulation jurisdiction wherein extensive powers are accorded planners at the upper levels of government and these powers are likewise found down through lower levels of government land use regulators. As an example, Governor Deukmejian has been engaged in an ongoing battle to curb the extensive regulatory control of the powerful California Coastal Commission, and perhaps the Nollan decision may have some impact on this issue.

Therefore, particularly with First English and Nollan, one must be cognizant of the substantive differences in the MPC and the California law.
influencing these cases as well as several recent others before the Supreme Court which may have provided the Court with the rationale needed to, as one Task Force member stated, "put the brakes on the strong land use regulation particularly found in the State of California." Along this line, it may be significant to note how far the U.S. Supreme Court apparently reached in Nollan in order to clearly identify the State of California as being somewhat "out of sync" with other jurisdictions in land use regulation: "Our conclusion on this point is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts." (Emphasis added, infra, page 14.) Further in First English, the Court states that, "we . . .hold that on these facts the California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment." (Emphasis added, infra, page 9.)

The members of the Commission's Task Force review team are not alone in their position on the distinctions between California and Pennsylvania land use regulations. In the September 1987 issue of Planning magazine, contributing editor Robert Guskind analyzes these two decisions in light of the relatively unique nature of California law. Under a subsection of his article entitled "California screaming," Mr. Guskind writes as follows:

"It's no accident that so many crucial land use cases have percolated up to the federal judiciary from California. Since the 1970s, California voters and officials have enacted progressively stricter land use regulations, growth controls, and development conditions. More than 100 California towns have passed measures to restrict growth; even Los Angeles, which may have invented the concept of urban sprawl, last year limited construction in residential neighborhoods."

Mr. Guskind also notes that "California has led the nation in imposing wide-ranging linkage fees and exactions that shift more of the cost of funding government services and programs to developers."

The MPC is probably one of the few such statutes in the country which provides the opportunity for landowners and developers to submit curative amendments to ordinances of local governments. Therefore one can readily see that the MPC provides more flexibility and opportunity for landowners and developers to express their views and hopefully avoid the types of factual circumstances and the litigation which flows therefrom, such as those created in California.

Even though First English was generally deemed to have little impact on the MPC, all of those surveyed concurred with the Supreme Court's dissenting opinion in that decision stating that we will see a "litigation explosion" as a result of the majority's opinion. Some even suggested that this opinion may be waved in the faces of government land use regulation officials as a threat of impending litigation or potential monetary damages claims in an effort to "bully and blackmail" local government not to delay determinations relative to land use planning or regulation. Those surveyed likewise agreed that lawyers may be the most likely beneficiaries of these decisions since government entities could incur substantial increases in legal fees associated with defense of actions instituted, whether spurious or not,
by landowners or developers (who likewise may be required to expend considerable sums in legal fees) intent upon avoiding delays in obtaining approval of their planned use of real estate. Some members also commented upon the positive benefits of these decisions with their impact of forcing local government planners and land use regulators to exercise greater care in making decisions which could have the potential to constitute inverse condemnation. As one member commented, "that result is not necessarily bad."

Generally speaking, it does appear that there was an initial overreaction to the outcome of these cases; however, a more detailed review indicates that the impact of the majority opinions upon Pennsylvania land use situations may be minimal at best. So long as "political considerations" or "community pressure" do not influence municipal zoning decisions, it would appear that few major problems could be imposed upon municipal governments in the Commonwealth operating pursuant to the MPC. It may therefore be significant in the final analysis, as the informal survey disclosed, that the major differences between the MPC and California land use law mean that these cases will not substantially affect nor adversely impair municipal rights in Pennsylvania land use planning or regulation cases.

B.II. AMERICAN PLANNING ASSOCIATION COMMENTARY: A PROFESSIONAL PLANNER'S PERSPECTIVE

According to Dwight H. Merriam, noted land use attorney active in the American Planning Association (APA), the Nollan decision portends serious consequences for local land use regulators. When questioned on the significance of these decisions with respect to Senate Bill 535 and the MPC, he stated that the impact of First English and Nollan will not be as dramatic upon state-wide enabling legislation as it will be upon the thousands of local zoning and planning ordinances which exist throughout municipal governments across the nation. In Mr. Merriam's opinion, local governments will be required to reassess both the quality as well as the quantity of their planners and perhaps be forced to expend additional sums of money for improvements in both of these areas.

During the discussion with Mr. Merriam, he noted that he was engaged in the preparation of a commentary for the APA relative to these two recent decisions. The Local Government Commission has subsequently obtained a copy of that document which has been appended hereto labeled as Appendix "A." One may note in the forward to Appendix "A" that Mr. Merriam's draft was reviewed by several other knowledgeable land use attorneys, including Brian Blaesser, Chair of the APA's Planning and Law Division, along with well-known Chicago Attorney, Fred Bosselman.

Mr. Merriam's commentary includes a thoughtful analysis of the many unresolved issues left in the wake of First English and Nollan. He cites the existence of "... far more unknowns as a result of the Nollan decision" than with First English, and he supports his aforesaid belief that local government units may be forced to spend more money to improve their planning process by concluding that "... there will be an increased need for more planning, both in the development of regulations and in the project review and approval
process." Among other interesting aspects of Mr. Merriam's commentary are the following:

1.) the many limitations imposed by the Court's holding in First English and the related undecided issues (see pp. 4-5 of Appendix "A");

2.) an overview of unanswered questions left by First English (see pp. 6-8 of Appendix "A"); and,

3.) the issue of whether the U.S. Supreme Court has adopted a new standard in Nollan, i.e., is it still the "rational relationship" standard or has the Court articulated a new "nexus" standard (see pp. 9-10 of Appendix "A").

B.III. LAW SCHOOL COMMENTARY: AN ACADEMIC PERSPECTIVE

Among other individuals surveyed was Richard A. Epstein, James Parker Hall Professor of Law at the University of Chicago, and editor of the Journal of Legal Studies. Mr. Epstein was the author of an article published in the Wall Street Journal following these recent Supreme Court decisions. Mr. Epstein is also the author of the book, Takings: Private Property and the Power of Eminent Domain, published in 1985 by the Harvard University Press.

Mr. Epstein described California land use regulation as "heavy handed" in discussing his reactions to both First English and Nollan. However, his recently published article demonstrates his concerns over the direction that the U.S. Supreme Court seems to be taking in cases of this nature. In addition to the two cases reviewed herein, Mr. Epstein also makes reference to a Pennsylvania case recently decided by the U.S. Supreme Court in Keystone Bituminous Coal Association v. DeBenedictis, 107 S.Ct. 1232, 94 L.Ed.2d 472, 55 U.S.L.W. 4326 (1987), which he describes as a case which "shows the court at its worst."

In DeBenedictis, the petitioners (Keystone Bituminous Coal Association) sought to enjoin the Pennsylvania Department of Environmental Resources (DER) and its Secretary, Nicholas DeBenedictis, from enforcing the provisions of the Bituminous Mine Subsidence and Land Conservation Act. The petitioners owned or controlled substantial coal reserves under property protected by the Act and they alleged that the Act's requirement that mining operations leave a certain amount of coal in "pillars" to support the surface constituted an unlawful taking in violation of the Fifth Amendment's "just compensation clause." The Court ruled that the enactment of this statute was intended to serve "genuine substantial and legitimate public interests in health, the environment, and the fiscal integrity of the area by minimizing damage to surface areas."

Mr. Epstein's directional view of the Supreme Court's decision in DeBenedictis followed by First English and Nollan was summarized in the article as follows:

"In three important cases decided during the term that ended last month, the court showed how it could first zig and then zag. The first of these cases, [DeBenedictis] dealing with mineral
rights, continued—indeed extended—the old pattern of massive judicial resignation in the face of manifest confiscation. Then came a sharp about-face in two subsequent California land-use cases [First English and Nollan]. These hold out the possibility of a judicial revolution in the takings area, at least as it applies to local governments."

The opinion expressed by Mr. Epstein that the Supreme Court has been "zig-zagging" does not necessarily receive confirmation from the Commission's review team. In the first place, the decision in the Pennsylvania case generally receives the overall approval of these reviewers from the perspective that the facts of this case demonstrate the Commonwealth's commitment to protect surface landowners from subsidence or other problems due to deep mining below their property. Contrary to Mr. Epstein's opinion that the Supreme Court erred in this decision by "... returning rights to the surface owners while letting them keep the original purchase price," one of the review team members commented upon this decision with respect to the Bituminous Mine Subsidence and Land Conservation Act of 1966 as follows:

"... the decision by the Supreme Court in DeBenedictis only demonstrates that the General Assembly of Pennsylvania in 1966 correctly acted to protect property owners within the Commonwealth from what had previously been the unfettered rights of the coal barons to indiscriminately extract the minerals beneath the surface without regard for the consequences of their actions."

Further, with respect to Nollan and First English, Mr. Epstein states the following:

"... the Supreme Court is willing today to take a stance on state control of land use that is far tougher than any it took only a year ago. Private property has indeed made something of a comeback. But it is too early to tell whether these two cases mark just a small bend in the road or signal a fundamental shift in its direction."

Additional research by Commission staff on Mr. Epstein's book reveals that he embraces the "strict interpretivism" or "originalism" philosophy of Constitutional interpretation wherein that vital document should be construed as it was originally and literally drafted more than 200 years ago.

Another perspective which counters that of Mr. Epstein was offered by Charles M. Haar, professor at Harvard Law School, and Jerold S. Kayden, real estate lecturer at the Harvard Graduate School of Design. They co-authored an article published in the New York Times in late July in which they state that these two decisions may not "... have left real estate developers clicking their heels and city officials shaking in their boots." Indeed, Messrs. Haar and Kayden conclude as follows:

"The opinion in no way changes the basic rule that property owners are not entitled to the most profitable use of their land. Indeed, to prove a constitutional violation, they must in most cases show that land use regulations deny them all reasonable use of their property
before they are eligible for monetary relief. Thus, in
general, regulations preserving historic landmarks,
wetlands and coastal areas should remain as valid after
[First English] as before."

These authors also note that the decision in First English may
"chill" the capability of local governments to utilize their respective
"exclusive zoning arsenal[s] aimed at preventing construction of low-income
and affordable multifamily housing." They see the caution with which local
land use regulators must approach these circumstances in light of First
English as a prospective limitation for which "liberals should be delighted."

With respect to Nollan, Messrs. Haar and Kayden note that the aura
of "heightened judicial scrutiny" created by the U.S. Supreme Court's "nexus"
standard may now require "Federal, state and local governments to make more
thoughtful decisions, supported by better planning . . . [thereby giving]
planners and environmentalists reason to celebrate." The authors then
conclude their point with Justice Brennan's comment from his 1981 dissent in
the San Diego Gas and Electric Co. v. City of San Diego case: "After all, if
a policeman must know the Constitution, then why not a planner?"

B.IV. CONCLUSIONS

The Local Government Commission shall shortly undertake a detailed
review of Senate Bill 535 and the Pennsylvania appellate courts' view of the
doctrine of inverse condemnation; however, at least initially, it does appear
that amendments may have to be considered to the current provisions of Section
406. As set forth in the Commentary to then SB 876 as published by the Local
Government Commission, that section proposes an amendment in SB 535 to
increase "the time period from one to two years during which a person whose
property has been designated and reserved on an official map as 'public
grounds' may require a municipality to issue a permit to build (pursuant to
this section), or in the alternative, to acquire the property or to begin
condemnation proceedings to acquire the property." In light of both cases,
additional amendments should perhaps be considered and the Commission shall
continue to update this information as research and review continues.

C. FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE V. COUNTY OF

LOS ANGELES, CALIFORNIA, 107 S.Ct. 2378, 96 L.Ed.2d 250, 55 U.S.L.W.


C.I. FACTUAL BACKGROUND

First English Evangelical Lutheran Church of Glendale, hereinafter
referred to as the "Church," purchased a 21-acre parcel of land in 1957 in a
canyon along the banks of Mill Creek in the Angeles National Forest. On
twelve flat acres of this parcel, the Church constructed several buildings
incident to the Church's operation of a campground, retreat center and
recreational area for handicapped children, known as "Lutherglen."
In 1977, a forest fire destroyed nearly 4,000 acres of watershed area, denuding the hills upstream from Lutherglen and creating a serious flood hazard. Flooding occurred in February of 1978 when eleven inches of rain ran off the watershed, overflowed the banks of Mill Creek, and destroyed the buildings in Lutherglen.

In an immediate response to the flooding, the County of Los Angeles, hereinafter referred to as the "County," enacted a public health and safety interim flood protection ordinance prohibiting construction of any buildings in the geographic region where Lutherglen once stood. Little more than a month later, the Church filed suit against the County alleging, among other things, that the flood protection ordinance denied the Church "all use of Lutherglen" for which monetary damages were demanded, based upon the theory of inverse condemnation.

The County cited Agins v. Tiburon, 24 Cal. 3d 266, 598 P.2d 25 (1979), aff'd on other grounds, 447 U.S. 255 (1980), as precedent for striking the Church's denial of use allegations as "immaterial and irrelevant." The trial court granted the County's motion to strike, holding that the Church's proper remedy was by way of declaratory relief or mandamus challenging the ordinance as excessive regulation and further ruling that compensation is not required until such a finding is made. Following presentation of the Church's evidence, the trial court granted the County's motion for nonsuit and dismissed the entire complaint.

Reading the Church's complaint as one seeking "damages for the uncompensated taking of Lutherglen," the California Court of Appeal concurred with the lower court's decision and affirmed on the basis of Agins "because the United States Supreme Court has not yet ruled on the question of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief." Following a denial of review by the Supreme Court of California, the Church appealed to the U.S. Supreme Court.

C.II. ISSUES FOR CONSIDERATION

The Supreme Court reasoned as follows: since the California Court of Appeal had affirmed the lower court's decision in reliance upon the California Supreme Court's conclusion in Agins that "the remedy for a taking [is limited] to nonmonetary relief," therefore, "the disposition of the case on these grounds isolates the remedial question for our consideration." Simply stated, then, the key issue in this case is WHETHER THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES GOVERNMENT TO PAY FOR A "TEMPORARY" REGULATORY TAKING OF PRIVATE PROPERTY?

The Supreme Court narrowly defined this issue for consideration and explicitly noted that it would not address two other important issues related to the controversy between the Church and the County: (1)"... whether the ordinance at issue actually denied [the Church] all use of its property"; and (2) "whether 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." Both of those questions were left open for decision by the lower courts in a remand order.
C.III. HOLDING OF THE COURT

As noted above, the Court's decision both reversed and remanded the holding by the California Court of Appeal. With respect to the key issue, the Supreme Court held: "... we find the constitutional claim properly presented in this case, and hold that on these facts the California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment." As to the other two issues, the Court stated that those questions "... remain open for decision on the remand we direct today."

C.IV. RATIONALE FOR THE DECISION

The Court noted that in four separate cases, beginning with Agins in 1980, the justices had ". . . found ourselves for one reason or another unable to consider the merits of the Agins rule." The Court concluded that in each of these four previous cases, they were ". . . unable to reach the remedial question"; however, the County's regulation of the Church's property in this case "squarely" presents the Court with "the constitutional question pretermitted in our earlier cases."

The Court begins its analysis of the key issue by examination of the Just Compensation Clause which "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." Quoting from United States v. Clarke, 445 U.S. 253, 257 (1980), the Court recognized a landowner's right to bring an action in inverse condemnation as a result of "the self-executing character of the constitutional provision with respect to compensation." The Supreme Court cites numerous cases as precedent for the conclusion that "in the event of a taking, the compensation remedy is required by the Constitution." (Emphasis added.)

On a related point, the Court also cites the following established doctrine:

"While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings."

The Court shall not permit the narrow interpretation of a taking as an "absolute conversion of real property" to apply in situations where government regulations can inflict damage or even destroy the value of privately owned property.

The Supreme Court notes that it is "not unmindful" of a governmental election to abandon its intrusion upon private property or discontinue its regulation of the use of said property. The Court reasons as follows:

"Similarly, a governmental body may acquiesce in a judicial declaration that one of its ordinances has affected an unconstitutional taking of property; the landowner has no right under the Just Compensation Clause to insist that a 'temporary'
taking be deemed a permanent taking. But we have not resolved whether abandonment by the government requires payment of compensation for the period of time during which regulations deny a landowner all use of his land."

In consideration of this latter issue, the Court finds "substantial guidance" in prior cases "where the government has only temporarily exercised its right to use private property." United States v. Dow, 357 U.S. 17 (1958); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945).

Even though all the takings in these cases were in fact of a "temporary" nature, the Supreme Court concluded that:

"... there was no question that compensation would be required for the Government's interference with the use of the property ... [and] ... that 'temporary' takings which, as here, [the Church v. the County] deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."

The Court also noted Justice Brennan's dissent in San Diego Gas and Electric Co. v. San Diego, 450 U.S. 621, 657 (1981), "Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable." Citing United States v. Causby, 328 U.S. 256, 261 (1946), the Court commented upon the appropriate means of determining how the County's compensation to the Church should be calculated "for the value of the use of the land during this [temporary] period": "It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken."

C.V. CONCLUSION

The U.S. Supreme Court concluded its decision by stating, "We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." Obviously the majority of the Court was aware of the dissenting opinion and the fear of the minority that the "decision today will generate a great deal of litigation ... most of it ... unproductive." Therefore the majority opinion reiterated that the denial of all use of the Church's property would have to be considered by the lower court and that the opinion was limited to the factual matters presented. The majority apparently felt compelled to comment further on these limitations:

"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. 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. But such consequences necessarily flow from any decision upholding a claim of

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constitutional right; many of the provisions of the Constitution are
designed to limit the flexibility and freedom of governmental
authorities and the Just Compensation Clause of the Fifth Amendment
is one of them. As Justice Holmes aptly noted more than 50 years
ago, '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.' Pennsylvania Coal
Co. v. Mahon, 260 U.S. 393, 416 (1922).

D. NOLLAN V. CALIFORNIA COASTAL COMMISSION, 107 S.Ct. 3141, 97 L.Ed.2d 677,

D.I. FACTUAL BACKGROUND

James and Marilyn Nollan, hereinafter referred to as "Nollan," owned
a beachfront lot in Ventura County, California, upon which was constructed a
dilapidated bungalow. Nollan wanted to demolish this structure and replace it
with a three bedroom house which would more closely resemble other homes in
the neighborhood. Under the California Public Resources Code, Nollan was
required to obtain a coastal development permit from the California Coastal
Commission, hereinafter referred to as the "Commission."

According to the Commission's staff, Nollan's permit application
could only be granted subject to the condition that Nollan allow the public an
easement to pass across a portion of their property in order to maintain
ingress and egress between two oceanside public beach areas located on either
side of Nollan's property. Nollan protested the public access condition and
sought a writ of mandamus from the Ventura County Superior Court to invalidate
the access condition, arguing that the Commission could not impose the
condition absent evidence that Nollan's proposed development would adversely
impact upon public access to the beach. The court agreed and remanded the
case to the Commission for a full evidentiary hearing.

Following a public hearing, the Commission reaffirmed the access
condition on Nollan's permit application citing the following:

(1) Nollan's new house would:

(a) increase blockage of the view of the ocean and
contribute to the prevention of the public
"psychologically from realizing a stretch of
coastline exists nearby that they have every right to
visit"; and,

(b) increase private use of the shorefront;

(2) Construction of the new house in conjunction with other
area development would cumulatively "burden the public's
ability to traverse to and along the shorefront."

Therefore, the Commission ruled that it could properly impose the condition to
offset that public burden by requiring Nollan to provide additional lateral
access to these public beaches in the form of an easement across their property.

Nollan appealed to the County Superior Court arguing that the access condition violated the Takings Clause of the Fifth Amendment. Superior Court avoided constitutional issues and ruled in favor of Nollan on the basis that the Commission's "administrative record did not provide an adequate factual basis for concluding that replacement of the bungalow with the house would create a direct or cumulative burden on public access to the sea." The Court granted the writ of mandamus, directing that the permit access condition be struck.

The Commission then appealed to the California Court of Appeal which reversed the Superior Court on several grounds. It ruled that the access condition did not violate Nollan's constitutional rights and that Nollan's taking claim "also failed because, although the condition diminished the value of Nollan's lot, it did not deprive them of all reasonable use of their property." Nollan's appeal to the U.S. Supreme Court raised only the constitutional question.

D.II. ISSUES FOR CONSIDERATION

Justice Scalia begins his analysis of the issues which the Court will confront as follows:

"Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute a taking of a property interest but rather, [as the dissenting justices contend], 'a mere restriction on its use' . . . is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them."

He further notes that the Supreme Court has "repeatedly held that, as to property reserved by its owner for private use, 'the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"

Then isolating the specific issue for consideration in this case, the Court states that the question becomes WHETHER REQUIRING UNCOMPENSATED CONVEYANCE OF AN EASEMENT AS A CONDITION FOR THE ISSUANCE OF A LAND USE PERMIT VIOLATES THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?
D.III. HOLDING OF THE COURT

The Court reversed the California Court of Appeal decision on the aforesaid constitutional issue. Justice Scalia summarized the holding as follows: "Whatever may be the outer limits of 'legitimate state interests' in the takings and land use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use, but 'an out-and-out plan of extortion.'"

D.IV. RATIONALE FOR THE DECISION

As some legal analysts have suggested, this case may mark the first time that the Supreme Court has employed the so-called "nexus test" to decide a takings case. That test appears to require that in any governmental land use regulation of private property, the imposition of a condition must have some reasonably related nexus or connection to "the original purpose of the building restriction" or prohibition. Therefore, so long as that nexus can be demonstrated, constitutional propriety is maintained; however the "... evident constitutional propriety disappears ... if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." Justice Scalia reasons that the Commission had failed to maintain that "constitutional propriety" when as "... here, 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 purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation."

The Court advances an interesting analogy to demonstrate its point in this regard:

"When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster."

All arguments of the Commission are thus dismissed by the Court as a "... play on words ... [which clearly has] nothing to it."

The Court finds the following arguments advanced by the Commission in favor of the imposition of the condition upon Nollan as "quite impossible to understand":

(1) "how a requirement that people already on the public beaches be able to walk across the Nollan's property reduces any obstacles to viewing the beach created by the new house";
(2) "how it lowers any 'psychological barrier' to using the public beaches'; and,

(3) "how it helps to remedy any additional congestion on [public beaches] caused by construction of the Nollan's new house."

The U.S. Supreme Court then concludes as follows:

"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. Our conclusion on this point is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts."

The Court then cites an extensive list of precedents for this conclusion taken from decisions in approximately twenty other states.

D.V. CONCLUSION

The Court generally concludes that any condition imposed upon an owner of private property which abridges that owner's property rights through lawful exercise of governmental police power must "substantially advance" a legitimate State interest. The Court therefore is "... inclined to be particularly careful about the adjective [substantially] where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective."

The Court recognizes the intent of the Commission in its honest belief "that the public interest will be served by a continuous strip of publicly accessible beach along the coast." However, no matter how well-intentioned this belief may be, the Court concludes as follows:

"The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its 'comprehensive program' if it wishes, by using its power of eminent domain for this 'public purpose,' see U.S. Const. Amdt. V; but if it wants an easement across the Nollans' property, it must pay for it."
Reprinted from the July 1987 issue of the American Planning Association Planning and Law Division Newsletter

Commentary

On

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California

U.S. Supreme Court
Decided June 9, 1987

and

Nollan v. California Coastal Commission

U.S. Supreme Court
Decided June 26, 1987

FOREWORD

Because of the many questions from the membership on the impact of the First Lutheran Church and Nollan decisions, APA Executive Director, Is Stollman, and Brian Blaesser, Chair of the Planning & Law Division, asked Dwight Merriam, former Chair of the Division, to prepare a commentary on the decisions and their possible impacts on planners and local government officials.

Drafts of the following commentary were reviewed as to the content and approach by Brian Blaesser, Fred Bosselman and Dave Brower. Because First Lutheran Church and Nollan leave many difficult, unanswered questions, any conclusions about the actual impacts of the decisions must be considered tentative. Anyone concerned with the impact of the decisions on their practice and decision making should consult with their local counsel.
Commentary

By

Dwight H. Merriam¹

FIRST LUTHERAN CHURCH

The Factual Background

The plaintiff is a church which purchased a 21 acre parcel 30 years ago in a canyon on the banks of Mill Creek in the Angeles National Forest. Twelve of the acres were developed as a camp, "Lutherglen," for handicapped children.

In July 1977 a forest fire denuded almost 4,000 acres of watershed area upstream from the camp.

Early in February 1978, following cloud seeding operations by the Flood District, 11 inches of rain fell on the watershed overflowing the banks of Mill Creek and destroying Lutherglen.

In January 1979, the County of Los Angeles adopted an interim ordinance to prohibit any building in the interim flood protection area. The ordinance, which became effective immediately, was expressly temporary to prevent development while there was mapping and evaluation of flood data.

A month after the ordinance took effect First Lutheran Church sued the County of Los Angeles and the Los Angeles County Flood Control District claiming:

1. A taking of its property by overregulation and liability for the creation of dangerous upstream conditions; and

2. Inverse condemnation and tortious injury arising from the Flood District's cloud seeding operations.²

¹ The views expressed by Mr. Merriam are his alone and are not those of his law firm or anyone his firm represents.

² The Church's original complaint also included a tort claim based on the county's alleged negligent installation of culverts that aggravated the flooding. This count was tried on the merits by the court, which ruled in favor of the county.
The defendants were successful in having the second cause of action dismissed by the trial court, but the California Court of Appeal reversed the trial court's ruling on the inverse condemnation theory of the second cause of action and the case was remanded to the trial court for further proceedings on that claim.

The Procedural Posture

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

In its first cause of action the church alleged a regulatory taking and sought only damages. Under California law and the Supreme Court of California's decision in Agins v. Tiburon, 24 Cal. 3d 266, 598 P.2d 25 (1979), aff'd on other grounds, 447 U.S. 255 (1980), a landowner may not maintain an inverse condemnation suit in the courts of California on the theory of a regulatory taking. In California, all a landowner can do is seek to have the regulation or ordinance held excessive and invalidated. Then, if the government continues the regulation in effect, compensation might be recovered - but not before. In short, just compensation was not an available remedy for a temporary regulatory taking in California.

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

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

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

"We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property (footnote omitted) or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as part of the State's authority to enact safety regulations. (citations omitted) These questions, of course, remain open for decision on the remand we direct today."
The Holding

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

Still, as is clear from Justice Stevens' dissent, First Lutheran Church was by no means an ideal case for the decision the Supreme Court sought. But it was good enough for a divided Court, 6-3, to reach the landmark holding:

"We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective. . . . Here we must assume the Los Angeles County ordinances have denied appellant all use of its property for a considerable period of years, and we hold that invalidation of the ordinance without attainment of fair value for the use of the property during this period would be a constitutionally insufficient remedy."

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

Limitations on the Holding and Undecided Issues

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

Remember, as Yogi Berra said, "It's not over until it's over." The First Lutheran Church case is going back to trial where the question of whether there ever was a taking will be decided. Was the delay from January 1979, when the interim ordinance was adopted, to October 17, 1985, when the Supreme Court of California denied a hearing in the case, so long that this temporary restriction constituted a regulatory taking? During the period the interim ordinance was in place, was there any economic use available for any portion of the property? During that time did the property have any market value -- that is, even though it was severely restricted in its use, did the prospect of a less restrictive, permanent ordinance allow the property to continue to have some value, enough to get over the taking threshold?
When the case goes back to trial, what will be the impact of the U.S. Supreme Court's decision in Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. ___ (1987)? In that case the Supreme Court quoted a decision of 100 years ago: "Long ago it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.'" If there are serious public safety objectives to be achieved in prohibiting development in the floodway, then the county's action might be sustained, particularly given the U.S. Supreme Court's Keystone Bituminous decision.

In the majority opinion, the Court provided this further limitation to its holding:

"We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances and the like which are not before us."

It's unclear what "normal delays" might include, but as the dissenters argue, the majority opinion does not seem to include lengthy litigation as part of a normal delay. In other words, the majority opinion suggests that a long delay, one of several years, which is occasioned by litigation on whether there even is a taking, would be enough delay to trigger a taking from the moment the regulation was applied.

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

"Once a court determines that a taking has occurred, the government retains the whole range of options already available - amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain. Thus we do not, as the Solicitor General suggests, permit a court at the behest of a private person, to require the . . . Government to exercise the power of eminent domain . . . .'"

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

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

The decision doesn't help in defining the line between a taking and permissible governmental regulation. As Justice Stevens says in his dissent:

"Some dividing line must be established between everyday regulatory inconveniences and those so severe that they constitute takings. The diminution of value inquiry has long been used in identifying that line. As Justice Holmes put it: 'Government hardly could go on if to some extent values incident to property could not be diminished without payment of every such change in the general law.' Pennsylvania Coal, supra, at 413. It is this basic distinction between regulatory and physical takings that the court ignores today."

Questions Remaining

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

1. **Will the decision encourage more or less litigation?**
The collective judgment appears to be that there will be more litigation, principally because landowners and developers may incorrectly believe the decision creates substantial new rights. Also, there is bound to be more litigation because of the many unanswered questions posed by the decision. As noted above, all that has changed is that just compensation is now available in all states as a remedy for a temporary or permanent regulatory taking. A plaintiff in a case brought under First Lutheran Church must still prove a taking. The standard for proving a taking remains unaltered.

2. **How will new cases brought as a result of First Lutheran Church be decided?** Just as before First Lutheran Church, nearly all of the land use regulation taking cases are likely to be won by local governments at trial because of the very difficult threshold test for proving a taking. While local governments will continue to be successful in most taking cases, it should be remembered that most land use cases are decided on other constitutional grounds, such as procedural due process and the issues of rationality and reasonableness in the adoption and application of regulations.
3. Will developers and landowners have any victories following First Lutheran Church and, if so, what will the financial burden be on local governments? This question is impossible to answer definitively at this point, but it is certain there will be a few cases in which temporary regulatory takings can be proved. In those instances, local governments will pay just compensation. It should be remembered, however, that just compensation under First Lutheran Church does not require paying the full value of the property, but only some measure of the loss from not having the property in economic use during the temporary period. In many instances, just compensation will be a fraction of the actual value of the property.

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

5. Does First Lutheran Church prohibit the use of moratoriums? As noted above, the First Lutheran Church decision is silent on the constitutionality of moratoriums. Justice Stevens' dissent suggests that in testing whether there is a taking, it is important to assess how much of the total area of property is regulated and how long the regulation has effect. It should be added that it is equally important that the local government lay an adequate foundation in the moratorium in terms of studies and evidence. We can predict the outcome with some certainty only at the extremes. For example, a five year moratorium on all building in all zones of a town would almost certainly be a temporary regulatory taking. A six month "planning pause" moratorium on multi-family development by special use permit in a zone which continues to allow single family detached development on half-acre lots would not be a temporary regulatory taking if there was a market for the single family homes.

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

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

Conclusion

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

NOLLAN v. CALIFORNIA COASTAL COMMISSION

The Factual Background

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

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

The Litigation

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

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

The Nollans went back to court and the trial court ruled in their favor, holding that the record did not provide an adequate basis for the alleged direct or accumulative burden on public access and the supposed need for the easement.

The Commission then appealed to the California Court of Appeal. While the appeal was pending the Nollans closed on their house, tore down the old bungalow, and built the new house without ever notifying the Commission.

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

The Supreme Court's Holding

The Court held that the easement was a "permanent physical occupation" of their property. The Court reiterated its standard that any regulation must "substantially advance" the "legitimate state interest" sought to be achieved. Even applying the California Coastal Commission's claimed lesser standard that such regulation need only be "reasonably related to the public need", the Court found the Commission's imposition of the Commission did "not meet even the most un tailored standards."

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

The Decision's Reach

The troubling part of this decision is that it's not one simply about requiring lateral beach access in California. It has the potential for affecting many types of development exaction programs including open space set asides in residential subdivisions, mandatory affordable housing linkage programs, and off-site infrastructure improvement requirements.

Even more troubling is the apparent standard adopted by the Court. While it is not absolutely clear that the Court's discussion articulates a new standard in land use law, or is
merely dicta, the Court seems to have expressly rejected the concept of a rational relationship between the condition and the governmental objective. The "new" standard, at least under the federal Constitution, appears to be that the regulation must "substantially advance" the "legitimate state interest".

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

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

The practical effect for planners will be that additional care will need to be given to ensuring that adequate evidence is provided on the connection between the condition and the legitimate governmental objective.

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

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

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

The Unknowns

There are far more unknowns as a result of the Nollan decision than with First Lutheran Church. The challenge for planners and developers alike will be to ensure that the most

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3 See footnote 3 of the majority opinion.
flexible regulatory techniques, such as floating zones and planned unit development ordinances, are preserved, even though they almost always use numerous conditions to tailor developments to their sites. As with First Lutheran Church, there will be an increased need for more planning, both in the development of regulations and in the project review and approval process.