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WHERE IS THE SUPREME COURT HEADING IN ITS TAKING ANALYSIS AND WHAT IMPACT WILL THIS DIRECTION HAVE ON MUNICIPALITIES?

A Look at *Nollan v. California Coastal Commission, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* and *Keystone Bituminous Coal Association v. Nicholas DeBenedictis**

Over 10,500 petroglyphs, or ancient Indian drawings, lie scattered across the black edge of a volcanic escarpment on the west mesa of Albuquerque, New Mexico.[1] Some property owners with land on and surrounding the escarpment are anxious to build due to increasing pressure for city expansion. In an effort to preserve the petroglyphs and the many archaeological sites as a designated historic district, the City of Albuquerque [City] adopted the Northwest Mesa Escarpment Plan [Plan].

The Plan prohibits development on the escarpment face and preserves the area immediately surrounding the escarpment area as open space.[2] It allows private development in the nearby Impact and View Area with building height and set-back restrictions designed to preserve the view of the escarpment.[3] The property owners claim these restrictions prevent full development and, in some cases, deny all use of all of their land.[4] Therefore, some property owners contend that the City must either buy the land or pay them monetary damages because the City has taken their land in violation of the Fifth Amendment to the United States Constitution.[5]

The Fifth Amendment, also called the Taking Clause, provides that private property cannot be taken by the government for public use without compensating the owner of the property.[6] The purpose of the Amendment is to prevent governments from unfairly forcing individual property owners to bear the burdens of public regulation which should be borne by the public at large.[7] Can the City lawfully require the no-build, set-back

*Sincere thanks to Bob White, land use lawyer for the City of Albuquerque, for his invaluable guidance throughout this paper.

1. Northwest Mesa Escarpment Plan, public hearing draft as adopted by the Albuquerque City Council 1 (Nov. 30, 1987)
2. Id. at vii.
3. Id. at 55-81.
4. Albuquerque Tribune, Dec. 7, 1987, at A10, col. 1.
5. Id.
6. U. S. Const. amend. V.
7. Penn. Central Transportation Co. v. City of New York, 438 US 104, 123 (1978).

and height restrictions or should the City of Albuquerque, and therefore Albuquerque taxpayers, have to pay the developer?

This question cannot be answered without understanding the impact on land use planning of the United States Supreme Court's three recent decisions in *Nollan v. California Coastal Commission* [*Nollan*],[8] *Keystone Bituminous Coal Association v. Nicholas DeBenedictis [Keystone]*.[9] and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* [*First English*].[10] This paper will examine *Nollan* in the context of subdivision exaction law and as the latest in a line of cases in which the Court found a taking when the government physically invaded an owner's land. The effect of *Nollan* will be analyzed in light of *Keystone*, decided three months earlier, which involved a land use regulation when the government had not allowed the continuous presence of the public on the property owner's land. *First English* will be discussed in terms of its possible effects on normal delays in land use planning, moratoria on development, interim ordinances and other growth control measures. Finally, the three cases will be examined together to determine their effect on takings jurisprudence as it applies to city government land use planning.

SUBDIVISION EXACTIONS

In order to understand *Nollan*, some background is needed in the body of law that has developed surrounding subdivision exactions. Exactions are required contributions by a developer to a local government in return for the issuance of a subdivision approval, or the granting of a special or conditional use permit, or an amendment to a zoning map, or some other land use approval that a municipality can require under the police power granted by state law.[11] The most common and least controversial exactions are those required when a developer is asked to "dedicate" land for internal streets, sidewalks and water and sewer lines or to pay a fee in lieu of a land dedication.[12] The government must use the money generated by the fee to purchase lands or facilities.[13] Recently, these "intradevelopment" exactions have included land for parks and schools.[14]

8. 107 S. Ct. at 3141 (1987)

9. 107 S. Ct. at 1232 (1987)

10. 107 S. Ct. at 2378 (1987)

11. Southwest Legal Foundation, Institute on Planning, Zoning and Eminent Domain § 2.02[1] at 2-4 (1986) ("Planning, Zoning and Eminent Domain").

12. Id. at § 2.02[1][a] at 2-4.

13. Steven Richards & Dwight Merriam, Land Dedications In Lieu of Fees and Impact Fees: When Are They Legal? Appendix D at D1 (prepared for the American Institute of Certified Planners Seminar on Creative Financing, Washington, D.C. Feb. 9-10, 1984) ("Land Dedications").

14. See e.g., Trent Meredith, Inc. v. City of Oxnard, 114 Cal.App.3d 317, 170 Cal. Rptr. 685 (Ct. App. 1981); Krughoff v. Naperville, 41 Ill.App. 334, 354 N.E.2d 489(1976).

These exactions are easily justified as a valid exercise of a city's police power because they place the costs of necessary improvements resulting from the new development on the shoulders of the new subdivision residents who created the need and who will benefit from the improvements.[15]

With the proliferation of subdivisions, local governments began requiring developers to construct or maintain off-site improvements, such as streets and highways which bound, cross or are located near the subdivision and to extend city water and sewer mains and storm drains.[16] While some courts have held that requiring these off-site improvements is legitimate, other courts have ruled the requirements unconstitutional since these improvements also benefit people other than subdivision residents.[17] Under either their zoning or planning power, cities can also require "impact fees" which are levied when the building permit is issued in the form of connection charges to a city's sewer and water systems.[18] Impact fees are more easily applied to areas away from the development.[19] Increasing cutbacks in federal revenue sharing grant and loan programs to state and local governments have made development exactions an important alternative source of funding for municipal infrastructure needs.[20]

It is important that the amount of land or money required from a developer be proportional and related to the need the development generates.[21] Otherwise, the developer may be asked to contribute more than his or her "fair share." The causal relationship between the pressures generated by the new development and the required exaction is also important.[22] When developers challenge these exactions as unconstitutional takings, courts differ in the degree of relationship they require. The most conservative position, held by the Illinois courts, requires that the burden upon the subdivider be specifically and uniquely attributable to his activity.[23] A city may find it difficult to prove that the need for new or expanded infrastructure (such as, roads, sewer systems) is solely at-

15. Planning, Zoning and Eminent Domain, § 2.02[1][a] at 2-5 (cited in note 11).

16. Id., § 2.02[1][b] at 2-5.

17. See, e.g., Arrowhead Development Company v. Livingston County Road Commission, 413 Mich. 505, 322 N.W.2d 702 (1982); Divan Builders Inc. v. Planning Board of the Township of Wayne, 66 N.J. 582, 334 A.2d 30 (1975).

18. Land Dedications at D4 (cited in note 13).

19. Id.

20. Robert H. Freilich & Stephen P. Chinn, Commentary: Finetuning the Taking Equation: Applying It To Development Exactions, Part I, Vol. 40, No. 2, Land Use Law and Zoning Digest 3 (Feb. 1988).

21. Planning, Zoning and Eminent Domain, § 2.02[2][a] at 2-12 (cited in note 11).

22. Id. at 2-13.

23. Pioneer Trust and Savings Bank v. Village of Mount Prospect, 22 Ill.2d 375, 176 N.E.2d 799 (1961). In this case the developer was required to donate acreage to build schools. Since the schools were at capacity prior to development, the need was not specifically and uniquely attributable to the development but to overall growth.

tributable to a particular development.[24] Most jurisdictions have adopted a "reasonable relationship" test, which holds that the exaction will be upheld as long as it is reasonably related to the needs created by the development.[25] This test recognizes that the cumulative effects of multiple developments often strain the infrastructure and justify the exaction.[26] A middle ground is emerging, called the "rational nexus" test, which requires that some demonstrable benefit to the people of the subdivision result from the exaction, and the exaction be proportional to the need generated.[27] The majority opinion in *Nollan* used the words "essential nexus."[28]

NOLLAN v. CALIFORNIA COASTAL COMMISSION

James and Marilyn Nollan leased a beachfront lot, located between two beaches, in Ventura County, California.[29] The lease contained an option to buy conditioned on their promise to demolish the bungalow on their property and to replace it with a larger structure.[30] In 1982, they applied for a development permit from the California Coastal Commission [Commission] to replace the bungalow with a three bedroom house in keeping with the rest of the neighborhood.[31] The Commission granted the permit on the condition that the Nollans transfer an easement to allow the public to pass across their beach. [32] The Commission's stated public purpose goals for requiring the easement conveyance were to protect the public's ability to see the beach from the road, to assist the public in overcoming a perceived "psychological barrier" to using the beach created by all the private development, and to prevent beach congestion.[33] The Nollans petitioned the Superior Court in California to invalidate the access condition as a violation of the Takings Clause of the Fifth Amendment.[34] The Superior Court invalidated the condition finding that the Commission failed to establish that the proposed new house would burden public access to the beach.[35] On appeal, the California Court of Appeals

24. See Planning, Zoning and Eminent Domain, § 2.02 [2][a] at 2-14 (cited in note 11).

25. Freilich & Chinn, Commentary at 7 (cited in note 20). See also Ayers v. City Council of Los Angeles, 207 P.2d 1 (1949).

26. Planning, Zoning and Eminent Domain, § 2.02[2][a] at 2-14.

27. Freilich & Chinn, Commentary at 7 (cited in note 20). See also Call v. City of West Jordan, 614 P.2d 1257 (Utah 1980); Wald Corp. v. Metropolitan Dade County, 338 So.2d 864 (Fla. App. 1976).

28. 107 S. Ct. at 3148.

29. Id. at 3143.

30. Id.

31. Id.

32. Id.

33. Id. at 3147.

34. Id. at 3144.

35. Id.

reversed, holding that the Commission established it's burden, and there was no taking since the Nollans were not deprived of all reasonable use of their property.[36] The Nollans appealed to the United States Supreme Court.

The Supreme Court reversed. Writing for a five member majority,[37] Justice Scalia pointed out that if the Commission had demanded a permanent public access easement outright, he would have no doubt that the Commission would have violated the Fifth Amendment.[38] However, requiring the easement in return for a rebuilding permit would be lawful if it, 1) substantially advanced a legitimate state interest, and 2) did not deny a landowner economically viable use of his or her land.[39] The Court found that the Commission's public access condition failed the first part of this test because the condition did not serve a public purpose related to the permit requirement;[40] therefore, the Court determined that California must pay the Nollans for the easement.[41]

The Court assumed that the Commission's stated public purposes were valid.[42] However, Justice Scalia found no "nexus" or connection between the effect of the Nollan's development and the requirement of the easement because the Commission's goal of preserving lateral access along the shoreline in front of the Nollans' home was not related to the Nollans' actions in building a larger house.[43] The nexus requirement focused on the remoteness of the development exaction from the asserted public purpose rather than the proportionality of the development exaction to the needs created by the development.[44] If the Commission had required a height limitation, a width restriction, or even a public viewing spot, the Court said it might have found a "reasonable relationship" between the permit condition and California's explicitly stated goal of protecting the public view of the beach.[45]

The Court rejected the Commission's contention that the access condition could be justified as part of a comprehensive program to provide the public access along public beach areas.[46] The Court is sending governments a message that they must demonstrate a "close fit" between the need for an exaction and the pressures created by new development. The

36. Id.
37. Joining in Justice Scalia's opinion were Chief Justice Rehnquist and Justices Powell, White and O'Conner.
38. 107 S. Ct. at 3145.
39. Id. at 3146.
40. Id. at 3150
41. Id.
42. Id. at 3147.
43. Id. at 3149.
44. Freilich and Chinn, Commentary at 7 (cited in note 20).
45. 107 S. Ct. at 3147-48.
46. Id. at 3150.

fact that an exaction serves a general public need is not enough. After *Nollan,* an exaction or permit condition will not be considered a taking if a) the government could have denied the proposed use altogether without that denial being a taking, b) instead, the government chose to approve the permit with a condition or exaction, and c) the condition or exaction served to eliminate the adverse effects of the proposed use of the property.[47] In other words, there must be an "essential nexus" between the exaction and the burdens created by the proposed use.[48] Justice Scalia cited cases using all three tests used by state courts in determining the degree of relationship between needs generated and exactions required: reasonable relationship, rational nexus and specifically and uniquely attributable.[49]

In his dissent, Justice Brennan noted the Court's traditional standard of review for testing a state's exercise of police power in enacting land use regulations had been whether or not the state "*could rationally have decided* that the measure adopted might achieve the state's objective."[50] He argued that the Court took an extremely narrow view of the public purpose goals served by the permit condition and should not have assumed that the only burden which concerned the Commission was blockage of the view of the beach.[51] According to Justice Brennan, the deed restriction on which the Nollans' permit approval was conditioned directly addressed the threat to public access to the tidelands and even met the Court's demand for a precise match between the condition imposed and the specific burden on access created by the Nollans.[52]

The Court's requirement that a land use regulation substantially advance a legitimate state goal signals an increased standard of judicial review.[53] However, the extent to which the Court will increase its scrutiny remains unclear.[54] The reason the Court applied closer scrutiny in *Nollan* was it suspected the Commission's motive in formulating the access condition might be to avoid compensation, rather than to serve the stated police power objective. [55] The Commission probably could have demonstrated the proper "fit" between the public purpose goals and the easement

47. Id. at 3148.
48. Id.
49. Id. at 3149.
50. Id. at 3151.
51. Id. at 3155.
52. Id. at 3151.
53. Id. at 3147 n.3 and 3150.
54. In Equal Protection cases, the Court will review classifications by gender with an "intermediate" or heightened level of review. The government must have important objectives in order to classify people according to sex, and the classification must be substantially related to achievement of those objectives. There is nothing in Nollan, however, to suggest that the Court will use the same level of review that it uses in gender cases when it reviews exaction cases.
55. 107 S. Ct. at 3150.

requirement had it anticipated the more stringent standard of review.[56] Why should the Court require so precise a fit? Although the Court only mentioned it in one sentence, it found the access requirement to be a "permanent physical occupation."[57] A review of other cases in which the Court found a physical invasion reveals the significance of this finding.

BACKGROUND ON PHYSICAL INVASION CASES

The Court has always found a compensable taking under the Fifth Amendment when the government or its agents have physically expropriated or permanently occupied privately owned real property.[58] In early cases, while building dams to improve navigation, the government was often faced with whether or not to compensate property owners for damage to their land caused by water, earth, sand, or artificial structures. At first the test was whether the injury was the "direct" result of the government's action.[59] Remote, incidental consequences of the government's exercise of plenary power to improve navigation, called "consequential" damages, were non-compensable.[60]

The most important factor involved in assessing the claimant's property right was the navigability of the water bordering the claimant's land.[61] Much of the government's commerce depended upon use of navigable waters at the turn of the century. Therefore, when the government was exercising its paramount commerce power on navigable waters, it did not award compensation when its activities damaged plaintiff's oyster beds,[62] caused condemnation of plaintiff's equipment erected to control the current and use the water power,[63] required plaintiff to remove his wharf,[64] or interfered with claimant's access to a navigable part of the stream.[65] The power of the federal government to improve navigable waters in the interest of interstate and foreign commerce "must be exercised, when private property is taken, in subordination to the Fifth Amendment."[66] If, on the other hand, the government caused flooding or other damage while in the process of building dams to land located on non-navigable

56. Id. at 3155 n. 4.
57. Id. at 3145.
58. Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419, 428 (1982).
59. See Gibson v. United States, 166 U.S. 269 (1897) where the government interfered with claimant's access to his land and Bedford v. United States, 192 U.S. 217 (1904) where the government's retaining wall of willow mattresses caused erosion and flooding to claimant's land.
60. See Jackson v. United States, 230 U.S. 1 (1913).
61. United States v. Willow River Power Co., 324 U.S. 499 (1945).
62. Lewis Blue Point Oyster Cultivation v. Briggs, 229 U.S. 82 (1913).
63. United States v. Chandler-Dunbar Water Power Company, 229 U.S. 53 (1913).
64. Willink v. United States, 240 U.S. 572 (1916).
65. United States v. Commodore Park, 324 U.S. 386 (1945).
66. United States v. Cress, 243 U.S. 316 (1917).

rivers, streams or tributaries, it compensated the owner for the damage.[67] In these cases, the government could not justify destroying an owner's property interest in pursuit of commerce because the waters involved were non-navigable. It was clear to the Court in these early flood cases that the destruction to an owner's property on non-navigable waters was a physical occupation and these cases formed the basis of the Court's present theory of physical invasion.

Although physical occupation of an owner's land by government troops or destruction of an owner's land located on non-navigable waters by flooding were clear cut examples of physical occupation, over time the Court broadened it's view of property rights by characterizing property as a bundle of sticks.[68] Each stick or strand represents a "right" the owner has with respect to the property, such as the right to solely possess it, to use it, to sell it, to enjoy it, to destroy it, or to give it away.[69] Using this metaphor, the Court has stated permanent physical occupation is the most serious invasion of an owner's property rights because "the government does not simply take a single 'strand' from the 'bundle' of property: it chops through the bundle, taking a slice of every strand."[70]

Physical invasion interferes with an owner's right to possess the property, to exclude others from the property and to make use of the property.[71] In *United States v. Causby,* the noise and glaring lights from military aircraft which flew directly over a chicken farm, frightened the chickens so badly they stopped laying eggs. The Court said the flights constituted a compensable physical invasion because they permanently interfered with the owner's enjoyment of the surface, an essential "stick" in the bundle.[72] The frequency and altitude of the flights made the owner's loss as great as if "the United States [had] entered upon the surface of the land and taken exclusive possession of it."[73]

The right to exclude is another essential stick in the bundle of property rights which is destroyed by physical invasion, according to the Court in *Kaiser Aetna v. United States.*[74] The owner of a private pond on the island of Oahu, Hawaii, spent millions of dollars dredging a channel so that the pond could be made into a marina.[75] The pond had been separated from

67. See Pumpelly v. Green Bay and M. Canal Co., 13 Wall 166 (1872) where the state's dam caused permanent overflow of plaintiff's land and United States v. Cress, 243 U.S. 316 (1917) where frequent overflows on claimant's land resulted in depreciation of the land to one-half its former value.

68. 458 U.S. at 433.

69. John E. Cribbit & Corwin W. Johnson, Property: Cases and Materials (5th Ed. 1984).

70. 458 U.S. at 435.

71. Id.

72. United States v. Causby, 328 U.S. 256 (1946).

73. Id. at 261.

74. Kaiser Aetna v. United States, 444 U.S. 164 (1979).

75. Id. at 164, 169.

a bay and from the Pacific Ocean by a barrier beach.[76] Due to the owner's improvements which connected the pond to navigable waters of the United States, the Corps of Engineers asserted a right to assure the public free access to the marina.[77] The Court held the government could not open the pond to the public without exercising its eminent domain power and compensating the developer.[78] Writing for the majority, Justice Rehnquist did not consider the importance to the public of access to the pond nor the loss (diminution) of value to the owner's interest since the Court found the impairment of the right to exclude constituted a physical invasion.[79]

The right to exclusive possession, although often considered the essence of private property, is not absolute. One year after the decision in *Kaiser Aetna,* the Court denied an owner compensation even though it involved a physical invasion. In *Pruneyard Shopping Center v. Robins,* the owner of a shopping center already open to the public was not allowed to prohibit students from distributing political literature.[80] His right to exclude others was not essential to the use or economic value of the property.[81] Writing for the majority, Justice Rehnquist concluded that even though there had been a taking of a shopping center owner's right to exclude, the owner had a lesser interest in this right because the shopping center was already open to the public.[82] In addition, the California state constitution's guarantee of rights of free expression and petition were important.[83] In the rare instances where private property which is already open to the public is temporarily invaded, and another Constitutional right is involved, the Court will deny compensation even when a physical invasion is involved.

The importance of physical invasion in determining compensation can be seen most clearly in the Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*[84] The New York legislature passed a law prohibiting a landlord from interfering with cable television installation and from collecting more than one dollar in fees from any cable company.[85] The Court of Appeals found the law served the legitimate public purpose of encouraging cable television development and had only a minimal economic impact on landlords.[86] The Supreme Court reversed, holding that permanent physical occupations were *takings per se,* without regard

76. Id. at 166.
77. Id. at 168.
78. Id. at 179-180.
79. Id.
80. Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).
81. Id. at 83.
82. Id.
83. Id. at 81.
84. 458 U.S. at 419 (1982).
85. Id. at 423-24
86. Id. at 424-25.

to the public interests they served.[87] The owner suffers a special kind of injury when a stranger (the government) invades and occupies his or her property according to the Court. This is qualitatively more severe than when the government just regulates the use of property according to the Court.[88] Temporary physical occupations would be subjected to the multi-factor balancing test used when determining regulatory takings.[89] In a stinging dissent, Justice Blackmun found the temporary/permanent distinction "misguided" and "potentially dangerous",[90] representing "an archaic judicial response to a modern social problem."[91] He would subject all takings claims to a multi-factor balancing test.

NOLLAN IN THE CONTEXT OF PHYSICAL INVASION

The Court's reaction to the physical intrusion in *Nollan* may now make more sense. When a property owner conveys a fundamental property right, such as the right to exclude others, to the government, the Court will consider this grant a permanent physical invasion no different from flooding an owner's land. The Court will apply the *Loretto* taking per se rule. Unless the exaction substantially advances legitimate governmental interests and the ends and means of the regulation have a sufficiently "close fit," the exaction will be held unconstitutional and compensable. However, even permanent physical occupation of private property will not inevitably result in the finding of a taking if the government can pass the Court's legitimate state interest and proportionality hurdles. In exaction cases, when the development condition imposed by the government poses no threat to title or does not require continuous, permanent occupation of the owner's land, there is no rationale for the reviewing court to resort to increased scrutiny.[92]

ANALYSIS OF *NOLLAN'S* IMPACT ON LAND USE PLANNING

Whenever the government appropriates a leasehold or other property interest, as it does when it requires a dedication in return for issuing a land use permit or when it requires that the landowner allow continuous, permanent public access to the land, the possibility of a physical invasion exists. The government will have to pay for the exaction or right of public access unless these requirements reduce or eliminate the adverse effects of the proposed use. The adverse effects by themselves should be sufficient

87. Id. at 426.
88. Id. at 436.
89. Id. at 434.
90. Id. at 443.
91. Id. at 455.
92. Freilich & Chinn, Commentary at 7 (cited in note 20).

to justify denial of the permit. Since courts will apply heightened scrutiny to the government's motive for acquiring a particular property right, the government must have a good record demonstrating the reasonable relationship between the burdens being placed on the landowner or developer by the required exaction or condition and the public purpose goals cited by the government as reasons for the exaction or condition. A regulation will go too far when the government should have instituted condemnation proceedings but did not.[93]

Some commentators feel that *Nollan* will result in higher costs for land use regulations because state and local governments will be prevented from adopting plans that maximize both public and private interests when faced with a requirement for such a tight fit between the ends and means of the regulation.[94] Now limited in imposing conditions on building permits, local governments may prefer to deny the permit altogether.[95] However, reasonable exactions with clearly documented public purpose goals should not be affected by the more stringent nexus requirement and the increased scrutiny requirement of *Nollan*. This should lead to a more disciplined approach by land use regulators.

WEAKNESS OF THE PHYSICAL INVASION TEST: "TECHNICALITIES OF FORM DICTATING CONSEQUENCES OF SUBSTANCE"[96]

Loretto clearly demonstrates the weakness of the physical invasion test in modern takings analysis. The statute requiring the cable installation was a reasonable legislative effort to insure tenants access to cable TV. It had a negligible economic impact on the landlord. As Justice Blackmun pointed out in his dissent, "takings" based upon physical contact do not distinguish between significant and insignificant losses.[97]

When the Court considers regulatory takings that are not deemed physical invasions, it takes into account factors such as the economic loss to the owner and the public benefit to be gained.[98] Some regulations that preclude nearly all beneficial use of land may have a more severe impact on the owner than others that involve only a slight physical invasion.[99] There is no good reason for giving physical invasion any special significance separate from economic loss when the latter is the landowner's

93. Id. at 8.
94. The Supreme Court, 1986 Term-Leading Cases, 101 Harv. L. Rev. 119, 249 (1987).
95. Id.
96. 458 U.S. at 450, quoting United States v. Central Eureka Mining Co., 357 U.S. 155 (1958).
97. Id. at 447.
98. 107 S. Ct. at 1242.
99. 458 U.S. at 447.

real concern.[100] The per se rule of *Loretto* treats all encroachments alike and ignores reasonable legislative determinations.[101] Justice Oliver Wendell Holmes once observed: "the fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed."[102] Perhaps it is this psychological attraction to tangible property that has mesmerized the Court into overreacting to minor threats to an owner's "bundle" of property rights.[103]

REGULATORY TAKINGS—*KEYSTONE BITUMINOUS COAL*

Historical Background

In early cases, a municipality's regulations could be excessive under its police power, particularly under its power to prohibit a nuisance, and still be valid.[104] Even when regulations caused severe losses in the value of an owner's property, the regulations were sustained.[105] In 1922, the Court signaled a drastic change in its usual deference to governments in *Pennsylvania Coal Company v. Mahon* [*Mahon*]. *Mahon* laid down the landmark rule that when a regulation "goes too far" it will be a taking under the Fifth Amendment.[106] The Pennsylvania legislature had enacted the Kohler Act to prohibit coal mining which caused the subsidence of certain surface structures by removing the supports from under them.[107] Pennsylvania law recognizes three separate estates in land: the mineral estate, the surface estate, and the support estate (the right of surface support).[108] The Pennsylvania Coal Company [Company] sold the surface rights to the Mahons, who bought a residential lot. The Company retained the support estate and all the mineral rights. When the Company started mining beneath their property, the Mahons sued under the Kohler Act to prevent subsidence to their home.[109] The Company said the Kohler Act made it commercially impractical to mine the coal contained in the support

100. Corwin W. Johnson, Compensation for Invalid Land-Use Regulations, 15 Ga. L. Rev. 559, 572 (1981).

101. John J. Costonis, Presumptive and Per Se Takings: A Decisional Model for the Taking Issue, 58 N.Y.U.L. Rev. 465, 523 (1983).

102. Block v. Hirsh, 256 U.S. 135, 155 (1921).

103. Costonis, 58 N.Y.U.L. Rev. at 514 (cited in note 101).

104. See, e.g. Hadacheck v. Sebastian, 239 U.S. 394 (1915), where plaintiff was prohibited from continuing his brickyard because the zoning ordinance required residential uses only and thus he lost all use of his property; Miller v. Schoene, 276 U.S. 272 (1928), where the Supreme Court upheld a Virginia statute requiring destruction, without compensation, of cedar trees infested with a pest deadly to nearby apple orchards but harmless to the cedar trees themselves.

105. In Hadacheck the Court upheld a diminution in value from 800,000 to 60,000 (approximately 90%), 239 U.S. at 405.

106. Pennsylvania Coal Company v. Mahon, 260 U.S. 393, 415 (1922).

107. Id. at 412-13.

108. 107 S. Ct. at 1238.

109. Pennsylvania Coal Company v. Mahon, 260 U.S. at 412.

estate and thus the Act deprived the Company of all its rights to that coal.[110] Justice Holmes, writing for the majority, focused upon the support estate as a separate estate and noted the loss caused by the regulation was severe, and there was no "reciprocity of advantage" to the Coal Company which would mitigate this loss.[111] In his dissent, Justice Brandeis pointed out that the state was not appropriating or making use of the restricted property, but merely preventing the owner from using the property in a way that interfered with the rights of the public.[112] He suggested that the value of the coal left in the ground be compared to the value of the entire property owned by the Company,[113] a position the majority later adopted in *Penn Central Transportation Co. v. City of New York* [*Penn Central*].[114] The majority gave no set formula for when a regulation "goes too far". The Court has had to struggle with this lack of formula since *Mahon* and is still making "ad hoc, factual inquiries" into the circumstances of each regulatory takings case.[115] Reviewing each regulatory takings case individually to see if it "goes too far" is in sharp contrast to applying the per se rule used in physical invasion cases.

Fifty years after *Mahon*, in *Penn Central*, the Court gave more guidance to courts on the important factors to consider when regulations are challenged. New York's Landmark Preservation Law prohibited Penn Central Railroad [Railroad] from building a fifty story office tower above Grand Central Terminal. New York City [City] adopted the law for the "education, pleasure and welfare of the people of the city" to protect historic structures and neighborhoods from destruction.[116] The City believed preservation of these landmarks was also important to its tourist and business industries.[117]

Once a building was designated a "landmark," the owner was restricted from building structures that would have an adverse impact on the architectural features of the landmark building.[118] The Railroad's Grand Central Terminal was one of the City's most famous buildings.[119] *Penn Central* did not contest the validity of the law's public purpose, but alleged that as applied the law's restrictions affected a taking of it's property requiring compensation.[120] Central to the Court's determination in sustaining the law was the fact that the law did not interfere with the present

110. Id. at 414.
111. Id. at 414-15.
112. Id. at 417.
113. Id. at 419.
114. Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).
115. 107 S. Ct. at 1247.
116. 438 U.S. at 109.
117. Id.
118. Id. at 112.
119. Id. at 115.
120. Id. at 122.

uses of the terminal, only its potential proposed uses, and therefore the Railroad's primary expectations were not frustrated.[121]

Unlike the *Mahon* Court, this Court also looked at the railroad's other profitable land holdings to decide whether the Railroad was receiving a reasonable return on its investment.[122] Furthermore, the Court found it significant that the Railroad could transfer it's development rights in air space above Grand Central Terminal to other properties it owned.[123] The *Penn Central* Court considered the owner's surface rights and the air rights together; even though the air rights were devalued, valuable surface rights remained.[124] In a departure from the *Mahon* decision, the Court focused on the uses permitted, not those prohibited, and the relevant question was not what the railroad had lost, but what rights it had left.

In *Penn Central,* the Court identified the major factors to be considered in a regulatory takings case analysis, which it reaffirmed in March 1987 in *Keystone Bituminous Coal.* The two-part test is as follows: A regulation will *not* be considered a taking if it 1) substantially advances a legitimate state interest, and 2) does not deny a landowner all economically viable use of his or her land.[125] In deciding the economic viability factor the Court considers a) the economic impact of the regulation on the property owner, particularly how much the regulation interferes with investment-backed expectations,[126] and b) the character of the government action, whether or not it is a physical invasion or a "public program adjusting the benefits and burdens of economic life to promote the common good."[127] Investment-backed expectations are defined by what they are not. They are not a denial of "the ability to exploit a property interest that [the owner] heretofore had believed was available for development."[128] If the landowner has some reasonable economic value left in the land, the regulation will stand.[129]

Keystone Bituminous Coal was decided sixty-five years after *Mahon.* The Pennsylvania statute in *Keystone* required coal mine operators to leave fifty percent of the coal in the ground under publicly used buildings, cemeteries and perennial streams to prevent subsidence damage. This Subsidence Act is very similar to the Kohler Act in *Mahon.* Yet the Court distinguished *Mahon* by saying the Kohler Act only involved the interest of a private homeowner.[130] Writing for the majority, Justice Stevens agreed

121. Id. at 136.
122. Id.
123. Id. at 137.
124. Id.
125. 107 S. Ct. at 1242.
126. Penn Central, 438 U.S. at 124-27.
127. Id.
128. Id. at 130.
129. Id. at 138 n. 36.
130. 107 S. Ct. at 1241.

with the characterization of the Kohler Act as "special legislation enacted for the sole benefit of the surface owners who had released their right to support."[131] Therefore, unlike the Subsidence Act, the Kohler Act was a private benefit statute with no public safety goals to validate the state's exercise of its police power.[132] The Court likened the Subsidence Act to previous valid governmental regulations enacted to abate a nuisance for important public health and safety reasons.[133]

The Court further distinguished *Keystone* from *Mahon* by noting that the Kohler Act made it "commercially impracticable" for the Company to mine certain coal. In contrast, the Keystone Coal Association [Association] demonstrated no injury.[134] Since the Association was bringing only a facial challenge to the statute, the only question before the Court was whether the mere enactment of the statute constituted a taking.[135] Petitioners faced an "uphill battle in making a facial attack on the Act as a taking."[136]

The Court was not influenced by Pennsylvania law which considers the support estate a separate property interest. Instead, the Court observed that the Subsidence Act affected less than 2 percent of the owner's total coal.[137] The clear documentation the state presented concerning the public welfare goals of the Subsidence Act was sufficient to prove the interest of the state was legitimate.[138]

ANALYSIS OF *KEYSTONE'S* IMPACT ON LAND USE PLANNING

In meeting challenges from land owners and developers that permanent municipal regulations prevent putting land to its "highest and best use," and thus amount to a taking, land use regulators will be aided by the focus on the developer/owner's full bundle of property rights used in *Penn Central* and *Keystone*. Zoning regulations which are often challenged are those designating property as open space, preservation park or greenbelt areas which preclude intensive development.[139] This focus on all the rights stands in sharp contrast to *Nollan*, where the "right to exclude" strand in the bundle of property rights was elevated to paramount importance. When the Court perceives governments have enacted land use regulations to prevent harm to protect the health, safety and welfare

131. Id. at 1240.
132. Id. at 1241-42.
133. Id. at 1244-45.
134. Id. at 1241-42.
135. Id. at 1246.
136. Id. at 1247.
137. Id at 1248.
138. Id. at 1242.
139. Land Use IV, a conference sponsored by Southwest Land Use Institute in cooperation with the Section of Urban, State and Local Government Law, American Bar Association, Mar. 24 & 25, 1988, Albuquerque, N. Mex.

of the public, as in *Keystone*, the Court will give land use regulations wide discretion. If the regulation does not involve physical invasion or title acquisition, the Court uses a balancing test to determine whether the benefit to the public is outweighed by the burden on the landowner.[140] The Court will continue to make "ad hoc, factual inquiries" organized around three significant factors: the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with the stated investment-backed expectations, and the character of the governmental action.[141]

Penn Central and *Keystone* recognize that governments may execute laws or programs that adversely affect recognized economic values particularly when the purpose of the governmental action is to prevent harm to the public. Diminution in value alone does not constitute a taking even when regulations drastically reduce the value of the owner's land.[142] As long as some economic use of the property is left, the regulation will stand. *Keystone* emphasizes the importance of keeping a good record documenting the public purpose for the regulation. The good record in *Keystone*, which clearly showed the public purpose for the regulation and how the regulation would advance these public purposes, stands in contrast to the poor record in *Nollan*. The only public purpose for the permit condition the majority could find in the record in *Nollan* was the purpose of protecting the public view of the beach.[143] The record was not sufficient to show the Commission's important goal of providing public access along the shoreline by limiting buildout. *Keystone* also cautions land use planners to allow as many other beneficial uses of the property as possible to avoid denying the developer all economically viable use of his/her land.[144]

MONEY FOR THE TEMPORARY TAKING: A LOOK AT *FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE v. THE COUNTY OF LOS ANGELES*

History of the Temporary Taking/Remedy Issue

Any discussion of the temporary taking issue must begin with *Agins v. City of Tiburon* [Agins].[145] In *Agins*, the property owners brought an

140. Freilich & Chinn, Commentary at 8 (cited in note 20).

141. Id.

142. The uncompensated losses in Hadacheck (cited in notes 104 & 105) and in Miller (cited in note 104) are good examples of the magnitude of loss that will be sustained.

143. 107 S. Ct. at 3155 n. 4.

144. For example, uses permitted in land zoned as open space might be farming, grazing, public or private recreation, timber production and harvesting, wildlife habitat, watershed or groundwater recharge, public recreation and scientific or educational purposes.

145. 447 U.S. 255 (1980).

inverse condemnation action [146] claiming that a zoning ordinance which limited development of their five-acre parcel amounted to a taking. The California Supreme Court held there was no taking, but even if there had been a taking, the only remedy for a temporary regulatory taking was to have the regulation declared invalid.[147] The California court reasoned that if money damages were allowed in these circumstances, the court would, in effect, force the government to exercise its power of eminent domain.[148]

On appeal, the Supreme Court agreed that no taking had occurred because the ordinance, on its face, allowed the Agins to build up to five houses on their five acres of property.[149] The Agins had not shown any injury since they were making a facial challenge to the ordinance. Since no taking was found, the Court said it was unnecessary to consider whether California could limit the remedy available to a landowner to invalidation of the ordinance only.[150]

The California invalidation remedy was again presented to the Court in three subsequent cases, but the issue was not decided because the controversies were not ripe. The Court said the challengers had failed to exhaust local administrative and state judicial remedies.[151] In the first of these cases, *San Diego Gas and Electric v. City of San Diego,* five justices thought the Court lacked jurisdiction because the judgment below was not final.[152] However, Justice Brennan discussed the merits of the issue in a dissent. Declaring that temporary police power regulations can destroy the use and enjoyment of property just as effectively as formal condemnation or physical invasion of the property, he stated once the court established a taking, the government must pay just compensation for the period beginning on the date the regulation first affected a taking and ending when the government rescinded or amended the regulation.[153] Although the opinion was a dissent, it was essentially this theory that the Court followed in *First English.*

First English Evangelical Lutheran Church v. County of Los Angeles

The Lutheran Church [Church] owned twenty-one acres on which it built a camp and retreat center for handicapped children called Lutherglen.

146. Because it is the landowner who is suing for compensation instead of a government instituting formal condemnation proceedings, this cause of action is called a suit in inverse condemnation.

147. Agins v. City of Tiburon, 157 Cal. Rptr. 372, 598 P. 2d. 25, 32 (1979).

148. Id. at 30.

149. 447 U.S. at 262.

150. Id. at 263.

151. San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); MacDonald, Sommers & Frates v. County of Yolo, 477 U.S. 340 (1986).

152. San Diego Gas & Electric, 450 U.S. at 9.

153. Id. at 658.

The land was located along a river that served as a drainage channel for a watershed area and in 1978 Lutherglen was destroyed by a flood.[154] To limit future flood damage, Los Angeles County [County] passed a temporary flood protection ordinance prohibiting building or replacing any structures within the previously flooded area.[155] The Church stated that since it could not rebuild Lutherglen, the ordinance denied all use of the property, and the Church sought damages. The Superior Court of California struck the provision of the complaint concerning damages as a remedy for the uncompensated taking of all use of Lutherglen.[156] The California Court of Appeals affirmed the trial court's decision to strike the allegations concerning the ordinance and the Supreme Court of California denied review.[157] Since the judgment was on the pleadings alone, neither the California trial court nor the appellate court addressed the health and safety reasons for the County's ordinance.[158]

The California courts relied solely on *Agins* as the basis for their decisions, accepting as true the Church's allegations in its Complaint that a taking of all use of Lutherglen had occurred. Since the only question before the Supreme Court was whether or not the pleadings stated a cause of action, the remedial question was isolated for the Court's consideration. The Court's holding is limited to the compensation claim.[159]

The Court made it clear that it was not deciding the taking issue, and remanded the case to the California state courts to determine whether the Los Angeles County temporary flood protection ordinance actually denied all use of the property.[160] In a 6 to 3 decision, the Court resolved the issue of the invalidation remedy by reversing the California Court of Appeals. The majority could see no difference between a temporary denial of all use of the property and a permanent taking.[161] It held that since compensation was required for a temporary *physical* taking, compensation must be paid for a temporary regulatory taking as well even if the offending regulation is ultimately invalidated or revoked.[162] Mere invalidation of the ordinance was held to be a constitutionally insufficient remedy.[163] The Court said the compensable period for a temporary taking begins when the taking first occurs and continues until the offending regulation is repealed.[164]

154. 107 S. Ct. 2378, 2381 (1987).
155. Id. at 2382.
156. Id.
157. Id. at 2383.
158. Id. at 2384 n. 7.
159. Id. at 2384-85.
160. Id. at 2385.
161. Id. at 2388.
162. Id.
163. Id. at 2389.
164. Id. at 2388.

On remand, Los Angeles County may argue that some reasonable use of the property is still left by the ordinance. Alternatively, the County may argue that the important public safety purpose of the ordinance will support the substantial governmental interference and the County should be allowed to rezone the use of the land to prevent public harm without having to compensate the Church. If the County can convince the California Superior Court that the ordinance does not grant the government title or a substantial property interest in the property, and that the ordinance does leave some reasonable use of the property to the Church, no taking will be found.

ANALYSIS OF THE IMPACT OF FIRST ENGLISH ON LAND USE PLANNING

The majority opinion in *First English* stated that "normal" delays in obtaining building permits and changing zoning ordinances were "quite different questions."[165] It is unclear what the Court considers a "normal delay." Oftentimes, the planning process can take years during which time a property owner may be denied significant use of his or her property.[166] The question remains whether unintentional delays are "abnormal" when caused by good faith errors on the part of governments, such as a city's failure to follow the requirements of a General Plan. Intentional bad faith delays will, if proved, most likely be compensable. Moratoria prohibiting development, often used by cities to control growth and preserve open space while developing a General Plan, might also be held compensable. The Court will look at the length of time the moratorium prohibits all development and the purpose for its enactment. Since cities may now have to pay for delays, some commentators feel flexible land use planning will be curtailed.[167] They feel cities will be cautious, less innovative, less likely to go outside the boundaries of already tested schemes.[168] Since *First English* provides no basis for distinguishing normal delays from excessive ones, cities may have to increase taxes in order to compensate developers and landowners for needed regulations which prohibit all use of the property for a certain length of time. To be on the safe side, cities should draft their ordinances and moratoria narrowly, with specific time limits, and allow some fruitful use of the restricted property in each case if possible. Cities must base their moratoria and other growth control measures on documented health and safety reasons. Cities would be wise to investigate what is reasonable and customary in land use planning

165. Id. at 2389.

166. The process of approving a subdivision map took eight years in Williamson County (cited in note 150).

167. The Supreme Court, 1986 Term-Leading Cases, 101 Harv. L. Rev. 119, 246 (1987).

168. Id. at 245.

around the country to ensure that the delays they impose are in line with what is considered to be "normal."

CONCLUSION

After *Nollan* and *First English*, it appears that the Court is willing to reduce the flexibility of governments in favor of expanded protection of property rights under the Takings Clause.[169] When development exactions, conditions placed on permit grants, and other planning and zoning ordinances involve the conveyance of title or involve continuous, permanent occupation by the public, they will generally be found to be a taking of property under the Fifth Amendment unless the requirement passes both a "legitimacy review" and an "economic impact review."[170] Under the "legitimacy analysis," the courts will ask two distinct questions: 1) whether the purpose of the regulatory action is a "legitimate state interest," and 2) whether the means used to achieve the objective "substantially advances" the intended purpose.[171] Courts are directed to closely scrutinize the government's motive behind enacting the regulation to assure that it is not a disguised attempt to avoid compensating the landowner.[172] The closeness of the causal connection between the state's interest and the requirement being put on the property and the degree that the landowner's development has generated the need for this requirement are crucial to the analysis of the means used to substantially advance the government's legitimate purpose.[173] Local governments will decide the degree of "fit" under state law using either the "rational nexus", "reasonable relationship" or "specifically and uniquely attributable" tests in the area of subdivision exactions. It is clear that local governments will not be able to charge new development for existing deficiencies such as road and sewer improvements.[174]

If the regulatory action survives the legitimacy review, then the Court will inquire whether or not the regulation denies an owner economically viable use of his land.[175] *Keystone* indicates courts will make this inquiry by examining the owner's property as a whole. If the conveyance passes the legitimacy review and the economic impact analysis, it will be deemed constitutional and non-compensable. If the conveyance fails the legitimacy and economic reviews, the government must institute an eminent domain action and compensate the landowner.

If a regulation does not involve continuous, permanent physical oc-

169. Id. at 246.
170. Freilich & Chinn, Commentary at 8 (cited in note 20).
171. Id.
172. Id.
173. Id.
174. Land Use IV (cited in note 139).
175. Freilich & Chinn, Commentary at 8 (cited in note 20).

cupation or title acquisition, *Keystone* tells us the Court will look at the individual circumstances of each case and apply the multi-factor balancing test to determine whether the benefit to the public is outweighed by the burden on the landowner. When there is clear documentation that the regulation is enacted to prevent a threat to the public welfare, the government may regulate virtually all uses of the property causing that harm.[176] Regulations to preserve open space, historic buildings, wetlands, etc. will be strengthened if they can be related to the prevention of harm to the public.

First English reminds developers and property owners that the federal courts are reluctant to become involved unless the owner or developer exhausts all available administrative remedies and a state court has ruled against the owner.[177] Exhaustion of remedies is necessary to clearly show the economic injury. Whether *First English* will have a "chilling effect" on land use planning remains to be seen. Unfortunately, none of the three cases provide any more information on how to determine when a regulation that does not involve a physical invasion "goes too far," and thus requires the government to exercise its power of eminent domain.[178]

The economic plight of local governments will worsen if *Nollan* and *First English* result in increased compensation to property owners. Already in a financial bind from decreased federal revenue sharing, cities will have even less money to develop and maintain transportation and sewer systems, to establish schools and parks, and to buy open space. Citizens around the country will be forced to choose whether to pay higher taxes or do without some municipal services.

I began this article by talking about the Northwest Mesa Escarpment Plan. It is unclear how *Nollan, First English* and *Keystone* will effect the single lot owner on the escarpment whose property is in a no-build area. The set back and height requirements, which do not deny the landowner reasonable use of his or her property, will not likely be held by New Mexico courts to be a taking. It is clear that developers making a facial challenge to an ordinance will have an uphill battle. On the other hand, city land use planners will exercise more care in the ordinances they draft and apply and the dedications they require. Efforts of cities to meet this increased care requirement, to acquire open space, and to preserve archeological, historical, and natural resources will cost the taxpayer. Albuquerque citizens, like citizens around the country, will soon realize if they do not want that high rise condominium in their backyard, they will have to pay for it!

LANE HORDER

176. Id. at 9.
177. Id. at 8-9.
178. Id. at 9.