

June 10, 1987

REPORT TO THE HONORABLE

MAYOR AND CITY COUNCIL

LAND USE REGULATION: DAMAGES FOR A TEMPORARY TAKING -- First English Evangelical Lutheran Church v. County of Los Angeles

The Supreme Court ruling that damages must be assessed against a local government which "takes" private property rights by enacting an unconstitutional land use regulation will have little, if any, effect on the City's planning and zoning process. My analysis follows:

Facts

First English Evangelical Lutheran Church (Church) controls land in a forest canyon in Los Angeles County on which it built a campground. In 1977, a forest fire destroyed trees and brush in the hills above the campground. A rainstorm caused a flood through the canyon camp which destroyed all of Church's buildings there.

In response to the flooding, the County adopted an emergency interim ordinance imposing a building ban in an "interim flood protection area," which included the campground. Shortly after the ordinance was adopted, Church filed a complaint which alleged, among other things, that the ordinance denied it "all use" of the campground. The complaint sought damages for the denial.

The County moved in Superior Court to strike the allegation that the ordinance denied Church all use of the campground. The County argued that California law provides no money damages for a regulatory "taking" of private property. The Superior Court agreed and granted the motion. The California Court of Appeal affirmed and review was granted by the United States Supreme Court.

Decision

The only issue addressed by the Supreme Court in its decision handed down yesterday is whether the "just compensation" clause of the Fifth Amendment requires a local government to pay damages suffered by a land owner during the period between the time an unconstitutional land use regulation becomes effective and the time at which it is set aside by a Court, in other words for the time the "taking" was effective. The Supreme Court said, "Yes, local government must pay."

What is more important is what the court did not say. It did

not say that the interim ordinance imposed on Church's campground was a taking. It did not define what a taking is. It merely remanded the case "for further proceedings not inconsistent with this opinion."

Procedurally, that means the case will return to the Superior Court where the ruling striking the allegation that the ordinance deprived Church of "all use" of the campground will be reconsidered. Undoubtedly, the motion to strike will be denied and the case will move on.

Facing the Superior Court remains the question of whether the interim ordinance was a "taking" in the first place. The answer may very well be, "No." If so, the County wins and Church has experienced a very expensive lesson in land use regulatory law.

Conclusions

With respect to the validity of land use regulations, First English Evangelical Lutheran changes nothing. The law remains that a regulation must not deny an owner all reasonable use of his property under the circumstances. Whether or not it does will be answered by applying the traditional rules used in determining the validity of an exercise of the police power. The questions to ask are: Does the regulating agency have a proper governmental interest in the problem the regulation seeks to solve? Is the regulation an appropriate means to achieve the solution? Does it achieve it with the least necessary intrusion on the rights of the regulated?

There is nothing new in all this. My office has often advised you that the regulation you impose must be reasonable. If it is not, as we have told you, the regulated property owner can go to court and get the regulation set aside. What this case adds is that, if the owner can prove he has suffered damages during the period the unreasonable regulation was in effect, the City will be required to compensate him or her for those damages.

With respect to the future, one sentence in yesterday's Supreme Court opinion bears repeating:

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.

As to future regulation, then, including the controversial subject of growth management, land use policies and procedures will continue in San Diego in a normal fashion. If a particular regulation appears to my office to be a likely candidate to be

set aside, we will tell you. It will be up to the Council to make the final determination whether, based on the facts in the record before you, the regulation is reasonable. If you are right, it will be found to be valid if challenged in court.

Respectfully submitted,
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