July 16, 1987

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL
LAND USE REGULATION: DAMAGES FOR LAND USE PERMIT CONDITIONS -- Nollan v. California Coastal Commission

Just before I took leave late last month, the United States Supreme Court handed down the second of its two recent decisions on land use regulatory "takings." On June 10, I reported the effect of the first, First English Evangelical Lutheran Church v. County of Los Angeles. As with that case, the second decision, Nollan v. California Coastal Commission, will have little, if any, impact on the City's planning and zoning process. My analysis follows:

Facts

Los Angeles Deputy City Attorney James Nollan and his wife, Marilyn, own a beachfront lot on Faria Beach in Ventura County. On it stands a small one-bedroom beach house. It is located between two public beaches, one a quarter mile to the north, the other about 1,800 feet to the south. The Nollans' property extends onto the beach to the mean high tide line. Between the house and the beach stands an eight-foot high seawall.

The Nollans wanted to replace the old, now rather dilapidated, structure with a new two-bedroom home. The new house was to be constructed landward of the seawall, which was not to be affected by the project. As required by the Coastal Act, they applied to the Coastal Commission for a permit to demolish the old house and construct the new one.

Without belaboring the rather extended administrative process which followed, the permit was finally granted, but it was on condition that the Nollans grant a public easement to cross the lot laterally; in other words, parallel to the coastline; between the mean high tide line and the seawall. The Nollans went to court seeking to have the Commission compelled to issue the permit without the condition. Eventually, the California Court of Appeal, Second District, found the condition to be valid 177 Cal.App.3d 719, 223 Cal.Rptr. 28 (1986). The Nollans appealed to the U.S. Supreme Court, which granted review.

Decision

On June 26, the Court handed down a very narrow decision holding that the condition imposed on the Nollans' permit was an unconstitutional taking of their property for which damages must

be paid. The problem with the condition, according to the majority opinion by Justice Scalia, is that it bears no reasonable connection to the public interest it seeks to protect.

The Commission claimed the condition was imposed to protect the public's interest in visual beach access (the ability to see the beach). The Court, for purposes of argument, assumed that public beach access, visual or otherwise, is a legitimate public interest which may be protected by a reasonable exercise of the police power. "We have long recognized that land use regulation does not effect a taking if it 'substantially advances legitimate state interests' and does not 'deny an owner economically viable use of his land," the Court said. The problem, according to Justice Scalia, is that the permit condition does not serve the interest involved and there must be a connection (a "nexus" or reasonable relation) between a land use regulation and the "legitimate state interest" it is supposed to protect.

In the Nollans' case, the state interest was the public's right to have at least visual access to the beach. The purpose of the condition, however was to permit members of the public, who already had physical beach access, to use the Nollans' property to move from one public beach to the other. "It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house," the Court said. It concluded:

> We are left, then, with the Commission's justification for the access requirement unrelated to land use regulation:
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> "The access required as a condition of this permit is part of a comprehensive program to provide
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> continuous public access along Faria Beach as the lots undergo development or redevelopment." . . .
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> That is simply an expression of the Commission's belief that the public interest will be served by a continuous strip of publicly accessible beach along the coast. 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.

Conclusions

It should be noted that the Court acknowledges that the Nollan condition involves a "permanent physical occupation" of a portion of the Nollans' private property. Such is not the case in most land use regulatory situations. (It is also interesting to note that there is nothing in Justice Scalia's opinion to indicate that the Nollans ever sought damages for inverse condemnation of their property; apparently they only wanted an order invalidating the condition.) But the decision is useful to illustrate the point I made in my June 10 report on the First English Evangelical Lutheran case:

> 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?

As you proceed with your legislative deliberations on the subjects of impact fees and the Interim Development Ordinance, the "nexus" or reasonable relationship test of Nollan should be kept clearly in mind. My office will continue to advise you that whatever regulation on use of private property you may consider, it must be reasonable; in other words, it must meet the standards I have set forth here and on June 10.

Respectfully submitted,
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