CALIFORNIA PLANNING & DEVELOPMENT REPORT

July 1987 | William Fulton, Editor & Publisher | Vol. 2, No. 7

Supreme Court Rulings: Effects Could Be Broad

Special Report:
Supreme Court Rulings
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Though their impact in strict legal terms isn't revolutionary, the U.S. Supreme Court's two recent California land-use decisions is sure to have a profound effect on planning and development in the state.

At the very least, the publicity surrounding the *First English Evangelical Church* and *Nollan* cases is sure to change the perceived balance of power between local governments and developers, making local politicians and planners more cautious about turning down new projects or attaching conditions to them.

Already, San Francisco Mayor Dianne Feinstein — often at odds with slow-growth, neighborhood-oriented advocates — has used the *First English* case as a reason to veto a neighborhood construction moratorium approved by the Board of Supervisors.

Perhaps more significantly, the two cases could signal the beginning of a new legal era in which property rights advance at the expense of government's ability to regulate land use.

As many local officials fear, the *First English* opinion opens the possibility that some building moratoriums and growth restrictions will be interpreted as "temporary takings" of property for which landowners must be compensated. The Pacific Legal Foundation is expected to engage in a full-court press on the issue — and, in fact, has already used the "temporary taking" rule in a lawsuit challenging a building *Continued on page 3*

San Diego Decides To Limit Housing

In what may be the largest restriction of residential construction ever undertaken by an American city, San Diego has decided to temporarily cut housing growth by about 60% while a new growth management plan is drawn up.

After a seven-hour hearing attended by some 3,000 citizens, the San Diego City Council tenatively voted early on June 23 to limit residential construction to 8,000 new residential units per year, with some exemptions. By comparison, last year the city issued about 19,000 building permits and saw 15,000 new units built.

The ordinance, which was retroactive to April 29, will be in effect for 12 months and may be extended for an additional six months while the city's general plan is revised to include additional growth management techniques. A final vote on the issue will be taken by the city council July 21.

San Diego builders fought the ordinance bitterly, but afterward said they would file no legal challenge. Instead, they said, they will concentrate on influencing the the general plan revision.

"We're going to fight a numerical cap," said Kim Kilkenny of the Construction Industry Federation in San Diego. *Continued on page 2*

June Elections Show Mixed Growth Results

The results of seven measures on local ballots June 2 didn't send a particularly anti-growth message to anybody — but voters in City Council President Pat Russell's coastal district in Los Angeles more than made up for it.

Appeals Court Strikes Down Solano Redevelopment Plan

A state appellate court has struck down Solano County's attempt to create a redevelopment area on the once-controversial site of a proposed Dow Chemical plant.

County supervisors approved the project in December 1983, only two weeks before a new state law prohibited redevelopment projects in vacant areas. The Court of Appeal found that the county had not demonstrated that the area was "blighted" as required under redevelopment law. The supervisors decided in late June not to appeal the decision.

The proposed redevelopment area would have been located in the Montezuma Hills along the Sacramento River. In the mid-'70s, Dow Chemical Co. proposed a petrochemical complex on part of this site — a proposal that became a *cause celebre* among environmentalists. After a long dispute, and an attempt by the Jerry Brown administration to resolve the dispute, Dow dropped the proposal in 1977.

In 1983, county supervisors decided to declare that same location — owned by Dow Chemical, Southern Pacific, Pacific Gas & Electric, and a few other large landholders — as a redevelopment project area. Racing against the year-end deadline, the supervisors declared the area "blighted" on Dec. 13.

However, attorney Clem Shute, representing the environmentalists who sued the county, contended that redevelopment was used simply to spur private development, which had not occurred previously.

Writing for the appellate court, Judge Zerne P. Haning concluded that the supervisors erred.

"(I)t is the declared policy of this state that even though the area is blighted it should not be subject to the redevelopment process unless redevelopment could not reasonably be expected by private enterprise acting alone," he wrote. "The record reveals that the vast majority of the project area is already owned by large, well-financed private interests. ... We may safely assume these corporations are holding the land for future development, and they will develop it when they can see a profit."

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The text of Emmington v. Solano County Redevelopment Agency appeared in the Los Angeles Daily Journal Daily Appellate Report on June 12, page 3060.

San Diego Decides to Limit New Housing

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Though the builders predicted that the ordinance would spell disaster for the San Diego economy, they acknowledged it would not affect construction of 12,000-16,000 units that have been permitted but not yet built.

Meanwhile, Acting Planning Director Mike Stepner said his staff is currently groping for a method by which to allot the 8,000 units. The staff had proposed a distribution of the units in the city's different neighborhoods, but the council told Stepner to revise it.

The latest case of growth-control fever broke out in San Diego at the end of April, when Ed Struiksma, normally a pro-development member of the City Council, proposed an immediate moratorium that would subject all residential development to discretionary review. That prompted Mayor Maureen O'Connor to reply one day later with her own plan, based on recommendations by consultant Robert Freilich, who had been working with a task force appointed by O'Connor early this year. (*CP&DR*, June 1987.) Freilich's proposal formed the basis of the council's June 22 action.

In part, these actions were prompted by the prospect that environmental groups might place an initiative on the ballot limiting residential construction to 4,000-6,000 units per year.

Under a plan devised by Freilich several years ago, residential builders pay development fees to cover the cost of infrastructure — but the fees vary depending on whether the new housing is in an older ("urbanized") part of the city, a newly suburbanizing area, or an unbuilt area in which the city seeks to discourage construction now.

"At the time, the urbanized areas were only get about 10 percent of the city's growth," said Freilich. "And they did have some available public facilities in most areas."

With growth outstripping forecasts, problems have arisen because the system has worked both too well and not well enough. According to Stepner, as a result of the Freilich system, 60 percent of the new residential construction has been in older areas of the city, where developers pay only nominal fees.

As part of the June 22 action, the council voted to impose a fee of $2,400 in older areas, not only for residential construction but also for commercial and industrial projects.

The second problem is that although a large amount of fee money has been collected in the suburbanizing areas, infrastructure construction has moved much more slowly than construction of the houses themselves.

Kilkenny blames the city government for "sitting" on $45 million in fee money, and indicated that the builders may push for permission to build the infrastructure themselves, rather than rely on the city.

O'Connor's growth task force had proposed a cap of 9,300 units per year. That figure was very close to the number of units established by the San Diego Association of Governments as the city's "fair share" of housing per year.

After hearing from 220 speakers, the City Council cut that number to 8,000, but increased the number of exemptions. Exemptions includ downtown, Otay Mesa, parts of southeast San Diego, and low-income housing in affluent areas.

Though one planning commissioner suggested these exemptions could add up to 4,000 more units per year to the allotment, Kilkenny termed the exemptions "nonsense."

"If you want to build low-income housing in La Jolla, you're in Fat City," he said.

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CALIFORNIA PLANNING & DEVELOPMENT REPORT

is published monthly by Torf Fulton Associates

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1275 Sunnycrest Avenue
Ventura, California 93003
(805) 642-7838

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8306 Wilshire Blvd., Suite 111
Beverly Hills, California 90211

Editor & Publisher: William Fulton
ISSN No. 0891-382X

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moratorium in Marin County's Tiburon.

The ultimate post-*First English*, post-*Nollan* balance of power on development issues in California may depend, to a great extent, on the "new" California Supreme Court, headed by Deukmejian appointee Malcolm Lucas.

The state Supreme Court under former Chief Justice Rose Bird was often held responsible for the state's unusually pro-government case law on land-use issues. In fact the court's deference to local planners predated Bird's tenure on the court and often included conservative justices as well as liberal ones. It remains to be seen whether the Lucas court will follow the California pro-government tradition or pay more due to the the U.S. Supreme Court's renewed emphasis on property rights.

The U.S. Supreme Court's rulings in the two cases are not as sweeping as they might appear at first. In the first case — *First English Evangelical Lutheran Church of Glendale v. Los Angeles County* — the Supreme Court ruled on June 9 that if a zoning ordinance is so restrictive that it constitutes a "taking" of property, then the landowner is entitled to financial compensation, just as if the property had been taken by eminent domain. *First English* also extended the compensation requirement to instances when a taking via regulation occurred only temporarily.

In the second case — *Nollan v. California Coastal Commission*, handed down June 26 — the high court ruled 5-4 that conditions attached to development permits must be linked strongly and directly to problems created by the development at hand.

How much did the two cases change the balance of power between developers and local governments in California? In strict legal terms, not much. Though *First English* overturned California's so-called *Agins* rule prohibiting financial compensation on zoning regulations, it didn't say — as many people thought at first — that local governments must compensate landowners for any downzoning. In fact, the court shied away from setting any standards about exactly when a regulation constitutes a taking.

And the *Nollan* case didn't outlaw exactions — not even the exotic social exactions, such as child care, public art, and low-income housing, that many California cities are requiring of developers. Rather, the high court simply stated that local governments must provide substantial proof that these exactions are directly related to the development project at hand.

"For developers to have real power, they need to have a decision in the U.S. Supreme Court or the state Supreme Court that overly strict land-use regulations are takings," says Stanford Law Professor Robert Ellickson, a prominent property rights advocate. "And that has not occurred."

Generally, the likely effect of the two rulings on the local development scene in California can be broken down into three areas: the perception gap, legal evolution, and green-eyeshade planning.

The Perception Gap

Whatever the actual legal content of these cases, the fact that they were both perceived as pro-developer may lead both developers and local politicians to assume that developers have more leverage in negotiating over new projects.

The possibility that such a "perception gap" might emerge began the moment the *First English* case was handed down on June 9. The Associated Press report sent out that morning from Washington — which formed the basis of television, radio, and afternoon newspaper reports — didn't make the ruling totally.clear.

In the very first paragraph of its dispatch, AP reported that the court said "property owners must be compensated when new restrictions are placed, even temporarily, on the use of their land." That sentence was widely misinterpreted by developers, local planners — and even some lawyers who had not read the case — to mean that

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Case Summary: First English v. L.A. County

In *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, the Supreme Court finally clarified an area of law it had grappled with unsuccessfully in four other cases — three from California — since the beginning of the decade.

In the 1979 *Agins* case, the California Supreme Court ruled that the correct legal "remedy" for an overly restrictive zoning ordinance is not financial compensation but invalidation of the ordinance. Since that time, property rights lawyers have pushed hard to get the U.S. Supreme Court to overturn the rule.

In the four previous cases, the court stumbled over procedural issues. But in *First English*, the property owners got what they wanted. The Supreme Court finally ruled that if a zoning ordinance is so restrictive that it constitutes a taking under the Fifth Amendment, then that landowner is entitled to compensation. The court did not try to define what a taking is, preferring — at least at this point — to leave that up to lower courts in individual cases.

Significantly, however, the court established the legal principle that a taking is compensible even if it is temporary — opening the possibility that building moratoriums and other growth restrictions might be "temporary takings" for which local governments may have to compensate landowners.

The case began in 1978, when a flood in the mountains above Los Angeles washed away buildings at the First English Evangelical Lutheran Church's retreat. The Board of Supervisors imposed a building moratorium — first temporary, later permanent — which prevented the church from reconstructing the buildings.

The church sued for damages, but a Superior Court judge in Los Angeles refused to allow a trial because of California's so-called *Agins* rule. The rule, named for a 1979 state Supreme Court case, stated that the legal remedy for restrictive zoning is invalidation of the ordinance, not damages. The Court of Appeal upheld the trial judge.

On appeal, the U.S. Supreme Court struck down the *Agins* rule, firmly establishing the legal principal that a "taking" by land-use regulation can require compensation. Furthermore, Chief Justice William Rehnquist, writing for the court in a 6-3 decision, stated that "where the government's activities have already worked a taking of all use of property, no subsequent action can relieve it of the duty to provide compensation for the period during which it was effective."

In dissent, Justice John Paul Stevens called the decision a "loose cannon" which would means that "cautious local officials and land-use planners may avoid taking any action that might later be challenged and thus give rise to a damage action."

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a local government had to compensate a landowner for any downzoning. This led to the somewhat manic atmosphere on June 9-10, when developers were "dancing in the streets" and threatening lawsuits that would have cities bathing in red ink. Once that initial wave of misperception dissipated, the situation calmed down and the response by many local officials was "surprisingly so-what," as San Francisco environmental attorney Clem Shute put it.

But it seems likely that, in many localities, developers will be able to lean on the *First English* decision to get what they want. In the words of Dean Misczynski, principal consultant to the Senate Office of Research, "Lots of elected officials who have been looking for an excuse not to turn down projects now have one."

Among the first such elected officials was Mayor Dianne Feinstein of San Francisco, who was confronted with a building moratorium in a five-block area of Bernal Heights passed by the Board of Supervisors the day before the *First English* decision was handed down. Saying she had been advised to do so by City Attorney Louise Renne (who's running for mayor herself), Feinstein pinned her veto of the building moratorium on First English.

Legal Evolution

The biggest unanswered legal question in *First English* — and the biggest fear of local governments at this point — is whether the "temporary taking" part of the ruling applies to local building moratoriums.

Robert Best of the Sacramento-based Pacific Legal Foundation believes it applies to at least some moratoriums, and maybe also to annual building caps. He says that indefinite and vaguely defined moratoriums may be particularly vulnerable, and claims to be looking for such a moratorium to attack in court.

Best and others agree that moratoriums are less likely to be attacked if they are imposed for a short period of time and/or are related to specific public health and safety concerns such as air quality or sewage capacity.

In fact, Best has already interjected the temporary taking doctrine into an ongoing lawsuit challenging a building moratorium in Tiburon. Pacific Legal Foundation is representing the Agins family — the same Agins family who lost the original California "taking" suit in 1979. Agins and several other landowners and developers claim the Tiburon moratorium, in effect since 1985 while a traffic study is being done, constitutes a temporary taking of their property.

The open legal questions remaining after *First English* and *Nollan* naturally lead to speculation about the California Supreme Court's attitude toward land-use cases. Since the ouster of three liberal justices last November, the court has decided no significant cases in the area, and land-use lawyers are anxious to get an indication of the new court's leanings.

"My guess is that in the land-use area this court is likely to take a harder look at regulations than in the past," says Stanford's Robert Ellickson.

The new court will have to lay down rules about regulatory takings, and Ellickson called the *Nollan* decision "an open invitation" for the California court to re-examine the 1971 case *(Associated Homebuilders v. City of Walnut Creek)* which established that local governments may use exactions which are only indirectly related to the development project at hand.

At the same time, government and environmental attorneys are quick to point out that, even before Rose Bird, the California courts gave wide lattitude to local governments in the land-use area. In fact, the California Supreme Court's *Agins* decision, which kicked off the whole taking controversy, was written by Frank Richardson, a very conservative justice by any standard.

Attorneys on both sides of the issue say that with financial compensation at stake, judges will be very reluctant to find that a

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Case Summary: Nollan v. Coastal Commission

This case began in 1982 when J. Patrick and Marilyn Nollan sought a permit to tear down an old cottage and replace it with a two-story permanent home along the ocean in Ventura. The Coastal Commission granted the permit on the condition that the Nollans yield an easement on about a third of the lot, allowing the public to walk across their beachfront property.

The commission's intention was to improve access to nearby public parks along the beach, and a similar easement had been exacted from 43 neighboring property owners who had also sought development permits of one sort or another.

A Superior Court judge in Ventura County ruled in favor of the Nollans and ordered the Coastal Commission to strike the condition. The state Court of Appeal reversed the local judge, ruling that case law in California permitted such an exaction. The California Supreme Court declined to hear the case, and the Nollans appealed to the U.S. Supreme Court.

Before the high court, the Coastal Commission argued that the Nollans' house had blocked views and thus contributed to a "psychological barrier" between the public and the ocean. The easement across the Nollans' property was designed to help break down that psychological barrier.

Writing for the majority in a 5-4 opinion, Justice Antonin Scalia reversed the California court ruling, saying that a close link did not exist between the problem created by the construction of the Nollan house and the easement required in return for the permit.

"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," Scalia wrote.

"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 services the same governmental purpose as (any denial of the building permit), the building restriction is not a valid regulation of land use by 'an out-and-out plan of extortion'."

Justice William Brennan, who sided with the majority in the *First English* case, filed a lengthy and strongly worded dissent in this case. "State agencies ... require considerable flexibility in responding to private desires for development in a way that guarantees the preservation of public access to the coast," he wrote. "They should be encouraged to regulate development in the context of the overall balance of competing uses of the shoreline. The Court today does precisely the opposite, overruling an eminently reasonable exercise of an expert state agency's judgment, substituting its own narrow view of how this balance should be struck."

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taking has occurred as the result of a zoning ordinance. At the same time, because the *First English* case leaves the definition of a regulatory taking up the the state courts, California's "taking" standard could wind up being more favorable to governments than in a more property-oriented state like Texas.

In 1985, the Texas Supreme Court ordered the City of Austin to pay more than $400,000 to a property owner whose land had been rezoned from industrial to residential because, it concluded, a "taking" had occurred. It's hard to imagine California courts reaching the same conclusion.

If California decisions do not line up with those in other states, however, development lawyers are likely to go back to the U.S. Supreme Court in hopes of obtaining a favorable standard on the taking issue.

"Eventually, there's going to have to face it," says Michael Berger, the lawyer who won the *First English* case. "There needs to be some uniform bottom-line standard." And with William Rehnquist, Antonin Scalia, and perhaps Robert Bork dominating the high court, that standard is likely to be more to the liking of landowners than local governments.

Green-Eyeshade Planning

There's no question that *Nollan* will force the Coastal Commission to reassess its policies, though Peter Douglas, the commission's staff director, says he believes most exactions would meet the *Nollan* requirement of a direct link.

Where *Nollan* could have a wider impact is in the area of development fees — and, by extension, the post-Proposition 13 political arena.

"Local governments and state agencies are going to have to make much more sophisticated findings" in requiring exactions, says Clem Shute.

But that doesn't mean the fees won't be wide-ranging or even steep. For example, development attorney Michael Berger says he thinks San Francisco's $5-per-square-foot transit impact fee on downtown office buildings, which recently won approval in the California courts after a hard-fought case (*CP&DR*, February 1987), would meet the Nollan test because the city did extensive statistical analysis on the impact of office buildings on the transit system.

Rather, the *Nollan* ruling places the burden of proof for an exaction or fee on the local government. That means more statistical and financial studies, such as that which San Francisco did, designed to find a direct link.

It may also mean more pressure to reform the post-Proposition 13 tax structure. Local governments in California began engaging in the kinds of land-use regulation attacked in *First English* and *Nollan* at least partly because Proposition 13 put them in financial trouble. Over the last nine years, it's been politically easier to impose conditions, fees, or restrictive regulations on developers than to levy general taxes on all residents.

This has led to many convoluted policies. Of downtown Boston, which has used similar exaction policies, Kansas City land-use attorney Robert Freilich says: "What I've been telling them is that if they would charge the developers for water, sewer, roads, etc., and then use general fund money for child care and things like that, rather than the other way around, they'd be a lot better off."

But Freilich notes, to reverse priorities would require more political courage than most local governments are willing to exhibit. To the extent that *Nollan* limits exactions to those which have a direct link to the project, the decision will make it legally harder for local governments to take the politically easy way out. And that, combined with other forces, may hasten a reform of post-Proposition 13 local tax policies.

Landowners v. California: A History

The legal history of the "inverse condemnation" issue in California and at the U.S. Supreme Court is unusually long and complicated. It took the court five tries in seven years to come up with five votes (in *First English*) in favor of overturning California's so-called *Agins* rule prohibiting compensation to landowners.

The history of these cases makes interesting reading not just because of the legal principles involved, but because of the facts of the cases themselves. Historic court cases in the land-use field, as in other areas, often arise from everyday disputes that planners, developers, and others can easily relate to. Here, then, is a summary of that history:

1979: In a famous case involving a landowner in the Marin County city of Tiburon, the California Supreme Court rules that the proper legal "remedy" for an unduly restrictive downzoning is invalidation of the ordinance, not damages for inverse condemnation.

The Agins family owned a five-acre tract of land with magnificent views of San Francisco Bay. The city restricted residential construction on the property to between one and five units.

The Agins sued, claiming a taking and demanding compensation. But the California Supreme Court rejects compensation, laying down the Agins rule. *Agins v. City of Tiburon*, 24 Cal.3d 266.

1980: In what will soon become a familiar pattern, the U.S. Supreme Court upholds the *Agins* case on a procedural matter without deciding the taking question. Writing for the court, Justice Lewis F. Powell reasons that because the Agins had never actually filed an application for a permit, the court could not determine whether a "taking" had occurred. *Agins v. City of Tiburon*, 447 U.S. 257.

1981: Only a week after handing down the *Agins* decision, the U.S. Supreme Court takes another case from California in a clear attempt to resolve the issue.

The new case involves a land dispute between San Diego Gas & Electric Co. and the City of San Diego. In 1966, the utility company had acquired a 214-acre tract of land as the possible site of a nuclear power plant. Seven years later, the city rezoned part of the land for open space. The power company sued and was awarded $3 million in damages; however an appellate court reversed the ruling because of *Agins*.

In a 5-4 decision, the U.S. Supreme Court boots the case on procedural grounds again, saying that because the appellate court had not determined whether a taking had actually occurred, the case was not "ripe" for review. But Justice William Brennan, in an influential dissent, makes a strong case for compensation and introduces the

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Excerpts From Supreme Court Rulings

First English v. L.A. County

Here are significant excerpts from the majority opinion, written by Chief Justice William Rehnquist:

It has ... been established doctrine at least since Justice Holmes' opinion for the Court in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) that "(t)he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." ... While the Supreme Court of California may not have actually disavowed this general rule in *Agins*, we believe that it has truncated the rule by disallowing damages that occurred prior to the ultimate invalidation of the challenged regulation. ...

(Furthermore,) invalidation of the ordinance or its successor after this period of time, though converting the taking into a "temporary" one, is not a sufficient remedy to meet the demands of the Just Compensation Clause. ...

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. ... 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. ...

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 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 constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authority, 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."

Here are significant excerpts from the dissent filed by Justice John Paul Stevens:

One thing is certain. The Court's decision today will generate a great deal of litigation. Most of it, I believe, will be unproductive. But the mere duty to defend the actions that today's decision will spawn will undoubtedly have a significant adverse impact on the land-use regulatory process. The Court has reached out to address an issue not actually presented in the case, and has then answered that self-imposed question in a superficial and, I believe, dangerous way. ...

Until today, we have repeatedly rejected the notion that all temporary diminutions in the value of property automatically activate the compensation requirement of the Takings Clause.

The policy implications of today's decision are obvious and, I fear, far-reaching. Cautious local officials and land-use planners may avoid taking any action that might later be challenged and thus give rise to a damage action. Much important regulation will never be enacted, even perhaps in the health and safety area.

Nollan v. Coastal Commission

Here are significant excerpts from the court's majority opinion, written by Justice Antonin Scalia:

(T)he Commission unquestionably would be able to deny the Nollans their permit outright if their new house ... would substantially impede these (public) purposes. ... Moreover ... the condition would be constitutional even if it had consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere.

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbad shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. ...

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. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house. ...

The Commission may well be right that (public access to the beach) 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 the power of eminent domain for this "public purchase" ... but if it wants an easement across the Nollans' property, it must pay for it.

Here are significant excerpts from the dissent filed by Justice William Brennan:

The Court finds fault with (the lateral access requirement) because it regards the condition as insufficiently tailored to address the precise type of reduction in access produced by the new development. ... Such a narrow conception of rationality, however, has long since been discredited as a judicial arrogance of legislative authority. "To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government." *Sproles v. Binford*, 286 U.S. 374 (1932). ...

State agencies ... require considerable flexibility in responding to private desires for development in a way that guarantees the preservation of public access to the coast. They should be encouraged to regulate development in the context of the overall balance of competing uses of the shoreline. The Court today does precisely the opposite, overruling an eminently reasonable exercise of an expert state agency's judgment, substituting its own narrow view of how this balance should be struck.

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concept of the "temporary taking." It is in this dissent that Brennan writes his now-famous line: "After all, if a policeman must know the Constitution, then why not a planner?"

Searching for guidance, lower courts begin to follow the principles laid out in Brennan's dissent. *San Diego Gas & Electric v. City of San Diego*, 450 U.S. 621.

1985: For the first time, the court looks beyond California in hopes of resolving the issue, taking up a dispute between a Tennessee bank and a local planning commission.

The dispute began in 1973, when the Williamson County Planning Commission had approved a preliminary plat, involving cluster development, for a Tennessee subdivision. The developer spent $3 million on a golf course, which it conveyed to the county, and $500,000 on water and sewer facilities. Subsequently the county changed its cluster zoning and density rules for the site.

Eventually this led Hamilton Bank, which took over the property from the now-bankrupt developer, to file an inverse condemnation suit. A jury found that a "taking" had occurred and awarded the bank $350,000 in damages. The Sixth U.S. Circuit Court of Appeals in Cincinnati ruled the damages award permissible, relying heavily on Brennan's dissent in the San Diego case.

When it reaches the Supreme Court, the case is widely viewed as the best hope yet for resolution of the issue. But the court again boots it on "ripeness," saying the bank should have sought variances and sued in state court before filing the federal suit.

Though planners and developers are again frustrated by the court's inability to decide the issue, experts say it is a clear indication that the justices are trying to steer inverse condemnation suits into state courts and keep them out of the federal court system. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172.

1986: The court returns to California, taking a case involving a dispute over a proposed development just outside Davis.

The developers in this case had hoped to build some 40 residential units in the outskirts of Davis. The county general plan described the property as residential. But the general plan in slow-growth Davis stated that the acreage should be kept agricultural until 1990, so the city refused to give the parcel water, sewer, and road service.

The county went along with the city, rejecting the developers' building plans as "premature." The California courts rejected the developers' suit for damages, citing the *Agins* case.

Failing to reach the compensation issue again, the Supreme Court rules that because the developers had not revised their plans and resubmitted them, all administrative procedures had not been exhausted. Land-use attorneys begin to wonder whether any case will ever be ripe enough for the Supreme Court. *MacDonald, Sommer & Frates v. Yolo County* 477 U.S. _____.

1987: For the fourth time in five tries, the court takes a case from California — this time in First English Evangelical Lutheran Church's lawsuit against L.A. County.

By a 6-3 vote, the court at last decides the issue in favor of landowners, overturning *Agins* and holding that compensation is appropriate in the case of a clear "taking." Also, building on Brennan's dissent in the San Diego case, the majority sanctions the concept that compensation may be awarded in the case of a "temporary" taking. *First English Evangelical Lutheran Church v. County of Los Angeles*, Docket No. 85-1199.

San Diego County Removes Planning Chief

San Diego County Planning Director Walter Ladwig has been removed from his position by the county's chief administrative officer, apparently because of the county government's shifting philosophy over development issues.

County CAO Norman Hickey announced on June 16 that Ladwig would be transferred to the CAO's office for six months to work on special projects. His future with the county beyond that point has not been determined. In the Planning Department, he will be replaced, at least in the interim, by Deputy Director Randall L. Hurlburt.

Deputy CAO Lari Sheehan said Ladwig's removal was the result of a shift in the county's approach toward planning and development issues.

"I don't think it's a question of Mr. Ladwig's professional capability," she said. "There's been a change of philosophy on the part of the board and the chief administrative office."

Rancho Santa Fe Residents Vote Down Incorporation

Voters in Rancho Santa Fe bucked a statewide trend and rejected an incorporation proposal June 2 by a vote of 70-30%, apparently because residents in the high-cost subdivision resented the inclusion of neighboring areas within the proposed borders.

Mike Ott of the San Diego Local Agency Formation Commission, or LAFCO, said the Rancho Santa Fe incorporation proponents had wanted only the residents of their subdivision. However, after considering geography, access, service delivery, and other factors, Ott said, several neighboring areas such as Hacienda Santa Fe were included.

Ballot Measures

Continued from page 8

According to Planning Director Deborah Nelson, last January the council prohibited multi-story buildings in all commercial areas except El Camino Real, retroactive to last September, pending revision of the city's general plan.

Measure B, a citizen initiative, would have extended the multi-story ban to all construction except single-family homes.

Nelson said the general plan revision is likely to contain some restriction on multi-story projects, though the limitation may be expressed in terms of floor-area ratio rather than height.

Contact: Deborah Nelson, Planning Director, (415) 948-1491.

Sonoma County

City of Sebastapol

Measure A: Citizens resoundingly defeated an initiative that would have converted two one-way streets in the city into two-way streets. The vote was 76-24%.

Results Mixed in June Balloting

Continued from page 1

Except for the Los Angeles council vote, the closest thing to an anti-growth victory was San Francisco's defeat of Proposition B, a measure to rezone city-owned land near City College of San Francisco for low-income housing.

Russell's coastal district includes the rapidly developing corridor near Los Angeles International Airport and the vacant land to be developed as the billion-dollar Playa Vista project by Howard Hughes interests. In her campaign, Russell insisted that she had dealt with the growth issue by imposing a transportation impact fee near the airport and striking tough deals with the Playa Vista developers.

Her defeat was clearly an anti-Russell vote. In the April primary she outpolled the unknown Galanter 42-29%, with the other 29% of the vote going to other candidates. However, in the runoff, Galanter picked up all the rest of the votes, with Russell again polling only 42%.

Galanter was seriously wounded in a nighttime knife attack in her home during the campaign and remained in the hospital until the eve of her swearing-in July 1. She becomes the second trained urban planner elected to the council in two years, following Michael Woo, who won the Hollywood district seat in 1985.

Galanter's victory is also indicative of a growing political split along racial lines in Los Angeles. She defeated Russell easily in mostly white Venice and Westchester, while losing in mostly black Crenshaw. Shortly after the election, a Los Angeles Times poll revealed that while blacks see drugs and crime as the major issue facing the city, whites overwhelmingly call traffic the No. 1 problem.

The San Francisco housing measures were placed on the ballot through the efforts of a father-and-son team of Marin County doctors who called the rezonings a "giveaway" to developers. J. Alfred and Dean Rider have been unsuccessful in their own attempts to develop property in San Francisco.

At the request of the city government, a San Francisco judge removed from the ballot a fourth San Francisco measure backed by the Rider organization. Proposition D, known as the "Stop the Great Land Giveaway Ordinance," would have prohibited the city from offering any more surplus land to low-cost housing developers at below-market rates. But Superior Court Judge Stuart Pollak ruled that the proposition unlawfully tried to control school district property over which the city has no control.

City-by-City Results on June Ballot Measures

San Diego County

City of Vista

Proposition E: By a vote of 66-34%, residents in Vista voted to approve the boundaries of the city's redevelopment project, which will include the downtown business district, the South Vista industrial park, and major city thoroughfares.

The vote is the latest chapter in a long history of conflict over the city's redevelopment area. According to City Manager Morris Vance, the citizens voted in 1975 to abolish the city's redevelopment area. In 1985, a city attempt to reinstate the redevelopment area passed by a mere four votes. Last November, in another election, voters overwhelmingly rejected another attempt to do away with the redevelopment area.

The city's leading opponent of redevelopment, Lloyd von Haden, plans to sue the city once the redevelopment plan is in place because he claims the new project area violates the law. The industrial park is mostly vacant land, he claims, and therefore cannot be included in the redevelopment area.

Contact: Morris Vance, City Manager, (619) 236-1340.

City and County of San Francisco

Propositions A and B: Both these measures were referendums on city actions to rezone city-owned land for high-density residential use, so the land could be sold or leased at below-market rates to developers committed to building low-cost housing.

But the results were mixed: A 114-unit project on the site of Polytechnic High School (Proposition A) gained approval, 57-43%, while a 203-unit project on the vacant Balboa Reservoir (Proposition B) was defeated, 55-45%.

The two projects are part of a citywide program to make surplus land available cheaply for developers of low-cost housing. Several other sites have already been used in this way, and the city government had planned to lease the Poly High site for $1 over 75 years and sell the 12-acre Balboa site for$36,900.

However, a referendum on the measures was placed on the ballot by an organization led by father-and-son Marin County physicians, J. Alfred and Dean Rider, who claimed the sale was a "giveaway" to wealthy out-of-town developers. Though the Riders deny it, city officials claim their efforts were an attempt to pressure the city into granting them permission to build a hotel near the UC-San Francisco Medical Center — permission which was denied in a previous referendum.

The Balboa Reservoir site is near City College of San Francisco. According to Dale Carlson, who ran the "Yes on A and B" campaign, some neighbors and City College faculty vocally opposed the project, claiming it would prevent the college from expanding onto the site. This opposition apparently contributed to Proposition B's loss, even though the college has no firm plans to expand at the present time.

The Poly High proposal passed with little public opposition, although the Riders are said to be circulating a petition to place a referendum on the disposition agreement on the November ballot.

Proposition C: On the first attempt, San Francisco voters also approved an exemption to Proposition M, the extreme limitation on new commercial construction which they narrowly approved last November. (*CP&DR*, December 1986.)

Proposition C, which received 65% of the vote, permits the Campeau Corp. to proceed with plans for Executive Park, a large (2.3 million square feet) mixed-used development near Candlestick Park.

San Mateo County

City of San Bruno

Measure A: By 54-46%, voters in San Bruno decided to waive the city's three-story height limit for the 12-acre Bayhill Plaza project proposed by Aetna Insurance Co. The vote was required under a 1974 San Bruno measure making all future buildings over three stories in height subject to approval by the voters.

The Aetna project would include a 10-story office building with about 225,000 square feet of space, a 10-story hotel tower with 200-300 rooms, and a four-story, market-rate senior citizen apartment complex with 100-150 units. Planning Director George Foscardo said the City Council, which favors the project, placed the measure on the ballot at Aetna's request.

Contact: George Foscardo, Planning Director, (415) 877-8874.

Santa Clara County

City of Los Altos

Measure B: A temporary moratorium on most multi-story construction in the city failed by 52-48%. The measure would have extended a City Council moratorium to include the El Camino Real commercial area and some residential areas. *Continued on page 7*