Miscellany

Supreme Court Land Decisions: What Do They Really Mean?

Last June, the Supreme Court handed down two important decisions affecting the regulation of land by the government. In *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, the Court held for the first time that landowners are entitled to money damages for a temporary regulatory taking of their property. Or put another way — if a property owner is left with no reasonable use of his or her property, then that owner may recover money for the value lost from the time of the "taking" until the government either purchases the property or provides relief from the overly strict controls on the property.

In *Nollan v. California Coastal Commission*, the Court held that requiring a beach-front property owner to convey an easement for public access along the beach as a condition of approving new construction was invalid because it did not "substantially advance" a "legitimate state interest." The Court failed to find an essential connection between the condition of the approval and the state's legislation governing the California Coastal Commission.

Since the decisions were handed down, landowners, developers, and public officials have been trying to figure out what impact they would have on development. In September 1987, *New England Builder* published an analysis by Harlow Unger which predicted that there would be a great deal of impact, and it would be favorable to developers, and "extremely costly to arrogant governmental authorities who pass regulations in cavalier fashion."

New England Builder was not alone. The *First Lutheran Church* decision was met with almost unbelievable hoopla. The media, particularly the newspapers, reported the decision as having landmark significance and concluded that the rules of the development game had been changed dramatically.

Some developers and landowners, and their lawyers, practically rampaged through council and commission meetings in the days and weeks following the decision. They claimed in a loud and consistent voice that anything but full approval of their projects would be a "taking" which would instantly trigger the grim consequences of money damages.

Unlike the *First Lutheran Church* decision, the *Nollan* case was in general ignored by the press. Apparently the media thought it was limited to the narrow facts of the California beach access problem.

This is somewhat ironic, because it may be that *Nollan* will have in the end more effect than the *First Lutheran Church*. *First Lutheran Church* did have some immediate effects. There were a number of development applications that probably got through the approval process more easily than they might have without this new sword hanging over the heads of decision makers. Also, most observers agree that more lawsuits have been brought in land-use cases since *First Lutheran Church* than would otherwise have been started.

In the long run, though, *First Lutheran Church* will have little impact on the development review and approval process. The Court established no new rule for what is and is not a taking. Actually, the *First Lutheran Church* case has never been tried — the issue of whether compensation was available came before the U.S. Supreme Court on a procedural question. There will be a trial in the case, and some people speculate that even if it is found there is no reasonable use remaining in the property, money damages still might not be paid. In another case, *Keystone Bituminous Coal Company v. DeBenedictis*, (March 9, 1987) the Court held that if there was an overriding public health or safety concern, compensation might not be available, even if there was no use remaining in the property. But such cases are extreme ones, and in nearly every instance where there is no use remaining in the property, money damages will now be paid.

These money damages are not likely to be great, however. They will probably be something equivalent to the leasehold value during the period the restrictions were in place. In other words, the potential damages are seldom going to be even close to a property's market value.

As to the *Nollan* decision, it will probably have a much greater effect in the long run on the land-use decision-making process. It seems to set a new standard for determining the reasonableness of regulation. Previously, it was generally believed that a regulation, or a decision under a regulation, need only be rationally or reasonably related to some type of legitimate governmental goal. Now, *Nollan* apparently requires that the regulation or decision "substantially advance" the government's interest. That holds regulators to a tougher standard. *Nollan* is likely to be a strong incentive for more — and better — planning and more articulate regulation.

Nollan will probably force planners to be more "site-specific" in their consideration of development projects. Instead of being able to slap on a mandatory, quantitative, and fixed standard, such as a percentage requirement for open space, or a fixed requirement for setback from a natural resource area, planners will have to be prepared to consider each application individually.

Very few land-use cases are won or lost on the taking issue alone. This is because the standard for a "taking" creates such a high threshold. Even a very strict regulation is likely to leave some type of use in the property. A mere lessening in value is not enough, in most situations, to be judged a "taking."

Most land-use controversies are, instead, decided in the courts on the basis of how reasonable the regulation is which enabled the taking — and that involves the question of standards as raised in the *Nollan* case.

As a consequence of both decisions, public land-use decision makers will need to have much more information to back up their decisions. They'll also need to be careful to draw up plans that are consistent with that information and with the law. Then, they will have to consider each development proposal on the basis of the actual site conditions. True, some mandatory, fixed standards will remain after *Nollan* — for example, front-yard, side-yard, and rear-yard setbacks, lot area, and building heights. But the planners and regulators are not going to be as cavalier. They will have to have to prove that their restrictions on property use "substantially advance" the government's permissible objectives.

Interestingly, a computer search of all cases decided at the state level since the decisions shows no apparent changes in their outcome on the basis of these decisions. In fact, a couple of federal decisions have expressly discounted the impact of *First Lutheran Church* and *Nollan*. However, not enough time has passed for new cases to make their way through the courts to the decision and appeal stages. Furthermore, the recent decisions don't reveal what already may be happening at the local level with commissioners and council members going easier on developers out of their new enlightenment — or perhaps fear — of the potential for liability. ■

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Miles of Piles

The last of 846 construction piles was driven into the ground recently at this site in East Cambridge, Mass. The piles, which are 14-inch-square precast columns ranging from 75 feet to 100 feet high, provide the foundation for a 13-story condominium project being developed by the Cohen Companies on the 61,300-square-foot site.

Timberframe Survey Results

Results from a ten-year study of timberframers conducted by Robert Gough, Jr., an economics professor at Wellesley, College, Wellesley, Mass. were recently reported in *Joiners' Quarterly*. Some highlights:

- New England timberframers reported much more activity than their counterparts in other regions between 1981 to 1985. While New Englanders averaged 10.8 homes per year in 1981, timberframers in other parts of the country were averaging 2 homes per year. But this gap has closed. After peaking at 13 homes per year during 1985, New England timberframers built 9.3 homes on average during 1986, while timberframers in the rest of the country built an average of 10.
- Panelized enclosure was very popular with 67 percent of the timberframers reporting that they use stress-skin panels. Fourteen percent reported they used the built-up method, and another 14 percent used both methods. The remaining 5 percent used other forms, such as stud walls, or stick building.
- Average square footage increased in all regions, from 1,784 in 1981 to 2,626 in 1987. Three bedrooms and two bathrooms are the norm.
- Active-solar heating systems are used less frequently since the solar tax credits were eliminated. Twenty-three percent of respondents never install solar-energy systems, and a large percentage (40 percent) reported that only 10 to 20 percent of their frames are designed with active solar. Energy efficient and passive solar energy methods remain popular, however, with 22 percent of the respondents using some type of passive-solar heating.

For more information, contact the Joiners' Quarterly, Fox Maple Press, Snowville Road, West Brownfield, ME 04010; 207/935-3720. ■

Maine Post & Beam Recovery Due to Franchising

Back in January, the *Portland Press Herald* reported that Maine Post & Beam was in trouble. The company, which had built thousands of homes in the Northeast, had laid off its entire staff while it sought to cure some financial problems. Almost 120 unfinished homes stood waiting while negotiations with the company's suppliers were held. But the negotiations were successful, and now most of the former Maine Post & Beam employees are back on the job. The solution was to franchise. Daybreak Development Corporation bought the company's York and Hamilton offices; and the managers of the Exton, Pa. and Cape Cod offices purchased theirs. The parent company no longer builds — it sells franchises that sell Maine Post & Beam products.

According to Jill Kardulas, who works for Daybreak in York, "[Maine Post & Beam] just got in over [its] head. The company had developed too many pieces of land while a boom was going on — and then the market got soft." But Kardulas reports that Daybreak's Maine Post & Beam franchise is doing very well now. "Business is booming," she says, and though there had been delays, all of the projects delayed in January are "back in the works." ■

Super Stapler

In a move to reduce manufacturing costs, Senco Products, Cincinnati-based manufacturer of air-powered fastening systems, developed a new fastener coating. But the coating proved to be more than a money-saver. The coating added strength to the fastener. Engineering lab tests showed that a single Q staple with the new coating held in excess of 600 pounds before the fastener crown broke. Field tests confirmed it. But that apparently didn't satisfy the company's desire for the dramatic. The company's engineering department suspended a brand-new Jaguar XJS V-12 on twelve Sencote Plus staples (they say eight would have been enough) while its advertising department had a heyday taking photos. The Jaguar weighed 5,000 pounds with the rigging — and was worth $45,000. ■

From What We Gather

Although residential housing starts fell 10 percent last year, you didn't hear too many people complaining. The reason is that new home prices rose by 15 percent, more than offsetting the drop in volume, writes Cahners economist Kermit Baker.

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Consumer complaints reached an all-time high last year with Better Business Bureaus. The leading category for pre-purchase inquiries was home-improvement and remodeling. But for actual complaints, remodeling drew a third fewer calls than "ordered products" bought from catalogs or periodicals — reported in *Carpenter*.

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More sunshine gets into U.S. homes now, according to the National Wood Window & Door Association, which reports that homes built in 1986 had an average of 14.2 windows per home compared with 12 per home in 1985.

What do builders do with their profits? Their most common investment is owning real estate they built, according to a survey conducted by *Professional Builder*. And what do they like to do on vacation? Relax, said 70 percent; and browse the local real-estate market, said 58 percent.

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In fact, the average contract price of conventionally financed new and existing homes rose to $125,000 in the third quarter of 1987. Over the past five years, the average annual increases have been about 6 percent.

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Home-improvement complaints in Connecticut, however, topped the list, accounting for 1,767 of the 12,000 written complaints received last year. The two most common problems were failure to complete work and poor workmanship. The runner-up was auto complaints, mostly from deceptive advertising and breach of contract.

Quote *of the* Month

"The small home builder will last forever. Small builders are a fundamental component of the home-building industry. Big guys can't operate as efficiently, no longer have better access to mortgage financing, and can't be as responsive to customers." Spoken in Dallas at the NAHB convention by Jonathan Goldfarb, housing analyst for Merrill Lynch.

Credit Where Credit's Due

The article "Fast Growth Not for Everyone: Ask Skip Kelley" appeared in the *Miscellany* column in January. In that article, about a contracting business failure, we failed to give credit to *Inc.* (2/84, 11/87) and *Remodeling* (5/87), the publications from which the material was excerpted and adapted. *Inc.*, (38 Commercial Wharf, Boston, MA 02110) is edited for the owners and managers of fast growing small to mid-sized companies, and *Remodeling*, published by Hanley Wood, Inc., (655 15th St. N.W., Washington, DC 20005) is edited for small and large remodeling contractors. Each magazine, we feel, is an excellent resource for its respective audience. ■

— Editor