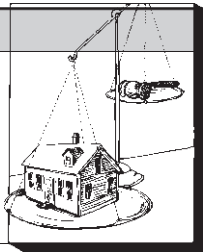


What's a Legal "Taking?"

by Jeffrey H. Mills and Dwight H. Merriam



A recent court case holds important implications for builders facing stringent growth-control regulations.

The disposition of the First English Evangelical Lutheran Church of Glendale v. County of Los Angeles has further defined what constitutes a "taking." Basically, a taking occurs when a court finds that government regulation or other action effectively "takes" private land from the owner by rendering it essentially useless or without value. Such a taking is unconstitutional. The First English case, which involved the question of whether such a taking had occurred, is notable on several grounds.

First, as noted last month in this column, the U.S. Supreme Court, before sending the case back to the California Appellate Court for a decision, ruled that a plaintiff may be entitled to monetary compensation if a city's action constitutes a taking of the plaintiff's property. This raised the stakes in such cases considerably, since no previous precedent or ruling had held that such compensation was called for.

However, in the First English case, the appellate court subsequently found that no taking had occurred. The First English Lutheran Church had claimed that a Los Angeles County temporary building moratorium affecting some of its land caused a taking. Few legal observers of the case were surprised that the church lost.

Public Safety a Key Issue

At issue was an interim development moratorium ordinance that prevented the church from reconstructing buildings on its 21-acre campground located in a flood plain in the Angeles National Forest. The pertinent portion of the Los Angeles County moratorium ordinance stated, "A person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area." The ordinance was temporary to

give the county time to form an area flood protection district and study appropriate land uses in the flood plain.

The appellate court said that this ordinance substantially advanced public safety, and that the ordinance extended "for a reasonable period of time." This suggests that land-use restrictions that temporarily halt development on the basis of public safety have strong constitutional footing.

Public safety issues were central to this decision. The appellate court's decision emphatically states that regulatory controls preventing construction in a flood plain (or, it follows, other land-use regulations seeking to prevent death and injury) are a valid exercise of the state's police powers.

The permanent ordinance that was subsequently adopted maintained the prohibition on construction or reconstruction of buildings, but allowed for parking facilities, certain recreation facilities (e.g., a swimming pool), accessory buildings that do not impede the flow of water, and flood control structures.

Safety First

It is significant to note that the court ruled that even if the county regulation had deprived First English of all uses of the property, it still would not have constituted a taking for which the church would be entitled to compensation. The court said that the public benefits the regulation conferred -- namely, the prevention of death and injury, or "the highest possible public interest" -- far exceeded the private costs it imposed on the individual property owner.

The California appellate court discussed this "highest possible public interest" at some length, and suggested a dual test for whether a taking deserves compensation: "[I]t makes perfect sense to deny compensation... where health and safety are at stake, but require compensation... where the land use regulation advances less pub-

lic purposes," such as controlling urbanization, preserving open space, or mitigating environmental impacts.

As for the temporary nature of the county's ordinance, the decision should strengthen the constitutionality of other temporary development moratoriums. The appellate court stated: "We do not read the U.S. Supreme Court's decision in First English as converting moratoriums and other interim land use restrictions into unconstitutional 'temporary takings' requiring compensation unless...these interim measures are unreasonable in purpose, duration, or scope."

The ordinance in question, the court said, was reasonable and of proper scope because it gave the county time to devise an ordinance protecting public health and safety, in this case, planning appropriate land uses for a flood plain. (One wonders, however,

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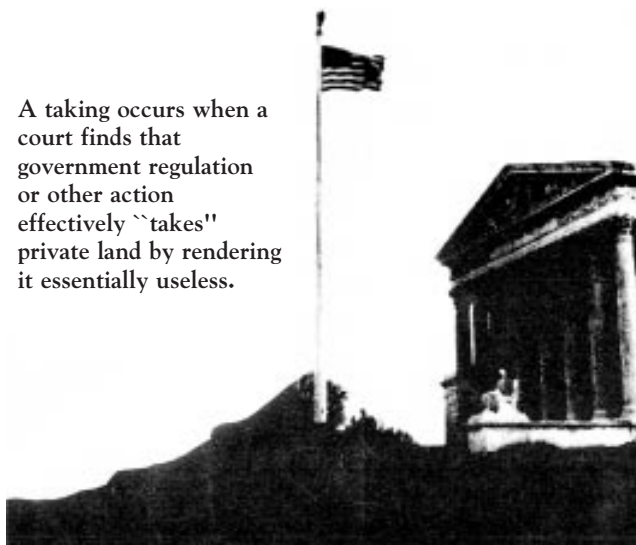
The court found the state's police powers in this case valid because the land in question was in a flood plain. The prevention of death and injury far exceeded the private cost it imposed on the individual property owner

whether a moratorium serving less lofty planning goals would be acceptable in the court's view.)

Of some comfort to municipalities considering moratoriums -- but alarming for landowners -- is the court's ruling that the length of the interim ordinance -- almost 2-1/2 years -- was an acceptable period to restrict all use of property.

The business of what constitutes a taking is not finished. Michael Berger, the lawyer for First English, sees the appellate court's decision as just another "act" in a "continuing saga." The California Supreme Court, however, has denied certification to hear an appeal in the case. Regardless, the issues raised in First English are sure to be litigated again. In the meantime, the appellate court's decision underlines the fact that regulatory takings are indeed rare. ■

A taking occurs when a court finds that government regulation or other action effectively "takes" private land by rendering it essentially useless.



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