'Get it Right The First Time': A Message From the United States Supreme Court to Land Use and Environmental Regulators—A Comment on *Nollan* and *First English*

I.
INTRODUCTION

The fifth amendment to the U.S. Constitution prohibits the state from taking private property for public use without just compensation.[1] Originally, courts construed the just compensation clause merely to require compensation when the state "physically occupied" private property.[2] In *Pennsylvania Coal Co. v. Mahon*,[3] however, Justice Oliver Wendell Holmes composed a simple sentence which developed into a new theory of just compensation known as the "regulatory takings doctrine." Justice Holmes wrote, "if [a] regulation goes too far it will be recognized as a taking."[4] Thus, under the regulatory takings doctrine, the state can effectuate a

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1. U.S. CONST. amend. V. Although the fifth amendment directly limits the power of the federal government, its just compensation clause applies to the states through the due process clause of the fourteenth amendment. *See* Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).

2. > [T]he concept of "taking" originally referred to the seizure of lands by the government, and . . . it retained this meaning through the time it was incorporated into our constitution and for a century thereafter. Only around the turn of the Twentieth Century—a period of conflict between freewheeling growth and expansion and an emerging concern that governmental regulation was needed—did the courts begin to expand the meaning of "taking" beyond the original conception.

F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 51 (1973).

3. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

4. Some scholars, however, believe that Justice Holmes used the word "taking" in a metaphorical sense, implying that the statute was a taking because the property owners were not provided with compensation, not that a taking always requires compensation. These scholars note that "[a] careful reading of the opinion shows that Holmes used the word 'taking' not to describe an event requiring payment of just compensation, but as a shorthand description of an invalid regulation." Siemon, *Of Regulatory Takings and Other Myths*, 1 J. LAND & ENVT. L. 105, 110 (1985). *See also* Comment, *Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis*, 57 WASH. L. REV. 715 (1982).

"taking" without physically occupying private property.[5]

On the final day of its 1986 Term, the United States Supreme Court handed down two regulatory takings decisions[6] which will materially affect the manner in which state and local governments enact land use and environmental regulations.[7] In the first of these decisions, *Nollan v. California Coastal Commission*,[8] the Court reinterpreted the standard of judicial review for determining whether a land use regulation constitutes a "regulatory taking." In the second decision, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[9] the Court addressed the issue of whether a property owner is entitled to compensation for a "temporary regulatory taking."[10] Before a court can award compensation for a "temporary taking," however, it must first find that a "taking" has occurred. Consequently, of these two decisions, *Nollan* will have a greater impact on land use and environmental regulators.

II.
NOLLAN V. CALIFORNIA COASTAL COMMISSION

The California Coastal Commission has a long standing policy of

5. In Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), the Court adopted a rule for permanent physical taking. *Loretto* found a taking when a cable television company, as authorized by New York state law, installed cables and boxes on the roof of an apartment building. The Court held that a permanent physical taking was not subject to a balancing test under the just compensation clause. The installing of cables and boxes is a taking even though it serves an important public benefit and has only minimal economic impact on the property owner.

In Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3145 (1987), as well, the Court held that a physical taking had occurred. Writing for the majority, Justice Scalia suggested that regular public access to a state-created easement constitutes a permanent physical invasion in the form of human presence—thus, under a *Loretto* analysis, a *per se* taking.

6. The Court actually handed down six takings decisions on the final day of its 1986 Term. Three of these decisions have attracted little attention (i.e., Hodel v. Irving, 107 S. Ct. 2076 (1987); FCC v. Florida Power Corp., 107 S. Ct. 1107 (1987); and California Coastal Comm'n v. Granite Rock, 107 S. Ct. 1419 (1987)). The remaining three have become known as the "Takings Trilogy" (i.e., Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); First English Evangelical Lutheran Church of Glendale v. Los Angeles, 107 S. Ct. 2378 (1987); and Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987)). This comment focuses on only the two most important cases of the trilogy, *Nollan* and *First English*.

7. These decisions, however, will not significantly alter the balance of power between government regulators and land use developers. *See* Haar & Kayden, *Private Property v. Public Use*, N.Y. Times, July 29, 1987, at A23, col. 2.

8. 107 S. Ct. 3141 (1987).

9. 107 S. Ct. 2378 (1987).

10. *Id.* Although the Court decided *First English* before *Nollan*, for analytical reasons these opinions will be examined in reverse chronological order.

requiring property owners to grant public easements across their land as a condition to issuing building permits.[11] The issuance of a building permit conditioned upon a developer granting an easement or other concession is known to land use planners as an "exaction." The practice of soliciting exactions from developers is popular among state and local governments[12] and has been sanctioned by the courts.[13]

A. *Facts and Procedural History: The Missing 'Nexus'*

Nollan is an exaction case. In *Nollan*, the California Coastal Commission demanded an exaction from the Nollans in return for a building permit. The Nollans owned a bungalow on a lot between two public beaches. They applied for a permit to demolish the bungalow and construct a larger residence in its place. The Coastal Commission granted the permit, provided the Nollans agreed to grant the public a lateral access easement over their property along the beach.[14] The Nollans, however, objected to the imposition of the Coastal Commission's condition.

Instead, the Nollans petitioned the Superior Court of Ventura County, California for a writ of administrative mandamus to invalidate the exaction. The Superior Court found that the exaction could not be imposed without an administrative finding that the proposed construction would have an adverse impact on public beach access. The court remanded the case to the Coastal Commission for an evidentiary hearing on this issue.[15] After the hearing, the Coastal Commission reaffirmed the propriety of the exaction. The Coastal Commission found that the proposed construction would "psychologically" inhibit public recognition of the right to coastal access by restricting the public's view of the beach.[16]

The Nollans returned to Ventura Superior Court and filed a supplemental petition alleging that the exaction constituted a taking of

11. The Coastal Commission had required deed restrictions as a condition of approving numerous new beach developments. "At the time of the Nollans' permit application, 43 of the permit requests for development along the nearby [b]each[es] had been conditioned on deed restrictions ensuring lateral public access along the shoreline." 107 S. Ct. at 3158 n.9 (Brennan, J., dissenting).

12. State and local governments find authority for soliciting exactions in the Standard Planning Act which requires subdividers to provide streets and other facilities within the subdivision. Most subdivision control ordinances contain these requirements. *See* D. MANDELKER, LAND USE LAW § 9.11 (1982).

13. Blevens v. City of Manchester, 103 N.H. 284, 170 A.2d 121 (1961).

14. 107 S. Ct. at 3143.

15. *Id.*

16. *Id.* at 3143-44.

private property without just compensation.[17] The Superior Court granted the Nollans' petition. The California Court of Appeal, however, subsequently reversed and remanded with instructions to deny the petition for a writ of mandamus on the ground that the evidence adequately supported the Coastal Commission's finding that the proposed construction would discourage public access.[18]

On appeal, the United States Supreme Court, in an opinion by Justice Scalia, found that the Coastal Commission's exaction of a lateral easement constituted a regulatory taking. The Court reasoned that no 'nexus' existed between the exaction demanded by the Coastal Commission and the stated governmental interest.[19]

B. *The Court's Reasoning: The Essential 'Nexus' Requirement*

In *Nollan*, the Court applied a standard of judicial review whose origins can be traced to the landmark case of *Village of Euclid v. Ambler Realty Co.*[20] The *Nollan* court held that "[l]and use regulation does not effect a taking if it substantially advance[s] legitimate state interests and does not 'den[y] an owner economically viable use of his land.' "[21]

The Court's adoption of the "substantially advance" standard came as no surprise to land use and environmental law scholars.[22] The surprise in *Nollan* came in the Court's interpretation rather than its adoption of the "substantially advance" standard. Traditionally, the Court has used a "rational basis" test to review a state's exercise of its police power; that is, in order to satisfy the "substantially advance" requirement, a state merely had to show that the regulation was rationally related to the government inter-

17. *Id.* at 3144.

18. *Id.*

19. *Id.* at 3148.

20. 272 U.S. 365 (1926). The Court in *Euclid* held that the governmental power to interfere with the general rights of the landowner by restricting the character of his use is not unlimited. Other questions aside, such restriction cannot be imposed if it does not bear a "substantial relation to the public health, safety, morals, or general welfare." *Id.* at 395.

21. 107 S. Ct. at 3146. The majority's opinion does not conduct an exhaustive analysis of the proper application of this standard. *Nollan* focuses on what constitutes "substantially advancing" a legitimate state interest. The Court does not address the question of what constitutes a "legitimate interest"—the existence of a "legitimate interest" is assumed. Furthermore, the Court completely fails to address the issue of whether the Nollans had been deprived of all "economically viable use" of their land.

22. This standard of judicial review was used in the seminal cases of Agins v. City of Tiburon, 447 U.S. 255 (1980) and Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), and was recently reaffirmed in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

est.[23] *Nollan*, however, held that, in order to withstand fifth amendment scrutiny, a land use regulation must do more than bear a rational relationship to a legitimate state interest.[24] The Court reinterpreted the "substantially advance" standard to require an essential "nexus" between the regulation and the stated governmental interest.[25]

C. *Analysis: Satisfying the 'Nexus' Requirement*

Prior to *Nollan*, courts gave great deference to a state's determination that a regulation "substantially advanced" a legitimate state interest. A presumption arose that a rational relationship existed between a regulation and a legitimate state interest.[26] In order to rebut this presumption of constitutionality, the landowner had the burden of proving that the challenged regulation had no rational relationship to any state interest.[27] Under *Nollan*, however, the presumption disappears, leaving the state with the burden of proving the existence of a "nexus" between a regulation and an articulated state interest.[28] Thus, *Nollan* not only heightens the level of judicial

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23. Courts frequently apply what amounts to a substantive due process test when they balance public purpose against private loss to determine whether a taking has occurred. The distinction between substantive due process and takings analysis is not always clear. *See Agins*, 447 U.S. at 255; *Penn Central*, 438 U.S. at 104.

24. There is an ongoing exchange in *Nollan* between Justices Brennan and Scalia. In his dissent, Justice Brennan asserts that it is "commonplace" for the Court to review a state's exercise of its police power by application of a "rational basis test." 107 S. Ct. at 3151. Justice Scalia argues that the court has always used a more stringent standard in takings cases. *Id.* at 3147. In support of this position, Justice Scalia cites *Agins* and *Penn Central*. Both of these cases, however, employ a balancing of interests due process approach. *See* footnote 3 of the majority opinion in *Nollan* for a more thorough discussion of Justice Scalia's responses to Brennan's dissent on this issue at 107 S. Ct. 3147.

25. *Id.* at 3147.

26. Land use regulation enjoys the usual presumption of constitutionality accorded economic regulation that affects interest in property. This presumption has important consequences. It means that the party attacking a land use regulation has *the burden of proving it unconstitutional* and the court will accept the policy expressed by the regulation unless it is clearly unreasonable (emphasis added).

D. MANDELKER, LAND USE LAW § 1.13 (1982). *See also* Robinson v. City of Bloomfield Hills, 350 Mich. 298, 86 N.W.2d 166 (1957); City of Phoenix v. Beall, 22 Ariz. App. 141, 524 P.2d 1314 (1974); Tillo v. City of Sioux Falls, 147 N.W.2d 128 (S.D. 1966).

27. For example, in Remmenga v. California Coastal Comm'n, 163 Cal. App. 3d 623, 209 Cal. Rptr. 628 (1985), the court held if a development project does not create an immediate need for coastal access, an access way may be required if the project's effect, together with the *cumulative impact* of similar future projects, would create or increase the need for coastal access. The Supreme Court denied review of *Remmenga*, noting a lack of probable jurisdiction. 474 U.S. 915 (1985).

28. 107 S. Ct. at 3147.

scrutiny to which state regulators are subject, it also shifts the burden of proof onto the governmental entity defending the land use or environmental ordinance challenged as a regulatory taking.[29]

When subjected to heightened scrutiny and deprived of the presumption of constitutionality, the California Coastal Commission was unable to meet the requirements of the "substantially advance" standard. The Coastal Commission had failed to establish the existence of a direct "nexus" between the lateral access easement exacted from the Nollans and the articulated state interest of promoting "visual access" of public beaches.[30] The Coastal Commission had sought the exaction on the theory that people driving or walking along the road would look toward the beach and see a wall of residential structures, including the Nollans' new home, and conclude that there was no public beach in the vicinity.[31] These individuals would in turn gravitate to more visually accessible public beaches, causing serious overcrowding.[32] The Court, however, pointed out that the Coastal Commission had failed to show how a lateral access easement *along* the beach would improve "visual access" from the coastal highway to the beach itself. Accordingly, the Court concluded that no "nexus" existed between the exaction (the lateral access easement) and the state interest (increasing visual access to the coast).

The outcome in *Nollan* may have been different, had the Coastal Commission known it would be subjected to heightened scrutiny and deprived of the presumption of constitutionality. The Coastal Commission could have easily established a "nexus" between the easement exacted from the Nollans and the legitimate state interest in promoting lateral access along the coast.[33] However, the Coastal Commission was unaccustomed to establishing the "nexus" between a regulation and a government interest with the degree of precision which the Court demanded in *Nollan*. As recently as 1985, the California Coastal Commission was allowed to impose ex-

29. The Court has taken a similar approach in exclusionary zoning and free speech land use cases. *See* D. MANDELKER, *supra* note 26. *See also* J.W. v. City of Tacoma, 720 F.2d 1126 (9th Cir. 1983) (holding that a heightened standard of judicial review applied when a city denied a special use permit for a group home for mentally ill patients).

30. 107 S. Ct. at 3143.

31. Justices Brennan and Scalia disagree as to whether the California Coastal Commission's report actually alleged that the Nollans' proposed construction would entirely block the view of the beach from the highway. *Id.*

32. *Id.*

33. Justice Brennan's dissent illustrates how the Coastal Commission could have satisfied the "nexus" requirement. *Id.* at 3160-63.

actions which did not bear a direct relationship between the problems created by a given development project and the exaction demanded.[34]

Under *Nollan*, however, regulatory schemes must bear a close "nexus" to articulated, legitimate government interests. Regulators can no longer demand exactions from land developers that do not bear a relationship to the burden imposed on the public by the proposed development. While *Nollan* may not significantly alter the balance of power between land developers and governmental regulators, it will force regulators to be more meticulous and conscientious when drafting or implementing legislation.[35] Regulators must learn to document the existence of a close "nexus" between the regulations they draft and the articulated government interest promoted.

III.
FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE V. COUNTY OF LOS ANGELES

While the Court in *Nollan* re-interpreted the standard of judicial review for determining whether a land use regulation constitutes a taking, the Court in *First English* addressed the issue of whether a property owner is entitled to compensation for a "temporary" regulatory taking.[36] A temporary regulatory taking is defined as a taking occurring in the period of time between a regulation's enactment and invalidation.[37]

A. *Facts and Procedural History: A Temporary Taking*

In *First English*, the County of Los Angeles adopted an interim ordinance prohibiting the First English Evangelical Lutheran Church of Glendale from reconstructing any building on a parcel of church-owned land located in a designated flood protection area in a canyon along the banks of Mill Creek in the Angeles National Forest.[38] The county passed the ordinance after a flood destroyed

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34. *Id.* at 3147.

35. *See supra* note 7.

36. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378 (1987).

37. Hamilton Bank v. William County Regional Planning Comm'n, 729 F.2d 402, 407 (6th Cir. 1984).

38. "The Church operated on the site a campground, known as 'Lutherglen,' as a retreat center and a recreational area for handicapped children," containing "a dining hall, two bunkhouses, a caretaker's lodge, an outdoor chapel, and a footbridge across the creek." 107 S. Ct. at 2381.

several structures used by the church as a campground for handicapped children.[39]

A month after the ordinance was enacted the Church filed a complaint in Los Angeles County Superior Court for inverse condemnation. The complaint alleged that the Church had been denied "economically viable use of its land" and was entitled to damages pursuant to the just compensation clause of the fifth amendment.

The Superior Court, granting the County's motion, struck the Church's damage allegation as irrelevant.[40] Pursuant to California law, an ordinance depriving a landowner of total use of his land can only be properly challenged by an action for declaratory relief or a writ of mandamus.[41] The California Court of Appeal affirmed the order granting the County's motion to strike. The Church appealed, but the California Supreme Court denied review.

On appeal, the United States Supreme Court reversed and remanded for rehearing, noting that the "California courts ha[d] decided the compensation question inconsistently with the requirements of the Fifth Amendment."[42] In an opinion by Chief Justice Rehnquist, the Court held that the Church was entitled to compensation for a "temporary" regulatory taking provided that, on remand, the state court found that the interim ordinance constituted a regulatory taking.[43]

B. *The Court's Reasoning: The Cost of a Temporary Taking*

The majority reasoned that a "temporary taking" is no different from a permanent taking, for which the fifth amendment requires

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39. In July, 1977, a forest fire denuded the hills upstream from Lutherglen, destroying approximately 3,860 acres of the watershed area and creating a serious flood hazard. Such flooding occurred on February 9 and 10, 1978, when a storm dropped 11 inches of rain in the watershed. The runoff from the storm overflowed the banks of the Mill Creek, flooding Lutherglen and destroying its buildings.

Id. Interim Ordinance No. 11,885 provided that "[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 located in Mill Creek Canyon." *Id.*

40. CAL. CIV. PROC. CODE § 436 (West 1987) allows the court, upon a properly noticed motion, to *strike* any "*irrelevant*, false, or improper matter in any pleading" (emphasis added).

41. Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 373 (1979), held that a landowner may not maintain an action for inverse condemnation based upon a regulatory taking. This determination was later upheld by the United States Supreme Court, 447 U.S. 255 (1980), and has become known as the "*Agins* rule."

42. 107 S. Ct. at 2383.

43. *Id.* at 2380-81.

just compensation.[44] The Court noted that, "by disallowing damages that occurred prior to the ultimate invalidation of the challenged regulation[,]" *Agins* truncated the general rule articulated by Justice Holmes that if a regulation "goes too far" it will be recognized as a taking.[45] The Court refused to allow the County simply to invalidate the regulation without paying the Church for the inconvenience, noting that it would not be an adequate remedy for the losses sustained by a landowner during the interim period.[46]

C. *Analysis: Regulating the Regulators*

Prior to *First English*, the rule in California was that the fifth amendment did not require compensation as a remedy for "temporary regulatory takings."[47] On four separate instances during the past decade,[48] property owners petitioned the Supreme Court to overturn the *Agins* rule. In each case, the Court avoided the regulatory taking issue on jurisdictional grounds.[49]

Notwithstanding, *San Diego Gas & Electric Co. v. City of San Diego*[50] was an influential step toward the Court's ruling in *First English*. In *San Diego Gas*, the city of San Diego rezoned parts of a 412-acre parcel owned by the utility as "open space." The utility brought an action in Superior Court for the County of San Diego for inverse condemnation, administrative mandamus and declara-

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44. *Id.* at 2381.

45. *Id.* at 2387. In United States v. Dow, 357 U.S. 17 (1958), the Court observed that abandonment "results in an alteration in the property interest taken—from [one of] full ownership to one of temporary use and occupation. In such cases compensation would be measured by the principles normally governing the taking of a right to use property temporarily." *Id.* at 26 (citations omitted). Many of the cases cited in *Dow* date from World War II and involve temporary appropriation of property by the armed forces.

46. 107 S. Ct. at 2389. In *First English*, the Church filed suit in early 1979, but did not obtain a taking ruling until 1985. Justice Rehnquist argued that the United States government had been required to pay compensation for leasehold interests of shorter duration than the period involved in *First English*. *Id.* at 2388.

47. *See supra* note 41. Numerous jurisdictions, however, have rejected the *Agins* rule. *See* cases cited in note 53.

48. Agins v. City of Tiburon, 447 U.S. 255 (1980); MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981).

49. In each of these cases the United States Supreme Court refused to rule on the *Agins* issue, finding that a final state judgment on the taking issue had not been entered by the state's highest court. Had the Court been so inclined, it could have avoided the *Agins* issue in *First English* on similar ground. The California Supreme Court had not entered a final judgment on the question of whether the County's ordinance constituted a regulatory taking. 107 S. Ct. at 2378.

50. 450 U.S. 621 (1981).

tory relief. The Superior Court awarded the utility damages, but the award was overturned by the California Court of Appeal on the ground that monetary compensation was an inappropriate remedy. The United States Supreme Court dismissed the appeal on the ground that the state appellate court had not yet rendered a final judgment on the issue of whether a regulatory taking had actually occurred.[51]

While the majority's opinion in *San Diego Gas* received little attention, Justice Brennan's frequently cited dissent planted the seed which eventually blossomed into *First English*. In *San Diego Gas*, Justice Brennan, in a footnote, provided jurists with insight into the attitude that many governmental regulators have toward drafting and implementing land use and environmental regulations. Justice Brennan quoted the following "advice" given by a California city attorney to fellow city attorneys at the 1974 Annual Conference of the National Institute of Municipal Law Officers:

> *"IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN."*
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> "If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent [California] Supreme Court case of *Selby* v. *City of San Buenaventura*, 10 Cal. 3d 110, appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again. . . . See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war . . ." (emphasis in original).[52]

The attitude reflected in this "advice" generated animosity among jurists toward the arrogance of certain governmental regulators. Shortly thereafter, several courts adopted Brennan's dissent,[53] and in *First English*, the Supreme Court itself ultimately embraced Brennan's position.

First English provides property owners with compensation for temporary takings while encouraging governmental regulators to act responsibly, by imposing a penalty for "going too far." The Court's decision, however, may have been premature given that the Court has failed to articulate a set formula for determining whether

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51. *Id.* at 621-30.

52. *Id.* at 655-56 n.22 (Brennan, J., dissenting) (citations omitted).

53. Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981); Sheerr v. Township of Evesham, 184 N.J. Super 11, 445 A.2d 46 (1982); Rippley v. City of Lincoln, 330 N.W.2d 505 (N.D. 1983)

a regulatory taking has occurred.[54] While the "substantially advance" standard for reviewing a statute challenged as a regulatory taking is well established, the Court has not adequately defined certain terms within the standard.[55] For example, the Court has not determined what constitutes a "legitimate state interest."[56] Of far greater significance, the Court has not been able to agree on a definitive approach for determining whether a land owner has been denied "all economically viable use" of his or her land.[57] Given these uncertainties combined with the availability of the damage remedy under *First English*, governmental regulators may become hesitant about implementing constitutionally questionable, yet beneficial, land use and environmental ordinances.

IV.
CONCLUSION

Nollan and *First English* send a clear message to land use and environmental regulators. First, regulations must bear a direct "nexus" to articulated, legitimate government interests. An exaction can only be demanded when necessary to alleviate the adverse impact of a proposed development. Second, if a regulation constitutes a taking, the state will incur monetary liability. The state can no longer simply invalidate a regulation—it must either pay damages for a temporary taking or exercise its powers of eminent domain.

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54. Justice Brennan's majority opinion in *Penn Central* concedes that the Court has never employed a set formula for determining whether a taking has occurred. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

55. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3146 (1987).

56. *Id.*

57. Johnson, *Compensation for Invalid Land-Use Regulations*, 15 GA. L. REV. 559 (1981). *See also* D. MANDELKER, LAND USE LAW § 2.9.

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