The Dog That Didn't Bark, Imperial Water, I Love L.A., and Other Tales From the California Takings Litigation Front

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INTRODUCTION

California, for good or ill, has led many of the nation's political, cultural, and legal trends. Takings law is no exception. Many of the policy and legal controversies that have morphed into national takings precedents started in the Golden State only to be adopted in other jurisdictions thereafter. In other cases, takings rules from this state have

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been considered and rejected by the U.S. Supreme Court and other state courts.

No matter. That not every takings principle originating in California has reached full legal flower elsewhere is not the point. What *is* significant is that, when it comes to the age-old tension between private property rights and government regulation, what the California legal system has said and decided, matters—decidedly. Other states, legal systems, and commentators necessarily take note of these legal aftershocks from the Left Coast.

This Article is designed to serve two purposes. First, it identifies some of the key recent developments in California takings law. (Or, in one case, a key *non*development.) Several of these developments are significant in their own right, others insofar as they relate to general legal trends in Takings Clause jurisprudence nationwide. Second, the Article analyzes some key ways in which the law of takings, as articulated by California courts, together with takings litigation practice, diverges significantly from the rules and practices observed in other jurisdictions around the country.

I. I LOVE L.A.: THE REGENCY OUTDOOR ADVERTISING CASE

> "Look at them trees . . .
> Century Boulevard . . .
> I love L.A.!"
> —Randy Newman, from the song
> "I Love L.A." (1983)[1]

The California Supreme Court decided a single takings case in 2006, one whose facts invoke several elements of iconic Southern California: palm trees, the Los Angeles International Airport (LAX), and the neon boulevards of West Los Angeles. *Regency Outdoor Advertising, Inc. v. City of Los Angeles* involved a property rights dispute concerning the major roadway serving LAX—Century Boulevard.[2] For many years, Regency Outdoor Advertising had leased space from private owners of properties fronting on Century Boulevard, permitting Regency to install and maintain large billboards that competed for the attention of passing motorists on their way to and from the airport. In 2000, the City of Los Angeles undertook a beautification project intended to enhance "the look" of the city's main asphalt portal to LAX. A key part of that

1. RANDY NEWMAN, *I Love L.A.*, *on* TROUBLE IN PARADISE (Warner Bros. Records 1983).

2. Regency Outdoor Adver., Inc. v. City of Los Angeles, 39 Cal. 4th 507 (2006).

beautification project involved the planting of mature palm trees along Century Boulevard.

And therein lay the problem. While Regency acknowledged that the trees themselves were planted on municipally owned property, it believed that their placement obstructed motorists' views of Regency's existing billboard displays. The company sued the City of Los Angeles in state court, claiming (among other things) that the city's actions had caused a compensable taking of Regency's property interest in the billboards. Specifically, Regency argued that under the state takings clause,[3] the city was obligated to compensate it for the alleged reduced value of the obscured billboard facings.

The California Supreme Court disagreed, rejecting Regency's takings claim in a unanimous opinion. In doing so, the Supreme Court found that Regency lacked a key prerequisite of a viable takings claim: a legally protected property interest. The court determined that while past precedents had guaranteed private landowners adjacent to public roads the right of free access and egress, takings clause principles do not go further. Carefully canvassing the relevant precedents from other state jurisdictions, the court concluded:

> The virtually unanimous rule applied in this class of cases provides that any such impairment to visibility does not, in and of itself, constitute a taking of, or compensable damage to, the property in question . . . [D]enying compensation for reduced visibility, in and of itself, without an additional showing of a partial physical taking or substantially impaired access, visits no unfairness upon property owners or others who occupy roadside parcels.[4]

Focusing on the "relevant parcel" principle of takings jurisprudence, Regency argued that through its acquisition of the billboard leases, the company had acquired and now was suffering severe economic injury to its interest in a particular "strand" in the bundle of property rights; that is, its leasehold was acutely sensitive to impairment of visibility. Relying

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3. CAL. CONST. art. I, § 19 ("Private property may be taken or damaged for public use only when just compensation . . . has first been paid to, or into court for, the owner."). California's takings clause, while phrased differently from and potentially more broadly than its federal counterpart, has generally been interpreted as affording property owners with a level of constitutional protection coextensive with that of the federal Takings Clause. *See* San Remo Hotel L.P. v. City & County of San Francisco, 41 P.3d 87, 100–01 (Cal. 2002); Customer Co. v. City of Sacramento, 895 P.2d 900 (Cal. 1996); Hensler v. City of Glendale, 876 P.2d 1043, 1048 n.4 (Cal. 1994). However, California case law has sometimes found a broader group of property interests cognizable under the California takings clause than under its federal counterpart. *See* Varjabedian v. City of Madera, 572 P.2d 43, 52 (Cal. 1977). For a general discussion, see ROBERT MELTZ, DWIGHT H. MERRIAM & RICHARD M. FRANK, THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION 19–23 (1999).

4. *Regency Outdoor Advertising*, 39 Cal. 4th at 520–22.

on established U.S. Supreme Court precedent that takings jurisprudence refuses to divide a single parcel into discrete segments for purposes of assessing economic impact, the California Supreme Court rejected this argument as well.

> Regency and the owners of the property upon which its billboards sat bargained in the shade of the government's well-established prerogative to plant trees on its own property. Regency now would have us foist onto the public what was appropriately a subject for negotiation between the firm and its lessors. We perceive no constitutional requirement that the public absorb these costs.[5]

Thus, in *Regency Outdoor Advertising*, the California Supreme Court rejected the constitutional notion of a "right to be seen" requiring compensation for municipal beautification efforts having no injurious effect on private property rights other than the claimed right to visibility.[6]

While *Regency Outdoor Advertising* qualifies as a "physical takings" case, it nonetheless illustrates the gradual analytical convergence—some would argue, confusion—of at least some aspects of physical and regulatory takings law in California and elsewhere. That latter trend is also a subject of the next chapter of our story.

II. IMPERIAL WATER: THE *ALLEGRETTI* DECISION

Regency Outdoor Advertising represents the only recent foray by the California Supreme Court into takings jurisprudence. However, the most important takings decision to emanate from the Golden State this past year, *Allegretti & Co. v. County of Imperial*,[7] was decided by the California Court of Appeal in San Diego. *Allegretti* concerned an increasingly important and litigated subject in the American West: the intersection between water rights, the Takings Clause, and government's police power.

Allegretti owns land in Imperial County that overlies groundwater resources that are pumped by Allegretti and its farmer tenant for irrigation. Allegretti requested a conditional use permit from Imperial County, seeking to redrill an inactive groundwater well in order to add approximately 200 acres of land for crop production. The county issued the permit, but on the condition that Allegretti limit its groundwater pumping to 12,000 acre feet per year. Allegretti responded by taking the county to court.

In California, state regulators do not comprehensively regulate groundwater resources, but local governments possess the ability to do so

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5. *Id.* at 523.

6. *Id.* at 513.

7. Allegretti & Co. v. County of Imperial, 42 Cal. Rptr. 3d 122 (Ct. App. 2006), *cert. denied*, 127 S. Ct. 960 (2007).

on a county-by-county basis.[8] Accordingly, Allegretti chose to challenge the county's permit condition under the Takings Clause, arguing that it constituted both a physical and regulatory taking of its water rights. The California Court of Appeal rejected both theories, and both aspects of the *Allegretti* opinion are noteworthy.

Allegretti's physical taking argument relied heavily on the U.S. Court of Federal Claims' 2001 decision in *Tulare Lake Basin Water Storage District v. United States*.[9] In *Tulare Lake*, plaintiff water contractors had argued—and the Claims Court ultimately held—that use restrictions imposed on the contractors' entitlement to water from the California State Water Project to further environmental objectives caused a physical taking of the contractors' property for which compensation was due.

The California Court of Appeal declined to follow *Tulare Lake*. Noting that it was "not bound by lower federal court decisions," the *Allegretti* court found the *Tulare Lake* reasoning unpersuasive.[10] Instead, the court cited with approval *Klamath Irrigation District v. United States*,[11] a later decision by the U.S. Court of Federal Claims. In *Klamath*, the Claims Court criticized *Tulare Lake* for treating plaintiffs' contracts as conferring exclusive property rights, and for neglecting to consider whether plaintiffs' claimed use of water violated established state law doctrines protecting fish and wildlife resources. In short, *Klamath* rejected both the approach and supporting rationales of *Tulare Lake*.[12]

Allegretti embraced the same view declared in *Klamath*. In the process, the California Court of Appeal emphasized that the water-restriction-as-physical-taking rule articulated in *Tulare Lake* is *not* the rule to be followed in California state courts.

> We likewise decline to rely on *Tulare Lake*'s reasoning to find a physical taking under the circumstances presented by County's action. Aside from the deficiencies noted in *Klamath*, we disagree with *Tulare Lake*'s conclusion that the government's imposition of pumping restrictions is no different than an actual physical diversion of water. The reasoning is flawed because in that case the government's passive restriction, which required the water users to leave water in the stream, did not constitute a physical invasion or appropriation . . . *Tulare Lake*'s reasoning disregards the hallmarks of

8. Baldwin v. County of Tehama, 36 Cal. Rptr. 2d 886 (Ct. App. 1994) (upholding county groundwater pumping ordinance).

9. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313 (2001).

10. *Allegretti*, 42 Cal. Rptr. 3d at 131. The court went on to note that "[e]ven if we found it appropriate to consider *Tulare Lake*, we would find it distinguishable by virtue of the existence of identifiable contractual rights between the plaintiffs and water rights holder [in *Tulare*], rights that are not present in this case." *Id.*

11. Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 504 (2005).

12. *Id.* at 538.

> a categorical physical taking, namely actual physical occupation or physical invasion of a property interest.[13]

The Court of Appeal found Allegretti's regulatory takings theory equally unpersuasive. First, it rejected Allegretti's argument that the county's regulation worked a "categorical" regulatory taking—i.e., that the permit condition denied Allegretti all economically beneficial or productive use of its land.[14] Finding that Allegretti and its farmer tenant could irrigate and farm a significant portion of its property even with the pumping restrictions imposed under the county permit, the court held, "therefore this has not been a total regulatory taking."[15]

The court next turned to plaintiff's claim that even if there was no categorical regulatory taking, the county should nonetheless be found liable under the ad hoc, multi-factor approach first set forth by the U.S. Supreme Court in *Penn Central Transportation Co. v. City of New York*.[16] Those well-known factors include: (1) the "economic impact of the regulation"; (2) the "extent to which the regulation interferes with distinct, investment-backed expectations" of the claimant; and (3) the "character of the governmental action."[17] Focusing on the each of these criteria in turn, the *Allegretti* court stressed that the plaintiff had failed to demonstrate any concrete, deleterious impact of the county's regulatory condition on Allegretti's property interest;[18] that Allegretti had proven no "compensable interference" with the landowner's distinct investment-backed expectations;[19] and that the county had not invaded or appropriated Allegretti's property or resources by imposing its permit condition.[20] Accordingly, the court found no compensable taking under the multi-factor *Penn Central* analysis.[21]

Allegretti's final argument was perhaps its most imaginative. In 1980, the U.S. Supreme Court first articulated the notion that a compensable regulatory taking could be demonstrated under the theory that the measure failed "to substantially advance legitimate state interests."[22] A quarter-century later, following much confusion and debate about that particular constitutional standard, the Supreme Court expressly renounced it as a principle of federal Takings Clause jurisprudence in

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13. Allegretti & Co. v. County of Imperial, 42 Cal. Rptr. 3d 122, 132 (Ct. App. 2006) (citations omitted), *cert. denied*, 127 S. Ct. 960 (2007).
14. *Id.* at 133.
15. *Id.* at 132–33.
16. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).
17. *Id.* at 124.
18. *Allegretti*, 42 Cal. Rptr. 3d at 133.
19. *Id.* at 135.
20. *Id.* at 134.
21. *Id.* at 133–36.
22. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

Lingle v. Chevron U.S.A. Inc.[23] Over the intervening twenty-five years, several California state court decisions had cited and otherwise referenced the "substantially advance" test.[24] That led to Allegretti's backstop contention: that even if the "substantially advance" test is no longer viable under the Fifth Amendment, it remains part of California *state* takings law.

The *Allegretti* court declined to specifically answer the question of whether the "substantially advance" test remains a viable principle of California state takings law.[25] Instead, it assumed *arguendo* that it was viable, but then had little difficulty concluding that "[the challenged] permit condition, imposed under the County's police power for the purpose of conserving groundwaters and preventing their undue waste, had an objectively sufficient connection to that valid governmental interest."[26] Both the California Supreme Court and the U.S. Supreme Court declined to exercise their discretionary jurisdiction to hear the *Allegretti* case, making the California Court of Appeal's decision final.[27]

Allegretti represents an important takings precedent in two respects. First, it is a forceful renunciation of the proposition, first articulated by the U.S. Court of Federal Claims in *Tulare Lake*, that restrictions on the exercise of privately held water rights effect a compensable, physical taking of property in violation of the Takings Clause. Second, *Allegretti* stands for the proposition that, absent a governmental restriction on the exercise of privately held water rights that deprives a property owner of *all* economically viable use of those water rights and the real property it irrigates or otherwise serves, a regulatory takings–based challenge to that restriction seems destined to fail as well.

The sole uncertainty left by *Allegretti* is whether the "substantially advance" alternative takings standard renounced by the Supreme Court last year in *Lingle* remains a viable principle of California state takings law. I believe the answer is no, for at least three reasons. First, the *Allegretti* court took pains to repeatedly state that it was applying that standard without deciding whether it in fact had any remaining constitutional relevance.[28] (The fact that the California Court of Appeal

23. 544 U.S. 528, 540 (2005).

24. *See, e.g.*, Landgate, Inc. v. Cal. Coastal Comm'n, 953 P.2d 1188, 1197–98 (Cal. 1998); Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851, 860–61 (Cal. 1997).

25. Allegretti & Co. v. County of Imperial, 42 Cal. Rptr. 3d 122, 137, 140 (Ct. App. 2006), *cert. denied*, 127 S. Ct. 960 (2007). Significantly, at least one other reported California appellate court appears to have addressed this question, and answered it in the negative. *See* Los Altos El Granada Investors v. City of Capitola, 43 Cal. Rptr. 3d 434 (Ct. App. 2006).

26. *Allegretti*, 42 Cal. Rptr. 3d at 138.

27. Allegretti & Co. v. County of Imperial, No. S143992, 2006 Cal. LEXIS 9142 (Cal. July 26, 2006) (denying petition for review); Allegretti & Co. v. Imperial County, 127 S. Ct. 960 (Jan. 8, 2007) (denying certiorari).

28. *See supra* note 25 and accompanying text.

could have easily disposed of that argument on its questionable "merits" may well account for why the court didn't address the threshold question.) Second, the *Allegretti* court quotes with apparent approval several extensive portions of the U.S. Supreme Court's recent decision in *Lingle* that formally jettisoned the "substantially advance" test.[29] Finally, and as noted above, other California case law seems to reject that test as having any continuing relevance under the California Constitution.[30]

III. *MONSANTO* REVISITED?: THE *SYNGENTA CROP PROTECTION* DECISION

One of the most daunting questions for the future of regulatory takings jurisprudence is whether and how it applies to *intellectual* property. A recent California state court decision, *Syngenta Crop Protection, Inc. v. Helliker*,[31] provides some answers that are especially important for California, the home of Silicon Valley and a fountainhead of intellectual property issues.

The U.S. Supreme Court first addressed the intersection of regulatory takings principles and intellectual property in its 1984 decision in *Ruckelshaus v. Monsanto Co.*[32] The Court made two key points in *Monsanto* that remain important today. First, holders of intellectual property are entitled to the constitutional protections afforded by the Takings Clause of the U.S. Constitution, just as are the owners of both land and other more tangible forms of personal property.[33] Second, in applying the now-famous, multi-factor test for assessing regulatory takings claims under *Penn Central*,[34] the Court indicated in *Monsanto* that the claimant's reasonable, investment-backed expectations are an especially significant criterion in assessing the claim that intellectual property rights have been "taken."[35]

Twenty-two years after the *Monsanto* decision, the *Syngenta* case involved a regulatory takings claim based on a set of facts that bore an uncanny resemblance to those in *Monsanto*. As in *Monsanto*, the plaintiffs in *Syngenta* were chemical companies that had submitted data concerning the chemical components and effects of pesticides they manufactured to government regulators. Like *Monsanto*, the government defendants in *Syngenta* subsequently used the data submitted by the pesticide manufacturers in a manner that did not preserve the confidentiality of those data to the manufacturers' satisfaction. The

29. *Allegretti*, 42 Cal. Rptr. 3d at 136–37 (citing Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005)).

30. *See supra* text accompanying note 25.

31. 42 Cal. Rptr. 3d 191 (Ct. App. 2006).

32. 467 U.S. 986 (1984).

33. *Id.* at 1003–04.

34. *See supra* notes 16–17 and accompanying text.

35. *Monsanto*, 467 U.S. at 1012–13.

Syngenta plaintiffs sued the state regulators in California state court, asserting that this unauthorized use of the data, which the manufacturers claimed as trade secrets, effected a compensable taking of their private property under both the U.S. and California Constitutions.

The California Court of Appeal's Solomonic decision in *Syngenta* similarly tracks that of the U.S. Supreme Court in *Monsanto*. Reviewing a California state statute providing that proprietary data submitted by a pesticide manufacturer in connection with its registration application may not be utilized or disclosed for other purposes, the *Syngenta* court found that plaintiff companies lacked a protectable property interest before January 1, 1997, the effective date of the statute, because the statute "provided no basis for a reasonable investment-backed expectation of confidentiality as to data submitted before its effective date."[36] However, plaintiffs stated a viable regulatory takings claim under both the California and U.S. Constitutions as to the period after January 1, 1997.[37] Accordingly, the Court of Appeal remanded the case to the trial court for further fact-finding and application of the *Penn Central* factors.

In so doing, the Court of Appeal in *Syngenta* rejected the government's novel attempt to undermine plaintiffs' claim of a reasonable investment-backed expectation.[38] Specifically, the government defendant argued that any expectation plaintiffs had that their data would be maintained by the government in confidence was contrary to the "government in the sunshine" objectives embodied in a separate California statute—the Public Records Act.[39] The *Syngenta* court had little difficulty overcoming this argument, noting that California's Public Records Act expressly exempts from public disclosure materials protected under other state and federal laws—such as the statute forming the basis of plaintiffs' takings claim in the first instance.[40]

While the *Syngenta* decision is perhaps unsurprising, given the U.S. Supreme Court's *Monsanto* opinion from decades earlier, *Syngenta* remains significant for at least two reasons. First, it adopts these principles as part of California state constitutional law and takings principles. Second, the opinion presages future, difficult litigation over the scope of intellectual property for purposes of the state and federal Takings Clauses.

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36. *Syngenta*, 42 Cal. Rptr. 3d at 216.
37. *Id.*
38. *Id.* at 217.
39. California Public Records Act, CAL. GOV'T CODE §§ 6250–6270 (West 2007).
40. Syngenta Crop Prot., Inc. v. Helliker, 42 Cal. Rptr. 3d 191, 216–17 (Ct. App. 2006).

IV. THE DOG THAT DIDN'T BARK: *NOLLAN/DOLAN* IN CALIFORNIA

In one of Sir Arthur Conan Doyle's famous mysteries, Sherlock Holmes takes note of a dog that didn't bark at the scene of the crime, and then correctly infers from that silence the identity of the criminal perpetrator. So, too, an important inference can be drawn, from the relative dearth of *Nollan/Dolan*-related takings litigation in California in the years following the landmark U.S. Supreme Court decisions in *Nollan v. California Coastal Commission*[41] and *Dolan v. City of Tigard*.[42]

By now, the facts and holdings of *Nollan* and *Dolan* are well known. *Nollan* involved a Takings Clause–based challenge to a public access condition imposed by the California Coastal Commission on a Southern California landowner who had sought a permit to rebuild his beachfront residence. The U.S. Supreme Court struck down the condition as violative of the Takings Clause and, in the process, created the "unconstitutional conditions" component of modern takings jurisprudence. Specifically, the Court held that there must be an "essential nexus" between a land dedication or monetary exaction on the one hand, and the underlying objective of the government's permit process on the other. Stated differently, the condition must substantially advance the same government purpose as that advanced by the permit itself.[43]

Seven years later, the Supreme Court refined and expanded upon its holding in *Nollan*. In *Dolan*, the Court supplemented the *Nollan* test with a requirement that the dedication or exaction impose no more than a proportionate degree of burden on the property owner. Thus, the doctrine of "rough proportionality" was born.[44]

In sum, the "substantially advance" requirement now has two distinct elements: from *Nollan*, the nature of the advancement; from *Dolan*, the degree.[45] The Court's decisions in *Nollan* and *Dolan* have certainly had a significant effect on California land use decision making. Most directly, the California Coastal Commission significantly revisited its public access procedures and access requirements in the wake of *Nollan*. And, in an important state court decision following shortly after *Dolan*, the California Supreme Court in *Ehrlich v. City of Culver City* extended the *Nollan/Dolan* rule beyond compelled dedications of real

41. 483 U.S. 825 (1987).
42. 512 U.S. 374 (1994).
43. *Nollan*, 483 U.S. at 835–36.
44. *Dolan*, 512 U.S. at 388–91.
45. *See generally* MELTZ, MERRIAM & FRANK, *supra* note 3, at 247–60.

property to also encompass certain types of "in lieu" monetary exactions.[46]

It has been a longstanding practice of California land use regulators to condition land use approvals on a wide array of dedications of real property to serve a variety of public purposes: construction of sidewalks, other public access paths, the building of public schools, utility corridors, etc. Moreover, in the wake of Proposition 13 in 1978 (and, with it, a shrinking property tax base), California local governments have become increasingly dependent over the past three decades on school fees, utility assessments, and a wide array of other monetary exactions to fund public services associated with new private development.

One would have thought that the convergence of these factors—the constitutional requirements imposed by *Nollan* and *Dolan*, coupled with California governments' continued reliance on land and monetary exactions—would have sparked a veritable explosion of *Nollan/Dolan*-based takings challenges in California in recent years. Remarkably, that has not been the case. While courts in other states continue to confront *Nollan/Dolan*-type takings litigation with some frequency,[47] there has actually been a relative absence of reported decisions in California on this subject over the past ten to fifteen years.

What accounts for this seemingly odd state of affairs?

I believe that the answer lies in California's enactment of and reliance on a detailed set of state *statutory* requirements for government exactions in the field of land use regulation. California statutes subject both state and local governments to numerous detailed procedural and substantive requirements associated with land dedications and monetary exactions. Some of these statutory requirements—such as those found in California's Subdivision Map Act[48]—long predate the Supreme Court's *Nollan* and *Dolan* decisions. Others, like the state's Schools Facility Act,[49] are of a more recent vintage. Several of the most noteworthy of these California statutory measures are described below.

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46. Ehrlich v. City of Culver City, 911 P.2d 429, 437 (Cal. 1996). *But cf.* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005) (implying that monetary fee exactions, as opposed to conditions requiring real property dedications, cannot constitute compensable takings).

47. *See, e.g.*, Hammer v. City of Eugene, 121 P.3d 693 (Or. Ct. App. 2005) (holding that *Dolan* does not affirmatively require government to conduct "rough proportionality" analysis; such an analysis can wait until a plaintiff first raises the *Dolan* issue in takings litigation); B.A.M. Dev., L.L.C. v. Salt Lake County, 128 P.3d 1161 (Utah 2006) (*Nollan/Dolan* applies to all monetary exactions, whether imposed legislatively or administratively); City of Olympia v. Drebick, 126 P.3d 802 (Wash. 2006) (*Nollan/Dolan* constitutional tests inapplicable to fees imposed by general legislation).

48. CAL. GOV'T CODE §§ 66410–66413.5 (West 2006).

49. *Id.* §§ 65970–65981.

A. *Mitigation Fee Act*

Particularly noteworthy in this regard is California's Mitigation Fee Act,[50] enacted by the state legislature in 1987—the same year as the Supreme Court's *Nollan* decision. (One may safely assume that the timing was not accidental.) The Mitigation Fee Act is intended to standardize the procedures for imposition of development fees; to clarify the required showing of a "reasonable relationship" between the impact of a particular development project and the fees assessed; and to "protect[] developers from disproportionate and excessive fees."[51] The statute mandates that local governments adopt findings and satisfy certain standards before imposing either impact fees or dedications of real property. The statute also prescribes a detailed process for challenging development impact fees.[52]

The Mitigation Fee Act does not expressly require a written study or specify the level of analysis necessary to satisfy the *Nollan*/*Dolan* constitutional standards and related statutory requirements. Nonetheless, it is increasingly common for local land use regulators in California to commission so called "nexus" studies to demonstrate the requisite constitutional and statutory relationships. A well-designed, thorough nexus study substantially reduces the risk of legal challenge and invalidation of the land use permit condition. Accordingly, this practice reduces the aggregate amount of takings litigation in California based on *Nollan*/*Dolan* theories.[53]

B. *California's Development Agreement Statute*

Under another provision of California law, local governments are authorized to enter into binding agreements with developers of real property that govern land use approvals.[54] This statute was enacted to alleviate problems encountered due to developers' perceived uncertainties in the multi-level governmental approval processes for complex land use development projects.[55] That uncertainty, in turn, results from the modest protection afforded by California's limited recognition of vested rights in land use development approvals; existing case law provides real estate developers relatively little insulation from

50. *Id.* §§ 66000–66009.

51. Ehrlich v. City of Culver City, 911 P.2d 429, 438 (Cal. 1996). For a general discussion of the Mitigation Fee Act, see ADAM U. LINDGREN ET AL., CALIFORNIA LAND USE PRACTICE §§ 18.49–18.64 (2006).

52. *Id.* §§ 18.65–18.82.

53. *See id.* at 863.

54. CAL. GOV'T CODE §§ 65864–65869.5 (West 2006).

55. *See, e.g., id.* § 65864(a). *See generally* DANIEL J. CURTIN, JR. & ROBERT E. MERRITT, CALIFORNIA SUBDIVISION MAP ACT AND THE DEVELOPMENT PROCESS §§ 7.16–7.26 (2005).

changes in applicable laws that may occur during the period a land use project is undergoing government permit reviews.[56] A development agreement negotiated and executed pursuant to this California statute alleviates this problem by assuring the developer that once a project has been commenced, it can be completed without being made subject to new or enhanced legal requirements.[57]

Of critical importance is the fact that California local governments often use development agreements to obtain exactions and dedications from the developer in exchange for more certainty in the government land use decision making process.[58] Such exactions, which include construction of public improvements, dedications of land, and payment of monetary fees, may well exceed those a local government could lawfully impose under *Nollan/Dolan* constitutional principles in the absence of a negotiated development agreement. By inducing government regulators and developers to negotiate these issues rather than litigate them in court, the development agreement statute serves to resolve these controversies and side-step many *Nollan/Dolan* litigation disputes.

C. A Renewed Emphasis on Administrative Findings

One of the most pronounced, long-term effects of the U.S. Supreme Court's decisions in *Nollan* and *Dolan* has been to emphasize the importance of the administrative hearing process in land use permit proceedings—especially the need for land use agencies to support their decisions with thoughtful, formal findings in the administrative record. It is probably fair to say that before those influential Supreme Court decisions, many land use regulators (and the attorneys who counseled them) viewed the preparation of administrative findings as a pro forma, perfunctory exercise. Not any longer. With their emphasis on finding an "essential nexus" between the permit condition and the governmental objective, and on the requisite "rough proportionality" between the permit condition and the project impact, *Nollan* and *Dolan* underscored the need for agencies' careful preparation of administrative findings that would pass constitutional muster.

That lesson has not been lost on land use regulators and attorneys in California. It is fair to say that the quality, detail, and volume of current-day administrative findings far exceed those routinely generated by local governments prior to *Nollan* and *Dolan*. Indeed, those Supreme Court decisions prompted remedial training sessions beginning in the late 1980s,

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56. *See, e.g.*, Avco Cmty. Developers, Inc. v. S. Coast Reg'l Comm'n, 553 P.2d 546 (Cal. 1976); CURTIN & MERRITT, *supra* note 55, § 7.16.

57. *Id.*

58. *See* CAL. GOV'T CODE § 65865.2.

at which government planners and lawyers were schooled in how to draft legally defensible administrative findings. Those prophylactic measures continue to this day.

The enhanced quality of these critically important administrative findings has undoubtedly discouraged many *Nollan/Dolan*-based challenges to California land use decisions from being pursued, and when such takings challenges are brought, the existence of quality administrative findings sharply tips the odds of success in the government's favor.[59]

D. The California Environmental Quality Act

A final reason *Nollan/Dolan* litigation has not been prevalent in California in recent years may be related to the state's "little NEPA" statute, the California Environmental Quality Act (CEQA).[60] CEQA requires state and local governments that approve any private development project with the potential for a substantial, adverse change to the environment to prepare a detailed written analysis of the project's anticipated environmental impacts before taking final action.

Mitigation measures for such projects are often imposed under CEQA as a condition of project approval. Indeed, the obligation to mitigate significant environmental impacts of a project is a requirement of CEQA that distinguishes it from the National Environmental Policy Act (NEPA),[61] which contains no such substantive obligation.[62] The environmental review required under CEQA for major California development projects often provides detailed documentation and substantiation for such mitigation measures, further ensuring a close, proportional fit between project impacts and permit conditions. That proportional fit, in turn, assists in ensuring that the two components of the *Nollan/Dolan* constitutional test concerning individual projects are satisfied.

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59. Two examples in which thorough administrative findings were expressly relied upon by reviewing courts in rejecting regulatory takings claims are *Landgate v. California Coastal Commission*, 953 P.2d 1188, 1199 (1998), in which the court found that the Commission's denial of a coastal permit application "advanced legitimate governmental interests in minimizing erosion and unsightly development," and *Lechuza Villas West v. California Coastal Commission*, 70 Cal. Rptr. 2d 399, 415 (Ct. App. 1997), where the court upheld the Commission's denial of a development permit based in part on its explicit finding that applicant had failed to demonstrate that the proposed development would not intrude upon publicly owned tidelands.

60. CAL. PUB. RES. CODE §§ 21000–21177 (West 2006).

61. 42 U.S.C. §§ 4321–4347 (2006).

62. *See, e.g.*, CAL. PUB. RES. CODE §§ 21002.1(a), 21100(b)(3); CAL. CODE REGS. tit. 14, § 15126.4 (2006). For a general description of the obligation to mitigate significant environmental impacts under CEQA, see STEPHEN L. KOSTKA & MICHAEL H. ZISCHKE, PRACTICE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (2006).

Like any government exaction or imposed dedication, a mitigation measure imposed under CEQA cannot violate constitutional standards.[63] However, the procedural requirements required by CEQA can and do provide California regulators with additional analytical tools to ensure that the exactions and dedications they impose as a condition of land use project approvals pass constitutional muster.

Of course, the existence of the statutory requirements and administrative practices summarized above do not fully insulate California land use regulators from *Nollan/Dolan* takings challenges. Nevertheless, they may well explain why in recent years California has not experienced nearly the amount of *Nollan/Dolan*-related litigation found in other states—or predicted for California by many takings mavens (including this one).

Just as Sherlock Holmes deduced much from the dog that didn't bark, so perhaps should observers take note of the relative silence when it comes to recent *Nollan/Dolan* litigation in California. It would appear that California lawmakers and land use regulators in the Golden State are doing something right, and perhaps it's time for other jurisdictions to take notice of that fact.

CONCLUSION

Writer Wallace Stegner once observed, "California is like the rest of the United States, only more so."

Takings litigation has for three decades been a prominent feature of California's environmental law landscape. As these most recent judicial developments amply demonstrate, California takings jurisprudence at times represents a harbinger of takings trends nationwide, and at others, a marked aberration from legal principles embraced in other jurisdictions. However, what California does on the takings front—as in so many other fields of endeavor—is always entertaining and worthy of note.

63. CAL. CODE REGS. tit. 14, §§ 15041(a), 15126.4(a)(4).