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This Land Is Your Land..Or Is It—Making Sense of Vested Rights in California

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THIS LAND IS YOUR LAND . . . OR IS IT?
MAKING SENSE OF VESTED RIGHTS
IN CALIFORNIA

Paul J. Nadel*

TABLE OF CONTENTS

I. Introduction .............................................. 792
II. The Concept of Vested Rights ......................... 795
   A. The Vested Rights Rule .............................. 795
   B. The Building Permit ............................... 796
      1. Avco: the need for final approval .............. 797
      2. Oceanic: application of Avco .................. 800
      3. The building permit and equitable estoppel ... 801
      4. Prohibiting subsequent phases .................... 802
      5. The building permit requirement one step further .. 803
      6. Equitable estoppel with respect to related permits .. 805
   C. The Substantial Expenditure Aspect ................... 808
   D. Good Faith Reliance .................................. 812
III. The Development Agreement and Vesting Tentative Map .. 813
   A. Development Agreements ............................. 813
      1. Provisions of the Development Agreement
         legislation ........................................ 814
      2. Why enter into a Development Agreement? ........ 815
      3. Enforceability of Development Agreements ....... 816
      4. The Development Agreement in a slow-growth
         environment ...................................... 818
   B. Vesting Tentative Map .................................. 818
      1. Provisions of the Vesting Tentative Map
         legislation ........................................ 819
      2. Developer compliance ............................. 820
      3. Limitations of the Vesting Tentative Map ....... 820
   C. VTM or Development Agreement? ....................... 822
IV. Inverse Condemnation ..................................... 825

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791
I. INTRODUCTION

In all real estate development projects, an inherent conflict exists between the private land developer’s need for certainty and predictability in the governmental approval process during development and the concern of local government agencies with issues of public health, safety and welfare. The general public, represented by local government agencies, retains ultimate control over the development of private property to protect public health, safety and welfare. However, without governmental assurances that a project can be completed as planned, a developer is forced to limit expenditures incurred prior to governmental approval to minimize losses in the event the project is not approved as planned, or if the conditions of approval are so onerous that the project becomes economically unfeasible to complete.

It has long been accepted by the courts that at some point in the development process the expenditures and dedications made by a developer in good faith reliance on initial governmental approvals should stop the government from applying regulatory changes that will prevent completion of a contemplated project or that will substantially impair the developer’s investment.1 Determining the particular point when a developer is entitled to protection is difficult. Faced with this uncertainty, it is essential that a developer in California have a working knowledge of the common-law2 and statutory3 bases under which a vested right to complete a project may arise. In addition, the developer should understand the constitutional principles of, and potential claims that can arise under, the theory of inverse condemnation.4

The common-law vested rights rule provides that a property owner does not acquire a vested right to construct improvements under a specific land use classification until the developer has (1) obtained a valid

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2. See infra notes 26-199 and accompanying text.
3. See infra notes 200-83 and accompanying text.
4. See infra notes 284-438 and accompanying text.
vested rights in california

building permit; and (2) performed substantial work and incurred substantial liabilities in good faith reliance on the permit. Until a property owner or developer acquires a vested right to complete a project, local governmental agencies retain complete authority to modify, control, condition or disapprove a proposed development, even after work has commenced, subject only to the limitation that the government action cannot be arbitrary or discriminatory. The vested rights rule only provides developers with modest assurances that a project undertaken in reliance on governmental approvals can be completed as designed. Due to the California courts’ reluctance to expand the limited protections of the vested rights rule, the development community sought legislative relief to reduce the developer’s risk of financial and professional loss due to unexpected changes in land use regulation or changes in the composition of a community’s elected governing body.

The California legislature enacted the Development Agreement legislation in 1979 and the Vesting Tentative Map legislation in 1984 to expand the protection for developers. Under the Development Agreement statutes, a local government agency may, but is not required to, enter into a “Development Agreement” with a property owner as a means to guide the development of the property. By utilizing a Development Agreement, a developer assures itself of the right to construct specific improvements.

A Development Agreement may afford a developer the greatest degree of certainty available in today’s development process; however, local agencies are not required to make this option available. In addition, implementing a Development Agreement often involves protracted and complex negotiations. The major shortcoming of the Development

8. See infra notes 200-83 and accompanying text.
10. Id. §§ 66498.1-66498.9 (West Supp. 1988).
11. Id. §§ 65864-65869.5.
12. Id. § 65865.
Agreement is that it does not protect a developer from the effects of federal and state laws and regulations that are enacted after the agreement is entered into.\(^\text{13}\)

Alternatively, the Vesting Tentative Map statutes\(^\text{14}\) permit the filing of a Vesting Tentative Map (VTM) which, if approved, gives the developer a vested right to proceed with its development in accordance with the local ordinances, policies and standards that are in effect at the time the VTM is approved.\(^\text{15}\) By simply stamping on the face of a standard tentative map the words "Vesting Tentative Map," a developer gains the right to proceed with the development for a specified period of time.\(^\text{16}\) The developer can obtain building permits and proceed with the development as long as the development substantially complies with the ordinances, policies and standards that are applicable when the local agency approves the developer's completed application for a tentative subdivision map.\(^\text{17}\) Although originally applicable only to residential subdivisions, the VTM legislation became applicable to commercial and industrial projects on January 1, 1988.\(^\text{18}\) As with the Development Agreement legislation, the VTM legislation does not protect the developer from subsequent enactments by federal or state entities.\(^\text{19}\)

The Development Agreement and VTM each represent a legislative expansion of the judicially-developed vested rights rule.\(^\text{20}\) Both sets of laws, although seemingly intertwined, can be helpful to developers in different situations and do not necessarily overlap.\(^\text{21}\) In some situations, a developer is well advised to use not only a VTM, but to also attempt to negotiate and finalize a Development Agreement.\(^\text{22}\)

A developer can also challenge the effects of a subsequently-enacted land use regulation as a "taking" under the California and United States constitutions. The United States Supreme Court recently considered the constitutionality of land use regulations.\(^\text{23}\) In *Nollan v. California* 13. *Id.* § 65869.5.
14. *Id.* §§ 66498.1-66498.9.
15. *Id.* § 66498.1(b).
16. *Id.*
17. *Id.*
18. *Id.* § 66498.7(b).
19. *Id.* § 66498.6(b).
20. See infra note 26 and accompanying text.
21. See infra notes 267-83 and accompanying text.
22. For example, a developer may be well advised to use both a VTM and a Development Agreement when the developer seeks a forward commitment from a local agency as to certain development approvals.
Coastal Commission\textsuperscript{24} and First Evangelical Lutheran Church of Glendale v. County of Los Angeles\textsuperscript{25} the Court refined the determination of whether the imposition of land use regulation constitutes a taking and, if so, whether just compensation must be paid to the property owner.

This Article reviews: (1) the development and current status of the concept of vested rights in California; (2) the Development Agreement and the VTM as instruments to satisfy the divergent interests of the developer and the general public; and (3) the current status and application of the law of inverse condemnation.

II. THE CONCEPT OF VESTED RIGHTS

A. The Vested Rights Rule

In California, the judicially developed doctrine of vested rights provides that a property owner does not acquire a vested right to construct improvements under a specific land use classification until the developer has (1) obtained a valid building permit; and (2) performed substantial work and incurred substantial liabilities in good faith reliance on the permit.\textsuperscript{26} It is important to note that neither the existence of particular zoning in itself, nor work undertaken pursuant to governmental approvals issued prior to the construction of improvements, can legally form the basis of a vested right to build a structure that does not comply with the laws in effect when a building permit is issued.\textsuperscript{27} Prior to establishing a vested right to complete a project, local agencies retain complete author-


\textsuperscript{25} 107 S. Ct. 3141 (1987).


\textsuperscript{27} \textit{Avco Community Developers, Inc. v. South Coast Regional Comm'n}, 17 Cal. 3d 785, 793, 553 P.2d 546, 551, 132 Cal. Rptr. 386, 391 (1976), \textit{cert. denied}, 429 U.S. 1083 (1977).
ity to modify, control, condition or disapprove a proposed development, subject only to the specific limitation that their actions cannot be arbitrary or discriminatory. By the late 1970s, it became clear to both developers and jurists that the vested rights theory had little predictive value to assure developers that projects undertaken in reliance on governmental approvals could be completed as planned. In Raley v. California Tahoe Regional Planning Agency, the California Court of Appeal observed that:

The mechanisms at work here combined to "protect" the environment by protracted and undependable administrative procedures followed by years of litigation. Only the most hardy and well-heeled can run so harsh a gauntlet. Burdened by land costs, loan interest, architectural, engineering and attorney fees, many entrepreneurs run out of money or heart or both long before the finish line.

[The] handmaiden of prevailing administrative anarchy is the vested rights rule . . . [which] gives a green light to administrative vacillation virtually up to the moment the builder starts pouring concrete.

In the past, California courts have not been receptive to the pleas of developers who have sought to expand the modest protections afforded by the vested rights rule.

B. The Building Permit

California courts have held consistently that absent a building permit, the government cannot be estopped from taking actions to defeat the contemplated construction of a particular improvement, notwithstanding

30. See sources cited supra note 7.
32. Id. at 984-85, 137 Cal. Rptr. at 711-12.
the existence of an approved final subdivision map. This is true regardless of how precise and limited the conditional use permit, zoning and other preliminary approvals may be, or how substantial and detrimental the reasonable reliance by the developer is on these approvals.

The issuance of a building permit underlies the ultimate determination as to whether a vested right has been obtained under California law. The issuance of a building permit is a bright line, threshold event. If a permit has not been issued, the unique attributes of a particular development project will not be examined. A review of several California cases is necessary to completely understand this aspect of the rule.

1. *Avco*: the need for final approval

The leading vested rights case in California is *Avco Community Developers, Inc. v. South Coast Regional Commission,* wherein the California Supreme Court had to determine “the point in the development process at which a landowner can be said to have acquired a vested right to construct buildings on his land.”

Prior to enactment of the Coastal Zone Conservation Act of 1972 (Conservation Act), Orange County, California had zoned the 74-acre tract at issue in *Avco* for “Planned Community Development” and had enacted certain “Planned District Regulations” to govern its development. *Avco* Community Developers, Inc. (Avco) had obtained a final subdivision map for the tract, obtained a rough grading permit, and had installed storm drains, street improvements, culverts and utilities. Avco had expended in excess of $2,000,000 in the process. As a condition to and in reliance upon the present planned community zoning and the issuance of the grading permit, Avco had sold Orange County eleven acres of beach property at a price substantially below its actual


35. See sources cited supra note 34.


37. Id. at 791, 553 P.2d 550, 132 Cal. Rptr. at 390.


39. *Avco*, 17 Cal. 3d at 789, 553 P.2d at 549, 132 Cal. Rptr. at 389.

40. Id.

41. Id. at 790, 553 P.2d at 549, 132 Cal. Rptr. at 389.
fair market value, and had dedicated additional land to provide access to the eleven acres.\textsuperscript{42}

After these expenditures and actions, but before Avco obtained building permits, the Conservation Act went into effect. Avco was required to obtain a permit from the California Coastal Commission unless it could be demonstrated that Avco had acquired a vested right.\textsuperscript{43} Avco applied to the California Coastal Commission for an exemption from the Conservation Act permit requirements, claiming that it had already acquired a vested right to complete its intended project.\textsuperscript{44} The Commission denied the exemption, and its decision was upheld by the trial court.\textsuperscript{45} On appeal, the California Supreme Court unanimously affirmed.\textsuperscript{46}

The court concluded that no vested right existed under common-law principles because building permits had not been obtained and the size, type of building, and other specific details of the project had never been approved.\textsuperscript{47} Avco unsuccessfully argued that the current California rule was inapplicable for planned developments because the rule was rooted in the context of single lot projects subject to traditional zoning.\textsuperscript{48} Avco contended that in a situation involving a subdivision, a developer acquires a vested right to construct buildings at the time it subdivides the real property and installs improvements in reliance on governmental approvals issued in contemplation of the entire development.\textsuperscript{49} The Supreme Court disagreed:

[N]either the existence of a particular zoning nor work undertaken pursuant to governmental approvals preparatory to construction of buildings can form the basis for a vested right to build a structure which does not comply with the laws applicable at the time a building permit is issued. By zoning the property or issuing approvals for work preliminary to construction the government makes no representation to a landowner that he will be exempt from the zoning laws in effect at the subsequent time he applies for a building permit or that he may construct particular structures on the property, and thus the government cannot be estopped to enforce the laws in effect.

\textsuperscript{42} Id. at 799, 553 P.2d at 555, 132 Cal. Rptr. at 395.
\textsuperscript{43} Id. at 788-89, 553 P.2d at 548, 132 Cal. Rptr. at 388.
\textsuperscript{44} Id. at 790, 553 P.2d at 549, 132 Cal. Rptr. at 389.
\textsuperscript{45} Id.
\textsuperscript{46} Id. at 802, 553 P.2d at 557, 132 Cal. Rptr. at 397.
\textsuperscript{47} Id. at 789-91, 553 P.2d at 548-49, 132 Cal. Rptr. at 388-89.
\textsuperscript{48} Id. at 796, 553 P.2d at 553, 132 Cal. Rptr. at 393.
\textsuperscript{49} Id. at 791, 553 P.2d at 550, 132 Cal. Rptr. at 390.
when the permit is issued.\textsuperscript{50} The court restated its position that by incurring substantial up-front expenditures based on existing zoning and preliminary approvals, a developer takes a "calculated risk" that the rules of the game may change before the developer obtains final building permits to complete structures that will enable the developer to recoup its investment.\textsuperscript{51}

Finally, the court rejected Avco's claim that the sale to Orange County of certain beach property at below fair market value estopped the state from enforcing the provisions of the Conservation Act.\textsuperscript{52} Justice Mosk, writing for the court, indicated that a specific approval, short of a building permit, might give rise to a vested right if the approval at issue provides the same degree of specificity and definition to a project that a building permit would.\textsuperscript{53} Obviously, the determination of whether such an approval meets this standard is a subjective one. As a result, a developer cannot be certain it has received all discretionary approvals necessary to create a vested right until it receives some kind of final determination through the courts or otherwise. Other California cases have recognized this problem and have relied directly on the terms of permits that demonstrate that all final discretionary approvals have been obtained.\textsuperscript{54}

\textit{Avco} involved the application of state legislation to a real estate development under construction.\textsuperscript{55} Several other courts have reached similar results in cases involving intervening local legislation.\textsuperscript{56} In \textit{Youngblood v. Board of Supervisors},\textsuperscript{57} the California Supreme Court held that developers are entitled to receive final subdivision map approval at the moment they comply with the conditions attached to the tentative tract map.\textsuperscript{58} The court stated that it was only fair to the public that a governing body should be required to decide whether and on what

\begin{itemize}
\item \textsuperscript{50} \textit{Id.} at 793, 553 P.2d at 551, 132 Cal. Rptr. at 391.
\item \textsuperscript{51} \textit{Id.} at 792, 553 P.2d at 550-51, 132 Cal. Rptr. at 390.
\item \textsuperscript{52} \textit{Id.} at 800, 553 P.2d at 556, 132 Cal. Rptr. at 395-96.
\item \textsuperscript{53} \textit{Id.} at 797, 553 P.2d at 554, 132 Cal. Rptr. at 393-94.
\item \textsuperscript{55} \textit{Avco}, 17 Cal. 3d at 789-90, 553 P.2d at 549, 132 Cal. Rptr at 389.
\item \textsuperscript{57} 22 Cal. 3d 644, 586 P.2d 556, 150 Cal. Rptr. 242 (1978).
\item \textsuperscript{58} \textit{Id.} at 654-55, 586 P.2d at 560-61, 150 Cal. Rptr. at 247-48.
\end{itemize}
grounds to approve the contemplated subdivision at the same time that it acts on the tentative tract map.\textsuperscript{59}

2. \textit{Oceanic:} application of \textit{Avco}

In \textit{Oceanic California, Inc. v. North Central Coast Regional Commission},\textsuperscript{60} the California Supreme Court determined that the developer did not have a vested right to complete its proposed development even though the facts strongly indicated that the developer had received the equivalent of final approval under the "building permit-equivalent" standard suggested in \textit{Avco}.\textsuperscript{61} Prior to the adoption of the Conservation Act in 1972,\textsuperscript{62} the plaintiff, Oceanic California, Inc. (Oceanic), spent approximately $27,000,000 in connection with a large residential and commercial-recreational project located in Sonoma County, California.\textsuperscript{63} From 1964 through 1972, Sonoma County had issued various approvals relating to the project, including planned community zoning, conditional use permits for condominiums, necessary grading permits and building permits for certain structures.\textsuperscript{64} As a condition of the planned community zoning and the subdivision approvals, Oceanic agreed to impose stringent private covenants upon the land.\textsuperscript{65} Prior to the adoption of the Conservation Act, Oceanic had subdivided lots that were subsequently sold, and had constructed single family residences and condominiums, together with related facilities.\textsuperscript{66} Oceanic obtained a permit to appropriate certain water located at a nearby river for use in connection with all of the units and acquired use permits to construct three waste water treatment plants after starting construction on two of them. Moreover, Oceanic arranged to furnish the units with all necessary utilities at the time the units were completed, and had previously dedicated 120 acres of ocean front property as a park which the Board of Supervisors had agreed to accept.\textsuperscript{67}

After the California Coastal Zone Conservation Act of 1972\textsuperscript{68} was adopted, Oceanic applied to the regional commission for an exemption from the permit requirements of the Act.\textsuperscript{69} The Act provided that if a developer had acquired a vested right based on the issuance of a valid

\textsuperscript{59} \textit{Id.} at 655-56, 586 P.2d 562, 150 Cal. Rptr. at 248.
\textsuperscript{61} \textit{Id.} at 75-76, 133 Cal. Rptr. at 674-75.
\textsuperscript{63} \textit{Oceanic}, 63 Cal. App. 3d at 65, 133 Cal. Rptr. at 668.
\textsuperscript{64} \textit{Id.} at 65, 133 Cal. Rptr. at 668.
\textsuperscript{65} \textit{Id.} at 63, 133 Cal. Rptr. at 667.
\textsuperscript{66} \textit{Id.} at 64, 133 Cal. Rptr. at 668.
\textsuperscript{67} \textit{Id.} at 62-64, 133 Cal. Rptr. at 667-68.
\textsuperscript{68} \textit{CAL. PUB. RES. CODE} §§ 27000-27650 (West 1986) (repealed 1977).
\textsuperscript{69} \textit{Oceanic}, 63 Cal. App. 3d at 61, 133 Cal. Rptr. at 666.
building permit prior to the effective date of the Act, the developer was not required to obtain an additional permit from the regional coastal commission. Oceanic conceded that it had not secured a building permit. Nonetheless, it contended that it had acquired a vested right based on the numerous approvals and actions taken by the county during the prior eight year period, which it claimed satisfied the exemption requirements of the Act.

Oceanic contended that (1) a vested right to continue should be recognized where a specific plan has been approved by the applicable governmental authority and actual development in reliance on the approval has been commenced, and (2) that establishing a vested right on the basis of a planned unit development approval was in the public interest and was essential to achieve modern planning goals. The trial court rejected these arguments and held that Oceanic did not have a vested right to complete the project in the absence of building permits. The trial court's holding was later affirmed by the Court of Appeal.

3. The building permit and equitable estoppel

Raley v. California Tahoe Regional Planning Agency involved the construction of a shopping center in Placer County, California. Although subject to a number of conditions, including approval by regional planning agencies, the developer in Raley had obtained preliminary development approval from the County. In accordance with the preliminary approval, the developer sought all necessary regional plan-
ning agency approvals. The approvals were issued with reference to a specific plan of development, including a plan for the construction of off-site improvements. Prior to obtaining the final building permits, but in reliance upon a land use permit it had already obtained, Raley spent approximately $150,000. Soon thereafter, the California Tahoe Regional Planning Agency (the Agency), one of the agencies that had granted its approval already, sought to revoke the approval and conduct a further review. The trial court accepted Raley’s reliance on the theory of equitable estoppel and denied the Agency’s attempts at revocation. The court of appeal overturned the trial court and held that Raley had not fulfilled the prerequisites necessary to establish a vested right. The court acknowledged the suggestion in Avco that a developer might acquire a vested right short of the issuance of a building permit if the preliminary approvals provide the same degree of specificity to a project as the parameters of a building permit would. Nevertheless, the court concluded that, based on the elements present in Raley, no estoppel arose under the “building permit-equivalent” theory suggested in Avco.

4. Prohibiting subsequent phases

In Court House Plaza Co. v. City of Palo Alto, the developer had its real property rezoned as a planned community district so that it could construct an office building and parking structure in two phases. The first phase consisted of a four-story office building over a two-level parking structure. In the second phase, the developer intended to construct an additional six stories to the office building and to make additional

79. Id.
80. Id.
81. Id. at 984, 137 Cal. Rptr. at 711.
82. Id. at 972-73, 137 Cal. Rptr. at 703-04.
83. Id. at 974, 137 Cal. Rptr. at 704-05.
84. Id. at 977, 986, 137 Cal. Rptr. at 707, 712.
85. Id. at 975 n.5, 137 Cal. Rptr. at 705 n.5.
86. Id. at 978, 137 Cal. Rptr. at 707.
88. A Planned Community Zoning District is a special zoning classification conceptually approved by the applicable city council. In order to receive such a zoning classification, the developer must provide the city council with a detailed project plan that benefits the community at large. Once approved, the developer has the city’s blessing to construct the developer’s planned development in accordance with the developer’s conceptual plan. A Planned Community Zoning District can only be altered or amended by a specific zoning change passed by the appropriate city council. See, e.g., Palo Alto, Cal. Municipal Code ch. 18.68 (1967 & rev. Oct. 1986).
89. Court House Plaza, 117 Cal. App. 3d at 878, 173 Cal. Rptr. at 162-63.
90. Id., 173 Cal. Rptr. at 162.
improvements to the parking structure. The developer had received all of the necessary permits and approvals and had completed all of the phase-one office building improvements. In anticipation of completing the phase-two improvements, the developer expended $450,000 for the construction of the necessary foundation support and incurred an additional $500,000 in preparatory expenses.

After the first phase was completed and the developer had incurred these additional phase-two expenses, a 50-foot building height restriction was enacted which affected all buildings in the city of Palo Alto, California, except those in planned community districts. Palo Alto subsequently rejected the developer's request to extend its development plan, and also refused to issue a building permit because the proposed phase-two additions failed to comply with then-existing building codes. The court held that the improvements constructed by the developer in anticipation of its second phase did not provide the developer with any vested right to complete phase two in accordance with the originally approved development plan. The developer was simply penalized for incurring the additional preparatory costs prior to issuance of a building permit for phase two.

5. The building permit requirement one step further

The California Supreme Court in Pardee Construction Co. v. City of Camarillo expanded on the Avco decision. Pardee Construction Co. (Pardee) entered into a stipulated judgment after Pardee sued the City for passing growth control ordinances that reduced the permissible density on the relevant property. Prior to passing the ordinances, the City had approved Pardee's

91. Id.
92. Id. at 879-80, 173 Cal. Rptr. at 162-63.
93. Id. at 885, 173 Cal. Rptr. at 167.
94. Id. at 878, 173 Cal. Rptr. at 163.
95. Id. at 878-79, 173 Cal. Rptr. at 163.
96. Id. at 885, 173 Cal. Rptr. at 167.
102. Pardee, 37 Cal. 3d at 468, 690 P.2d at 703, 208 Cal. Rptr. at 229.
master plan, annexed the tract, and zoned the tract to permit development consistent with the master plan. The judgment provided that (1) Pardee had "a vested right to proceed with the development of all of the [p]roperty" in conformity with the approved master plan and zoning; and (2) the City of Camarillo was "estopped" from enacting land use regulations "inconsistent" with the master plan and zoning.

In 1981, after the parties had entered into the stipulated judgment, the City adopted another growth control ordinance limiting the total number of building permits to be issued each year. The ordinance, if applied to Pardee, would have significantly affected its contemplated project. After spending approximately $14,000,000 in connection with the development, Pardee filed suit seeking an order establishing that the ordinance should be inapplicable to its project. Pardee claimed that it had previously acquired a vested right under the stipulated judgment to proceed with its development in accordance with the previously approved master plan and zoning.

The trial court denied Pardee's request without opinion. The California Supreme Court affirmed, holding that the growth control ordinance did not violate Pardee's vested right to complete its development in accordance with the master plan and zoning, but merely affected the "timing" of Pardee's development. Pardee effectively allows a government to control a developer's timing of the construction and ultimate completion of a project, thereby permitting a government to directly affect the overall economic viability of a proposed development.

The California Supreme Court has yet to address the issue of the potential conflict between a Development Agreement and subsequently enacted land use controls. One must consider whether Pardee indi-

103. Id., 690 P.2d at 703, 208 Cal. Rptr. at 229-30.
104. Id.
105. Id. at 470, 690 P.2d at 704, 208 Cal. Rptr. at 231.
106. Id. at 473, 690 P.2d at 706, 208 Cal. Rptr. at 233.
107. Id. at 467-68, 690 P.2d at 702, 208 Cal. Rptr. at 229.
108. Id. at 466-67 & n.1, 690 P.2d at 702 & n.1, 208 Cal. Rptr. at 228-29 & n.1.
109. Id. at 472-73, 690 P.2d at 706, 208 Cal. Rptr. at 233. The court explained:

The Growth Control Ordinance is essentially a regulation of the time, or rate, of development. It regulates the rate of development by limiting the number of dwelling units that may be built per year. It allocates the number of units among developers according to engineering and aesthetic criteria that, on their face, do not deprive Pardee of its right to build the units contemplated by the consent judgment. It does not change zoning and does not alter the master plan and therefore does not restrict or prevent Pardee from its development of the property in accordance with the master plan and the zoning provided by Ordinance No. 178.

Id.

110. See infra text accompanying notes 200-66.
cates that the California Supreme Court will determine that a subsequently adopted ordinance falls short of violating the "vested rights" of a developer based on a Development Agreement, notwithstanding the fact that new conditions imposed on a developer to obtain building permits increase the time and expense of a project substantially.\textsuperscript{111}

6. Equitable estoppel with respect to related permits

California case law suggests that once a building permit has been obtained and the developer has relied upon it to its material detriment, the doctrine of equitable estoppel may be asserted by the developer to prevent a government agency from denying the issuance of related permits.\textsuperscript{112} For example, in \textit{Stanson v. San Diego Coast Regional Commission},\textsuperscript{113} the developer wanted to remodel a portion of a building that had been used previously for storage and restaurant purposes.\textsuperscript{114} The building was on property in the coastal zone and was within the San Diego Coast Regional Commission's (Commission) jurisdiction.\textsuperscript{115} The developer contacted the Commission before it obtained a building permit and was advised that a coastal development permit was not necessary to convert the storage space.\textsuperscript{116} The developer received a valid building permit from the City of San Diego and completed more than ninety percent of the necessary renovation work.\textsuperscript{117} Although the developer had relied on the issuance of the building permit when it commenced the project, the Commission informed the developer later that a coastal development permit would, in fact, be required.\textsuperscript{118} Apprised of this new fact, the developer applied for, and was denied, the coastal development permit.\textsuperscript{119} The developer then sought a writ of mandate to require the Commission to issue the permit.\textsuperscript{120} The trial court held in favor of the Commission.\textsuperscript{121} The court of appeal reversed, and remanded the case to the trial

\begin{itemize}
  \item \textsuperscript{111} See supra text accompanying notes 97-110.
  \item \textsuperscript{113} 101 Cal. App. 3d 38, 161 Cal. Rptr. 392 (1980).
  \item \textsuperscript{114} \textit{Id.} at 41, 161 Cal. Rptr. at 394.
  \item \textsuperscript{115} \textit{Id.}
  \item \textsuperscript{116} \textit{Id.} at 42, 161 Cal. Rptr. at 395.
  \item \textsuperscript{117} \textit{Id.}
  \item \textsuperscript{118} \textit{Id.}
  \item \textsuperscript{119} \textit{Id.} at 42-43, 161 Cal. Rptr. at 395-96.
  \item \textsuperscript{120} \textit{Id.} at 43, 161 Cal. Rptr. at 396.
  \item \textsuperscript{121} \textit{Id.} at 43-44, 161 Cal. Rptr. at 396.
\end{itemize}
court. The court of appeal instructed the trial court to apply the doctrine of equitable estoppel to determine whether the developer had acquired a vested right to complete the renovation. The trial court was instructed to consider (1) the material work that had been undertaken; and (2) the substantial costs the developer had incurred by relying on the receipt of a valid building permit and on the representation of a staff member of the Commission that a coastal development permit would not be required. The appellate court recited its understanding of the equitable estoppel doctrine with regard to the land use context as follows: “[A]n owner of property acquires a vested right to construct a building where the conduct of the government amounts to a representation that such construction is fully approved and legal, and in reliance on such representation the owner materially changes position.”

The Stanson decision implies that once a building permit is issued by a local government entity, a subsequent local governing body may be estopped from claiming that a related, albeit independent, permit must be obtained if the developer has reasonably and materially relied to its detriment on the prior conduct of the first local government agency.

In two recent decisions, Halaco Engineering Co. v. South Central Coast Regional Commission and Monterey Sand Co. v. California Coastal Commission, the California courts have taken Stanson one step further. In Halaco, an engineering company claimed that it had acquired a vested right to continue making improvements on an industrial siltation pond. The company, in building the plant and the related siltation pond, had relied on the representations of local officials that no grading permit or any other permit would be required. The company claimed that there was no need to obtain a coastal development permit, notwithstanding the fact that no grading or other local permit had been actually procured for the pond itself. The California Supreme Court agreed with the company. The court based its holding on the trial court’s finding that the local government knew when it issued permits for the related plant that the improvement and periodic enlargement of the

122. Id. at 51, 161 Cal. Rptr. at 400.
123. Id. at 49-51, 161 Cal. Rptr. at 399-400.
124. Id.
125. Id. at 49, 161 Cal. Rptr. at 399.
126. Id.
129. Halaco, 42 Cal. 3d at 56-57, 720 P.2d at 17, 227 Cal. Rptr. at 669.
130. Id. at 76 n.21, 720 P.2d at 30 n.21, 227 Cal. Rptr. at 682 n.21.
131. Id. at 59, 720 P.2d at 18-19, 227 Cal. Rptr. at 670.
132. Id. at 76, 720 P.2d at 31, 227 Cal. Rptr. at 682.
siltation pond was an important part of the plant’s operation.\textsuperscript{133}

In Monterey, the court of appeal applied the doctrine of equitable estoppel and held that a sand mining company had acquired a vested right to continue to mine in connection with a 1968 state lease.\textsuperscript{134} The State of California granted a mineral lease to Monterey Sand in 1968 as the result of a litigation settlement.\textsuperscript{135} Monterey Sand gave up its claim of right and title to the subject property in exchange for the grant from the State of the right to continue its existing sand extraction operations for forty years.\textsuperscript{136} The lease did not condition the right to continue extraction operations on the acquisition of a federal permit.\textsuperscript{137} A vested right was found despite the fact that the company had failed to obtain a required federal permit prior to the effective date of the Conservation Act.\textsuperscript{138} The court of appeal found that all necessary authorizations from the State were acquired by virtue of the lease and further found that “the state agency responsible for protection of the state’s interest in public lands” had made the promises in question.\textsuperscript{139} The court decided that the state’s acquiescence in Monterey Sand’s continued extraction activities with knowledge that it was possible that a federal permit might be required estopped the state from later relying on the lack of the permit to assert coastal act permit jurisdiction over Monterey Sand.\textsuperscript{140} The court concluded that it would be difficult to envision a stronger case for application of estoppel principles than the unique facts presented by this case.\textsuperscript{141}

Reliance on a building permit satisfies one element of the vested rights rule only if the building permit is valid in all respects.\textsuperscript{142} California case law indicates that if a government agency wrongfully withholds a permit, or if a developer relies on the issuance of a permit that is later found to have been issued improperly, the developer is usually not entitled to any form of relief.\textsuperscript{143} A vested right is not created regardless of

\textsuperscript{133} Id. at 75-76, 720 P.2d at 30, 227 Cal. Rptr. at 682.
\textsuperscript{134} Monterey, 191 Cal. App. 3d at 177-78, 236 Cal. Rptr. at 320.
\textsuperscript{135} Id. at 177, 236 Cal. Rptr. at 320.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id. at 176, 236 Cal. Rptr. at 319. When the Conservation Act went into effect, it required certain coastal development permits. \textsc{cal. pub. res. code} §§ 27000-27650.
\textsuperscript{139} Id. at 177, 236 Cal. Rptr. at 320.
\textsuperscript{140} Id. at 178, 236 Cal. Rptr. at 321.
\textsuperscript{141} Id. at 177, 236 Cal. Rptr. at 320.
\textsuperscript{143} See, e.g., Strong, 15 Cal. 3d at 725, 543 P.2d at 266-67, 125 Cal. Rptr. at 898-99;
the extent of work performed by a developer or the amount of liabilities incurred.\textsuperscript{144}

For example, in \textit{California Central Coast Regional Coastal Zone Conservation Commission v. McKeon Construction},\textsuperscript{145} the California Court of Appeal determined that the City of Capitola, California frustrated the developer's attempts to obtain a building permit.\textsuperscript{146} During the pendency of the dispute, the Conservation Act\textsuperscript{147} went into effect and was applicable to the area where the condominium development was to be located.\textsuperscript{148} The developer tried to persuade the court that had the building permit not been arbitrarily denied at the outset, it would have performed sufficient work to establish a vested right prior to the effective date of the Conservation Act, and would have completed construction free of the Conservation Act's requirements.\textsuperscript{149} Nonetheless, the court of appeal held that the developer had failed to acquire a vested right to proceed with the project.\textsuperscript{150} The court reasoned that the developer was subject to the Conservation Act's requirements because it had failed to perform substantial work in reliance upon a valid building permit prior to the effective date of the Act.\textsuperscript{151}

\textbf{C. The Substantial Expenditure Aspect}

In California, a developer must not only obtain a valid building permit in order to acquire a vested right, but must also perform substantial work and incur substantial liabilities in good faith reliance on the permit.\textsuperscript{152} Early case law held that for a vested right to be established, only a small amount of work had to be performed.\textsuperscript{153} In the 1958 case of \textit{Kissinger v. City of Los Angeles},\textsuperscript{154} the court concluded that the plaintiff

\begin{itemize}
\item People v. County of Kern, 39 Cal. App. 3d 830, 115 Cal. Rptr. 67 (1974);
\item Pettit v. City of Fresno, 34 Cal. App. 3d 813, 110 Cal. Rptr. 262 (1973).
\end{itemize}
had acquired a vested right to complete construction of several apartment buildings after the plaintiff had incurred approximately $2,300 in expenses performing preliminary work.\(^\text{155}\)

In a recent California case, *Highland Development Co. v. City of Los Angeles*,\(^\text{156}\) the court found that the amount of money spent in reliance on the building permit must be measured according to the total scope of the work authorized by the building permit.\(^\text{157}\) In *Highland*, the City of Los Angeles issued a driveway permit to the plaintiff who immediately completed the driveway at a total cost of $1,000.\(^\text{158}\) After the work was finished, the city revoked the plaintiff’s building permit.\(^\text{159}\) The court ruled in favor of the plaintiff because the extent of the work that had been performed was substantial in relation to the scope of the construction authorized by the building permit.\(^\text{160}\) The court stated that it had “no hesitation . . . that such work and expenditures, even if small in absolute terms, could constitute substantial reliance sufficient to create a vested right in the driveway permit.”\(^\text{161}\)

Another California decision, however, creates a degree of uncertainty in trying to determine the meaning of “substantial.” In *Santa Monica Pines, Ltd. v. Rent Control Board*,\(^\text{162}\) the developer claimed that it had acquired a vested right to convert apartment units into condominium units free from the constraints of a newly enacted rent control ordinance.\(^\text{163}\) The developer based its assertion on the expenditures it had made in reliance upon a tentative map that had been approved before the rent control ordinance was adopted.\(^\text{164}\) The California Supreme Court held that the developer’s payment of $42,000 for a condominium license fee after the rent control ordinance was adopted failed to constitute reasonable reliance by the developer.\(^\text{165}\) Instead, the court decided that the developer had simply taken a “calculated risk.”\(^\text{166}\) The court held further that to be considered part of a substantial expenditure, the money
must be spent after the permit or other entitlements are issued and before the change in law occurs that affects the development.\(^\text{167}\) The court also determined that the developer's expenditure of over $1,000 prior to the enactment of the rent control ordinance and in reliance on the tentative map, failed to constitute a "substantial" percentage of the total projected cost of $60,000 to complete the condominium conversion.\(^\text{168}\)

In *Cooper v. County of Los Angeles*,\(^\text{169}\) which was decided prior to *Santa Monica Pines*, the court set forth two alternative tests to use in determining whether the expenditures made and liabilities incurred by a developer are "substantial."\(^\text{170}\) If the development is relatively small, the "percentage comparison test" is used.\(^\text{171}\) In applying the percentage comparison test, the court compares on a percentage basis the amount of liability incurred and construction performed with the total cost of the project. If the percentage is substantial, the developer acquires a vested right.\(^\text{172}\) When the development is large, the "quantitatively substantial test" is used.\(^\text{173}\) Under this theory, the court looks at the total amount actually expended and the total amount of liability incurred, without considering total development costs.\(^\text{174}\) As with the percentage comparison test, if the total amounts are substantial, a developer may acquire a vested right to complete the project as approved.\(^\text{175}\) The proposed substantiality tests, however, fail to provide much guidance since the assessment of expenditures and liabilities remains subjective.\(^\text{176}\)

To determine whether work performed and money spent are substantial, courts often distinguish "soft" costs from "hard" costs.\(^\text{177}\) "Soft" costs include the cost of land acquired as well as costs related to architectural and engineering fees.\(^\text{178}\) "Hard" costs consist of costs for physical improvements to the land, and the material and labor costs for

\(^{167}\) Id.

\(^{168}\) Id.


\(^{170}\) Id. at 538-39, 138 Cal. Rptr. at 233.

\(^{171}\) Id.

\(^{172}\) Id.

\(^{173}\) Id.

\(^{174}\) Id.

\(^{175}\) Id.

\(^{176}\) Id.

\(^{177}\) The court offered no concrete percentage guidelines against which to assess "substantiality."


\(^{178}\) *Raley*, 68 Cal. App. 3d at 985-86, 137 Cal. Rptr. at 712.
the structures that will be constructed on the property.\textsuperscript{179} A major shortcoming of the Cooper tests is that "soft" costs are excluded when assessing whether the expenditures are substantial.\textsuperscript{180} For developers, however, both types of costs represent "dollars of equal hardness."\textsuperscript{181}

The "substantial expenditure" criteria were also addressed in \textit{British and Continental Development Corp. v. City of Los Angeles}.\textsuperscript{182} The trial court held that the developer had successfully established a vested right to complete construction of an office tower because it had spent approximately $18,000 preparing for construction.\textsuperscript{183} The trial court held further that even if the $18,000 spent for site grading and demolition of existing structures could not be considered substantial, the $1,300,000 value of the demolished improvements, taken with the $18,000, was substantial.\textsuperscript{184}

The court of appeal affirmed.\textsuperscript{185} The court ruled that because the developer previously had obtained a building permit relating to its project, the trial court was justified in including in its analysis the original value of the demolished building.\textsuperscript{186} The court of appeal held that since the developer had acted in good faith, performed substantial work, and had procured a building permit authorizing the construction of the proposed office building, it acquired a vested right to perform construction free from the effects of the traffic control ordinance at issue.\textsuperscript{187}

The trial court's analysis in \textit{British and Continental Development Corp.} seems to depart from the current trend of cases.\textsuperscript{188} The trial court took into account the "soft" cost of the value of the demolished building.\textsuperscript{189} The decision illustrates how difficult it is to predict precisely which costs will be considered by a court and whether the total amounts expended will be deemed to be "substantial."

\begin{footnotes}
\item[179] \textit{Id.}
\item[180] \textit{Id.}
\item[181] \textit{Id.} at 986, 137 Cal. Rptr. at 712.
\item[183] \textit{Id.} at 2.
\item[184] \textit{Id.} at 4.
\item[185] \textit{British and Continental Dev. Corp.}, No. B 021742 (Cal. App Ct., 2d Dist., Div. 4, Apr. 17, 1987).
\item[186] \textit{Id.}
\item[187] \textit{Id.} at 7-8.
\item[188] See supra notes 156-81 and accompanying text.
\end{footnotes}
D. Good Faith Reliance

The third element in determining whether a developer has obtained a vested right to complete a project is the prerequisite that the developer perform work and expend money *in good faith reliance* upon the grant of a permit. If work is performed without a permit when one is required, this work is considered to be illegal and not performed in good faith. The expenditures associated with illegal work are not considered in determining whether the developer has acquired a vested right. Moreover, if the developer anticipates that a change in the law will occur, and proceeds to complete work in an abnormally hasty manner to maximize construction prior to the anticipated change, courts have held that the good faith reliance requirement is not met.

The Hawaii case of *County of Kauai v. Pacific Standard Life Insurance Co.* illustrates this situation. In *Pacific Standard*, after a rezoning of the developer's property was approved and after building permits were issued, the developer incurred substantial construction expenses. After the rezoning, but before the issuance of building permits, a referendum petition was executed and the rezoning was placed on the ballot for the upcoming election. The election was held three months after the issuance of the first building permit and the rezoning of the property was repealed. The court held that the developer did not acquire a vested right. The developer's reliance was not in "good faith" because it knew that the referendum petition and the forthcoming election might change the zoning classification. The *Pacific Standard* decision appears to send a strong message to developers: developers may not rely on a permit until all potential, known contests of that permit are resolved.

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192. See sources cited supra note 191.


195. *Id.* at 320, 653 P.2d at 770-71, 777.

196. *Id.* at 321, 653 P.2d at 770.

197. *Id.* at 327, 653 P.2d at 771.

198. *Id.* at 326, 653 P.2d at 779.

199. *Id.* at 326, 653 P.2d at 777-78.
III. THE DEVELOPMENT AGREEMENT AND VESTING TENTATIVE MAP

Over the past decade, several statutes have been enacted that purport to limit the power of local agencies to apply newly enacted ordinances to ongoing development projects. Principal among these are the Development Agreement legislation of 1979 and the Vesting Tentative Map legislation of 1984.

The California legislature enacted the Development Agreement legislation and the Vesting Tentative Map legislation in response to the difficulties that developers of long-range, multi-phased projects had encountered as a result of the judicially developed vested rights doctrine. Both pieces of legislation were passed in an attempt to provide developers with the statutory equivalent of a vested right.

A. Development Agreements

A Development Agreement is a contract between a local government and a developer which delineates the terms of a developer's proposed project. In enacting the Development Agreement legislation of 1979, the California legislature explained:

(a) The lack of certainty in the approval of development projects can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning which would make maximum efficient utilization of resources at the least economic cost to the public.

(b) Assurance to the applicant for a development project that upon approval of the project, the applicant may proceed with the project in accordance with existing policies, rules and regulations, and subject to conditions of approval, will strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic costs of development.

The legislation was intended both to preserve local government control over development projects and to give developers the opportunity to

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specify the parameters of a project in one undertaking before construction is started.206 Further, the legislation was aimed at providing a developer with some assurance, at the time resources are committed to a project, that the developer will be entitled to complete a project as approved.207 The Development Agreement legislation also fulfills the public need to alleviate haphazard land regulation schemes that burden smaller, less integrated development projects, and to provide for comprehensive long-term planning and land use regulation for major developments.

1. Provisions of the Development Agreement legislation

Pursuant to California Government Code sections 65864-65869.5, a local government agency may, but is not required to, enter into a Development Agreement with a property owner as a means to guide the development of the property.208 Unless otherwise provided in the Development Agreement the rules, regulations, and official policies governing permitted uses, design, density, improvement and construction of the proposed project consist of those that are in effect when the Development Agreement is fully executed.209

A city or county has the right to enter into a Development Agreement with the legal or equitable owner of any property; however, the city or county must comply with the requirements of any local ordinance that has been enacted pursuant to the Development Agreement legislation.210 The Development Agreement legislation requires each local government to enact an ordinance outlining the procedures and requirements applicable to Development Agreements.211

The local ordinance must include: (1) a requirement that the Development Agreement be reviewed at least once a year; and (2) at the yearly review, the developer has the burden of proving its "good faith compliance with the terms of the agreement."212 At the yearly review, if the local agency determines, on the basis of adequate proof, that the developer has failed to comply in good faith with the covenants and obligations of the Development Agreement, the local agency may either modify or terminate the Development Agreement.213

The Development Agreement itself must specify "the duration of

206. Id. § 65864(b).
207. Id.
208. Id. §§ 65864-65869.5.
209. Id. § 65866.
210. Id. § 65865.
211. Id. § 65865(c).
212. Id. § 65865.1.
213. Id.
the agreement, the permitted uses of the property, the density or intensity of use, the maximum height and size of proposed buildings, and provisions for reservation or dedication of land for public purposes." It may also include terms and limitations applying to subsequent discretionary government action, provided that such terms and limitations do not impair the use or density of the property, or the intensity of development as specified in the Development Agreement. The Development Agreement may also specify the time frame when construction of the development shall be commenced and completed, and may also include covenants and conditions relating to financing the required public facilities. If the land is within the California Coastal Zone, the Development Agreement must be approved by the California Coastal Zone Commission.

If a Development Agreement is adequately specific when adopted, it can solve many of the problems faced by a developer under the judicially formulated vested rights doctrine. A Development Agreement will be valid, as approved, regardless of any subsequent changes in the general plan, zoning, subdivision or building regulations of the city or county. Therefore, the developer can proceed under the approved Development Agreement subject only to regulations that are in effect when the Development Agreement is executed. It must be noted, however, that a Development Agreement is subject to any subsequently enacted federal or state laws.

2. Why enter into a Development Agreement?

Without the protections and benefits of a Development Agreement (or a Vesting Tentative Map), a developer in California has little assurance that it will be permitted to complete a project as designed. A Development Agreement protects developers who expend significant amounts of money in the early stages of a project.

214. Id. § 65865.2. Unlike the Vesting Tentative Tract Map, the term of a Development Agreement is not limited by statute. Id. § 65865.2. Cf. Id. §§ 66452.6, 66498.1 (West 1983 & Supp. 1988) (providing the prescribed duration of the vesting attributes of a VTM).

215. Id. § 65865.2.

216. Id.

217. Id.

218. Id. §§ 65867.5, 65869 (West 1983 & Supp. 1988).

219. Id. § 65866.

220. Id. § 65869.5 (West 1983 & Supp. 1988). A Development Agreement is recorded once it has been approved. Id. § 65868.5. It is then enforceable by the parties and by any successors and assigns. Id. After recording, the Development Agreement can be amended or cancelled only with the consent of the parties or of any successors or assigns. Id. § 65868.

221. See supra text accompanying notes 34-199.
In Avco Community Developers, Inc. v. South Coast Regional Commission, the California Supreme Court essentially eliminated the protection of the doctrine of equitable estoppel for developers and substituted in its place the "building permit" requirement discussed above. Avco provides an insignificant degree of security for a developer who expends material costs at the inception of a project. Since a developer must prove substantial expenditures and good faith reliance on a validly issued building permit, the seemingly clear holding of Avco nonetheless exposes developers to vague standards and subjective determinations of whether a vested right exists. Further, reliance on a building permit cannot provide a developer with a vested right that is broader than the specified scope of the permit. For example, the fact that a developer has graded its property pursuant to a validly issued grading permit will not guarantee that the developer is entitled to complete the project.

From a local government perspective, the assurances provided by a Development Agreement serve to avoid any potential "chilling effect" on the growth of a vital real estate development market. A Development Agreement also gives the developer the opportunity to demonstrate to local government agencies that the proposed project is economically feasible and that the development will not burden the public. Local government agencies benefit further from Development Agreements because the agreements can be structured to require developers to conform to well-defined parameters. A Development Agreement can specify that improvements must be completed within an established time frame and in a prescribed fashion. Finally, as discussed in Part IV, a Development Agreement may provide a contractual basis for certain expenditures made by a developer and thus may enable a local government to circumvent the requirement that a nexus must exist between a land use condition and the burden being imposed, under the recent United States Supreme Court decision in Nollan v. California Coastal Commission.

3. Enforceability of Development Agreements

At first blush, the Development Agreement appears to establish a procedure whereby a developer can securely proceed with the substantial

222. 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), cert. denied, 429 U.S. 1083 (1977); CAL. GOV'T CODE § 65868.
223. See supra notes 36-59 and accompanying text.
224. See supra notes 52-54 and accompanying text.
225. See supra notes 92-94 and accompanying text.
226. See infra notes 284-438 and accompanying text.
227. 107 S. Ct. 3141 (1987); see infra notes 367-99 and accompanying text.
expenditure of funds at the outset of a multi-phase project. There re-

mains, however, the significant question of whether the agreements will
be enforced by the courts.\textsuperscript{228} Land use regulations and procedures relating
to the development and improvement of property are within the po-
lice power of local government.\textsuperscript{229} Since a Development Agreement is
binding not only on the current governing body, but also on its suc-

cessors,\textsuperscript{230} an argument can be made that by entering into a Development
Agreement, the present governing body deprives any future governing
bodies from exercising their inherent police powers.

It is settled California law that a government may not contract away
its future right to exercise its police power.\textsuperscript{231} In many instances in
which local agencies and developers have attempted to enter into long-
term agreements relating to future developments, the courts have invali-
dated these attempts and declared them unenforceable.\textsuperscript{232} Therefore, the
inherent benefit of the Development Agreement as a method by which to
avoid the effect of subsequent changes in the law that are detrimental to a
developer is still questionable. One can still argue, however, that en-
forcement of a Development Agreement does not deprive a future gov-
ernment body of its regulatory discretion or its police powers. A
Development Agreement deals specifically with the problems and issues
properly considered by a local governing agency in the exercise of its
police power. Thus, when a governing agency enters into an agreement,
it can be viewed as the agency's exercise of its current police power re-
garding those specific issues rather than an abdication of the local
agency's exercise of its future police power.

Further, the Development Agreement legislation has certain built-in
protections for government entities. First, the legislation requires peri-
odic review of all Development Agreements.\textsuperscript{233} Second, the legislation

\textsuperscript{228} See infra note 232 and accompanying text.
\textsuperscript{229} The term police power "connotes the time-tested conceptional limit of public en-
croachment upon private interests." Goldblatt v. Town of Hempstead, 369 U.S. 590, 594
(1962). The Supreme Court in Lawton v. Steele, 152 U.S. 133 (1894), explained that in order
to be a permissible use of police power, the state must show "first, that the interests of the
public . . . require such interference; and, second, that the means are reasonably necessary for
accomplishment of the purpose, and not unduly oppressive upon individuals." \textit{Id.} at 137.
\textsuperscript{230} CAL. GOV'T CODE \textsection 65868.5 (West 1983 & Supp. 1988).
\textsuperscript{231} See, e.g., Delucchi v. County of Santa Cruz, 179 Cal. App. 3d 814, 823-24, 225 Cal.
\textsuperscript{232} Caminetti v. Pacific Mut. Life Ins. Co., 22 Cal. 2d 344, 139 P.2d 908 (1943); Acker v.
Baldwin, 18 Cal. 2d 341, 15 P.2d 455 (1941); McNeil v. City of South Pasadena, 166 Cal. 153,
135 P. 32 (1913); Laurel Hill Cemetery v. City and County of San Francisco, 152 Cal. 464, 93
P. 70 (1907); Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872
\textsuperscript{233} CAL. GOV'T CODE \textsection 65865.1.
expressly recognizes that a local government can adopt and implement new regulations and policies which do not conflict with the regulations and policies that are applicable to the property covered by a Development Agreement. Finally, the legislation requires a Development Agreement to be consistent with applicable specific and general plans.

4. The Development Agreement in a slow-growth environment

In today's slow-growth climate, developers are concerned about the viability of Development Agreements in light of the numerous "slow-growth" or "growth-management" initiatives and ordinances that have been passed that have affected the areas in which projects are located. The concern is justified. In some cases, the slow-growth initiative could be considered a "subsequently enacted law" that conflicts with the regulations and policies that were applicable to the property when the Development Agreement was entered into. In this case, a developer would be entitled to finish the development according to the terms and provisions of the Development Agreement, notwithstanding the provisions of the new ordinance. In other cases, as in Pardee Construction Co. v. City of Camarillo, the slow-growth law is considered to be a matter of "timing." If the Development Agreement does not specifically address "timing" or "slow-growth," the developer and the development may be affected by the constraints of the new slow-growth ordinance.

B. Vesting Tentative Map

In 1984, the California legislature attempted to alleviate the uncertainties surrounding the development process in California by further amending the Subdivision Map Act to create a variation of the standard tentative map. The legislature termed this new instrument a "Vesting Tentative Map" (VTM). This new legislation, which became effective January 1, 1986 for residential developments, and January 1, 1988 for all other developments, is based on the legislature's view that "[t]he pri-

234. Id. § 65866.
235. Id. §§ 65865.1, 65866.
236. For example, in the November 8, 1988 California elections, the following cities approved slow-growth initiatives: Chino, Costa Mesa, San Juan Capistrano, and Chula Vista. See also, CAMARILLO, CAL., MUN. CODE, ch. 20, §§ 20.01.04, 20.01.05 (1981); THOUSAND OAKS, CAL., MUNICIPAL CODE, ch. 10, Measure A (1980).
238. CAL. GOV'T CODE §§ 66498.1-66498.9.
239. Id. § 66498.1.
240. Id. § 66498.7.
vested sector should be able to rely upon an approved vesting tentative map prior to expending resources and incurring liabilities without the risk of having the project frustrated by subsequent action by the approving local agency. . . ."\textsuperscript{241}

1. Provisions of the Vesting Tentative Map legislation

The legislation creating the VTM permits a developer to apply for a VTM and requires the local government to process the application, even if the project requires only a parcel map and the applicable ordinances do not require a tentative map to be filed as a condition to the approval of a final parcel map.\textsuperscript{242} According to the statute's terms, the use of a VTM creates a type of vested right for the landowner.\textsuperscript{243} The VTM allows a developer to proceed with a proposed development, including approved land uses and construction of buildings and modifications of the land, in substantial compliance with the local ordinances, policies and guidelines that are in effect at the time the VTM is approved.\textsuperscript{244} Therefore, under the legislation, a developer who files a VTM is entitled to all of its benefits in any case where a tentative map or merely a parcel map is required.\textsuperscript{245}

A VTM is filed and processed just like any other tentative map. It must be conspicuously identified as a VTM on its face.\textsuperscript{246} The vested rights acquired by a developer as a result of the approval of a VTM continue for a period provided by local ordinance. However, in the event a final map is recorded, the vested rights survive for a period of not less than one year, nor more than two years, after the final map is recorded.\textsuperscript{247} When a project is developed in several phases and more than one map is recorded, these time periods start running from the date each final map for each phase is recorded.\textsuperscript{248} It is important to note, however, that all vested rights that are acquired under a VTM terminate if a final map is not approved prior to the expiration of the VTM.\textsuperscript{249} In the event that a completed application is not processed within thirty days of submission, the time periods described above are automatically extended for a period of time equal to the processing time taken by the local agency.

\textsuperscript{241.} Id. § 66498.9(b).
\textsuperscript{242.} Id. §§ 66428, 66498.1 (West Supp. 1988).
\textsuperscript{243.} Id. § 66498.1(b).
\textsuperscript{244.} Id. § 66498.1.
\textsuperscript{245.} Id.; see also id. §§ 66428, 66463.5(g) (West 1983 & Supp. 1988).
\textsuperscript{246.} Id. § 66452 (West 1983 & Supp. 1988).
\textsuperscript{247.} Id. § 66452.6 (West 1983 & Supp. 1988).
\textsuperscript{248.} Id.; see also id. § 66498.1.
\textsuperscript{249.} Id. § 66498.1(d).
after the developer files the completed application for a grading permit, design review or architectural review.\textsuperscript{250} Moreover, the developer always has the option of applying for an extension in order to comply with these time periods.\textsuperscript{251}

When a developer receives a building permit, the vested rights acquired by the developer continue until the permit expires by its own terms.\textsuperscript{252} When a parcel map is filed after a VTM, the time periods described above apply except that the time periods start to run with the recordation of the parcel map.\textsuperscript{253}

\section*{2. Developer compliance}

A developer is not excused from complying with local ordinances and state laws just because it has filed a VTM, nor does a local agency lose its authority to impose conditions on the approval of a VTM.\textsuperscript{254} A developer does, however, have the option of seeking an amendment to the map once it has been approved.\textsuperscript{255} If a map is inconsistent with the local zoning ordinances then in effect, the local agency can disapprove the map or condition its approval upon a change in the zoning. In that case, the developer does not acquire any vested rights until it complies with the necessary zoning change.\textsuperscript{256}

\section*{3. Limitations of the Vesting Tentative Map}

There are some limitations on the vested rights that a developer acquires by using a VTM. As in the case of the Development Agreement legislation, the rights granted by a VTM “relate only to the imposition by local agencies of conditions or requirements created and imposed by local ordinances,” and do “not grant local agencies the option to disregard any state or federal laws, regulations, or policies.”\textsuperscript{257} As a result, the seemingly secure vested rights that are conferred statutorily by a VTM can be rendered moot by the subsequent enactment of state or federal land use regulations. Moreover, the vested rights that a developer obtains can be defeated by local ordinances that are later enacted to protect local residents from “a condition dangerous to their health or safety.”\textsuperscript{258}

\textsuperscript{250} Id. § 66452.6(g).
\textsuperscript{251} Id.
\textsuperscript{252} Id. § 66498.1(d); see also id. § 66452.6(h).
\textsuperscript{253} Id. § 66452.6(g).
\textsuperscript{254} Id. § 66498.6, 66498.1(e).
\textsuperscript{255} Id. § 66498.2.
\textsuperscript{256} Id. § 66498.3.
\textsuperscript{257} Id. § 66498.6(h).
\textsuperscript{258} Id. § 66498.1(c)(1).
The VTM legislation does not provide a statutorily vested right to proceed with a specifically defined project, nor does the legislation require that the proposed project be described in detail in the application for, or as part of, the VTM. Instead, the legislation requires that the proposed project be "in substantial compliance with [existing] ordinances, policies and standards." To the extent that the ordinances, policies and standards permit a local government to maintain a degree of discretion over a developer after approval of the VTM, a developer is still exposed to the risk of not being allowed to complete a project as designed. For example, California Government Code section 66498.3(a) appears to allow a local government to deny an application for a zoning change, despite the fact that a zoning change will be required in order to complete the proposed and so-called "approved" development covered by the VTM.

There are other discretionary approvals that also might be required after a VTM is approved. For example, a local governing body could try to use its authority with respect to design reviews and conditional use permits in an attempt to halt a development covered by a VTM. A prudent developer, therefore, should describe the proposed subdivision as precisely as possible in the VTM application and should not regard the VTM as a substitute for a detailed Development Agreement.

Finally, the so-called vested rights conferred by the new VTM legislation, which allow the developer to proceed with development in substantial compliance with the ordinances, policies and standards in effect at the time the application for the VTM is filed, fails to insulate the developer from the subsequent enactment of growth control ordinances. This was the case in Pardee Construction Co. v. City of Camarillo, in which the California Supreme Court found that the subsequent land use controls affected the timing or rate of the proposed project, but did not affect the developer's ultimate right to complete the proposed development.

Since the rights conferred by a VTM are not concrete, developers should exercise great care before expending significant amounts of time and money in reliance on a VTM's effectiveness. A developer may, in fact, be required to incur substantial start-up costs to acquire, at best, these quasi-vested rights, or at worst, to discover that the local government is unwilling to perfect a developer's right to proceed with a project.

259. Id. § 66498.1(b).
260. Id. § 66498.1(e).
261. Id. § 66498.3(a).
263. Id. at 472, 690 P.2d at 706, 208 Cal. Rptr. at 233.
In short, local governments are armed with a potentially powerful weapon to stop a developer's progress.

As a rule, local governments retain the right to exercise discretion with respect to many, if not all, aspects of a proposed development even if a VTM has been filed and approved.\textsuperscript{264} This right, coupled with the fact that a VTM appears only to confer a vested right to develop property for a specified period of time, has led several local governments to require developers to provide all relevant and material information about a proposed project when a VTM application is submitted.\textsuperscript{265} Further, some local governments require developers to process substantial discretionary land use approvals related to the proposed project prior to or along with the submission of the VTM application.\textsuperscript{266} As developers are learning, those local governments that are trying to discourage developers from using VTM's to preserve their rights are, for example, requiring detailed development plans, site plans, and landscaping plans in an effort to create expensive and risky challenges for the developer. For this reason, developers who pursue projects in jurisdictions that disfavor or actively discourage development should enter into a Development Agreement with the community if that alternative is available.

C. VTM or Development Agreement?

There are material differences between a Development Agreement and a VTM that may justify the use of both for some projects. In some cases, it may be appropriate only to use one of the devices.

First, a local government is required to accept and process a VTM.\textsuperscript{267} A VTM must be processed exactly like any other tentative map, except as otherwise provided in the California Subdivision Map Act or by local ordinance.\textsuperscript{268} In contrast, a local government is not obligated to enter into a Development Agreement, although it is required to "consider" all applications that are submitted for Development

\textsuperscript{264.} See supra notes 257-58 and accompanying text.
\textsuperscript{265.} \textsc{Cal. Gov't Code} §§ 66498.1 and 66498.8.
\textsuperscript{266.} These local governments rely upon: (1) \textsc{Benny v. City of Alameda}, 105 \textsc{Cal. App. 3d} 1006, 164 \textsc{Cal. Rptr. 776} (1980), which holds that a city may require a developer to obtain all necessary zoning approvals before the developer is permitted to file its tentative map; (2) \textsc{California Government Code} section 66411, which gives local governments control over the design and improvement of subdivisions; and (3) \textsc{California Government Code} section 66452(b), which provides that a VTM is to be processed in the same manner as a conventional tentative map except as otherwise provided by the Subdivision Map Act or by a local ordinance adopted pursuant to the Subdivision Map Act.
\textsuperscript{267.} \textsc{Cal. Gov't Code} § 66498.1 (West Supp. 1988).
\textsuperscript{268.} \textit{Id.} § 66452(b) (West 1983 & Supp. 1988).
Agreements.  

Second, the parameters of a VTM are often established by local ordinances that delineate the specific details relating to project engineering and planning. A Development Agreement, in contrast, requires long, protracted negotiations to finalize. Therefore, a developer should be prepared for lengthy negotiations and must expect to compromise on certain facets of the project.

Third, the duration of a Development Agreement is governed by its own terms. The duration of a VTM is subject to both local ordinances and statutes that specify a term of no less than one year nor more than two years beyond recordation of the final map. However, California Government Code section 66452.6(a) permits a subdivider to file final maps in stages in situations in which the subdivider is required to construct or finance construction of public improvements of $100,000 or more outside the parameters of the tentative map. Each staged filing extends the expiration of the tentative map for a period of thirty-six months from its date of expiration, or the date of the previously filed final map, whichever is later. A VTM cannot be extended beyond ten years from the initial approval date unless a Development Agreement has been entered into, and then, it is only effective for the term specified in the Development Agreement. It should be noted that the number of phased final maps that are permitted is determined by the appropriate advisory agency at the time the tentative tract map is approved.

Finally, as discussed above, pursuant to California Government Code section 66498.1, a VTM merely confers a developer with the right to proceed with development in substantial compliance with existing ordinances, policies and standards. Therefore, a VTM, unlike a Development Agreement, does not give a developer the right to construct certain pre-approved improvements.

Today there are strong public policy reasons supporting this vested rights legislation. Under traditional zoning practices, when a simple
subdivision map and building permit were all that a developer needed to establish a vested right, it might have made sense to fix vested rights at the time when a building permit was issued. However, present residential and industrial projects are often vastly more complex. Under planned unit development zoning, for example, the building permit plays only a minor role in what is frequently a lengthy and complex approval process. Numerous approvals are often required, such as amendments of general plans, environmental clearances, alterations in traffic plans, approval of tentative maps, and the issuance of use permits. To force a developer to remain at risk until the issuance of a building permit is unwise and unfair. This procedural framework discourages openness and cooperation between the developer and the local agency. Without assurances that their long-term projects can be completed as planned, developers are encouraged to deceptively and artificially phase projects in an attempt to reduce their risk and establish vested rights on a gradual basis. The end result does not promote sound public planning and implementation and is not what the California Legislature intended when it drafted the Development Agreement legislation.

It appears that the legislature's goal was to arm developers with solid protections in the early stages of the development process. Nevertheless, the Development Agreement and VTM legislation may not be as effective as the legislature intended. Despite the flaws in both statutes, both the Development Agreement and VTM legislation clearly indicate
that the California legislature believes that the government should be precluded from changing the regulations pertaining to a development once a developer receives discretionary approval for a specific project and relies on the approval in good faith to its detriment. The legislature has clearly tried to give developers greater protection by rejecting the unyielding building permit requirements mandated in the planned unit development context.

IV. INVERSE CONDEMNATION

When a developer is denied a vested right to develop property in an economically feasible manner, the vested rights issue becomes intertwined with the concept of condemnation. Regardless of whether a property owner acquires a common-law or statutory vested right, a developer may challenge the effect of land use regulations on its property as a "taking" under the just compensation clause of the fifth amendment.284 The California Constitution also provides that private property may not be taken for public use without payment of just compensation to its owner.285 For several years, the just compensation clause of the fifth amendment has been used to challenge a variety of land use and development regulations, including zoning,286 aesthetic consideration ordinances,287 landmark preservation regulations,288 infectious tree disease ordinances,289 intoxicating liquors regulations,290 flood control ordinance restrictions,291 smoke emission controls,292 and beach easement requirements.293 The regulation and restraint of property, as exemplified by an overly burdensome land use regulation, can constitute a taking if a prop-

284. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.
   Private property may be taken . . . for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.
Id.
erty owner’s use of his or her property is unduly restricted. While this basic principle appears to be straightforward, determining when a taking has occurred is difficult. To prevail on a challenge under the fifth amendment with respect to a land use regulation, the property owner must demonstrate that the regulation either “denies an owner economically viable use of his land” or “does not substantially advance legitimate state interests.”

Generally, a land use regulation will not constitute a taking if it has an adverse effect only on the recognized economic value of property. Over the years, the courts have applied a balancing test in evaluating the constitutionality of land use regulations. The property right affected by the regulation is evaluated in the context of the state interest being advanced—the greater the impact on the property owner, the greater the state interest required to justify the regulation. In applying this balancing test, the Supreme Court of the United States typically has deferred to state courts on the question of the nature of the property right being affected.

The view of the California courts that development is considered a privilege, not a right, poses an obstacle for developers who bring constitutional challenges to land use regulations. The courts in California have determined that the interest of a developer in proceeding with the development of its property should be assigned low priority on the scale of affected rights, and therefore can be offset by moderately compelling public need. In addition, although the Supreme Court of the United States has historically required a “nexus” between the conditions imposed by the regulation and the governmental purpose advanced for the

297. See, e.g., Terminal Plaza Corp. v. City and County of San Francisco, 177 Cal. App. 3d 892, 223 Cal. Rptr. 379 (1986); Norsco Enter v. City of Fremont, 54 Cal. App. 3d 488, 126 Cal. Rptr. 659 (1976); Associated Home Builders, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, cert. dismissed, 404 U.S. 878 (1971).
regulation, the Court generally has deferred to state administrative and judicial determinations when deciding whether the nexus is adequate in a given context.

In *Williamson County Regional Planning Commission v. Hamilton Bank*, the Supreme Court of the United States stated that a property owner has not been exposed to a violation of the just compensation clause until "the State fails to provide adequate compensation for the taking." The Court held that the case was not ripe for a judicial determination and reasoned that a claim rooted in taking is premature until the State has been given the opportunity to grant adequate compensation and has denied such request. However, in *Pennsylvania Coal Co. v. Mahon*, although the Court did find that a land use regulation could go "too far" and constitute a taking, the Court failed to articulate a standard for review. The Court has acknowledged that it has yet to develop a "'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Instead of setting forth concrete guidelines to determine these issues, the Court has stated that "whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [of the] case.'"

In order to be sustained, zoning actions, like the exercise of a government's police power, must bear a reasonable relation to the public health, safety or welfare. If a property owner has not acquired a building permit and has not performed substantial work in reliance thereon, he or she is unlikely to have an acknowledged vested right to retain the

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302. See, e.g., *Nollan*, 107 S. Ct. at 3148; *Agins*, 447 U.S. at 262-63; *Penn Cent.*, 438 U.S. at 130-31.
305. *Id.* at 195.
306. *Id.* at 196-97.
308. *Id.* at 415-16.
310. *Id.* (footnotes omitted) (quoting *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958)).
existing zoning classification. Without a vested right, the sole fact that a zoning classification is revised, and a more restrictive classification adopted, does not provide a property owner with a valid claim in inverse condemnation. There is no cause of action in inverse condemnation even if the more restrictive zoning classification causes a diminution in the value of the affected property. If the government can demonstrate that the revised zoning plan leaves any reasonably beneficial use for the property, and does not constitute an appropriation of the property for public use, an action in inverse condemnation is likely to fail.

In the area of inverse condemnation, most claims for compensation involve the exercise of a government's zoning power. A review of California's leading zoning case, Agins v. City of Tiburon, provides an explanation of the current state of the law in this area. In Agins, the city of Tiburon, California adopted ordinances that modified the existing zoning law and redirected the Agins' property into a more restrictive Residential Planned Development and Open Space Zone. The modified restrictions on density would have permitted the Agins to construct between one and five single family residences on their property with a grant of a variance by the city. Instead of filing for a variance, however, the Agins elected to file suit in state court alleging that a taking of their


313. See cases cited supra note 289.


318. Id. at 257. A Residential Planned Development is a phrase used to describe separately owned residential parcels which have (a) one or more additional parcels owned in common by the owners of the separately owned parcels and/or (b) reciprocal or mutual interests in or restrictions upon all or part of the separately owned parcels of property. This type of development is similar to a condominium development except that in a Residential Planned Development the parcel owner obtains fee ownership to the land beneath its unit. H. MILLER & M. STARR, CURRENT LAW OF CALIFORNIA REAL ESTATE, § 24:92 (1978 & Supp. 1987). The term Open Space Zone refers to any parcel of property or area of land or water that is unimproved and dedicated to an open space use and which is designated on a regional, local or state plan as (i) open space for the managed production of resources, (ii) open space for the preservation of natural resources, (iii) open space for outdoor recreation, or (iv) open space for public health and safety. See CAL. GOV'T CODE § 65560 (West 1983 & Supp. 1988).

319. 447 U.S. at 257.
property had occurred.\textsuperscript{320} They contended that the city had "completely destroyed the value of their property for any purpose or use whatsoever . . . ."\textsuperscript{321} The Supreme Court of the United States affirmed the decision of the California Supreme Court and rejected the claim that the local zoning regulation constituted a taking under current law.\textsuperscript{322} The Court stated that the application of a general zoning law to particular property constitutes a taking if: (1) the ordinance does not substantially advance legitimate state interests; or (2) the ordinance denies an owner the economically viable use of the land.\textsuperscript{323}

Applying this test, the Court held that the City of Tiburon's open space ordinances did in fact substantially advance a legitimate governmental goal—that of discouraging the "premature and unnecessary conversion of open-space land to urban uses,"\textsuperscript{324}—and was therefore an appropriate exercise of the City's police power. Additionally, the Court stated that although it was true that the ordinances did serve to limit development, the ordinances neither acted to destroy any fundamental attributes of ownership nor prevented the property owner from realizing the highest and best use of the property.\textsuperscript{325}

\textit{A. The Legitimate State Interest Test}

In \textit{Nollan v. California Coastal Commission},\textsuperscript{326} the Supreme Court of the United States refined the first part of the \textit{Agins} test. The issue before the Court was whether a California Coastal Commission development permit condition that required dedication of a lateral access easement along the Nollans' private beach constituted a taking.\textsuperscript{327} The Court applied the \textit{Agins} test and rejected the state's argument that the dedication substantially furthered the legitimate state interest in providing an unobstructed view of the coastline.\textsuperscript{328} Although the Court stated that it had not previously specified what was required in order to pass the first part of the \textit{Agins} test, the Court decided that the dedication requirement was insufficient.\textsuperscript{329}

\textsuperscript{320} \textit{Id.} at 258.
\textsuperscript{321} \textit{Id.}
\textsuperscript{322} \textit{Id.} at 259.
\textsuperscript{323} \textit{Id.} at 260.
\textsuperscript{324} \textit{Id.} at 261 (citing \textsc{Cal. Gov't Code} § 65561(b) (West Supp. 1979)).
\textsuperscript{325} \textit{Id.} at 262.
\textsuperscript{327} \textit{Nollan}, 107 S. Ct. at 3144.
\textsuperscript{328} \textit{Id.} at 3146-47.
\textsuperscript{329} \textit{Id.} at 3149.
In *Keystone Bituminous Coal Association v. DeBenedictis*, the Supreme Court recognized that the two prongs of the test enumerated in *Agins* “have become integral parts of our takings analysis.” In *Keystone*, the Court expanded on the first branch of the test, and stated that even among those regulations that substantially advance a legitimate state interest, some government interests will be more defensible than others. The Court relied on *Pennsylvania Coal Co. v. Mahon* for the proposition that the nature of the state interest justifying the regulation is a vital factor in determining whether there has been a taking, and consequently whether compensation is required. The Court in *Keystone* was reluctant to find a taking when government simply seeks to limit the use of real property to prevent a contemplated use that is considered to be a nuisance. The Court reasoned that a landowner is not entitled to use its land if the use will create a public nuisance. Thus, there is not a “taking” when the state promulgates a regulation to enjoin the activity creating the nuisance.

**B. The Economic Viability Test**

Although a governmental regulation can have an adverse impact on the value of real property, mere fluctuations in the present value of real property “are incidents of ownership. They cannot be considered as a ‘taking’ in the constitutional sense.” In an effort to explain the justification for some form of governmental regulation in the land use context, the Court in *Pennsylvania Coal Co. v. Mahon* observed that:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magni-

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331. Id. at 485.
332. Id. at 488-89.
333. 260 U.S. 393 (1922).
335. Id. at 491.
336. Id. at 491-92
337. Id. at 492.
339. 260 U.S. 393 (1922).
tude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends on the particular facts.\textsuperscript{340}

In deciding whether certain property owners had been deprived of the "economically viable use" of their land, the Court in \textit{Keystone Bituminous Coal Association v. DeBenedictis}\textsuperscript{341} ruled that proper analysis requires the Court to compare the value taken from the landowner's property with the actual value remaining in the landowner's property after the regulation is imposed.\textsuperscript{342} A court's characterization or definition of the value of the property that has been taken is a threshold requirement in arriving at a final figure.\textsuperscript{343}

The plaintiffs in \textit{Keystone} owned or controlled substantial coal reserves that were affected by the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act (Subsidence Act).\textsuperscript{344} The plaintiffs alleged that the required compliance with the Subsidence Act constituted a taking of their property which required just compensation.\textsuperscript{345}

Instead of focusing on the claim that the Subsidence Act required the plaintiffs to forego mining almost twenty-seven million tons of coal located within their mines, the Court focused on the fact that this twenty-seven million tons of coal was less than two percent of the total coal available to plaintiffs within their own mines.\textsuperscript{346} The Court concluded that the Subsidence Act had affected such a small portion of the owners' potential coal production that the owners had "not shown any deprivation significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking."\textsuperscript{347}

In \textit{Grupe v. California Coastal Commission},\textsuperscript{348} a 1985 case decided by the California Court of Appeal, the plaintiff brought an action to invalidate an easement condition that was required by the California Coastal Commission in connection with plaintiff's proposed development.\textsuperscript{349} The plaintiff contended that the required dedication was tantamount to a taking of his property without just compensation.\textsuperscript{350}

\textsuperscript{340} \textit{Id.} at 413.
\textsuperscript{341} 480 U.S. 470 (1987).
\textsuperscript{342} \textit{Id.} at 497.
\textsuperscript{343} \textit{Id.}
\textsuperscript{344} \textit{Id.} at 478.
\textsuperscript{345} \textit{Id.} at 478-79.
\textsuperscript{346} \textit{Id.} at 496.
\textsuperscript{347} \textit{Id.} at 493.
\textsuperscript{348} 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985).
\textsuperscript{349} \textit{Id.} at 156, 212 Cal. Rptr. at 581.
\textsuperscript{350} \textit{Id.} at 171, 212 Cal. Rptr. at 592.
To decide whether the easement condition constituted a taking, the court applied the *Agins* test and found that the condition imposed on the plaintiff did not "rob" him of all reasonable use and economic value of his property.\(^{351}\) The court thereby interpreted *Agins* as requiring the complete and total deprivation of all use of one's property in order to constitute a taking. Further, the court ruled that it was not unjust to require the plaintiff alone to bear the burden of the easement condition.\(^{352}\) The court reasoned that the plaintiff had received a substantial benefit from the local commission's decision to allow the development of plaintiff's property in the first place.\(^{353}\) When this benefit was compared with the value of plaintiff's property as developed, the economic loss was not significant enough to support a finding that a taking had occurred.\(^{354}\)

The court also acknowledged the importance of the government's need to foster public rights:

Where the state or its subdivisions have acted to promote the public trust and such action has resulted in damage to the property rights of upland owners, the courts have generally been unwilling to find a taking, even though the action might be deemed a taking in a non-trust context.\(^{355}\)

Although the court did recognize that there could be incidences where a taking has occurred when the state was acting to further the purposes of the public trust, the court reiterated that "courts have been extraordinarily deferential to state action designed to further the purposes of public trust, even though such action results in significant economic injury to individuals."\(^{356}\)

**C. Is There a Nexus?**

When faced with the question of whether land use regulations or conditions create an unfair restraint and burden on property, the courts typically will affirm the constitutionality of an ordinance, regulation or condition that requires the payment of a fee or dedication of a property right as a prerequisite to land-use approval or the grant of a building permit if both of the following conditions are met: (1) the land use regulation imposed must substantially advance a legitimate governmental interest that is within the local agency's police power; and (2) a nexus must

\(^{351}\) *Id.* at 175, 212 Cal. Rptr. at 596.

\(^{352}\) *Id.* at 177, 212 Cal. Rptr. at 597.

\(^{353}\) *Id.* at 176-77, 212 Cal. Rptr. at 596-97.

\(^{354}\) *Id.* at 177, 212 Cal. Rptr. at 597.

\(^{355}\) *Id.* at 171, 212 Cal. Rptr. at 592-93 (footnote omitted).

\(^{356}\) *Id.* at 172, 212 Cal. Rptr. at 593.
VESTED RIGHTS IN CALIFORNIA

exist between the required land use regulation or condition and the governmental purpose that is relied upon for regulating the landowner's property.\(^{357}\)

Recently, the nexus requirement has emerged as the principal area of controversy in inverse condemnation law.\(^{358}\) The California courts have generally required a similar nexus to exist between the imposition of a regulation or condition and the proffered governmental purpose.\(^{359}\) The 1971 California Supreme Court decision of Associated Home Builders v. City of Walnut Creek\(^ {360}\) dismantled the California courts' historically restrictive direct-nexus theory that had been used in connection with dedications that are required for the issuance of land use permits.\(^{361}\)

In Associated Home Builders, the plaintiff challenged the constitutionality of section 11546 of the California Business and Professions Code, which authorized a city or county government to require a subdivider to dedicate land, or pay fees in lieu thereof, for park or recreational purposes as a condition to the approval of a subdivision map.\(^ {362}\) The plaintiff subdividers argued that the land use dedications required by the statute could be constitutional only if the state could demonstrate that the need for the dedication was directly attributable to the subdivision at issue,\(^ {363}\) otherwise, the dedications deprived the subdivider of the use of its property without just compensation.\(^ {364}\) The Court rejected this claim and stated that it had "no doubt that . . . [the statute] can be justified on the basis of a general public need for recreational facilities caused by present and future subdivisions."\(^ {365}\) Therefore, the Court held that there only has to be an indirect connection, or nexus, between a dedication or fee requirement and the regulation of a proposed development.\(^ {366}\)

The most recent United States Supreme Court case that considered the nexus requirement is Nollan v. California Coastal Commission.\(^ {367}\) In

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358. See sources cited supra note 23.
360. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr 630 (1971).
361. See sources cited supra note 359.
362. Id. at 635, 484 P.2d at 608, 94 Cal. Rptr. at 632-33.
363. Id. at 637-38, 484 P.2d at 610, 94 Cal. Rptr. at 634.
364. Id. at 637, 484 P.2d at 610, 94 Cal. Rptr at 634.
365. Id. at 638, 484 P.2d at 610, 94 Cal. Rptr. at 634.
366. Id. at 638-39, 484 P.2d at 610-11, 94 Cal. Rptr. at 634-35.
Nollan, the plaintiffs tried to obtain a rebuilding permit from the California Coastal Commission to allow them to tear down their existing single story beachfront house in Ventura County, California and replace it with a two-story house. The Commission ruled that the proposed construction would block the view of the ocean, and thus add to the development of "a wall of residential structures that would prevent the public from 'psychologically . . . realizing [that] a stretch of coastline exists nearby that they have every right to visit.'" The Commission agreed to approve the proposed construction only on the condition that the Nollans grant the public an easement to pass along the beachfront in front of their property. After unsuccessfully challenging this easement condition before the California Coastal Commission and the California courts, the Nollans appealed the decision to the Supreme Court of the United States and asserted that the condition was a taking under the fifth and fourteenth amendments of the United States Constitution.

The Court reversed the California court rulings and held that the dedication was tantamount to a taking. The Court decided that if the state of California had required the Nollans to grant a permanent public easement across their property in order to increase the public's access to the beach, instead of conditioning their rebuilding permit on the easement, that action would certainly have constituted a taking. The Court stated that the government's claim that an appropriation of an easement across one's property is not a taking but rather "a mere restriction on use" essentially deprives those words of their common-sense meaning. The Court held that although the exaction of the required easement would certainly violate the takings clause, conditioning the Nollans' permit on their granting of the easement would nevertheless be a lawful land use regulation if it substantially furthered governmental purposes that would justify denial of the permit. The Court indicated that if the California Coastal Commission had conditioned the public-access easement on the public's need to view the coastline, and had validly supported its decision, the Nollans might have been required to

368. Id. at 3143.
369. Id. at 3143-44 (quoting App. Brief at 58).
370. Id.
373. Id. at 3150.
374. Id. at 3145.
375. Id.
376. Id. at 3148.
grant a portion of their beachfront property for the benefit of those desiring to view the coastline.\textsuperscript{377}

The Court acknowledged that land use regulations do not constitute a taking if they substantially further legitimate governmental interests and do not deny a property owner the economically viable use of the land.\textsuperscript{378} The Court concluded that the public-access easement condition imposed by the California Coastal Commission failed to further the governmental interest advanced to justify the condition.\textsuperscript{379} Unless a permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an “out-and-out plan of extortion.”\textsuperscript{380}

The Court did not dispute that preserving the public’s ability to see the beach from the nearby public roadways was a legitimate governmental interest.\textsuperscript{381} The Court nevertheless concluded that when the condition imposed fails to further the justified purpose of the imposition, the required nexus does not exist and “the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensation to those willing to contribute $100 to the state treasury.”\textsuperscript{382} Since the imposition of the public-access easement condition did not directly further the stated public purposes related to the permit requirement, it was not an appropriate exercise of land use regulation.\textsuperscript{383}

\textsuperscript{377} Id. at 3147-48.
\textsuperscript{378} Id. at 3146.
\textsuperscript{379} Id. at 3148.
\textsuperscript{380} Id. at 3148 (citation omitted).
\textsuperscript{381} Id. at 3147.
\textsuperscript{382} Id. at 3148.
\textsuperscript{383} Id. The California Coastal Commission claimed that a building permit condition, based upon the same legitimate police power purpose as a denial of a building permit, should not be classified as a taking if the denial of the building permit would not be a taking. The Court in dicta agreed with the California Coastal Commission’s assertion and observed that:

[If] the Commission attached to the permit some condition that would have protected the public’s ability to see the beach notwithstanding construction of a new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it 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. Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission’s assumed power to forbid construction of the house in order to protect the public’s view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of police power rather than a taking, it would be
In sum, \textit{Nollan} requires a nexus between the land use condition and the burden imposed on the landowner.\footnote{The Court concluded that where a lateral easement is required for access to the beach but is justified on the basis that the easement is required to maintain the view of the coastline, a constitutional gap occurs between the land use regulation and the findings of fact. \textit{Id.} at 3147-48.} If no nexus exists, the land use regulation imposed is improper and constitutes a taking of real property for which compensation must be paid to the landowner pursuant to the fifth and fourteenth amendments of the United States Constitution.\footnote{U.S. CONST. amend. V.}

The \textit{Nollan} Court appeared to reject the indirect-nexus theory that some California courts were following after the \textit{Associated Home Builders} decision.\footnote{\textit{Nollan}, 107 S. Ct. at 3148-49; \textit{see Nollan}, 177 Cal. App. 3d at 723, 223 Cal. Rptr. at 30-31; Whaler's Village Club v. California Coastal Comm'n, 173 Cal. App. 3d 240, 220 Cal. Rptr. 2 (1985), \textit{cert. denied}, 476 U.S. 1111 (1986); Grupe v. California Coastal Comm'n, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985).} The indirect nexus theory is based on the premise that real estate development is a privilege and not a right.\footnote{See supra notes 300-03 and accompanying text.} In \textit{Nollan}, the Court rejected the state court's characterization of the property right involved as a privilege and noted that: "[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'"\footnote{\textit{Nollan}, 107 S. Ct. at 3146 n.2.} In effect, \textit{Nollan} eviscerated one ground used by the government to justify mandatory development conditions that are imposed on real estate developments—namely, that a condition is a reasonable \textit{quid pro quo} for the "benefit" that the developer will gain from building.

It still remains unclear whether the Supreme Court has formulated a strict nexus formula. Although the Court held that the public access condition in \textit{Nollan} was unconstitutional,\footnote{\textit{Id.} at 3147; \textit{see also} Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); \textit{Agins}, 447 U.S. at 260-61; Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); Goreib v. Fox, 274 U.S. 603 (1927); \textit{Euclid} v. Ambler Realty Co., 272 U.S. 365 (1926).} the Court did not state how close the nexus must be in order for a regulation to substantially further the legitimate state interest which is the basis for the land use regulation. The Court provided some guidance to landowners and government entities by observing that its previous decisions indicated "that a broad range of governmental purposes and regulations satisfies these requirements."\footnote{\textit{Id.} at 3148.} One must not misinterpret \textit{Nollan} as holding that the re-
required easement can be upheld only if the proposed development creates the need for the dedication. This argument was rejected earlier by the California Supreme Court in Associated Home Builders. Subsequent cases, such as Nollan, have further clarified the standards for assessing the reasonableness of such conditions. Importantly, the Nollan Court did not imply that land use regulations that physically deprive a landowner of real property will be subject to stricter scrutiny than those regulations involving only the imposition of fees.

In an effort to define the nexus requirement further, sections 66000 through 66003 were added to the California Government Code in 1987. Effective January 1, 1989, these sections impose certain conditions on any local agency that exacts a fee, other than a tax or special assessment, as a condition for approval of a development project if the purpose of the fee is to defray all or a portion of the cost of public facilities related to the development. Specifically, section 66001 requires the local agency imposing the fee to determine: (1) if there is a reasonable connection between the use of the fee and the type of development project on which the fee is being imposed; and (2) to specifically determine if there is a reasonable connection between the need for the public facility and the kind of development on which the fee is being imposed. Finally, section 66001 requires any local agency that imposes such a fee to show a reasonable relationship, or nexus, between the amount of the fee and the cost of the public facility that is related to the development. Certainly, these requirements force local agencies to satisfy the nexus requirement at the outset when a development fee is imposed.

D. Monetary Damages For Unconstitutional Land Use Regulations

In First English Evangelical Lutheran Church v. County of Los Angeles, the Supreme Court of the United States held that the just compensation clause of the fifth amendment entitles a property owner to recover

391. Associated Home Builders, 4 Cal. 3d at 640, 484 P.2d at 61, 94 Cal. Rptr. at 635.
393. Id.
395. Id. § 66000(b).
396. Id. §§ 66000-66001.
397. Id. § 66001(a)(3).
398. Id. § 66001(a)(4).
399. Id. § 66001(b).
damages if a land use restriction constitutes a taking of property, even if
the taking is only temporary.\textsuperscript{401} Prior to \textit{First English}, the California
Supreme Court had strictly held that when a landowner had been denied
all beneficial use of property as a result of unreasonable governmental
regulation, the landowner was not entitled to a damage award and could
only seek a court order invalidating the unreasonable regulation as a vio-
lation of the due process requirements of the fifth and fourteenth amend-
ments.\textsuperscript{402} In reversing the California precedent, the Supreme Court of
the United States ruled that the remedy for a taking by a land use regu-
lation is \textit{compensation}, and not merely the invalidation of the land use reg-
ulation in question.\textsuperscript{403} The Court held further that compensation accrues
from the date that a final determination is made that there has been a
taking, even if the taking is only temporary.\textsuperscript{404}

In 1957, First English Evangelical Church (First English) acquired
a large parcel of land located in a canyon along the banks of the Middle
Fork of Mill Creek in the Angeles National Forest.\textsuperscript{405} The Middle Fork
was a drainage channel for a watershed area that was owned by the
United States Forest Service.\textsuperscript{406} Twelve acres of the property owned by
the church were flatlands containing certain structural improvements.
The church operated a campground on the site, and used it as a retreat
center and a recreational area for handicapped children.\textsuperscript{407} In July of
1977, a forest fire destroyed approximately 4,000 acres of the watershed
area surrounding the church's campground, and created a serious flood
hazard.\textsuperscript{408} Mill Creek flooded in February of 1978 and destroyed all of
the buildings located at the church's site.\textsuperscript{409}

After the flooding, the County of Los Angeles, California adopted
Interim Ordinance No. 11,855, which 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 . . . ."\textsuperscript{410}
First English filed a complaint against the county, alleging, among other
things, that imposition of the Interim Ordinance constituted an imper-

\begin{footnotes}
\item[401] Id. at 2387-88.
\item[403] First English, 107 S. Ct. at 2386.
\item[404] Id. at 2387-89.
\item[405] Id. at 2381.
\item[406] Id.
\item[407] Id.
\item[408] Id.
\item[409] Id.
\item[410] Id. at 2381-82.
\end{footnotes}
Relying on Agins v. City of Tiburon, the trial court dismissed the church’s claim, and found that when an ordinance deprives a landowner of the entire use of its property, the landowner may challenge the ordinance only by an action for declaratory relief or mandamus. The trial court reasoned that since First English sought only monetary relief, the allegation that the Interim Ordinance deprived the church of the use of its land was irrelevant. The California Court of Appeal also relied on Agins and rejected the church’s claim. The Court of Appeal declined the invitation to reevaluate Agins. The California Supreme Court denied review, and the case was appealed to the Supreme Court of the United States.

First English is best analyzed as a compensation case rather than a takings case because the Supreme Court assumed in its analysis that a taking had already been established. The Court held that the invalidation of the Interim Ordinance alone, without payment of monetary damages for the period of time that the church was denied the use of its property was unconstitutional. The case was then remanded to the California trial court for a determination of whether the imposition of the flood control ordinance resulted in a taking of the church’s property.

With regard to the payment of monetary damages, the Court explained that “where a 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.” With this statement, the Court acknowledged that first, even if a government suspends a regulation at a later date, compensation must nevertheless be paid for that period of time when the regulation was in effect. Second, the Court addressed a previously undecided issue by recognizing that compensation is a viable remedy when a regulatory taking occurs. As discussed above, it is

411. Id. at 2382.
413. First English, 107 S. Ct. at 2382.
414. Id.
415. Id.
416. Id.
417. Id.
418. Id. at 2389.
419. Id.
420. Id.
421. Id.
422. Id.
423. See, e.g., MacDonald Sommer & Frates v. Yolo County, 477 U.S. 340 (1986); William-
important to note that the Court decided that damages constitute an available remedy only if a taking is found. The Court remanded to the lower court the more difficult question of whether the Interim Ordinance actually constituted a taking. The Court was unwilling to decide whether the land use regulation denied the church all beneficial use of its real property because the case reached the Court on a motion to dismiss and the question of whether a taking had occurred had not been raised in the complaint.

Significantly, the Court noted that although the doctrine of inverse condemnation is predicated on the theory that a taking can occur without formal condemnation proceedings, the California Supreme Court had “truncated” this rule with its decision in Agins. The Court reasoned that “by disallowing damages that occurred prior to the ultimate invalidation of the challenged regulation,” the California Supreme Court failed to strictly follow the requirements of the just compensation clause of the fifth amendment. In arriving at this conclusion, the First English Court was guided by cases in which governments had only temporarily exercised their right to use the real property of private citizens. The Court reviewed several early cases involving the appropriation of private property for government use during World War II. The Court concluded that although the “takings” in these World War II cases were only temporary, “there was no question that compensation would be required for the government’s interference with the use of the property . . .” The Court did not, however, rule that a land use regulation that falls short of depriving a landowner of all beneficial use of its property constitutes a constitutional taking. Citing Danforth v. United States and Agins v. City of Tiburon, the Court distinguished between depriv-
ing a landowner of all of the use of the property (a “taking”) and the mere fluctuation in the value of the property (an incident of ownership).\textsuperscript{436}

The Court’s decision in \textit{First English} sends a strong message to all government entities: when a land use regulation is found to be unconstitutional, a government can be required to invalidate the unconstitutional restriction and, in addition, to pay damages for the period of time during which the land use regulation denied the property owner all use of the land.\textsuperscript{437}

\textit{First English} makes it clear that the price of a governmental “wrong guess” has gone up. Together \textit{Nollan} and \textit{First English} increase the bargaining strength of the developer and the land use planner during the development process.

\textit{Nollan} and \textit{First English} may also lead to a number of changes in the way land use issues are handled by developers and regulators. First, since stalling and procrastination by the government may prove expensive, speedier decision-making and streamlined litigation may result.\textsuperscript{438} Second, government agencies may attempt to develop rational and clearly articulated regulations and development conditions, which are supported by objective studies demonstrating how the regulations or conditions directly and specifically mitigate the impact of a particular development. Finally, the incidence of “takings” lawsuits may increase, particularly in communities that are under pressure to curb future growth.

\textbf{IV. Conclusion}

The foregoing discussion illustrates the tremendous challenges facing developers in California during the current slow-growth era. Negative public sentiment, coupled with governmental discretion, has created uncertainty for developers with respect to the viability of constructing proposed projects. Until a developer obtains a validly issued building permit and incurs substantial liabilities in good faith reliance on the permit, it cannot be certain that new obstacles will not thwart the completion of a proposed development. Short of the issuance of a building permit, a California developer is well-advised to file a Vesting Tentative Map and, where permissible, enter into a Development Agreement. The Vesting Tentative Map and the Development Agreement together do not

\textsuperscript{436} \textit{First English}, 107 S. Ct. at 2388.
\textsuperscript{437} \textit{Id.} at 2388-89.
\textsuperscript{438} \textit{Id.} at 2389.
provide a comprehensive solution, but do provide the developer with some welcome protections and guidelines. Finally, developers must keep in mind that although completing a development is the primary objective, if the circumstances warrant it, a developer can bring an action in inverse condemnation and seek compensation for the taking of its property.