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MEMORANDUM

TO : Honorable Mayor and City Council

FROM: Lawrence W. McLaughlin, City Attorney LWM

DATE: July 22, 1988

RE : Laguna Advisory Committee Report-"No development below 76 feet" and "No net fill below 76 feet" recommendations

The purpose of this Memorandum is to discuss land-use law as it pertains to the above recommendations of the Laguna Advisory Committee.

Before turning to that subject, I should first clear up some possible confusion over the legal status of the map prepared as a result of the Council's May 23, 1988 meeting. That map was prepared to illustrate and clarify the recommendations of the Laguna Advisory Committee. The map is not City "policy". It is merely an aid to the discussion of proposed policy.

It is true that staff will make recommendations from its review of the map, as to those properties which should be "preserved in a natural state", but the Council makes the policy decisions, and those decisions have not yet been made.

The original recommendations of the Laguna Advisory Committee, "No development below 76 feet" and "No net fill below 76 feet", have been considerably clarified during the hearing process. The map was prepared to illustrate those recommendations; it identifies certain parcels of property which are located in previously developed areas (for which the Committee recommended that there be no "net fill" below the 76 foot elevation), and parcels of property which are in an undeveloped "natural" state (for which the Committee recommended that there be "no development" below the 76 foot elevation).

The primary legal questions arising from those recommendations are as follows:

1. Alleged "vested rights" of property owners to develop in the previously-developed locations;

2. Alleged "inverse condemnation" (or, a "taking of property without compensation") if no development is to be permitted in the previously-undeveloped locations.

This memorandum will try to summarize the law as it applies to both issues.

1. "Vested Rights"

In layman's terms this means that at some point in the development process a city will be prevented from "changing the rules". Development is expensive; developers want assurance that the city will not change its land-use regulations affecting that development after it has begun. Nevertheless, and despite that desire, a city does have the right to change its regulations up to a point.

A property owner cannot claim a vested right to build out a project unless a building permit has been obtained and substantial work has been done and substantial liabilities incurred in good faith reliance upon the permit. Avco Community Developers, Inc. v. South Coast Regional Com. (17 C.3d 785).

In practice this means that a developer will not have "vested rights" even if he purchased property with a reasonable expectation that the city would have at that time permitted a certain type or level of development. The city can change the rules and limit those development rights up to the point where the developer has obtained a "permit" and done "substantial work". In general, the developer must comply with those laws which are in effect at the time the building permit is issued.

Recent appellant court decisions have even held that developers do not have "vested rights" after tentative and final map approval.

One recent case has confused the issue to some extent. In Barrie v. Calif. Coastal Com. (196 CA3d 8) the Court stated:

> "The government (agency) may be estopped from denying or conditioning a permit when a property owner in good faith reliance on a permit or a representation that construction is fully approved performs a substantial amount of work and thereby suffers a detriment by proceeding with the development."

The Barrie case seems to hold that a developer would have "vested rights" even without a permit if the city has represented that his proposed project was "fully approved".

To apply the law to specific parcels or to specific development projects, in this memorandum, is not possible. The record for each such project must be individually examined with a specific opinion issued for each.

Generally speaking, however, it appears that a "no net fill" policy could be adopted in most, if not all cases.

2. "Inverse Condemnation"

The question here is whether a land-use decision amounts to a "taking" prohibited by the Fifth Amendment to the U.S. Constitution. When governmental action amounts to a "taking" the law requires either that the property owner be paid compensation, or that the action be invalidated.

The U.S. Supreme Court has never provided a clear "formula" to determine when a "taking" has occurred. As was said in one of its cases, it depends "upon the particular circumstances" of each case. However, some guidance has been provided by California land- use cases which have been upheld by the U.S. Supreme Court.

In Agins v. City of Tiburon (447 US 255), the Court stated that application of a zoning law to a particular piece of property becomes a "taking" if the ordinance in question either: 1. "does not substantially advance legitimate state interest", or 2. "denies an owner economically viable use of his land".

Parenthetically, it should be clarified that we are referring to undeveloped land within the City's boundaries for which the City is considering a policy of "no development". Land outside the City's boundaries is not under consideration.

The two elements referred to in the Agins decision will be addressed separately:

a. "Substantially advance a legitimate state interest".

As was stated in the recent U.S. Supreme Court decision, Nollan v. Calif. Coastal Com. (107 S.Ct. 3141):

> "Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies

Haw. about Common good + protection from flooding

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the requirement that the former 'substantially advance' the latter. They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements."

In Keystone Bituminous Coal Assn. v. De Benedictis (107 S.Ct. 1232) the Court noted:

> "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by the government (citations) than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."

The more defensible the City's interest in regulating the property, the more likely that a regulation will be upheld.

Hmmm!

I am of the opinion that protection of the Laguna would be considered a "legitimate state interest".

b. "Denying economically viable use of land".

By their very nature governmental regulations have an impact on property values. "Mere fluctuations" in value are considered to be normal "incidents of ownership" and will not be considered a "taking". As was stated in Penn Central Transp. Co. v. New York City (438 US 104), the U.S. Supreme Court has continually "recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values".

In the Keystone Coal case cited above, the Court looked to the value that was left in the owner's property, not the value that was taken.

The recent, and well-known case of First English Evangelical Lutheran Church of Glendale v. County of Los Angeles (107 S.Ct. 2378) (holding that a landowner may recover damages for even a "temporary taking") involved an ordinance which basically prevented the all use of the plaintiff's land; however, the reason given was one of the best: flood control. It is generally felt that, ultimately, the ordinance will be found to not be a "taking".

Our local problem

The First Lutheran decision is also interesting because it speaks of compensating an owner who is deprived of "all use" of his property, only. The Court used the phrase "all use" throughout its decision, constantly commenting that a landowner shall be compensated for having been deprived of "all use" of his land. (The Court specifically did not decide that had occurred, however, as mentioned above.)

On the face of it, the Laguna Committee Recommendation of "no development", if taken literally, would appear to deprive an owner of "all use", and since, under the Agins case, it is an "either-or" situation, this particular recommendation, if applied, could constitute a "taking", unless a viable use for the land remained afterward.

A recent Ninth Circuit Court of Appeals case, Lake Nacimiento Ranch Co. v. County of San Luis Obispo (830 F.2d 977), attempted to further define "economically viable use". There the Court stated that the "test" (after the application of the regulation) focuses on the existence of remaining permissible "beneficial uses", and that the person challenging the regulation has the burden of proving that the regulation denies all "beneficial use", that is, that there is no available beneficial use left. In other words, if a land owner is left with "some" use of his land it is up to him to prove that the remaining use is not economically viable.

Some general observations may be made:

1. The Council can avoid the question altogether if it chooses to somehow acquire the property.

2. Prior to making a general policy of "no development" each affected parcel should be individually reviewed as to its present zoning, physical characteristics, and so forth, to see what present use of the property could theoretically be made. For example, most probably no "taking" would occur if a parcel could not be developed even were no policy adopted. (Adoption of such a policy would nevertheless very likely result in litigation, however, because, as mentioned above, there is no "formula" to apply, and each case is examined on its own merits.)