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**REGULATORY TAKINGS LAW: FINDING
ORDER AND LOGIC IN THE JUST
COMPENSATION CLAUSE**

1999 Edwin L. Crawford Memorial Lecture on Municipal Law

NOVEMBER 10, 1999



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Edwin L. Crawford

Edwin L. Crawford was an attorney, a public servant and an advocate for local government issues. A resident of Broome County, Ed served as town attorney for the Town of Vestal, and later as the Town's supervisor and Chairman of the Town Board for four years. During this time, he also served as a member and chairman of the Broome County Board of Supervisors and the Broome County Legislature. In 1969, he was elected Broome County Executive. From 1977 until his death, Ed served as Executive Director of the New York State Association of Counties. He volunteered his time for dozens of organizations, including service on the Board of Directors for the National Association of Counties.

About the Lecture Series

This Lecture Series was established in 1996 at Albany Law School to honor the memory of Ed Crawford. The program strives to educate and promote dialogue on important and timely issues affecting local governments.

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INTRODUCTION

Edwin L. Crawford died just over six years ago at age 68. I didn't know him, but I wish I had. From all that I have read about him, he had a wonderful life and a great career. He was a native of Broome County and served in World War II in the 17th Airborne Division in a glider unit. After the war, he graduated from Cornell University and Cornell Law School, and then practiced law in Broome County from 1950 to 1997.

He was perhaps best noted for his efforts to modernize county governments across the country. He served as the Town Attorney for the Town of Vestal, and after that, as the Town's Supervisor and Chairman of the Town Board for four years. It was Ed Crawford who led the drive in Broome County for an elected county executive, then ultimately held the post there himself for eight years, initially elected in 1968.

He then became the Executive Director of the New York State Association of Counties, in which position he worked closely with the Governor, the legislature and county officials in various initiatives on behalf of New York's counties.

This annual lecture series, which was established in 1996 at the Albany Law School, honors the memory of Ed Crawford, and I am pleased to give this year's lecture.

I went back and read some of the scores of articles in which Ed Crawford was cited or quoted to get a sense of the man. It is hard to do from articles, and I probably have got it wrong, but he certainly seemed to be a forthcoming, candid and straight-shooting person—qualities which are highly desirable and seldom found among career politicians and public officials.

In 1985, for example, The New York Times had an article about the difficulty towns and schools were having in finding insurance. Ed Crawford in his capacity as executive director of the New York State Association of Counties assessed the politics of getting things done at a special session:

"You don't discuss things at a special session. One house has its bill and you talk about it, and the other guys talk about their bill. The Governor probably doesn't like either one of them. So they each pass only their bills, and everybody goes home and yells at the other side."

In talking about the difficulties that Broome, Seneca and Dutchess Counties were having as self-insured counties, he said:

“Religion comes very quickly and very easily when you’re self-insured. You put some money in the budget as a reserve fund, you hire the best defense lawyers you can find, and say no to every claim. And that isn’t right, because you force every litigant to go to trial. And there are some cases where you probably ought to settle. But you take this hard-line posture and the fellow who has a deserving claim falls into the same slot as a less valid, or frivolous, claim, of which there are a number.”

In 1993, The Buffalo News reported efforts by counties to get legislation enabling the counties to raise local sales taxes above 3%, and Ed Crawford argued that the need for state approval is both unnecessary and cumbersome:

“It’s a local issue and should be resolved at the local level. The need for state approval makes the counties come down (to Albany) year after year on their hands and knees, tin cups in hand.”

Ed Crawford enjoyed enormous respect and credibility for a number of reasons. One of them was the length of time he had been in county government. As he was quoted in a New York Times article in 1987:

“I go back 35 years, and I don’t know of any county that has totally suspended real property taxes.”

And he was an astute observer of politics. In a Newsday article in 1991, he described the phenomenon of budget discussions right before the election:

“Usually it’s a political debate . . . The out party always wants it before election—regardless of which party is out.”

And finally, Ed Crawford was a realist and pragmatist. In a 1991 New York Times article, in talking about a budget plan by Suffolk county executive Patrick Halpin which would freeze taxes with service cuts, Ed Crawford said:

“Counties carry a monstrous responsibility for running welfare, social service and health programs. We can’t lay it all on the property tax payer, so the result is no-growth budgets, reduction in services, and layoffs. In spite of all that, in some

counties, they're going to have tax increases.”

So with that perspective and a little history of the man to whom this lecture is dedicated, I am pleased to talk with you today about the U.S. Supreme Court's most recent takings decision, a case that the Court has just decided to hear, and the problems we have in reporting and understanding all of these cases.

The Del Monte Dunes case decided this year by the U.S. Supreme Court involves a parcel in Monterey, California, of almost 38 acres along the beach, surrounded by other developments including a state beach park and the Navy's post-graduate school. It was at one point a tank farm. It is definitely not an unaltered piece of real estate, regardless of the sense you may have from the case. Here's the picture of it. Up at the top, you see the highway that goes by, and that will figure in a restriction that the City of Monterey tried to impose. To the left is a public beach. In the middle is the so called “bowl,” which eventually became the last portion of the property available for development. A sewer line cuts across the property.

If you want to talk about Del Monte Dunes and impress your friends, here are some of the important insider facts you need to know. The case really revolves around the buckwheat plant, the Smith's blue butterfly, and the non-native ice plant on the site, which was planted to control erosion by Phillips Petroleum when it was a tank farm. The ice plant displaces the buckwheat plant, and the buckwheat plant is the habitat for the Smith's blue butterfly. Now if you are depressed at times by the misery of your day-to-day life, just be glad you are not a Smith's blue butterfly. The Smith's blue butterfly lives most of his existence as an ugly larva and then it mates only once, which it can do only on the flowering blossom of the buckwheat plant. It never travels more than 200 feet from where it is born, and it dies within two weeks of mating. The central question as to the development of this site was the preservation of the Smith's blue butterfly, yet it was never actually ever found there.

The Fish and Wildlife Service studied the area and, out of five annual site investigations spread over a seven- or eight-year period, they found one larva on the site. We've never had a good explanation of how it got there. The property rights advocates suspect, because they see shadows everywhere, that somebody “salted” the site or planted the larva. To the conservationists, preservationists and government advocates, it was good reason to suspect— regardless of the scientific facts of the Smith's blue butterfly—that it was a habitat area.

Prior to the start of this case in the mid 1980s, the site was zoned for multi-family with over 1000 units theoretically possible. The developers came in initially for 334 units, and the Planning Commission said: “334 units, I don't think so. How about

coming back with 264?” They came back with 264. The Planning Commission said: “264 is kind of pushing it. How about 224? We think we’d like that.” Well, they came back with 224, and the Planning Commission denied it. They appealed to the Council. It was remanded by the Council which said “How about 190?” They came in with 190, and the Planning Commission said “no,” then “yes,” and that’s the history of five separate applications. The property rights advocates would argue there were five applications. The pro-government side said there were only two denials. At least five of the U.S. Supreme Court Justices were very concerned about the treatment of Del Monte Dunes. The 190-unit plan only involved about five acres, and all the rest of it was tied up. Almost seven acres were set aside for parking. They were also required to set aside almost 18 acres for open space and eight acres for landscaping. Were these exactions? No, but they had the practical effect of closing the property in and leaving no reasonable beneficial use.

We’ll never really get to the bottom of this case; we can’t know the truth. But, there is a sense from reading the decisions below that the government led the property owner down several dead-end paths. On the other hand, it’s quite appropriate to argue that the developer over-reached, regardless of the fact that the parcel was zoned for 1000 units. What it’s zoned for doesn’t mean the maximum is appropriate. Three hundred units may have been too many, and the application may have been devoid of sufficient information to inform the government as to what was appropriate. So I don’t know. What I do know is that the record does look bad for the government when you read it, and the Supreme Court did read it.

Here’s what I think the crux of it was: Not only were these five applications denied, but it may have been over-regulation by “whittling down.” Monterey imposed an oceanfront set aside for public use. This meant the freeway height limitation (they wanted people to be able to see from the highway out to the water), a park buffer, and a much larger access road. Ultimately, all they left was this five- or six-acre bowl in the middle, which was the primary habitat for the Smith’s blue butterfly and the buckwheat plant, so they said no. So here we are again. Picture all the restrictions around the site on view here. [Using a pointer, speaker showed various points.] You can see that these were the previous tank locations. All that was left was the five- or six-acre parcel. As the Ninth circuit described it, “The city progressively denied use of portions of the Dunes until no part remained available for use consistent with leaving the property in its natural state.” This is not a case driven by diminution in value. The court didn’t use that test. What they were talking about was that there was no reasonable beneficial and economic use remaining in the property, not that the property didn’t have value. In fact, as some of you know from reading the decision, the property did have value. Del Monte Dunes caved in during the process of these denials. They said, “We give up.” They sold it to the state for a park, at \$800,000 more than they paid for it.

When I was first informed of that fact, I said this will be a tough takings case to prove. How can there be a loss of value when they sold it for more than they paid for it? First of all, in selling the property to the state—and this is something you won't find in the records of the decisions as you read them—they were required to do some environmental clean-up. When you factor that cost in, and the application fees—which ran into hundreds of thousands of dollars for five applications involving the services of lawyers and engineers and designers—and the carrying expenses for the mortgage and so forth, selling it for \$800,000 more than they paid for it may have been a substantial loss. But the fact that they sold it for more than they paid for it was never an issue in the trial, never an issue in the Ninth Circuit, and never an issue in the U.S. Supreme Court. What this case was about was five denials, one after another, and the property being whittled down until the property owner had virtually no area left within which to develop.

The litigation began. What is important in this case, and probably not much discussed yet, is that it was started before the First English decision. Those aficionados of takings law will know that the 1987 decision was important in establishing that all states, even California, had an obligation to pay money damages as just compensation. Because Del Monte Dunes started before First English was decided, they had an opportunity to go to federal court first. After First English, because there was now a state court money damages remedy, they could not go to federal court first.

Believe it or not, Del Monte Dunes was initially dismissed as un-ripe. They went off to the Ninth Circuit, and the Ninth Circuit reversed the trial court. Five denials later they said it's ripe, go back and try it. You should read Del Monte Dunes I because it has some good facts. It went back to the trial court, and look what happened. The jury awarded almost a million and a half dollars on equal protection and takings claims. At least some of the issues were tried to a jury. Interestingly, the court kept the substantive due process claim and then decided there was not a violation of substantive due process; but the jury did find on the equal protection and takings ground that Del Monte Dunes was damaged and awarded a million and a half dollars.

They went back to the Ninth Circuit, which upheld the jury award. I found it really fun reading about trover, detinue and replevin. I thought it was a reincarnated rock band from the late '60s, but no, they're old legal theories. The Ninth Circuit was trying to decide in a 1983 claim under equal protection and takings, do you get a jury trial or not? I submit to you that even though this is an important takings case, it's really more a case about jury trials. When you see that a couple of Justices on the Supreme Court ended up on different sides of the fence than where they would normally be in a takings case, you should reach the same conclusion that this had to do more with Federalism,

the right to a jury trial. The Supreme Court addressed the federalism issue involving the state of Maine late in the session, as well.

And so, off they went to the U.S. Supreme Court. Here were the issues: If you get a jury trial, should the jury or court re-weigh the evidence on reasonableness from below? And what about Dolan and the concept of rough proportionality, which had to do with the dedication of some land? Can it be applied in a regulatory takings case context such as this? The developer won in the Supreme Court, and the damages award was upheld. Juries are permitted in these federal actions, although I think you're going to see few, if any, actions again. Importantly, Dolan's concept of rough proportionality was not extended by the court in this case outside the context of land dedications, although they could do it later.

As important as Del Monte Dunes is, it will have little or no effect. This is indeed the first case in this country in which the U.S. Supreme Court has upheld a money damages award for a taking, and they did so in the face of the fact that the property owners sold it for more than they had paid for it. All of that is important indeed; but the court was split on the right to a jury, and I think that is what the case is more about. I think this case, like nearly all takings cases, is a factual mutant. The cases that end up in court, as you know, are a distillation of a distillation of a distillation. They reflect instances in which property owners cannot determine the results, have an ax to grind, or have some hidden agenda that they are playing out that has nothing to do with the merits of their case. Ninety-five percent or more of the cases are settled before they are tried. Of the cases that are tried, few of them go up on appeal. A lot of decisions are not reported. Developers are not in the business of waging lawsuits. When a developer comes to me and says, "I can't get my development approved. I'd like to make some money on a section 1983 case," I don't want that client. I want developers I represent to be in the business of making money from doing developments. Sure, there are grounds for principle in these cases; but when they start playing out other agendas in litigation, you end up with strange cases.

How many of you read the Dolan decision? Her brief is one of the myths we have in this area. It starts out with, "Mrs. Dolan, an elderly widow," but the elderly widow, Florence Dolan, presumably in a mom-and-pop scenario, was actually the owner of a chain of big hardware stores that she and her husband operated called "A-Boy Hardware," so they could be first in the Yellow Pages. The Tigard, Washington, store—which is the subject of that case—had a big trailer parked in the front that said "A-Boy" on it, because she wanted to evade the sign regulations that would otherwise restrict her signage. Yet, she came on as a mom-and-pop-crushed-by-the-government sort of person. That was not at all the case. She was bankrolled to the tune of \$200,000 by Oregonians in Action, a private property rights advocacy group in Oregon, to play out

her case. This was a property rights case, not one about Florence Dolan. I think the government did wrong in that case. I think they were foolish in defending it. I think they should not have required the exaction to begin with. They could have taken it by eminent domain for three or four thousand dollars and been done with it. Instead, they ended up having to pay her \$1.5 million dollars in settlement. That is part of the other lesson I am going to get to in a moment. People do not know what happened in these cases. Florence Dolan settled for a million and a half dollars and a commemorative plaque celebrating her victory in the U.S. Supreme Court.

The cases that reach this level tend to be strange animals, creatures that we are not likely to see other places. Del Monte Dunes really is a strange case. Most governments are not going to be as aggressive as Monterey. After the decision, the city attorney in Monterey was quoted in the paper saying essentially, “We didn’t do anything wrong, and we’re not going to change the way we operate.” I tell governments that I represent, and other people when I speak about this case for the government, to just get away from this decision. Make it clear that it is not the way it is done in your county, village, city or town. Make it clear that you do not treat people that way—whether they are developers, neighbors or environmental group. Make it clear you treat them constitutionally. Make it clear that you are not going to get involved in litigation like that because it will not happen that way in your municipality. Smart governments will disavow what Monterey did and get around it by demonstrating a desire to approve something. One way to cut off these cases early on is to get to the bottom line, to get ready to approve something.

Furthermore, procedurally, it is a crazy case. Remember, I said it was a pre-1987 case before First English. Now, you have got a remedy in state court. The Williamson County ripeness requirement of going to state court for compensation still exists. Most of these cases are going to have to go to state court. Not many will go to federal court. Most land use cases are not takings cases either. They are due process cases, procedural due process and substantive due process. Do not think that everybody is guaranteed a jury trial in most state court cases. There are still several types of federal cases in which you are not going to get a jury trial either.

In conclusion on Del Monte Dunes, I think that it is so procedurally and factually limited that it is really not going to have any profound effect on takings jurisprudence.

Let me tell you a few things about bad faith. As I said, at least five of the Justices talked about bad faith right out of a box. Have any of you seen a U.S. Supreme Court argument? I love watching Justice Scalia. He’s terrific—fun to watch and listen to. Do you remember what was going on in this country a year ago in October? We had reached a new low of public discourse at the time the Del Monte Dunes argument was

before the Supreme Court.

When you look down the bench at the United States Supreme Court Justices, there is an empty spot because Justice Scalia, who's short, tends to lean way back in his chair and you do not see him. The argument is going on, and Monterey's lawyer is saying, "This is not atypical." (Never trust a lawyer who uses a double negative.) Then you hear this disembodied voice saying, "And this is typical, you say?" Scalia leans up in his chair, his head rises up above the bench, and he goes on to say, "The landowner here essentially thinks it was getting jerked around," which is wonderful phraseology for the United States Supreme Court. "Isn't there some point at which, although there's a rational basis for the fifth decision, a rational basis for the fourth and the third and the second and the first, you begin to smell a rat?" he goes on to say. (So we call it "The-Jerked-Around and I-Smell-a-Rat Test.") He continues, "And at that point, can't we say, despite our normal rational basis review, there's some other factor that begins to come in here, and this is, at some point you can say, simply unreasonable?" Then Justice Kennedy asks, "Suppose the planning commissioner is in bad faith in implementing the ordinance, could that question go to the jury?"

Bad faith wasn't an issue in the case in the Ninth Circuit. Bad faith was not briefed, but Mike Berger, who represented Del Monte Dunes, was ecstatic at this point. Justice Rehnquist asked if it was not possible that an element of bad faith would come in somewhere along the lines of Justice Scalia. Could not a finder of fact, either a jury or judge, say an element of bad faith plays a part in the decision. Justice Souter added, "Isn't the issue of bad faith one that may be considered right up front under that particular heading?" Justice Breyer called it the extreme run-around test—"If this is basically a temporary takings case, and the point of the temporary takings doctrine is to stop, say, cities giving people what one might call the 'extreme run-around.'" From Justice Ginsberg, "Mr. Uhass, [the lawyer for the City of Monterey] may I just interrupt to clarify what Mr. Uhass said . . . that bad faith and motive were not made issues in the case."

So now, in the face of all that, the U.S. Supreme Court has taken a new case, the Olech case. Has anyone heard of the Olech case? Mrs. Olech and her husband and the neighbors sued the Illinois town in which they live about storm water run-off, and they won. After they brought their case about the storm water, their well failed, and they and their neighbors went to the Town of Willowbrook and said, "Our well failed, and we need to connect up to the municipal water supply. We're living on bottled water," and they laid out a hose connected into their neighbors' well. The municipality said, hmmm . . . the Olechs who won \$100,000 bucks from us last year. (At least, this is the way the case is characterized.) They said, "You can connect up to our public water supply, but instead of the usual 15-foot easement that we've required from everyone else, we want

33 feet from you, because we want to widen and pave the street, put in a new sidewalk and do some other things, and we need the money for the water connection up front.” So they pay the money up front, \$7,000 plus for each of the three families, I guess it was. After three months, the local government lawyer finally wrote a letter that said, “You know we’ve always required 15 feet. It has to be 15 feet, it can’t be 33 feet.” In the meantime, their rubber hose on the ground had frozen. They were living on bottled water in their home to their great distress. The Town did connect them up, and it was in that posture that Grace Olech sued, and the 7th Circuit said that she could stay in court on that. The three months of distress that was caused by the municipality requiring, with the appearance of vindictiveness, that she and her neighbors give a 33-foot easement instead of a 15-foot easement was enough for her to stay in court.

Why did the Supreme Court take that case? I’m guessing that they were so wound up about the issue of bad faith in Del Monte Dunes, because in all these cases, we can do all these takings tests, we can look at substantive due process, but the bottom line in my view of these cases is ultimately one of fundamental fairness. It is a fundamental right of people to be treated fairly, and the court is beginning to focus on that. That is why you have these varied Justices asking the same question about why Del Monte Dunes was treated that way. Is Mrs. Olech going to win her case? I have no idea. It sounds like a thin case to me, but she was treated badly. I think it is probably a 1983-type constitutional tort. I don’t think it is a taking, but it might be an equal protection claim.

We just had a remarkable decision in Connecticut—George Thomas against the City of West Haven, decided this summer at 249 Connecticut 385. The Connecticut Supreme Court upheld the right of a property owner to stay in court on an equal protection claim in a re-zoning case. Every year, I write an article for the Quinnipiac Law Review about land use law in the Second Circuit which is the worst place in the entire country to claim a property interest. In New York, practically nothing is a property interest; but every place I know, requesting a re-zoning is not a property interest, and you do not get to have a takings claim for that. You probably will not even get any due process, because it is totally a legislative act in most jurisdictions, except for a half dozen around the country.

These men came in and requested a re-zoning. They had a bad history in the town, and they got denied. They went to court, they won at court, and they went back. I wish I had time to read all the language to you. The Chairman said, among other things, “We give this guy everything, and now he comes in with this [expletive deleted]. He’s a shrewdy. I’d like to have this guy come back when he’s ready.” The planner said in essence, “You can’t treat him this way” and “You’ve got to listen to him.” The Vice Chairman said “You said we’ve got to listen to him; we do. We listen to him, and

that's all there is to it." It went on like this for pages. With that history on the record, the Connecticut Supreme Court said that white middle class developers who gave up on their takings and due process claims early in the case can stay in court under Section 1983 with an equal protection claim because they have been treated shabbily by the local officials. These are extreme cases. They hardly every happen, and more sophisticated communities do not do as much on the record perhaps as this town did. I think there is evolving in this area a real concern by the courts of conservative and liberal stripe alike with fundamental fairness and the way people are treated.

You have in your handouts a copy of the lost chapter from my book, *The Takings Issue*. This was a chapter that I enjoyed writing more than any in the book, and it hurt me more than ever when the publisher said, "You've got to whack 500-600 pages from this text; it's too big." I read this book by John Kotre called *White Gloves*. I very seldom recommend a book for people to read but, like *Getting to Yes*, this book has been a very influential one for me. Here I am in my 50s, and I wondered all my life why I could not get to the truth. The fact is, as Professor Kotre tells us, you will never get to the truth, and the reason is because of the way we remember things.

Remember the argument you had with someone yesterday? Go back to them today and say, "I'm sorry we had that argument." They do not even remember the argument the way you did; it's completely different. Go back home at Thanksgiving or holiday time, and talk to your parents about how they embarrassed you when you were eight years old. They do not remember it like that, and they have stories about you that you do not remember the same way.

Professor Kotre says we remember things in ways that serve our personality. These takings cases, even the *Del Monte Dunes* case, are remembered and interpreted by people who have definite biases, definite agendas, definite ways of looking at things. For instance, the Urban Land Institute published an article by Gus Bauman from Beveridge & Diamond, former counsel for the Home Builders and generally a good, middle-of-the-road observer. In the article, Bauman said "[t]he significance of *City of Monterey v. Del Monte Dunes at Monterey* cannot be overstated." Oh, I think it can. He says it is big win—that *Del Monte Dunes* is a killer case that does everything.

Tim Dowling of the Community Rights Counsel presented a paper at the International Municipal Lawyers Association (IMLA) annual conference. IMLA is pro-government, and a very good group to go to if you need help in these cases. Dowling's paper describes in some length how municipal attorneys should use *Del Monte Dunes* to defend against various theories of takings liability. If I were the government lawyer and somebody said *Del Monte Dunes* to me, I would say, "I don't know what you're talking about." I would never use *Del Monte Dunes* as a way to defend my government

against a takings claim.

Here are two knowledgeable highly regarded people saying two completely different things because of their view of the world. I will leave you to read Professors Kotre's quote at the beginning of my chapter, but basically he says that we remember things in ways that fit our view of the world.

So it is important to remember three points about the takings issue. First, there are myths about these cases—enormous myths. I just told you about one of them. Gus Bauman and Tim Dowling talking about Del Monte Dunes—already there is a myth. The Nolan Case, which the California coastal beach property rights people say is a great case, proving you can not require an easement from somebody. Government lawyers also say it is a great case. It proves, they say, that you can have a conditional approval if the conditions are necessary to approve it. They are both right to some extent, but they see the cases completely different. Second, there is an enormous amount of misinformation. Third, there is a general failure to follow-up.

Now let me tell you something about the second and third points very quickly. Here are two stories about misinformation and failure to follow-up. I got a call at 11:00 in the morning on the day the First English case was handed down in 1987 from a reporter from one of the three largest newspapers in the country, who will remain nameless so I do not embarrass her. She says she wants my opinion on what this case means. Well, this was before fax machines and anything else, and I was in a meeting with a client out of town and I said:

"I haven't seen the decision. What happened?" She told me what happened, and I said "That's interesting." She asked for my opinion. I said, "I haven't seen the decision. Have you talked to anybody else?" She said "yes" and listed five or six land use luminaries. I asked "Do they have an opinion?" She said, "Yes, they said [it means this and means that] . . ." I asked her, "Have they read the decision?" She replies, "Well no, they don't have the decision yet either." I asked her, "Do you have the decision?" The reporter's reply was, "No, I don't have it yet. I just got a call on it." I said, "I'm not talking about it."

The next morning, an article appeared in column one below the fold that was just wrong and scared the heck out of people. First English was a scary case for people around the country. We saw a real pull-back in volunteerism, which was totally unnecessary, and the next day that newspaper had an Op-Ed piece which was also wrong.

This greatly increased the fear of liability among municipalities and I will bet you there are not a half a dozen people in this room, speaking of point number three of not following up, who know what really happened in First English. Mike Berger represented

the church in that case. They sued for a temporary taking, and they won in Supreme Court on the pleadings issue alone. The takings issue was never tried in that case. Never tried. It was on the pleadings only. California was told to get in line with the rest of the states, get in line with the United States Constitution, and pay money damages when you take somebody's property. Up until then all you got was a reversal of the decision. Does anybody know what happened in the end in First English? Do you know how much money they got? They did not get a dime. It went back to the middle level appellate court and the court said this is a church camp, they can pitch tents, they can sing songs, they can cook s'mores. (I made up that last part because it is more interesting.) If this was industrial property, the court said, and they could not build on it during the moratorium following the flood, then it would be different. There was no temporary taking and Mike Berger and his clients never got a dime, but people did not follow up on that story.

The other story is about Dolan. I was having lunch with friends in a museum café in Honolulu the morning of the decision. I was there to give a speech. I had represented the city and county of Honolulu in a dozen cases including one that went up on a cert. petition to U.S. Supreme Court, and the people knew I was in town. While I was eating a sandwich, a T.V. camera was pushed in my face. "Mr. Merriam, you're in town to talk about the takings issue, perhaps you saw that Mrs. Dolan's case was decided this morning. Could you comment?" Well, I had him. Honolulu has a six-hour time difference. I had the decision; I had talked to everyone who knew anything. I knew all about the case and had a nice conversation with the media, and they went on their way.

It is instant press that gets us into trouble—the people who want to know what the cases mean right after the decision and before the evening news.

Finally, I will finish with a few more stories about the problems with follow-up. I told you First English never won a dime. Do you know what happened at the end of David Lucas's case? He was the fellow with two lots in South Carolina who won in the U.S. Supreme Court. There were two lots they were trying to save from being developed because of flooding in the area and they fought and fought and fought. They ended up having to pay Lucas \$1.5 million for the lots, part of which was \$400,000 for his lawyers, which I thought was the fairest part of the settlement. Do you know what the State of South Carolina did then? They sold the lots to a developer, and they were built on. They needed to get their money back from the settlement.

Mrs. Dolan settled for \$1.5 million, as I told you, and Mrs. Suitum from the Suitum case, students here may have been reading about, settled for \$600,000.

In conclusion, these takings cases are strange cases. They are Trojan horses with hidden agendas—people playing out the property rights battle through others, for the most part. They are cases in which a fraction of one percent of governments have gone bad. They do not characterize local government decision-making in this country at all. They are extreme and unusual cases. Most land use disputes are settled without litigation, without this torment, without this trouble. Most of these cases are totally fact driven and do not have a whole lot to say about our decision-making at the state or local level. There are enormous myths that have grown-up around these cases, and they are indeed myths—views that are designed to fit the perspectives of the people talking about these cases. We do not really know much about these cases when they are decided, and we should not talk a whole lot about them until we see how they play out in the courts and at the administrative decision-making level. Finally, we will never know what these cases really mean. To understand what they may mean, we need to follow up on what actually happened to them in the end. By doing that, we may be able to eliminate the myths and to understand and appreciate how these decisions can be used to assist in better decision-making and in respecting the rights of everyone involved in the land use preservation, development and approval process. We may indeed be better informed for the betterment of all concerned.

With that, I thank you very much for being here today. It has been a great pleasure to present this lecture.