

1986

## Colman v. Utah State Land Board : Unknown

Utah Supreme Court

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Unknown.

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BRIEF

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March 23, 1990

**FILED**

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Clerk, Supreme Court, Utah

HAND-DELIVERED

Mr. Geoffrey J. Butler  
Supreme Court Clerk  
332 State Capitol  
Salt Lake City, UT 84114

RE: Colman v. Utah State Land Board, No. 860331  
Reply to State Respondents' Third Citation of New  
Authority

Dear Mr. Butler:

This letter is submitted in response to the State's third citation of new authority in accordance with rule 24(j) of the Rules of the Utah Supreme Court.

The State has cited the Court to the California Appeals Court decision in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 898 (Cal. App. 1989) in support of its position that, as a matter of law, Colman has not stated a claim for a taking of private property. This decision, which is the result of the Supreme Court's remand, adds nothing to the arguments previously presented by the parties in Colman.

In First English, 482 U.S. 304, 107 S. Ct. 2378 (1987) the United States Supreme Court addressed two issues. First, the Court held that monetary damages can be sought for inverse condemnation based on unconstitutional regulatory takings. Second, and more important for this case, the Supreme Court held that a temporary taking is compensable under the just compensation clause. 107 S. Ct. at 3141. The Supreme Court remanded the case for the California courts to determine whether the temporary land use regulation at issue resulted in a temporary taking of the plaintiff's property.

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On remand, the California Court of Appeals held that there was no taking because the regulation did not deprive the plaintiff of "all use" of its property. First English (Cal.), 258 Cal Rptr. at 904-05. The court found that the plaintiff was left with several of its contemplated uses throughout the term of the interim ordinance challenged by the plaintiff. Id. at 904.

Colman's factual basis for a taking is substantially different than First English. First, the Lutheran Church in First English alleged a regulatory taking. Colman, however, alleges a physical occupation of his property, which is a taking per se. Colman's Supp. Brief at 36. Alternatively, Colman alleges that he has been deprived of all beneficial use of his property. Colman's Supp. Brief at 37-38.

The record in this case does not provide a basis for this Court ruling that Colman has not been deprived of all use of his land as he alleges. Physical occupation or deprivation of all beneficial use of the property, even if only temporary, is a compensable taking. Colman Supp. Brief at 36-38. The determination of whether there is a "physical invasion," "substantial impairment" or "peculiar injury" constituting a compensable taking is a question of fact for the trial court. Colman Supp. Brief at 23-24. The California Appeals Court decision in First English does not alter this conclusion nor provide a basis for this court ruling that Colman has not stated a claim as a matter of law.

Although the California court may have correctly ruled that there was no taking in First English because the plaintiff was not deprived of its beneficial use of the property, the court's discussion is questionable in two respects. First, the California court has, like many others, confused the state's police power and eminent domain power. See Colman's Supp. Brief at 8-13. As the State points out in its letter, the California court stated that the disputed "zoning restrictions represent a valid exercise of police power and not an unconstitutional 'taking without compensation.'" The validity of the exercise of the state's police power is a question of due process, not just compensation. A proper exercise of the police power (e.g. a valid regulation), however, may still require compensation under the taking clause:

[A] basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the

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event of otherwise proper interference amounting to a taking. First English, 107 S. Ct. at 2384-85; Colman's Supp. Brief at 12.

Colman does not claim that the State's decision to breach the causeway was an invalid exercise of its police power in violation of the due process clause. His claim is that this otherwise proper interference with his property requires compensation under the just compensation clause of the Utah and United States Constitutions.

Second, the California First English case suggests that the State can take property without just compensation to the extent that the regulation is necessary to preserve public safety. Because the California court held that plaintiff was not deprived of all use of its property, this statement is dicta. (For an analysis of the public safety and emergency argument, please see Colman's Supp. Brief at 46-50.) It is important to note that the public safety rationale approved by the court was the protection of human lives, not property. First English (Cal.), 258 Cal. Rptr. at 895, 901-02. In Colman, the State breached the causeway to protect property, not human life. Finally, the California court specifically found that First English presented a "dramatic illustration of the principle of 'reciprocity of advantage'" id. at 905. No such reciprocity is present in Colman. Colman Supp. Brief at 35-36.

For these reasons, and as more fully set forth in Colman's Supplemental Brief, the trial court's ruling that there was no taking in Colman should be reversed.

Respectfully submitted.

Sincerely,



Carol Clawson

cc: R. Douglas Credille, Esq.  
L. Ridd Larson, Esq.

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