No. 86-133

In The
Supreme Court of the United States
October Term, 1986

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

On Appeal from the Court of Appeal of the State of California, Second Appellate District

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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In a preamble to its motion, appellee California Coastal Commission unfairly portrays the nature of this case. This appeal does not "attack[] the ability of the California Coastal Commission to protect publicly-owned tidelands and the people's right of access to those lands." Motion of Appellee California Coastal Commission to Dismiss or Affirm (Motion) at 2. The commission is not protecting publicly-owned tidelands; it is merely attempting

to expand them. This appeal attacks the commission's ability to require dedication of privately-owned land for the purpose of adding to the state's inventory of publicly-owned land, without compensating the owners. Publicly-owned land is not threatened, or even involved, in this case. It is privately-owned land that needs this Court's protection.

ARGUMENT

I

CALIFORNIA INTERPRETS FEDERAL "TAKING" LAW DIFFERENTLY THAN DOES THIS COURT

The principle attacked in this appeal is the California rule that permit applicants may be required to surrender their private property to the state without compensation, even though their projects neither caused nor contribute to the public need in question.[1] The commission contends that this Court has "concurred" with the California rule "either by express holdings or through dismissal of prior appeals." The commission, however, does not cite any "express holdings," and the Nollans are unaware of any. As for the precedential value of summary dismissals of prior appeals, this Court has frequently stated in recent years that "summary actions do not have the same

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[1] The commission's assertion that this rule has been "uniformly applied in California for more than 35 years" is not an accurate summary of California law. *See* Jurisdictional Statement at 15-16.

authority in this Court as do decisions rendered after plenary consideration." *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 500 (1981); *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 180-81 (1979); *Edelman v. Jordan,* 415 U.S. 651, 671 (1974). Accordingly, this Court has noted: "It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action." *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation,* 439 U.S. 436, 476 n.20 (1979); *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 308 n.1 (1976).

The California rule is that confiscation of private property accomplished in the permit-issuing context is, by definition, a permissible exercise of the police power, not an exercise of the power of eminent domain; therefore, no "taking" analysis need be undertaken by the courts. The court's inquiry under the California rule is therefore limited to determining whether the exaction was statutorily authorized and served the public welfare (*i.e.*, whether it was within the police power). This is quite different from the federal rule, which recognizes the constitutional prohibition against government requiring some people alone to bear fully the burden of satisfying public needs they did not create.

The commission admits that the Nollans have correctly characterized the California rule when it states: "Contrary to the argument of appellants here, the validity of such dedication requirements is not dependent upon a factual showing that the development has created the need for it." Motion at 6. California in this way interprets

the protections of the Federal Constitution differently than this Court.

II

THE NOLLANS DID NOT RECEIVE A MEANINGFUL "TAKING" ANALYSIS, AND ARE ENTITLED TO ONE

The commission next argues that the Nollans got their "taking" analysis when the Court of Appeal gratuitously noted:

> "The *Grupe* court also held that the exaction [in *Grupe*] did not constitute a 'taking' because although it caused a diminution in the value of Grupe's property, it did not deprive him of the reasonable use of his property." Jurisdictional Statement, Appendix A at 6; Motion at 7.

Aside from the obvious fact that this was not an analysis of the Nollans' case, just a recitation of another case, it is also not the appropriate test for a case like the Nollans'.

The language taken from *Grupe* is the test this Court has employed to determine whether "***regulation*** '[goes] too far.'" *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. —, 91 L. Ed. 2d 285, 294 (1986) (emphasis added). This test is applied only when the "regulations do not require the landlord to suffer the physical occupation of a portion of his property by a third party." *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 440 (1982). The commission essentially concedes this by quoting in its motion the following language from *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980):

> "The application of a *general zoning* law to particular property effects a taking if the ordinance

> . . . denies an owner economically viable use of his land . . . ." Motion at 7 (emphasis added).

The statute being applied to the Nollans, California Public Resources Code § 30212, is not a "general zoning" law. The statute is not a regulatory law at all; that is, it does not restrict what *use* the Nollans may make of their property. Rather, the statute mandates an uncompensated *conveyance* of their property to the state, and the opening up of that property to physical public use. As this Court stated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978):

> "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion . . . than when interference arises from [regulation]."

The same point was made in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979):

> "This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina. . . . And even if the Government physically invades only an easement in property, it must nonetheless pay compensation." *Id.* at 180.

The commission has avoided the Nollans' primary assertion that this is a physical invasion case based on *Kaiser Aetna* and *Loretto v. Teleprompter Manhattan CATV Corporation*. It devotes one brief paragraph to *Loretto* on Page No. 8 of its motion, in which it merely states that *Loretto* did not involve a permit application. The implication of this argument is that the constitutional

violation found present in *Loretto* could have been avoided had the city simply made the physical invasion of Mrs. Loretto's property a condition of a permit. The commission would thus have this Court distinguish the invasion here from the invasion found unlawful in *Loretto* on the grounds that Mrs. Loretto "took no action which could trigger the police power of the State." Motion at 8. This distinction was raised and rejected, however, in the *Loretto* opinion itself. The cable companies had argued that New York's cable attachment law applied only to rental property—a regulated industry in New York—and that the privilege sought by landlords, of engaging in the rental business, could be conditioned by requirements such as cable access that served the public welfare. This Court responded:

> "Teleprompter notes that the law applies only to buildings used as rental property, and draws the conclusion that the law is simply a permissible regulation of the use of real property. We fail to see, however, why a physical occupation of one type of property but not another type is any less a physical occupation. . . .
>
> " . . . [A] landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. . . . The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated." *Loretto,* 458 U.S. at 438-39 and n.17.

Almost every aspect of human life could require a permit if the state chose to regulate it. States should not be allowed to acquire private property without compensation through the simple device of setting up a permitting scheme, then lying in wait for the owner to "trigger the police power."

The commission also tries to trivialize the effect of its dedication requirement by referring to it as a "mere diminution in the value of property." Motion at 7. The Nollans are suffering an intrusion on protected private property that is much greater than the cable access requirement declared unconstitutional in *Loretto* or the public access requirement declared unconstitutional in *Kaiser Aetna*. The cables and boxes in *Loretto* quietly occupied only a few square feet on the outside of Mrs. Loretto's apartment building. She still held the full fee title to the underlying building. Here, the public will occupy more than a third of the Nollans' entire lot. Because public use will occur day in and day out, in perpetuity, the occupation is permanent, even though the identity of individual beach users will change as people come and leave. Unlike Mrs. Loretto's inanimate cables and boxes, the public can be expected to litter, make noise, and probably vandalize the Nollans' property. Moreover, the Nollans will have to insure themselves for public liability. Finally, the state here is doing much more than just authorizing third parties to occupy an area, the title to which is still held in fee by the owners. In addition to authorizing occupation of the Nollans' property, the state is making itself a *co-owner* of their property. *Cf. Kaiser Aetna*, 444 U.S. at 166 (government wanted public access, but not co-ownership). The permit condition under review requires the Nollans to convey an easement over the seaward third of their lot to the State of California. Co-ownership of a private beachfront lot in Southern California is a very valuable property interest indeed. This sort of invasion of rights cannot be countenanced just because the owner is left with

other rights that were not affected. The Nollans are entitled to a meaningful "taking" analysis and to just compensation.[2]

III

THIS CASE PRESENTS QUESTIONS OF LAW WITH BROAD APPLICABILITY

The commission's next contention, that this appeal raises only narrow and factually specific questions, is curious. According to this Court, "taking" cases are by nature "essentially ad hoc, factual inquiries" and therefore must always be presented to the Court with reference to their specific facts. *Penn Central,* 438 U.S. at 124; *Kaiser Aetna,* 444 U.S. at 175. This case is much less factually specific than most. The Nollans are not complaining that the California courts drew the wrong conclusion after a proper "taking" analysis (a factual question of degrees). Rather the Nollans are complaining that the California courts never gave them a proper "taking" analysis, when they were entitled to one (a pure question of law). *See* "Questions Presented," Jurisdictional Statement at i.

The Nollans' complaint is that the California courts apply a police power test instead of a "taking" analysis. If the exaction is authorized by a statute and good for the public, the inquiry ends. Whether the owners' rights were violated is not considered.

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[2] It is the Nollans' position that the physical invasion authorized in this case is a per se taking under *Loretto, et al.* At a minimum, however, such a physical occupation of one-third of their land cannot be constitutionally permissible without a finding that their project directly contributed to the public need in question. *See Hall v. City of Santa Barbara,* 797 F.2d 1493 (9th Cir. 1986) (taking analysis differs when physical occupation involved).

The relevant relationship in a meaningful "taking" analysis is not the relationship between the exaction and the public need, but rather the relationship between the exaction and the owners' proposed use. Here the owners' proposed use was the mere replacement of an existing house. As acknowledged by the lower court, and the commission in its motion: "Here the Nollans' project has not created the need for access to the tidelands fronting their property." Jurisdictional Statement, Appendix A at 6; Motion at 9. Despite this, throughout the commission's motion, and the lower court's opinion, the conclusory statement is made that the Nollans' project is "one more brick in the wall separating the people of California from the state's tidelands." Jurisdictional Statement, Appendix A at 6, Motion at 5, 7.

To say that the Nollans' project is "one more brick in the wall" is very poetic. But poetry is not a substitute for factual analysis. How is the Nollans' project one more brick in the wall? It does not interfere with access. The public has never had legal access across any part of the Nollans' lot. The Nollans' lot has been privately owned since before California became a state. If any part of the Nollans' lot was ever used by the public for access to state-owned tidelands, it was by trespassing. The Nollans' replacement house does not encroach on public property; it is situated entirely on private property, and conforms to all setback and height limitations. Any legal access to state-owned tidelands that formerly existed still exists. The Nollans' project is not one more brick in the wall separating the people of California from their tidelands. Rather, the published decision of the California Court of Appeal in this case is one more brick in the wall separating California property owners from their constitutional rights.

IV

THIS CASE IS PROPERLY HERE ON APPEAL

California Public Resources Code § 30212 requires an uncompensated dedication of land for "access" whenever something within the all-inclusive definition of "development" occurs between the last public road and the sea. The Court of Appeal acknowledged that the commission was therefore "required by the provisions of Public Resources Code section 30212" to demand a dedication of access from the Nollans. Thus, the validity of Section 30212, as applied to the Nollans, is properly before this Court on appeal.

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Respectfully submitted,

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