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' REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES CITED	ii
I. THE CALIFORNIA COURT OF APPEAL FAILED TO APPLY THE REQUIRED "TAKING" ANALYSIS	2
II. UNDER CALIFORNIA LAW THE NOLLANS HAVE THE RIGHT TO EXCLUDE OTHERS FROM USING THEIR PROPERTY FOR ACCESS TO THE OCEAN	3
III. A "TAKING" IS NOT EXCUSED BECAUSE IT IS ACCOMPLISHED THROUGH A REGULATORY PERMIT PROCESS	7
A. A "Taking" Is Not Determined by the Process Employed To Confiscate the Nollans' Property	7
B. The Regulatory Permit Process Provides No Compensation to the Nollans	8
C. The Use of a Regulatory Permit to Confiscate Property Is an Unfair Procedure Which Leads to Unjust Results	10
IV. UNDER THE CIRCUMSTANCES OF THIS CASE THE EXACTION OF A PUBLIC RIGHT-OF-WAY ACROSS THE NOLLANS' PROPERTY IS A "TAKING"	11
A. The Nollans Will Suffer a Physical Invasion	12
B. The Property Interest Being Taken from the Nollans Is One the Government Is Normally Expected To Condemn and Pay For	14
C. The Commission's Action Is Not a Prohibition on Use	15
D. The Nollans Had Investment Backed Expectations in the Privacy of the Residence	15

TABLE OF CONTENTS—Continued

Page

E. The Commission Imposed the Permit Condition with the Intent of Taking Property from the Nollans for Public Use 16

F. No Special Reason Exists To Burden the Nollans with the Full Cost of Establishing Public Use of Their Beach Property 17

CONCLUSION 19

TABLE OF AUTHORITIES CITED

Page

Cases

Agins v. City of Tiburon, 24 Cal. 3d 266 (1979), aff'd on other grounds, 447 U.S. 255 (1980) 10

Aptos Seascape Corp. v. County of Santa Cruz, 138 Cal. App. 3d 484 (1982) 5

Bolsa Land Co. v. Burdick, 151 Cal. 254 (1907) 4

City of Oakland v. Oakland Water Front Co., 118 Cal. 160 (1897) 4

Dickman v. Commissioner, 465 U.S. 330 (1984) 9

Federal Communications Commission v. Florida Power Corporation, — U.S. —, 55 U.S.L.W. 4236 (decided Feb. 25, 1987) 13

Frost v. Railroad Commission, 271 U.S. 583 (1926) 8

Georgia-Pacific Corporation v. California Coastal Commission, 132 Cal. App. 3d 678 (1982) 10

Gion v. City of Santa Cruz, 2 Cal. 3d 29 (1970) 5

Griggs v. County of Allegheny, 369 U.S. 84 (1962) 13

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) 11

Heist v. County of Colusa, 163 Cal. App. 3d 841 (1984) 6

Henry Dalton & Sons v. Oakland, 168 Cal. 463 (1914) 6

Hughes v. Washington, 389 U.S. 290 (1967) 7

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 3, 8

Kimball Laundry Co. v. United States, 338 U.S. 1 (1949) 13

Lane v. City of Redondo Beach, 49 Cal. App. 3d 251 (1975) 6

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 7, 8, 13, 16

TABLE OF AUTHORITIES CITED—Continued

Page

Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921) 7

McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879 (1953) 4, 5

Pacific Legal Foundation v. California Coastal Commission, 33 Cal. 3d 158 (1982) 10

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) ..... *Passim*

People ex rel. Younger v. County of El Dorado, 96 Cal. App. 3d 403 (1979) 5, 6

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 13

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 8

Sea Ranch Association v. California Coastal Commission, 552 F. Supp. 241 (N.D. Cal. 1982) 10

Southern California Edison Co. v. Bourgerie, 9 Cal. 3d 169 (1973) 14

United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940) 9

United States v. Causby, 328 U.S. 256 (1946) 7, 13

United States v. Cress, 243 U.S. 316 (1917) 7

United States v. Fuller, 409 U.S. 488 (1973) 9

United States v. General Motors Corp., 323 U.S. 373 (1945) 7

United States v. Kaiser Aetna, 408 F. Supp. 42 (D. Hawaii 1976) 8

United States v. Pewee Coal Co., 341 U.S. 114 (1951) 13

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 14, 16, 17

TABLE OF AUTHORITIES CITED—Continued

Page

Whaler's Village Club v. California Coastal Commission, 173 Cal. App. 3d 240 (1985) 10

Wickard v. Filburn, 317 U.S. 111 (1942) 18

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. —, 105 S. Ct. 3108 (1985) 17

Withrow v. Larkin, 421 U.S. 35 (1975) 19

Youakim v. Miller, 425 U.S. 231 (1976) 3

STATUTES

Cal. Civ. Code § 654 (West's 1982) 9

Cal. Pub. Res. Code § 30105.5 (West's 1986) 18

§ 31106 (West's 1986) 11

MISCELLANEOUS

41 Ops. Cal. Att'y Gen. 39 (1963) 4

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APPELLANTS' REPLY BRIEF

In the Brief for Appellee the commission abandons the decision of the California Court of Appeal and strikes off on its own. It proposes a novel taking "test," thereby admitting that the Court of Appeal did not provide a meaningful "taking" analysis, even from the commission's perspective.

When it comes to the facts, the commission's brief portrays a different case than the one at bar. It advances theories concerning prescriptive rights that were not presented to the court below. It misrepresents the Nollans' rights of ownership. It even makes factual contentions about the property that are contrary to the findings of

both courts below and contrary to *admissions* which it made in its answer to the Nollans' complaint.

Another startling aspect of the Brief for Appellee is the commission's repeated arguments that strong public policy for beach access justifies the abridgment of individual rights. These arguments reveal that the commission does not object to the replacement of one small family home on a single lot which has been in use for residential purposes for half a century. It is only the Nollans' private ownership of the beach area which the commission finds contrary to public policy. To justify taking the beach for public use the commission characterizes the Nollans' unremarkable act of replacing an existing house on private property as an unfair burden on society. It is important to bear in mind that the Nollans do not stand in the way of the state acquiring their beach if it wants to. They ask only that their individual rights be protected in the process.

I

THE CALIFORNIA COURT OF APPEAL FAILED TO APPLY THE REQUIRED "TAKING" ANALYSIS

The Brief for Appellee concedes the first question presented by this appeal. At Page Nos. 14-15 of its brief, the commission sets out its "test for the validity" of a permit condition. The Nollans disagree that a "taking" analysis is limited to any such set formula. Nonetheless, that "test" clearly calls for the state court to apply both a police power analysis and a *separate* analysis of the question of whether a "taking" resulted. Thus the commission agrees with the Nollans' principal contention that the California Court of Appeal, having determined that the permit condition was a valid exercise of the police power, was obligated then to consider the separate question of whether the condition constituted a "taking" of the Nollans' property. Jurisdictional Statement at i, 15-19; Brief of Appellants at 30-36.

The controversy on this question is now reduced to whether the California Court of Appeal did apply the

required "taking" analysis. It did not. *See* Brief of Appellants at 30-36. On this issue, the commission takes an ambivalent position. Initially the commission argues that the Court of Appeal did not consider the federal "taking" issue. Brief for Appellee at 12.[1] In an ambiguous footnote, the commission then suggests that the Court of Appeal did recognize the "taking" issue, cited a taking analysis in a different case, and "incorporated that analysis by reference." Brief for Appellee at 12 n.5. Either of these contradictory positions recognizes that the Court of Appeal did not follow the dictates of this Court which require that a taking analysis be an "essentially ad hoc, factual inquir[y]" into the facts of the particular case. *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 124 (1978); *Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979).

II

UNDER CALIFORNIA LAW THE NOLLANS HAVE THE RIGHT TO EXCLUDE OTHERS FROM USING THEIR PROPERTY FOR ACCESS TO THE OCEAN

The commission totally misrepresents California law by claiming that, due to Article X, Section 4 of the California Constitution, the Nollans lack the property right to exclude the public from crossing their private property. Brief for Appellee at 26-27. California law is exactly opposite.[2]

The California Supreme Court has repeatedly recognized that owners of private property located adjacent

[1] The Nollans will not elaborate on their previous response to the commission's erroneous claim that the federal issues were not raised in the courts below. *See* Response of Appellants to Motion of Appellee, California Coastal Commission, to Dismiss dated December 9, 1986, at 3-7.

[2] The commission's claim that the Nollans lack the right to exclude the public from their property is a question not raised or resolved in the courts below. " 'It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.' " *Youakim v. Miller,* 425 U.S. 231, 234 (1976).

to tidelands can exclude the public from crossing their property.

> "It is true that private ownership of the shore may prevent access to the navigable waters of the bay, but so does the private ownership of the upland prevent access to the shore and to the navigable waters in the same sense and to the same extent. . . . By the exercise of the right of eminent domain all necessary means of access from the uplands to the waterfront may be condemned for the public use . . . ." *City of Oakland v. Oakland Water Front Co.,* 118 Cal. 160, 185 (1897).

The California Supreme Court also spoke on this subject in *Bolsa Land Co. v. Burdick,* 151 Cal. 254 (1907). Plaintiffs in that case sued defendants for trespass after defendants repeatedly crossed plaintiffs' property to reach Bolsa Bay.

> "Whether or not Bolsa Bay ever was, or, if it ever was, whether it is now, part of the navigable waters of the state, defendants certainly have no right to invade private property to gain access thereto. If to approach such waters a right of way becomes necessary over private lands, such right of way does not run to the public with the use of the waters. It must be condemned and paid for by the public, as must any other right of way for public use." *Id.* at 260.[3]

The California Supreme Court has more recently confirmed the principle of these cases. In *McCarthy v. City of Manhattan Beach,* 41 Cal. 2d 879 (1953), the court denied compensation to an oceanfront owner whose property was rezoned for recreational beach use only. The court based its decision on the "presumption" that the owner could fence off his beach and charge an admission

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[3] "In spite of the sweeping provisions of Article XV, section 2 of the Constitution [now Article X, Section 4], and the injunction therein to the Legislature to give its provisions the most liberal interpretation, the few reported cases in California have adopted the general rule that one may not trespass on private land to get to navigable tidewaters for the purpose of commerce, navigation or fishing." 41 Ops. Cal. Att'y Gen. 39, 41 (1963). *See also* JA 208-09, 235, 238.

fee for public entry. *Id.* at 892. *Gion v. City of Santa Cruz,* 2 Cal. 3d 29 (1970), addressed the question of the public's right to use a privately owned, unimproved dirt road to the beach. *Id.* at 36. The court found that the public had the right to use the road only because previous owners, by failing to exclude the public for the requisite period, had "impliedly dedicated the property to the public." *Id.* at 44.

In a recent case, *Aptos Seascape Corp. v. County of Santa Cruz,* 138 Cal. App. 3d 484 (1982), the California Court of Appeal rejected the argument now made by the commission that "the beach up to the highest high water mark is burdened with a 'public servitude' similar to the 'public trust easement.'" *Id.* at 505. The court held:

> "In light of *City of Los Angeles v. Venice Peninsula Properties, supra,* 31 Cal. 3d 288, we conclude that the trial court correctly concluded that Seascape's property was not subject to any servitude. In that case, the court held that the public trust doctrine applies to tidelands . . . . As already explained, 'tidelands' are lands between the lines of mean high tide and mean low tide. (*Marks v. Whitney, supra,* 6 Cal.3d at pp. 257-258.) Nothing in *City of Los Angeles* supports the notion that the public's rights . . . extended *beyond* the tidelands to the highest high water line, as the County would have this court hold." 138 Cal. App. 3d at 505-06 (emphasis in original).

The dedication sought by the commission would open the Nollans' land from the mean high tide line to their seawall, or, in other words, to the highest high water mark. *See* Brief for Appellee at 5. *Aptos Seascape* thus directly refutes the commission's claim, that "the 'property right' which the Nollans claim [over this area] . . . does not exist."[4] Brief for Appellee at 27.

None of the cases cited by the commission stands for the proposition it asserts. *People ex rel. Younger v.*

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[4] The holding of this case also disposes of the claims by some amici that the California "public trust" doctrine extends to the Nollans' property.

County of El Dorado, 96 Cal. App. 3d 403 (1979), overturned a county ordinance which attempted to outlaw rafting on the American River. The question of whether the public has a constitutional right to cross private property to reach the water was simply not an issue in the case. However, the court did observe that because "[m]ost of the land on both sides of the river is privately owned . . . *access to the water is limited,*" *id.* at 405 (emphasis added), thus acknowledging that the public has no general right to reach the water by crossing private property.

The commission also cites *Henry Dalton & Sons v. Oakland,* 168 Cal. 463 (1914), another case which, if anything, disproves their position. No claim of a right to cross *plaintiff's* private property was presented. The case merely involved plaintiff's claim of a right of access across tidelands held as public property by the *city.* On that issue plaintiff (a member of the public) lost.

Last of all, the commission cites *Lane v. City of Redondo Beach,* 49 Cal. App. 3d 251 (1975). *Lane* is another case involving access over *public* property. In *Lane* plaintiffs challenged a redevelopment plan under which the City of Redondo Beach vacated certain city streets leading to the harbor. The court ruled that because the city is the trustee of the tidelands trust, it has a duty to provide public access to the navigable waters. 49 Cal. App. 3d at 257. *Lane,* like the others, nowhere discusses access across *private* property. In contrast to *Lane* the Court of Appeal in *Heist v. County of Colusa,* 163 Cal. App. 3d 841 (1984), reached the opposite result and approved the vacation of a public road which was separated from public trust lands by private property. The court found the road did not provide access to the water because the public had no right to trespass across private land. *Id.* at 851.

Given the lack of any authorities supporting its position and given the substantial authorities directly contradicting its claim, the commission's assertion that the Nollans lack the legal right under California law to

exclude members of the public from crossing their land is frivolous.

III

A "TAKING" IS NOT EXCUSED BECAUSE IT IS ACCOMPLISHED THROUGH A REGULATORY PERMIT PROCESS

A. A "Taking" Is Not Determined by the Process Employed To Confiscate the Nollans' Property

The commission argues that a right-of-way may be confiscated as an exaction affixed to a permit even though condemnation of the same right-of-way would require payment of just compensation. Brief for Appellee at 28-29. The method employed is irrelevant. A "taking" is determined by "the owner's loss," *United States v. Causby,* 328 U.S. 256, 261 (1946); *United States v. General Motors Corp.,* 323 U.S. 373, 375 (1945), or by "the character of the invasion." *United States v. Cress,* 243 U.S. 316, 328 (1917). A "taking" of property by any method and called by any name is still a "taking." "[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does.*" *Hughes v. Washington,* 389 U.S. 290, 298 (1967) (Stewart, J., concurring) (emphasis in original).

The same argument was rejected by this Court in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982). The commission asserts that "in *Loretto,* the property owner took no action which could trigger the police power," Brief for Appellee at 28, but the commission is wrong. The law at issue in *Loretto* applied "only to buildings used as rental property." *Loretto,* 458 U.S. at 438. Offering real property for rent is a sufficient action "to trigger the police power" in New York. *See Marcus Brown Holding Co. v. Feldman,* 256 U.S. 170 (1921). In *Loretto* this Court expressly stated:

> "[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." 458 U.S. at 439 n.17.

The commission also claims that in *Kaiser Aetna, supra,* this Court impliedly approved of physical invasions as regulatory conditions. Brief for Appellee at 29-30. Again the commission is wrong. This Court disapproved the public access requirement. Kaiser-Aetna did have permits pending at the time before the Corps of Engineers (*United States v. Kaiser Aetna,* 408 F. Supp. 42, 45 (D. Hawaii 1976)), and it is clear that the existence of those pending permit applications did not change this Court's determination. The language cited by the commission only states that conditions "for the promotion of navigation" are appropriate if the actions of the permittee "have impaired navigation." *Kaiser Aetna,* 444 U.S. at 179. The Nollans have done nothing to impair access to the beach.

The commission's argument was also rejected in *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986 (1984), where the Environmental Protection Agency (EPA) claimed that under the comprehensive registration scheme in the statute it could require Monsanto to relinquish its property rights in certain scientific data. This Court held that EPA could not use the licensing process to preempt Monsanto's property rights, noting that if the statute could authorize EPA to use its regulatory power to destroy property rights recognized under state law, "the Taking Clause has lost all vitality." *Id.* at 1012. The same limitation has been applied to the states. Property which a state cannot take by express divestment it cannot take "under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold." *Frost v. Railroad Commission,* 271 U.S. 583, 593 (1926).

B. The Regulatory Permit Process Provides No Compensation to the Nollans

The commission suggests that a "taking" by permit is excused because the property owners may receive some-

thing of value from the granting of a permit. Brief for Appellee at 15. This argument stands the law of property on its head. It is based on the fallacious premise that a permit creates the right of use of property. In California the right of use is inherent in the concept of property. Cal. Civ. Code § 654 (West's 1982). " 'Property is composed of constituent elements and of those elements the right to use the physical thing to the exclusion of others is the most essential and beneficial.' " *Dickman v. Commissioner,* 465 U.S. 330, 336 (1984) (quoting *Passailaigue v. United States,* 224 F. Supp. 682, 686 (M.D. Ga. 1963)). Coastal development regulation does not bestow the benefit of use on the property owner; it functions to restrict uses which would otherwise be permissible.[5] In the absence of the Coastal Act, the Nollans would have been free to rebuild their house without regard to the limitations imposed by that Act. The "permit" is merely advanced certification that the project as proposed complies with the limitations imposed by the statute.[6]

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[5] Since this Court has repeatedly ruled that the loss of development rights through regulation does not require compensation, *see, e.g., Penn Central, supra,* it would be the ultimate irony if a decision not to restrict those same development rights were to be considered just compensation for the taking of other property interests.

[6] Permits, such as a coastal development permit, which merely certify compliance with regulations are to be distinguished from permits which actually grant a true benefit, such as use of public lands. *See, e.g., United States v. Fuller,* 409 U.S. 488, 489 (1973) (permits to graze cattle on federal domain). This distinction also makes *United States v. Appalachian Electric Power Co.,* 311 U.S. 377 (1940), inapplicable. "The flow of a navigable stream is in no sense private property." *Id.* at 424. Therefore, a permit to construct a dam across navigable waters to capture the economic benefits of the energy in the moving waters clearly grants a special benefit from a publicly owned resource. Moreover, in *Appalachian Electric Power* the statute provided compensation for at least the " 'net investment' " in any property taken by the government. *Id.* at 420 n.65. Therefore, the Court proceeded to "assume *without deciding* that . . . riparian rights may pass to the United States for less than their value." *Id.* at 427 (emphasis added).

C. The Use of a Regulatory Permit to Confiscate Property Is an Unfair Procedure Which Leads to Unjust Results

Unlike eminent domain proceedings, when the government acquires property through a regulatory exaction it encounters no cost unless the property owner marshals his or her courage and personal resources to commit to a long and costly legal challenge. Even if the property owner prevails the costs of litigation are usually not recoverable, *Pacific Legal Foundation v. California Coastal Commission,* 33 Cal. 3d 158, 167 (1982), and compensation for the loss of use during the years of litigation is not available. *Agins v. City of Tiburon,* 24 Cal. 3d 266 (1979), *aff'd on other grounds,* 447 U.S. 255 (1980). Unless the value of the property taken clearly exceeds the substantial cost of modern day litigation, the property owner always loses. Government agencies are well aware that the typical costs of litigation far exceed the value of the typical property exaction from the small property owner who, therefore, has no reasonable choice but to relinquish his or her property to the state.[7] The exaction of property through permit conditions provides only the most affluent with any option for seeking justice. For the average property owner it is a fundamentally unfair procedure.

This case challenges the confiscation of a right-of-way across one very small piece of property. It does not question governmental authority to restrict property use or to require subdividers to build roads or develop

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[7] In the most recent coastal access annual report, Footnote No. 8, *infra,* the commission at Page No. 14 reports that access conditions have been imposed on 2,080 permits and that accessways now total 52.64 *miles* in length. It is significant that the commission's opponents in litigation over coastal access rights-of-way are typically not small property owners but major corporations (*Georgia-Pacific Corporation v. California Coastal Commission,* 132 Cal. App. 3d 678 (1982)), and wealthy homeowner associations (*Sea Ranch Association v. California Coastal Commission,* 552 F. Supp. 241 (N.D. Cal. 1982), *Whaler's Village Club v. California Coastal Commission,* 173 Cal. App. 3d 240 (1985)).

parks serving their development. Brief for Appellee at 18-21. On the facts of this case the commission is taking property to further an established acquisition program not related to the Nollans' actions. There is no need to distort the regulatory process for this acquisition purpose. The power of eminent domain is coextensive with the police power. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).[8] The government should be required to employ this ready option. The owner, of course, can be assessed a fair share of the costs of this action under the standards adopted by this Court for such assessments. *See* Brief of Appellant at 21-30.

IV

UNDER THE CIRCUMSTANCES OF THIS CASE THE EXACTION OF A PUBLIC RIGHT-OF-WAY ACROSS THE NOLLANS' PROPERTY IS A "TAKING"

This Court has rejected the concept of a "set formula" and emphasized that the determination of a "taking" claim requires the evaluation of all pertinent considerations in light of " 'the particular circumstances' " of each case. *Penn Central,* 438 U.S. at 124. Nonetheless the commission proposes a single, inflexible "test" for "the validity of a condition attached to development approval." Brief for Appellee at 14-15. The proposed "test" violates the teachings of this Court by focusing on matters other than the harm to the property owner. The government's

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[8] California has authorized other agencies (not the commission) to use eminent domain to acquire beach access rights. Cal. Pub. Res. Code § 31106 (West's 1986). Funds have also been made available. JA 139. In January, 1987, the commission issued "Coastal Access Program, Seventh Annual Report," a joint report with the State Coastal Conservancy. This report states at Page No. 3:

> "Public acquisition of land for coastal access and recreational use has been funded primarily through voter-approved bond sales, the most recent in June, 1984, when voters approved the sale of bonds which provided $40.5 million to the Department of Parks and Recreation for coastal park acquisition and development and $35 million to the State Coastal Conservancy for coastal programs and grants."

"need" is given primary weight, including needs created not by the property owner but by "other similar projects." Individual property owners are to be lumped into groups and their rights evaluated only as an element of the collective whole. The effect on the individual property owner is downplayed so drastically that no distinction is recognized between a limitation on use and an intentional expropriation of property. Traditionally recognized "takings," including confiscation of fee ownership of an area of land, could easily pass the commission's "test" and require no compensation. This one-sided proposed "test" does not comport with the "takings" analysis described by this Court which provides the government with substantial latitude to restrict uses but prohibits the expropriation of recognized property interests.

In *Penn Central, supra,* this Court's review of the jurisprudence of the Fifth Amendment identified five factors which had been significant in the "ad hoc" analyses the Court had applied in a variety of circumstances to evaluate "taking" claims. These factors, when applied to the facts of this case, clearly show that the exaction of the right-of-way from the Nollans transgresses constitutional limits.

A. The Nollans Will Suffer a Physical Invasion

"A 'taking' may more readily be found when the interference with the property can be characterized as a physical invasion . . . ." *Penn Central,* 438 U.S. at 124.[9] The commission's claim that this case does not involve a physical invasion, Brief for Appellee at 27, is absurd. The only purpose for the right-of-way is to have people enter on and make use of the property. This Court has long recognized that intermittent or temporary entry by persons without consent by the owner constitutes a taking.

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[9] The commission's characterization of its action as "protection of public resources," Brief for Appellee at 31, simply misses the point by describing the purpose for taking the right-of-way rather than the nature of the action taken to achieve that purpose.

Griggs v. County of Allegheny, 369 U.S. 84 (1962); *United States v. Pewee Coal Co.,* 341 U.S. 114 (1951); *Kimball Laundry Co. v. United States,* 338 U.S. 1 (1949); *United States v. Causby,* 328 U.S. 256. The commission makes no attempt to rationalize its argument with the contrary holdings of these cases. Only *Causby* is mentioned, and the citation misrepresents the holding by suggesting that a "taking" was found only because there was a "loss of use for any purpose." Brief for Appellee at 28. While the *Causby* analysis began by recognizing that a taking would certainly occur from the "supposed case" of a complete loss of use, on the *Causby* facts "enjoyment and use of the land are not completely destroyed." 328 U.S. at 262. A "taking" was found in *Causby* because the partial limitations on use "were the product of a direct invasion of respondents' domain." *Id.* at 265.

The commission's suggestion that this Court in *Pruneyard Shopping Center v. Robins,* 447 U.S. 74 (1980), indicated a willingness to countenance physical invasions, Brief for Appellee at 31-32, ignores the crucial distinction of the owners' consent to the entry. *See* Brief of Appellants at 16 n.10. The *Pruneyard* decision distinguishes the open, invited access of that case from closed, private areas. *Id.* at 84.[10] "[I]t is the invitation . . . that makes the difference. The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license." *Federal Communications Commission v. Florida Power Corporation,* — U.S. —, 55 U.S.L.W. 4236, 4238 (decided Feb. 25, 1987). Those who enter and make use of the Nollans' property will be "interloper[s] with a government license."

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[10] *Pruneyard* does not apply to this case for the additional reason that in that case the California Supreme Court had construed the California Constitution to create public rights to the use of private shopping centers. 447 U.S. at 81. In contrast California law protects the Nollans' rights to exclude strangers. *See* Argument II, *supra.*

B. The Property Interest Being Taken from the Nollans Is One the Government Is Normally Expected To Condemn and Pay For

The interests taken by the government must be "sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." *Penn Central,* 438 U.S. at 125. It is beyond dispute that the right-of-way demanded from the Nollans is, under most circumstances, the kind of property interest which is protected by the Just Compensation Clause. *See* Brief of Appellants at 21-22. "[T]he appropriation of the use of private property" is a "taking," *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 163-64 (1980). Under California law when an easement is created by "the appropriation of a mere right of way" it is "unquestionably compensable 'property.'" *Southern California Edison Co. v. Bourgerie,* 9 Cal. 3d 169, 172-73 (1973). Although the commission maintains that California law governing coastal property is different, Brief for Appellee at 26-27, the commission is wrong. *See* Argument II, *supra.*

The commission makes various attempts to belittle the importance to the Nollan family of their interest in excluding the general public from their yard. It argues that the area is "a maximum of 10 feet wide," Brief for Appellee at 35, that "the public had already acquired rights to use the property," *id.,* and that the Nollans had no right "to exclude the public" from the area. *Id.* at 27. These claims are not supported by any findings by the courts below. To the contrary the commission admitted the allegation in Paragraph No. 26 of the supplemental petition for writ of mandate that "[t]he area to be dedicated to public use . . . constitutes approximately 30% of petitioners' property." JA 334, 406. The trial court in both decisions found that the commission was taking the use of "approximately one-third of the property." JA 37, 414. The commission expressly declined to decide whether a public right of use existed. JA 45, 47, and did not raise as an affirmative defense any claim of a right

of use or other interest in the property. JA 410-11. Although the public has access along the tidelands at Faria Beach, the Nollans' reasonable expectation that the public would not have a right-of-way across their adjacent property is firmly supported by California property law. This case was decided in the courts below on the basis that the Nollans' fee title is no less of a property interest than any other fee ownership and that the public right-of-way would extend across approximately one-third of their property area.

C. The Commission's Action Is Not a Prohibition on Use

Governmental action "prohibiting particular contemplated uses of land" will be upheld as long as it is "reasonably necessary to the effectuation of a substantial public purpose" and does not have "an unduly harsh impact upon the owner's use of the property." *Penn Central,* 438 U.S. at 125-27. Unlike cases involving zoning or the denial of a development application, in this case the commission did not impose a restriction on the Nollans' use of their property. The commission acted to acquire a public right-of-way. The Nollans do not dispute the extensive power of the commission to impose restrictions on *their use* of the beach area of their property to ensure clear views up and down the beach and an attractive, open shore area. They ask only to draw the line at the point where strangers will enter upon and make use of their property. The commission readily admits that this case "is not a situation where the property owner has been denied a permit or denied the use of property." Brief for Appellee at 33. Therefore, the facts of this case do not raise the issue of whether a regulation of permitted uses has gone too far in restricting reasonable economic use.

D. The Nollans Had Investment Backed Expectations in the Privacy of the Residence

Governmental action "may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" *Penn Central,* 438 U.S. at 127. For the Nollans, the

investment in their residence is substantial and an obvious purpose for the investment in a private residence is to exclude the general public. The commission suggests that knowledge of its intention to take the right-of-way robbed the Nollans of any reasonable basis to believe they could exclude the public. Brief for Appellee at 30, 34. This Court has held, however, that when the property right is recognized under state law, knowledge of the government's intention to confiscate property does not defeat the expectation required to support a "taking" claim, even when a statutory provision authorizes the state's action. *Webb's Fabulous Pharmacies,* 449 U.S. at 161. In *Loretto, supra,* this Court found a "taking" to have occurred even though Loretto purchased the property after the cable equipment had already been installed. 458 U.S. at 421-22.

E. The Commission Imposed the Permit Condition with the Intent of Taking Property from the Nollans for Public Use

"Finally, government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute 'takings.'" *Penn Central,* 438 U.S. at 128. The Nollans have been snared in a well-established, comprehensive program of the commission to create an elaborate network of *new* rights-of-way to expand and improve access to beach areas for the general public. The commission has vigorously pursued this purpose, establishing by way of its Public Access (Shoreline) Interpretative Guidelines (JA 349-483) a programmatic objective to exact rights-of-way from all manner of new development except projects expressly exempted by the Legislature. JA 359-60. On Faria Beach where the Nollans' property is located the commission had established a specific local "comprehensive program to provide continuous public access along Faria Beach." JA 68. The commission's "findings" emphasize the "comprehensive program" for obtaining access and focus on preexisting facts not related to the Nollans' actions. JA 68. The discussion at the time of

the final vote focused *only* on the need to carry forward with the commission's previously established objectives to establish "fluid access" up and down the coast and the concern of the commission that it not lose "a chunk of an access that we had counted on . . . for continuity." JA 326.

The simple fact of this case is that the commission had acquisition on its mind. It is creating a public road along the beach. The Nollans' loss of property is not a "by-product of governmental decision making." It is a "result from a deliberate decision to appropriate certain property for public use." *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. —, 105 S. Ct. 3108, 3126 (1985) (Stevens, J., concurring). The commission's action "has not merely 'adjust[ed] the benefits and burdens of economic life to promote the common good.' Rather, the exaction is a forced contribution to [a] general governmental [program to acquire coastal property]." *Webb's Fabulous Pharmacies,* 449 U.S. at 163 (citation omitted).

F. No Special Reason Exists To Burden the Nollans with the Full Cost of Establishing Public Use of Their Beach Property

Recognizing that the Nollans have caused no actual effect on public access, the commission attempts to justify its demand for the right-of-way by suggesting that the Nollans have caused "overcrowding of existing facilities and loss of open space" and "deprivation of visual access." Brief for Appellee at 32. There are, however, no *facts* in the record to show that the new home cuts off views of the beach which existed around or over the structure which previously existed on the lot. The only facts in the record are to the contrary that no views existed with the previous development. JA 301, 311-12, 396. At Faria Beach a low, one-story house blocks all view of the beach and the ocean. JA 267. The commission bases its claim not on facts but on an erroneous assumption that since the house is larger it must block the view. JA 57-58, 65. Likewise, there are no facts to show that the replacement home will contribute to

new development pressures. The facts are to the contrary. There is no increase in the number of residential units and the intended occupancy of the unit is reduced. JA 17, 21, 59, 301, 315. The commission's claim again is not supported by facts, only by its surmise that someone else might at some future time use the house to accommodate "a larger family." JA 60. Even the commission concluded that since the Nollans' project would reduce intended occupancy from eight to four "a reduction in use would occur if occupancy were to be permanently limited to four individuals." *Id.* On the facts of this case, the one for one replacement of a single residential unit has had no effect on available public access to the beach, has had no effect on views of the beach area, and has caused no crowding of public facilities or areas.

The commission attempts to rely upon the rubric of "cumulative impacts" as a substitute for facts in the record demonstrating actual effects. Brief for Appellee at 17-18, 22. However, there can be no "cumulative effect" in the absence of "incremental effects of *an individual project.*" Cal. Pub. Res. Code § 30105.5 (West's 1986) (emphasis added). *Wickard v. Filburn,* 317 U.S. 111 (1942), does not support the contention that no actual effects from the Nollans' project are required in a "taking" analysis. In that case, although the farmer grew a minimal amount of wheat, he did grow wheat. The findings of both the courts below are that the Nollans did not affect access. JA 38, 417, 419, 425. Moreover, this Court's discussion of cumulative effects in *Wickard v. Filburn* is directed toward the issue of whether the jurisdiction of the agency under the Agricultural Adjustment Act of 1938 and the Commerce Clause could reach the minimal activities of the wheat farmer. A just compensation claim is not discussed.

Finding no actual effects from the Nollans' project, the Court of Appeal resorted to metaphorical reasoning, stating that it is one small project among many along the

coast and, therefore, one more brick in the wall separating the people of California from the state's tidelands. JA 425. However accurate that metaphor may be in describing other areas of the California coast it is a misrepresentation of the Ventura coast where Faria Beach is located. There is no solid wall. In the first ten miles of coast north of the City of Ventura there are only two small, isolated residential tracts covering approximately one and one-half miles. The rest is public beach and open coast. JA 302. The Ventura County Beaches Study describes Faria Beach as "a small residential tract" on a section of the coast which "is not highly developed," includes a state beach and two county beach parks, and provides "an exceptionally scenic drive for the freeway traveler *with unobstructed views of the ocean.*" JA 256 (emphasis added). Beach access is not a general concept. "[It] will depend on the local situation." JA 217. The Nollans, by replacing one small house with another in a small residential tract along this open coastal area, have done nothing to detract from either the public's actual use or mental conceptions of the tidelands area.

CONCLUSION

The decision of the trial court should be reinstated. The commission argues that "the appropriate remedy would be to remand the matter to allow the condition to be deleted." Brief for Appellee at 36. Therefore, the Nollans and the commission are in agreement that the appropriate remedy would be to relieve the Nollans from the burden of the permit condition. However, a remand is neither appropriate nor necessary. The judgment of the trial court directed that the condition be removed from the permit. JA 412. Since the parties agree on the remedy "a remand at this juncture would be a costly procedure to emphasize points that have already been made and recognized by both parties." *Withrow v. Larkin,* 421 U.S. 35, 45-46 (1975). Since the Court of Appeal reversed based on inappropriate legal standards,

the decision of the Court of Appeal should be reversed and the judgment of the trial court reinstated.

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Respectfully submitted,

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