
IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

NO. 86-133

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

**MOTION OF APPELLEE CALIFORNIA COASTAL
COMMISSION TO DISMISS**

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QUESTIONS PRESENTED

The questions presented by this motion to dismiss are whether:

(a) Appellants James Patrick Nollan and Marilyn Harvey Nollan lack standing to appeal to this Court under 28 United States Code section 1257 (2) where the federal question posed in their appeal was neither presented nor decided in the courts below; and

(b) Appellants James Patrick Nollan and Marilyn Harvey Nollan have waived their right to challenge the decision of appellee California Coastal Commission under California law.

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**MOTION OF APPELLEE CALIFORNIA COASTAL
COMMISSION TO DISMISS**

Appellee California Coastal Commission, pursuant to Rule 16.1(a), (b) and (d) of the Rules of the Supreme Court of the United States, moves the Court to dismiss this appeal on the

grounds that this Court is without jurisdiction because the federal question posed was not presented or decided by the courts below and because, under state law, the appellants have waived their ability to challenge appellee California Coastal Commission's decision.¹

STATEMENT OF THE CASE

Appellants James Patrick Nollan and Marilyn Harvey Nollan ("Nollans") invoke the jurisdiction of this Court under 28 United States Code section 1257(2). (Juris. State., pp. 2-3.) The Nollans claim the decision of appellee California Coastal Commission ("Commission"), made pursuant to California Public Resources Code section 30212, is contrary to the Fifth Amendment of the United States Constitution. Specifically, the Nollans assert that their Fifth Amendment rights were violated because the state courts failed to analyze whether a valid exercise of the police power nevertheless may warrant compensation. (Juris. State., p. i.) Appellants assert they raised the issue of entitlement to compensation in the courts below. (Juris. State., p. 4.) They did not.

In the courts below, the Nollans in their Supplemental Petition for Writ of Mandate sought only to invalidate the action of appellee Commission. While offhand references to compensation were made throughout their briefs, no compensation was sought in these proceedings in the courts below. Thus the question presented to this Court was never presented to or decided by the courts below. Moreover, the Nollans have constructed the development

¹ Appellee previously filed a motion to dismiss the appeal herein or, alternatively, to affirm the judgment of the state appellate court below upon different grounds, specifically the lack of a substantial federal question. Authority for the filing of this motion is found in Stern, Gressman and Shapiro, *Supreme Court Practice* (6th Ed. 1986) p. 647:

"But after... the Court has ruled upon the jurisdictional statement in an appeal, a motion to dismiss may be received if not based upon grounds already advanced...."

which was the subject of the challenged decision by appellee. This fact was first disclosed to the courts in the Nollans' Jurisdictional Statement. (Juris. State., p. 5, fn. 1.) Under California law, such construction results in a waiver of the right to challenge any conditions imposed on approval of the development.

STATEMENT OF FACTS

The Nollans' property which is the subject of this litigation is located in the Faria Beach Tract of Ventura County, California.

This case concerns a deed restriction imposed as a condition of a permit for the demolition of the Nollans' beach cottage and construction of the Nollans' new beachfront house. The deed restriction required the Nollans to acknowledge the public's right to use a narrow beach for lateral access seaward of an existing seawall. All the development proposed by the Nollans would be behind or landward of the seawall. The seawall is located very near the mean high tide line. (Juris. State., A 74 E, p. 41.) The public owns the tidelands below the mean high water line. At times the seawall appears to be about 10 feet from the high water line (*ibid.*), and other times, the water extends up to the Nollans' seawall, as well as the seawalls of neighboring residents, preventing pedestrian passage when the tide is in. (*Id.* at p. 47.)

The public had been given permission to use the beach along the Faria Tract for lateral access in the past. (*Id.* at p. 28.) The public has also made use of the beach at Faria for recreational purposes, including surfing, beach hiking and bathing. (*Id.* at p. 49.) While the public has made substantial use of the Faria beach area in the past, including the seaward strip of the Nollan property, no assurance existed that such use would be allowed to continue. (*Id.* at p. 50.)

Appellants leased their lot in the Faria Beach Tract. (*Id.* at p. 27.) On March 1, 1982, the Nollans applied to appellee Commission for a coastal development permit to demolish a one story, 521 square foot, one bedroom, substandard beach house on their lot and construct a two story, three bedroom, 1,674 square foot residence with attached two-car garage. (*Id.* at pp. 2-3.) While the beach house had been used in the past as a summer home and vacation rental, it had not been used at all since March 1982. (Juris. State., p. 5.) The Nollans intend to live permanently in the new residence in contrast to the limited occasional vacation use by them and renters of the smaller structure. (Juris. State., App. E, p. 39.)

The Faria Beach Tract was originally comprised of small beach cottages, such as the Nollans', which were used mainly as vacation homes. (*Id.* at p. 40.) As in many other coastal communities, these small secondary homes are being torn down and replaced with much bigger primary residences. (*Ibid.*) The Commission has approved many permits for such demolition and new construction in the Faria Tract, including one on each side of the Nollan property. (*Id.* at p. 38.) The Nollans' new residence would be three times larger and one story higher than the old beach house and would greatly increase the lot coverage to 2,464 square feet. (*Id.* at p. 36.) The Nollans' lot is only 2,800 square feet. (*Ibid.*)

The Commission placed the Nollans' application on what is known as the administrative permit calendar and approved it on April 7, 1982, with a condition requiring lateral public access. The Nollans objected to that condition and requested a full public hearing. This request was denied. (*Ibid.*)

The Nollans then filed a petition for a writ of mandate. On January 18, 1983, after a hearing, the trial court ordered that a " 'writ of mandate shall issue from this court, remanding the proceedings to respondent and commanding respondent to set aside its decision of April 7, 1982 . . . and set the matter for a full evidentiary hearing.' " (*Ibid.*)

Upon remand a full public hearing was held before the Commission. At the conclusion of the hearing, the Commission approved the Nollans' permit application again with the condition requiring lateral public access. (*Ibid.*) The Commission found the proposed project would, with others like it, cumulatively adversely impact the public's right to traverse to and along the shoreline. (Juris. State., App. E, pp. 42, 45.)

The Nollans filed a supplemental petition for writ of mandamus. (Supplemental Petition for Writ of Mandamus, attached here as Appendix 1.) In their petition the Nollans sought only that the access condition be invalidated and that the permit be issued without the condition. (App. 1, p. 21.) The Nollans did not ask for compensation in the event the access condition was found to be valid. (*Ibid.*).

The trial court issued a peremptory writ commanding the Commission to issue the permit without the condition requiring public access. The Commission appealed. (Juris. State., App. A, p. 3.) The Nollans purchased their previously leased lot following the trial court decision. (Juris. State., p. 5, fn. 1.)

The Court of Appeal reversed, holding the access condition was valid. (Juris. State., App. A, p. 5.) The Nollans did not raise and the Court of Appeal did not address whether compensation was nevertheless owed because the access condition permitted the public to use a portion of the Nollans' property.

The Nollans sought review by the California Supreme Court. Review was denied. (Juris. State., App. B, p. 10.) The Nollans then filed the present appeal where they disclosed for the first time that they had constructed the house upon prevailing in the trial court. (Juris. State., p. 5, fn. 1.) The Nollans did not seek any monetary relief and the courts below did not deny, award or rule on the question of their entitlement to it.

ARGUMENT

I

THE COURT LACKS JURISDICTION TO HEAR THIS CASE. APPELLANTS FAILED TO PROPERLY RAISE THE QUESTION OF COMPENSATION FOR THE VALID EXERCISE OF THE POLICE POWER IN THE STATE COURTS BELOW; CONSEQUENTLY, IT CANNOT BE RAISED IN THIS COURT FOR THE FIRST TIME.

The first question presented in the Nollans' jurisdictional statement posits:

“Having determined that a permit condition which exacts a dedication of access across real property to allow a physical invasion for public use is a valid exercise of the police power, must the state courts then evaluate whether compensation under the Fifth Amendment is nonetheless owing?” (Juris. State., p. i.)

The Nollans assert that despite the validity of the access condition imposed, they were entitled to just compensation. (*Id.* at p. 22.) However, the Nollans never sought compensation in the courts below; rather, they sought only to invalidate the access condition. In the prayer for relief in the California Superior Court, the Nollans asked that:

“1. a peremptory writ of mandate be issued directing respondent to delete the special access conditions from its approval of petitioners' permit and approve said permit without such conditions;

“2. a peremptory writ of mandate be granted by this court requiring and compelling respondent to:

“.....

“c. a perform its statutory and constitutional duties in accordance with the Coastal Act of 1976, applicable state law, and the State and Federal Constitutions; ...” (App. 1, p. 21.)

“.....

“5. other and further relief as the Court deems just and proper be awarded to petitioners.” (App. 1, pp. 21-22.)²

Throughout the proceedings in the courts below, the Nollans sought to invalidate the access condition. Nowhere did they explicitly seek compensation or monetary damages for the alleged “taking” of their property. They only sought to free themselves of the access condition and to avoid public use of the sandy beach. For that reason, the issue is not properly before this Court.

For this Court to have jurisdiction, the federal question must have been both raised and decided in the state court below. (*Cardinale v. Louisiana* (1969) 394 U.S. 437, 438 [22 L.Ed.2d 398, 89 S.Ct. 1161].) It must appear from the record that the decision of the federal question was necessary to the determination of the cause and actually decided. (*Lynch v. New York* (1934) 293 U.S.

² Such a prayer for other relief does not constitute a claim for monetary relief. In California, such a claim must state the amount prayed for (except for personal injury and wrongful death). (Cal. Civ. Proc., § 425.10.) Relief can only be awarded consistent with the case made by the complaint and embraced within the issue. (§ 580.) Nowhere in their supplemental petition did the Nollans seek compensatory relief.

52, 54 [79 L.Ed 191, 193, 55 S.Ct. 16].) Jurisdiction cannot be founded on surmise nor be sustained by references in briefs. (*Ibid.*)

Raising the federal question for the first time before this Court cannot confer jurisdiction.

“It is too late, of course, to raise the federal question for the first time in the notice of appeal to the Supreme Court or in the jurisdictional statement. Such papers are not part of the record of the state court proceedings and it is that record which must affirmatively show a raising of the federal issue.” (Stern, Gressman and Shapiro, *supra*, p. 157.)

Appellants failed to properly raise in the state courts below the federal question of whether compensation under the Fifth Amendment to the United States Constitution is due for valid regulatory actions allowing public use of private property. Raising the question for the first time before this Court cannot confer jurisdiction. Therefore, the issue is not properly before the Court and jurisdiction will not lie. The appeal should be dismissed.

II

APPELLANTS HAVE WAIVED THE RIGHT TO CHALLENGE THE ACCESS CONDITION UNDER STATE LAW BY CONSTRUCTING THE DEVELOPMENT PRIOR TO FINAL ADJUDICATION OF THIS MATTER.

Following this Court's noting of probable jurisdiction, the Commission undertook to determine the exact factual setting

regarding the Nollans' construction of the house during the pendency of this case. It will be recalled that appellants for the first time disclosed in a footnote in their Jurisdictional Statement that:

“After winning this case in the trial court, the Nollans . . . , constructed the new residence.”
(Juris. State., p. 5.)³

The Nollans have never requested or received their coastal development permit or provided the deed restriction. In fact the permit remains in the Commission's file in its Santa Barbara office.⁴ By demolishing the old house and erecting the new structure, the Nollans essentially obtained all they would have been entitled to had they accepted the permit. However, by constructing without the permit having issued, they have evaded the conditions imposed.

Under state law, a landowner who objects to a condition of permit approval has two options. The landowner can accept the permit and undertake the authorized development. In so doing, the landowner receives the benefits of the permit and is therefore bound by any conditions attached. Such an acceptance precludes a subsequent challenge to the permit conditions. (*County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510-511, [138 Cal.Rptr. 472, 564 P.2d 14] appeal dismissed 434 U.S. 944 [54 L.Ed.2d 306, 98 S.Ct. 469].) A landowner who objects to the conditions has the

³ The construction occurred without any coastal development permit having been issued, in violation of the California Coastal Act of 1976. (Cal. Pub. Resources Code, § 30600; *Whaler's Village Club v. California Coastal Com.* (1985) 173 Cal.App.3d 240, [____ Cal.Rptr. ____] dismissed for want of jurisdiction ____ U.S. ____ [106 S.Ct. 1962; 90 L.Ed.2d 648] (injunctive relief, civil fines and penalties available for violation of Coastal Act).) A violation action would be separate matter which the Commission would have to bring. This has not yet been addressed by the Commission.

⁴ The Commission will provide further proof of these facts should this Court deem it necessary. (See, Stern, Gressman and Shapiro, *supra*, pp. 564-565.)

right to judicially challenge them. (*Ibid.*; accord, *J-Marion Co. v. County of Sacramento* (1977) 76 Cal.App.3d 517, 523 [142 Cal.Rptr. 723].) The challenge must be brought before the permit is accepted. It is fundamental that a landowner who accepts a permit and complies with its conditions waives the right to assert the invalidity of the conditions and sue the issuing public entity for the costs of complying. (*Pfeiffer v. City of La Mesa* (1977) 69 Cal.App.3d 74, 78 [137 Cal.Rptr. 804].) This principle is applicable where a landowner unilaterally announces he is proceeding under protest and reserving the right to seek compensation later. (*Ibid.*) In *Pfeiffer*, the landowners obtained approval of a building permit subject to conditions requiring the granting of an easement and construction of a storm drain across the property. (*Id.* at p. 76.) They elected to comply with the conditions under protest, asserting they were not waiving their rights to compensation. (*Ibid.*) The Court of Appeal held this could not be done. Their proper remedy was to seek invalidation of the conditions pursuant to California Code of Civil Procedure section 1094.5. As the court explained:

“If every owner who disagrees with the conditions of a permit could unilaterally decide to comply with them under protest, do the work, and file an action in inverse condemnation on the theory of economic coercion, complete chaos would result in the administration of this important aspect of municipal affairs.” (*Pfeiffer v. City of La Mesa, supra*, 69 Cal.App.3d at p. 78.)

The Nollans did admittedly challenge the access condition in the proper manner. However, they refused to await the final outcome of the judicial proceedings. Before the Commission was able to exercise its right to appeal the adverse trial court decision, the Nollans unilaterally, without the knowledge or acquiescence of the Commission, proceeded to construct the residence without any permit and in violation of the California Coastal Act. If, as in

Pfeiffer, a property owner who complies with the law and his permit is barred from challenging the permit's conditions, clearly one who violates the law is precluded from such a challenge.

Property owners who challenge the validity of permit conditions must await the final outcome of the judicial proceedings before undertaking the permitted development. Absent the agreement or acquiescence of the governmental entity, a unilateral decision by the property owner to proceed with the development waives the ability to challenge the conditions of development approval. (*Pfeiffer v. City of La Mesa, supra*, 69 Cal.App.3d at p. 76.)⁵ Under state law, appellants have waived their challenge to the access condition and have, therefore, no right to appeal to this Court. An actual case or controversy is an essential prerequisite to this Court's jurisdiction. (*Simon v. Eastern Ky. Welfare Rights Org.* (1976) 426 U.S. 26, 37 [48 L.Ed.2d 450, 96 S.Ct. 1917].) A plaintiff must show some injury to himself that is likely to be redressed by a favorable decision. (*Id.* at p. 38.) Since the Nollans are precluded by state law from challenging the access condition, no case or controversy remains for this Court's resolution. The Nollans' appeal should be dismissed.

⁵ In 1984 California enacted legislation which, under prescribed and limited circumstances, allows a property owner to comply under protest and later challenge any exaction attached to permit approval. (Cal. Gov. Code, § 65913.5.) It has no application here.

CONCLUSION

For the foregoing reasons, the appeal by James Patrick Nollan and Marilyn Harvey Nollan should be dismissed for lack of jurisdiction, and the judgment below be allowed to stand.

DATED: _____.

Respectfully submitted,

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