

No. 86-133

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

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JAMES PATRICK NOLLAN,  
MARILYN HARVEY NOLLAN,  
*Appellants,*

vs.

CALIFORNIA COASTAL COMMISSION,  
*Appellee.*

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ON APPEAL FROM  
THE COURT OF APPEAL OF CALIFORNIA  
SECOND APPELLATE DISTRICT, DIVISION SIX

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BRIEF AMICUS CURIAE OF THE  
CALIFORNIA ASSOCIATION OF REALTORS<sup>®</sup>  
IN SUPPORT OF APPELLANTS

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**INTEREST OF AMICUS CURIAE**

Pursuant to Supreme Court Rule 36,  
the California Association of Realtors®  
respectfully submits this brief amicus

curiae in support of Appellants, James Patrick Nollan and Marilyn Harvey Nollan.

Amicus curiae California Association of Realtors® (C.A.R.) is a voluntary trade association whose members consist of Boards of Realtors® in California and those persons licensed by the state of California as real estate brokers and salespersons who are members of local boards. C.A.R. is the largest state trade association in the United States and has over 180 affiliated Boards of Realtors® and over 115,000 members.

The mission of C.A.R. is to serve in developing and promoting programs and services that will enhance the members' freedom and ability to conduct their in-

dividual businesses sucessfully with integrity and competency. Moreover, C.A.R. serves to promote, through collective action, the preservation of real property rights.

C.A.R. members believe that every person should have the right to acquire real property with confidence and certainty that the value of such property will not be unduly diminished or jeopardized by governmental action at any level without just compensation.

The California rule that permits administrative agencies to take private property without compensation, to fulfill public needs not created by the property owner undermines the preservation of real



property rights and has far-reaching significance to the real estate industry engaged in the sale and development of real property.

Counsel for C.A.R. are familiar with the questions involved and the scope of their presentation and believe that further argument on the issues discussed by this amicus brief will be helpful to this Court.

### SUMMARY OF THE ARGUMENT

This court is presented with the question of whether the cost associated with the State of California's desire to maximize public access to the California beaches must be borne by all of its tax

payers or whether it instead can be imposed entirely upon the owners of the individual properties. The beach access and use condition is imposed by the Commission even though the Nollans wish only to remodel and enlarge a substandard beach house, an act which does not affect the existing public access to the beach.

The California rule holds that such conditions on improving a property are valid exercises of the police power and cannot constitute a taking if the dedication is reasonably related to the constitutionally declared public purpose, in this instance maximizing public access to the coastline. It is not necessary that consideration be given to whether a relationship exists between the actual im-

provement by the private property owner and the condition for approval.

This court has held that a "taking" analysis requires an evaluation of the character of the government action and the interference with investment-backed expectations. When the governmental action is a physical invasion of the property destroying the right of exclusive use of the property, a taking analysis is mandated by the U.S. Constitution. Further when a condition imposed on a property owner is unrelated to the activity of that property owner, the agency is forcing that private property owner to bear a disproportionate burden. Policy behind the Just Compensation Clause requires compensation.

## ARGUMENT

THE COASTAL COMMISSION'S BEACH ACCESS AND USE CONDITIONS CONSTITUTE A "TAKING" WITHOUT JUST COMPENSATION PROHIBITED BY THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

- A. When the government, in exercising its police power, physically invades the property, a "taking" occurs.

The Fifth Amendment to the United States Constitution protects against, among other things, the taking of private property for public use without just compensation. "*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking'." *Penn*

*Central Transportation Co. v. City of New York*, 438 U.S. 104, 127 (1978) quoting *Pennsylvania Coal* p. 415. This is particularly true when the character of the governmental action constitutes a physical taking of the property.

In *Penn Central* this Court reviewed the general principles governing the Takings Clause and noted that no "set formula" existed to determine in all cases if compensation is constitutionally due for a government restriction of property. The factual inquiries, according to the Court, are not standardless. The framework set forth in *Penn Central* has been used thereafter by this court as the analytical basis for approaching the problem of taking by regulation.

The Court acknowledges that in each case the line of demarcation between permissible regulation and unconstitutional taking must be decided on its own facts. The Court did identify the following factors as having particular significance (*Penn Central* at 123-128):

- ° the economic impact on the claimant and particularly the extent to which the regulation has interfered with distinct investment-backed expectations; i.e., interests that are sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for Fifth Amendment purposes.
  
- ° the "character" of the government

action, ranging from physical invasion of property to a general regulatory program adjusting the benefits and burdens of economic life to promote the common good.

This court has long recognized that property is not just the physical land but rather a bundle of rights. Among the rights in this bundle are the right to use, possess, and exclude others.

The term "property" as used in the Constitution includes the entire bundle of rights attendant to an individual's ownership of a physical thing.

". . . [I]t denote[s] the group of rights inhering in the citi-

zen's relation to the physical thing, as the right to possess, use, and dispose of it . . . The constitutional provision is addressed to every sort of interest the citizen may possess." *Penn Central*, J. Rehnquist dissenting, at 142 citing *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945) emphasis in original.

A regulatory appropriation of property is of such a serious nature that, ". . . the government does not simply take a single strand from the bundle of property rights: it chops through the bundle taking a slice of every strand." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

To the extent that the appropriation literally invades the physical property the following concomitant rights are



destroyed (*Loretto* at 435-438):

- the owner has no right to exclusively possess the occupied property nor to exclude others from possession and use of the space
  
- the permanent physical occupation of property forever denies the owner any power to control the use of the property
  
- Even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale the permanent occupation of that space by a stranger will ordinarily

empty the right of any value since the purchaser will also be unable to make use of the property.

In *Loretto* this court drew a sharp distinction between government's ability to regulate a landowner's use of his own land and government's ability to require a landowner to allow a third party to make use of his land. Citing *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) the court stated that an actual physical invasion is a government intrusion of an unusually serious character:

". . . [A]n owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property . . . [P]roperty law has long protected an owner's expectation

that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury . . . . Furthermore, such an occupation is qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion." *Id.* at 436 emphasis in original.

Where there is such a permanent invasion, said the court, there is no need to weigh the extent the government has interfered with the landowner's reasonable investment-backed expectation because the "character" of the government action is a per se violation of the Fifth Amendment. *Loretto* at 437.

Coastal property owners are losing the above-described bundle of rights because the Commission requires them to convey to the public a permanent right of passage over and use at any time of the yards of their homes.

If this were other than coastal property it would be clear that the acquisition of the yard of a family home is a "taking." A declaration that open space should be maximized for public use would not de facto allow the appropriate governmental entity to acquire the backyards of family homes without compensation.

The fact that this is coastal property does not and should not alter the

"taking" analysis under the Fifth and Fourteenth Amendments. Such a declaration of public purpose merely supplies the justification for a "taking" of private property but the question of just compensation must still be entertained. The Commission is acquiring property for the public good at the expense of the Nollans and therefore a "taking" analysis must be applied to the facts of this case.

**B. Assessments For Public Improvements To Promote The General Welfare Must Bear A Reasonable Relation To The Benefits Received Or Burdens Created Or Individual Property Owners Are Required To Bear A Disproportionate Share Of The Public Burden.**

In determining whether a state law violates the policy behind the Takings

Clause, it is necessary to examine whether the acquisition of private property forces individual property owners to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. *Pruneyard Shopping Center v. Robbins*, 447 U.S. 73 (1980), citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

"The Fifth Amendment prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Pruneyard* at 74 fn. 7, quoting *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893).

The current law in California is

that the Coastal Commission can extract a dedication of public access to the beach without a showing that the requested change in use creates a need for additional public access. The dedication is based on the general public need for recreational facilities irrespective of the fact that the requested change in use of property has no effect on existing public access.

A reasonable nexus test has been codified by the California Legislature in situations involving dedications and subdivision approval. Local agencies are prohibited from conditioning the issuance of a building or use permit on dedication of land or public improvements not rea-

sonably related to the use of property for which the use permit is requested. *California Government Code* Section 65909,

"No local governmental body, or any agency thereof, may condition the issuance of any building or use permit or zone variance on any or all of the following: (a) The dedication of land for any purpose not reasonably related to the use of the property for which the variance, building, or use permit is requested. . ."

A dedication requirement is excessive to the extent it is not reasonably necessary to meet public needs arising from the subdivision. *California Government Code* Section 66475.4(b):

"A dedication requirement imposed as a condition of approval of a tentative map is invalid to the



extent to which it is determined by a court to be excessive. A dedication requirement is excessive to the extent it is not reasonably necessary to meet public needs arising as a result of the subdivision. If, at the time of imposition of the dedication requirement, a city, county, or city and county provides a mechanism for determining the amount of compensation for that portion of the dedication requirement which is excessive, and the manner of payment thereof, this section shall not apply."

Notwithstanding this clear statement of intent the courts in California have disregarded the reasonable nexus test.

The necessity of a finding that a reasonable relationship exists between the proposed use and the burden created by the project has been redefined by

California courts so that the dedication of land need only be reasonably related to the goal of maximizing access. *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633 (1971); *Remmenga v. California Coastal Commission*, 163 Cal.App.3d 623 (1985); *Grupe v. California Coastal Commission*, 166 Cal.App.3d 148 (1985).

There is no requirement that the dedication imposed as a condition of the approval of a proposed use be rationally related to the benefits or burdens resulting from the proposed use.

In *Associated Home Builders* the California Supreme Court held that there

need be only an indirect relationship between the conditioned dedication and the public need.

"A regulatory body may constitutionally require a dedication of property in the interests of the general welfare as a condition of permitting land development. It does not act in eminent domain when it does this, and the validity of the dedication requirement is not dependent on a factual showing that the development has created the need for it." *Id.* 638-640.

Subsequent cases expanded the holding of *Associated Home Builders* by applying that standard and finding it sufficient that the ". . . 'scope and extent' of the easements required by the Commission were 'reasonably related' to one of the principal objectives of the Coastal Act, which is to provide for maximum access to

the coast by all the people of this state." *Grupe* at 166 citing *Georgia Pacific Corp. v. California Coastal Commission*, 132 Cal.App. 3d 678, 699 (1982).

The obvious question is when, if ever, is acquiring beachfront property not reasonably related to maximizing public access? The answer -- rarely, if ever. What check exists then on the unrestrained zealous actions of a governmental entity desirous of maximizing the public good?

This current standard minimizes if not ignores any relationship the proposed use has on the conditional dedication of

property, and creates a situation in which the private property owner is required to bear a disproportionate burden in meeting the goal of maximizing public access to the coastline. Only by requiring that a reasonable relationship exist between the proposed use and the acquisition of property can this situation be remedied and brought back into the proscripts of the Constitution.

Without the existance of a reasonable nexus between the proposed use and the acquisition of property it is difficult for a purchaser of property or his Realtor® to accurately assess the true market value and its future potential. Additionally, for practical purposes a

cloud exists on title resulting from the unpredictability of ownership.

Under ideal conditions a purchaser of residential real property pays fair market value with the anticipation that at the very least it will not depreciate in value. Investment risks are identified and evaluated in determining the purchase price of the property. When discussing residential property in particular, it is important to note that development fees and dedications are generally premised on the theory that the developer can pass the costs on to future purchasers; the residential purchaser is not capable of doing so.

Although there is no guarantee that the property will never be taken, at least under the Constitution if the property is subsequently acquired by a governmental entity just compensation must be paid. This ensures that in furthering the public good the private property owner will not be required to bear a disproportionate share of cost.

Without the existance of a reasonable nexus the property owner is unable to reasonably ascertain what activity will trigger an acquisition of property. Take for example the situation where an individual purchases property for fair market value only to discover years later that a law has been enacted allowing the government to take, without compensation,

one-third of all private property for the public good with no conditions on the power to acquire that property. Without a reasonable nexus the result is the same as this unbridled police power: the owner of the property has lost the return on his investment and his property.

The Commission has issued 1,929 permits with access conditions since its inception. *Coastal Access Program Sixth Annual Report, A Joint Report of the California Coastal Commission and the State Coastal Conservancy* (January, 1986). In each instance, property owners were held ransom to the public desire to acquire public beach access irrespective of what change in use was proposed by the



property owner. The Commission has essentially ignored any discussion of public purchase of such access and has required its dedication as a condition of any improvement or building activity undertaken.

A condition requiring the dedication of property to maximize public beach access when the proposed change in use has no affect on the existing access is not reasonable. The purpose is not to mitigate the effect of the proposed use but merely to acquire property without compensating the property owner.

When an agency such as the Commission takes private property in such a

manner to fund the cost of social programs, it violates the U.S. Constitution because inter alia individual private property owners like the Nollans are required to bear a disproportionate share of the public burden.

### CONCLUSION

The right to exclude others is one of the essential sticks in the bundle of property rights which underlie the Fifth Amendment guarantee against the taking of property without just compensation. There has literally been a taking of those rights to the extent that the California Supreme Court has interpreted the law to permit the California Coastal

Commission to extract, without compensation, a dedication from private property owners for public access to California beaches.

The courts in California have misapplied the reasonable nexus test intended by the Legislature so that it is no longer relevant. This misapplication goes beyond the limits of permitted regulation.

"The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private prop-

erty disappears. But that cannot be accomplished in this way under the Constitution of the United States. The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) emphasis added.

When enacting the California Coastal Act the California Legislature, perhaps cognizant of this "natural tendency of human nature," clearly reiterated the guarantee of compensation for a taking of private property:

"The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the regional commission . . . or local government acting pursuant to this division to exercise their power to grant or deny a

permit in a manner which will take or damage private proeprty for public use, without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States." *California Public Resources Code* Section 30010, emphasis added.

Despite this clear and unequivocal statement the courts in California have allowed the Commission to take private property without compensation because it will benefit the public. The words of Justice Holmes in *Pennsylvania Coal* must not be forgotten:

"We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving

the desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 416  
emphasis added.

C.A.R. urges that this Court find that a taking analysis is mandated by the Constitution and restore the reasonable nexus test to the State of California, as was intended by the California Legislature.

DATED: December 18, 1986.

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