

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 and  
MARILYN HARVEY NOLLAN,

*Appellants,*

v.

CALIFORNIA COASTAL COMMISSION,

*Appellee.*

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

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**BRIEF FOR APPELLEE**

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## QUESTIONS PRESENTED

1. Pursuant to the police power, may government, as a condition to approval of a new development project, require a property owner to allow the public to pass across the narrow, sandy beach portion of the property in order to compensate for the burdens on the public's right of access to the publicly owned tidelands which will emanate from the cumulative impacts of that and similar projects?

2. Where such a condition is imposed on a permit sought by a lessee of a residential lot, must compensation be paid when the lessee, knowing of the condition, subsequently purchases the lot and replaces an existing small house with a new, substantially larger one?

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vs.

CALIFORNIA COASTAL COMMISSION.

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**ON APPEAL FROM THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA,  
SECOND APPELLATE DISTRICT**

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**BRIEF FOR APPELLEE**

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**STATEMENT OF THE CASE**

Appellee California Coastal Commission is a state agency charged with planning and regulation of land use along California's 1,000 mile coastline pursuant to the California Coastal Act of 1976. (Cal. Pub. Resources Code, §30000 et seq.) The Coastal Act of 1976 is the legislative continuation of the scheme for coastal protection originally adopted by the People of California as an initiative measure in 1972. In adopting the 1972 Coastal Initiative, the people declared that California's

coastal zone is a distinct and valuable natural resource belonging to all the people and existing as a delicately balanced ecosystem. The people further found that the permanent protection of the remaining natural and scenic resources of the coastal zone is a paramount concern for present and future residents of the state and nation. (Cal. Pub. Resources Code, §27001.) One of the primary goals of the Coastal Initiative was the preservation of public access to the publicly owned tidelands. Public access to the tidelands is protected by Article X, section 4 of the California Constitution. The Coastal Initiative was designed to implement that constitutional protection.

As required by the initiative, the California Coastal Plan was prepared for the future regulation and development of the coastal zone. The plan identified public coastal access as a major long-term goal of coastal conservation and development. The Coastal Plan was submitted to the Legislature which used it as a guide to enact the Coastal Act of 1976. ("Coastal Act"; *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 164 [188 Cal.Rptr. 104, 655 P.2d 306].) In the 1976 Act, the Legislature found and declared that one of the basic goals of the state for the coastal zone is to maximize public access to and along the coast consistent with sound resource conservation principles and constitutionally protected rights of private property owners. (Cal. Pub. Resources Code, §30001.5, subd. (c).) The Legislature consequently adopted the policy that, in carrying out the requirement of Article X, section 4 of the California Constitution, maximum access shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners and natural resource areas from overuse. (Cal. Pub. Resources Code, §30210.)

Under the California Coastal Act of 1976, the Legislature authorized the California Coastal Commission ("Commission") to approve coastal development permits for new development projects in the geographically limited coastal zone and to attach conditions to permits to offset the deleterious impacts

new development projects will impose on coastal resources. (Cal. Pub. Resources Code, §§30103, 30106, 30600 and 30607.) The Coastal Act mandates the Commission to condition its approval of new beachfront development projects upon protection and provision of public access to and along the coast, consistent with the state constitutional provision ensuring public access to those public lands. (Cal. Const., art. X §4; Cal. Pub. Resources Code, §30212.) The Coastal Act became one of the components of California's coastal zone management program that was adopted pursuant to the Federal Coastal Zone Management Act ("CZMA"). (86 Stats. 1281, §§301-316; 16 U.S.C. §§1451-1464.) The CZMA encourages states to develop and implement coastal management programs, which, after review and approval by the Secretary of Commerce, guide land and water uses in the state's coastal zone. (16 U.S.C. §§1454-1455.) The CZMA requires such management plans to include a planning process for the protection of, and public access to, beaches and other coastal resources. (16 U.S.C. §1454, subd. (b)(7).) The Secretary of Commerce approved California's Coastal Zone Management Plan in 1977, including the provisions on public access. It is the Commission's ability to implement those access provisions and protect public access to the tidelands which is challenged here.

James Patrick Nollan and Marilyn Harvey Nollan ("Nollans") appeal from the decision of the California Court of Appeal. The court below upheld the Commission's ability to condition the Nollans' new development project so as to protect public access to the tidelands from the project's adverse impacts, both individual and cumulative.

The Nollans' property which is the subject of this litigation is located in the Faria Beach Tract of Ventura County, California. The Faria Beach area, including the Nollans' beach property, is a popular recreation area. (Joint Appendix ("JA") 81-82, 255-260.) Faria County Park is located nearly a third of a mile upcoast from the Nollan property and the Cove Beach (a private cove where public use is permitted) is located 1,800

feet downcoast. (JA 49.) However, no continuous access linkage along the coast exists between the Cove and Faria County Park. The public was given permission by the Nollans' predecessors-in-interest to use the beach along the Faria Tract for lateral access. (JA 48.) The Nollans have continued to permit public use. (JA 303.) The public has also made use of the beach at Faria for recreational purposes, including surfing, beach hiking and bathing. (JA 69.) Due to the long continued public use, public prescriptive rights may have arisen in the Faria Beach area, including the Nollan property. (JA 85-86.) While the public has made substantial use of the Faria Beach area in the past, including the beach area of the Nollan property, no assurance exists that such use will be allowed to continue. (JA 303.)

The Faria Beach Tract was originally comprised of small beach cottages, such as the Nollans', which were used mainly as vacation homes. (JA 40.) As in many other coastal communities, these small secondary homes are being torn down and replaced with much bigger primary residences. (JA 60.) 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. (JA 58.)

In 1982 appellants leased their lot in the Faria Beach Tract. (Juris. State., p. 5.) On March 1, 1982, the Nollans applied to appellee Commission for a coastal development permit to demolish their one story, 521 square foot, one bedroom, substandard beach house and construct a two story, three bedroom, 1,674 square foot residence with attached two-car garage. (JA 47.) 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., p. 5, JA 59.) The Nollans' new residence is three times larger and one story higher than the old beach house and greatly increases the gross floor area to 2,464

square feet. (JA 56.) The Nollans' lot is 2,800 square feet.<sup>1</sup> (JA 23a, 56.) The new house will cover nearly all the buildable lot space behind the seawall, extending to within three feet of the lot lines on either side. (JA 26.) All development proposed by the Nollans is landward of the seawall. The seawall is located very near the mean high tide line. (JA 61.) 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.*) At other times the water extends up to the Nollans' seawall, as well as the seawalls of neighboring residents, preventing pedestrian passage along the shore when the tide is in. (*Id.* at p. 68; see also photographs found at JA 262-276 depicting the water and the beach conditions at Faria.)

The Commission placed the Nollans' application on what is known as the administrative permit calendar, which allows only an abbreviated public hearing. Over the Nollans' objection, the application was approved on April 7, 1982, with a condition requiring that the Nollans provide lateral public access. The Nollans then filed a petition for a writ of mandate. On January 17, 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." (JA 40.)

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<sup>1</sup>The Nollans have criticized the figures used by the Commission to describe their project, stating they are incorrect and their lot is 3,800 square feet. (JA 397. *Juris. State*, p. 4; *Response to Motion to Dismiss*, p. 2.) However, the figures used by the Commission were supplied by the Nollans' architect, who designed the project and who was authorized by the Nollans to act as their representative and bind them in all matters concerning the permit. (JA 12, 23a.) While Mr. Nollan at one point indicated those figures were incorrect, the Nollans never supplied any substitute figures to correct the alleged inaccuracies before the Commission. (JA 397.) Neither figure is absolute, in any event, since the Nollans' seaward boundary line is the mean high tide line which is ambulatory and fluctuates, hence the size of the lot will fluctuate. (JA 61, 125, 204; compare photographs of Faria Beach at JA 262-264 and 272-274.)

Upon remand a full public hearing was held before the Commission. The Commission sought the advice of the State Lands Commission because questions had been raised regarding public rights in the Nollan property. A Senior Land Agent from the Department of Justice interviewed 30 people about public use of the area, their own use and that of many others. (Ja 85-86)<sup>2</sup> In his opinion, the area seaward of the Nollans' seawall had been impliedly dedicated through public use. (*Ibid.*) He also investigated the sovereign nature of the property seaward of the seawall and concluded that it was possible that the land was below the mean high tide line and hence sovereign land. (*Ibid.*) At the public hearing, which was held on two separate dates, the Commission received the staff report together with the State Lands Commission study undertaken by the Senior Land Agent, public testimony and input from the Nollans. The Commission also heard testimony from a representative of South Central Coast Watch who supported the access condition because of anticipated impacts on public access due to the project and the landward migration of the ocean due to erosion. (JA 308-309.) A representative of the Western Surfing Association testified that loss of access would adversely affect persons who have used and presently use the area. (JA 289-290.) In addition the Commission considered the following evidence: reports on 12 permits for demolition and new construction of single family residences in the Faria Beach Tract as well as four other permits, a Ventura Beaches Study which included Faria Beach, a Commission study on coastal public access in San Diego, a study of the cumulative impacts of shore zone development at Lake Tahoe, a handbook for planners on coastal regulation, three scholarly articles on coastal access problems encountered in other states and a beach user study as well as slides of the Nollans' property and the Faria area. (JA 42-43, listing these documents.) Most of these documents are included in the Joint Appendix. (JA 81-276.)

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<sup>2</sup>Declarations of 18 people interviewed were attached to his report and are found in the administrative record at pages 79-121. (JA 86.)

The Commission found that the Nollans' project would adversely impact public access rights. (JA 62, 65-66.) The evidence before the Commission demonstrated both the individual and cumulative impacts of the new development. The reports on permits in the immediate vicinity, a study of beaches in the area, testimony from the public, surfing articles about Faria, and the information derived from the implied dedication and sovereign interest investigation constitute concrete evidence of the past history and present conditions in the Faria area including the Nollan property. (See JA 81-86, 255-276, and pp. 79-121, 186-279 of the second volume of the administrative record.) This evidence clearly shows the trend of development in Faria. The scholarly works and studies about other coastal areas demonstrate the likely and probable future impacts of proposed development and allowed the Commission to extrapolate and analogize. (JA 87-254.) The use of evidence such as this is the essence of land use planning; it gives the Commission the ability to predict probable outcomes by learning from the past and similar situations.

The Nollans' project is one of many in Faria Beach area. As of 1983 when the Commission heard their application, the Commission had heard 60 requests for permits in the Faria Beach Tract. Approximately 43 were approved with access conditions, 14 were processed prior to adoption of the current regulations which allow joint lessor/lessee applications, and the other 3 were for non-beachfront lots. (JA 48.) The remaining 78 lots in the tract will likely undergo similar development. (JA 60-61.) The Commission found increases in development and high structure densities have impacts on existing access. As private development increases, public use of adjacent tidelands decreases. (JA 62-64, 174-183.) A study of Ventura County Beaches, including the Faria area, by the State Department of Parks and Recreation in 1976 demonstrates the need for public access resulting from increased buildout. The study identified erosion, over-crowding of existing facilities and loss of open space as factors limiting public access to the beach. (JA 255-260.) The Commission found increased development in the area will exacerbate these problems. (JA 57-61.)



As the studies in the record demonstrate, if the public cannot see the coast, the public is not inclined to use it. (JA 62-66, 161-200, 221-254.) As a result other areas will be sought by the public for beach use. (JA 96.) Those areas will become increasingly crowded as development in places like Faria grows. (JA 59.) Given the already limited availability of accessible beach areas, the impacts on public access to and use of the tidelands are undeniable. (See JA 123-124, 161-163, 201-202, 247-250.) The Nollans' house contributes to these problems. It is a visual impediment to public access. Being three times larger than the cottage it replaced and covering nearly the entire lot, the project will block any previously available view. Directly on either side are two new larger structures. Twelve permits for similar developments are in the record. The end result of all this new construction will be a wall of large two story homes instead of the previous small beach cottages. Any public view of the ocean from the road will be obliterated. The only remaining view will be from these private homes and will be solely reserved for their occupants. Absent a public right of access between the ocean and these buildings, the public will be precluded from visual as well as physical enjoyment of the sea. (JA 62.)

At the conclusion of the hearing, the Commission approved the Nollan permit subject to recordation of a deed restriction acknowledging the right of the public to pass and repass across the narrow beach between the ocean and the toe of the Nollans' seawall.<sup>3</sup> In requiring the deed restriction, the

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<sup>3</sup>Such a condition for pass and repass lateral access merely permits the public to walk and run along the shoreline parallel to the water. No additional use is allowed, including loitering, sunbathing and the like. (See JA 379.) The access condition imposed is the least intrusive type of condition. Under certain other circumstances the Commission may require an applicant to permit passive recreational use. (JA 370-371.) The deed restriction is used where it is necessary to protect habitat values of a site, where topographic constraints warrant the restriction, or where the privacy of the owner must be protected. (JA 370.) The access condition does not apply to any of the Nollans' property landward of the seawall (where their new house is located) and no public use of that area is permitted.

Commission was acting in accord with Article X, section 4 of the California Constitution, section 1454 of the Federal Coastal Zone Management Act (16 U.S.C. §1454), and sections 30210, 30211 and 30212 of the California Coastal Act. (Cal. Pub. Resources Code, §§30210-30212; all relevant provisions of the Coastal Act are included in the attached Appendix.)

After the Commission rendered its decision, the Nollans filed a Supplemental Petition for Writ of Mandate on July 15, 1983. (JA 328-398.) On December 5, 1983, the matter was tried by the court. The trial court granted the Petition for Writ of Mandate, invalidating the access condition and remanding the matter to the Commission. (JA 412-420.) Following the trial court decision, the Nollans purchased the beachfront lot from the Faria Family Trust, demolished the cottage and built the new house. (Juris. State., p. 5, fn. 1.) They neither sought to have the coastal permit issued nor complied with its conditions. The permit remains in the Commission's file in its Santa Barbara office.<sup>4</sup>

Rather than accepting the remand and striking the condition, the Commission filed a timely appeal, and the Court of Appeal reversed the judgment granting the writ of mandate in an opinion published on January 24, 1986. (JA 421-427.) The Court of Appeal found that the Nollans' project, together with others like it, limits public access to the tidelands and beaches. Collectively these projects create a need for public access. (JA 425.) In upholding the access condition, the appellate court relied extensively on *Grupe v. California Coastal Com.* (1985) 166 Cal.App.3d 148 [212 Cal.Rptr. 578], essentially incorporating the reasoning of that opinion by reference. As the Court of Appeal noted, the facts in *Grupe* were substantially similar to the facts in the Nollans' case. (JA 425.) The only difference was that Grupe sought to build a residence on one of

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<sup>4</sup>California law permits an appeal within 60 days of the trial court judgment. Once the appeal is filed, the trial court judgment remains stayed pending the outcome of the appeal. (Code Civ. Proc., §§916, 1110.)

the few remaining vacant lots in his subdivision. (JA 425.) Since both projects constituted new development, the difference was not relevant. (JA 425.) All of the arguments raised by the Nollans were raised and thoroughly analyzed in the *Grube* decision upholding the access condition in question there.

The Nollans' request for review by the California Supreme Court was denied. (Juris. State., App. B. p. 10.)

### SUMMARY OF ARGUMENT

1. The Court lacks jurisdiction to hear this case. The federal question of compensation presented was never raised or decided by the court below. Additionally, under state law, the Nollans have waived their right to challenge the access condition at issue by building the house prior to final adjudication of their rights.

2. The following test should be utilized to assess the validity of a condition on development approval: the condition must be rationally related to a legitimate public purpose; the condition must satisfy or alleviate public needs or burdens created or contributed to by the development; the condition may not deprive the landowner of all reasonable or economic use of the property nor may it impermissibly interfere with reasonable investment-backed expectations; the burden on the landowner may not be disproportionate, considering both the public needs or burdens and any benefits to the landowner.

This test is comprised of elements previously used by this Court and others in ruling on the takings question. It represents a fair balancing of the interests of the public with the interests of landowners.

3. Police power land use regulation includes the government's ability to place conditions on approval of development. Conditions may be based on the cumulative as well as the individual impacts of projects. Conditions requiring public use

of portions of property are appropriate where the need for the condition is created or contributed to by a project. Conditions allowing public access pursuant to the California Coastal Act of 1976 serve the important public purpose of ensuring the public's ability to reach and use the publicly owned tidelands. They also protect public rights of access to tidelands, guaranteed by the state constitution, from the adverse impacts, both individual and cumulative, of new development along the coast.

4. The access condition in question does not effect a taking of the Nollans' property. The Nollans' property interest is limited by the state constitutional provision guaranteeing public access to the tidelands. Article X, section 4 of the California Constitution precludes the Nollans from excluding the public from the tidelands where required for a public purpose. While the access condition does allow public use of the property, it does not amount to a physical invasion requiring a finding of a *per se* taking. The evidence demonstrates that the Nollans development will have adverse impacts on the public's ability to use the tidelands. The Nollans will also benefit from the condition since they will be able to utilize similar access made available by conditions imposed on other new development projects, in Faria and elsewhere along the California coast. The condition does not deprive the Nollans of all reasonable or economic use of their lot. They have built their new house on the only buildable portion of their lot. They are not precluded from using the beach so long as they do not interfere with the public passing along the shore. Their property is presumably worth more with the new house than with the old one. The Nollans purchased their lot and built the new house after the Commission's decision requiring access, hence their reasonable investment-backed expectations have not been affected.

5. Compensation is neither appropriate nor required in this case since the Nollans have built their house without having fulfilled the condition and have suffered no damage. If the access condition is improper, the case should be remanded for its deletion.

## ARGUMENT

## I

**THIS COURT LACKS JURISDICTION TO HEAR THIS CASE.****A. 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.**

Appellee filed separately a Motion to Dismiss on the grounds that jurisdiction is lacking due to the Nollans' failure to properly present the federal question to the courts below. (Motion of Appellee California Coastal Commission to Dismiss filed November 26, 1986.) The motion was denied by the Court before the joint appendix was received. Appellee desires to preserve its objection, should this Court reconsider. Briefly stated, the sole relief sought in the state courts by the Nollans was invalidation of the access condition. (JA 328-347.) Nowhere did they seek compensation for the access condition in the event it was found to be valid. (*Ibid.*)

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.<sup>5</sup> (See Motion to Dismiss.)

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<sup>5</sup>Insofar as the Nollans claim that they were entitled to and did not receive a thorough analysis of their "taking" claim, the Commission submits this is not a sufficient ground to confer jurisdiction. The Court of Appeal did address their claims, in part by reference to another Court of Appeal decision. *Grupe v. California Coastal Com., supra*. 166 Cal.App.3d 148. The *Nollan* court was in complete agreement with the extensive "taking" analysis contained in the *Grupe* decision and incorporated that analysis by reference rather than repeat it verbatim. Where, as here, the facts of a case are so nearly identical to a prior one that the only differences are irrelevant, reliance on the prior decision's reasoning is entirely appropriate.

**B. Appellants Have Waived Their Rights to Challenge the Access Condition Under State Law by Constructing the Development Prior to Final Adjudication of This Matter.**

As a separate ground for dismissal, appellee has raised the Nollans' waiver of the right to challenge the access condition due to their construction of the house. (Motion of Appellee California Coastal Commission to Dismiss.) Again to briefly state that position, following the trial court decision granting the petition for writ of mandate, the Nollans demolished the beach cottage and constructed their new house, ostensibly in reliance on that trial court decision. (Juris. State., p. 5, fn. 1.) However, the trial court decision was never effective. During the 60 days in which the Commission had to file an appeal, any reliance on the trial decision was at the Nollans' own risk. (*Selby Realty Co. v. O'Bannon* (1969) 2 Cal.App.3d 917, 923 [82 Cal.Rptr. 807].) Once the appeal was filed, the decision remained stayed pending final resolution of the appeal. (Code Civ. Proc. §§916, 1110.) The Commission never gave any approval to the Nollans to proceed with construction. The Commission declined to accept their tender of a deed restriction to be held in escrow because the terms of the restriction were inconsistent with the Commission's decision and the language used cast serious doubt on the validity of the proffered restriction. (JA 296-297, 384-390, 390-393.)<sup>6</sup>

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<sup>6</sup>At the public hearing, the Nollans submitted their proposal for a deed restriction to be held in escrow pending the outcome of any subsequent litigation. (JA 384-390.) However, the deed restriction proposed did not conform to the terms of the condition being considered by the Commission. It was inherently contradictory and self-serving, stating the Commission's proposed condition was illegal and unconstitutional, casting serious question on the validity of the Nollans' proposal. It also incorrectly enumerated proscribed public uses which in any event were not contemplated by the Commission. (*Ibid.*) The Commission refused to accept the Nollans' proposed deed restriction, for these reasons and also on grounds that such a precedent might encourage litigation. (JA 296-297, 390-393.)

For the reasons set forth in appellee's Motion to Dismiss, the Nollans have waived their right to challenge the public access condition. Hence, no case or controversy remains for this Court to decide and jurisdiction will not lie. (*Simon v. Eastern Ky. Welfare Rights Org.* (1976) 426 U.S. 26, 37.) The case should be dismissed.

## II

### **THE TEST FOR THE VALIDITY OF THE ACCESS CONDITION IS WHETHER THE CONDITION IS RATIONALLY RELATED TO A LEGITIMATE PUBLIC PURPOSE, AND WHETHER THE CONDITION IS REASONABLY RELATED TO A PUBLIC BURDEN OR NEED CREATED, OR CONTRIBUTED TO, BY THE PROPOSED DEVELOPMENT.**

The Commission submits the following test should be utilized to assess the validity of a condition attached to development approval:

1. First, the condition must be a valid exercise of the police power.

a. The development must affect the public. It must either create, alone or together with other similar projects, a public need or place a burden on a public right. (*Hadacheck v. Sebastian* (1915) 239 U.S. 394, 411; *Atchison, R. Co. v. Pub. Util. Comm'n* (1953) 346 U.S. 346, 353, 354.)

b. The condition must be rationally related to a legitimate public purpose. It must satisfy the public need or alleviate the public burden which the development creates or contributes to. (*Euclid v. Ambler Co.* (1926) 272 U.S. 365; *Nectow v. Cambridge* (1928) 277 U.S. 183, 188.)

2. Second, the condition may not violate the traditional takings tests employed by this Court.

a. An owner may not be deprived of all economic use or value of the property under the guise of a

condition of approval. (*Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104.)

b. The burden on the private landowner may not be clearly disproportionate, taking into account both the public burden or need and any benefit to the landowner, including any increase in value which the landowner receives by virtue of the government approval. (*Agins v. Tiburon* (1980) 477 U.S. 255, 262; *Goldblatt v. Hempstead* (1962) 369 U.S. 590, 594-596.)

c. The condition may not impermissibly interfere with reasonable investment-backed expectations. (*Kaiser Aetna v. United States* (1979) 444 U.S. 164, 179; *Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74, 84.)

The Commission submits that the access condition in question easily satisfies this test, as well as that proposed by the United States in its amicus brief. (Brief for the United States, p. 9.) Nevertheless, the delineation of the test is important. The United States fails to incorporate in its test any notion of cumulative or incremental impacts of individual small developments. (*Id.* at p. 22.) It also fails to recognize that one factor which must enter into the consideration of how a property owner is impacted by a condition is the increase in property value which may accompany the granting of a permit. (*Id.* at p. 28.)

The Commission asks this Court to adopt this test so that courts and land planners will have an appropriate standard to utilize in rendering their decisions. It is all very well to say that a governmental entity must know the Constitutional limits of its authority, but without a clearly articulated statement to define those limits, this Court will continue to see myriad requests for review. The standard proposed here will enable both land use



regulators and courts to articulate their reasoning in light of the Constitutional standards. Perhaps most important of all, both regulators and those regulated will obtain the benefit of predictability in the conduct of their affairs.

The Fifth Amendment certainly provides the ultimate statement of the limits of governmental authority, but it does not provide the practical guidance needed for assessing the validity of conditions of land use permits in today's complex society.

### III

#### **THE COMMISSION'S DECISION IMPOSING THE ACCESS CONDITION CONSTITUTES A VALID EXERCISE OF THE POLICE POWER.**

##### **A. Regulation of Land Use Pursuant to the Police Power is Valid.**

The regulation of land use is a long, venerable tradition which this Court has recognized as a proper exercise of the police power. (*Welch v. Swasey* (1909) 214 U.S. 91; *Euclid v. Ambler Co.*, *supra*, 272 U.S. 365; *Gorieb v. Fox* (1927) 274 U.S. 603; *Penn Central Transp. Co. v. New York City*, *supra*, 438 U.S. 104.) This Court has upheld land use regulation in the context of zoning (*Euclid v. Ambler Co.*, *supra*), historic landmark preservation (*Penn Central Transp. Co. v. New York City*, *supra*), wetland preservation (*United States v. Riverside Bayview Homes* (1985) 474 U.S. \_\_\_\_ [88 L.Ed.2d 419, 106 S.Ct. 455] and even the protection of freedom of speech (*Pruneyard Shopping Center v. Robins*, *supra*, 447 U.S. 74). Appellants do not dispute this ability of government to regulate land use pursuant to the police power. (Appellants' Brief on the Merits, pp. 24-25, 35.)

**B. The Regulation of Land Use Pursuant to the Police Power Includes the Ability to Condition Approval of Development.**

The police power encompasses the ability to condition the use of land so as to protect public interests. (*Agins v. Tiburon, supra*, 447 U.S. 255, upholding siting and design limitations aimed at preserving open space and the scenic quality of an area; *Penn Central Transp. Co. v. New York City, supra*, 438 U.S. 104, upholding historic landmark preservation law precluding construction of a multi-story building above Grand Central Terminal; *Welch v. Swasey, supra*, 214 U.S. 91, upholding height restrictions; and *Gorieb v. Fox, supra*, 274 U.S. 603, upholding requirement that certain portions of parcels be left unbuilt.) Pursuant to the police power, appellee Commission has the ability to condition approval of coastal development so as to protect public interests.

**1. Conditions May Properly Take Into Consideration the Cumulative Impacts of Proposed Developments.**

Appellants argue that conditions may only be attached to approval of development if the development *alone* would create the need for the condition. Such an argument ignores reality and established precedent. The impacts of a proposed project cannot be isolated or separated from the impacts of other projects in the area.

Regulation based on the impacts of the aggregate as opposed to impacts of an individual has long been accepted. As this Court explained in *Wickard v. Filburn* (1942) 317 U.S. 111, 127, in upholding regulation designed to control the price of wheat pursuant to the Commerce Clause:

“That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial. . . .”

Consideration of the cumulative impacts of proposed projects is integral to land use and environmental regulation. Congress has consistently obligated governmental agencies to consider the impacts of a project together with others like it. (Federal Power Act, 16 U.S.C. §800 et seq.; National Environmental Policy Act of 1976, 42 U.S.C. §4321 et seq.; Coastal Zone Management Act, 16 U.S.C. §1451 et seq.) The courts have reinforced this obligation, cautioning agencies that ignoring the cumulative impacts of a project would be in derogation of their duties. (*National Wildlife Federation v. F.E.R.C.* (9th Cir. 1986) 801 F.2d 1505, 1513; *Sierra Club v. Marsh* (1st Cir. 1985) 769 F.2d 868, 881.) As the Court in *Natural Resources Defense Council v. Callaway* (2d Cir. 1975) 524 F.2d 79, 88 aptly observed:

“. . . an agency may not go to the opposite extreme of treating a project as an isolated ‘single-shot’ venture in the face of persuasive evidence that it is but one of several substantially similar operations, each of which will have the same polluting effect in the same area. To ignore the prospective cumulative harm under such circumstances could be to risk ecological disaster.” (See also, *Baltimore Gas & Electric Co. v. NRDC* (1983) 462 U.S. 87, 106-107.)

The Commission is mandated to consider the cumulative impacts of new development projects. (Cal. Pub. Resources Code, §§30105.5, 30250.)

## **2. Conditions on Development Approvals May Include Requirements of Dedication.**

Regulatory approvals are often conditioned upon requiring some public use of the applicant’s property. (Federal Power Act, 16 U.S.C. §800 et seq.; 33 C.F.R. 320.4(e) and (g)(2), 325.4(a); *Penn Central Transp. Co. v. New York City*, *supra*, 438 U.S. 104; see also *Pruneyard Shopping Center v. Robins*, *supra*, 447 U.S. 74.) As noted in the Brief for the United States

(p.3), such conditions may even include dedications of public access. Moreover, dedications are not limited to the needs of or burdens created by a proposed project alone, but may be justified by cumulative impacts. (*Associated Home Builders etc., Inc. v. City of Walnut Creek*, (1971) 4 Cal.3d 633 [94 Cal.Rptr. 630, 484 P.2d 606], dismissed for want of a substantial federal question 404 U.S. 878; *Ayres v. City Council of Los Angeles* (1949) 34 Cal.2d 31 [207 P.2d 1]; *Remmenga v. California Coastal Com.* (1985) 163 Cal.App.3d 623 [209 Cal.Rptr. 628] dismissed for want of a federal question — U.S. — [88 L.Ed.2d 250, 106 S.Ct. 241]; *Whaler's Village Club v. California Coastal Com.* (1985) 173 Cal.App.3d 240 [220 Cal.Rptr. 2] dismissed for want of jurisdiction — U.S. — [90 L.Ed.2d 648, 106 S.Ct. 1962].)

The California courts have articulated the policy underlying this rule. In *Associated Home Builders etc., Inc. v. City of Walnut Creek*, *supra*, 4 Cal.3d 633, the California Supreme Court upheld a condition that required a subdivider to dedicate land or pay a fee for park or recreational purposes. As the court explained, the statute in question was justified on the basis of:

“... a general public need for recreational facilities caused by present and future subdivisions. The elimination of open space in California is a melancholy aspect of the unprecedented population increase which has characterized our state in the last few decades. Manifestly governmental entities have the responsibility to provide park and recreation land to accommodate this human expansion despite the inexorable decrease of open space available to fulfill such need. . . .” (*Id.* at p. 638; *Ayres v. City Council of Los Angeles*, *supra*, 34 Cal.2d 31, upholding dedication conditions imposed on a subdivider based upon future as well as immediate needs.)

This reasoning has been applied to access conditions required pursuant to the Coastal Act. Utilizing this test, the courts in California have consistently recognized and upheld the Commission's authority to require dedication of public access as a condition of permit approval.<sup>7</sup> Perhaps the most cogent analysis was given by a three-judge panel of the federal district court in *Sea Ranch Ass'n v. California Coastal Com'n* (1981) 527 F.Supp. 390. (The judgment was subsequently vacated on grounds of mootness because of the settlement of the controversy in question but the analysis remains valid. See 454 U.S. 1070 and 552 F.Supp. 241.) After reviewing the Commission's authority under the Coastal Act, the court held:

“With these provisions of the Act in mind, this court finds public access and aesthetic considerations constitute areas that legitimately fall within the Commission's regulatory power. The permitting process is the means for the Commission to enforce the power delegated to it. It is clear that the Commission would be in violation of the policies and its duties as spelled out under the Act if it had not formulated or imposed the challenged conditions. Absent imposition of these or similar conditions ten miles of the California coastline would become a private beach with many portions of it cut off from the public's view.” (*Sea Ranch Ass'n. v. California Coastal Com., supra*, 527 F. Supp. at p. 393.)

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<sup>7</sup>*Natural Resources Defense Council, Inc. v. California Coastal Zone Conservation Com.* (1976) 57 Cal.App.3d 76, 92 [129 Cal.Rptr. 57]; *Frisco Land & Mining Co. v. State of California* (1977) 74 Cal.App.3d 736, 754, [141 Cal.Rptr. 820] cert. denied 436 U.S. 918; *Liberty v. California Coastal Com.* (1980) 113 Cal.App.3d 491, 500 [170 Cal.Rptr. 247]; *Grupe v. California Coastal Com., supra*, 166 Cal.App.3d 148, 165. As stated in *Georgia-Pacific Corp. v. California Coastal Com.* (1982) 132 Cal.App.3d 678, 699 [183 Cal.Rptr. 395], “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. . . .”

The court held:

“. . . planning bodies may condition development on aesthetic considerations or dedications of property for public recreational facilities or access. *The fact that the development has no direct nexus to the condition, that the benefit to the public is greater than to the developer, or that future needs are taken into consideration, does not destroy the validity of the condition.* The court is free to look to these factors, as well as the general goals behind the authorizing statute, in evaluating the reasonableness of the regulation.

“Applying these standards to the instant case it is clear that the challenged conditions must stand. The public need for access to state beaches on foot or visually and the importance the people of California place on that need have been embodied in the California Coastal Zone Conservation Act. The Act spelled out the need to maximize public access and views. As we noted earlier, failure to implement these conditions would result in loss of public access and views on a substantial portion of the northern California coastline. Moreover, the gradual build-out at Sea Ranch, and like developments in the region, with the likely attendant increase in local population and tourism, will increase the existing need for public access.” (*Id.* at p. 395; emphasis added.)

California courts have recognized that conditions which do not bear a rational relationship to the burdens created or contributed to by a project are invalid. Such conditions have been invalidated as excessive exercises of the police power. (See, *Scrutton v. County of Sacramento* (1969) 275 Cal.App.2d 412, 421 [79 Cal.Rptr. 872]; *Kelber v. City of Upland* (1957) 155 Cal.App.2d 631, 638 [318 P.2d 561]; *Liberty v. California Coastal Com., supra*, 113 Cal.App.3d 491; and *Arnel Development Co. v. City of Costa Mesa* (1981) 126 Cal.App.3d 330

[178 Cal.Rptr. 723]; see also, *Georgia-Pacific Corp. v. California Coastal Com.*, *supra*, 132 Cal.App.3d 678, 701, holding that an access condition must bear some reasonable relationship to the project.)

The California Court of Appeal below applied this standard in reviewing the Commission's decision. Relying on *Associated Home Builders, etc., Inc. v. City of Walnut Creek*, *supra*, 4 Cal.3d 633, *Grupe v. California Coastal Com.*, *supra*, 166 Cal.App.3d 148, and *Remmenga v. California Coastal Com.*, *supra*, 163 Cal.App.3d 623, the court held imposition of the access condition was valid, noting that while the Nollans' project alone has not created the need for access to the tidelands fronting their property, "it is a small project among many others which together limit public access to the tidelands and beaches of the state and, therefore, collectively create a need for public access." (JA 425.) Much like the wheat farmer in *Wickard v. Filburn*, *supra*, 317 U.S. 111, whose contribution alone to the demand for wheat was trivial but when combined with others like his was not, the Nollans' contribution to the need for public access, taken together with that of many others similarly situated, will be far from trivial. (See *Grupe v. California Coastal Com.*, *supra*, 166 Cal.App.3d at p. 167.)

**C. The Land Use Regulation in Question Serves the Important Public Purpose of Allowing Public Access to Publicly Owned Tidelands.**

In imposing the access condition in question, appellee Commission was acting pursuant to the authority vested in it by the California Legislature under the California Coastal Act of 1976. (Cal. Pub. Resources Code, §30000 et seq.) The Coastal Act of 1976 is the legislative continuation of the coastal protection afforded by the initiative which created the California Coastal Zone Conservation Act of 1972. (Cal. Pub. Resources Code, §27000 et seq.) The Coastal Initiative was prompted by growing public concern over protection and preservation of coastal resources from the impacts of increased development.

“‘The deleterious consequences of haphazard community growth in this state and the need to prevent further random development are evident to even the most casual observer.’ ( *Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 120 [109 Cal.Rptr. 799, 514 P.2d 111].) This is particularly true of our 1,000-mile coastline. Visual, as well as physical, access to large segments of our beaches has been obstructed by residential, commercial and industrial development. . . .” ( *CEED v. California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306, 321 [118 Cal.Rptr. 315].)

One of the primary goals of the Coastal Initiative was to increase public access to the shore. As the California Supreme Court observed:

“In recent decades, the People of California have become painfully aware of the deterioration in the quality and availability of recreational opportunities along the California coastline due to the combined factors of an increasing demand for its use and the simultaneous decreasing supply of accessible land in the coastal zone. Growing public consciousness of the finite quantity and fragile nature of the coastal environment led to the 1972 passage of Proposition 20, an initiative measure entitled the California Coastal Zone Conservation Act (the 1972 Coastal Act). . . .” ( *Pacific Legal Foundation v. California Coastal Com.*, *supra*, 33 Cal.3d 158, 162.)

In enacting the Coastal Act of 1976, the Legislature continued the coastal protection afforded by the Coastal Initiative. In keeping with the prior mandate of the People, one of the principal objectives of the 1976 Coastal Act is to preserve existing public rights of access to the shoreline and to expand public access for the future. ( *Pacific Legal Foundation v. California Coastal Com.*, *supra*, 33 Cal.3d at p. 163.)



There has long been a strong public policy in California in favor of allowing public access to shoreline areas for public purposes. (Cal. Const., art. X, §4; *County of Los Angeles v. Berk* (1980) 26 Cal.3d 201, 222 [161 Cal.Rptr. 742, 605 P.2d 381]; *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29, 42-43 [84 Cal.Rptr. 162, 465 P.2d 50].) This policy is founded on the need to assure the public's ability to use tidelands along the coast. Those tidelands are sovereign lands which are held in trust by the state for public uses including the right to fish, hunt, bathe, swim, use for boating and general recreational purposes. (*Marks v. Whitney* (1971) 6 Cal.3d 251, 259 [98 Cal.Rptr. 790, 491 P.2d 374].) As the California Legislature and the courts have recognized, public ownership and the concomitant right to use the tidelands are worthless without the ability to reach those lands. The ability to reach the tidelands contemplates not only access to the shore but along the shore enabling the public to reach and use its tidelands located both up and down coast. (See JA 318-319, 326.)

Thus, the access condition is rationally related to the important public purpose of ensuring access to the tidelands. The condition both satisfies the need for public access and alleviates the burdens resulting from the cumulative impacts of new development in the Faria Beach area.

**D. The California Legislature Has Determined That Public Access Conditions Are Appropriate in New Development Projects.**

In enacting the Coastal Act, the Legislature determined that public access conditions should be imposed on new development projects. The Legislature found and declared that the coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people and that future developments that are carefully planned and developed consistent with the Act are essential to the economic and social well-being of the people of the state. (Cal. Pub. Resources Code, §30001.) The Legislature declared that a basic goal of

the state is to maximize public access to and along the coast. (Cal. Pub. Resources Code, §30001.5, subd. (c).) Section 30212 of the Coastal Act, subdivision (a), provides that “public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby or (3) agriculture would be adversely affected.” The Legislature had ample basis on which to conclude that construction of new developments between the first public road and the coast would cumulatively adversely impact the public’s constitutional right of access to the tidelands. Government studies have demonstrated that hundreds of miles of publicly owned tidelands have been walled off from public access by private development. (See *Remmenga v. California Coastal Com.*, *supra*, 163 Cal.App.3d 623, 630.) As this Court has repeatedly held, a Legislature’s factual determinations supporting a statute may not be judicially questioned if the Legislature could reasonably believe them to be true. (*Minnesota v. Clover Leaf Creamery Co.* (1981) 449 U.S. 456; *Vance v. Bradley* (1979) 440 U.S. 93; see also *Day-Brite Lighting, Inc. v. Missouri* (1952) 342 U.S. 421.) In reviewing police power regulations, this Court has made clear that the court does not sit as a super legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. (*Day-Brite Lighting, Inc. v. Missouri*, *supra*, at p. 423.) It is not the function of the courts to substitute their evaluation of legislative facts for that of the Legislature. (*Minnesota v. Clover Leaf Creamery Co.*, *supra*, 449 U.S. at p. 470.)

The police power is not confined to a narrow category; it extends to all the great public needs. (*Day-Brite Lighting, Inc. v. Missouri*, *supra*, 342 U.S. at p. 424.) Public access to public tidelands and coastal resources is a compelling public need. (See *Pacific Legal Foundation v. California Coastal Com.*,

*supra*, 33 Cal.3d at p. 162.) Absent access to the tidelands, the public can neither use nor enjoy the property it owns. In recognition of this fact, Congress has declared it is the national policy to encourage and assist states to develop and implement coastal management programs which include provisions for public access to the coasts. (16 U.S.C. §1452(2)(D).) The California Legislature's determination of the need for public access in new development projects should not be set aside.

#### IV

#### **IMPOSITION OF THE ACCESS CONDITION DOES NOT RESULT IN TAKING OF APPELLANTS' PROPERTY.**

##### **A. The Nollans' Property Interest Is Subject to the State Constitutional Provision Protecting Public Access to the Tidelands.**

In a "takings" case, one of the first questions to be answered is whether there is a property interest which is protected by the Fifth Amendment to the United States Constitution. (*Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 1000.) As this Court has recognized:

"Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." (*Board of Regents v. Roth* (1972) 408 U.S. 564, 577.)

A mere unilateral expectation or abstract need is not a property interest entitled to protection. (*Webb's Fabulous Pharmacies, Inc. v. Beckwith* (1980) 449 U.S. 155, 161.) The Nollans assert they have been deprived of the right to exclude others because of the Commission's decision. (Brief for Appellants, p. 21.) However, since its adoption in 1879, the California Constitution has prohibited beachfront owners from excluding the public's

right of way to the tidelands wherever necessary for a public purpose. (Cal. Const., art. X, § 4, included in the Appendix.) This guarantee of the public right of way to the tidelands has been recognized by the courts. (*Henry Dalton & Sons Co. v. Oakland* (1914) 168 Cal. 463; *People ex rel. Younger v. County of El Dorado* (1979) 96 Cal.App.3d 403, 406 [157 Cal.Rptr. 815]; *Lane v. City of Redondo Beach* (1975) 49 Cal.App.3d 251, 255-257 [122 Cal.Rptr. 189].) It is the basis for the public access provisions in the California Coastal Act. (Cal. Pub. Resources Code, §30210.)

When the Nollans acquired their beachfront property, one of the strands lacking in their bundle of property rights was the ability to exclude the public from access to the tidelands. (See *Andrus v. Allard* (1979) 444 U.S. 51, 65-66.) State law does not allow an owner whose property abuts navigable waters to exclude the public where access is necessary for a public purpose. Thus, under California law, the “property right” which the Nollans claim was taken does not exist. The public purpose of access to the tidelands is undoubted, and a beachfront property owner who is required to recognize the public’s right to access as a condition of a development permit is simply not deprived of any property right under state law. The Commission’s decision required the Nollans to acknowledge and not interfere with the public’s use of the beach. This preserved the public’s right, guaranteed by the State Constitution, of access to the tidelands. The Commission’s decision did not deprive the Nollans of any property right.

**B. Contrary to Appellants’ Assertions, This Is Not a So-Called Physical Invasion Case.**

Even if the condition had affected a property right, there has still been no “taking.” Appellants have characterized the Commission’s decision as resulting in a physical invasion of their property and hence a taking for which compensation is due. In so doing, appellants attempt to align this case with

prior decisions of this Court holding uncompensated physical invasions impermissible. However, as amicus United States agrees, this traditional line of “physical invasion” cases is inapposite to a police power permit regulatory case such as the present one. (Brief on behalf of the United States, p. 15.)

Traditional physical invasion cases involve situations where government authorizes use of private property without any action by the property owner. These cases do not involve permit situations where, in exchange for permission to use private property, the property owner is asked to offset the burdens the use will create or contribute to by allowing public use of portions of his property.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, (1982) 458 U.S. 419, this Court found a physical invasion of private property required compensation. However, in *Loretto*, the property owner took no action which could trigger the police power of the State of New York. New York had enacted a statute which permitted cable television companies to install cables on apartment buildings to serve the tenants but without paying the owners of the buildings for the space occupied by the cables. This Court found that authorizing the cable companies to use private property without compensation to the owner constituted a taking. The case did not involve a permit situation like this one where the property owner seeks governmental authorization to effect a change in his property, and, in approving this change, the government attaches conditions to its approval. As this Court noted in *Loretto*, an easement of passage does not amount to a taking *per se*. (*Id.* at pp. 428-429, 433.)<sup>8</sup> (See also, *United States v. Causby* (1945) 328 U.S. 262—government flight path over chicken ranch resulting in loss of use for any purpose constituted a taking.)

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<sup>8</sup>As the Solicitor General points out, the access condition in question differs from the cable placement in *Loretto*. It does not qualify as permanent in nature or as a physical occupation of private property since the public only obtains the right to pass and repass. (Brief for the United States, pp. 14-15.)

The difference between traditional physical invasion cases and regulatory police power cases lies in the concept of fairness. In traditional physical invasion cases, the property owner is forced to unfairly shoulder a burden that should properly be borne by the public. (See, *Penn Central Transp. Co. v. New York City*, *supra*, 438 U.S. 104, 123.) In a regulatory police power case, the property owner is asked to share in alleviating the public burden his project will create, or contribute to. The fairness lies in protecting the public from the actions of the property owner. The public should not be asked to unfairly shoulder the burdens created by private property owners.

The case of *Kaiser Aetna v. United States*, *supra*, 444 U.S. 164, is perhaps most illustrative of the difference between valid regulatory conditions and improper physical invasions. Kaiser Aetna sought approval from the Corps of Engineers to dredge a private pond and create a private marina. The pond was not considered part of the navigable waters of the United States. The Corps advised Kaiser Aetna that permits for this activity were unnecessary. Subsequently, the Corps asserted that Kaiser Aetna could not preclude the public from the marina because it had become part of the navigable water of the United States, despite the fact that Kaiser Aetna had invested millions of dollars on the assumption the marina would remain private. In upholding Kaiser Aetna's challenge to the Corps' assertion, this Court noted:

"We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, or could have conditioned its approval of the dredging on petitioners' agreement to comply with various measures that it deemed appropriate for the promotion of navigation. But what petitioners now have is a body of water that was private property under Hawaiian law, linked to navigable water by a channel dredged by them with the consent of the Government. While the consent of individual officials representing the United States cannot 'estop' the United

States, [citations omitted], it can lead to the fruition of a number of expectancies embodied in the concept of ‘property’—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner’s property. . . .” (*Id.* at p. 179.)

Unlike *Kaiser Aetna*, the Nollans’ expectancy of continued private use of their beach is unfounded. The Nollans not only purchased their property knowing the public has a constitutionally guaranteed right of access to the adjacent tidelands, they purchased the land after the Commission’s permit decision. Unlike *Kaiser Aetna*, no expectation of continued private use was led to fruition by government. Quite the contrary, the Nollans were fully informed of the Commission’s obligation to require them to permit public use of their beachfront as a condition of development approval long before they purchased their lot and built their new house. Striking the access condition now would result in an absolute windfall to the Nollans and a detriment to the public.

Merely characterizing the Commission’s decision as amounting to a “physical invasion” does not make it a taking for purposes of this Court’s analysis. (See, *Grupe v. California Coastal Com.*, *supra*, 166 Cal.App.3d at p. 176.) As this Court recognized in *Pruneyard Shopping Center v. Robins*, *supra*, 447 U.S. 74, 84, not every assertion of physical invasion is determinative of whether a taking has occurred. None has occurred here.

**C. Analysis of the Factors Which This Court Has Previously Identified As Significant to Finding a Taking Discloses There Has Been No Taking of Appellants' Property.**

This Court has identified several factors which are significant to a takings analysis. (*Penn Central Transp. Co. v. New York City*, *supra*, 438 U.S. 104.) These are (1) the nature of the governmental action, (2) the economic impact of the regulation, and (3) the extent to which the regulation interferes with reasonable investment-backed expectations. (*Id.* at pp. 124-125; *Kaiser Aetna v. United States*, *supra*, 444 U.S. at pp. 174-175; *Ruckelshaus v. Monsanto Co.*, *supra*, 467 U.S. 986.) Applying these factors establishes there has been no taking of the Nollans' property.

**1. The Nature of the Governmental Action in Question Is the Protection of Constitutionally Guaranteed Public Rights.**

The decision of the Commission was made to protect the public's right of access to the tidelands, guaranteed by the State Constitution, from the adverse impacts of the Nollan project. (JA 65-66.) In analyzing whether governmental action has "gone too far," this Court has recognized that the nature of the action in question is particularly significant. Here, the nature of the governmental action was the protection of public resources and constitutional rights. Consequently, the government must be afforded broad latitude in its action.

This Court has previously acknowledged the ability of a state to exercise its police power and its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution. (*Pruneyard Shopping Center v. Robins*, *supra*, 447 U.S. at p. 81; *Cooper v. California* (1967) 386 U.S. 58.) In *Pruneyard*, the California Supreme Court had interpreted the State Constitution as requiring the owner of a shopping center to permit members of the public to exercise their rights of free expression and petition



on the center's premises. This Court affirmed, holding that even though the result might be considered a "physical invasion" of the shopping center's property, the center had failed to demonstrate that the right to exclude the public was so essential to the use or economic value of the property that the state-authorized limitation of it amounted to a taking. (*Id.* at p. 84.) A similar result must obtain here.<sup>9</sup>

The evidence before the Commission emphatically demonstrated the impacts that would result from the Nollans' project. The increase in development and high structure densities results in impacts on existing public access. The eroding nature of the Faria Beach, the overcrowding of existing facilities and loss of open space have limited public access. Increased development will only exacerbate these problems. (JA 57-66, 255-260.) The deprivation of visual access will also impede physical access. As the evidence shows, loss of visual access means the public will not be aware of access opportunities. If the public cannot see the coast, the public will not use it. (JA 62-66, 161-200, 221-254.) Other areas will become increasingly crowded as a result. Based on the mass of evidence before it, the Commission properly found the Nollans' construction of the new house constituted new development pursuant to the Coastal Act of 1976 and that the burdens on public access resulting from the construction, along with other projects like it, required provision for public access. (JA 47-68; see discussion of evidence in the Statement of the Case.)

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<sup>9</sup>The California court had noted that it was not confronted with an individual property owner but rather with a large retail business actively seeking patrons. (*Pruneyard Shopping Center v. Robins, supra*, 447 U.S. at p.78.) It is important to remember that the shopping center had not sought in any way to impinge upon public rights except by denying entry. It was not a case where the actions of the property owner would burden or adversely affect the public's rights. Here, the Nollans' construction of the new house will impact public rights quite apart from merely excluding the public from the private beach.

## **2. The Nollans Have Not Been Deprived of All Economic Use or Value of Their Property.**

The Nollans have already built the new house, albeit unlawfully, which was the subject of their coastal permit application. (Juris. State., p. 5, fn. 1.) Obviously they have not been deprived of the use of their property.

The access condition as approved by the Commission required the Nollans to acknowledge the right of the public to use the beach between the mean high tide line and the seawall. (JA 46.) It does not preclude the Nollans from using the beach. Contrary to the Nollans' strident arguments, their use of the beach will not be hindered. (See Appellants' Brief on the Merits, p. 20.) Barbecues, volleyball games and the like would still be possible to the extent they are at present. (See JA 268-269.) The Nollans would simply need to let the public walk past them along the beach. Given the narrowness of the beach and the frequency with which it is inundated by wave action, the Nollans' use of the beach will, in all likelihood, not change. (JA 61.) Since all of the Nollans' development was constructed landward of the seawall (JA 26), the public's use of the beach seaward of the seawall will not interfere with the Nollans' use of their new house. Given their admission that they have previously permitted the public to use their beach, it is apparent that such use does not interfere with the Nollans' use of their property. (JA 303.)<sup>10</sup>

This is not a situation where the property owner has been denied a permit or denied the use of property. (Compare *Martino v. Santa Clara Valley Water Dist.* (9th Cir. 1983) 703 F.2d 1141 and *Williamson Planning Comm'n v. Hamilton Bank* (1985) 473 U.S. \_\_\_\_ [87 L.Ed.2d. 126, 105 S.Ct. 3108].) Furthermore, as the court below recognized, any diminution in value resulting from the access condition would not result in a taking since reasonable use of the property remains. (JA 425.)

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<sup>10</sup>The Nollans will be protected from liability for public use by California Civil Code section 846 which shields property owners from liability for recreational use of their property by the public.

While the Nollans' property value may not be quite as high without a private beach, the Nollans are not losing all reasonable use or all economic use of their property since presumably their property is worth more with the new house than with the old one. (See, *Grupe v. California Coastal Com.*, *supra*, 166 Cal.App.3d at pp. 175-176; *Whaler's Village Club v. California Coastal Com.*, *supra*, 173 Cal.App.3d at p. 258.) As this Court has repeatedly stated, a mere diminution in the value of property does not result in a taking without just compensation. (*Penn Central Transp. Co. v. New York City*, *supra*, 438 U.S. at p. 131; *Euclid v. Ambler*, *supra* 272 U.S. 365; *Hadacheck v. Sebastian*, *supra*, 239 U.S. 394.)

The Nollans will actually benefit from the access condition and other similar conditions. The Nollans will be able to use all similar access in Faria and elsewhere along the coast, as members of the public. This reciprocity of advantage clearly benefits the Nollans. (See, Brief on Behalf of the United States, p. 28 fn. 28.)

**3. The Access Condition Does Not Interfere With Any Reasonable Investment-Backed Expectation of the Appellants.**

Appellants originally were lessees of their beachfront property. They did not exercise their option to purchase the lot until after the Commission's decision. (Juris. State., p. 5, fn. 1.) The access requirements of the Coastal Act had been in existence for over 10 years by the time the Nollans acquired their property, and Article X, section 4 of the California Constitution for over a hundred years. Under these circumstances, the Commission's decision could not interfere with reasonable investment-backed expectations. (*Ruckleshaus v. Monsanto Co.*, *supra*, 476 U.S. 986). The timing of the Nollans' purchase alone is sufficient to defeat a taking. (*Andrus v. Allard*, *supra*, 444 U.S. 51, 64-65.)

Moreover, the access condition covers only that portion of their property between the seawall and mean high tide line of the ocean. (JA 46.) The evidence before the Commission reveals this area to be a maximum of 10 feet wide. (JA 83, 85-86; 262-264.) The width of the beach also fluctuates. (JA 61, 204.) The seaward boundary of the Nollans' property, the mean high tide line, moves with this fluctuation of the beach.<sup>11</sup> The evidence also strongly suggested the public had already acquired rights to use the property through long continued use without objection by the owners. (JA 68-71, 85-86, 289-290, see also declarations on public use found in the administrative record following remand at pp. 79-121.) The public owns the tidelands adjacent to the Nollans and has the concomitant right to use them, as well as the constitutionally guaranteed right of access thereto. (*Marks v. Whitney, supra*, 6 Cal.3d 251; Cal. Const., art. X, §4.) The Nollans have no right to exclude the public from the adjacent tidelands. (*Grupe v. California Coastal Com., supra*, 166 Cal.App.3d at pp. 171-172; *Whaler's Village Club v. California Coastal Com., supra*, 173 Cal.App.3d at p. 255.) Under these circumstances, the Nollans could have no reasonable investment-backed expectation of acquiring a beach free from public rights.

The judgment of the court below should be affirmed.

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<sup>11</sup>The boundary between the tidelands and the uplands in California, the mean high tide line also often referred to as the ordinary high water mark, is ambulatory. It fluctuates with the changes in the beach. (See *Swarzwald v. Cooley* (1940) 39 Cal.App.2d 306, 313; Maloney and Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping* (1974) 53 No. Carolina L.Rev., pp. 185, 224-233.) This is true where the beach is in a natural condition. There were indications in the record that the beach in front of the Nollans' may not be in a natural condition. (JA 70, 79, 80, 83, 85, 86.) However, as the Senior Land Agent noted, further investigation would be necessary to determine this. (JA 85-86.) Based on the evidence, the Commission found the access condition appropriate to protect the potential public ownership of the beach. (JA 70-71.)

**THE NOLLANS ARE NOT ENTITLED TO COMPENSATION.**

If this Court determines that the access condition was improper, the appropriate remedy would be to remand the matter to allow the condition to be deleted. (*Agins v. Tiburon, supra*, 447 U.S. 255.) There is nothing in the Constitution that “prevents the government from electing to abandon” an improper or excessive regulation and thus eliminate a taking. (*Williamson Planning Comm’n v. Hamilton Bank, supra*, 473 U.S. \_\_\_\_ [105 S.Ct.3108, 3125] Stevens, J., concurring; *San Diego Gas & Electric Co. v. San Diego* (1981) 450 U.S. 621, 657, Brennan, J., dissenting.) There can be no question of whether the Nollans are entitled to any damages for undue regulation since they were never regulated. They built the house without the coastal permit, never satisfied the access condition, and never recorded the required deed restriction. The challenged access condition has never been applied to the Nollans because recordation of the deed restriction was a condition precedent to issuance of the coastal permit.

Thus, even if the access condition is inappropriate, the proper remedy is not compensation as the Nollans suggest, but rather a remand to allow the access condition to be deleted.

**CONCLUSION**

Either the appeal should be dismissed or the judgment of the California Court of Appeal should be affirmed.

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