No. 86-133

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

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

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

BRIEF OF APPELLANTS

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Appeal Docketed July 29, 1986
Probable Jurisdiction Noted October 20, 1986

QUESTIONS PRESENTED

1. Where the Nollans' proposal to rebuild their private residence on the same site as a previous house did not create the public's need to use the adjacent beach, does the requirement that they dedicate a public right-of-way across all of their private beach and allow the physical invasion of one-third of their property by the public at large constitute a "taking" under the Fifth and Fourteenth Amendments?

2. Where a state statute authorizes the exaction of a public right-of-way as a condition on the approval of a coastal development permit, must the state courts evaluate the facts of each case to determine whether the burdens imposed on the individual property owner would constitute a "taking" under the Fifth and Fourteenth Amendments?

PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the Court of Appeal of the State of California.

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OPINIONS BELOW

The staff report adopted as the decision of the California Coastal Commission is unpublished. Joint Appendix (JA) at 41. The trial court twice invalidated the public use condition and issued two statements of decision which are unpublished. JA at 36 and 413. The opinion of the California Court of Appeal upholding the condition is reported at 177 Cal. App. 3d 719 (1986). JA at 421. The California Supreme Court denied review. Jurisdictional Statement, Appendix B.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(2). The application of a California state statute to the Nollans was challenged as violating the United States Constitution and the statute was upheld in an opinion by the California Court of Appeal which became final on April 30, 1986, when review was denied by the California Supreme Court. Notice of appeal to this Court was filed on May 14, 1986, and this appeal was docketed in this Court on July 29, 1986.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment to the United States Constitution:

> "[N]or shall private property be taken for public use, without just compensation."

Fourteenth Amendment to the United States Constitution:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Public Resources Code §§ 30106, 30212, and 30600(a) (West 1986); California Civil Code § 654 (West 1982). The portions of these code sections which are involved in this case are set forth in the appendix to this brief.

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STATEMENT OF THE CASE

The Nollans are owners of a parcel of land in a residential subdivision in Ventura County, California. The lot is small and has no unique or exceptional features except its location. It is located on the ocean at Faria Beach and the sandy beach area extends over one-third of the property. JA at 75-75b, 414. Because of its location the California Coastal Act[1] requires that any development[2] on the lot must be approved by both local authorities and the California Coastal Commission.[3]

For approximately 40 years the Nollan family had leased the property and used the old house on the lot for weekend and vacation use and for rental to others. JA at 309-10. When the Nollans decided to purchase the lot and rebuild the house to make their personal family residence there, they were obligated to apply for a coastal development permit from the commission. At the time their application was filed with the commission in 1982, the Nollans still held a lease with an option to buy the lot. JA at 14. The existing structure did not meet many current building, health, or safety standards. Abuse by renters and deterioration from natural elements left the building an eyesore in a neighborhood in the process of

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[1] Cal. Pub. Res. Code § 30000, *et seq.* All citations to the California Public Resources Code are to West's 1986.

[2] California Public Resources Code § 30106 defines development in the most expansive terms, including "the placement or erection of any solid material or structure." This broad definition encompasses even routine, minor residential improvements such as building a deck or erecting a fence.

[3] Cal. Pub. Res. Code § 30600(a).

renovation to attractive, moderate-size homes. JA at 302. The Nollans' option to buy required them to renovate or demolish and replace the existing house. JA at 310. The Nollans were under pressure from the owner of the property to satisfy the condition on the option so that escrow could close and the property transfer could be completed.[4] JA at 282-84, 401-03.

The issuance of the permit requested by the Nollans was a routine matter. They applied only to replace the old, dilapidated house with a moderate-size, new home on the same site.[5] Their proposal complied with all planning and zoning limitations on the property. The Nollans received an "administrative permit" from a staff official, JA at 31-35, which would be routinely validated as a consent item on the commission's agenda unless two of the members of the commission voted to set the permit for hearing. JA at 32.[6] Although the Nollans requested a hearing, the commission on April 17, 1982, routinely approved the Nollans' permit without a hearing, along with all other administrative permits on that agenda item. JA at 30.

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[4] After winning this case in the trial court, the Nollans satisfied the condition, exercised their option to purchase the property, and constructed the new residence.

[5] The plot plan of the Nollans' lot including the 521 square foot "footprint" of the original house and the 1,236 square foot "footprint" of the new, two-story, 1,674 square foot house appears at JA at 75a.

[6] California Public Resources Code § 30624 has been amended to require a request by at least one-third of the appointed members of the commission to set an administrative permit for hearing.

The Nollans requested the hearing to ask the commission to remove the special condition allowing public use of their property which the staff had placed on the permit. JA at 23, 27-28. The condition stated:

> "Prior to the issuance of the Coastal Development Permit, the applicants shall record, in a form and manner approved by the Executive Director, a deed restriction acknowledging the right of the public to pass and repass across the subject properties in an area bounded by the mean high tide line at one end, to the toe of the revetment at the other. In the event that any dispute should arise as to the interpretation of this condition, the matter shall be referred to the Commission for resolution." JA at 34.

Failure to comply with this condition would subject the Nollans to penalties under the California Coastal Act. JA at 32. The Nollans refused to make the required dedication unless they could reserve the right to have a court of competent jurisdiction determine whether the imposition of this obligation violated their constitutional rights. They gave the commission the required deed restriction but added a reservation of the right to challenge the validity of the dedication requirement. This deed restriction was rejected by the commission which insisted that the Nollans waive any legal challenge to the condition. JA at 390-93.

The content of the deed restriction required by the commission's executive director demonstrates the severity of the burden being imposed. A "public servitude" is created establishing a right-of-way for the public at large to use one-third of the total area of the lot which is the Nollans' personal residence. The personal use and enjoyment of the area by the Nollans is expressly subordinated to the public use. The Nollans are to "make no

use of that portion of the beach" which might interfere with use of the right-of-way being "conferred on the public." JA at 386-87.

After the commission approved the administrative permit, the Nollans initiated this legal challenge asking the trial court to set aside the dedication condition. JA at 328. The Nollans argued that a requirement of public use of their property violated their constitutional rights. The trial court agreed, concluding that the record before the commission did not demonstrate the required relationship between the dedication to public use being required from the Nollans and their proposal to reconstruct the house on their property. The trial court's findings include:

1. The Nollans are being required to "dedicate the entire beach, approximately one-third of the property." JA at 37.

2. The Nollans "are not building a single-family residence on a vacant lot but rather are replacing a single-family residence with another single-family residence." JA at 38.

3. The Nollans "are not changing the use of the property." *Id.*

4. "It does not appear that this replacement home is out of character with the other houses in the area." *Id.*

5. "[T]he record does not show at this time that [the new home's] placement on existing residential private property will burden the public's otherwise available access to the beach." *Id.*

The trial court remanded the case to the commission to conduct "a full evidentiary hearing" on the dedication issue. JA at 40. The commission accepted the remand and set a hearing on the Nollans' permit application. The staff report adopted by the commission describes the new "evidence" which is purported to address the relationship between the Nollans' replacement home and the requirement that they dedicate a public right-of-way along Faria Beach in front of their property.[7] JA at 42-43. None of these materials identifies any effect of the Nollans' project which could create a public need for more public beach or otherwise identifies any relationship between the replacement of the Nollans' home and the exaction of the right-of-way.

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[7] The opinion of the Court of Appeal summarizes this evidence.

1. "Reports on 12 permits for demolition and reconstruction of single-family residences [on other lots] in the Faria Beach tract and four other permits."

2. "[S]tatewide interpretative guidelines [issued by the commission] on access."

3. "[A] Ventura beach study."

4. "[A] report on an investigation of the existence of public rights acquired through implied dedication at Faria, including declarations of surfers who frequent Faria beach."

5. "[E]xcerpts from surfing publications about the area."

6. "[A] commission study on coastal access in San Diego."

7. "[A] study of cumulative impact on shore-zoned development at Lake Tahoe."

8. "[A] hand book on coastal recreation for planners."

9. "[T]hree articles on coastal access problems encountered in other states."

10. "[A] beach user study component of the Santa Monica Land Use Plan." JA at 423-24.

The same is true of the 12 pages of "FINDINGS AND DECLARATIONS" adopted by the commission on the subject of "Public Access." There is no connection between the effects of the specific project proposed by the Nollans and the required dedication of a public right-of-way along Faria Beach. JA at 51-68. Initially the commission determined that the Nollans' project was "new development" and that the Public Resources Code, the commission's guidelines,[8] and the Ventura County land use plan required an access dedication from all new development.

The only findings on the Nollans' house itself are that it will be larger[9] and that it will be used as a permanent residence rather than a beach rental. JA at 56-60.

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[8] The commission's guidelines which are not quoted in the findings state:

> "Thus, based upon the historical evidence that development along the California coast results in many different ways in the preclusion of public use of the state-owned tidelands, based on the same conclusions by the Commission in adopting the Coastal Plan, and based upon the legislative expressions in both the 1972 and 1976 Coastal Acts, the Commission concludes that all new development projects cause a sufficient burden on public access to warrant the imposition of access conditions as a condition to development, subject only to the exceptions specified by the Legislature." JA at 359-60.

[9] Figures presented by the commission's staff for lot size and lot coverage are erroneous. Although the architect described the lot area to be 2,800 square feet, JA at 23a, that figure relates only to the building site above the existing seawall. The full lot size, including the beach area, is 3,800 square

(Continued)

The report then discussed the generalized impact of building on formerly undeveloped land, but mentioned nothing which indicated that the Nollans' project had an effect on public use along the beach. To the contrary the commission found that as a result of the change from vacation rental to permanent residence of the Nollan family "a reduction in use would occur if occupancy were to be permanently limited to four individuals." JA at 69. The commission concluded that other, *existing* circumstances had affected access:

> "The commission finds the applicant's lot is located along a unique stretch of coast where lateral public access in [*sic*] inadequate due to the construction of private residential structures and shoreline protective devices along a fluctuating shoreline. At times the wet sandy beach extends up to both the applicant's and other residents' existing seawalls, preventing pedestrian passage when the tide is in. Finally, the Commission notes that there are several existing provisions of pass and repass lateral access benefits already given by past Faria Beach Tract applicants as a result of prior coastal permit decisions. The access required as a condition of this permit is part of a comprehensive program to provide continuous public access along Faria Beach as the lots undergo development or redevelopment. The Commission therefore finds that, pursuant to the public access

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feet. See JA at 26 (plot plan), 397 (declaration of James Nollan). The true lot coverage by the new house and garage is 1,236 square feet, not 2,464 square feet. See JA at 23a (architect's letter), 26 (plot plan), 397 (declaration of James Nollan). Although these errors were brought to the commission's attention by Mr. Nollan, JA at 397, in the report adopted by the commission only the general reference to lot coverage increasing "by nearly five times" was deleted. Compare JA at 597 to JA at 56. The incorrect numbers were not changed to reflect the true facts.

> policies and specifically Section 30212(a), that adequate public access does not exist nearby and a deed restriction offer to allow the public pass and re-pass rights is consistent with both past Commission action and with the site's ability to provide such access." JA at 68.

Thus, the commission's findings related to the geographical location of the Nollans' lot and the state's desire to own more public beach in that area and did not identify any effect on public use from the reconstruction of the Nollans' house. Nonetheless, the commission again approved the permit with the same deed restriction requiring public use of the Nollans' property.

The Nollans renewed this challenge in the trial court on July 15, 1983. The supplemental petition again requested the court to set aside the special condition allowing public use of their property on the basis that the commission had violated the Nollans' constitutional rights "by placing an access condition on the approval of petitioners' permit, which condition bears no reasonable relationship to any asserted burden created by the proposed home and constitutes a taking of private property for public use in violation of the Fifth and Fourteenth Amendments of the United States Constitution . . . ." JA at 343. The trial court, again holding for the Nollans, restated the legal standard that the commission could not require the dedication unless it could "make an evidentiary showing of direct and definable adverse impact on the public access which should either demonstrate immediate impact or verifiable, nonspeculative, cumulative impact." JA at 416. Applying this legal standard, the trial court found that the commission's new evidence was "either not specific to the Nollan property or too speculative in nature

to support a finding that this project, by these petitioners, will create a direct or cumulative burden on public access to the sea" and that "the record did not support a finding that petitioners' proposed development would burden the public." JA at 417. On February 15, 1984, the trial court entered judgment striking the special condition from the permit. JA at 412.

On appeal the findings of the trial court were not disturbed. The Court of Appeal agreed that "[h]ere the Nollans' project has not created a need for access to the tidelands fronting on their property." JA at 425. However, the appellate court ruled that the trial court had applied an incorrect legal standard:

> "The trial court found that the evidence did not support a finding that the Nollans' project would create a 'direct or cumulative burden on public access to the sea.' Since a direct burden on public access need not be demonstrated, we hold the trial court ruling to be in error." JA at 424.

The Court of Appeal emphasized that "the justification for required dedication is not limited to the needs of or burdens created by the project." JA at 425. The appellate court then concluded that the action by the commission should be upheld because "[t]he Commission found the Nollan project to be a new development. This finding was required by the provisions of Public Resources Code Section 30212." JA at 425. There was no analysis of the specific facts of this case to determine whether the application of the statutory access requirement to the Nollans would result in the taking of their property for public use in violation of the Fifth and Fourteenth Amendments. The opinion of the Court of Appeal was filed on

January 24, 1986, and the California Supreme Court denied review on April 30, 1986. Timely appeal was docketed in this Court on July 29, 1986. Probable jurisdiction was noted on October 20, 1986.

SUMMARY OF ARGUMENT

The Nollans and the commission are locked in a dispute over what obligations rest on the state when it decides to open the yard of a private residence for use as a public right-of-way. The Nollans contend that the state cannot impose an exaction on them in the form of this physical invasion unless it either (1) condemns the right-of-way and pays just compensation, or (2) demonstrates that the need for the public right-of-way directly results from the action the Nollans proposed to take to rebuild the house on their lot. The commission contends that regardless of the reasons for the Nollans' application it is always free to require the dedication of the right-of-way as long as it will contribute to the implementation of the public policies reflected in the California Coastal Act. The commission's contention places directly upon the shoulders of the Nollans, as coastal property owners, the full cost of public benefits derived from enhancing public use areas along the beach. That result cannot be squared with the guarantees of the Fifth and Fourteenth Amendments as interpreted by this Court's decisions ruling on physical invasions and the imposition of other special costs on property owners.

The Nollans are being subjected to the most severe form of deprivation short of formal expropriation. They are being required to dedicate a public right-of-way across a large portion of their property to allow repeated physical invasions of the yard of their personal residence by the public at large. This requirement by the commission that the Nollans dedicate their property to public use results in the type of physical invasion which this Court has uniformly found to constitute a "taking" in violation of the Fifth and Fourteenth Amendments. The invasion of the small, residential lot in this case presents more severe effects on the property owner than were present in the invasion of the recreational marina in *Kaiser Aetna v. United States,* 444 U.S. 164 (1979). In this case the regular physical invasions by members of the public are combined with a permanent, legal displacement of the Nollans by a deed restriction which subordinates their interests to the public use. The resulting effect on the Nollans is qualitatively more severe than the permanent, physical occupation found to be a taking in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982). The precedents of this Court holding physical invasions to be "takings" control this case.

The Nollans' request to rebuild their residence on the site of their former beach house provides no justification for the state to require them to dedicate a portion of their property to a public right-of-way and to open their residential parcel to physical invasions by the public at large. Their action created no change in use of the parcel and complied in all ways with all use restrictions imposed on the property. The commission has shown no relationship to exist between the Nollans' request to rebuild their

house and the required dedication of a public right-of-way. The trial court's undisturbed findings show that any public need which might exist was there before the Nollans requested to rebuild their home and their actions did not disturb previously existing public access in the area. This Court has repeatedly noted that the underlying purpose of the Taking Clause is to ensure that some persons alone are not required to bear fully the cost of public benefits which in all fairness and justice should be borne by the public as a whole. *See, e.g., Armstrong v. United States,* 364 U.S. 40, 49 (1960); *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 123 (1978). Under the circumstances of this case, where the Nollans' action has not created the need for the public right-of-way and they receive no special benefits from it, they are being unfairly required to bear the full costs of providing an enlarged beach area for general public use.

This Court has established a two-step analysis to determine the constitutional validity under the Taking Clause of an obligation imposed on a property owner pursuant to a statutory mandate. *Penn Central,* 438 U.S. at 135-36. The first step is to ensure that the statute is a valid grant of authority and jurisdiction to the governmental agency. If the statute is valid, it is necessary to conduct an "ad hoc, factual inquir[y]" to determine whether the interference with the particular property owners' interest is of such a magnitude that compensation is required. *Kaiser Aetna,* 444 U.S. at 175. The California Court of Appeal erred by completing only the first step of the required analysis. It concluded that the statute required the dedication ordered by the commission and that the interests of the Nollans beyond that point were irrelevant.

The failure of the Court of Appeal to give an appropriate, factual analysis of the burdens being imposed on the Nollans denied them any meaningful consideration of whether the dedication condition constituted a "taking" in violation of the Fifth and Fourteenth Amendments.

ARGUMENT

I

THE PHYSICAL INVASION OF THE NOLLANS' PROPERTY IS THE TYPE OF INTRUSIVE GOVERNMENTAL ACTION WHICH THIS COURT HAS UNIFORMLY FOUND TO BE A TAKING

Since *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. (13 Wall.) 166 (1872), this Court has ruled without exception that involuntary physical invasions of privately owned real property caused by the government or by third parties under government authorization constitute "takings" under the Fifth and Fourteenth Amendments. The uniformity of these rulings was acknowledged in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419.

> "Professor Michelman has accurately summarized the case law concerning the role of the concept of physical invasions in the development of takings jurisprudence:
>
> "'At one time it was commonly held that, in the absence of explicit expropriation, a compensable "taking" could occur *only* through physical encroachment and occupation. The modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, *never* deny

> compensation for a physical takeover. The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, "regularly" use, or "permanently" occupy, space or a thing which theretofore was understood to be under private ownership.' Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law, 80 Harv L Rev 1165, 1184 (1967) (emphasis in original; footnotes omitted)." 458 U.S. at 427 n.5.

These physical invasion cases have involved a variety of factual circumstances including the placement of inanimate things, *Loretto, supra* (boxes and cables); *Pumpelly, supra* (water), the physical takeover and operation by other persons, *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (seizure and direction of operation of coal mine), and authorization of repeated passage across the property, *Kaiser Aetna, supra* (public access to marina); *Griggs v. County of Allegheny*, 369 U.S. 84 (1962) (airplane overflights); *United States v. Causby*, 328 U.S. 256 (1946) (airplane overflights). Differences in the nature of the physical invasion have not affected the result. The Nollans present a particularly egregious example of a case of this type.[10]

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[10] This line of cases is to be distinguished from those cases where the property owner has voluntarily opened the property to general public use for commercial purposes and the government requirement being imposed is limited to regulating the relationship between the property owner and his invitees. *Compare, e.g., Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (state law requiring individuals be allowed to distribute pamphlets and circulate petition in shopping center); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (federal law prohibiting discrimination based on race in the renting of motel accommodations).

The facts of the Nollans' situation present a near perfect match with *Kaiser Aetna, supra.* Both cases arose in the context of a government regulation and permit program. Both parcels of private property abut areas subject to the navigational servitude. The government agency in each case imposed the requirement of allowing physical invasion by the public at large of a portion of the private property for the purpose of enhancing the public use of the adjacent public area. After reviewing the historical development of the law in similar cases the Court in *Kaiser Aetna* concluded that the government action in requiring an open public right-of-way under the circumstances went "so far beyond ordinary regulation," 444 U.S. at 178, that it fell into a category in which it has never been doubted that the government "was required by the Eminent Domain Clause of the Fifth Amendment to condemn and pay fair value for that interest." 444 U.S. at 177. To reach a contrary result in this case the Court would have to overrule *Kaiser Aetna,* a case decided only seven years ago.

To the extent that there are factual differences between these two cases those differences demonstrate that the burdens imposed on the Nollans by the California Coastal Commission substantially exceed the burden imposed on Kaiser Aetna by the Corps of Engineers. One important distinction is the difference in the nature of the properties involved. The Nollans' property is their personal family residence. The property in *Kaiser Aetna* was the Hawaii Kai Marina, an area set aside for nondomestic use. The use of the marina was not limited only to residential property owners in the area. Marina shopping center merchants used a ferry, the Marina Queen, to

attract shoppers to their stores and real estate agents ferried potential buyers into the marina to promote the sale of marina lots. *Kaiser Aetna*, 444 U.S. at 168. This Court has long recognized that "[t]he constitution extends special safeguards to the privacy of the home." *United States v. Orito*, 413 U.S. 139, 142 (1973). The order of the commission that the public be allowed to make use of one-third of the area of the Nollans' small, residential parcel transgresses any reasonable protection of the privacy of their home.

Another distinction is the compatibility of the private use with the ordered public use. The intended private use of the open area of the Hawaii Kai Marina was navigational use by a large number of persons and boats. The public use demanded by the Corps of Engineers was the same use, just more of it. In contrast a public right-of-way is incompatible with the domestic, residential purpose of the Nollans' small lot. While the private users in *Kaiser Aetna* could continue to use the marina in much the same way even with the public use, the Nollans will be forced to withdraw their residential use to the area behind the line drawn by the commission.

The third significant distinction which indicates a greater burden on the Nollans is the commission's requirement that they take an affirmative act to create a public right-of-way which did not previously exist. In *Kaiser Aetna* the Corps of Engineers argued that the navigational servitude had been extended across Hawaii Kai Marina by operation of law. The corps was seeking to prevent Kaiser Aetna from interfering with a public right-of-way which the corps claimed already existed. By

comparison the coastal commission did not base its order on a finding that a public right to use the Nollans' property already existed. To the extent any such possibility was recognized the commission expressly reserved that matter for future consideration. JA at 45, 47. Instead the commission imposed an affirmative duty on the Nollans to create a previously nonexistent public right-of-way by recording a deed restriction in their chain of title. This affirmative duty moves the facts of this case toward the type of physical intrusion invalidated by this Court in *Loretto, supra.*

In *Loretto* this Court ruled that "a permanent physical occupation" is always a taking. The intrusion on the Nollans is a physical invasion far in excess of the placement of small, inanimate objects which occurred in *Loretto.* The box and cables affixed to the side of Mrs. Loretto's building did not impose maintenance and behavior problems and did not open the door to property damage and public liability claims, all of which face the Nollans.

The permanent physical occupation was found to be objectionable in *Loretto* because of its effect in displacing the owner. "Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' To the extent that the government permanently occupies physical property it effectively destroys *each* of these rights." 458 U.S. at 435 (emphasis in original; citation omitted). In this case, as in *Causby, supra,* and *Griggs, supra,* the repetitious physical invasions by members of the public only physically displace the Nollans during actual occupancy; however, the required deed restriction works a legal displacement of the Nollans which is both

permanent and continuous. While the occupation in *Loretto* could end (458 U.S. at 439 n.17) the displacement of the Nollans is to be everlasting, "running with the land." JA at 388. Unlike any other land use regulation case decided by this Court in this case the owners are being required to execute and record in their chain of title a deed restriction granting without compensation a property interest "free of prior liens except tax liens." JA at 46. This affirmative obligation will create a public right-of-way over their residential property which will obligate the Nollans *at all times* to "make no use of that portion of the beach" which might obstruct the open public right-of-way. JA at 387. Thus, the Nollans could not implant a barbeque, bench, or picnic table, nor could they park a sailboat on or string a volleyball net across their beach area. JA at 396. The combination of the repeated physical invasion by members of the public with the permanent, continuous legal displacement of the Nollans creates an interference with the Nollans' use and enjoyment of their property of such a magnitude that it exceeds the permanent physical occupation found invalid in *Loretto*.

These precedents control this case. The burdens being imposed on the Nollans are as intrusive and severe as the impositions uniformly found by this Court in these prior cases to be "takings." The express purpose of the affirmative obligation put on the Nollans is to expand the area of public use adjacent to the public tidelands. Obligations of this type "can so easily be identified and redistributed, that 'justice and fairness' require that they be borne by the public as a whole." *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 14 (1984).

II

THE NOLLANS HAVE RECEIVED NO SPECIAL BENEFIT NOR CREATED ANY SPECIAL PUBLIC BURDEN TO JUSTIFY THE IMPOSITION ON THEM OF THE FULL COST OF EXPANDING A PUBLIC BEACH AREA

Since the Nollans acknowledge that the state could condemn their property to create a public beach, the dispute between them and the commission is limited to the method being used. The state's policy is to confiscate the property it desires from individual coastal property owners through dedication requirements in coastal development permits. JA at 359-60. The Nollans contend that the facts of their case provide no justification for them to be singled out to bear a particularly onerous burden, which in fairness should be borne by the public at large.

Under the required deed restriction the Nollans not only must allow a physical invasion of their property by the public, they must also give the public a right of use which is superior to any residual rights they retain. JA at 357. This Court has recognized that "[t]he right to exclude others is generally 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1101 (1984) (citing *Kaiser Aetna*, 444 U.S. at 176). This principle is recognized in California property law where property is defined by "the right of one or more persons to possess and use it *to the exclusion of others.*" Cal. Civ. Code § 654 (West 1982) (emphasis added). Therefore, the exceptional loss being suffered by

the Nollans is "sufficiently important" to them that it falls into that category of interests which "the Government must condemn and pay for." *Kaiser Aetna*, 444 U.S. at 179-80; *United States v. 10.0 Acres*, 535 F.2d 1092, 1094 (9th Cir. 1976). If the state were formally to establish Faria Beach as a public beach, there can be no question that it would have to condemn the beach area of the Nollans' property and pay to them market value for it. *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984); *Olson v. United States*, 292 U.S. 246, 254-55 (1934). Nothing in the facts of this case justifies the establishment of an informal state beach by using a permit condition to avoid the government's constitutionally mandated obligation to condemn and pay for what it wants.

The furthest this Court has gone in finding that the facts of a particular case justify a special burden imposed on the owners of property is the use of a rule of reason in cases involving fees and assessments. Those cases have acknowledged that in some instances the government, when taking property, may be merely responding to a public need created by the owner, or providing the owners' other property with a special benefit. The rule of reason as applied in those cases allows the government to impose special costs on property owners in proportion to special benefits being received by the owner, or to public burdens created by the owner. *See, e.g., Penn Central*, 438 U.S. at 148 n.11 (Rehnquist, J., dissenting); *Nashville, Chattanooga, & St. Louis Railway v. Walters*, 294 U.S. 405, 429 (1935); *Parks v. Watson*, 716 F.2d 646, 652-53 (9th Cir. 1983); *City of Gainesville v. Southern Railway Co.*, 423 F.2d 588, 591 (5th Cir. 1970). This rule

has evolved over many years of consideration by this Court of different obligations imposed on property owners.

In the early case of *Norwood v. Baker*, 172 U.S. 269 (1898), the Village of Norwood condemned a strip of land through the center of a single parcel for the purpose of constructing a road, and then assessed the owner for the full costs of the condemnation. The owner sued, contending that the assessment was not in proportion to any benefits received by her; rather, the condemnation was intended to connect two roads abutting her property for public convenience. This Court agreed, and wrote:

> "In our judgment the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation." 172 U.S. at 279 (emphasis in original).

Norwood was a landmark case, standing for the proposition that such special burdens on a property owner are permissible only to the extent that the owner derives special benefits from the government's action. The special benefits are, in effect, a form of just compensation. *Norwood* was followed in other cases decided by this Court, *see, e.g., Georgia Railway & Electric Co. v. City of Decatur*, 295 U.S. 165, 170 (1935) ("if the burden imposed is without any compensating advantage . . . the assessment amounts to confiscation"); *Myles Salt Co. v. Board of Commissioners*, 239 U.S. 478, 483 (1916) (it is unconstitutional to include property in a drainage district "solely and only for the purpose of deriving revenue therefrom

. . . without any benefit to plaintiffs or its property whatever"), and is still recognized as good law today, *see, e.g., Furey v. City of Sacramento*, 780 F.2d 1448, 1454 (9th Cir. 1986) ("government may not force a landowner to make an improvement that, while valuable to others, is useless to him").

In *Nashville, Chattanooga, & St. Louis Railway v. Walters, supra*, this Court addressed a Tennessee statute which authorized the state highway commission to construct a highway underpass at locations where a state highway crossed a railroad track. The statute imposed upon the railroad company in every case one-half of the costs of constructing the underpass. 294 U.S. at 412.

> "While the Railway, the sufferer from the construction of the new highway, is burdened with one-half the costs of the underpass, the owners of trucks and busses and others, who are beneficiaries of its construction, are immune from making any direct contribution toward the cost. . . .
>
> . . . .
>
> "The promotion of public convenience will not justify requiring of a railroad, any more than of others, the expenditure of money, *unless it can be shown that a duty to provide the particular convenience rests upon it.*
>
> "It is true that the police power embraces regulations designed to promote public convenience or the general welfare . . . . But when particular individuals

> are singled out to bear the costs of advancing the public convenience, *that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured.*" *Id.* at 427-29 (emphasis added; citations omitted).

Thus, *Nashville* established that the burden must be justified by showing either that the property owners are receiving a special benefit, or that they owe a "duty to provide the particular convenience," by having created the "evils to be eradicated." This rule was confirmed in *Atchison, Topeka & Santa Fe Railway Co. v. Public Utilities Commission of California*, 346 U.S. 346 (1953), where the railroad was being required to pay half the cost of replacing certain underpasses because they were deteriorated and undersized. 346 U.S. at 349. This Court wrote:

> "It was not an arbitrary exercise of power by the Commission to refuse to allocate costs on the basis of benefits alone. The railroad tracks are in the streets not as a matter of right but by permission from the State or its subdivisions. The presence of these tracks in the streets creates the burden of constructing grade separations in the interest of public safety and convenience. Having brought about the problem, the railroads are in no position to complain because their share in the cost of alleviating it is not based solely on the special benefits accruing to them from the improvements." 346 U.S. at 353.

Thus, this Court has allowed the imposition of special costs on property owners only when the government can show special benefits to the property or special public needs caused by the property owners. In no case has this Court sanctioned the conscription of private property to

meet public needs unrelated to any harm the owners have done or advantage they will receive.

This rule of reason is not limited to assessments for public works projects. *National Cable Television Association v. United States*, 415 U.S. 336, 340-42 (1974) (regulatory fees must be rationally related to a special benefit bestowed upon the applicant, or the agency's direct costs of regulating the applicant); *National Board of Young Men's Christian Associations v. United States*, 395 U.S. 85, 92 (1969) (destruction by rioters of troop-occupied building not a taking where "the private party is the particular intended beneficiary of the governmental activity"). Nor is the occurrence of uncompensated exactions found only in assessments for public works projects.

> "Local governments . . . are increasingly allocating . . . infrastructure costs to the new development. Special assessments were the earliest method of imposing these costs. Currently, it is more popular to impose exactions on developers, by specifying conditions which must be met before development permission . . . is granted." D. Hagan & D. Miszynski, *Windfalls for Wipeouts: Land Value Capture and Compensation* 342 (1978) (footnote omitted).

Thus, the exaction of property interests such as that imposed on the Nollans is now recognized as an alternative method of imposing a special assessment. In that context the rule of reason described by the Court has been followed by the lower federal courts and by most state courts which have passed on the issue.[11] For example, in a recent Ninth Circuit decision involving facts analogous to the

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[11] For a review of the many state courts that have recognized some form of the above rule, see the brief of the National Association of Home Builders as amicus curiae in support of appellants.

Nollans' case, *Parks v. Watson,* 716 F.2d 646 (9th Cir. 1983), property owners, in order to develop certain property they owned, needed the vacation of platted city streets on the property. The owners petitioned the city to vacate the platted streets. In return, as a condition for vacating the roads, the city asked the owners to dedicate to the city a part of the property which contained two valuable geothermal wells. The court ruled that although the public interest might be served by the city gaining ownership of the geothermal wells, that fact was not enough to authorize the city to demand them from their owner as a condition of doing something unrelated to the wells.

> "Both case authority and scholarly commentary indicate that a condition requiring an applicant for a governmental benefit to forego a constitutional right [the right to be compensated when private property is taken for public use] is unlawful if the condition is not rationally related to the benefit conferred." 716 F.2d at 652.
>
> "Since the requirement that Klamath Valley Company give its geothermal wells to the City had no rational relationship to any public purpose related to the vacation of the platted streets, the unrelated purpose does not support the requirement that the company surrender its property without just compensation. . . . The condition violates the fifth amendment." 716 F.2d at 653.

For other recent examples of decisions adhering to this rule in the federal courts, consider *City of Gainesville v. Southern Railway Co., supra,* and *Southern Railway Co. v. City of Morristown,* 332 F.Supp. 482 (E.D. Tenn. 1970).

Kaiser Aetna, supra, and *Vaughn v. Vermillion Corp.*, 444 U.S. 206 (1979), are recent cases in which this Court has emphasized the importance of the relationship between the owners' actions and the public burden being imposed on them. Reviewing circumstances similar to those of this case, the Court distinguished actions which might "have impaired navigation" or caused "destruction of a pre-existing natural navigable waterway" from actions on private property with no such effect on public use. The Court indicated in both cases that while the former actions might justify the imposition of special obligations on the property owner, the latter clearly do not. *Kaiser Aetna* 444 U.S. at 179-80; *Vaughn*, 444 U.S. at 208-09.

The replacement of one house with another on the Nollans' property occurs entirely within the boundaries of their private property, JA at 26, 394, and will not impair or destroy in any way any manner of use by the general public of the adjacent public tidelands area. The record below and the undisturbed findings of the trial court establish that access along the beach is not affected by the new house. JA at 37. The Nollans have created no burdens on access to or use of the beach or otherwise caused the need for the public right-of-way.

Similarly, the Nollans benefit in no way from the expanded area of public use. They already have full access to and use of the beach, bought and paid for when they purchased their property. The effects of the dedication requirement on them are all negative. They lose the enjoyment, the privacy, and the security of a private beach area. The public gets the use; the Nollans get to clean up and bear the costs.

The reconstruction of the house and the requirement of the dedication are independent acts. The Nollans must pay with their property not because of any harmful thing they are doing or any beneficial thing they will receive, but because they own the property which the commission "had counted on . . . for continuity" and to establish "fluid access" up and down the coast. JA at 326. They are caught in the middle of "a comprehensive program to provide continuous public access along Faria Beach." JA at 68. The imposition of this special cost which has no reasonable relationship to any benefit received or burden created by the Nollans violates basic principles of fairness.

> "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness . . . as it does from technical concepts of property law." *United States v. Fuller*, 409 U.S. 488, 490 (1973) (citation omitted).

This Court has stated on many occasions that the Constitution's guaranty against uncompensated takings was intended "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. at 49; *see also San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting); *Pruneyard*, 447 U.S. at 83; *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central*, 438 U.S. at 123; *National Board of Young Men's Christian Associations*, 395 U.S. at 89.

The Nollans should be no exception. Their fair share of the cost of providing the general public with an expanded beach area is no more than that of any other

member of the public at large. The trial court correctly invalidated the commission's order for requiring them to "surrender[] to the public something more and different from that which is exacted from other members of the public." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893).

III

THE CALIFORNIA COURT OF APPEAL DID NOT APPLY A MEANINGFUL, FACTUAL ANALYSIS TO THE CLAIM OF THE NOLLANS THAT THE REQUIRED DEDICATION OF A PUBLIC RIGHT-OF-WAY VIOLATED THE TAKING CLAUSE

It is well established that "property rights" are fundamental civil rights of the individual owners. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Yet, a particularly disturbing aspect of the decision of the Court of Appeal is the failure to discuss in any way the effect of the commission's order on the Nollans. The Nollans are recognized only as applicants in the state permit process—as something being processed through the bureaucratic mill. There is no recognition of their individual interest in retaining full enjoyment of their property and not allowing the public at large open access to the yard of their personal residence. The burdens suffered by the Nollans were irrelevant to the considerations of the government agency which assumed control over their lives. The Nollans were characterized as being "one more brick in the wall" interfering with the state's desire to enhance the use of the coastal area by the people of California. JA at 425. They were indeed treated like just another brick.

In refusing to consider the individual effects on the Nollans the Court of Appeal was applying the law in California, developed in previous cases, that Public Resources Code § 30212 required a mechanical exaction of a public right-of-way from coastal development permit applicants without regard to the factual circumstances of individual projects. The commission itself adopted this interpretation as its policy in its public access guidelines. JA at 359-60. The California courts approved this interpretation starting with *Georgia-Pacific Corp. v. California Coastal Commission,* 132 Cal. App. 3d 678 (1982).

In *Georgia-Pacific* a lumber company applied for coastal development permits to make certain improvements to its lumber mill property on the north coast of California including the construction of a visitor service facility, parking lot, helicopter pad, hangar, and related outbuildings. The commission conditioned the permits, requiring the company to dedicate specified easements to the public for access to and along the shoreline. The trial court struck the conditions, ruling that

> "the public access conditions imposed by the Commission . . . violate Article 1, Section 19 of the California Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, because the conditions deprive Georgia-Pacific of private property without due process of law and without just compensation, in that the scope and extent of the easements required to be dedicated by said conditions are not reasonably related to the nature and impact of the four projects proposed by Georgia-Pacific." 132 Cal. App. 3d at 689 n.7.

The Court of Appeal reversed the trial court and recited the rule that would eventually be applied to the Nollans:

> "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. (*Associated Home Builders, etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 638-640 . . . .) 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. (See § 30001.5, subd. (c).) Their relationship to the 'nature and impact' of the proposed projects was not a valid basis for the trial court's determination that the access conditions deprived Georgia-Pacific of its constitutional rights." 132 Cal. App. 3d at 699.

This language from *Georgia-Pacific* has been cited and followed in subsequent cases involving private individuals wishing to do nothing more than construct one single-family home on their one lot. *See, e.g., Remmenga v. California Coastal Commission*, 163 Cal. App. 3d 623, 628-29 (1985); *Grupe v. California Coastal Commission*, 166 Cal. App. 3d 148, 166 (1985). In *Grupe*, the court said that it would still require a finding that the applicant's project contributed "at least in an incidental manner" to the public need for more public beach. *Id.* at 166 n.11. It then found that Grupe's project sufficiently contributed to the public need because the project involved

new development on a previously vacant, private lot. *Id.* at 167.

The Court of Appeal, in the case at bar, found *Remmenga* and *Grupe* controlling, *except* to the extent that *Grupe* required more than just a simple showing that the exaction advances the purposes of the Coastal Act.

> "The cases of *Remmenga* and *Grupe* are dispositive here and require affirmation of the Commission's decision.
>
> "This case and *Grupe* differ in that *Grupe* involved construction of a residence on one of the few remaining vacant lots in the area. The difference is irrelevant. The Commission found the Nollan project to be a new development. This finding was required by the provisions of Public Resources Code section 30212. . . .
>
> ". . . Public Resources Code section 30212 requires public access to be provided in new development projects . . . ." 177 Cal. App. 3d at 723-24, JA at 425-26.

Thus, the Court of Appeal ruled that the only relevant inquiry is whether the project is "new development" as that term is used in the Coastal Act. The inquiry ends there; it is "irrelevant" that the project makes no change in the use of the property and has no effect on existing public access. No factual inquiry into the specific effects on the property owner is necessary.

This Court has directed a different course. In *Penn Central, supra,* a two-step analysis is set forth to determine the constitutional validity under the Taking Clause of an obligation on property imposed pursuant to a statutory mandate. That analysis requires a full, factual consideration of the effects on the individual property owner.

> "Rejection of appellants' broad arguments is not, however, the end of our inquiry, for all we thus far have

> established is that the New York City law is not rendered invalid by its failure to provide 'just compensation' whenever a landmark owner is restricted in the exploitation of property interests, such as air rights, to a greater extent than provided for under applicable zoning laws. We now consider whether the interference with appellants' property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].'" *Penn Central*, 438 U.S. at 135-36.

The trial court followed the course set by this Court and conducted a factual inquiry to determine whether the nature and extent of the obligations imposed on the Nollans could be justified by any "direct and definable adverse impact on public access" from the Nollans' actions. JA at 415-16. After careful review of the record the trial court concluded that "the record does not support a finding that petitioners' project would burden public access." JA at 419. The Court of Appeal did not disturb these findings. It expressly agreed that "the Nollans' project has not created the need for access to the tidelands fronting on their property." JA at 425. While confirming the factual findings the Court of Appeal rejected the legal principle that it was necessary to consider the facts of the case to identify a direct relationship:

> "Since a direct burden on public access need not be demonstrated, we hold the trial court ruling to be in error." JA at 424.

Instead of analyzing the facts of the Nollans' case the Court of Appeal simply followed *Grupe* and *Remmenga* which the court concluded had established as California law that "the justification for required dedication is not limited to the needs of or burdens created by the project."

JA at 425. The court refused to recognize its obligation to determine "whether the interference with [the Nollans'] property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].'" *Penn Central*, 438 U.S. at 136.

By analyzing only the statutory authorization of power the Court of Appeal failed to fulfill its judicial obligation to ensure that the commission in the use of its authority had complied with its responsibility to protect the individual rights of the Nollans.

> "It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to devest the other party of any rights of person or property. . . . [T]he 14th Amendment . . . forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held." *Smyth v. Ames*, 169 U.S. 466, 524-25 (1898).

This Court has made quite clear that the mere existence of valid regulatory jurisdiction over a property owner does not preclude the possibility of a "taking." Establishing a valid statutory grant of jurisdiction is a threshold question. *Penn Central*, 438 U.S. at 135-36; *Agins*, 447 U.S. at 260.

Once valid jurisdiction is established, however, this Court "has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries." *Kaiser Aetna*, 444 U.S. at 175. "These 'ad hoc, factual inquiries' must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances." *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 295 (1981). After it is determined that the commission properly established its jurisdiction "[t]he 'taking' issue remains available to, and may be litigated by, any owner or lessee whose property interest is adversely affected by the enforcement of the Act." *Id.* at 306 (Powell, J., concurring).

The refusal by the Court of Appeal to address the specific burdens imposed on the Nollans by the commission's order denied the Nollans their constitutional right to "a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest [to expand the area of public use at Faria Beach]." *Agins*, 447 U.S. at 260.

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CONCLUSION

This case is controlled by two lines of decisions of this Court. It has uniformly been held that physical invasions of private property authorized by government violate the Taking Clause and that special costs cannot be imposed on property owners in the absence of any special benefit received or burdens created by the property

owners' actions. The decision of the Court of Appeal should be reversed and the judgment of the trial court affirmed.

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