No. 86-133

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

JAMES PATRICK NOLLAN AND
MARILYN HARVEY NOLLAN,
Appellants,

VS.

CALIFORNIA COASTAL COMMISSION,
Appellee.

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

BRIEF OF DESIGNATED CALIFORNIA CITIES AND COUNTIES AS AMICI CURIAE IN SUPPORT OF APPELLEE

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AMICI CURIAE
CALIFORNIA CITIES AND COUNTIES:

Cities

Belvedere
Benicia
Berkeley
Commerce
Concord
Corte Madera
Danville
Davis
Del Rey Oaks
Duarte
Escondido
Fairfax
Fairfield
Hayward
Lafayette
Laguna Beach
Los Angeles
Los Gatos
Madera
Marina
McFarland
Mill Valley
Modesto
Moraga
Morro Bay
Newport Beach
Orinda
Pittsburg
Pomona
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Redding
Roseville
Sacramento
San Bernardino
San Buenaventura
San Francisco
San Jose
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San Luis Obispo
San Rafael
Santa Barbara
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Tulare
Visalia

Counties

Alameda
Marin
Monterey
San Francisco
Santa Cruz
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County Supervisors Association of California

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INTEREST OF THE AMICI CURIAE

At issue in this case is the constitutionality of a California Coastal Commission permit condition requiring dedication of an easement for lateral public access along the beach in front of appellants' home. The forty-six California cities, six California counties and the County Supervisors Association of California which have joined together as amici curiae[1] have a substantial interest in the enforcement of the California Coastal Act of 1976.

[1] Pursuant to Rule 36 of the Rules of this Court the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

Cal. Pub. Res. Code § 30000 et seq. In addition, amici curiae, as well as other local governments in this state and other states, routinely employ dedications as a way of allocating a portion of the costs associated with new or intensified development to project applicants. It is plain that the Court's decision in this case may affect amici curiae's continued ability to regulate land use for the benefit of the public.

SUMMARY OF ARGUMENT

There was no taking in the instant case. Nor was there an unconstitutional exercise of the police power. Dedication requirements, such as the Coastal Commission permit condition at issue in this case, are subject to the same constitutional analysis as any other governmental action.

The Nollans bought the property and built the new house after the enactment of the statute specifying the conditions for public access easements. They voluntarily committed themselves to the public access requirement and thus there was no infringement of their reasonable investment-backed expectations. Likewise, the permit condition had little or no economic impact upon the Nollans because the statutory conditions for public access were imposed before they purchased the property, and thus were reflected in the purchase price. For these reasons there can be no taking in this case.

The Commission's public access condition is not a physical invasion of the Nollans' property. Like zoning designations, setback requirements and land use permits, the condition is a regulation of the use of real property. A finding by this Court that dedication requirements are either permanent physical occupations or lesser physical invasions subject to stricter scrutiny than other regulatory actions is legally unsupportable and would have drastic implications. Dedication requirements, which have long been an important tool in local and state government land use systems, would be all but eliminated and the scope of the police power correspondingly reduced.

Finally, the Commission's permit requirement is rationally related to legitimate governmental interests in maximizing public

access to the shore. Thus, the Commission's action is a constitutional exercise of the police power. To impose the public access condition on the Nollans' permit does not intrude upon constitutionally protected property rights.

ARGUMENT

I

SINCE THERE HAS BEEN NO INFRINGEMENT OF THE NOLLANS' REASONABLE INVESTMENT-BACKED EXPECTATIONS AND SINCE THE ECONOMIC IMPACT OF THE PUBLIC ACCESS DEDICATION REQUIREMENT IS MINIMAL, NO TAKING HAS OCCURRED.

A. Courts Examine Several Factors to Determine Whether an Unconstitutional Taking Has Occurred.

The Fifth Amendment guarantees that private property shall not "be taken for public use, without just compensation." This Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed 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. 40, 49 (1960). At the same time, as the Court stated in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922), "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." The Court subsequently reinforced this point in *Andrus v. Allard*, 444 U.S. 51, 65 (1979):

> [G]overnment regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use of economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by *purchase*.

(Emphasis in original.) Most recently, in *Connolly v. Pension Benefit Guaranty Corp.*, 106 S.Ct. 1018, 1025 (1986), the Court pointed out that "Congress routinely creates burdens for some

that directly benefit others [without violating the Fifth Amendment]."

To determine whether a governmental action has effected an unconstitutional taking, the Court examines three factors of particular significance: (1) the extent to which the government action interferes with reasonable investment-backed expectations; (2) the economic impact of the government regulation; and (3) the character of the government action, i.e., whether there is a physical invasion. *MacDonald, Sommer & Frates v. Yolo County*, 106 S.Ct. 2561, 2566 (1986).[2]

With respect to the first factor, where the Court finds that there clearly were no reasonable investment-backed expectations whatsoever, it need not look further. There is no unconstitutional taking. *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1005 (1984). And even where there may have been some interference with investment-backed expectations, there still may be no taking. See *Connolly v. Pension Benefit Guaranty Corp.*, 106 S.Ct. at 1027.

With respect to the second factor, economic impact of the regulation, although the Court has never specified exactly what would need to be shown to establish a taking, it is clear what does not establish a taking. For example, severe diminutions in value do not suffice to establish a taking. See *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (no taking despite diminution in value from $800,000 to a maximum of $60,000 and property could not be used for any purpose permitted under city's ordinance);

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[2] The Court, in other cases of governmental regulation, has set forth a related standard to determine whether a regulatory taking has occurred. A taking occurs when the regulation either does not substantially advance legitimate state interests or denies an owner any economically viable use of land. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138 n. 36 (1978)). Under this formulation of the rule, the question of economic viability incorporates the first two parts of the more general taking analysis—reasonable investment-backed expectations and economic impact of the regulation. This test omits the third prong of the test, reflecting the fact that regulatory actions do not constitute physical invasions. (*See* §§ II and III, *infra.*)

William C. Haas Co. v. City of San Francisco, 605 F.2d 1117, 1120-1121 (9th Cir. 1979), cert. denied, 445 U.S. 928 (1979) (no taking where value of property diminished from about $2,000,000 to about $100,000). See, e.g., *Miller v. Schoene*, 276 U.S. 272 (1928); *Gorieb v. Fox*, 274 U.S. 603, 608 (1927); *Welch v. Swasey*, 214 U.S. 91 (1909); *Goldblatt v. Hempstead*, 369 U.S. 590, 592-93 (1962). Nor does a property owner have a constitutional right to recover his investment in his property. *Park Avenue Tower Associates v. City of New York*, 746 F.2d 135, 139 (2d Cir. 1984) (quoting Sadowsky v. City of New York, 732 F.2d 312, 317 (2d Cir. 1984)).

Another important factor relating to both economic impact and reasonable investment-backed expectations is whether the challenged regulation allows the property owner to continue the existing use of the property. *See Penn Central, supra*, 438 U.S. at 136. A regulation which does so is highly unlikely to constitute a taking.

Finally, analyzing the third factor, the Court will take into account whether the regulation causes a physical invasion of property:

> A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (quoting *Penn Central, supra*, 438 U.S. at 124). Actual permanent and exclusive physical occupation of property by the government or under government authority is a taking per se. *Id.*

B. There Was No Taking Since There Has Been No Infringement of the Nollans' Reasonable Investment-Backed Expectations.

One of the most critical questions in determining whether a taking has occurred is the extent to which the challenged government action interfered with plaintiff's reasonable investment-

backed expectations. See *Williamson County Regional Planning Commission v. Hamilton Bank*, 106 S.Ct. 3108, 3119 (1985). Where a property owner has made large investments implementing a lawful use of his property in reliance upon governmental approvals or assurances, there can be an interference with reasonable investment-backed expectations, and a taking may have occurred. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 (1979).

Kaiser Aetna v. United States, supra, is the only case where this Court has explicitly found both interference with reasonable investment-backed expectations and a taking. In *Kaiser Aetna*, Kuapa Pond was converted into a marina by connecting it to the adjacent bay. The owner did so only after requesting approval from the Army Corps of Engineers and receiving assurance from the Corps that no permits were necessary. In reliance on such assurances, the owner invested millions of dollars in improvements to the marina and surrounding area. Subsequently, the United States claimed that because Kuapa Pond had become a navigable water, the public had a right of access on the pond. The Court held that if the Government were to open the pond up to the public, it would be an unconstitutional taking.

In *Kaiser Aetna*, the company had invested millions of dollars in improvements on the assumption that Kuapa pond was privately owned and in reliance upon the Government's assurances that such investments were lawful. These factors were critical to the Court's holding. 444 U.S. at 169. The Court stated:

> [I]f the Government wishes to make what was formerly Kuapa Pond into a public aquatic park *after petitioners have proceeded as far as they have here*, it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredged pond while petitioners' agreement with their customers calls for an annual $72 regular fee.

444 U.S. at 180 (emphasis added).

Ruckelshaus v. Monsanto, supra, added another crucial dimension to the issue of reasonable investment-backed expectations. There, the Court held that where it is clear as a matter of law that

the property owner could not have had any reasonable investment-backed expectations, there is no taking. The Court need not proceed to examine the other taking factors. 467 U.S. at 1005-06.

In *Ruckelshaus*, Monsanto claimed that certain provisions of the Federal Insecticide, Fungicide and Rodenticide Act effected a taking of property without just compensation. The challenged provisions, passed in 1978, governed use of data submitted to the Environmental Protection Agency ("EPA") by applicants for pesticide registration. They provided that data submitted by the applicant could be used or revealed by EPA at certain times and under certain circumstances, even if trade secrets were involved. 467 U.S. at 994-96, 1006.

The Court held that with respect to any data submitted by Monsanto after the effective date of the 1978 provisions,

> Monsanto could not have had a reasonable, investment-backed expectation that EPA would keep the data confidential beyond the limits prescribed in the amended statute itself. Monsanto was on notice of the manner in which EPA was authorized to use and disclose any data turned over to it by an applicant for registration. . . .
>
> * * *
>
> If, despite the data-consideration and data-disclosure provisions in the statute, Monsanto chose to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable investment-backed expectations are disturbed when EPA acts to use or disclose the data in a manner that was authorized by law at the time of the submission.
>
> * * *
>
> Thus, as long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.

467 U.S. at 1006-07. The Court found "the force of this [reasonable investment-backed expectations] factor . . . so overwhelming . . . that it dispose[d] of the taking question. . . ." 467

U.S. at 1005. Thus, *Ruckelshaus* holds that where the owner makes his investment with full knowledge of a law which is rationally related to a legitimate purpose, the loss caused by the law is not an unconstitutional taking.

That is precisely what occurred in the case at hand. The Nollans did not actually purchase the property in question until sometime after February 15, 1984. Jurisdictional Statement at 5 n. 1. Public Resources Code section 30212, the basis for the Commission's imposition of the public access requirement, was enacted in 1976, eight years prior to their investment. Any expectation the Nollans might have had that they could build their new house without dedicating lateral public access along the beach clearly had no reasonable basis since the statutory provision had been in effect for nearly a decade.[3]

The Nollans had a full range of choices available to them before they made any investment at all. They could have decided not to purchase the property. They could have decided to purchase the property but to restrict their improvements so as not to increase the size of the dwelling more than 10 percent over that of the original house. Or they could have decided to purchase the property and construct a much larger new house, thereby subjecting themselves to the Commission's requirement that they dedicate lateral public access along their beach. They chose to reject their first two options and proceed with the third. They therefore voluntarily made their investment knowing that Public Resources Code section 30212 created the strong likelihood of a required public access dedication.

Like Monsanto, which chose to submit data to the government, knowing that the law in effect at that time permitted the government to use that data and reveal certain of it to the public, the Nollans chose to purchase the property and construct a large new dwelling knowing that the Coastal Commission would require

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[3] The Nollans actually purchased the property after the Commission had imposed the permit condition at issue here. However, amici curiae are of the view that any expectations the Nollans might have formed are completely negated by the enactment of Public Resources Code Section 30212 before they purchased the property.

that they dedicate lateral beach access to the public. Under these circumstances, the Nollans had no reasonable investment-backed expectations and there can be no taking as a matter of law.[4]

C. There Was No Taking Because the Coastal Commission Permit Condition Had Little or No Economic Impact Upon the Nollans.

In the case of a governmental regulatory action, there can be no taking where the action has no economic impact on the property owner. *Agins v. City of Tiburon, supra*, 447 U.S. at 260. In the instant case, there is no taking, not only because there was no

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[4] The United States attempts to distinguish this case from *Ruckelshaus* on the ground that "in *Monsanto* . . . the elements of voluntariness and reasonableness had been satisfied, while in this case these are precisely the elements at the core of the controversy." United States brief at 18-19 (footnote omitted). The distinction fails. Monsanto's action was, if anything, less "voluntary" than was the Nollans' decision to purchase the property and construct a large new house. Monsanto is engaged in the development and production of chemical products, including pesticides. 467 U.S. at 997. In order to sell a pesticide, it must register it with EPA. In order to register the pesticide, Monsanto must submit sufficient data to show that the pesticide will not have unreasonably adverse effects on the environment. 467 U.S. at 992. Thus, for Monsanto to continue its business, it had no choice: it had to submit its data to EPA.

The Nollans, in contrast, had far more options open to them, including not purchasing the property, or purchasing it but restricting their reconstruction activities. They had used the house in its previous state for forty years. (J.A. 309-310.) There is no reason that they could not have repaired and maintained or even reconstructed it to make it suitable for the next forty years. Nor is the reasonableness of the permit condition and its relation to governmental objectives any more in question in this case than it was in *Ruckelshaus*.

The United States also attempts to distinguish *Ruckelshaus* on the grounds that pesticide regulation uniquely implicates public health. United States brief at 19. In this case, however, the permit condition implements constitutional provisions establishing a public trust over tidelands and requiring adequate public access to those tidelands. The governmental interest at stake could hardly be more significant.

infringement of reasonable investment-backed expectations, but also because the economic impact on the Nollans of the Coastal Commission's action appears to be non-existent. Even though the record lacks specific information regarding the value of the property in question, the evidence does show that the Nollans suffered no economic harm from the Commission's action.

First, as explained above, the Nollans purchased the property long after the enactment of Public Resources Code section 30212. The existence of the statute was known and presumably taken into account by both the buyer (Nollans) and the seller and thus was reflected in the purchase price paid by the Nollans. It could not, therefore, have had an economic impact on the Nollans.

Second, the access condition merely formalized what had long been the practice of both the Nollans and their predecessors, the Faria family. (J.A. 48, 85-86, 303) The public had always been permitted access along the beach portion of the Nollans' lot and along the entire stretch of the Faria Beach. The permit condition merely ensured and formalized the continuation of the status quo.

Third, most of the Nollans' property was unaffected by the permit condition. The Nollans retained full and exclusive use of the house, garage, and all property inland of the seawall. The eight foot high seawall serves as a physical boundary separating the private living portion of the Nollans' property from the beach available to the public. At certain times of the year, when high tide reaches and even passes the seawall, the permit condition is in essence a nullity, since there is no land between the high tide line and the seawall. (J.A. 61)[5]

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[5] Even during the remainder of the year, the amount of beach subject to the permit condition is small. The Nollans repeatedly claim that the Commission's public access condition affects one-third of their property. *See, e.g.*, Appellants' Brief at i, 5, 6, 18. The facts in the record indicate that this is a gross exaggeration. The permit condition requires a dedication of public access between the seawall and the mean high tide line. (J.A. 34) The record indicates that the seawall is, at most, ten feet from the mean high tide line. (J.A. 61) As the property is less than forty feet wide at that point, less than 400 square feet of the property is affected by the condition. (J.A. 26) Assuming that the Nollans are

If the Court finds that there is insufficient evidence in the record to determine the precise economic impact of the Commission's action upon the Nollans, then the case should be remanded to the trial court to take evidence upon that point. In other words, based upon its review of the economic impact of the permit condition, the Court could find either that there is no economic impact and therefore no taking, or that there is insufficient evidence on the point so that remand is required. Under no circumstances is there sufficient evidence on this issue to support a holding that a taking has occurred.

II

THE COASTAL COMMISSION'S REQUIREMENT THAT THE NOLLANS ALLOW LATERAL PUBLIC ACCESS ACROSS THE BEACH AS A CONDITION TO THE PERMIT ALLOWING THE NOLLANS TO BUILD A NEW HOUSE IS NOT A PHYSICAL INVASION OF THE PROPERTY.

As discussed in section I above, the Court need not reach the third factor of the taking test—the character of the governmental action—because review of the first two factors establishes that no taking has occurred. In any event, analysis of the character of the governmental action demonstrates that the Commission's public access permit condition does not involve a physical invasion. Rather, it is indistinguishable, for the purposes of the takings analysis, from other governmental regulations, such as setback requirements, in-lieu fee requirements, and zoning requirements, in that it is a simple limitation upon the manner in which the Nollans may use their property.

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correct in asserting that their property consists of 3800 square feet, the access condition affects just over 10 percent of their property. If the Commission is correct that the property is only 2800 square feet, then the condition affects less than 15 percent of the property.

A. Because the Nollans Were Free to Continue Using, Repairing, Maintaining, and Improving Their House Without Ever Being Subject to a Public Access Requirement, There Was No Physical Invasion.

The Nollans have, throughout this proceeding, emphasized that the original dwelling had "fallen into disrepair," that it had a "deteriorated condition" and a "shabby appearance," and that it was an "eyesore" and a "nuisance." Jurisdictional Statement at 5. They note that the building violated many building, health, and safety code standards and that they "were eventually forced to stop renting it" due to its poor condition. *Id.* The Nollans advised this Court that they could not remedy or repair the rundown condition of the house without being forced to dedicate access along the beach. Jurisdictional Statement at 4-5.

As Public Resources Code section 30212 itself makes clear, however, the Nollans' claim is erroneous. Section 30212 specifies a number of actions that property owners may take without subjecting themselves to a public access easement dedication. An owner may replace any structure destroyed by disaster; may demolish and reconstruct a residence provided that the size of the new residence does not exceed that of the old by more than 10 percent; may construct improvements to any structure which do not change the intensity of its use; and may repair or maintain structures and improvements as long as such actions do not have an adverse impact on lateral public access along the beach. The Nollans' assertion that section 30212 requires a dedication of access along the beach for any construction, repair or improvement activity is patently false. *See* Jurisdictional Statement at 4.

Despite the law's clear permission to do any of these things, the Nollans chose to do otherwise, constructing a new home more than three times the size of the old one, together with a garage that, by itself, is almost the size of the old house. (J.A. 56) By taking this action, the Nollans voluntarily subjected themselves to the public access requirement.

Further, the Commission simply placed a condition upon the Nollans' intensified use of the property. In other words, the Commission regulated the Nollans' use of their property. The

Nollans, when faced with the condition, remained free to reject the condition and reduce their renovation plans so as not to subject themselves to a public access requirement under Public Resources Code section 30212.

This situation contrasts sharply with circumstances in which the Court has found either a permanent physical occupation or a lesser physical invasion. In each such case, the action taken or authorized by the government has been unilateral and beyond any control of the property owner.

In *Loretto*, for example, the challenged law provided that the landlord could not interfere with the installation of cable television facilities. As the Court stated in that case, a permanent physical occupation such as that effected by the New York law

> is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion.

Loretto, supra, 458 U.S. at 436 (emphasis in original). The Court went on to point out that its holding was "very narrow":

> We affirm the traditional rule that a permanent physical occupation of property is a taking . . . .We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property.

458 U.S. at 441 (emphasis in original). Whereas in *Loretto*, the owner was denied the right to occupy the space himself, was denied all control over the use of the property taken, and was deprived of all value of that property, the Nollans retained each of these things. *See also United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (government takeover of company during war); *United States v. Causby*, 328 U.S. 256 (1946) (government regularly conducted flights over plaintiff's land); *Pumpelly v. Green Bay Co.*, 13 Wall. 166 (1872) (dam permanently floods plaintiff's property).

Even government actions found to be lesser physical invasions—and thus not per se takings—have been unilateral imposi-

tions upon property owners. In *Kaiser Aetna v. United States, supra*, the Court emphasized that a key to its holding was that the Government had given its unconditional consent to the dredging and then, after it was complete, simply asserted that the public had access. The Court noted:

> We have not the slightest doubt that the Government 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.

Kaiser Aetna, supra, 444 U.S. at 179.

The instant case differs significantly from all of the cases discussed above. The Coastal Commission did not initiate this action; the Nollans did. Had the Nollans not sought to replace their home with a new home triple the size, the public access requirement would not have been imposed. The Commission was simply regulating the Nollans' use of the property by imposing a permit condition which the Commission found rationally related to the change in intensity of use of the property proposed by the Nollans.

Therefore, the factors relevant to a determination whether a taking occurred are the extent of any infringement of the Nollans' reasonable investment-backed expectations and the nature of the economic impact of the requirement. (*See* § I, *supra.*) Because no physical invasion was unilaterally imposed, the third factor, character of the government action, weighs against finding a taking in this case.

B. Exactions Required as a Condition to Subdivision or Development Permits Are Like Other Zoning Regulations and Should Be Subject to the Same Taking Test.

The United States argues that even if the Court does not view the public access condition as a permanent physical occupation and thus a per se taking, still it should consider the "physical invasion" resulting from the access condition to be a factor weighing in favor of finding a taking. United States brief at 15-16 ("[t]he physically invasive character of the condition in this case renders substantially more burdensome the government's task of

justification."). As a matter of constitutional theory, this makes no sense.[6]

First, such a theory would make a major constitutional distinction between land dedications and equivalent in-lieu fees.[7] A developer that dedicated land for a park could be lucky enough to obtain compensation, while another developer who paid in-lieu fees in an amount equal to the value of a land dedication would not be compensated. This would result because the dedication was considered a "physical invasion" whereas the fee payment was not. There is no constitutional ground for making such a distinction. A ruling that a dedication is more likely to be a taking than an in-lieu fee will mean simply that governments will always require in-lieu fees, which will in turn be used to purchase the land necessary for the required facilities. Just as an in-lieu fee requirement is simply a permit condition regulating property use, so is a dedication requirement.

Other examples highlight the meaninglessness of the proposed constitutional distinction. Under the United States' theory, a public access dedication requirement such as the one at issue in this case, that did not limit or affect in any way the historical use of the property, would automatically be far more likely to be a taking than even the most severe zoning or setback requirement which prohibited the existing use of the property or which caused

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[6] As commentators Heyman and Gilhool state,

> There seems no ground for distinguishing constitutionally a 'positive exaction' and negative regulation of use. Either, neither, or both can be discriminatory or a taking in any specific case.

Heyman and Gilhool, "The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions," 73 Yale L. J. 1119, 1137 (1964).

[7] "Dedications" are transfers of land from a property owner or subdivider to the government. The term "exactions" is broader, including both land dedications as well as "in-lieu fees" or "impact fees". "In-lieu fees" are charges equal to the value of land that would otherwise be dedicated. "Impact fees" are charges levied on new developments to help finance capital improvements made necessary by the new development.

a dramatic diminution in the property's value. See, e.g., *Hadacheck v. Sebastian*, supra; *Gorieb v. Fox*, supra, 274 U.S. 603; *William C. Haas Co. v. City of San Francisco*, supra. This is because any dedication requirement would be considered a physical invasion whereas any zoning or setback requirement, no matter how severely it limited use of the property, would not.

Second, the theory advanced by the United States would create a meaningless distinction based on the precise public use made of the dedicated property. Land dedicated for use as a street would presumably qualify as "physically invaded" since members of the public would regularly use the land. But what about, for example, solar access easements? See Cal. Gov. Code § 66475.3. An owner would be deprived of use of airspace just as one is deprived of the use of property when dedicating other fees or easements. Is a solar access easement a physical invasion? Or is it more analogous to a setback requirement, which is not considered a physical invasion? See *Gorieb v. Fox*, supra, 274 U.S. 603 (setback regulation prohibiting all use of a portion of a parcel of land valid because the property as a whole could be beneficially used). Would it mean that a land dedication used for a street is more likely to be a taking than a dedication for a wildlife refuge or a habitat protection area? A street, used constantly by members of the public and physically transformed with pavement, sidewalks, etc., is certainly more physically invasive than a wildlife refuge or habitat protection area, where the land is left in its natural state and the public is not permitted entry.

The constitutionality of a dedication requirement should not depend upon the distinction between dedications and in-lieu fees or between streets, solar access easements, and preservation areas. Rather, dedication and exaction requirements should be considered in just the same manner as setbacks and other zoning regulations. All are regulations of land use or limitations placed by the government on the ways in which private property can be used.

III

EVEN IF THE COURT FINDS THAT THIS CASE INVOLVES A PHYSICAL INVASION, SINCE IT IS NOT A PERMANENT PHYSICAL OCCUPATION, THE TRADITIONAL TAKING ANALYSIS, RATHER THAN A PER SE RULE, APPLIES.

A. Since the Invasion Resulting from the Required Public Access Dedication Is Occasional and Sporadic, the Traditional Taking Analysis Applies.

As discussed in section II above, this case involves a regulatory action, not a physical invasion. Even if the Court were to find that the Coastal Commission's imposition of a public access requirement did constitute a physical invasion of the Nollans' property, still there would be no taking per se.

The only circumstance in which the Court will find a taking without invoking the usual balancing test is where the government has authorized or carried out a permanent physical occupation of private property. *Loretto, supra,* 458 U.S. at 432-34, 441. The Court has found such a permanent physical occupation of property in only a small handful of cases. See *Loretto, supra; Pumpelly v. Green Bay Co., supra; United States v. Pewee Coal Co., supra; United States v. Causby, supra.*

In *Loretto*, the Court went to great lengths to underscore the limited circumstances under which a physical invasion is grounds for finding a taking per se. The Court noted that the public access easement at issue in *Kaiser Aetna* was not a permanent occupation of land and therefore not a taking per se. 458 U.S. at 433. Similarly, the *Loretto* Court held that in *PruneYard* the invasion was "temporary" and "limited in nature" so a per se rule did not apply. 458 U.S. at 434.

Like the public access easement in *Kaiser Aetna* and the similar public intrusion in *PruneYard*, the public access dedication required by the Coastal Commission, if considered a physical invasion at all, is temporary, sporadic, and limited in nature. Under no circumstances could it qualify as a "permanent physical occupation" under the terms of *Loretto.* The Nollans can still use

the portion of the property subject to the easement to the same extent that they always have. And that portion of the property still confers additional value upon the property as a whole because it is adjacent to the ocean. Thus, the Commission's condition takes but one small strand—the right to exclude the public from a small portion of the property—from the Nollans' bundle of property rights rather than "chopping through the bundle." 458 U.S. at 435-36.

For these reasons, even if the Court were to consider this case to involve a physical invasion, nevertheless it would have to analyze the other two factors: reasonable investment-backed expectations and economic impact of the regulation. *PruneYard, supra*, 447 U.S. at 83; *Kaiser Aetna, supra*, 444 U.S. at 175. As explained above, application of these factors to the facts of this case leads to the conclusion that no taking occurred.

B. If a Per Se Taking Rule Were Applied in This Case, It Would Have to Be Applied to Virtually Any Dedication Requirement; Such a Holding Would Drastically Curtail the Ability of Governments to Regulate Land Use For the Public Benefit.

1. How Dedications and Exactions Are Used in California.

In California, as in other states, local governments rely extensively upon dedications as a means of placing some of the costs of new or intensified development upon the newcomers rather than upon the public at large.[8] For more than forty years, California

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[8] Other purposes served by these required dedications are deterrence of premature and excessive subdivision and protection of ratepayers from the costs of municipally installed improvements which remain unused when lots are not sold. Heyman and Gilhool, *supra*, 73 Yale L. J. at 1121.

According to other commentators, subdivision exaction requirements were adopted "to eliminate the jumble of disconnected street systems resulting from earlier voluntary dedications and to avoid a future public debt like that experienced by subdivisions made defunct by the real estate crash of the 1920s." Bosselman and Stroud, Pariah to Paragon:

law has vested local governments with authority to require the dedication of real property as a precondition to subdivision approval, to facilitate the provision of streets and infrastructure.

At first, state law permitted mandatory dedications only for streets, alleys, drainage and public utility easements necessitated by the new subdivision.[9] *See* Cal.Gov. Code § 66475, first enacted in 1943 as Cal. Bus. & Prof. Code § 11535. In later years, state laws were enacted granting local governments in California the authority to condition subdivision approval upon either dedication of land or provision of in-lieu fees for other infrastructure elements required for new subdivisions. Local governments were given authority to require payment of fees to defray the cost of drainage and sanitary sewer facilities (Cal. Gov. Code § 66483) and to defray the cost of constructing bridges and "major thoroughfares" which benefit the subdivision. Cal. Gov. Code § 66484.

California law permits mandatory dedications or in-lieu fees for park or recreational purposes, and for public facilities, including fire stations, libraries, schools, and recreational facilities. Cal. Gov. Code §§ 66477, 66478, and 66479. Other mandatory dedications authorized under certain circumstances are dedication of public transit facilities (such as bus turnouts, benches, shelters and similar items) which directly benefit the residents of a subdivision (Cal. Gov. Code § 66475.2), land for bicycle paths for the use and safety of the subdivision residents (Cal. Gov. Code § 66475.1), easements for the receipt of sunlight for solar energy systems within the subdivision (Cal. Gov. Code § 66475.3), and fees for the construction of recharge facilities for groundwater aquifers (Cal. Gov. Code § 66484.5).

Developer Exactions in Florida, 1975-85, 14 Stetson L. R. 527, 528 (1985).

[9] The "requirement" that a developer dedicate streets within the subdivision to the local government is typically favored by the developer as it shifts the costs of street maintenance and repair from the developer to the community tax base. *See* Heyman and Gilhool, *supra*, 73 Yale L. J. 1131.

In addition to Public Resources Code section 30212, which authorizes the Coastal Commission to exact public access dedications and which is at issue in this case, a number of other code sections permit mandatory dedications to help ensure public access to public waters. Local governments may mandate dedications in order to ensure the public's access to public waterways (Cal. Gov. Code § 66478.4), stream and river banks (Cal. Gov. Code § 66478.5), publicly-owned lakes and reservoirs (Cal. Gov. Code § 66478.12), and the ocean coastline and bay shoreline below the ordinary high water mark (Cal. Gov. Code § 66478.11). These code sections are a critical component of state and local governments' ability to implement article X, section 4 of the California Constitution guaranteeing public access to the tidelands, as well as the public trust doctrine, also grounded in the California Constitution.

2. The Effect of Finding the Nollans' Permit Condition a Per Se Taking.

The Nollans argue that their permit condition, and consequently any dedication requirement, is a physical invasion and thus per se a compensable taking. Appellants' brief at 20. Elsewhere in this brief amici explain the legal fallacies in this argument. *See* §§ II, IIIA, *supra*. In addition, the practical implications are staggering.

A finding that the Coastal Commission's public access permit condition is a per se taking would deprive state and local governments of one of their most essential planning tools. If this permit condition is considered a permanent physical occupation and therefore a taking, then virtually every dedication requirement must suffer the same fate. Governments would be prevented from requiring even the most basic and long upheld dedications of streets and utility easements within the subdivision because such dedications would be per se takings. Fifty years of planning doctrine would be thrown out. A new, much narrower, definition of the scope of the police power would govern, allowing governments far less freedom in their efforts to protect and promote the public health, safety and welfare, than they have enjoyed to date. Under this new narrowed formulation of the police power, a government could not require dedications even when the devel-

oper obviously created the need (*e.g.*, streets within a subdivision).

IV

IMPOSITION OF THE PERMIT CONDITION WAS A REASONABLE EXERCISE OF THE POLICE POWER SINCE THERE WAS A RATIONAL RELATIONSHIP BETWEEN THE PERMIT CONDITION AND A LEGITIMATE GOVERNMENTAL OBJECTIVE.

A. The Constitution Requires a Rational Relationship Between the Permit Condition and Legitimate Governmental Interests.

Another constitutional issue raised in this case which is closely intertwined with the taking issue is whether the Coastal Commission's permit condition was a reasonable exercise of the police power. In order for the permit condition to be a reasonable exercise of the police power, there must be a rational relationship between the permit condition and a legitimate governmental interest. As this Court has stated,

> the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

Williamson v. Lee Optical Co., 348 U.S. 483, 487-488 (1955). Some courts address this issue as a question of substantive due process; others use a takings rubric. *See, e.g., Ruckelshaus v. Monsanto, supra*, at 998-9; *Rogin v. Bensalem Township*, 616 F.2d 680, 689-690 (3d Cir. 1980), *cert. denied, Mark-Garner Associates, Inc. v. Bensalem Township*, 450 U.S. 1029 (1981). *See also Goldblatt v. Hempstead*, 369 U.S. at 594-5. A rational relationship exists if there is any state of facts either known or which could reasonably be assumed which affords support for the law. *See Williamson v. Lee Optical, supra; United States v. Carolene Products*, 304 U.S. 144, 154 (1938); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981).

In reviewing zoning and other land use laws, the courts give great deference to the legislative judgment:

> State Legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing [urban] conditions require; and their conclusions should not be disturbed by the courts, unless clearly arbitrary and unreasonable.

Gorieb v. Fox, supra, 274 U.S. at 608. *See also Euclid v. Ambler Realty Co.,* 272 U.S. 365, 388 (1926); *Construction Industry Association, Sonoma County v. City of Petaluma,* 522 F.2d 897 (9th Cir. 1975), *cert. denied* 424 U.S. 934 (1976) ("[b]eing neither a super legislature nor a zoning board of appeal, a federal court is without authority to weigh and reappraise the factors considered or ignored by the legislative body in passing the challenged zoning regulation. The reasonableness, not the wisdom, of the [zoning] is at issue . . . .") Thus it has long been clear that courts will not second-guess governmental zoning and land use determinations, for to do so would tie the hands of state and local governments and insert the courts into an inappropriate arena of decision-making.

Even regulations which place severe burdens on isolated property owners and which benefit those owners only in the same abstract sense that the whole community benefits will not be found an unreasonable exercise of the police power. *See, e.g., Hadacheck v. Sebastian, supra,* (law prohibiting brickyards caused one owner's property to devalue from about $800,000 to a maximum of $60,000 with no specific benefits to him); *Goldblatt v. Hempstead, supra; Miller v. Schoene, supra.*

B. There Is No Constitutional Basis For Requiring More Than A Rational Relationship Between the Permit Condition and Legitimate Governmental Objectives.

The Nollans, the United States and supporting amici all argue that a specific relationship between the required public access dedication and the needs created by the Nollans' new development is required above and beyond a rational relationship be-

tween the dedication and the governmental objective of ensuring public access to the state's shoreline. In essence, they argue that the Coastal Commission, in imposing a public access permit condition upon the Nollans, is subject to a higher constitutional standard than other governmental entities imposing other sorts of land use regulations. Appellants' arguments have no basis in the United States constitution.

The constitution requires two things. *See Agins v. City of Tiburon, supra,* 447 U.S. at 260. First, the regulation must not effect a taking. As discussed above in sections I, II, and III, the Court has set forth several factors to be analyzed in making this determination. None of these factors requires the kind of relationship advocated by appellants. Second, the regulation must not violate due process by exceeding the limits of the police power. A regulation satisfies this requirement if there is a rational relationship between it and legitimate governmental interests. *See, e.g., Williamson v. Lee Optical, supra,* 348 U.S. at 487-8.

The Commission's permit condition easily meets the requirements of substantive due process. The permit condition was enacted pursuant to Public Resources Code sections 30210-30212. Those code sections require that maximum public access be provided to carry out the requirement of article X, section 4 of the California Constitution. To that end, they also require that public access be provided in new development projects except where adequate access already exists or where agriculture would be adversely affected, or where public access is inconsistent with public safety, military needs or the protection of fragile coastal resources.

These provisions clearly advance legitimate governmental goals. *See Agins v. City of Tiburon, supra,* 447 U.S. at 261 (city zoning ordinance enacted in furtherance of California statutory open space protection scheme substantially advances legitimate governmental purpose of preserving open space). The goals of the Coastal Act and sections 30210, 30211, and 30212 in particular, to maximize public access to and along the coast, are legitimate, as they parallel provisions of the state's own constitution. *See* Cal. Pub. Res. Code § 30001.5. And the State has determined that these provisions of the Coastal Act are necessary to carry out its

constitution. Cal. Pub. Res. Code § 30210. The Coastal Commission, by imposing the permit condition, was merely enforcing these legitimate and lawful provisions of state law. Clearly, therefore, there is a rational relationship between the permit condition and *legitimate governmental interests.*[10]

The only federal cases cited by the Nollans and amici in support of their claim that the permit condition is subject to a higher constitutional standard than usual are the so-called "unconstitutional condition" and related cases. *See* Appellants' brief at 22-27; HomeBuilders brief at 6-9. These cases do not support their arguments. For the most part, they concern unilateral assessments by the government upon unwitting property owners. *See, e.g., Norwood v. Baker*, 172 U.S. 269 (1898); *Nashville, Chattanooga, & St. Louis Railway v. Walters*, 294 U.S. 405, 412 (1935); *Atchison, Topeka & Santa Fe Railway Co. v. Public Utilities Commission of California*, 346 U.S. 346, 349 (1953). As explained *supra* at section II, this case does not involve a unilateral imposition by the government upon a property owner. Rather, the permit condition gave the Nollans the choice whether to limit their construction work in specified respects or to agree to dedicate public access along their beach. The Nollans chose not to maintain or repair or reconstruct their house, but to build a much larger new house, thereby foregoing their option of avoiding the permit condition. The facts of this case bear no resemblance to the unconstitutional condition cases.[11]

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[10] The Nollans do not claim that the permit condition is not rationally related to the legitimate purpose of the Coastal Act to provide "[m]aximum public access to and along the coast." Cal. Pub. Res. Code § 30001.5.

Moreover, there is abundant evidence in the record supporting the Coastal Commission's determination that construction of the Nollans' new house would, both by itself and cumulatively in connection with numerous other such new coastline developments, interfere with the public's access to the shoreline. *See, e.g.*, J.A. 41-261.

[11] *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), does not, as appellants claim, support their argument. In *Parks*, the court discussed the requirement of many state courts that a dedication must have some

Furthermore, these cases merely stand for the proposition that the government may not impose a choice between a valuable governmental benefit and the exercise of a constitutionally guaranteed right. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972). These cases do not expand the reach of those constitutional rights. The rights at issue in this case are two: the right to just compensation if one's property is taken for public use, and the right to not be deprived of one's property without due process of law. With respect to the just compensation (or taking) issue, a review of all the factors which this Court has found relevant reveals that no taking has occurred. *See* §§ I-IV, supra. And with respect to the issue of substantive due process (or reasonable exercise of police power) the record is clear that the required rational relationship between governmental objectives and the permit condition is present. The constitution requires nothing more.

CONCLUSION

For all the reasons stated herein, amici respectfully request that this Court affirm the decision of the California Court of Appeal.

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Respectfully submitted,

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reasonable relationship to the needs created by the subdivision. 716 F.2d at 653. The court invalidated the condition imposed in that case, however, not because it did not relate to the needs created by the permit but because it "was totally unrelated to [the city's] . . . legitimate interest in receiving compensation for vacation [of street plats]." 716 F.2d at 652. Thus, the Ninth Circuit was merely applying the usual rational standard to determine whether the city's action was a reasonable exercise of its police power