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 Appeals of the State of California, Second Appellate District

BRIEF OF THE BREEZY POINT COOPERATIVE, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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Interest of Amicus Curiae

The Breezy Point Cooperative is the creation of 2,835 individual homeowners banded together in a Cooperative Corporation which includes the communities of Roxbury, Rockaway Point and Breezy Point in Queens County, New York. These one family detached homes are located on the 500 acres of land and beachfront owned by the Cooperative. The Cooperative's land and beachfront, although privately owned, are located within the Breezy Point Unit of the

Gateway National Recreation area (Pub. L. No. 92-592) (1972), comprising lands and waters in the New York Harbor locale, "possessing outstanding natural and recreational features." The Breezy Point Unit encompasses the area between the eastern boundary of Jacob Riis Park and the westernmost point of Rockaway Peninsula, excepting the Breezy Point Cooperative. Pursuant to the Act, within the Breezy Point Unit, the Secretary of the Interior shall acquire an interest in the area to "assure the public use of and access to the entire beach." 16 U.S.C. § 460cc-1(c).

In 1979 the federal government attempted to condemn a portion of the Cooperative's beachfront for inclusion in the Gateway National Recreation Area. As a preliminary matter the Cooperative's title to the beachfront was tried and was confirmed to the low-water line. After this determination, the federal government abandoned its attempt to condemn the beach.

Recently, the Department of Buildings of the City of New York has objected to and, in some instances refused to issue building permits to the homeowners in the Cooperative for improvements to their homes. Discussions with the City of New York to resolve this situation have been halted because the City has requested that the Cooperative deed to the City a Scenic and Public Access Easement. Pursuant to the proposed deed the public would be permitted to traverse in the easement area from contiguous portions of Gateway National Recreation Area. The Cooperative would be required to maintain the easement area in perpetuity. The City claims such a deed is consistent with the New York State Waterfront Revitalization and Coastal Resources Act of 1981 and the United States Coastal Zone Management Act of 1972. The City contends that its policy is to promote maintenance and protection of the beaches, both privately and publicly, as well as public

access to the waterfront. The Cooperative has thus far refused to grant the deed to the city.

The Cooperative, therefore, has a vital interest in the legal issues that affect the power of state and local governments to obtain the surrender of private property rights without compensation as a condition for obtaining building permits.

The rule sought to be sustained in this Court by the California Coastal Commission is that confiscation of private property accomplished in the context of the issuance of a building permit is a permissible exercise of police power. Obviously, the implications of such a rule are not unique to California. There are thousands of property owners whose land abuts public parks, lands and beaches. These owners find themselves subject to increasing pressure by state, local and even federal authorities to obtain access to or across their lands to form a continuous park or beach for public use.

A decision by this Court upholding the authority of state and local governments to exact deeds from private property owners as a condition to obtaining building permits will serve to encourage the further violation of the Fifth and Fourteenth amendment rights of property owners and would repudiate long-standing constitutional principles.

Because of the Cooperative's deep concern about the outcome of this case and the implication of the decision upon the Cooperative's beachfront as well as its impact upon property owners throughout the United States whose land abuts public beach or park land, the Cooperative submits this brief to assist the Court in its resolution of the issues.[1]

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.

Summary of Argument

In analyzing the issue of whether the California Coastal Commission ("Coastal Commission") may condition the granting of a building permit to a private beachfront homeowner upon the dedication of a public access easement, the California Court of Appeals held only that the Coastal Commission had the proper statutory authority and acted properly in exacting this condition. The error in the Court of Appeals' decision was both in the standard applied to evaluate the Coastal Commission's act and the failure to consider whether the condition imposed by the Coastal Commission was tantamount to a "taking."

The exaction of property as a condition to the granting of a building permit is an unconstitutional exercise of police powers where there is no reasonable causal connection between the building project and the exaction. Such unreasonable exercise of police powers amounts to a "taking" without just compensation. The distinction between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made and the needs created by such use.

In order to sustain the Coastal Commission's action, there must be a reasonable relationship or nexus between the Nollans' planned home renovation and the need for increased public access to the Nollans' beachfront; an "indirect" relationship is not enough. Accordingly, as the Nollans' planned home renovation created no increase in the need for public access to the beachlands, the condition cannot be justified as having been caused by the Nollans' development.

A government action, even a regulation under its police powers, may amount to a "taking" under the Fifth and Fourteenth Amendments. Thus, even if the access easement dedication is viewed as a proper exercise of the police powers, it may still be an unconstitutional "taking." If there is a permanent physical occupation, there is a "taking" *per se*. The Nollans were required to convey by deed to the State of California a lateral access easement over their beachfront property as a condition for obtaining a building permit to alter their existing home.[2] This is a permanent physical occupation of their property and the condition is invalid.

Even if the access easement dedication is not viewed as a permanent physical occupation, the Court must still balance several factors to determine whether the governmental action constitutes a "taking," i.e. the character of the government action; the economic impact on the property owner; and the extent the regulation has interfered with investment-backed expecations of the owner. In this case, the character of the government action weighs heavily in favor of finding a "taking." The access condition is a physical invasion by the government upon the owner's property, and impacts adversely on the use of the land and upon the investment made by the Nollans. The conveyance of an easement causes a daily physical invasion of the Nollans' property; the physical invasion absolutely dispossesses the Nollans of their right to exclude others from the property. Furthermore, the easement is qualitatively more severe than a regulation of the use of property, as the Nollans have no control over the timing or extent of the invasion.

The fact that the Nollans, individual property owners, are being asked to bear the full burden of increased public

2. The public easement would cover more than a third of the Nollans' entire lot. *See* Appellants' Brief Opposing Motion to Dismiss or Affirm at 7.

access to the beachlands also weighs in favor of finding a "taking." The Nollans' planned home renovation did not create any increased need for such public access. It is therefore unreasonable to condition the grant of a building permit upon the exaction of a portion of their property.

The proper and accepted means for creating increased public access to beachlands is by invoking the government's eminent domain powers. This mechanism has been repeatedly adopted by both state and federal governments. This Court should strike down the "back-door" approach to confiscation of private property which the Coastal Commission has implemented. The increase of public access to the beachlands, however laudable an aim, is a burden which should be borne by the California public, and not just the beachfront homeowners.

ARGUMENT

I

WHETHER GOVERNMENT ACTION AMOUNTS TO A "TAKING" WITHOUT JUST COMPENSATION IS AN INQUIRY SEPARATE FROM WHETHER THE GOVERNMENT'S ACTION IS PROPER AND AUTHORIZED

Under the Fifth Amendment, applicable to the States through the Fourteenth Amendment, private property may not be taken for public use, without just compensation.[3] U.S. Const. amends. V, XIV. The procedure which governments often use for taking private property for public use is a condemnation action, achieved through the power of eminent domain. *See Berman* v. *Parker*, 348 U.S. 26 (1954). Such an affirmative action by the government by

3. The California Constitution similarly provides that: "Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner." Cal. Const. art. I, § 19.

institution of formal condemnation proceedings is a well-recognized means to satisfy the constitutional mandate of the Fifth Amendment's "taking" clause.

Less clear, however, is when a government action which affects private property constitutes a "taking" absent commencement of condemnation proceedings.[4] This appeal presents the question of whether California may, consistent with the Fifth and Fourteenth Amendments, condition the granting of a building permit to renovate and upgrade an existing home upon the dedication of a public access easement over that owner's private beachfront property where there is no reasonable relationship between the planned improvement and an increased need for public access to the homeowner's beachfront.

A. The California Court of Appeals Decision in Nollan Analyzed Only Whether the Government's Acts Were Authorized.

The California Court of Appeals in *Nollan* v. *California Coastal Commission,* 177 Cal. App. 3d 719, 223 Cal. Rptr. 28 (1986) held that the Coastal Commission could condition the grant of a building permit to the Nollans upon the Nollans dedicating a lateral public access easement. The public access easement was to be in the form of a recorded "deed restriction"; thus, the Nollans in effect, were to burden their property with an irrevocable easement to the State.

The California Court of Appeals upheld the Commission's requirement as being supported by "substantial evidence" and disregarded the trial court's finding that the evidence before the Commission "did not support a finding

4. This Court has noted that the issue of what constitutes a "taking" has caused "considerable difficulty." *Penn Central Transportation Co.* v. *City of New York,* 438 U.S. 104 (1978).

that the Nollans' project would create a 'direct or cumulative burden on public access to the sea.' " 177 Cal. App. 3d at 722-23, 223 Cal. Rptr. at 30, holding instead that only an "indirect relationship" must exist between the permit condition and "a need to which the project contributes." Having determined that the exaction of this easement was within the authority of the Coastal Commission[5] and that some "indirect" relationship existed between the Nollans' home renovation and the easement,[6] the court ended its review. Nowhere in its decision did the court even consider whether the Coastal Commission's requirement that the Nollans convey an easement by deed to California amounted to a "taking" of the Nollans' property without just compensation.

5. The Coastal Commission's authority derives from California's statutory program, the California Coastal Act of 1976, which was enacted to carry out the California constitutional mandate that "access to the navigable waters of [the] State shall be always attainable for the people thereof. Cal. Const. art. 10, § 4. *See also Whalers' Village Club* v. *California Coastal Commission*, 173 Cal. App. 3d 240, 220 Cal. Rptr. 2 (1985). Interestingly, the California Coastal Act includes a provision which expressly forbids any government act in furtherance of the California Coastal Act which would "take or damage private property for public use, without the payment of just compensation therefor." Cal. Pub. Res. Code § 30010 (West 1986). Despite this clear proscription against using the Coastal Act to "take" property, the California Coastal Commission has reportedly issued over 1,817 permits with access conditions. Tabor, *The California Coastal Commission and Regulatory Takings*, 17 Pac. L.J. 863, n.5 (1986) (citing to California Coastal Commission and California Coastal Conservancy, Coastal Access Program Fifth Annual Report).

6. The Court of Appeals conceded that the Nollans' plans to reconstruct their summer home to a full-time residence did not create any greater need for public access to the tidelands. The "indirect relationship" which the court found to exist between the easement and the permit was that this "is a small project among many others which together limit public access to the tidelands and beaches . . ." 177 Cal. App. 3d at 723, 223 Cal. Rptr. at 30.

B. An Exaction Which Is not Reasonably Related to a Need Created by a Project Is Unconstitutional as an Improper Exercise of Police Powers and Amounts to a "Taking."

The state may achieve a broad-range of regulatory purposes through the exercise of its police powers. However, any act of the state is unconstitutional if it is clearly arbitrary and unreasonable, having no substantial relation to public health, safety, morals, or the general welfare. *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395 (1926). This ability of the state to act on behalf of the public interest, however, is limited by the Due Process Clause of the Fourteenth Amendment; a state's act must be reasonable, and have a real and substantial relation to the object being sought. *See Nebbia* v. *New York*, 291 U.S. 502 (1934).

The issue of the propriety of land dedication arises most often in challenges to statutes or ordinances affecting subdivision developers. In virtually all jurisdictions, however, the government's action is upheld only if the subdivision project has created the need for the exaction or dedication. *See* Pavelko, *Subdivision Exactions: A Review of Judicial Standards* 25 J. of Urb. & Contemp. Law 269 (1983).[7]

7. Pavelko identifies four different judicial tests of exaction which have emerged: (a) the privilege test, (b) the strict need test, (c) the specifically and uniquely attributable test and (d) the rational nexus test. Of these tests, only the so-called privilege test does not require a showing that the need for the exaction was created by the subdivision development. *See Ayres* v. *City Council of Los Angeles*, 34 Cal. 2d 31, 42, 207 P.2d 1, 7 (1949). This test, however, is no longer a predominant test of exaction validity. Pavelko, 25 J. of Urb. & Contemp. Law, at 283. All the other tests require a direct causal relationship between the burdens created by the development and the exaction requirement. The California test used in *Nollan* appears to most closely approximate this privilege test, although earlier California cases adopted the rational nexus test. *See Scrutton* v. *County of Sacramento*, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969).

An exaction which is not reasonably related to a need created by a project is an improper exercise of police powers and amounts to a "taking." *See, e.g., Howard County* v. *JJM, Inc.*, 301 Md. 256, 482 A.2d 908 (1984) (requirement of reservation of right-of-way through subdivision for future highway had no nexus to subdivision plans); *Liberty* v. *California Coastal Commission*, 113 Cal. App. 3d 491, 170 Cal. Rptr. 247 (1980) (condition for building permit that property owner dedicate property for free public parking until 5:00 p.m. daily was unrelated to development plans); *Frank Ansuini, Inc.* v. *City of Cranston*, 107 R.I. 63, 264 A.2d 910 (1970) (regulation requiring donation of at least 7% of subdivision land for recreational purposes was not based upon any need created by the project).

The distinction between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement imposed by the government has some reasonable relationship or nexus to the use to which the property is being made and the needs created by such use. It is inappropriate for the government to set a dedication or exaction requirement as an excuse for taking property when a landowner merely happens to be asking for some license, approval or permit from the government.

Simpson v. *City of North Platte*, 206 Neb. 240, 292 N.W.2d 297 (1980) is strikingly similar to the case at bar. There, a city ordinance prohibited construction or improvements upon property unless the owners dedicated land for expansion of public streets. Plaintiffs were denied a building permit to construct a restaurant on their property because they had not dedicated a 40-foot right-of-way over their property for use in connecting two public highways in the future. The court held that the city's scheme was "land banking" and that since the plans for the use of this land were not caused by the plaintiff's building projects, it was unconstitutional "taking." The court in holding the

government's acts unreasonable noted that this ordinance could be applied so as to require a dedication of 40 feet of land simply if the plaintiffs had sought a building permit to add one foot on to their kitchen. 206 Neb. at 246, 292 N.W.2d at 301.

Similarly, in *181 Inc.* v. *Salem County Planning Board*, 133 N.J. Super. 350, 336 A.2d 501 (1975), a landowner was denied approval of a site plan for construction of a law office because the owner had refused to dedicate a portion of the land for use in future road widening. The court struck down the compulsory dedication requirement because there was no showing of a rational nexus between the landowner's building project and the need for the dedication. The court held:

> It must definitely appear that the proposed action by the developer will either forthwith or in the demonstraby immediate future so burden the abutting road, through increased traffic or otherwise, as to require its accelerated improvement. Such dedication must be for specific and presently contemplated immediate improvements—not for the purpose of 'banking' the land for use in a projected but unscheduled possible future use.

133 N.J. Super. at 359, 336 A.2d at 506.

Likewise, there is no rational nexus between the Nollans' home renovation plans and the need for increased public access. The only justification proffered by the Coastal Commission for the easement dedication requirement is akin to land banking—that all the small development projects on the beach will collectively create some future need for public access. 177 Cal. App. 3d at 723, 223 Cal. Rptr. at 30. Since the Nollans' plans did not, however, create any " 'direct or cumulative burden on public access to the sea,' " 177 Cal. App. 3d at 722-723, 223 Cal. Rptr. at 30

(quoting trial court), there is no reasonable relationship between the Coastal Commission's dedication requirement and the Nollans' building project. Merely by the act of applying for a building permit the Nollans were expected to give up property unrelated to the permit. Such an unreasonable exercise of police powers amounts to a "taking."

C. Even a Valid Exercise of the State's Police Powers May Result in a "Taking" Under the Fifth Amendment.

Even if the California court's test of the Nollans' dedication was the proper one—requiring only an "indirect" relationship to sustain the exercise of police powers—the Nollans were still entitled to a separate "takings" analysis. A government action which is an otherwise valid exercise of police powers may still be unconstitutional; there is a point when the police powers go "so far," that the government's act has become a "taking." *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922).

This Court in *Pennsylvania Coal Co.* v. *Mahon, supra,* made clear that the police powers are limited by the Fifth Amendment. Justice Holmes stated: "When [the exercise of police powers] reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act." 260 U.S. at 413. Justice Holmes emphasized that the Fifth Amendment protection could not be qualified by the police powers because that would ultimately result in the demise of private property. In language equally applicable to the Coastal Commission's access condition, Holmes stated:

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

> to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

260 U.S. at 416.[8]

While this Court has, subsequent to *Pennsylvania Coal*, often upheld the validity of land use regulations, it has consistently evaluated such regulations to see whether they had gone "too far" and were thus tantamount to "takings." *See, e.g., Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978) (landmark preservation law which affected how property owner could redevelop a building did not constitute a "taking"); *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980) (residential zoning ordinance did not constitute a "taking"); *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962) (town ordinance, regulating dredging activities which caused appellants to abandon prior business, was not a "taking").

Under the California approach to this issue, it appears that so long as the regulatory program has some rational basis and serves some legitimate public purpose, there is no "taking." *See, e.g., Remmenga* v. *California Coastal Commission*, 163 Cal. App. 3d 623, 209 Cal. Rptr. 628 (1985); *Georgia-Pacific Corp.* v. *California Coastal Commission*, 132 Cal. App. 3d 678, 699, 183 Cal. Rptr. 395, 407-08 (1982). *Whalers' Village Club* v. *California Coastal Commission, supra; Ayres* v. *City Council of Los Angeles*, 34 Cal. 2d 31, 207 P.2d 1 (1949).

The problem inherent in this approach is that it completely confuses the "taking" question with the police

8. It cannot be disputed that the Coastal Commission's program of exacting access easements as conditions for the issuance of building permits to beachlot homeowners is a "short cut" to getting the public benefit of increased beach access, without paying for it. Not only is this short cut unconstitutional, but it is in contravention of the well-recognized use of the eminent domain mechanism to achieve the same ends of increased public access to the beachlands. *See infra* Point III.

powers consideration. A distinction must be made between improper exercises of police powers, direct physical takings of property, and excessive government regulation which merely affects the economic use of the property. Where the government appropriates private property for public use, it is not enough to analyze its validity as an exercise of police powers. If, for example, California's test were the proper one under a Fifth Amendment challenge, then *any* confiscation of property could be justified as merely an an exercise of state police powers. However, *Pennsylvania Coal* and its progeny teaches that more careful scrutiny is required to determine if there has been a "taking." Thus, in the land dedication situation, even where it is already determined that there is a proper exercise of police powers, a court must still evaluate the effects of the dedication requirement on the private property holder as to whether a "taking" has resulted. The reason to insist upon a separate "takings" analysis is to insure that the government not totally abandon the interests of the private property holder because of the public benefit involved. As recognized by this court in *Armstrong* v. *United States*, 364 U.S. 40 (1960):

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was 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.

364 U.S. at 49.

The California Coastal Commission has conceded that the access condition imposed upon the Nollans is but a "part of a comprehensive program to provide continuous public access along Faria Beach as the lots undergo development or redevelopment." Report of California Coastal Commission, attached as Appendix E to Appellant's Juris-

dictional Statement, at E-48. It is unconstitutional for the Commission, in furtherance of its goal to provide a "continuous public access along [the] beach," to force the private beachfront homeowners to solely shoulder the burden of achieving this public objective. The cost of achieving greater public access to beachlands now has become the responsibility of the private beachfront property owners, a small percentage of California's population. As stated by Justice Rehnquist: "[i]t is exactly this imposition of general costs on a few individuals at which the 'taking' protection is directed." *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. at 147 (Rehnquist, J., dissenting).

Moreover, California cannot avoid the fact of its Fifth Amendment violation simply by justifying the acquisition of these easements as a proper police power function. The Coastal Commission may argue that it is acquiring the access easements pursuant to a valid statutory program; however, if it chooses to do so, it must do so as an exercise of its eminent domain function through just compensation and not through this "back-door" policy of requiring dedication of property as a condition for the granting of a building permit.

II

THE COMMISSION'S DEMAND FOR THE CONVEYANCE OF A DEED OF PUBLIC ACCESS TO THE STATE OF CALIFORNIA AS A CONDITION PRECEDENT TO THE APPROVAL OF A BUILDING PERMIT EFFECTS A "TAKING" UNDER THE FIFTH AND FOURTEENTH AMENDMENTS

The issue of whether "justice and fairness" requires that action effecting private property be deemed a "taking," involves an *ad hoc* factual inquiry and "depends largely 'upon the particular circumstances [in that]

case.' '' *Penn Central Transportation Co.* v. *City of New York,* 438 U.S. at 124 (citations omitted). While this Court has not established a single "set formula" for determining a "taking," *id.,* the Court has recognized certain standards which apply when resolving whether an action works a "taking." *See Loretto* v. *Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982).[9]

In Loretto, the Court reviewed prior precedent to glean out general principles governing the Takings Clause question. The Court noted the distinction between government action which results in physical intrusion of private property and other government regulatory action which arises "from some public program adjusting the benefits and burdens of economic life to promote the common good." *Loretto,* 458 U.S. at 426, *citing Penn Central Transportation Co.* v. *New York City,* 438 U.S. at 124. The Court held that a "permanent physical occupation authorized by the government is a taking without regard to the public interests that it may serve." *Id.* This *per se* rule of "taking" is contrasted with a regulation that merely restricts the use of property or a temporary physical invasion, both of which remain subject to a balancing test to see if a taking has occurred. 438 U.S. at 131-32.

A. The Access Condition Required by the Coastal Commission Is a Per Se "Taking."

The public access easement which the Coastal Commission required the Nollans to convey in exchange for a building permit is a permanent physical occupation and thus,

9. In addition to the general inquiry of when a "taking" has resulted due to government action, any constitutional challenge under the Fifth and Fourteenth Amendments also must show there is "private property" interest at issue, *United States* v. *Willow River Power Co.,* 324 U.S. 499 (1945), and that the property has been taken for some "public use." *Hawaii Housing Authority* v. *Midkiff,* 467 U.S. 229 (1984). Neither of these requirements are at issue on this appeal.

is a *per se* taking under the Fifth and Fourteenth Amendments.

In *Loretto, supra,* New York State Executive Law § 828(1) provided that a landlord must permit a cable television company to install television cable upon the landlord's building. When the appellee cable company installed its cable on the appellant's building roof, pursuant to permission granted by the building's previous owners, the appellant sued the cable company, claiming the installation of the cable amounted to an unconstitutional "taking" without just compensation.

The New York Court of Appeals held that the statute authorizing the cable installation was a valid exercise of the state's police powers and not a "taking." The court considered the cable installation a proper government regulation and evaluated it by balancing the relevant factors. The fact that the cable installation resulted in a physical invasion to the property was considered only one of several relevant factors. The Court of Appeals found this invasion "minimal" and upheld the statute. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 145 (1981), *rev'd*, 458 U.S. 419 (1982).

This Court reversed, holding that the installation of the cable on appellant's roof was a "taking." This Court rejected the New York Court of Appeals' use of a balancing test, and its finding that the cable installation was a valid exercise of police powers. Instead, this Court noted that historically, the Court had always found a taking whenever a case involved a "permanent physical occupation" of real property. The *Loretto* Court found that this historical rule was justified by the character of the permanent physical occupation:

> Such an appropriation is perhaps the most serious form of invasion of an owner's property interests. To

> borrow a metaphor, *cf. Andrus* v. *Allard*, 444 U.S. 51, 65-66, 62 L. Ed.2d 210, 100 S. Ct. 318 (1979), the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand.

458 U.S. at 435. When the government permanently occupies property, according to the Court, it destroys the rights to possess, use and dispose of the property. The *Loretto* Court reasoned that the owner could no longer possess the occupied space or exclude others, the owner loses the power to control the use of the property, and the property loses much of its value since any transfer or sale will carry the same restraints on its use.

The Court in *Loretto* did note that not every physical invasion constituted a taking. The Court, citing *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979) and the intermittent flooding cases, indicated that temporary limitations are subject to a more complex balancing process. "The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from his property." 458 U.S. at 435 n.12.

The Nollans' easement dedication was a *per se* "taking." The Coastal Commission required that the Nollans dedicate the public access easement as part of its title by having the deed acknowledging the easement recorded. As the condition required *conveyance* to the state of California, there can be no real dispute concerning the *permanence* of this physical occupation.

A conveyance by deed to the state, however, must as a matter of law constitiute a taking. Unlike the intermittent flooding cases and the occasional leafletting in a shopping center, in addition to the actual conveyance of a property

right to the state, the Nollans have been dispossessed of their right to exclusively use and exclude others from their property. The daily occupation of their beachfront by the public is a permanent physical occupation. The easement dedication means the Nollans will lose the "most treasured" property right—the right to exclude others. *Loretto*, 458 U.S. at 435. *See also Kaiser Aetna* v. *United States*, 444 U.S. at 179-180.[10] The Nollans must additionally give up any plans for use of their property which may conflict with the public's newly-created access route over their beachfront. The Nollans will no longer have any control over which or how many "strangers" can invade their property, or when such invasion may occur. More than a third of the Nollans' private beachfront lot will become nothing less than a permanent public way for which the Nollans will lose the right of exclusive possession, the ability to make use of their property as they choose, and the power to exclude. Additionally, the Nollans must now subject themselves to possible court actions by the Coastal Commission should they perform any work on their property or place anything on the beach which might be construed as an unreasonable interference with or obstruction of this public easement. *See Danielson* v. *Sykes*, 157 Cal. 686, 109 P. 87 (1910); *Aladdin Petroleum*

10 In *Kaiser Aetna* v. *United States*, this Court held that the federal government attempt to create a public right of access to an improved pond went beyond ordinary regulation or improvement for navigation so as to amount to a "taking." 444 U.S. at 178. The imposition of the navigational servitude by the federal government resulted in an actual physical invasion of the privately owned marina and interfered with the fundamental element of property ownership—the right to exclude. Although the Court in *Kaiser Aetna* held that the government's action did not rise to the level of a *per se* taking, the Coastal Commission's action in the instant case does. In *Kaiser Aetna* the federal government had merely attempted to create a recognized public right of access. The Coastal Commission, on the other hand, requires the property owner to *convey by deed* a public access easement. Having sought to take actual title to a portion of the Nollans' property, the Coastal Commission has effected a "taking."

Corp. v. *Gold Crown Properties, Inc.*, 221 Kan. 579, 561 P.2d 818 (1977).

The importance of the concept of physical invasion in the Takings Clause analysis has been best described as follows:

> 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 added; footnotes omitted).

The easement which the Nollans are required to grant the State of California is a permanent physical occupation by the State and is therefore a *per se* taking. Accordingly, this Court need not evaluate any additional factors in order to declare unconstitutional the Coastal Commission's program of requiring a conveyance by deed of an access easement as a condition to the grant of a building permit.[11]

11. The fact that the easement condition came about only after the Nollans applied for a building permit should not be a factor to be considered under the *per se* takings test of *Loretto*. First, this Court in *Loretto* unequivocally stated "that a permanent physical occupation is a government action of such a unique character that it is a taking

(footnote continued on next page)

B. The Requirement of Dedication of an Easement Constitutes a "Taking" Even Under the "Balancing" Approach.

Even if the Court declines to apply the *Loretto per se* test for a "taking," "justice and fairness" mandate that the Coastal Commission's dedication condition be deemed a "taking" under the Fifth and Fourteenth Amendments. When the *per se* rule is not applied, a balancing of several factors should be undertaken to determine if the government action constitutes a "taking." *See Penn Central Transportation Co.* v. *City of New York,* 438 U.S. at 124. Some of the factors previously identified by this Court are: a) the character of the government action; b) the economic impact of the regulation on the property owner; and c) the extent the regulation has interfered with distinct investment-backed expectations. *Id.* Also significant is whether it is reasonable in a given situation to require a property holder to solely bear the burden created by a public benefit.

In this case, the character of the government action weighs heavily in favor of finding a "taking." There can be absolutely no disputing that the access condition is a physical invasion by the government upon the beachlot owner's property. This must be contrasted with govern-

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without regard to other factors that a court might ordinarily examine." 458 U.S. at 432. Second, if the mere fact that the easement condition was imposed as *quid pro quo* for the building permit governed, this would simply invite governments to set up barriers for private property owners so that they need to seek governmental approval at every turn, and thus easily have similar conditions imposed. Finally, this Court in *Loretto* expressly rejected the analagous argument that the cable installation had to be considered as a condition for the landlord's privilege of renting his building: "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." 458 U.S. at 439 n.17. Similarly, the Nollans' right to make improvements upon their home should not be conditioned upon the forfeiture of a piece of their property or the right to compensation for such a forfeiture.

ment action which merely "adjusts" the benefits and burdens of economic life to promote the common good,"[12] as it is generally accepted that a "taking" is more readily found when the interference with property can be characterized as a physical invasion.

Numerous cases decided by this Court underscore that physical invasion upon property are likely to be viewed as "takings." *See, e.g., Kaiser Aetna* v. *United States, supra;* (claimed right-of-way easement involving navigable waters); *United States* v. *Causby,* 328 U.S. 256 (1946) (easement of flight over claimant's land); *Griggs* v. *Allegheny County,* 369 U.S. 84 (1962) (air easement over claimant's land); *United States* v. *General Motors Corp.,* 323 U.S. 373 (1945) (temporary use of warehouse by government); *Portsmouth Harbor Land & Hotel Co.* v. *United States,* 260 U.S. 327 (1922) (continuous firing of guns over land by government).

12. When a government regulation such as a zoning ordinance affects the use and economic value of private property, but is not a physical invasion of the property, it is subject to a less vigorous test for a "taking." A taking will be found if such a regulation does not substantially advance legitimate state interests or if it denies an owner economically viable use of his land. *See United States* v. *Riverside Bayview Homes, Inc.,* 106 S. Ct. 455 (1986); *Agins* v. *City of Tiburon,* 447 U.S. at 260. The Coastal Commission erroneously urges that this is the appropriate "takings" inquiry to apply to the Nollans' case. *See* Motion of Appellee to Dismiss or Affirm at 7. This suggestion is clearly erroneous for it fails to take into account that the regulatory program affecting the Nollans involved a physical intrusion upon their property. A distinction must be drawn between a direct public appropriation and a government regulation which results in a *de facto* taking. Both are unconstitutional if uncompensated; however, the *de facto* taking is a concept of the excessive use of police powers, and this is a separate inquiry from whether the government has acted by a direct physical invasion. *See Loretto* v. *Teleprompter Manhattan CATV Corp.,* 53 N.Y.2d 124, 161-163, 440 N.Y.S.2d 843, 862-64 (1981) (Cooke, J., dissenting) *rev'd,* 458 U.S. 419 (1982). If the Commission's test were the proper test in every takings challenge, then even the cable installation in *Loretto* and the right-of-way easement in *Kaiser Aetna, supra,* (discussed *infra* at p. 23) would be upheld.

In *Kaiser Aetna* v. *United States, supra*, Kaiser Aetna, private developers, created a marina subdivision by dredging and filling a privately owned pond in Hawaii. When the developers established the marina community, they connected the pond to a nearby public bay. Kaiser Aetna continued to control access into the marina from the bay, allowing primarily marina lessees and members to use the pond for a fee.

The United States claimed that since the pond had been developed and opened to the navigable waters that the public had a right to use this pond without payment of compensation to the owner. The Court held, however, that this would amount to a "taking" because the government's attempt to recognize a public right of access to the improved pond would result in an actual physical invasion of the privately owned marina and pond. 444 U.S. at 180. The Court noted the government could accomplish this purpose only by its eminent domain power. *Id.*

The Coastal Commission's access condition presents an even more compelling situation for finding a "taking" than in *Kaiser Aetna*. Although both situations involve the essential right to exclude the public, the Nollans are being told to give up this property right as a deed restriction, while the federal government in *Kaiser Aetna* did not exact any change in the marina's title—only that public access be allowed.

Furthermore, it is also significant that the Court found a "taking" in *Kaiser Aetna*, even though the marina's developers had initiated the development which created the pond's opening to navigable waters. This rebuts the suggestion that regulation is always proper when "triggered" by a private property owner's action. *See* Coastal Commission's Motion to Dismiss or Affirm at 8.

The fact that the Nollans, individual property owners, are being asked to bear the full burden of increased public

access to the beachlands also weighs in favor of finding a "taking." The Coastal Commission's exaction was not directly related to any need created by the Nollans' home renovation plans. At best, it was a plan of future land banking. It is unreasonable for the Coastal Commission to require the conveyance of land for the benefit of the general public, absent a sufficient nexus between the Nollans' development project and the access dedication. The Nollans' home improvement plans have no direct effect on the need for increased public access to the beach, since their plans will neither increase the influx of people to the beach nor interfere with some pre-existing access route. If increased public access to the beach is a laudable government objective, it should be shouldered by the public at large, rather than by a handful of property owners who happen to own beachfront property and desire to make home improvements. The individual property owners should not be obliged to give up their property for the public's benefit without getting justly compensated by the government.

III

THE ACCEPTED AND PROPER MECHANISM FOR CREATING PUBLIC ACCESS TO BEACHLANDS IS THROUGH THE POWER OF EMINENT DOMAIN

The program implemented by the California Coastal Commission which conditions the issuance of building permits upon the grant of a deed to California of an access easement is a "back-door" approach to increase public access to public beaches and create contiguous public beachlands. The proper and well-recognized means for creating such access and contiguous beachlands is not through such a "taking," but rather by the mechanism of eminent domain.

Congress has repeatedly passed legislation designed to authorize the purchase or condemnation of privately-owned beach property to create contiguous public beaches and to increase access to public beaches. By condoning the access condition imposed upon the Nollans, the Court will be sanctioning the acquisition of interests in private lands without fair and just compensation as provided for in the federal and state legislation for the creation of contiguous beach area and park lands.

The Gateway National Recreation Area Act of 1972, 16 U.S.C. § 460cc (1982) establishes a National Recreation Area along the New York, New Jersey shorelines. The legislation directs the Secretary of the Interior (the "Secretary") to acquire, by donation, purchase or exchange, "an adequate interest in the area to assure the public use of and access to the entire beach." 16 U.S.C. § 460cc-1 (a)(c)(1) (1982).

In the Indiana Dunes National Lakeshore Act of 1976, 16 U.S.C. § 460(u) (1982), the Secretary is directed to study the "desirability of acquisition of any or all of" certain specified areas from the standpoint of beach access and then "consider and propose options to guarantee public access to and use of the beach area." 16 U.S.C. § 460u-18 (1982).

Similarly, the Golden Gate National Recreation Area Act of 1972, 16 U.S.C. § 460bb (1982), also authorizes purchase or condemnation of beachfront land to secure beach access. Interestingly, in connection with that Act the House Interior and Insular Affiairs Committee noted that the purchase of the privately-owned beach property would be warranted only if such purchase would create contiguous beach running along the California oceanfront, and to do this the State and County lands on the oceanfront would have to be donated to the Federal government. H.R. Rep. No. 1391, 92nd Cong. 2d Sess. (Oct. 11, 1972) *reprinted in* 1972 U.S. Code Cong. & Admin. News 4850, 4858. Thus,

the clear legislative intent of this program was to use federal funds to create a contiguous public beach. *See also United States* v. *3.66 Acres of Land*, 426 F. Supp. 533 (N.D. Cal. 1977) (condemnation action to acquire portion of the privately owned land overlooking the Pacific Ocean as part of Golden Gate National Recreation Area).

Further, in a number of federal legislative programs which create National Recreation Areas and National Seashores, the Secretary is authorized to acquire "by purchase, gift, condemnation, the land, waters, and other property, and improvements thereon and any interests therein," within the boundaries described in the various Acts. *See, e.g.*, Cape Cod National Seashore Act of 1961, 16 U.S.C. § 459b-3(d) (1982); Fire Island National Seashore Act of 1964, 16 U.S.C. §§ 459e, 459e-1(e) (1982); Assateague Island National Seashore Act of 1965, 16 U.S.C. §§ 459f, 459f-1(d) (1965); Gulf Islands National Seashore Act of 1971, 16 U.S.C. §§ 459h, 459h-1(c) (1982); Canaveral National Seashore Act of 1975, 16 U.S.C. §§ 459j, 459j-2(a) (1982); Indiana Dunes National Lakeshore Act of 1976, 16 U.S.C. §§ 460u, 460u-3 (1982); Sleeping Bear Dunes National Lakeshore Act of 1982, 16 U.S.C. §§ 460x, 460x-10(b) (1982); Chickasaw National Recreation Area Act of 1976, 16 U.S.C. §§ 460hh, 460hh-1(c) (1982).

These acts all include a scheme which allows the owner of the property to elect to suspend the condemnation of the property for a specific time period. Importantly, however, Congress specifically excluded access ways to the beach from those properties where the Secretary's power of condemnation could be suspended. The Act provides that:

> the Secretary may exclude from the land so designated any beach or waters, together with so much of the land adjoining such beach or waters as to the Secretary may deem necessary for public access thereto.

16 U.S.C. § 459b-3(d) (1982) (Cape Cod National Seashore Act).[13] Thus, access to the beach can be immediately purchased or condemned by the government.

Congress has additionally authorized the Secretary of the Interior to acquire conservation, recreation and scenic easements from private landowners. *See. e.g.*, Sleeping Bear Dunes National Lakeshore Act of 1982, 16 U.S.C. § 460x-11(d)(2) (1982) (public access easements in lakeshore establishing Resource Preservation Area for educational and research purposes); Indiana Dunes National Lakeshore Act of 1976, 16 U.S.C. § 460u-15 (1982) (acquisition of interests to assure public access to banks of Little Calumet River); Whiskeytown-Shasta-Trinity National Recreation Area Act of 1965, 16 U.S.C. § 460q-1(a) (1982) (easements to assure public access to creek and to provide hiking and horseback trails); Cuyahoga Valley National Recreation Area Act of 1974, 16 U.S.C. § 460ff-1(c) (1982) (scenic easements); Hells Canyon National Recreation Area Act of 1975, 16 U.S.C. § 460gg-6(b) (1982) (scenic easements); Wild & Scenic Rivers Act, 16 U.S.C. §§ 1271, 1274(a)(1) (1982) (scenic easements). *See United States v. 101.80 Acres of Land*, 716 F.2d 714, 716 (9th Cir. 1983).

Moreover, California has explicitly recognized that the proper method of securing public access to privately owned beaches is through legislation authorizing relevant public agencies or officials to acquire such property by purchase or condemnation.[14] *See* Cal. Pub. Res. Code § 30010 (West

13. While the legislation creating the Cape Cod National Seashore (and the other National Park legislation) specifically authorizes acquisition of property for park purposes by condemnation, such an authorizing provision is not necessary. As the legislative history to this Act provides, "Congress by the act of August 1, 1888, conferred general authority on any officer of the Federal Government authorized to acquire real estate for public uses to acquire it by condemnation." S. Rep. No. 428, 87th Cong., 1st Sess. (June 20, 1961), *reprinted in* 1961 U.S. Code Cong. & Admin. News 2212, 2232.

14. Numerous states also provide for acquisition or property for general recreation or conservation purposes without specifically men-

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1986); *See also,* Del. Code Ann. tit. 7, § 6810(a) (1972); Fla. Stat. § 375.031 (1967); Mich. Comp. Laws Ann. § 318.5 (West 1970); Haw. Rev. Stat. § 46-6.5 (1973), § 115-2 (1977).

The California Coastal Act provides for the acquisition by eminent domain of private beachfront property. Cal. Pub. Res. Code § 30010 (West 1986). In that Act, the California Legislature, in fact, acknowledges that when exercising the power to grant or deny a permit required for building along the state's coast, the relevant public commission or public body is not authorized to "take or damage private property for public use, without the payment of just compensation therefor." Cal. Pub. Res. Code § 30010 (West 1986).

Since 1933, the California Department of Parks and Recreation or a predecessor agency has acquired scenic easements over land in or immediately adjacent to state parks. 2A J. Sackman & R. Van Brunt, *Nichols' The Law of Eminent Domain,* § 7.45[2][c] p. 7-353 (3d ed. 1985). Scenic easement acquisitions have been carried out under a California statute which provides

> (a) The department, with the consent of the Department of Finance, and subject to Section 15853 of the Government Code, may acquire title to or interest in real and personal property which the department deems necessary or proper for the extension, improvement, or development of the state park system.

Cal. Pub. Res. Code § 5006(a) (West 1984). Section 15853 of the Government Code provides for acquisition of prop-

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tioning public access to beaches. *See, e.g.,* Conn. Gen. Stat. Ann. §§ 23-8, 23-9 (West 1971) (acquisition, by purchase or eminent domain, of open spaces for recreation); Md. Nat. Res. Code Ann. § 5-1202 (1977) (acquisition of property to preserve open spaces and recreational access easements); New York Park and Recreation Land Acquisition Bond Act, N.Y. Parks Rec. & Hist. Preserv. Law § 15.03 (McKinney 1984) (allocation of money to acquire private land for park and recreation uses).

erty by the State Public Works Board. Cal. Gov't Code § 15853 (West 1980).

Thus, the Federal government and California as well, have recognized that privately-owned beachfront property may be "taken" for public use—such as creating increased public access to the beaches—through purchase or condemnation. It is this method of government acquisition rather than the conditional approach practiced by the Coastal Commission which should be used to make public any part of our nation's coastline. Such acquisition programs guarantee that private persons not alone bear the public burden of the creation of public beach areas and public access thereto which "in all fairness and justice should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. at 49.

Conclusion

For the foregoing reasons, the Breezy Point Cooperative most respectfully urges this Court to reverse the decision of the California Court of Appeals.

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