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.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND CALIFORNIA BUILDING INDUSTRY ASSOCIATION AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE GOVERNMENT MAY NOT UNREASONABLY CONDITION THE EXERCISE OF CONSTITUTIONAL RIGHTS	5
A. The Rule In The Federal Courts	6
B. The Rules In States Other Than California	9
II. CALIFORNIA'S RULE RELEGATES THE PROTECTION OF FEDERAL CONSTITUTIONAL RIGHTS TO THE WHIM OF ADMINISTRATIVE DISCRETION	17
III. THE CONSTITUTION PROHIBITS MEETING LEGITIMATE GOVERNMENTAL OBJECTIVES BY SUBJECTING INDIVIDUAL CITIZENS TO UNCOMPENSATED PHYSICAL OCCUPATION OF THEIR PROPERTY	26
CONCLUSION	29

TABLE OF AUTHORITIES

Page

Cases

Admiral Dev. Corp. v. City of Maitland,
267 So.2d 860 (Fla. App. 1972) 10

Agins v. City of Tiburon
447 U.S. 255 (1980) 5, 20

Arnett v. City of Mobile
449 So.2d 1222 (Ala. 1984) 23

Aunt Hack Ridge Estates, Inc. v. Planning Comm'n
273 A.2d 880 (Conn. 1970) 12

Baltimore Planning Comm'n v. Victor Dev. Co.
275 A.2d 478 (Md. 1970) 11

Bethlehem Evangelical Lutheran Church v.
City of Lakewood,
626 P.2d 668 (Colo. 1981) 13

Billings Properties, Inc. v. Yellowstone County
394 P.2d 182 (Mont. 1964) 11

Board of Supervisors v. Rowe
216 S.E.2d 199 (Va. 1975) 11

Brair West, Inc. v. City of Lincoln
291 N.W.2d 730 (Neb. 1980) 13, 15

	Page
Bynam v. Schiro 219 F. Supp. 204 (E.D. La. 1963) *aff'd* 375 U.S. 395 (1964)	8
Call v. City of West Jordan 614 P.2d 1257 (Utah 1980)	12, 13
City of College Station v. Turtle Rock Corp. 680 S.W.2d 802 (Tex. 1984)	13
Collis v. City of Bloomington 246 N.W.2d 19 (Minn. 1976)	2, 13, 15
Dames & Moore v. Regan 453 U.S. 654 (1981)	22
Delaware, L. & W. R. Co. v. Morristown 276 U.S. 182 (1928)	21
Dickman v. Commissioner 465 U.S. 330 (1984)	20
East Neck Estates, Ltd. v. Luchsinger 305 N.Y.S.2d 922 (N.Y. Super. 1969)	21
Frank Ansuini, Inc. v. City of Cranston 264 A.2d 910 (R.I. 1970)	11
Frost v. Railroad Commission 271 U.S. 583 (1926)	8, 17
Georgia-Pacific Corp. v. California Coastal Comm'n 132 Cal. App. 3d 678 (1982)	20

	Page
Griggs v. Allegheny County 369 U.S. 84 (1962)	27
Grupe v. California Coastal Comm'n 166 Cal. App.3d 148 (1985)	17-19
Hawaii Housing Authority v. Midkiff 467 U.S. 229 (1984)	27
Home Builders Association of Central Arizona Inc. v. Riddel, 510 P.2d 376 (Ariz. 1973)	15
Howard County v. JJM, Inc. 482 A.2d 908 (Md. 1984)	13
J.E.D. Associates, Inc. v. Town of Atkinson 432 A.2d 12 (N.H. 1981)	2, 13, 16
Jenad, Inc. v. Village of Scarsdale 218 N.E.2d 673 (N.Y. 1966)	12
Jordan v. Village of Menomonee Falls 137 N.W.2d 442 (Wis. 1965)	12
Kaiser Aetna v. United States 444 U.S. 164 (1979)	5, 20-22, 25-27
Kamhi v. Planning Bd. 452 N.E.2d 1193 (N.Y. 1983)	13
Lampton v. Pinaire 610 S.W.2d 915 (Ky. App. 1980)	13

	Page
Land/Vest Properties, Inc. v. Town of Plainfield 379 A.2d 200 (N.H. 1977)	14
Littlefield v. City of Afton 785 F.2d 596 (8th Cir. 1986)	7
Loan Ass'n v. Topeka (20 Wall.) 87 U.S. 655 (1875)	25
Longridge Builders, Inc. v. Planning Bd. 245 A.2d 336 (N.J. 1968)	13, 15
Loretto v. Teleprompter Manhattan CATV Corp. 458 U.S. 419 (1982)	5, 21, 23, 27
MacDonald, Sommer & Frates v. County of Yolo 477 U.S. __, 106 S. Ct. 2561 (1986)	5
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McKain v. City Plan. Comm'n 279 N.E.2d 370 (Ohio App. 1971)	11
McNabb v. United States 318 U.S. 332 (1943)	4
Nollan v. California Coastal Comm'n 177 Cal. App.3d 719 (1986)	17, 19

	Page
Norwood v. Baker 172 U.S. 269 (1898)	14
Olmstead v. United States 277 U.S. 438 (1928)	3
Parks v. Watson 716 F.2d 646 (9th Cir. 1983)	7, 8
Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978)	5, 20, 27
Pennsylvania Coal Co. v. Mahon 260 U.S. 393 (1922)	4, 23, 25
Perry v. Sindermann 408 U.S. 593 (1972)	6-8, 17
Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961)	10
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Remmenga v. California Coastal Comm'n 163 Cal. App. 3d 623 (1985), *app. dismissed,* 106 S. Ct. 241	17-19
Regional Rail Reorganization Act Cases 419 U.S. 986 (1984)	22
Ruckelshaus v. Monsanto Co. 467 U.S. 986 (1984)	22

	Page
San Diego Gas & Elec. Co. v. City of San Diego 450 U.S. 621 (1981)	5
Schwing v. City of Baton Rouge 249 So.2d 304 (La. App. 1971)	10
Shelton v. Tucker 364 U.S. 479 (1960)	4
Simpson v. City of North Platte 292 N.W.2d 297 (Neb. 1980)	11, 23
Stanley v. Illinois 405 U.S. 645 (1972)	4
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Town of Longboat Key v. Lands End, Ltd. 433 So.2d 574 (Fla. App. 1983)	13
Trent-Meredith, Inc. v. City of Oxnard 114 Cal. App. 3d 317 (1981)	20
United States v. Causby 328 U.S. 256 (1946)	27
United States v. Security Indus. Bank 459 U.S. 70 (1982)	21
Whaler's Village Club v. California Coastal Comm'n 173 Cal.App.3d 240 (1985), *app. dismissed* 106 S. Ct. 1962	17-19

Page

Watson v. Memphis
373 U.S. 526 (1963) 28

West Park Ave., Inc. v. Township of Ocean
224 A.2d 1 (N.J. 1966) 2, 23

Wilkerson v. Johnson
699 F.2d 325 (6th Cir. 1983) 8

Williamson County Reg. Plan. Comm'n v.
Hamilton Bank, 473 US __,
105 S. Ct. 3108 (1985) 3, 5

Texts

Berger, You Can't Win Them All — Or Can You?,
54 Cal. St. B. J. 16 (1979) 4

Bley, Exactions in the 1980s, Institute on
Planning, Zoning, and Eminent Domain 297
(S.W. Legal Foundation 1984) 13

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Coastal Commission: A Question of
Overreaching, 21 Santa Clara Law. (1981) 26

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Can Local Governments Require as a Condi-
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	Page
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Hale, Unconstitutional Conditions and Constitutional Rights, 35 Colum. L. Rev. 321 (1935)	6
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Juergensmeyer & Blake, Impact Fees: An Answer to Local Governments' Capital Funding Dilemma, 9 Fla. St. U.L. Rev. 415 (1981)	2, 13
Kratovil, Eminent Domain Revisited and Some Land Use Problems, 34 De Paul L. Rev. 587 (1985)	27
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Page

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Publications

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Ordinances

Los Angeles Preliminary Transit Corridor Specific Plan (1984) 24
Monterey Ord. No. 2416 C.S. (1980) 24
San Francisco Downtown Plan (1985) 24
San Francisco Office/Housing Production Program (1982) 24
San Francisco Transit Impact Development Fee Ordinance (San Francisco Admin. Code §§38.1 *et seq.* 24
Santa Monica General Plan: Land Use and Circulation Elements (1984) 24

Constitution

United States Constitution, Fifth Amendment 4, 25

The National Association of Home Builders and the California Building Industry Association have received the parties' written consent to file this brief as *Amici Curiae* in support of the Appellants and have filed their letters of consent with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE

The National Association of Home Builders represents 142,000 builder and associate members organized in approximately 800 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only those who create single-family homes but also apartment, condominium, commercial, and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The California Building Industry Association, the state affiliate of the National Association of Home Builders, is a federation of seven local and regional associations representing 5,400 members who build most of California's housing.

As some local government budgets have become tighter, government agencies have bent their not inconsiderable talents toward creating new ways to finance projects thought to be desirable. One tactic whose use has been rapidly expanding is to have others finance public projects by targeting a discrete section of the populace at a particularly vulnerable time: property owners seeking permits to use or improve their land.

Some government agencies have discovered that, if they can link the issuance of development-related permits to

requiring "donation" of land, or provision of some public service, or payment of cash "in lieu" thereof, the agencies can cause those who wish to use or improve their property to bridge the gap between shrinking governmental budgets and the demand for public projects or services.[1]

Judicial reaction to such exactions has not been uniform. While most state courts occupy a middle ground, permitting exactions *IF* there is a rational relationship between the use proposed by the property owner and creation of the need for the exaction, there are occupants of both extremes. One extreme is before the Court in this case. In California, virtually anything goes. Governmental agencies may exact what they will and the California courts sustain it. At the same time, courts in other states have compared similar exactions to criminal acts. (*J.E.D. Associates, Inc. v. Town of Atkinson,* 432 A.2d 12, 14 [N.H. 1981] ["extortion"]; *Collis v. City of Bloomington,* 246 N.W.2d 19, 26 [Minn. 1976] ["grand theft"]; *West Park Ave., Inc. v. Township of Ocean,* 224 A.2d 1, 4 [N.J. 1966] ["illegally extorted"].)

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1 That government agencies like to characterize these exactions as "donations" or "dedications," voluntarily given as a condition to development approval, should not mask the reality of the situation. (Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale,* 52 Corn. L. Q. 871, 876-81 [1967]) "As a practical matter, most developers are forced to comply with the requirements laid down by local governments because of the prohibitively expensive financing and opportunity costs incurred as a result of protracted delay caused by litigation." (Juergensmeyer & Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma,* 9 Fla. St. U.L. Rev. 415, 417, n. 9 [1981]) Thus, any "donation" is purely fictional. As this Court wisely admonished through Justice Holmes:

> ". . . in states bound together by a Constitution and subject to the 14th amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." (*McDonald v. Mabee,* 243 U.S. 90, 91 [1917])

Some uniformity seems required in the way in which Constitutionally protected property rights are treated in the state courts.[2]

Our interest lies in seeing that the law in this field remains consistent, fair, and cognizant of the need to protect the rights of the individual when confronted with well-meaning government officials whose actions to achieve a public good may impinge on Constitutional guarantees. As Justice Brandeis insightfully admonished:

> "Experience should teach us to be most on our guard to protect liberty when government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." (*Olmstead v. United States*, 277 US 438, 479 [1928] [Brandeis, J., dissenting].)

SUMMARY OF ARGUMENT

Ends and means. That is what this case is about.

The Coastal Commission and the California courts focus on what they view as the need of Californians for greater enjoyment of coastal amenities. Mr. and Mrs. Nollan would be among the last to deny the beneficial effects of the coast. That is why they chose to buy a coastal lot and build a home there for themselves and their children.

Thus, the question is not whether it is good to enable people to enjoy beaches. The question is *how* can government, in our Constitutional system, go about achieving its desire?

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2 This seems particularly pertinent in light of this Court's expressed preference for seeing such issues litigated in state courts. (*Williamson County Reg. Plan. Comm'n v. Hamilton Bank,* 473 US ___, 105 S. Ct. 3108 [1985])

This Court has often cautioned that the means chosen by government officials to meet perceived public needs must be carefully scrutinized for Constitutional conformity:

> "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and of the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more than mediocre ones." (*Stanley v. Illinois*, 405 U.S. 645, 656 [1972]; footnote omitted.)[3]

To meet its perceived needs, California has cast its net too broadly. As will be seen, the bedrock Constitutional principle underlying conditions and exactions is that they are valid only to the extent that they bear a reasonable relationship to needs created by the permit being sought.

California's rule, particularly as it is applied in litigation involving the Coastal Commission,[4] eliminates the need for any rational relationship. It upholds the kind of confiscatory actions that the Fifth Amendment was designed to preclude. It merits disapproval.

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3 *See also Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *McNabb v. United States*, 318 U.S. 332, 347 (1943); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

4 For an analysis of the tender treatment reserved for the Commission by the California courts, see Berger, *You Can't Win Them All — Or Can You?*, 54 Cal. St. B. J. 16 (1979). (The article was written by the lead author of this brief.)

ARGUMENT

I. THE GOVERNMENT MAY NOT UNREASONABLY CONDITION THE EXERCISE OF CONSTITUTIONAL RIGHTS

While this Court has been quite active in land use cases recently, it has not yet dealt with any case questioning the ability of a state or local government agency to condition the issuance of a land use permit on the exaction, "donation," or "dedication" of property by the permit applicant. [5]

The exaction issue is important, has produced varying responses from state courts (all purporting to interpret the same Constitutional protection against confiscation of property), and will likely grow in significance as financially pressed government agencies continue their efforts to obtain something for nothing by conditioning the grant of permits on the "donation" or "dedication" of property.[6]

For, at bottom, what happened here is that private citizens have been told that the only way to obtain a permit to build

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[5] This Court has, of course, reviewed issues involving the Constitutionality of police power regulations in other contexts. (*See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 [1978]; *Kaiser Aetna v. United States*, 444 U.S. 164 [1979]; *Agins v. City of Tiburon*, 447 U.S. 255 [1980]; *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 [1981]; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 [1982]; *Williamson County Reg. Plan Comm'n v. Hamilton Bank*, 473 U.S. __; 105 S. Ct. 3108 [1985]; *MacDonald, Sommer & Frates v. County of Yolo*, 477 US __; 106 S. Ct. 2561 [1986].)

The compensation issue is again before the Court this Term (*First English Evangelical Lutheran Church v. County of Los Angeles*, No. 85-1199), as is the validity of a statute that takes the use of property (*Keystone Bituminous Coal Ass'n v. Duncan*, No. 85-1092).

[6] See forthcoming *Exactions Symposium*, 50 Law & Contemp. Probs. No. 1 (Winter 1987).

their home is by forfeiting a right guaranteed by the Constitution: They must give property to the government for public use and receive no compensation. The question before the Court is under what circumstances can such forfeiture be compelled?

A. The Rule In The Federal Courts

This Court is no stranger to governmental attempts to condition the receipt of some governmental benefit on the surrender of a Constitutional right. In *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), this Court held — in no uncertain terms — that the government could not circumvent the Constitution in that fashion:

> "For at least a quarter century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. *It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests* . . . . For if the government could deny a benefit to a person because of his constitutionally protected [rights], *his exercise of those freedoms would in effect be penalized and inhibited.* This would allow the government to 'produce a result which [it] could not command directly.' [Citation.] Such interference with constitutional rights is impermissible." Emphasis added.)[7]

[7] For analyses of earlier decisions of this Court, see Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 Colum. L. Rev. 321 (1935); Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960).

Building on this Court's decision in *Perry*, the Ninth Circuit Court of Appeals recently applied it in the context of a condition to a land use permit which required "dedication" of property. In *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), a property owner sought to have a city vacate "paper" streets[8] so apartments could be built. The city was amenable, but conditioned the "vacation" of the non-existent streets on the property owner's giving to the city property containing valuable geothermal wells.[9] The court lost little time in concluding that the city's desire to own the geothermal wells did not give it the right to extort dedication of the wells because of the serendipitous appearance of their owner seeking a permit to undertake activity unrelated to geothermal wells:

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

A similar situation occurred in *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986). There, the city sought to condition the construction of a single residence on the property owners' dedication of an easement to permit

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[8] *I.e.*, streets that appeared on the City's general plan for future construction but did not exist as traveled ways.

[9] These produce steam and hot water created by the earth's magma when the magma is close to the surface. The heat energy is used to produce electrical power.

access to a neighboring landlocked parcel owned by others. Relying, *inter alia*, on this Court's decision in *Perry* and the Ninth Circuit's decision in *Parks*, the court concluded that:

> "... appellants stated a substantive due process claim when they alleged that the City acted capriciously and arbitrarily and imposed an unconstitutional condition on the granting of the permit." (785 F.2d at 607)

See also Wilkerson v. Johnson, 699 F.2d 325, 328 (6th Cir. 1983) [illegal conditions attached to barbershop permit]; *Bynam v. Schiro*, 219 F. Supp. 204, 210 (E.D. La. 1963) (three judge District Court), *aff'd* 375 U.S. 395 (1964) [illegal condition on permit to use city auditorium that speakers advocate segregation].[10]

This Court dealt with a related matter (also arising in California) 60 years ago in *Frost v. Railroad Commission*, 271 U.S. 583 (1926). There, by regulation, California conditioned the issuance of permits to private truckers to use the highways on agreement by the private carriers to assume the duties and burdens of public carriers. In holding that the right to use the highways could not be so conditioned, this Court spoke in words that provide a fitting template for the case at bench and its requirement of a fictional donation of an easement in exchange for development permission:

> "Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. *In reality, the carrier is given no choice, except a choice between the rock and the whirlpool, — an option to forego a privilege which may be vital to his livelihood, or to*

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10 "... the City has no power to make its license to an auditorium-user depend on the licensee's giving up a constitutional right." (219 F. Supp. at 210)

> *submit to a requirement which may constitute an intolerable burden.*
>
> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that *it may not impose conditions which require the relinquishment of constitutional rights*. If the state may compel the surrender of one constitional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." (271 U.S. at 593-94; emphasis added.)

The bedrock federal Constitutional precept is that the government may not condition the grant of any benefit on the surrender of a Constitutional right.

B. The Rules In States Other Than California

The state courts have developed several variants of the test to determine whether an exaction is Constitutional. All except California require *some* rational and substantial nexus between the condition imposed by the government

and the need created by the proposed project.[11]

Illinois is perhaps the most vigilant in protecting the rights of the individual. Its courts will not permit an exaction absent a direct cause and effect relationship between the action proposed by the property owner and the exaction demanded by the government:

> "If the requirement is within the statutory grant of power to the municipality and if the burden cast upon the subdivider is *specifically and uniquely attributable to his activity*, then the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power." (*Pioneer Trust & Sav. Bank v. Village of Mount Prospect*, 176 N.E.2d 799, 802 [Ill. 1961]; emphasis added.)

This approach of strictly protecting individual rights has also been applied in other states. (*See Admiral Dev. Corp. v. City of Maitland*, 267 So.2d 860 [Fla. App. 1972]; *Schwing v. City of Baton Rouge*, 249 So.2d 304 [La. App.

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[11] One commentator concluded an exhaustive examination of state court decisions as follows:

> "All these tests, *with the possible exception of those used in California*, attempt to examine the needs of the area being subdivided or the burdens it will place on public facilities and then determine whether the exaction in some way meets the need or offsets the burden. *The California court, while parroting constitutionally required reasonableness, states its rule in no-win language* and requires the developer to bear the burden of proving that there is no reasonable relationship between the dedication requirement and health, safety, and general welfare. Note, however, that *this test completely ignores the question of confiscation as though it never arises*." (Staples, *Exaction — Mandatory Dedications and Payments in Lieu of Dedication*, Institute on Planning, Zoning, and Eminent Domain 111, 119 [S.W. Legal Foundation 1980]; emphasis added.)

1971]; *Baltimore Planning Comm'n v. Victor Dev. Co.*, 275 A.2d 478 [Md. 1970]; *State ex rel. Noland v. St. Louis County*, 478 S.W.2d 363 [Mo. 1972]; *Billings Properties, Inc. v. Yellowstone County*, 394 P.2d 182 [Mont. 1964]; *Simpson v. City of North Platte*, 292 N.W.2d 297 [Neb. 1980]; *McKain v. City Plan. Comm'n*, 270 N.E.2d 370 [Ohio App. 1971]; *Frank Ansuini, Inc. v. City of Cranston*, 264 A.2d 910 [R.I. 1970]; *Board of Supervisors v. Rowe*, 216 S.E.2d 199 [Va. 1975].)

The Illinois rule was slightly modified by the Wisconsin Supreme Court because of a concern that casting the rule in terms of problems ". . . specifically and uniquely attributable . . ." to the applicant might place so heavy a burden of proof on government agencies that no conditions would ever be valid. The Court therefore placed an interpretive gloss on the phrase ". . . specifically and uniquely attributable . . ." which protected the individual but also permitted the government to append rationally related conditions:

> "We deem this to be an acceptable statement of the yardstick to be applied, provided the words 'specifically and uniquely attributable to his activity' are not so restrictively applied as to cast an unreasonable burden of proof upon the municipality which has enacted the ordinance under attack. In most instances it would be impossible for the municipality to prove that the land required to be dedicated for a park or school site was to meet a need solely attributable to the anticipated influx of people into the community to occupy this particular subdivision. On the other hand, a municipality might well be able to establish that a group of subdivisions approved over a period of several years had been responsible for bringing into the community a considerable number of people making it necessary that the land dedications

required of subdividers be utilized for school, park, and recreational purposes for the benefit of such influx. In the absence of contravening evidence this would establish a reasonable basis for finding that the need for the acquisition was occasioned by the activity of the subdivider. Possible contravening evidence would be a showing that the municipality prior to the opening up of the subdivisions, acquired sufficient lands for school, park, and recreational purposes to provide for future anticipated needs including such influx, or that the normal growth of the municipality would have made necessary the acquisition irrespective of the influx caused by opening up of subdivisions.

"There also may be situations, unlike the instant one, where there is no substantial influx from the outside and the proposed subdivision only fulfills a purely local need within the community. In those situations it may be more difficult to adduce proof sufficient to sustain a land-dedication requirement.

"We conclude that a required dedication of land for school, park, or recreational sites as a condition for approval of the subdivision plat should be upheld as a valid exercise of police power *if the evidence reasonably establishes that the municipality will be required to provide more land for schools, parks, and playgrounds as a result of approval of the subdivision.*" (*Jordan v. Village of Menomonee Falls*, 137 N.W.2d 442, 447 [Wis. 1965]; emphasis added.)

The Wisconsin gloss on the Illinois rule has often been followed. (*E.g., Aunt Hack Ridge Estates, Inc. v. Planning Comm'n*, 273 A.2d 880 [Conn. 1970]; *Jenad, Inc. v. Village of Scarsdale*, 218 N.E.2d 673 [N.Y. 1966]; *Call v. City of West Jordan*, 614 P.2d 1257 [Utah 1980].)

More recently, the rule generally being applied in state courts is that the condition or exaction is valid *if* it is rationally related to the applicant's proposed action. "Rationally related" means there must be some nexus between the problem caused by the applicant and the quid pro quo demanded by the government. (*See Bethlehem Evangelical Lutheran Church v. City of Lakewood,* 626 P.2d 668 [Colo. 1981]; *Town of Longboat Key v. Lands End, Ltd.,* 433 So.2d 574 [Fla. App. 1983]; *Lampton v. Pinaire,* 610 S.W.2d 915 [Ky. App. 1980]; *Howard County v. JJM, Inc.,* 482 A.2d 908 [Md. 1984]; *Collis v. City of Bloomington,* 246 N.W.2d 19 [Minn. 1976]; *Briar West, Inc. v. City of Lincoln,* 291 N.W.2d 730 [Neb. 1980]; *J.E.D. Associates v. Town of Atkinson,* 432 A.2d 12 [N.H. 1981]; *Longridge Builders, Inc. v. Planning Bd.,* 245 A.2d 336 [N.J. 1968]; *Kamhi v. Planning Bd.,* 452 N.E.2d 1193 [N.Y. 1983]; *City of College Station v. Turtle Rock Corp.,* 680 S.W.2d 802 [Tex. 1984]; *Call v. City of West Jordan,* 614 P.2d 1257 [Utah 1980]; *see generally* Bley, *Exactions in the 1980s,* Institute on Planning, Zoning, and Eminent Domain 297, 314 [S.W. Legal Foundation 1984]; Connors & Meacham, *Paying the Piper: What Can Local Governments Require as a Condition of Development Approval?,* Institute on Planning, Zoning, and Eminent Domain ch. 2 at 2-12, 2-16 [S.W. Legal Foundation 1986]; Juergensmeyer & Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma,* 9 Fla. St. U. L. Rev. 415, 430-33 [1981]; Reps & Smith, *Control of Urban Land Subdivision,* 14 Syracuse L. Rev. 405, 407 [1963]; Staples, *Exaction — Mandatory Dedications and Payments in Lieu of Dedication,* Institute on Planning, Zoning, and Eminent Domain 111, 120-23 [S.W. Legal Foundation 1980].)

State courts have also recognized a relationship between development exactions and special assessment districts,

and have often analyzed the validity of each by reference to the other. In assessment district cases, property owners in a specified area are assessed the cost of installing public improvements (*e.g.*, new or improved streets, curbs, gutters, street lights, etc.). The cost is spread among the property owners according to the benefit they receive from the improvements. But the Constitutional proscription against the uncompensated taking of private property for public use precludes assessing an owner *more* than he benefits.[12]

See, e.g., Land/Vest Properties, Inc. v. Town of Plainfield, 379 A.2d 200, 204 (N.H. 1977) in which an unreasonable exaction was struck down:

> "In resolving this issue, analogy may be made to the law governing special assessments. The special assessment a town may charge a landowner for a public improvement which, in part, specially benefits his property can be compared to defendant's subdivision exaction. [Citation.] To the extent that it applies private property to public use, the special assessment, like the subdivision exaction is restricted by the principle of just compensation . . . '"[S]pecial assessments upon property for the cost of public improvements are in violation of our

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[12] This Court's views on special assessments were emphatically stated by Justice Harlan in *Norwood v. Baker*, 172 U.S. 269, 278-79 (1898):

> "But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. . . . [T]he guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvements, could not be questioned by him in the courts of the country."

Constitution if they are in substantial excess of the [equivalent in special] benefits received."' [Citations.] These special benefits constitute the just compensation to which the specially assessed landowner is entitled. [Citation.]

"In view of the analogous deprivation of property worked by a special assessment and a subdivision exaction, it would be plainly unfair to circumvent in the subdivision context the protection guaranteed by the proportionality required of special assessments."

See also Home Builders Association of Central Arizona, Inc. v. Riddel, 510 P.2d 376 (Ariz. 1973); *Briar West, Inc. v. City of Lincoln,* 291 N.W.2d 730, 733 (Neb. 1980); *Longridge Builders, Inc. v. Planning Bd.,* 245 A.2d 336, 337-38 (N.J. 1968); Reps & Smith, *Control of Urban Land Subdivision,* 14 Syracuse L. Rev. 405, 407-09 (1963).

Where no obviously rational relationship exists, exactions have been denounced in stinging terms:

"While in general subdivision regulations are a valid exercise of the police power, made necessary by the problems subdivisions create — *i.e.*, greater needs for municipal services and facilities — the possibility of arbitrariness and unfairness in their application is nonetheless substantial: A municipality could use dedication regulations to exact land or fees from a subdivider far out of proportion to the needs created by his subdivision in order to avoid imposing the burden of paying for additional services on all citizens via taxation. To tolerate this situation would be to allow an otherwise acceptable exercise of police power to become *grand theft.*" *(Collis v. City of Bloomington,* 246 N.W.2d 19, 26 [Minn. 1976]; emphasis added.)

> "Regulation H requires the dedication of seven-and-one-half per cent of the total land comprising the subdivision without any consideration of the town's need for the land. Moreover, there is evidence, that was improperly excluded, which indicates that some developers would be permitted to pay the town the value of the land in lieu of its dedication. This appears to us to be *an out-and-out plan of extortion* whereby developers are required to pay for the privilege of using their land for valid and reasonable purposes even though it satisfies all other requirements of the town's zoning and subdivision regulations.
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> * * *
>
> "Municipal officials having authority to adopt ordinances and regulations have a constitutional duty to observe these [constitutional] protections [of private property rights]. They may not attempt to *extort* from a citizen a surrender of his right to just compensation for any part of his property that is taken from him for public use as a price for permission to exercise his right to put his property to whatever legitimate use he desires subject only to reasonable regulation." (*J.E.D. Associates, Inc. v. Town of Atkinson*, 432 A.2d 12, 14-15 [N.H. 1981]; emphasis added.)

Thus, while there are several variants of the exaction rule in state courts, all — except California — seek to protect the rights of the individual against overreaching demands of the government by requiring a rational relationship between the exaction imposed by the government and the action proposed by the property owner.[13]

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[13] *See* Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 Yale L. J. 385, 481-86 (1977).

II. CALIFORNIA'S RULE RELEGATES THE PROTECTION OF FEDERAL CONSTITUTIONAL RIGHTS TO THE WHIM OF ADMINISTRATIVE DISCRETION

Plainly, there must be some limit on the ability of government agencies to impose conditions on the issuance of permits. Otherwise, no citizen's rights as to anything would be secure. This Court's admonition in *Frost v. Railroad Commission,* 271 U.S. 583, 594 (1926) bears repetition:

> "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all."[14]

The California exaction rule is exemplified by four contemporary Coastal Commission cases, of which the case at bench is the most recent: *Remmenga v. California Coastal Comm'n,* 163 Cal. App. 3d 623 (1985), *app. dismissed,* 106 S. Ct. 241 [Chief Justice Burger and Justices Rehnquist and Brennan would have noted probable jurisdiction]; *Grupe v. California Coastal Comm'n,* 166 Cal. App. 3d 148 (1985); *Whaler's Village Club v. California Coastal Comm'n,* 173 Cal. App. 3d 240 (1985), app. dismissed for want of jurisdiction, 106 S. Ct. 1962; *Nollan v. California Coastal Comm'n,* 177 Cal. App. 3d 719 (1986) [the case at bench].

The theory uniting these cases, which places California outside the rule applied elsewhere, is that, while the California courts generally pay lip service to the concept that exactions must bear a reasonable relationship to the

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[14] *See Perry v. Sindermann,* 408 U.S. 593, 597 (1972), listing numerous decisions of this Court invalidating conditions placed on obtaining some governmental benefit, even those denominated mere privileges rather than rights.

permit being sought,[15] their actions belie that assertion. These California cases apply the relationship rule in such an extreme manner that virtually *any* governmental desire suffices to supply that relationship.

In stark contrast to all of the cases (state and federal) discussed earlier, California does not require that the action of the permit applicant bear any cause and effect relationship to the problem sought to be remedied by the condition.

Consider the facts. In *Remmenga,* the property owner sought to construct one house on a 106 acre parcel. He was required to pay $5,000 (in lieu of dedicating property for access to the beach)[16] into a fund to acquire beach access elsewhere. In *Grupe,* the property owner sought to build one home on a 15,000 square foot lot. He was required to dedicate a public access easement over two thirds of his lot. In *Whaler's Village,* condominium owners sought to protect their existing homes from an ocean storm that had undermined one and threatened to destroy others. The condominium owners were required to dedicate to the state the right for the public to use the condominium's private beach. In the case at bench, the

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[15] *Remmenga,* 163 Cal. App. 3d at 627; *Grupe,* 166 Cal. App. 3d at 164; *Whaler's Village,* 173 Cal. App. 3d at 259.

See the analysis of Mr. Staples quoted above in note 11, regarding California's "... parroting [the language of] constitutionally required reasonableness ..."

In the case at bench the Court of Appeal, perhaps encouraged by the refusal of either this Court or the California Supreme Court to intervene in *Remmenga,* Grupe or *Whaler's Village,* dropped even the pretense of lip service. It candidly said that "... the Nollans' project has not created the need for access to the tidelands..." (177 Cal. App. 3d at 723) and then concluded that the absence of any causal relationship was irrelevant.

[16] He could not dedicate property for beach access because the closest part of his 106 acre parcel was more than a mile inland from the beach.

Nollans sought to replace a neighborhood eyesore with a larger (but still modest) home. To gain permission to reconstruct their home, the Nollans were required to dedicate a public access easement over one third of their lot.

Nothing in any of the four cases showed that the proposed construction would have *any* impact on the public's access to the coast. Here, the court was forthright: ". . . the Nollans' project has not created the need for access to the tidelands . . ." (177 Cal. App. 3d at 723)

In each of the four cases, the California Court of Appeal acknowledged this non-impact but held it irrelevant. As the Court of Appeal put it in the case at bench, ". . . a direct burden on public access need not be demonstrated . . ." (177 Cal. App. 3d at 723)

Why? Because in the view of the California courts, one must examine the construction of a single home (even on a lot already put to residential use for many years) in the context of the entire 1,000 mile coastline of California. (*Remmenga,* 163 Cal. App. 3d at 630 [". . .a link in a chain barring access . . ." (citing generalized studies of the entire coastal zone)]; *Grupe,* 166 Cal. App 3d at 167 [". . . one more brick in the wall . . ."]; *Whaler's Village,* 173 Cal. App. 3d at 260 [quoting *Remmenga*]; *Nollan,* 177 Cal. App. 3d at 723 [citing *Remmenga* and *Grupe.*]) As the Court put it in *Remmenga:*

> "A regulatory body may constitutionally require a dedication of property in the interest of the general welfare as a condition of permitting land development. It does not act in eminent domain when it does this, and *the validity of the dedication requirement is not dependent on a factual showing that the development has created the need for it.* [Citations.]" (163 Cal. App. 3d at 629; emphasis added;

> quoting with approval from an earlier Coastal Commission case.)

By definition, a "rational relationship" must have some basis. Here, the concern is development of the California coastal area in a way that balances the rights of the owners of coastal property and other citizens. When demanding that a particular property owner in a specific area "donate" property to the state before being permitted to build anything on his land, there should be some rational relationship between the proposed development and the "donation."[17]

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[17] Part of the California problem lies in the philosophical belief of the California courts that property owners have no right to do anything with their land. The ability to use land is seen as a privilege. (*See, e.g., Trent-Meredith, Inc. v. City of Oxnard,* 114 Cal. App. 3d 317, 328 [1981]; *Georgia-Pacific Corp. v. California Coastal Comm'n,* 132 Cal. App. 3d 678, 699 [1982].) This concept seems plainly at odds with this Court's holdings that property owners have the right to make economically viable use of their land. (*See, e.g., Agins v. City of Tiburon,* 447 U.S. 255, 260 [1980]; *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124 [majority], 143-44 [dissent] [1978]; *Kaiser Aetna v. United States,* 444 U.S. 164, 174, n. 8 [1979].) As recently noted:

> "Of the aggregate rights associated with any property interest, the right of use of property is perhaps of the highest order." (*Dickman v. Commissioner,* 465 U.S. 330, 336, [1984])

Good intentions are irrelevant.[18] So is power. As this Court said in *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979):

> "In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a 'taking,' however, is an entirely separate question. [Citation.]"[19]

That it may be a good thing to provide additional access to California's coast does not mean the state may achieve

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[18] In a case involving strikingly similar facts, a New York court reached precisely the opposite result of the California court in this case:

> ". . . a condition may be imposed upon property so long as there is a reasonable relationship between the problem sought to be alleviated and the application concerning the property. In the case at bar, no such relationship exists. As Special Term properly found, there is currently no lawful, public access to the beach over the petitioner's property. The proposed subdivision will in no manner alter this state of affairs. While the problem of diminishing access to the beach is a matter of serious public concern (see Executive Law, at 912, subd 1), it is not one which can properly be alleviated by requiring petitioner to dedicate a portion of her property to public use." (*Mackall v. White*, 445 N.Y.S.2d 486 [N.Y. App. 1981]; *see also East Neck Estates, Ltd. v. Luchsinger*, 305 N.Y.S.2d 922 [N.Y. Super. 1969] [demand for dedication of $92,000 worth of beach front as condition for permit to develop remainder of $208,000 tract held confiscatory and invalid].)

[19] This same concept that action may be appropriate for the government to take and still require compensation to make it Constitutionally acceptable has been oft repeated. (*See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 [1982]; *United States v. Security Indus. Bank*, 459 U.S. 70, 75 [1982]; *Delaware, L. & W. R. Co. v. Morristown*, 276 U.S. 182, 193 [1928].)

that goal any way it wills.[20] As in *Kaiser Aetna,* whether the means constitutes a taking " . . . is an entirely separate question." *That* question is the one before this Court. For California to answer it Constitutionally, there must in fact exist a rational relationship between the proposed use and the imposed exaction.

The only "impediment" to access after construction of the Nollans' home is the same one which existed before: the land is privately owned. (*Compare Mackall v. White,* 445 N.Y.S.2d 486 [N.Y. App. 1981], quoted above in note 18.) But this Court concluded in a classic opinion that that "impediment" can only be removed by the Constitutional means of purchasing access:

> "The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so shortsighted as to acquire only surface rights, without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place, and refusing to pay for it because the public wanted it very much. *The protection of private property in the 5th Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation.* A similar assumption is made in the decisions upon the 14th Amendment. [Citation.] When this

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[20] Thus, while this Court has acknowledged the power of Congress to deal with such diverse, yet substantial, topics as the bankruptcies of northeastern railroads, the registration of pesticides, and the Iranian hostage crisis, it has firmly expressed the view that the solution to such problems must conform to the just compensation clause. (*See Regional Rail Reorganization Act Cases,* 419 U.S. 102 [1974]; *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986 [1984]; *Dames & Moore v. Regan,* 453 U.S. 654 [1981].)

California's "need" for recreational beach access can stand on no more compelling footing.

> seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
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> * * *
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> "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." (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-16 [1922]; emphasis added.)

Because of these actions of the California courts, government entities throughout California have been emboldened to bend their most creative efforts at imposing conditions only marginally related (if at all) to the use of property for which the owner seeks a permit. The fundamental relationship between these conditions and the proposed project is that the government wants the property, the money, or the service and the applicant is a vulnerable and available target, unable to offer more defense than the proverbial fish in a barrel.[21] Moreover, cases like the one at bench have told the entities that they will not be judicially restrained for their actions. Thus, exacting property or funds for (or provision of) the following items may now be the price for obtaining permission to use one's own property,

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[21] His only choices are to comply with the demand or not put his property to use. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439, n. 17 (1982), this Court dismissed the non-use alternative as Constitutionally unacceptable.

For other decisions explicitly rejecting the imposition of exactions on a target of opportunity unrelated to the need sought to be fulfilled by government, *see, e.g.*, *Arnett v. City of Mobile*, 449 So.2d 1222 (Ala. 1984); *Simpson v. City of North Platte*, 292 N.W.2d 297 (Neb. 1980); *West Park Ave., Inc. v. Township of Ocean*, 224 A.2d 1 (N.J. 1966).

even if the proposed use does not create the need for the exacted provision:

- child care (San Francisco);
- public art (San Francisco, Santa Monica, Los Angeles);
- "amenity space," including promenades, playgrounds, and jogging tracks (Los Angeles);
- low income housing (Monterey, Santa Monica, San Francisco, Santa Barbara);
- public transit (Los Angeles, San Francisco).[22]

If the harsh California rule is allowed to stand, it will free government agencies to coerce property or money for the public benefit from randomly chosen individuals as the price of a routine permit. Based on the facts stated in the opinion below, and the lip service paid the need for nexus, *any* exaction will be sustainable. If the facts of this case show "nexus," any facts will.[23]

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[22] See San Francisco Downtown Plan (1985); San Francisco Office/Housing Production Program (1982); San Francisco Transit Impact Development Fee Ordinance (San Francisco Admin. Code §§38.1 et seq. [1981]); Los Angeles Preliminary Transit Corridor Specific Plan (1984); Monterey Ord. No. 2416 C.S. (1980); Santa Monica General Plan: Land Use and Circulation Elements (1984).

[23] The Coastal Commission has been so adamant and successful in demanding "donations" of access before the issuance of any permit, it has become the subject of "black humor" among the California bar. In a column in the Los Angeles Daily Journal (the daily legal newspaper with the largest circulation in California), the tongue-in-cheek suggestion was made that the Coastal Commission be given statewide (not just coastal) jurisdiction, in order to give the rest of California the "benefits" of the Coastal Commission's beach access policy:

> "Why not extend the Coastal Commission's authority all the way to the eastern edge of the state?
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> "Consider the possibilities.
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> "Say some homeowner in Barstow [a Mojave desert community more than 100 miles from the coast] wants to add a carport to his residence. The commission could step in and

(continued)

California has allowed its concern for effectuating broad governmental goals to swallow the Fifth Amendment's prohibition against confiscation of individual rights. (*Compare Kaiser Aetna v. United States,* 444 U.S. 164, 177 [1979]; *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415-416 [1922].) If the right to use property is subject to governmental whim, then the right has disappeared. As this Court enduringly said more than a century ago:

> "It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism." (*Loan Ass'n v. Topeka,* [20 Wall.] 87 U.S. 655, 662 [1875])

This Court's assistance is urgently needed to reassert both balance and the primacy of the Constitution.

(ftn. continued)
require public dedication of an easement for a bicycle path to the ocean as a condition for building permission.

"Soon the state would be criss-crossed with paths to the sea for the public to enjoy and everyone's fitness would be enhanced.

"We can't allow selfish property owners to hamper public enjoyment of our natural resources." (Policzer, "From the Courts," Los Angeles Daily Journal, October 29, 1985, pt 2, p 1)

III. THE CONSTITUTION PROHIBITS MEETING LEGITIMATE GOVERNMENTAL OBJECTIVES BY SUBJECTING INDIVIDUAL CITIZENS TO UNCOMPENSATED PHYSICAL OCCUPATION OF THEIR PROPERTY

The California Court of Appeal suggests that the Legislature has recognized a problem, accepted the duty to solve it, and devised a solution. But the opinion proceeds as though recognition of a legitimate governmental *goal* legitimizes whatever *solution* is chosen.

That is not the law in the United States. Determination of a legitimate governmental objective is the first, not the last, step. The means chosen to achieve the objective must then be subjected to Constitutional scrutiny.

This case is an analytical twin of *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).[24] There, the Corps of Engineers sought to compel the owner of a private marina to open the marina for public use. This Court would not permit it:

> ". . . [T]he imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina . . . And even if the government physically invades only an easement in property, it must nonetheless pay just compensation. [Citations.]" (444 U.S. at 180)

The same is true here. The result of the Coastal Commission's action will be the physical invasion of the Nollans' lot by strangers. Such random, unwanted, and

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24 Commentators have noted the similarity between *Kaiser Aetna* and Coastal Commission easement exactions. (*See, e.g.*, Tabor, *The California Coastal Commission and Regulatory Takings*, 17 Pac. L. J. 863, 882-90 [1986]; Comment, *Public Access and the California Coastal Commission: A Question of Overreaching*, 21 Santa Clara Law. 395, 401-02, n. 26 [1981].)

unpredictable intrusions by unknown numbers of the general public is so significant that this Court concluded in *Kaiser Aetna:*

> ". . . we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." (444 U.S. at 180)

This Court has routinely noted that governmental actions resulting in actual physical invasion are relatively simple to analyze from the vantage point of the just compensation clause: physical invasion is a taking that cannot be accomplished without compensation. (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-35 [1982]; *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 180 [1979]; *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 [1978]; *Griggs v. Allegheny County*, 369 U.S. 84, 88-89 [1962]; *United States v. Causby*, 328 U.S. 256, 261 [1946]; *Pumpelly v. Green Bay Co.*, 13 Wall. [80 U.S.] 166, 181 [1871]; *see* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1184 [1967]; Kratovil, *Eminent Domain Revisited and Some Land Use Problems*, 34 De Paul L. Rev. 587, 602 [1985].)

That it may be a valid goal of California to increase coastal access for the general public is not the only question involved. California is not writing on a clean slate, free to create a new world in its image, free of any constraints. The slate contains much writing on it already. Among the things written are that property may be privately owned and is Constitutionally protected. As this Court noted in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), states are free to engage in land reform, but when private property is taken in the process for use by others, compensation is mandatory.

There are thus two questions that must be addressed in this type of case:

- Is the governmental objective within the ambit of the police power?
- If so, does the proposed solution violate the Constitutional rights of some citizens?

No challenge is raised to the first issue. It can be conceded that the general goal of providing coastal access is legitimate. To legally achieve that goal by exaction, however, there must be a rational relationship between the applicant's action and the government's exaction for the exaction to satisfy the Constitution.

Regardless of the propriety of the governmental goal, the route to its solution must conform to the Constitution, not circumvent it. As this Court put it in *Watson v. Memphis*, 373 U.S. 526, 537 (1963):

> "[V]indication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them."

CONCLUSION

To assure the primacy of the Constitution, these *Amici* pray that the Court make it clear that exactions and compelled "dedications" imposed on individual property owners as conditions to make use of their property must bear a rational and fair relationship to the property owner's proposed action.

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