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

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

ROGER J. MARZULLA
THOMAS E. HOOKANO
DOUGLAS W. KMIEC
Deputy Assistant Attorneys General

RICHARD J. LAZARUS
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
JOSEPH F. DIMENTO
RAYMOND B. LUDWISZEWSKI
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the California Coastal Commission committed an unconstitutional taking of property when it required, as a condition on a coastal development permit for replacement of an existing house with a substantially larger home, that the permittee dedicate to the public a right to pass and repass laterally along the shoreline.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and regulations:

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-133

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN, APPELLANTS

v.

CALIFORNIA COASTAL COMMISSION

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES

This case concerns the constitutionality of a state coastal zone management practice of conditioning the issuance of certain development permits upon the permit applicant's acceptance of a deed restriction allowing the public to pass and repass across the property along the shoreline. State coastal zone management is of substantial interest to the federal government. Pursuant to the Coastal Zone Management Act of 1972, as amended, 16 U.S.C. 1451 *et seq.*, the Secretary of Commerce has provided financial assistance to coastal states to promote "the development of a [state] management program for the land and water resources of [the] coastal zone" (16 U.S.C. 1454(a)(1)). These plans must include, inter alia, "a planning process for the protection of, and access to, public beaches and other public coastal areas of environmental, recreational,

historical, esthetic, ecological, or cultural value" (16 U.S.C. 1454(b)(7)). The Secretary of Commerce reviewed and approved the California Coastal Zone Management Plan at issue in this case and has since conducted several reviews (in 1979, 1980, 1982, and 1985) of the program's implementation, including the public access provisions.[1] Hence, the constitutionality of the state program, particularly its effort to obtain public access over private property without formal condemnation, is of substantial programmatic interest to the United States.

More broadly, the United States administers a number of federal statutes that sometimes further their regulatory objectives by imposing conditions on the permit applicant's use of its property. See, *e.g.*, Endangered Species Act, 16 U.S.C. 1539(a) (Secretary of the Interior may permit, under such terms and conditions as he shall prescribe, certain acts prohibited by the Act by requiring acts necessary to mitigate the impacts of the activity or to establish and maintain the affected species); 33 C.F.R. 325.4(a) (Army Corps of Engineers may impose permit conditions on Section 404 permits (Clean Water Act, 33 U.S.C. 1344) "directly related to the impacts of the proposal, appropriate to the scope and degree of those

[1] A coastal state that has completed the development of its management program may submit its program to the Secretary for his review and approval and, if the program is approved, the state may be eligible for federal grants to defray up to 80 percent of the cost of administering the program and may be eligible for additional grants if the Secretary subsequently determines that the coastal state is making satisfactory progress in achieving the federal Act's objectives (see 16 U.S.C. 1454(h)(2), 1455(a), 1455a(a)(1)(B), 1458). One requirement for approval is that the Secretary must find that the state has power "to acquire fee simple and less than fee simple interests in land, waters, and other property through condemnation or other means when necessary to achieve conformance with the management program" (16 U.S.C. 1455(d)(2)). Although the Secretary of Commerce has approved the state program at issue in this case and continues to review its implementation, the scope of the Secretary's review does not, of course, extend to the constitutionality of the state program's application to individual landowners.

impacts, and reasonably enforceable."). Such permit conditions may even include dedications of public access. See 33 C.F.R. 320.4(e) and (g)(2), 325.4(a) (Corps of Engineer permitting authority extends to safeguarding public access to navigable waters); 36 C.F.R. 212.9(b) (Forest Service may obtain easements for trails over non-federal lands "by purchase, condemnation, donation, or as a reciprocal for permits"). The Court's consideration of the legal issues raised in this case, therefore, may potentially affect the scope of the federal government's regulatory authority in a number of federal programs.

STATEMENT

1. On March 1, 1982, appellants filed an application with appellee, the California Coastal Commission, for a coastal development permit to demolish an existing 521 square foot, one story, one bedroom, summer residence on a beach front lot and to construct in its place a 1,674 square foot, two-story, three bedroom, permanent residence, with attached two car garage (J.S. App. A2-A3; see J.A. 3-14). At the time, appellants were lessees of the property and possessed an option to purchase that was conditioned on their either rehabilitating the existing dwelling (which was in disrepair) or replacing it with a new structure (J.A. 36, 47-48). A concrete seawall, which is approximately eight feet tall and ten feet from the current mean high tide line, separates the beach portion of the property from the house and its immediate surrounding area (*id.* at 61). The parties dispute the size of the lot, presumably due to uncertainty in locating the historic mean high tide line, which is the seaward boundary of the lot under California law. See *City of Berkeley* v. *Superior Court*, 26 Cal.3d 515, 518 n.1, 521, 606 P.2d 362, 363 n.1, 364, 162 Cal. Rptr. 327, 328 n.1, 329 (1980). The Coastal Commission states that appellants' lot is 2800 square feet (see J.S. App. E21), while appellants state that the lot is 3800 square feet (see J.S. 4; J.A. 397). The lot is one of 138 similar residential lots along a tract of the beach, which had been owned by one family until recently when the family decided to provide its lessees, including appel-

lants, an option to purchase the lot within prescribed time periods (J.A. 47-48).

On April 7, 1982, the Executive Director of the Coastal Commission issued his determination that appellants should be granted a development permit with the condition that appellants must first record "a deed restriction acknowledging the right of the public to pass and repass across the * * * property in an area bounded by the mean high tide line at one end, to the toe of the revetment at the other end" (J.A. 34).[2] The Executive Director's determination that such lateral public access along the shoreline is required was based on findings by a regional office of the Commission that the proposed development would burden the public's ability to gain access along the shoreline by "discouraging the public from visiting the shoreline," "congesting existing access roads and recreational areas," and "increasing the use of the beach by residents and guests," and because adequate access did not already exist nearby (*id.* at 18-23).

The Executive Director was acting pursuant to the Coastal Commission's authority under the California Coastal Act of 1976, which states that "public access" along the coast must be a condition of permitting "new development" along the coastal zone, unless one of several circumstances is present, including "adequate access existing nearby" (Cal. Pub. Res. Code § 30212(a) (West 1986) (J.S. App. E54)). The Coastal Act provides that "new development" does not include "[t]he demolition

---

[2] "Pass and repass" access provides the public with only the right to walk and run along the beach and appears to be the least onerous of public access conditions exacted by the Coastal Commission in granting development permits under the Coastal Act (J.A. 370). In other contexts the Commission sometimes requires that the permit applicant allow "passive recreation uses" or "active recreation uses" (*id.* at 370-371). The Commission's guidelines provide "that because the 'pass and repass' condition severely limits the public's ability to enjoy the adjacent state-owned tidelands * * *, this form of access dedication should be used only where necessary to protect the habitat values of the site, where topographic constraints warrant the restriction, or where it is necessary to protect the privacy of the landowner" (*id.* at 870).

and reconstruction of a single family residence; provided that the reconstructed residence shall not exceed either the floor area, height or bulk of the former structure by more than 10 percent, and that the reconstructed residence shall be sited in the same location on the affected property" (Cal. Pub. Res. Code § 30212(b)(2) (West 1986) (J.S. App. E54)). Appellants formally objected to the Executive Director's determination and requested a full hearing before the Coastal Commission (J.A. 14-23). The Commission denied the hearing request (*id.* at 27-30).

2. Appellants subsequently filed in state superior court a petition for a writ of administrative mandamus, which the superior court granted, ordering the Coastal Commission to hold a full public hearing on appellants' permit application (J.A. 36-39). The court concluded that the Commission could not impose the lateral access condition in the absence of a showing that appellants' proposed residential development would have an individual or cumulative adverse impact on public access to the sea (*id.* at 38-39). The court discounted the relevance to the case of the Commission's evidence regarding the cumulative impact of residential construction on vacant lots and found that the current record did not support the Commission's decision (*ibid.*).

3. On remand, the Coastal Commission made further factual findings and held a public hearing at which appellants argued that the new structure would not affect the public's visual access to the beach, which they contended was already blocked by the existing dwelling, and that adequate access existed nearby (J.S. App. E21-E53; J.A. 41-73, 292-327). The Commission, however, reinstated its prior determination that a lateral access condition was appropriate (*ibid.*), noting that the Commission had similarly conditioned 43 out of 60 coastal development permits along the tract and that the condition was consistent with the public's historical use of the property (J.A. 47-48, 50).[3]

---

[3] Of the 17 permits not similarly conditioned, 14 permits were approved at a time when the Commission did not have administra-

The Commission further found that the proposed development constituted a "new development," within the meaning of Section 30212 of the California Public Resources Code because it would increase the size of the existing residence by more than 10 percent and would generate a cumulative burden on public access opportunities (J.A. 56-57). In particular, the Commission found "that the [appellants'] proposed development would present an increase in view blockage, an increase in private use of the shorefront, and that this impact would burden the public's ability to traverse to and along the shorefront" (*id.* at 65-66). The Commission determined that the proposed structure would be both higher and substantially wider than the existing dwelling and, consequently, would contribute to the development of "a 'wall' of residential structures" that would prevent the public "psychologically" "from realizing a stretch of coastline exists nearby that they have every right to visit" (*id.* at 56-58). The Commission also noted that the development would increase the intensity of private use of the lot while inducing growth in the area, and thereby possibly exacerbate conflict between the public and private property owners concerning the precise boundary line separating their respective rights along the shore (*id.* at 60-62).[4] The Commission rejected appellants' contention that the availability of vertical access in the general vicinity or of lateral access on either side of appellants' lot constituted "adequate access nearby," within the

---

tive regulations in place that allowed imposition of the condition, and the remaining 3 permits did not involve shorefront lots (J.A. 48).

[4] Included in the Commission's determination was a discussion of a state senior land agent's preliminary conclusion that most if not all of the property seaward of the seawall belonged to the public either by virtue of the location of the historic mean high tide line or due to the public's historical use of the beach for passive recreational use (J.A. 69-70; see *id.* at 85-86). The Commission made no finding with respect to ownership of the beach and the permit expressly reserved the state's right to assert any proprietary rights it might have (*id.* at 35).

meaning of the statutory exception to the public access requirement (*id.* at 66-68). The Commission concluded that neither is an adequate substitute (*ibid.*; see *id.* at 380-381).

4. Appellants filed a supplemental petition for a writ of administrative mandamus with the state superior court (J.A. 328-348), which again ruled in their favor (*id.* at 412-420). The court held that the evidence relied upon by the Commission—including "books and articles about access problems in other states, the impact in general of new subdivision building in previously undeveloped areas, a draft land use plan for Santa Monica, mimeographed form declarations from some surfers, and studies of shoreline conditions at Lake Tahoe" (*id.* at 416-417)—was "either not specific to the [appellants'] property or too speculative in nature to support a finding that this project * * * will create a direct or cumulative burden on public access to the sea" (*id.* at 417). The court also rejected the Commission's conclusion that the access condition was required because the project would amount to more than a 10 percent increase in size: "[A] 10 percent enlargement of [appellants'] tiny house would barely be enough to add a good-sized closet to their old floorplan * * *. A test for the imposition of access requirements which automatically required a dedication of access for any reconstruction exceeding 10% of the former structure would be unreasonably harsh" (*id.* at 418). Finally, the court rejected the Commission's determination that there was not "adequate access" nearby and directed the Commission to issue the permit without the lateral access condition (*id.* at 419-420).

The Coastal Commission did not grant the permit, but instead appealed the trial court's adverse decision.[5] While that appeal was pending, appellants exercised their option to purchase the property, and subsequently demol-

[5] Under California law, the Commission's appeal appears to have had the effect of automatically staying the district court's order (see Cal. Civ. Proc. Code Ann. § 1094.5(g) (West 1980)).

ished the existing dwelling and constructed the new larger residence (J.S. 5 n.1). Apparently, appellants did not first notify the Commission or seek its formal permission prior to taking these actions (see Mot. to Dis. 8-10).

5. On appeal, the court of appeal reversed (J.S. App. A1-A9; J.A. 421-427). The court first held that the trial court erred in ruling that the access condition must be supported by a finding that the proposed development would create a direct or cumulative burden on public access (J.A. 424-425). The court of appeal also held that the lateral access condition did not constitute a taking because it did not deprive appellants of the "reasonable use" of their property (*id.* at 425). The court of appeal reasoned that "only an indirect relationship between an exaction and a need to which the project contributes need exist" and the Commission had established that such an indirect relationship exists in this case because, although the proposed structure did not alone create the need for access, "it is a small project among many others which together limit public access * * * and collectively create a need" (*id.* at 424-426).[6] Finally, the court of appeal upheld the Commission's determination that "adequate access" did not otherwise exist (*id.* at 426).

SUMMARY OF ARGUMENT

1. This case concerns a takings challenge to the California Coastal Commission's determination that appellants must record a deed restriction allowing public access laterally along the shoreline in order to receive a coastal development permit. Evaluation of appellants' takings claim requires consideration of three somewhat

---

[6] The court of appeal, rejecting the reasoning of the trial court, held that the Commission's evidence concerning the impact of development on vacant lands was relevant because appellants' project would increase the dwelling size by more than 10 percent and, therefore, would (like development on vacant land) constitute a "new development," within the meaning of the California Public Resources Code (J.A. 425-426).

overlapping factors previously identified by this Court as having particular significance in takings analysis: the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. In certain contexts, this Court has found that the force of just one of these factors is so overwhelming as to be dispositive of the takings inquiry. In this case, however, we believe that no one factor is determinative of appellants' takings claim. The Coastal Commission's lateral access dedication requirement is not a per se taking simply because it implicates a physical invasion of appellants' property. On the other hand, the Commission's permit condition does not escape meaningful takings scrutiny simply because appellants had notice of the condition prior to their purchase of the property or because the permit condition does not deprive appellants of any economically viable use of their property. In our view, a more structured and determinate inquiry is both possible and appropriate.

2. In particular, we believe that the Fifth Amendment limits the power to condition in two respects. First, the permit condition must advance the same legitimate governmental purpose furthered by the restriction the permit excuses. Second, the condition must be reasonably fashioned both in character and degree to address those burdens that the development of appellants' property would impose on the public health, safety, and welfare. Neither the strength of the public need for lateral access nor a showing of a rational relationship between the permit condition and some legitimate public purpose is sufficient to defeat appellants' takings claim. If the character or degree of the burdens imposed by the permit condition on appellants is wholly out of proportion to the burdens of appellants' development on the public, the condition is unconstitutional.

3. Neither the court of appeal nor the superior court applied the correct legal analysis and, as a result, remand is necessary so that those courts may, in the first instance, undertake the thorough factual inquiry essential

to proper disposition of appellants' takings claim. In particular, the court of appeal erred in not recognizing the significance to takings analysis of the permit condition's denial of the basic right of a private landowner to exclude the public from his property. The court of appeal also erred in inquiring only whether the permit exaction bore *some* threshold relationship to the burdens imposed on the public by appellants' home expansion. It failed to consider whether, as required by the Fifth Amendment, the public access exaction was sufficiently related both in *character* and in *degree* to the burdens on public access and use resulting from appellants' development. For these reasons, we share appellants' view that the judgment below, ordering the district court to deny appellants' petition for writ of mandate, should be reversed.

We cannot conclude, however, on the basis of the current record, that the Coastal Commission's permit condition of lateral access amounts to an unconstitutional taking. Although the public access provisions of the California Coastal Act of 1976, especially as construed by the Commission's interpretive guidelines, may suggest a readiness on the part of the Commission to apply the provisions in an unconstitutional manner in a particular case, the superior court failed to justify its conclusion that such an unconstitutional application occurred here. The superior court omitted to undertake certain factual and legal inquiries essential to proper resolution of appellants' takings claim, including an inquiry into the possibility of substantially diminished private property expectations in the peculiar property covered by the permit condition. For this reason, we believe that the case should be remanded to the superior court for further inquiry and for application of takings analysis consistent with the decisions of this Court.

ARGUMENT

REMAND IS NECESSARY TO DETERMINE WHETHER THE COASTAL COMMISSION'S PERMIT CONDITION OF A DEDICATION OF LATERAL ACCESS IS REASONABLY PROPORTIONAL BOTH IN CHARACTER AND DEGREE TO THE BURDENS ON THE PUBLIC IMPOSED BY APPELLANTS' DEVELOPMENT

In recent years, this Court—at least in respect to impositions that depart from the paradigm of a permanent physical occupation—has repeatedly "eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and ha[s] relied instead on ad hoc, factual inquiries into the circumstances of each particular case." *Connolly* v. *Pension Benefit Guaranty Corp.* No. 84-1555 (Feb. 26, 1986), slip op. 12-13; see, *e.g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979); *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978). The focus of the judicial inquiry in each case is "whether the restriction on private property 'forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 83 (1980), quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). "[W]hile most burdens consequent upon governmental action undertaken in the public interest must be borne by individual landowners as concomitants of the 'the advantage of living and doing business in a civilized community,' some are so substantial and unforeseeable, and can so easily be identified and redistributed, that 'justice and fairness' require that they be borne by the public as a whole." *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. 1, 14 (1984) (citations and footnotes omitted).

To aid the takings analysis, the Court has identified three somewhat overlapping factors that have particular significance: "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations" (*PruneYard Shopping Center* v. *Robins*, 447 U.S. at 83; see *MacDonald, Sommer & Frates* v. *Yolo County*, No. 84-2015 (June 25, 1986), slip op. 8; *Connolly* v. *Pension Benefit Guaranty Corp.*, slip op. 13; *Kaiser Aetna* v. *United States*, 444 U.S. at 175). Based on our assessment of the three factors as applied to the circumstances of this case, we agree with appellants that the state court of appeal did not correctly apply this Court's takings decisions in rejecting appellants' takings claim.[7] Because, however, the superior court rejected the Coastal Commission's defense to appellants' claim without fully considering several factual and legal matters raised by the record that we believe would be best addressed by a state trial court in the first instance, we believe the case should be remanded for such further proceedings.

---

[7] The Coastal Commission contends in a second motion to dismiss (Mot. to Dis. 8-11), which this Court denied on December 15, 1986, that it learned for the first time from appellants' jurisdictional statement that appellants had built their replacement dwelling without a permit while the case was pending on appeal, and that under California law such unilateral action amounts to a waiver of appellants' right to challenge the constitutionality of the permit condition. It is settled beyond dispute that a litigant must follow state procedures in raising a federal constitutional claim in state court and that, unless those state procedures are unreasonable, failure to do so may deprive this Court of jurisdiction to review the constitutional claim. See *Williams* v. *Georgia*, 349 U.S. 375, 382-385 (1955); see generally R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* 149-155 (6th ed. 1986). It is less clear whether the Commission has not waived this independent state ground and may raise it for the first time before this Court. Where, however, "[t]he focus of [a] lawsuit has been completely blurred if not altogether obliterated [by subsequent events], and [the Court's judgment] on the important issues involved is potentially immaterial," remand may be appropriate. *Sanks* v. *Georgia*, 401 U.S. 144, 152 (1971).

A. No One of the Three Factors Identified by this Court as Having Particular Significance to Takings Analysis —the Character of the Governmental Action, its Interference with Reasonable Investment-Backed Expectations, and its Economic Impact—Is Dispositive of the Constitutionality of the Coastal Commission's Lateral Access Requirement

In some circumstances, this Court has found the force of just one of the three factors previously identified as being of particular significance to taking analysis—the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations—to be so overwhelming as to be dispositive of the takings inquiry. In *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), the Court held that the "character of the governmental action"—there, "a permanent physical occupation" of private property by a sovereign—was enough to justify a finding that an unconstitutional taking had occurred. In *Ruckelshaus* v. *Monsanto*, 467 U.S. at 1005, the Court held that consideration of the government's "interference with reasonable investment-backed expectations" was sufficient to dispose of a takings challenge. Looking solely to that factor, the Court in *Monsanto* concluded that application of a government regulation to certain activities constituted an unconstitutional taking, while its application to other activities plainly did not (*id.* at 1005-1016). Finally, where the takings challenge is to a classic exercise of the police power, such as traditional zoning restrictions, in which the government is simply "adjusting the benefits and burdens of economic life to promote the common good,"[8] the Court has typically focused solely on the "economic impact" of the law, inquiring whether the challenged law "denies an owner economically viable use of his land." See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 296 (1981); *Agins* v. *City of Tiburon*, 447 U.S. 255,

---

[8] *Penn Central Transp. Co.* v. *New York City*, 438 U.S. at 124.

260 (1980). We believe, however, that in this case, as in *Connolly* v. *Pension Benefit Guaranty Corp.*, slip op. 12-15 and in *Kaiser Aetna* v. *United States*, 444 U.S. at 178-180, no one of the three factors identified by this Court is dispositive of the takings issue.

1. A Permit Condition on Development of Private Property that Exacts a Limited Public Easement Across the Property Has Been Held Not to Be the Equivalent of a Permanent Physical Occupation and Therefore Should Not Be Treated as a Per Se Taking

It is well settled that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government" (*Penn Central Transportation Co.* v. *New York City*, 438 U.S. at 124). See, *e.g.*, *Griggs* v. *Allegheny County*, 369 U.S. 84, 88-90 (1962); *United States* v. *Causby*, 328 U.S. 256, 265-266 (1946); see also Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1185 (1967). Indeed, in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. at 432, this Court embraced a virtual per se "rule that a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Loretto* involved the placement, pursuant to a state statute, of a transmission cable on the roof of an apartment building, which the Court held to be a Fifth Amendment taking, notwithstanding the minimal economic impact of the intrusion on the building's owner.

While *Loretto*'s teachings concerning the significance of physical invasions carry substantial relevance for this case, its per se rule is not dispositive of appellants' claim. Unlike the cable placement in *Loretto*, the Coastal Commission lateral access dedication requirements do not qualify as "permanent" in nature or as a physical "occupation" of private property, since the public obtains only a right to "pass and repass" and not a right to occupy

permanently appellants' beach or even to engage in passive recreational activities on the beach (see J.A. 34, 369-371).[9]

In *Loretto*, the Court emphasized that such a " 'temporary and shifting' " use is not the equivalent, for the purposes of takings analysis, of a "permanent" physical occupation (458 U.S. at 428-429, quoting *St. Louis* v. *Western Union Telegraph Co.*, 148 U.S. 92, 98-99 (1893)). Cf. *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 545 (1972) (upholding requirement that employer allow union organizers access to plant because the "the 'yielding' of property rights it may require is both temporary and minimal"). Similarly, in *Kaiser Aetna*, which involved an effort by the Army Corps of Engineers to require public access to a private marina, the Court did not treat that "easement of passage" as an "occupation" automatically requiring compensation. See *Loretto*, 458 U.S. at 433. Instead, the Court characterized the governmental action as a physical "invasion" and concluded that it constituted an unconstitutional taking only after engaging in a multifactor takings analysis (see 444 U.S. at 178-179).

This case also differs from *Loretto* in that it involves a permit condition allegedly necessary to alleviate burdens resulting from appellants' proposed residential development, rather than a limitation or condition unilaterally imposed by the government. In order to assess the constitutionality of such a permit condition, one must consider whether the effects of developing the land in the proposed manner are so adverse as to justify the government's imposition of a condition as intrusive as a physical invasion, and whether the government imposition bears

---

[9] The terms "permanent" and "occupation" have acquired a technical meaning in some of this Court's takings cases. The invasion here, of course, is permanent in the sense that the easement it exacts is not limited in time, and the intrusion—passing and repassing—is entirely physical and in that sense an occupation (though intermittent) as opposed to a regulatory limitation.

an appropriate relation to the development's impact on others. Such impositions on property owners are not immune from takings analysis on the mistaken theory that they are "voluntarily" assumed as a condition of development (see pages 18-19, *infra*). The physically invasive character of the condition in this case renders substantially more burdensome the government's task of justification. Resolution of the takings claim, however, cannot be disposed of by a simple per se rule based on the character of the governmental action.[10]

2. The Coastal Commission's Lateral Access Requirement Is Not Immune From Takings Challenge On the Theory That There Is No Interference with "Reasonable Investment-Backed Expectations" When a Landowner Has Prior Notice That a Development Permit Will Include a Particular Condition

Appellants' taking claim also cannot be *defeated* by reference to the single factor that there was no interference with "reasonable investment-backed expectations" since appellants had notice of the Coastal Commission's condition prior to their voluntary purchase of the property. To be sure, "[t]he timing of acquisition of [property] is relevant to a takings analysis of [the owner's] investment-backed expectation" (*Andrus* v. *Allard*, 444 U.S. 51, 64-65 (1979)) and prior notice weighs against the finding of a taking. See *Connolly* v. *Pension Benefit*

[10] The Coastal Commission's argument is distinct from New York City's argument in *Loretto*, squarely rejected by this Court, that the landowner could simply avoid application of the statute by ceasing to rent apartments to tenants. See 458 U.S. at 439 n.17 ("a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical invasion"). In *Loretto*, the City made no suggestion that a burden imposed by the activity being regulated somehow justified the physical occupation requirement. Cf. *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 163-164 (1980) ("No police power justification is offered for the deprivation. * * * The county's appropriation of the beneficial use of the [property] is analogous to the appropriation of the use of private property in [*Causby*].").

Guaranty Corporation, slip op. 14-15; *Ruckelshaus* v. *Monsanto*, 467 U.S. at 1004-1014; cf. *Bowen* v. *Agencies Opposed to Social Security Entrapment*, No. 85-521 (June 19, 1986), slip op. 13-14. Indeed, in *Monsanto*, this Court rejected, on that basis alone, a takings challenge to a federal statute that authorized federal agency disclosure of trade secret information submitted to the agency in order to register a pesticide for sale in interstate or foreign commerce. The Court held that "as long as [the company] is aware of the conditions under which the [trade secret] data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking" (467 U.S. at 1007).[11]

Monsanto, however, does not compel rejection of appellants' taking claim in this case. To be sure, in this case, as in *Monsanto*, appellants clearly were "aware" of the permit condition—that they convey a limited easement over a portion of their property to the public—the legality of which they contest.[12] In addition, there is no dispute that the permit condition in this case is, as in *Monsanto*, "rationally related to a legitimate Government interest" (467 U.S. at 1007).[13] This Court in *Monsanto*,

---

[11] Because the Court found that Monsanto did not have sufficient notice prior to its submissions made between October 22, 1972, and September 30, 1978 (and, indeed had received explicit statutory guarantees to the contrary with respect to those submissions), the Court concluded that application of the federal statutory requirement to those submissions would amount to an unconstitutional taking in the absence of "just compensation." See 467 U.S. at 1010-1013.

[12] Indeed, appellants did not formally own the property when they applied for the development permit and or when they received the Coastal Commission's decision. Presumably, therefore, the price paid by appellants for the property may have reflected any losses caused by the Commission's effort to impose a lateral access condition on development.

[13] Congress has itself recognized the importance of providing and protecting public access to and along the coastal zone. See 16 U.S.C.

however, did not intend to disturb the well settled notion that the mere showing of a rational relationship between a governmental measure and a legitimate governmental objective does not end the takings inquiry.[14] Nor does *Monsanto* stand for the proposition that government may always avoid any takings scrutiny simply by providing a landowner with prior notice of a permit condition or other restriction.[15] The features that distinguish this case from *Monsanto* and require the application of a broader assessment of appellants' takings claim than that necessary in *Monsanto* are the Court's assumptions in *Monsanto* that the elements of voluntariness and reason-

---

1452(2)(D), 1454(b)(7). This Court, moreover, has often warned against judicial second-guessing of legislative determinations of what constitutes a legitimate governmental interest (see, *e.g.*, *Monsanto*, 467 U.S. at 1014; cf. *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 240 (1984)) or of whether a specific police power measure is "rationally related" to a particular objective (see, *e.g.*, *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 461-470 (1981); *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176, 186 (1935)).

[14] "[H]owever 'rational' the exercise of [governmental] power may be, that inquiry is quite separate from the question whether the enactment takes property within the prohibition of the Fifth Amendment." *United States* v. *Security Industrial Bank*, 459 U.S. 70, 75 (1982); *Loretto*, 458 U.S. at 425 ("It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid."); *Agins* v. *City of Tiburon*, 447 U.S. at 260 ("taking if the [enactment] does not substantially advance legitimate state interests *or* denies an owner economically viable use of his land") (emphasis added and citations omitted); see also *Penn Central*, 438 U.S. at 127.

[15] "Were the rule otherwise, the [Fifth Amendment] would be reduced to a mere tautology." Cf. *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 539, 541 (1985) (rejecting contention that state may avoid procedural due process scrutiny when "the property right is defined by, and conditioned on, the legislature's choice of procedures for its deprivation"). As this Court emphasized in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980), "a State, by *ipse dixit*, may not transform private property into public property without compensation, even [in a limited respect]. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent."

ableness had been satisfied,[16] while in this case these are precisely the elements at the core of the controversy. In addition, the legislation challenged in *Monsanto* concerned pesticide regulation and, therefore, unlike this case, implicated public health and safety—an area in which judicial deference to legislative action is traditionally great (see page 21 & note 19, *infra*).

In this case, appellants have from the outset sharply disputed the reasonableness of the burdens imposed by the condition, claiming that the "condition bears no reasonable relationship to any asserted burden created by the proposed home" (J.A. 343). Their request, moreover, for a development permit may be "in form voluntary," but it may "in fact lack[] none of the elements of compulsion." See *Frost & Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583, 593 (1926). Unless the activity they propose—to replace a single family vacation home with a larger single family permanent residence on property zoned residential—somehow justifies the particular exaction being imposed, that exaction must be viewed like a unilateral assertion of government power.

3. The Coastal Commission's Lateral Access Requirement May Amount to an Unconstitutional Taking Although Appellants Plainly Are Not Being Deprived of All "Economically Viable Use" of Their Property

Finally, it is relevant to, but not dispositive of appellants' takings claim that the Coastal Commission's con-

---

[16] In *Monsanto*, the Court assumed the "voluntary" nature of the private action that triggered the imposition of the federal statute's disclosure statute (see 467 U.S. at 1007). In addition, the Court apparently assumed the reasonableness of the burden imposed by the condition based on Monsanto's own behavior. See *ibid.* ("That Monsanto is willing to bear this burden in exchange for the ability to market pesticides into this country is evidenced by the fact that it has continued to expand its research and development and to submit data to EPA despite the enactment of the [express statutory requirement of disclosure]."); see also *Connolly* v. *Pension Benefit Guaranty Corp.*, slip op. 14-15 (employers had more than sufficient notice that they were liable for their "proportionate share").

dition on development would not deprive appellants of all "economically viable use" of their property. In *Agins* v. *City of Tiburon*, 447 U.S. at 260, this Court stated that the application to particular property of a classic exercise of the police power, such as a general zoning law, effects a taking if the ordinance "denies an owner economically viable use of his land." The Coastal Commission's policy of conditioning development permits on the landowner dedicating lateral access to the public is plainly within the state's police power (see page 17 & note 13, *supra*) and it does not deprive appellants of all "economically viable use" of their land.[17]

While the failure to meet this test might render the Commission's practice an unconstitutional taking, the satisfaction of it does not necessarily end the inquiry. For the Takings Clause is intended to prevent the Government from imposing on particular individuals burdens which, "in all fairness and justice, should be borne by the public as a whole" (*Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 123 (1978); *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)), even if the government impositions do not deprive the owner of the whole economic value of his property. The government's authority to affect property values through regulations depends not just on a legitimate public purpose, but also on general and just distribution of the burdens. Accordingly, government cannot claim absolute power to impose conditions on the mistaken theory that it is merely offering the landowner the "option" or "privilege" of a *more*

---

[17] The lateral access requirement is triggered only because appellants propose building a residence more than 10 percent larger than the existing dwelling. Under the literal terms of the state statute, appellants could have avoided the requirement by replacing the existing dwelling with a house less than 10 percent greater in size. The smaller house might be less desirable to appellants, but would certainly constitute an "economically viable use" of the property. Likewise the option of building a larger home, subject to the condition of lateral access for the public along the shore, would constitute a viable use of the property.

economically viable use.[18] The government's power to require such a condition without payment of compensation must turn upon a reasonable relationship, in character and degree, between the permit condition and the burdens imposed by the proposed development which triggers the permit requirement. Otherwise, the Takings Clause would not be offended by the wholly arbitrary and selective imposition of conditions that reduce value but leave economically viable uses.

B. The Constitutionality of the Coastal Commission's Condition on Appellants' Development Permit Turns on Whether the Condition is Rationally Related to A Legitimate Governmental Goal *And* Whether the Terms of the Condition Are Reasonably Proportional Both In Character and Degree to the Burdens Imposed By Appellants' Development

Assessment of all three factors identified by this Court as having particular significance to takings analysis suggests that the constitutionality of a permit condition, such as the one at issue in this case, turns on the relationship between the government's justifications for the condition and the burdens that would be imposed on the public by the activity being regulated or restricted. As a general matter, the more intrusive the condition on the landowners' property rights (either because of the character of the intrusion or its degree), the more likely it is that a taking should be found. And, conversely, the more substantial the government interests (either in character or degree) in addressing the burdens on the public that the landowner's proposed activity would cause, the more justified the government's "singling out" the landowner and the less likely that a taking should be found.[19]

---

[18] See generally Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs On New Suburban Residents Through Subdivision Exactions*, 73 Yale L. J. 1119, 1130 (1964).

[19] Where, for example, the governmental interest at stake is a core police power concern, such as public health and safety, the requisite relationship that the government must establish to justify a condition is less than with other government interests more

The validity of a Takings Clause objection to an exercise of the police power in conditioning a permit is not, however, a simple function of the urgency of the governmental interest and the intrusiveness of the imposition on the landowner. A more structured and determinate inquiry is both possible and appropriate. In particular, we believe that the Fifth Amendment limits the power to condition in two respects. First, the permit condition must advance the same legitimate governmental purpose furthered by the restriction that the permit excuses.[20] Second, the condition must be reasonably fashioned both in character and degree to address those burdens that the proposed use of the private property would impose on the public health, safety, or welfare.[21] These inquiries are

---

distributional in character, which, while legitimate, may be less weighty in the constitutional balance. Cf. *Sporhase* v. *Nebraska*, 458 U.S. 941, 956 (1982); *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 821-822 & n.3 (1984) (Brennan, J., dissenting); *Penn Central Transp. Co.* v. *New York City*, 438 U.S. at 145 (Rehnquist, J., dissenting).

[20] Because the permit condition acts to lift a police power restriction, the condition must itself be rationally related to the legitimate goal advanced by the restriction. While a restriction on private activity may theoretically be justified by traditional police power concerns, the terms of a condition that would excuse compliance with the restriction may indicate that the actual purpose is unrelated to the purported police power goal. This Court described the necessary relationship in *Stephenson* v. *Binford*, 287 U.S. 251, 275 (1932), when the Court distinguished the case before the Court from an earlier case where the terms of a condition had revealed that "the [state] act * * * was in no real sense a regulation of the use of the public highways. Its purpose was to protect the business of those who were common carriers. * * * Protection or conservation of the highways was not involved." See *Frost & Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583, 591 (1926).

[21] See ALI, *Model Land Development Code* § 2-103 (1976) ("[permit exactions] of a quality and quantity reasonably necessary for the proposed development"); cf. *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 325 (1893) (emphasis added) ("[The takings clause] prevents the public from loading up on one individual more than his just share of the burdens of government, and says that when he surrenders to the public something *more and different*

required by the Fifth Amendment because when individual property owners are singled out to bear the cost of advancing the public convenience, the imposition must bear "some reasonable relation to the evils to be eradicated" (*Nashville, C. & St. L. Ry.* v. *Walters*, 294 U.S. 405, 429 (1935) (footnote and citations omitted)) in order to ensure that the individual has not been asked to share more than his "proportion[ate]" burden (see *Connolly* v. *Pension Benefit Guaranty Corp.*, slip op. 14; cf. *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)).[22] Neither the strength of the public need nor a strong desire to appropriate private property is enough to avoid an unconstitutional taking. See *Pennsylvania Coal* v. *Mahon*, 260 U.S. 393, 415-416 (1922) ("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"). Nor can majoritarian principles be trusted to protect the individual property owner from legislative overreaching. See *ibid.*; see also *Pumpelly* v. *Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177 (1871). Hence, when either the character or the degree of the burdens imposed by the permit condition is "wholly out of proportion," such a burden is unconstitutional. See *Connolly*, slip op. 2 (O'Connor, J., concurring); see also *Stephenson* v. *Binford*, 287 U.S. at 275.[23]

---

from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.") (emphasis added); *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 622 n.12 (1981) (general revenue tax need satisfy only threshold standard of reasonableness to survive Commerce Clause challenge, but user fee taxes are subject to more exacting review "[b]ecause such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services").

[22] See Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. Rev. 465, 488 (1983).

[23] On this basis, state courts have struck down municipal conditions on development permits in some circumstances (see, *e.g.*, *Howard County* v. *JJM, Inc.*, 301 Md. 256, 282, 482 A.2d 908, 921

C. Neither Court Below Applied the Correct Takings Analysis and, Consequently, Remand is Necessary for Further Consideration of Facts Relevant to Disposition of Appellants' Takings Claim

The courts below misapplied this Court's takings precedent and, as a result, their limited factual inquiry provides an insufficient basis for final disposition of appellants' takings claim. While the condition of allowing lateral public access is itself sufficiently related to a legitimate governmental goal as to satisfy the public purpose requirement of an exercise of the power of eminent domain, it is unclear whether the intrusive "character" of the condition (a requirement that appellants effectively convey a real property interest to the public with respect to a portion of their land) is sufficiently linked to any public burdens resulting from the proposed development as to justify its imposition without the payment of just compensation. Because neither the superior court nor the court of appeal undertook the factual or legal analysis necessary to resolve that issue, the case should be remanded.

We note that the California Coastal Act, on its face and as construed by the Coastal Commission's interpretive guidelines, raises substantial takings concerns. As reflected in those guidelines, the statutory trigger for imposing the lateral access condition on a development permit does not appear to be carefully linked to the burdens imposed by the development, as required by the Takings Clause, but instead appears to be more focused on the public need for access. See J.A. 357 (Cal. Pub. Res. Code § 30212 (West 1986) "focuses * * * on the appropriate-

---

(1984); *Land/Vest Properties, Inc.* v. *Town of Plainfield*, 117 N.H. 817, 823-824, 379 A.2d 200, 204-205 (1977); *Longridge Builders, Inc.* v. *Planning Board*, 52 N.J. 348, 350, 245 A.2d 336, 337 (1968)), and upheld permit conditions in other circumstances (see, *e.g.*, *City of College Station* v. *Turtle Rock Corp.*, 680 S.W.2d 802, 804, 806 (Tex. 1984); *Home Builders Ass'n* v. *City of Kansas City*, 555 S.W.2d 832, 834, 835 (Mo. 1977); *Jenad* v. *Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966)).

ness of access itself, rather than on any burdens which might be generated by particular types of development"); J.A. 358 ("recognizing these potential impacts of development, the Legislature has thus focused the application of Section 30212 on the appropriateness of access rather than on the type of development proposed").

In addition, even to the extent that the state statute recognizes that certain types of development, particularly replacement of residential dwellings, should not automatically require a dedication of lateral access (see Cal. Pub. Res. Code § 30212(b)(2) (West 1986); J.A. 360-361), the statutory measure for determining whether a specific replacement dwelling should trigger that requirement should be viewed with a somewhat jaundiced eye. As noted by the superior court below (J.A. 418), "[i]n a case such as [appellants'], a 10% enlargement of their tiny house would barely be enough to add a good-sized closet to their old floorplan * * *." [24]

This Court has repeatedly stressed "that the constitutionality of statutes ought not to be decided except in an actual factual setting that makes such a decision necessary [and that] [a]dherence to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-295 (1981); see *Connolly* v. *Pension Benefit Guaranty Corp.*, slip op. 1-2 (O'Connor, J., concurring); *Stephenson* v. *Binford*, 287 U.S. 251, 277 (1932); *City of College Station* v. *Turtle Rock Corp.*, 680 S.W.2d 802, 806 (Tex. 1984). The constitutionality of the Coastal Commission's requirement of lateral access before the Court, therefore, depends on its application in the particular circumstances

[24] Some state courts have commented on the problematic nature of permit conditions that are triggered by statutory measures based on percentages. See, *e.g.*, *Collis* v. *City of Bloomington*, 310 Minn. 5, 20, 246 N.W.2d 19, 27 (1976); *Ansuini* v. *City of Cranston*, 107 R.I. 63, 69-70, 264 A.2d 910, 913-914 (1970); see also *Hollywood, Inc.* v. *Broward County*, 431 So.2d 606, 610 (Fla. Dist. App. 1983) (population increase is better measure of public burden than amount of land involved).

of this case and not on what the Commission theoretically might do in a different case. See *United States* v. *Central Eureka Mining Company*, 357 U.S. 155, 168 (1958); *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U.S. at 414-415; see also *Pacific Legal Foundation* v. *California Coastal Commission*, 33 Cal.3d 158, 172-174, 655 P.2d 306, 315-317, 188 Cal. Rptr. 104, 113-115 (1982); *Collis* v. *City of Bloomington*, 310 Minn. 5, 20, 246 N.W.2d 19, 27 (1976).

In analyzing the operation of the statute in this case, the court of appeal erred in focusing almost entirely on whether the condition furthered legitimate governmental goals and whether the condition left appellants with any economically viable use (see J.A. 421-427). As discussed above, neither of these factors is sufficient to defeat appellants' takings claim. To the extent, moreover, that the court of appeal considered at all the critical relationship of the burdens imposed on appellants by the dedication condition to the burdens imposed on the public by appellants' proposed development, the court undertook only the most cursory analysis. The court considered only whether some bare logical connection existed and never inquired, as required by the Fifth Amendment, into the reasonableness of that relationship either in terms of the character or degree of the burdens imposed.

In particular, the court of appeal failed to consider the significance to appellants' takings claim that the permit condition they challenged exacted a real property interest —an easement across a portion of their property—and, hence, interfered with appellants' "right to exclude." "The right to exclude others is generally 'one of the most essential sticks in the bundles of rights that are commonly [called] property.'" *Ruckelshaus* v. *Monsanto*, 467 U.S. at 1011, quoting *Kaiser Aetna* v. *United States*, 444 U.S. at 176; see *Loretto*, 458 U.S. at 433 ("government intrusion of an unusually serious character"). The interference is especially acute in the case of a private homeowner because of " 'the overriding respect for the sanctity of the home that has been embedded in our tradi-

tions since the origins of the Republic.' " *Oliver* v. *United States*, 466 U.S. 170, 178 (1984), quoting *Payton* v. *New York*, 445 U.S. 573, 601 (1980); see *PruneYard Shopping Center*, 447 U.S. at 94 (Marshall, J., concurring); *id.* at 95 (White, J., concurring); see also *Board of Supervisors* v. *Rowe*, 216 Va. 128, 138, 216 S.E. 199, 208 (1975). For this reason, as a general matter, exaction of a public easement over private residential property on an individual basis[25] is usually of such a fundamentally intrusive character[26] that the permitting authority can justify it only upon a showing that burdens

---

[25] Notably, concerns of the same character and magnitude are not present in the case of municipal exactions imposed on subdivisions. In those cases, the interference is neither so personal nor so fundamental. Cf. *PruneYard Shopping Center* v. *Robins*, 447 U.S. at 83-85; *Railway Express* v. *New York*, 336 U.S. 106, 116 (1949) (Jackson, J., concurring) ("it is one thing to tolerate action from those who act on their own and it is another thing to permit the same action to be promoted for a price"); see *Collis* v. *City of Bloomington*, 310 Minn. at 15, 246 N.W.2d at 25 ("In subdivision control disputes, the developer is not defending hearth and home against the king's intrusion but simply attempting to maximize his profits from the sale of a finished product."); *Bd. of Supervisors* v. *Rowe*, 216 Va. at 138, 216 S.E.2d at 208 (application of permit condition to individual parcels substantially more troublesome than application to subdivider). In addition, the character of the burden on the public is more likely to be akin to that imposed on the developer in the subdivision case. A large development is, for example, likely to lead to increased use of public facilities and therefore may justify a municipal determination that approval of the subdivision should be conditioned on the subdivider's agreement to dedicate certain property to the public. See *ibid.* No doubt for these reasons, appellants acknowledge that a similar dedication requirement imposed on a subdivision proposal would be a far different matter under the Takings Clause. See J.A. 15.

[26] In this case, the courts below have not considered evidence in the record relating to the degree of interference with the right to exclude. This Court has previously recognized that the right to exclude is not always "so essential to the use or economic value of * * * property that the state-authorized limitation of it amount[s] to a taking" (*PruneYard Shopping Center* v. *Robins*, 447 U.S. at 84).

of a similarly intrusive quality would be imposed on the public by the proposed development.[27]

Three remaining issues raised by the record in this case suggest, however, that appellants may have relevantly diminished expectations of privacy in the property affected by the lateral access requirement, thus diminishing the significance of the right to exclude that is at issue in this case.[28] First, the California Constitution may support diminished private property expectations in the shore zone in California, including appellants' beach.[29] Second,

---

[27] In this case, the Commission's principal justification for the exaction is the loss of visual access to the coastal zone that would be caused by a dwelling that is substantially larger both in height and width than the existing dwelling (see J.A. 56-58, 65-66). We agree with the court of appeal and the superior court that such cumulative, contributing effects are important and well within the scope of a valid police power measure. We also agree with the Coastal Commission that protection of visual access to the coastal zone is an important public concern. The state and the nation properly place great importance on public access to California's magnificent coastline. Finally, we would also agree that the burden on the public implicated by appellants' permit application is, at least to a limited extent, of a similar character to that imposed on appellants—both share a common concern with public access. This case, therefore, does not present a challenge to a permit condition that is wholly unrelated to the activity being regulated. We do not believe, however, that in most cases, a potential loss of *visual* access is sufficient to justify exaction of *physical* access. Except perhaps when the magnitude of the former is sufficiently compelling to justify governmental denial of the permit altogether, the two interests are too fundamentally different in character to be in fair proportion, as required by the Fifth Amendment.

[28] Appellants also enjoy a "reciprocity of advantage" due to the Coastal Act's access dedication policy because it enables them to enjoy the beach in front of neighboring lots. See *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. at 415; see also *Penn Central Transp. Co.* v. *New York City*, 438 U.S. at 147 (Rehnquist, J., dissenting). "Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the [law], these benefits must be considered along with any diminution in market value that the appellants might suffer." *Agins* v. *City of Tiburon*, 447 U.S. at 262.

[29] Article X, Section 4 of the California Constitution has provided since 1879 that "[n]o individual, partnership, or corporation claim-

there may have been longstanding historical use (over 45 years) by the public of the property at issue for the very purposes (passing and repassing) allowed by the permit condition.[30] Third, the nature of the property at issue, which has not been considered by the courts below, may similarly undercut the meaningfulness of the right to exclude at issue in this case.[31]

---

ing or possessing the frontage or tidal lands of a * * * navigable water in this state shall be permitted to exclude the right of way to such water." It is well settled that state law may, within bounds, define the scope of property rights in the first instance and, consequently, the meaning of this constitutional provision may bear on the taking issue in this case. See *Ruckelshaus* v. *Monsanto*, 467 U.S. at 1001; *Webbs Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. at 161; *PruneYard Shopping Center* v. *Robins*, 447 U.S. at 82. While we cannot, of course, speak to this issue of state law with any authority, it does appear potentially relevant to the judicial inquiry in an appropriate takings analysis and should be considered by the state courts on remand.

[30] Indeed, there was historical acceptance of that public use by prior owners, and appellants are apparently willing to accept that use in the future. See J.A. 48, 50, 67, 303. We note also that the beach property at issue is the object of a continuing boundary dispute between appellants and the Coastal Commission due to the inevitable uncertainty in determining the precise location of the historic mean high tide line. Indeed, there are suggestions in the record that the boundary may be at the seawall itself, if not impliedly dedicated to the public on the basis of past use. See *id.* at 69-70. Such uncertainty underscores the peculiar physical nature of the property at issue and the possibility that property expectations in such property may be of a less fundamental character.

[31] It is our understanding that the beach property that would be covered by the dedication is separated from the house and the immediate surrounding area by a seawall approximately eight feet tall. In the Fourth Amendment context, this Court has recognized the diminished expectations of privacy in property outside "the area immediately surrounding the home," particularly when "as a practical matter the[] land[] * * * is accessible to the public." *Oliver* v. *United States*, 466 U.S. at 178, 179. Although these concerns do not defeat a landowner's formal title, they nonetheless may be relevant to the issue whether a pass and repass easement amounts to an *unconstitutional* taking.

In conclusion, although the Coastal Commission bears a heavy burden on remand to justify the character of the condition it chose to impose on appellants, on the present record it cannot be said that such a showing plainly cannot be made. Because both the superior court and the court of appeal applied incorrect legal standards and failed to inquire into several potentially dispositive matters, remand is appropriate to permit the lower courts to apply the correct legal standard to the fact of this case in the first instance. See *Ansonia Board of Education* v. *Philbrook*, No. 85-495 (Nov. 17, 1986), slip op. 9-10; *City of Los Angeles* v. *Preferred Communications, Inc.*, No. 85-390 (June 2, 1986), slip op. 5-6.

CONCLUSION

The judgment of the court of appeal should be reversed and the case remanded for further proceedings.

Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

ROGER J. MARZULLA
THOMAS E. HOOKANO
DOUGLAS W. KMIEC
Deputy Assistant Attorneys General

RICHARD J. LAZARUS
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
JOSEPH F. DIMENTO
RAYMOND B. LUDWISZEWSKI
Attorneys

DECEMBER 1986