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,

Appellees.

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

JURISDICTIONAL STATEMENT

Of Counsel

TIMOTHY A. BITTLE
JOHN H. LEE
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

RONALD A. ZUMBRUN
ROBERT K. BEST
COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

Attorneys for Appellants

QUESTIONS PRESENTED

1. Having determined that a permit condition which exacts a dedication of access across real property to allow a physical invasion for public use is a valid exercise of the police power, must the state courts then evaluate whether compensation under the Fifth Amendment is nonetheless owing?

2. Where the state courts have found that reconstruction of a personal residence did not create the public's need for access across the owner's beach, is the owner bearing more than his share of a public burden when he is required to sustain 100% of the cost of providing public use of his beach without compensation?

LIST OF PARTIES

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

STATUTES

UNITED STATES CONSTITUTION

MISCELLANEOUS

No. .....

—o—

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

—o—

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellees.

—o—

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

—o—

JURISDICTIONAL STATEMENT

—o—

James Patrick Nollan and Marilyn Harvey Nollan, the appellants, appeal from the final judgment of the Court of Appeal of the State of California, Second Appellate District, sustaining the validity of California Public

Resources Code § 30212 as applied to the Nollans over the Nollans' objection that applying the statute to their circumstances without compensation violates the Fifth and Fourteenth Amendments to the United States Constitution.

OPINIONS BELOW

The opinion of the California Court of Appeal is reported at 177 Cal. App. 3d 719 (1986) and attached as Appendix A. The order of the California Supreme Court denying review is unpublished and attached as Appendix B. The notice of appeal is attached as Appendix C. The trial court's statement of decision is unpublished and attached as Appendix D. The staff report adopted as the decision of the California Coastal Commission is unpublished and attached as Appendix E.

JURISDICTION

The Court of Appeal filed its opinion on January 24, 1986, reversing a favorable judgment for the Nollans in the Superior Court. A petition for rehearing was denied February 18, 1986. The Nollans petitioned for review before the Supreme Court of California. That petition was denied by order dated April 30, 1986, at which point the proceeding became final in the California state courts. A notice of appeal to this Court was filed with the California Court of Appeal on May 14, 1986. The appeal is

timely. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides:

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

The Fourteenth Amendment to the United States Constitution provides:

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

California Public Resources Code § 30212 is attached as Appendix F.

STATEMENT OF THE CASE

As a condition of a permit to rebuild their house, the Nollans were required by the California Coastal Commission to dedicate access across the beach area of their property for public use, nearly one-third of their property. The commission in imposing the condition, and the Court of Appeal in sustaining the condition, relied upon

California Public Resources Code § 30212. Appendix A at 7-8; Appendix E at 11. Section 30212, in pertinent part, requires that whenever construction, repair, or improvement activity occurs on private property between the last public road and the ocean, a dedication of access along the beach must be provided by the owner. *See* Appendix F.

The Nollans objected to the exaction before the commission in writing on the grounds that their project did not affect existing public access along the coast nor create a need for more public access, and in the absence of such facts it would violate the just compensation provision of the Fifth Amendment to require them to bear fully the cost of providing the public the benefit of more public beach. The Nollans also pled the just compensation issue in their writ of mandate filed in the trial court and argued it in their brief before the appellate court. Over the Nollans' objection, Section 30212 and its application to them were upheld by the California Court of Appeal which applied a California rule of law that "the justification for required dedication [of a property interest to the state] is not limited to the needs of or burdens created by the project." 177 Cal. App. 3d at 723, Appendix A at 7. Thus, no "taking" analysis occurred, only an analysis of whether the exaction was authorized by Section 30212. This approach conflicts with clear precedents of this Court, including: *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and *United States v. Security Industrial Bank*, 459 U.S. 70 (1982).

The Nollans are the owners of a 3,800 square foot residential beach lot in Ventura County, California. The

property is part of what is known as the Faria Tract. Faria County Park, an oceanside public park with a public beach and recreation area, is within one-quarter of a mile upcoast of the Nollan property and was donated to the public by the Faria family, the Nollans' predecessors in interest. Another public beach area, known locally as "the Cove," lies within 1,800 feet downcoast from the Nollans.

At first the Nollans leased their property from the Faria family with an option to buy. The building that was on the Nollans' lot at the beginning of the lease was a small bungalow, totaling only 504 square feet. The Nollans used this original structure as a rental for summer vacationers. After years of rental use, however, the building had fallen into disrepair. The abuse of summer renters, winter vandals, and the natural elements had taken their toll. Its deteriorated condition, small size, and shabby appearance made it an eyesore and a nuisance in an otherwise attractive neighborhood of newer, larger homes. The structure fell below many building, health, and safety code standards and the Nollans were eventually forced to stop renting it.

The Nollans' option to purchase the property had been conditioned on the Nollans' promise to demolish the substandard residence and replace it.[1] On February 25, 1982, the Nollans submitted a permit application to the California Coastal Commission. The application requested a permit to demolish the existing substandard

---

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

dwelling and replace it with a three-bedroom house in keeping with the rest of the neighborhood.

The Nollans were informed by mail that their application had been placed on the administrative calendar for the April 7, 1982, commission hearing in Eureka, California. They were further informed that the commission staff was recommending as a condition to the permit that the Nollans be required to dedicate to the state a public use easement over approximately one-third of their lot. The Nollans were unable to attend the April 7, 1982, hearing because of the burdens involved in traveling to Eureka from their residence in Los Angeles, a distance of some 630 miles. The Nollans were told that they could give their testimony to a member of the commission's staff in Santa Barbara, who would receive comments regarding various applications from persons who were unable to attend the hearing in Eureka, and would then relay the comments to the commission at the hearing.

Mr. Nollan went to Santa Barbara and presented written and oral objections to the imposition of the easement condition recommended by staff. At the April 7, 1982, hearing in Eureka the commission had before it Mr. Nollan's comments plus the Nollans' permit application, maps, photographs, plans, and additional project information solicited by the commission. Together, these materials detailed the location, appearance, dimensions, number of rooms, and intended use of both the existing house and the proposed house. As staff had recommended, the commission approved the permit on condition that the Nollans dedicate an easement for use of their beach to the public. The commission decision stated:

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

On June 3, 1982, the Nollans filed a petition for writ of administrative mandate to have the access condition invalidated. The Nollans argued, *inter alia,* that the commission's authority to exact real property as a condition of land use approval is limited to situations where it appears from the facts that there is a direct causal relationship between the exaction and a public need created by the proposed development which the exaction will meet. In the absence of such a relationship, they argued, the exaction of real property without compensation violates the Fifth Amendment. Finally, the Nollans argued that their plans to demolish an existing single-family dwelling and construct another single-family dwelling in its place did not create a public need for more public beach; that any need the state had for more public beach was a pre-existing need, not a need caused by the Nollans.

The Superior Court agreed with the Nollans and entered judgment in their favor. The court entered findings as follows:

> "Petitioners are not building a single-family residence on a vacant lot but rather are replacing a single-family residence with another single-family residence. Petitioners are not changing the use of the property.

> It does not appear that the replacement home is out of character with the other houses in the area. Although the house that will be built by petitioners is nearly three times as large as the small house now on the property, the record does not show at this time that its placement on existing residential private property will burden the public's otherwise available access to the beach." Clerk's Transcript on Appeal (CT) at 235.

The court entered conclusions of law as follows:

> "The Commission may constitutionally require a grant of public access only when the facts in the case before it demonstrate that a proposed development will place a burden on public access to the coast. . . .
>
> "In ruling on coastal development permits, the Commission must make a case-by-case analysis of the evidence presented to determine whether a burden has been placed on public access to the coast. A valid access condition must be supported by an evidentiary showing of direct and definable adverse impact on public access." CT at 235.

The judgment set aside the commission's decision and remanded the case to the commission to "make proper evidentiary findings, and take action [on the Nollans' permit application] in accordance with this decision." CT at 236. The decision was not appealed. Instead, in return to the writ, the commission stated: "In closed session, the Commission voted to accept the directive of the peremptory writ and to order petitioners' permit application set for a full evidentiary hearing." CT at 243. Thus, the first action of this case became final.

On remand, the commission's staff reported to the commission that the court had merely ruled that "the

record does not show at this time'' a public burden resulting from the Nollans' project. The staff assured the commission that a record could be compiled that would show a public burden, and recommended that the commission affirm its original decision. At the April 28, 1983, hearing on remand, the commission opened the record and received from its staff a mass of information, all from sources unrelated to the Nollan application. The information consisted of such things as literature on public access needs in general, planning guides describing where additional access would be desirable, studies on the effects of development at Lake Tahoe, articles on access problems in other states, excerpts from surfing publications describing Faria Beach as a good place to surf, a draft land use plan for the City of Santa Monica, and commission decisions on other people's permit applications. No new evidence was presented about the Nollan project.[2]

Next the record was opened for public testimony. Two members of the public were called to speak. Both spoke not in opposition to the Nollan project, but in support of gaining more public beach. Neither identified any public needs that would be created by the Nollan project.

No other members of the public were called to speak although the commission had ''all kinds of slips with this number on it.'' The commission might have heard testimony reflecting neighborhood support for the Nollans'

---

[2] The trial court later wrote: "A review of the administrative record indicates that the commission's own staff were petitioners' principal adversaries on remand, improperly assuming the role of advocates." Appendix D at 4.

proposal to tear down their substandard dwelling, except that the commission chairman ruled:

> "I assume at least on behalf of the applicant, Ms. Lambert, you were speaking on behalf of your client and anybody else in support of the position. . . .
>
> . . . .
>
> "Our procedures typically are that when we're having a hearing only we hear from the applicant and then any opposition. . . ." Administrative Record at 544-45.

The public hearing was concluded. The commission voted to retain the condition requiring dedication of an easement from the Nollans.

On June 23, 1983, after the final vote on the Nollans' permit application, the commission held a meeting to adopt findings which would support its decision. It is clear from the transcript of that meeting that the commission was requiring a dedication from the Nollans based upon the location of their property, and upon the commission's agenda for acquisition of public beach, regardless of what impact the Nollans' project would have on the public. One commissioner stated:

> "One thing that Nollan does, if it does come through the court a second time and the court makes the same finding, is it will allow a potential offer to dedicate in the middle of a series of offers to dedicate to suddenly disappear.
>
> "So even though we can look down the coast and up the coast except for Mr. Nollan, we have access . . . we're planning on combining all these together to make this fluid access . . . taking a chunk of an access *that we had counted on* out really causes an inability for continuity . . . ." CT at 486-87 (emphasis added).

On July 15, 1983, the Nollans returned to court with another mandamus petition. Again the Superior Court ruled in favor of the Nollans, repeating the standard it had previously articulated:

> "[T]he commission's authority to impose public access requirements as a condition to permit approval is limited to situations where, subsequent to an evidentiary hearing, it is shown that the applicant's proposed development will have an adverse impact on public access to the sea . . . ." Appendix D at 2.

The court then held that despite its biased efforts the commission on remand had not been able to produce evidence showing that the state was justified in taking property from the Nollans. Appendix D at 4-5.

The commission appealed and on January 24, 1986, the Court of Appeal reversed the trial court, holding that, as a matter of law in California, no such justification need be shown to validate an exaction of property in the regulatory context. The Court of Appeal agreed that "[h]ere the Nollans' project has not created the need for access to the tidelands fronting their property." *Nollan v. California Coastal Commission,* 177 Cal. App. 3d at 723, Appendix A at 7. But the Court of Appeal concluded:

> "Since a direct burden on public access need not be demonstrated, we hold the trial court ruling to be in error.
>
> . . . .
>
> "As we pointed out in *Remmenga v. California Coastal Com.* (1985) 163 Cal. App. 3d 623, 628 [209 Cal. Rptr. 628], the justification for required dedication is not limited to the needs of or burdens created by the project." *Nollan,* 177 Cal. App. 3d at 723, Appendix A at 5, 7.

The Court of Appeal then went through the analysis of what it held was the alternative justification for an exaction of property. The court determined that the commission was "required by the provisions of Public Resources Code section 30212" to demand a dedication of property from the Nollans since their property lies between the last public road and the sea, and because their reconstruction project comes within the all-inclusive definition of "development," and because there was not already adequate access nearby. 177 Cal. App. 3d at 724. Appendix A at 7-9. Having determined that the exaction carried out the mandate of Section 30212, and the legitimate purpose of the Coastal Act "to provide maximum public access to and along the coast," the Court of Appeal ended its inquiry and ordered the trial court's judgment reversed. 177 Cal. App. 3d at 724, Appendix A at 9.

In effect the decision of the Court of Appeal would uphold against a constitutional "taking" claim any legislatively authorized exaction of property which is made a condition of an otherwise valid exercise of the state's police power.

———o———

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. Introduction

In its Fifth Annual Report, issued in January, 1985, the commission reported that as of that date it had imposed uncompensated dedication requirements on 1.817 California property owners. *Coastal Access Program Fifth Annual Report*, A Joint Report of the California

Coastal Commission and the State Coastal Conservancy at 8 (January, 1985). This number has presumably grown by several hundred in the past year. Many of these dedication requirements may be justified. Many may not. In those situations where the dedication requirement is not justified, the owner currently has no recourse in the California courts. The Court of Appeal decision in *Nollan* has been published in California's official reports, along with several other similar appellate decisions dealing with the same controversy. Together, they represent the law in California that the state may acquire property for itself without compensation as a payoff for the issuance of a permit.

This case is different from the regulatory takings cases, such as *Agins v. City of Tiburon,* 447 U.S. 255 (1980), and its progeny. Here, the state is not simply regulating the owners' use of their land. Rather, the state is acquiring an interest in their land and opening their land to physical invasion for public use.

If the law espoused in this decision accurately reflects constitutional requirements the City of New York could avoid the ruling of this Court in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, by the simple device of requiring the property owner to allow the installation of cable equipment as a condition of a permit to make any repairs or maintenance on the building. Unlike the Due Process Clause, however, the Just Compensation Clause is not simply a guaranty that certain procedures will be followed before property is taken. It is a substantive guaranty that, regardless of the procedure employed, private property will not be taken for public use unless the owner is compensated.

This Court has not directly addressed to what extent, and under what circumstances, an owner may be required by the state to give away real property without compensation as a condition of receiving approval to make some use of his land. Several precedents of this Court indicate, however, that it is the loss to the owner which determines whether a "taking" has occurred. *United States v. Causby,* 328 U.S. 256, 261 (1945). It stands to reason, therefore, that since the Nollans are suffering a substantial loss of property rights, they should be entitled to some sort of meaningful "taking" analysis. This is consistent with the cases holding that the review of state action should not stop with a determination that the state validly exercised its police power. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 425; *United States v. Security Industrial Bank,* 459 U.S. at 74-75. Moreover, several decisions of this Court have stated that the purpose of the Just Compensation Clause is to ensure that some individuals alone are not forced to bear fully the cost of public benefits which, in all fairness, should be borne by the public as a whole. *See, e.g., Armstrong v. United States,* 364 U.S. 40, 49 (1960); *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 123 (1978). Yet the California Court of Appeal has refused to consider the Nollans' claim that they are being forced to bear an unfair share of the cost of a public benefit because the value of the exaction of property imposed on them has no relationship to any burden imposed or benefit received as a result of their request.

B. Under California Law the State May Exact a Property Interest To Allow Physical Invasion of the Property Without Payment of Just Compensation and Without Demonstrating That the Benefits Received or Burdens Created by the Property Owner Are Directly Related to the Nature and Extent of the Property Interest Taken

Historically, the rule in California was a sound one. Representative of the early cases is *Scrutton v. County of Sacramento,* 275 Cal. App. 2d 412 (1969):

> "[C]onditions imposed on the grant of land use applications are valid if reasonably conceived to fulfill public needs *emanating from the landowner's proposed use.*" *Id.* at 421 (emphasis added). *See also Ayres v. City Council of the City of Los Angeles,* 34 Cal. 2d 31, 42 (1949); *Mid-Way Cabinet Fixture Manufacturing v. County of San Joaquin,* 257 Cal. App. 2d 181, 192 (1967).

The holdings of the *Scrutton* line of cases were modified in 1971 by the California Supreme Court in *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek,* 4 Cal. 3d 633 (1971). *Associated Home Builders* involved parkland dedication from the developer of a major new subdivision. The Court found the *Scrutton* test satisfied in that the dedication requirement was reasonably conceived to fulfill a public need for additional parkland created by the new subdivision since the new subdivision brought an influx of new residents who would tax existing recreational facilities. In dicta, however, the Court indicated that a dedication requirement would be valid even if it did not meet the *Scrutton* test:

> "We do not find . . . support for the principle urged by Associated that a dedication requirement may be

upheld only if the particular subdivision creates the need for dedication.

> "Even if it were not for the authority of *Ayers* [*sic*] we would have no doubt that section 11546 can be justified on the basis of a general public need for recreational facilities . . . ." 4 Cal. 3d at 638.

As to whether a "taking" could occur under the guise of subdivision regulation, the Court stated that "the city was not acting in eminent domain . . . ." *Id.*

The first case to apply the dicta in *Associated Home Builders* to a case where the *Scrutton* test was ***not*** satisfied was *Norsco Enterprises v. City of Fremont,* 54 Cal. App. 3d 488 (1976). In *Norsco,* the city levied fees in lieu of a dedication of parkland against the owner of an apartment building who had converted the apartment units into condominiums. The owner argued that the mere conversion of apartment units into a condominium form of ownership did not change the population of the building and, therefore, the influx of new residents found in *Associated Home Builders* was not present.

The court held that it was unnecessary for the city to show that Norsco had contributed to the need for parkland:

> "[In *Associated Home Builders*] the high court pointed out that population growth brought about by a proposed subdivision was not the *only* justification for the statute. It rejected an argument, such as that made here. that the required land dedication or 'in lieu fees' were 'justified only if it can be shown that the need for additional park and recreational facilities is attributable to . . . the new subdivision . . . .'" *Norsco,* 54 Cal. App. 3d at 494 (emphasis in original).

Georgia-Pacific Corp. v. California Coastal Commission, 132 Cal. App. 3d 678 (1982), became the first case to apply the *Associated Home Builders* rule to an exaction of a property interest to allow public access. *Georgia-Pacific* also became the first case to extend the rule to an application for permission to *use* land, rather than an application for permission to *subdivide* land.[3]

In *Georgia-Pacific* a lumber company applied for coastal development permits to make certain improvements to its lumber mill property on the north coast of California including the construction of a visitor service facility, parking lot, helicopter pad, hangar, and related outbuildings. The commission conditioned the permits, requiring the company to dedicate specified easements to the public for access to the shoreline. The trial court struck the conditions, ruling that "the public access conditions imposed by the Commission . . . violate Article 1, Section 19 of the California Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, because the conditions deprive Georgia-Pacific of private property without due process of law and without just compensation, in that the scope and extent of the easements required to be dedicated by said conditions are not reasonably related to the nature and impact of the four projects proposed by Georgia-Pacific." 132 Cal. App. 3d at 689 n.7.

The Court of Appeal reversed the trial court and reinstated the conditions. The Court of Appeal recited the

---

[3] This was a significant expansion of the *Associated Home Builders* rule. Although owners have no constitutional right to subdivide land, they do have a right to make viable economic use of their land in accordance with their reasonable investment-backed expectations. *Agins* v. *City of Tiburon*, 447 U.S. at 260.

rule that would eventually be applied to the Nollans in the case at bar:

> "A regulatory body may constitutionally require a dedication of property in the interests of the general welfare as a condition of permitting land development. It does not act in eminent domain when it does this, and the validity of the dedication requirement is not dependent on a factual showing that the development has created the need for it. (*Associated Home Builders, etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 638-640 . . . .) The 'scope and extent' of the easements required by the Commission were 'reasonably related' to one of the principal objectives of the Coastal Act, which is to provide for maximum access to the coast by all the people of this State. (See § 30001.5, subd. (c).) Their relationship to the 'nature and impact' of the proposed projects was not a valid basis for the trial court's determination that the access conditions deprived Georgia-Pacific of its constitutional rights." 132 Cal. App. 3d at 699.

This language from *Georgia-Pacific* has been cited and followed in subsequent cases involving private individuals wishing to do nothing more than construct one single-family home on their one lot. *See, e.g., Remmenga v. California Coastal Commission,* 163 Cal. App. 3d 623, 628-29 (1985); *Grupe v. California Coastal Commission,* 166 Cal. App. 3d 148, 166 (1985). In *Grupe,* the court said that it would still require a finding that the applicant's project contributed "at least in an incidental manner" to the public need for more public beach. In other words, the *Grupe* court, while acknowledging *Georgia-Pacific, see* 166 Cal. App. 3d at 166 n.11, retreated slightly from *Georgia-Pacific,* ruling that it was not enough for the exaction to simply advance the purposes of the Coastal Act. It then found

that Grupe's project sufficiently contributed to the public need because the project involved new development on previously vacant, albeit private, land.

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

> "The cases of *Remmenga* and *Grupe* are dispositive here and require affirmation of the Commission's decision.
>
> "This case and *Grupe* differ in that *Grupe* involved construction of a residence on one of the few remaining vacant lots in the area. *The difference is irrelevant.* The Commission found the Nollan project to be a new development. This finding was required by the provisions of Public Resources Code section 30212. . . .
>
> ". . . Public Resources Code section 30212 requires public access to be provided in new development projects. . . ." *Nollan,* 177 Cal. App. 3d at 723-24, Appendix A at 7-8 (emphasis added).

Thus, the court in the case at bar, reembraced *Georgia-Pacific* and the idea that an exaction is valid when it is authorized by a statute which is a valid exercise of the police power. The inquiry ends there; it is "irrelevant" that the project makes no change in the use of the property and has no effect on existing public access.

C. Under the Just Compensation Clause, the Exaction of a Property Interest To Allow Physical Invasion of the Property for Public Use Is Invalid Without Payment of Compensation Unless the Burdens Created or Benefits Received by the Property Owner Are Directly Related to the Nature and Extent of the Property Interest Taken

The California rule, discussed above, is that permit-issuing agencies can take private property without compensation to fulfill public needs not created by the applicant, when authorized to do so by a regulatory statute. No taking analysis is owed to the applicant by the state courts, because the agency is exercising the state's police power, not its power of eminent domain. The California rule conflicts with decisions of this Court interpreting the protections of the Federal Constitution.

In several cases, this Court has stated that the evaluation of the constitutionality of a governmental act does not cease with a determination that the act was a valid exercise of the police power. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 425, this Court stated:

> "The Court of Appeals determined that § 828 serves . . . legitimate public purpose[s] . . . and thus is within the State's police power. We have no reason to question that determination. It is a separate question however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid."

Again, in *United States v. Security Industrial Bank*, 459 U.S. 70, this Court repeated the rule that valid exercises of governmental power may nonetheless require compensation when property rights are affected:

> "It may be readily agreed that § 522(f)(2) is a rational exercise of Congress' authority . . . . Such

> agreement does not, however, obviate the additional difficulty that arises when that power is . . . used to defeat traditional property interests. The bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation. ... Thus, however 'rational' the exercise of the bankruptcy power may be, that inquiry is quite separate from the question whether the enactment takes property [so as to require compensation]." *Id.* at 74-75.

The government's authority to take property is not separate from the police power. It is simply a part of the police power. The police power is the power of government to serve the people for which it exists. *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941. 956 (1982). The police power authorizes government to undertake any measure deemed necessary, by the people's elected representatives, to benefit the public health, safety, or welfare. *Andrus v. Allard*, 444 U.S. 51, 59 (1979); *Eiger v. Garrity*, 246 U.S. 97, 102-03 (1918). The government's authority to take or damage private property for the benefit of the public welfare is thus simply a subsidiary power of the government's overall police power. *Hawaii Housing Authority v. Midkiff*, — U.S. —, 81 L. Ed. 2d 186, 196 (1984); *Berman v. Parker*, 348 U.S. 26, 31-32 (1954). As far back as *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), this Court rejected the idea that the guaranty against uncompensated takings could be "qualified by the police power." *Id.* at 415. If this were the rule, wrote the Court, "the natural tendency of human nature is to extend the qualification more and more until at last private property

disappears." *Id.*[4] "But," said the Court in *Pennsylvania Coal*, "that cannot be accomplished in this way under the Constitution of the United States." *Id.*

Section 30212 was admittedly enacted to benefit the public welfare. As the Court of Appeal found in the case at bar, Section 30212 serves "the stated purpose of the Legislature in enacting the Coastal Act to provide maximum public access to and along the coast." *Nollan*, 177 Cal. App. 3d at 724, Appendix A at 9. The Nollans concede therefore that it is within the state's police power to take private property to obtain expanded public access along the coast. As *Loretto* and *Security Industrial Bank* point out, however, it is a separate question whether the statute's application to the Nollans would require the payment of compensation. And the duty to address that question cannot be avoided by a conclusion that the state used its police power. Thus, the Nollans were entitled to a meaningful "taking" analysis, not just a determination that their project fell within the parameters of an otherwise valid statute.

D. Under Constitutional Standards the Exaction of Public Access from the Nollans Is Invalid Without Payment of Just Compensation

"In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his

---

[4] This natural tendency of human nature can be observed in the evolution of the California rule discussed in the preceding section. The rule at first applied only to large developments and came as a condition to receiving a governmental privilege to subdivide. The courts have acted "to extend the qualifications more and more until at last" it applies to single-family homeowners and comes as a condition to reconstructing a single-family residence with no change in use.

> neighbor's shoulders . . . . 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. at 416.

This Court has stated on several occasions that the purpose of the guaranty of just compensation is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. at 49; *Penn Central Transportation Company v. City of New York,* 438 U.S. at 123; *Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 83 (1980); *Agins v. City of Tiburon,* 447 U.S. at 260.

In the case at bar it is inconceivable that the Nollans' replacement of a single house, entirely on private property, has created the public need for additional state-owned beach in Ventura County. No findings that such an effect occurred were made by either the commission or the courts below. The trial court twice found that any need for additional access along the coast could not be attributed to the Nollans' action. These factual findings were not disturbed on appeal. The Court of Appeal reversed on the basis that "a direct burden on public access need not be demonstrated." Appendix A at 5. It is clear from the facts that any public need for additional state-owned beach was a preexisting need that, "in all fairness and justice, should be borne by the public as a whole."

In applying the various tests for determining when a "taking" has occurred, this Court has paid particular attention to "the character of the governmental action."

Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 426. In the latter case, this Court stated:

> "'A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some [regulatory] program . . . .'" *Loretto*, 458 U.S. at 426 (quoting *Penn Central*, 438 U.S. at 124).

The exaction of real property from the Nollans is not regulation; it does not merely limit what they can do with their land. To the contrary the Nollans are being required to give up to the government a recognized property interest (the right to exclude others) and to suffer a physical invasion of their residential property. The sole purpose of the "access" requirement is to provide for the public in general to enter upon the Nollans' residential land. The public has preempted the Nollans' right to private enjoyment of the property they purchased. The Nollans must tolerate public use and occupation of their property to whatever degree each day may bring, and, at the end of the day, must clean up after the public.

This Court has also held that "the right to exclude others is generally 'one of the most essential sticks in the bundle of rights that are commonly characterized as property,'" *Ruckelshaus v. Monsanto Co.*, — U.S. —, 81 L. Ed.2d 815, 838 (1984); *Kaiser Aetna v. United States*, 444 U.S. at 176, and is one that generally cannot be taken without compensation. *Kaiser Aetna*, 444 U.S. at 179-80. There are no unique facts or equities in the case at bar that would warrant a departure from the above general rule. Such unique facts or equities are found only when the

project itself creates the need for more publicly owned land, by diminishing the supply of, increasing demand for, or interfering with access to existing public land. This principle was referred to by this Court in *National Cable Television Association v. United States*, 415 U.S. 336 (1974). In that case the Court discussed the difference between a tax and a fee. Taxes were characterized as a nondelegable legislative function which could be levied arbitrarily, in that the amount assessed need not bear any relationship to the benefits received from government or the individual's contribution to public needs. 415 U.S. at 340. The Court held that the power to tax cannot be exercised by administrative agencies. *Id.* at 340. 342. Fees, which *can* be levied by administrative agencies, in order to avoid being declared an invalid tax, must *not* be arbitrary. That is, they must be rationally related to a special benefit bestowed upon the applicant, a public need caused by the applicant, or the agency's direct costs of regulating the applicant. *See id.* at 340-42. To conclude otherwise, said the Court, "carries an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House." *Id.* at 341.

The property exacted from the Nollans in the case at bar is the same as a "fee." The state has simply taken its fee "in kind." The size of the fee was exceptional. The state took one-third of the Nollans' property and *all* of their sandy beach. There was no attempt by the commission or the California courts to quantify any contribution by the Nollans to this general, preexisting public need nor to relate the contribution by the Nollans (if any) to the amount of the exaction. In point of fact, the Nollans

have not contributed to the public need. Taking property from the Nollans cannot therefore be justified as a fee for anything they have done, or received. It is an acquisition of private property that can only be accomplished with the payment of compensation.

———o———

CONCLUSION

The California courts have created a handy fiction which makes it possible for the state to acquire private property without paying for it, while the courts look the other way. When a confiscation of land reasonably relates to the purpose of a statute, it is considered a valid exercise of the police power, not an act of eminent domain. Individuals whose property is taken pursuant to a statute are, under this rule, denied a "taking" analysis when the validity of the exaction is challenged in the California courts. The Nollans are victims of this rule. Under federal constitutional law they were entitled to a meaningful "taking" analysis based on the effect the reconstruction of this house would have on public access along the coast. That analysis would show no relationship sufficient to justify the exaction of one-third of their property without payment of just compensation. They request this Court to grant a hearing in this case to clarify the legal standards under the Fifth and Fourteenth Amendments which limit actions by the state to exact from property owners without payment of compensation a right of physical entry by the public onto their residential property.

DATED: July, 1986.

Respectfully submitted,

Of Counsel

TIMOTHY A. BITTLE
JOHN H. LEE
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

RONALD A. ZUMBRUN
ROBERT K. BEST
COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

Attorneys for Appellants