

No. 86-133

In the
Supreme Court of the United States

OCTOBER TERM, 1986

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

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

**MOTION OF APPELLEE CALIFORNIA COASTAL
COMMISSION TO DISMISS OR AFFIRM**

JOHN K. VAN DE KAMP

Attorney General

N. GREGORY TAYLOR

Assistant Attorney General

JAMEE JORDAN PATTERSON

Deputy Attorney General

110 West A Street, Suite 700

San Diego, California 92101

Telephone: (619) 237-6050

Attorneys for Appellee

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	2
I THE ISSUES PRESENTED BY THIS APPEAL ARE SO BASIC TO LONG-ESTABLISHED LAW ON LAND USE REGULATION AS TO REQUIRE NO FURTHER ARGUMENT	6
A. The Opinion of the Court Below Is Consistent With This Court’s Decisions Analyzing Whether Governmental Regulation Amounts to a Taking.	7
B. The Questions Presented in This Appeal Are Narrow and Factually Specific.	9
C. Appellants Mischaracterize the Opinion of the Court Below.	9
II. APPEAL TO THIS COURT IS IMPROPER.	10
CONCLUSION	11

TABLE OF CITATIONS

	Page
CASES	
Agin v. Tiburon (1980) 447 U.S. 255	7
Associated Home Builders etc., Inc. v. City of Walnut Creek (1971) 4 Cal.3d 633	6
Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek et al. (1971) 404 U.S. 878	2,6,10
CEEED v. California Coastal Zone Conservation Com. (1974) 43 Cal.App.3d 306	3
Grupe v. California Coastal Com. (1985) 166 Cal.App.3d 148	7
Loretto v. Teleprompter Manhattan CATV Corp. (1982) 458 U.S. 419	8,9
Penn Central Transp. Co. v. New York City (1978) 438 U.S. 104	7
Penna. Coal Co. v. Mahon (1922) 260 U.S. 393	7
Remmenga v. California Coastal Com. (1985) ___ U.S. ___ [106 S.Ct. 241, 88 L.Ed.2d 250]	1,6,9

TABLE OF CITATIONS (continued)

	Page
United States v. Security Industrial Bank (1982) 459 U.S. 70.....	8
Whaler's Village Club v. California Coastal Com. (1986) ____ U.S. ____ [106 S.Ct. 1962, 90 L.Ed.2d 648]	1,6,9

CODES

Pub. Resources Code §§ 30001.5(c), 30212	3
28 U.S.C. § 1257(2)	10

CONSTITUTIONS

Article X, § 4 Cal. Constitution	2
--	---

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,

Appellee.

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

**MOTION OF APPELLEE CALIFORNIA COASTAL
COMMISSION TO DISMISS OR AFFIRM**

The California Coastal Commission, appellee, respectfully moves this Honorable Court to dismiss the appeal now pending, or, in the alternative, to affirm the decision of the California Court of Appeal, Second Appellate District, Division Six, on the following grounds:

A. The questions upon which the decision of the cause depends are insubstantial and do not require further argument. These same issues have previously been presented to this Court in the recent cases of *Whaler's Village Club v. California Coastal Com.* (1986) ___ U.S. ___ [106 S.Ct. 1962; 90 L.Ed.2d 648] (dismissed for want of jurisdiction), *Remmenga v. California Coastal Com.* (1985) ___ U.S. ___ [106 S.Ct. 241, 88 L.Ed.2d 250] (dismissed for want of a substantial federal question) and *Associated Home*

Builders of the Greater East Bay, Inc. v. City of Walnut Creek et al. (1971) 404 U.S. 878, (dismissed for want of a substantial federal question).

B. This appeal is improvidently brought because the decision of the California Court of Appeal did not involve the validity of a state statute. Rather, it involved the application of the California Coastal Act by appellee California Coastal Commission in a particular factual context. Moreover, appellants have not stated grounds for review by this Court under certiorari.

STATEMENT OF THE CASE

This appeal attacks the ability of the California Coastal Commission to regulate new coastal development. Specifically, it attacks the ability of the California Coastal Commission to protect publicly-owned tidelands and the people's right of access to those lands, guaranteed by the state constitution, from the cumulative adverse impacts of new coastal development. The public tidelands in California are threatened by the ever-increasing urbanization of the coastline. Buildout and the resultant intensification of private use adversely impacts the public's right to use its tidelands. At stake here is the ability of the California Coastal Commission to balance public rights in tidelands and access to those lands with the desires of coastal property owners to develop their property by requiring dedication of public access in exchange for permit approval to undertake such development. Traditional land use law has long recognized the power of government to condition its approval of development upon dedication requirements to lessen or avoid potential impacts on public resources. This case falls squarely under that long recognized power.

Under article X, section 4 of the California Constitution,¹ no

¹ "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."

upland owner may interfere with the public's right of access to the sea. Further, the State Legislature is obligated to enact all laws necessary to make public access always attainable. Pursuant to this mandate and in light of the growing public awareness of the deleterious impacts of development and increased urbanization on the coast, the California Legislature enacted the Coastal Act of 1976.² One of the express goals of the Legislature's enactment is to maximize public access to and along the coast. (Pub. Resources Code, § 30001.5(c).) Section 30212 of the Coastal Act provides in pertinent part:

“(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.”

It is within this context that the dedication condition at issue here was required.

The facts of this case are accurately set forth in the opinion of the California Court of Appeal, attached as Appendix A to appellants' Jurisdictional Statement.

Briefly, appellants Marilyn Harvey Nollan and James Patrick Nollan (“Nollans”) own a lot on the beach in the Faria Beach Tract

² In 1972, the people of California adopted the Coastal Initiative which found and declared that the coastal zone is a distinct and valuable resource belonging to all the people, that it exists as a delicately balanced ecosystem and that the permanent protection of the remaining natural and scenic resources of the coastal zone is a paramount concern to present and future residents of the state and nation. (*CEEED v. California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306, 321.) The 1976 Act is the legislative continuation of that Coastal Initiative.

in Ventura County, California. (Juris. State., App. A, p. 2.) On March 1, 1982, the Nollans applied to appellee California Coastal Commission ("Commission") for a coastal development permit to demolish a one story, 521 square foot, one bedroom, substandard beach house on their lot and construct a two story, three bedroom, 1,674 square foot residence with attached two-car garage. (*Id.* at pp. 2-3.) They intend to live permanently in the new residence in contrast to the limited occasional vacation use by them and renters of the smaller structure. (*Id.* at p. 3.)

The Commission placed the Nollans' application on what is known as the administrative permit calendar and approved it on April 7, 1982, with a condition requiring lateral public access. The Nollans objected to that condition and requested a full public hearing. This request was denied. (*Ibid.*)

The Nollans then filed a petition for a writ of mandate. On January 18, 1983, after a hearing, the trial court ordered that a "writ of mandate shall issue from this court, remanding the proceedings to respondent and commanding respondent to set aside its decision of April 7, 1982 . . . and set the matter for a full evidentiary hearing." (*Ibid.*)

Upon remand a full public hearing was held before the Commission. At the conclusion of the hearing, the Commission approved the Nollans' permit application again with the condition requiring lateral public access. (*Ibid.*) The Commission found the proposed project would, with others like it, cumulatively adversely impact the public's right to traverse to and along the shoreline. (Juris. State, App. E, pp. 42, 45.)

The Nollans filed a supplemental petition for writ of mandate. The trial court issued a peremptory writ commanding the Commission to issue the permit without the condition requiring public access. The Commission appealed. (Juris. State, App. A, p. 3.)

The Court of Appeal reversed, holding:

"In *Grupe v. California Coastal Com.* (1985) 166

Cal.App.3d 148, 165, the court construed the leading California case on the constitutionality of exactions, *Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, to hold that only an indirect relationship between an exaction and a need to which the project contributes need exist. We agree with the *Grupe* reasoning.

“ . . .

“The court in *Grupe* held that the access condition was related to a need for public access to which Grupe’s project contributed, even though standing alone it had not created the need for access. The court reasoned the project was one more brick in the wall separating the people of California from the state’s tidelands. (*Id.* at p. 168.)

“The *Grupe* court also held that the exaction did not constitute a ‘taking’ because although it caused a diminution in the value of Grupe’s property, it did not deprive him of the reasonable use of his property. (*Id.* at pp. 175-176.)

“As we pointed out in *Remmenga v. California Coastal Com.* (1985) 163 Cal.App.3d 623, 628, the justification for required dedication is not limited to the needs of or burdens created by the project. Here the Nollans’ project has not created the need for access to the tidelands fronting their property but it is a small project among many others which together limit public access to the tidelands and beaches of the state and, therefore, collectively create a need for public access. The cases of *Remmenga* and *Grupe* are dispositive here and require affirmation of the Commission’s decision.” (*Id.* at pp. 5-6.)

**THE ISSUES PRESENTED BY THIS APPEAL
ARE SO BASIC TO LONG-ESTABLISHED
LAW ON LAND USE REGULATION AS TO
REQUIRE NO FURTHER ARGUMENT.**

Appellants' attack in this case is on principles of constitutional law uniformly applied in California for more than 35 years with which this Court has concurred either by express holdings or through dismissal of prior appeals. This appeal presents issues so basic to long-established law on land use regulation that no further argument is required.

In *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek et al.*, *supra*, 404 U.S. 878, this Court concurred with a California Supreme Court decision upholding the constitutionality of dedication requirements as a condition to approval of new development. (*Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633.) Contrary to the argument of appellants here, the validity of such dedication requirements is not dependent upon a factual showing that the development has created the need for it.

Similarly, this Court rejected an appeal, for lack of a substantial federal question, in a case challenging appellee Commission's ability to require fees in lieu of actual dedications for provision of public access. (*Remmenga v. California Coastal Com.*, *supra*, 88 L.Ed.2d 250.) In that case, the California Court of Appeal had upheld imposition of fees, in lieu of provision of dedicated public access, against a constitutional challenge identical to that proffered by appellant here.

Most recently, this Court rejected an appeal, for want of jurisdiction, in a case challenging appellee Commission's ability to require actual dedication of public access. (*Whalers' Village Club v. California Coastal Com.*, *supra*, 90 L.Ed.2d 648.) In that case, too, the California Court of Appeal upheld the access dedication condition against a constitutional challenge on "takings" grounds.

Appellants' argument that the Commission cannot require a dedication as a condition to approval of new development absent a showing of a direct relationship merits no further consideration by this Court.

A. The Opinion of the Court Below Is Consistent With This Court's Decisions Analyzing Whether Governmental Regulation Amounts to a Taking.

The Court of Appeal found that the Nollans' project, together with others like it, limit public access to the tidelands and beaches of the state and, therefore, collectively they create a need for public access. The court, relying on *Grupe v. California Coastal Com.* (1985) 166 Cal.App.3d 148, noted that the project was one more brick in the wall separating the people of California from the state's tidelands. (Juris. State., App. A, p. 6.) The court also relied on the *Grupe* court's reasoning that although the access condition caused a diminution in the value of the property, it did not deprive the owners of the reasonable use of the property therefore the condition did not constitute a taking. (*Ibid.*)

This analysis clearly comports with this Court's test for determining whether a taking has occurred. As this Court stated in *Agin v. Tiburon* (1980) 447 U.S. 255, 260:

"The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 277 U.S. 183, 188, (1928) [48 S.Ct. 447, 448, 72 L.Ed.2 842] or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138, n. 36 (1978) . . ."

Moreover, this Court has recognized that a mere diminution in the value of property cannot amount to a taking. (*Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393, 413; *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 131.) Thus, the analysis employed

by the court below in reviewing the validity of the access condition was consistent with this Court's pronouncements.

Appellants mistakenly rely on *Lorretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419 and *United States v. Security Industrial Bank* (1982) 459 U.S. 70. (Juris. State., pp. 4, 13-14.)³

Lorretto v. Teleprompter Manhattan CATV Corp., *supra*, involved a situation where the property owner took no action which could trigger the police power of the State of New York. New York enacted a statute permitting Teleprompter, a cable television company, to install television cables on apartment buildings without paying the owners of the buildings. This Court found this physical intrusion without any action of the property owner was improper unless payment was made. The case does not involve a permit situation like the present one where the property owner seeks governmental authorization to effect a change in his property and, in approving this change, the government attaches conditions to its approval.

Similarly, *United States v. Security Industrial Bank*, *supra*, 459 U.S. 70, involved a challenge to a bankruptcy statute which purported to retroactively abrogate liens on certain property acquired before the enactment of the provision. This Court expressly did not decide the constitutionality of retroactive application. (*Id.* at p. 74.) The Court noted, instead, that no bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress. (*Id.* at p. 81.) Finding no such explicit command, the Court refused to allow retroactive application of the provision. Again, the case is not one involving the exercise of the police power in a regulatory context. The property owner, the lienholder, sought no governmental authorization to effect a change in his property, unlike the Nollans here.

³ Appellants erroneously assert this is not a so-called "regulatory takings" case. (Juris. State., p. 13.) To the contrary, this undoubtedly is a regulatory case since the Commission, in approving the permit for the Nollans' development, was regulating the use of the property. The access dedication requirement is simply like any other dedication requirement imposed as a condition to development approval.

Appellants' reliance on both *Loretto* and *Security Industrial Bank* is inappropriate.

**B. The Questions Presented in This Appeal
Are Narrow and Factually Specific.**

This case involved the application of the Coastal Act to a narrow, specific set of facts regarding the replacement of a substandard structure. This Court previously found no substantial federal question presented or no jurisdiction in appeals involving broader applications of the Coastal Act. In *Remmenga v. California Coastal Com.*, *supra*, 88 L.Ed.2d 250, the question presented involved the imposition of fees in lieu of access dedications on new development projects on vacant land. In *Whaler's Village Club v. California Coastal Com.*, *supra*, 90 L.Ed.2d 648, an actual dedication requirement was upheld in connection with new construction to protect existing residential development. Here the dedication requirement was imposed on the replacement of a substandard beach cottage with a much larger full time residence, a very narrow and specific factual situation. Further review by this Court is unwarranted.

**C. Appellants Mischaracterize the
Opinion of the Court Below.**

Appellants would have this Court believe the opinion of the court below required no relationship between the condition attached and the project proposed. (Juris. State., pp. 20, 23.) This is not true.

The court below recognized the necessity of a relationship between an exaction and a need to which the project contributes. (Juris. State., App. A, p. 5.) The court held that "the Nollans' project has not created the need for access to tidelands fronting their property but it is a small project among many others which together limit public access to the tidelands and beaches of the state and, therefore, collectively create a need for public access." (*Id.* at p. 16.) The court below simply recognized that the cumulative impacts of many projects may collectively create a need which only one of the projects

individually might not create.⁴ This is precisely the concept approved by this Court in *Associated Home Builders of the Greater East Bay Inc. v. City of Walnut Creek, supra*, 404 U.S. 878, (appeal dismissed for want of a substantial federal question). Appellants' arguments are so explicitly foreclosed by prior decisions of this Court as to warrant no further consideration.

II

APPEAL TO THIS COURT IS IMPROPER

Appellants invoke the jurisdiction of this Court based on 28 United States Code section 1257(2). That section allows an appeal when the validity of a state statute is drawn into question on the grounds it is repugnant to the United States Constitution. Here, however, it is the permit decision of the California Coastal Commission, based on the factual circumstances before it, which is challenged. (Juris. State., App. E.) The California Court of Appeal did not address the validity of a state statute; rather, it upheld the Commission's administrative decision against constitutional attack. (Juris. State., App. A.) Further, appellants did not seek review by the Supreme Court of California of the validity of a state statute. Review of the conditions attached to the Commission's permit decision only was sought. While appellants had challenged the constitutionality of various provisions of the California Coastal Act in their Supplemental Petition for Writ of Mandate, that challenge was not the basis for the decision of the state appellate court. Thus, the appeal should either be dismissed as improvidently brought or, if treated as a petition for review by writ of certiorari, review should be denied on the grounds set forth above.

⁴ The Nollans claim they were entitled to a meaningful "takings" analysis (Juris. State., p. 22). They received one. The court below did not merely find that "their project fell within the parameters of an otherwise valid statute" (*ibid.*), the court clearly analyzed the relationship between their project and the condition as well as the condition's economic impact. The Nollans' argument to the contrary is specious.

CONCLUSION

The constitutional issues raised by appellants need no further review by this Court. The decision of the State Court of Appeal is entirely consistent with prior decisions of this Court and with accepted land use law as it has evolved over the past century. The Court of Appeal decision should be affirmed or, alternatively, the appeal should be dismissed.

DATED: _____

Respectfully submitted,

JOHN K. VAN DE KAMP

Attorney General

N. GREGORY TAYLOR

Assistant Attorney General

JAMEE JORDAN PATTERSON

Deputy Attorney General

Attorneys for Appellee

JJP:lyc:ar
LA82CV0818
8/27/86