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

RESPONSE OF APPELLANTS TO MOTION OF APPELLEE CALIFORNIA COASTAL COMMISSION TO DISMISS

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Together the two arguments presented in the Motion of Appellee, California Coastal Commission, to Dismiss (Motion) ask this Court to rule that California property owners have no opportunity for judicial review of a permit condition requiring a dedication of property which is alleged to cause a "taking" in violation of the Fifth and Fourteenth Amendments. First, the commission argues that such claims cannot be reviewed in proceedings in which damages are not sought. To establish a claim for damages the property owner would have to comply with

the condition and make the dedication. The commission then argues that having made the dedication the property owner has complied with the permit and is deemed to have waived any challenge to its conditions. These arguments, taken together or individually, have no merit.

The motion includes a special section entitled "Statement of Facts" in which it presents facts concerning the Nollans' property and their new house which materially distort the actual circumstances by citing to erroneous statements included by the commission staff in the limited portion of the record submitted to the Court in the Appendix to the Jurisdictional Statement. The portion of the record containing the correct facts on lot size, lot coverage by the new house, and beach area lost to the dedication requirement will be included in the Joint Appendix. Since these factual matters do not appear to bear on the legal arguments raised by the commission in this motion, the relevant evidentiary materials are not submitted with this motion and the true facts concerning the Nollans' property and their project to rebuild their house will be presented in appellants' brief on the merits and the Joint Appendix. However, for the Court's information the Nollans' lot size is approximately 3,800 square feet (not 2,800 square feet); lot coverage by the new house is approximately 1,500 square feet (not 2,464 square feet); and the beach area taken by the dedication is approximately 30% of the total lot (not 10 feet). *See* Appendix to Motion at A-7[1]; Clerk's Transcript at 403.

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[1] In its reply to the supplemental petition for writ of administrative mandamus the commission admitted the allegations in Paragraph No. 26 that the dedication included 30% of the property.

I

THE FEDERAL QUESTION OF WHETHER THE APPLICATION OF CALIFORNIA PUBLIC RESOURCES CODE SECTION 30212 TO THE NOLLANS VIOLATED THE "TAKING" CLAUSE WAS RAISED AND DECIDED IN THE COURTS BELOW

The Motion is based upon a mischaracterization of the claim presented by the Nollans. Citing to Page No. 22 of the Jurisdictional Statement, the commission states:

> "The Nollans assert that despite the validity of the access condition imposed, they were entitled to just compensation." Motion at 6.

The Nollans have never conceded, at Page No. 22 of the Jurisdictional Statement nor anywhere else, "the validity of the access condition." The Nollans assert that the condition on their permit is *invalid* because it will take their property from them for public use without providing just compensation. Page No. 22 of the Jurisdictional Statement states "that it is within the state's police power to take private property to obtain expanded public access along the coast." It is the Nollans' claim, however, that to take their property, the state must exercise its power of eminent domain and pay fair value. Jurisdictional Statement at 7. Since the commission is not authorized to exercise the state's eminent domain power through its authority to grant or deny a coastal development permit (Cal. Pub. Res. Code § 30010 (West 1986)), the invalid condition must be set aside.

The commission's argument confuses the remedy sought with the claim asserted. It is, of course, both true and obvious that the Nollans' petition for writ of administrative mandamus did not pray for damages. It is

false, however, to state that the federal question was not raised. It was raised before the commission.[2] The supplemental petition for writ of administrative mandamus at Paragraph No. 56 expressly alleges as a "basis for relief" that the commission placed

> "an access condition on the approval of petitioners' permit, which condition bears no reasonable relationship to any asserted burden created by the proposed home and constitutes a taking of private property for public use in violation of the Fifth and Fourteenth Amendments of the United States Constitution and article I, section 19 of the California Constitution." Appendix to Motion at A-15.

The trial court's original decision decided this constitutional question in favor of the Nollans:

> "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. No such burden is shown by the facts in the administrative record." Clerk's Transcript at 235 (emphasis added).

The constitutional issue, having been decided by the trial court in its first decision, was not directly discussed in the second decision. The trial court considered it at that point to be "law of this case." Jurisdictional Statement, Appendix at D-15. However, the trial court explained that the basis for the second judgment was the

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[2] The deed restriction offered to the commission by the Nollans stated:

> "This Deed Restriction is executed under protest and shall not be construed as a waiver by the applicants and permit holders of their rights, if any, to be free from government-compelled dedication of private property for public use without just compensation, in violation of the Fifth Amendment." Clerk's Transcript at 348.

failure of the commission to make the constitutionally required showing directed by the first decision:

> "Since no appeal was taken from this Court's first decision, which held that the evidence in the record did not support a finding that petitioners' proposed development would burden the public, the same decision is compelled by the fact that no new evidence of any relevance has been added to the record this time around." Jurisdictional Statement, Appendix at D-17.

Although the Court of Appeal gave the constitutional argument scant attention, it clearly ruled on it, concluding that the constitutional taking claim in this case was controlled by the decision in *Grupe v. California Coastal Commission,* 166 Cal. App. 3d 148 (1985).

> "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." Jurisdictional Statement, Appendix at A-6.

It is surprising to note that the commission's argument in this Motion is directly contrary to the argument it made to this Court in the Motion of Appellee, California Coastal Commission, to Dismiss or Affirm (First Motion). In the First Motion, the commission's principal argument was that the Court of Appeal had addressed the constitutional taking issue and decided it in a manner consistent with this Court's precedents. First Motion at 7-9. The commission expressly stated:

> "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.

> "This analysis clearly comports with this Court's test for determining whether a taking has occurred." First Motion at 7 (citation omitted).

The commission's new argument that no such question was ever presented in the courts below is a distortion of the case before the Court of Appeal.

The fact that the Nollans did not request damages means only that this Court does not face the issue in this case of whether monetary damages are a constitutionally compelled remedy to be mandated over the objections of the state. Under California civil procedure, challenges to the validity of a condition on a permit are to be raised in a proceeding in mandamus.

> "The gravamen of plaintiff's complaint is that the city refused to issue the permit unless plaintiff complied with an assertedly invalid condition. The appropriate method by which to consider such a claim is by a proceeding in mandamus under section 1094.5 of the Code of Civil Procedure." *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 128 (1973).

In this case the Nollans complied with that California procedure and with the law established by both the State Supreme Court and the State Legislature that invalidation through a proceeding in mandamus (and not damages) is the preferred remedy when the commission imposes a permit condition which results in the taking of property in violation of the Fifth and Fourteenth Amendments. *Agins v. City of Tiburon*, 24 Cal. 3d 266 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980); Cal. Pub. Res. Code § 30010 (West 1986) (the commission is not authorized to exercise its power to grant a permit "in a maner which will take or damage private property for public use, without payment of just compensation").

California cases in which a court has found a condition on a permit issued by the commission to be invalid have applied this remedy. *See Georgia-Pacific Corp. v. California Coastal Commission,* 132 Cal. App. 3d 678 (1982); *Liberty v. California Coastal Commission,* 113 Cal. App. 3d 491 (1980).

The commission's Motion cites no case of this Court for authority for its contention that this Court will not take jurisdiction of a challenge to a state statute based on the "Taking" Clause unless a prayer for damages was prosecuted in the lower courts. There are, however, a number of precedents supporting jurisdiction to review a "taking" claim in the absence of any claim for money damages. *See, e.g., Keystone Bituminous Coal Association v. Duncan,* No. 85-1092 (argued Nov. 10, 1986); *Hodel v. Virginia Surface Mining and Reclamation Association,* 452 U.S. 264 (1981); *Kaiser Aetna v. United States,* 444 U.S. 164 (1979); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922).

The federal constitutional issue presented in this case was raised and decided in the courts below. Jurisdiction in this Court is not defeated by the Nollans' decision to pursue only the invalidation remedy, which is the remedy established under state law as the preferred remedy for the Nollans' constitutional claim.

II

THE NOLLANS HAVE NOT WAIVED THE RIGHT TO CHALLENGE THE ACCESS CONDITION UNDER STATE LAW

Contrary to the assertion by the commission there is no general rule under California state law that a permit applicant has no option but to comply with unlawful

demands of a public agency in order to obtain promptly a permit for which he or she is fully eligible. Such a rule, if it existed, would raise serious state and federal constitutional questions if applied to force a permit applicant to the Hobson's choice of waiving a constitutional right or foregoing the permit to which he or she is otherwise entitled.

The possibility for serious abuse of individual rights under such a rule is amply demonstrated by the conduct of the commission in the Nollans' case. The Nollans offered the required deed restriction, asking only to reserve the right to have a court of law review the dedication requirement for conformance with constitutional standards. The commission rejected this offer and instead required "the Nollans to submit an offer . . . that does not contemplate a legal challenge to the Commission's action on the permit." Appendix to Motion at A-3 and A-9.[3]

In California, "the act of filing suit against a governmental entity represents an exercise of the right of petition and thus invokes constitutional protection." *City of Long Beach v. Bozek*, 31 Cal. 3d 527, 534 (1982). Thus, the commission demanded that the Nollans sacrifice two constitutional rights. They were ordered to give up both the right not to have their property taken without just compensation and the right to petition the courts for redress of a constitutional grievance.

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[3] In its reply to the supplemental petition for writ of administrative mandamus the commission admitted the allegations in Paragraph Nos. 6 and 35 concerning the offer of dedication with reservation of rights as set out in footnote No. 2, *supra*.

California law prohibits state agencies from conditioning government benefits on the recipient's waiver of constitutional rights. In *Bagley v. Washington Township Hospital District,* 65 Cal. 2d 499 (1966), the California Supreme Court ruled that public employment could not be conditioned upon employees agreeing to refrain from political campaign activities. In *Parrish v. Civil Service Commission of the County of Alameda,* 66 Cal. 2d 260 (1967), the California Supreme Court invalidated a statute requiring welfare recipients as a condition of continued aid to submit to warrantless searches of their homes. In *Atkisson v. Kern County Housing Authority,* 59 Cal. App. 3d 89 (1976), the California Court of Appeal ruled that recipients of low-income housing could not be forbidden from living with someone of the opposite sex not related by blood or marriage. Recently in *Committee to Defend Reproductive Rights v. Myers,* 29 Cal. 3d 252 (1981), the California Supreme Court ruled that Medi-Cal assistance to pregnant women could not be conditioned upon forfeiture of their constitutional rights to choose an abortion.

Federal law is in accord. In *Perry v. Sindermann,* 408 U.S. 593 (1972), this Court made it clear that a governmental benefit could not be conditioned on the waiver of a constitutional right.

> "For if the government could deny a benefit to a person because of his constitutionally protected [rights], his exercise of those freedoms would in effect be penalized and inhibited." 408 U.S. at 597.

Numerous cases of this Court applying this general principle were collected in the *Perry* opinion. *Id.*

The commission's suggestion that the Nollans should be deemed to have waived their rights to seek judicial review of the unconstitutional obligation imposed on them can have no merit in light of the clear authority against unconstitutional conditions and coerced waivers of constitutional rights. The commission's argument rests primarily on the case of *Pfeiffer v. City of La Mesa*, 69 Cal. App. 3d 74 (1977). In *Pfeiffer* the city placed a condition on a permit approval requiring the landowner to construct certain improvements which the landowner alleged were to benefit other property. The landowner constructed the improvements and then brought an action in inverse condemnation seeking damages from the city for the costs of the improvements. *Id.* at 76. Contrary to the commission's assertion, the court did not rule that no claim could be stated against the city. It held that "the proper method to test the validity of conditions in a building permit is a proceeding in mandamus under Code of Civil Procedure section 1094.5." *Id. Pfeiffer* is an articulation of the rule stated by the California Supreme Court in *Agins v. City of Tiburon, supra*, that a landowner "may attempt through declaratory relief or mandamus to invalidate the ordinance as excessive regulation in violation of the Fifth Amendment . . . . He may not, however, elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into an unlawful taking for which compensation in eminent domain must be paid." 24 Cal. 3d at 273. The recognized rationale for the rule in California is to protect "governmental fiscal planning" from the threat of unforeseen claims for "substantial monetary damages." *Air Quality Products, Inc. v. State of California*, 96 Cal. App. 3d 340, 352 (1979). The Nollans complied with this rule: they

challenged the unlawful permit condition in an action for mandamus under California Code of Civil Procedure § 1094.5 and did not request damages. Appendix to Motion at A-1.

The commission's reliance on *County of Imperial v. McDougal,* 19 Cal. 3d 505 (1977), and *J-Marion Co. v. County of Sacramento,* 76 Cal. App. 3d 517 (1977), is also misplaced. These cases hold that a subsequent property owner cannot challenge a condition which his predecessor in interest accepted without protest or voluntarily agreed to have included in a land use approval. These cases have no relevance here. The Nollans are not attempting to avoid commitments voluntarily made by their predecessor in interest and passed to them. They steadfastly maintained before the commission that the access condition was invalid and that they would refuse to make the dedication unless they could retain the right to seek judicial review of its validity.

Any illusion that a property owner who has accepted a permit retains no cause of action under California law to challenge an unlawful condition was recently dispelled by the California Supreme Court in *Candid Enterprises, Inc. v. Grossmont Union High School District,* 39 Cal. 3d 878 (1985). To satisfy a condition on the approval of a condominium project Candid Enterprises was required under a secured agreement with the school district to pay certain "school-impact fees" at the time it commenced construction. *Id.* at 883. When Candid began construction it paid some fees under protest and brought an action in mandamus to set aside the agreement and require return of the fees paid. *Id.* at 884 The school district argued that by commencing construction under the permit Candid had waived both

the right to challenge the agreement and the right to seek return of the fees paid. Because the court ruled that the district could collect the fees, it did not reach the question of whether Candid had waived its right to seek return of the fees paid. *Id.* at 891 n.7. However, the court did address and decide the question of whether the requirement to pay such fees was subject to challenge, clearly ruling that the mandamus remedy had not been waived:

> "Respondents also press the procedural point that their demurrer should have been sustained. This argument, however, is untenable. Although the writ of administrative mandate does not lie because the Board was not required by law to grant petitioner a hearing . . . the writ of ordinary mandate is available." *Id.* at 885 n.3.

The cases relied on by the commission do not stand for the constitutionally questionable proposition that applicants for a government permit in California may be required to waive a constitutional right as a condition of obtaining a permit for which they are otherwise eligible. Although California land use law does not recognize a damages remedy for unlawful permit conditions and although fees once paid may not be recoverable, a property owner may challenge such condition by a proceeding in mandamus. The Nollans have conformed to this requirement. Their action in proceeding to demolish and reconstruct the home on their property does not alter their continuing dispute with the commission over whether they must execute and record the deed restriction required by their permit.

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CONCLUSION

For the reasons set forth above, the Motion of Appellee, California Coastal Commission, to Dismiss should be denied.

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Respectfully submitted,

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