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## Nollon v. California Coastal Commission: The Conditions Triggering Use of the Essential-Nexus Test in Regulatory-Takings Cases

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**NOLLAN V. CALIFORNIA COASTAL COMMISSION: THE  
“CONDITIONS” TRIGGERING USE OF THE  
ESSENTIAL-NEXUS TEST IN  
REGULATORY-TAKINGS CASES**

**I. INTRODUCTION**

Under its police power, a state government<sup>1</sup> may enact land use regulations restricting private property uses for the public benefit.<sup>2</sup> While this is a broad power, it is not unlimited. When the state’s intrusion upon a landowner’s dominion interest goes “too far,”<sup>3</sup> a landowner may be able to challenge the regulation as a “regulatory taking.”<sup>4</sup> In a regulatory-takings case, the landowner claims that a land use regulation results in a taking of a valuable property interest and accordingly requires the state to pay him or her just compensation under the fifth and fourteenth amendments.<sup>5</sup>

The Supreme Court of the United States has adopted several tests to determine when a land use regulation amounts to a regulatory taking.<sup>6</sup> In *Nollan v. California Coastal Commission*,<sup>7</sup> the Court appeared to suggest that a regulatory taking may be established if a land use regulation fails to “substantially advance legitimate state interests.”<sup>8</sup>

The Court held that where a state imposes a land use *condition* that would amount to a taking if imposed outright, the condition must bear

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1. This Note is limited to discussion of state power in the land use context and does not discuss federal power. For a discussion of federal land use power, see 1 J. SACKMAN, NICHOLS ON EMINENT DOMAIN § 1.24 (rev. 3d ed. 1988).

2. See *infra* notes 26-35 and accompanying text for a discussion of the state’s police power.

3. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 397 (1922).

4. See *infra* notes 30-33 and accompanying text for a general discussion of regulatory takings.

5. U.S. CONST. amend. V. “The fifth amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed 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. 40, 49 (1960). The fifth amendment is applicable to the states via the fourteenth amendment. *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 235-41 (1897).

6. See *infra* notes 36-65 and accompanying text for a discussion of the Supreme Court’s disposition of regulatory takings cases.

7. 107 S. Ct. 3141 (1987) [*Nollan II*].

8. *Id.* at 3146 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)). The Court appeared to suggest that under the facts in *Nollan*, the failure to establish only the first part of the two-part *Agins* test would amount to a taking. *Id.* at 3150. See *infra* notes 44-48 and accompanying text for a discussion of the *Agins* two-part test.

an "essential nexus" with a legitimate state purpose in order to be valid.<sup>9</sup> The failure of a land use condition to meet the "essential-nexus" requirement renders the condition a taking—a taking that can only be accomplished through the state's power of eminent domain, along with the requisite payment of just compensation.<sup>10</sup> Requiring an essential nexus in such cases ensures that the state cannot seek to obtain by a condition what it could not obtain outright without resorting to the use of eminent domain and the requisite payment of just compensation.<sup>11</sup>

This Note analyzes *Nollan* and the future implications of the essential-nexus test. The *Nollan* Court failed to explicitly define the scope of the essential-nexus test for future regulatory-takings cases. If *Nollan* is interpreted broadly, all land use regulations may have to satisfy an essential nexus with a legitimate purpose in order to be valid. This Note, however, rejects a broad interpretation of *Nollan* and proposes that the parameters of *Nollan* should be construed more narrowly. Under the proposed reading of *Nollan*, a land use regulation will only need to satisfy an essential nexus when the state seeks to impose a land use *condition* that would amount to a taking if imposed outright. Limiting application of the essential-nexus test is preferable because applying that standard to *all* land use regulations would place an undue burden on the state's ability to impose land use restrictions.<sup>12</sup> The next section briefly reviews some of the distinctions between the state's power of eminent domain and its police power.

## II. DISTINCTIONS BETWEEN THE STATE'S EMINENT DOMAIN AND POLICE POWER

State government can directly affect private-property interests through two distinct powers:<sup>13</sup> (1) the eminent-domain power;<sup>14</sup> and (2)

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9. *Nollan* II, 107 S. Ct. at 3147-48.

10. *Id.* at 3150. See *infra* notes 16-25 and accompanying text for a discussion of eminent domain.

11. See *infra* notes 203-15 and accompanying text for discussion of the doctrine of unconstitutional conditions.

12. See *infra* notes 212-17 and accompanying text for discussion of a narrower interpretation of *Nollan*.

13. The state may also affect private property through its power to tax. See 1 J. SACKMAN, *supra* note 1, at § 1.41. The power of eminent domain and the power of taxation have certain characteristics in common. . . . [B]oth powers (1) originate as an inherent attribute of sovereignty; (2) are generally operative upon property; and (3) may be asserted only for a public use and to promote the general welfare. *Id.*

See *id.* at § 1.41[1]-[4] for further discussion of the state's taxing power and its effect on property interests.

14. See *infra* notes 16-25 and accompanying text for discussion of eminent domain.

the police power.<sup>15</sup>

### A. Eminent Domain

A "taking" involves a publicly inflicted injury upon a landowner's property interest, requiring just compensation under the Constitution.<sup>16</sup> Eminent domain empowers a sovereign government to take private property for public use without the landowner's consent upon the payment of just compensation.<sup>17</sup> Under its eminent domain power, the government initiates legal proceedings to condemn land for public use.<sup>18</sup> After the landowner is justly compensated, the property is transferred to the state for public use and enjoyment.<sup>19</sup>

Constitutional provisions requiring just compensation for a taking of private property limit the power of eminent domain.<sup>20</sup> The fifth amendment's guarantee that "[no] . . . property [shall] be taken for public use, without just compensation"<sup>21</sup> is, therefore, a limitation, rather than a source, of eminent-domain power.<sup>22</sup>

Typically, eminent domain occurs when the state needs land for a public purpose, such as for a road or a sidewalk, and then appropriates the property for that use.<sup>23</sup> In such a case, the government initiates condemnation proceedings, condemns the land, and then compensates the

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15. See *infra* notes 26-35 and accompanying text for discussion of the state's police power.

16. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1165 (1967).

17. 1 J. SACKMAN, *supra* note 1, at § 1.11. "Authority is . . . universal in support of the amplified definition of eminent domain as the power of the sovereign to take property for public use without the owner's consent upon making just compensation." *Id.* The state's eminent-domain power is an attribute of state sovereignty. *Id.* at § 1.141[3]. The power endures as long as the state exists, and state legislatures may not constrict the power in any manner. *Id.*

18. *Agins v. Tiburon*, 447 U.S. 255, 258 n.2 (1980) (citing *United States v. Clarke*, 445 U.S. 253, 255-58 (1980)). See *infra* text accompanying note 32 for a definition of inverse condemnation.

19. 1 J. SACKMAN, *supra* note 1, at § 1.42[2].

20. *Id.* at §§ 1.3, 1.14[2].

[T]he sovereign power of the state is broad enough to cover the enactment of any law affecting persons or property within its jurisdiction, and as the taking of property within the jurisdiction of a state for public use upon payment of compensation is not prohibited by the constitution . . . it necessarily follows it is within the sovereign power of a state, and it needs no additional justification.

*Id.* at § 1.13[4].

21. U.S. CONST. amend. V.

22. The constitutional provisions which provide just compensation only limit the power of eminent domain and generally do not impose limitations upon valid exercises of the police power. 1 J. SACKMAN, *supra* note 1, at § 1.42[2].

23. *Id.* at § 1.22[1]. "The primary object for the exercise of eminent domain in any community is the establishment of roads." *Id.*

landowner for the forced taking.<sup>24</sup> An exercise of eminent domain necessarily involves the taking of some proprietary interest.<sup>25</sup>

### B. Police Power

A second power belonging to the state which can affect private-property rights is its police power. The police power is the power of the sovereign to regulate property uses on behalf of the public health, safety and welfare.<sup>26</sup> When the state exercises its police power, the owner of private property may be denied unrestricted use of his or her property if the present use is deemed injurious to the public welfare.<sup>27</sup>

A police-power regulation can include, for example, a zoning ordinance that prohibits future operation of an existing factory because pollutants released into the environment pose a harm to a nearby residential neighborhood.<sup>28</sup> A land use regulation often restricts an otherwise valid use of property in order to prevent public harm or detriment caused by its unrestricted use.<sup>29</sup>

As with the power of eminent domain, the state's police power, though very broad, is not unlimited. When regulatory legislation deprives a landowner of virtually all use and enjoyment of his or her property, the regulation may come within the strictures of the law of eminent domain.<sup>30</sup> If a land use regulation goes "too far,"<sup>31</sup> it may be declared an invalid exercise of the state's police power and designated a "regulatory taking."<sup>32</sup> A regulation that amounts to a taking involves an invalid ex-

24. See 6 J. SACKMAN, *supra* note 1, at §§ 22.01, 24.02 for a general discussion of condemnation proceedings. See *id.* at § 24.25 for a general discussion of attempt to purchase land.

25. 1 J. SACKMAN, *supra* note 1, at § 1.11. The power of eminent domain "in its irreducible terms [is]: (a) Power to take, (b) Without the owner's consent, (c) For the public use." *Id.* (emphasis added).

26. *Id.* at § 1.42.

27. *Id.* at § 1.42[2].

28. "The police power may be loosely described as the power of the sovereign to prevent persons under its jurisdiction from conducting themselves or using their property to the detriment of the general welfare." *Id.* The Supreme Court will generally not find a taking when a land use regulation prohibits an otherwise valid use of land in order to prevent public harm or detriment. See *infra* text accompanying note 36 for citations to the "nuisance" cases.

29. See *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (prohibiting operation of brickyard not a taking); *infra* text accompanying note 36.

30. 1 J. SACKMAN, *supra* note 1, at § 1.42[1].

31. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 397 (1922).

32. Regulatory takings refer to cases where the state's exercise of its police power, in regulating private uses of property, amount to a taking of property and require the payment of just compensation. When a landowner challenges a land use regulation on the grounds that a taking has occurred, he or she brings an "inverse condemnation" proceeding. "Inverse condemnation is 'a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been

ercise of both the police power and the eminent-domain power because it fails to compensate the landowner for the loss.<sup>33</sup>

What distinguishes eminent domain from the police power is that eminent domain involves the *taking* of private property for public use while the police power involves *regulating* private property uses to prevent public harm.<sup>34</sup> When the state exercises its police power, the state is not appropriating property, but rather regulating the manner in which private property may be used.<sup>35</sup> Thus, in cases involving a state's proper use of its police power, the Constitution does not require just compensation since no property is actually taken.

### III. TAKINGS ANALYSIS

The Supreme Court of the United States has adopted several different tests to determine when a land use regulation amounts to a taking.<sup>36</sup> The Court, however, has been unable to establish any "set formula" delineating when economic injuries caused by government action must be designated as takings in the interest of "justice and fairness."<sup>37</sup> In *Penn Central Transportation Co. v. New York City*,<sup>38</sup> the Court introduced a

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instituted.'" *Agins*, 447 U.S. at 258 n.2 (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980)).

33. 1 J. SACKMAN, *supra* note 1, at § 1.42[1].

34. *Id.* at § 1.42.

35. *Id.* "Laws and regulations of a police nature . . . do not appropriate property for public use, but simply regulate its use and enjoyment by the owner." *Id.*

36. These tests include: (1) the "physical invasion" or "appropriation" test in which any physical intrusion by the government will effect a taking; *see United States v. Causby*, 328 U.S. 256 (1946) (direct overflight of government aircraft over chicken farm constitutes a taking); *Pumpelly v. Green Bay*, 80 U.S. 166 (1871) (indirect flooding caused by construction of a dam is a taking); (2) the "nuisance" test, where the government tries to prevent a public harm; *see Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (prohibiting operation of sand and gravel business not a taking); *Miller v. Schoene*, 276 U.S. 272 (1928) (cutting down ornamental cedar trees not a taking); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (zoning regulations for public health, safety and welfare presumed valid and not takings); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (prohibiting mining coal a taking because totally destroyed economic value of property); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (prohibiting operation of brickyard not a taking); *Mugler v. Kansas*, 123 U.S. 623 (1887) (prohibiting sale of intoxicating liquors not a taking); and (3) the "severity-of-economic-impact" test, where advancement of an important public interest may warrant destruction of property rights; *see Armstrong v. United States*, 364 U.S. 40 (1960) (total destruction of value of shipbuilder's lien constitutes a taking); *Pennsylvania Coal*, 260 U.S. at 398; *Miller*, 276 U.S. at 279; *Hadacheck*, 239 U.S. at 396; *Euclid*, 272 U.S. at 384; *Goldblatt*, 369 U.S. at 595-96.

For an excellent discussion of the Court's tests, see Note, *FCC v. Florida Power Corp.: Limiting the Utility of the Loretto Rule*, 41 U. MIAMI L. REV. 1149, 1152-62 (1987); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-28 (1978).

37. *Penn Cent.*, 438 U.S. at 124 (citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962)).

38. 438 U.S. 104 (1978).

takings analysis that required a multifactor, case-by-case analysis.

In *Penn Central*,<sup>39</sup> the Court identified three important factors to be considered when a landowner challenges a land use regulation as a taking of property. The factors are: (1) the economic impact of the regulation—whether the regulation has interfered with any of the landowner's distinct, investment-backed expectations, and if so, the extent of interference with the use or value of the property;<sup>40</sup> (2) the character of the government's action—whether there has been any physical invasion of the property by the government;<sup>41</sup> and (3) whether a state tribunal has reasonably concluded that prohibiting the desired use of the land would benefit the public health, safety, morals or general welfare.<sup>42</sup>

Under the multifactor approach, the Court analyzes these three factors to determine whether a land use regulation amounts to a taking of property.<sup>43</sup> If all of the factors are in the landowner's favor, the Court will likely find that a taking has occurred.

In *Agins v. Tiburon*,<sup>44</sup> the Court announced a two-part test which

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39. In *Penn Cent.*, the Court upheld the validity of New York City's Landmark Preservation Law. Application of the statute prevented the owners of the Grand Central Terminal from constructing a multi-story office building above the Terminal, which had been designated a landmark. *Id.* at 115-16, 138.

The owners brought a lawsuit claiming that application of the Landmark Preservation Law effected a taking of property. *Id.* at 107, 119. *Penn Central* argued that any substantial restriction imposed on a landowner's ability to develop his or her land was a taking that required the payment of compensation. *Id.* at 130.

In rejecting the argument, the Court refused to focus on *Penn Central*'s inability to develop the air rights above the terminal as a compensable property interest. *Id.* at 130-31. Rather, the Court considered whether the regulation as applied to the whole building, not just the area above the terminal, effected a taking of property. *Id.* The Court upheld the landmark law because it substantially promoted valid public purposes—enhancing the quality of life and preserving the aesthetic characteristics of the city—and because application of the law did not interfere with the present use of the terminal or impair any investment-backed expectations. *Id.* at 128-38.

40. *Id.* at 124 (citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962)).

41. *Id.* (citing *United States v. Causby*, 328 U.S. 256 (1946)).

42. *Id.* at 125 (citing *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928)).

43. See *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979), for an application of *Penn Central*'s multifactor approach.

44. 447 U.S. 255 (1980). In *Agins*, landowners sued the City of Tiburon for damages and a declaratory judgment that a zoning regulation, limiting construction of single-family homes, was unconstitutional. The zoning ordinance limited construction to five single-family homes on a five-acre tract of land owned by the *Agins*. *Id.* at 257.

The *Agins* Court stated that a regulatory taking is essentially "a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest." *Id.* at 260. The Court upheld the zoning ordinance because the benefit to the public outweighed the burden upon the landowners. *Id.* at 261-62. Therefore, under the ruling in *Agins*, where the public benefit from a land use regulation outweighs the private burden on a landowner, a regulatory taking will not be established. *Id.*

appeared to synthesize the three factors announced in *Penn Central*. The Court held that a general zoning law<sup>45</sup> will not effect a taking if it: (1) substantially advances legitimate state interests,<sup>46</sup> and (2) does not deny an owner economically viable use of his or her land.<sup>47</sup> By considering only these two factors, the *Agins* two-part test abridges the "overall standard of 'fairness and justice'" embodied in *Penn Central*'s multifactor approach.<sup>48</sup>

In certain situations, the Court may find that the existence of a single factor is sufficient to establish a taking. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>49</sup> the Court held that the character of government action alone may be enough to constitute a taking. In *Loretto*, the Court stated that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."<sup>50</sup> When a "physical intrusion [by government] reaches the extreme form of a permanent physical occupation," the Court considers the character of the government action as the determining factor that a taking has occurred.<sup>51</sup>

Thus, when the character of government action results in any permanent physical occupation of land, it will be considered a taking, even if the occupation is de minimus and does not interfere with other uses of the landowner's premises.<sup>52</sup> In such a case, the Court has held that the

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45. Unlike other land use regulations, zoning regulations are presumptively valid as long as they bear a substantial relationship to the public welfare and do not inflict irreparable injury on the landowner. *Id.* at 260-61 (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

46. *Id.* at 260 (citing *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928)).

47. *Id.* (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138 n.36 (1978)).

48. Freilich & Morgan, 10 ZONING & PLANNING LAW REPORT 169, 170 (Dec. 1987) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)). See *Keystone Bituminous Coal Ass'n v. De Benedictis*, 107 S. Ct. 1232, 1242-51 (1987) for an application of the *Agins* two-part test.

49. 458 U.S. 419 (1982). In *Loretto*, a New York law permitted cable television companies to install cable equipment upon rental property. *Id.* at 421. The owner of an apartment building subject to the regulation brought a class action on behalf of all affected owners of real property, alleging that the installation of cable equipment was a trespass and a taking of property without just compensation. *Id.* at 424.

50. *Id.* at 426. The Court recognized that the New York law served a legitimate public purpose by providing valuable educational and community information. *Id.* at 425. However, the Court held that even if the regulation was a valid police-power regulation, it may still be a taking if it impaired essential property rights. *Id.*

51. *Id.* at 426. The Court's per se takings rule was based on historical notions of property rights. *Id.* at 435. Whenever the government permanently and physically occupies property, it destroys the three essential property rights—the rights "to possess, use and dispose." *Id.* (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)).

52. *Id.* at 430. Once a permanent physical occupation is established, the Court will find that a taking has occurred, and only then will it look to the extent of physical occupation by



normal multifactor analysis of *Penn Central* does not apply.<sup>53</sup> Instead, the Court has effectively pronounced that permanent physical occupations by the government are to be viewed as per se takings.<sup>54</sup>

In a recent case, the Court determined that damages are available for a "temporary" taking.<sup>55</sup> In *First English Evangelical Lutheran Church v. County of Los Angeles*,<sup>56</sup> landowners claimed that application of a flood-control ordinance denied them all use of their property<sup>57</sup> and, accordingly, they sought damages for the uncompensated taking of their property.<sup>58</sup> The Court held that damages are available for a temporary taking from the time an invalid regulation is enforced against a landowner until the regulation is judicially declared a taking of property.<sup>59</sup> *First English* thus stands for the proposition that a landowner may recover damages for the period during which an invalid land use regulation resulted in a taking of property.<sup>60</sup> However, a landowner must show that he or she has been "denied . . . all use of [his or her] property for a

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the government to determine the amount of compensation owed to the landowner. *Id.* at 437. The extent of occupation is irrelevant to the initial question of whether there is a taking.

53. *Id.* at 426. In cases which do not involve a permanent physical occupation by government, the Court affirmed that the proper analysis would be the multifactor approach of *Penn Central*. *Id.*

54. *Id.*

55. *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2381 (1987).

56. *Id.*

57. *Id.* at 2384. The Court held that in cases "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 2389. The Court limited the damages remedy to cases where a landowner was denied *all use of property*. *Id.* However, the damages remedy would not be available to a landowner who was denied all use of land because of "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like." *Id.*

The Court remanded the case to the California Court of Appeal for a determination of whether the flood control ordinance actually effected a taking of property by denying the landowners "all use of [their] property." *Id.*

58. *Id.* at 2382.

59. *Id.* at 2388. In four previous decisions, the Court was unable to consider the availability of a damages remedy for a temporary taking of property because of various procedural defects. *See MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986) (issue of taking or remedy not reached without final determination by local government on application of its land use regulation); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) (inverse condemnation claim not yet ripe for review until local government agency rendered final decision on landowner's development application); *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621 (1981) (remedies for taking not considered due to lack of "final judgment or decree" on actual taking); and *Agins v. Tiburon*, 447 U.S. 255 (1980) (Court refused to evaluate economic impact of zoning ordinance until landowner submitted development proposal to local officials).

60. *First English*, 107 S. Ct. at 2389.

considerable number of years"<sup>61</sup> before the damages remedy will be available.<sup>62</sup>

In sum, the Supreme Court has identified several methods to evaluate a takings claim. The Court may look to the state's interest in the regulation, the economic impact on the landowner and whether there has been any physical invasion by the government.<sup>63</sup> If there has been a physical invasion by the government, the Court may declare a per se taking without looking to the state's interest or to the economic impact on the landowner.<sup>64</sup> Finally, where a government regulation has been declared a taking by a court of law, the landowner may be entitled to damages for the period during which the regulation denied the landowner all use of his or her land.<sup>65</sup>

In *Nollan v. California Coastal Commission*,<sup>66</sup> the Court considered whether, under the two-part test announced in *Agins*, there needed to be a particular connection between the state's interest and the regulation imposed, such that the regulation substantially advanced that state interest. The following section discusses the Court's treatment of a takings claim under the *Agins* two-part test.

#### IV. STATEMENT OF THE CASE

##### A. Facts

James and Marilyn Nollan owned a beachfront lot with a small 504 square-foot bungalow<sup>67</sup> in Ventura County, California.<sup>68</sup> The property was flanked on both sides by public beaches, Faria County Park located a quarter-mile to the north, and an area popularly known as "the Cove" located 1,800 feet directly to the south.<sup>69</sup> A concrete seawall separated the beach portion of the Nollans' property from the rest of their lot.<sup>70</sup> The historic mean high tide set the lot's oceanside boundary.<sup>71</sup>

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61. *Id.* (emphasis added).

62. *Id.*

63. See *Penn Cent.*, 438 U.S. at 124-25.

64. See *Loretto*, 458 U.S. at 426.

65. See *First English*, 107 S. Ct. at 2388.

66. 107 S. Ct. 3141 (1987) [*Nollan II*].

67. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3143 (1987) [*Nollan II*].

68. Appellant's Opening Brief at 3, *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987) (No. 86-133). The Nollans' lot was part of a residential subdivision. *Id.*

69. *Nollan II*, 107 S. Ct. at 3143.

70. *Id.* The dry sandy beach area extended over one-third of the Nollans' property. Appellant's Opening Brief at 3, *Nollan II* (No. 86-133).

71. See 2 J. SACKMAN, *supra* note 1, at § 5.33[5]. There are three types of land in which issues involving the public's right of access to the sea may arise. The first is the area seaward from the mean low tide line and is owned entirely by the sovereign. *Id.* The second area is

The Nollans originally leased their property with an option to purchase.<sup>72</sup> The option agreement was contingent upon the Nollans' promise to demolish the existing structure on the lot, and replace it with a single-family home to conform with the rest of the neighborhood.<sup>73</sup> In order to construct the improvements, California Public Resources Code sections 30106, 30212, and 30600<sup>74</sup> required that the Nollans obtain a coastal development permit from the California Coastal Commission (Commission).<sup>75</sup>

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located between the mean high tide and the mean low tide. This area is known as the foreshore and is considered to be held in trust by the sovereign for public use. *Id.* The third area extends from the mean high tide to the vegetation line. This "dry sand beach" area may be owned by private owners to the public's exclusion. *Id.*

72. *Nollan II*, 107 S. Ct. at 3143.

73. *Id.* The neighborhood was residential with attractive moderate-sized homes. Appellant's Opening Brief at 4, *Nollan II* (No. 86-133).

74. Section 30106 provides in pertinent part:

"Development" means, on land, . . . the placement or erection of any solid material or structure; . . . construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public or municipal utility;  
 . . . .

Cal. Pub. Res. Code § 30106 (West 1986).

Section 30212 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.

(b) For purposes of this section, "new development" does not include

. . .

(2) The demolition 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 as the former structure.

(3) Improvements to any structure which do not change the intensity of its use, which do not increase either the floor area, height, or bulk of the structure by more than 10 percent, which do not block or impede public access, and which do not result in a seaward encroachment by the structure.

. . .

(c) Nothing in this division shall restrict public access nor shall it excuse the performance of duties and responsibilities of public agencies which are required by Sections 66478.1 to 66478.14, inclusive, of the Government Code and by Section 4 of Article X of the California Constitution.

*Id.* § 30212. See *infra* note 170 for text of section 4 of article X of the California Constitution.

Section 30600 provides in pertinent part:

(a) In addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, on or after January 1, 1977, any person wishing to perform or undertake any development in the coastal zone . . . shall obtain a coastal development permit. . . .

Cal. Pub. Res. Code § 30600 (West 1986).

75. *Nollan II*, 107 S. Ct. at 3143.

### B. Procedural History

The Nollans submitted their permit application to the Commission proposing to demolish the existing bungalow and replace it with a "two-story, three-bedroom, 1,674 square-foot residence with [an] attached two-car garage."<sup>76</sup> The Commission approved the permit but conditioned its approval upon the Nollans' grant of a public easement across their property between the mean high tide line and the seawall.<sup>77</sup> The Commission determined that the easement would allow for greater public access to both Faria County Park and the Cove.<sup>78</sup>

The Nollans filed a petition for a writ of administrative mandamus<sup>79</sup> requesting that the condition be invalidated.<sup>80</sup> The Nollans argued that the Commission could not impose the condition without an evidentiary showing that the Nollans' proposed development project would work a direct adverse impact on public access to the beach.<sup>81</sup>

The California Superior Court for the County of Ventura held that the Commission failed to demonstrate any potential adverse effects that might flow from the Nollans' proposed construction.<sup>82</sup> Accordingly, the court remanded the case to the Commission for a "full evidentiary hearing" on whether the Nollans' project would have any direct adverse effect

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76. *Nollan v. California Coastal Comm'n*, 177 Cal. App. 3d 719, 721, 223 Cal. Rptr. 28, 29 (1986) [*Nollan I*].

77. This area was approximately one-third of the Nollans' property. Appellant's Opening Brief at 5, *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987) (No. 86-133). See *supra* note 70 and accompanying text.

78. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3143 (1987) [*Nollan II*].

79. The California Code of Civil Procedure defines the procedure for a writ of administrative mandamus as follows:

(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. . . .

Cal. Civ. Proc. Code § 1094.5 (West Supp. 1988).

80. *Nollan II*, 107 S. Ct. at 3143.

81. *Id.*

82. *Id.* The trial court's findings included:

1. The Nollans are being required to "dedicate the entire beach, approximately one-third of the property."
2. The Nollans "are not building a single-family residence on a vacant lot but rather are replacing a single-family residence with another single-family residence."
3. The Nollans "are not changing the use of the property."
4. "It does not appear that this replacement home is out of character with the other houses in the area."
5. "[T]he record does not show at this time that [the new home's] placement on existing residential private property will burden the public's otherwise available access to the beach."

Appellant's Opening Brief at 6, *Nollan II* (No. 86-133) (quoting Joint Appendix at 37-38).

on public access to the beach.<sup>83</sup>

The Commission held a public hearing and determined that the Nollans' new home would impair the public's ability to view the ocean.<sup>84</sup> The Commission's findings were not based on the potential effect of the Nollans' project standing alone, but rather on the "cumulative impact" of their project together with other shorefront development.<sup>85</sup>

The Commission found that the Nollans' new house would contribute to the development of a wall of residential structures which would impair the public's view of the coastline.<sup>86</sup> In addition, the new house would increase private use of the shorefront.<sup>87</sup> The increased private use of the shorefront coupled with the cumulative effect of other development, would burden public access to the ocean according to the Commission's findings.<sup>88</sup> The Commission also noted that forty-three out of sixty coastal-development permits granted along the same tract of land had been similarly conditioned to provide for lateral public access.<sup>89</sup> Therefore, in order to offset the potential adverse effects of the Nollans' project, the Commission upheld the easement condition.<sup>90</sup>

The Nollans thereafter filed a supplemental petition for a writ of administrative mandamus with the superior court.<sup>91</sup> They argued that the condition's imposition violated the takings clause of the fifth amend-

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83. *Id.* at 7; *Nollan II*, 107 S. Ct. at 3143 (citing Appellant's Opening Brief at 7, *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987) (No. 86-133)).

84. *Nollan II*, 107 S. Ct. at 3143.

85. Appellant's Opening Brief at 9, *Nollan II* (No. 86-133). The Commission's findings indicated that:

[T]he [Nollans'] lot is located along a unique stretch of coast where lateral public access [is] inadequate due to the construction of private residential structures and shoreline protective devices along a fluctuating shoreline. At times the wet sandy beach extends up to both the applicant's and other residents' existing seawalls, preventing pedestrian passage when the tide is in. . . . [T]he Commission notes that there are several existing provisions of pass and repass lateral access benefits already given by past Faria Beach Tract applicants as a result of prior coastal permit decisions. The access required as a condition of this permit is part of a comprehensive program to provide continuous public access along Faria Beach as the lots undergo development or redevelopment. The Commission therefore finds that, pursuant to the public access policies and specifically Section 30212(a) [see *supra* text accompanying note 74 for pertinent text of the statute], that adequate public access does not exist nearby and a deed restriction offer to allow the public pass and re-pass rights is consistent with both past Commission action and with the site's ability to provide such access.

*Id.* at 9-10.

86. *Nollan II*, 107 S. Ct. at 3143-44.

87. *Id.* at 3144.

88. *Id.*

89. *Id.*

90. *Id.* at 3143.

91. *Id.*

ment.<sup>92</sup> The Nollans asserted that unless the Commission could present evidence of a definable adverse impact on public access, it could not condition the permit.<sup>93</sup>

The superior court ruled in favor of the Nollans solely on statutory grounds and did not reach the takings claim.<sup>94</sup> The court held that the Commission could impose public-access conditions on coastal development permits for the replacement of single-family residences only in cases where the Commission could show either direct or cumulative adverse impact on public access to the sea.<sup>95</sup> The court found the evidentiary basis established by the Commission too speculative and not specific enough to the Nollans' project.<sup>96</sup> Therefore, the Commission's conclusion that the proposed development would create either a direct or cumulative burden on the public's access to the sea could not be supported.<sup>97</sup> The court granted the writ of mandamus and ordered the permit condition eliminated.<sup>98</sup>

The Commission appealed to the California Court of Appeal.<sup>99</sup> While the appeal was pending, the Nollans, in compliance with the option agreement, purchased the property and made substantial improvements to the bungalow.<sup>100</sup> However, the Nollans did not notify the Commission of these actions.<sup>101</sup>

The court of appeal reversed the superior court's holding.<sup>102</sup> The court held that the trial court had applied an incorrect legal standard for determining whether the permit could be conditioned on providing access.<sup>103</sup> Under the court of appeal's reading of the Coastal Act, section 30212 of the Public Resources Code<sup>104</sup> allowed conditioning coastal development permits upon the owner's grant of access even without a showing of direct or cumulative burden on public access.<sup>105</sup>

The court of appeal applied the reasoning of *Grupe v. California*

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92. *Id.* at 3144.

93. Appellant's Opening Brief at 10, *Nollan II* (No. 86-133).

94. *Nollan II*, 107 S. Ct. at 3144.

95. *Id.*

96. Appellant's Opening Brief at 10-11, *Nollan II* (No. 86-133).

97. *Id.*; *Nollan II*, 107 S. Ct. at 3144.

98. *Nollan II*, 107 S. Ct. at 3144.

99. *Nollan I*, 177 Cal. App. 3d 719, 223 Cal. Rptr. 28.

100. *Nollan II*, 107 S. Ct. at 3144.

101. *Id.*

102. *Nollan I*, 177 Cal. App. 3d at 725, 223 Cal. Rptr. at 32.

103. *Id.* at 722-23, 223 Cal. Rptr. at 30.

104. CAL. PUB. RES. CODE § 30212 (West 1986). See *supra* text accompanying note 74 for pertinent text of the statute.

105. *Nollan I*, 177 Cal. App. 3d at 723-25, 223 Cal. Rptr. at 30-31.

*Coastal Commission*.<sup>106</sup> The *Grupe* court had held that exactions pursuant to the Coastal Act required only "an indirect relationship between a proposed exaction and a need to which the development contributes."<sup>107</sup>

Under the *Grupe* court's interpretation of the Coastal Act and California case law, a coastal-development permit that is conditioned upon the landowner's grant of public access will be valid as long as the proposed development would contribute *indirectly* to the public's need for beachfront access.<sup>108</sup> The *Grupe* court determined that any project that indirectly burdened access could validly be conditioned to provide public access.<sup>109</sup>

Relying on the reasoning in *Grupe*, the court of appeal, in *Nollan*, held that as long as the Commission could show that the cumulative impact of the project in conjunction with other shorefront development indirectly contributed to the public's need for access, the imposition of an access condition would be valid.<sup>110</sup> Thus, the court reversed the superior court's grant of the writ of mandamus and held that the Commission's imposition of an access condition under section 30212 would be valid even if the project did not directly create the need for access.<sup>111</sup> The court of appeal also ruled against the Nollans' takings claim.<sup>112</sup>

The California Supreme Court denied the Nollans' petition for review.<sup>113</sup> The Nollans appealed to the Supreme Court of the United States,<sup>114</sup> raising the constitutional issue of whether the Commission's

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106. 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1986).

107. *Id.* at 166, 212 Cal. Rptr. at 589; *see also* Associated Home Builders of the Greater East Bay v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971); Remmenga v. California Coastal Comm'n, 163 Cal. App. 3d 623, 209 Cal. Rptr. 628 (1985).

108. *Grupe*, 166 Cal. App. 3d at 163-67, 212 Cal. Rptr. at 587-90.

109. The facts in *Grupe* clearly met the indirect-burden test.

[The] beach front home is one more brick in the wall separating the People of California from the state's tidelands. Although . . . [the] home alone has not created the need for access to the tidelands fronting . . . [the] property, it is one small project among a myriad of others which together do severely limit public access to the tidelands and beaches of this state, and therefore collectively create a need for public access. Thus, the condition exacted to facilitate access is related to a need to which . . . [the] project contributes, even though standing alone, it has not created the need for access.

*Grupe*, 166 Cal. App. 3d at 167, 212 Cal. Rptr. at 589 (footnote and citations omitted).

110. *Nollan I*, 177 Cal. App. 3d at 723-25, 223 Cal. Rptr. at 31.

111. *Id.*

112. *Id.* at 722-23, 223 Cal. Rptr. at 30-31. The court applied the identical takings analysis of the *Grupe* court and ruled that the easement condition did not deprive the Nollans of all reasonable use of their property. Thus, the condition was a valid regulation of property. *Id.* at 723, 223 Cal. Rptr. at 30; *see also Grupe*, 166 Cal. App. 3d at 174-77, 212 Cal. Rptr. at 604.

113. *Id.* at 725, 223 Cal. Rptr. at 32.

114. The Supreme Court's jurisdiction was invoked pursuant to 28 U.S.C. § 1257(2) which provides in pertinent part:

imposition of the access condition effected a taking of property in violation of the fifth and fourteenth amendments.<sup>115</sup>

The Supreme Court reversed the California Court of Appeal.<sup>116</sup> The Court held that the imposition of the access condition was an invalid exercise of the state's police power because the condition failed to satisfy the requisite connection with a legitimate state interest.<sup>117</sup> The condition failed to satisfy an "essential nexus" with the state's purpose for conditioning the development, and thus failed to substantially advance a legitimate state interest.<sup>118</sup>

The Court ruled that the Commission could not constitutionally require the Nollans to grant the access easement as a condition to a development permit due to the lack of an essential nexus.<sup>119</sup> Under the Court's holding, the only way California could legitimately obtain an easement across the Nollans' property would be to exercise its power of eminent domain by condemning the property and compensating the Nollans for the taking.<sup>120</sup>

## V. REASONING OF THE COURT

The Court used a three-step approach in concluding that the easement condition imposed on the Nollans amounted to a taking of prop-

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

....

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. . . .

28 U.S.C. § 1257 (1982) (amended 1988).

115. *Nollan II*, 107 S. Ct. at 3145. The constitutional questions presented to the Court were:

(1) Where the Nollans' proposal to rebuild their private residence on the same site as a previous house did not create the public's need to use the adjacent beach, does the requirement that they dedicate a public right-of-way across all of their private beach and allow the physical invasion of one-third of their property by the public at large constitute a "taking" under the Fifth and Fourteenth Amendments?

(2) Where a state statute authorizes the exaction of a public right-of-way as a condition on the approval of a coastal development permit, must the state courts evaluate the facts of each case to determine whether the burdens imposed on the individual property owner would constitute a "taking" under the Fifth and Fourteenth Amendments?

Appellant's Opening Brief at i, *Nollan II* (No. 86-133).

116. *Nollan II*, 107 S. Ct. at 3150.

117. *Id.* at 3148.

118. *Id.* at 3148-50. The Court recognized California's right to prohibit development that impaired legitimate state interests, as long as the landowner was not deprived of all viable use of his or her land. *Id.* at 3147.

119. *Id.* at 3150.

120. *Id.*



erty.<sup>121</sup> First, the Court identified two circumstances where government action clearly results in a taking of property: (1) any exercise of the power of eminent domain; and (2) any "permanent physical occupation" of private property by government itself or by others pursuant to government regulation.<sup>122</sup> The Court recognized that had the permit condition that was imposed on the Nollans been imposed outright, rather than as a condition to the permit, it would have certainly constituted a taking under either theory.<sup>123</sup>

The Court next sought to determine whether imposing the condition as an exercise of the police power would alter the finding that a taking had occurred.<sup>124</sup> The Court recognized that the state clearly had the power to prohibit development of any beachfront property, and could deny the issuance of a development permit outright, as long as there was a valid purpose for the denial.<sup>125</sup> To be a valid exercise of the state's police power the regulation must: (1) substantially advance legitimate state interests; and (2) not deny an owner economically viable use of his or her land.<sup>126</sup>

Finally, the Court determined that the Commission's greater power to deny the permit necessarily included the lesser power to condition the same permit, as long as the condition imposed served the same legitimate end as the prohibition on development itself.<sup>127</sup> It was the failure to satisfy this last requirement—the requirement of an "essential nexus"—that rendered the easement condition that was imposed on the Nollans an invalid exercise of the police power, and thus, a taking of property without just compensation.<sup>128</sup>

#### A. *Eminent Domain and Permanent Physical Occupation*

Justice Scalia, writing for the majority, reviewed basic eminent domain principles and the rule of *Loretto v. Teleprompter CATV Corp.*<sup>129</sup> Regarding eminent domain, the Justice stated that if the Commission had required the Nollans to grant outright an easement for public access across their property, there clearly would have been a taking of property

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121. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3145-50 (1987) [*Nollan II*].

122. *Id.* at 3145.

123. *Id.* at 3145-46.

124. *Id.* at 3146-47.

125. *Id.* at 3146.

126. *Id.*

127. *Id.* at 3148.

128. *Id.* at 3148-50.

129. 458 U.S. 419 (1982).

requiring the payment of compensation.<sup>130</sup> The Court observed that “one of the principal uses of the eminent domain power is to assure that the government be able to require [necessary] conveyance[s], . . . so long as it pays for them.”<sup>131</sup>

In addition to noting that there is a taking whenever government exercises its eminent-domain power, the Court restated the *Loretto* rule for cases involving public easements.<sup>132</sup> In *Loretto*, the Court held that a permanent physical occupation by the government, or by others pursuant to a government regulation, is a taking per se, thus obviating the need for judicial balancing of possible public benefits or economic impact to the landowner resulting from the regulation.<sup>133</sup>

Tailoring the *Loretto* rule to the facts of the case before it, the Court stated:

[A] “permanent physical occupation” has occurred . . . where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.<sup>134</sup>

Justice Scalia reasoned that the public-access easement impaired “the right to exclude [others . . .], “one of the most essential sticks in the bundle of rights that are commonly characterized as property.””<sup>135</sup> The Court, accordingly, concluded that had the Commission imposed the easement outright upon the Nollans, there would have been a permanent physical occupation, and thus, a taking under *Loretto*.<sup>136</sup>

In sum, the *Nollan* Court held that under either an eminent-domain theory or under the *Loretto* rule there would have been a taking had the Commission imposed the public-access easement outright upon the Nollans’ property.<sup>137</sup> The Court next considered whether requiring that the Nollans grant an easement as a condition to their development permit, would alter the determination that a taking had occurred.<sup>138</sup>

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130. *Nollan v. California Coastal Comm’n*, 107 S. Ct. 3141, 3145 (1987) [*Nollan II*].

131. *Id.* An “appropriation of a public easement across a landowner’s premises . . . constitute(s) [a] taking of a property interest.” *Id.*

132. *Id.* (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

133. *Loretto*, 458 U.S. at 426 (“a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve”). See *supra* notes 49-54 and accompanying text for a discussion of *Loretto*.

134. *Nollan II*, 107 S. Ct. at 3145.

135. *Id.* (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982), quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

136. *Id.*

137. *Id.*

138. *Id.* at 3146-48.

### B. *The Commission's Power to Deny the Permit*

The Court acknowledged that the Commission had the power to prohibit development on beachfront property as long as the prohibition would: (1) substantially advance legitimate state interests; and (2) not deny the landowner all economically viable use of his or her land.<sup>139</sup> In order for a land use regulation to be a constitutional exercise of the state's police power, both requirements must be satisfied. In *Nollan*, the Court did not reach the second prong of the test because the easement condition failed to substantially advance a legitimate state interest.<sup>140</sup>

As part of its analysis of permissible state interests, the Court identified a "broad range of governmental purposes and regulations"<sup>141</sup> that might satisfy the requirement that the regulation substantially advance the government purpose. The Court assumed, for purposes of the *Nollans'* case, that California had three legitimate state interests to advance:<sup>142</sup> (1) protecting the public's right to see the public beaches; (2) overcoming the public's "psychological barrier" to using the public beaches; and (3) preventing congestion on the public beaches.<sup>143</sup>

### C. *The Commission's Power to Condition the Permit*

The Court held that if the Commission could have shown that the *Nollans'* project would impair any of the identified interests, then the project could be prohibited unless the denial amounted to a taking.<sup>144</sup> The Court asserted that the Commission's greater power to prohibit development would necessarily include the lesser power to impose a condition on the same project, as long as the prohibition and the condition both served the same end.<sup>145</sup>

Assuming that protecting the public's *view* of the ocean was a valid

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139. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3146 (1987) [*Nollan II*]. The Court applied the *Agins v. Tiburon*, 447 U.S. 255 (1980), two-part test: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." *Id.* at 260 (citation omitted). See *supra* notes 44-48 and accompanying text for a discussion of *Agins*.

140. *Nollan II*, 107 S. Ct. at 3147-48.

141. *Id.* at 3147 (citing *Agins v. Tiburon*, 447 U.S. 255, 260-62 (1980) (scenic zoning); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (landmark preservation); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1962) (residential zoning)).

142. *Nollan II*, 107 S. Ct. at 3147.

143. *Id.*

144. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3147 (1987) [*Nollan II*].

145. *Id.* The Court held that "a permit condition that serve[d] the same legitimate police power purpose as a refusal to issue the permit should not be a taking if the refusal to issue the permit would not constitute a taking." *Id.*

purpose for the Commission to pursue, the Court stated that any land use condition that actually protected the public's view of the ocean, such as a height limitation on structures or fences, would be a valid condition.<sup>146</sup> Even a requirement that the Nollans "provide a viewing spot on their property for passersby with whose [view] of the ocean [the Nollans'] new house would interfere" would be valid.<sup>147</sup> The conditions would be valid because they served the same purpose as the Commission's purpose—protecting the public's ability to view the beach<sup>148</sup>—even though those conditions imposed outright would have constituted a taking of property.<sup>149</sup>

### 1. The essential-nexus test

The Court held that the Commission's power to impose virtually any condition on development was not unlimited;<sup>150</sup> rather, in order for the condition to be valid, it must bear an "essential nexus" to a legitimate state interest.<sup>151</sup> The Court suggested that the requirement of an essential nexus between a legitimate state interest and the condition must be present whenever a state seeks to impose a condition that would amount to a taking if imposed outright.<sup>152</sup> The justification for the nexus requirement in such cases is the constitutional requirement that just compensation be paid for the taking of property.<sup>153</sup> The Court stated:

The evident constitutional propriety [for the imposition of conditions] disappears . . . [when] the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, . . . *the original* purpose of the building restriction . . . becomes, quite simply, the obtaining of an easement to serve

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146. *Id.* at 3147-48.

147. *Id.* at 3148.

148. *Id.* at 3147-48.

149. *Id.*

150. *Id.* at 3146-48.

151. *Id.* at 3148. The Court gave the following example of a condition that failed to have an essential nexus with a legitimate state interest:

[Assume that a state] law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute \$100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a \$100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster.

*Id.*

152. *Id.* at 3148, 3150.

153. *Id.* at 3150.

some valid government purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion."<sup>154</sup>

The essential-nexus test ensures that when states impose conditions on development that would effect a taking if imposed outright, the condition complies with constitutional standards.

## 2. Application of the essential-nexus test

The Commission argued that the Nollans' project would interfere with "visual access" to the beach, thus creating a "psychological barrier" to access.<sup>155</sup> The cumulative effect of the project with other shorefront development would also contribute to the need for more "access."<sup>156</sup> The burdens on the different kinds of access would be alleviated, it was argued, by imposing an easement to provide "lateral access" across the Nollans' private beachfront property which separated two public beaches.<sup>157</sup>

By closely analyzing the Commission's argument, the Court concluded that the condition failed to satisfy an essential nexus with a legitimate interest.<sup>158</sup> The Commission argued that a wall of houses completely blocked the view of the beach and a person looking from the road would not be able to see any portion of the beach.<sup>159</sup> Therefore, an

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154. *Id.* at 3148 (emphasis added) (quoting *J.E.D. Assoc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981); Brief for United States as *Amicus Curiae* at 22 & n.20, *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987) (No. 86-133); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982)). In a footnote, the Court stated:

One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land use goals purportedly sought to be served than would result from more lenient (but nontradeable) development restrictions. Thus, the importance of the purpose underlying the prohibition not only does not *justify* the imposition of unrelated conditions for eliminating the prohibition, but positively militates against the practice.

*Id.* n.5 (emphasis in original).

155. *Id.* at 3149.

156. *Id.*

157. *Id.*

158. *Id.* The Court stated: "It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollan's property reduces any obstacles to viewing the beach created by the new house." *Id.*

159. *Id.* at 3143. The majority rejected Justice Brennan's interpretation of the Commission's argument that:

ease would be needed to offset the impairment of the oceanview caused by the Nollans' project and to provide the public with lateral access between the two beaches. The Court stated, however, that the lateral-access easement would only be used by people who were *already* situated on these beaches, and that consequently, the potential impairment of the oceanview caused by the Nollans' project would have absolutely no effect upon *their* access to the public beaches.<sup>160</sup> Since the lateral-access condition was to provide access for people already on the beach, there was clearly no connection between the condition imposed by the Commission and the potential impairment of the oceanview that was to be created by the Nollans' project.

The Court stated that its finding of a lack of an essential nexus under the facts in *Nollan* was "consistent with the approach taken by every other court that has considered the question, *with the exception of the California state courts.*"<sup>161</sup>

#### D. The Majority's Conclusion

The Court ended its analysis of the Nollans' taking claim by recognizing that the Commission had the right to advance its "comprehensive program" of regulating development of the shorefront, but only if it complied with the essential-nexus requirement.<sup>162</sup> An essential-nexus requirement ensures that when the state imposes a condition that would amount to a taking if imposed outright, the state's real purpose will be to further a valid public interest, rather than to avoid paying just compensation for the taking of property.<sup>163</sup>

The Court's opinion can be summarized as follows: When a state seeks to impose a land use *condition* that would amount to a taking if

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[A] person looking toward the beach from the road will see a street of residential structures . . . and conclude that there is no public beach nearby. If, however, that person sees people passing and repassing along the dry sand behind the Nollans' home, he will realize that there is a public beach somewhere in the vicinity.

*Id.* at 3150.

160. *Id.* at 3149, 3150.

161. *Id.* at 3149 (emphasis added). The *Nollan* Court cited a number of cases supporting the conclusion that the Commission failed to establish an essential nexus between the condition imposed and the interest to be advanced by the condition. *Id.*

162. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3150 (1987) [*Nollan II*].

163. *Id.* at 3148. The Court stated:

[O]ur cases describe the condition for abridgement of property rights through the police power as a 'substantial advanc[ing]' of a legitimate State interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective.

*Id.* at 3150 (emphasis in original).

imposed outright, the condition must bear an "essential nexus" to a legitimate state interest in order to be valid.<sup>164</sup> In other words, the condition imposed must actually further the same end as the state's purpose for imposing the condition, such that the latter is substantially advanced by the former. The failure to establish an essential nexus will render the condition a taking of property.<sup>165</sup> The state can then only effectuate its purpose by exercising its eminent-domain power and compensating the landowner for the property taken.<sup>166</sup>

### E. *The Dissenting Opinions*

#### 1. Justice Brennan

Justice Brennan, in a dissent joined by Justice Marshall, argued that the majority imposed "a degree of exactitude" that was inconsistent with the Court's usual standard for reviewing exercises of the state's police power.<sup>167</sup> He stated that the state's police power "demand[ed] only that the State 'could rationally have decided' that the measure adopted might achieve the State's objective."<sup>168</sup>

Applying this deferential standard of review, Justice Brennan rejected the majority's "narrow conception of rationality."<sup>169</sup> He criticized the majority's "essential-nexus" requirement by stating that "[t]he Court's insistence on a precise fit between the forms of burden and condition on each individual parcel along the California coast . . . penalize[s] the Commission[']s . . . flexibility, [and] hamper[s] the ability to fulfill its public trust mandate."<sup>170</sup>

Justice Brennan then argued that even if the majority's essential-nexus test was the appropriate standard to apply, the regulation in *Nollan* satisfied its more stringent requirements.<sup>171</sup> He argued that the "lat-

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164. *Id.* at 3146-48.

165. *Id.* at 3150.

166. *Id.*

167. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3151 (1987) (Brennan, J., dissenting) [*Nollan II*].

168. *Id.* (Brennan, J., dissenting) (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (emphasis in original)).

169. *Id.* at 3153 (Brennan, J., dissenting).

170. *Id.* (Brennan, J., dissenting). Justice Brennan argued that article X of the California Constitution protected the public's expectation of adequate access to the ocean from impairment by private landowners. The majority strongly rejected this argument. *Id.* at 3145-46.

Article X, § 4 of the California Constitution provides in pertinent part: "No individual . . . possessing the frontage . . . of . . . navigable water in this state, shall be permitted to exclude the right of way to any such water . . ." CAL. CONST. of 1879, art. X, § 4 (amended 1986).

171. *Nollan II*, 107 S. Ct. at 3154-56 (Brennan, J., dissenting).

eral-access condition" alleviated the impression that the beaches located behind the "wall of homes" were solely for private use<sup>172</sup>—an argument strongly rejected by the majority.<sup>173</sup>

The second argument advanced by Justice Brennan dealt with the disposition of the Nollans' takings issue. He noted that even if the regulation was a legitimate exercise of the police power, it must satisfy a separate takings analysis.<sup>174</sup> Under his analysis, the regulation would create only minimal physical intrusion, minimal diminution in value, and would not impair any investment-backed expectations.<sup>175</sup> He concluded that under the multifactor approach of *Penn Central Transportation Co. v. New York City*,<sup>176</sup> the regulation did not constitute a taking.<sup>177</sup>

Justice Brennan concluded his dissent by admonishing the majority for ignoring state agencies' need for considerable flexibility in responding to the problems associated with development along the shorefront.<sup>178</sup> Justice Brennan asserted that rather than impeding coastal conservation, the Court should encourage necessary regulation along the shorefront.<sup>179</sup> He found that the majority ruling accomplished the opposite result with "reasoning . . . hardly suited to the complex reality of natural resource" preservation.<sup>180</sup> Justice Brennan expressed his hope that a "broader vision" would ultimately prevail.<sup>181</sup> He felt that "States should be afforded considerable latitude in regulating private development, without fear that their regulatory efforts will often be found to constitute a taking,"<sup>182</sup> thus chilling necessary regulation of the public beaches.

## 2. Justice Blackmun

Justice Blackmun dissented on the grounds that the majority's benefit-burden nexus requirement impeded the adoption of "creative solutions" to solve serious land use problems.<sup>183</sup> He agreed with Justice

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172. *Id.* at 3154 (Brennan, J., dissenting).

173. *Id.* at 3149.

174. *Id.* at 3156 (Brennan, J., dissenting).

175. *Id.* at 3156-60 (Brennan, J., dissenting).

176. 438 U.S. 104 (1970).

177. *Nollan II*, 107 S. Ct. at 3160 (Brennan, J., dissenting).

178. *Id.* at 3162 (Brennan, J., dissenting).

179. *Id.* (Brennan, J., dissenting).

180. *Id.* (Brennan, J., dissenting).

181. *Id.* (Brennan, J., dissenting).

182. *Id.* n.14 (Brennan, J., dissenting). Justice Brennan also reaffirmed his position in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting) that when a "regulatory taking" has been judicially established, the appropriate remedy is monetary damages. *Id.* (Brennan, J., dissenting).

183. *Id.* at 3162 (Blackmun, J., dissenting). Justice Blackmun disagreed with the Court's discussion of the public-trust doctrine. *Id.* (Blackmun, J., dissenting). See *id.* at 3145-46 for



Brennan that "a State's exercise of its police power need be no more than rationally based."<sup>184</sup>

Justice Blackmun stated that "[c]oastal development by its very nature makes public access to the shore generally more difficult."<sup>185</sup> He suggested that the diminished visual access to the ocean created by development could be offset by imposing conditions on access.<sup>186</sup>

Finally, Justice Blackmun applied *Penn Central's* multifactor approach, concluding that the regulation did not effect a taking.<sup>187</sup> He reasoned that there was no diminution in value or impairment of investment-backed expectations since the Nollans had sufficient notice of the easement condition before they purchased the property.<sup>188</sup>

### 3. Justice Stevens

Justice Stevens, joined by Justice Blackmun, cautioned against the negative implications that the majority's holding in *Nollan* could have on future land use planning when read together with *First English Evangelical Lutheran Church v. County of Los Angeles*,<sup>189</sup> where the Court permitted a landowner to recover damages for a temporary taking.<sup>190</sup> Justice Stevens reasoned that *Nollan* and *First English* together may lead to an "unprecedented chilling effect . . . on public officials charged with the responsibility for drafting and implementing regulations designed to protect the environment and the public welfare."<sup>191</sup> Justice Stevens believed that the public interest would best be served by encouraging flexible and creative solutions to problems caused by private development.<sup>192</sup> Justice Stevens worried that land use planners would adopt less flexible approaches due to the potential application of *First English's* damages remedy and the essential-nexus requirement of *Nollan*.<sup>193</sup>

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the majority's rejection of Justice Brennan's public-trust doctrine argument. See *supra* note 170 and accompanying text for Justice Brennan's discussion of the public-trust doctrine.

184. *Id.* at 3162-63 (Blackmun, J., dissenting) (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981)).

185. *Id.* at 3163 (Blackmun, J., dissenting).

186. *Id.* (Blackmun, J., dissenting).

187. *Id.* (Blackmun, J., dissenting).

188. *Id.* (Blackmun, J., dissenting).

189. *Id.* (Stevens, J., dissenting) (citing *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378 (1987)).

190. See *supra* notes 55-62 for a discussion of *First English*.

191. *Id.* (Stevens, J., dissenting).

192. *Id.* (Stevens, J., dissenting).

193. *Id.* at 3163-64 (Stevens, J., dissenting).

## VI. ANALYSIS

A. *Application of Heightened Scrutiny*

The most significant aspect of *Nollan v. California Coastal Commission*<sup>194</sup> is the Supreme Court's requirement that a land use *condition* must satisfy an essential nexus with the state's purpose for imposing the condition.<sup>195</sup> The *Nollan* Court applied heightened judicial scrutiny<sup>196</sup> to invalidate an easement imposed as a condition to a coastal development permit.<sup>197</sup> To comply with constitutional standards, a regulation of the type involved in *Nollan* must have a legitimate purpose and must substantially advance that purpose.<sup>198</sup>

*Nollan* may be interpreted broadly to suggest that *all* future land use regulations must bear an essential nexus between the regulation and the state interest such that the former substantially advances the latter.<sup>199</sup> A broad reading of *Nollan* will require courts to apply heightened scrutiny to all land use regulations enacted under the state's police power. To pass the heightened level of judicial scrutiny, all land use regulations would, therefore, have to satisfy an essential nexus with a legitimate state purpose in order to be a valid police-power measure.<sup>200</sup>

Such a broad reading of *Nollan* would make it considerably easier for landowners to challenge land use regulations as invalid exercises of the state's police power, because the state would be compelled to meet a much higher burden than under rational-basis review. Under the rational-basis standard, the state would only need to show that a rational legislature *might* have thought that it would be reasonable to impose the land use regulation in order for the regulation to be valid.<sup>201</sup> In comparison, a heightened scrutiny standard would require the state to prove that the land use regulation "*substantially* advances legitimate state interests"

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194. 107 S. Ct. 3141 (1987) [*Nollan II*].

195. *Id.* at 3146-50.

196. See Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A.L. REV. 449, 455-57 (1988). Under heightened judicial scrutiny, a court presumes that a regulation is unconstitutional and requires proof that the regulation effectively serves a valid government purpose. *Id.* at 452.

197. *Nollan II*, 107 S. Ct. at 3149-50.

198. *Id.* at 3146-50. The Court never reached the second part of the *Agins* test—whether the regulation denied the Nollans' all use of their land. *Id.* at 3146 (citing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

199. See Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 HASTINGS L. J. 335, 338, 357 (1988); Falik & Shimko, *The "Takings" Nexus—The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 HASTINGS L. J. 359, 378 n.111, 390-91 (1988).

200. *Nollan II*, 107 S. Ct. at 3146.

201. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981).

in order to be valid.<sup>202</sup>

### B. Doctrine of Unconstitutional Conditions

A more careful reading of *Nollan v. California Coastal Commission*,<sup>203</sup> however, suggests that not all land use regulations must satisfy an essential nexus by substantially furthering legitimate state interests. Rather, *Nollan*'s essential-nexus requirement should only apply in cases where the state imposes a land use *condition* that would effect a taking if imposed outright. Under this limited reading of *Nollan*, land use regulations that condition government benefits upon the landowner's relinquishment of "one of the essential sticks in the bundle of [property] rights"<sup>204</sup>—such as the right to exclude others—must satisfy an "essential nexus" with a legitimate state interest. In such cases, the failure to satisfy the nexus requirement would render the condition an illegitimate exercise of the state's police power.

The facts of *Nollan* fully support this narrower interpretation. The Court held that had the Commission required the Nollans to convey the easement outright, rather than imposing the easement as a condition to a development permit, there would have been a taking under either the *Loretto* rule or under eminent-domain principles.<sup>205</sup>

The Court in *Nollan* stated that: "We are inclined to be particularly careful . . . where the actual conveyance of property is made a condition to the lifting of a land use restriction . . . . [I]n that context there is heightened risk that the purpose is *avoidance of the compensation require-*

202. *Nollan II*, 107 S. Ct. at 3146 (emphasis added). If all future land use regulations will be subject to heightened judicial scrutiny, then property rights will be elevated to the status of a "quasi-fundamental" right and be entitled to the same standard of review accorded gender and illegitimacy classifications in equal protection cases. See *Lalli v. Lalli*, 439 U.S. 259, 265 (1978) ("classifications based on legitimacy [must be] . . . substantially related to permissible state interests"); *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives").

Application of heightened scrutiny to property rights would lead to the same confusion that the Court generated with *Allied Structural Steel Co. v. Spannus*, 438 U.S. 234 (1978), when the Court elevated contract-based property rights to the status of a quasi-fundamental right. *Id.* at 244-51. The Court later retreated from its position in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983), and *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983), by holding that contract-based property rights were not subject to heightened scrutiny.

203. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987) [*Nollan II*].

204. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). See *supra* note 135 and accompanying text.

205. *Nollan II*, 107 S. Ct. at 3145. See *supra* notes 129-38 and accompanying text for discussion of eminent domain and the *Loretto* rule in *Nollan*.

ment, rather than the stated police power objective."<sup>206</sup> The risk that the state's motive is the "avoidance of compensation" can only arise when the state's action would seek to obtain by a condition what it could not obtain outright without resorting to the use of eminent domain.<sup>207</sup> An essential-nexus requirement for conditions that would effect a taking if imposed outright ensures that, when government exacts a valuable property interest as a condition to the grant of a benefit, the state's purpose will actually be to benefit the public.

Furthermore, the narrow interpretation of *Nollan* complies with the doctrine of unconstitutional conditions.<sup>208</sup> Even though states have broad power to impose conditions on the grant of government benefits,<sup>209</sup> the Supreme Court has held that a state may not impose "any unconstitutional conditions on the grant of a privilege."<sup>210</sup> The state imposes an unconstitutional condition when a condition to the receipt of a government benefit forces the recipient to relinquish a constitutional right<sup>211</sup>—such as when a condition imposed on a development permit forces a landowner to forego the payment of just compensation for the taking of property in order to receive the permit.

In *Nollan*, the Court determined that imposing the easement outright clearly would have resulted in a taking of property.<sup>212</sup> Thus, when the Commission conditioned the Nollans' development permit on their agreeing to grant the public an access easement across their property, the Commission violated the doctrine of unconstitutional conditions. The

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206. *Nollan II*, 107 S. Ct. at 3150 (emphasis added).

207. *Id.*

208. Under the doctrine of unconstitutional conditions, a state may not impose any conditions on the grant of a government benefit, which imposed outright would force the relinquishment of a constitutional right. See *Sherbert v. Verner*, 374 U.S. 398, 405 (1962) (citing *Speiser v. Randall*, 357 U.S. 513 (1958)) ("conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms").

The *Nollan* Court avoided discussion of the doctrine of unconstitutional conditions by stating, in a footnote, that the permit sought by the Nollans did not qualify as a government benefit. *Nollan II*, 107 S. Ct. at 3146 n.2 ("the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit'"). See *infra* notes 210-11 and accompanying text for further discussion of the doctrine of unconstitutional conditions.

209. See *Nollan II*, 107 S. Ct. at 3147-48 for a general discussion of state power to impose conditions in the land use context.

210. *Western & Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648, 657-58 (1981) (citing *Sherbert v. Verner*, 374 U.S. 398, 404-05 (1963); *Wieman v. Updegraff*, 344 U.S. 183, 191-92 (1952); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 599 (1926)).

211. *See id.*

212. *Nollan II*, 107 S. Ct. at 3145.

condition imposed by the Commission violated the constitutional prohibition against taking property for public use without just compensation. The imposition of the access condition to the grant of a development permit forced the Nollans to relinquish their constitutional right to just compensation for an easement over their private beachfront, and was, therefore, unconstitutional.

After the Court declared that the condition would have been a taking of property if imposed outright, it then held that the Commission could not avoid the payment of compensation unless the condition satisfied an essential nexus with a valid state purpose.<sup>213</sup> The Court stated that applying heightened judicial scrutiny<sup>214</sup> is particularly warranted when the state's real purpose for imposing the condition might be the exaction of a valuable property interest without paying compensation to the landowner.<sup>215</sup>

Accordingly, *Nollan*'s requirement of an essential nexus in the land use context should be limited to situations where the government imposes a condition that would amount to a taking if imposed outright. The nexus requirement in that situation ensures that the state has a valid public purpose when it imposes conditions, and if not, it will have to pay the landowner just compensation for the taking of property.

### C. *Nollan's Impact on the Imposition of Conditions on Development*

If the proposed narrow view of *Nollan v. California Coastal Commission*<sup>216</sup> is adopted, the only types of land use conditions affected by the case will be those that amount to a taking of property if imposed outright, and then only if they fail to satisfy an essential nexus with a legitimate state interest. Such conditions are most likely to appear in cases involving required dedications of land or in cases, like *Nollan*, involving the imposition of easements. Nearly all other types of conditions on development, such as requiring a developer to pay fees or requiring a subdivider to provide more parking spaces, would not be subject to *Nollan*'s essential-nexus requirement, and probably could be shown to satisfy the more lenient standard of bearing a rational connection with a legitimate purpose.

Even if a state imposes a condition that would amount to a taking if imposed outright, the condition may still be valid if it satisfies an essential nexus with a legitimate state purpose. For example, assume that a

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213. *Id.* at 3150.

214. See *supra* text accompanying note 196 for a general discussion of heightened scrutiny.

215. *Nollan II*, 107 S. Ct at 3150.

216. 107 S. Ct. 3141 (1987) [*Nollan II*].

state requires the dedication of land for a park as a condition to the grant of a permit to build over vacant land. And further assume that the vacant land in question has been used over the years for recreational purposes by neighborhood children. Hence, the state's purpose for imposing the condition is to provide a park for the neighborhood children to replace the lost vacant land.

In such a case, the condition imposed on the grant of a permit—the dedication of land for a park—may very well bear an essential nexus with a legitimate state interest—replacement of recreational facilities lost by construction of the building. Under the *Nollan* standard, because the condition imposed satisfies an essential nexus with a legitimate state interest, the condition would be valid even though it would amount to a taking if it were imposed outright.<sup>217</sup>

Therefore, the essential-nexus test ensures that when states impose conditions on development, they must be closely tailored to alleviate actual burdens caused by a proposed project. If the narrow interpretation of the case is adopted, then *Nollan*'s impact on the kinds of conditions that can no longer be imposed under the state's police power will be limited to cases where: (1) the condition imposed would amount to a taking if imposed outright; and (2) the condition imposed fails to satisfy an essential nexus with a legitimate state interest.

#### D. Standards for Conditioning Development

The principles adopted in *Nollan* clarify, for state courts, the standard to be used when analyzing conditional land use restrictions as potential takings.<sup>218</sup> Previously, states had used three different standards in such cases: (1) the reasonable-relationship test,<sup>219</sup> (2) the nexus test,<sup>220</sup>

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217. *Id.* at 3145, 3148.

218. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3146-48 (1987) [*Nollan II*].

219. The reasonable-relationship test placed a burden on the landowner to show that the required dedication did not relate to public health, safety and welfare. See *Associated Home Builders v. City of Walnut Creek*, 4 Cal. 3d 633, 638, 484 P.2d 606, 610, 94 Cal. Rptr. 630, 634 (1971) (subdivision exactions for parks "can be justified on the basis of a general need for recreational facilities caused by present and future subdivision"); *Ayres v. City Council*, 34 Cal. 2d 31, 38-39, 207 P.2d 1, 5-6 (1949) (California Supreme Court upheld dedication conditions "reasonably related to the protection of the public health, safety and welfare" and "reasonably related to the potential traffic needs"); *Georgia-Pacific Corp. v. California Coastal Comm'n*, 132 Cal. App. 3d 678, 699, 183 Cal. Rptr. 395, 407 (1985) ("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 people of the State."); Bell, *California Opens the Door for Municipalities to Obtain Greater Revenue From Subdivision Exactions*, 22 REAL PROP. PROB. & TR. J. 345, 349-59 (1987).

For application of the reasonable-relationship test to required dedications of beachfront access, see *Whaler's Village Club v. California Coastal Comm'n*, 173 Cal. App. 3d 240, 254-61,

and (3) the specifically-and-uniquely-attributable test.<sup>221</sup> In *Nollan*, the Court seems to have adopted a middle-ground approach. The majority's ruling in *Nollan* clearly showed disfavor for the reasonable-relationship test applied by California courts.<sup>222</sup> A majority of the Court suggested that applying the reasonable-relationship test to conditions on development that would amount to a taking if imposed outright, did not adequately protect a landowner's interests from government intrusion.<sup>223</sup> Thus, *Nollan* is an attempt by the Court to force all jurisdictions to comply with, at minimum, the essential-nexus standard in cases involving the imposition of conditions on development.

Such an intent is evident in the Court's examination of the connection between the easement condition and the state's purposes for imposing the condition. The Court found it "impossible" to understand how a requirement allowing people already on public beaches to walk across the Nollans' property would reduce any obstacle to viewing the beach, lower any psychological barrier to using the beaches, or help to remedy any

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220 Cal. Rptr. 2, 9-14 (1985), cert. denied, 476 U.S. 1111 (1986) (Coastal Commission's required dedication of beach access as condition to permit for "new development" only needs to be reasonably related to one of the Coastal Act's principal objectives); *Grupe v. California Coastal Comm'n*, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985); *Remmenga v. California Coastal Comm'n*, 163 Cal. App. 3d 623, 209 Cal. Rptr. 628 (1985). For a discussion of *Grupe*, see *supra* notes 106-09 and accompanying text.

In *Remmenga*, the California Court of Appeal held that "even if an individual project does not create an immediate need for a compensating accessway, one may be required of it if its effect together with the cumulative impact of similar projects would in the future create or increase the need for a system of such compensating accessways." *Remmenga*, 163 Cal. App. 3d at 628, 209 Cal. Rptr. at 631.

220. State courts applied the nexus test to ordinances that required subdivision developers to dedicate land or pay fees for open space or parks as conditions to the grant of development permits. *Bell*, *supra* note 219, at 348. For further discussion of the nexus test, see *id.* (citing *Longridge Builders, Inc. v. Planning Board*, 52 N.J. 348, 245 A.2d 336 (1968) (subdivider can be "compelled only to bear that portion of the cost which bears a rational nexus to the needs created by, and benefits conferred upon, the subdivision"))).

The nexus test closely resembles the test applied by the *Nollan II* Court. See *Nollan II*, 107 S. Ct. at 3148-49. Under the nexus test, a burden created by development—such as loss of recreational facilities or overcrowding—could be offset by conditioning the project upon the dedication of land or payment of fees for park facilities or open space. The condition imposed must substantially relate to the burdens created by the subdivision.

221. The specifically-and-uniquely-attributable test focused on the needs or burdens created by the proposed subdivision. *Bell*, *supra* note 219, at 348. Mandatory dedications were valid only when the needs created by the project were directly attributable to the project. *Id.*

The standard required that all conditions be specifically- or narrowly-tailored to alleviate burdens caused by the development. *Id.* at 347-48 (citing *Pioneer Trust & Sav. Bank v. Village of Mount Prospect*, 22 Ill. 2d 375, 176 N.E.2d 799 (1961) (mandatory dedications as conditions to subdivision approval must be "specifically and uniquely attributable" to the subdivider's activity)).

222. *Nollan II*, 107 S. Ct. at 3149-50.

223. *Id.* at 3150.

additional congestion on the beaches caused by construction of the Nollans' new house.<sup>224</sup> The Court stated:

[T]he Commission's imposition of the permit condition cannot be treated as an exercise of its land use power for any of these purposes. Our conclusion on this point is consistent with the approach taken by every other court that has considered the question, *with the exception of the California state courts.*<sup>225</sup>

Further, the Court found that the easement condition imposed by the Commission would not even pass California's reasonable-relationship standard.<sup>226</sup> By reversing the California Court of Appeal and rejecting the long line of California cases which applied a deferential standard of review to conditions on development, the Court appears to have forced California to abandon its reasonable-relationship standard and to adopt a higher standard of review.

The Court in *Nollan* clearly demonstrated that it would pursue an active role in measuring benefits and burdens of a land use regulation.<sup>227</sup> Moreover, the Court suggested that it will no longer defer to a state's declarations of valid public purposes, and that it will apply a higher level of scrutiny when determining the legitimacy of conditions on development that would amount to a taking if imposed outright.<sup>228</sup>

#### *E. Application of the Essential-Nexus Test*

The Court announced that it will examine land use regulations even more closely when there is a danger that the state's real purpose for conditioning benefits is to avoid the payment of compensation for the grant of a valuable property interest.<sup>229</sup> Such cases normally arise when the government exacts an easement or requires the dedication of land as a condition to its approval of a development permit.

In such cases, the Court will require that the condition satisfy a strict "essential nexus" with a valid police-power purpose to ensure that the purpose is legitimate. Thus, under the essential-nexus test adopted in *Nollan*, the state has the burden of demonstrating that the condition imposed actually furthers the state's purpose for imposing the condition.<sup>230</sup>

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224. *Id.* at 3149.

225. *Id.* (citations omitted) (emphasis added).

226. *Id.* at 3148.

227. *Id.* at 3148-50.

228. *Id.*

229. *Id.* at 3150.

230. See *supra* text accompanying notes 196 and 202 for a general discussion of heightened scrutiny.



Heightened judicial scrutiny is particularly warranted when the state exacts a valuable interest in land due to the element of the state's self-interest. There is a real danger that the state's real purpose may be to obtain a property interest in land without the payment of compensation.<sup>231</sup>

Commentators have suggested that *Nollan's* essential-nexus test can be easily satisfied by future development plans, legislative findings and impact analyses showing that the state's real purpose does satisfy an essential nexus with the condition imposed.<sup>232</sup> Thus, concern with the potential "chilling effect" on creative land use planning, expressed by the dissenters in *Nollan*, may not be as problematic as originally thought.

However, with the need for a factual showing of an essential nexus as required by *Nollan* and the availability of damages for a temporary taking under *First English Evangelical Lutheran Church v. County of Los Angeles*,<sup>233</sup> landowners can be assured that all future conditions on development that would effect a taking if imposed outright, will satisfy the essential nexus required under the Constitution. *Nollan's* essential-nexus test ensures that landowners' interests will be safeguarded against violations of governmental power that the fifth and fourteenth amendments were designed to protect.<sup>234</sup>

In the face of an overdeveloped and overburdened shorefront, exactions and dedications can be important tools to ensure that the public will be able to enjoy an unspoiled ocean view and adequate access to the public beaches. The government must be able to impose necessary land use regulations for the public benefit. Public enjoyment of public beaches and recreational facilities clearly falls within the interests the state may

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231. A similar analysis has been used by the Supreme Court for state regulations that impair private contracts. U.S. CONST. art. I, § 10 ("No state shall enter into any . . . Law impairing the Obligation of Contracts . . ."). In analyzing whether the state's impairment of contracts violates the contracts clause, the Court applies a stricter standard of review for public contracts than for private contracts. Stricter scrutiny for public contracts is warranted due to the state's self-interest. See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977) ("complete deference to legislative assessment of reasonableness and necessity is not appropriate [when dealing with impairment of public contracts] because the State's self-interest is at stake").

Compare *Energy Reserves Group, Inc. v. Kansas Power & Light*, 459 U.S. 400 (1983), and *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983) (impairment-of-private-contracts test) with *United States Trust Co.*, 431 U.S. at 29 (Court's more stringent test for impairment of public contracts—"reasonable and necessary to serve . . . important purposes claimed by the State").

232. Marsh & Rosenthal, *At Long Last, the Supreme Court Speaks Out On the "Taking" Issue*, Daily Journal Report, February 5, 1988 at 21.

233. 107 S. Ct. 2378 (1987). See *supra* notes 55-62 and accompanying text for a discussion of *First English*.

234. See Sax, *Takings, Private Property and Public Rights*, 81 YALE L. J. 149 (1971).

protect. But, when such regulations go "too far,"<sup>235</sup> landowners can be assured that they will be protected against the imposition of unconstitutional conditions and will be justly compensated for the taking of property.

A narrow reading of *Nollan* strikes an equitable balance between the government's interest in regulating property uses for the public benefit and the landowner's interest in full enjoyment of his or her property. Therefore, the requirement of an essential nexus in the land use context should be limited to cases where a state seeks to impose a condition that would amount to a taking if imposed outright. Only then is there a danger that the state's real motive is to obtain by a condition what it could not obtain outright without resorting to the use of its eminent-domain power.

## VII. CONCLUSION

In *Nollan v. California Coastal Commission*,<sup>236</sup> the Court applied heightened scrutiny to a land use condition imposed on a development permit and declared the condition an invalid exercise of the state's police power.<sup>237</sup> Under a narrow interpretation of *Nollan*, all conditions that would amount to a taking of property if imposed outright must satisfy an essential nexus with the state's purpose for imposing the condition.<sup>238</sup> Limiting the nexus requirement to such cases ensures both that a state government will have the necessary latitude to impose important land use regulations, and that landowners will be protected from an abuse of governmental power.

Although the Court did not explicitly define the scope of its holding, a balance between the competing interests of landowners and state governments can best be achieved by limiting the essential-nexus requirement to conditions on development that would amount to a taking if imposed outright. Requiring the state to demonstrate an essential nexus between its purpose and the condition regardless of whether the condition would be a taking if imposed outright, would unnecessarily impede the state's ability to impose land use regulations for the public benefit. It seems unlikely that the Court would establish such a broad ruling without explicitly stating its intention to do so. Therefore, courts should apply the proposed narrow interpretation of *Nollan* unless and until the

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235. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 397 (1922). See *supra* notes 29-56 for a discussion of the Supreme Court's disposition of regulatory takings cases.

236. 107 S. Ct. 3141 (1987) [*Nollan II*].

237. *Id.* at 3150.

238. See *supra* notes 203-17 for a discussion of the narrow interpretation of *Nollan*.

Supreme Court explicitly states that *all* land use regulations must henceforth satisfy the close and demanding fit that the essential-nexus test requires.

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