

4-15-1988

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### Recommended Citation

Timothy A. Bittle *Nollan v. California Coastal Commission: You Can't Always Get What You Want, But Sometimes You Get What You Need*, 15 Pepp. L. Rev. Iss. 3 (1988)

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# *Nollan v. California Coastal Commission:* You Can't Always Get What You Want, But Sometimes You Get What You Need

Timothy A. Bittle\*

## I. INTRODUCTION

Pat Nollan is a deputy city attorney for the City of Los Angeles. As a lawyer whose job it is to advise and defend city government in its legal affairs, Pat is well acquainted with the latitude government enjoys when exercising its authority to regulate land use. The fact that Pat Nollan fought the State of California all the way to the United States Supreme Court to challenge a land use condition imposed on his property is perhaps a commentary on how far modern regulations had encroached upon traditional principles of property rights. Property rights emerged victorious, however, in the far-reaching opinion rendered by the Supreme Court in *Nollan v. California Coastal Commission*.<sup>1</sup>

The fifth amendment guarantees the payment of just compensation to one whose private property is taken for public use.<sup>2</sup> At issue in *Nollan* was the extent to which the fifth amendment limits the ability of government to condition the granting of building permits upon the applicants' dedication of property to the public without compensation. This question had never been decided by the Supreme Court. It generated substantial interest and concern, including amicus curiae briefs on behalf of the United States, twenty-nine individual states,

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\* The author is a staff attorney at Pacific Legal Foundation in Sacramento, California. He was co-counsel for the Nollans while the case was in the state courts and in the United States Supreme Court.

1. 107 S. Ct. 3141 (1987).

2. U.S. CONST. amend. V. The fifth amendment is made applicable to the states through the fourteenth amendment. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 122 (1978).

fifty-two California cities and counties, the Council of State Governments, the United States Conference of Mayors, the National Association of Counties, and the National League of Cities.

The court in *Nollan* announced a new constitutional test for reviewing permit conditions which sets definite limits on how far private land use can be conditioned by government in the future. This article will discuss California "takings" jurisprudence before and after *Nollan*, and will specifically discuss the mechanics of the Supreme Court's new test.

## II. THE NOLLAN FACTS

Pat Nollan and his wife, Marilyn, were lessees of an ocean-front lot in a custom home subdivision known as Faria Beach, in north Ventura County. Their lessor, the Faria Family Trust, had subdivided the tract and remained active as a homeowners' association and architectural review board.

When the lease commenced, the lot was occupied by a small one-bedroom house which the Nollans rented to summer vacationers. However, after several years of rental use, off-season vandalism, and ocean storms, the building had fallen into serious disrepair and could no longer be rented out. The Nollans' lease was scheduled to expire on a certain date, but included an option to purchase the property if certain conditions were met. Among those conditions was a requirement that the Nollans remove the existing structure and submit plans for its replacement with a larger home in keeping with the rest of the neighborhood.

With the lease's expiration date approaching, the Nollans decided to exercise their option to buy the property. On February 25, 1982, in accordance with California law, the Nollans submitted an application to the California Coastal Commission, requesting a permit to demolish the existing structure and replace it with a modern three-bedroom home for themselves. The proposed home complied with all existing restrictions for the property and did not require any variances or special approvals. The Nollans had already obtained all necessary permits from the county, but since their lot lay within the coastal zone,<sup>3</sup> they were also required by the California Coastal Act<sup>4</sup> to obtain a coastal development permit from the Commission.<sup>5</sup>

Initially, the Nollans' application was treated as a routine approval with conditions. Their permit was granted without a hearing. Because the Coastal Act requires that "[p]ublic access from the nearest

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3. CAL. PUB. RES. CODE §§ 30150-30176 (West 1986 & Supp. 1988) (defining coastal zone).

4. *Id.* §§ 30000-30950.

5. *Id.* § 30600(a).

public roadway to the shoreline and along the coast shall be provided in new development projects . . . ,"<sup>6</sup> the Commission attached a condition to the permit which required the Nollans to convey an easement to the state granting access to the public across the entire beach area of their property, approximately one-third of the lot. The dedication of this strip of beach was intended to allow people walking along the shoreline to continue their walk across the Nollans' beach without trespassing.

The Nollans filed a petition for writ of administrative mandamus<sup>7</sup> challenging the access condition. The Ventura County Superior Court agreed that blind adherence to the access requirements of the Coastal Act could lead to unconstitutional results, and accordingly remanded the case to the Commission with instructions to conduct an evidentiary hearing to consider the justification for requiring a grant of access in the case.<sup>8</sup> The court advised the Commission that it "may constitutionally require a grant of public access only when the facts in the case before it demonstrate that a proposed development will place a burden on public access to the coast."<sup>9</sup>

On remand, following a public hearing, the Commission found that the increased size of the new house would interfere with the public's ability to view the ocean from the road, thus preventing the public "psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit,"<sup>10</sup> resulting in additional public use at other more visible areas of the coast.<sup>11</sup> Based on these findings, the Commission voted to retain the access condition.<sup>12</sup>

The Nollans returned to court with another administrative mandamus petition. Again, the superior court ruled in favor of the Nollans, repeating its previously articulated standard that the Commission's authority to impose public access requirements as a condition to per-

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6. *Id.* § 30212.

7. See CAL. CIV. PROC. CODE § 1094.5 (West 1980 & Supp. 1988) (describing procedure for review of administrative orders or decisions).

8. *Nollan v. California Coastal Comm'n*, No. SP 50805 Civ. (Cal. Super. Ct. Jan. 18, 1983), *rev'd*, 177 Cal. App. 3d 719, 223 Cal. Rptr. 28 (1986), *rev'd*, 107 S. Ct. 3141 (1987).

9. *Id.*

10. Joint Appendix at 58, *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987) (No. 86-133). The public may rightfully use the beach seaward of the mean high-tide line. See *Marks v. Whitney*, 6 Cal. 3d 251, 259, 491 P.2d 324, 380, 98 Cal. Rptr. 790, 796 (1971); CAL. CIV. CODE § 670 (West 1982) (state owns land below ordinary high-water mark).

11. Joint Appendix at 58, *Nollan* (No. 86-133).

12. See *Nollan*, No. SP 50805 Civ. at 3 (Cal. Super. Ct. Feb. 15, 1984).

mit approval is limited to situations where the applicant's proposed development will have an adverse impact on public access to the sea. This time the court ordered the Commission to issue the Nollans' permit without the access condition.<sup>13</sup>

The Commission appealed the order and on January 24, 1986, the California Court of Appeal reversed the trial court, holding that under California law no such justification need be shown to validate an exaction of property in the regulatory context.<sup>14</sup> Although the court of appeal agreed that the "Nollans' project ha[d] not created the need for access to the tidelands fronting their property,"<sup>15</sup> it nevertheless concluded that "[s]ince a direct burden on public access need not be demonstrated . . .,"<sup>16</sup> the trial court ruling was in error. The court held that "the justification for required dedication is not limited to the needs of or burdens created by the project."<sup>17</sup>

The court of appeal then applied what it believed to be the proper constitutional analysis. It determined that the Commission was required by the Coastal Act to demand a dedication of property from the Nollans, and that the particular condition imposed carried out the purpose and mandate of the Act.<sup>18</sup> The court then considered whether the condition caused a "taking" and reasoned that it did not because even though the condition caused a diminution in the value of the Nollans' property, it did not deprive them of the reasonable use of the property.<sup>19</sup>

When the California Supreme Court denied review, the Nollans appealed to the United States Supreme Court. Probable jurisdiction was noted by the Court on October 20, 1986.<sup>20</sup>

### III. THE LAW IN CALIFORNIA PRIOR TO NOLLAN

The court of appeal's decision in *Nollan* represented the final step of an evolution in the law with respect to permit exactions in the California courts. Historically, California courts had borrowed from the law governing nuisance abatement and benefit assessments when reviewing permit exactions. Just as compensation is not owed when government prohibits a particular noxious use of an owner's property,<sup>21</sup> the California courts saw no need to compensate the owner

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13. *Id.* at 8.

14. *Nollan*, 177 Cal. App. 3d 719, 223 Cal. Rptr. 28, *rev'd*, 107 S. Ct. 3141 (1987).

15. *Id.* at 723, 223 Cal. Rptr. at 30.

16. *Id.*

17. *Id.*

18. *Id.* at 724, 223 Cal. Rptr. at 31.

19. *Id.* at 723, 223 Cal. Rptr. at 30.

20. *Nollan*, 107 S. Ct. at 3143 (1987).

21. *See, e.g.*, *Friedman v. City of Los Angeles*, 52 Cal. App. 3d 317, 321, 125 Cal. Rptr. 93, 95 (1975); *Yen Eng v. Board of Bldg. and Safety Comm'rs*, 184 Cal. App. 2d 514, 520-21, 7 Cal. Rptr. 564, 568 (1960); *Morton v. Superior Court of San Mateo*, 124

when an acquisition of the property was necessary to cure some general public harm caused by development of the owner's property. Similarly, as the law relating to assessments allows an owner to be taxed in order to provide public improvements that will specially benefit the property,<sup>22</sup> the California courts considered it proper for government to require land developers to dedicate property for streets, parks, and the like that would specially benefit their developments. Aside from these situations, however, it was considered unconstitutional for government to condition the granting of permits on the applicant's dedication of land.<sup>23</sup>

The landmark case in this area was *Ayres v. City Council of Los Angeles*.<sup>24</sup> In *Ayres*, the city council required an uncompensated dedication of land for street-widening purposes as a condition to the approval of a subdivision.<sup>25</sup> The subdivider attacked the condition as constituting an unconstitutional taking of private property.<sup>26</sup> The court found that: (1) development of the subdivision would generate traffic and cause traffic hazards necessitating the widening of the boulevard;<sup>27</sup> (2) the widening would benefit the ultimate lot owners;<sup>28</sup> and (3) without the widening, the proposed subdivision would not be feasible.<sup>29</sup> Based upon these findings, the court rejected the landowner's constitutional challenge to the exaction, stating, "[W]here it is a condition reasonably related to increased traffic and other needs of the proposed subdivision it is voluntary in theory and not contrary to constitutional concepts."<sup>30</sup> Thus, *Ayres* allowed the imposition of subdivision conditions requiring the uncompensated dedication of

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Cal. App. 2d 577, 581-82, 269 P.2d 81, 84-85 (1954). *But see* Goldblatt v. Town of Hempstead, 369 U.S. 590, 593-94 (1962) (prohibition of noxious uses of property does not require compensation provided the regulation is not so onerous as to constitute a taking); *Holtz v. Superior Court of San Francisco*, 3 Cal. 3d 296, 305, 475 P.2d 441, 446, 90 Cal. Rptr. 345, 350 (1970) (compensation is not required for a taking or damaging of property only when the governmental action is under emergency conditions to avert impending peril).

22. *See, e.g.*, *City of Los Angeles v. Los Angeles County Flood Control Dist.*, 11 Cal. 2d 395, 401, 80 P.2d 479, 481 (1938); *Spring St. Co. v. City of Los Angeles*, 170 Cal. 24, 30, 148 P. 217, 219 (1915).

23. *See, e.g.*, *Liberty v. California Coastal Comm'n*, 113 Cal. App. 3d, 491, 170 Cal. Rptr. 247 (1980); *Mid-Way Cabinet Fixture Mfg. v. County of San Joaquin*, 257 Cal. App. 2d 181, 65 Cal. Rptr. 37 (1967).

24. 34 Cal. 2d 31, 207 P.2d 1 (1949).

25. *Id.* at 34, 207 P.2d at 3.

26. *Id.* at 35, 207 P.2d at 3.

27. *Id.* at 38-39, 207 P.2d at 5-6.

28. *Id.*

29. *Id.* at 40, 207 P.2d at 6-7.

30. *Id.* at 42, 207 P.2d at 8.

property, but *only* when the conditions were imposed to serve the needs of the new residents or to mitigate public harms created by the new development. At least that is how *Ayres* was interpreted for the next twenty years.<sup>31</sup>

*Mid-Way Cabinet Fixture Manufacturing v. County of San Joaquin*,<sup>32</sup> another street-improvement case, so interpreted *Ayres* when it invalidated a dedication requirement with this statement:

It is clear to us from this record that the conditions imposed upon Mid-Way are not so imposed because of any of its activities relating to . . . the sometime-to-be-built four-lane expressway. . . . They were imposed because respondents seem to conceive that the burden of the cost of access and highway widening rights of way and the cost of interchanges generally can be shifted by government onto adjoining landowners . . . . [However,] [j]ustification of conditions depends upon there being some real relationship between the thing wanted by the landowner from government and the quid pro quo exacted by government therefor.<sup>33</sup>

Another case following this view of *Ayres* was *Scrutton v. County of Sacramento*,<sup>34</sup> which recited the *Ayres* rule as follows: "[C]onditions imposed on the grant of land use applications are valid if reasonably conceived to fulfill public needs emanating from the landowner's proposed use."<sup>35</sup>

The rule developed by this line of cases was greatly eroded in 1971 by the California Supreme Court in *Associated Home Builders, Inc. v. City of Walnut Creek*.<sup>36</sup> *Associated Home Builders* involved a facial challenge to a statute authorizing municipalities to require parkland dedications from subdividers.<sup>37</sup> The court found the test for constitutionality articulated in *Mid-Way* and *Scrutton* satisfied in that the exactions authorized by the statute were necessary to fulfill the need for additional parkland created by the types of subdivisions that would be subject to the statute.<sup>38</sup> In dicta, however, the court reinterpreted *Ayres* and indicated that a dedication requirement would be valid even if it did not meet the *Mid-Way/Scrutton* standard of review:

We do not find in *Ayres* support for the principle urged by Associated that a dedication requirement may be upheld only if the particular subdivision creates the need for dedication.

Even if it were not for the authority of *Ayers* [sic] we would have no doubt that section 11546 can be justified on the basis of a general public need for recreational facilities . . . .<sup>39</sup>

As to the question of whether a taking could occur under the guise of

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31. See *infra* text accompanying notes 32-68.

32. 257 Cal. App. 2d 181, 65 Cal. Rptr. 37 (1967).

33. *Id.* at 191-92, 65 Cal. Rptr. at 44.

34. 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969).

35. *Id.* at 421, 79 Cal. Rptr. at 879.

36. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).

37. See CAL. GOV'T CODE §§ 66477, 66479 (West 1983 & Supp. 1988).

38. *Associated Home Builders*, 4 Cal. 3d at 641, 484 P.2d at 613, 94 Cal. Rptr. at 637.

39. *Id.* at 638, 484 P.2d at 610, 94 Cal. Rptr. at 634.

subdivision regulation, the court expressly stated that a municipality requiring a dedication of land in the permit context is "not acting in eminent domain."<sup>40</sup>

Although subtle, this language in *Associated Home Builders* eliminated the need for applying a case-by-case takings analysis to cases involving uncompensated dedication conditions. Such exactions were given general sanction as being constitutional. The scope of judicial inquiry in such cases was instead limited to a police power analysis, i.e., government may require dedications of private property without compensation so long as the legislature makes a finding that a "general public need" for the exaction is present.<sup>41</sup>

The first case to apply the dicta in *Associated Home Builders* to a case in which the *Mid-Way/Scrutton* standard was not satisfied was *Norsco Enterprises v. City of Fremont*.<sup>42</sup> In *Norsco*, the city levied fees in lieu of a dedication of parkland against the owner of an apartment building who had converted the apartments into condominiums. The owner argued that the mere conversion of apartment units into a condominium form of ownership did not change the population of the building and, therefore, the influx of new residents found in *Associated Home Builders* was not present.<sup>43</sup> The court held, however, that it was unnecessary for the city to show that *Norsco* had contributed to the need for parkland:

[In *Associated Home Builders*] the high court pointed out that population growth brought about by a proposed subdivision was not the *only* justification for the statute. It rejected an argument, such as that made here, that the required land dedication or "in lieu fees" were "justified only if it can be shown that the need for additional park and recreational facilities is attributable to . . . the new subdivision . . ."<sup>44</sup>

*Georgia-Pacific Corp. v. California Coastal Commission*<sup>45</sup> became the first case to extend the *Associated Home Builders* rule to an application for permission to *use* land, rather than an application for permission to subdivide land.<sup>46</sup> This was a significant expansion of

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40. *Id.*

41. For a comment agreeing with this interpretation of *Ayres* by *Associated Home Builders*, see Comment, *Land Development and the Environment: The Subdivision Map Act*, 5 PAC. L.J. 55 (1974) ("The *Ayres* case demonstrates that benefit to the community . . . and not some special relationship to the subdivision, is required for a valid dedication requirement." *Id.* at 83).

42. 54 Cal. App. 3d 488, 126 Cal. Rptr. 659 (1976).

43. *Id.* at 493-94, 126 Cal. Rptr. at 662.

44. *Id.* at 494, 129 Cal. Rptr. at 662 (emphasis in original).

45. 132 Cal. App. 3d 678, 183 Cal. Rptr. 395 (1982).

46. *Norsco* was a subdivision case. In California, a condominium conversion is a subdivision. See CAL. GOV'T CODE § 66424 (West 1983 & Supp. 1988).



the *Associated Home Builders* rule. Although owners have no constitutional right to subdivide land,<sup>47</sup> they do have a right to make economically viable use of their land in accordance with their reasonable investment-backed expectations.<sup>48</sup>

In *Georgia-Pacific*, a lumber company applied for coastal development permits to make certain improvements to its lumber mill property on the north coast of California. Among the proposed improvements were the construction of a visitor service facility, parking lot, helicopter pad, hangar, and related outbuildings. The Coastal Commission granted the permits, but conditioned them upon the company's dedicating specified easements to the public for access to the shoreline. The trial court struck the conditions, ruling that the public access conditions imposed by the Commission violated the Takings Clause "in that the scope and extent of the easements required to be dedicated . . . [were] not reasonably related to the nature and impact of the four projects proposed by Georgia-Pacific."<sup>49</sup>

The appellate court reversed the trial court and reinstated the conditions, reciting the rule that would eventually be applied to the *Nollans*' case by the court of appeal:

A regulatory body may constitutionally require a dedication of property in the interests of the general welfare as a condition of permitting land development. It does not act in eminent domain when it does this, and the validity of the dedication requirement is not dependent on a factual showing that the development has created the need for it. (*Associated Home Builders, etc., Inc. v. City of Walnut Creek* . . . ) The "scope and extent" of the easements required by the Commission were "reasonably related" to one of the principal objectives of the Coastal Act, which is to provide for maximum access to the coast by all the people of this State. [citation omitted] Their relationship to the "nature and impact" of the proposed projects was not a valid basis for the trial court's determination that the access conditions deprived Georgia-Pacific of its constitutional rights.<sup>50</sup>

*Georgia-Pacific* made it clear that California courts were testing the validity of exactions—not by looking at the relationship between the exaction and the landowner's proposed use—but by focusing solely on the relationship between the exaction and the statute authorizing the exaction.

Subsequently, a case was decided which set the stage for *Nollan*.

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47. See *Trent Meredith, Inc. v. City of Oxnard*, 114 Cal. App. 3d 317, 328, 170 Cal. Rptr. 685, 691 (1981); *HFH, Ltd. v. Superior Court of Los Angeles County*, 15 Cal. 3d 508, 516, 542 P.2d 237, 241-43, 125 Cal. Rptr. 365, 369-70 (1975) (citing with approval *Morse v. County of San Luis Obispo*, 247 Cal. App. 2d 600, 602, 55 Cal. Rptr. 710 (1967)); *Associated Home Builders v. City of Walnut Creek*, 4 Cal. 3d 633, 638, 484 P.2d 606, 610, 94 Cal. Rptr. 630, 634 (1971); cf. *Furey v. City of Sacramento*, 592 F. Supp. 463, 469 (E.D. Cal. 1984), *aff'd*, 780 F.2d 1448 (9th Cir. 1986) ("The United States Supreme Court has repeatedly held that the property rights protected by the Takings Clause are those property rights created by state law.").

48. See *Agins v. City of Tiburon*, 447 U.S. 255, 262-63 (1980).

49. *Georgia-Pacific Corp.*, 132 Cal. App. 3d at 689 n.7, 183 Cal. Rptr. at 401 n.7.

50. *Id.* at 699, 183 Cal. Rptr. at 407-08.

*Grupe v. California Coastal Commission*<sup>51</sup> involved an individual who simply wished to construct one single-family home on a pre-subdivided, vacant, residentially zoned lot he had purchased.<sup>52</sup> The Coastal Commission attached a condition to Grupe's development permit which effectively required him to dedicate the seaward two-thirds of his lot to the public.<sup>53</sup> Grupe argued that although *Associated Home Builders* and its progeny established that, as a general proposition, government permit-issuing agencies may constitutionally require uncompensated dedications of land, the federal takings cases entitled him to a *separate* takings analysis addressed to the particular circumstances of his case.<sup>54</sup> The court of appeal quoting *Georgia-Pacific* agreed that, as a general proposition, exactions were considered constitutional.<sup>55</sup> The court went on, however, to conduct a further takings analysis, referring to the factors listed by the United States Supreme Court in *Penn Central Transportation Co. v. City of New York*.<sup>56</sup> The court then ruled that although the acquisition of Grupe's land was designed to accomplish a uniquely public function,<sup>57</sup> and despite the fact that the public function could properly be characterized as a physical invasion of Grupe's property,<sup>58</sup> Grupe was nonetheless left with a reasonable use of his property<sup>59</sup> and "has received a substantial benefit by being allowed to proceed with the development of his property."<sup>60</sup> The court held in favor of the Commission finding that the latter two factors outweighed the former two.<sup>61</sup>

*Grupe* was the first case to reintroduce a takings analysis in a California permit exaction case. The analysis employed, however, did not focus on the relationship between the exaction and the proposed de-

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51. 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985).

52. *Id.* at 155, 212 Cal. Rptr. at 581.

53. *Id.* at 156, 212 Cal. Rptr. at 581.

54. *Id.* at 173, 212 Cal. Rptr. at 594.

55. *Id.* at 172, 212 Cal. Rptr. at 593.

56. 438 U.S. 104 (1978). *Penn Central* identified "several factors that have particular significance" for determining whether government-caused losses amount to a "taking" in a particular case, including "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations [and] the character of the governmental action." *Id.* at 124. Another factor is whether government actions are properly characterized as "acquisitions of resources to permit or facilitate uniquely public functions." *Id.* at 128.

57. *Grupe*, 166 Cal. App. 3d at 176, 212 Cal. Rptr. at 596.

58. *Id.*

59. *Id.* at 175-76, 212 Cal. Rptr. at 595-96.

60. *Id.* at 176-77, 212 Cal. Rptr. at 596-97.

61. *Id.* at 177, 212 Cal. Rptr. at 597.

velopment, as was done in the *Mid-Way/Scrutton* line of cases. Rather, the *Grupe* takings analysis presupposed that dedication requirements should be reviewed in the same manner as regulations which restrict use.<sup>62</sup>

The appellate court in *Nollan* found the *Grupe* decision to be "dispositive"<sup>63</sup> in requiring affirmation of the Commission's decision to impose an exaction on the Nollans. Following the *Grupe* analysis, the *Nollan* court recited the general rule articulated in *Georgia-Pacific* that "the justification for required dedication is not limited to the needs of or burdens created by the project."<sup>64</sup> The appellate court added for emphasis that "[h]ere the Nollans' project has not created the need for access to the tidelands fronting their property . . . ."<sup>65</sup>

The court then looked at the relationship between the exaction and the purposes of the Coastal Act, and found that the one carried out the other.<sup>66</sup> The court emphasized that the *nature* of the Nollans' project was not the focus of attention: "This case and *Grupe* differ in that *Grupe* involved construction of a residence on one of the few remaining vacant lots in the area. The difference is irrelevant."<sup>67</sup>

Finally, the court considered separately, as did *Grupe*, whether application of the condition to the Nollans caused a taking. The court's treatment of the issue, however, was terse; the court simply referred to the result in *Grupe*: "The *Grupe* court also held that the exaction did not constitute a 'taking' because although it caused a diminution in the value of *Grupe*'s property, it did not deprive him of the reasonable use of his property."<sup>68</sup>

To summarize the evolution of law in this area, the court of appeal's decision in *Nollan* confirmed that permit exactions enjoyed a presumption of constitutionality; that the particular exaction passed

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62. Compare *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (regulation of owner's use is valid if regulation substantially advances legitimate state interest and owner retains economically viable use) with *Loretto v. Teleprompter Manhattan CATV Co.*, 458 U.S. 419, 434-35 (1982) (physical occupation is a per se taking without regard to whether owner retains an economically viable use).

63. *Nollan v. California Coastal Comm'n*, 177 Cal. App. 3d 719, 723, 223 Cal. Rptr. 28, 30 (1986), *rev'd*, 107 S. Ct. 3141 (1987).

64. *Id.*

65. *Id.*

66. *Id.* at 724, 223 Cal. Rptr. at 31.

67. *Id.* at 723-24, 223 Cal. Rptr. at 31.

68. *Id.* at 723, 223 Cal. Rptr. at 31 (citation omitted). It could be argued that the court of appeal in *Nollan* did not in fact give the Nollans a separate takings analysis (the way the *Grupe* court had) because it was not directed to "the particular circumstances [of the Nollans'] case." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Rather, the "analysis" was merely a recital of the conclusion reached in the analysis of *Grupe*'s facts. Viewing *Nollan* in this way, it is a throwback to *Georgia-Pacific* and *Norsco* which had accepted as a general rule that no taking could occur as a result of an exaction, and therefore no form of individual analysis was necessary.

constitutional muster if it was a valid exercise of the police power, and it left the owner with a reasonable use of his property. The need to tie the exaction to the owner's project, as required by the *Mid-Way/Scrutton* line of cases, was no longer recognized because exactions were no longer viewed as a tool of mitigation in the event the project created public harm. Rather, exactions had come to be viewed as a *quid pro quo* for the benefit received when government permitted an owner to build on his private land. In the opinion that reversed the court of appeal in *Nollan*, the United States Supreme Court swept away this body of California law and established a much stricter test for reviewing the constitutionality of permit exactions.

#### IV. THE SUPREME COURT'S NEW TEST

##### A. Step One

The constitutional analysis, or "test," employed by the Supreme Court in *Nollan* starts at Section II of the opinion.<sup>69</sup> The Court begins with a fundamental premise. The premise is that uncompensated dedication requirements, standing alone, are unconstitutional: "Had California simply required the Nollans to make an easement across their beachfront available to the public . . . rather than conditioning their permit . . . , we have no doubt there would have been a taking."<sup>70</sup> So, for example, if the Nollans had never applied for a permit, but had simply received a notice in the mail from the state requiring them to dedicate their beachfront, there would have been a *per se* taking.

This fundamental premise is in turn based upon the "*character of the governmental action.*"<sup>71</sup> An unprovoked dedication requirement, even an easement for public access, is a physical invasion. In *Loretto*,<sup>72</sup> the court observed:

[W]here governmental action results in "[a] permanent physical occupation" of the property, by the government itself or by others . . . "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner. . . ." We think a "permanent physical occupation" has occurred, for purposes of that rule, 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 per-

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69. *Nollan*, 107 S. Ct. at 3145.

70. *Id.*

71. *Penn Cent.*, 438 U.S. at 124 (emphasis added).

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

mitted to station himself permanently upon the premises.<sup>73</sup>

Having observed that requiring an uncompensated conveyance of the easement outside the permit context would be a taking, the Court then posed the question, "whether requiring it to be conveyed as a *condition* for issuing a land use permit alters the outcome."<sup>74</sup> Presumably, the outcome would be altered if issuance of the permit amounted to just compensation for the exaction. The reader will recall that this idea had been accepted by the California courts. The court in *Grupe*, citing *Associated Home Builders*, stated that an owner receives "a substantial benefit by being allowed to proceed with the development of his property . . . in return for . . . [being required] to dedicate a portion of his land . . . ."<sup>75</sup>

The Supreme Court in *Nollan*, however, rejected this idea out of hand: "[T]he 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.'"<sup>76</sup>

Alternatively, the outcome might be altered if, by virtue of being attached to a permit, the "character" of the exaction were changed from a physical invasion to a lesser form of interference that does not constitute a taking per se. The Supreme Court accepted this proposition and found that in *some* situations, requiring the exaction as a condition for issuing a land use permit may change the character of the exaction from a physical invasion to a legitimate regulation. The Court stated: "We have long recognized that land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'"<sup>77</sup>

Thus, the Court recognized that an exaction can be either a physical invasion (in which case it is a taking per se) or a legitimate regulation (in which case it may or may not be a taking).<sup>78</sup> The theory is elementary. The Court assumes that some permit applications may be conditioned while others may not. Specifically, where the denial of a permit would leave the owner with no economically viable use for his property, the denial would constitute a taking. Such a permit

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73. *Nollan*, 107 S. Ct. at 3145 (citations omitted).

74. *Id.* at 3146 (emphasis added).

75. *Grupe v. California Coastal Comm'n*, 166 Cal. App. 3d 148, 176-77, 212 Cal. Rptr. 578, 596-97 (1985) (citing *Associated Home Builders v. City of Walnut Creek*, 4 Cal. 3d 633, 644, 484 P.2d 606, 615, 94 Cal. Rptr. 630, 639 (1971)).

76. *Nollan*, 107 S. Ct. at 3146 n.2.

77. *Id.* at 3146 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

78. The Court does not express its decision in these terms until near the end of the opinion, when in summary it states: "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.'" *Id.* at 3148 (citation omitted).

is unconditionable—it cannot be withheld: “We assume, without deciding, that . . . the Commission . . . would be able to deny the Nollans their permit outright . . . *unless* the denial would interfere so drastically with the Nollans’ use of their property as to constitute a taking.”<sup>79</sup>

When the permit is unconditionable for this reason, there is no difference between receiving a dedication notice in the mail, and encountering the dedication requirement as a “condition” to the granting of a permit. Since the permit may not be conditioned, the presence of the permit is a red herring; or in the Court’s words, its presence does not “alter the outcome.”<sup>80</sup> The exaction in these cases is tantamount to a physical invasion and is thus treated as a taking *per se*.

On the other hand, under circumstances where the permit may constitutionally be denied, because doing so would not leave the owner without a reasonable use of the property, then the permit may *also* be granted upon conditions. An exaction is not properly characterized as a physical invasion in these circumstances because the owner can choose to refuse the conditioned permit without forfeiting his constitutional right of reasonable use. In these circumstances, an exaction condition is properly treated as a type of regulation.

The above analysis will hereinafter be referred to as the “first step” of the *Nollan* test. For a dedication condition to pass this step, the governmental agency must have the lawful right to deny the permit being applied for. Clearing the hurdle of this first prerequisite does not guarantee, however, that the permit may be conditioned upon any and every requirement the agency dreams up. The particular condition must also pass step two.

### *B. Step Two*

Once it is determined that a permit denial would still leave the landowner with an economically viable use, it does not necessarily follow that the permit can therefore be denied for *any* reason. For example, a permit could not be denied because the applicant’s skin color is black. Nor could the agency deny a permit for purely arbitrary reasons, such as a feeling by the agency that the applicant is already rich enough and does not need the profits that would be generated by this project. Rather, a denial must advance a legitimate

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79. *Id.* at 3147 (emphasis added).

80. See *supra* text accompanying note 74.

governmental interest.<sup>81</sup> As to what governmental interests would justify denial of a land use permit, the Court in *Nollan* said: "Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' . . . . They have made clear, however, that a broad range of governmental purposes [qualify]."<sup>82</sup>

In deciding *Nollan*, the Court assumed<sup>83</sup> that "among these permissible purposes are protecting the public's ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on the public beaches."<sup>84</sup> Presumably, however, not all effects of a project are of sufficient significance to justify complete denial of the project. Only those effects that are significant enough to justify outright denial may form the basis for a condition requiring a dedication of land.<sup>85</sup>

Once a permitting agency has decided that a land use project should be denied as proposed, and the agency's reasons advance a legitimate governmental interest, the agency is free at that point to deny the permit. The Court held in *Nollan* that the agency is also free at that point, as an alternative, to grant the permit with conditions: "The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree."<sup>86</sup>

This quote makes it clear, however, that the condition selected by the agency must be one "that serves the *same* legitimate police-power purpose as a refusal to issue the permit."<sup>87</sup> Thus, if the legitimate reason for denying a permit is that the project will block ocean views, the agency may, in substitution for the denial, grant the permit with a condition that preserves ocean views:

Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional.<sup>88</sup>

Thus, even a condition that requires the dedication of land would be constitutional if it alleviates public impacts of the project that could instead have been alleviated by outright denial of permission to carry out the project.

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81. *Id.* at 3146-47.

82. *Id.*

83. *See id.* at 3147.

84. *Id.*

85. *Id.* at 3148.

86. *Id.* at 3147.

87. *Id.* (emphasis added).

88. *Id.* at 3147-48.

By limiting agencies' ability to impose conditions solely to situations in which the anticipated effects of a proposed project would justify the project's denial, the potential for abuse of the permit granting power is greatly reduced. If, on the other hand, agencies had the power to exchange permits for unrelated transfers of money or land, that power in the wrong hands could be abused. Permits crucial to important projects of wealthy corporate applicants could be withheld until the applicant provided a host of amenities which the public wanted but was not willing to pay taxes for. More and more areas of life might become regulated, with more and more opportunities for extortion. These dangers were anticipated and curtailed by the *Nollan* Court in adopting this aspect of its test. After *Nollan*, government agencies cannot always get what they want, but if they pass step one, they can get what they need.

The condition imposed must advance the same interests that justify denial. The extent to which the condition must do so was spelled out by the Court as follows:

[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.<sup>89</sup>

Applying this standard to the facts of the *Nollan* case, the Court stated:

[H]ere, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was . . . . It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house.<sup>90</sup>

The dissenting Justices criticized the majority for employing this heightened level of judicial scrutiny.<sup>91</sup> But to the extent weight is given to their interpretations of the majority opinion, the dissenting Justices may help to define the relationship that must exist between an exaction condition and a harmful aspect of the project which could have justified its denial. Justice Brennan described the required nexus as "a precise match between the condition imposed and the specific type of burden . . . created by the [proposed use],"<sup>92</sup> and

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

90. *Id.* at 3148-49.

91. *Id.* at 3151 (Brennan, J., dissenting).

92. *Id.* at 3154.



also as "a precise *quid pro quo* of burdens and benefits . . . ."93 Justice Blackmun referred to the standard as an "'eye for an eye'" requirement,94 reflecting a "rigid interpretation of the necessary correlation between a burden created by development and a condition imposed . . . ."95

The Court's emphasis on the importance of a proper nexus was undoubtedly provoked by Justice Brennan's suggestion that government agencies (like the Coastal Commission) should have little difficulty conjuring up adverse effects of a project in order to meet the Court's new requirements.96 Justice Brennan's skepticism is curious, given the majority's requirement that the purpose served by the exaction must be one that justifies "forbid[ding] construction of the house altogether."97 In response to his skepticism, however, the majority makes it clear that courts are not to accept agency rationales for exactions on their face; the courts are under a constitutional obligation to take a closer look.

### C. *Summary of the New Test*

The first step can be viewed as a trade.98 Since outright dedication requirements are unconstitutional, the property owner has a right to resist the dedication condition. However, in circumstances where the agency has a lawful right to deny the owner's permit, the owner and the agency may lawfully trade their rights. That is, the agency can agree to issue a permit for the owner's project provided the owner accepts a dedication requirement. If, on the other hand, the agency cannot deny the permit, because to disallow the requested use would be a taking, then the agency has nothing to trade, and *no* exaction is permissible. Thus, to get beyond step one, the agency must be able to justify an outright denial of the applicant's permit.

In situations where the agency can justify denial of the applicant's permit, an exaction attached as a condition to the permit will be lawful if a legitimate governmental interest is being substantially advanced by the exaction. A legitimate governmental interest is one that would justify outright denial of the permit. Thus, step two can be analogized to contract law where courts examine for adequacy the consideration given by a promisee. Under *Nollan*, the reviewing court must examine the trade made by the parties in step one to en-

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93. *Id.* at 3160 (emphasis in original).

94. *Id.* at 3162 (Blackmun, J., dissenting).

95. *Id.*

96. *Id.* at 3161 (Brennan, J., dissenting).

97. *Id.* at 3148.

98. *Cf. id.* at 3146 n.2 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) for the proposition that property rights which cannot be "taken" by government can nonetheless be the subject of a voluntary "exchange").

sure that the exaction was imposed by the agency to alleviate effects of the project which would have justified permit denial. An exaction which passes both steps of this new test is valid.

#### V. THE LAW IN CALIFORNIA AFTER NOLLAN

*Nollan* obviously changed the law relating to permit exactions. Instead of beginning with a presumption of constitutionality, as recent California cases had done,<sup>99</sup> the Supreme Court set out with a presumption that, due to their physical invasion character, demands for dedication are unconstitutional.<sup>100</sup> Exaction activity will henceforth be treated as regulation by the Supreme Court only when it is a true substitute for regulation, *i.e.*, when it is employed as an alternative to prohibiting the requested use.<sup>101</sup> The takings analysis employed in *Grupe*<sup>102</sup> was retained; however, instead of asking whether the owner has a viable use *after the permit is granted*, the courts now must ask whether the owner would have a viable use *if the permit were denied*. If this first step is passed, then the particular exaction chosen is evaluated and must withstand a heightened level of judicial scrutiny. Instead of merely asking whether the condition is "reasonably related" to the purposes of a statute authorizing exactions,<sup>103</sup> courts are to inquire whether the exaction substantially advances the same legitimate governmental interest that would have justified denial of the applicant's permit.<sup>104</sup>

Besides the above changes to California law as it relates specifically to permit exactions, the *Nollan* opinion made certain announcements which theoretically reach beyond the borders of permit exaction law. For example, after assuming facts that transformed the condition from a physical invasion into a potentially valid regulation, the Court applied the heightened level of scrutiny discussed above. The intriguing thing about this is that the Court made no apparent effort to limit the application of this elevated level of review to dedication requirements.<sup>105</sup> Instead, the Court referred in very general terms to

99. *See, e.g.*, *Grupe v. California Coastal Comm'n*, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985).

100. *Nollan*, 107 S. Ct. at 3145.

101. *Id.* at 3147-48.

102. *See supra* text accompanying notes 51-61.

103. *See Georgia-Pacific Corp. v. California Coastal Comm'n*, 132 Cal. App. 3d 678, 699, 183 Cal. Rptr. 395, 407-08 (1982).

104. *Nollan*, 107 S. Ct. at 3147.

105. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) is the only other opinion in which the Court appears to have applied close judicial scrutiny in a land use case to

those situations where heightened scrutiny would apply, and repeatedly referred to situations involving "permit conditions" in general, and to "land use regulation" in general.<sup>106</sup> Justice Brennan's dissent criticized the majority for treating exactions differently from other exercises of the police power in the regulation of land use.<sup>107</sup> However, instead of defending what Justice Brennan regarded as special treatment for exactions, the majority opinion responded by attacking his assumption that other types of land use regulation were entitled to a mere "rational basis" standard of review:

Contrary to Justice BRENNAN's claim, our opinions do not establish that these standards are the same as those applied to due process or equal-protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved . . . not that "the State 'could rationally have decided' the measure adopted might achieve the State's objective. . . ." [T]here is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical. *Goldblatt v. Hempstead*, 369 U.S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962), does appear to assume that the inquiries are the same, but that assumption is inconsistent with the formulations of our later cases.<sup>108</sup>

The other pronouncement in *Nollan* which is able to cross over into areas of the law outside the field of permit exactions is the Court's unqualified statement that "the right to build on one's own property . . . cannot remotely be described as a 'governmental benefit.'"<sup>109</sup> A few Supreme Court cases have stated in dicta that the ability to use one's land is a right inhering in the ownership of property,<sup>110</sup> but never before had the right to "use" been spelled out as a

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the question of whether the regulation at issue served a legitimate governmental purpose. Only Justice Powell voted consistently for the use of close scrutiny in both *Moore* and *Nollan*. The other six Justices who participated in both cases switched sides on this issue.

106. *Nollan*, 107 S. Ct. at 3146 ("land use regulation does not effect a taking if it 'substantially advance[s]' legitimate state interests"); *id.* at 3147 (a "permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking."); *id.* at 3148 ("the evident constitutional[ity] . . . disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."); *id.* ("unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation."); *id.* at 3150 ("as indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a 'substantial advance[ing]' of a legitimate State interest.") (emphasis added) (citations omitted).

107. *Id.* at 3151-52.

108. *Id.* at 3147 n.3 (citation omitted).

109. *Id.* at 3146 n.2.

110. See, e.g., *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945); *Buchanan v. Warley*, 245 U.S. 60, 74 (1917).

right to "build."

The effect of a recognized right to build, combined with heightened review for all permit conditions and building restrictions in general, could result in the judicial reexamination of certain other doctrines in California. For example, the validity of cases upholding permit conditions that require *something other than* dedications of land is brought into question. Logically, conditions like those upheld in *Norsco Enterprises v. City of Fremont*,<sup>111</sup> requiring the payment of fees in lieu of dedication, should be reviewed in the same manner as dedications. Otherwise, the protections afforded by the *Nollan* decision could be circumvented by the simple device of requiring the payment of a fee equivalent to the value of the desired dedication. Under this arrangement, the government agency could then condemn the property and compensate the owner with his own money.<sup>112</sup> Other conditions require the following types of activities: the off-site construction of replacement rental housing,<sup>113</sup> the on-site construction of a certain percentage of low-income housing, the commitment of a certain percentage of construction costs to publicly displayed art, the provision of day care centers, the establishment of ride-share programs, and other similar conditions making headlines in California,<sup>114</sup> although not necessarily involving dedications, may all have to pass the *Nollan* test.

Additionally, the issue arises of how to review those situations where land is down-zoned to prevent development. California courts have traditionally accepted the principle in Longtin's treatise on California land use law<sup>115</sup> that "[d]evelopment is a privilege not a right."<sup>116</sup> The *Nollan* concept that building on one's own property is one of the sticks in the bundle of rights known as property ownership<sup>117</sup> could change the result in cases like *Furey v. City of Sacramento*,<sup>118</sup> which held that a down-zoning to open space is generally not a taking where the effect is to preserve land in its historical use.

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111. 54 Cal. App. 3d 488, 126 Cal. Rptr. 659 (1976).

112. See, e.g., *Norwood v. Baker*, 172 U.S. 269 (1898).

113. See, e.g., *Terminal Plaza Corp. v. City of San Francisco*, 177 Cal. App. 3d 892, 223 Cal. Rptr. 379 (1986).

114. DiMento, *Nollan v. Coastal Commission: What Has Scalia Wrought?*, *San Francisco Banner Daily J.*, July 10, 1987, at 4, col. 3.

115. R. LONGTIN, *CALIFORNIA LAND USE REGULATIONS* 617 (1977).

116. *Trent Meredith, Inc. v. City of Oxnard*, 114 Cal. App. 3d 317, 328, 170 Cal. Rptr. 685, 691 (1981).

117. See *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

118. 24 Cal. 3d 862, 598 P.2d 844, 157 Cal. Rptr. 684 (1979).

This concept of a vested right to build also creates doubts about the vitality of California vested rights law. In the leading case of *Avco Community Developers, Inc. v. South Coast Regional Commission*,<sup>119</sup> the California Supreme Court refused to recognize a right to build even after the owner had invested approximately three million dollars in grading and installing of subdivision improvements. The theory behind cases like *Avco* is that owners have no right to build until they detrimentally rely upon a validly issued building permit. Until the ruling in *Avco*, the courts regarded the ability to build on the property as a mere expectancy of a benefit which could be withheld by government.<sup>120</sup> After *Nollan*, even if the right to construct a particular building remains unperfected until *Avco*'s elements of estoppel are established, it would appear the owner's right to build *something* must be recognized.

The *Nollan* decision also raises procedural questions. For years the law in California has limited judicial review of government agency decisions affecting land use rights to a "substantial evidence" standard rather than the higher scrutiny of "independent judgment." Independent judgment review is required when fundamental vested rights are at stake.<sup>121</sup> The court in *Drummey v. State Board of Funeral Directors*<sup>122</sup> stated:

[T]o say that [agency] findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards.<sup>123</sup>

Yet subsequent cases held that property owners, absent a building permit,<sup>124</sup> had no vested right to build.<sup>125</sup> Therefore, agency decisions affecting the ability of landowners to develop their property were limited in review to the substantial evidence standard. The propriety of employing the independent judgment standard after *Nollan* arises not only from the recognition in *Nollan* of a vested right to

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119. 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976).

120. *Id.* at 793, 553 P.2d at 551, 132 Cal. Rptr. at 391; *see also* *Patterson v. Central Coast Regional Comm'n*, 58 Cal. App. 3d 833, 843, 130 Cal. Rptr. 169, 175 (1976).

121. *See* *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 821, 567 P.2d 1162, 1172, 140 Cal. Rptr. 442, 452 (1977); *Strumsky v. San Diego County Employees' Retirement Ass'n*, 11 Cal. 3d 28, 34, 520 P.2d 29, 33, 112 Cal. Rptr. 805, 809 (1974); *Bixby v. Pierno*, 4 Cal. 3d 130, 138, 481 P.2d 242, 247, 93 Cal. Rptr. 234, 239 (1971); *Drummey v. State Bd. of Funeral Directors and Embalmers*, 13 Cal. 2d 75, 85, 57 P.2d 848, 854 (1939).

122. 13 Cal. 2d 75, 87 P.2d 848 (1939).

123. *Id.* at 85, 87 P.2d at 854 (quoting *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 52 (1935)).

124. *See supra* text accompanying notes 117-118.

125. *See, e.g., Nollan v. California Coastal Comm'n*, 177 Cal. App. 3d 719, 722, 223 Cal. Rptr. 28, 29 (1986), *rev'd*, 107 S. Ct. 3141 (1987); *Georgia-Pacific Corp. v. California Coastal Comm'n*, 132 Cal. App. 3d 687, 697, 183 Cal. Rptr. 395, 406 (1982).

build, but also by the Court's call for a higher level of judicial inquiry when land use decisions are under review.

#### VI. CONCLUSION

The two-step analysis adopted by the Supreme Court in *Nollan* rewrote California takings jurisprudence in the field of permit exactions. The decision also suggests that other types of permit conditions may likewise be required to pass the new test. Besides formulating an approach for courts to use when reviewing permit conditions, the *Nollan* Court recognized that land use permits restrict an intrinsic property right rather than grant a governmental benefit. Finally, the Court called for a new and heightened level of judicial scrutiny to be employed perhaps in all land use regulation cases. In the long term, depending upon how *Nollan* is applied in future decisions, these latter aspects of the case may rival in importance *Nollan*'s new standards for the constitutionality of exactions.

