Local Government Law Bulletin

Number 30
August 1987

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"Taking" Found for Beach Access Dedication Requirement
Nollan v. California Coastal Commission

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I. INTRODUCTION

On June 26, 1987, the United States Supreme Court did something it has not done since 1922.[1] It ruled that a land-use regulation amounted to an unconstitutional "taking" of private property under the Fifth and Fourteenth Amendments to the United States Constitution. In *Nollan v. California Coastal Commission*,[2] the Court declared unconstitutional a California Coastal Commission requirement that owners of a small beachfront lot dedicate a public access easement across the front of their property as a condition of their being permitted to replace a small beach cottage with a two-story house and double garage. The public easement would have allowed the public to "pass and repass" across James and Marilyn Nollan's property within a 10-foot strip between the mean high tide mark of the Pacific Ocean and their 8-foot-high seawall. The ruling reversed the California Court of Appeal's decision,[3] which had upheld the dedication requirement by relying on the liberal constitutional test California courts have applied in developer dedication cases. The *Nollan* case was the second within two weeks in which the United States Supreme Court ruled in favor of property owners and against governments enforcing land-use restrictions. In the earlier case of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[4] the Court ruled that when government adopts a land development regulation that amounts to a taking, it must compensate the owner for the restrictions imposed on the property for the period between the adoption of the regulation and the judicial decision finally invalidating it. *Nollan* offers an example of an instance where just such a taking was found to have occurred.

1. Sixty-five years ago the United States Supreme Court ruled that a mining restriction designed to prevent subsidence was an unconstitutional taking in the case of Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

2. No. 86-133, 55 U.S.L.W. 5145 (June 26, 1987).

3. Nollan v. California Coastal Commission, 177 Cal. App.3d 719, 223 Cal. Rptr. 28 (1986).

4. No. 85-1199, 55 U.S.L.W. 4781 (June 9, 1987).

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II. THE LAW OF "EXACTIONS"

The *Nollan* case may best be analyzed as an "exactions" case.[5] For purposes of this discussion, an exaction is a condition of development permission that requires a public facility or improvement to be provided at the developer's expense. Most exactions fall into one of four categories: (1) requirements that land be dedicated for street rights-of-way, parks, or utility easements and the like; (2) requirements that improvements be constructed or installed on land so dedicated; (3) requirements that fees be paid in lieu of compliance with dedication or improvement provisions; and (4) requirements that developers pay "impact" or "facility" fees reflecting their respective prorated shares of the costs of providing new roads, utility systems, parks, and similar facilities serving the entire area.

Traditionally, the land and improvements that developers have been expected to provide have been located "on-site" (within or on the perimeter of project boundaries), since these exactions must principally serve the residents or users of the development. Many public facilities, however, serve far more than a single development, and "in-kind" dedications for public facility sites and improvements are not easily divisible or apportioned. As a result, more and more communities have turned to exaction fees, which allow public facility costs to be more carefully and equitably apportioned to particular projects. The dedication of a right-of-way along the beach in *Nollan* was a relatively simple, yet crude, form of exaction.

The claim that the application of land-use regulations amounts to an unconstitutional taking may arise in a variety of circumstances. Only when an exaction is imposed, however, is a transfer of property to the public or an actual physical occupation of the land by the public likely. Nonetheless, planning law jurisprudence makes it clear that the mere placing of conditions upon development permission that require the transformation of private property (land, improvements, or cash) into public assets does not necessarily give rise to an unconstitutional taking. Indeed a number of state and federal courts have established constitutional tests for exactions that examine the connection between the exaction and the need for the public facility attributable to the development.

Although no North Carolina appellate court has ever established a constitutional test for exactions,[6] a number of state courts and several federal courts have had the opportunity to consider the constitutional question. The first and most conservative test is the "specifically and uniquely attributable" test:[7] An exaction is constitutional only if the burden cast upon the developer is specifically and uniquely attributable to the development. The general public benefit from the exaction must be rather insignificant, and the benefits must inure almost exclusively to project residents. (If measured against this test, the access-way dedication in *Nollan* would most likely fail.) A second, more flexible, constitutional test is the "reasonably related" or "rational nexus" test.[8] It asks whether the dedication, improvement, or fee requirement is "reasonably related" to or bears a "rational nexus" to the nature and impact of the development proposed. The cost burden to the developer generally cannot exceed the prorated portion of the costs of providing public facilities that can fairly be attributed to the development. Courts that use one of the versions of this test generally do not require the development to enjoy the exclusive or even the principal benefit from the dedication, improvement, or expenditure of the fee. A third test has been used by California courts that is more liberal than the tests used elsewhere and allows an even more indirect link between the exaction and the impact of the development.[9] California state courts have found no constitutional requirement that exactions serve primarily the development for which they are imposed. In the context of beach access-way dedications, it has been enough that existing beach access ways provided by dedications from new development adequately serve existing and new residents alike and that a developer bear no more

5. For a current and comprehensive treatment of the topic, *see* Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW AND CONTEMP. PROBS. 1 (1987).

6. In Messer v. Town of Chapel Hill, 59 N.C. App. 692, 297 S.E.2d 632 (1982), *rev. den.*, 307 N.C. 697 (1982), the North Carolina Court of Appeals upheld the facial constitutionality of the provision in the North Carolina municipal subdivision regulation enabling statute (G.S. 160A- 372) that authorizes park-land dedication requirements and held that the city's designation of a site on the developer's land for the dedication did not amount to the taking of private property for a public purpose without payment of just compensation in violation of the United States and North Carolina Constitutions. The question of whether the exaction was sufficiently related to the expected need for additional park land generated by the development was not raised.

7. The classic exposition of this test can be found in Pioneer Trust & Saving Bank v. Mount Prospect, 22 Ill.2d 375, 176 N.E.2d 799 (1961).

8. A discussion of these tests can be found in Home Builders Ass'n v. City of Kansas City, 555 S.W.2d 832 (Mo. 1977).

9. The test dates from the California Supreme Court's decision in Associated Home Builders v. City of Walnut Creek, 4 Cal.3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971), *appeal dismissed*, 404 U.S. 878 (1971).

than an equitable share of the costs of providing facilities to serve new growth.[10]

III. THE DECISION

In *Nollan* the constitutional question was not raised in the earlier stages of the case. The California Coastal Commission issued the Nollans' development permit under the California Coastal Act. One provision of that Act authorizes the Commission to impose public-access conditions on coastal development permits for replacing an existing single-family home with a new one only where the proposed development would have an adverse impact on public access to the sea.[11] After the Coastal Commission imposed the dedication requirement on the Nollans' permit, the matter was remanded to it by the county superior court for a full evidentiary hearing on the question of whether the development would have a direct adverse impact on public access to the beach, as provided in the statute. When the Commission again included the permit condition and its decision was again appealed, the superior court held that the record was inadequate to sustain the required statutory finding. The California Court of Appeal reversed, however, ruling that there was no statutory or constitutional obstacle to the imposition of the access condition. In reaching its decision, the court relied on the constitutional test used by California state courts. The Nollans then appealed directly to the United States Supreme Court, raising only the taking question under the United States Constitution.

The majority opinion, written by Justice Scalia, seemed to suggest the right-of-way dedication requirement in *Nollan* could meet *no* constitutional test based on the connection between the exaction and the public need attributed to the development, apparently including the version of the test used by California courts. ("We can accept, for purposes of discussion, the Commission's proposed test as to how close a 'fit' between the condition and the burden is required, because we find that this case does not meet even the most untailored standards.")[12] Nevertheless, the Court did recognize indirectly the validity of the first two types of constitutional tests mentioned above, declaring that "Our conclusion is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts."[13] In this regard, then, attorneys and planners may infer that the *Nollan* decision is apparently an extension of the mainstream of the existing law of exactions.

Despite its confirmation of the more traditional constitutional tests for exactions, however, the Court clearly wanted to analyze the *Nollan* case in its own way. The tone of the majority opinion suggested that a period has begun in which the court will more rigorously scrutinize the public regulation of private property. In its discussion of an impermissible permit condition, it declared that such a restriction "is not a valid regulation of land use, but 'an out-and-out plan of extortion,' "[14] clearly suggesting government illegality. This rhetoric aside, a potentially far-reaching, but more subtle, change in emphasis (the minority would say "change in doctrine") can be found in the standard the Court used for judging the taking claim. In the past the United States Supreme Court has typically analyzed both taking and substantive due process claims in terms of the threshold question of whether the use of the police power is rational. In *Nollan*, however, the Court declared that "contrary to JUSTICE BRENNAN'S claim (in a dissenting opinion), our opinions do not establish that these standards (for analyzing a taking claim) are the same as those applied to due process or equal-protection claims."[15] In *Nollan* a majority of the Justices supported the view that the taking clause is more demanding. According to the Court, the constitutional test is not whether the "State could rationally have decided the measure adopted might achieve the State's objective."[16] Instead, "the abridgment of property rights through the police power" is constitutionally permissible under the taking clause only as a "*substantial* advanc[ing] of a legitimate State interest."[17] This change in emphasis (or doctrine) could well furnish the Court with new reason for reviewing cases involving government regulation of property more stringently.

The *Nollan* court was particularly concerned about the possibility that a government may "leverage away" its police power by regulating less stringently than it could in order to impose on those regulated conditions and concessions that are unrelated to the initial purpose of regulation. For example, a government with the power to prohibit a particular type of development might be

10. The case upon which the California Court of Appeal relied in its *Nollan* decision was Grupe v. California Coastal Commission, 166 Cal. App.3d 148, 212 Cal. Rptr. 578 (1985).

11. CAL. PUB. RES. CODE § 30212 (West Supp. 1986).

12. 55 U.S.L.W. at 5148.

13. *Id.*

14. *Id.*

15. *Id.* n. 3.

16. *Id.* at 5147 n. 3.

17. *Id.* at 5149.

tempted to allow the development, but impose an extraneous condition or exaction on the developer in the process of so doing. According to the Court, "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 nontradable) development restrictions."[18]

In applying that principle to the *Nollan* case, the Court declared that the purposes articulated by the California Coastal Commission for issuing the Nollan permit were "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." The Court assumed, without deciding, that these purposes were legitimate. To make its point, however, the Court claimed that there was no substantial advancing of these purposes by the terms of the permit and no connection whatsoever between the Commission's announced purposes and the access-way dedication. It found it "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."[19] If it was the view that was to be protected, the Scalia opinion suggested, an appropriate condition would be that the Nollans provide a viewing spot on their property for passersby with whose view of the ocean their new house would interfere. In addition, the Coastal Commission claimed that the Nollans' new house (along with other shorefront development) would interfere with the desire of people who drove past the Nollans' house to use the beach, thus creating a "psychological barrier" to access. The Court characterized this claim as a "play on words," suggesting that any "psychological barrier" created by additional coastal development would actually tend to *reduce* the use of public beaches, even as shorefront development might tend to increase the number of potential beach users. Furthermore, the Court also found it "impossible to understand how (the access way dedication) lowers any 'psychological barrier' to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new home."[20]

One has to wonder whether the Court heard the best arguments the State of California could muster. After all, the State could have argued that the development of land along the coast would probably increase the use of public beaches. Why was it not plausible to claim that an access-way dedication requirement could legitimately be tied to a permit for even a modest development, since any new development along the coast will probably increase the use of beach areas and contribute to the overall need for more access ways? The Commission might have been able to advance these arguments forcefully if the access easement were required as a condition to the approval of a new residential subdivision, particularly if a new access way would be needed to allow residents of lots without shorefront to reach the ocean. But the facts of the *Nollan* case apparently made it extraordinarily awkward for the State of California to offer these more traditional justifications. The Nollans' development permit application was for the replacement of one single-family residence with another. It is a difficult argument indeed to claim that the Nollan development would increase the use of public beaches when the number of dwelling units developed on the property had not increased. (Apparently the Commission did not emphasize the fact that the new residence was 1,674 square feet in area, over three times as large as the 504 square-foot bungalow that was demolished, and it probably could accommodate a few more residents.) Unable to show that that the Nollans' development plans had a direct impact on public beach use, the Commission was content to contend that the visual impact of the development was sufficient to warrant the dedication.

One peculiarity of the *Nollan* case was the uncertain impact of a provision of the California Constitution, adopted in 1872. It specifically prohibits any individual's "exclu[ding] the right of way to [any navigable] water whenever it is required for any public purpose."[21] The majority decided that the provision did not affect the result in this case for several reasons. First, it found the provision inapplicable to lateral easements such as the one in *Nollan* that run *along* navigable water rather than extend *to* it (from the street to the sea). In the process the Court did apparently examine what little California law interpreted this provision, suggesting that despite the provision, California law did not bestow upon members of the general public the right to cross private land to reach navigable tidewaters. At this point

18. *Id.* at 5148 n. 5.
19. *Id.* at 5148.
20. *Id.*
21. CAL. CONST., art. X, § 4.

the Court backed off, concluding that it was inappropriate for it to provide the first definitive interpretation of this provision, particularly since the parties had not argued the matter in the California Court of Appeal. Brennan in dissent did not specifically claim that the California constitutional provision established a new set of easement rights for the public, but he did declare that the Nollans "cannot claim that the deed restriction has deprived them of a *reasonable expectation* to exclude from their property persons desiring to gain access to the sea."[22]

IV. THE DISSENTING OPINIONS

The dissenting Justices—Blackmun, Brennan, Marshall, and Stevens—criticized the majority for requiring such a stringent nexus between the exaction and the burden on public facilities, chiding it for what the Blackmun dissent termed "an 'eye for an eye' mentality."[23] The Brennan dissent, joined by Marshall, emphasized that the burden imposed on the Nollans by the grant of a "pass and repass" easement would be minimal. The narrow eight-foot strip between the high water mark and the Nollan seawall was apparently unsuitable for public sunbathing, picnicking, fishing, or boat launching; it essentially amounted to a pedestrian way. Brennan suggested that the easement was less of an intrusion than a sidewalk, an exaction commonly required as a condition of development permission.[24] The physically intrusive nature of the easement turned out to be a critical aspect of the majority's reasoning since the impact of the right-of-way on the value of the Nollan property was practically nonexistent. There was also disagreement about the relevance of evidence that the mean high tide line varied and that this boundary moved up to and beyond the seawall at certain times of the year. The Brennan dissent found that the beach access dedication was crafted in such a way as to address the particular problem created by the shifting high-tide line. The majority, in apparent response to Brennan, suggested that "the risk of boundary disputes is inherent in the right to exclude others from one's property"[25] and could not serve as a basis for permit condition.

The Brennan dissent also mentioned an idea that should have received more attention from the majority. According to Brennan, the comprehensive nature of the Commission's access-way dedication program provided reciprocal benefits to those property owners such as the Nollans who were burdened by the requirements. This principle, labeled the "average reciprocity of advantage" by Justice Holmes 65 years ago in *Pennsylvania Coal Co. v. Mahan*,[26] provides a basis for a finding that no constitutional taking of regulated property has occurred. Certainly in the Nollans' neighborhood the burdens of dedication were widespread. As of January, 1985, the California Coastal Commission had imposed the requirement of dedicated public beach access on 1,817 coastal property owners.[27] In the Faria Beach area where the Nollan property was located, 43 of 60 coastal development permits had been conditioned upon similar dedication requirements, and of the 17 not so conditioned, 14 had been approved before administrative regulations were adopted allowing the imposition of such conditions, and the remaining three did not involve shorefront property. As a practical matter, the Nollans enjoyed the reciprocal benefits of regulation because apparently they were able to walk along the beach beyond the confines of their property only because the Commission had imposed similar conditions in approving other new beach developments. The reciprocal nature of the burdens and benefits might have been more evident had the Commission been able to show that a substantial portion of those who used public beaches and access ways in the Faria Beach area were residents of beachfront developments in that area or their invitees. But this idea of reciprocity is not well-suited to analyzing beach access-way dedications. The thrust of the coastal programs in California, North Carolina, and most states is not to provide better access to the beach for local residents. Rather it is to protect the interests of the greater public at large, to provide opportunities for greater use of public beaches by all citizens, and to mitigate the effects of beachfront projects that, according to one California appeals court, put "one more brick in the wall separating the people (of California) from the state's tidelands."[28] In the eyes of the *Nollan* court, the benefits and burdens of the dedication requirement were skewed in favor of the public to the detriment of coastal property owners. As the court said, "California is free to advance its 'comprehensive program' if it wishes by using its power of eminent domain for this 'public purpose,' see U.S.

22. 55 U.S.L.W. at 5153 (emphasis added).
23. *Id.* at 5155 (BLACKMUN, J., dissenting)
24. *Id.* at 5152 (BRENNAN, J., dissenting)
25. *Id.* at 5148.
26. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
27. "Court to Review Access to Beaches," *Zoning News*, December 1986, at 1.
28. Grupe v. California Coastal Commission, 166 Cal. App.3d 148, 168, 212 Cal. Rptr. 578 (1985).

Const. Amdt. V; but if it wants an easement across the Nollans' property, it must pay for it."[29]

V. IMPLICATIONS

The most obvious implications of *Nollan* for North Carolina governments appear to lie in the Court's emphasis on the rights of private property and the clear connection that must be shown between governmental purposes and regulatory means. There is no direct suggestion that government must assume the burden of proving that a challenged regulation is *not* a taking, although Scalia does write that legislative deference and "constitutional propriety" disappear when the means "utterly fails to further the end advanced."[30]

The *Nollan* opinion does not define the elements of its "substantial nexus" text, nor does it offer much guidance in ascertaining how that text will apply. Justice Stevens (in dissent) remarked that local officials "must pay the price for the necessarily vague standards in this area of the law."[31] Further jurisprudence will probably be necessary before it is possible to determine just how strict the standards are likely to be.

Certain types of exactions, however, clearly appear to be in jeopardy. Off-site dedication or improvement requirements will be very difficult to justify. Requirements that developers provide low-income housing as a condition of being allowed to develop office space (used in Boston, San Francisco, and several other large cities) appear suspect because the link between the exaction and the impact of the development is more attenuated. North Carolina communities should not assume, however, that improper exactions are strictly a foreign concern. Planners and attorneys should be particularly careful to review "negotiated conditions" placed on zoning special-use permits or rezonings for which no specific provision is made in the ordinance. Local governments that impose such conditions may be unable to furnish evidence of the governing board's legislative intent outlining the connection between the conditions imposed and the public purpose to be achieved or to show that the affected property owners are not being forced "alone to bear public burdens which, in all fairness and justice, should be borne by the public at large."[32] *Nollan* may also have implications for the the fairly common practice of granting residential density bonuses to developers who provide certain amenities or dedicate land for public purposes. The Scalia opinion clearly found objectionable the practice of adding an unrelated condition to an otherwise valid permit. It remains unclear whether the Court will sanction conditions placed on the use of police power that allow the "trading" of standards for achieving one type of land-use objective at the expense of another.

Certain implications of *Nollan*, however, are already clear. Local governments will find that dedication, improvement, and fee requirements will be susceptible to challenge, without a firm analytical basis for the requirement. Local governments must be armed with park-land standards, trip-generation rates, and utility system capacity-allocation figures, and the like, and be willing to use them in establishing ordinance standards for exactions, rather than relying on them for justification after an exaction is challenged. In addition, *Nollan* teaches the lesson that no system of exactions may be applied without proper regard for the application of the standard to each individual property. If regulatory standards are relatively coarse, the ordinance should provide for, and the locality should be prepared to use, variance and waiver provisions or provisions allowing substitute methods of compliance to ensure that the application of a regulatory requirement in a particular circumstance does not give rise to a taking claim. *Nollan* should not jeopardize a well-conceived set of exaction requirements, but it does serve as a reminder that governments may not legally induce concessions from property owners and developers simply by taking advantage of the great leverage that the process of development approval provides.

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29. 55 U.S.L.W. at 5149.

30. *Id.* at 5148.

31. *Id.* at 5156 (STEVENS, J., dissenting)

32. *Id.* at 5147 n. 4, quoting Armstrong v. United States, 364 U.S. 40, 49 (1960).