

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 86-133

**TITLE** JAMES PATRICK NOLLAN, ET UX., Appellants V.  
CALIFORNIA COASTAL COMMISSION

**PLACE** Washington, D. C.

**DATE** March 30, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

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JAMES PATRICK NOLLAN, ET UX., :  
Appellants :  
v. : - No. 86-133  
CALIFORNIA COASTAL COMMISSION :  
-----x

Washington, D.C.

Monday, March 30, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

ROBERT K. BEST, ESQ., Sacramento, California; on behalf of the Appellants.

MS. ANDREA SHERIDAN ORDIN, ESQ., Los Angeles, California; on behalf of the Appellees.

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments next in No. 86-133, James Patrick Nollan against California Coastal Commission.

Mr. Best, you may proceed whenever you're ready.

ORAL ARGUMENT OF ROBERT K. BEST, ESQ.,  
ON BEHALF OF THE APPELLANTS

MR. BEST: Mr. Chief Justice, and may it please the Court:

This case presents the issue of the scope of protection under the just compensation clause, where the right of the Nollan family to exclude others from the property surrounding their family home on the coast of California.

The case comes to you on an appeal from a decision by the California Court of Appeal which overturned favorable judgments for the Nollans.

The trial court had ruled, after a review of the facts of the case, that the Nollans intended action to replace one single family residential structure with a new, larger family home would have no effect on the public's access to and around the beach in the area of their home; and therefore, could not justify the imposition on the Nollans of the requirement placed by

1 the California Coastal Commission that they dedicate an  
2 accessway covering approximately one-third of their  
3 property, for public use.

4 QUESTION: Mr. Best, may I ask you to address  
5 a preliminary question that is troubling me.

6 The allegation of California is that the  
7 Nollans went ahead during the litigation and rebuilt the  
8 house, and that under California law, that amounts to a  
9 waiver of their right to challenge the constitutionality  
10 of the permit.

11 How is that dealt with below? And what is  
12 your response to that problem?

13 MR. BEST: The issue was never raised below,  
14 Justice O'Connor, so it was not decided by the courts  
15 below in this case.

16 QUESTION: Was the construction -- is it a  
17 fact that the construction was carried out pending this  
18 litigation?

19 MR. BEST: Yes. The house was constructed  
20 without the permit.

21 QUESTION: Was that after the matter was heard  
22 by the Court of Appeal in the California courts?

23 MR. BEST: The construction was going on  
24 during the time this case was on appeal. And our point  
25 here, on that particular argument, is that the

1 presentation by the Attorney General and our response to  
2 that in our -- our response to the second motion to  
3 dismiss is, that that is not California law; that what  
4 California law provides --

5 QUESTION: Well, what do you expect us to do?  
6 To decide the California law question here?

7 MR. BEST: No, I don't believe it's necessary  
8 to decide that question here, because I think California  
9 law on the point is very clear.

10 QUESTION: Well, we'd have to decide that then.

11 MR. BEST: I don't believe so. I guess to the  
12 extent, if this Court believes there is a question as to  
13 whether or not a waiver of a right to follow a judicial  
14 proceeding has occurred.

15 Our point is that the courts below have  
16 already decided that point, and the courts have said  
17 that mandamus is always available.

18 There was a recent California Supreme Court  
19 decision in the Candid Enterprises case, which is cited  
20 in our response, where the Court essentially dealt with  
21 the same issue and expressly said that, although a  
22 waiver may occur as to past expenditures, as to damages  
23 that had occurred, preceding -- in reliance -- not  
24 challenging the permit, that the remedy of mandamus is  
25 always available.

1           And that has been California's proceeding all  
2 along the line. Otherwise, without the remedy, you put  
3 the permit applicant in essentially this problem of  
4 having to swallow an unconstitutional provision.

5           And one of the things that were very --  
6 concerning us, in terms of the argument that is being  
7 made by the Attorney General here, is to suggest that  
8 the permit processes may be used as an exaction  
9 mechanism without regard to the facts of the case,  
10 because it shifts the whole burden onto the property  
11 owner.

12           Whenever the government wants a piece of  
13 property, if they're lucky enough to have jurisdiction  
14 over the owner for any reason where a regulatory permit  
15 is involved --

16           QUESTION: You would agree, would't you, Mr.  
17 Best, that your client proceeds at his peril in this  
18 respect; that if he loses here, he's then bound by the  
19 California Coastal Commission requirement?

20           MR. BEST: Absolutely, Your Honor. He must --  
21 if this case -- if the decision of the Court of Appeal  
22 is not reversed, the Nollans are obligated to make the  
23 dedication of the property for the public right of way.

24           QUESTION: Could you tell me precisely what  
25 the access right would be? Is it just across the rear

1 of your property?

2 MR. BEST: That's correct --

3 QUESTION: It's not through -- from outside  
4 your property down to the beach?

5 MR. BEST: No, it is not an access from the  
6 road to the beach. It is an access along the beach.  
7 The Commission --

8 QUESTION: It's between the high water mark  
9 and what?

10 MR. BEST: And the seawall.

11 QUESTION: And how far is that?

12 MR. BEST: There's some dispute as to how far  
13 it is. But according to the property records that exist  
14 at this time, we're talking about approximately 35 feet.

15 QUESTION: And that is -- and you have title  
16 to that?

17 MR. BEST: The Nollans have title to that.

18 QUESTION: And if -- if -- if you lose the  
19 case, then people may not only cross -- cross that  
20 piece, but they could just use it?

21 MR. BEST: No. The dedication provision is  
22 for pass and repass rights, which means the public can  
23 walk back and forth and use the beach for tide pooling,  
24 for getting -- if they're surfing, to take their  
25 surfboards along, and so forth.



1           But it would not allow them, for example, to  
2 engage in recreational activity.

3           QUESTION: They couldn't set up their beach  
4 chair there, and sit in it?

5           MR. BEST: In theory, that's correct, Your  
6 Honor. But as a practical matter, if the public has  
7 access, your ability to go out and say, well, sure you  
8 can walk up and down, but you can't stand and talk, the  
9 Nollans feel that once the door is opened, the ability  
10 to interject any sort of effective control is going to  
11 be lost.

12           QUESTION: They could surf there, too, I  
13 assume? That would be passing and repassing?

14           MR. BEST: Surf, Justice Scalia?

15           QUESTION: Yes.

16           MR. BEST: Yes, sir, they do surf there now.  
17 They can surf there without the accessway, and this is a  
18 popular surfing area.

19           QUESTION: Well, not when it's at high tide.  
20 What happens when --

21           MR. BEST: Well, surfers -- as a surfer, they  
22 go in at the -- at the open public access areas that  
23 exist a few hundred yards to the north, and a few  
24 hundred yards to the south of the Nollans' property.  
25 And then, of course, they can paddle their surfboards

1 around any place, and surf where they can surf.

2 And if they surf in, they turn around and go  
3 back out again.

4 So it doesn't really have a significant impact  
5 currently. This is a very active surfing beach even  
6 without the access provision that's there, is the point  
7 I'm trying to make.

8 QUESTION: May I ask, Mr. Best, would it be a  
9 taking under your view of the case if they insisted on  
10 -- if the regulation was not in the form it is, but  
11 said, you may not build a fence along the side to  
12 interrupt with the passage?

13 MR. BEST: No, Your Honor.

14 QUESTION: That would not be --

15 MR. BEST: We think there's a very important  
16 distinction with this case, is that it is not a  
17 regulation of use, as the prohibition on building  
18 anything would be a regulation on use.

19 QUESTION: Why is it different in practical  
20 effect from a prohibition against putting up a fence?

21 MR. BEST: It's different in a practical  
22 effect because what is happening is, you are actually  
23 transferring a property to the government, and other  
24 people are obtaining an interest in your property.

25 QUESTION: Well, that's a difference in legal

1 effect. But what's the difference in practical effect,  
2 for a person living there?

3 MR. BEST: It's a difference in practical  
4 effect specifically in they have no -- they lose their  
5 ability to go out and ask people not to be there. In  
6 other words --

7 QUESTION: Not to pass through; not to pass  
8 through.

9 MR. BEST: That's true, but if the fences  
10 aren't there --

11 QUESTION: They don't lose their ability to  
12 ask people not to be there. If the people stop, as I  
13 understand it, they can ask them to please move on.

14 MR. BEST: That is correct.

15 QUESTION: But the thing they can't do is  
16 interrupt their passage.

17 MR. BEST: That is correct. Which of course --

18 QUESTION: It seems to me that's the practical  
19 equivalent of a fence. That's all a fence does.

20 MR. BEST: No, I think it's the opposite of a  
21 fence. In other words, if they were denied the ability  
22 to put up a fence, then they would not have a physical  
23 barrier, but they could still go out and say, don't  
24 cross, you know -- don't cross the beach.

25 QUESTION: But if you win this case, can't you

1 put up a fence?

2 MR. BEST: Well, you couldn't put up a fence  
3 without a coastal development permit. And there's clear  
4 that they're not going to approve that.

5 And again, you see, that would be a regulation  
6 of use.

7 QUESTION: Most people don't trespass even  
8 without a fence, I take it? You have fairly law abiding  
9 people in California, don't you? You really need fences  
10 to stop them from trespassing?

11 MR. BEST: Justice Scalia, we have both kinds  
12 in California. Some people do not trespass without a  
13 fence; other people do.

14 And that's part of the problem. This is an  
15 open access for anybody.

16 QUESTION: Can you put a -- if you win this  
17 case, can you put up a sign, private beach?

18 MR. BEST: If you have a coastal development  
19 permit, you can put up a sign.

20 QUESTION: Will you get one? Can you get one,  
21 if you lose this case?

22 MR. BEST: I doubt very seriously that it  
23 would be approved.

24 QUESTION: Hold your breath.

25 MR. BEST: But again, you see, that's a

1 regulation on use.

2 QUESTION: Well, what about just putting a  
3 line on the seawall: No trespassing from Point A to  
4 Point B?

5 MR. BEST: Not without a coastal development  
6 permit.

7 QUESTION: You couldn't even do that?

8 MR. BEST: That's correct. And, again, you --  
9 again, the Nollans are not disputing that. And Justice  
10 Stevens, I want to go back to that and emphasize, the  
11 Nollans feel there is a big difference between being  
12 told -- their being told not to do something on their  
13 property, and being told to allow somebody else to do  
14 something on their property.

15 And whether that is being told not to put up a  
16 fence, or not to put up a sign, that -- or being told  
17 not to build on the beach area, they concede that the  
18 state has that authority.

19 QUESTION: But if you win this case, you could  
20 have a -- you could hire two people, one in one chair at  
21 one end of the private property, and one in the other  
22 end, and say, sorry, don't go beyond this point?

23 MR. BEST: Well, let's look at in a practical  
24 sense.

25 QUESTION: I mean that wouldn't require a

1 permit?

2 MR. BEST: That could be hired -- that could  
3 be done without a permit.

4 QUESTION: What would you do about the  
5 surfboard that came in? If you do assign -- put  
6 somebody on each end, you can't stop that man from  
7 coming in?

8 MR. BEST: That's correct. A man can come in  
9 on the surf, and he can -- because the tidelands are  
10 public. In other words, the lands up to the mean high  
11 tide are public, and surfers are free to ride in and  
12 turn around and go back out again without regard to this  
13 particular accessway.

14 But I -- let me explain to you why this is  
15 important to the Nollans. I think it's important to  
16 recognize this.

17 Faria Beach is a variable beach. The sand  
18 washes in and the sand washes out. And there are  
19 admittedly times when it is not particular important to  
20 the Nollans to be able to exclude the public; times  
21 when, as some of the briefs have said, you have a rocky,  
22 relatively inhospitable area separated by a high  
23 seawall.

24 But when the sand comes in, and there are  
25 pictures in the Joint Appendix at page 261 and 265, that

1 shows you have a broad sandy beach with a relatively low  
2 seawall.

3 And when you have that kind of a circumstance,  
4 then it isn't so much of a concern of the people who are  
5 walking across the -- the foot 33, 34 and 35, right  
6 along the surf. The Nollans have no interest in  
7 excluding people from normal use of the beach.

8 But this dedication is not just a few feet  
9 along the side of the tidelands. It goes all the way up  
10 to the seawall.

11 And at times like that, people can walk along  
12 just a few feet from the Nollans' house. They can see  
13 over the seawall directly into their living area. They  
14 can reach over the seawall into the very small area that  
15 is left between their house.

16 Now, as any parents of small children, that  
17 concerns them.

18 QUESTION: Mr. Best, the -- the other side,  
19 California also argues that the state already  
20 effectively holds an easement by virtue of the  
21 California constitution.

22 MR. BEST: I cannot believe they made that  
23 argument, Your Honor.

24 Again, in our reply brief, we point out that  
25 the constitutional provision has been -- has been

1 interpreted several times by the California Supreme  
2 Court and by several Courts of Appeal, and it has never  
3 been interpreted -- in fact, the Attorney General's own  
4 opinion on this matter says that these -- that provision  
5 has never been interpreted to allow the public a right  
6 of access across private lands.

7 I simply -- and the case they cited in their  
8 brief do not stand for that proposition. In fact, those  
9 very cases reinforce that private land is private land.

10 The Nollans' fee title is no less than anybody  
11 else's fee title.

12 QUESTION: Well, one would think that if that  
13 were the constitution of California, the Court of Appeal  
14 would have said something about it.

15 MR. BEST: And you would think there would be  
16 no need for even asking for the exaction in the first  
17 place, because the right would already exist.

18 The Commission had never believed that they  
19 had this right without this. The Commission made  
20 reference to maybe there are prescriptive rights, or  
21 maybe there was an implied dedication, although none of  
22 those matters were ever decided either by the Commission  
23 or the courts below, but never referred to the fact that  
24 we have an absolute right under the California  
25 constitution for access.



1 I simply don't know where that argument came  
2 from.

3 Now, on this case, we would like to emphasize  
4 that since it is not a regulation abuse, since what we  
5 are dealing with here is not a prohibition on the  
6 Nollans, and this property is stringently regulated.

7 I mean, recognize this. You have a very small  
8 piece of property that is only allowed for single family  
9 residential use, and it is very stringently regulated in  
10 terms of health and safety standards as to what you can  
11 build there.

12 And the Nollans are complying with all of  
13 that, and not challenging any of that. This is not  
14 really a land use issue, in the sense that nobody's  
15 asked to change the approved land use, a land use which  
16 has been in effect for over half a century.

17 What the question here is, in essence, the  
18 coastal development permit is another building permit, a  
19 second level building permit, in addition to the one the  
20 Nollans had to acquire from the county and local  
21 governments.

22 So the controlling factor in a takings  
23 analysis when applied to this type of case is the  
24 character of the governmental action being involved  
25 here; the fact that, indeed, what we have here is the

1 government engaged in an acquisition program.

2 There is an established state program to  
3 develop a roadway along the beach. It's set forth  
4 preliminary in the statute, and then the Commission, in  
5 its policy guidelines, adopted for the whole state,  
6 expressly says they're going to take this kind of an  
7 accessway from any kind of development, without regard  
8 to what it is, as long as it's not expressly exempted in  
9 the statute.

10 The guidelines go so far as to say, look at  
11 the need for access, and look at the property's ability  
12 to give that access, and don't -- don't look at what the  
13 property owner is doing when you decide to take that  
14 access.

15 In the staff report, in making the decision,  
16 the Commission refers to the comprehensive program right  
17 at Faria Beach itself to obtain this kind of an  
18 accessway.

19 QUESTION: Well, what -- could the -- suppose  
20 you had applied for this right to rebuild this house,  
21 and you are making it larger?

22 MR. BEST: Yes, sir.

23 QUESTION: And the Commission just said,  
24 sorry, no.

25 MR. BEST: That is within the power of the

1 Commission. That's a regulation of use.

2 QUESTION: We just don't want a house built  
3 there -- or that we don't want it rebuilt there?

4 MR. BEST: And that case is not this case,  
5 Your Honor. The Commission has the power to deny that.  
6 And if they denied the rebuilding of it, then we would  
7 be here on a traditional regulatory takings case, if  
8 this Court had ever been interested in taking another  
9 traditional takings case.

10 But that would be a denial of use. And this  
11 case does not dispute either the authority of the state  
12 to obtain an accessway along the coast if they want one,  
13 or the ability of the Commission to restrict use.

14 What this case disputes is the ability of the  
15 state to obtain the accessway without condemning it by  
16 attaching the requirement that the accessway be given to  
17 them on a regulatory permit to which they're otherwise  
18 eligible.

19 QUESTION: Mr. Best, what is the accessway  
20 that they have now?

21 MR. BEST: The accessway that they have now is  
22 what is called vertical access, in other words, north of  
23 the Nollans and south of the Nollans a few hundred yards  
24 in each direction, there, one, is a public beach area  
25 where they get all the way to the coast.

1 QUESTION: Well, what is going to happen when  
2 you lose here?

3 MR. BEST: If we lose here --

4 QUESTION: Yes.

5 MR. BEST: -- then the Nollans will have to  
6 dedicate across approximately --

7 QUESTION: And what will that mean?

8 MR. BEST: That will give a square of beach in  
9 the middle of private beach --

10 QUESTION: Which everybody is using right now?

11 MR. BEST: Which some people are using right  
12 now.

13 QUESTION: Right now. Well, they're the  
14 public, aren't they?

15 MR. BEST: Some members of the public are  
16 using it right now, with the permission of the Nollans.  
17 But the Nollans currently have the ability, if there's  
18 something going on there they don't like, or if they  
19 don't want the people crossing within a few feet of  
20 their window, to go out and ask them to cross down by  
21 the waterway and stay away from their private  
22 residence, for example, if their small children are  
23 playing in the backyard.

24 They lose that under this access provision.

25 QUESTION: What else do they lose?

1 MR. BEST: They lose basically the ability to  
2 control who comes on their property.

3 QUESTION: Their feelings are hurt.

4 MR. BEST: I didn't hear that last --

5 QUESTION: Their feelings are hurt?

6 MR. BEST: No, Your Honor, it's much more than  
7 the feelings are hurt. As parents of small children,  
8 you're talking about the backyard of their home.

9 This is, in effect, one big sandbox in the  
10 backyard of their home, and they would like to retain  
11 some ability to control --

12 QUESTION: (Inaudible.)

13 MR. BEST: That's correct. But the swimming  
14 pool isn't there. The swimming pool belongs to the  
15 public. And so does the sand right adjacent to the  
16 swimming pool belong to the public.

17 Then there's a sand that belongs to the  
18 Nollans. And again, one of the most difficult aspects  
19 about this particular effect, and why the Nollans are  
20 upset about it, is, the Commission didn't just say,  
21 let's take a little strip of sand along towards the  
22 water.

23 The Commission said, we want all this beach,  
24 all the way up to the seawall, which means, people could  
25 wander back and forth right next to their windows.

1 QUESTION: How high is the seawall?

2 MR. BEST: The seawall, Justice Stevens,  
3 varies in height depending on the season and how much  
4 sand is there. And the pictures in the record will  
5 demonstrate that.

6 QUESTION: I thought it was about eight feet  
7 high.

8 MR. BEST: Your Honor, it can be as high as  
9 eight feet high. At other times, it is as low as -- as  
10 three or four feet.

11 QUESTION: But that's when the water is  
12 adjacent to it, isn't it?

13 MR. BEST: No, it's the other way around.  
14 When the sand comes in, the water retreats, and you have  
15 a very, very broad -- it's when the sand washes out that  
16 the water comes all the way into the seawall.

17 Mr. Nollan's declaration said from his  
18 measurements, at the time when the sand has accreted on  
19 the beach, that the mean high tideland stops ten feet  
20 beyond his property; ten feet beyond his property line;  
21 there's ten feet of sandy beach area above the mean high  
22 tide line before his property line begins.

23 QUESTION: So that people, even under your  
24 view, could use that ten feet --

25 MR. BEST: Oh, they can use that ten feet.

1 QUESTION: -- but they can't come across that  
2 --

3 MR. BEST: It's only where Mr. Nollan's  
4 property line ends.

5 QUESTION: The -- how often is your beach  
6 useable at all?

7 MR. BEST: Well, the beach is useable for one  
8 reason --

9 QUESTION: Yes, but isn't it rocky,  
10 sometimes? If there's no sand, what's there?

11 MR. BEST: If there's no sand, what you have  
12 is a lot of rocks with some sand in between the rocks.  
13 And then the beach is useable for tide pooling or for,  
14 you know, there's a lot of things people do at the beach  
15 besides play volleyball.

16 And when the sand comes in, you have more  
17 recreational opportunities. But the beach is definitely  
18 useable except in those situations where the storm tides  
19 are in and the water is really pounding against the  
20 seawalls and in unusually high tides.

21 QUESTION: Is this house at risk from being  
22 undermined by the sea?

23 MR. BEST: Not as long as the seawalls hold.  
24 They will be damaged by extremely high weather, by the  
25 water coming over the seawalls and hitting the house.

1           But they're been there -- been there many,  
2 many years, and the damage has not been irreparable, or  
3 sufficient to get people not to rebuild.

4           QUESTION: Mr. Best, supposing that the  
5 seawall had not been built on this property, and your  
6 clients applied for permission to build a new house with  
7 -- and construct a seawall that was going to be perhaps  
8 eight or ten feet high.

9           And the Commission says, we're not going to  
10 let you -- we're not going to let you build the seawall  
11 because that's going to cut off people's view from the  
12 road.

13           Do you think there's anything wrong with that  
14 sort of a condition?

15           MR. BEST: I think that, again, when you're  
16 having a prohibition, a regulation on use, that the only  
17 way we can evaluate that is with what effect that has on  
18 the value of the property and so forth.

19           There they're not acquiring property for  
20 themselves. They're saying, don't do something to  
21 disturb the property. The question is, maybe that would  
22 make that property totally worthless.

23           QUESTION: Well --

24           MR. BEST: And might be a taking.

25           QUESTION: -- supposing it doesn't make it



1 worthless.

2 MR. BEST: If it doesn't make it worthless,  
3 and there's still -- the property is still of value to  
4 the owner, then it would not appear to be a taking,  
5 unless you came under one of the other factors in the  
6 Penn Central analysis.

7 QUESTION: Well, what about typical zoning --  
8 or zoning requirements that, if there's going to be a  
9 new subdivision developed, that the owners have to  
10 dedicate land for public streets and rights of way? Is  
11 that similar to your case? Do you think that government  
12 can extract that kind of a dedication?

13 MR. BEST: Well, it's exceedingly different  
14 from our case. Let me emphasize that again.

15 We have one lot, replacing the same use on the  
16 same lot. In a subdivision case, you're normally  
17 talking about multiple lots. Frequently a change in use  
18 from undeveloped property to developed property.

19 And you have a different factual context. And  
20 I think what we are supporting --

21 QUESTION: Well, is that going to be all right  
22 under your view of the constitutional requirements under  
23 the takings clause? Does the balance -- can the balance  
24 come out differently and be constitutional?

25 MR. BEST: Under our view --

1           QUESTION: Can the city, for instance, in one  
2 of these developments, require a dedication of land for  
3 a school or a park because of the population that's  
4 going to be using this new subdivision?

5           MR. BEST: Yes, Your Honor. Under our --

6           QUESTION: And roads?

7           MR. BEST: Roads? Yes, Your Honor. Under our  
8 view of the takings clause, it's an ad hoc factual  
9 inquiry based on that case.

10           And the case presents different factors. Now  
11 this case is not -- this Court has not decided a  
12 specific case of this type before. And that's why we  
13 have analogized to the assessment cases in our opening  
14 brief, and suggested that one of the ways you can  
15 distinguish between the minimal type cases where --  
16 where the -- have a minimal effect, and it would be a  
17 taking to impose an exaction, and the other types of  
18 cases is, by analyzing whether the property owner is  
19 creating a burden or not, and the exaction is solely for  
20 the purpose of relieving that burden.

21           Here we have two problems. One is, it's clear  
22 on the record, nobody really denies that what the  
23 Commission is doing is taking the property. They want  
24 the property for a totally different purpose; nothing to  
25 do with what they're building there.

1                   QUESTION: Mr. Best, could I interrupt you  
2 just a second. Do I correctly -- I don't want to  
3 misstate your argument.

4                   If I understand you, you're saying that if  
5 they had a regulation of use which, in substance, said  
6 to the Nollans you may not use this property in anyway  
7 that will interfere with the public's walking past  
8 without loitering or stopping, that would be  
9 permissible.

10                   You can't put up a fence or a sign or you  
11 can't put a guard out. The regulation of use would be  
12 permissible.

13                   MR. BEST: That's correct, Your Honor. If  
14 they --

15                   QUESTION: But what's wrong is, precisely the  
16 same objective is accomplished because there's a  
17 dedication?

18                   MR. BEST: It's not the same objective, and  
19 it's not the same result, and I think that's where you  
20 and I are having trouble communicating.

21                   What we are saying is, they're free to  
22 regulate this sandy beach area, allow nothing to be done  
23 on it, for the purpose of keeping an open coastal area  
24 for aesthetic and environmental reasons.

25                   QUESTION: Well, specifically, nothing that

1 will prevent a member of the public from walking from  
2 Point A to Point B; that's the use.

3 MR. BEST: Nothing that will physically  
4 prevent. They can't put anything on it.

5 QUESTION: Well, what if the regulation was  
6 use, you may not put up signs or have anyone out there  
7 orally advising them not to do it?

8 MR. BEST: Now, there we would draw the line.  
9 When you get beyond the signs, when you're talking about  
10 the physical development and then saying, and you cannot  
11 stop people -- in other words, and in effect, you must  
12 give them a right of way.

13 QUESTION: You can't sue somebody for --

14 MR. BEST: You can't sue somebody. You can't  
15 enforce --

16 QUESTION: That's where you draw the line.

17 MR. BEST: -- you can't force -- you can't  
18 throw them off. You can't call the cops and say they're  
19 trespassing. As long as the government is saying, don't  
20 build a fence. Don't put a barrier out there of any  
21 kind, that's fine.

22 But when they get to the point and say, and,  
23 you lose your legal right to tell somebody to leave your  
24 property, no matter how obnoxious or how distasteful you  
25 find their presence, or threatening to your family you

1 may find their presence, that's where the line has to be  
2 drawn.

3 In effect, here, there's just no dispute.  
4 What we are dealing with here is a right of way, a right  
5 of way for the public to walk back and forth across this  
6 property; and we are dealing with a program that takes a  
7 very important concern -- this is a private residence, a  
8 family with small children -- away from this family to  
9 serve a program, a statewide program.

10 And I would like to reserve a few minutes for  
11 rebuttal if there are no other questions.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
13 Best. We'll hear now from you, Ms. Ordin.

14 ORAL ARGUMENT OF ANDREA SHERIDAN ORDIN, ESQ.,

15 ON BEHALF OF THE APPELLEES

16 MS. ORDIN: Mr. Chief Justice, and may it  
17 please the Court:

18 Contrary to the argument, we do believe that  
19 this is another traditional regulatory taking case  
20 before this Court.

21 Before you is a fairly unremarkable condition  
22 which is allowed -- which has been placed by the Coastal  
23 Commission on the granting of a permit for new  
24 development, granting really a sidewalk by the sea,  
25 allowing persons to pass and repass in that perhaps

1 10-foot area between the high mean tide and the top of  
2 the seawall.

3 The record is not entirely clear how tall that  
4 seawall is. Eight feet appears in the Solicitor  
5 General's record. Different figures appear in  
6 declarations.

7 The pictures at the back of your Appendix, I  
8 think, make it very clear that in great part, all  
9 seawalls tend to be above the heads of all who walk  
10 along there.

11 QUESTION: Well, it has to depend on how much  
12 sand there happens to be in, doesn't it?

13 MS. ORDIN: That's exactly right, and how much  
14 water there happens to be, as you recognize from those  
15 pictures also. It is an inhospitable, rocky shore, much  
16 of the time, with the water lapping or crashing against  
17 that seawall.

18 QUESTION: Where -- is it Ventura County?

19 MS. ORDIN: Yes, it is. Faria Trust Beach.

20 And was once a -- a larger trust which has now  
21 been broken into these smaller parcels and lots, each  
22 with single family dwellings or vacation homes.

23 But here it was a permit by the Coastal  
24 Commission which was granted to build new development.  
25 The Coastal Commission didn't say, no, you may not build

1 a house that is three times as large as the one that was  
2 there before.

3 The Coastal Commission did not say, you may  
4 not have a two-story house here which will block visual  
5 access, which will cause the types of burdens that we  
6 sere in the record below.

7 The Coastal Commission after taking evidence,  
8 and of course with some help from the trial court who  
9 sent it back to the Coastal Commission to take some  
10 more evidence, did then decide that they would impose  
11 the least restrictive of all permit conditions; and that  
12 is, the -- the pass and repass conditions.

13 QUESTION: Ms. Ordin, does the Coastal  
14 Commission contend here that the pass and repass  
15 easement is necessitated in anyway by the change in the  
16 house that's going to be on the property?

17 MS. ORDIN: Yes, the Coastal Commission does.

18 QUESTION: And would you explain how that goes?

19 MS. ORDIN: Yes. The individual house,  
20 perhaps in and of itself, would not be sufficient to  
21 cause that type of burden.

22 QUESTION: To cause what type of burden?

23 MS. ORDIN: The -- oh, the burden on the  
24 visual access to the coast. As you can see in the  
25 administrative record, there are studies, and there are

1 -- studies not only of this tract but other -- other  
2 tracts which show that one of the purposes behind the  
3 Coastal Act was to allow the public to have access to  
4 its own public lands.

5 And one of the most important areas has been  
6 the area to see that land; to know that your public  
7 beach is there; and be able to get there. And so --

8 QUESTION: Well, there was already a house  
9 there, though?

10 MS. ORDIN: Yes, a house.

11 QUESTION: So I don't see how that's much of a  
12 burden. There was a -- it's a replacement of one house  
13 for another, so your argument there seems quite weak  
14 frankly.

15 MS. ORDIN: We believe that that house, which  
16 was originally 521 square feet, and then is in excess of  
17 1,600 square feet and two stories with adjacent garages,  
18 is a very different house, and therefore, a new  
19 development.

20 But certainly, if it were only that house, and  
21 that house alone, I'm afraid we might have to concede  
22 that.

23 QUESTION: Well --

24 MS. ORDIN: But it is all the other houses.

25 QUESTION: What's that got to do with --



1 QUESTION: Why should the Nollans be held  
2 responsible for all the other houses?

3 MS. ORDIN: Because they are a part of this  
4 wall of houses along the thousand miles of the coast  
5 which are creating a wall between the people and their  
6 public beaches.

7 QUESTION: Well, it's a visual wall you've  
8 been talking about.

9 MS. ORDIN: Yes, we have.

10 QUESTION: But what -- I would suppose the  
11 Coastal Commission could solve the public's right to be  
12 able to see the ocean without requiring a property owner  
13 to allow access across the rear of his property.

14 What's that got to do with vision?

15 MS. ORDIN: The way the Pacific Coast Highway  
16 passes this area, the visions for the persons in their  
17 buses and in their cars and walking along is obstructed  
18 by those houses, which are much higher --

19 QUESTION: Well, I agree -- I agree with  
20 that. But what's that got to do with the right of way  
21 across the rear of the property?

22 MS. ORDIN: It is one of the burdens that this  
23 house, along with others, has place on the -- on the  
24 rights of the public.

25 QUESTION: But how does the easement alleviate

1 that burden? It doesn't enable anyone to see better  
2 from the bus?

3 MS. ORDIN: Our position is that there are a  
4 variety of burdens that are placed by this construction  
5 and other construction; and there are a variety of  
6 purposes that are served.

7 QUESTION: Well, before the house -- before  
8 the property owner -- before this property wanted to be  
9 expanded, before the owner wanted to expand it, there  
10 was the same restriction across the back of his  
11 property.

12 Why did expanding the house increase or  
13 decrease the burden on the public access along the beach?

14 MS. ORDIN: It is a -- it's the other side of  
15 that coin of the burden on access. And I think this  
16 Court has said as recently as in footnote 21 of Keystone  
17 that the actual match of the burden and what the  
18 individual property owner gives up does not have to be  
19 precise or exact.

20 QUESTION: Well, this is nowhere near -- we're  
21 not arguing whether it's precise and exact. What you  
22 seem to be arguing is that if you do anything that's  
23 going to harm the public somehow, we can make you cough  
24 up something in return that'll help the public, whether  
25 it's related or not.

1 MS. ORDIN: Well, I think it's much more  
2 specific than that, Justice Scalia.

3 QUESTION: What about a vertical right of  
4 access? I assume that the logic of your position is that  
5 you could have required vertical access here, too?

6 MS. ORDIN: The logic of our position is that  
7 we could have required vertical access. This is not a  
8 vertical --

9 QUESTION: So everybody along that coast could  
10 be required to let the public pass from the road with an  
11 easement across their land without any compensation by  
12 the state?

13 MS. ORDIN: In this particular case, where we  
14 have a specific statute which is grounded in the  
15 California constitutional provision, which demands that  
16 we give maximum access to the public --

17 QUESTION: Well, you can pay for it and comply  
18 with the constitution, I mean, right?

19 MS. ORDIN: But it isn't a payment case. It  
20 is a case that says, there have been burdens placed on  
21 the public based on your development of new  
22 development.

23 As a legislative finding, as a constitutional  
24 finding, California has said, in its wisdom, that that  
25 is a burden. And that burden must be paid for

1 incrementally, snally, sometimes by moderate -- moderate  
2 losses to the property owner.

3 Here the property owner gains from this, also.  
4 There are incremental benefits that sometimes arise  
5 here. This property owner, who may have lost very  
6 little -- a right to exclude people; the right of use in  
7 this pass and repass -- is gaining from that very same  
8 condition --

9 QUESTION: What?

10 MS. ORDIN: -- that is imposed by the Coastal  
11 Commission on all similar situated --

12 QUESTION: What is he gaining?

13 MS. ORDIN: He too is gaining that right to  
14 walk along the beach, as he --

15 QUESTION: Well, didn't he -- the owner didn't  
16 have the right to walk along the beach? His own beach?

17 MS. ORDIN: Oh, I'm sorry, Justice Marshall.  
18 Of course he had the right to walk along his own beach.  
19 But he may wish to go further than in front of his own  
20 private home. And he may wish not to pass down from the  
21 seawall, and to walk half a mile up to a public beach,  
22 or a half a mile down.

23 QUESTION: Well, that doesn't -- did this  
24 fellow had dune buggies running around there?

25 MS. ORDIN: There was no right to have dune

1 buggies running around there.

2 QUESTION: Well, what's to stop the state from  
3 giving him that right?

4 MS. ORDIN: Well, the state would feel very  
5 strongly about the damage to the coast from dune buggies  
6 riding along there. So --

7 QUESTION: Well, could they have buses?

8 MS. ORDIN: Could not have buses, because  
9 based on this record --

10 QUESTION: Why not?

11 MS. ORDIN: Because based upon this record the  
12 state took evidence showing the -- the fragile nature of  
13 this environment; and the state would not require  
14 anything but this very minimal intrusion of passing and  
15 repassing right next to the public beach, and perhaps on  
16 the public beach.

17 QUESTION: Well, why do they need to take --  
18 they're passing there now, right?

19 MS. ORDIN: They are passing there now.

20 QUESTION: Why give them the right to pass  
21 when they're already passing?

22 MS. ORDIN: Well, but this --

23 QUESTION: There must be some other reason.  
24 There must be another reason.

25 MS. ORDIN: Well, one of the reasons that was

1 in the record was that this is now a big house that's  
2 going to last a long time, and although the Nollans --

3 QUESTION: I'm not talking about the house;  
4 I'm talking about the beach. What changed the beach,  
5 now?

6 MS. ORDIN: The Nollans are the ones who are  
7 giving permission at this time to let people pass. The  
8 Nollans are doing that --

9 QUESTION: Well, how are they going to stop  
10 them?

11 MS. ORDIN: The Nollans cannot stop them --  
12 well, can stop them now if this -- if we do not win this  
13 case. But the -- the successors in interest from the  
14 Nollans might very well say, we don't want the public to  
15 pass.

16 There are many questions about the ownership  
17 of this property, there is no question about it, in  
18 terms of whether it's even been impliedly dedicated  
19 already.

20 But the Coastal Commission took no position on  
21 those areas, and instead, it merely wishes --

22 QUESTION: You just walked in and said, we're  
23 going to have a highway in front of your house.

24 MS. ORDIN: No, we are going to allow the  
25 public to walk along a small area --

1 QUESTION: Well, does the public usually walk  
2 along a highway?

3 MS. ORDIN: In California, sometimes too much.

4 QUESTION: Well, they do. So that's what  
5 they're going -- they're going to open this up, what is  
6 now a private highway, and make it a public highway.

7 MS. ORDIN: We are asking a property owner who  
8 has --

9 QUESTION: (Inaudible.)

10 MS. ORDIN: We are asking -- or we would not  
11 be here -- we are asking the property owner --

12 QUESTION: Well, please don't ask me -- if  
13 that's what --

14 QUESTION: I don't see why you tie it to the,  
15 you know, to the alteration in the house. This is an  
16 important state interest, I suppose.

17 Why don't you just do the same for all houses,  
18 whether they -- you know, the person who is lucky enough  
19 to have modernized their house a couple of years before  
20 the California Coastal Act went into effect doesn't have  
21 to give you an easement, I -- you have to pay for that  
22 one from that other person who's already modernized his  
23 house? But this person, since he wants to modernize the  
24 house, has to give it to you for free.

25 That doesn't seem fair, somehow.

1 MS. ORDIN: Well, that's a legislative  
2 judgment. I believe under our California constitutional  
3 provision, a statute such as you suggest might very well  
4 not only pass, but pass constitutional muster here and  
5 in California.

6 But the legislature made a different  
7 judgment. And the legislature said that it is that type  
8 of new development that we will impose this type of a  
9 condition.

10 QUESTION: What type of new development? It  
11 sounds like all types of new development.

12 MS. ORDIN: Well, the guidelines in those  
13 statutes are, any development which is in excess of 10  
14 percent of the footage.

15 However if you see --

16 QUESTION: Square -- square footage? It's a  
17 comparison of square footage or lineal footage?

18 MS. ORDIN: It compares square footage. So  
19 here, of course, we are far over the 10 percent figure;  
20 it is not even close.

21 But the Coastal Commission has the power to  
22 define new development within that statute; and it has  
23 that guideline that anything over 10 percent shall be  
24 new development.

25 If I may then, the -- to return to my point



1 that I do believe this is a traditional regulatory  
2 permit case, I do believe that in this case, the  
3 intrusion here, contrary to some of the arguments, is --  
4 is extraordinarily minimal.

5 And there are the questions of what the  
6 underlying right is for a property owner to exclude in  
7 such a case. But in any case, this very small passage  
8 and repassage certainly does not in anyway impose  
9 anything that looks like a Loretto type taking for the  
10 purposes of this Court.

11 QUESTION: How far is the seawall from the  
12 back of this house here? Let's assume that there --  
13 that whoever lives in the house has little children, or  
14 even, they don't have little children. They have a back  
15 window there overlooking the sea, which they normally  
16 want to have open.

17 Now, I wouldn't consider it a minimal  
18 intrusion at all if your backyard is, what, seven feet,  
19 and then there's the seawall. And when the sand's all  
20 the way up there, the seawall is, let's say, four feet  
21 high.

22 And let's assume there's a person down the  
23 street that I think -- I don't trust him. I mean, he  
24 just looks shifty eyed. And he takes to walking back  
25 and forth seven feet away from my back window, back and

1       forth; back and forth.

2               I can't stop him, so long as he keeps going  
3 back and forth, right? Looking into my house and --

4               MS. ORDIN: On two points. The same person  
5 passing back and front in front of the house causes and  
6 raises and heightens a kind of concern about that which  
7 I think certainly the Nollans could take different  
8 action --

9               QUESTION: What different action? I can't  
10 stop them. The person hasn't done anything.

11              MS. ORDIN: Well, you may not wish to -- the  
12 Nollans may not wish to, but they may indeed wish to  
13 call someone, if they feel threatened or in fear, if  
14 that is the allegation.

15              QUESTION: No, they just don't like the fellow  
16 walking back and forth and looking into their house  
17 constantly. It makes them --

18              MS. ORDIN: But as to --

19              QUESTION: They couldn't stop that, could  
20 they, unless there were some --

21              MS. ORDIN: Unless there were facts to show  
22 that this was a harrassing or other --

23              QUESTION: I'd much rather have another 15  
24 feet beyond my property to keep them that much further  
25 off. Wouldn't that be nicer?

1 MS. ORDIN: It may be nicer, but if you have  
2 built new development, it may indeed be that you are  
3 going to have to make different judgments.

4 The Coastal Commission also has the power to  
5 arrange for privacy buffers. The statutory scheme is  
6 quite discretionary. It does not extend as far as the  
7 constitutional would allow us.

8 QUESTION: Well, Mr. Nollan thought he bought  
9 a privacy buffer. I mean, that's the point.

10 MS. ORDIN: Well, I'm not sure. Because that  
11 gets to his reasonable expectations. And here we have  
12 had a Coastal Commission Act. We have had a California  
13 constitution. And we have had these regulations.

14 And when he actually bought this house in  
15 1982, all of them were in place, and was fully aware of  
16 all of those conditions.

17 So I am not sure that he had any reasonable  
18 expectation of anything other than reasonable, rational  
19 regulation by the Coastal Commission.

20 QUESTION: You mean so long as the things that  
21 California couldn't do previous -- to existing  
22 landowners, they can do in the future by just saying, in  
23 the future we are -- we want you all to be on notice, we  
24 can take easements over your land.

25 And although prior to their saying that, it

1 would have been unconstitutional, the mere fact that they  
2 have disrupted investor expectations by announcing that  
3 in the future, though it's unconstitutional, that  
4 they're going to do it, that that changes things?

5 MS. ORDIN: The mere announcement does not  
6 make what was -- or is not -- does not make it  
7 constitutional.

8 Under these facts here, the Nollans, if they  
9 were making a traditional takings argument, I think are  
10 ousted from that argument because of their recognition  
11 of this regulatory scheme.

12 And again, what we would say is a regulatory  
13 scheme that has a great deal of discretion, and allows  
14 the property owner much flexibility, and does not even  
15 extend as far as the state constitution and the United  
16 States Constitution would allow it to go.

17 QUESTION: Ms. Ordin?

18 MS. ORDIN: Yes.

19 QUESTION: Didn't the case we had in Kaiser  
20 Aetna say that the right to exclude is of central  
21 importance to a property owner?

22 MS. ORDIN: Yes. Certainly this Court has  
23 said it in Kaiser Aetna, and has said it often. And of  
24 course it is --

25 QUESTION: And do you agree?

1 MS. ORDIN: That it is an important aspect of  
2 the property --

3 QUESTION: Of central importance to the  
4 property owner.

5 MS. ORDIN: I will say it was of central  
6 importance. I would say in Kaiser Aetna, the reason  
7 that that case was decided differently than I would have  
8 this Court decide this case is a situation where  
9 government, unlike government here, which has made its  
10 will known very clearly, government and the Corps of  
11 Engineers in that case allowed the property owner to  
12 spend millions of dollars to develop a navigational  
13 servitude, and once that navigational servitude existed,  
14 government came in years later and said, now you must  
15 have public access.

16 So that, though I certainly agree as a general  
17 proposition of the importance of the right to exclude,  
18 the decision in Kaiser versus Aetna does not assist, I  
19 believe, in deciding this case.

20 QUESTION: You concede that there has to be a  
21 reasonable relationship between the contemplated use of  
22 the land and the condition that government extracts --

23 MS. ORDIN: I do concede that.

24 QUESTION: -- in exchange for the permit?

25 MS. ORDIN: I concede that it not only --

1 QUESTION: So this case then turns on whether  
2 such a reasonable relationship exists? Is that the  
3 crux of this case, in your view?

4 MS. ORDIN: The crux -- I do believe it may be  
5 a two-part analysis. But the very first analysis is  
6 exactly as Your Honor suggests; that indeed, we look to  
7 see if there has been a rational and reasonable  
8 relationship or nexus between the harm being sought to  
9 be obviated and the nature of the action.

10 QUESTION: And so some might think that the  
11 state is limited in its concern about the visual burden  
12 to regulations that limit the height of the structure or  
13 the size of it.

14 But you say it goes beyond that?

15 MS. ORDIN: That's right. Because, again,  
16 reasonable and rational does not mean exactitude. And  
17 here, we are looking at all of the burdens on access.

18 And one of the access, because it happens to  
19 be visual, is the burden, access along the beachfront  
20 and the walking is a way of compensating.

21 There could have been other ways. He could  
22 have --

23 QUESTION: Well, I -- I might be inclined to  
24 think that the reasonable nexus would be limited to  
25 regulations of the size, location and so forth of the

1 structure itself.

2 MS. ORDIN: That might be an analysis that the  
3 legislation would have -- would have determined. Our  
4 legislature did not.

5 And in fact, that kind of analysis might lead  
6 --

7 QUESTION: But if that -- if the reasonable  
8 relationship or the nexus is part of the constitutional  
9 balance, then that's something the court has to be  
10 concerned about as well.

11 MS. ORDIN: Yes.

12 QUESTION: It isn't totally left up to the  
13 legislative body, I suppose.

14 MS. ORDIN: Absolutely. Great deference,  
15 clearly, to the legislative body; but absolutely, that is  
16 right.

17 I would like to point out that time -- not  
18 time and place, but size and place of the structure  
19 might very well be a much more substantial taking in the  
20 generic sense than anything like walking along the  
21 beach.

22 If in fact we had denied the permit  
23 altogether, or if in fact we said, you may not build a  
24 second story, certainly many, many homeowners would say  
25 that that was much more obstructive and much more

1 intrusive into their private rights.

2 QUESTION: Yes, but, Mr. Ordin, may I follow  
3 up on Justice O'Connor's question? The burden here is  
4 on visual access of the beautiful ocean and the shore.

5 It seems to me you've alleviated that harm.  
6 It seems to me you might argue, had you given --  
7 required vertical access, you might say, well, they can  
8 park the bus and get out and walk to the beach and  
9 therefore see what they otherwise couldn't see. That  
10 might be related.

11 But how does horizontal access respond to the  
12 particular burden you've described?

13 MS. ORDIN: Access, we say, and have said  
14 through the statutes and through the regulations, is a  
15 term which includes ability to enjoy the beach.

16 And there are many ways that you are forbidden  
17 from enjoying that beach. Congestion, lack of parking  
18 lots, the inability to see the beach, private dwellings;  
19 a whole variety of areas.

20 So it is the larger picture of access that we  
21 are trying to fix. And we have made that judgment that  
22 insofar as access, the visual access, has been cut off,  
23 and other burdens that this house may place on the -- on  
24 the public, that we look to ways to compensate.

25 And you can compensate it by vertical access



1 and by horizontal access. And in this case, they  
2 determined, after all the facts, that it was horizontal  
3 access.

4 I really believe that the definition is  
5 broader than looking to the individual burden in one  
6 situation, and making the condition fit exactly.

7 QUESTION: What about -- what about making  
8 this landowner, who owns another piece of property half  
9 a mile down the highway, devote that to a public parking  
10 lot for buses, so the people can get out and look at the  
11 ocean? Could the state do that, as a condition to  
12 increasing the size of your house?

13 MS. ORDIN: I would think that finally is  
14 right at the line of what is a reasonable --

15 QUESTION: Gee, I think that's a lot closer --

16 MS. ORDIN: Because of the buses?

17 QUESTION: -- I think it's this side from what  
18 you've done, because --

19 MS. ORDIN: Well, I concede that, also.

20 QUESTION: You're saying, here are the people  
21 driving along the highway who's view is obstructed by  
22 increasing the size of the house will now have some  
23 place else they can go a half a mile down where they can  
24 see the ocean.

25 And you think that that would be bad, but this

1 is good.

2 MS. ORDIN: No, I -- I --

3 QUESTION: Because this serves entirely  
4 different people. That is, the people who drive by in  
5 the bus still can't see the shore, but at least there'll  
6 be some other people, surfers or whoever, who can walk  
7 along the wall and look into this fellow's house.

8 QUESTION: Of course it may be, there won't be  
9 anybody. It may be that his two neighbors aren't  
10 subject to this passage requirement. And so nobody can  
11 cross their property, and hence, nobody can cross this  
12 fellow's except his two neighbors. Big gain.

13 MS. ORDIN: Well, we are not talking about big  
14 gain or small gain or good or bad.

15 QUESTION: We certainly aren't, you're right.

16 MS. ORDIN: What we are talking about is the  
17 upholding of a regulatory scheme which is designed to  
18 make gains, and has done it very slowly, and very  
19 ponderously.

20 And here we're hopeful that the conditions  
21 will be held to be a reasonable exercise of the police  
22 power.

23 The -- whether the half a mile away a bus stop  
24 would be reasonable would differ among -- among various  
25 municipalities.

1           Certainly in many dedication cases, there are  
2 in lieu fees. Some of the state cases that we talk  
3 about in our brief, Remmenga is a payment in lieu, and  
4 then payment is made somewhere else.

5           That has traditionally been upheld by this  
6 Court as a rational, reasonable relationship.

7           And so it might very well apply here.

8           One of the arguments, of course, that has been  
9 made in the briefs is that there isn't sufficient  
10 information on the taking issue in this -- in this  
11 record for this Court to make a final decision.

12           I would only submit to this Court that in  
13 fact, there is sufficient information.

14           The Court of Appeal record here is definitely  
15 brief; there is no question about that. But I think we  
16 have to recognize that the Court of Appeal, when it did  
17 its taking analysis, came at the end of three other  
18 California cases, three of which this Court had not  
19 granted hearing.

20           And therefore, the short analysis in the Court  
21 of Appeal of what the requirements of the Federal  
22 Constitution and the state constitution more than  
23 suffices to show that an adequate examination of this  
24 Court's cases in Loretto, this Court's cases in Penn  
25 Central, were analyzed and found not to be a taking.

1 If there are no further questions --

2 QUESTION: I have just one.

3 MS. ORDIN: Yes?

4 QUESTION: Is there anything in the record to  
5 tell us what the market value of this particular dispute  
6 is?

7 MS. ORDIN: No, there is not. And of course  
8 it is California's position that that was the burden of  
9 the Nollans. The Nollans had the opportunity and the  
10 ability to put some -- some information into the record  
11 on the diminution of value, if any.

12 It is our position, of course, that that  
13 diminution would be minimal, and certainly, in no way,  
14 reduces their reasonable expectations.

15 They have value given to them by this permit.  
16 The ability to increase the value of their lot and their  
17 house by the structure; and whatever value might be put  
18 on it at some later time and some later place of this  
19 right to access, there is no showing that in any way  
20 they have been damaged financially.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
22 Ordin.

23 MS. ORDIN: Thank you.

24 CHIEF JUSTICE REHNQUIST: Mr. Best, you have  
25 four minutes remaining.

1 REBUTTAL ARGUMENT OF ROBERT K. BEST, ESQ.,  
2 SON BEHALF OF THE APPELLANTS

3 MR. BEST: I'll be brief, Your Honor.

4 I'd like to address quickly two concessions  
5 made by counsel in her presentation, conceding that  
6 there must be the reasonable relationship test applied  
7 in this case, and also earlier, a concession that if the  
8 case is limited to an evaluation of the facts of the  
9 Nollans, she would concede that they were in trouble.

10 So in essence what their argument is is that  
11 there must be a reasonable relationship test, but the  
12 reasonable relationship is between their legislative  
13 findings, or their statewide program, and what they are  
14 doing, and not on the facts of the case.

15 And that's our fundamental concern here, is  
16 that this taking analysis should be performed on the  
17 facts of the case.

18 QUESTION: But Mr. Best, let me just ask you  
19 right there.

20 Suppose well in advance of this conveyance  
21 they had passed a law that said, there shall be no  
22 further development of property that improves --  
23 increases the interruption of visibility unless this  
24 action is granted.

25 Just a flat rule across the board. Would you

1 then say that each time a piece was granted, you have to  
2 test the particular property? Or could you test it on a  
3 general basis?

4 I don't know is that question is clear or not.

5 MR. BEST: I think you could try to do it on a  
6 general basis. You're doing a facial challenge based on  
7 a taking and --

8 QUESTION: No, no, my question is, if they can  
9 justify it as a whole, would that mean that any  
10 particular property owner could get in effect an  
11 exemption from it by saying, yes, but the reason for the  
12 rule really doesn't apply to my property, because I'm  
13 only slightly enlarging the house?

14 MR. BEST: That would be our position, Your  
15 Honor, that they would have to have that exemption  
16 because of the takings clause.

17 We can justify it in a police powers sense,  
18 and having a rational basis for what they're doing. But  
19 if the effect of that is to take the property, each  
20 individual property owner is entitled to show on the  
21 facts of his or her case that that would be the result.

22 When you look at the facts of this case,  
23 they're relying on this visual access concept. You  
24 know, quite frankly, that's strictly a made-up  
25 proposition.

1 In other words, they decided to take this  
2 access before it was remanded to them. And when it was  
3 remanded to them, they had to come up with a reason.

4 But if you look at the facts of the case, if  
5 you look at the picture on page 267 of the Joint  
6 Appendix, you have a picture taken from the road across  
7 a one-story house almost -- very similar to what used to  
8 exist on the Nollans' property, toward the ocean, and  
9 what do you see? You see no beach. You see no surf.  
10 You see no ocean.

11 The fact of the matter is here, from the  
12 roadway, if you look at the beach, anything that is more  
13 than about six feet high, if that's how tall you are,  
14 blocks your view.

15 There was no visual access with the old  
16 development on the property. Mr. Nollan submitted  
17 pictures in the record, and a declaration in which he  
18 described the pictures, and says, look it, I've stood at  
19 all these points and looked at the ocean and you can't  
20 see anything.

21 It's just simply the Commission's legislative  
22 finding that anytime you build a bigger house you're  
23 going to block visual access which they're relying on.

24 They won't look at the facts of the case.  
25 They won't look at what is happening to the Nollans.

1           And I think that's a particular concern when  
2 we're dealing with a question of is there sufficient  
3 information in the record to make a decision in this  
4 case.

5           The facts in this case are relatively simple,  
6 and they're all clearly in the record.

7           You had a house that was there. It was being  
8 used for single family usage. It blocked all view of  
9 the ocean. The only thing the Nollans did was to build  
10 a bigger house.

11           They had to go above the 10 percent, because  
12 as the trial court said in its original findings, 10  
13 percent on the old house wasn't enough to add a decent  
14 closet to the house; and it would still be a house that  
15 was not acceptable for a family dwelling.

16           And so the Nollans were caught. They were  
17 caught in a situation where they were a member of a  
18 trust before this permit process ever --

19           QUESTION: Was the house longer from side to  
20 side that it was?

21           MR. BEST: Justice White, the house is bigger  
22 in all ways. It's wider, it's deeper, and it's taller.

23           The reason it doesn't block view, though, is  
24 because in the older house there were fences that went  
25 out from the house to the property lines which blocked



1 the view.

2 And you couldn't see the beach, the sand, the  
3 surf or the ocean over the fences, either.

4 And so, again, the point is, on the facts of  
5 this case, we have a taking.

6 Thank you.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Best.

8 The case is submitted.

9 (Whereupon, at 12:02 p.m., the case in the  
10 above-entitled matter was submitted.)

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#86-133 - JAMES PATRICK NOLLAN, ET UX., Appellants V.

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