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The Evolving "Takings" Doctrine: The Supreme Court Poses a Challenge for Coastal Zone Management

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The Supreme Court poses a challenge for coastal zone management

by
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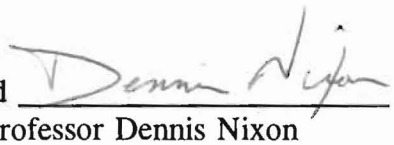
Approved 
Professor Dennis Nixon

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SYNOPSIS

There is an increasingly powerful and vocal group coalescing in society today, sometimes described as anti-environmentalists or Property Firsters[1], who feel that the government has exceeded its authority in interfering with individual rights for the purpose of protecting natural resources. The resurgence of this philosophy has often been attributed to the "conservative renaissance of the Reagan years,"[2] but the movement appears to be gathering support even in the ostensibly more liberal political atmosphere of the 1990s. Regardless of any personal convictions regarding this often emotionally-charged issue, people involved in coastal management and planning should be aware of the changes in legal doctrines which have come about as a result of "property first" challenges to regulatory or zoning statutes.

These challenges have been pursued successfully in the courts by characterizing

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[1]This group has also been characterized as the property rights movement or the pro-property movement. University of Chicago law professor Richard Epstein has been a prominent voice for their efforts, and is credited with the authorship of their "manifesto" (Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain, (1985)). Kaplan and Cohn, *Pay Me, or Get Off My Land*, NEWSWEEK, 9 March 1992, at 70.

[2]*Ibid.* There is little doubt that President Reagan's policies were conservative, and it would seem that his administration was not unaware of the potential regulatory pitfalls created by the legal trends of the late 1980's. This concern was demonstrated in the President's response to the Supreme Court's "temporary taking" decision in *First English Lutheran Church v. County of Los Angeles*. 482 U. S. 304 (1987). President Reagan issued an executive order directing that the Justice Department to promulgate "Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings." Executive Order No. 12,630, 53 Fed. Reg. 8,859 (1988), as quoted by Peterson, *The Takings Clause: In Search of Underlying Principles Part I -- A Critique of Current Takings Clause Doctrine*, 77 CALIF. L. REV. 1301, 1302 (1989). This order dealt with limiting the possibility of incurring takings claims by limiting the regulations placed on land use, a stance that was unreservedly hostile to environmental efforts.

state and local land use ordinances as a "taking" of private property under the Fifth Amendment,[3] so it is vital for coastal managers to have the clearest possible understanding of the basis of the challenges: the takings doctrine. In the course of the past decade, this doctrine has been altered by several important U. S. Supreme Court decisions which dealt with resolving a conflict between land use ordinances and the property rights of private citizens. It seems, however, that most discussion of these decisions has been confined to law review journals and to the debates regarding strictly legal implications contained therein. Instead of focusing solely on the often subtle and convoluted legal points of the takings decisions, this paper will provide an analysis of the issue as it affects coastal management regulatory and zoning efforts.

In order to clearly establish this framework, Section I will briefly describe the history of land-use management and the regulatory tools commonly used in the field today. It will examine some of the issues and conflicts at work in the nation's coastal areas, emphasizing the history of management efforts and providing a basis for ensuing discussion. Section II will provide a description of the takings issue and a synopsis of the current state of the takings doctrine in light of three influential Supreme Court decisions regarding takings by environmental regulations. This description will present the major points of the legal theories behind takings

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[3]The takings clause of the U. S. Constitution states that "private property [shall not] be taken for public use without just compensation." U. S. CONST., amend. V, and this clause is applicable to the states through the due process clause of the fourteenth amendment, see *Chicago, B. & Q. R. R. v. Chicago*, 166 U. S. 226 (1897) in which the Court held that there was "a condition precedent to the exercise of the power of eminent domain that the statute make provision for reasonable compensation to the owner," quoted by Kmiec, *The Original Understanding of the Taking Clause is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1660 (1988).

jurisprudence, with the goal of developing a better understanding of the interactions of judicial and regulatory efforts. Section III will discuss the origins and implications of the recent changes in the takings doctrine and will focus on potential strategies for continuing ecologically sound practices while minimizing takings challenges. Drawing on this background, it will discuss possible methods of regulation which do not violate established legal limits, concentrating on the role of coastal managers in the further development of takings doctrine.

I. LAND MANAGEMENT IN THE COASTAL ZONE

A. Land-Use Management

Conflicting ideas about the proper role of land-use regulation and the extent of an owner's autonomy in determining the appropriate uses of property lie at the root of the property rights controversy. These types of conflicts are not new, nor are they strictly a product of the rapidly changing society of the twentieth century. The basic definition of property, and of an owner's rights with regard to its use, have been constantly transformed throughout history. The concept of property rights in America today has its origins in the ancient laws of England, but it is indisputable that the problems of modern society have required extensive alterations to traditional values.

1. The Early History

The dawn of our current era of land proprietorship, or private ownership, occurred in the thirteenth century when the older concept of feudal land tenure began to be replaced with freehold ownership of land in towns and cities.[4] Eventually, the private ownership of land came to be considered a fundamental right of the citizenry. Legal scholars recognized the importance and power behind this concept:

> "There is nothing which so generally strikes the imagination, and engages the affections of mankind as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in exclusion of the rights of

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[4]RUTHERFORD H. PLATT, LAND USE CONTROL: GEOGRAPHY, LAW, AND PUBLIC POLICY 51 (1991).

any other individual in the Universe."[5]

This right to own the land absolutely, and to pass it on to designated heirs, is still one of the most fundamental and jealously guarded rights in our society.

Nevertheless, even thirteenth century landowners were not completely autonomous in the use of their property. When land uses brought law-abiding people into conflict with one another, their disputes were often settled by judicial authorities, and these settlements were incorporated into the English common law.[6] One of the most important tenets of the common law was the doctrine of nuisance, which provided both a protection for property owners and a limitation of their rights. This venerable doctrine has recently assumed a new level of importance for land-use management, and it will be examined in greater detail in Section II. For the moment, however, it is sufficient to understand that property owners have traditionally been enjoined not to use their land in ways that were harmful to neighbors or to society at large.[7]

These traditions of property ownership and common law moved across the Atlantic with the English settlers of the American colonies, and their strength in the New World was evident in the constitutional protections given to property when those

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[5]WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, SECOND BOOK 1 (1768/1863), quoted by PLATT, *supra* note 4, 52.

[6]An understanding of the nature of the common law has become increasingly important for land-use regulators and managers. Platt describes it succinctly as consisting of "the accumulated wisdom of courts faced with specific disputes in which they invoke principles of law, drawn from earlier decisions and other sources, as a basis for decision." PLATT, *supra* note 4, 52.

[7]Typical forms of uses that created a nuisance were: blocking off light and air, creating bad odors or other types of air pollution, loud continuous noises, and "other externalities that impair the quiet enjoyment of nearby property." PLATT, *supra* note 4, 53.

colonies became a nation.[8] The development and settlement of the North American continent required people with a sense of independence and fierce individualism, and these qualities were reflected in the evolution of the new nation's property laws. As one author put it, "the nation was built by private initiatives on privately held land. The American land ethic grew as an ethic of owner autonomy and change."[9]

It was not until the industrialization of the nineteenth and twentieth centuries that comprehensive land-use management began to become a necessity. By that time, growing urban populations and new technologies made it imperative to develop some method of centralized control over property uses. The methods still in use today grew out of attempts to solve problems as they arose, and the current practice of land-use regulation has been described as "a fascinating mixture of administrative, constitutional, local government, and property law"[10] that "often mirror[s] the clash of values in modern American society."[11]

2. *The Emergence of Zoning*

Although other restrictions on the use of property exist, the practice of zoning

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[8]See discussion of the Fifth Amendment and the takings clause, *supra* note 3. Additional protections were given to property under the Third (prohibiting the quartering of soldiers in private homes without owners' permission) and Fourth (making explicit the right of citizens to be secure in their houses) Amendments. U. S. CONST., amend. III and IV, quoted by Humbach, *Law and a New Land Ethic*, 74 MINN. L. REV. 339 (1989).

[9]Humbach, *supra* note 8, 340.

[10]PETER W. SALSICH, JR., LAND USE REGULATION: PLANNING, ZONING, SUBDIVISION REGULATION, AND ENVIRONMENTAL CONTROL xi (1991).

[11]*Ibid.*

has dominated twentieth century land-use planning and management in this country. Originally practiced in Germany,[12] zoning was enthusiastically adopted in America, becoming a "quintessentially American institution with the blend of idealism and greed that that implies."[13] At the time of its introduction, zoning was met with some resistance, as is usually the case with new ideas. In keeping with the requirements of American government, the dispute over the constitutional validity of zoning was settled by the Supreme Court. In *Village of Euclid v. Ambler Realty Co.*,[14] the Court upheld the power of a local government to restrict property uses under a zoning scheme, even though the restrictions had severe adverse impacts on the market value of some property. The method of land-use regulation which was legitimized by this decision came to be referred to as Euclidian zoning.[15]

It is not the intention of this discussion to provide a detailed analysis of the practice of zoning, and such descriptions have been more than adequately provided by other authors.[16] Nonetheless, it is necessary for land-use managers, including coastal mangers, to have a basic understanding of how the method works, its uses, and its effect on regulatory efforts. The Court's legal rationale for allowing the

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[12]SALSICH, *supra* note 10, 125.

[13]PLATT, *supra* note 4, 165.

[14]272 U. S. 365 (1926), cited in Comment: *Is There a Doctrine in the House?: The Nuisance Exception to the Takings Clause Has Been Mortally Wounded By Lucas*, 1992 WIS. L. REV. 1304 (authored by Andrew R. Mylott).

[15]PLATT, *supra* note 4, 165.

[16]See, for example, DUDLEY S. HINDS, NEIL G. CARN, and O. NICHOLAS ORDWAY, WINNING AT ZONING (1979).

constitutionality of zoning was that the practice was simply an extension of the common law of nuisance,[17] one "with the great advantage . . . of providing all landowners with knowledge before the fact of what they could and could not do with their land."[18] The power of local governments to enact zoning regulations was derived from the police power[19] of the state, and therefore state enabling legislation was necessary in order for zoning to be implemented.[20]

Once the enabling legislation was in place, local governments could plan out[21] and control the use of property within their jurisdiction. The mechanism for this control was two-part: 1) a zoning map was developed, clearly indicating the affected areas and their boundaries; and 2) zoning ordinances were drafted, containing information on the allowable uses of the areas shown on the map. There are numerous types of zoning ordinances, some of which deal with the density of development allowed, others which dictate the authorized uses of an area (agricultural, residential, commercial, etc.), and still others which have more specific

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[17]"The Court granted broad deference to legislative determinations by allowing local authorities to restrict building rights according to the general location of a particular property. In doing so, the Court likened building in violation of zoning regulations to committing a nuisance, [saying] 'A nuisance may be merely a right thing in the wrong place, -- like a pig in the parlor instead of the barnyard.'" Mylott, *supra* note 14, 1304-1305, quoting *Euclid*, *supra* note 14, at 338.

[18]RICHARD F. BABCOCK, THE ZONING GAME 4 (1966).

[19]The police power of the state (ie. the government) has been summarized as the "term given to the general governmental power to protect the health, safety, morals, and general welfare of its citizenry." SALSICH, *supra* note 10, 3.

[20]*Ibid.*, 127.

[21]It is axiomatic that zoning requirements must advance and be in accordance with a "comprehensive plan." PLATT, *supra* note 4, 201. In fact, Babcock mockingly refers to the "Planner's Oath: 'Zoning is merely a tool of planning.'" BABCOCK, *supra* note 18, 120.

restrictions such as historic preservation rules. An area can be affected by more than one type of zoning ordinance, and the combinations can become quite complicated.[22] These types of traditional zoning regulations tend to be somewhat rigid and cumbersome, and efforts to allow the zoning ordinances to evolve with time have introduced ever more complex schemes into the equation. These more complex types of zoning techniques have come to be known collectively as flexible zoning.[23]

Because flexible zoning techniques were designed to allow for changing or special circumstances in an area, they can be extremely useful for coastal managers who must deal with an extraordinary, and often-changing, physical environment. By their nature, flexible zoning techniques involve innovation, and so they are subject to the disadvantages of the challenges and controversies that surround new ideas. Nevertheless, flexible zoning may offer useful solutions to the unique problems of the coastal zone. The issues and laws involved in coastal management differ somewhat from non-coastal urban planning, and so deserve further attention.

B. Coastal Zone Management

"The basic issue in the coastal zone is the management of growth to meet multiple objectives."[24] The apparent simplicity of this assertion masks a myriad of constantly

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[22]DUDLEY S. HINDS, NEIL G. CARN, and O. NICHOLAS ORDWAY, *supra* note 16, chap. 1 & 5 passim.

[23]*Ibid.*, 98-99.

[24]MICHAEL S. BARUM, TIMOTHY BACKSTROM, and BRADLEY SCHRADER, ENVIRONMENTAL LAW AND THE SITING OF FACILITIES: ISSUES IN LAND USE AND COASTAL ZONE MANAGEMENT 119 (1976), hereinafter BARUM.

changing and often formidable problems which arise when these management objectives conflict with one another. As society grows more complex and population pressures increase, the likelihood of conflict among landowners and other interest groups increases as well. Yet our dependence on the nation's coasts as an area of residence and productivity has not declined with the advance of technology, but rather is steadily growing.[25]

The idea of controlling and regulating activities along a nation's coasts and in the adjacent areas is not new. The need for regulation was recognized as early as the sixth century when the governing authorities of the time saw the necessity of codifying citizens' right to make certain use of these areas. Although these early laws have been significantly altered by the passage of centuries, the basic concepts have survived in the Public Trust Doctrine[26] and have helped to shape modern law governing coastal zone management efforts.

The field of Coastal Zone Management as a distinct discipline, however, began only recently, in the second half of the twentieth century. The late 1960s and early 1970s were years of increasing environmental awareness in the United States as the

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[25]It is estimated that approximately 54 percent of the total population of the United States lives in the coastal zone. Current figures also indicate that 33 to 50 percent of nation's jobs and one-third of the GNP originates in coastal areas. In spite of this dependence on the region, government officials and environmentalists agree that the coastal ecosystems around the nation present an "overpowering problem." Martello, *Saving Coastal Areas Through Partnerships*, 35 SEA TECHNOLOGY 65, 65-66 (September 1994).

[26]The Public Trust Doctrine provides that title to tidal and navigable freshwaters, the lands beneath these waters, and the living resources inhabiting them is held by the state in trust for the benefit of the public. It establishes the public's right to use these areas for a variety of purposes. MOLLY SELVIN, THIS TENDER AND DELICATE BUSINESS - THE PUBLIC TRUST DOCTRINE IN AMERICAN LAW AND ECONOMIC POLICY 1789-1920 1-3 (1987).

devastation wrought by years of uncontrolled industrial and developmental activities began to be apparent.[27] Incidents of catastrophic pollution such as oil spills helped to establish public support for environmental regulation. As one author put it, "The long-tolerated destruction of our environmental inheritance . . . finally produced a social reaction."[28]

Measures designed to deal with this problem included environmental policy legislation, land-use controls, and state constitutional provisions guaranteeing citizens' right to environmental quality.[29] Environmental land-use controls were often justified by efforts to quantify the social costs of environmental degradation, but such efforts aroused enormous controversy. The argument about the existence of environmental "externalities,"[30] and about the proper methods for dealing with them if they do exist (as something other than a clever, pseudo-scientific justification for shifting the costs of a cleaner ecosystem onto the hapless business community), remains one of the bitterest disputes in the environmental arena today.

Nonetheless, numerous laws were enacted during the years which have been

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[27]The awareness of these issues was heightened by the publication of numerous books cataloging the environmental woes facing the nation and the world. Rachel Carson's Silent Spring (1962) is credited with having "ignited the environmental movement." PLATT, *supra* note 4, 300. This work was augmented by numerous others of a similar theme. See Platt, 300-301 for a listing of the more effective publications on this topic.

[28]DANIEL R. MANDELKER, ENVIRONMENT AND EQUITY: A REGULATORY CHALLENGE 1 (1981).

[29]*Ibid.*

[30]Economists define externalities as "the side-effects of an action that influence the well-being of nonconsenting parties." Externalities may be either beneficial or harmful. JAMES D. GWARTNEY AND RICHARD L. STROUP, ECONOMICS: PRIVATE AND PUBLIC CHOICE 86, 6th ed., (1992).

dubbed the "Federal Environmental Decade,"[31] with the aim of preventing further damage to the earth's resources. Some of the most important and enduring of these laws include the National Environmental Policy Act (NEPA), the Clean Air Act, the Federal Water Pollution Control Act (Clean Water Act), and the Coastal Zone Management Act (CZMA). The focus of much of this legislation was on the clean-up and prevention of pollution, but the designers of these laws also recognized the need to establish a basis for controlling environmentally harmful actions in the future. The Coastal Zone Management Act in particular provided a framework for constructive future planning efforts.[32]

C. The Coastal Zone Management Act

Originally enacted in 1972 and reauthorized (and amended) in 1990, the CZMA is the legislation which currently guides national efforts at coastal management. The basic national policy outlined by the Act, to "preserve, protect, develop, and where possible to restore or enhance"[33] coastal resources, has often been regarded as contradictory in nature. This statement of policy, however, is also an acknowledgement of the often conflicting demands placed on those who oversee the

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[31]PLATT, *supra* note 4, 299. "The new environmental laws of the 1970's did not merely refine the conservation measures of the 1960's. They enlarged both the range of problems addressed through federal programs and the spectrum of means by which such problems were to be attacked. . . the federal role shifted from a timid reliance on state programs to direct setting and enforcement of national standards." *Id.*

[32]See BARUM, *supra* note 24, at 121-127, for a complete discussion of the various environmental legislation passed during this period. The Coastal Zone Management Act, hereinafter CZMA, expressed lawmakers' intention to promote sustainable development in the nation's coastal zone and acts as a guide for state government efforts in this area. Coastal Zone Management Act of 1972, 16 U. S. C. 1451 et seq.

[33]Coastal Zone Management Act of 1972, 16 U. S. C. 1451, sect 303(1).

management of coastal areas. While it is clearly impossible to develop and preserve the same discrete location, the CZMA calls on the good judgement of administrators to determine which of the options is most desirable in various areas. Unfortunately, it is not always possible to divide conflicting uses into separate areas, and it is in such circumstances that managers must try to balance the demands of diverse users in the coastal zone.

Decisions regarding local use, preservation, or development of coastal lands are usually best made at as near a local level as possible. The CZMA recognized this principle and employed various incentives to encourage each coastal state to develop an individual plan for the coastal zone.[34] This structure gave the resulting national effort great versatility by allowing each state government to craft a management plan which was appropriate for the geography, economy, and political landscape of the area. As is the case with all such forward-looking legislation, the Constitution itself being no exception, the framework provided could not suffice to solve all the problems encountered over time.

Only a decade after the passage of the Coastal Zone Management Act, scientists and administrators working to implement the newly-established Coastal Zone Management Plans were faced with problems that had not been fully anticipated. These coastal managers, along with state and federal legislators and eventually the judiciary, began to struggle with complex questions such as the extent (if any) of state

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[34] *Ibid.*, sect. 306. The term "coastal zone," as defined by the CZMA, includes the coastal waters and the adjacent shorelands, with the landward boundary extending "inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters." *Ibid.*, sect. 304(1).

coastal zone management authority over continental shelf oil and gas leasing and the need for coordination of management plans in areas such as the Chesapeake Bay (which fell under multiple jurisdictions).[35] The problem of coastal management impacts on riparian landowners' rights, especially those in barrier beach and island areas, began to emerge and was discussed in some detail at a conference of coastal managers held in June 1982.[36] Concerns that conflict in this area might pose a significant problem proved to be valid in the years that followed.

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[35]It is indicative of the type of organizational gridlock that can affect coastal management efforts that this problem has still not been solved as 1994 draws to a close. It was not until July of this year that any formal agreement to "manage the Chesapeake Bay watershed as a cohesive whole" was developed. Now that management entities have agreed to work together, the success of such a unilateral approach remains to be seen. Graham, *Integrating Coastal Management*, 35 SEA TECHNOLOGY 7, (September 1994).

[36]THOMAS D. GALLOWAY, ed., THE NEWEST FEDERALISM: A NEW FRAMEWORK FOR COASTAL ISSUES 194-214 (1982).

II - THE TAKINGS DOCTRINE

A. Nollan v. California Coastal Commission

The closely related issues of when government regulation constitutes a taking of private property and of determining what comprises just compensation for such a taking have long been contentious ones.[37] In the 1987 term, the Supreme Court handed down four decisions which significantly impacted the takings doctrine.[38] Although the decision in *First English Evangelical Lutheran Church v. County of Los Angeles* would have increasing importance in future years, it was *Nollan v. California Coastal Commission* that had a direct, immediate effect on coastal management efforts.

1. Facts in the Case

The incident which precipitated this case seems fairly straightforward and simple. James and Marilyn Nollan leased a beachfront lot containing a small bungalow in

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[37]One analyst evaluating the status of the Supreme Court's takings doctrine has commented that "it is difficult to imagine a body of case law in greater doctrinal and conceptual disarray," and has described it as being "in chaos." Peterson, *supra* note 2, at 1303-4. Other scholars have leapt into the takings fray, on one side or the other, and have cited longstanding controversy on the topic, see Notes: *Taking Back Takings: A Coasean Approach to Regulation*, 106 HARV. L. REV. 914, 920 (1993).

[38]*Nollan v. California Coastal Commission*, 107 S. Ct. 3141 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378 (1987), hereinafter *First English*; *Hodel v. Irving*, 107 S. Ct. 2076 (1987); *Keystone Bituminous Coal Association v. DeBenedictis*, 107 S. Ct. 1232 (1987).

Ventura County, California with an option to buy the property. This option to purchase the lot was conditional, however, and required that the Nollans demolish and replace the existing bungalow. This simple real estate transaction was transformed into a complex legal problem when the couple sought a permit from the California Coastal Commission to build a three-bedroom house on the property. The request was approved, but the permit contained a provision requiring that the Nollans grant the public an easement across their property.[39] Since it was the property owners' persistent objections to this requirement that brought the case to the Supreme Court, it is worthwhile to examine the details of the contested easement and the Commission's motivations in requiring it.

This easement consisted of allowing the public lateral access to the beach portion of the property. A description of the Nollan's lot was provided by Justice Scalia in his opinion for the Court and this description sheds some light on the intentions of the Commission. There was a public beach area in the immediate vicinity on either side of the property, and the beachfront portion of the lot was separated from the remainder by an eight foot high seawall.[40] It seems clear that the Commission was

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[39]Under California law, beachfront property owners were required to obtain a coastal development permit from the California Coastal Commission before undertaking a project of this sort. The easement condition imposed on the Nollans was not unusual since the California Coastal Act of 1976 authorized the Commission to impose public-access conditions on this sort of permit. *Nollan v. California Coastal Commission*, 107 S. Ct. 3141, 3143-3145.

[40]The Faria County Park, a public recreation area and beach, was located a quarter of a mile north of the Nollan's property, and another public beach was located 1,800 feet south of their lot. *Ibid.*, 3143.

attempting to ensure that the new, and significantly larger,[41] house on this site did not in any way interfere with public use of the beaches to either side of the property (or below the mean high tide mark which was the boundary of the private lot).

Members of the public were to be granted access to "pass and repass"[42] along the sand between the seawall and the mean high tide mark.[43] The specific requirement for a deed condition containing this easement is made more understandable when the description of the property is expanded to include the fact that "the high-tide line shifts throughout the year, moving up to and beyond the seawall, so that public passage for a portion of the year would either be impossible or would not occur on appellant's property."[44] Given this type of physical environment along the beachfront, it was logical for the Commission to take steps to ensure that the increased development would not result in a barrier to public transit of the area.

Since the Commission's purpose in requiring the easement was legitimate and understandable, what was it about the permit provision that was so contentious as to

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[41]The Nollans' coastal development permit allowed them to replace a 521-square-foot structure with a two-story, 1,674-square-foot house and attached two car garage (for a total development covering 2,464 square feet). *Ibid.*, 3158 (Justice Brennan, dissenting).

[42]The right to pass and repass is defined under California law as "the right to walk and run along the shoreline," and this type of public access was deemed appropriate under circumstances such as those found on the Nollan's property. *Ibid.*, 3158 (Justice Brennan, dissenting).

[43]In one of the dissenting opinions in this case, Justice Brennan pointed out that "The deed restriction was crafted to deal with the particular character of the beach along which appellants sought to build, and with the specific problems created by expansion of development toward the public tidelands. . . . The State sought to ensure that such development would not disrupt the historical expectation of the public regarding access to the sea." *Ibid.*, 3141, 3156 (Justice Brennan, dissenting).

[44]*Ibid.*, 3157 (Justice Brennan, dissenting).

require the decision of the nation's highest judicial authority to resolve? Was the method used to obtain the easement somehow extraordinary, and so capable of generating such fierce opposition from the Nollans? Both Justice Scalia, in the majority opinion, and Justice Brennan, writing in dissent, acknowledged that this was not the case.[45] In fact, the Commission had been requiring lateral access easements from beachfront developers for years before the Nollans brought their case to court.

The Supreme Court, however, reversed the ruling of the California Court of Appeal, deciding that the permit condition constituted a taking of the Nollans' property without just compensation.[46] That this decision was a sharp blow to the California Coastal Commission is certain, and it had significant implications for land-use regulators across the nation. Policies which had served adequately for years to balance public and private needs were suddenly called into question and made vulnerable to takings challenges. Justice Brennan no doubt summed up the feelings of many when he stated that:

> "The Court has thus struck down the Commission's reasonable effort to respond to intensified development along the California coast, on behalf of landowners who can make no claim that their reasonable expectations have been disrupted. The Court has, in

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[45]Justice Brennan makes the point that "The specific deed restriction to which the Commission sought to subject [the Nollans] had been imposed since 1979 on all 43 shoreline new development projects [in the area]." *Ibid.*, 3160; Justice Scalia acknowledges that the Nollans "acquired the land well after the Commission had begun to implement its policy [of conditioning building permits on the granting of easements]." *Ibid.*, 3147.

[46]In his strongly-worded conclusion to the majority opinion in this case, Justice Scalia declares that "California is free to advance its 'comprehensive program,' [of providing public beach access] if it wishes, by using its power of eminent domain for this 'public purpose,' but if it wants an easement across the Nollans' property, it must pay for it." *Ibid.*, 3151.

short, given [the Nollans] a windfall at the expense of the public."[47]

Nonetheless, those people who must continue efforts to effectively manage development in the coastal zone should understand the broader implications of the issues decided in *Nollan*.

2. *The Nature of Property and of Takings*

Much of the discussion regarding this case, both in the Justices' opinions and in subsequent reviews and articles, involves the attempt to define exactly what constitutes a taking of private property by the government. By necessity, this discussion requires a definition of the term "property," but there is general disagreement as to the importance of isolating the Court's precise meaning when using this term.[48] Although some would argue that the definition of property is of minimal importance, at least in *Nollan*,[49] anyone striving to understand the

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[47]*Ibid.*, 3151 (Justice Brennan, dissenting).

[48]Peterson considers pinning down an exact definition as critical and devotes a large segment of her extensive work on the Court's underlying principles regarding the takings doctrine to an in-depth discussion of the term "property" and the evolution of its meaning, noting that "In recent takings decisions, the Court has defined 'property' in different and conflicting ways without even acknowledging the inconsistencies in its definition, much less trying to resolve them. Peterson, *supra* note 2, 1304. On the other hand, Douglas Kmiec considers the lack of a static definition of property to be inherent in the system, and states that "fixing upon a conception of property that gets the distinction between harm and benefit . . . consistent with the constitutional aim of insulating individual citizens from arbitrary or disproportionately burdensome exercises of governmental power . . . should be the main task of every taking case." Kmiec, *supra* note 3, 1640.

[49]As one author put it, "There may be 'fundamental attributes of ownership' that government cannot take without paying just compensation, but the right to develop land is not one of them." Humbach, *supra* note 8, 351 (cites omitted).

implications of this decision should be familiar with the common concepts of "property" which are referred to in the discussion.

Leaving aside any detailed analysis of the nature of property under the Constitution, it is sufficient to understand that the Supreme Court has often utilized the metaphor of property as a "bundle" of "strands" or "sticks."[50] Given the complex nature of private property rights, this metaphor serves to illustrate how a taking can occur when the deprivation of property involves an action other than an outright, physical transfer of custody. A bundle of property rights might include such diverse sticks as the right to build a structure, the right to extract minerals, or the right to graze cattle. A taking of property may therefore involve only one stick in the property owner's bundle of rights, provided that the stick in question is a separate and identifiable property interest.[51]

The next logical area of examination is the question of how the required easement across the Nollan's property constituted a taking of one of their property sticks. In order to decide this question, the Court set forth a chain of reasoning that is unfamiliar and seems quite long and winding to a person not trained in the law. This

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[50]*Nollan*, 107 S. Ct. 3141, 3145, citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 433 (1982), quoting *Kaiser Aetna v. United States*, 444 U. S. 164, 176 (1979).

[51]For instance, the Court held in *Nollan* that the appellants had been deprived of property, saying that "as to property reserved by its owner for private use, 'the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Ibid.* On the other end of the spectrum, the Court found that no taking had occurred in the case of a mining company seeking compensation for a state law which barred them from removing a portion of the existing coal on their property (*Keystone Bituminous Coal Association v. DeBenedicits*, 107 S. Ct. 1232 (1987)). In this case, the Court refused to consider the right to mine the portion of coal that remained in place "as distinct property rights, observing that it has consistently held that when an owner has a full bundle of rights, the destruction of one strand is not a taking." Callies, *Takings Clause--Take Three*, 73 A.B.A. J. 48, 52 (1987).

chain proceeds as follows. When the Nollans acquired their property, they acquired a bundle of rights which included the right to exclude other people from that property.[52] Therefore, the required easement across their section of the beach deprived the owners of a part of their property bundle. The fact that the state required an easement as a condition for the issuance of a land-use permit did not make the easement any less a withholding of the Nollans' stick of exclusion than requiring the easement outright would have done.[53] In addition, the easement was considered by the Court to be a "permanent physical occupation,"[54] and such an occupation is perhaps the most clear-cut instance of governmental action that is considered to be a taking.[55] This being the case, it seems that the chain of reasoning should end here with the simple conclusion that the easement requirement was a taking of private property, but the issue becomes more complex.

The takings doctrine is a somewhat muddled area of the law. The confusion is attributable to the many variables involved in takings cases and the ambiguous nature of the concepts involved. Described as an "uneasy effort to reconcile government

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[52]This is the interpretation of their rights as set forth by Justice Scalia in the majority opinion. *Nollan*, 107 S. Ct. 3141, 3145. Justice Brennan espouses the opposite view in his dissenting opinion, stating that "California . . . has clearly established that the power of exclusion for which appellants seek compensation simply is not a strand in the bundle of appellants' property rights, and appellants have never acted as if it were." *Nollan*, 107 S. Ct. 3141, 3159 (Justice Brennan, dissenting).

[53]*Nollan*, 107 S. Ct. 3141, 3147-48.

[54]The Court stated, "We think a 'permanent physical occupation' has occurred, . . . where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Ibid.*, 3146.

[55]Peterson, *supra* note 2, 1310.

power and individual liberty as encapsulated in the concept of private property,"[56] the takings doctrine encompasses a series of rules riddled with exceptions.[57] One such exception emerges as a possibility in the Nollan's case, and dealing with it adds a twist to the chain of reasoning. This exception hinges on the difference between governmental action which constitutes a taking of private property because it is useful to the public (under the power of eminent domain), and governmental action which constitutes a taking, but which may not be compensable because it prevents some detriment to the public interest (as an exercise of the police power).[58]

It is at this point that the *Nollan* Court makes pivotal decisions on two issues that are of prime importance to coastal management efforts. The Court stated that an easement requirement (or a similar type of land-use restriction) like that imposed on the Nollans would be considered a taking, *except* in cases where the requirement for the easement "'substantially advances[s] legitimate state interests' and 'does not den[y]

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[56]Kmiec, *supra* note 3, 1630.

[57]One author summarized this state of affairs rather eloquently when he said, "No single theory has yet emerged which can serve as a comprehensive, universally applicable approach to resolving takings disputes. The Supreme Court often resolves difficult issues of constitutional law by establishing amorphous concepts and slippery tests, at least pretending that reasonable persons will be able to apply [them] uniformly and correctly. The takings question has evoked a rare judicial confession of inability to devise an appropriate test." Singer, *Flooding the Fifth Amendment: The National Flood Insurance Program and the 'Takings' Clause*, 17 B. C. ENVTL. AFF. L. REV. 323, 338-9 (1990).

[58]*Ibid.*, 338. The "police power" of a state has been defined as "the inherent power of a government to promote the public health, safety, or general welfare." Cook, Casenote: *Lucas v. South Carolina Coastal Council: Low Tide for the Takings Clause*, 44 MERCER L. REV. 1433, 1439 (1993).

an owner economically viable use of his land.'"[59] The first question for the Court was then: was the requirement for an easement granting lateral access to the Nollan's property a legitimate exercise of the state's police power that would escape being classified as a compensable taking?[60]

In answering this question, the Court's reasoning is crucial to the success of future management efforts similar to the one in contention. The Court took no stance in *Nollan* as to exactly what constitutes a legitimate state interest, but instead accepted as such the Commission's purposes in requiring the easement. These purposes included "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."[61] Since these purposes were legitimate, restricting the Nollans' use of their land would be an exercise of police power, and the Court went so far as to say that the Commission would be authorized to refuse the Nollans' permit request altogether.[62]

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[59]*Nollan*, 107 S. Ct. 3141, 3147, quoting *Agins v. Tiburon*, 447 U. S. 255, 260 (1980) and citing *Penn Central Transportation Co. v. New York City,* 438 U. S. 104, 127 (1978).

[60]There is one other possible avenue for arguing that the easement requirement was not a taking of private property, and Peterson summarized it succinctly by saying: "However, when the Nollans bought their land, state law already provided that they would have to give up an easement if they wished to build. Thus, . . . one could argue that no property was taken. . ." Peterson, *supra* note 2, 1335-6. Justice Brennan raises just this argument in his dissenting opinion (*Nollan*, 107 S. Ct. 3141, 3159-60 (Justice Brennan, dissenting).), but Justice Scalia's opinion gives short shrift to this point in a footnote (*Nollan*, 107 S. Ct. 3141, 3147).

[61]*Ibid.,* 3148.

[62]". . . the Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) would substantially impede these purposes, unless their denial would interfere so drastically with the Nollans' use of their property as to constitute a taking." *Ibid.*, 3148.

Therefore, the Court's analysis indicated that the Nollans would not have been entitled to compensation if the Commission had refused to issue them a permit altogether. Based on this assumption, the Court addressed the second pivotal question: would a permit condition that served the same legitimate police-power purpose as a simple refusal to issue that permit be considered a taking when the refusal itself would not? The Court answered that this type of permit condition would not be a taking,[63] but then qualified their straightforward answer with one of the "slippery tests"[64] which are so common in takings decisions. This addition to the array of tests for determining the existence of a taking is one that should be given careful consideration by coastal managers.

3. Views On The Essential-Nexus Test

The new takings test devised in the Court's *Nollan* opinion basically states that where a permit condition is imposed on a landowner for the purpose of furthering some legitimate state interest, there must be an "essential nexus" between that purpose and the stipulations of the permit condition.[65] If this essential nexus cannot be

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[63]Justice Scalia elaborates this point, saying ". . . if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house . . . so long as the Commission could have exercised its police power . . . to forbid construction of the house altogether, imposition of the condition would also be constitutional." *Ibid.*, 3148.

[64]Singer, *supra* note 57, 338.

[65]In explaining the reasoning behind the need for such a test, the Court states that ". . . constitutional propriety [of the permit condition substituted for a denial of the permit] disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations

demonstrated, then the permit condition amounts to a taking of private property for which the owner must be compensated. The reaction to the announcement of the essential nexus test was somewhat mixed. Justice Brennan's dissenting opinion (in which he was joined by Justice Marshall) left no doubt as to the deep dissatisfaction with which some members of the Court viewed this test. He stated that "the Court employs its unduly restrictive standard of police power rationality to find a taking where neither the character of governmental action nor the nature of the private interest affected raise any takings concern."[66] In his separate dissenting opinion, Justice Blackmun also took the position that the essential nexus requirement was too narrow.[67]

The controversy about this test was not limited to the Court or to the question of whether there was a sound legal basis to support the nexus requirement. In fact, a highly significant flaw to the essential nexus test, at least from a managerial standpoint, was demonstrated by the widely varied interpretations of its meaning that have been expressed since it was announced. Some analysts summed up the *Nollan* test by concluding that the "Court appears to have given its collective blessing to impact fees, dedications, exactions, and other conditions on land development."[68]

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to those willing to contribute $100 to the state treasury." *Nollan*, 107 S. Ct. 3141, 3148.

[66]*Ibid.*, 3161 (Justice Brennan, dissenting).

[67]"The close nexus between benefits and burdens that the Court now imposes on permit conditions creates an anomaly in the ordinary requirement that a State's exercise of its police power need be no more than rationally based." *Ibid.*, 107 S. Ct. 3141, 3163 (Justice Blackmun, dissenting).

[68]Callies, *supra* note 51, 52.

Yet even this optimistic view was tempered by the consideration that ". . .'traditional dedication and exaction requirements long presumed legal, such as public roads and parks . . . may have to pass scrutiny under the Court's 'essential nexus' test, and some may fail."[69]

Another view of the *Nollan* decision held that the impact of the essential nexus test itself was less important for the takings doctrine than the Court's return to the consideration of "fairness" in takings cases that the decision signalled.[70] Adherents of this theory regarded the careful formulation of the test found in Justice Scalia's writing to be little more than judicial word-play designed to present the facts in such a way that it was possible to justify arriving at the desired "fair" decision. If this were the case, land-use managers need not concern themselves with puzzling out the established takings doctrine when attempting to forecast whether or not a particular regulatory effort will be considered a taking. Instead, they must analyze the impacts of the regulation in terms of fairness to the landowners since, ". . . the Court decided Nollan in a manner that is consistent with the analysis one might expect if one were to consider the case in terms of societal notions of fairness, without regard to the

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[69]*Ibid.*, 54.

[70]Professor Peterson uses the *Nollan* decision to demonstrate her theory that although much effort has been expended in order to explicate the principles of the Court's takings doctrine, the actual doctrine is so tangled and complex that it is of little use in predicting when the Court will find that a taking has occurred. She posits, however, that such predictions can be accurately made by looking at whether intended government action is fair to the landowner, citing as support the Court's opinion in *Armstrong v. United States*, 364 U. S. 40 49 (1960) which asserted that the takings clause was ". . . designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Peterson, *supra* note 2, 1304.

Court's elaborate takings doctrine.[71] Given the highly subjective nature of the term "fairness," this is not a helpful management strategy.

A more moderate version of this theory allows for both the validity of the essential nexus test and the consideration of fairness. Without throwing away the Court's established doctrine in takings cases, another author espouses the idea that the essential nexus test should in fact be expanded to include a consideration of whether or not landowners are being asked to bear the burden of remedying a problem for which they are not solely or directly to blame.[72] If this is so, then in order to predict when a land-use restriction will be considered a taking, a manager must examine the intent of the government action. Using this method of analysis, it is necessary "to draw a distinction between the use of the police power to prevent harms as opposed to its use to extract benefits, a distinction central to the nuisance exception to the just compensation requirement [in which land-use restriction is not considered a taking]."[73]

Other interpretations of the exact meaning and utility of the essential nexus test were numerous. In February of 1988, a conference was held at Dartmouth College's

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[71]*Ibid.*, 1341.

[72]This author approves of the essential nexus test, but feels that the *Nollan* decision did not go far enough toward considerations of fairness since the majority opinion ". . . contains a most important limitation, one that [Justice Scalia] scarcely explores . . . namely, that the nexus requirement to be applied in these cases measures not just the closeness of fit between regulatory means and ends but also whether the burden of the regulation is properly placed on this landowner." Kmiec, *supra* note 3, 1651.

[73]*Ibid.*, 1651. The nuisance exception itself underwent some drastic changes a few years after *Nollan*. These changes will be discussed in detail, but do not pertain to analysis of this case.

Nelson A. Rockefeller Center for the Social Sciences at which at least eight different explanations of the decision were presented and debated.[74] Given the multitudes of differing opinions generated by *Nollan*, it would appear that the essential nexus requirement has only complicated matters for coastal managers. Nor did the Court's opinion offer any clarification of this standard which might help choose among the theories about their exact meaning. Instead, the majority announced this test and then carefully detailed all the reasons why the Nollans' permit condition did not fill the requirement *in this case*, concluding that: "It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house."[75]

While this pronouncement neatly disposed of the permit condition in the Nollans' case, it offered little assistance to managers attempting to craft effective land-use regulations which will not run afoul of the takings doctrine. In his dissent, Justice Brennan takes a positive view of this omission, saying that "the Court's decision . . . will probably have little ultimate impact"[76] since the Commission (and presumably other similar authorities) "should have little difficulty in the future in utilizing its expertise to demonstrate a specific connection between provisions for access and

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[74]Fischel, Introduction: *Utilitarian Balancing and Formalism in Takings*, 88 COLUM. L. REV. 1581, (1988). It is interesting to note that the author of this article demonstrated that many interpretations of *Nollan* were possible by explaining how the decision could be "much more likely to harm developers than to help them." *Id.*, 1588.

[75]*Nollan*, 107 S. Ct. 3141, 3149.

[76]*Ibid.*, 3161 (Justice Brennan, dissenting).

burdens on access produced by new development."[77] Before blithely assuming, however, that the essential nexus requirement will be easily satisfied, coastal managers should consider that the experts at the California Coastal Commission thought they had shown such a connection between their permit condition and the harm caused by further development. The potential hazards of trying to establish an essential nexus are demonstrated by the fact that three Supreme Court Justices thought the Commission had done so as well.[78]

Anyone in the business of coastal management who feels sanguine about their ability to craft regulatory provisions which will meet the requirement for an essential nexus should read the Court's opinion more carefully. Rather than offering any information about what constitutes an essential nexus, Justice Scalia delivers a pointed warning that establishing one will not be easy in the future.[79] It is obvious from the discourse between the Justices in this case that several of them held extreme and opposing views when it came to determining the extent of governmental control over land uses.

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[77]*Ibid.*, 3162 (Justice Brennan, dissenting).

[78]Justice Brennan states this forcefully by saying, "The Court is therefore simply wrong that there is no reasonable relationship between the permit condition and the specific type of burden on public access created by the appellants' proposed development." *Ibid.*, 3157 (Justice Brennan, dissenting). Justice Blackmun agrees, although in more genteel tones, saying "In my view, the easement exacted from appellants and the problems their development created are adequately related . . ." *Ibid.*, 3163 (Justice Blackmun, dissenting).

[79]"We do not share Justice Brennan's confidence that the Commission 'should have little difficulty [in demonstrating an essential nexus]' that will avoid the effect of today's decision. We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." *Nollan*, 107 S. Ct. 3141, 3150.

This deep ideological division among the members of the Court appeared to have grown throughout the 1980's, and it tended to result in decisions, such as *Nollan*, which are of limited use in developing appropriate policies. This decision in this case failed to resolve the underlying conflict, a situation which was hardly advantageous to either the public or to private landowners. As Justice Blackmun pointed out, "The land-use problems this country faces require creative solutions. These are not advanced by an 'eye for an eye' mentality."[80] The aftermath, among land-use planners, of the announcement of the essential nexus test seemed to be frustration. One economist expressed it by saying, "If the Court is not going to disturb the existing state of regulatory entitlements . . . then it should at least get out of the way while those burdened by the regulations and those who control them make mutually satisfactory bargains."[81]

In summary, it would seem that the addition of the essential nexus test to the Supreme Court's repertoire in takings decisions only served to make an already complicated doctrine more complex. An attempt to describe what government actions might constitute a taking after the 1987 decisions would quickly bog down in a morass of "if-then-but" statements. Approaching the problem from a different perspective, one author, Professor Frank Michelman, laid out a series of fairly simple rules for determining what was **not** considered a compensable taking:

> "A regulation is not a taking if it prevents a nuisance or public danger. Under other circumstances, it is not a taking unless (a) it

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[80]*Ibid.*, 3163 (Justice Blackmun, dissenting).

[81]Fischel, *supra* note 74, 1581.

> requires a physical invasion of private property, no matter how trivial or transient, (b) it leaves the owner with no economically viable use or (c) it entirely divests the owner of some essential aspect of property such as the right to pass it on to someone after one dies."[82]

On their surface, these rules appeared to be of value in helping land-use managers, including coastal managers, to steer clear of regulatory action that would lead to takings claims, and there was undoubtedly some use in this summary of the takings doctrine. Even its author, however, realized that there was a potential for more restrictive interpretation on the part of the judiciary when he pointed out that "only the Court . . . seems to know which aspects [of property] are essential and which are not."[83] In spite of this continuing ambiguity, the takings doctrine remained substantially unchanged for another five years, until another beachfront property owner pursued a challenge to land-use legislation in effect on the opposite side of the continent. His challenge led to a Supreme Court decision that left the post-1987 rules explicated by Michelman in a complete jumble and introduced a new twist to the takings question.

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[82]Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600-1604 (1988), quoted by Fischel, *supra* note 74, 1589. The characterization of a government action as a taking of private property when it deprives the owner of some "fundamental aspect" of property was elucidated by the Court in *Hodel v. Irving*, 107 S. Ct. 2076, (1987) and has been characterized as a view which should "cause grave concern throughout the environmental community." Note: *Hodel v. Irving: The Supreme Court's Emerging Takings Analysis--A Question of How Many Pumpkin Seeds Per Acre*, 18 ENVTL. L. 598 (1988) (authored by John H. Leavitt).

[83]Michelman, *supra* note 82, 1589.

B. Lucas v. South Carolina Coastal Council

In 1988, the state of South Carolina passed legislation which was designed to prevent further development of the state's barrier beach areas. This environmentally progressive law was based on sound ecological principles and supported by observations of the effect of barrier beach development over a period of twelve years.[84] The law was changed, however, after it was challenged on the basis that it violated the constitutional rights of a riparian land owner. The legal battle over this section of the Carolina coast served as a graphic demonstration of the complex interactions of social, political, legal, and scientific issues that comprise coastal zone management in the 1990s. Its outcome added a significant (and, from a land-use planner's perspective, a potentially disastrous) new dimension to the already convoluted construct of the takings doctrine.

The decision in *Lucas v. South Carolina Coastal Council*[85] was in large part unexpected, and it generated concern in many quarters, including among coastal managers, that the Court[86] was now moving towards establishing a takings doctrine

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[84]The South Carolina legislature determined that "without adequate controls, development unwisely has been sited too close to the [barrier beach/dune] system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and private interests to protect the system from this unwise development. S. C. CODE @@ 43-39-250(4) (1993), copy provided to the author by the South Carolina Legislative Research Service.

[85]*Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992).

[86]Since the decision in *Nollan v. California Coastal Commission*, the composition of the Supreme Court had been altered. Justices Powell, Brennan, and Marshall were replaced by Justices Thomas, Souter, and Kennedy.

that would be inimical to future environmental regulation endeavors. There has since been little indication that this is not a valid concern.

1. Facts in the Case

The case revolves around two beachfront lots on the Isle of Palms on the coast of South Carolina. The two lots were purchased by David Lucas in 1986 and, at the time of purchase, both state law and existing zoning regulations would have allowed the construction of single-family residences on the property.[87] Although Lucas's stated intent was to build such a residence on each lot (one for himself and one for resale)[88], no construction had begun when the South Carolina legislature passed the Beachfront Management Act in 1988.[89]

This Act was an extremely aggressive attempt to curtail additional construction in an area where previous development had resulted in costly damage to both the environment and to man-made structures. Based on legislative findings which included that the beach/dune system along the coast of South Carolina protected life and property by serving as a storm barrier and that development would endanger adjacent property, the law prohibited the construction of improvements (with a few

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[87]In fact, at the time of purchase Mr. Lucas was not even required to obtain a development permit from the South Carolina Coastal Council in order to pursue this type of construction. *Lucas*, 112 S. Ct. 2886, 2889.

[88]Kaplan and Cohn, *supra* note 1, 70.

[89]In fact, in the eighteen months between his purchase of the lots and the passage of the Beachfront Management Act, David Lucas never applied for a building permit, *Lucas*, 112 S. Ct. 2886, 2917 (Justice Stevens, dissenting); or sought any administrative remedy for his conflict with the South Carolina Coastal Council. *Ibid.*, 68 (Justice Blackmun, dissenting).

exceptions, such as the construction of wooden decks and walkways) on lots such as the ones owned by Lucas.[90]

Since the physical characteristics of the two lots were relevant to both the debate in this case and to consideration of the decision's implications for coastal management, it is worthwhile to relate a description of the property and of Lucas's relationship to it. The lots in contention were located in the Wild Dune development, an area which began to experience intense residential construction in the late 1970's,[91] and the land had changed ownership frequently since 1979.[92] In his dissenting opinion, Justice Blackmun paints a vivid word-picture of the property:

> "The area is notoriously unstable. In roughly half of the last 40 years, all or part of petitioner's property was part of the beach or flooded twice daily by the ebb and flow of the tide. Between 1957 and 1963, petitioner's property was under water. Between 1963 and 1973, the shoreline was 100 to 150 feet onto petitioner's property. In 1973, the first line of stable vegetation was about halfway through the property. Between 1981 and 1983, the Isle of Palms issued 12 emergency orders for sandbagging to protect property in the Wild Dunes development.[93]

Although it hardly seems prudent to build a home in such an area, the extent of the shorefront construction surrounding Lucas's lots provided proof enough that many people were undeterred by the dangers inherent in the location.

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[90]S.C. CODE ANN @@ 48-39-250.

[91]At the time of the Supreme Court's decision in this case, Mr. Lucas had been living in the Wild Dunes development for fourteen years. He was "a contractor, manager, and part owner" of the development, and the two lots in question comprised half of the vacant property left in the area. *Lucas*, 112 S. Ct. 2886, 2905 (Justice Blackmun, dissenting).

[92]*Ibid.*

[93]*Ibid.*

In fact, the Wild Dunes development seemed to be a prime example of the type of "overinvestment" which economists and regulators have cautioned will occur when private land owners can shift the burden of their unwise development costs onto the public.[94] In coastal areas, this phenomena is often heralded by the construction of expensive homes in regions which had previously been considered too unstable or undesirable for use. Speculators buy the land at inflated prices, confident that they can sell at a profit or recoup losses from the government, and indifferent to the costs their actions might impose on the public.

There seems to be a perception among some authors describing the efforts to halt such construction that the recognition of social ills created by unwise development is a new concept in society.[95] To the contrary, one of the oldest writings our culture possesses uses the issue of improvident coastal construction as an illustrative metaphor, describing: "a foolish man, which built his house upon the sand, and the rain descended, and the floods came, and the winds blew, and beat upon that house; and it fell."[96] In biblical times, however, the foolish man had no expectation that others would pay for the costs of his mistakes. To the lawmakers of South Carolina, the Beachfront Management Act was an attempt to prevent the mistakes before they happened, and it is this concept, if any, that is new.

As with many new ideas, this one was not well received by everyone concerned.

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[94]For more detailed discussions of the overinvestment issue from both an economic and a regulatory standpoint, see Fischel, *supra* note 74; and Singer, *supra* note 57.

[95]See *Lucas*, 112 S. Ct. 2886, 2904 and Cook, *supra* note 58, 1441.

[96]Matthew 7:26.

After the Beachfront Management Act was passed, Lucas filed suit against the government of South Carolina, specifically the South Carolina Coastal Council, claiming that the prohibition of construction on his lots in fact amounted to an uncompensated taking of his property by the government. The trial court agreed, stating that the construction ban had "deprived Lucas of any reasonable economic use of the lots, . . . and rendered them valueless."[97] The court ordered that Lucas be compensated for this taking of his property by payment of a monetary reimbursement for the property in question.[98] The state then appealed the case to the South Carolina Supreme Court who reversed the trial court's decision.

This reversal came about as a result of the State Supreme Court's understanding of the realm of "regulatory takings" which deprive landowners of some use of their property without actually physically occupying or confiscating that property.[99] Among the various categories of government actions which might have been characterized as regulatory takings, the South Carolina Supreme Court believed that there were those actions that were designed "to prevent serious public harm,"[100] and that such actions were not subject to the compensation requirement in the takings

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[97]*Lucas*, 112 S. Ct. 2886, 2890.

[98]In 1986, Lucas paid $975,000 for the two residential lots in question. The trial court ordered the Council to pay $1,232,387.50 for the lots. *Ibid.*, 2889-2890.

[99]"In the case of a regulatory taking, the aggrieved property owner normally must bring an action in inverse condemnation, that is, to force the state to compensate the owner for the economic impact of its action." Mylott, *supra* note 14, 1299.

[100]*Lucas*, 112 S. Ct. 2886, 2890, quoting 304 S. C. 383, 404 S. E. 2d at 899 (citing, *inter alia*, *Mugler v. Kansas*, 123 U. S. 623 (1887).

clause.[101] Since Lucas had not challenged the State legislature's findings regarding the ecological dangers of developing his lots and had not contested the constitutional validity of the Beachfront Management Act, the State Supreme Court concluded that he acknowledged his proposed development to be such a harmful activity.[102]

The South Carolina court went on to reason that this tacit acknowledgement of the problems caused by beachfront construction meant that Lucas conceded that the Act was designed to prevent a serious public harm (such as the environmental degradation caused by beach erosion, destruction of habitat, storm damage to property, etc.). The Act was therefore a legitimate exercise of the state's police powers. Although acknowledging that the value of Lucas's property had been affected, the state argued that this did not constitute a compensable taking, but instead fell under the canopy of the nuisance exception.[103]

As the foregoing discussion of *Nollan* demonstrated, the confused state of the takings doctrine did not provide the South Carolina Supreme Court with the luxury of a clear precedent or established guidelines to rely on in deciding this case. They were

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[101]This interpretation of the situation by the South Carolina Supreme Court does not seem inconsistent with the U. S. Supreme Court's takings doctrine up to this point. This "nuisance exception" to the takings clause was well-known and had been described as "the self-defining concept that the government may, through its exercise of its police powers, abate an activity it deems a public nuisance without liability for compensation." Mylott, *supra* note 14, 1308.

[102]The South Carolina Supreme Court found that Lucas "conceded that the beach/dune area of South Carolina's shores is an extremely valuable public resource; that the erection of new construction, . . . contributes to the erosion and destruction of this public resource; and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm." *Lucas*, 112 S. Ct. 2886, 2896, quoting 304 S. C., at 382-383, 404 S. E. 2d, at 898.

[103]Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1435 (1993).

equipped instead with the ad hoc tests which had been generated by previous decisions. It is not too surprising, then, that the State Supreme Court arrived at the same conclusion which adherence to Professor Michelman's rules for the post-1987 takings doctrine (see note 82) would suggest to be valid. Basing their decision on the fact that "Lucas did not challenge the validity of the legislative findings that a ban on development was necessary to protect life and property, . . . nor did he question the validity of the Act as a lawful exercise of the police power,"[104] the South Carolina court stated that no taking had occurred.

It is easy to see that this reversal of the trial court's decision was based on the extensive case history of takings law as applied to the circumstances of this case. This history indicated that the state's proper exercise of its police power "to enjoin a property owner from activities akin to public nuisances"[105] did not require compensation under the Fifth Amendment. The complexities of *Lucas* had not yet finished developing, however, and further discussion of the final disposition must include some mention of the legal complications that arose even before the U. S. Supreme Court decided the case.

2. *The Effect of Lucas on the Beachfront Management Act*

While the lawyers argued in South Carolina, the state legislature was not unaware of or unaffected by the proceedings. Even before the State Supreme Court handed down

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[104] *Ibid.*

[105] *Lucas*, 112 S. Ct. 2886, 2897.

their decision in 1990, lawmakers amended the Beachfront Management Act, perhaps in the hope of forestalling more million dollar lawsuits. Section 48-39-290(D) was changed to allow for the issuance of special permits to build "if the structure is not constructed or reconstructed on a primary oceanfront sand dune or on the active beach."[106]

This amendment to the Act was, and still is, interpreted by some as a bit of cowardly backpedalling by the legislature. The devastation caused by Hurricane Hugo along large portions of the South Carolina coast in 1989 had confirmed the soundness of the 1988 statute and seemed to argue against the changes incorporated in the 1990 Amendments.[107] Coastal communities, including the Isle of Palms, were submerged under the storm's five foot wave surge and battered by high winds, resulting in damage to and loss of beachfront structures.[108] For the 1990 amendments to provide allowances for construction on the same beachfront appeared to be a betrayal of the original intent of the law. However, a close look at the statute reveals that it still retained some restrictive provisions.

Under the newly amended Act, a landowner was given the right to apply for a special building permit under section 48-39-290(D), but no set guidelines for granting

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[106]S.C. Code Ann. 48-39-290(D), (1993).

[107]The damage inflicted on South Carolina by this storm in September, 1989 included "29 deaths and approximately $ 6 billion in property damage, much of it the result of uncontrolled beachfront development." *Lucas*, 112 S. Ct. 2886, 2904. In fact, this region has been damaged by numerous storms since, including the most recent natural disaster, Hurricane Gordon, in November of 1994.

[108]Skelton, *Houses On The Sand: Takings Issues Surrounding Statutory Restrictions On The Use Of Oceanfront Property*, 18 B.C. ENVTL. AFF. L. REV. 125, 130 (1990).

these permits were given, except that the land use "must not be detrimental to the public health, safety, or welfare."[109] The decision to grant or deny permits was left to the discretion of the Permitting Committee who were given authority to "impose reasonable additional conditions and safeguards"[110] to fulfill the purposes of the Act. Additionally, the owner of a specially permitted structure could be required to remove it if any erosion of the beach resulted in the structure becoming located on the active beach.[111]

While the compromise embodied in this special permit loophole was no doubt unsatisfactory to those people with a strong environmental focus, Lucas himself was unimpressed with the opportunity it presented him to build his houses. He took his case to the Supreme Court, claiming that he had suffered a temporary taking of his property prior to the 1990 Amendments and that the remaining constraints (post-1990 Amendments) imposed on his lots were also injurious.[112]

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[109]S.C. Code ANN 48-39-290(D), (1993). The ability of the restrictive portions of the 1990 amendments to withstand constitutional challenges remains to be seen. In fact, it is quite likely that development permits have simply been extended under this provision in order to escape further challenges (which the state would most likely lose). No data was available to examine this issue further.

[110]*Ibid.*

[111]*Ibid.*

[112]*Lucas*, 112 S. Ct. 2886, 2891. The claim of a temporary taking of his property was based on the 1987 decision in *First English*, *supra* note 2, which held that where regulation deprived owners of all use of their land, compensation could be required even if the deprivation was temporary. Thus, in Lucas's case, the state was required to compensate him for the restrictions on his right to build houses on his lots between 1988 and 1990.

3. Nuisance and Noxious Uses--the Supreme Court decides Lucas

The U. S. Supreme Court agreed with Lucas, and the earlier decision was reversed, with the case remanded to the circuit level for disposition. In light of the substantial body of law supporting the South Carolina Supreme Court's decision (based on the nuisance exception to the takings clause), the reversal of this decision by the U. S. Supreme Court was a major development in the law. It required that the majority opinion execute a sharp, yet controlled and somehow justifiable, turn away from what had been considered longstanding precedent.[113] The impact of this shift in doctrine on the field of coastal zone management has been profound.

The Supreme Court decision in the case can once again be simply stated, but like *Nollan*, the reasoning behind the decision was complex. The Court ruled that where land use restrictions deprived a landowner of all economically beneficial uses of the property, a taking had occurred unless the regulated activity constituted a nuisance activity subject to prohibition under state common law.[114] This was a significant departure from the usual application of the nuisance exception, and one which promised increased difficulty in planning efforts. One author translated this decision into land-use management terms by saying, "In other words, if a piece of land has no current market value except in uses that the legislature has found too harmful to

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[113]The Court did not accomplish this turnabout without generating some controversy and cynicism, as illustrated by the comment that "in the new world of judicial activism - right-wing style - led by Antonin Scalia, precedent means little more than a misspelling of the fellow living at the White House." Kaplan and Cohn, *supra* note 1, 70.

[114]Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993).

allow, the state must now buy the land if it wants to prevent the harmful uses."[115]

As the Supreme Court's opinion, authored by Justice Scalia, makes clear, the logic behind the *Lucas* decision hinges on the applicability of the "harmful or noxious uses" principle[116] to the facts of the case. This principle is expressed in the common law maxim of *sic utere tuo ut alienum non laedas*, or the duty of landowners to exercise their rights in ways that do not harm the interests of other subjects of law.[117] This seems like a straightforward axiom, but in practice the conflicting needs and desires of property owners make its application far from simple. A purpose for which one person intends to use their property may be somehow harmful or distasteful to another person, but still be a legitimate purpose. When such conflicts arise, the second person (or, in many cases, group of people) will often try to prevent the offending use. It then becomes the province of the courts to decide which of the citizens has the better right to exercise their will over the protests of the other.

The decisions in such cases make up the body of nuisance law, which "starts from an implicit assumption that uses of land may have detrimental effects . . . but still not necessarily be . . . in any sense blameworthy."[118] For many years, the courts have decided nuisance cases by examining the disputed use and determining whether or not it was noxious, and then by balancing the interests of the owners against the interests

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[115]Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1 (1993).

[116]*Lucas*, 112 S. Ct. 2886, 2897.

[117]*Ibid.*, 2901.

[118]Humbach, *supra* note 115, 10.

of the public. The interests of the owners of the property were usually evaluated in terms of the economic impact associated with prohibiting or restricting their intended use of their land.[119]

It is not surprising that the evolution of nuisance law was highly subjective. In some cases, the judicial decisions supported land-use restrictions, even those which were considered inappropriate rather than illegal (such as operating a brewery).[120] In others, the courts supported landowners' challenges to government regulation which restricted property use. In many cases, especially those involving uses of new technology, no attempt was made to curtail activities which were clearly noxious.[121] It seems, then, that the legal concept of what constitutes a nuisance is just as slippery as the takings doctrine itself. Nuisance law has traditionally been a hodge-podge of principles that were tacked together over the years to deal with land-use crises as they arose. As one author put it, "The only objective feature that common law nuisance cases seem to share is that somebody did something, not otherwise a . . . crime, whose consequences had negative effects on others."[122]

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[119]Kadlecek, Note: *The Effect of Lucas v. South Carolina Coastal Council on the Law of Regulatory Takings*, 68 WASH. L. REV. 415, 418 (1993). The author explains that the economic impact on the property owner was determined by looking at three factors: the effect of a regulation on the land's market value, the uses of the property that remain viable, and the owner's reasonable "investment-backed expectations" (quoting *Penn Central* 438 U. S. at 136) concerning the property's profitability.

[120]*Mugler v. Kansas*, 123 U. S. 623 (1887), cited by Mylott, *supra* note 14, 1301.

[121]This type of decision was often based on the premise that in some circumstances, "there is often no sensible policy choice but to decide that, on balance, the public interest is best advanced by allowing the uses (such as important industries) to proceed despite their harmful effects on neighbors or the community at large." Humbach, *supra* note 115, 11.

[122]*Ibid.*, 13.

Nevertheless, in the *Lucas* decision, the Supreme Court expressed dissatisfaction with the use of these principles to decide the takings issue. Justice Scalia makes it clear that the Court no longer considers the subjective nature of the harmful or noxious uses principle appropriate for determining whether a land-use restriction is compensable. In an often-quoted passage, this principle is called "simply the progenitor of our more contemporary statements that 'land-use regulation does not effect a taking if it substantially advances legitimate state interests.'"[123] This statement heralded the Court's abrupt abandonment of a part of the takings doctrine which had served to resolve land-use disputes for over a century, leaving the dimensions of its contemporary standard unclear.

This sudden departure, according to the *Lucas* majority, was due to the ambiguity inherent in determining what sort of activity amounts to a noxious or harmful use which would bring the nuisance exception to the takings clause into play. The Court insisted that it was impossible to establish an objective standard for discerning the difference between government regulatory actions that prevented harm and those that conferred benefits upon the public.[124] In light of this difficulty, "it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory takings -- which require compensation -- from regulatory deprivations that do not."[125]

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[123]*Lucas*, 112 S. Ct. 2886,2897, quoting *Nollan* 107 S. Ct., at 3147, quoting *Agins v. Tiburon*, 447 U. S., at 260.

[124]*Lucas*, 112 S. Ct. 2886, 2897.

[125]*Ibid.*, 2899.

Justice Scalia's explanation for the Court's inability to make this determination was reminiscent of his words regarding the nature of an essential nexus in *Nollan*. He was disturbed that "whether one or the other [harm-preventing or benefit conferring] characterizations will come to one's lips in a particular case depends primarily upon one's evaluation of the worth of competing uses of real estate."[126] As Justice Scalia expressed the Court's view, the state legislatures would also be unable (or perhaps unwilling) to make an objective distinction as to the true purpose of a law.

Legislative findings which indicated that an action would prevent a public harm therefore became useless in invalidating takings claims. Instead of being viewed as lawmakers' efforts to protect the public as "society's malefactors discovered ever new kinds of mischief to plague the rest of us,"[127] such findings were seen by the *Lucas* Court as merely a clever recitation of "a harm-preventing justification for [the lawmakers'] action."[128] In another echo of his tone in *Nollan*, Justice Scalia rather contemptuously dismisses as inadequate the test of whether a regulation prevents harm. Since it would be easy for lawmakers to adopt harm-preventing phraseology in their findings, this once valid inquiry suddenly just "amounts to a test of whether the legislature has a stupid staff."[129] The Court was careful, however, not to

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[126]*Ibid.*, 2898.

[127]Humbach, *supra* note 115, 18.

[128]*Lucas*, 112 S. Ct. 2886, 2898.

[129]*Ibid.*

completely discredit the concept that the state can limit actions which are nuisances. Instead, it said that a law or regulation which imposes such severe restrictions on land use that all economically beneficial uses are prohibited must "inhere in the title itself, in the restrictions that *background principles* of the State's law of property and nuisance already place upon land ownership."[130]

The *Lucas* decision in effect reshuffled and re-prioritized the rules of the takings doctrine. A regulation is now always to be considered a compensable taking if it (a) involves a physical occupation of private property, no matter how slight or (b) it deprives the owner of all economically viable use. In the second instance, the taking of private property might not be compensable only if it falls under the severely curtailed nuisance exception. The nuisance exception can no longer be applied to laws that expand the category of harmful land use, but must "do no more than duplicate the result that could have been achieved in the courts. . . under the State's law of private nuisance or by the State under its complementary power to abate nuisances."[131] Regulatory actions that do not meet either of these two absolute criteria for categorical takings must be evaluated in terms of the "ad hoc, factual inquir[y]"[132] that characterized most takings decisions in the past.

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[130]*Ibid.*, 2900, emphasis added.

[131]*Ibid.*

[132]Kadlecek, *supra* note 119, 418, quoting *Penn Central Transportation Co. v. City of New York*, 438 U. S. 104 (1978).

4. Views on the Lucas Categorical Takings Test

After Lucas's case was remanded to the South Carolina Supreme Court for review using these new criteria, that court rather quickly ruled that Lucas had in fact suffered a taking of his property and was entitled to receive payment. That taking, however, was only a temporary one since the 1990 amendment to the Beachfront Management Act now allowed the opportunity for building on his lots.[133] This ended four years of legal wrangling for David Lucas, but the controversy over the meaning of the Supreme Court's decision had just begun.

If there was anything about the *Lucas* decision that almost everyone agreed upon, it was that no one cared for it much. The extent of this dissatisfaction was made evident by the controversy that the opinion generated among the members of the Court themselves. Justice Souter, for example, filed a separate statement arguing that the case should never have been decided. His reasons for taking this stance were fairly simple, and they addressed one of the issues which makes analysis of the decision so complicated, namely the assumption that the Beachfront Management Act had deprived Lucas of "his entire economic interest in the subject property."[134]

While it remains indisputable that the owner was denied his intended use for the property, it seemed to be quite a stretch to conclude that there was no other possible economically beneficial use available to him. Since the Court did not attempt to explain how this total deprivation was identified in Lucas's case, it did not provide

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[133]Lazarus, *Putting the Correct 'Spin' on Lucas*, 45 STAN. L. REV. 1411, 1413 (1993).

[134]*Lucas*, 112 S. Ct. 2886, 2925 (statement of Justice Souter).

any criteria for recognizing when such deprivations would occur in future cases. Justice Souter also pointed out that the majority's insistence that destruction of land's economic uses would only be noncompensable if supported by the state's common law of nuisance was contradictory to the very nature of that nuisance law. He writes that "it is difficult to imagine property that can be used only to create a nuisance, such that its sole economic value must presuppose the right to occupy it for such seriously noxious activity."[135]

Justice Kennedy, who had joined the Court between the *Nollan* and *Lucas* decisions, expressed similar "reservations . . . about [the] finding that a beach front lot loses all value because of a development restriction."[136] In his concurring statement, however, his primary objection to the majority opinion was that the Court failed to examine some relevant issues, and so erred in the limitations it placed on the nuisance exception. He believed that "the finding of no value must be considered . . . by reference to the owner's reasonable, investment-backed expectations."[137] These expectations must in turn "be understood in light of the whole of our legal tradition,"[138] and "the common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society."[139] Although

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[135]*Ibid.*, 2926 (statement of Justice Souter).

[136]*Lucas*, 112 S. Ct. 2886, 2903 (Justice Kennedy, concurring).

[137]*Ibid.*

[138]*Ibid.*

[139]*Ibid.*

Justice Kennedy concurred in the judgement, it was clear that he was disturbed by the implications of the Court's decision to severely curtail the state's ability to exercise the police power in the prevention of noxious uses of property.

The dissenting opinion written by Justice Blackmun indicates, in no uncertain terms, that he shares these same misgivings by saying:

> "Today the Court launches a missile to kill a mouse. . . My fear is that the Court's new policies will spread beyond the narrow confines of the present case. For that reason, I, like the Court, will give far greater attention to this case than its narrow scope suggests--not because I can intercept the Court's missile, or save the targeted mouse, but because I hope perhaps to limit the collateral damage."[140]

As this passage implies, the dissenting Justices agreed with Justice Souter that the Court should not have decided the case in the first place, and their reasons for this belief involved Lucas's failure to apply for a special permit after the 1990 Amendments were passed or to in any other way seek an administrative remedy for his troubles.[141] Justice Steven's dissent places even more emphasis on the relevance of Lucas's actions with regard to the land, questioning the validity of even a temporary takings claim in light of the fact that "the record does not tell us whether

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[140] *Ibid.*, 2904 (Justice Blackmun, dissenting).

[141] Justice Blackmun made no attempt to express his sentiments diplomatically, as the newer members of the Court had done. He comments that, "my disagreement with the Court begins with its decision to review this case." *Ibid.*, 2906 (Justice Blackmun, dissenting). He points out that the state of South Carolina "from the very beginning of this litigation . . . has argued that the courts: 'lack jurisdiction in this matter because [Lucas] has sought no authorization from Council for use of his property, has not challenged the location of the baseline or setback line . . . and because no final agency decision has been rendered concerning use of his property' . . . [and this argument] is undoubtedly correct." *Ibid.*, 2907 (Justice Blackmun, dissenting).

[Lucas's] building plans were even temporarily frustrated by the enactment of the statute."[142]

In addition to questioning the wisdom of deciding the case at all, Justice Blackmun was dubious of the finding that Lucas was deprived of all of his property's economic value, calling such a conclusion "almost certainly erroneous."[143] Justice Stevens' dissent addresses the issue by stating outright that even if Lucas were not allowed to build on the lots, his land was "far from 'valueless.'"[144] It is clear that this finding of total deprivation generated a great deal of controversy among the members of the Court, and caused some of them to be uneasy about the effect of this somewhat tenuous standard on future decisions. It was difficult to identify the definition of property being used in *Lucas*, since "the Court offers no basis for its assumption that the only uses of property cognizable under the Constitution are developmental uses."[145] These members of the Court are not alone in finding fault with *Lucas*. One legal scholar sharply criticized the Court's decision as limited and inept, because "*Lucas's* outdated view of property . . . is not satisfactory in an age of ecological

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[142]*Ibid.*, 2917 (Justice Stevens, dissenting). In Justice Stevens' opinion, it is noteworthy that "petitioner acquired the lot about 18 months before the statute was passed; [but] there is no evidence that he ever sought a building permit from the local authorities." *Ibid.*

[143]*Ibid.*, 2908 (Justice Blackmun, dissenting). Justice Blackmun expands on this point, saying, "the trial court appeared to believe that the property could be considered 'valueless' if it was not available for its most profitable use. Absent that erroneous assumption, . . . I find no evidence . . . supporting the . . . conclusion that the damage to the lots by virtue of the restrictions was 'total.'" *Ibid.*

[144]*Ibid.*, 2919 (Justice Stevens, dissenting).

[145]*Ibid.*

awareness."[146]

There have been many criticisms of the case. Some expressed unhappiness with the ruling from a purely theoretical standpoint, arguing that it was vague and problematic. One author who held this view outlined what he perceived to be numerous technical flaws in the majority opinion and concluded that although "the Court's . . . aspiration to improve the [takings] doctrine is commendable . . . the ruling in *Lucas* is not a step in the right direction."[147] The concern most frequently cited by those who viewed the decision unfavorably was that in limiting the nuisance exception to encompass only those actions already prohibited under common law, the Court was crippling the essential growth of that body of law.[148] Since the common law concept of nuisance evolved at least partially from legislative action,[149] this limitation meant that the states had been deprived of an historical mechanism for responding to change.

This issue is perhaps the one most relevant to coastal management efforts. The fragile and constantly changing coastal zone is an area that has often felt the

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[146]Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1455 (1993).

[147]Fisher, *The Trouble With Lucas*, 45 STAN. L. REV. 1393, 1410 (1993). These sentiments are echoed by Cook, who calls the Court's new economic benefits threshold test for takings "flawed because it does not accomplish any other results than those available under the old ad hoc analysis, [and it] creates a per se rule more complicated than the ad hoc inquiry. . ." Cook, *supra* note 58, 1440.

[148]"The Court's holding today effectively freezes the State's common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property." *Lucas*, 112 S. Ct. 2886, 2921 (Justice Stevens, dissenting).

[149]". . . legislatures have traditionally had authority to add new kinds of public mischief to the list of public nuisances." Humbach, *supra* note 115, 18.

deleterious impacts of new industries. It will undoubtedly do so again in the future, but the rules set forth in *Lucas* may prevent state or local governments from taking action to preserve their resources. This concern should occur to all land-use managers since "under these new regulations, a property owner will never be subject to the rule's [nuisance] exception"[150] if their action was not recognized as a common law nuisance in 1992. It requires only a cursory recollection of the technological developments of the past forty years (or even of the past ten years) to realize that this is a short-sighted policy for the evolution of laws which must deal with such changes.[151]

This complaint is singularly significant because the arena of emerging social and environmental consciousness is perhaps one of the most hotly contested of the realms in which the common law of nuisance can no longer accommodate change. For a person who accepts the environmentalist view that construction on barrier beaches creates a hazard for the public and destroys a valuable resource, it seems clear that Lucas's proposed development should be prohibited. However, "neither construction nor agriculture currently meets the test of 'grounding' in 'background principles of nuisance and property law'"[152] since "both are commonly practiced and viewed as

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[150]Cook, *supra* note 58, 1441.

[151]Professor Humbach expressed this eloquently by saying, "As knowledge, needs, and social values evolve with time and changed circumstances, what once seemed innocuous may grow noxious, while the noxious may become benign. A century ago, for example, beer and margarine were considered harmful enough substances to justify a legal ban, while opiates were sold without prescription and Coca-Cola contained cocaine." Humbach, *supra* note 115, 17.

[152]Kadlecek, *supra* note 119, 431, quoting *Lucas*, 112 S. Ct. 2886 (1992).

appropriate activities."[153] Those people who are more skeptical of claims of environmental damage will embrace the Court's new doctrine[154] and be likely to pursue takings claims. Faced with the extensive *Lucas* limitations on the application of the police power, state legislatures will undoubtedly be more cautious about curtailing property rights.

Fortunately, this restriction on the nuisance exception is not relevant to those instances where a regulation does not deprive the owners of all economically beneficial use of their land. It seems likely that, in view of *Lucas*, state governments and other regulatory bodies will strive to prevent the courts from making such a finding in any takings challenge. Barring any significant doctrinal changes from the Supreme Court, this may not prove to be too difficult, as even the *Lucas* majority admitted.[155] There is a possibility however, that the decision may presage such a doctrinal shift, one which could pose a more subtle danger to sensible environmental policy efforts.

The *Lucas* Court implied a willingness to re-evaluate the definition of property

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[153]*Ibid.*

[154]The Lucas majority insisted that the Court did not develop a new rule, but simply elaborated on a "long-established standard." *Lucas*, 112 S. Ct. 2886, 2894. There seemed to be a lack of support for this claim in the opinion, and it was repudiated by both dissenting Justices, one of whom wrote, "When the government regulation prevents the owner from any economically valuable use of his property, the private interest is unquestionably substantial, but we have never before held that no public interest can outweigh it." *Ibid.*, 2910 (Justice Blackmun, dissenting). Justice Stevens was even more emphatic, stating that "the Court's new rule is unsupported by prior decisions, arbitrary and unsound in practice, and theoretically unjustified." *Ibid.*, 2920 (Justice Stevens, dissenting).

[155]The Court characterized situations where the government deprives a landowner of all economically beneficial use as "relatively rare." *Lucas*, 112 S. Ct. 2886, 2894.

once again, this time by dispensing with the "no-segmentation" rule which provides that: "'Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether . . . a taking [has occurred], this Court focuses rather . . . on . . . the parcel as a whole."[156] If this rule is invalidated in the future, instances where the government will be found to have deprived an owner of all economically beneficial use of property might become quite common since the unit of property in question can be viewed as smaller and more limited in scope. Several analysts of property law have identified this as the most significant of the implications of *Lucas*.[157]

While people interested in conservation or environmentally sound use of the coastal zone are concerned about *Lucas's* restrictions on legislation, property rights supporters bemoan the fact that the Court did not go far enough in limiting regulatory power. The economic misfortunes currently being experienced by many people tend to make them protective of their remaining assets and add credence to the idea that excessive government regulatory action "has resulted in a massive federal taking of

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[156]Humbach, *supra* note 115, 21, quoting *Penn Central Transportation Co. v. New York City*, 438 U. S. 104, 130-31 (1978). The author notes that the *Lucas* Court "displayed a marked lack of enthusiasm" for the rule, and that it had indicated the possibility of change by characterizing past applications of the rule as "'inconsistent pronouncements.'" *Ibid.*, 22.

[157]See, for example, Kadlecek, *supra* note 119, 434, concluding that "*Lucas* will have little substantive effect on the outcome of takings challenges in the lower courts. However, if the Court permits 'piecemealing' of property interests, the takings doctrine in future years may require compensation for a far greater number of land use restrictions."

private property."[158] It is mostly individuals who belong to this group who feel that *Lucas* failed to protect property owners.

Richard A. Epstein, co-author of one of the briefs presented to the Court on Lucas's behalf and a prominent property-rights proponent (see note 1), complained that while the decision was an important one in takings jurisprudence it was not definitive enough. In his view, the categorical rule describing a loss of all economically beneficial use of property as a *per se* taking was a laudable development. He felt, however, that even the sharply limited nuisance exception still allowed to state legislatures was too much and he complained that "what the Court gave with one hand, it took away with the other."[159] At the root of Epstein's dispute with *Lucas* was his belief that the Court deliberately limited the scope of their decision in this case in order to ensure that it would not "bring many more forms of land use regulation within the Takings Clause, where they could receive the close scrutiny and swift dispatch that most of them so richly deserve."[160]

Epstein received support for his opinion that *Lucas* was not a triumph for property rights from some surprising sources. David Gardiner, legislative director of the Sierra Club, expressed a belief that "The Court's ruling . . . represents a significant defeat for those who predicted that the Court would announce a major enlargement of

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[158]Roberts, *Takings by the Bureaucracy: The Economy, and Legal and Property Rights*, 58 VITAL SPEECHES OF THE DAY 744, 749 (1 October 1992).

[159]Epstein, *supra* note 114, 1369.

[160]*Ibid.*, 1392.

property rights . . ."[161] In fact, there were some people who made the argument that the ultimate effect of the *Lucas* decision would be beneficial for regulatory efforts by making it harder for takings suits to succeed. Lazarus constructed a near-convincing case that the ruling actually "signals the emergence of a takings analysis that is more receptive to environmental concerns."[162]

So far, the Court has not elaborated or expanded on the *Lucas* doctrine, and their future intentions as to the issues raised in the case must remain a matter of speculation. There have been indications in the ensuing years as to which direction the Court is leaning, and it appears to be favoring the land-use philosophies of Epstein. This propensity was demonstrated in the 1994 session[163], when the Court decided a case reminiscent of *Nollan* in which a store owner alleged a taking when a city government imposed conditions on her permit to expand her facilities.

C. *Dolan v. City of Tigard*

This case, unlike *Nollan* and *Lucas*, did not involve a land-use dispute in the coastal zone. Nonetheless, the Court's decision was the next step in the progression begun by the two cases previously discussed, and it was a continuation of the

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[161]Lazarus, *supra* note 133, 1411.

[162]*Ibid.*, 1431.

[163]The composition of the Supreme Court did not change as greatly between 1992 and 1994 as it had between the decisions in *Nollan* and *Lucas*. The only Justice to leave the Court in this period was Justice White who was replaced by Clinton-nominee Justice Ginsburg.

development of a new takings doctrine. In fact, the Court stated explicitly that their intention in deciding *Dolan v. City of Tigard* was "to resolve a question left open by our decision in *Nollan v. California Coastal Council*. . ."[164] There seems to be general agreement among planners that the *Dolan* decision "announced a sweeping new federal takings standard . . . that promises to significantly alter local government practices"[165] in regulating development.

Such a change will inevitably have substantial impacts on the practices of land management in all areas of the country, including the coastal zone. As anticipated by property rights supporters (see note 164), the Court's decision in this case was not a departure from the trends of the late 1980's and earlier years of this decade. It seems to have dealt a death-blow to the theory that "the American landbase is seen, more than ever, as a shared resource of all,"[166] and to the idea that there is widespread agreement that this resource deserves significant efforts at either protection or prudent use.

1. Facts in the Case

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[164]*Dolan v. City of Tigard*, 114 S. Ct. 2309, 2312. In an article published prior to the decision, one lawyer and property-rights proponent speculated (tongue-in-cheek) that perhaps the Court chose this particular case to expand on *Nollan* so that any new takings test arising from the decision would have a catchy name: the *Nollan/Dolan* rule. Berger, *Nollan Meets Dolan Rollin' Down the Bikepath*, 46 LAND USE L. & ZONING DIG. 3, 4 (February 1994). While this frivolous suggestion seems unlikely, the tone of the article conveys the impression that the property-first supporters are confident of their movement's support from the Court.

[165]Morgan, *Exactions as Takings Tactics for Dealing with Dolan*, 46 LAND USE L. & ZONING DIG. 3 (September, 1994).

[166]Humbach, *supra* note 8, 341.

The basic facts in this case were fairly uncomplicated, lacking in many of the complex side issues found in the previously discussed decisions. Florence Dolan wanted to expand her existing plumbing and electric supply store located in the Central Business District of the city of Tigard, Oregon and she applied for a permit to do so.[167]

The City Planning Commission granted her the permit, on the condition that she dedicate approximately 10% of her lot to the city, specifically "the portion of her property lying within the 100-year floodplain . . . and an additional 15-foot strip of land adjacent to the floodplain."[168] The permit conditions were imposed through the use of a flexible zoning technique known as overlay zoning,[169] and they were in accordance with the city's Community Development Code (CDC) and Master Drainage Plan, both of which had been adopted to meet the state's requirement for a comprehensive land use management plan.[170]

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[167]*Dolan*, 114 S. Ct. 2309, 2313. The addition for which Dolan requested a permit increased the size of her store from 9,700 square feet to 17,600 square feet and it included plans for paving a 39-space parking lot on the property. *Ibid.*

[168]*Ibid.*, 2314. Although she would have been dedicating the land to the city, Dolan would still have been able use that 10% of her property towards meeting the city's zoning requirement that 15% of her lot be open space and landscaping. *Ibid.*

[169]Overlay zoning is defined as "a technique in which new, more restrictive zoning is 'laid over' a zone already in existence in order to regulate or restrict certain uses that are permitted by the underlying zoning regulation," and the constitutionality of this type of flexible zoning has been upheld by state courts. SALSICH, *supra* note 10, 163. Not surprisingly, property-first advocates dislike overlay zoning, seeing it as "a device by which a city telegraphs that it doesn't really intend to abide by the underlying zoning, but, instead, intends to impose some additional conditions on development." Berger, *supra* note 164, 3.

[170]*Dolan*, 114 S. Ct. 2309, 2313. Specifically, the CDC required that all new development would be subject to the requirement for the dedication of land to be used in the construction of a pedestrian/bicycle pathway through the Central Business District, a pathway designed to reduce

The requirement for dedication of the land within the floodplain was not particularly unusual. The risks of building structures in such areas have been well-known for years, and it is not uncommon to find restrictions on development of property located in the floodplain.[171] Nor did the courts, including the Supreme Court, question the city's right to use overlay zoning to regulate the development in the floodplain. In fact, the *Dolan* Court pointed out once again that "'government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change.'"[172]

The requirement that the property owner also dedicate an additional strip of land for use in the municipal bike path caused a great deal more furor. The fact that this land was to be used in extending the municipal pedestrian/bike path raised the suspicion that "what the city wanted was not an amount of land sufficient [to mitigate the effects of Dolan's development]; what it wanted was a particular 15-foot strip of land that Dolan happened to own."[173] Yet similar property exactions have been widely used by municipal governments to obtain land for use in public projects such

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traffic congestion in the area. *Ibid.*, 2314. The Drainage Plan recommended that in order to combat the dangers of flooding, the Fanno Creek Basin (next to Dolan's property) be improved through channel excavation and that it be kept free of structures. *Ibid.*, 2314.

[171]A floodplain is defined as "a natural overflow area adjoining surface waters, including streams, rivers, lakes, estuaries, bays, and the open ocean." PLATT, *supra* note 4, 238. The 100-year floodplain is that area which has a 1 percent probability of being flooded in any given year, and it is this geographic region which is most commonly the area regulated by land use management plans. *Ibid.*, 239.

[172]*Dolan*, 114 S. Ct. 2309, 2316, quoting *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 413.

[173]Kelly, *Supreme Court Strikes Middle Ground on Exactions Test*, 46 LAND USE L. & ZONING DIG. 6 (July 1994).

as streets and drainage facilities throughout the nation's history.[174] The results of such projects were regarded as beneficial to both the public and to the private land owners whose property was served by the facilities. In this particular case, it was argued that "Dolan's acceptance of the permit, with its attached conditions, would provide her with benefits that may well go beyond any advantage she gets from expanding her business."[175] It seems likely that the somewhat unorthodox public purpose of constructing a pedestrian/bicycle pathway vice a more conventional roadway contributed to the increased level of scrutiny afforded the city's land dedication requirement.

Unhappy with the permit requirement that she deed a portion of her property to the city, Dolan requested a variance[176] from the CDC standards for new development, arguing that the proposed store addition and parking lot would not conflict with the policies of the comprehensive land use management plan.[177] In the process of evaluating this request for a variance, the City Planning Commission set forth a series of findings regarding the impacts of the proposed development and the degree to which these impacts were related to the conditions imposed on Dolan's building permit. Basically, the city found that the new, larger store would attract

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[174]Morgan, *supra* note 165, 4.

[175]*Dolan*, 114 S. Ct. 2309, 2324 (Justice Stevens, dissenting).

[176]A variance is "an administrative exception granted [by the zoning authority] to relieve a 'hardship' to a property owner who cannot make reasonable use of his or her land if the applicable zoning regulations are strictly enforced." PLATT, *supra* note 4, 188.

[177]*Dolan*, 114 S. Ct. 2309, 2314.

more customers and add to the traffic problems in the vicinity, but that the pedestrian/bicycle path across the property would reduce this negative impact by providing a viable alternative transportation method.[178] The city also found that the requirement for dedicating the floodplain portion of the lot was warranted by the paved parking lot included as a part of the new development since the pavement would increase the impervious surface on the property, adding to the amount of runoff into an "already strained creek and drainage basin."[179]

In accordance with these findings, the Commission denied Dolan's request for a variance. When an appeal failed to produce the desired result, she brought suit against the city alleging that the permit conditions constituted a taking of her property without just compensation.[180] The Oregon Court of Appeals and the Oregon Supreme Court both rejected her arguments and upheld the city's zoning efforts based on the conclusion that the city had shown that there was a "reasonable relationship"[181] between Dolan's proposed development and the permit conditions imposed. The Oregon Supreme Court specifically, and perhaps unwisely, rejected the landowner's contention that the Supreme Court had "abandoned the 'reasonable

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[178]*Ibid.*, 2315. Opponents of the city's policies were quick to mock this assertion with the image of consumers riding around the bikepath with the "kitchen sink" propped between the handlebars, as though Dolan's store sold nothing that could be transported by a bicyclist. Berger, *supra* note 164, 4.

[179]*Dolan*, 114 S. Ct. 2309, 2315.

[180]*Ibid.*, 2315.

[181]*Ibid.*

relationship' test in favor of a stricter 'essential nexus' test,"[182] instead interpreting the *Nollan* decision to mean that it was sufficient to show that the exaction served the same purpose as denial of the permit would have served.[183] If the intention of the Oregon courts was to test the Supreme Court's current attitude toward the volatile takings issue and the current state of the doctrines expressed in *Nollan* and *Lucas*,[184] they received an emphatic answer from the *Dolan* Court. Chief Justice Rehnquist delivered the opinion for the Supreme Court, avoiding for the most part the colorful rhetoric found in the *Nollan* and *Lucas* decisions. The *Dolan* opinion built on those two previous cases, but outlined a new requirement concerning regulatory takings.

2. *The Dolan "Rough Proportionality" Test*

The decision in this case has been described as establishing a new, three-part takings test,[185] but in fact the first two "parts" of the test were simply an application of tests developed in previous decisions, the requirement that a land use restriction serve a legitimate public purpose and the existence of an essential nexus between

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[182]*Ibid.*

[183]*Ibid.*

[184]It almost seems that the Oregon Supreme Court couched their decision in language that was sure to draw fire from the Supreme Court. One law professor and commentator on recent takings decisions pointed this out: "In fact, ignoring the essential nexus test [from *Nollan*] may be too gentle a characterization [of the Oregon Court's decision]. The Oregon court virtually rubs the *Nollan* majority's collective nose in reasonable relationship in paragraph after paragraph, citing [the essential nexus test] only [once]. . . for 'purposes of discussion.'" Callies, *After Nollan: Dolan v. City of Tigard*, 46 LAND USE L. & ZONING DIG. 4, 5 (February 1994).

[185]Callies, *Nexus Redux on Required Land Dedications*, 46 LAND USE L. & ZONING DIG. 3 (July 1994).

permit conditions and the purpose they were supposed to further. The new standard, or third test, applied by the *Dolan* decision was in itself a more refined and highly exacting extension of the *Nollan* essential nexus test: a determination of "the required degree of connection between the exactions and the projected impact of the proposed development."[186] The Court stated that the required degree of connection was a "rough proportionality."[187] Although this test was, like previous takings tests, open to a certain degree of interpretation, it is useful to understand how the *Dolan* majority arrived at their conclusions.

The Court's approach to deciding this case was similar to the logic used in *Nollan*, not surprising given the degree of similarity between the two cases. The majority opinion begins with the familiar-sounding statement that "had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to develop her property on such a dedication, a taking would have occurred."[188] The Court recognized the city's legitimate need to engage in land-use planning, however, and re-stated the constitutional validity of a regulation which "substantially advances legitimate state interests" without denying an owner "economically viable use of his land."[189] The issue, examined in such detail in *Lucas*, of whether the regulation in question would deprive Dolan of the

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[186]*Dolan*, 114 S. Ct. 2309, 2317.

[187]*Ibid.*, 2319.

[188]*Ibid.*, 2316.

[189]*Ibid.*, citing *Agins v. Tiburon*, 447 U. S. 255, 260 (1980).

economically beneficial use of her property was briefly evaluated and dismissed. It was clear that even outright denial of a permit to expand the store would leave her with the economic use she enjoyed before the whole controversy began.[190]

The Court then disposed of the question of whether or not the required dedication of a portion of Dolan's land would advance a legitimate state purpose, concluding that the city government's action was consistent with "the type of legitimate public purpose[s] we have upheld"[191] in the past. Having established this, the Court turned to the *Nollan* essential nexus test, and applied it to the present situation. Although the Oregon Supreme Court had discounted the importance of this test, the City Planning Commission had not done so. The permit conditions appear to have been carefully crafted so as not to run afoul of that important requirement. In their analysis, the *Dolan* Court concluded quickly that it was "obvious that a nexus exists"[192] between the requirement for land dedication and the purposes of preventing flood damage and lessening traffic congestion.

Up to this point, it seemed the city of Tigard had satisfied the constitutional requirements for imposing a valid permit condition on a property owner in accordance with the Supreme Court's takings doctrine. However, the Court was not satisfied that this adherence to previous doctrines provided an adequate answer to all the issues raised by Dolan in her complaint. In this case, the property owner contended "that

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[190] *Ibid.*

[191] *Ibid.*, 2318.

[192] *Ibid.*

the city . . . forced her to choose between the building permit and her right under the Fifth Amendment to just compensation."[193] Additionally, the Court considered Dolan's case to be different from previous regulatory cases because the city had "made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel"[194] rather than basing their permit requirements on "essentially legislative determinations classifying entire areas of the city."[195]

Finally, the fact that the city sought to obtain possession of the property was a point of concern. The Court pointed out that the resulting "loss of her ability to exclude others . . . [deprived Dolan of] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[196] In an undoubtedly deliberate echo of their language in *Nollan*, the majority stated that: "It is difficult to see why recreational visitors trampling along petitioner's floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems along Fanno Creek."[197]

In their efforts to resolve these issues, the *Dolan* majority looked to the precedents

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[193]*Ibid.*, 2317. The Court's opinion reiterated that "under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit." *Ibid.*, citing *Perry v. Sindermann*, 408 U. S. 593, 33 (1972).

[194]Kelly, *supra* note 173, 7. This author maintained that the "adjudicative decision" language in *Dolan* will protect many types of subdivision exactions from scrutiny, limiting the effect of the decision.

[195]*Ibid.*

[196]*Dolan*, 114 S. Ct. 2309, 2320, quoting *Kaiser Aetna*, 444 U. S. 164, 176 (1979).

[197]*Ibid.*, 2320.

established by state courts to determine "whether [the Commission's findings regarding the permit conditions] are constitutionally sufficient to justify the conditions imposed by the city on petitioner's building permit."[198] The Court's analysis of these state court decisions rejected standards that were considered to be too stringent or too lax, settling on the requirement that the government demonstrate some degree of rough proportionality "between the required dedication and the impact of the proposed development."[199]

Like previous takings cases, the *Dolan* decision generated vehement disagreement among the members of the Supreme Court. Justice Stevens, who has consistently opposed the ongoing development of the Court's pro-property rights takings doctrine, disliked the results in this case to such an extent that he "insisted on reading his dissent aloud from the bench (something done on only rare occasion these days)."[200] The majority's announcement of the new takings test was described in this dissenting opinion as a decision to "erect a new constitutional hurdle in the path of [previously valid land-use permit] conditions,"[201] giving credence to the idea that the progression of takings law in the past decade has been little more than a path to securing "judicial power to invalidate state economic regulations that Members of this

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[198]*Ibid.*, 2318.

[199]*Ibid.*, 2319.

[200]Berger, *Not Always Right to Try to Get As Much As You Can*, 46 LAND USE L. & ZONING DIG. 4 (July 1994).

[201]*Dolan*, 114 S. Ct. 2309, 2323 (Justice Stevens, dissenting).

Court view as unwise or unfair."[202] Countering this assertion, the majority opinion presented their new rough proportionality test as merely the resolution of a question raised in *Nollan* but left unanswered due to the particular facts of that case.[203]

Justice Steven's disagreement with the majority went beyond his dislike of the perception that "the Court is really writing on a clean slate rather than merely applying 'well-settled' doctrine."[204] Having stated his objections to the formulation of the rough proportionality test in the first place[205], his dissent points out that "even under the Court's new rule, both defects [that the majority found in the city's case] are, at most, nothing more than harmless error."[206] The first of these involved the dedication of land in the floodplain to the city for public use, a requirement Justice Stevens admits was not necessarily absolute but which might have been more beneficial to Dolan than a prohibition on construction in this area would

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[202]*Ibid.*, 2327 (Justice Stevens, dissenting).

[203]*Dolan*, 114 S. Ct. 2309, 2317. The Court seemed intent on stressing the view that the development of the rough proportionality test was merely an extension of *Nollan*, not a new requirement: "We were not required to reach this question in *Nollan*, because we concluded that the connection did not meet even the loosest standard. Here, however, we must decide this question." *Ibid.*

[204]*Ibid.*, 2328 (Justice Stevens, dissenting).

[205]Justice Stevens points out that the Court's decision lacks federal precedent and asserts that the state court decisions the majority relies on "either fail to support or decidedly undermine the Court's conclusions in key respects." *Ibid.*, 2323 (Justice Stevens, dissenting). He calls the formulation of the new takings test "unjustified when all tools needed to resolve the questions presented by this case can be garnered from our existing case law." *Ibid.*, 2326 (Justice Stevens, dissenting).

[206]*Ibid.*, 2326.

have been.[207]

The second defect identified by the *Dolan* Court concerned the city's lack of any quantitative analysis of the amount of traffic the new store would generate and the ability of the bike path to offset this effect. The majority stated that:

> "No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated."[208]

Given the Court's reluctance to be more specific about just what, other than precise mathematical calculation, would constitute a quantitative finding on the part of the city, it is not surprising that one of the most immediate implications of the decision was that it left "a lot to be litigated."[209] Another implication was that the majority was, in this case, indulging in the same sort of verbal "gimmickry"[210] which the *Nollan* majority had accused the California Coastal Commission of using. Both dissenting opinions pointed out this weakness in the Court's opinion, Justice Stevens

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[207]*Ibid.*, 2326 (Justice Stevens, dissenting). In response to the majority's complaint that "the city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control," *Ibid.*, 2320; Justice Stevens countered that "it seems likely that potential customers 'trampling along petitioner's floodplain' are more valuable than a useless parcel of vacant land." *Ibid.*, 2326.

[208]*Ibid.*, 2319-2320.

[209]Morgan, *supra* note 165, 6. Justice Stevens shares this apprehension that the decision signalled that the Court was "extending its welcome mat to a significant new class of litigants." *Dolan*, 114 S. Ct. 2309, 2326 (Justice Stevens, dissenting).

[210]*Dolan*, 114 S. Ct. 2309, 2317.

referring to it as "nothing more than a play on words,"[211] and Justice Souter noting that "the Court concludes that the City loses based on one word ("could" instead of "would"), and despite the fact that the record shows the connection the Court looks for."[212]

It is clear that, like Justice Blackmun in his *Lucas* dissent, Justice Stevens believes that the Court's decision in *Dolan* amounted to a reckless abandonment of valuable legal doctrines in the pursuit of broadening the range of property rights which "matter mightily to this Court."[213] One of the most worrisome aspects of the decision was that it "built on another aspect of *Lucas*, in which the Court expressed the view that taking all rights in a discrete portion of the property . . . could be a taking."[214] Justice Stevens' dissent devoted considerable time in trying to reassert the long-standing doctrine that "'a claimant's parcel of property [cannot] first be divided into what was taken and what was left' to demonstrate a compensable taking."[215]

He was also disturbed by the new test's criteria that the government entity involved be the one to establish proof that the regulatory permit conditions satisfy the proportionality requirement, and concerned about the effects of this decision on future

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[211]*Ibid.*, 2326 (Justice Stevens, dissenting).

[212]*Ibid.*, 2331 (Justice Souter, dissenting).

[213]Callies, *supra* note 185, 4.

[214]Berger, *supra* note 200, 5.

[215]*Dolan*, 114 S. Ct. 2309, 2324 (Justice Stevens, dissenting), quoting *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2290 (1993).

takings suits.[216] The statement that, "the Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan"[217] was echoed by Justice Souter's dissent as well.[218]

Once again, the response to the Court's decision has been varied, depending on the author's stance regarding property rights. Those who adhere to the property-first philosophy have applauded the decision as a firm statement from the Court that "property owners are not mere obstacles scattered around the countryside to impede order and propriety."[219] More moderate voices asserted that the Dolan decision is "no . . . threat . . . to the ability of a community to zone or otherwise regulate land use,"[220] since all that the decision prohibited was "a negotiated exaction where the exaction is based on the needs of the city and not on the impacts of the development."[221] Still other commentators expressed the opinion that the *Dolan* test may now apply to all subdivision exactions, such as those for sidewalks and streets, and voiced concerns that "municipalities will abandon worthy public improvement

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[216]*Ibid.*, 2323 (Justice Stevens, dissenting).

[217]*Ibid.*, 2326 (Justice Stevens, dissenting).

[218]". . . the Court has placed the burden of producing evidence of relationship on the city, despite the usual rule in cases involving the police power that the government is presumed to have acted constitutionally." *Ibid.*, 2331 (Justice Souter, dissenting).

[219]Berger, *supra* note 200, 4.

[220]Kelly, *supra* note 173, 7.

[221]*Ibid.*

programs rather than face potential liability."[222] From a land management perspective, it does seem that the *Dolan* decision illustrates a frustrating judicial trend to stymie efforts at reasonable control measures. The political policy issues involved in the takings doctrine appear to be overshadowing even the legal issues, and it seems that the prediction that "hard cases make bad law" has come true.[223]

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[222]Morgan, *supra* note 165, 7.

[223]Kelly, *Nollan, Lucas, and Dolan: Respecting Expectations*, 46 LAND USE L. & ZONING DIG. 5 (February 1994).

III - MANAGEMENT WITHOUT TAKING

A. The Realm of Politics

A great deal of the debate amongst scholars and members of the judiciary seems to have been predicated on the theory that the controversy over takings and property rights is an intellectual exercise among disinterested and impartial parties. As the discussions of the takings doctrine in the previous section demonstrated, this is hardly the case. Any person's opinions on such a subject must be colored by their underlying beliefs about the issues involved, and not even Supreme Court Justices are immune to the vagaries of human nature. In a particularly insightful commentary on this aspect of the takings issue, Professor Gregory S. Alexander summarized the situation by saying:

> "Takings doctrine is generated not by any abstract methodological or theoretical concern, but by the pictures that judges have in their heads about the participants in the public land-use planning arena, pictures about who is empowered, who is unempowered and how those who enjoy a power monopoly have used that power to their strategic advantage."[224]

Even a cursory review of the language in the takings cases which have been discussed demonstrates the validity of this point.

In the Court's *Nollan* decision, Justice Scalia described a sly and manipulative state government engaged in creating legal fictions to deprive the helpless landowners

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[224]Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752, 1753 (1988).

of their property through a plan of extortion.[225] The dissenting opinion from Justice Brennan showed an entirely different picture, one in which the government acted in good faith only to be sandbagged by the sneaky Nollans, whom he described as "interlopers,"[226] and their pack of clever lawyers. The language of the *Lucas* decision was even more vivid, with Justice Scalia accusing the state of "plundering landowners generally"[227] and Justice Blackmun implying that David Lucas's real motivations involved political activism and monetary gain rather than the desire to build houses.[228] The *Dolan* Court showed the same dichotomy, with Chief Justice Rehnquist invoking the specter of an oppressive government which used the police power "'as an excuse for taking property simply because at that particular moment the landowner [asked] the city for some license or permit.'"[229] On the other hand was Justice Stevens, describing the city of Tigard's land dedication requirements as "rational, impartial, and conducive to fulfilling the aims of a valid land-use plan"[230] while hinting that Dolan was engaged in a calculating and self-serving attempt to

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[225]*Nollan*, 107 S. Ct. 3141, 3143-3151 passim.

[226]*Ibid.*, 3154.

[227]*Lucas*, 112 S. Ct. 2886, 2899.

[228]*Ibid.*, 2908 (Justice Blackmun, dissenting). Justice Blackmun pointed out that "petitioner made no allegations that he had any definite plans for using his property. At trial, Lucas testified that . . . he was 'in no hurry' to build [his house] 'because the lot was appreciating in value.'" *Ibid.* Justice Blackmun seemed to feel that Lucas was, in essence, asking the government to cover his losses resulting from a bit of poorly-judged land speculation.

[229]*Dolan,* 114 S. Ct. 2309, 2319, quoting *Simpson v. North Platte*, 206 Neb. 240, 245 (1980).

[230]*Ibid.*, 2329 (Justice Stevens, dissenting).

thwart reasonable municipal planning in the pursuit of a profit.[231]

An observer with any degree of impartiality would undoubtedly see the true situation as somewhere between the extreme visions set forth by these opposing factions. Neither governments nor private landowners are the absolute saints or conniving sinners described in these parables of power, but there is indisputably some degree of self-interest motivating the actions of each of the players in the takings game. There is also little doubt that this self-interest is tempered by political philosophy, and David Lucas served as a prime example of the takings actor as a political animal.

Whatever his motives for filing suit in 1988, it was clear by 1992 that Lucas viewed his case as not just a legal, but also an ideological challenge to the environmental concerns that had prompted passage of the Beachfront Management Act. The week that the Supreme Court heard arguments in his case, Lucas indulged in a bit of hyperbole and stated that he hoped the forthcoming decision would be "the end of the wild-eyed tree huggers."[232] Nor was Lucas the only one to view his case as a turning point in a struggle of conflicting land ethics. Senator John Chafee of Rhode Island was quoted as calling the case "the scariest thing coming down the pike for anyone who cares about the environment."[233]

In the democracy of modern America, it is not considered surprising or even

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[231] *Ibid.*, 2326 (Justice Stevens, dissenting).

[232] Kaplan and Cohn, *supra* note 1, 70.

[233] *Ibid.*

particularly unethical for private citizens to manipulate the system of government in order to press their own advantage, even at the expense of some other societal good. It has long been recognized that "there is little evidence in the history of land development in America that the private decision-maker, left to his own devices, can be trusted to act in the public interest."[234] It is ostensibly the government's job to ensure that the public interest is nonetheless served, and so the judiciary becomes the arbitrator of the dispute between the public and private sectors.

It is all the more important, then, that judges avoid the pitfalls of political interests to the greatest extent possible. Recognizing that Supreme Court Justices are only human and that there will therefore be an inevitable overlap between professional decisions and private judgements, there is a danger that in regard to the takings issue, judicial partisanship has, to steal a phrase from the Court itself, gone too far.[235] The dissenting opinions in both the *Lucas* and *Dolan* cases make it clear that some members of the Supreme Court have recognized the increasingly political nature of takings litigation. In *Lucas*, Justice Blackmun raised the concern that the Court's desire to make a statement regarding the takings doctrine led the majority to compromise judicial standards.[236] Nor is this view limited to the dissenting

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[234]BABCOCK, *supra* note 18, 185.

[235]The current dispute over regulatory takings has its roots in the Supreme Court's statement in the landmark case of *Pennsylvania Coal Co. v. Mahon* that, "if regulation goes too far, it will be recognized as a taking." *Lucas*, 112 S. Ct. 2886, 2893, quoting *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 415 (1922).

[236]*Ibid.*, 2907-2908. He comments: "Clearly, the Court was eager to decide this case. But eagerness, in the absence of prior jurisdiction, must--and in this case should have been--met with restraint." *Ibid.*, 2909 (Justice Blackmun, dissenting). More pointedly, he hints that the Court

Justices. Richard J. Lazarus, who represented the South Carolina Coastal Council before the Supreme Court, insisted that the case was heard by the Court not for its merits but in order for the Reagan-Bush appointed conservative justices to signal a doctrinal shift to the lower courts.[237]

One of the frequent commentators on the takings issue has summarized the current situation by saying that "the regulatory takings debate is not really about property rights, . . . it is, more fundamentally, an institutional debate as to which branch of government should have the final say on the substantive issues of land-use regulation."[238] Justice Blackmun recognized the existence of this debate when he said in his *Lucas* dissent, that "there is nothing magical in the reasoning of judges long dead,"[239] and asked "if judges in the 18th and 19th centuries can distinguish a harm from a benefit, why not judges in the 20th century, and if judges can, why not legislators?"[240]

This shift of power from the legislative branch of government to the judiciary may well be the most important and disturbing aspect of the trend of the takings doctrine over the past decade. Although he was speaking of a somewhat different topic, the words of one-time Supreme Court nominee Robert Bork are uncannily applicable to

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chose to hear an unsuitable case merely because the majority felt that the facts would produce a pre-determined and desired result: "The Court's willingness to dispense with precedent in its haste to reach a result is not limited to its initial jurisdictional decision." *Ibid.*

[237]Lazarus, *supra* note 133, 1413.

[238]Humbach, *supra* note 115, 27.

[239]*Lucas*, 112 S. Ct. 2886, 2914 (Justice Blackmun, dissenting).

[240]*Ibid.*

the current situation:

> "With each successive case, the Court shrinks the sphere of legislative decision making and expands the role of the judiciary . . . This means that we are increasingly governed not by law or elected representatives but by an unelected, unrepresentative, unaccountable committee . . . applying no will but their own."[241]

Resolution of such a fundamental conflict between two sections of the government will not be easily or quickly achieved, and it is unlikely that the Supreme Court will become an apolitical body in the conceivable future. In the meantime, planners and managers must find methods to continue their endeavors, and coastal managers are no different from other land-use regulatory personnel in this respect.

B. Coastal Management Within the Realm of Politics

After much debate and analysis of what the Supreme Court really said and what the Supreme Court really meant about regulatory takings, the planning environment is still one of uncertainty. It seems that just as land-use managers get a handle on the latest twist to the takings doctrine, a new circumstance arises and a new takings test is born. Nevertheless, and despite the Court's disparaging reference to the "so-called 'coastal zone'"[242] in *Lucas*, management of coastal resources must continue. It is inevitable that this management will involve the regulation of land uses, at least to some extent.

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[241]Hatch, Book Review, 75 CORNELL L. REV. 1338, 1344-1345 (1990) (reviewing R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1989), quoting at 130).

[242]*Lucas*, 112 S. Ct. 2886, 2889.

The question which remains to be answered, then, is how best to apply land-use regulations in order to effectively protect both private and public interests while avoiding conflict with the doctrine of regulatory takings. There are no new and innovative techniques of land management available which will miraculously escape the threat of takings challenges. In fact, it seems likely that any attempt to use such techniques would immediately draw fire from property-first proponents. The challenge for coastal managers will be to utilize existing and proven methods to obtain the desired results. Several techniques of flexible zoning may prove to be useful tools in this endeavor.

1. Transfer of Development Rights and Existing-Use Zoning

The transfer of development rights (TDR) method of flexible zoning can be used to preserve areas of critical interest or value by removing the right to develop the property. Owners of property in the area to be preserved (the sending area) can sell their development rights to owners of property in areas where increased construction will have less of an adverse impact (the receiving area). In order for this scheme to work, the TDR must be implemented through local zoning regulations, and a rather unique set of circumstances must exist. The property owners in the receiving area must see some profit in developing their land beyond the limits allowed by current zoning (ie. they must want to increase density of development, height, etc.), and the property owners in the receiving area must be unwilling or unable to use their

development rights on their own property.[243]

The need for managers to exploit or create this set of circumstances in order to use TDRs will limit the utility of this technique, and there has been some speculation that the essential nexus test of *Nollan* may preclude the use of TDRs altogether.[244] This may not necessarily be a valid concern since the essential nexus test pertained to permit conditions imposed on property owners engaged in development, and not directly to the structure of zoning ordinances governing that development. The method may be of use in cases similar to *Lucas*, in which the goal is to prevent development or redevelopment of a sensitive area. The Supreme Court has made it clear that a complete ban on construction in such areas will probably amount to a taking of property which must be compensated. The use of TDRs could help direct construction away from the most sensitive areas, and allowing property owners who are barred or discouraged from construction to sell their development rights elsewhere may help to offset the government's costs in such matters, even if it does not altogether avoid the takings issue.[245]

The technique of existing use zoning may also have some limited applications in the coastal zone. It will not solve problems of access and use like those in *Nollan*, or

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[243]PLATT, *supra* note 4, 234-237 passim.

[244]Humbach, *supra* note 8, 352. This author contends that TDRs "came under a major constitutional cloud" in *Nollan* since "the essential nexus" will always be lacking. *Id.*

[245]PLATT, *supra* note 4, 236; noting that the Supreme Court decision in *Penn Central Transportation Co. v. City of New York* (98 S. Ct. 2646, 1978) mentioned that: "it is not literally accurate to say that they have been denied all use of those pre-existing [development rights]. . . they are made transferrable . . . [and] nevertheless mitigate whatever financial burdens the law has imposed . . ."

be of much use in already-developed areas like the subdivision in *Lucas*, but it may help the forward-looking planner to avoid the types of problems faced in those instances. Existing use zoning is basically a set of regulations which provide that "within the existing-use zone, the lawful uses of each piece of land are the uses for which the parcel already is reasonably adapted."[246] It is up to coastal managers to identify those areas where this type of zoning could prevent detrimental uses in the future,[247] and to take action to implement the required regulations.

The ease with which these types of zoning methods can effectively accomplish coastal management objectives will depend greatly on the nature of the land in question. If the area to be managed consists of largely undeveloped property, the coastal manager may find their task relatively easy. Environmental restrictions and new zoning regulations in such areas, especially those which are not currently attractive to developers, may meet little resistance. However, in areas where existing developments have created "reasonable, 'investment-backed, expectation[s],' that vest the rights of the owner to make reasonable use of the property in accordance with current zoning regulations,"[248] the coastal manager must tread carefully.

2. *"Thoughtful" Planning and Regulation*

Unfortunately for the coastal manager, it is not always possible to confine

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[246]Humbach, *supra* note 8, 349

[247]These areas have been described as "relatively undisturbed locales where the normal presumption runs against active modifications of land use anyway." *Ibid.*

[248]Kelly, *supra* note 223, 6.

regulatory efforts to undeveloped or uncontested areas. Coastal management is not just about preservation, it is about managing the multiple uses of property and other resources in the coastal zone. In order to be effective in the current regulatory takings environment, land-use planners would be well advised to heed the words of the property rights advocate who called for more "thoughtful"[249] planning. Before implementing new policies, or even implementing old ones which are similar to the procedures followed by the city of Tigard in *Dolan*, managers need to stop and think of the possible consequences.

It is easy to know where to begin this analysis, but it will become steadily more complex as it progresses. Managers can start with question: does my proposed action involve any degree of physical occupation of someone's property? If the answer is yes, the action constitutes a taking and some form of compensation must be provided for. If the answer is no, then the next question should be: will my proposed action deprive the owner of all economically beneficial use of their property? This question may not be so easily answered given the current uncertainty regarding the unit of property to be considered,[250] but the coastal manager should analyze the possibility that the claim of deprivation of use may be made. If it seems likely that all use will be denied, the manager must look for a "background principle of nuisance and property law"[251] to justify the prohibition on the owner's use of

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[249]Berger, *supra* note 200, 4.

[250]See, for example: Kadlecek, *supra* note 119, 432-434; and Berger, *supra* note 200, 5.

[251]*Lucas*, 112 S. Ct. 2886, 2901-2902.

their property. This may be extremely difficult to do, so it is likely that this type of regulation will result in a compensable taking of property.

On the other hand, if the owner still has some economic use of their property, and the proposed action will merely restrict that use, the takings analysis grows even more subjective and complicated. If the action being proposed involves some sort of development permit restriction or exaction, both common management tools, then the *Nollan* and *Dolan* tests come into play. It is up to the regulator to demonstrate an essential nexus between the restriction on the property owner and the purpose it is intended to serve. The thoughtful planner should establish this nexus outright, through methods such as articulation in a comprehensive land-use plan, even if the nexus appears to be obvious and well-recognized.[252] It seems clear that even the appearance of arbitrary and unfair government requirements will invite close scrutiny from the current Supreme Court, so prudent coastal managers should be prepared to thoroughly defend the reasonableness of their requirements.

Effective means for dealing with the *Dolan* rough proportionality test are equally elusive. Since the Court chose not to provide a precise methodology for satisfying this requirement, coastal managers will have to attempt to err on the side of being overly quantitative in their analyses of the relation between the mitigating effects of an exaction and the effects of the owner's property use. Thorough studies of the economic impact of a proposed development appear to be called for, including the costs of the studies themselves and any closely-related benefits to be derived from

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[252]Morgan, *supra* note 165, 7.

governmental restrictions on the development. A popular suggestion for dealing with *Dolan* has been to anticipate the public costs of private development, and to account for these future costs through the well-established procedures for levying impact fees.[253]

It is more important than ever for land-use managers to look closely at the implications of their actions before jumping into regulatory schemes. This is especially true of coastal managers who deal with a fragile and volatile environment where the need for changes in policy often seems urgent. The South Carolina experience with *Lucas* is an example of what may happen when coastal managers lose sight of the influence of the property rights movement. The Beachfront Management Act was an outstanding law from an environmental conservation standpoint, one that dealt aggressively with a pressing problem. It failed to account for social and political realities, however, and as one land-use planner put it: "[this] unfortunate and unreasonable decision to bar the construction of homes on two existing lots along a developed road in a developed subdivision gave the country a miserable precedent."[254] Land-use managers must try to avoid exploring the outer envelope of the takings doctrine through litigation, a practice which, considering the current trends from the Supreme Court, has been like playing Russian roulette with the future of takings jurisprudence. "It is time for planners to stop creating cases that lead to

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[253]*Ibid.*, 7-8. Impact fees are collected in order to allow the government to offset the negative influences of new development. Cash fees are used to provide the necessary infrastructure for growth in an area, and real-estate (land dedications) are another form of impact fee payment. See also, Kelly, *supra* note 173, 8-9.

[254]Kelly, *supra* note 223, 7.

predictably bad decisions,"[255] especially since it is the planners who must then work within the confines of those decisions.

There is another avenue of response to the *Nollan*, *Lucas*, *Dolan* trend of takings jurisprudence which may be as dangerous to environmental efforts as more bad decisions, the practice of initiating takings legislation. Takings legislation is basically an effort to head off takings claims by requiring that the government either 1) avoid making laws that might result in takings claims, or 2) pay owners a percentage of their property value based on a determination of the impact of a regulation, regardless of whether or not a regulatory taking actually occurred.[256] These attempts to keep the takings issue out of the courts are most likely to result in costly bureaucracy and an overall "chilling effect on land-use planning and regulation."[257]

While a great deal of the push for takings legislation has been in the states,[258] there has been a significant effort to enact federal statutes as well. Current congressional efforts in this area have been labelled the "Unholy Trinity" by environmental organizations because of their three-part agenda to: require payment of compensation when environmental laws take away property interests; require risk assessment and cost-benefit analyses for new environmental rules; and do away with

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[255] *Ibid.*

[256] Freilich and Doyle, *Taking Legislation: Misguided and Dangerous*, 46 LAND USE L. & ZONING DIG. 3 (October 1994).

[257] *Ibid.*

[258] As the 1994 legislative session drew to a close, ten states had enacted takings legislation and such legislation had been considered by all 50 states. *Ibid.*, 3-5.

federal environmental mandates which are not accompanied by adequate funding.[259] The Congress seems to be adopting a strategy of avoiding the takings issue by utterly freezing environmental regulation efforts, and this strategy is not a sound one. The marked improvements in air and water quality in the past 30 years and the current safeguards enjoyed by society with regard to harmful land uses appear to have blinded some legislators to the dangers of imprudent development. The pro-property rights members of Congress who plan to "rein in government excesses"[260] in the environmental arena, should remember that "reform and progress were the result, not of enlightened foresight, but of bitter hindsight."[261]

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[259]Graham, *supra* note 35, 7.

[260]USA Today, 21 November 1994, at A4.

[261]PLATT, *supra* note 4, 51.

IV - CONCLUSIONS

The current property rights movement in this country is gathering strength and garnering support from the judiciary as the end of the twentieth century approaches. Ironically, this movement is part of a backlash against environmental activism and regulation that has been fueled, at least in part, by the success of previous conservation and clean-up efforts. Only in a society in which catastrophic pollution is relatively rare would anyone suggest that the environmental movement must focus on "explaining . . . why clean air, clean water is good."[262] The lack of such benefits makes the advantages of possessing them self-evident.

Unfortunately, the land-use management efforts which most often come under attack through property rights takings challenges are designed to provide benefits which are not as clear-cut as fresh air or drinkable water. These efforts typically involve measures designed to protect resources from dangers that have only recently been recognized and which are still discounted by many. Law professor John A. Humbach expressed this eloquently when he wrote:

> "A major factor in the current "property rights" debate is many people's honest belief that there is no real social harm in doing such things as destroying wetlands, exterminating entire species, or wrecking our nation's cultural legacy. Not so long ago, after all, wetlands were just swamps, wildlife was mainly an annoyance, and old buildings were merely in the way." [263]

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[262]USA Today, 21 November 1994, at A4.

[263]Humbach, *supra* note 115, 7.

The origins of the property rights movement are complex, and the socio-political atmosphere of the 1990's seems to offer a broad base of support for this cause. In the current uncertain economic climate, a growing number of people are unhappy to find any hint of government waste or frivolous spending. Nature has only added to the troubles with a series of destructive hurricanes and the severe flooding experienced in both 1993 and 1994, costing millions of dollars for the U. S. taxpayers.

It is important for coastal management personnel to be aware of these political undercurrents, because the business of land-use planning is inherently a political one. Environmental regulations cannot be created or implemented in an idealistic vacuum with the expectation that no challenges will arise. The Supreme Court's takings analysis in the cases of *Nollan*, *Lucas*, and *Dolan* has made it clear that the property rights movement will continue to receive judicial support for their efforts in the future. The range of regulatory action which can be defeated by a takings challenge has been significantly broadened since 1987. In *Nollan* and *Dolan*, the use of development permit conditions to further land-use planning objectives came under scrutiny, and the result was a more restrictive set of criteria for designing such conditions. The *Lucas* decision resulted in a new categorical takings test, (the loss of all economically viable use of property), which may yet lead to an increase in successful takings claims, especially if the definition of property continues to narrow. Perhaps more importantly, this decision halted the evolution of the common law of nuisance by sharply reducing legislative power to determine whether new or

previously innocuous-seeming uses now constitute a noxious use of property. It appears likely that the Supreme Court will continue to this trend of restricting the regulation of private property uses. The Republican majority in Congress seems intent on pursuing takings legislation, a potentially more pressing and serious threat to environmentally friendly management efforts.

This somewhat gloomy summation of the current state of the takings doctrine does not spell the end of the environmental movement, or of coastal management efforts. The economic and political influences at work in the nation could ultimately prove beneficial if the pro-environmental regulation faction takes the initiative and engages in some thoughtful planning. In fact, public opinion has already begun to reflect displeasure with government spending in areas like the National Flood Insurance Program, a program that has been criticized for encouraging overdevelopment in floodplains and coastal areas.

One recent article described in detail the problems of multiple loss incidents and funding deficits plaguing the program and quoted Representative Joe Kennedy as calling NFIP an entitlement program for some of the wealthiest homeowners in America.[264] It is undeniable that waterfront homeowners, especially those who are also land developers, are numbered among the wealthy segment of society. As a growing number of middle- and even upper-class Americans circle their figurative wagons and prepare to defend their slice of the American pie, the wise coastal manager may want to emphasize the financial benefits provided (or losses avoided) by

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[264]Turque, McCormick, and Glick, *On the Disaster Dole*, NEWSWEEK 24 (2 August 1993).

land-use regulation.

Even more important than influencing public opinion through political means, the coastal manager must concentrate on ensuring that regulatory efforts are plausible. It is fruitless to ignore the current Supreme Court's apparent hostility toward environmental land-use regulation. Nor is it likely that the property rights movement will halt their efforts in the courts[265] or in Congress to limit environmental initiatives. It is vital that coastal management personnel be aware of the current status of the takings doctrine, and that they strive to conform to the guidelines which have been established. A realistic view of the limitations of regulatory efforts is critical to successful planning, but this should not prevent the development of genuinely productive management initiatives. If the current legal trends continue, the property rights movement will probably continue to expand to the limits of the taxpayers financial endurance. When the fiscal constraints of local governments begin to preclude environmentally friendly regulation, the American people will have to decide whether it is the private landowner's rights which are more important, or those of the public.

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[265]Their commitment to establishing further limits on regulatory efforts was made evident in the most recent book from Professor Epstein in which he encouraged greater activism and lamented that the opportunity for curtailment of such efforts presented by *Nollan* and *First English* had been "frittered away." RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 195 (1993).

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