

NOLLAN

Drawing a line in the sand for private property rights

Robert K. Best

TRUSTEE &
LEAD ATTORNEY
IN *NOLLAN*



Bob Best (center), who successfully argued the *Nollan* case, discusses strategy with other PLF attorneys in 1979.

IN THE 1980'S the California Coastal Commission forced landowners to pay a price to obtain a coastal development permit. When permits were approved, they included an exaction requiring the owners to dedicate a portion of their property to the state to provide public access across their land. Even when the development did not interfere in any way with existing public access, the Commission demanded its tribute. You want a permit? Pay up with some of your property.

Some frustrated landowners challenged these property exactions for being unconstitutional takings of property without payment of just compensation. The appellate courts consistently supported the Commission no matter how outrageous its actions appeared to be. Over the years the Commission gained a reputation that it could do no wrong in the eyes of the California courts. In an ironic twist of fate this reputation led to the Commission's most significant set-back, when Pacific Legal Foundation took the agency to the United States Supreme Court.

An attorney working in the Los Angeles City Attorney's Office had applied for a coastal development permit to convert his family's vacation cabin into a permanent residence. The permit had been approved with the condition that he dedicate the entire beach area of the property for public access. He felt the requirement was illegal and unfair, but he decided not to appeal to the courts. He knew of the Commission's no-lose reputation. As part of his work that day he read a new appellate court decision, *Pacific Legal Foundation v. California Coastal Commission*. For the first time he knew of, the Commission had lost! Patrick Nollan called PLF.

The California courts had not changed. The decision which triggered the call to PLF was later reversed by the

California Supreme Court. While PLF obtained a favorable decision for Nollan in the trial court, the appellate court bowed to the Commission and upheld the dedication requirement. This perfunctory decision by the appellate court provided the basis for Nollan and PLF to go the U.S. Supreme Court.

Presenting the *Nollan* case to the Supreme Court was a major challenge. There was no controlling precedent. We were asking the Court to make new law. Because the Court had recognized the states to have broad powers to regulate land use, we had to establish that the Commission was confiscating Nollan's property right to exclude others from his land. It was not regulating the use of his land.

We stressed during oral argument that the distinguishing factor between lawful dedications and unlawful exactions is "whether the property owner is creating a burden or not, and the exaction is solely for the purpose of relieving that burden." Justice Stevens, who authored a dissent, repeatedly pushed the idea that there is no real difference between a regulation prohibiting the placement of a no trespassing sign and the property dedication required of Nollan. My response thankfully carried the day with the majority on the Court. "Justice Stevens, I want to emphasize, the Nollans feel there is a big difference between being told not to do something on their property, and being told to allow somebody else to do something on their property."

In the end we made new law, benefiting property owners across the land. The Court's opinion held the exaction demanded by the Commission was unconstitutional because Nollan had created no burden on the public that the exaction would relieve. In the Court's words, requiring a property dedication in this circumstance would amount to "extortion." ♦