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IN THE SUPREME COURT OF FLORIDA

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TAMPA-HILLSBOROUGH COUNTY EXPRESSWAY AUTHORITY,

Petitioner,

v.

A.G.W.S. CORPORATION,

Respondent.

Case No. 80,656

TAMPA-HILLSBOROUGH COUNTY EXPRESSWAY AUTHORITY,

Petitioner,

v.

DUNDEE DEVELOPMENT GROUP, a Florida General Partnership,

Respondent.

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS AND IN AFFIRMANCE OF THE DECISION BELOW

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INTEREST OF AMICUS

In accordance with Florida Rule of Appellate Procedure 9.370, Pacific Legal Foundation files this brief amicus curiae. Letters of permission are attached as Exhibit A to this brief.

Pacific Legal Foundation is a nonprofit, public interest legal foundation headquartered in Sacramento, California, with branch offices in Bellevue, Washington, and Anchorage, Alaska. It has over 20,000 contributors and supporters nationwide, including several dozen donors from the State of Florida. Many of these PLF supporters are property owners. Those supporters who own property in Florida are especially concerned with arguments aimed at diminishing property rights of the sort advanced by appellants.

Pacific Legal Foundation has developed an expertise in property rights that may be of help to this Court in determining whether or not the judgment of the trial court should be upheld. While the Foundation and (insofar as known to its attorneys) its supporters have no immediate pecuniary interest in the outcome of this case, their effort to establish favorable precedents nationwide for the protection of property rights will be affected by this case. In the past, for example, Pacific Legal Foundation attorneys directly represented the Nollans in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), a case which helped change the landscape of takings law. PLF attorneys represented Bonnie Agins as friend of the court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987), *c.f. Agins v. City of Tiburon,* 447 U.S. 255 (1980); and PLF participated on its own behalf as a friend of the court in the federal and state Supreme Courts in *Lucas v. South Carolina Coastal Council,* 404 S.E.2d 845 (1991), *rev'd*, 505 U.S. ___, 120 L. Ed. 2d 798 (1992). These, of course, were all cases of great significance to the law of property rights.

The interests of the plaintiffs-appellees are directed solely toward the protection of their own particular property interests at issue in this case rather than the

broader interests of Pacific Legal Foundation and its supporters. Pacific Legal Foundation believes that its participation as amicus in this brief will help focus this Court's attention on the public interest inherent in the protection of private property rights.

STATEMENT OF THE CASE AND THE FACTS

Pacific Legal Foundation adopts the statement of case and facts presented by respondent A.G.W.S.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Joint Ventures, Inc. v. Department of Transportation*, 563 So. 2d 622 (Fla. 1990), this Court correctly recognized that a regulation which fails to substantially advance a legitimate governmental interest results in a taking. The imposition of the regulation is alleged to have injured the property interests of respondents A.G.W.S. and Dundee Development Group. Government petitioners, however, are trying to prevent property owners from proving their damages. Instead, they are asking this Court to create a new theory of takings law that would preclude compensation for takings found to result from governmental regulation found not to advance a legitimate governmental interest unless an independent, and heretofore entirely separate, economic impact test for takings is also met.

As the intersection and apparent conflict between regulation and property has grown in recent decades, it has become increasingly apparent that judicial intervention is sometimes necessary to protect the rights of citizens who own property. A decade ago, there were virtually no significant cases anywhere where just compensation damages had been

awarded to property owners who had suffered as a result of excessive governmental regulations. Now there are a number of cases with more pending.[1]

The specter that governmental agencies might be financially responsible for their more egregious actions is not welcomed by some government agencies and some advocates of a more extensive regulatory state. As a result, there is opposition to the decision below by defendant and several amici. So bothered is it by the concept of governmental responsibility that one amici, the National Audubon Society (NAS), is apparently asking this Court not only to reverse the decision below but is also asking this Court to reverse *Joint Ventures* and, most incredibly of all, *to reverse or ignore a long history of United States Supreme Court rulings from Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), to Lucas v. South Carolina Coastal Council, 120 L. Ed. 2d 798.*

This brief will explain why this Court should not turn away from the wisdom of over 70 years of takings jurisprudence and will show why principles of fairness require that the decision below be affirmed.

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[1] *See, e.g., Whitney Benefits, Inc. v. United States,* 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied,* ___ U.S. ___, 116 L. Ed. 2d 354 (1991) ($60 million plus interest (from 1977), awarded to owners and lessees of coal deposits when mining prohibited); *Florida Rock Industries, Inc. v. United States,* 21 Cl. Ct. 161 (1990), *appeal pending in Federal Circuit Court of Appeals* ($1.02 million awarded for when permit to mine limestone denied); *Loveladies Harbor, Inc. v. United States,* 21 Cl. Ct. 153 (1990), *appeal pending in Federal Circuit Court of Appeals* ($2.66 million awarded when permit to prepare wetlands for homebuilding denied); *Formanek v. United States,* 26 Cl. Ct. 332 (1992) ($933,921 awarded for wetlands taking). For a description of this trend, and an analysis of the takings theories relied upon in these decisions, *see* James S. Burling, *Property Rights, Endangered Species, Wetlands, and Other Critters--Is It Against Nature to Pay for a Taking?,* 27 LAND & WATER L. REV. 309 (1992).

I

A TAKING CAN OCCUR UNDER A VARIETY OF CIRCUMSTANCES

This Court and the United States Supreme Court have described the basic purpose of the Takings Clause to the Fifth Amendment:[2]

> The Fifth Amendment's guarantee ... [is] 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.[3]

Land use regulations which are designed to enhance the public good inevitably involve a cost. The question is whether the government or the owners of property should bear that cost. As Justice Holmes stated, "the question at bottom is upon whom the loss of the changes desired should fall." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 416. To answer this question, over the years the Court has established certain tests for determining a taking.

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[2] The Fifth Amendment states in relevant part:

> [N]or [shall any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

See also Article X, Section 6(a) of the Florida Constitution.

[3] *Joint Ventures, Inc. v. Department of Transportation*, 563 So. 2d at 624 n.7; *Armstrong v. United States*, 364 U.S. 40, 49 (1960), *cited in Nollan v. California Coastal Commission*, 483 U.S. at 835 n.4 (noting that this is the "principal" rationale for the Fifth Amendment's Taking Clause); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123 (1978).

In order to determine whether or not a regulation is or is not a taking, the Court stated in *Agins v. City of Tiburon* that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests ... ***or*** denies an owner economically viable use of his land." 447 U.S. at 260 (emphasis added; citation omitted). *Accord Lucas v. South Carolina Coastal Council*, 120 L. Ed. 2d at 813, 818. *See also Penn Central Transportation Co. v. City of New York*, 438 U.S. at 127.

The first test is the takings law analogue of a due process inquiry--a determination of whether the regulation advances a legitimate governmental interest. However, it is decidedly *not* a due process test.[4] Unlike due process claims, for example, the Court in *Nollan* made it clear that a heightened level of scrutiny would apply in the

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[4] In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), Justice Stevens, in a concurrence, described the "substantial relation" test as enunciated in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), as where the due process and takings tests were "fused." To argue that the "substantial relation" test is not a test for finding a takings (as argued by amicus NAS at Page 20 of its brief in discussing *Nectow*), therefore, would ignore the history and meaning behind this test.

While *Nectow* was filed as a "due process" claim, it has been treated as involving takings issues ever since. This is because early decisions such as *Euclid* and *Nectow* relied upon the Fourteenth Amendment Due Process Clause to "incorporate" takings considerations. The first case to do this was *Chicago, Burlington, & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 235 (1897) ("compensation for private property taken for public use is an essential element of due process of law as ordained by the 14th Amendment").

Other cases have noted the distinction between due process and takings tests. The Ninth Circuit, for example, in *Nelson v. City of Selma*, 881 F.2d 836 (9th Cir. 1989), questioned whether a substantive due process claim survives a more specific Fifth Amendment takings claim.

context of a takings analysis. *Nollan*, 483 U.S. at 834 n.3. Although the Court has not generally characterized it as such, the first takings test of *Agins* creates a categorical rule: If a regulation which affects a property right does not substantially advance a legitimate governmental interest, there will always be a taking. While most regulations do advance a legitimate governmental interest, there have been some exceptions.[5] This, of course, was the crux of this Court's ruling in *Joint Ventures*, 563 So. 2d 622.

The second takings test of *Agins* addresses the issue of economic use. *Lucas v. South Carolina Coastal Council*, 120 L. Ed. 2d 798, amplified the understanding of the "use" test of a takings inquiry by expanding the terminology to include such formulations as "economically beneficial or productive use of land." 120 L. Ed. 2d at 813. The *Lucas* Court treated the economic test separate from the first "substantially advance" test of *Agins*. Furthermore, noting that the parties conceded the validity of the regulation in *Lucas*, 120 L. Ed. 2d at 816-17, the *Lucas* Court continued that even a legitimate justification for a statute cannot insulate it from an economic-based takings analysis. 120 L. Ed. 2d at 819.

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[5] *Nollan*, 483 U.S. 825, involved the striking down of a regulatory fiat which required a property owner to give up beachfront property in exchange for a building permit. The Court found that the requirement was an "'out-and-out plan of extortion'" and did not advance a legitimate regulatory goal. 483 U.S. at 837, 834. Another classic example of the Court striking down a regulation because it failed to meet the "substantially advance a legitimate governmental interest standard" was in *Delaware, Lackawanna, & Western Railroad Co. v. Town of Morristown*, 276 U.S. 182, 195 (1928), where the taking of railroad property for a taxi stand failed to advance a legitimate governmental interest. Another case where a statute did not substantially advance a legitimate state interest is *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989) (court overturns restrictions against converting single-room occupancy hotel rooms. The court's articulation of the standard is particularly lucid.)

There are also special categorical circumstances where a regulation will almost certainly be a taking, as when there is an actual "physical invasion" of the property[6] or when 100% of the economically-beneficial or productive use of the property is taken.[7]

Lucas also clarified the fact that just because a regulation is in the public interest does not mean that it cannot result in a taking of property. The Court concluded that a regulation that destroys the value of private property is always subject to scrutiny in accordance with the Fifth Amendment--unless the regulation merely codifies the existing "common law nuisance" limitations that already exist on property. 120 L. Ed. 2d at 821-22.

Together *Lucas* and *Agins* provide a way to conceptualize the law of takings as a series of questions or steps. Thus, in accordance with *Lucas* and *Agins*, the first step is to define the property right and analyze the extent of the allowable uses under traditional common law. As in *Lucas*, building homes in an existing subdivision is very likely to be an allowable use, but building a nuclear reactor on a fault zone would not be. 120 L. Ed. 2d at 821.

Next the regulation itself should be analyzed. If it does not substantially advance a legitimate governmental interest, there is a taking. As found by the court below,

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[6] *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 420 (1982) (a taking found when a cable television wire was placed on an apartment building); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (regulation allowing trespassers onto property is a taking); *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. (13 Wall) 166 (1872) (water from a government dam that backs upon private property takes that property).

[7] A 100% loss of the beneficial or productive use is a classic example of a regulation that "denies an owner economically viable use." *See Lucas v. South Carolina Coastal Council*, 120 L. Ed. 2d at 813-14.

compensation must be paid for the taking that occurred during the time in which the regulation is in effect.[8] If the regulation is not rescinded, the government agency may be responsible for the full fair market value of the affected property--which means the value as if the regulatory restriction was not in place.

If, *and only if*, a regulation passes the "substantially advance a legitimate governmental interest" test, does a court need to analyze the economic impact of a regulation to see whether or not there has been a taking. If a regulation "denies all economically beneficial or productive use of land," *Lucas*, 120 L. Ed. 2d at 813, or if it leaves 100% of the property "economically idle," *id.* at 815, contrary to the owner's "reasonable, investment-backed expectations," *see id.* at 824 (Kennedy, J., concurring), then the *Lucas* categorical test is invoked and compensation must be paid.[9]

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[8] *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. at 319. Such compensation may be, for example, the rental value of the property during the time in which the regulation denied use of the property. *See, e.g., Yuba Natural Resources, Inc. v. United States,* 821 F.2d 638 (Fed. Cir. 1987) (*Yuba I*); *Yuba Natural Resources, Inc. v. United States,* 904 F.2d 1577 (Fed. Cir. 1990) (updates *Yuba I*). For a useful discussion of temporary regulatory takings *see Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991) (analogizes length of time vehicle parked on property to significance of temporary taking).

[9] *See id.* at 813-14.

If less than 100% of the productive or beneficial use is destroyed, the court will weigh various factors (including the economic impact, interference with investment-backed expectations, and the character of the regulation) in what has been called an "ad hoc" and "case-by-case" analysis to sort out whether "justice and fairness" call for a taking. *Kaiser Aetna v. United States,* 444 U.S. at 175. (If only a portion of the beneficial or productive use of the parcel of property is completely destroyed, or if only a distinct severable property interest (such as a mineral right) is completely destroyed, then a court may find that there is a "partial taking." The Court in *Lucas* expressly deferred consideration of the issue of awarding compensation for partial takings. 120 L. Ed. 2d at 813 n.7.)

The error of appellants and their amici supporters is that they would ignore the disjunctive nature of the economic and the "substantially advance" tests. Not only would this render meaningless the plain meaning behind the Supreme Court's use of the word "or" to distinguish these tests, *Agins*, 447 U.S. at 260, but they would destroy the logic behind the Court's enunciation of this test at all.

II

THE "SUBSTANTIALLY ADVANCE A LEGITIMATE GOVERNMENTAL INTEREST" TEST IS AN INDEPENDENT MEANS FOR DETERMINING A TAKINGS WHICH IS NOT TIED TO ANY ECONOMIC ANALYSIS

A. The United States Supreme Court Has Never Found That the "Legitimate Governmental Interest" Test Is Dependent Upon Economic Factors

In *Joint Ventures*, this Court recognized that a long line of United States Supreme Court decisions support the proposition that "[a] use restriction which fails to substantially advance a legitimate state interest may result in a 'taking.'" 563 So. 2d at 625 n.9. An analysis of the decisions which have enunciated this doctrine reveals not a single instance where the United States Supreme Court indicated that the finding of a "failure to advance" taking would be dependent upon the economic impacts of the regulation on affected property.

1. In Keystone Bituminous Coal Association the Court Examined Two Distinct Takings Tests

The United States Supreme Court in *Agins* articulated the two separate takings tests in the disjunctive. As it turned out, the Court found the regulations at issue to

"substantially advance legitimate governmental goals," 447 U.S. at 261, and the case did not provide an example of a circumstance where a regulation would be a taking as a result of a violation of the first test.

However, in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), the Supreme Court had an opportunity to examine the two takings tests in more detail and made it plain that it was talking about two separate and distinct tests. The Court began its takings analysis by noting that the decision that a coal mining regulation was a taking in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, depended on *two* integral factors: that the regulation "could not be 'sustained as an exercise of the police power' ... [and] [s]econd, the statute made it 'commercially impracticable' to mine 'certain coal.'" *Keystone*, 480 U.S. at 484 (quoting *Pennsylvania Coal*, 260 U.S. at 414). The *Keystone* Court then proceeded to analyze each of these two tests in detail, finding that the coal mining regulation at issue in *Keystone* was valid for two separate reasons: First, the regulation *did* advance a legitimate governmental interest and, second, the petitioners *failed* to demonstrate any particularized economic impact.

From Pages 485 to 493, the Court examined the "public purpose" behind the regulation in *Keystone*. *Nowhere* in this discussion is there any hint that a finding of a taking based upon the legitimate governmental-interest test is dependent upon a further analysis of the economic impact of the regulation. Instead, legislative findings regarding public health and safety are discussed. *Id.* at 486. The lack of any attempt to use the regulation merely to benefit private parties is discussed. *Id.*

On Page 490, the Court discussed *Miller v. Schoene*, 276 U.S. 272 (1928), where property (cedar trees) was destroyed to protect the public interest. Justice Stevens specifically noted that the state's exercise of its police power was "justified" and therefore no compensation had to be paid.[10] Implicit in the *Keystone* Court's analysis of *Miller* is the conclusion that if the regulation was *not* justified, compensation *would* have to be paid.[11]

The only place where the *Keystone* Court mentions the issue of the economic impact of a regulation in its section discussing the legitimacy of the regulation is a brief reference to *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), where the *Keystone* Court had noted that a "comparison of values ... is relevant [but] ... by no means conclusive." 480 U.S. at 490. The implication, of course, is that a regulation can still be a taking even if values are not greatly affected.

Finally, the *Keystone* Court concluded its analysis of the validity of the regulation by noting:

> Nonetheless, we need not rest our decision on this factor alone, because petitioners have also failed to make a showing of diminution of value.

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[10] Of course, after *Lucas* we know that this is not the end of the inquiry. Even a regulation that is "justified" can be a taking if the economic injury is great enough.

[11] Furthermore, the regulation in *Miller* did not destroy the entire value of the property--the trees, for example, could have been sold for lumber and the underlying land remained uneffected. *See Keystone*, 480 U.S. at 513 (Rehnquist, J., dissenting) (citing *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 126). *See also Lucas*, 120 L. Ed. 2d at 819 n.13. Because there was economic value remaining in the trees, any hint that compensation should have been paid if the regulation failed the "substantially advance" test could not be dependent on a further analysis of economic harm.

480 U.S. at 492-93. The Court then proceeded to analyze whether the regulation adversely affected economic value and expectations. Thus, the Court treated the "substantially advance" issue as an *independent* test for the finding of a taking; it did not find that the outcome would hinge *also* on an economic analysis. Indeed if, as petitioners argue, there can be no "taking" unless there is also a severe economic impact, then there would be no point in discussing the substantially advance test in the context of a *takings* inquiry.

2. Just Because Just Compensation Has Not Yet Been Awarded in a Case Where a Regulation Was Found To Be a Taking Because of Its "Failure to Advance a Legitimate Governmental Interest" Does Not Mean That Compensation Is Not Appropriate

Much is made by petitioners of the fact that there are no cases on the books where money damages have actually been awarded because a regulation failed to advance a legitimate governmental interest. *See* opening brief of petitioner, Tampa-Hillsborough Expressway Authority, at 23-29. Several responses are in order.

First, before 1990, it would have been equally plausible to argue that no compensation should ever be awarded when a regulation destroys the "economically beneficial or productive use of land," *Lucas*, 120 L. Ed. 2d at 813, because there were *no cases before 1990 where such compensation had been awarded for a purely regulatory taking*. This, however, is hardly a reason why compensation should never be granted and, indeed, the courts subsequently have done the right thing and have awarded compensation in a number of cases.[12] Most notably, on remand the South Carolina Supreme Court ordered

[12] *See* cases cited in Footnote 1, *supra*.

damages to be calculated and then paid in *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 (1992).

Second, courts are not in the habit of giving litigants that which they do not ask for. In all of the significant cases where a court has found that a regulation was a regulatory taking for failure to advance a legitimate governmental interest, invalidation was the remedy because invalidation was all the litigants asked for. Thus, the first sentence in Justice Holmes' opinion in *Pennsylvania Coal* notes that the case was brought "to prevent the Pennsylvania Coal Company from mining under their property." 260 U.S. at 412. A request for compensation is nowhere mentioned. In *Nectow v. City of Cambridge*, 277 U.S. 183, the Court found that regulation was invalid but did not award compensation. That is logical because the "suit was for a mandatory injunction directing the city ... to pass upon [a building permit] application ... without regard to the provisions of the ordinance." 277 U.S. at 186.

In *Hodel v. Irving*, 481 U.S. 704 (1987), the United States Supreme Court found invalid a law that destroyed the ability to inherit by intestacy of devise fractional interests in Indian land allotments.[13] Noting that the "character of the Government regulation here is extraordinary," the Court overturned the law both because of its impact on individual property interests and its irrationality. (For example, it failed to advance its stated purpose of consolidating land interests because in some cases passing the interests to heirs might *help* rather than hinder consolidation. 481 U.S. at 716.) The main point of *Hodel*,

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[13] For a description of allotments, *see* 481 U.S. at 706-09.

however, is that the relief requested was not compensation[14] but declaratory relief. *See Irving v. Clark*, 758 F.2d 1260 (8th Cir. 1985).

Two other cases, discussed in more detail in Parts B through D below, also demonstrate that courts give only the relief asked for. In *Delaware, Lackawanna, & Western Railroad Co. v. Town of Morristown*, 276 U.S. at 195, and in *Nollan*, 483 U.S. at 825, the Courts did not award compensation because none was requested. Thus, the "failure" of courts to award compensation when regulations are held not to advance legitimate governmental interests should not be dispositive of how the courts rule on this issue in the future.

B. The Doctrine That a Takings Can Be Found from a Failure to Advance a Legitimate Governmental Interest Is Not an Aberrant Theory of the Modern Court

In a section that barely disguises its contempt for the recent history of the United States Supreme Court, NAS argues that the Court has "[o]ver the last ten years ... for reasons that it has never explicitly explained ... gradually blurred the doctrinal distinctions between the takings and due process clauses." NAS brief at 19. NAS continues to claim that "[s]everal relatively recent U.S. Supreme Court decisions baldly assert that a regulation that 'fails to substantially advance a legitimate state interest' ... constitutes an unconstitutional taking." *Id.*

As discussed above, the origins of the use of the "substantially advance" prong in a takings context date back to *Euclid* and *Nectow*. Most enlightening, however, is

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[14] If compensation had been requested, the litigants should have filed in the Court of Claims not Federal District Court.

Delaware, Lackawanna, & Western Railroad Co. v. Town of Morristown, 276 U.S. at 195. In that case, the Town of Morristown, New Jersey, attempted to pass a regulation requiring that a certain portion of a driveway at a train station should be designated as a taxi stand. The Court held:

> [T]he declaration of the ordinance that the specified part of the driveway "is hereby designated ... as [a] ... hack stand" clearly transcends the power of regulation. To compel the use of petitioner's land for that purpose is to *take it without compensation* in contravention of the constitutional safeguard.

Id. (emphasis added). Thus, the idea that a regulation which exceeds the legitimate power of the government can be a taking is hardly an aberration of the modern court.

NAS continues its argument by claiming that *Pennsylvania Coal* got it wrong when it relied on *Nectow* for the "test of means-ends rationality." NAS brief at 20. First, the test is not one of rationality but heightened scrutiny. *Nollan*, 483 U.S. at 834 n.3. Second, *Pennsylvania Coal* is still good law as it was relied upon heavily in *Lucas*. *See, e.g.*, 120 L. Ed. 2d at 812. Third, *Nectow* has never been overruled and it *does* apply the substantially-advance test in what has long been considered to be, in part, a takings context.

In 1897, the Supreme Court wrote in *Chicago, Burlington, & Quincy* that the due process clause requires the payment of just compensation. *See, e.g.*, 166 U.S. at 233 ("necessary to inquire ... whether 'due process of law' requires compensation"), 235-36, 241 ("[if] private property is taken ... without compensation ... [it] is, upon principle and authority, wanting in the due process of law required by the 14th Amendment"). When the Court later recognized for the first time in *Pennsylvania Coal* that a *regulation* can cause a taking, it was perfectly correct to utilize *Nectow* in its *takings* analysis and it would have

been totally illogical to suggest that a regulatory taking derived from a "substantially-advance" analysis can give no right to compensation "for that which was actually taken." *See Chicago, Burlington, & Quincy*, 166 U.S. at 256. *See also Moore*, 431 U.S. at 514 (Stevens, J., concurring); Note 4, *supra*.

NAS, of course, has an answer for this "due process" problem. It notes that *Penn Central* is not good law because it does not explain why it ruled as it did, NAS brief at 21. Likewise, *Agins* is not good law because it relies on *Penn Central*. NAS brief at 21. *Nollan* is not good law because it was "boldly" written by Justice Scalia and it is a "narrow" case. NAS brief at 21-22.[15] The reason why the decision is narrow is because it is "limited to cases involving actual physical invasions of property." *Id.* at 23. NAS, however, is wrong.

C. Nollan Is Not a "Physical Invasion" Case

Nollan is not a physical invasion case. It is clear from the plain facts of *Nollan* that no physical invasion was involved or even contemplated in that case. To make this distinction even plainer, the United States Supreme Court recently reiterated its criteria for *physical* takings: "The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido*, 503 U.S. ___, 118 L. Ed. 2d 153, 161 (1992) (emphasis in original). This was plainly not the case in *Nollan* which involved a coercive exaction imposed as a condition to the issuance of a building permit. Since *Nollan* was not a physical takings case, the heightened scrutiny

[15] NAS also argues that *Nollan* is the first case where a regulation was struck down on the substantially-advance test. As explained in the above sections, this is not true.

requirement enunciated by the Supreme Court in *Nollan* can have no relevance to physical takings.[16] It is in the context of *regulatory* takings that *Nollan* "changed the standard of constitutional review in takings cases." *See, e.g., Surfside Colony, Ltd. v. California Coastal Commission*, 226 Cal. App. 3d 1260, 1270 (1991).[17]

Justice Scalia carefully distinguished *Nollan* from physical invasion cases by making the hypothetical observation that *if* the state had simply seized an easement over the Nollans' property, *that would have been a physical taking*. *Nollan*, 483 U.S. at 831. But of course, that is not what happened. The regulation at issue in *Nollan* was designed to coerce a "voluntary" transfer of wealth to the government in exchange for a building permit. If the Nollans had been content to live without the permit, they would have been left in peace. This is the essence of a *regulatory* taking as was recently reiterated by the Supreme Court in *Yee*.

Indeed, the *Yee* Court cites *Nollan* as an *example* of a *regulatory* takings case, distinguishing it from the physical takings theory advanced in *Yee*:

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[16] Indeed, the degree of scrutiny is irrelevant in a physical takings situation for, where a physical invasion is shown, the result is a taking per se.

[17] In emphasizing that the standard of review in takings cases is not the same as that employed in the due process and equal protection cases, the *Nollan* Court said that *Goldblatt v. Town of Hempstead*, 369 U.S. 590, did appear "to assume that the inquiries are the same." 483 U.S. at 834 n.3. But the *Nollan* Court went on to say that this "assumption is inconsistent with the formulations of our later cases." *Id.* *Goldblatt* is a classic example of a regulatory takings case (a zoning ordinance regulating dredging and pit excavations) and the *Nollan* Court's reference to, and its need to disapprove of, the reasoning in *Goldblatt* shows convincingly that its adoption of a higher standard of review was with reference to regulatory takings. There would have been no need to even discuss *Goldblatt* if the Court had viewed the Nollans' case as presenting a physical taking situation.

> [Evidence of the distributional effects of a regulation] might have some bearing on whether the ordinance causes a *regulatory* taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance. See Nollan v California Coastal Comm'n, supra, at 834-835, 97 L Ed 2d 677, 107 S Ct 3141. But it has nothing to do with whether the ordinance causes a *physical* taking.

Yee, 118 L. Ed. 2d at 167 (emphasis in original).

Precisely the same type of regulation that occurred in *Nollan* is involved in the case at bar. The state did not physically occupy the land of A.G.W.S. or Dundee, but it froze the status of the land. This is perfectly analogous to the Coastal Commission's demand in *Nollan* and falls squarely within the Supreme Court's doctrine of *regulatory* takings.

D. Nollan Is a Classic Example of a Case Involving a Regulation That Fails to Advance a Legitimate Governmental Interest

The most curious passage of Tampa-Hillsborough's brief occurs when it argues that *Nollan* supports its argument that no compensation can be awarded when a regulation fails to advance a legitimate governmental interest:

> If, as A.G.W.S. and DUNDEE argue, a property owner is entitled to compensation even under the "non-economic test" of *Agins v. City of Tiburon* ... then the United States Supreme Court itself was incorrect in not awarding compensation to the Nollans.

Tampa-Hillsborough opening brief at 24. The problem here is that the Nollan case never reached the stage where compensation would have been appropriate.[18] The property right that was subject to the taking in *Nollan* was the right to develop property. 483 U.S.

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[18] The Nollans were represented by attorneys with Pacific Legal Foundation.

at 833 n.2. The exercise of that right was being denied unless the Nollans agreed to give up an easement to the public to cross the beach area of their residential parcel. 483 U.S. at 828. Since the Nollans had refused to grant the easement, and they ultimately built on their property, no actual taking had occurred that would require the payment of just compensation.

The Nollans sued to invalidate the permit condition claiming that the demand for the dedication of the easement resulted in a taking. *Id.* Since the California Court of Appeal ruled that no taking resulted from the dedication requirement, the issue before the Supreme Court was limited to whether or not the ruling of the California Court of Appeal was correct. During a window between appeals, the Nollans built their house. *Id.* at 829. The Supreme Court ruled (after the house was built) that such a required dedication would cause a taking and reversed the decision of the California Court of Appeal. *Id.* at 842. It was then up to the California Coastal Commission to decide whether to remove the permit condition or to condemn an easement if it still wanted the beach. The California Coastal Commission decided to issue the permit without the condition. Therefore, under the unique circumstances of the case, no taking ever actually occurred that would require the payment of just compensation.

Although the issue of whether or not the Nollans were entitled to a payment of just compensation was not before the United States Supreme Court, it is impossible to read that decision as saying anything other than that compensation would have been required if the state had insisted upon prohibiting the land's use unless the easement was granted.

The rationale behind the Court's decision is instructive on two other points. First of all, the Court indicated that there is a distinct difference between due-process claims and takings claims although both are based on the question of a regulation's legitimacy. This difference is reflected by very different standards of review:

> [O]ur opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved ... not that "the State '*could rationally have decided*' that the measure adopted might achieve the State's objective."

Nollan, 483 U.S. at 834 n.3 (emphasis in original).

Second, the Court actually found a taking because the demanded exaction failed to ameliorate the alleged harm of a large house creating a "psychological barrier" to the public realizing the existence of the beach. *Id.* at 838. The Court was simply unable to find any nexus between this alleged harm and a lateral beach access. *Nollan*, therefore, reaffirms the holding that the "substantially-advance" takings test is a completely independent test and it provides a bright-line example of when that test is violated. That no compensation was awarded is irrelevant.

E. Compensation Is the Appropriate Remedy for a Taking

Implicit in the arguments of appellant's brief is the notion that if takings damages are awarded, there will be a chilling effect on the ability of regulators to regulate. On the contrary, the only chilling effect will be on regulators who have a predilection to pass unconstitutional regulations. As Justice Brennan once noted: "After all, if a policeman must know the Constitution, then why not a planner?" *San Diego Gas & Electric Co. v. City of*

San Diego, 450 U.S. at 661 n.26 (Brennan, J., dissenting). More to the point, however, is the fact that the United States Supreme Court made it abundantly clear in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, that where a taking occurs, if compensation is demanded, the Constitution requires it to be paid.[19] If a regulation is found invalid because it tries to avoid the duty to pay just compensation (as here), that does not excuse the duty to pay for the loss caused by the taking during the time the regulation was in effect.[20] As the Court held: "Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause." 482 U.S. at 319. *See also Hendler v. United States*, 952 F.2d 1364 (discusses the types of interests that can be subject to temporary takings). The *First English* Court nowhere said that some types of takings deserve compensation while others do not. The Constitution's language is simple--*all* takings must be compensated. Compensation is the *only* appropriate remedy here.

CONCLUSION

A.G.W.S. and Dundee Development Group are entitled to their day in trial court to prove what, if any, damages they suffered as a result of the passage of an invalid

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[19] Similarly, in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 113 (1989), the Supreme Court held that the remedy for injury caused by a preempted statute is not just invalidation but damages as well under 42 U.S.C. § 1983.

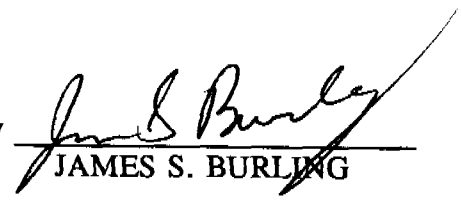
[20] The notion that compensation should not be paid for temporary takings from regulations that go "too for" was advanced to some extent by Justice Stevens in his *First Church* dissent. *See* 427 U.S. at 328 (Stevens, J., dissenting). This, of course, was *not* the opinion adopted by the Court.

ordinance that this Court held took their property. The United States Supreme Court has made it abundantly clear that regulations which fail to advance a legitimate governmental interest are takings and that just compensation is the preferred and constitutionally-mandated remedy for a taking. The judgment below should be affirmed.

DATED: February 23, 1993.

Respectfully submitted,

RONALD A. ZUMBRUN
JAMES S. BURLING

By 
JAMES S. BURLING

Attorneys for Amicus Curiae,
Pacific Legal Foundation

EXHIBIT A

DECLARATION OF SERVICE BY MAIL

I, Concha Grajeda, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 2700 Gateway Oaks Drive, Suite 200, Sacramento, California.

On February 23, 1993, true copies of AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS AND IN AFFIRMANCE OF THE DECISION BELOW were placed in envelopes addressed to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 23rd day of February, 1993, at Sacramento, California.

Concha Grajeda

CONCHA GRAJEDA