No. 99-2047

IN THE

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TRAVARES,
General Treasurer, and
COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Writ of Certiorari to the Supreme Court of Rhode Island

BRIEF OF THE CALIFORNIA COASTAL PROPERTY OWNERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus California Coastal Property Owners Association ("Association") is an association of owners of property located within the highly regulated California coastal zone. The Association was formed in response to the California Coastal Commission's failure to implement and abide by this

[1] Pursuant to Rule 37.6 of this Court, *amicus* states that no party had any role in writing this brief, and that no one other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. This brief is being filed in accordance with the consent of the parties; their letter of consent has been filed with the Clerk.

Court's decision in *Nollan* v. *California Coastal Commission* and by the terms of the Commission's statutory charter. The Association's principal purpose is to advocate for and to help ensure that the regulation of private property, development, and public beach access along the coast of California is consistent with state and federal law and the Constitution of the United States, and that it reflects an appropriate balance between the interests of the public in coastal access and preservation and the constitutional rights of coastal property owners to the full enjoyment and use of their property.

The Association will address the first question presented by the petition – whether property owners lack standing to bring takings challenges to government action that predates the acquisition of their property. This is a question of enormous importance. It is vital not only to disputes involving the particular type of regulatory taking at issue here (an ordinance that is alleged to deny the owner all economically beneficial use of his property), but also to all regulatory takings claims, including those, as in *Nollan*, that involve a physical invasion of property.

In particular, this issue is at the heart of a number of pending disputes involving coastal property in California. Despite this Court's seemingly unequivocal holdings in *Nollan*, *Dolan*, and *Lucas*, courts and public agencies, including the California Coastal Commission, are currently using the same arguments adopted by the Rhode Island Supreme Court to bar property owners from challenging *Nollan*-like physical takings because they did not own the property at the time the unconstitutional permit condition was imposed. Thus, the Association has a significant interest in the first issue presented in this case.

The Association takes no position on the remaining questions presented, or on the ultimate merits of this dispute. As property owners who enjoy and whose property benefits from the preservation of the unique environment of the coastal zone, the Association's members fully appreciate the

need to weigh carefully the impact of any proposal to alter the often-fragile ecological balance in that zone. We acknowledge that state and local governments have good reason to be concerned and cautious regarding proposals for coastal development, and certainly that includes any proposal that might alter or destroy wetlands. Nevertheless, the Association also believes that even the most important environmental objectives must be pursued consistent with the dictates of the United States Constitution, and that this Court's prior decisions in *Nollan* and *Lucas* have already established the bounds within which governments constitutionally may act. Foreclosing property owners from even bringing their takings challenges to court, as Rhode Island has done, and as the California Coastal Commission is seeking to do, falls well outside these constitutional limits.

SUMMARY OF ARGUMENT

The threshold issue in this case is whether a property owner is barred forever from challenging government action as a taking because that action occurred prior to the owner's acquisition of the property. The question arises here in the context of one type of per se "regulatory taking," involving a governmental action that deprives the owner of all beneficial economic use of the property. But the decision below would apply equally to the other type of per se regulatory taking, called a "physical taking" below, when the government takes steps physically to occupy the property, such as by taking a permanent easement. The Rhode Island Supreme Court made clear its view that the same rule should apply to both types of takings. Indeed, in justifying its holding with respect to the former category of regulatory takings, the Rhode Island Supreme Court expressly and heavily relied on what it considered the settled ban on subsequent owner standing to challenge physical takings. See Pet. App. A-16.

The Rhode Island Supreme Court erred in its analysis of both types of regulatory takings claims. Although the law

with respect to subsequent purchasers is settled with respect to physical takings, the rule in fact is precisely the opposite of the rule stated below. In *Nollan* v. *California Coastal Commission*, this Court squarely held that a subsequent purchaser has standing to challenge a physical taking. 483 U.S. 825, 834 n.2 (1987). Although the Court's discussion of this point appeared in a footnote, the issue itself was heavily briefed, its resolution was unambiguous, and it was necessary to the result. The holding in *Nollan* therefore cannot be dismissed as mere dictum.

Given this clear holding, it would have been shocking if the Court's decision in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), on which the court below also relied heavily, had altered the law. It did not. Contrary to the Rhode Island Supreme Court's misreading, *Lucas* did not establish a new rule that all state laws or policies that are in effect as of the time property is acquired automatically become part of the limited set of "background principles" of state law that are immune from challenge under the Takings Clause. The Court instead took pains in *Lucas* to make clear that only those state laws that "do no more than duplicate the result that could have been achieved in the courts" were they to have applied longstanding state law with respect to "public nuisance," "private nuisance," and the "forestalling of grave threats to the lives and property of others" (*id.* at 1029 & n.16), are not subject to a takings claim. And the Court further made clear its intent – in clarifying the law with respect to regulatory takings that deny all beneficial economic use – to adopt a rule that provides such claims "similar treatment" to that provided to physical takings. *Id.* There is thus no basis for the rule against standing for subsequent owners that Rhode Island enforced here.

The Court's decision on the significance of the timing of ownership will have an enormous impact not simply upon the loss-of-all-economic use claim at issue here, but upon all per se regulatory takings claims, including those involving the

physical invasion of private property. As the Court observed in *Lucas*, it is appropriate to afford "similar treatment" to both types of claims. *Id.* at 1029. This Court's decision therefore can, and should, clarify that its holding is applicable to both types of per se regulatory takings claims.

Such clarity is particularly important because the Court's mandate in *Nollan* and other physical takings cases is being denied by lower courts and by state and local government agencies on the same theory adopted by the Rhode Island Supreme Court. Most notably, the California Coastal Commission itself is now using *Lucas* as an excuse to revive arguments that it advanced – and that this Court rejected – in the *Nollan* case. As a result, state and federal courts have barred property owners from challenging the very same types of takings of beachfront easements that this Court condemned as "'out and out extortion'" over 13 years ago. It is inconceivable that such blatant misappropriations of private property could ever be reconciled with the "background principles" of state common law that the Court identified in *Lucas* as limiting the government's ability to take property without compensation. The Commission's actions thus confirm what several members of this Court have acknowledged, which is that such a misreading of *Lucas* would render this Court's takings jurisprudence a nullity.

Given this alarming pattern of lower court misapprehension and state agency defiance of *Nollan* and *Lucas*, it is vitally important for this Court to address the standing of subsequent owners in both the physical and regulatory takings contexts. The Court should make clear, as a general rule, that subsequent owners have the same rights as prior owners to challenge unlawful government takings of private property.

ARGUMENT

I. A PROPERTY OWNER MAY BRING A TAKINGS CHALLENGE TO GOVERNMENTAL ACTION THAT PREDATES THE OWNER'S ACQUISITION OF THE PROPERTY.

This Court has identified "at least two discrete categories of regulatory action" that effect a per se taking of private property. *Lucas*, 505 U.S. at 1015. One category, alleged by petitioner in this case, is "where regulation denies all economically beneficial or productive use of [the] land." *Id.* The other, (alleged, for example in *Nollan*), "encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property." *Id.* As "per se" takings, each of these types of actions requires the payment of compensation "without case-specific inquiry into the public interest advanced in support of the restraint." *Id.*

The Rhode Island Supreme Court correctly recited this Court's typology of takings claims, though it chose to call the former type a "regulatory taking" and the latter a "physical taking." Pet. App. A-8 to A-9. And it accurately observed that it would be inconsistent with *Lucas* if "regulatory takings would be treated differently from physical takings," because in *Lucas* the Court stated that "the two types of takings should be accorded similar treatment." *Id.* at A-16. But the Rhode Island Supreme Court gravely erred when it concluded, based on *Lucas*, that "[a]ll subsequent owners take the land subject to the pre-existing limitations and without the compensation owed to the original affected owner." *Id.*

The Rhode Island Supreme Court began by deriving from *Lucas* the proposition that *any* state law or regulation that "predates the claimant's ownership of the land" limits his title and therefore forecloses his standing to assert a takings challenge. Pet. App. A-15. This was error, for the court below examined none of the limiting factors that this Court set forth for determining whether a given law could properly

be found to be part of the "background principles of the State's law of property and nuisance," which in turn determines whether what was taken by that law was part of the owner's title to begin with. *Lucas*, 505 U.S. at 1029-31.

The court then compounded the error by asserting that when a "physical taking" is at issue, "only the owner at the time of the taking is owed compensation." Pet. App. A-16. This Court's decision in *Nollan* establishes that subsequent owners may challenge per se takings which "predate" their acquisition of their property and of which they had full notice at the time of the acquisition. Nothing in *Lucas* disturbed this holding, either for physical takings cases, or for cases where the government action deprived the owner of all economically beneficial or productive use of the property.

A. *Nollan* Held That Owners May Challenge Physical Takings That Predate Their Purchase.

This Court addressed, and rejected, the argument that property owners are barrred from challenging physical takings that predate their acquisition of the property in *Nollan v. California Coastal Commission*. As the Court acknowledged, the Nollans did not actually purchase their property until *after* the Coastal Commission had imposed the permit condition at issue, and thus they had knowledge of both the specific permit condition and the Commission's longstanding policy of imposing such conditions at the time they purchased their property. *Nollan*, 483 U.S. at 828-30.[2] The California Coastal Commission and numerous *amici* urged the Court to

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[2] *See also Nollan*, 483 U.S. at 860 (Brennan, J., dissenting); Brief of Appellee California Coastal Commission at 30, 34, *Nollan, supra,* (No. 86-133) ("Commission Br."); Brief of *Amicus Curiae* Natural Resources Defense Council at 27 n.21, *Nollan, supra,* (No. 86-133) ("NRDC Br."); Brief of *Amicus Curiae* Designated California Cities and Counties at 8, *Nollan, supra,* (No. 86-133) ("Cities and Counties Br."); Brief of *Amicus Curiae* the Commonwealth of Massachusetts at 14, *Nollan, supra,* (No. 86-133) ("State AGs Br.").

reject the Nollans' challenge on this basis alone. See pages 9-10, *infra*.

The Court flatly rejected that argument:

> Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

Nollan, 483 U.S. at 834 n.2.

This aspect of the *Nollan* decision was not dicta, but was necessary to the Court's holding. At issue in *Nollan* was a longstanding "comprehensive program" of the California Coastal Commission to require all coastal property owners to record an offer to dedicate a public easement across their property in return for approval of any development permit they might submit. See *Nollan*, 483 U.S. at 827-29, 831, 841. The condition demanded of the Nollans was to offer to dedicate a lateral public easement across their beachfront in exchange for permission to replace a small, dilapidated summer rental cottage with a larger, three-bedroom, permanent residence. *Id.* at 828. The easement, which would have allowed the public to pass and repass between two public beaches along the coast above and below the tract, was defended by the Commission as necessary to offset the impact on public beach access from the "blockage of the view of the ocean" caused by the new, larger structure. *Id.*

The Court acknowledged that the Commission has a legitimate public interest in ensuring visual access to the ocean, and observed that the Commission could have sought to protect that interest by requiring the property owners to offer to dedicate "a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." *Id.* at 836. But the Court rejected this

justification with respect to the condition imposed on the Nollans, because there was no "nexus" between "visual access to the ocean and a permit condition requiring lateral public access along the Nollans' beachfront lot." *Dolan* v. *City of Tigard*, 512 U.S. 374, 387 (1994). "The absence of a nexus left the Commission in the position of simply trying to obtain an easement through gimmickry," *Id.* at 387, converting the policy of imposing such permit conditions without proof of a valid nexus into "an out-and-out plan of extortion." *Nollan*, 483 U.S. at 837 (citation omitted). Thus, the central holding of *Nollan* is that, to avoid paying compensation for the taking of an easement, the government must prove a nexus between the impact of the permit condition and the purpose "advanced as the justification" for it. *Id.*[3]

The Court could not have reached this holding, however, if the Nollans had lacked standing to bring their takings challenge in the first place. And the argument that the Nollans lacked standing because they had notice of the Commission's comprehensive program of exacting public easements, and bought their property subject to that restriction, was raised both by the Coastal Commission itself and by numerous *amici curiae*.

The Commission, for example, pointed out that the Nollans "did not exercise their option to *purchase* the lot until *after* the Commission's decision" to impose the challenged condition on their development permit. Commission Br., at 34 (emphasis supplied). The Commission claimed that this fact alone was dispositive: "[t]he timing of the Nollans' purchase

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[3] The Court in *Nollan* held that the burden of proof rested with the Government, *Nollan*, 483 U.S. at 836, and subsequently held in *Dolan* v. *City of Tigard* that the government also bears the burden of showing that the impact of the condition on the property owner is roughly proportional to the degree to which the condition advances the governmental objective. 512 U.S. at 391 n.8, 395.

alone is sufficient to defeat a taking." *Id.* The Commission further buttressed the point by arguing that the Nollans had "no expectation of continued private use" that was frustrated by the government. *Id.* at 30. "Quite the contrary," the Commission asserted:

> [T]he Nollans were fully informed of the Commission's obligation to require them to permit public use of their beachfront as a condition of development approval *long before they purchased their lot* and built their new house. Striking the access condition now would result in an absolute windfall to the Nollans and a detriment to the public.[4]

Id. (emphasis supplied).

Several *amici curiae* made this same point to the Court. See, *e.g.*, NRDC Br., at 22-23 n.16 (Nollans knew of condition of public access over their beach "through [the Commission's] imposition of conditions on their development permit *before* they ever exercised their option to purchase the property") (emphasis in original).[5] And several dissenting Justices maintained that the notice that the Nollans had of the state's intent to demand an easement in return for any coastal development should have defeated their takings claim. *Nollan*, 483 U.S. at 860 (Brennan, J., joined by Marshall, J., dissenting) (appellants were "on notice that new developments would be approved only if provisions were made for lateral beach access"); *id.* at 866 (Blackmun, J., dissenting)

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[4] The Court's decision to allow the Nollans to obtain the "windfall" of building their house without having to relinquish an easement echoes the Court's decision to let those homeowners who first sold to non-white purchasers in violation of racial covenants keep the financial "windfall" they allegedly received. *See Barrows* v. *Jackson*, 346 U.S. 249 (1953); *see also id.* at 268 (Vinson, C.J. dissenting) (Court should have allowed state to compel homeowners to "disgorge that which was gained at the expense of depreciation in her neighbors' property").

[5] *See also* State AGs Br., at 14; Cities and Counties Br., at 8 n.3.

("Nollans had notice of the easement before they purchased the property and that public use of the beach had been permitted for decades.").

Thus, in *Nollan*, the Court was presented, in the context of a physical taking, with the same arguments for denying standing to a subsequent owner that the Rhode Island Supreme Court found convincing in *Palazzolo*. The Court squarely rejected these arguments in *Nollan*. The only remaining question, therefore, is whether *Lucas* changed this law.

B. *Lucas* Did Not Change The Standing Of Subsequent Owners.

In *Lucas* v. *South Carolina Coastal Council*, this Court reversed the state court's judgment that a statute banning all residential construction on petitioner's beachfront property had not caused a taking, and remanded for an evaluation whether that statute merely implemented a result that could otherwise have been obtained through application of the state's existing background law of nuisance and property. 505 U.S. at 1031-32. Because the statute at issue was passed *after* Lucas acquired his property, the question presented here in *Palazzolo* was plainly not presented in *Lucas*. And nowhere did the Court suggest in *Lucas* that it was intending to reverse or even to narrow its prior holding in *Nollan*. Under traditional principles of jurisprudence, then, *Lucas* did not cut back on *Nollan*. Nevertheless, the Rhode Island Supreme Court relied on certain statements in *Lucas* to justify its holding that property owners are categorically barred from bringing takings challenges to governmental action that predates their ownership of the property.

The Rhode Island Supreme Court referred first to what it called "the Supreme Court's dictate in *Lucas* instructing reviewing courts to determine whether a landowner originally possessed the right to engage in a particular use." Pet. App. A-15. It then cited to the "similar treatment" that the Court said in *Lucas* should be afforded to regulatory and physical

takings, and quoted an example from *Lucas* that "'a permanent easement that was a pre-existing limitation upon the landowner's title' would not amount to a compensable taking." *Id.* at A-16 (quoting *Lucas*, 505 U.S. at 1028-29). The lower court then assumed, without further reference to *Lucas*, that *any* pre-existing statutory or regulatory limitation on the owner's title was sufficient to bar a challenge to that limitation. *Id.*

But that is clearly not what *Lucas* held. In the passage immediately following the example relied on below of the "permanent easement that was a pre-existing limitation upon the landowner's title," the Court went on to explain the point, first, by contrasting two cases. In one case, *Scranton* v. *Wheeler*, 179 U.S. 141 (1900), the Court found that no taking had occurred, because the interests of a "riparian owner in the submerged lands . . . bordering on a public navigable water" were held subject to the government's navigational servitude. *Id.* at 163. The government's navigational servitude is an inherent limitation on submerged land that borders a public navigable water, and so any purchaser of such land takes title subject to it, and cannot claim a taking when the government exercises its rights. *Id.* at 162. By contrast, in *Kaiser Aetna* v. *United States*, 444 U.S. 161, 178-80 (1979), the navigational servitude was held *not* to be part of the background law that limited the owner's title to the property in question. That property was originally "separated from the adjacent bay and ocean by a natural barrier beach, [and it] has always been considered to be private property under Hawaiian law." *Id.* at 178-79. These cases thus illustrate the narrow scope this Court has given to government assertions of a "permanent easement that was a pre-existing limitation upon the landowner's title."

After contrasting these two physical takings cases, the Court stated that "similar treatment" was appropriate for regulatory takings, and further explained that only a very limited range of statutes would not be subject to per se

condemnation were they to prohibit all beneficial use of land. The range was limited to those laws that "do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise," such as "forestalling 'grave threats to the lives and property of others.' " *Lucas*, 505 U.S. at 1029 & n.16. Like the navigational servitude, these sorts of limitations on private property, the Court explained, "*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." *Id.* at 1029 (emphasis supplied). Thus, a per se takings claim could not succeed against a statute that did nothing more than codify these principles, for in so doing the state would simply "make the implication of those background principles of nuisance and property law explicit." *Id.* at 1030. Conversely, the Court made clear, statutes that went beyond these principles would work a taking. *Id.* at 1031-32.

By relying selectively on only snippets of language from *Lucas*, then, the lower court missed its central point. Only a very narrow class of statutes is immune from challenge under the Takings Clause – those that "duplicate" what the courts could achieve under background principles of nuisance and property law. Nothing in *Lucas* cuts back on the standing, expressly vindicated in *Nollan*, of owners to challenge "extortionate" permit conditions imposed before they acquired title, or to challenge pre-existing laws that deprive new owners of all beneficial use of their property, simply because a prior owner failed to challenge those unconstitutional actions. Rather, as in *Nollan*, those "prior owners must be understood to have transferred their full property rights in conveying the lot" – including the right to challenge any prior government action amounting to a taking. *Nollan*, 483 U.S. at 834 n.2.

Since *Lucas* was decided, two justices have observed that its meaning would be rendered a "nullity" if property rights could be eliminated by "pretextual procedural rulings" or any other law that a state simply chose, without foundation, to denominate as "background law." Thus, Justice Scalia, joined by Justice O'Connor, stated:

> [a]s a general matter, the Constitution leaves the law of real property to the States. But just as a State may not deny rights protected under the Federal Constitution through *pretextual procedural rulings*, neither may it do so by invoking *nonexistent rules of state substantive law*. Our opinion in *Lucas*, for example, would be a *nullity* if *anything* that a state court chooses to denominate "background law" – regardless of whether it is really such – could eliminate property rights. . . . No more by judicial decree than by legislative fiat may a State transform private property into public property without compensation.

Stevens v. *City of Cannon Beach*, 510 U.S. 1207, 1211-12 (1994) (Scalia, J., joined by O'Connor, J., dissenting from denial of petition for writ of certiorari) (emphasis supplied) (citations omitted).

Justice Kennedy made a similar point when he observed, in separate writing in *Lucas*, that the Constitution protects those investment-backed expectations that "are based on objective rules and customs that can be understood as reasonable by all parties involved," and are not automatically limited by anything the "courts allow as a proper exercise of governmental authority," for in that event property would merely "become what courts say it is." *Lucas*, 505 U.S. at 1034-35 (Kennedy, J., concurring in the judgment). Indeed, it is fundamental to takings law that "a State, by *ipse dixit*, may not transform private property into public property without compensation . . . ." *Webbs' Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980). Thus, to interpret *Lucas* to permit states to enforce procedural bars to challenges to

government action that plainly worked a taking at the time it occurred, and that continues to cloud the current owner's title, is improper, for it would render the constitutional protection that *Lucas* sought to extend a "nullity." Whatever laws might be invoked to justify such a procedural bar, they are not a part of the limited range of "background principles of nuisance and property law" that the Court described in *Lucas*. They would also conflict directly with applicable law in the context of physical takings, which – per *Nollan* – allows such challenges to be brought.

II. THE CALIFORNIA COASTAL COMMISSION'S CONTINUING EFFORTS TO DENY STANDING TO SUBSEQUENT OWNERS ILLUSTRATES THE BROAD IMPORTANCE OF THE FIRST QUESTION PRESENTED.

Whether subsequent purchasers should be categorically barred from challenging an unconstitutional taking of property is a critical issue in several pending proceedings in California. The California Coastal Commission, the state Attorney General, and one local government have each taken the position that subsequent owners do not have standing to challenge the taking of easements if the permit condition was imposed prior to their acquisition of the property. Astonishingly, they take that position despite the fact that this Court rejected this argument in the *Nollan* litigation to which the California Coastal Commission was itself a party. And to date, the argument has been accepted by one federal district court and two state superior courts. Because the Commission's position effectively renders *Nollan* and *Lucas* a nullity in California, we urge the Court to clarify that subsequent owners may challenge prior governmental action that amounts to either a regulatory or a physical taking.

A. Pending California Litigation.

To date, the case furthest along procedurally is *Daniel* v. *County of Santa Barbara*, No. 99-56887 (9th Cir., filed

December 16, 1999), which is pending (not yet argued) in the Ninth Circuit court of appeals. Ann Daniel and Leonard Hill bought their coastal property in 1997. At the time of their purchase, the California Coastal Commission had already extracted from a prior owner an offer to dedicate an easement. The offer was recorded long before this Court's decision in *Nollan*, and it is undisputed that no individualized determination of nexus or proportionality in accordance with *Nollan* or *Dolan* was ever made by any government agency. See App. at 6a, 9a, 10a, 21a n.39.[6]

In 1998, the County of Santa Barbara took action to accept the offer, and did so over the vigorous objections of Daniel and Hill. They first attempted to rescind their offer, then claimed both that the original offer to dedicate was null and void for failure to comply with *Nollan*, and that in any event the County's acceptance of the offer in the absence of the showing required by *Nollan* and *Dolan* was itself unconstitutional. *Id.* at 9a-10a. The County was unmoved, and Daniel and Hill were forced to sue.

The district court dismissed the complaint, stating that "[b]ecause the irrevocable offer was made prior to the time the Property was conveyed to plaintiffs, the taking had already occurred, and they have no standing to challenge it at this point." See App. at 26a; see also *id.* at 20a-26a. Misreading *Lucas* just as the Rhode Island Supreme Court did (see *id.* at 24a-26a), the district court treated the permit condition as a "'pre-existing limitation upon the landowner's title'" that was enforceable without regard to whether that limitation had been lawfully imposed as an original matter. *Id.* (quoting *Lucas*, 505 U.S. at 1028-29). The district court then held that the failure of the original owners to challenge the offer to dedicate relieved the County of any liability for an

[6] The district court's unpublished opinion in *Daniel* is reproduced in an appendix to this brief.

unconstitutional taking because all subsequent owners took title subject to that restriction. *Id.* at 21a n.39.

In reaching this holding, the district court attempted to distinguish *Nollan* as involving a party with "a leasehold interest with an option to buy" rather than a subsequent owner, (App. at 25a), but it overlooked the critical point that the Nollans, just like Daniel and Hill, "acquired the land well after the Commission had begun to implement its policy" (*Nollan*, 483 U.S. at 833 n.2), and were fully on notice that the Commission had required an easement in return for permission to build. The district court also accepted the same policy argument about the financial impact of receiving notice that was advanced and rejected in *Nollan*. The district court assumed that the price Daniel and Hill paid for the property "was presumably reduced to reflect the exaction of the irrevocable offer to dedicate and the risk that the County would accept it." App. at 25a & n.40 ("the market price would account for the risk that the County would accept the outstanding offer"). That argument also was advanced, to no avail, in *Nollan*. See Brief of *Amicus Curiae* the Solicitor General of the United States at 17 n.12, *Nollan, supra*, (No. 86-133) ("[A]ppellants did not own the property when they applied for the development permit and/or when they received the Commission's decision. Presumably, therefore, the price paid by appellants for the property may have reflected any losses caused by the Commission's effort to impose a lateral access requirement on development.").[7]

[7] *See also* State AGs Br., at 16 (limitation "would have lowered the price the Nollans paid or should have paid for the property"); NRDC Br., at 22-23 n.16 ("the price the Nollans paid for their property should have—or at least could have—taken into account any impact of the public access condition imposed by the Coastal Commission"); Cities and Counties Br., at 8, (public access condition "was known and presumably taken into account by both the buyer (Nollans) and the seller and thus was reflected in the purchase price paid by the Nollans"; imposition of the condition "could not, therefore, have had an economic impact on the Nollans").

On appeal, the California Coastal Commission has submitted an *amicus* brief in support of the County, in which it claims that its permit conditions "are immune from attack." Brief of *Amicus Curiae* California Coastal Commission at 6-7, *Daniel, supra*. ("Commission's *Amicus* Br.") The Commission's position is that the owner's "predecessor-in-interest" failed to attack the original permit condition and hence the right to the "property covered by the easement was not part of the bundle of rights they purchased when they acquired this property:"

> Under California law, the conditions imposed by the Commission are *immune from attack. Appellants' predecessors in interest* not only failed to timely bring a judicial challenge to the validity of these conditions but accepted the benefit of the permits to which they were attached. As a result, res judicata and principles of estoppel apply and bar appellants' assault on the Commission's conditions. In turn, because these conditions are immune from attack and because the required offer was a recorded interest at the time appellants acquired the property at issue, appellants lack standing to assert that the County's action constituted a taking of a property interest which they possess. Simply put, appellants lack standing to assert that the County's action deprived them of the right to exclude the public from that portion of their property covered by the easement *because that right was not part of the bundle of rights they purchased when they acquired this property.*

Commission's *Amicus* Br., at 6-7 (emphasis supplied).

The Commission and the County have successfully advanced the same argument in similar litigation involving a different property pending in state court.[8] These cases challenge both the imposition of the condition by the Commission, and separately the County's later acceptance, of a permit condition that could not possibly survive review under the nexus and proportionality standards required by *Nollan* and *Dolan*.[9] Moreover, in the former case, the Commission has actually filed a countersuit seeking civil penalties of up to $15,000 per day against the property owner for having the temerity to record a notice of rescission of the blatantly extortionate offer to dedicate that had been extracted from the previous owner.[10] The Commission's theory is not that the offer to dedicate could satisfy *Nollan* – for it plainly could not – but that the property owner is barred by state law from even recording notice of the owner's intent to challenge any agency's acceptance of that offer.[11] This physical takings issue thus bears not merely the "sound of 'old, unhappy, far-

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[8] *See Parker* v. *California Coastal Comm'n.*, No. 305674 (San Francisco Cal. Super. Ct. Dec. 21, 1999) (demurrer granted) and *Cole* v. *Board of Supervisors*, No. 01003407 (Santa Barbara Cal. Super. Ct. Nov. 21, 2000) (demurrer granted) (collectively, the "*Stanford Farms Trust*" cases).

[9] In the *Stanford Farms Trust* cases, the Commission exacted, and the County recently accepted, an offer to dedicate an owner's entire beachfront – some 77,000 square feet – in return for a permit to build a sunroom and deck totaling no more than 600 square feet. Not only did the development amount to a tiny fraction – 1/135 – of the area demanded, but the location of the development – nearly 1000 feet inland from a 60-foot high coastal bluff – means that the construction could have had no conceivable impact of any kind on public access to the beach.

[10] *See* Second Amended Cross-Complaint of California Coastal Commission at n.8 , *Parker* v. *California Coastal Comm'n, supra,* (filed March 3, 2000).

[11] *See* California Coastal Comm'n, *Public Access Action Plan* at 17, (June 1999) ("*Public Access Plan*"), *available at* http://www.coastal.ca.gov/access/accesspl.pdf. Because the California Coastal Commission may not, by law, hold title to coastal property, Cal. Pub. Res. Code § 30212; *see also Public Access Plan*, at 29, the offers to dedicate may be accepted only by other public agencies approved by the Commission; in advance of the acceptance, however, an owner has no way of knowing which entity will accept the offer, and the owner in this case thus recorded a rescission in order to give notice to any potential accepting agency and thereby to preserve his claim.

off things, and battles long ago,'" but of "sorrow, loss, or pain, that has been, and may be again." Cf. *Kaiser Aetna*, 444 U.S. at 177.

B. The California Coastal Commission's Policies Are Rendering *Nollan* A Nullity.

The impact of the pending California litigation extends far beyond the specific properties in question. At issue is whether the *Nollan* decision will be reduced in impact to a single property owner, or whether it will serve to restrain state and local governments from exacting, taking, and keeping easements in circumstances this Court previously branded extortionate.

The issue has become timely now, because until recently, the hundreds of offers to dedicate beachfront easements that the Commission automatically exacted over the last 25 years sat unaccepted by any local agency. As of June 1999, the Commission had extracted 1288 offers to dedicate public access easements across private coastal property, of which only 464 had been accepted. Because these offers to dedicate typically expire after 21 years, the Commission realized that if it did not push local governments to accept the outstanding offers, many would soon expire.

It is likely that many, if not all, of the affected properties are now in the hands of new owners.[12] Under the Commission's reasoning, and that of the district court in *Daniel*, all of these unlawful, extortionate takings are "immune from attack." This allows the State to acquire, for free, millions of dollars' worth of beachfront property that this Court made

[12] The average length of home ownership in California is 5-10 years. California Ass'n of Realtors, *House Finance Survey* (1999) (stating that the number of years repeat buyers stayed in their previous residence has remained at 5 years since 1992); Inman News Features, *Home Switchers Accelerate* (Nov. 19, 1998) *available at* http://news.inman.com/inmanstories.asp?ID=11469 (average length of home ownership in California is 10.5 years).

clear, in *Nollan*, could be seized by the state only if it were willing to "pay for it." 483 U.S. at 842.

This Court has long recognized that if the "objective of a state practice is to discourage the assertion of constitutional rights it is 'patently unconstitutional.'" *Corpus* v. *Estelle*, 414 U.S. 932, 933 (1973) (quoting *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 32 n.20 (1973)). *Amicus* therefore urges the Court, in addressing the Rhode Island Supreme Court's mistaken analysis of regulatory takings in the *Palazzolo* case, to clarify not only that the result below was wrong, but that the Rhode Island Supreme Court's reliance on the supposedly settled rule in physical takings cases is wrong as well. Subsequent owners receive the "full property rights" of the prior owner, *Nollan*, 483 U.S. at 834 n.2. They are therefore entitled to challenge unconstitutional takings that predate their ownership, whether that taking was in the form of an unlawful permit condition, an unlawful easement or other physical occupation, or the denial of beneficial economic uses of the property. In each case, the state must be held accountable when it is "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

CONCLUSION

For the foregoing reasons, the Court should reverse the holding of the Rhode Island Supreme Court that "a regulatory takings claim may not be maintained where the regulation predates the acquisition of the property."

Respectfully submitted,

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November 22, 2000

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.: CV 98-9453 MMM (AJWx)

ANN DANIEL and LEONARD HILL,

Plaintiffs/Petitioners,

vs.

COUNTY OF SANTA BARBARA, *et al.*,

Defendants/Respondents.

ORDER GRANTING DEFENDANT COUNTY OF SANTA BARBARA'S MOTION TO DISMISS

[filed Oct. 13, 1999]

[entered Oct. 14, 1999]

In 1997, plaintiffs Ann Daniel and Leonard Hill purchased a beachfront home on Padaro Lane in Santa Barbara County (the "Property"). The Property had once been part of a larger parcel belonging to Carl Johnson, which Johnson subdivided into four lots in 1974. The California Coastal Commission approved Johnson's subdivision map on the condition that he make an offer, irrevocable for 25 years, to dedicate a public access easement, consisting of a 5 foot wide walkway, across his property from Padaro Lane to the mean-high tide mark. In 1977, Johnson obtained a permit to build a residence on what was later to become plaintiffs' property. The permit contained the same condition.

On April 7, 1987, in response to a demand by the California Coastal Commission, the Property's subsequent owners, Bruce and Darleine Bucklew, signed an "Irrevocable Offer to Dedicate" the 5 foot public access walkway. This offer was recorded on April 9, 1987 in the Official Records of Santa Barbara County. Neither Carl Johnson nor the Bucklews are parties to this suit.

Plaintiffs Ann Daniel and Leonard Hill purchased the Property in 1997. On September 15, 1998, Santa Barbara County gave them notice that, on October 6, 1998, it would consider whether to accept the 1987 Offer. On October 5, 1998, plaintiffs attempted to rescind the 1987 Offer. They filed written objections and reiterated their protests at the public hearing. Nonetheless, on October 20, 1998, the Board of Supervisors adopted a resolution accepting the Bucklews' 1987 Offer as well as many similar offers to dedicate public access easements.

Plaintiffs filed this declaratory relief suit against the County on November 24, 1998, alleging a physical taking in violation of the Takings Clause of the Fifth Amendment of the United States Constitution. Additionally, they alleged a taking in violation of Article I, § 19 of the California Constitution and other pendent state claims for quiet title and violation of the California Environmental Quality Act (CEQA).

The County has moved to dismiss, contending that (1) plaintiffs' takings challenge is not ripe for decision because their predecessors-in-interest failed timely to exhaust their state remedies and never sought just compensation; (2) the California Coastal Commission is an indispensable party that cannot be joined because it enjoys Eleventh Amendment immunity from suit in federal court; (3) plaintiffs and their predecessors-in-interest waived their right to challenge the conditions by enjoying the benefits of the permits that were issued; (4) plaintiffs' takings claim is time-barred because the statute of limitations on it began to run when the Commission imposed conditions on the issuance of the subdivision map

and building permits in 1974 and 1977, respectively; (5) plaintiffs lack standing to sue for conditions that were proposed by the Commission and accepted by their predecessors-in-interest because plaintiffs purchased the property subject to the conditions; and (6) a stay of the action in favor of state court remedies is appropriate under the *Pullman* abstention doctrine.

The court's threshold inquiry must be whether plaintiffs have a viable federal constitutional claim, since that is the basis upon which jurisdiction is invoked. Plaintiffs' Fifth Amendment takings challenge is based on the alleged unconstitutional conditions the Commission attached to its issuance of permits to Johnson in 1974 and 1977, and its demand that those conditions be reaffirmed by the Bucklews in 1987. Neither Johnson nor the Bucklews challenged the conditions, and they attached to the Property prior to the time plaintiffs took title to it. For this reason, plaintiffs lack standing to pursue a takings claim. Moreover, any takings claim is time-barred because it accrued in 1974 and 1977, when the conditions were imposed, and no later than 1987, when they were reaffirmed by the Bucklews in response to a demand by the Commission.

Finally, even if plaintiffs had standing to raise a takings claim, and even if such a claim were not time-barred, it would not be ripe for decision because plaintiffs have not (and cannot) allege an essential element of the claim – that the state refused to compensate them or the prior owners for the purported taking. Accordingly, the court finds that plaintiffs' federal claims are non-justiciable and must be dismissed. Consequently, it need not address the County's arguments regarding abstention, waiver and the absence of an indispensable party from the suit. Additionally, the court concludes that it is appropriate at this early stage of the litigation to dismiss plaintiffs' pendent state claims.

I. FACTUAL BACKGROUND

In deciding a motion to dismiss under Rule 12(b)(6), the court's review is limited to the contents of the complaint. *Campanelli v. Bockrath*, 100 F.3d 1476, 1479 (9th Cir. 1996). All allegations of material fact must be taken as true, and construed in the light most favorable to the non-moving party. *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). For this reason, the statement of facts that follows recites and accepts as true the allegations contained in plaintiffs' complaint. Additionally, because one of the bases for this motion is an asserted lack of subject matter jurisdiction, the court is authorized under Rule 12(b)(1) to consider facts beyond the face of the complaint and has done so in this instance.

A. Carl Johnson

In 1973, Carl D. Johnson owned the Property as part of a larger parcel. Johnson applied to Santa Barbara County for approval to divide the parcel into four separate lots. As proposed, the division included a private 30-foot driveway and a private 5-foot walkway to the beach for the owners of the four parcels to use.[1] On December 6, 1973, the County approved "Parcel Map No. 11,909" (the "Parcel Map"), dividing the land into four parcels designated Parcels "A" through "D." Parcel "A" later became plaintiffs' Property.[2]

In early 1974, Johnson submitted an application to the California Coastal Commission (Application No. 26-25) for approval of the Parcel Map. On April 11, 1974, the South Central Coast Regional Commission conditionally approved the map. One of the two conditions read as follows:

> Applicant shall offer for dedication to the County of Santa Barbara or its successor in jurisdiction, for

[1] Complaint, ¶ 7.

[2] *Id.*, ¶ 8.

> recreational pedestrian and bicycle access an easement 5' in width from Padaro Lane to the mean high tide line coinciding with the 30' ingress and egress right-of-way delineated on the lot split map accompanying the Application. Said offer shall be a firm continuing offer of dedication which is not rejected or vitiated by failure to accept or purported rejection for a period of 25 years, unless the County has in the meantime provided beach access within a distance of 300 yards upcoast or downcoast of this parcel. The offer of dedication shall be conditioned on assumption by the County of Santa Barbara or its successor, of the burden of maintenance of the easement and the beach area to which access is provided, together with the burden of public liability on the easement."[3]

Johnson appealed the foregoing Permit Condition to the California State Coastal Zone Conservation Commission.[4] On May 15, 1974, that Commission found that the appeal raised "no substantial issue[s]" and confirmed the decision of the Regional Commission.[5] Johnson did not appeal the decision further or seek any judicial remedy. On September 12, 1974, Parcel Map No. 11,909 was recorded in Santa Barbara County's official records, thereby completing the division of the land into four parcels.[6]

In 1977, Johnson submitted an application for a Coastal Development Permit to the California Coastal Commission in

[3] *Id.*, ¶ 9.

[4] *Id.*, ¶ 10.

[5] *Id.*, ¶ 11.

[6] *Id.*, ¶ 12. Plaintiffs allege that neither the County nor the California Coastal Commission required the execution and recordation of a separate document embodying the offer to dedicate at any time prior to recordation of the Parcel Map. Thus, they assert the act of recordation constituted the offer satisfying the permit condition. *Id.*

order to build a residence for his family on the Property.[7] On September 16, 1977, the Commission approved issuance of Coastal Development Permit No. 141-19 (the "CDP"), which included a "Special Condition" identical to the condition imposed on the Parcel Map quoted above.[8] Johnson constructed a residence on the Property in 1978 as authorized by the CDP.[9]

Plaintiffs allege that neither at the time the permit conditions were imposed, nor at any time thereafter, did issuing authorities make an individualized determination that the activity authorized by the permits (i.e., subdividing the parcel into four lots and building a residence) would adversely impact the public's ability to access the publicly-owned, adjacent beach.[10] Rather, they contend, there has never been a rational relationship between the conditions imposed and the Property's development and use.[11] Plaintiffs also assert that at the time the permit conditions were imposed, the County made no offer of monetary compensation in exchange for the concessions.[12]

B. The Bucklews

On April 8, 1987, Bruce and Darleine Bucklew, who were then the owners of the Property, executed an "Irrevocable Offer to Dedicate," which was dated April 7, 1987 and was recorded on April 9 in the Official Records of Santa Barbara County as Instrument No. 1987-025967 ("the 1987 Offer").

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[7] *Id.*, ¶ 13.

[8] *Id.*, ¶ 14.

[9] *Id.*, ¶ 15.

[10] *Id.*, ¶¶ 16, 19, 20.

[11] *Id.*, ¶¶ 17, 18.

[12] *Id.*, ¶ 21.

The 1987 Offer makes specific reference to the CDP.[13] Plaintiffs allege that California Coastal Commission officials threatened and intimidated the Bucklews into signing the 1987 Offer, and that they signed it only under duress. Prior to the execution of the 1987 Offer, Commission officials sent the Bucklews a letter that stated:

> "If this permit condition [requiring that an offer to dedicate be signed] still has not been met, please be advised that you are in violation of the Coastal Act of 1976. Those found in violation of the coastal Act are subject to court action for an injunction and/or a fine of $10,000, plus an additional fine of not less than $50 nor more than $5000 for each day a violation continues (Public Resources Code Sections 30820-23)."[14]

Plaintiffs assert that the Bucklews received no consideration for their execution of the 1987 Offer since the Commission had no legal basis for threatening to bring an enforcement action against them. They further assert that the 1987 Offer was prepared by Commission employees who knew or should have known that the document did not conform to the permit conditions in several respects, including the fact that it purported to extend the life of the Offer 13 years beyond the original expiration date.[15]

Plaintiffs allege that at no time prior to the execution and recordation of the 1987 Offer did any official or employee of the Commission or the County explain to the Bucklews (a) that the 1987 Offer was substantively different from the permits conditions; or (b) that the 1987 Offer purported to

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[13] A copy of the 1987 Offer is attached to plaintiffs' complaint as Exhibit "B."

[14] Complaint, ¶ 23.

[15] *Id.*, ¶ 25.

grant rights substantially beyond those mandated by the conditions.[16]

On June 26, 1987, ten weeks after the execution and recordation of the 1987 Offer, the United States Supreme Court issued its ruling in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). *Nollan* held that a public access condition the California Coastal Commission had placed upon issuance of a building permit for a single family residence was a Fifth Amendment taking that required just compensation.[17] Plaintiffs allege that prior to June 26, 1987, officials and employees of the Commission knew that (a) *Nollan* was pending before the United States Supreme Court; (b) the case involved a challenge to the public access program administered by the Commission; (c) the Supreme Court had granted review after the California Court of Appeal issued a ruling favorable to the Commission, suggesting that the prior ruling was invalid; (d) the Supreme Court had heard oral argument in *Nollan* on March 30, 1987, and was expected to issue its opinion shortly; and (e) the public access program might have to be terminated or substantially restricted depending on the Court's decision in *Nollan*.[18] Plaintiffs allege the Commission withheld the foregoing information regarding *Nollan* from the Bucklews prior to the recordation of the 1987 Offer,[19] that Commission officials had superior knowledge and experience as compared with the Bucklews and that the Commission owed the Bucklews a duty of full disclosure and fair dealing consistent with elemental notions of procedural due process.[20]

[16] *Id.*, ¶ 26.

[17] *Id.*, ¶ 27.

[18] *Id.*, ¶ 28.

[19] *Id.*, ¶ 29.

[20] *Id.*, ¶ 30.

Plaintiffs allege that prior to the Bucklews' execution of the "Irrevocable Offer to Dedicate" on April 8 1987, neither the Commission nor the County made an individualized determination that the earlier development of the Property that was the purported justification for the 1987 Offer would adversely impact the public's ability to access the publicly-owned, adjacent beach.[21] Nor, allegedly, did either ever make an individualized determination that the conditions contained in the 1987 Offer were roughly proportional to the impact generated by development of the Property. Rather, plaintiffs contend, there has never been a rational relationship between the conditions in the offer and the Property's development and use.[22] Plaintiffs also assert that neither the Commission nor the County offered the Bucklews any monetary compensation for the exaction.[23]

C. Plaintiffs Ann Daniel and Leonard Hill

Plaintiffs Ann Daniel and Leonard Hill purchased the Property in 1997. On or about September 15, 1998, the County notified them that it intended to consider whether to accept the 1987 Offer at a meeting on October 6, 1998.[24] On October 5, 1998, plaintiffs served a notice of rescission of the 1987 Offer on the County. They also objected in writing and at the public hearing to the imposition of the conditions and extraction of the offer.[25] On October 20, 1998, following a public hearing, the Board of Supervisors adopted Resolution No. 98-389 titled "Resolution of Acceptance of Offers and

[21] *Id.*, ¶ 31.

[22] *Id.*, ¶¶ 32, 35.

[23] *Id.*, ¶¶ 35, 36.

[24] *Id.*, ¶ 37.

[25] *Id.*, ¶¶ 39-41.

Irrevocable Offers to Dedicate Public Access Easements."[26] Plaintiffs allege that adoption of the resolution was a discretionary act and that the Board was so informed by County Counsel.[27]

Plaintiffs contend that as of October 20, 1998, the County had not made an individualized determination that development of the Property would have an adverse impact on the public's ability to access the publicly-owned, adjacent beach,[28] or that the extent of the exaction was roughly proportional to the impact of the Property's development.[29] Additionally, they assert that as of that date, there was no rational relationship between the exaction achieved by the Resolution and any impact caused by the development, nor any findings that activity on the Property justified adoption of the Resolution.[30] As of October 20, 1998, the County had not offered Daniel and Hill any monetary compensation for the exaction effected by the Resolution.[31] Further, the County has allegedly not complied with the permit's requirement that it assume "the burden of maintenance of the easement and the beach area to which access is provided, together with the burden of public liability on the easement."[32]

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[26] *Id.*, ¶ 42. A copy of the resolution is attached to plaintiffs' complaint as Exhibit "C."

[27] *Id.*, ¶ 43.

[28] *Id.*, ¶ 44.

[29] *Id.*, ¶ 48.

[30] *Id.*, ¶¶ 45-47.

[31] *Id.*, ¶ 49.

[32] *Id.*, ¶ 38.

II. DISCUSSION

A. Legal Standard Governing Motions To Dismiss Under Rule 12(b)(1)

A party asserting that the court lacks subject matter jurisdiction of an action may raise the issue by filing a motion pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Even where defendant is the moving party, plaintiff bears the burden of establishing that the court has subject matter jurisdiction. See *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

A Rule 12(b)(1) challenge may be facial (i.e., based solely on the allegations contained in the complaint) or factual (i.e., based on extrinsic evidence presented for the court's consideration). See *Thornhill Publishing Co. v. General Tel. & Electronics*, 594 F.2d 730, 733 (9th Cir. 1979) (facial attack); *Meliezer v. Resolution Trust Co.*, 952 F.2d 879, 881 (5th Cir. 1992) (challenge based on extrinsic evidence). Where facial, the court must accept the allegations of the complaint as true. See *Valdez v. United States*, 837 F.Supp. 1065, 1067 (E.D.Cal. 1993), aff'd., 56 F.3d 1177 (9th Cir. 1995). Where factual, the court may weigh the evidence presented in order to determine the facts and evaluate whether it has power to hear the case. See *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).

The County has attacked the court's jurisdiction to hear plaintiff's constitutional claim on multiple bases: (1) that it is not ripe for review because plaintiffs and their predecessors-in-interest failed to pursue state court remedies, including attempted recovery of "just compensation" for the alleged Fifth Amendment taking; and (2) that plaintiffs purchased the Property subject to the recorded 1987 Offer, and thus lack standing to challenge the validity of the procedures by which it was obtained. These issues are properly raised by a Rule 12(b)(1) motion. See, e.g., *Bland v. Fessler*, 88 F.3d 729,

732, n. 4 (9th Cir. 1996) (ripeness properly challenged under Rule 12(b)(1)); *Medina v. Clinton*, 86 F.3d 155, 157 (9th Cir. 1996) (affirming district court's dismissal for lack of standing under Rule 12(b)(1)); *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989) (motions raising ripeness are treated as having been brought under Rule 12(b)(1)); *Coye v. Sullivan*, 1991 WL 319038, * 1 (E.D.Cal. 1991) (because standing implicates subject matter jurisdiction, it is properly challenged under Rule 12(b)(1)).

The County has proffered state records documenting its actions respecting the Property, and the court has accepted and considered this evidence in evaluating defendant's ripeness and standing arguments.

B. Legal Standard Governing Motions To Dismiss Under Rule 12(b)(6)

A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. A court may not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir. 1997); *Moore v. City of Costa Mesa*, 886 F.2d 260, 262 (9th Cir. 1989) (quoting *Conley*), cert. denied, 496 U.S. 906 (1990). In other words, a Rule 12(b)(6) dismissal is proper only where there is either a "lack of cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988).

As noted above, in deciding a motion to dismiss for failure to state a claim, the court's review is limited to the contents of the complaint. *Campanelli, supra*, 100 F.3d at 1479; *Allarcom Pay Television, Ltd. v. General Instrument Corp.*, 69 F.3d 381, 385 (9th Cir. 1995). The court must accept all factual allegations pleaded in the complaint as true, and must construe them and draw all reasonable inferences from them

in favor of the nonmoving party. *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996); *Mier v. Owens*, 57 F.3d 747, 750 (9th Cir. 1995), citing *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987); *NL Indus. Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). It need not, however, accept as true unreasonable inferences of conclusory legal allegations cast in the form of factual allegations. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981), cert. denied, 454 U.S. 1030 (1981).

The court may not consider material outside the complaint (e.g., facts presented in briefs, affidavits, or discovery materials) in ruling on a Rule 12(b)(6) motion. *In re American Continental Corp./Lincoln Savings & Loan Securities Litigation*, 102 F.3d 1524, 1537 (9th Cir. 1996). Nonetheless, it may properly consider exhibits submitted with the complaint, documents whose contents are alleged in the complaint when their authenticity is not questioned, and matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1989); *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), cert. denied, 114 S. Ct. 2704 (1994).

Because statutes of limitations are not generally regarded as jurisdictional, challenges asserting that a complaint is time-barred are properly considered under Rule 12(b)(6). See *Kesselring v. F/T Arctic Hero*, 95 F.3d 23, 24 (9th Cir. 1996) ("Provisions phrased as time limits on filing court actions are generally interpreted as statutes of limitations, not as jurisdictional bars"). Cf. *Lord v. Babbitt*, 943 F.Supp. 1203, 1209 and n. 4 (D. Alaska 1996) (addressing a challenge to plaintiff's complaint based on the statute of limitations under Rule 12(b)(6) rather than Rule 12(b)(1) because federal statutes of limitations are no longer jurisdictional). Here, defendant contends that plaintiffs' claims are time-barred because the statute of limitations began to run in 1974 or

1977, when the conditions were first imposed or, at the latest, in 1987, then the Bucklews signed the irrevocable offer.

C. Fifth Amendment Takings Claim

The Takings Clause of the Fifth Amendment provides: "[N]or shall property be taken for public use, without just compensation." The Fourteenth Amendment's Due Process Clause makes the clause applicable to the States. See *Dolan v. City of Tigard*, 512 U.S. 374, 384, n. 5 (1994). Takings claims generally may be "divided into two classes: permanent physical occupation claims and regulatory takings." *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 684 (9th Cir. 1993), cert. denied, 510 U.S. 1093 (1994). "A physical occupation occurs when the government physically intrudes upon private property either directly or by authorizing others to do so. A regulatory taking occurs when the value or usefulness of private property is diminished by a regulatory action that does not involve a physical occupation of the property." *Id.*

Plaintiffs seek declaratory relief to remedy a "physical taking of private property." They allege that unless the Resolution of Acceptance is invalidated, it will effect a physical taking of their Property, for which they "have received no compensation" and for which "the County is offering no such compensation."[33] Plaintiffs claim that (1) the initial permit conditions were void; (2) the 1987 Offer was void when made; (3) if the 1987 Offer was ever valid, it became void by virtue of the Supreme Court's decision in *Nollan*; and (4) even if the permit conditions and the 1987 Offer are valid, the Board of Supervisors' Resolution of Acceptance "in and of itself, accomplished a taking of property without compensation."[34]

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[33] First Amended Complaint, ¶ 54.

[34] *Id.*, ¶ 55(d).

The County vigorously disputes plaintiffs' assertion that a physical taking has occurred. The issue is key, since characterization of the claim as a physical or a regulatory taking will affect when the claim accrued for statute of limitations purposes, whether it is ripe for relief, and whether plaintiffs have standing to sue. Plaintiffs contend there was a physical taking when the County accepted the 1987 Offer and took title to the easement. Additionally, they assert that a physical occupation will inevitably occur when the public is permitted to use the walkway. The County claims that plaintiffs' "characterization of this lawsuit as one for a physical taking rather than a regulatory taking is a transparent attempt to avoid procedural defects which bar a regulatory taking claim in this instance – the statute of limitations and the doctrines of ripeness and res judicata."[35] It contends that plaintiffs' claim is instead based on a "regulatory taking," since the irrevocable offer to dedicate a public access easement was obtained pursuant to a regulatory scheme by which the Commission granted subdivision and building permits conditioned on the execution of such offers.[36]

To a certain extent each party's characterization is correct, since the factual scenario does not fit neatly into either of the two categories, and embodies characteristics of both.

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[35] Def.'s Mot. at 1:9-13.

[36] Characterized as a regulatory taking, the County asserts that plaintiffs' claim is actually a facial challenge to the Coastal Act or to the Commission's permitting program. Regulatory takings may be attacked by challenging the facial constitutionality of a statute or land use regulation, or by arguing that the statute is unconstitutional as applied to the plaintiff. "A facial challenge involves 'a claim that the mere enactment of a statute constitutes a taking,' while an as-applied challenge involves 'a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation.'" *Levald, supra*, 998 F.2d at 686 (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987), cert. denied, 510 U.S. 1093 (1994)).

Plaintiffs claim that, through a regulatory scheme, the government imposed unconstitutional conditions on the issuance of a public benefit, i.e. a development permit. Because the conditions imposed required that the landowners make an irrevocable offer to dedicate an easement over the land, however, the taking effected was physical in nature. The real question is whether the alleged taking occurred at the time the irrevocable offer to dedicate was extracted (i.e., 1974 and 1977 or 1987), or only when the County accepted the offer in 1998.

1. When A Taking Occurs

Courts have generally found that a permanent physical invasion of private property constitutes a *per se* taking. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (cable television operators installation of cabling on landlords' apartment buildings pursuant to New York law constituted a taking under "the traditional rule that a permanent physical occupation of property is a taking"); *Levald, supra*, 998 F.2d at 684 (permanent physical occupation of property sufficient to support a takings claim occurs when the government physically intrudes upon private property either directly or by authorizing others to do so).

A taking also occurs when government takes title to property, in whole or in part, prior to any physical invasion. See *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992) (a taking occurs under the Fifth Amendment when "the government [has authorized] a physical occupation of property (or actually takes title)"); *Chicago, R.I. & P. Ry. Co. v. United States*, 284 U.S. 80, 96 (1931) (a taking "may result from a taking of the use of property . . . quite as well as from the taking of the title"). Additionally, a taking can occur when government action creates a cloud on the title to property that decreases its value. See *J.B. Ranch v. Grand County*, 958 F.2d 306, 309 (10th Cir. 1992) (a cloud on title to property causing a diminution of land values constitutes a taking).

2. The *Nollan* and *Dolan* Cases

In both *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, two Supreme Court cases involving development exactions,[37] the Court held that government action constituted a physical taking because it deprived the property owner of the right to exclude others from the property. *Nollan* held "that a 'permanent physical occupation' ha[d] occurred, for purposes of [the *Loretto*] rule, where individuals [were] 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." *Nollan, supra*, 483 U.S. at 832. Courts have interpreted "*Nollan* and *Dolan* . . . as extending the analysis of complete physical occupation cases to those situations in which the government achieves the same end (i.e., the possession of one's physical property) through a conditional permitting procedure." *Clajon, supra*, 70 F.3d at 1578; see also *Nollan, supra*, 483 U.S. at 841 (stating that the Court will be "particularly careful" in assessing cases where an owner is required to convey property in exchange for the lifting of a land-use restriction because of the "heightened risk" that the purpose of the exaction is "avoidance of the compensation requirement, rather than the stated police power objective"); *Garneau v. City of Seattle*, 147 F.3d 802, 812 (9th Cir. 1998) ("Because *Nollan* and *Dolan* both involved physical invasions of private property, the Court found the exactions were *per se* takings").

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[37] A "development exaction" is a governmental requirement that a property owner dedicate some portion of his or her land for public use before granting that property owner a permit to develop the land. This 'exaction' of land often involves the actual deeding of some of the property to the public – either through an easement or an outright transfer of the land. See *Clajon Production Corporation v. Petera*, 70 F.3d 1566, 1578, n. 20 (10th Cir. 1995).

In *Nollan*, which is factually most similar to the case at bar, the owners of the beachfront lot proposed to demolish a small bungalow on the property and build a larger house. As required by California law, they applied to the California Coastal Commission for a building permit. The Commission issued a building permit conditioned on the property owners' recordation of a deed restriction granting a public access easement over their land. *Nollan, supra*, 483 U.S. at 828. The Court affirmed the rule "that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" *Id.* at 824. It held, however, that to escape takings liability, there must be an "essential nexus" between the conditions imposed and the legitimate state interest identified. The Court concluded that the condition imposed by the Commission "utterly fail[ed]" to achieve its stated objectives – protecting the public's ability to see the beach, assisting the public in overcoming the perceived "psychological" barrier to using the beach, and preventing beach congestion. Thus, it concluded, the easement condition was nothing more than "an out-and-out plan of extortion." *Id.* at 837.

In the 1994 case of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Supreme Court granted certiorari to determine the degree of connection required between a development exaction and the impact of the property owner's proposed project. See *id.* at 377. *Dolan* involved an application to expand a plumbing and electrical supply store and pave a thirty-nine space parking lot. *Id.* at 379. Pursuant to its comprehensive development plan, the city granted a permit on the condition that the owner dedicate property along the creek behind the property for storm drainage and an additional adjacent fifteen-foot wide strip as a pedestrian/bicycle pathway. The Court held that both conditions satisfied the "essential nexus" requirement announced in *Nollan*. The Court noted that the proposed

parking area would increase water runoff, that the state had a legitimate interest in controlling flood problems, and that the storm drainage condition was directly related to concern. Additionally, it stated that the store's expansion would increase traffic in the downtown area, that the state had a legitimate interest in reducing traffic congestion, and that the pedestrian/bicycle pathway would lessen increased traffic flow in nearby streets. *Id.* at 387-88.

Having determined that the requisite nexus was present, the Court next considered whether the degree of the exactions was consonant with the projected impact of the proposed development. Noting that "a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment," it placed the burden on the government to establish "rough proportionality" by making some sort of individualized finding. It stated that, while "[n]o precise mathematical formula is required, . . . the city must make some effort to quantify its findings in support of the dedication . . . beyond the conclusory statement that it could offset" the conditions created by the proposed development. *Id.* at 395-96. The Court held that proper findings of rough proportionality had not been made. *Id.*

In *Garneau*, the Ninth Circuit explained that *Nollan* and *Dolan* establish a three-part test for determining whether a taking has occurred in connection with the imposition of development conditions. "First the court asks whether government imposition of the exaction would constitute a taking. Second is the 'essential nexus' test, which asks whether the government has a legitimate purpose in demanding the exaction. Third is the 'rough proportionality' test, which asks whether the exaction demanded is roughly proportional to the government's legitimate interests." *Garneau, supra*, 147 F.3d at 809. The court noted that "[t]he first inquiry ignores the government's land use power, and asks only whether government imposition of the exaction would be a taking," while "[t]he second and third inquiries

seek to determine whether the government may shield itself from a takings claim through the use of its police powers." *Id.* at 809, 810. For purposes of the present motion, then, the key question is the first – did the Commission's exaction of an irrevocable offer to dedicate an easement over the Property constitute a taking, or did any taking occur only later when the government perfected its title to the easement or the first uninvited person used the public access.

3. Application To The Instant Case

In *Nollan* and *Dolan*, the imposition of an allegedly unconstitutional condition resulted in the immediate dedication of property for public purposes. Thus, the government's imposition of conditions through the permitting process effected a physical invasion or occupation of the landowners' property. Here, by contrast, in 1974 and 1977, the Commission required that Johnson make an irrevocable offer to dedicate an easement over the Property, but the County did not immediately accept the offer. Similarly, in 1987, the Bucklews were required to extend the term of the irrevocable offer for a period of thirteen years.[38] Again, the County did not immediately accept the offer. Nonetheless, in each instance, the Commission exacted – and thus "took" from the property owners – the right to a future easement over the Property. The County obtained what was essentially equivalent to an option, which was valuable to it and gave it a property interest under California law. See *County of San Diego v. Miller*, 13 Cal.3d 684, 693 (1975) (owner of an unexercised option to purchase land possesses a property right). At a minimum, from the time it was made, the irrevocable offer placed a cloud on title to the Property and diminished its value. Thus, the alleged taking occurred at the point when the government exacted the concession from the

[38] Because the court concludes that any taking that occurred took place as early as 1974, it need not decide whether the extension of the irrevocable offer's term effected an additional taking.

property owners. The fact that there was no physical entry on the land until later does not alter this fact.[39]

Plaintiffs contend that, if this is true, the County's acceptance of the irrevocable offer to dedicate in 1998 should nonetheless be treated as a separate taking under either a "continuous" or "incremental" takings theory. Continuous takings have been found where the government allows a taking to occur by a continuing process of physical events, such as by gradual flooding. In such a case, the plaintiff may postpone filing suit until the nature and extent of the taking becomes clear. See *United States v. Dickinson*, 331 U.S. 745, 749 (1947). In *Dickinson*, the Supreme Court refused to set a firm date upon which a takings claim based on flooding caused by a dam accrued, stating that, in cases involving intermittent flooding, plaintiff's cause of action does not accrue until "the situation becomes stabilized." *Id.* Thus, the plaintiff in such a case may postpone filing suit until "the consequences of inundation have so manifested themselves that a final account may be struck." *Id.* Invoking *Dickinson*, plaintiffs assert that the situation regarding the Property did

[39] Plaintiffs contend that no taking occurred in 1974, 1977 or 1987 because the irrevocable offer granted by Johnson and extended by the Bucklews was void *ab initio*, or became void following the Supreme Court's 1987 decision in *Nollan*. Because the Nollans challenged the Coastal Commission's permitting procedures "as applied" to them, the decision in their favor did not void other dedications exacted by the Commission. *Nollan, supra*, 483 U.S. at 837-38; see also *id.* at 852, n. 6 (Brennan, J., dissenting) (the case "is a challenge to the permit condition as applied to the Nollans' property, so the presence or absence of seawalls on other property is irrelevant"). Indeed, the core holding of *Nollan* and *Dolan* is that there must be an individualized inquiry into the "nexus" between the condition imposed and the impact of the proposed development, as well as their "rough proportionality." The alleged failure to conduct this type of inquiry prior to imposing conditions on Johnson's permits might well have resulted in a finding of unconstitutional taking had the matter been raised when the conditions were imposed. The fact that neither Johnson nor the Bucklews mounted such a challenge or sought "just compensation," however, does not now render the conditions void.

not become stable, and their damages ascertainable, until the County accepted the irrevocable offer to dedicate.

The Supreme Court and other courts have interpreted *Dickinson* narrowly. In *United States v. Dow*, 357 U.S. 17, 27 (1958), the Court stated that *Dickinson* held only that the statute of limitations does not bar a takings claim based on flooding "when it [is] uncertain at what stage in the flooding operation the land ha[s] become appropriated to public use." Other cases have adopted this reading of *Dickinson* and its reference to "stabilization." See *Applegate v. United States*, 25 F.3d 1579, 1582 (Fed. Cir. 1994) ("The expressly limited holding in *Dickinson* was that the statute of limitations did not bar an action under the Tucker Act for a taking by flooding when it was uncertain at what stage in the flooding operation the land had become appropriated to public use"); *Kabua v. United States*, 546 F.2d 381, 384 (Fed. Cir. 1976) (in *Dow*, the Supreme Court "more or less limited [*Dickinson*] to the class of flooding cases to which it belonged, when the landowner must wait in asserting his claim, until he knows whether the subjection to flooding is so substantial and frequent as to constitute a taking"); *Hilkovsky v. United States*, 504 F.2d 1112, 1114 (Ct.Cl. 1974) (*Dow* "distinguished the flooding situation in *Dickinson* from other types of Government taking because, in the slow flooding situation in *Dickinson*, the full extent of the Government taking could not be known until the high water mark of the flooding had been reached"); *Cavin v. United States*, 19 Cl.Ct. 190, 197 (1989) (finding that the *Dickinson* stabilization doctrine was inapplicable where the Forest Service's actions were deliberate and discrete; "the stabilization doctrine speaks to situations involving continuing physical processes, such as gradual flooding").

The events underlying this case are not easily analogized to flooding or other continuous natural processes where stabilization is difficult to pinpoint. A taking either did or did not occur when the Commission imposed conditions on

Johnsons' permits, and when the Bucklews extended the irrevocable offer to dedicate. If it did, then its value could have been fixed, much as an option to purchase land may be valued and reduced to a sum certain. *Dickinson*, therefore, does not support plaintiffs' invocation of a continuous takings theory here.

Plaintiffs alternatively contend that there have been multiple, incremental takings in this case. Under this theory, the first takings occurred when the permit conditions were imposed in 1974 and 1977. An additional taking occurred when the Coastal Commission required that the Bucklews extended the irrevocable offer to dedicate for a period of thirteen years. The exaction from the Bucklews may well have constituted a second taking, since the government extracted an extension of the term of the offer without compensation. See *A.J. Hodges Industries, Inc. v. United States*, 355 F.2d 592, (Ct.Cl. 1966) (flights of Government-owned B-47 aircraft over private land constituted the taking of an easement in the overhead airspace if the flights were so low and frequent as to interfere directly and immediately with the use and enjoyment of the land, and the introduction of B-52 bombers, which were twice as large as the B-47s and noisier, constituted an additional taking). Plaintiffs contend that yet another taking occurred when the county accepted the irrevocable offer to dedicate. They assert that this action was significantly more invasive of their property rights, and that it was not until the County accepted the offer that they lost their right to exclude others from the Property.

What the plaintiffs claim has been taken from them was, in fact, taken from Johnson in 1974 and 1977, and/or from the Bucklews in 1987. If Johnson or the Bucklews *had* sought and received just compensation for those takings when they occurred, plaintiffs could not now claim additional compensation based on the County's acceptance of the offer to dedicate. The fact that the prior owners failed to seek or receive just compensation does not change the fact that a

taking occurred. Thus, the court concludes that any taking that occurred took place at the time the condition requiring that Johnson make the irrevocable offer to dedicate was imposed and/or at the time the Bucklews were required to extend the term of the offer.

D. Standing To Sue

The County contends that plaintiffs lack standing to bring a takings claim because the offers to dedicate were obtained from prior owners of the Property, and plaintiffs did not acquire the property until years later in 1997. Because plaintiffs did now own the property when the offers were exacted, the County contends they never acquired the interest purportedly taken, and consequently lack standing to assert a Fifth Amendment claim.

What has been taken from the bundle of a property owner's rights cannot be transferred to a subsequent owner. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) ("Where the State seeks to sustain regulation that deprives land of all economically beneficial use, . . . it may resist compensation only if . . . inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with"); *Danforth v. United States*, 308 U.S. 271, 284 (1939) (it is undisputed that "since compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment"); *United States Olympic Comm. v. Intelicense Corp., S.A.*, 737 F.2d 263, 268 (2d Cir.), cert, denied, 469 U.S. 982 (1984) ("Only the owner of an interest in property at the time of [an] alleged taking has standing to assert that a taking has occurred"); *Cavin v. United States*, 956 F.2d 1131, 1134 (Fed.Cir. 1992) (claimants could not maintain suit alleging that the government took real property without just compensation unless they established undisputed ownership of the property at time of the taking); compare *Nollan, supra*, 483 U.S. at 827-28 (although the Nollans had not acquired ownership of the property prior to the State's decision to

condition a coastal development permit on their consent to an easement, they held a leasehold interest with an option to buy).

Plaintiffs have not alleged that they purchased the property without notice of the permit condition and irrevocable offer to dedicate, both of which were recorded and evident in the chain of title. See *United States v. Dow*, 357 U.S. 17, 20 (1958) (it was not inequitable that a subsequent owner had no takings claim since he "took his deed with full notice of the condemnation proceeding," and had "readily available contractual means by which he could have protected himself vis-a-vis his grantors against the contingency" that he would have no claim). The price plaintiffs paid for the land was presumably reduced to reflect the exaction of the irrevocable offer to dedicate and the risk that the County would accept it.[40] "A landowner who purchased land after an alleged taking cannot avail himself of the Just Compensation Clause because he has suffered no injury. The price paid for the property presumably reflected the market value of the property minus the interests taken." *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 476 (9th Cir. 1994), overruled on other grounds, *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). Consequently, plaintiffs lack standing to challenge the exaction under the Takings Clause of the Fifth Amendment.

Nor can plaintiffs acquire standing by claiming that a separate taking occurred when the County voted to accept the offer to dedicate. The mere exercise of a pre-existing right does not effect a taking. See *Lucas, supra*, 505 U.S. at 1028-

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[40] Because plaintiffs and the seller had full information regarding the irrevocable offer to dedicate, and the *Nollan* decision, the market price would account for the risk that the County would accept the outstanding offer. This follows from the efficient market hypothesis, that market prices "at any time 'fully reflect' all available information." Eugene Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. Fin. 383, 383 (1970).

29 ("we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title"); *United States v. 30.54 Acres of Land, More or Less*, 90 F.3d 790, 792 (3rd Cir. 1996) (holding that because a "navigational servitude was a preexisting limitation on the landowners' title to riparian land, . . . the [government's] exercise of the servitude to prohibit the use of the landowners' property was not a taking under the Fifth Amendment"). Because the irrevocable offer was made prior to the time the Property was conveyed to plaintiffs, the taking had already occurred, and they have no standing to challenge it at this point.[41]

E. Statute of Limitations

The Ninth Circuit has utilized the statute of limitations analysis developed in connection with 42 U.S.C. § 1983 claims to determine whether regulatory takings claims are time-barred. See *Levald, supra*, 998 F.2d at 684, 687-88. Thus, an action arising in California prior to 1985 is governed

[41] The fact that the County might not have exercised its right to accept the irrevocable offer does not alter the analysis. See *DeAnza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1087 (9th Cir. 1991). In *DeAnza*, plaintiffs argued that their takings cause of action did not accrue until the county amended a mobile home rent control ordinance to remove the sunset provision with which it was originally enacted. *Id.* at 1086. Discussing its earlier decision in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), cert. denied, 485 U.S. 940 (1988), the court noted that the city in that case had argued that no takings cause of action had accrued because "the ordinance could be repealed and was not permanent." *Id.* at 1087 (citing *Hall, supra*, 833 F.2d at 1277). The court observed that it had rejected this argument, holding "that the possibility of repeal did not change the nature of the taking," since "the possibility that an action may be repealed or 'undone' does not affect the existence of a taking claim." *Id.* As respects deletion of the sunset provision in the rent control ordinance before it, the *DeAnza* court stated: "The county's amendment in 1987 giving the ordinance an indefinite rather than a definite duration did not create an entirely new cause of action for purposes of the statute of limitations." *Id.*

by a three-year statute of limitations (*Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987)), while the limitations period for a California action accruing after 1985 is one year (*Levald, supra*, 998 F.2d at 688). A Fifth Amendment claim accrues when the taking occurs. *Alliance of Descendants of Texas v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994). Even assuming plaintiffs had standing to challenge the constitutionality of the Commission's actions vis-a-vis their predecessors-in-interest, therefore, the action would nonetheless be time-barred, since, measured from the date the purportedly unconstitutional conditions were exacted – 1974 and 1977 – or from the date on which the irrevocable offer was extended in 1987, the statute of limitations expired years before plaintiffs brought this suit.[42]

F. Ripeness Of Plaintiffs' Takings Claim

In *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Supreme Court established to distinct requirements that must be met before a takings claim is ripe for decision. First, "the government entity charged with implementing the regulations [must have] reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186. Second, plaintiffs must have sought "compensation through the procedures provided by the State for obtaining such compensation." *Id.* at 195. See also *The San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir. 1998) ("In order to assert an as-applied takings claim, a

[42] Plaintiffs and their predecessors-in-interest similarly failed to seek state compensation in a timely fashion. See *Hensler v. City of Glendale*, 8 Cal.4th 1, 22 (1994) ("if the challenge is to the application of the regulation to a specific piece of property, the statute of limitations for initiating a judicial challenge to the administrative action runs from the date of the final adjudicatory administrative decision. Government Code section 66499.37 establishes a 90-day period of limitation for these actions. Thus, there is no uncertainty regarding the commencement of the [statute of limitations] period"), cert. denied, 513 U.S. 1184 (1995).

plaintiff must establish two things: (1) the governmental entity has reached a final decision on the applicability of the regulation to the plaintiff's property; and (2) the plaintiff is unable to receive just compensation from the government"). "Both the final decision and compensation elements must be ripe before the claim is justiciable." *Dodd v. Hood River County*, 59 F.3d 852, 858 (9th Cir. 1995).

It is the second prong of this test that is at issue in this case, i.e., that a "takings claim . . . is unripe until the owner has sought, and been denied, just compensation by the state." *The San Remo Hotel, supra*, 145 F.3d at 1101 (citing *Sinclair Oil Corp. v. County of Santa Barbara*, 98 F.3d 401, 406 (9th Cir. 1996), cert. denied, 118 S.Ct. 1386 (1998), and *Levald, supra*, 998 F.2d at 686). This requirement is rooted in the text of the Constitution, for "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson, supra*, 473 U.S. at 194. "So long as the state provides 'an adequate process for obtaining compensation,' no constitutional violation can occur" until just compensation is denied. *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989) (quoting *Williamson*, 473 U.S. at 194-95), cert. denied, 494 U.S. 1016 (1990), overruled on other grounds in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). Thus, a plaintiff cannot bring a takings action until the state denies just compensation because the cause of action does not accrue until that point. See *Williamson, supra*, 473 U.S. at 196 ("a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State of obtaining such compensation"); *Miller v. Campbell County*, 945 F.2d 348, 352 (10th Cir. 1991) (takings claim not ripe where plaintiffs had not "been turned away empty-handed" at the state level), cert. denied, 502 U.S. 1096 (1991).

A review of the procedural history in *Nollan* discloses what Johnson or the Bucklews should have done to preserve a claim – when the permit condition was exacted, or the recording of the irrevocable offer to dedicate was demanded, they should have exhausted their administrative remedies before the Coastal Commission and thereafter filed a petition for writ of mandate in the Superior Court. See *Nollan, supra*, 483 U.S. at 829; see also *Jama Const. v. City of Los Angeles*, 938 F.2d 1045, 1047-48 (9th Cir. 1991) (takings claim dismissed as unripe where plaintiff "did not seek compensation through California procedures before bringing its federal action"), cert. denied, 503 U.S. 919 (1992). Similarly, even if the Board of Supervisors' resolution accepting the irrevocable offer constituted a new or different taking, plaintiffs do not allege that they initiated administrative or state judicial proceedings to obtain just compensation. In fact, they disavow any interest in pursuing compensation damages in this suit. Thus, even if they had standing and their claim was timely, it would not be ripe and thus not justiciable.

G. Pendent State Claims

In addition to their single federal claim, plaintiffs have alleged three pendent state claims – a taking under the California Constitution, quiet title, and violations of CEQA. When the court has dismissed all claims over which it has original jurisdiction, it may, in its discretion, decline to exercise supplemental jurisdiction over the remaining state law claims. 28 U.S.C. § 1367(c)(3). See *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350, n. 7 (1988); *Gini v. Las Vegas Metropolitan Police Dept.*, 40 F.3d 1041, 1046 (9th Cir. 1994) ("'[i]n the usual case in which federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state law claims'"); *Schneider v. TRW, Inc.*, 938 F.2d 986, 992-93 (9th Cir. 1991) (holding that the district court has discretion to dismiss state law claims after

dismissing all federal claims on summary judgment); *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985) ("Generally, dismissal of federal claims before trial dictates that the pendent state claims should also be dismissed"); *Wren v. Sletten Const. Co.*, 654 F.2d 529, 536 (9th Cir. 1981) ("When the state issues apparently predominate and all federal claims are dismissed before trial, the proper exercise of discretion requires dismissal of the state claim").

Here, the court has determined that the County is entitled to dismissal of the only federal claim alleged in plaintiffs' complaint. Accordingly, it declines to exercise supplemental jurisdiction over the remaining state law claims. Because jurisdiction in this case was premised on the existence of a federal question, and because the court has dismissed that claim, plaintiffs' claims for quiet title, taking under the California Constitution and CEQA violations are dismissed without prejudice.

III. CONCLUSION

Since the court has determined that plaintiffs have no standing to assert a Fifth Amendment takings claim, that such claim is barred by the statute of limitations, and that the claim is not ripe, the court assumes that plaintiffs cannot amend to cure the deficiencies that presently exist in the pleading. For this reason, the County's motion to dismiss is granted without leave to amend.

Dated: October 6, 1999

/s/ Margaret M. Morrow
MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE