The bungalow in Nollan

Most lawyers reading this page are familiar with *Nollan v. Calif. Coastal Comm'n*, the 1987 Supreme Court case holding that exactions in exchange for land use permits must show an "essential nexus" between the purported harm generated by the permit and aims of the exaction. (More precisely, *Nollan* gave heightened scrutiny to finding that nexus.). Whatever one thinks of the holding, it could possibly lead to some perverse outcomes. Here's the hypothetical that I give to my students:

> Suppose you've got a landowner on a beach in Malibu, who wants to put up a big mansion and maybe a conference center on the beach. Of course, the community hates it because it will increase traffic and congestion, and wants the property drastically reduced in size, which the landowner rejects. But then the local Sierra Club comes to the planning commission and the landowner and says, "Look: adjoining the property is some wonderful land that would be perfect for hiking trails to view the ocean. Why doesn't the landowner dedicate the land for hiking trails to the city? That way, the city residents get great trails, which are better than the reduced traffic anyway, and the landowner gets the permit to do what it wants to do? It's a win-win." Before *Nollan,* you'd probably do that deal. Afterwards, you can't, because there is no nexus between the permit and the exaction. So in fact, there are situations where *Nollan* is preventing mutually beneficial deals between cities and landowners."

That's true theoretically, but then the students usually ask: who will sue? Presumably, the landowner won't, because then it will unravel the deal. Then who? My very tentative answer has been: who always sues? The neighbors. From the standpoint of the guy living next door to the landowner in the hypothetical, it's a lose-lose. He gets all the impacts, but the benefits are distributed throughout the city.

But then there is a follow-up question: do the neighbors have standing? That is trickier, and I think quite opaque. We all know the famous trilogy from *Lujan v. Defenders of Wildlife*, which held that for a plaintiff to have standing in federal court, it must show: 1) injury-in-fact; 2) causation; and 3) redressability. Does the

disgruntled neighbor have standing?

I have always thought so. He certainly suffers 1) an authentic injury; caused by 2) the permit; which 3) would go away if it was struck down. But the question is: what has to cause the injury-in-fact? Certainly in this hypothetical the *permit* does, but the *exaction* does not. Which one is primary from standing purposes? It's not clear, and that is especially because from the standpoint of practical reality, the two are linked: the landowner only gets the permit if he dedicates the property. In the real world, the two cannot be distinguished.

I first began to consider these issues when reading Bill Fischel's important work, *Regulatory Takings: Law, Economics, and Politics*. Bill makes a similar argument concerning the potential of *Nollan* to prevent mutually beneficial deal-making. Perhaps because he isn't a lawyer (and perhaps because the book predates *Lujan*), Bill does not deal with the standing issue. Instead, the example he uses for the neighbor's lawsuit is *Municipal Art Soc'y v. City of New York,* where the city insisted on a monetary exaction for a developer in Columbus Circle, and the neighbors sued because the City was going to spend the money elsewhere. But *Municipal Art Soc'y* is a state court case based upon the New York State little NEPA statute: it isn't really a takings case to begin with. So that doesn't work.

The plot thickens. *Lujan* applies to standing in *federal* court. But of course now, the vast majority of Takings case are heard in state court because of the ripeness doctrine set forth in *Williamson County Regional Planning Comm'n v. Hamilton Bank*. *Williamson County* held that because the Takings Clause only bans takings without just compensation, the state must be given an opportunity to compensate and that that opportunity includes state court proceedings. And if that is so, then the *Lujan* requirements are inapposite: the issue is *state* standing rules, which are usually far more liberal than in federal court.

So especially in light of *Williamson County,* I think that the aggrieved neighbor would have the right to sue. That means that *Nollan* would in fact prevent mutually beneficial dealing: in the hypothetical I mentioned above, Malibu would probably condition the permit on a drastic reduction in size, which does not benefit the landowner at all. I would be interested in hearing if others have a similar take, or if there has been scholarly work on the issue: I haven't seen it, but that hardly means it isn't out there.

Several decades ago, Justice Robert Jackson observed that tax law is "beset with

invisible boomerangs“; he might have added Takings law to his list.