

What Property Rights: The California Coastal Commission's History of Abusing Land Rights and Some Thoughts on the Underlying Causes

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I.

INTRODUCTION

When California enacted the California Coastal Act of 1976 (Act),² and created the California Coastal Commission (Commission) to implement the policies of that Act, it attempted to ensure a balanced approach toward future development along the coast. In particular, the Act empowered the Commission to weigh environmentally-minded conservation goals against economic needs and private property rights in determining how development should proceed.³ Portions of the Act specifically

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2. CAL. PUB. RES. CODE § 30000 *et. seq.*

3. *See id.* § 30004 (“to protect regional, state, and national interests in assuring the maintenance of long-term productivity and economic vitality of coastal resources necessary for the well-being of the people of the state, and to avoid long-term costs to the public and a diminished quality of life from a mis-use of coastal resources . . . it is necessary to provide for continued state coastal planning and management through a state coastal commission.”); § 30001.5. (“Assure orderly, balanced utilization and conservation of coastal zone resources, taking into account the social and economic needs of the people of the state.”). Even in attempting to resolve conflicts between the economic and environmental purposes of the Act, the Legislature attempted to strike a balance between those very purposes:

The Legislature . . . declares that in carrying out the provisions of this division such conflicts [between the policies of the Legislature declares that broader policies which, for example, serve to concentrate development in close proximity to urban and employment centers may be more protective overall, than specific wildlife habitat and other similar resource policies. *Id.* § 30007.5.

preclude the Commission from applying the Act in a manner that offends constitutional protections for private property.⁴

After twenty-five years, it is fair to say that the Commission is more attentive today to claims of property rights, at least in some circumstances, than it was in the years immediately following its creation. Nevertheless, for many observers, the Commission's incremental progress hardly achieves the balance between private and public rights contemplated by the Coastal Act and United States Constitution. Indeed, in the last few years, the Commission has been described in the following terms: "categorically refuses to recognize the validity of an individual homeowner's property rights;"⁵ "a perfect example of well-meaning liberalism gone terribly awry;"⁶ "a rogue organization less interested in matters of general interest than in micromanaging such details as the color of people's homes, what they can plant in their gardens and whether they should be allowed to fence wild animals away from the yards where their children play;"⁷ "the poster child for government power run amok—but because everything the commission does is supposedly to protect the environment, hardly anybody questions it;"⁸ "established . . . to help local governments adopt local coastal plans. Instead, it pulled a Saddam, investing itself with dictatorial powers over every last grain of the state's 1.5 million acres of coastal property—public and private;"⁹ "If one's goal is to slow development at all costs—even if it means undermining private property rights . . . then one would be aghast at a monumental court decision this week that says the California Coastal Commission is unconstitutional. Everyone else should be elated."¹⁰

In other words, the Act recognizes that, when occurring in population centers, economic development is entirely consistent with the policies of the Act, including the policy to construe those policies in favor of resource protection.

Id.

4. See *id.* § 30010.

5. See Ann White, *Avoiding Coastal Commission Dictates*, SAN DIEGO UNION TRIBUNE, Sept. 18, 2003.

6. *Going Coastal*, WALL ST. J., July 13, 2001, at A10, 2001.

7. Wade Major, *Out-of-Step Bureaucracy Roams California Shores*, L. A. TIMES, Jan. 23, 2003.

8. *Editorial: Reinventing the Coastal Commission*, The Carmel Pine Cone, Jan. 3, 2003.

9. Kimberly A. Strassel, *California Coastal Decommission*, WALL ST. J., Jan. 27, 2003.

10. *Coastal Decommission*, ORANGE COUNTY REGISTER, Jan. 1, 2003.

A review of the extensive body of case law involving the Commission and publicly reported accounts of the Commission's actions tends to support the foregoing complaints, at least to the extent they suggest that the Commission has insufficient respect for private rights in land. As described in this article, such a review indicates that, much of the time, the Commission operates by neglect at best, and contempt at worst, when it comes to private property rights. Lack of appreciation for individual property rights can be found in all of the Commission's activities; one can see it in the denial of carefully-planned development projects along the coast, imposition of severe conditions on approved projects, strict enforcement of a strict reading the Coastal Act, and in the Commission's interpretation of the scope of its own jurisdiction and the procedural protections afforded coastal development applicants.¹¹

This article documents the Commission's response to claims of private land rights, whether that response is manifested in substantive or procedural applications of the Commission's power, and surveys the judicial conflicts which result. Upon coming to the conclusion that individual property interests rank low on the Commission's priority list, the article attempts to explain the reasons for a *de facto* policy treating private land use as a privilege subject to the Commission's control, rather than as constitutionally protected right. Part II of this article reviews the purposes of the Coastal Act and the role of the Commission in implementing the Act, with special emphasis on the Commission's power over activities on private land. Part III surveys selected case law and press accounts documenting the Commission's actions, and summarizes instances in which the Commission appears to have given insufficient respect to private rights. Part IV seeks and finds explanations for the Commission's dim view of property rights in the California Supreme Court's refusal to hold land use regulators to constitutional limitations, the Commission's leadership, and the influence of well-funded special interest pressure groups that seek to restrict or prevent private land use along the coast. The article concludes that, if the Coastal Act, including its environmental objectives, is to be successfully and properly implemented, the Coastal Commission must overcome its own biases and finally accept private property as a necessary and beneficial institution.

11. See *infra* Part III.

II.

THE CALIFORNIA COASTAL COMMISSION'S ROLE
UNDER THE COASTAL ACT OF 1976

In 1972, the United States enacted the Coastal Zone Management Act, a body of law designed to coax coastal states to enact their own comprehensive laws regarding the management of development along coastlines. Responding to passage of the federal act, and the California Legislature's previous unwillingness to pass a state counterpart, a majority of Californians passed Proposition 20 in November of 1972, an initiative otherwise known as the California Coastal Zone Conservation Act of 1972.¹² This law created a new state entity, the California Coastal Commission, and six regional coastal boards, and empowered them to review coastal development proposals.¹³ The 1972 act also commanded the state Commission to develop a comprehensive coastal development plan, to be submitted to the state legislature by December 1, 1975.¹⁴ The California Coastal Act of 1976 arose from the recommendations suggested by the Commission in that plan.¹⁵ Upon passage in 1977, the 1976 Act became the sole authority for the Commission's continued role as manager of

12. See *Briggs v. State of California*, 159 Cal. App. 3d 190, 201 n.6 (1979).

13. *Id.* The *Briggs* court explained:

The 1972 act created the California Coastal Zone Conservation Commission and six regional commissions; it directed them to undertake whatever studies were necessary to determine the proper planning principles and assumptions needed to ensure the conservation and protection of coastal zone resources. Based upon those studies, the Commissions were directed to develop and adopt a California Coastal Zone Conservation Plan for submission to the Legislature (former Pub. Res. Code, §§ 27200-27201; 27300-27304; 27320).

During the period necessary for preparation of the plan and consideration of the plan and consideration of it by the Legislature, the Commissions were granted broad regulatory controls over proposed developments within the permit area of the coastal zone. Any person who wished to develop property within the zone was required to obtain a permit from the appropriate Regional Commission; any determination by the Regional Commission was thereafter subject to de novo review on appeal by the State Commission. (Former Pub. Res. Code, §§ 27400, 27423.)

14. *Id.*

The 1972 act, by its own terms, expired on December 31, 1976, (former Pub. Res. Code, § 27650). Prior to that time, however, the Commissions had prepared the California Coastal Plan and had submitted it to the California Legislature. The Legislature found that the plan conformed to the requirements of the 1972 legislation (Pub. Res. Code, §30002). The Legislature further concluded that some of the recommendations of the Commissions were appropriate for immediate implementation, that some of them required further study, and that other similar means were appropriate for implementation.

15. *Id.*

coastal land use planning and as final administrative authority over coastal development.

The basic objectives of the Coastal Act are found in a series of legislative findings and declarations that introduce the Act.¹⁶ In general, these findings reflect the Legislature's intention to create a centralized system for reviewing and approving coastal development, guided by the desire to further environmental,¹⁷ recreational,¹⁸ and economic progress.¹⁹ While many findings and declarations emphasize the need to protect natural resources along the coast, others recognize that some development is necessary and desirable²⁰ and that the drive to advance public interests along the coast cannot be used as a pretext to run roughshod over private property owners.²¹

To implement and manage the balanced policies of the Act, the Legislature created a central Coastal Commission²² and gave it broad powers.²³ With regard to the use of private property, the most significant substantive power is the right to grant, or condition, final approval of developments proposed to occur within the "coastal zone."²⁴ This zone is "generally" defined to extend inland 1000 yards from the "mean high tide of the sea."²⁵ In "significant coastal estuarine, habitat, and recreational areas, the zone extends inland to the "first major ridgeline paralleling the

16. §§ 30001-300012.

17. *See id.* §§ 30001(a) (b); 30001.5 (a).

18. *See id.* § 30001.5(c).

19. *See id.* §§ 30001(d); 30001.2.

20. *See id.* § 30001 (d) ("[F]uture developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state and especially to working persons employed within the coast.").

21. The goal of providing "public recreational opportunities" is, for instance, to be pursued consistent with "constitutionally protected rights of private property owners." *Id.* § 30001.5(c). Public access goals must also be advanced "in a reasonable manner that considers the equities and balances the rights of the individual property owner" *Id.* § 30214(b). Finally, no part of the Act may be applied to unconstitutionally take private property:

[T]his division is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor.

See id. § 30010.

22. *See id.* §§ 30310-30319.5.

23. *See id.* § 30330.

24. *See id.* §§ 30610; 30604 (a) (original jurisdiction); §§ 30603; 30604(b) (jurisdiction on appeal from local decision).

25. *See id.* § 30103(a).

sea or five miles from the mean high tideline, whichever is less.”²⁶ In preparing detailed maps of the coastal zone to be incorporated as part of the Act, the Commission has authority to adjust the inland line of the coastal zone up to 100 yards.²⁷ In certain geographical areas, the Act itself painstakingly details the extent of the coastal zone.²⁸ For purposes of appeals to the Commission, the jurisdiction-conferring coastal zone shrinks to the areas “between the sea and the first public road paralleling the sea or within 300 feet of the inland of any beach or the mean high tideline of the sea where there is no beach, whichever is greater.”²⁹

When development—broadly defined to include “the placement or movement of any solid material, discharge of any material or change in density or intensity of land or water use, including the subdivision of land”³⁰—is set to occur in the coastal zone, the Act originally granted the Commission the power to rule, as an initial matter, on its permissibility.³¹ However, the Act provided for a gradual delegation of the initial permitting power to local coastal governments.³² In particular, recognizing the need for “responsiveness to local conditions, accountability, and public accessibility,”³³ the Act requires local coastal governments to create a local coastal program (LCP), including a land use plan designed to reflect the policies of the Act.³⁴ Upon the Commission’s certification that an LCP conforms to the Act, the local plan goes into effect, and coastal development permit applicants must then initially seek approval from relevant local planning agencies, except in areas where the Commission retains its original jurisdiction.³⁵

Until an LCP is in place, most coastal development applicants must seek a permit directly from the Commission.³⁶ But they may also have to obtain an *additional* permit from the local gov-

26. *Id.*

27. *Id.* See also § 30603.1.

28. *Id.* §§ 30150-30174.

29. *Id.* § 30603(a).

30. See *id.* § 30106.

31. An exemption from the requirement to obtain a coastal development permit from the Commission applies to construction of single-family homes on certain, environmentally insensitive and residentially configured lots. See *id.* § 30610.1.

32. See *id.* §§ 30006(d); 30006.5(a).

33. See *id.* § 30004(a).

34. See *id.* §§ 30500; 30512; 30512.1; 30512.2.

35. See *id.* § 30519.

36. See *id.* §§ 30600(c); 30601.

ernment, since the Act grants localities the option of implementing interim permitting procedures prior to certification of its LCP.³⁷ Even after an LCP goes into effect, the Commission has, in many instances, final approval authority over all coastal development. This authority arises from the fact that the Act allows members of the Commission, as well as any “aggrieved person,”³⁸ to appeal a local development decision directly to the Commission.³⁹ If the Commission agrees that such an appeal raises a “substantial issue” as to whether the project conforms to the LCP, or the Act’s “public access policies,” the Commission will hold a hearing addressing the project and, soon after, make a decision without deference to the local government’s own conclusions.⁴⁰

Assuming it has jurisdiction over a development application, as an initial matter or on appeal, the Commission “shall provide for a de novo public hearing” on the application “no later than 49 days after the date on which the application or appeal is filed with the commission.”⁴¹ The Commission must arrive at a decision “within 21 days after the conclusion of the hearing.”⁴² If no action is taken on an appeal within these time limits, the “decision of the local government . . . shall become final, unless the time limit . . . is waived by the applicant.”⁴³

Ultimately, the Commission may deny or approve a permit, based on whether the underlying project is in conformity with the policies of the Act⁴⁴ or, if an LCP is in place, with the policies of

37. *See id.* § 30601.

38. The Act defines an “aggrieved person,” in relevant part, as: any person, who, in person or through a representative, appeared at a public hearing of the commission, local government, or port governing body in connection with the decision or action appealed, or who by other appropriate means prior to a hearing, informed the commission, local government, or port governing body of the nature of his concerns or who for good cause was unable to do either.

See id. § 30801.

39. *See id.* § 30625.

40. *See id.* § 30625.

41. *See id.* § 30621.

42. *See id.* § 30622.

43. *See id.* § 30625(a).

44. *See id.* § 30604(a).

Prior to certification of the local coastal program, a coastal development permit shall be issued if the issuing agency, or the commission on appeal, finds that the proposed development is in conformity with Chapter 3 (commencing with Section 30200) [of the Act] and that the permitted development will not prejudice the ability of the local government to prepare a local coastal program that is in conformity with Chapter 3 (commencing with Section 30200).

Id.

the local coastal plan.⁴⁵ The Commission, and local agencies acting pursuant to a certified LCP, may also “modify” a proposed development by subjecting a permit to “reasonable terms and conditions.”⁴⁶ The Act does not specify the full scope of “reasonable” conditions, though it makes clear that a permitting agency may condition “new”⁴⁷ development upon the dedication of land, and, in certain areas, an “in-lieu” fee, or other requirements designed to secure public beach access.⁴⁸ Other conditions contemplated by the Act include those designed to protect the “scenic and visual qualities of coastal areas,”⁴⁹ and to mitigate the impact of development upon agricultural and other lands.⁵⁰

If the Commission’s Executive Director believes at any time that someone is engaging in, or is about to engage in development in the coastal zone without a coastal development permit, the Director or Commission may issue an “order directing that person . . . to cease and desist.”⁵¹ An executive cease-and-desist order may be “subject to such terms and conditions as the executive director determines are necessary to avoid irreparable injury to any area within the jurisdiction of the commission pending action by the commission” to issue, after public hearing, its own cease-and-desist order.⁵² A commission-issued order may be subject to “such terms and conditions as the commission may determine are necessary to ensure compliance with this division, including immediate removal of any development.”⁵³ Violators of

45. *See id.* § 30604(b). “After certification of the local coastal program, a coastal development permit shall be issued if the issuing agency or the commission on appeal finds that the proposed development is in conformity with the certified local coastal program.”

46. *See id.* §§ 30607; 30625.

47. “New” development generally does not include “[r]eplacement of any structure” where the size of the replacement does not exceed the previous structure by more than 10 percent, “demolition and reconstruction of a single-family residence,” provided, that the size of the reconstructed residence does not exceed the previous residence by more than 10 percent, improvements to existing structures that do not increase the intensity of use, interfere with public access or exceed the increase to the structure size by more than 10 percent; repair of seawalls.” *See id.* § 30211. *See also, id.* § 30610.

48. *See id.* §§ 30212, 30252, 30610.3.

49. *See id.* § 30251.

50. *See id.* § 30171.2.

51. *See id.* § 30809.

52. *See id.* § 30809(c).

53. *Id.* § 30810. The commission may specifically order “restoration” of a site developed without a permit. *See id.* § 30811.

the Coastal Act, especially those that fail to heed the Commission's warnings, may suffer stiff civil penalties.⁵⁴

III.

THE COASTAL COMMISSION IN ACTION: A HISTORY OF ABUSING PRIVATE PROPERTY RIGHTS

The legislature hereby finds and declares that [the Coastal Act] is not intended, and shall not be construed as authorizing the commission . . . or local government . . . to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use without the payment of just compensation therefor.⁵⁵

A review of judicial decisions since the Act went into effect shows that the Commission has often used its substantial permitting and enforcement powers to thwart the private use of land, in conflict with constitutional property rights. The agency has displayed a similar disrespect for private property rights when interpreting other aspects of the Act, including the scope of the Commission's jurisdiction and the nature of the permitting procedure.

A. *The Commission's History of Using Its Permitting Power to Take Private Property for Public Use Without Just Compensation*

No legal concept has provided more trouble for the Coastal Commission, and more hope for property owners, than the constitutional principle that private property shall not "be taken for public use without just compensation,"⁵⁶ a principle incorporated into the Act by Section 30010. This prohibition on takings has provided the primary, and most robust, basis for serious judicial scrutiny of the agency's actions. Yet, because the Commission tends to take the narrowest view of pro-property owner takings decisions, such decisions have not resulted in any meaningful modification of the agency's policies. Judicial invalidation of the Commission's actions on constitutional grounds seems to cause the Commission to hesitate only in pursuing the exact course struck down; actions that are identical in effect, if not in fact, continue. The Commission's unwillingness to submit to the spirit

54. *See id.* §§ 30020, 30821.6, 30822.

55. *Id.* § 30010.

56. U.S. CONST. amend. V.

and force of the prohibition on takings of property is especially pronounced with respect to its policy of exacting public benefits, like public beach access, as a condition of approving a development permit.

1. A Lesson Unlearned: The Goal of Advancing Public Coastal Interests Does Not Justify the Means

Simply stated the regulations and the Commission's conduct in applying them expose the Commission's position that the permit process is to be used as a vehicle for increasing and expanding public access at the expense of private property owners, giving no consideration to whether or not any particular proposed development creates a need for additional access or impairs existing access.⁵⁷

The most famous takings case involving the Coastal Commission is *Nollan v. California Coastal Commission*.⁵⁸ In 1987, the United States Supreme Court resolved this dispute, involving the issue of whether the Commission could condition a development permit on the dedication of a public access easement, in favor of the property owners. The Court held that land use conditions unrelated to the impact of the proposed development amounted to an unconstitutional taking.⁵⁹ Unfortunately, the Commission had demanded dedications of property for public access purposes, without regard for the Takings Clause, for many years before the *Nollan* decision.⁶⁰

One of the first major challenges to the Commission's zealous advancement of public beach access occurred in 1980 in the appropriately named case of *Liberty v. California Coastal Commission*.⁶¹ In *Liberty*, the Commission required a restaurant developer to record a "deed restriction, obligating the applicant and any successor interest to provide free public parking in the parking lot on the project parcel . . . until 5:00 p.m. daily" for the next thirty years.⁶² *Liberty* sued, claiming in part that the Com-

57. *Pacific Legal Found. v. California Coastal Comm'n*, 180 Cal. Rptr. 858, 862 (Cal. Ct. App. 1982), *rev'd on ripeness grounds*, 655 P.2d 306 (Cal. 1982).

58. 483 U.S. 825 (1987). See generally Timothy A. Bittle, *Nollan v. California Coastal Commission: You Can't Always Get What You Want, but Sometimes You Get What You Need*, 15 PEPP. L. REV. 345 (1988).

59. *Nollan*, 483 U.S. at 838-42.

60. *Id.* at 857 (Brennan, J., dissenting). ("At the time of the [Nollans'] permit request, the Commission had [already] conditioned all 43 of the proposals for coastal new development in [the Nollans'] tract on the provision of deed restrictions ensuring lateral access along the shore.")

61. 113 Cal. App. 3d 491 (Cal. Ct. App. 1980).

62. *Id.* at 495.

mission's requirements unconstitutionally took his private property.⁶³ In considering the claim, the California appeals court articulated a relatively strict standard of review:

Where the conditions imposed are not related to the use being made of the property but are imposed because the entity conceives a means of shifting the burden of providing the cost of a public benefit to another not responsible for or only remotely or speculatively benefitting from it, there is an unreasonable exercise of the police power.⁶⁴

The court held that the thirty-year free-parking requirement failed this test because "to go beyond [requiring provision of parking for intended use of property] and require the property owner to provide free parking for the public intending to use the beach and other privately owned restaurants in the area for which ample parking has not been provided is unfair."⁶⁵ It concluded: "The state Commission is here attempting to disguise under the police power its actual exercise of eminent domain [taking private property]. That it cannot do."⁶⁶

Liberty appeared to put a damper on the Commission's desire to require near-perpetual public parking in return for a building permit. But it may have energized the Commission to pursue a policy of compelling permit applicants to dedicate public beach access easements on private property as a condition of permit approval. The scope of this policy was originally enshrined in the Commission's self-created "Public Access Guidelines." These guidelines called for the exaction of public easements from permit applicants in any case where there would be an "intensification of use,"⁶⁷ without concern for the adequacy of existing public access.⁶⁸

In the consolidated 1982 cases of *Pacific Legal Foundation v. California Coastal Commission* and *Jackson v. California Coastal*

63. *Id.* at 498.

64. *Id.* at 502.

65. *Id.* at 504.

66. *Id.*

67. The Guidelines declared, in part, that "[a]ll new development resulting in any intensification of land use generates sufficient burdens on public access to require access conditions in conjunction with that development." *Pacific Legal Found. v. California Coastal Comm'n*, 180 Cal. Rptr. 858, 862 (Cal. Ct. App. 1982), *rev'd* 655 P.2d 306 (Cal. 1982) (quoting Guidelines, Part II(B) at 5).

68. The Guidelines stated, "[a]lthough the question of whether adequate access exists nearby applies to the siting of both lateral and vertical access, the Commission has generally found that existing access along the shoreline is not adequate to serve the public needs" *Id.* (quoting Guidelines, Part III(D)(3) at 17).

Commission, coastal property owners initiated a legal challenge to the Commission's access policies, both as described in the Guidelines and as applied to a specific development.⁶⁹ In *Jackson*, two property owners brought an "as-applied" challenge to the Commission's public access policies after the agency required them to hand over a portion of their property to the state in return for permission to shore up existing seawalls.⁷⁰ As in *Liberty*, the California Court of Appeals stressed that there "must . . . be a reasonable and rational relationship between the use for which the landowner seeks a permit and what the government exacts for granting permission."⁷¹ It agreed with the trial court that there was no rational relationship between the "development" (i.e., placement of rocks) and the condition that the landowners give up beachfront property since the rocks "were below the normal sand level and did not change one iota the configuration of the beach nor impact existing public access."⁷² Faced with the trial court ruling, the Commission abandoned its appeal in *Jackson* and the appellate court awarded attorney's fees to the *Jackson* plaintiffs, an award which was subsequently overturned by the California Supreme Court.⁷³

In the companion case of *Pacific Legal Foundation*, a non-profit, non-partisan public interest organization, whose members included coastal property owners, sued to invalidate the Commission's Access Guidelines. In dramatic fashion, the appellate court held that the agency had exceeded its authority "in a manner that offends the constitutional protection of private property."⁷⁴ Its opinion included a stinging indictment of the Commission and its Guidelines, starting with the Commission's conclusion that any "intensification of use" was sufficient to trigger an access condition:

That is an unwarranted extension of the language of the Act and a rejection of any need for determining the relationship between the development and public access. It is so broad that it could include many types of development which would have nothing to do with access. "Intensification of use" does not necessarily impede existing access nor does it necessarily create a need for additional access. For example, an addition of a bedroom to a family dwelling

69. *Pacific Legal Foundation*, 655 P.2d at 308-09.

70. *Id.* at 309.

71. *Pacific Legal Foundation*, 180 Cal. Rptr. at 865.

72. *Id.* at 864.

73. *Pacific Legal Foundation*, 655 P.2d at 309.

74. *Pacific Legal Foundation*, 180 Cal. Rptr. at 866.

to accommodate a new baby would intensify the land use and might increase the size of a house by more than 10% so as to qualify as “new development,” but it could hardly be said to burden public access to the beach or create a need for additional public access.⁷⁵

The court also criticized the Guidelines for absolving the Commission of the need to carefully consider the adequacy of existing access before imposing an access condition. In the court’s view, this “repeals that portion [of the Act] which specifically says that no access conditions should be imposed where adequate nearby access exists, and instead declares by fiat that no adequate nearby access exists any place in the zone.”⁷⁶

Finally, based on its review of the Guidelines, the appeals court strongly denounced the Commission’s “unconcealed bias against the constitutionally protected right of private property,” explaining that

Rarely, if ever, have we had occasion to note *such an overt manifestation of bias and the use of such pejorative language in the official writings of an agency of the State of California*. By [portions of its Guidelines]⁷⁷ the Commission has simply declared that the very existence of privately owned residences along the shore line is an anathema to the public interest and has cast the private property owner in the role of the “heavy” in every scenario. The regulation is in direct contradiction with the spirit of Public Resources Code section 30001(d) and the stated legislative policy.⁷⁸

The state supreme court later held Pacific Legal Foundation’s challenge to the Guidelines barred on ripeness grounds,⁷⁹ thus allowing the Commission to put off significant revisions to its policies.

The legal challenges continued to mount as the Commission continued demanding private property for public access at almost every permitting opportunity. In a spate of decisions between

75. *Id.* at 862.

76. *Id.* at 863.

77. The portion of the Guidelines criticized by the court stated:

Private development imposes an impediment to or burden on the public’s ability to gain access to or along the shoreline, either incrementally or cumulatively in the following ways: . . . discourages them from visiting the shoreline in the first place because of physical proximity of development ; . . . creates use conflicts in which landowners harass and intimidate the public and seek to prevent them from using tidelands

Id. at 863.

78. *Id.* (emphasis added).

79. See *Pacific Legal Foundation*, 655 P.2d at 313-17.

1982 and 1986, California appellate courts upheld the imposition of these conditions, overturning trial court judgments holding such conditions beyond the Commission's statutory authority and unconstitutional as uncompensated takings.⁸⁰ Several of these decisions are especially noteworthy for illustrating how far the Commission has been willing to go, and how creative it has been, in foisting the burden of providing public beach access onto the shoulders of private property owners.

In the 1985 case of *Grupe v. California Coastal Commission*, the Commission conditioned a permit to build a single-family beachfront home on dedication of a public access and recreational easement over the owner's property.⁸¹ The home was proposed in an area that hardly lacked adequate beach access; it was bordered on both the north and south by state beaches.⁸² Nor did the home appear to cause any harm to existing access; it was within a gated community already closed to the public.⁸³ None of this deterred the Commission from demanding the easement, which would have covered two-thirds of the homeowners parcel.⁸⁴ The trial court invalidated the easement condition in part because it was found to constitute an unconstitutional taking of property.⁸⁵

On appeal, the California Court of Appeals reversed the trial court. The appellate court agreed that an exaction of private property is valid only if it is reasonably related to needs created by the subject development.⁸⁶ But in the court's view, under this standard, "there need only be an *indirect relationship* between a

80. See *Antoine v. California Coastal Comm'n*, 8 Cal. App. 4th 641, 648 (1992) (requiring public access easement on top of seawall because wall "may" have been partially constructed on public tidelands); *Whaler's Village Club v. California Coastal Commission*, 173 Cal. App. 3d 240 (1985) (reversing trial court decision that prevented Commission from requiring dedication of property for public beach access as a permit condition); *Grupe v. California Coastal Commission*, 166 Cal. App. 3d 148 (1985) reversing trial court decision concluding that public beach access condition caused an unconstitutional taking; *Remmenga v. California Coastal Commission*, 163 Cal. App. 3d 623 (1985) (reversing trial court decision barring Commission from requiring permit applicant to pay a \$5,000 fee, in lieu of dedicating land, for public access); *Georgia-Pacific Corp. v. California Coastal Comm'n*, 132 Cal. App. 3d 678, 688-89 (Cal. Ct. App. 1982) (reversing trial court judgment that imposition of beach access condition on lumber facility was statutorily unwarranted and amounted to an unconstitutional taking of property).

81. 66 Cal. App. 3d 148, 156 (Cal. Ct. App. 1985).

82. *Id.* at 155.

83. *Id.*

84. *Id.* at 156.

85. *Id.* at 158-59.

86. *Id.* at 163-64.

proposed exaction and a need to which the development contributes.”⁸⁷ This meant that the court could “consider the overall impact of a particular development and *others like it*, [and] the needs of the public now and in the future”⁸⁸ The condition in *Grupe* passed judicial scrutiny under this “guilt by association” standard, even if the Grupe’s home did not itself adversely affect access, because:

[The Grupe’s] beach front home is one more brick in the wall separating the people of California from the state’s tidelands. Although [the] home has not created the need for access to the tidelands fronting its property, it is one small project among a myriad of others which together do severely limit public access to the tidelands and beaches of the state and therefore collectively create a need for public access.⁸⁹

In other words, since the Grupe’s home was a “development” along the beach and development *generally* causes a need for public access, the Commission could single out the Grupes to provide property for such access.

In *Remmenga v. California Coastal Commission*, the Commission tried its hand at forcing a Santa Barbara County permit applicant to pay an “in-lieu” public access fee, designed to facilitate acquisition of real property for public beach access purposes.⁹⁰ Initially, the Commission attempted to impose its traditional public beach access easement condition on the Hollister Ranch permit applicant.⁹¹ It did so despite the fact that there was no way the Remmenga’s proposed home would harm public access since there is no public access into the Ranch or its beaches (other than walking at low-tide or by boat) and the Remmenga’s home was to be built on a lot *one mile* from the beach.⁹²

When the Remmengas challenged the traditional easement condition under these circumstances, the trial court issued a favorable ruling requiring the commission to “set aside the decision and reconsider its action.”⁹³ In response, the state Legislature added a new section to the Coastal Act which required permit applicants in Hollister Ranch to pay a fee of \$5000 to the State Coastal Conservancy “in lieu of dedication of a right of way

87. *Id.* at 166 (emphasis added).

88. *Id.* (emphasis added).

89. *Id.* at 167.

90. 163 Cal. App. 3d 623, 626 (Cal. Ct. App. 1985).

91. *Id.*

92. *Id.*

93. *Id.*

to the coast.”⁹⁴ The Remmengas asserted that, when applied to them, the fee requirement was just as invalid as a requirement that they dedicate real property for public access purposes.⁹⁵

Relying on the same type of rationale applied in *Grupe*, the California Court of Appeals disagreed. It ruled that “even if an individual project does not create an immediate need for a compensating accessway, one may be required of it if its effect together with the cumulative impact of similar projects would in the future create or increase the need for a system of such compensating accessways.”⁹⁶ According to the court, the Commission could extract money from the Remmengas simply because it was *possible* that development in Hollister Ranch might *someday* harm public access:

Petitioner’s proposed improvement may constitute only a small impediment to public access, but when viewed as part of the entire subdivision as it develops in the future the proposed improvement may well be a link in the chain barring access or making access more difficult and costly.⁹⁷

By 1986, the deferential standard of review applied in *Remmenga* and *Grupe* was quickly overcoming the standard articulated in *Liberty* and *Pacific Legal Foundation* as the “takings” test for land use exactions in California. This trend soon crumbled, however, under the weight of the United States Supreme Court’s decision in *Nollan v. California Coastal Commission*. *Nollan* arose in the early 1980s when James and Marilyn Nollan applied to the Commission to replace a dilapidated 504 square-foot beach “bungalow”—one that had fallen into such disrepair that it could no longer be rented out—⁹⁸ with a new “three-bedroom house in keeping with the rest of the neighborhood.”⁹⁹ True to form, the Commission informed the Nollans that they could have the necessary permits only if they agreed to dedicate a public access easement, running parallel to the seashore, across the dry sand area of their lot.¹⁰⁰ The Nollans turned to the courts in an effort to bar the Commission from imposing the dedication condition and to have the condition declared a taking without

94. CAL. PUB. RES. CODE § 30610.3.

95. *Remmenga*, 163 Cal. App. 3d at 627.

96. *Id.* at 628.

97. *Id.* at 639.

98. *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 827 (1987).

99. *Id.* at 828-29.

100. *Id.* at 828-29.

just compensation in violation of the Takings Clause of the Fifth Amendment.

Upon reviewing the case, the California Superior Court ordered the Commission to hold a hearing to determine if the Nollan's proposed house would have a direct adverse impact on public beach access.¹⁰¹ Following such a hearing, the Commission supported the challenged easement condition with findings that the Nollan's house "would increase blockage of the view of the ocean, thus contributing to "a 'wall' of residential structures" that would prevent the public "psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit." The Commission also found that the house was likely to jeopardize public access by increasing "private use of the shoreline."¹⁰²

The trial court was unswayed; it concluded that the access condition could not be sustained because there was still no evidence that the house would actually have a "direct or cumulative burden" on beach access.¹⁰³ After the California Appeals Court reversed on appeal, holding in part that the dedication requirement did not amount to a taking,¹⁰⁴ and the California Supreme Court refused to hear the case, the Nollans turned to the United States Supreme Court.¹⁰⁵

In its 1987 opinion, the Supreme Court adopted a constitutional test for land use conditions that recalled the stricter standard applied in *Liberty*. Specifically, the Court concluded that a land use condition "substantially advances legitimate state interests," and thus passes constitutional muster, only when it is *directly related* to the development impact sought to be addressed. It ultimately held that the lateral beach access easement demanded of the Nollans failed the test because it did not address the identified impact of their home:

It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 830.

105. *Id.* at 831.

to remedy any additional congestion on them caused by construction of the Nollans' new house.¹⁰⁶

Absent a relationship between the impact of the Nollan's home and the access condition, the Commission's actions could not be treated as a proper exercise of the police power.¹⁰⁷ The Commission "was free to advance" public access along the coast, but if it wanted "an easement across the Nollans' property, it must pay for it."¹⁰⁸

Nollan established that a direct connection must exist between a development condition and a legitimate public problem that *arises from the development*.¹⁰⁹ The Court left unanswered the question of just how close a connection there must be between development condition and development impact, since the beachfront easement demanded of the Nollans failed to meet even the loosest standard.¹¹⁰ In the 1994 case of *Dolan v. City of Tigard*,¹¹¹ the Court answered the question of the required degree of connection by declaring that "*rough proportionality* best encapsulates what we hold to be the requirement of the Fifth Amendment."¹¹²

In light of *Nollan*, state cases such as *Grupe* which uphold real property exactions under a deferential standard must be considered wrongly decided.¹¹³ *Remmenga* is also likely incorrect, even though it concerned a demand for money, rather than for real property. *Nollan* arose largely from a concern that allowing gov-

106. *Id.* at 838-39 (emphasis added).

107. *Id.* at 837.

108. *Id.* at 841-42.

109. *Id.* at 838-39. In sum, the *Nollan* nexus test hinges the constitutionality of land use conditions such as those imposed by the Commission upon: (1) a legitimate state interest or purpose; (2) a connection between that interest and the land use condition chosen to address it; and (3) a direct connection between the impact of *the proposed development* and interest sought to be advanced. See *id.* at 838-39. In this regard, it is important to remember that the Court struck the easement condition imposed on the Nollans in part because it did not reduce "any obstacles to viewing the beach created by the new house." *Id.* at 838. See *Burton v. Clark County*, 958 P.2d 343 (Wash. Ct. App. 1998).

110. *Id.* at 838. The Court stated, "[W]e find that this case does not meet even the most untailored standards." *Id.*

111. 512 U.S. 374 (1994).

112. *Id.* at 391 (emphasis added).

113. See *Surfside Colony, Ltd. v. California Coastal Comm'n*, 226 Cal. App. 3d 1260 (Cal. Ct. App. 1991). In striking down an access condition for lack of an essential nexus, the *Surfside* court recognized that "*Nollan* . . . changed the standard of constitutional review in takings cases. Whether the new standard be described as 'substantial relationship,' or 'heightened scrutiny,' it is clear that the rational basis test . . . no longer controls." *Id.* at 1270.

ernment to impose a condition not directly linked to the impact of development was to allow an “out-and-out plan of extortion.”¹¹⁴ As such, *Nollan* addressed a suspect type of *behavior*, i.e., exacting property for the public benefit without evidence that the development causes the need for the exaction, not a suspect type of condition.¹¹⁵ Accordingly, *Nollan’s* rationale, and the nexus test arising from that rationale, should apply if the Commission decides it would like money, rather than real property, to advance public access goals.¹¹⁶

Nevertheless, some state courts have declared that *Nollan’s* heightened scrutiny should not apply to monetary fees, as long as those fees are imposed under generally applicable legislation,¹¹⁷ rather than through a discretionary process. This is an unnecessary distinction. Nothing in the Supreme Court’s decisions mandates a per se exception for legislative or generally applicable exactions. Indeed, though ultimately imposed in a discretionary context, the exaction struck down in *Dolan* arose from a legislatively-enacted code that required *all* floodplain developers to dedicate “sufficient” land for open space and for a pedestrian path or bikeway.¹¹⁸ And *Nollan* struck down an exaction imposed on an ad-hoc basis, but authorized by the longstanding policy of the California Coastal Commission, taken under the Public Resources Code, to require almost *all* beachfront developers to dedicate land along the beach for public access purposes.¹¹⁹ Given this factual background, any language in *Dolan* suggesting a distinction between legislative and discretionary

114. *Nollan*, 483 U.S. at 837.

115. See Ehrlich v. City of Culver City, 911 P.2d 429, 444 (Cal. 1996) (“The essential nexus test is, in short, a ‘means-ends’ equation, intended to limit the government’s bargaining mobility in imposing permit conditions on individual property owners – whether they consist of possessory dedications or the exaction of cash payments— that because they appear to lack any evident connection to the public impact of the proposed land use, may conceal an illegitimate demand— may in other words, amount to ‘out-and-out extortion.’”) (first emphasis added).

116. *Id.*; San Remo Hotel v. City and County of San Francisco, 41 P.3d 87 (Cal. 2002) (“fees do present some danger of improper leveraging”).

117. See generally, J. David Breemer, *The Evolution of the “Essential Nexus”*: How State and Federal Courts Have Applied *Nollan* and *Dolan* and Where They Should Go From Here, 59 WASH. & LEE L. REV. 373, 390-91 (2002) (reviewing cases adhering to a distinction between legislatively-enacted exactions and those imposed in an adjudicative process).

118. *Dolan v. City of Tigard*, 512 U.S. 374, 379 (1994).

119. *Nollan v. California Coastal Commission*, 223 Cal. Rptr. 28, 31 (Cal. Ct. App. 1986) (finding that the *California Coastal Act of 1976* required coastal development permits to be conditioned on a grant of access).

land use decisions is best understood as pointing to a distinction between exactions and general zoning laws, not to distinctions between types of exactions.¹²⁰

Even if an exaction could be reliably identified as a “legislative” or “adjudicative” decision, this classification should have little relevance for purposes of constitutional takings analysis. Exactions have become subject to heightened constitutional review because of their impact on the property owner when not properly tailored to development. An exaction is either properly tailored to the impact of development and therefore a burden which the property owner should bear alone or it is not. The analysis does not change because the government uses “a different bureaucratic vehicle when expropriating its citizens’ property.”¹²¹

California courts have gravitated toward the legislative/adjudicative distinction, despite its considerable flaws.¹²² But no post-*Nollan* decision has considered whether *Nollan* applies to a legislatively-adopted fee like the one imposed on Hollister Ranch by the Coastal Act in *Remmenga*. That is, no decision has considered the constitutionality of a fee designed to achieve the exact same public access goals, with as little connection to the subject

120. 512 U.S. at 385.

121. *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 389-92 (Ill. Ct. App. 1995). For other decisions rejecting or criticizing the legislative exaction exception to *Nollan* and *Dolan*, see *Schultz v. City of Grants Pass*, 884 P.2d 569, 572-73 (Or. Ct. App. 1994); *J.C. Reeves Corp. v. Clackamas County*, 887 P.2d 360, 365 n.1 (Or. Ct. App. 1994) (“A condition on the development of property is not converted into something other than that by reason of legislation that requires it to be imposed.”). See also *Trimen Development Co. v. King County*, 877 P.2d 187, 189-90 (1994).

In any case, the generally applicable/discretionary distinction is an unwieldy and illogical method for determining the takings standard of review in the exaction context. The fact is that land use conditions are typically imposed pursuant to both generally applicable legislation and a discretionary decision, as *Nollan* and *Dolan* illustrate. Consequently, it will be very difficult for a court to accurately and persuasively label an exaction as either adjudicative/discretionary or legislative/generally applicable. See Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. REV. 242, 257-67 (2000) (concluding that all methods of applying the distinction “are difficult to use in practice”). The classification of exactions in this manner will typically reveal more about the subjective predisposition of the court than it will about the true origination of the exaction. Compare *Board of County Commissioners v. Karp*, 662 So. 2d 718, 720 (Fla. Dist. Ct. App. 1995) (rezoning of one out of 48 parcels held to be a legislative act) with *Battaglia Properties, Ltd. v. Florida Land & Water Adjudicatory Comm’n*, 629 So. 2d 161, 165 (Fla. Dist. Ct. App. 1993) (zoning of 120-acre parcel held to be adjudicatory in nature).

122. See *San Remo Hotel*, 41 P.3d at 105-107.

development, as the condition stuck down in *Nollan*. It would take an incredibly strained reading of that opinion to conclude that it permits the exaction of fees facilitating the forced purchase of public access easements that could not be directly exacted, consistent with the Constitution, simply because the fees were set by the California legislature.

Nollan should, therefore, have broken like a tidal wave over the Commission and its beach access policies. But, notwithstanding the claims of some of its officers,¹²³ the Commission has treated the Supreme Court's decision more like a temporary irritant, rather than a binding command to respect property rights. The Commission has made no attempt to secure compensation for those pre-*Nollan* land use applicants on whom it imposed access conditions now recognizable as unconstitutional under that decision. Instead, the Commission has acted vigorously and successfully to keep all pre-*Nollan* exactions in place.¹²⁴

While the post-*Nollan* Commission appears to proceed somewhat more cautiously in considering dedications of access for new development, it continues to sporadically impose these conditions without a direct connection to the impact of development, in violation of *Nollan*.¹²⁵ The Commission is more brazen when it comes to imposing conditions not involving the dedication of private property, though there is, as we have seen, little reason for believing that *Nollan* and *Dolan* are strictly limited to this context. The Commission's reluctance to follow *Nollan* and *Dolan* is disturbing because these decisions strike a fair compromise between private rights and the public desire to mitigate the negative impacts of development, provide standards easily applied in

123. See Dennis Pfaff, *The Coast Master*, CALIFORNIA LAWYER, Jan. 1997, at 38. (Executive Director Peter Douglas "estimates that as a result of *Nollan* and other takings cases, two-thirds of the projects that would have been required to provide beach access are now exempted from doing so.")

124. See e.g., Kenneth R. Weiss, *The State Not All Quiet on the Beachfront Coastal Access: News Publisher Settles One Legal Battle, But She and Others Still Aim to Stop Public From Using Shore Below Seaside Estates*, L. A. TIMES (July 7, 2002) at B8. (Commission enforces pre-*Nollan* easement exaction and settles dispute after payment of \$460,000 in fines, which Commission intends to use to purchase private property); *Daniel v. County of Santa Barbara*, 288 F.3d 375 (2002) (Commission argues as amicus for enforcement of pre-*Nollan* dedication requirement imposed by the Commission and enforced by the County of Santa Barbara).

125. See *Surfside Colony*, 226 Cal. App. 3d 1260 (striking down access dedication condition under *Nollan*). See also *Antoine v. California Coastal Comm'n*, 8 Cal. App. 641 (Cal. Ct. App. 1992) (public access easement required as a condition of a seawall intended to be built wholly on private property).

the development process, and are part of the established constitutional fabric.¹²⁶

2. The Commission's History of Denying the Beneficial Private Use of Land and Interfering with the Land Use Expectations of Property Owners

In 1977, Kenneth E. Healing purchased a 2.5 acre lot in the Santa Monica Mountains, overlooking Tuna Canyon and the Pacific Ocean. What he had in mind was building a modest, three-bedroom home for his family. What he got [from the Commission] was a long-term nightmare.¹²⁷

The Constitution imposes limitations on the government's power to deny or interfere with the use of property as well as on its power to condition approval of property use. The right to make some economically viable use of private property or obtain compensation is established in several United States Supreme Court decisions, the most famous of which is *Lucas v. South Carolina Coastal Council*.¹²⁸ In *Lucas*, the Court adopted a rule that previous decisions strongly implied: a per se taking occurs when the government imposes land use restrictions that prevent all economically beneficial use of private property.¹²⁹

When the *Lucas* rule applies, the government owes compensation regardless of the public purposes advanced in support of the challenged land use restriction.¹³⁰ *Lucas* can be avoided if the

126. See generally, Fred P. Bosselman, *Dolan Works in Takings Sides on Takings Issues* (Thomes E. Roberts ed. 2002), 345 (“[T]he so-called Dolan test should be applied to all forms of development exactions. My rationale is simple: The test is logical and it works.”).

127. 8 Cal. App. at 760.

128. 505 U.S. 1003 (1992).

129. *Id.* at 1019. Writing for the majority, Justice Scalia reviewed the Court's previous takings cases and concluded that two categories of regulatory action had been identified as resulting in a taking without regard to the “public interest advanced in support of the restraint.” The first of these per se takings categories included cases where the government used its regulatory power to physically invade or occupy private property or authorize third parties to do so. The second consisted of regulations that “denied all economically beneficial or productive use of land.” *Id.* at 1015-17. Suggesting that a regulatory deprivation of productive use is the equivalent, from the landowner's point of view, of a physical occupation, Scalia concluded that “when the owner of real property has been called upon to sacrifice all economically beneficial use in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.” *Id.* at 1019. For general discussion of the nature of *Lucas*' “denial of all economically beneficial use” rule, see J. David Breemer, *Of Nominal Value: The Impact of Tahoe-Sierra on Lucas and the Fundamental Right to Use Private Property*, 33 ELR 10331 (May 2003).

130. *Id.* at 1015.

government approves some property use, but this does not necessarily absolve the government of the duty to compensate. Under Supreme Court precedent, interference with a property owner's "investment-backed expectations" and significant diminution of property value may also trigger compensation, even when the government denies less than all economically beneficial use of property.¹³¹

Although the Supreme Court's decisions establish constitutional restraints on the zealous advancement of public purposes in the land use context, the Commission has often behaved as if such restraints do not apply to it. Even modest proposals to make use of property have been rejected, without compensation, when brought to the Commission. The case of *Healing v. California Coastal Commission* aptly illustrates.¹³²

Healing wanted to build a three-bedroom home on a two and a half acre parcel of property near Santa Monica, California. The property was surrounded by established roadways and three existing homes. Nevertheless, Healing was told that the Commission would not allow him to build because his property was in an "environmentally sensitive habitat area" (ESHA).¹³³ Subsequent changes in the local land use program extracted Healing's lot from the ESHA, while placing it in a "Significant Watershed Area" (SWA). This change appeared to open the door to development¹³⁴ and Healing accordingly applied for a permit.¹³⁵ Because the local land use program had not been officially certified, the Commission exercised jurisdiction over the application.¹³⁶

In considering the application, the Commission raised concerns that approval of Healing's plans would interfere with certification of the local program.¹³⁷ The concerns focused on the

131. *Lucas* indicated that only well-established common law limitations on the nature of property, like the principle that there is no right to build or maintain a nuisance, may allow the government to escape the duty to compensate when it prevents all economic use. *Id.* at 1029-31. See generally, David L. Callies and J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis)Use of Investment-Backed Expectations*, 36 VAL. U. L. REV. 339 (2002).

132. 27 Cal. Rptr. 2d 758 (Cal. Ct. App. 1994). See generally, Sharon L. Browne, *Administrative Mandamus as a Prerequisite to Inverse Condemnation: "Healing" California's Confused Takings Law*, 22 PEPP. L. REV. 99 (1994).

133. 27 Cal. Rptr. at 760-61.

134. *Id.* at 761.

135. *Id.* at 761.

136. *Id.*

137. *Id.*

local program's proposed requirement that a local Environmental Review Board (ERB) give the Commission recommendations prior to development within a SWA.¹³⁸ In Healing's case, there had been no ERB recommendation because the ERB had not been created. The Commission concluded that, in the absence of such recommendation, Commission approval of the project *might* prejudice the locality's effort to create a certified LCP.¹³⁹ The Commission therefore refused to act on Healing's application.

Subsequently, a court order directed the County to create the ERB.¹⁴⁰ The Commission responded with new findings supporting an assertion that it still could not approve Healing's application because it still did not know whether approval of Healing's home would prejudice the local LCP effort. This time, the Commission found uncertainty in the lack of any indication that the local ERB was actually operating or that Healing would take his application to that entity.¹⁴¹ Stranded in a state of administrative limbo, the practical effect of which was to prevent the use of his land, Healing sued, asking for an order commanding the issuance of his permit or the provision of just compensation for the loss of all economically beneficial use of his property.¹⁴²

In court, the Commission contended that "it may never" be able to make a decision on Healing's application until final certification of the local program and that the court itself could not rule until the Commission finally acted on Healing's application.¹⁴³ When the California Appeals Court heard Healing's case, it expressed disbelief and disgust with the Commission's contentions and indeed, its entire course of action:

The County has been trying since 1982 to obtain certification of its LCP, without success. Meanwhile, along comes poor Healing who, as directed by the Coastal Act, applies to the Coastal Commission for a permit to build his house, only to be told by the Commission that, because the Commission has not approved the County's LCP, the Commission can't say one way or the other whether Healing's house "could" affect the County's ability to obtain that certification and, as far as the Commission is concerned, its failure to act one way or the other means there has been no denial of a permit

138. *Id.*

139. *Id.* at 761-62; 763-64.

140. *Id.* at 762.

141. *Id.* at 762-63.

142. *Id.* at 762.

143. *Id.* at 763-64.

which, in turn, means Healing's complaints are not "ripe" for judicial review—and may never be so.¹⁴⁴

The court summed up its incredulity at the CCC's position in this way:

It is in the nature of our work that we see many virtuoso performances in the theatres of bureaucracy but we confess a sort of perverse admiration for the Commission's role in this case. It has soared beyond both the ridiculous and the sublime and presented a scenario sufficiently extraordinary to relieve us of any obligation to explain why we are reversing the judgment on Healing's mandate petition. To state the Coastal Commission's position is to demonstrate its absurdity.¹⁴⁵

Clearly disturbed by the Commission's attitude toward "poor Healing," the court ordered the agency to promptly process Healing's application by seeking ERB review or, if the ERB still did not exist, by making an up or down decision on his application without regard for the local program.¹⁴⁶ The court also allowed a full trial on Healing's takings claim to go forward, rejecting as "inadequate" the Commission's position that a takings claim had to be litigated as part of the mandate action, and thus on the basis of an administrative record over which the Commission had control.¹⁴⁷

Healing is hardly an anomaly. In case after case, the Commission has found a way to prevent the reasonable use of established private property interests.¹⁴⁸ Typically, environmental concerns

144. *Id.* at 764.

145. *Id.*

146. *Id.* at 746. The court stated:

Healing's petition for a writ of mandate should have been granted, with directions to the Commission to refer Healing's permit application to the ERB for the ERB's prompt review and recommendations or, if there is still no ERB in existence, to disregard the County's proposed LCP on the ground the County has abandoned any intent it might once have had to become a permitting authority.

Id.

147. *Id.* at 765. The court conceived the issue as whether a trial court can determine taking liability based upon an administrative record created under circumstances where, as the Commission concedes, witnesses are not sworn, testimony is not presented by means of direct or cross-examination but rather by narrative statements, and the Commission does not have the authority to issue subpoenas or compel anyone to attend its hearing." *Id.* It answered in the negative: "the cases relied on by the Commission [do] not support the Commission's position that an administrative mandate hearing is a satisfactory substitute for a trial.

Id.

148. *See, e.g., Beck v. California Coastal Commission*, 479 F. Supp. 392 (C.D. CA. 1979) (Commission grants permit for a home, and several time extensions, but ulti-

provide the official justification for such decisions. But, as *Healing* illustrates, there is often a subtext to these cases suggesting that the Commission is also driven by a desire to create precedents that expand its powers to control the private use of coastal land.

The same dynamics are evident in the Commission's history of ignoring the reasonable land use expectations of coastal landowners. It is well-recognized that, at a minimum, a landowner obtains reasonable and protected development expectations when that owner has secured a vested right to a particular project by acquiring official development approval or other assurances.¹⁴⁹ Three examples from case law show that the Commis-

mately denies both a necessary time extension and a new permit application); *Buckley v. California Coastal Commission*, 68 Cal. App. 4th 178, 188-90 (Cal. Ct. App. 1998) (Coastal Commission unlawfully asserts jurisdiction over exempted lot to deny single-family residence); *Lechuza Villas West v. California Coastal Commission*, 60 Cal. App. 4th 218, 224-25 (Cal. Ct. App. 1997) (Commission denies permission to build homes on "17 legally-subdivided contiguous lots"); *Maya Del Mar v. California Coastal Commission*, 152 Cal. App. 3d 49, 51 (Cal. Ct. App. 1984) (Commission denies building permit for lot of less than one acre in part because local coastal program required a minimum of one acre). See also *Mills v. City of Malibu*, 75 Cal. App. 4th 249, 253 (Cal. Ct. App. 1999) (city submits local land use plan to Commission with finding that 51 acres of private land near ocean was ideally suited for development as a "visitor-serving commercial" use, Commission hinges approval on designation of same private land for "conservation" uses); *Patrick Media Group, Inc. v. California Coastal Commission*, 11 Cal. Rptr. 824 (Cal. Ct. App. 1992); *Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal. App. 3d 484, 492 n.3 (Cal. Ct. App. 1982) (Coastal Commission files amicus brief on behalf of County supporting denial of all use of seventy acres of larger parcel of private property).

In *Patrick Media*, the Commission approved a development permit upon the condition that the applicant remove three off-site advertising structures. The structures had, however, already been leased to a third party, *Patrick Media*. *Id.* at 826. Somehow, the Commission failed to give the company any notice of the pending action affecting its interests or of the Commission's final decision. *Id.* at 826-28. When *Patrick Media* found out it was losing its leasehold due to the Commission's requirements, it presented a claim for compensation to the CCC under a state law that specifically required compensation whenever an existing advertising structure was banned. *Id.* at 828. The Commission told *Patrick Media* to take its complaint to the permit applicant/lessor and later fought tenaciously to avoid paying a little over \$34,500 in compensation for terminating *Patrick Media's* lease. *Id.* at 600-01.

149. See Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215, 237-38 (1995) ("A landowner's expectations are investment-backed and reasonable when he substantially proceeds in good faith after government approval of his development. Government action creates a vested right in property in this situation and, like a property right privately reserved, courts should protect it as a landowner's investment-backed expectation."). For further, in-depth treatment of the "investment-backed expectations" doctrine, see R.S. Radford & J. David Breemer, *Great Expectations: Will Palazzolo v. Rhode Island Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L. J. 449 (2001).

sion is unwilling to accept these principles when they limit its power to control coastal land use.

In *Pardee Construction Co. v. California Coastal Commission*, a construction company gained development approval before enactment of the 1972 Coastal Act and thus was exempt from its terms.¹⁵⁰ When development slowed, forcing the company to seek an extension of its exemption, the Commission tried to enforce self-created regulations that would have required the company to start the permit process all over.¹⁵¹ The California Court of Appeals refused to go along, concluding that the company had a vested right to proceed with development, a right “in the nature of a property right . . . rooted in the constitution,” and that the Commission could not retroactively destroy such rights.¹⁵²

Soon after *Pardee*, the court in *Stanson v. San Diego Coast Regional Commission* found that a vested property right prevented the Commission from barring construction of a restaurant after it told the owner that no permit was necessary, and the owner had acquired local approval and had completed 90% of the restaurant.¹⁵³ More recently, in *Monterey Sand Co. v. California Coastal Commission*, the Commission unsuccessfully tried to strong-arm a property owner into applying for a coastal permit to continue extracting sand from property that had been leased by the state to the owner for that very purpose a full decade before the Coastal Act became effective.¹⁵⁴

150. 157 Cal. Rptr. 184, 185-86 (Cal. Ct. App. 1979). See also *California Coastal Comm'n v. Alves*, 222 Cal. Rptr. 572 (Cal. Ct. App. 1986). In *Alves*, the Commission similarly sought to halt residential construction on private lots subdivided and approved for such development before enactment of the Coastal Act. Indeed, the Commission sought

civil fines in the amount of \$10,000 from each [property owner], additional civil fines for intentional violations of the Act, and also requested that an injunction issue: (1) restraining further construction or sale of structures on the property; (2) requiring removal of the partially completed house on the property; (3) restraining the sale of any of the lots; and (4) requiring recombination of the subdivided lots into a single 105-acre parcel.”

Id. at 579-80. Implicitly recognizing that enforcement of the Act under these circumstances would destroy the landowners' investment-backed expectations, the California Court of Appeals rejected the Commission's position.*Id.*

151. *Id.* at 186-87.

152. *Id.* at 189.

153. 161 Cal. Rptr. 392 (Cal. Ct. App. 1980).

154. 191 Cal. App. 3d 169 (Cal. Ct. App. 1987).

3. The Commission's History of Using Enforcement Powers to Solidify Its Hold on Coastal Land and to Extract Concessions from Property Owners

The Commission has also used its enforcement program to eradicate private land use expectations developed without the Commission's blessing. It is easy for property owners to engage in regulated activity without knowing they need a coastal development permit because the Act defines "development" as the placement of any solid or gaseous object. Regardless of whether there was an intent to violate the Coastal Act, unpermitted activity triggers the Commission's enforcement authority.¹⁵⁵ The Commission may then issue a cease-and-desist order, require the violator to return property to its pre-developed state, impose conditions ostensibly designed to mitigate the impact of the "development," and finally, seek judicially-imposed civil penalties.¹⁵⁶

The Commission gained these broad enforcement powers in the early 1990s, and it has zealously applied its authority ever since.¹⁵⁷ Although the Commission's own publications suggest that its enforcement program targets egregious violations of the Coastal Act, outside evidence suggests instead that it has used its expanded authority and cadre of coastal troopers to go after even the smallest activity on private land. The unsuspecting landowner, whether large or small, is typically threatened with severe penalties unless a retroactive permit settling the issue is obtained from the Commission,¹⁵⁸ a process that requires the permit applicant to surrender further property rights or offer other concessions in return for the Commission's approval.

The treatment of Topanga Canyon horse rancher Patricia Moore illustrates the typical course of the Commission's enforcement program.¹⁵⁹ Moore wanted a lot-line adjustment altering

155. "Between 1996 and 1999, the Commission's open violation caseload increased by 96%, creating a need for additional staff. The program was expanded in 2000, and the number of permanent enforcement staff positions was increased from 5 to 14." See CAL. PUB. RES. CODE §§ 30800-30812. See generally Philip J. Hess, *Citizen Enforcement Suits Under the California Coastal Act*, 24-DEC. L.A. LAW 17 (Dec. 2001).

156. See CAL. PUB. RES. CODE §§ 30800-30812 (West 1996).

157. CALIFORNIA COASTAL COMMISSION, ENFORCEMENT PROGRAM PROGRESS REPORT, 2 Mar. 2003 available at <http://www.coastal.ca.gov/programs.html>.

158. See CAL. CODE REGS. tit. 14, § 13055(b) (2004) (providing for issuance of after-the-fact permit to resolve violations).

159. See Bob Pool, *Horse Owner Bucks at Oak Plan Land: Rancher Resists Coastal Panel's Call For Her to Fence Off the Trees to Protect Their Roots. She Says the Animals Do No Harm*, L. A. TIMES, Aug. 11, 2001, at B1.

the line between her eight-acre parcel of land and a parcel owned by a neighbor, but the Commission indicated it would refuse to allow it.¹⁶⁰ This prompted her to sell the land to the neighbor with the intent to lease it back for grazing purposes.¹⁶¹ When members of the Commission's staff dropped by to check on the arrangement, they discovered that Moore had erected a corral fence on her property without a permit. They advised her to seek one.¹⁶²

Upon submission of a retroactive permit application, the Commission agreed to issue the permit only if she built fences around "all oak trees on her sprawling hillside pastureland."¹⁶³ Horses were incompatible with oaks, according to the Commission, because the animals might stand on their roots and eat the bark.¹⁶⁴ Moore and other area ranch owners were outraged with the notion that "Your horse can't stand under an oak tree," since "[t]hat's what horses do."¹⁶⁵ Indeed, horses and other livestock had apparently been quartered on Moore's property for over a century and the oaks, many of which predated that period, had managed to survive the feared equestrian onslaught.¹⁶⁶ Nevertheless, the Commission "want[ed] horses removed from oak tree areas," beginning with the areas on Moore's property.¹⁶⁷ But Moore balked, withdrew her retroactive permit application and dared the Commission to impose penalties on her: "No jury, she predict[ed], will fault a person for using a fence to keep horses from wandering onto the road and into traffic."¹⁶⁸

Unfortunately, the Commission has repeatedly illustrated that it does not have the heart of such a jury when it comes to policing the use of land.¹⁶⁹ In its view, placement of a portable beach umbrella is "development" in violation of the Coastal Act when kept in place overnight. Trimming trees that contain the nests of a non-endangered bird, but no birds, has warranted a cease-and-

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 699-702 (1999) (describing jury verdict in favor of landowner on takings and equal protection claims against city for denial of permit to develop private property).

desist order.¹⁷⁰ Un-permitted goats, even those raised as part of an ongoing biomedical research operation, have triggered demands to immediately halt the offending “development.”¹⁷¹

The Commission’s enforcement teams have gone after a landowner that tried to void a pre-*Nollan* shoreline access easement condition that was imposed on a permit to build on a cliff top *fifty feet above* the beach and thus plainly lacked the required connection to development impact.¹⁷² In the same case, the Commission sought and obtained fines from the owner for having the audacity to challenge the easement.¹⁷³ Even activities expressly designed to advance environmental goals, and approved for that purpose by local government, are targeted for enforcement action.¹⁷⁴

It is not clear why the Commission has moved so rapidly toward a policy of strict enforcement that falls so often on ordinary landowners. What is clear is that California taxpayers and the Commission’s legitimacy would benefit from a more selective ap-

170. See *State Order is Too Late to Save Herons’ Nests*, L. A. TIMES, Aug. 23, 2001, at B5.

171. See *Coastal Commission Order Shutdown of Goat Farm*, L. A. TIMES, July 13, 2000, at A19.

172. See James Rainey, *California and the West Billionaire Battles Authorities on Access to Beach Courts: Self-styled Environmental Philanthropist Tries to Overturn Easement That Allows Public on Santa Barbara Property. The Fight Has Implications in Cases Elsewhere*, L. A. TIMES, Dec. 11, 2000, at A3 (Commission issued cease-and-desist order to stop property owner from revoking shoreline access easement granted by pre-*Nollan* owner in return for permission to build a deck and sun room on cliff top fifty feet above shoreline).

173. In a bit of sad irony, the Commission announced that it would turn around and use the fines obtained from enforcement of the unconstitutional exaction to buy property from other private owners. *Id.*

174. See *Malibu City, Coastal Panel Reach Pact on Beach Parking*, L. A. TIMES, Mar. 19, 1998, at B4, available at 1998 WL 2409743 (Commission issued a cease-and-desist order requiring the City of Malibu to remove boulders it had placed along a road “to prevent people from parking on the environmentally sensitive headlands and blocking public views of the ocean.” To settle the dispute, the City agreed to create eight parking spaces “across from the boulders [and] about 30 additional parking spaces on adjacent residential streets.”); *Marine Forests Soc’y v. Cal. Coastal Comm’n*, 104 Cal. App. 4th 1232 (2002). In *Marine Forests*, the Commission stepped in to halt the construction of an artificial reef, designed to reinvigorate lost marine habitat, in Newport Beach, California. *Id.* at 1238. *Marine Forests* challenged the Commission’s enforcement authority in part on the ground that the Commission was an unconstitutional entity as currently constructed. The appellate court agreed with *Marine Forests* that the Commission violates constitutional separation of powers principles because two-thirds of the commissioners are appointed by, and hold their positions at the will of, the California Legislature, allowing the Legislature to co-opt executive powers. See *id.* at 1242-1251. As of this writing, the separation of powers issue in *Marine Forests* is pending before the California Supreme Court.

plication of the Commission's enforcement authority. Continuance of the current policy of targeting minor, locally approved activities conveys the distinct impression that enforcement is more about solidifying the Commission's hold on the coast than it is about securing the balanced policies of the Coastal Act. Indeed, a cynic might wonder whether recently ramped-up enforcement activity has something to do with the unequal bargaining power between smaller landowners and the Commission, and the Commission's ability to leverage this inequality to extract concessions, including further restrictions on land use, during the retroactive permit process that normally follows enforcement action. The Commission can negate these impressions, and ensure fairness and legitimacy, simply by refocusing its enforcement activities on intentional violations of the Act and on violations, whether knowing or not, that involve activity lacking local approval and significant adverse impacts.

B. *The Commission's History of Expanding the Scope of Its Jurisdiction While Narrowing Procedural Protections for Property Owners*

To act under the permitting or enforcement provisions of the Coastal Act, the Commission must first satisfy a range of jurisdictional and procedural prerequisites that are susceptible to divergent interpretations. The Commission has consistently discovered and applied the interpretation that triggers and expands its own powers, to the detriment of coastal landowners. *Landgate v. California Coastal Commission* provides the preeminent example.¹⁷⁵

In *Landgate*, a Malibu-area property owner agreed to give the County of Los Angeles a portion of his property, to be used for a road bisecting the property, in return for a lot-line adjustment that created two separate lots zoned for construction of a single-family home.¹⁷⁶ After completion of the road and recording of the lot adjustment, Landgate purchased the recently created northern lot for purposes of building a single-family home.¹⁷⁷ When the County signaled its approval, Landgate applied to the Commission for a coastal development permit.¹⁷⁸

175. 73 Cal. Rptr. 2d 841 (Cal. 1998).

176. *Id.* at 1190.

177. *Id.*

178. *Id.*

The Commission did not like the proposed home's "visual impacts," and the grading necessary for construction, but it focused on the lot-line adjustment. If, the Commission lamented, "the old lots had remained, then development could have been directed to the more topographically . . . suitable southern portion of the property."¹⁷⁹ The Commission soon determined that the lot line adjustment was illegal. In its view, the adjustment was a "development" subject to the Commission's jurisdiction; since the Commission had not exercised this jurisdiction to approve the adjustment, Landgate's lot was not a legal building site.¹⁸⁰ On this basis, the Commission denied the development application.¹⁸¹

Landgate promptly sued to nullify the Commission's expansive understanding of its jurisdictional reach. Both the trial court and California Court of Appeals agreed that a lot-line adjustment like the type at issue in Landgate was not a "development" over which the Commission had any authority.¹⁸² Two years after denying Landgate's project because of its unlawful interpretation of the jurisdiction granted by the Coastal Act, the Commission finally allowed Landgate to proceed with a scaled-back project.¹⁸³

Many other property owners have found themselves suddenly forced to seek the Commission's favor due to an unexpectedly broad, and ultimately wrongful, assertion of its jurisdiction. In the hands of the Commission, even basic procedural rules designed to ease the burdens on coastal development applicants can become a tool for stalling the reasonable use of property. Thus, in *Andrews v. California Coastal Commission*, the Commission twisted its voting rules to assert appellate authority over a locally-approved subdivision of land.¹⁸⁴

For the Commission to take official action, the Coastal Act requires "a majority vote of the members present at the meeting of the commission."¹⁸⁵ In *Andrews*, nine commissioners were present and listening as the Commission considered whether a "substantial issue" existed, giving it appellate jurisdiction. A tenth commissioner, who "had not heard the discussion and was unfamiliar with the matter," walked into the room in the middle of

179. *Id.* 1190-91.

180. *Id.* at 1191.

181. *Id.* at 1192.

182. *Id.* at 1192-93.

183. *Id.* at 1193.

184. 189 Cal. Rptr. 279 (Cal. Ct. App. 1983).

185. *Id.* at 281.

the consideration.¹⁸⁶ After a short hearing, five commissioners voted in favor of finding *no substantial issue* and thus no appellate jurisdiction, four voted against and the late-arriving commissioner abstained.¹⁸⁷ But, counting the late-arriving commissioner as the tenth “present” commissioner, the Chairman determined that six votes were needed for a majority vote passing the motion. Because the applicant had only secured a majority of nine members, the Commission rejected the motion and concluded that it would exert jurisdiction.¹⁸⁸

The California Court of Appeals in *Andrews* found it “totally unreasonable” that the Commission would count a commissioner who was unfamiliar with the issue and therefore ineligible to vote as “present” for purposes of counting votes.¹⁸⁹ It therefore divested the Commission of jurisdiction.¹⁹⁰ A similar story played out twenty years later in the 2003 case of *Encinitas County Day School v. California Coastal Commission*.¹⁹¹ *Encinitas* illustrates abuse of substantive and jurisdictional authority, as well as procedural powers, and thus provides a fitting end to this section of the article.

In 1998, Encinitas County Day School (ECDS) secured approval from the City of Encinitas (the City) to build a 432-student elementary school on a twenty-acre parcel of undeveloped property. The property was located between Manchester Avenue, a relatively small public road, and a lagoon, but another undeveloped parcel of land sat between the School’s property and the lagoon. Highway 101, a four-lane freeway, separated the project site from the Pacific Ocean and the beach areas.

For twenty years, the Commission had considered Highway 101 to be the first public road from the sea and thus the inland boundary of CCC jurisdiction, and had made this position clear to the public since 1981.¹⁹² Nevertheless, “within 48 hours . . .

186. *Id.* at 280.

187. *Id.* at 281.

188. *Id.*

189. *Id.*

190. *Id.* at 282 (“The correct and legal effect of the vote was that a majority of the commission, eligible to vote, decided that no substantial statewide issue was presented.”).

191. 108 Cal. App. 4th 575 (Cal. Ct. App. 2003).

192. *Encinitas Country Day School v. California Coastal Comm’n*, San Diego Superior Court Statement of Decision at 3-4 (May 17, 2001) (on file with author) (“As early as 1981 and at each subsequent remapping in 1988 and 1995, the Coastal Commission itself consciously adopted Highway 101 as the first public road. Since 1981, the draft certification map was circulated to the public and relied upon by the public,

the Coastal Commission staff, completely bypassing Regulation 13576 [procedure for establishing appellate jurisdiction], obviated the jurisdictional map in effect since 1981 and extended its jurisdiction over the school project and other property by asserting Manchester as the first public road for purposes of appellate jurisdiction."¹⁹³ The trial court concluded that "many of the reasons offered by the Commission's staff for its actions were pretextual, and that the staff's actions were in fact taken for no other purpose other than to delay development." On appeal, the appellate court was more forgiving, declaring that it could not conclude that the Commission's sudden assertion of jurisdiction over the project "was wholly arbitrary or capricious" or a "completely untenable legal position."¹⁹⁴

The Commission followed up its unprecedented, but apparently not "wholly arbitrary or capricious," assertion of geographical jurisdiction with a wholly unlawful interpretation of the time limits for scheduling a hearing on an appealed project. The Coastal Act requires a hearing on an appealed matter to be set within forty-nine days of the date of appeal. But in the *Encinitas* case, the Commission interpreted this rule to mean that it could comply with the deadline by simply *opening and postponing* the matter within forty-nine days.¹⁹⁵ For such authority, the Commission relied on *Colorado Yacht Club v. California Coastal Commission*, a previous appellate decision upholding the forty-nine-day limit.¹⁹⁶ The new interpretation in *Encinitas* would, it was believed, allow the Commission to put off consideration of any substantive issues, including whether a substantial (and thus appealable) issue existed, whether it had appellate jurisdiction, or the merits of the appeals.¹⁹⁷

After so opening and postponing the *Encinitas* matter within forty-nine days, the Commission staff later recommended that the ECDS appeal should be heard and the project rejected.¹⁹⁸ The Commission subsequently adopted the staff's recommendations and, in so doing, reversed the local approval of the school

the City of Encinitas, and the Coastal Commission itself in issuing jurisdictional opinions on at least two prior occasions.")

193. *Id.* at 4.

194. *Encinitas County Day School v. California Coastal Comm'n*, No. D040300 slip. op. at 25, 26 (May 8, 2003).

195. See 108 Cal. App. 4th 575, 583-84 (Cal. Ct. App. 2003).

196. 13 Cal. App. 4th 860 (Cal. Ct. App. 1993).

197. *Encinitas*, 108 Cal. App. 4th at 579-80.

198. *Id.* at 580.

project.¹⁹⁹ The *Encinitas* appellate court held, however, that the opening and postponing of a matter did not amount to compliance with the forty-nine-day hearing rule.²⁰⁰ The court took the Commission to task for relying on *Colorado Yacht Club* because that decision not only failed to support the Commission's position, but "*specifically observed*" that the "postpone and continue" interpretation would not be consistent with the legislative intent behind the forty-nine-day limit.²⁰¹ By failing to hold a meaningful hearing on the appeal within the prescribed time period, the Commission lost jurisdiction over the School's project and the local decision prevailed by default.

In light of the 2003 case of *Encinitas County Day School*, it is apparent that the anti-property rights culture of the Commission has changed little over the last twenty-five years. Throughout this period, the Commission has displayed a hostile attitude toward the reasonable use of private property in every aspect of the coastal development permitting process and along every part of the California coast.²⁰² The Commission acts, in short, as if environmental and public access ends justify any regulatory means, regardless of the impact on individual landowners.

While this method of governing may be acceptable in certain communist and fascist political systems, it is intolerable in the American constitutional system.²⁰³ That system is, after all, designed to ensure that individual liberties survive in the face of majority goals, no matter how compelling in their own right: "[t]he Constitution is certain and fixed; it contains the permanent will of the people, is the supreme law of the land It says to legislators, thus far ye shall go and no further."²⁰⁴ From the days of the founding, property rights have been recognized as one of the strongest bulwarks against encroachments on liberty.²⁰⁵

199. *Id.*

200. *Id.* at 587.

201. *Id.* at 585 (emphasis added).

202. See White, *supra* note 5.

203. See *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 316 (1795) (noting that when it comes to the power to invade private property rights, "[o]mnipotence in legislation is despotism."). See generally, Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1568-74 (2003) (surveying colonial period writings showing that the preservation of private property was integral to the creation of the United States).

204. *Vanhorne's Lessee*, 2 U.S. at 308, 311.

205. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 324 (1893) ("[I]n any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most cer-

On a practical level, this means that public goals must sometimes be abandoned or altered to ensure fairness to the individual landowner, even when this seems inconvenient or burdensome to the government.²⁰⁶ This principle underlies *Nollan, Dolan*²⁰⁷ and other modern decisions that have attempted to compel regulators to carefully tailor their land use decisions so that individual property owners do not bear a disproportionate share of the cost of providing public goods. They are also evident in the Coastal Act itself²⁰⁸ and supported by public opinion.²⁰⁹ Why, then, has the Commission so consistently trod upon individual property rights?

tain tests of the character and value of the government.”); *Cannon v. Delaware*, 807 A.2d 556, 567 (Del. 2002) (“Prior to the American Revolution, property ownership became identified with the preservation of political liberty”). JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT* 43 (1998) (“[T]he framers saw property ownership as a buffer protecting individuals from government coercion. Arbitrary redistribution of property destroyed liberty, and thus the framers hoped to restrain attacks on property rights.”) On the eve of the Declaration of Independence, Virginian Arthur Lee reminded his fellow colonials that “the right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty.” *Id.* at 26 (quoting ARTHUR LEE, *AN APPEAL TO THE JUSTICE AND INTERESTS OF THE PEOPLE OF GREAT BRITAIN, IN THE PRESENT DISPUTE WITH AMERICA*, 14 (New York, 1775)). A year after the United States Constitution was adopted, John Adams expressed the continued preeminence of the view that “[p]roperty must be secured or liberty cannot exist.” *Discourses on Davila, in THE WORKS OF JOHN ADAMS* 280 (Charles Francis Adams ed. 1851).

206. *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304, 321 (1987) (“[M]any of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them.”).

207. Under *Dolan*’s “rough proportionality” standard, the government bears the burden of showing that the exaction “is related both in nature and extent to the impact of the proposed development” to avoid a taking. *Dolan v. City of Tigard*, 512 U.S. at 386 (emphasis added). By requiring a strong causal link between development and exaction, the “nexus” and “rough proportionality” standards ensure that the landowner shoulders only those public burdens that result from her development. See Jan G. Laitos, *Causation and the Unconstitutional Conditions Doctrine: Why the City of Tigard’s Exaction Was a Taking*, 72 DENV. U. L. REV. 893, 904-07 (1995).

208. See CAL. PUB. RES. CODE § 30214(b) (Public access goals must be advanced “in a reasonable manner that considers the equities and that balances the rights of the individual property owner.”).

209. “Poll after poll shows that most people . . . passionately resist added restrictions on the use of their land.” ZYGMUNT J.B. PLATER, ET. AL., *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY*, 1135 (1998) (emphasis added).

IV.

THE FORCES BEHIND THE ANTI-PROPERTY
RIGHTS COMMISSION

There's been such overdevelopment of the coast before and since, she says she's praying for a tsunami. 'I want a fresh start,' says the Beverly Hills Resident [and environmentalist leader Ellen Stern Harris]²¹⁰

To a certain extent, the Commission's hostility to private coastal land use and its penchant for shifting public burdens to private landowners must be considered a function of particular projects, personalities and prevailing political realities.²¹¹ However, it seems unlikely that the Commission could have sustained this stance for so long, with respect to so many projects, absent the influence of more permanent anti-property rights forces. Three prominent candidates for this role include: (1) the California Supreme Court's jurisprudence; (2) the Commission's leadership; and (3) environmental special interest groups.

A. *The California Supreme Court's Policy of Protecting the "Flexibility" of Land Use Regulators*

While the California Court of Appeals has been moderately attentive to claims that the Commission regulates in a manner inconsistent with property rights,²¹² the California Supreme Court has moved in the opposite direction. Indeed, the last twenty-five years of California Supreme Court decisions make it clear that the court is loath to issue rulings that would diminish the flexibility of the state's land use regulators. In the 1979 case of *Agins v. City of Tiburon*, the court said as much in concluding that landowners were not entitled to monetary damages when government regulation went so far as to take private property.²¹³ Quoting favorably from commentary, the *Agins* court noted that a damages remedy for regulatory takings would "discourage the

210. Steve Lopez, *Points West Decommissioned, It's Sand Aid Time*, L. A. TIMES, Jan. 1, 2003, at B1.

211. As the Wall Street Journal notes, the Commission's "corruption is infamous: One commissioner was convicted in 1993 for soliciting bribes for permits." Strassel, *supra* note 9. More recently, The Commission has operated under a "pay to play" system that gives donors to California Governor Gray Davis' campaign treasury a significant advantage in securing permitting approval. See Lance Williams, *Donors to Davis Get Coastal Permits: State Agency Smiles on Governor's Contributors*, S.F. CHRONICLE, Oct. 20, 2002, at A1.

212. See *supra*, Part III.

213. 157 Cal. Rptr. 372 (Cal. 1979).

implementation of strict or innovative planning measures in favor of measures which are less stringent, more traditional and fiscally safe.”²¹⁴ Following this reasoning, the court concluded that “the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation [damages] remedy” requires denying a property owner the right to just compensation for regulatory takings and thus limiting the owner to a right to invalidate the offending governmental action.²¹⁵

In 1981, the late United States Supreme Court Justice Brennan explained why the California Supreme Court’s decision in *Agins* places no meaningful bar in the way of, and in fact encourages, repeated draconian regulatory encroachments on private property:

Invalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity. At the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney gave fellow City Attorneys the following advice: “IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.”

If legal preventative maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don’t worry about it. All is not lost. One of the extra ‘goodies’ contained in [a] recent [California] Supreme Court case [upon which *Agins* later relied for the invalidation rule] appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again

See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war.²¹⁶

Six years later, a majority of the United States Supreme Court followed Justice Brennan’s lead and, in *First English Evangelical Church of Glendale v. County of Los Angeles*, expressly rejected California’s invalidation takings remedy in favor of a compensatory remedy.²¹⁷ In so doing, the Court dismissed the reasoning adopted by the California Supreme Court in *Agins*:

We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land use planners and

214. *Id.* at 377.

215. *Id.* at 378.

216. *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 655 n.22 (1981) (Brennan, J., dissenting).

217. 482 U.S. 304 (1987).

governing bodies of municipal corporations when enacting land use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause is one of them.²¹⁸

First English declared that compensation is the mandatory remedy when a regulation causes a permanent taking, and when the same taking becomes temporary by rescission or judicial invalidation. In 1992, *Lucas* confirmed another rule implicit in *First English*: a regulation depriving a landowner of all economically beneficial use of land amounts to a taking.²¹⁹ Unfortunately, when it comes to takings law, the opinions of the United States Supreme Court have had little impact on the pro-regulation course charted by the justices of the California Supreme Court.

Landgate serves to illustrate once again. In that case, it will be recalled, lower courts invalidated the Commission's assertion of jurisdiction over Landgate's property and the denial of residential development that resulted from that assertion.²²⁰ Landgate claimed that it was entitled to temporary takings damages during the litigation and effective period of the Commission's unlawful denial of all use.²²¹ This assertion seemed to flow easily from *First English* and *Lucas*. But the California Supreme Court articulated a unique view of those cases, holding that the unlawful, temporary denial of all use was simply a "normal delay" in the development process that Landgate was required to accept.²²² There could have been a temporary taking only if Landgate was able to show that the invalidated, temporary government act was "solely designed to delay development,"²²³ a requirement that is absent from the United States Supreme Court's precedent.

218. *Id.* at 321.

219. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992).

220. *Landgate v. California Coastal Comm'n*, 73 Cal. Rptr. 2d 841, 845-46 (Cal. 1998).

221. *Id.* at 846-47.

222. *Id.* at 856, 857.

223. *Id.* at 852 ("It would be, of course, a different question if . . . that [Commission] position was so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it.").

Courts²²⁴ and commentators²²⁵ outside California have rightly criticized *Landgate* as incompatible with *First English* and as a serious threat to the ability of property owners to gain compensation for damages occurring during the temporary imposition of strict and unlawful land use controls. California property owners are typically *required* to judicially invalidate illegal land use regulation before seeking just compensation (another unique California rule).²²⁶ Since *Landgate* almost wholly precludes compensation for invalidated actions, invalidation is the only realistic takings remedy.²²⁷ Therefore, from the Commission's perspective, invalidation is the worst consequence for excessive regulation of coastal land use. This is the very situation condemned by Justice Brennan as likely to encourage continuing violations of private property rights.²²⁸

The California Supreme Court has attempted to preserve a similar degree of flexibility for the Commission and other land use regulators when it comes to the imposition of permit conditions. When asked, the court refused to hear the Nollans' challenge to the Commission's demand for real property as a permit condition, leaving it to the United States Supreme Court to hold the California courts to the discipline of the Takings Clause. The state supreme court also initially refused to hear *Ehrlich v. City of Culver City*, a case pitting the force of *Nollan* against a city that sought to exact significant sums of money, instead of real property, in return for development approval.²²⁹ The court relented after the United States Supreme Court remanded *Ehrlich*

224. See e.g., *Eberle v. Dane County Board of Adjustment*, 595 N.W. 2d 730, 742 n. 25 (Wis. 1999) (“[T]he argument of the majority in *Landgate* was clearly considered and rejected by the United States Supreme Court.”).

225. See e.g., Steven J. Eagle, *Just Compensation for Permanent Takings of Temporal Interests*, 10 FED. CIR. 485, 501 (2000) (“[E]xpansion of the normal delay to include administrative appeals and prolonged litigation seems totally unwarranted and indeed . . . threatens to vitiate *First English*” and the constitutional right to just compensation.).

226. See *Hensler v. City of Glendale*, 8 Cal. 4th 1, 13-17 (Cal. 1994).

227. It is conceivable that compensation could be awarded as the remedy for a regulation that the claimant *unsuccessfully* tried to invalidate by a mandate proceeding. However, in the fifteen years since California courts have required just compensation claimants to first prosecute a mandate action, there are no reported cases where a court has awarded compensation for a regulation upheld as valid in that action. The record is hardly better when it comes to the awarding of damages for an invalidated regulation; only one reported case exists to that effect. See *Ali v. City of Los Angeles*, 91 Cal. Rptr. 2d 458 (Cal. Ct. App. 1999).

228. See *supra* note 192 and accompanying text.

229. 12 Cal. 4th 854, 859-60 (Cal. 1996).

to the Court of Appeals for reconsideration in light of *Dolan*, and the appeals court responded by reaffirming its previous decision in favor of the government.²³⁰

The California Supreme Court's 1996 opinion in *Ehrlich* has turned out to be the one bright light in two decades of anti-property rights decisions. There, the court held that *Nollan* and *Dolan* at least apply to monetary exactions imposed on a discretionary basis.²³¹ But since then, the court has construed *Ehrlich* narrowly, a trend that reached its peak in the 2002 case of *San Remo Hotel v. City of San Francisco*.²³² *San Remo* held that *Ehrlich*, *Nollan*, and *Dolan* did not constrain San Francisco from applying an ordinance requiring a hotel to pay almost \$600,000 in return for a permit allowing the conversion of residential units to tourist uses.²³³

In the court's view, *Nollan* and its progeny did not control in *San Remo* because those cases were limited to exactions imposed on an adjudicative (individualized) basis. Exactions imposed pursuant to legislation of general applicability—like the hotel fee required by the San Francisco ordinance—were subject to a standard of review deferential to the government.²³⁴ The decision prompted this warning from dissenting Justice Janice Brown:

A public agency can just as easily extort unfair fees legislatively from a class of property owners as it can adjudicatively from a single property owner. The nature of the wrong is not different or less abusive to its victims, but the scope of the wrong is multiplied many times over In light of the majority's decision, however, we can be sure that agencies will now act legislatively, rather than adjudicatively, and thereby insulate their actions from close judicial scrutiny.²³⁵

230. *Id.* at 859.

231. *Id.*

232. *San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal. 4th 643 (Cal. 2002).

233. *See id.* at 668–72.

234. *Id.*

235. *Id.* at 698 (Brown, J., dissenting). Brown also had this to say about the sorry state of private property in California:

[P]rivate property, already an endangered species in California, is now entirely extinct in San Francisco. The City and County of San Francisco has implemented a neo-feudal regime where the nominal owner of property must use that property according to the preferences of the majorities that prevail in the political process—or, worse, the political powerbrokers who often control the government independently of majoritarian preferences. Thus, “the lamb [has been] committed to the custody of the wolf.” (6 *The Works of John Adams*, *supra* note 205, at 280.) San Francisco has redefined the American dream. Where once government was

California's high court has given the Commission and other coastal land use regulators the green light to adopt permitting policies that are patently incompatible with the purpose of the Takings Clause of the United States Constitution and which have been so rejected by other state courts. But it is important to acknowledge that nothing in the state supreme court's jurisprudence *requires* an approach stacked against the property owner.²³⁶ The Commission always retains the option of exercising self-restraint in the application of its judicially-sanctioned permitting flexibility and freedom. It can, in short, choose to voluntarily respect and protect individual rights of private property. But so far, it has eschewed this course.

B. *The Commission's Leadership*

Lack of self-restraint is ultimately a reflection of internal forces. In the power and personality of the Executive Director of the Coastal Commission, one finds the most compelling internal explanation for the Commission's refusal to moderate its bias against private property. The Executive Director guides the preparation and submission of Staff Reports to the Commission that detail the factual and legal issues relevant to new development applications. The Reports recommend denial or approval of a project, propose conditions that should be attached to approved projects,²³⁷ and make findings regarding the impact of the

closely constrained to increase the freedom of individuals, now property ownership is closely constrained to increase the power of government. Where once government was a necessary evil because it protected private property, now private property is a necessary evil because it funds government programs. *Id.* at 692 (Brown, J., dissenting).

236. Many local California coastal land use entities have not been nearly as hostile to private property as the Commission, and in fact strongly resent the Commission's mode of operation. See Insite Research, *California Coastal Planners Survey*, April 18-26, 2002 (polling of local coastal planners). Among other things, the Survey found that (1) "an astonishingly low 14% [of local planners] feel that the Commission's policies are based on what's best for their community;" (2) *not one* surveyed planner was willing to agree that communities would be better off by having the Commission draft local coastal plans; (3) 40% believe the Commission has *exceeded its legal authority*; (4) a mere 38% believe the Commission has followed the mandates of the Coastal Act, (5) less than 40% believe the Commission is consistent in application of its own rule and policies; (6) 30% believe those policies are based on sound science. See also *Mills Land & Water Co. v. City of Huntington Beach*, 75 Cal. App. 4th 249 (Cal. Ct. App. 1999) (providing an excellent study of the dynamics in the conflict between local governments and the Commission, illustrating the Commission's unwillingness to adopt the more moderate approach of some local governments).

237. 75 Cal. App. 4th at 249.

project and its consistency with the Coastal Act and/or local coastal program.²³⁸

The Director also has authority to instigate and make recommendations regarding enforcement actions.²³⁹ The Commission staff—the people who actually put together the findings, recommendations and Reports as a whole—serve at the direction of, and are appointed by, the Executive Director.²⁴⁰ Thus, the Director has enormous power to mold the opinions of the Commissioners and to take independent actions, when it comes to permitting the use of coastal land.²⁴¹

For the majority of the Commission's existence, Peter Douglas has been the Executive Director of the Commission. A co-author of the 1972 initiative that gave rise to the Coastal Act, Mr. Douglas has spoken passionately about his commitment to environmental causes, and condemned the forces of "capitalism and imperialism," consumerism, and materialism that encourage individualism and thwart the ascendancy of environmental causes.²⁴² To overcome these forces, Mr. Douglas advocates several solutions. One of the grander is "holistic cerebral vision therapy."²⁴³ Apparently, successful "therapy" would change human behavior

238. *Id.*

239. 14 CAL. CODE REGS. tit. xiv § § 13057, 13183.

240. *Id.* tit. xiv § 13032.

241. When Commissioner Sara Wan was asked by a reporter why she appealed a locally-approved home proposal, she apparently "acknowledged that she was unfamiliar with the project. It seems that "*Commission staff had merely asked her and two other commissioners to file appeal, so they did.*" (emphasis added) David V. Mitchel, *Sparsely, Sage and Timely: The Unconstitutional Protocol of the California Coastal Commission*, available at www.ptreyeslight.com/columns/sparsely/sparsely0102_03.html.

242. At a 2002 environmental law conference in Yosemite Valley, Mr. Douglas explained that:

Active advocacy for the conservation of Nature . . . is [in part] about struggle against *dehumanizing, amoral corporate capitalism and imperialism at all levels around the planet*, and environmental destruction resulting from *greed and materialism*. It is about the loss of human rights, human health, community values, and livelihood. It is about the degradation of home for all life.

Peter Douglas, *Shades of Green: Buying and Selling Environmental Protection*, Address to Yosemite Environmental Law Conference (Oct. 26, 2002) (on file with author) at 17 (emphasis added)(hereinafter *Shades of Green*).

243. *Id.* at 5. It is not clear how "holistic cerebral vision therapy" would work on an individual level, as a practical matter, but it seems that it might entail re-educating people to believe that the environmental status quo puts human survival at risk *Id.* ("We can and must promote longer range thinking through . . . an appeal to the same evolutionary dynamic that may have gotten us into the environmental mess we're in—self-serving survivalist thinking. I call this holistic cerebral vision therapy.").

and ultimately result in the collectivization of property ownership under the concept of "environmental commons:"

We argue that certain environmental resources and values associated with human and natural communities are held in common and cannot be owned or harmed by an individual. We speak of environmental commons, such as ecosystems, that know no property boundaries but whose biological health and vitality affect many people and other life.²⁴⁴

Such environmental commons, as Douglas views them, would dominate the use of vast areas of land and other property:

I view environmental commons to be those features of *land* and *water areas*, and *air space*, that exist *independently or as part of an integral part of a dynamic whole* (i.e., eco-system, watershed, waterbody, coastal bight, air basin, public park, neighborhood, village, town, city) whose functional viability and integrity must be protected in order to ensure the survival of natural or human community values deemed to be of vital importance to public health, well-being and quality of life. Examples include, wilderness areas, nature reserves, environmentally sensitive habitat and *neighborhoods where people live, work and play*. The environmental commons of a residential neighborhood, for example, are those places in it *whether on public or private land*, the uses of which directly or indirectly impact the quality, functionality and safety of the human community (i.e., streets, sidewalks, playgrounds, schools, park and open spaces). One important way to protect environmental commons is through reasonable land use controls.²⁴⁵

This desire to convert private property into a vast public (government-controlled) "environmental commons" argues in spirit, if not in fact, for the abolishment of private property as it has been understood in this nation since its inception. Douglas comes closer to making this argument directly when he turns the concept of the "tragedy of the commons" on its head.

As generally understood, the "tragedy of the commons" is the principle that commonly owned property is generally cared for by nobody and exploited to ruination because everyone has (1) an incentive to use the common resource before someone else gets it and thus, (2) no incentive to conserve its resources.²⁴⁶ Be-

244. Peter Douglas, *The Loss of Community Environmental Values: An American Tragedy*, Remarks to the California Chapter of the American Planning Association, (Oct. 13, 1997) available at www.law.georgetown.edu/gelpi/takings/douglas.htm at 8 [hereinafter *Loss of Community Environmental Values*].

245. *Id.* at 9.

246. Scholars and philosophers have long recognized that communal property ownership leads to waste and conflict. For instance, Aristotle criticized communism

cause land will often be more efficiently used and better cared for when put into the hands of *private owners*, who have a vested interest in the health of their property, the logical solution to the “tragedy of the commons” is to convert the commons into private ownership. But this solution is Douglas’ “tragedy.”²⁴⁷ In short, Douglas appears to view the concept of private property itself as a sad mistake.

Similarly, Douglas appears not to accept the constitutional principle that the public should compensate landowners when the government severely restricts private property for the benefit of the general public.²⁴⁸ For Douglas, this principle has unacceptable and “widespread chilling effects on public officials charged with environmental protection who now steer clear of tough land use decisions to avoid falling under the fiscal hammer of ‘takings’ claims and interim monetary damages.”²⁴⁹ Having to pay for public environmental benefits (like open space) would result in fewer environmental commons than Douglas believes necessary. In part for this reason, Douglas argues for “strong government regulation, *in perpetuity*,” as the preferred method for protecting “community values.”²⁵⁰

Given the nature of the Executive Director’s deeply-held idealism, as evidenced in his frequent public speeches, it is difficult to believe that the individual Commissioners are or have been receiving staff advice that is sensitive to individual private property rights. On the contrary, the anti-private property perspectives held by the most powerful single person on the Commission go far toward explaining a bureaucratic culture of persistent and “unconcealed bias against the constitutionally protected right of private property.”²⁵¹ Douglas’ views also help to explain why

in this way: “What belongs in common to the most people is accorded the least care. They take thought for their own things above all, and less about things common, or only so much as falls to them individually.” ARISTOTLE, *POLITICS*, Book 2, chapter 3 (Carnes Lord, ed. Ernest Baker, trans.) Oxford University Press 1998 (1995). More recent scholars have affirmed Aristotle’s views. See Garrett Hardin, *The Tragedy of the Commons*, 162 *Sci* 1243 (1968); TIBOR R. MACHAN, ED., *THE COMMONS: ITS TRAGEDY AND OTHER FOLLIES* (2001).

247. *Shades of Green*, *supra* note 242 at 6 (“Over time we have privatized the commons and enclosed them to the exclusion of the general public. This is the tragedy of the commons in our time.”).

248. *Id.* at 7-9; *Loss of Community Environmental Values*, *supra* note 244 at 7-9.

249. *Shades of Green*, *supra* note 242 at 9.

250. *Id.*

251. *Pacific Legal Foundation v. California Coastal Comm’n*, 180 Cal. Rptr. 858, 863 (Cal. Ct. App. 1982).

takings decisions have had little meaningful impact on the culture and policies that frame and channel the Commission's consideration of individual permit applications.

C. *The Influence of Environmental Pressure Groups*

While the Executive Director and his staff can construct and maintain a land use permitting culture and framework hostile to private property, they cannot issue a final decision on a proposed use of coastal land. That job is reserved to the individual commissioners. The Commissioners have the ability to protect a landowner's right to make some use of property, to realize investment-backed expectations and to issue a permit free from extortionate demands, without regard for the staff's recommendations. Having that power is far different, however, than having the will to exercise it.

Throughout the Commission's history, special interest groups have pressured the Commissioners to repress any concern about the impact of their decisions upon property owners. The permitting process invites this type of pressure in several ways. First, it is designed to allow almost anyone to speak out against a project at the Commission's public hearings, regardless of whether the speaker lives near the project or has any other interest that is directly affected.²⁵² Second, and more significantly, any "aggrieved person" can appeal any locally approved project to the Commission, where "aggrieved person" essentially means any person that spoke out at an earlier hearing concerning the appealed project or submitted concerns by other means or "for good cause was unable to do either."²⁵³ Finally, the Act extends the right to sue to overturn a final Commission decision beyond "aggrieved persons:" "*any person* may maintain an action for declaratory relief and equitable relief to restrain any violation of [the Act]."²⁵⁴ The Act thus gives standing for citizen enforcement actions, "seemingly without any restrictions."²⁵⁵

Some environmental groups persistently use this process to pressure the Commission to ignore landowner concerns. The Si-

252. CAL. PUB. RES. CODE §§ 30006; 30621.

253. *Id.* § 30801.

254. *Id.* § 30803. The right to "judicial review of [a coastal development approval] by filing a *petition for writ of mandate* [is limited to] aggrieved persons." *Id.* § 30802 (emphasis added).

255. *Sanders v. Pacific & Gas Elec. Co.*, 53 Cal. App. 3d 661, 673 (Cal. Ct. App. 1975). See generally Philip J. Hess, *Citizen Enforcement Suits Under the California Coastal Act*, 24-Dec. L.A. LAW 17 (Dec. 2001).

erra Club maintains a constant presence at the Commission's monthly public hearings, which allows the organization to speak out against individual projects and to converse informally with the Commission's executive staff regarding particular projects of interest. Other local pressure groups participate in coastal decision-making on an ad-hoc basis to oppose a particular project.²⁵⁶

It is routine for these groups to appeal a thoroughly reviewed, locally approved project to the Commission in an effort to defeat it.²⁵⁷ It is not just larger projects that attract their attention; even modest single-family home proposals can trigger their opposition.²⁵⁸ Like Douglas himself, the Sierra Club and other groups involved in the coastal permitting process often seem to be guided by a vision of the California coast as it existed several hundred years ago. To return to such a time, in terms of coastal

256. Consider, for example, the San Elijo Lagoon Conservancy's opposition to development near San Elijo Lagoon in Encinitas, California. *See, e.g., Kirkorowicz v. California Coastal Comm'n*, 83 Cal. App. 4th 980, 983-95 (Cal. Ct. App. 2000) (group opposed plan to build horse stables and related facilities on a twenty-one-acre parcel north of the lagoon, though evidence showed that project might have minor impacts on less than one half-acre of "degraded" and "very-low quality" wetlands); *Encinitas County Day School v. Cal. Coastal Comm'n*, 108 Cal. App. 4th 575 (Cal. Ct. App. 2003) (reviewing a group's opposition to building of school on land physically separated from lagoon by another undeveloped parcel of property).

257. The project in *Kirkorowicz* was appealed to the Commission by the San Elijo Lagoon Conservancy after extensive review by the local government and imposition of environmental mitigation measures as a condition of approval. 83 Cal. App. 4th 980 (Cal. Ct. App. 2000). The project in *Encinitas* was appealed to the Commission under similar circumstances. 108 Cal. App. 4th 575 (Cal. Ct. App. 2003).

258. *See, e.g., Coastal Development Appeal No. A-1-01-56* (Williams, Mendocino Co.) (Appeal by Friends of Schooner Gulch, Sierra Club, Mendocino-Lake Group, Dr. Hillary Adams & Roanne Withers from decision of County of Mendocino granting permit with conditions to Gale & Dorothy Williams for 2,460 sq.ft. single-family home, 632-sq.ft. attached garage & mechanical room, septic system, connection to private water system, driveway, concrete walkway and wooden decks, at 27560 South Highway One, near Schooner Gulch, Mendocino County).

development, appears to be their end game,²⁵⁹ and the justification for imposing hardships on individual coastal landowners.²⁶⁰

The threat of a lawsuit²⁶¹ or political retaliation²⁶² puts added force behind special interest appeals for unbridled regulation. When the Act does not permit the Commissioners to succumb to this pressure, environmentalist special interest groups attempt to

259. See, e.g., Roger Vincent & Martha Groves, *L.A.'s Urban Model; After years of setbacks and controversy, Playa Vista is officially open. Planners are studying it as an experiment in high-density housing*, LA TIMES A1 (October 18, 2003) ("environmentalists . . . wanted the land to revert to its preindustrial state"); Steve Lopez, *Points West Coast Decommissioned, It's Sand Aid Time*, LA TIMES, Jan. 1, 2003 (describing Ms. Ellen Stern Harris' candid admission that she prays for a tsunami to hit the California coast because she "wants a fresh start"); *Going Coastal*, supra note 6 (Sierra Club attorney says that abolishment of the current Commission would lead to one that "will be a heck of a lot more stringent than the one we have now").

A letter writer to the Los Angeles Times had this response to Ms. Harris' tsunami dreams:

You quote Ellen Stern Harris (cited as the "mother" of the Coastal Act) as saying, "I continue to pray for a tsunami, so we can get a fresh start." Is the good "mother," as she seeks divine intervention and the utilization of a destructive force of nature for her cause, asking only for houses on the beach to be washed away or is she praying for a total wipeout that will take the occupants with it. In either case, its a warm and heartfelt way to start a new year.

LA TIMES, Jan. 3, 2002, 2002 WL 2443388.

260. Interestingly, even ardent environmentalists suddenly become ardent property rights activists when the Commission lays the impact of public goals at their own door. See *California and the West Billionaire Battles Authorities on Access to Beach Courts*, supra note 172 (a "billionaire environmental philanthropist" defends "private property rights" after the Commission and Santa Barbara County intend to enforce public access easement on the environmentalist's Santa Barbara estate property).

261. See, e.g., Grace Lee, *Ranch Sale Going Ahead*, L.A. DAILY NEWS, Sept. 23, 2003 (proposed residential development of 2800 acres resulted in "more than a dozen lawsuits" alleging environmental harm); Dana Littlefield & Daniel Evans, *Battle Over the Bluffs: Planned retreat pits homeowners against environmentalists in Solana Beach*, SAN DIEGO UNION-TRIBUNE, N1, Oct. 5, 2003 (environmentalists filed multiple lawsuits to get the city to adopt a policy of allowing homes to fall into the ocean when erosion undercut supporting bluffs); Roger Vincent & Martha Groves, supra note 259 ("In lawsuit after lawsuit," environmentalists took on developer of an innovative urban project now studied as a model of urban design).

262. In 2002, the Sierra Club and other groups unsuccessfully pressured former Governor Davis to remove Commissioner Gregg Hart, who was perceived as "pro-development." See Mark Massara, *New Coastal Commission Members*, at http://ventura.sierraclub.org/back_issues/0204/members.shtml. More recently, the Club organized a campaign designed to encourage former Governor Davis to reappoint a favored Commissioner and to coax other political leaders to indirectly support Commissioner Sara Wan's chair. See *Santa Lucia action network, Phase II- Protect the Independence of the Coastal Commission*, at <http://santalucia.sierraclubaction.org/showalert.asp?aaid=157>

get the courts to rewrite the relevant portions of the Act.²⁶³ For members of the Commission and Commission Staff predisposed to ignore property rights, this pressure provides a tangible justification for erring on the side of more severe land use restrictions.²⁶⁴

There are no private property advocacy groups that have similar access or power. While there is no legal impediment to enhanced participation on their part, two practical problems prevent them from adopting the tactics of environmental pressure groups. First, property rights advocates have nowhere near the financial resources available to groups like the Sierra Club. The annual income of the dozen or so major national property rights organizations equals about *one-fifth* of the annual budget of the Sierra Club alone, when the incomes of all those organizations are *combined*.²⁶⁵ The annual budget of the Pacific Legal Foundation, the largest organization dedicated to property rights, and the major presence in California, is about one-fifteenth of the Sierra Club's.²⁶⁶ Second, and perhaps more importantly, property rights organizations face the distinct possibility that, given the Executive Director's unflattering opinion of their pres-

263. See *Comment, Conflict in the California Coastal Act*, 38 Cal. W. L. Rev. 255, 278 (2001). This comment explains that the "final option" to reverse Act provisions requiring the Commission to grant a seawall permit to protect "existing" homes from erosion is "activist litigation against the Coastal Commission." The author elaborates,

[i]n essence, coastal advocates must seek to ask the judiciary to correctly interpret Section 30235 [i.e., construe "existing development," for which seawall permits must be granted, to mean only pre-1976, not presently existing, development] and order the Coastal Commission to follow the 'new' interpretation. . . Thus, changing the interpretation of the Coastal Act would require the Coastal Commission to continue to approve permits for shoreline armoring and coastal activists bringing suit against the Coastal Commission seeking a writ of mandamus.

In a footnote, the author proudly announces that the foregoing strategy was "formulated through discussions with Doug Ardley, Esq. (Surfer's Environmental Alliance) and Mark Massara, Esq. (Coastal Director of the Sierra Club.)" *Id.* at 278, n.167.

264. See *supra* note 262.

265. The combined annual income of "The Pacific Legal Foundation, the Defenders of Property rights and a dozen other conservative legal foundations" is pegged at \$15 million by an organization that considers such foundations to have excessive influence. See <http://www.communityrights.org/CombatsJudicialActivism?CombatMain.asp>. (last viewed October 3, 2003). In contrast, according to the Yearbook of International Co-operation and Development, the Sierra Club's 2002 annual budget totaled \$78 million. See <http://www.greenyearbook.org/ngo/sierra.htm> (last viewed October 3, 2003). The 2002 income for the Natural Resources Defense Council, another pro-regulation advocacy group, was about \$46.5 million. See <http://www.nrdc.org/about/finances.asp> (last viewed October 3, 2002).

266. The Pacific Legal Foundation's 2001 budget was about \$6 million. Introduction to Pacific Legal Foundation (March 2001).

ence and work²⁶⁷, active participation on behalf of a landowner will sink the landowner's chances for a permit and harm the cause of private property as a whole. For these reasons, environmental pressure groups can push and pull the Commission toward extreme positions with little organized opposition.

V.

CONCLUSION

The Coastal Act enshrines a noble and legitimate public interest in ensuring that private coastal land use proceeds in an orderly fashion sensitive to evolving environmental and beach access values. But by micro-managing every conceivable use of private property and local planning, with little regard for constitutionally protected private property interests, the Commission has disrupted the delicate balance sought by the Act between private and public interests along the coast. So far, the Commission's legacy is consistent with neither the concepts of limited government and individual rights upon which the Constitution, and this nation, are founded, nor with the Act's recognition that environmental goals must be weighed against economic security and individual rights in land.

The Commission's zealous advancement of environmental preservation and correspondingly dim view of economically beneficial private land use is not even good environmental policy, over the long run. Major environmental progress depends upon economic improvement²⁶⁸ and economic progress depends heav-

267. See *Shades of Green*, at 7 ("The instruments of the demise of public land rights and environmental values include the Pacific Legal Foundation, Defenders of Property Rights, American Land Rights Alliance (formerly the National Inholders Association), Center for the Defense of Free Enterprise, People for the West!, Cato Institute, and the American Legislative Exchange (ALEC).").

268. Princeton University scholars have demonstrated that national environmental quality begins to improve once per capita income exceeds \$8,000. Perhaps, more importantly, their study indicates that greater levels of income generally lead to better environmental quality in many areas of concern. See GENE M. GROSSMAN, & ALAN KRUEGER, *ECONOMIC GROWTH AND THE ENVIRONMENT* (Nat'l Bureau of Econ. Research, working paper No. W4634, 1994). The reasons for this correlation are simple: economic growth fuels a popular demand for environmental protection and leads to technological innovations that minimize environmental harm. See *Environmental Cleanups Linked to Economic Issue*, 13 U. CHI. CHRON. No. 10, Jan. 20, 1994 available at <http://chronicle.uchicago.edu/940120/coursey.shtml> (summarizing work of Professor Don Coursey showing that demand for environmental quality and expenditures toward environmental improvement increases with income); See Mathew Brown and Jane Shaw, *Does Prosperity Protect the Environment?*, at <http://www.perc.org/publications/percreports/feb1999/prosperity> (summarizing some of

ily on the degree to which a legal system recognizes and protects private property rights.²⁶⁹ As these rights dim, and basic economic needs become a more immediate concern, a society's ability and will to seek environmental goods will fade. The reverse occurs as private property rights and investments are protected, and the resulting development and creation of businesses results in economic security and technological advancement.²⁷⁰ Serious environmental problems will grow in California, as elsewhere, if

the studies dealing with the relationship between economic development and the environment).

269. See, e.g., BENJAMIN POWELL, PRIVATE PROPERTY RIGHTS, ECONOMIC FREEDOM AND WELL BEING, (Global Prosperity Initiative Working Paper No. 27) available at <http://www.mercatus.org/pdf/materials/445.pdf>; Seth W. Norton, "Property Rights, the Environment and Economic Well-Being," in WHO OWNS THE ENVIRONMENT? (Peter J. Hill and Roger E. Meiners, Eds., 1998) 37-54.

270. It is instructive that as the United States' gross domestic product increased by about 161% between 1970 and 2001, and the miles traveled by vehicle increased by about 150%, the combined emissions of the six major categories of air pollutants decreased during this same time by 25% and that "[n]ational air quality levels measured at thousands of monitoring stations across the country have shown improvements over the past 20 years for all six principal pollutants." See OFFICE OF AIR QUALITY, U.S. ENVTL. PROT. AGENCY, LATEST FINDINGS OF NATIONAL AIR QUALITY: 2001 STATUS AND TRENDS, available at <http://www.epa.gov/air/aqtrnd01/index.html> (last viewed on Apr. 1, 2004). See also, EXECUTIVE SUMMARY OF 1999 ENVIRONMENTAL INDICATORS FOR NORTH AMERICA AND THE UNITED KINGDOM, available at <http://www.fraserinstitute.ca/shared/readmore.asp?snav=PB&id=226>. The summary makes these points :

Overall, environmental quality improved 10.8 percent in Canada, 18.6 percent in the United States and 10.4 percent in the United Kingdom relative to conditions in 1980. In Mexico, overall environmental quality remained the same relative to conditions in 1990.

Air pollution from sulphur dioxide, nitrogen dioxide, carbon monoxide, particulates, and lead has decreased considerably in Canada, the United States and the United Kingdom.

The ambient level of sulphur dioxide decreased by 61.5 percent in Canada and 60.7 percent in the United States between 1975 and 1995. The ambient level of sulphur dioxide decreased 92 percent between 1976 and 1996 in the United Kingdom . In Mexico, ambient levels of sulphur dioxide in Mexico City decreased 50 percent between 1988 and 1996.

Ambient lead concentration fell 99.9 percent both in Canada and in the United States between 1976 and 1994. Ambient lead concentrations fell 90.1 percent between 1980 and 1995 in the United Kingdom. In Mexico, ambient lead concentrations fell 82.5 percent between 1990 and 1995.

In 1994, over 90 percent of the lakes tested in the United States supported overall use.

In 1995, Alberta and Saskatchewan met their water quality goals over 90 percent of the time; British Columbia and New Brunswick met their goals over 80 percent of the time; Manitoba met its goals over 70 percent of the time.

DDE concentrations have fallen over 75 percent in Lake Michigan and Lake Superior, over 80 percent in Lake Erie and Lake Ontario, and 90 percent in Lake Huron since 1977.

there is a sustained decrease in security for private property, and resulting economic stagnation, not because people build a home, barn, corral, or other structure on their property.²⁷¹

The general public's right of coastal access may also be poorly served, over time, by policies that severely limit private land development. Due largely to decades of ever strengthening and costly regulation, buying a modest home on the coast is now so expensive that few people can hope to realize that California dream.²⁷² But all Californians have a right to use the beach²⁷³

Contaminants in fish found in the North Sea have fallen dramatically since 1982. For example, PCBs found in North Sea cod declined 75.8 percent between 1982 and 1996.

Forests are increasing in North America and the United Kingdom as growth exceeds the harvesting of trees.

The amount of land set aside for parks, wilderness, and wildlife is increasing in Canada, the United States, the United Kingdom, and Mexico.

The amounts of toxic chemicals exposed to the environment is decreasing.

271. The experience of the former communist-block nations, which provided little to no protection for private property, struggled to create economic security, and suffered terrible environmental pollution as a result provides a vivid example. See David R. Gergan & Anne E. Andrews, *Cleaning up the Fouled Workers' Paradise*, U.S. NEWS & WORLD REPORT, May 30, 1990 (noting that "with the iron curtain finally parted, many are now shocked as they see for the first time the devastation that Communism loosed upon the environment in Eastern Europe" and quoting a report concluding that environmental conditions there are "the worst in the world, particularly in Poland, East Germany and Czechoslovakia"); Marlise Simons, *Danube is Blue No Longer River Has Become Choked With Waste*, L. A. DAILY NEWS, May 13, 1990 (noting that "[d]espite the extent of pollution in the Danube, specialists says its health seems robust compared to the grid of rivers that drain the northern plains of Eastern Europe and spill into the Baltic sea," which have been pounded . . . to near biological death"); Marlise Simons, *Eastern Europe and the Luxury of Clean Air: As East Bloc Emerges From Decades of Secrecy, Extent of Environmental Abuse Becomes Known*, ST. PETERSBURG TIMES, Apr. 8, 1990 ("In the years when Soviet-bloc rulers claimed they were forming 'a new socialist man,' they were in many instances condemning this man and his family to severe lung and heart disease, cancer, eye and skin ailments and, often, sickly children and shorter lives."). See also, Walter Block, *Environmentalism and Freedom: The Case for Private Property Rights*, 17 J. Bus. Ethics No. 6, 1887-99 (1998) available at <http://cba.loyno.edu/faculty/Block/Blockarticles/environmentalism.htm> (noting that "under Communism, there was little or no waste treatment of sewage in Poland, the gold roof in Cracow's Sigismund Chapel dissolved due to acid rain, there was a dark brown haze over much of East Germany, and the sulfur dioxide concentration in Czechoslovakia were eight times levels common in the U.S."). Ironically, the economic might and generosity of western, free-market oriented countries helped clean up Communism's mess even while improving the western environment. See Simons, *Danube No Longer Blue*, *supra* ("The West, it appears, has also been assigned the rescue of the marred waters of the formerly communist countries whose new governments say they have neither the capital nor technology to confront the mess").

272. According to the California Association of Realtors, in the second quarter of 2003, the median price of a home in Malibu was \$930,000; in Santa Barbara, \$623,000; in the "Beach Cities" areas of Southwest Los Angeles, \$635,000; in San

and people living in the less expensive inland areas²⁷⁴ will undoubtedly seek to exercise this right at some point. To do so, they will need places to sleep and eat near the coast.

Families visiting the coast with small children and older adults need hotels and other services. As restrictions on development increase, fewer services are built. Areas of the coast where services are wholly barred have become the exclusive province of the backpacking set. Areas that currently have services, but experience no growth, have been subjected to higher demand as population increases. Hotel rooms and other services are consequently becoming more expensive, effectively barring poorer families from the beach.²⁷⁵

Well-maintained public coastal parks, access ways and natural areas play a vital role in the life of California and the Coastal Act seeks to ensure that they continue to exist. But, under the Act, "future developments that are carefully planned and developed . . . are [also] essential to the economic and social well-being of the people of this state and especially to working persons employed within the coast."²⁷⁶ The prosperous,²⁷⁷ environmentally progressive,²⁷⁸ egalitarian and free coast²⁷⁹ Californians aspire to can exist only when property rights are respected. At a minimum, this simply means that the Commission should allow the reasonable private use of land except when truly unique characteristics or impacts require its preservation for a public use. In

Luis Obispo, \$430,000; in San Francisco County, \$560,000; and in San Diego, \$375,000. See CAL. ASS'N REALTORS, FIRST QTR. SALES & PRICE REP., available at <http://www.car.org/index.php?id=MZIyODk=> (last viewed April 1, 2004); see generally, Emmet Pierce, Wave Goodbye: For many, prices sink the dream of ocean-view living, San Diego Union-Tribune, May 9, 2004, 2004 WL 58991877.

273. CAL. CONST. art. X, § 4.

274. In the second quarter of 2003, the median price of a home in the San Fernando Valley area was \$237,000; in Sacramento, \$227,000 in San Bernardino County, \$183,000 and in Bakersfield, \$137,000. *Id.*

275. See generally, Steve Scholl, Can You Afford a Night on the Coast?, in California Coast & Ocean (Winter 2003) available at <http://www.coastalconservancy.ca.gov/coast&ocean/winter2004/pages/one.html>. (the concern that preservationist coastal regulation would make the coast unaffordable has "proved well founded"). This result seems difficult to reconcile with the Coastal Act's declaration that "future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state and especially to working persons employed within the coast." CAL. PUB. RES. CODE § 30001(d).

276. CAL. PUB. RES. CODE § 30001 (d).

277. See *supra* note 267 and accompanying text.

278. See *supra* note 268-69 and accompanying text.

279. See *supra* note 204-06 and accompanying text.

such a case, the public should compensate the private landowners for the benefit.

If the public is unwilling to pay to put private land to public use,²⁸⁰ the result may be construction of a new home, hotel, barn, restaurant, or low-income housing development. Though such use of land might offend some people, *it is the price of freedom*. First Amendment free speech protections require that people put up with speech they find disturbing;²⁸¹ constitutional limitations on police interrogation sometimes require that defendants whose confessions are improperly obtained go free;²⁸² protections for religious exercise require the acceptance of religious practices that some may find objectionable;²⁸³ and constitutional protections for private property mean that, sometimes, people get to use their property in a manner that disturbs other people. The alternative is to live in a system where individuals have no meaningful rights; the majority rules absolutely, and as the will of the majority, the government pursues majority goals without limitation. As Peter Douglas, the Executive Director of the Coastal Commission has stated: "All but fringe groups, value and respect private property rights."²⁸⁴ Indeed. To avoid becoming a part of the fringe, the Commission must chart a new course that honors and respects the important place of private property in the American constitutional fabric.

280. If the public is unwilling to pay for the property that government tries to take in its name, it may be reasonable to conclude that the problems and goals the government seeks to address by infringing on private land rights are simply not as pressing to the majority as the government claims. Some public polls already support this view: while the public generally expresses great concern about the environment's health when asked a generic question about its importance, they consistently rank environmental issues at the bottom of their priorities when presented with a list of other social issues. See FRASER INSTITUTE, *supra* note 270.

281. See, e.g., *Cohen v. California*, 403 U.S. 15 (1971) (First Amendment protected right of individual to wear a jacket in a public courtroom with the words "Fuck the Draft" emblazoned on the back).

282. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

283. See *Church of Lakumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (laws prohibiting animal sacrifice violated right to free exercise of religion).

284. *Loss of Community Environmental Values*, at 7.