PACIFIC LEGAL FOUNDATION

January 4, 2017

Mr. John Ainsworth
Acting Executive Director
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

VIA E-MAIL John.Ainsworth@coastal.ca.gov
AND FIRST-CLASS MAIL

Re: Appeal No. A-3-PSB-15-0030 (Rozo, Pismo Beach)

Dear Director Ainsworth:

Pacific Legal Foundation is the nation's oldest and most successful nonprofit, pro-bono public-interest law firm dedicated to the preservation of strong property rights. As such, PLF has engaged in numerous lawsuits nationwide to preserve federal and state constitutional limits on government action.

PLF consistently follows the actions of the California Coastal Commission, and has often commented as an interested party when appeals brought before the Commission raise constitutional concerns. One such appeal, Appeal No. A-3-PSB-15-0030 concerning applicants Ernie and Pam Rozo, includes a staff recommendation for a "substantial issue" determination that raises particular concerns in light of settled Supreme Court precedent. PLF has previously commented on this appeal in a letter dated April 6, 2016.

The staff report on the de novo appeal of coastal development permit number 14-000080 includes a recommendation that the Commission make a substantial issue determination because the City of Pismo Beach did not require any type of public access easement throughout its approval process. Accordingly, the staff suggests that the CDP raises a substantial issue under the Coastal Act. While staff nonetheless recommends approval of the permit, this finding is not only inconsistent with provisions of the Coastal Act, but with established precedent under both the U.S. and California Constitutions. Specifically, it is contrary to the unconstitutional conditions framework established in the seminal case of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

In *Nollan*, a property owner sought a permit to demolish and replace a beach bungalow. The Coastal Commission granted the permit, but required the property owner to grant a public easement across

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his private beach. The Supreme Court ruled that such a condition was unconstitutional, describing it as an "out-and-out plan of extortion." The Court held that conditions on development permits are permissible only to the extent that they mitigate the impacts of the development. Where there is no such "essential nexus," the demands are unconstitutional.

The California Legislature has codified these constitutional limitations into the Coastal Act itself, in section 30010. That section declares that no governing body acting under the Coastal Act may grant or deny a permit in a way that takes private property for public use without just compensation. It is settled law under both the U.S. and California Constitutions that if the City were to simply demand an easement for public access from the Rozos, it would constitute a taking and require just compensation. *See Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) ("And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation."), *and San Remo Hotel L.P. v. City & County of San Francisco*, 27 Cal. 4th 643, 664 (2002) (noting that the Takings Clause of the California Constitution has congruent protections to the Fifth Amendment of the U.S. Constitution).

Under Coastal Act section 30625, appeals are limited to grounds that the development does not conform to the standards set forth in the certified local coastal program or the public access policies set forth in the Coastal Act. Here, staff likely recognizes—though fails to expressly acknowledge—that any demand for public access made to the Rozos would be unconstitutional. No public access currently exists over the Rozo property, and the removal and replacement of a single-family home—much like the bungalow at issue in *Nollan*—will have no impact on the existing public access.

The only public access issue noted by staff is that an easement in the area of the Rozo property would be "beneficial to helping to close the [California Coastal Trail] gap at this location." But this only suggests a public desire to have a unified coastal trail, which is completely independent of the Rozo development. The burden of providing a lateral access trail in the Shell Beach area should not—and constitutionally cannot—fall on one property owner. Such burdens, "in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40 (1960). And as was noted in *Nollan*, the State of California remains free to pursue whatever public access policy it wishes along the coast—but "it must pay for it." *Nollan*, 483 U.S. at 842.

Staff has attempted to flip the narrative by stating that the "limited public access impacts (if any)" do not "rise to the level of requiring an easement." However, the Coastal Act, the California Constitution, and the U.S. Constitution all affirmatively prohibit the City of Pismo Beach from requesting an easement from the Rozos under these circumstances. Since a demand for public access from the Rozos is barred, failing to demand public access cannot be inconsistent with the public access policies of the Act.

PLF has challenged government at all levels from coast to coast to protect property owners from unconstitutional burdens on the use of their land. PLF will continue to zealously litigate to preserve the protections on property rights established in cases such as *Nollan v. California Coastal Commission*. We urge this Commission to consider the issues raised above when deliberating on the Rozo appeal. A development which does not impact public access does not raise a substantial issue as to public access, and this Commission should vote accordingly.

Sincerely,

JEREMY TALCOTT
Attorney

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