PACIFIC LEGAL FOUNDATION

October 19, 2017

The Honorable Chief Justice Tani G. Cantil-Sakauye
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Surfrider Foundation v. Martins Beach 1, LLC, et al.*, No. S244410

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under California law for the purpose of litigating matters affecting the public interest. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. Thousands of individuals nationwide support PLF, as do many organizations and associations. PLF is headquartered in Sacramento, California, and has offices in Bellevue, Washington; Washington, D.C.; and Palm Beach Gardens, Florida.

The Foundation has litigated many cases defending private property rights in the Supreme Court of the United States. *See*, *e.g.*, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 530 U.S. 725 (1997); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). PLF attorneys have also been regular participants in property cases in the California Supreme Court, including most recently: *Lynch v. Cal. Coastal Comm'n*, 3 Cal. 5th 470 (2017); *City of Perris v. Stamper*, 1 Cal. 5th 576, 585 (2016); *Prop. Reserve, Inc. v. Superior Court*, 1 Cal. 5th 151 (2016); *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal. 4th 435 (2015); *Tuolumne Jobs & Small Business Alliance v. Superior Court*, 59 Cal. 4th 1029 (2014).

PLF and its supporters believe that this case is of significant importance to California's landowners and has far-reaching implications for their traditional rights in property. The decision below extends unlimited jurisdictional power to the California Coastal Commission (Commission) to require, at its discretion, a "coastal development permit" for almost any change in activity that occurs within the coastal zone. This broad

interpretation of the California Coastal Act amounts to an unconstitutional delegation of legislative power to the Commission, raises significant constitutional concerns, and creates substantial hardship and potential liability for thousands of landowners and businesses within the coastal zone.

THIS COURT SHOULD GRANT THIS PETITION TO DETERMINE AN IMPORTANT AND STATEWIDE QUESTION REGARDING THE DEFINITION OF "DEVELOPMENT" UNDER THE COASTAL ACT

This Court should grant review to settle an important question of law that will affect the thousands of property owners, and the 75 cities and counties, in the coastal zone. The Coastal Act defines the Commission's jurisdiction as reaching only "development" in the coastal zone. Pub. Res. Code § 30600(a). Coastal development permits are required only for defined, enumerated activities that qualify as "developments." *Id.* § 30106. Under the Act, "development" is defined as the following:

> "Development" means, on land, in or under water, the placement or erection of any solid material or structure . . . change in the density or intensity of use of land . . . change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility

Id. § 30106.

Under the court of appeal's decision, however, the term "development" reaches almost any activity within the coastal zone. Such a broad interpretation grants the Commission near total discretion to determine whether and when to demand a permit. The decision also creates uncertainty for the regulated public and municipalities. More importantly, it raises a serious constitutional question about whether Section 30106, as interpreted by the court of appeal, unconstitutionally delegates unprecedented legislative power to the Commission. The avoidance canon counsels that this Court should grant review to adopt a statutorily and constitutionally sound interpretation of the Coastal Act. A failure to correct the court of appeal's unconstitutional construction of Section 30106 may have negative implications for landowners and businesses throughout the coastal zone.

I. The Court of Appeal's Expansive Definition of "Development" Creates an Unlawful Delegation of Legislative Authority

An interpretation of the Coastal Act that grants nearly unlimited discretion to the Commission to determine its jurisdictional authority raises the question of unlawful delegation. Statutes that confer "unrestricted authority to make fundamental policy decisions" to an agency are an unconstitutional delegation of legislative authority. *Samples v. Brown*, 146 Cal. App. 4th 787, 804 (2007). This doctrine stems directly from the California Constitution, and ensures that "truly fundamental issues" are resolved by the Legislature, while any grant of authority is "accompanied by safeguards adequate to prevent its abuse." *See* Cal. Const. art. III, § 3 ("Persons charged with the exercise of one power may not exercise either of the others."); *see also Kugler v. Yocum*, 69 Cal. 2d 371, 376 (1968).

The unlawful delegation doctrine is concerned with "avoiding or minimizing unchecked power." *McHugh v. Santa Monica Rent Control Bd.*, 49 Cal. 3d 348, 362 (1989) (emphasis omitted). The decision below instead removes all jurisdictional limits from the Act. This interpretation grants the Commission total discretion to assert authority over almost any change in human activity incident to property ownership within the coastal zone.

The court of appeal swept aside the grave constitutional concerns raised by such an expansive grant of power by noting that the Commission was authorized to exempt certain temporary or de minimis activities from the permitting requirements. Ct. App. Op. at 15; Pub. Res. Code § 30624.7; *id.* § 30610(i)(1). But a discretionary exemption from otherwise limitless jurisdiction magnifies rather than corrects an unlawful delegation. Taken together, the Commission has nearly unfettered authority to claim jurisdiction, coupled with the ability (though no requirement) to decline to exercise that jurisdiction at its discretion.

Even if the Commission voluntarily limits its jurisdiction to avoid further constitutional violations, the delegation would not be cured. As the U.S. Supreme Court has reasoned, an agency may not "cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 472 (2001).

The court of appeal opinion creates Commission jurisdiction over basic property-related activities that have not required a permit at any time in the almost 45 years the Coastal Act has been in effect. Such a fundamental change in the scope of the Coastal Act is precisely the kind of fundamental policy decision that the Legislature itself must resolve, and is an issue over which the agency has no say. *See*, *e.g.*, *PG&E Corp. v. Pub. Utilities Comm'n*, 118 Cal. App. 4th 1174, 1194 (2004) ("[T]he general rule of deference to interpretations of statutes subject to the regulatory jurisdiction of agencies does not apply when the issue is the scope of the agency's jurisdiction."). Because the Legislature—and not the Commission or the courts—is the proper entity to make such policy determinations, this Court should grant the petition for review to reverse the lower court's expansive interpretation.

11. The Court of Appeal's Interpretation of Section 30106 Could Have Far-Reaching Effects on Owners and Businesses Within the Coastal Zone

If allowed to stand, the lower court's opinion may lead to unworkable and absurd results. The court of appeal opinion allows the Commission to claim jurisdiction where a landowner has engaged in the minor activities of painting over an existing sign, locking and affixing a sign to an existing gate, and hiring security to patrol private property and deter unwanted trespassers. Under this theory, there are numerous basic activities incident to property ownership over which the Commission could now assert jurisdiction. The Commission could demand a coastal development permit to repaint a dilapidated house in a new color, place "No Trespassing" signs along an existing fence, or to invite friends or relatives for a brief visit.

The Legislature did not intend for the Coastal Act to "decrease the rights of any owner of property" under the state or federal constitutions. Pub. Res. Code § 30010. Additionally, the Legislature commanded that the Act "shall not be construed" to authorize the Commission to use its permitting power to take or damage private property for public use. *Id*. The Act's goal of maximizing public access is required to be "consistent with . . . constitutionally protected rights of private property owners." *Id*. § 30001.5. Asking coastal landowners to seek—and face denial of—a coastal development permit before taking reasonable steps to protect their property subjugates many constitutionally and statutorily protected rights of property ownership to the whim of the Commission.

Further, requiring a coastal development permit before landowners engage in activities such as putting locks on a gate and hiring security guards may lead to deprivations of other constitutionally and statutorily protected rights. California landowners have a constitutionally protected right to protect their private property. Cal. Const. art. I, § 1. Basic activities that protect property such as adding a lock to an existing gate and taking other reasonable steps to deter uninvited members of the public from entering property should not be subject to Commission veto through the coastal development permit process.

State law also codifies the right to exclude unwanted members of the public. California's criminal trespass law makes it a misdemeanor to "[enter] any lands, whether unenclosed or enclosed by a fence, for the purpose of injuring any property or property rights." Cal. Penal Code § 602. A trespasser injures property because he interferes with the landowner's right to exclude. *See Allred v. Harris*, 14 Cal. App. 4th 1386, 1390 (1993). In the civil context, California law also creates protection from trespassers. *See*, *e.g.*, Cal. Code of Civ. Proc. § 338 (three-year statute of limitation for trespass to real property); § 735 (providing treble damages for unlawful entry on cultivated private property); Cal. Civ. Code §§ 1008-1009. *See also* Cal. Civ. Jury Instructions 2000 (jury instruction for common law trespass).

An inability to adequately protect a portion of one's property may also interfere with landowners' constitutionally protected right to privacy by creating an "implied permission to the public" to enter. *Lorenzana v. Superior Court*, 9 Cal. 3d 626, 629 (1973). Preventing a landowner from "taking reasonable steps" to prevent unwanted entry by the public may diminish that owner's reasonable expectation of privacy, opening her property to searches that would otherwise be unreasonable. *See People v. Camacho*, 23 Cal. 4th 824, 843 (2000) (George, C.J., dissenting) (collecting federal court cases finding implied invitations to the public on otherwise private property during Fourth Amendment analyses).

Many businesses operate within the coastal zone, and their livelihood depends on regularly—though temporarily and subject to ejectment—inviting the public onto their property. Under the court of appeal's opinion, the Commission could demand each such business obtain a coastal development permit prior to shuttering its business. The superior court injunction not only requires the Martins to continue operating a money-losing business, they have forced them to set rates at those in place when the Coastal Act was adopted in 1973. Pet. at 6. Not all landowners are in the position of the

current and previous owners of Martins Beach, who operated the beach at a financial loss for decades. *Id*. Requiring an expensive and time-consuming coastal permit application before landowners can stem financial losses will also operate as a forceful disincentive for existing property owners to open businesses that invite members of the public on to the property.

For existing businesses, denial of a requested permit will require that landowners continue in a career they wish to leave under the threat of civil liability. Cal. Pub. Res. Code § 30820. Using state power to force individuals into a state-chosen occupation raises "substantial questions of constitutional dimension." *See Nash v. City of Santa Monica*, 37 Cal. 3d 97, 103 (1984). Both the California and United States Constitution protect individuals' right to be free of deprivations of liberty without due process of law. Cal. Const. art. 1, § 7; U.S. Const. amend. XIV, § 1. The unconstitutional conditions doctrine prevents governments from using their permitting power to coerce people into giving up constitutionally protected rights. *See*, *e.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013).

In all of these instances, landowners and businesses will be faced with an unenviable choice: approach the Commission seeking expensive, time-consuming, and potentially unnecessary coastal development permits or face immense penalties under the Coastal Act for carrying out "unpermitted coastal development." Cal. Pub. Res. Code § 30820. These fines may also extend to landowners who have previously engaged in similar activities. *California Coastal Comm'n v. Tahmassebi*, 69 Cal. App. 4th 255, 259 (1998) (civil fines and penalties totaling $15,000 assessed on a property owner after being found to have developed without a coastal development permit). If those actions include revoking access to members of the public that was previously permissively granted, it could also trigger civil liability under the Commission's enforcement power. Pub. Res. Code § 30821. Landowners should not face crippling penalties for engaging in behaviors that have long been considered lawful and beyond the reach of the Coastal Act.

III. The Avoidance Canon Counsels That the Courts Should Not Adopt an Interpretation of Section 30106 That Is Unconstitutional

A statute "must be construed, if reasonably possible, in a manner that avoids a serious constitutional question." *People v. Engram*, 50 Cal. 4th 1131, 1161 (2010). Indeed, as this Court has explained:

> If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable.

People v. Superior Court (Romero), 13 Cal. 4th 497, 509 (1996). The canon prevents courts from deciding unnecessary issues by presuming that the Legislature does not casually seek to raise such difficult issues. *Id*.

Even assuming *arguendo* that the court of appeal's construction of Section 30106 is "equally reasonable,"[1] it should not be adopted because it raises several significant constitutional concerns. As Petitioners note, an injunction that deprives a landowner of the right to exclude—one of the most fundamental elements of property ownership—cannot be reconciled with decades of Supreme Court takings jurisprudence. Pet. at 27-34; *see also Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (holding that a public easement across previously private property requires compensation, and noting that the right to exclude others is "one of the most essential sticks in the bundle of rights"). Under the California Constitution's Declaration of Rights, the rights of "acquiring, possessing, and *protecting* property" are also preserved as "inalienable." Cal. Const. art. I, § 1 (emphasis added).

Activities such as painting existing structures, placing locks and signs on existing structures, and even hiring security guards if needed to deter trespassing are all longstanding, lawful activities incident to property ownership. The avoidance canon should counsel this Court to grant review and adopt an interpretation that avoids the serious constitutional questions raised by requiring landowners to seek permission from the Commission to engage in those activities.

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[1] It seems unlikely that an interpretation that prevents all coastal landowners from granting or withdrawing access to their property without a coastal development permit is the best reading of Section 30106, especially in light of other sections of the Act which codify an intention to preserve traditional private property rights. *See* Pet. at 15-16.

CONCLUSION

The court of appeal's opinion uses a novel interpretation of the word "development" to grant unfettered discretion to the Commission. This will allow the Commission to demand coastal development permits for common landowner activities that have occurred within the coastal zone for nearly 45 years without Commission interference. This unnatural reading of the Act raises several constitutional concerns that can—and should—be avoided.

We respectfully request that this Court grant review to correct the court of appeal's erroneous interpretation of "development" under Section 30106 of the Coastal Act.

Respectfully submitted,

DAMIEN M. SCHIFF
JEREMY TALCOTT
Pacific Legal Foundation

JEREMY TALCOTT, No. 311490

Attorneys for Amicus Curiae
Pacific Legal Foundation