The California Coastal Act, Public Access, and Private Property Rights

Remarks of,

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Delivered at the conference,

California's Coastal Act: The Next 40 Years
The Bancroft Hotel
Berkeley, California
November 17, 2016

The California coast conjures pleasant images of languid summer picnics, roaring surf, whooping seals, stinging salt air, beach combing, little birds scampering along the dunes. Speaking about Monterey in particular, Robert Louis Stevenson famously remarked that "[o]n no other coast that I know shall you enjoy, in calm, sunny weather, such a spectacle of Ocean's greatness, such beauty of changing colour, or such degrees of thunder in the sound."[1]

It's not surprising, then, that the people of California have invested immense power in an administrative agency to ensure that the public continue to have access to the coast. Now, I am sure that when many of you hear the words "Pacific Legal Foundation," you think of an organization that is not particularly friendly to the California Coastal Commission, and therefore not particularly friendly to coastal access. I am here to confirm that your impression is only half right. We undoubtedly disagree with much of what the Commission does, but that fact does not make us against public access. Indeed, most of the controversies concerning public access over the last forty years of the Coastal Act have not really been about whether access is a good thing. Rather, they have been about *how* access should be obtained, and *who* should bear the burden of providing that access.

To be sure, understandings about the propriety of demanding public access have come a long way since the passage in 1972 of Proposition 20, the progenitor of the California Coastal Act of 1976. By the early 1970s, the still inchoate environmental movement had been remarkably successful at making people more sensitive generally to the conditions of our natural environment. Earlier in the century, Aldo Leopold had pronounced what amounted to an eco-ethics, according to which a thing "is right when it tends to preserve the integrity, stability, and beauty

[1] Robert Louis Stevenson, *Monterey*, *in* FROM SCOTLAND TO SILVERADO 152 (James D. Hart ed., The Belknap Press) (1966).

of the biotic community," and "wrong when it tends otherwise."[2] A little later, Rachel Carson would condemn "the control of nature" as a program "born of the Neanderthal age of biology and philosophy, when it was supposed that nature exists for the convenience of man."[3] It was a time when even a Supreme Court justice could write—can you guess who?—that the "esthetic values of the wilderness are as much our inheritance as the veins of copper and gold in our hills and the forests of our mountains."[4]

Closer to home, the Santa Barbara oil spill of 1969, followed by the construction of several large and controversial coastal developments affecting public access,[5] crystalized these sentiments and channeled them politically. The California Coastal Alliance qualified Proposition 20 and, following a barrage of telephone calls, along with the production of brochures and tee shirts graced by a "Where's the Beach?" cartoon,[6] the initiative was passed. It established a state-wide zoning mechanism and ultimately led the way to the California Coastal Act of 1976. The proposition's purpose was, its proponents argued, to preserve the values of the coast for everyone.[7] Its opponents saw it somewhat differently: as their billboards read, "Conservation Yes—Confiscation No. Vote No on 20."[8]

I think perhaps that the opponents were on to something. The passage of Proposition 20 suggested a certain negative attitude toward property rights, one nicely captured in a law review article written by Peter Douglas and Joseph Petrillo shortly before the passage of the 1976 Coastal Act. In that piece, Douglas and Petrillo criticized private coastal development for, among other offenses, "requiring the public, without its consent, to give up previously uninterrupted views of the sea" and

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[2] ALDO LEOPOLD, A SAND COUNTY ALMANAC 224-25 (Oxford Univ. Press 1968) (1949).

[3] RACHEL CARSON, SILENT SPRING 297 (1962). For the view that much of *Silent Spring* is alarmist, technophobic, and unfounded, see Roger Meiners & Andrew P. Morriss, *Silent Spring at 50: Reflections on an Environmental Classic*, PERC Policy Series No. 51 (2012).

[4] *Quoted in* CARSON, *supra* n.3, at 72.

[5] By the early 1970s, there was "little or no public access" to approximately three quarters of the California coast. Catherine R. Hall, *Capturing the Spirit of the California Coastal Act in Local Coastal Programs*, 2 STAN ENVTL. L. ANN. 61, 61 n.1 (1979). It is not clear what portion of that inaccessible area the public would have wanted to visit.

[6] Janet Adams, *Proposition 20—A Citizens' Campaign*, 24 SYRACUSE L. REV. 1019, 1027 (1973).

[7] *See id*. at 1045-46.

[8] Peter M. Douglas & Joseph E. Petrillo, *California's Coast: The Struggle Today—A Plan for Tomorrow, Part II*, 4 FLA. ST. U.L. REV. 315, 332 n.291 (1976). Opposition to Proposition 20 was not exclusive to the private sector. *See* Teresa Marie Lobdell & Mark Andrew Chavez, *The California Coastal Act of 1976: Allocating Coastal Land-Use Control Responsibilities between State and Local Governments*, 2 STAN. ENVTL. L. ANN. 1, 15 n.77 (1979) ("The League of California Cities voted 123 to 74 to oppose the initiative. During the League's debates, the mayor of Long Beach said: 'Everything I have labored for for twelve years in office will come to a screeching halt if it passes. This is a very vicious piece of legislation.").

"to sacrifice access to the coastline."[9] The concept of property rights therefore should be reconceived, they argued, as "a privileged stewardship . . . encompass[ing] enforceable social and environmental obligations" and "accompanied by an assumption of substantial public responsibilities."[10]

I suspect that, in Douglas' view as well as in the view of most Coastal Act proponents, the public burdens on private coastal property include the obligation to provide public access. Indeed, the Douglas and Petrillo article urges that, for example, coastal subdivisions be forced to provide public access, or to provide a monetary in-lieu payment.[11] The authors were confident that such access demands would be upheld by the courts, relying on a then-recent California Supreme Court decision authorizing land dedications for public parks.[12] Similarly sanguine about such public access conditions was the Coastal Act itself, which boldly required that most new development must provide public access from the nearest public roadway to the shoreline and along the coast, without any hint of any constitutional impediment to that demand.[13]

Such a hopeful attitude was supported, at least in the early part of the 1980s, by the California case law. For example, in the 1982 decision of *Georgia Pacific Corp. v. California Coastal Commission*,[14] the court of appeal upheld a coastal access easement condition as a valid exercise of the police power, noting that "the validity of the dedication requirement is not dependent on a factual showing that the development has created a need for it."[15] Similarly, in the 1985 decision of *Grupe v. California Coastal Commission*,[16] the court of appeal upheld the Commission's conditioning of a permit to build a single-family home on the owner's dedication of a public easement to allow the public to pass in front of the home from one section of

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[9] Douglas & Petrillo, *supra* n.8, at 331. Douglas had written earlier that "land use planning is often little more than an expression of value judgments and that management is their implementation." Peter Douglas, *Coastal Resources Planning and Control: The California Approach*, 5 ENVTL. L. 741, 747 (1975).

[10] Douglas & Petrillo, *supra* n. 8, at 331, 332. Professor Ellickson presciently recognized where that approach would end up. *See* Robert C. Ellickson, *Ticket to Thermidor: A Commentary on the Proposed California Coastal Plan*, 49 S. CAL. L. REV. 715, 739 (1976) ("The principal losers from the enactment of the Coastal Plan [a forerunner of the Coastal Act] would be average California taxpayers and housing consumers. . . . [T]he Plan's restrictions on new construction can be expected to increase sharply the price of both new and used housing near the beach."). The notion that private coastal property is impressed with a super-public-trust held enough political sway at the time to defeat a bill, supported by business and labor as a substitute for what would become the Coastal Act, to require the state "to compensate landowners whenever financial burdens of coastal controls hit them 'disproportionately.'" Hall, *supra* n.2, at 65 n.19.

[11] Douglas & Petrillo, *supra* n.8, at 326.

[12] *Id*. (citing Assoc. Home Builders v. City of Walnut Creek, 484 P.2d 606 (Cal. 1971)).

[13] CAL. PUB. RES. CODE § 30212.

[14] 132 Cal. App. 3d 678 (1982).

[15] *Id*. at 699.

[16] 166 Cal. App. 3d 148 (1985).

public beach to another. The court explained that "there need be only an indirect relationship between a proposed exaction and a need to which the development contributes."[17] It went on to conclude that the challenged easement "clearly meets this test," because the proposed "beach front home is one more brick in the wall separating the People of California from the state's tidelands."[18] That the single home-building project "alone has not created the need for access to the tidelands fronting . . . the property" is immaterial, because the project "is one small project among a myriad of others which together do severely limit public access to the tidelands and beaches of this state, and therefore collectively create a need for public access."[19] So, what the court of appeal required was a nexus of a type, what one might call a general or indirect nexus. A dedication could be required of a development so long as the dedication was designed to remedy a harm typically associated with the *class* of development of which the particular project was a part.[20] Thus, it was not surprising when, in 1986, the court of appeal upheld another public access easement condition imposed on a residential home-building project along Faria Beach in Ventura County.

But is it that case, *Nollan v. California Coastal Commission*,[21] which has become the preeminent decision addressing public access and the Coastal Act. The case concerned the attempts of the Nollan family to secure a permit to replace their tumbledown bungalow with a newer structure.[22] The Coastal Commission was willing to give the Nollans the permit to demolish and rebuild, but only on condition that they deed to the public, in perpetuity, a significant portion of their otherwise private beach.[23] The Commission argued that the Nollans' home-building project would obstruct views to the beach from members of the public walking in front of the Nollans' property, and hence would create a "psychological barrier" to the public's accessing the coast.[24] In the Commission's view, an easement across the Nollans' private beach was needed to make up for the reduction of visual public access to the beach.[25] But the demanded easement would not have provided any relief to the psychologically frustrated members of the public trying to get to the beach. It only would have allowed people already on the beach to continue to walk directly in front of the Nollans' home.[26]

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[17] *Id*. at 166.
[18] *Id*. at 167.
[19] *Id*.
[20] *See id*. at 166 n.11.
[21] 483 U.S. 825 (1987).
[22] *Id*. at 827.
[23] *Id*. at 828-29.
[24] *Id*.
[25] *See id*. at 836, 838.
[26] *Id*. at 838-39.

The Nollans sued the Commission, arguing that the easement condition on their permit threatened to take their property without compensation. Not surprisingly, the court of appeal ruled against the Nollans, upholding the easement condition on the "beach front home is one more brick in the wall" theory. But this time the United States Supreme Court took case. In a decision by Justice Scalia, the Court held that the Commission's easement condition was nothing less than "an out-and-out plan of extortion."[27] The Commission had violated the Nollans' rights, the Court explained, by conditioning their land-use permit on their forfeiting a valuable property interest that was entirely unrelated to any impact of their proposed home-building project.[28] To be sure, a land-use agency, the Court conceded, may impose reasonable conditions that mitigate the harm of a proposed project.[29] But what an agency may not do, and yet what the Commission was proposing to do, is demand from a permit applicant a valuable property interest that lacks "an essential nexus" to any impact of the proposed development.[30] Requiring such unrelated mitigation would amount to an unconstitutional condition on the permit applicant's use of his property.[31] Thus, Justice Scalia concluded that "California is free to advance its 'comprehensive program' [to provide continuous public access along the beach,] . . . but if it wants an easement across the Nollans' property, it must pay for it."[32]

The decision's immediate reception in the legal academy was mixed. A much-cited article in the *Harvard Environmental Law Review* predicted that "some legitimate exercises of land use regulatory authority will be forgone, for want of the resources or the will to document adequately their justification, or out of fear, warranted or unwarranted, of potential [temporary takings] liability."[33] A student-authored piece in the *Whitter Law Review* provocatively titled, *Staring Down the Barrel of Nollan: Can the Coastal Commission Dodge the Bullet?*, opined that *Nollan* "dealt a serious blow to the Commission's conditional permit policy," but the article's author nevertheless bravely sought to cheer his readers with the prediction that "the negative impact of the decision will, fortunately for this and subsequent generations of environmentally conscious citizens, be effectively sidestepped by more factually oriented responsible land use planning."[34] A less sanguine author, writing in the *Harvard Law Review*, worried that, "[b]y requiring a tighter fit between the ends and means of land-use regulations, *Nollan* raises the costs of land-use regulation to a

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[27] *See id*. at 837 (quoting J.E.D. Assocs., Inc. v. Atkinson, 432 A.2d 12, 14-15 (1981)).
[28] *Nollan*, 483 U.S. at 838-39.
[29] *Id*. at 836-37.
[30] *See id*. at 837.
[31] *See id*. at 841-42. *See also* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2594 (2013).
[32] *Nollan*, 483 U.S. at 841-42.
[33] Nathaniel S. Lawrence, *Means, Motives, and Takings: The Nexus Test of Nollan v. California Coastal Commission*, 12 HARV. ENVTL. L. REV. 231, 263 (1988).
[34] Paul Morison, Note, *Staring Down the Barrel of* Nollan*: Can the Coastal Commission Dodge Bullet?*, 9 WHITTIER L. REV. 579, 611 (1987).

point that may prevent local and state governments from adopting plans that maximize both public and private interests."[35] In contrast, a more sympathetic author, in a piece entitled *Extortion Loses A Synonym Thanks to Court Ordered Accountability in Land Use Exactions Programs*, observed that even after *Nollan* "government agencies may continue to use innovative land use regulations that balance the benefits of an exaction program with the burdens of covered construction."[36] But what they may not do is "accumulate societal gains at the expense of innocent individuals under the facade of an exaction program."[37]

Much of the academic fuss over *Nollan* focused on the possibility that the case portended an end to the New Deal era of jurisprudence, which installed the rule that property rights receive less protection than other constitutional rights.[38] Nevertheless, commentators recognized that the essential nexus test "described by Justice Scalia is not the first use of the word 'nexus' in takings of land use cases," and that, since "the 1960's, courts have applied some sort of 'rational nexus' test to the question of the validity of specific exactions."[39] The difference, as noted in Justice Scalia's *Nollan* opinion,[40] is that what most jurisdictions considered to be a "rational nexus" was something tighter than what we have seen the California courts deemed sufficient. Recall that, in the cases prior to *Nollan*, the California courts had upheld exactions so long as the dedication was rationally related to mitigating the effects *typically to be produced by the class of development as a whole*.[41] In contrast, *Nollan* requires a more precise—that is, "essential"—nexus, according to which the condition must be tailored to mitigating the effects of the particular project.

In the now almost thirty years since *Nollan* was decided, the Supreme Court has provided a few key elaborations of the doctrine. Perhaps most importantly, it has held that an essential nexus is not enough; a "rough proportionality" between the condition and the quantity and quality of the project's impacts also is required.[42] Moreover, the Court has made clear that the doctrine applies to monetary, as well as real property, exactions.[43] And the Court has clarified *Nollan*'s doctrinal

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[35] Note, *Land Use Regulation*, 101 HARV. L. REV. 240, 249 (1987).
[36] John P. O'Connor, Jr., Casenote, *Extortion Loses a Synonym Thanks to Court Ordered Accountability in Land Use Exaction Programs*, 57 U. CIN. L. REV. 397, 421 (1988).
[37] *Id*.
[38] Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1605-14 (1988); Lawrence W. Andrea, Comment, *Trespass at High Tide: The Supreme Court Gives Heightened Scrutiny to a State Imposed Easement Requirement*, 54 BROOK. L. REV. 991, 1011-17 (1988). *See also* Note, *Taking a Step Back: A Reconsideration of the Takings Test of* Nollan v. California Coastal Commission, 102 HARV. L. REV. 448, 450 (1988).
[39] Steven J. Lemon, *et al*., Comment, *The First Applications of the Nollan Nexus Test: Observations and Comments*, 13 HARV. ENVTL. L. REV. 585, 589 (1989).
[40] *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 839-40 (1987) (citing cases).
[41] *See* Grupe v. Cal. Coastal Comm'n, 166 Cal. App. 3d 148, 166 n.11 (1985).
[42] Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).
[43] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2603 (2013).

underpinnings. The case does not really establish a "takings" test, but is instead a special application of the unconstitutional conditions doctrine, which "protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits."[44] In other words, "[e]xtortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation."[45]

A few years after *Nollan*, the California Legislature amended the Coastal Act to provide that the law gives no authority to grant or deny a permit in a manner that would constitute a taking.[46] And since that time, the sky has not fallen—the coast is as physically accessible now as it ever has been. Part of the reason no doubt is because of the Commission's pre-*Nollan* policy of unconstitutionally exacting property rights from hapless coastal landowners, a policy that received renewed life even after *Nollan* when the California court of appeal held that property owners who had been required to accede to the Commission's unconstitutional easement demands before *Nollan* was the law of the land could not claim the benefits of that decision after-the-fact, even if the limitations period for a takings claim had not yet expired.[47] Another reason why the coastal access sky hasn't fallen is that, as our moderator wrote in an article for *Ecology Law Quarterly* a few years back, "it is increasingly common for local land use regulators in California to commission so called 'nexus' studies to demonstrate the requisite constitutional and statutory relationships," and that a "well-designed, thorough nexus study substantially reduces the risk of legal challenge and invalidation of the land use permit condition."[48] In other words, land-use agencies typically can still get what they want. And ironically, there is some scholarship indicating that the costs of these nexus studies are borne by property-owner-developers themselves.[49]

Nowadays, however, the issue is not so much the travails of coastal visitors who suffer a "psychological barrier" to accessing the coast, but rather those who encounter an economic barrier. The coast is an expensive place in which to live and to visit—hence, the Commission's recent efforts to condition new developments on the provision of affordable accommodations. This practice is just as unconstitutional as the Commission's easement-demanding practice in *Nollan*.[50] In fact, in one respect,

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[44] *Id*. at 2594.
[45] *Id*. at 2596.
[46] CAL. PUB. RES. CODE § 30010, added by Cal. Stats. 1991, Ch. 285, § 2, at 1794.
[47] Cal. Coastal Comm'n v. Superior Court (Ham), 210 Cal. App. 3d 1488, 1495-96 (1989).
[48] Richard Frank, *The Dog that Didn't Bark, Imperial Water, I Love L.A., and Other Tales from the California Takings Litigation Front*, 34 ECOLOGY L.Q. 517, 528 (2007).
[49] Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609, 644 n.173 (2004).
[50] *See* Damien Schiff, *The trial court wasn't interested, but maybe you'll be*, PLF Liberty Blog (Apr. 11, 2016), http://blog.pacificlegal.org/the-trial-court-wasnt-interested-but-maybe-youll-be/.

the Commission's affordability conditions are worse than what was demanded in *Nollan*. At least in *Nollan* no one could plausibly argue that the Commission itself was responsible for reduced physical public access. Yet a major reason for the coast's economic inaccessibility is the stringent land-use regulations which apply to it, and which limit the supply of new housing and visitor accommodations. The Commission, of course, is responsible for much of that regulation. How ironic, then, that implementation of the Coastal Act itself has become a major obstacle to coastal access in this state.