

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FIVE

SURFRIDER FOUNDATION,

Plaintiff and Respondent,

v.

**MARTINS BEACH 1, LLC and MARTINS
BEACH 2, LLC,**

Defendants and Appellants.

Case No. A144268 and
A145176

San Mateo County Superior Court, Case No. CIV520336
The Honorable Barbara J. Mallach, Judge

**AMICUS CURIAE BRIEF OF THE CALIFORNIA
COASTAL COMMISSION IN SUPPORT OF
PLAINTIFF AND RESPONDENT SURFRIDER
FOUNDATION**

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Case Name: *SURFRIDER FOUNDATION v. MARTINS BEACH 1, LLC and MARTINS BEACH 2, LLC* Court of Appeal No.: A144268 and A145176

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INTRODUCTION

California's 1,100 miles of coastline and its coastal beaches are unique and irreplaceable state resources. Californians recognized this over 45 years ago with the passage in 1972 of Proposition 20, the California Coastal Zone Conservation Act. Four years after passage of that citizen initiative, the Legislature enacted the California Coastal Act of 1976, a comprehensive statutory scheme designed to protect the coastline and coastal beaches. (Pub. Resources Code, § 30000 et seq.) The Coastal Act created the California Coastal Commission and conferred on it primary responsibility for implementation of the Act. (Pub. Resources Code, § 30330.)

This case centers on whether the complete closure of an historically popular San Mateo County beach, known as Martins Beach, and the methods used to achieve that closure, are subject to the Coastal Act permitting process.¹ This case is of great importance to the Commission because the issues presented implicate a critical Coastal Act objective: maximizing public access and recreational opportunities along the coast consistent with sound resource conservation principles and protection of private property rights. (Pub. Resources Code, § 30001.5, subd. (c).)

The Commission respectfully submits that the trial court correctly interpreted and applied the Coastal Act in requiring the Martins Beach owners, two limited liability corporations (the LLCs), to obtain a coastal development permit for their closure of the much-used beach. In reaching its decision, the trial court recognized the broad definition of "development" in the Coastal Act, which encompasses the placement of

¹ The beach at issue is known as both "Martins Beach" and "Martin's Beach." This brief uses "Martins Beach" consistent with the trial court caption of the case.

structures, such as gates, as well as changes in the density or intensity of use of land and changes in the intensity of use of water or access thereto. (Pub. Resources Code, § 30106.) The trial court also recognized that the Coastal Act contains provisions to assure that permit decisions do not result in the taking of private property without payment of just compensation. (Pub. Resources Code, § 30010.)

The trial court correctly rejected the LLCs' arguments that requiring them simply to *apply* for a coastal development permit, and maintain the status quo pending a final administrative decision to grant, conditionally grant, deny or waive a permit, offends constitutionally protected private property rights. The LLCs' argument that the court should narrowly construe the definition of "development" to avoid a constitutional problem is not supported by law, and it rests on an unsubstantiated assertion that the LLCs actually possess property rights that entitle them to completely exclude the public from Martins Beach. This court recently rejected the LLCs' arguments about their right to exclude the public from their property as a matter of law, including a remand for further proceedings on whether the historic management and public use of Martins Beach has resulted in the express dedication of public rights of access at the site. (*Friends of Martin's Beach v. Martin's Beach I LLC* (2016) 246 Cal.App.4th 1312, 1352.) The uncertain nature of existing public and private property rights at Martins Beach highlights the lack of merit of the LLCs' constitutional claims which are predicated on their asserted ownership of all of the property at Martins Beach and absolute right to exclude the public from the site.

The Coastal Act permitting agencies—San Mateo County and the Commission— should be given an opportunity to consider a permit application for closure of Martins Beach and an opportunity to develop a factual record regarding, among other matters, the existing public and

private rights at the site. They should also be given the opportunity to *avoid* interference with the LLCs' private property interests while still applying pertinent Coastal Act policies and requirements at the coastal site.

The trial court properly presumed that the Coastal Act permitting agencies "will adhere to [their] responsibilit[ies] to fairly balance the competing interests set forth in the Coastal Act," including the protection of private property interests. (11 CT 3127.) This court should affirm the judgment below.

STATEMENT OF THE CASE

The Commission adopts the Surfrider Foundation's Procedural and Factual Background, with the following supplement.

In 2009, the LLCs brought suit against the Commission and San Mateo County regarding the Coastal Act permit process as it pertains to closure of the beach to the public. That lawsuit sought declaratory and injunctive relief against the Commission and the County, and specifically sought a court order to authorize the closing of the beach without obtaining a coastal development permit. (13 CT 3601-3613.) The trial court sustained the Commission's demurrer to all claims in that suit without leave to amend because the complaint alleged no Commission action whatsoever, and because "in any case, administrative jurisdiction under the Coastal Act exists and remedies thereunder have not been exhausted." (13 CT 3621.) In sustaining the County's demurrer without leave to amend, the trial court noted:

Although Plaintiff asserts that the Coastal Act jurisdiction is a question of law, it is likely that there will be issues of fact with regard to the precise circumstances under which access was provided by Plaintiff's predecessors in interest The exact circumstances of the prior access, and the extent to which Plaintiff seeks to change access, are appropriate factual inquiries to be submitted to the appropriate administrative body. That body's final decision may be reviewed by this court by writ of mandamus.

(13 CT 3621.) The LLCs neither appealed this prior decision nor applied for a coastal development permit to close the beach.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT CLOSURE OF MARTINS BEACH IS SUBJECT TO THE COASTAL ACT PERMIT PROCESS

A. The Coastal Act Framework

The California Coastal Act, Public Resources Code section 30000 et seq., was enacted as a “comprehensive scheme to govern land use planning for the entire coastal zone of California.” (*San Mateo Coastal Landowners v. County of San Mateo* (1995) 38 Cal.App.4th 523, 534, quoting *Yost v. Thomas* (1984) 36 Cal. 3d 561, 565.) The purposes of the Act are, inter alia, to “[p]rotect, maintain, and where feasible, enhance and restore the overall quality of the coastal zone environment,” to “[a]ssure orderly, balanced utilization and conservation of coastal zone resources” and to “[m]aximize public access to and along the coast and maximize public recreational opportunities consistent with sound resource conservation principles and constitutionally protected rights of private property owners.” (Pub. Resources Code, § 30001.5.)

The Act declares that it is to be “liberally construed to accomplish its purposes and objectives.” (Pub. Resources Code, § 30009; *see also Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal. 4th 783, 793-794 [“the Coastal Act is to be liberally construed to accomplish its purposes and objectives”] and *Bolsa Chica Land Trust v. California Coastal Commission* (1999) 71 Cal.App.4th 493, 506 [“[t]he courts are enjoined to construe the statute liberally in light of its beneficent purposes”].)

Anyone who wishes to undertake non-exempt development in the coastal zone must obtain a coastal development permit or obtain a waiver of the permit requirement. (Pub. Resources Code, §§ 30600, 30624.7; Cal. Code Regs., tit. 14, § 13238 et seq.) The Coastal Act exempts various categories of development from the requirement to obtain a coastal development permit, including improvements to existing structures, repair and maintenance activities, and, most relevant here in light of the LLCs' parade of extreme hypothetical applications of the Act, temporary events that do not have a significant adverse impact upon coastal resources. (Pub. Resources Code, § 30108.6.)

In order to implement the Act's permit requirement, each local government within the coastal zone is charged with preparing a local coastal program (LCP), consisting primarily of land use plans, zoning ordinances, and zoning district maps. (Pub. Resources Code, § 30108.6.) The local government is responsible for submitting the LCP to the Commission for its approval as consistent with the policies and requirements of the Act. (Pub. Resources Code, §§ 30200, subd. (a), 30500-30525.) Once the Commission certifies a LCP, the primary permit authority over coastal zone development located in the area subject to the LCP is transferred from the Commission to the local government. (Pub. Resources Code, § 30519, subd. (a).) For development adjacent to the shoreline, the local government must approve a coastal development permit if "the proposed development is in conformity with" the certified LCP and the public access and recreation policies of the Coastal Act. (Pub. Resources Code, § 30604, subs. (b), (c).) The Commission retains appellate jurisdiction over local government actions approving certain types of development projects and retains original permit jurisdiction over any development proposed or undertaken on any tidelands, submerged lands or

on public trust lands. (Pub. Resources Code, §§ 30603, subd. (a), 30519, subd. (b).)

In this case, San Mateo County has a certified LCP. (13 CT 3625-3858.)

B. “Development” is Broadly Defined in the Coastal Act

The Coastal Act definition of “development” extends beyond ordinary dictionary definitions of the term. The definition includes, among other activities, the placement of structures within the coastal zone, changes in the density or intensity of use of land in the coastal zone, and—most relevant to this case—any “change in the intensity of use of water or access thereto” in the coastal zone. (Pub. Resources Code, § 30106.)²

² Public Resources Code section 30106 provides:

“Development” means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use: change in 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; and removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z’berg-Nejedly Forest Practice Act of 1973(commencing with Section 45112).”

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This court has observed that the Coastal Act does not simply use the term “development,” and leave the Commission and the courts to ascertain its meaning from common usage or legislative history. “Rather, the statute provides an expansive definition of the activities that constitute development for purposes of the Act. It is the language of that definition that must be applied and interpreted, giving the words their usual and ordinary meaning.” (*Gualala Festivals Committee v. California Coastal Commission* (2010) 183 Cal.App.4th 60, 67.)

Case law confirms the Act’s broad definition of “development.” Most recently, the California Supreme Court considered the matter in *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles*, *supra*, 55 Cal. 4th 783. The activity at issue there was conversion of the form of ownership within a private mobile home park from tenant occupancy to residential ownership, a form of subdivision. The Supreme Court determined that the change in the form of ownership within the private park constituted development that required a coastal development permit because, by statute, subdivision was deemed to change the density or intensity of use of land. (*Id.* at p. 795.) The court held that an expansive definition of “development” is consistent with the mandate that the Coastal Act is to be “liberally construed” and noted that the term “development” for Coastal Act purposes includes activities that would “*decrease* intensity of use, such as by limiting public access to the coastline.” (*Ibid.*; emphasis in the original.)

(...continued)

“As used in this section, “structure” includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line.”

Similarly, in *Gualala Festivals Committee v. California Coastal Commission*, *supra*, 183 Cal.App.4th 60, this court held that an annual July 4th fireworks display was “development” under the Coastal Act because it resulted in the discharge of solid and chemical waste within the coastal zone, causing harm to sensitive resources. (*Id.* at p. 68.) The Commission’s factual administrative record, developed with its expertise in protection of coastal resources, revealed that year after year fireworks were being discharged into the Gualala River estuary, with documented detriment to marine mammals and nesting seabirds during the fireworks show. (*Ibid.*)

In *Gualala*, this court addressed the argument the LLCs make in this case that the broad statutory definition of “development” in the Coastal Act can lead to absurd results. The court responded by noting that the Act provides for exemptions and waivers of the permit requirement for both temporary and de minimis activities. (*Id.* at pp. 68-69; see also Pub. Resources Code, § 30610 [a coastal development permit is not required for temporary events that the executive director finds do not have any significant adverse impacts on coastal resources]; Pub. Resources Code, § 30624.7 [the executive director is entitled to issue waivers for any de minimis development].) The court concluded that the way to “provide the Commission necessary flexibility” to accomplish the Act’s statutory purposes “is to construe the Act to provide the Commission with both expansive jurisdiction to control even limited, temporary development and authority to exempt. . . development that does not have ‘any significant adverse impact upon coastal resources’.” (*Gualala, supra*, 183 Cal.App.4th at pp. 69-70.)³

³ While the LLCs suggest that a broad definition of development will lead to absurd and oppressive permitting requirements (see, e.g., AOB at p. (continued...))

A host of other appellate cases, in addition to those cited in Respondent's Brief, have affirmed the Coastal Act's broad definition of "development." Development that is subject to the coastal development permit process includes:

- The installation of gates and change of hours of operation of beach access ways (*City of Dana Point v. California Coastal Commission* (2013) 217 Cal.App.4th 170, 174);
- Installation of gates with "no trespassing" signs (*LT-WR, L.L.C. v. California Coastal Commission* (2007) 152 Cal.App.4th 770, 776, 804-805);
- The placement of fee collection devices in a coastal parking lot (*Surfrider Foundation v. California Coastal Commission* (1994) 26 Cal.App.4th 151, 157);
- Lot line adjustments (*Landgate v. California Coastal Commission* (1998) 17 Cal.4th 1006, 1024-1025; *La Fe, Inc. v. County of Los Angeles* (1999) 73 Cal.App.4th 231, 242);
- Off shore sand extraction (*Monterey Sand Co. v. California Coastal Commission* (1987) 191 Cal.App.3d 169, 176);
- Remodeling an existing supermarket into 16 small retail shops and a restaurant (*Stanson v. San Diego Coast Regional Commission* (1980) 101 Cal.App.3d 38, 47-48).

As apparent from the above cases, Coastal Act development is not limited to activity that occurs on public property or on property to which the public has a right of access. "Development" under the Act includes

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43), there is no evidence or case law to support that the Commission or any local government has ever asserted Coastal Act permit jurisdiction over truly trivial activities such as a birthday party or closure of a seating area in a restaurant. Additionally, this case involving closure of a popular beach that has been open to the public for almost a century, is not analogous to any of the LLCs' many examples of hypothetical absurd applications of the Coastal Act.

activity that occurs entirely on private property if the activity falls within the statutory definition of the term. The Act also encompasses not only activity that directly physically impedes access to the shoreline but also “all impediments to access, whether direct or indirect, physical or nonphysical” that fall within the statutory definition of “development.” (*Surfrider Foundation v. California Coastal Commission*, *supra*, 26 Cal.App.4th at p. 158.)

C. The Closure of Martins Beach Falls Within the Coastal Act Definition of “Development”

The closure of Martins Beach, which includes closure of a post-Coastal Act gate to prevent the public from reaching the beach and the water, easily falls within the Coastal Act’s definition of “development.” Closure of the popular beach, which was operated as a public beach and has been visited by thousands of people over many decades, is a change in the density or intensity of use of land in the coastal zone. The closure is also a change in the intensity of use of water and access to the water in the coastal zone, because the closure prevents both use of and access to the water at the beach. Indeed, the LLCs’ representative at trial admitted that the LLCs changed access to the beach, including the water, without obtaining a permit or waiver. (7 RT 565-567; 13 CT 3120.) The beach closure also constitutes development under the Act because the gate used to exclude the public from access to the beach, which the trial court determined was placed after enactment of the Coastal Act (11 CT 3121), is a “structure” placed in the coastal zone without a permit. (Pub. Resources Code, § 30106; *LT-WR, L. L. C. v. California Coastal Commission*, *supra*, 152 Cal.App.4th at pp. 804-805.)

The LLCs’ various arguments emphasizing their private property interests are misplaced for a number of reasons.

First, as noted above, the Act’s definition of “development” applies equally to private and public property. (See pp. 4-8, above.) Thus, activity that changes the density or intensity of use of land or the intensity of use of the water or access thereto in the coastal zone is development that requires a permit, regardless whether the property is private, public or a mixture of both.

Second, the LLCs’ claim that all of the property affected by their beach closure activities is indisputably private has been rejected by this court. (See, e.g., AOB at p. 21 and pp. 58-61.) In *Friends of Martin’s Beach v. Martin’s Beach I, LLC, et al.*, *supra*, 246 Cal.App.4th 1312, this court reversed a quiet title judgment in favor of the LLCs that purported to quiet private title to the tidelands and submerged lands offshore at Martins Beach, which is the property that the public has historically used for, among other recreational activities, surfing and fishing. (*Id.* at p. 1354.) This court also reversed a judgment that rejected a claim that portions of the Martins Beach property have been dedicated to the public for public use. (*Id.* at p. 1352.) *Friends of Martin’s Beach* undercuts the LLCs’ attempts to exempt themselves from the reach of the Coastal Act permit requirement based on their assertions that they hold title to the property free and clear of any rights of public access.

Third, the LLCs’ arguments misconstrue Public Resources Code section 30010, a provision of the Coastal Act that prohibits the Commission and local governments from exercising their power to grant or deny a permit in a manner that will “take or damage private property for public use.” The Coastal Act mandates consideration of and respect for private property interests, but it does not do so in the context of the threshold determination of whether activity meets the statutory definition of “development” requiring a permit. Instead, the Act requires a permit for activity that meets the broad definition of “development,” but prohibits

permit decisions that take or damage private property for public use without payment of compensation. (Pub. Resources Code, § 30010.) This makes sense because it allows the agencies with land use expertise in the coastal zone to determine in the first instance the existence, nature and extent of both the private and public property rights at a particular site and to consider whether and how application of Coastal Act policies might affect those rights before making a decision to grant or deny a permit, or to waive the permit requirement altogether.

Fourth, the Second District Court of Appeal has recognized that gates and signs and other activities intended to protect private property and exclude uninvited strangers can constitute development under the Coastal Act. In *LT-WR, L.L.C. v. California Coastal Commission, supra*, 152 Cal.App.4th 770, 804-805, the court held that irrespective of a property owner's intent in installing gates and "no trespassing" signs, including an intent to exclude the public and avoid tort liability for strangers' use of private property, the placement of the structures constitutes Coastal Act "development." The court's holding flows inevitably from the purposes of the Act because the means used to exclude the public from property can pose a potential for profound impacts on coastal resources. Fences and gates come in many forms (e.g., a tall solid brick wall) and many have the potential to significantly and adversely affect coastal resources. The permitting process provides the Coastal Act permitting agencies with the opportunity to consider and, if necessary, address these impacts, while also adhering to the requirement that permit decisions may not take private property without payment of compensation.⁴

⁴ The LLCs argue in their Reply Brief that *LT-WR, L.L.C. v. California Coastal Commission, supra*, 152 Cal.App.4th 770, prevents Coastal Act permit agencies from considering the existence and extent of
(continued...)

Closure of the Martins Beach to the public meets the definition of “development” in the Coastal Act and the trial court correctly rejected the LLCs’ arguments that it does fall within that definition simply because of the LLCs’ asserted private property interests at the site.

II. THE LLCs MUST EXHAUST THEIR ADMINISTRATIVE REMEDIES BEFORE PRESENTING JUDICIAL CLAIMS THAT THEY ARE EXEMPT FROM THE COASTAL ACT PERMIT PROCESS

In the 2009 case the LLCs filed against San Mateo County and the Commission regarding their asserted right to close Martins Beach without a coastal development permit, the trial court sustained demurrers to the action in part because the LLCs had an available administrative remedy they did not exhaust: application for a coastal development permit. (See *ante* at p. 3.) That ruling was based on solid legal footing that applies equally to the jurisdictional defenses the LLCs raise in this action.

In *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, the California Supreme Court established that courts should consider three factors to determine whether exhaustion of administrative remedies should be required when a litigant makes a judicial claim of lack of agency jurisdiction. The three *Coachella* factors are (1) the injury or burden that exhaustion will impose; (2) the strength of the legal argument that the

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the public’s existing rights of access to the shoreline. (Reply Brief at p. 17.) They are wrong. *LT-WR, L.L.C.* involved placement of an inland gate in the coastal zone, and did not involve any consideration of access to the shoreline. Public Resources Code section 30211, which was not at issue in *LT-WR, L.L.C.*, expressly authorizes Coastal Act permitting agencies to consider whether development interferes with the public’s right of access to the sea where acquired through use or legislative authorization.

agency lacks jurisdiction; and (3) the extent to which administrative expertise may aid in resolving the jurisdictional issue. (*Id.* at p. 1080.) Application of the *Coachella* factors here supports that the LLCs should not be excused from the requirement to exhaust their administrative remedies.

First, the injury or burden to the LLCs of applying for a coastal development permit and raising claims of exemption from the permit requirement in administrative permit proceedings is slight, particularly when compared with the LLCs' participation in litigation to *avoid* the permit requirement, including this action and the unsuccessful judicial action against the County and the Commission seeking an exemption from the permit requirement. Moreover, as set forth below, the requirements to engage in the permit process and maintain the status quo in the interim do not impermissibly take a property interest from the LLCs, as they contend. (See *post* at pp. 17-27.)

Second, the LLCs' argument regarding lack of Coastal Act permit jurisdiction is weak. The LLCs' activity in closing the beach plainly falls within the Act's broad definition of "development" because, among other impacts, it indisputably changes the intensity of use of the water at the site and the access thereto through both direct and indirect means. (See Pub. Resources Code, § 30106; *Surfrider Foundation v. California Coastal Commission*, *supra*, 26 Cal.App.4th at p. 158.))

Third, as the trial court noted in the LLCs' previous action, the administrative expertise of the County and the Commission and the development of a factual record based on that expertise will aid in resolving the jurisdictional dispute. (13 CT 3621 ["The exact circumstances of the prior access, and the extent to which Plaintiff seeks to change access, are appropriate factual inquiries to be submitted to the appropriate administrative body".])

As an example of a factual dispute here, the LLCs contend that they were not required to obtain a permit for placement of the gate that is being used to exclude the public from the beach because, in their view, their property is designated as agricultural property in the LCP and therefore did not require a permit for placement of the gate. (AOB at pp. 49-51.) The LLCs also contend that placement of the gate was exempt repair and maintenance of an existing structure that does not require a permit. (*Ibid.*) In opposition, the Surfrider Foundation contends that the San Mateo County LCP designates Martins Beach as public access property and that a permit was required for placement of the gate. (Respondent’s Brief at p. 15, fn. 3 and p. 27, fn. 27.) Disputes of this nature, including investigation into whether the LLCs replaced more than 50 percent of a pre-Coastal Act gate apparatus— which would *not* be exempt from a permit requirement (Cal.Code of Regs., tit. 14, §13252, subd. (b))— are classic examples of matters that are best addressed in administrative proceedings by agencies with specialized expertise in the subject matter.⁵ The *Coachella* factors support requiring the LLCs to exhaust their administrative remedies.

South Coast Regional Com. v. Gordon (1977) 18 Cal.3d 832 also supports that the LLCs must exhaust their administrative remedies before presenting a permit exemption claim to the courts. There, the California Supreme Court held that a property owner could not litigate his claim that he was exempt from a coastal permit requirement without first providing the permitting agency an opportunity to consider the claim. The agency in *Gordon*, a predecessor agency to the Commission, brought a judicial

⁵ The factual record that would be developed in an administrative proceeding would not be limited to the facts presented to the trial court in this case. Thus the arguments in Section II.C of the LLCs’ Reply Brief are irrelevant in their exclusive focus on whether Surfrider presented substantial evidence to support any particular factual finding *in this case*.

enforcement proceeding similar to the Surfrider Foundation's action here to halt construction of a house without the necessary coastal development permit. Although the property owner did not initiate the litigation and raised his claim of exemption from the permit requirement (based on an asserted vested right) only as a defense in the litigation, the court held that the exemption claim should have been presented first in an agency administrative permit proceeding. (*Id.* at pp. 836-837.) The court rejected an argument that, because vested rights are rooted in the Constitution, the agency could not make an initial determination on the exemption claim.⁶ (*Ibid.*)

More recently in *McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, the Sixth District Court of Appeal considered whether a litigant claiming the Commission lacked appellate jurisdiction in a particular matter could bypass the Commission's administrative consideration of that claim and raise it for the first time in a judicial proceeding. As in *Gordon*, the court held that the jurisdictional claim should have been raised first in an administrative proceeding. (*Id.* at p. 285.)

In this case, the court should require the LLCs to raise their arguments that they are exempt from the Coastal Act permit process in a permit proceeding. Public Resources Code section 30010 assures consideration of the LLCs' arguments regarding protection of their private property interests

⁶ The court in *Gordon* also rejected the property owner's argument, similar to one made by the LLCs in this case, that presenting his permit exemption argument was futile because the Attorney General had already taken the position in court, on behalf of the permitting agency, that he was not exempt from the permit requirement. The court held that the Attorney General's arguments were not the equivalent of full agency consideration of the exemption claim and a vote on it after a public hearing. (*Gordon, supra*, 18 Cal.3d at pp. 838-839.)

in a permit proceeding, and both the County and the Commission routinely apply that provision in making Coastal Act permit decisions. As the trial court correctly observed, courts should expect that the administrative agencies will correctly balance competing interests in carrying out their Coastal Act responsibilities. (11 CT 3127)

III. THE TRIAL COURT JUDGMENT DOES NOT TAKE PROPERTY FROM THE LLCs

The LLCs argue that the trial court's judgment raises "a host of constitutional concerns" that "should be avoided." (AOB at p. 55.) Chief among these is that requiring them to comply with the Coastal Act permit process results in a taking of their property without just compensation.

This court should not avoid the LLCs' constitutional concerns by adopting an unsupported and artificially narrow definition of the term "development," as suggested by the LLCs. As the United States Supreme Court has recognized, "the possibility that the application of a regulatory program may in some instances result in the taking of property is no justification for the use of narrowing construction to curtail the program" (*United States v. Riverside Bayview Homes, Inc.* (1985) 474 U.S. 121, 127-128.) "Under such circumstances, adoption of a narrowing construction does not constitute avoidance of a constitutional difficulty; it merely frustrates permissible applications of a statute or regulation." (*Ibid.*)

Instead of frustrating permissible applications of the Coastal Act by avoiding the LLCs' constitutional concerns, the court should simply reject the LLCs' claims that requiring them to apply for a coastal development permit, and maintain the status quo in the interim, results in a taking of their property. The LLCs' claims regarding a taking of their property are based on unfocused and erroneous interpretations of takings jurisprudence, and they are not, in any event, ripe for judicial consideration. Because of the

unfocused nature of the LLCs' taking claims and supporting argument, the Commission begins with a brief summary of takings law.

A. Takings Law Framework

The Fifth Amendment of the United States Constitution provides that private property shall not “be taken for public use, without just compensation.” Article 1, section 19 of the California Constitution similarly provides that private property “may be taken or damaged for public use only when just compensation . . . has first been paid to, or into court, for the owner.”

The clearest sort of taking of governmental taking of property occurs when a public agency directly condemns private property for a public use, such as to build a road, a school or a subway system. The LLCs' claims here do not involve that type of direct taking; rather, the LLCs are claiming a type of taking known as a “regulatory taking.” The United States Supreme Court first recognized regulatory takings in *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393. There, the court determined that there are instances where government regulation of property can be so onerous as to be tantamount to a direct appropriation of property. In the words of the court, a regulatory taking occurs when the application of regulation to property “goes too far.” (*Id.* at p. 415.)

1. Regulatory takings tests

To determine whether government regulation “goes too far” and therefore amounts to a regulatory taking, the United States Supreme Court has adopted two categorical tests for a narrow set of regulatory activities that constitute per se takings, and an ad hoc balancing test, known as the *Penn Central* test, that applies in all other circumstances.

The first categorical test for a per se taking is set out in *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003. The *Lucas* court held that when a regulation denies a property owner all economically viable use of his or her property, there is a taking without any need for a “case specific” inquiry into the public interest involved. (*Id.* at p. 1014.) The *Lucas* court emphasized that the per se regulatory taking category is extremely narrow and is applicable only “in the extraordinary circumstance when no productive or economically beneficial use of land is permitted” or the entire property has become useless because of the government regulation. (*Id.* at pp. 1016-1017.)

The second categorical test for a per se taking applies when the government permanently physically occupies property, no matter how minor the occupation. (*Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419 [addressing a New York City ordinance that required apartment building owners to allow installation of cable boxes on their buildings so that renters would have cable access].) The *Loretto* per se taking rule is expressly limited to a “*permanent* physical occupation of property,” that “absolutely dispossesses the owner of his right to use and exclude others from his property,” and it does not apply to “*temporary* limitations on the right to exclude.” (*Id.* at pp. 434 & 435 n. 12; emphasis added.)

The Supreme Court emphasized in *Loretto* the narrow nature of its per se takings rule, and explained the distinction between a permanent physical occupation of property, to which its per se rule applies, and a physical invasion short of an occupation which is subject to the *Penn Central* ad hoc balancing test. A physical occupation, as defined by the court, destroys the owner’s right to possession, use and disposal of the property, including each of the following: (1) the owner “has no right to possess the occupied space himself, and also has no power to exclude the occupier from

possession and use of the space”; (2) “the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property; and (3) “even though the owner may retain the bare legal right to dispose of the occupied space. . . , the permanent occupation of that space . . . will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.” (*Loretto, supra*, at pp. 435-436.)

In cases that do not fall into either the *Lucas* or *Loretto* per se taking categories, a balancing test first articulated in *Penn Central Trans. Co. v. City of New York* (1978) 438 U.S. 104, 124, applies. (*Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528, 538; *Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1270.) The *Penn Central* test requires consideration of three separate factors to determine whether regulation of property amounts to a taking: (1) the economic impact of the government action on the property; (2) the reasonable investment-backed expectations of the property owner; and (3) the character of the government action. (*Ibid.*)

The tests for finding a regulatory taking do not change because the alleged taking is a temporary one. While the Supreme Court recognized the concept of a temporary taking claim in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* (1987) 482 U.S. 304 (referred to as “*First Lutheran*” in the LLCs’ briefs), it did not hold that delays inherent in a permit process, a requirement to maintain the status quo during a permit process, or any other type of temporary government interference with property constitutes a new type of per se taking to which none of the ordinary rules applicable to regulatory takings claims apply. “We merely hold that where the government’s activities have already worked a taking of all use of property, no subsequent action by the

government can relieve it of the duty to provide compensation for the period during which the taking was effective. (*Id.* at 312-313.)⁷

2. The Ripeness Requirement

Regulatory takings claims are subject to a strict ripeness requirement that requires a “final, definitive position regarding how regulations will be applied to a particular piece of land.” (*Williamson County Regional Planning Commission v. Hamilton Bank* (1985) 477 U.S. 172, 191; see also *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 609 [landowner may not establish a regulatory taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation].) The reason for the ripeness requirement is that it is impossible to know whether government regulation of property deprives an owner of all economic value and use of property without knowing the extent of the regulation. (*MacDonald, Sommer & Frates v. Yolo County* (1986) 477 U.S. 340, 348 [“A court cannot determine whether a regulation has gone ‘too far’ unless it knows how far the regulation goes”].)

Litigants cannot bypass the ripeness requirement for a regulatory taking claim by asserting that the permit process itself, including the requirement to maintain the status quo during permit proceedings, is the taking. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002) 535 U.S. 302, 340, the United States Supreme Court rejected arguments that a multi-year development moratorium at Lake Tahoe was a per se *Lucas* taking because property owners were

⁷ On remand of *First English*, the California courts concluded that there had not been any taking. (*First English Evangelical Church of Glendale v. County of Los Angeles* (1989) 210 Cal.App.3d 1353.)

deprived of all use of their property during the period of the permit moratorium. The Court stated:

We would create a perverse system of incentives were we to hold that landowners must wait for a taking claim to ripen so that planners can make well-reasoned decisions while, at the same time, holding that those planners must compensate landowners for the delay.

(*Id.* at p. 340.)

Similarly, in *Landgate, Inc. v. California Coastal Commission* (1998) 17 Cal.4th 1006, the California Supreme Court held that interference with uses of property occasioned by normal delays in the permitting process does not constitute a regulatory taking. The court explained that “[a] requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself ‘take’ the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired.” (*Id.* at pp. 1017-1018, quoting *United States v. Riverside Bayview Homes, Inc.*, *supra*, 474 U.S. at pp. 126-127.)

B. The Requirement to Obtain a Coastal Development Permit is Not a Regulatory Taking

There are several reasons that a regulatory taking claim fails in this case.

First, the requirement to obtain a coastal development permit before changing the status quo at Martins Beach does not meet either of the two categorical tests for a taking. There is no per se *Lucas* regulatory taking because the LLCs have not attempted to, and could not, claim that the requirement to obtain a coastal development permit, or a permit waiver, and to maintain the status quo until they do so, deprives them of all economically viable use of their property. Indeed, the LLCs’ counsel testified at trial that it was “nonsense” that the existence of public access

across Martins Beach Road would make the property valueless to the owner. (8 RT 717:15-18; 718:12-14.)

Second, the requirement to obtain a permit and maintain the status quo at the site does not come close to constituting a per se physical occupation under the rule set forth in *Loretto, supra*, 458 U.S. 419. Notwithstanding the LLCs' statements that the trial court judgment "permanently" divests them of the right to exclude the public from their property and mandates that they "forever" relinquish their right to exclude the public from their property (Reply Brief at pp. 1 and 18), neither the Coastal Act permitting process nor the trial court judgment result in a "permanent physical occupation" that destroys the LLCs' right to possess, use, and dispose of the property. (See *ante* at pp. 18-19.) At trial, the LLCs' counsel admitted in testimony that even if the road used for access to the beach were to be formally designated as a public accessway, the LLCs would still have use of the property, including the road, as would all of the families who live in the LLCs' rental cabins on the property. (8 RT 721.) Because the LLCs can use the property during the permit process, in the same manner as they did for several years before closing the site, the permit requirement and the requirement to maintain access during the permit proceedings are not a physical occupation of the LLCs' property subject to the per se *Loretto* rule.

Additionally, even assuming a physical occupation of the LLCs' property, which does not exist in this case, any alleged physical occupation is not permanent. If the LLCs apply for and obtain a coastal development permit to do precisely as they wish with their property, which certainly could occur, there is no permanent alienation of any of their property under any theory. The per se *Loretto* rule for *permanent* physical occupations of property does not apply in this case.

The LLCs' erroneously rely on language in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, to support that any government interference with the right to exclude the public from private property is a *Loretto* per se taking. (See, e.g., Reply Brief at p. 30.) The passages the LLCs cite from *Nollan* are inapt. In *Nollan*, the United States Supreme Court considered a permit condition requiring a *permanent* access easement and determined that because the easement condition did not have a nexus to the impact of the development it amounted to an unconstitutional taking of property. *Nollan* did not extend the *Loretto* per se rule to temporary physical invasions of property, and, in fact, reiterated that the *Loretto* per se rule applies only to *permanent* physical occupations of property. (*Nollan, supra*, at pp. 831-833.)

Because the categorical takings tests do not apply, the LLCs' takings claims, including their claim of a temporary taking, are subject to application of the *Penn Central* factors. The LLCs have not presented evidence to satisfy any of the three prongs of the *Penn Central* test for either a permanent or temporary taking.

The LLCs presented no evidence regarding the economic impact of the permit requirement on the value of the Martins Beach property. In fact, the only evidence at trial regarding the value of the property and the economic impact of allowing the public temporary access to the beach during the permit process was that the LLCs purchased the property for \$32.5 million, when the public had access to the land and water at the beach. (13 CT 3117.) The LLCs' counsel also testified that even if the road used for access to the beach were to be taken in eminent domain, "there would still be use for the owner and use for all the families that live on the property." (8 RT 721.) This evidence does not support that the economic impact of requiring the LLCs to maintain the status quo during permit

proceedings is so serious and substantial that it results in a taking of the LLCs' property.

There was no evidence at trial regarding the owners' investment-backed expectations when they acquired the property other than the Deputy Director of the San Mateo County Planning and Building Department's testimony that he advised the LLCs' representative before the LLCs bought the property that a coastal development permit would be required to close the beach to the public. (9 RT 965:20-26.)

The character of the government action in this case, whether considered as the Coastal Act permit requirement or the trial court judgment that requires the LLCs to apply for a permit before changing the use of their property, is not unusual or onerous in any sense. It is, instead, a routine exercise of the police power to regulate land that the Legislature has found to be a "distinct and valuable" California resource, the regulation of which is "essential" to the well-being of the people of the state. (Pub. Resources Code, § 30001.)

The LLCs cannot demonstrate that either the permit requirement or the trial court judgment requiring maintenance of the status quo pending compliance with the requirement are per se takings, and they have failed to present evidence to satisfy the *Penn Central* criteria for finding that application of the Coastal Act's regulatory requirements effect a taking of their property. The LLCs' taking claims lack merit.

C. The LLCs' Taking Claims Are Not Ripe

Even assuming that the LLCs had presented evidence to support a regulatory taking pursuant to the *Penn Central* factors, the claim that the Coastal Act permit requirement is a regulatory taking is not ripe. It is not ripe because, until and unless the LLCs apply for a coastal development permit and the Coastal Act agencies reach a "final definitive position" on

the Act's application to their property, it is impossible to determine the precise nature and extent of the economic impact of Coastal Act regulation on the property or the final character of the government action.

(*Williamson County Regional Planning Commission v. Hamilton Bank*, *supra*, 477 U.S. at p. 191.) If the Coastal Act agencies grant the LLCs a permit to close their property to the public, or accept that denial of a permit would violate the provisions of Public Resources Code section 30010 and adjust application of Coastal Act policies accordingly, or find that the public has existing rights of access to the property, those decisions would certainly inform determinations regarding the economic impact on the LLCs of Coastal Act regulation of their property as well as determinations regarding the character of the government action. It is therefore impossible to definitively apply the ad hoc *Penn Central* factors now, even assuming the LLCs had presented evidence on those factors, to determine whether anything about the permit requirement or the trial court judgment effects a taking of the LLCs property.

To the extent the LLCs attempt to create ripe regulatory taking claim by vague reference to a "judicial taking," the attempt fails. The LLCs' reference to a "judicial taking" is based on language extracted from a plurality opinion in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection* (2010) 560 U.S. 702. (AOB at pp. 61-63.) In that case, four justices discussed the concept of a judicial taking. (*Id.* at p. 715 ["In sum, the Takings Clause bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking".]) Whatever the status of this doctrine, the mere requirement to obtain a permit before changing the use of property, which is all that the trial court judgment requires, does not amount to a regulatory taking. (See *Landgate*, *supra*, 17 Cal.4th at p. 1029 [a judicial

determination of the validity of the “preconditions to development” is a normal part of the permit process].)

The LLCs’ reference to *Nollan, supra*, and *Dolan v. City of Tigard* (1994) 512 U.S. 374, also ignores the lack of ripeness of their takings claim. (See AOB at pp. 24-28.) *Nollan* and *Dolan* require a nexus and rough proportionality between land use exactions imposed as conditions of development and the impacts of development. The *Nollan* and *Dolan* constitutional constraints on land use exactions have never been extended to apply to the threshold requirement to obtain a land use permit because it would be impossible to do so. Without knowing the substance and extent of what has been exacted to mitigate the impacts of development, a court cannot possibly determine whether the exaction has a nexus to or is roughly proportional to the impacts of development. The court should disregard the LLCs’ inapt references to *Nollan* and *Dolan*.

In sum, the LLCs do not have any ripe, cognizable claim that application of the Coastal Act’s permit requirement to the closure of Martin’s Beach, including an obligation to maintain the status quo absent compliance with that requirement, effects a taking of their property.

CONCLUSION

For the reasons set forth above, the California Coastal Commission requests that this court affirm the trial court’s judgment.

Dated: July 1, 2016

Respectfully submitted,

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Amicus curiae Brief of the California Coastal Commission in Support of Plaintiff and Respondent
Surfrider Foundation.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **Amicus Curiae Brief of the California Coastal Commission in Support of Plaintiff and Respondent Surfrider Foundation** uses a 13 point Times New Roman font and contains 8,073 words.

Dated: July 1, 2016

KAMALA D. HARRIS
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/s/ Christiana Tiedemann
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Commission*

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Surfrider Foundation v. Martins Beach 1, LLC, et al.**

Nos.: **California Court of Appeal, 1st Appellate District, Nos. A144268 and A145176**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On July 1, 2016, I served the attached **AMICUS CURIAE BRIEF OF THE CALIFORNIA COASTAL COMMISSION IN SUPPORT OF PLAINTIFF AND RESPONDENT SURFRIDER FOUNDATION** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1515 Clay Street, 20th Floor, Oakland, CA 94612-0550, addressed as follows:

Clerk of the Superior Court
Appeals Section
400 County Center
Redwood City, CA 94063-1655

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 30, 2016, at Oakland, California.

Leticia Martinez-Carter
Declarant

/s/Leticia Martinez-Carter
Signature