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[T]his homeowner turned to me and said something I thought I'd never hear on a California beach. . . . He said he did not like to look out his window and see people swimming, because it blocked his view.

- Robert LeMond, age 54, responding to being asked to leave by a sheriff called by a complaining Malibu beachfront homeowner.¹

Coastal Justice: The Case for Public Access

By Jessica A. Duncan*

I. Introduction

Malibu's Zuma Beach is famous as one of the most beautiful stretches of coastline in California. Zuma has long been the destination of surfers, sunbathers, runners, picnickers, and throngs of people who seek to escape from the heat of inland Southern California for the solace of the ocean breeze. Tourists flock from all over the globe to the home of *Baywatch* and the glamorous Malibu way of life.

If you were to visit Zuma one hot summer day, your experience might go something like this: As you round the bend on Pacific Coast Highway, the glinting blue ocean comes into view. You then notice the

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1. Timothy Egan, *Owners of Malibu Mansions Cry, 'This Sand Is My Sand,'* N.Y. TIMES, Aug. 25, 2002, at A1.

sea of cars in the public parking lot and lining both sides of the highway. Sand is barely visible between all the towels and beach umbrellas. You keep driving, looking for a spot to park but you do not find an empty space until you've reached the end of the line. You park, but now you are at the northern end of the bay and you can no longer see the ocean past the wall of fences, landscaping, and majestic private homes. You trek back to the public beach, kids and beach chairs in hand, as cars speed by you on the highway. You finally feel the warm sand between your toes and you start looking for a spot to sit. You turn north because the beach to your south is packed while the beach in front of the big houses is fairly empty. You come to a sign that says "No Trespassing, Private Property Begins 50 ft. toward the ocean from this sign." You keep walking but every twenty feet or so another sign with a similar message protests your presence. Although you feel uncomfortable, you sit down in the dry sand because your kids want to play now. About ten minutes later, a security guard on a red ATV rolls up and tells you this is private property and you must leave.

That "private" beach bordering Zuma is known as Broad Beach. It is so named because, prior to its rise in popularity among the rich and famous as the haven of their private lives, the beach was wide. Today, however, as development on the beach has accelerated erosion, the distance between

the homes that line the beach and water's edge has diminished.²

Residents of Broad Beach are protective of the sand, not for its value as a public resource, but rather for its value as their backyard. The boundary of their property reaches as far as the mean high tide line.³ The line where private becomes public cannot be permanently fixed, however, because the mean high tide line is ambulatory, moving with the daily and seasonal tides and the erosion and accretion of the beach.⁴ Without a current accurate survey, as a practical matter, the dry sand on Broad Beach is considered private property.⁵ Beach below the mean high tide line is called "tidelands" and is held under the public trust, which means that the state owns the land for the benefit of the public as a whole.⁶

California granted jurisdiction and authority to administer the tidelands and public beaches to the State Lands Commission ("State Lands").⁷ In holding title to these public trust lands, State Lands is a property owner, with the same rights as belong to a private property owner.⁸ Since the use of these lands belongs to the public, the property rights inhering in State Lands as trustee thereof should outweigh those of the individual where the interests of the State and the private property owner conflict. While State Lands is committed to protecting public access to these lands,⁹ the agency presently does not take any offensive steps to do so beyond what is necessary to accept

2. See STATE OF CALIFORNIA RESOURCES AGENCY, DEPARTMENT OF NAVIGATION & OCEAN DEVELOPMENT, ASSESSMENT & ATLAS OF SHORELINE EROSION ALONG THE CALIFORNIA COAST 37, 45 (1977).

3. *Lechuza Villas West v. California Coastal Comm'n*, 60 Cal. App. 4th 218, 228 (1997).

4. *Id.* at 235.

5. Kenneth Weiss, *A Malibu Civics Lesson: Beach is Open*, L.A. TIMES, Aug. 25, 2003, at B1.

6. *Lechuza*, 60 Cal. App. 4th at 235.

7. CAL. PUB. RES. CODE §§ 6301, 6216 (Deering Lexis through 2004 Supp.).

8. See discussion at Section III.B, and *infra* note 57.

9. Press Release, California State Lands Comm'n, *State Lands Comm'n Increases Coastal Access*, <http://www.slc.ca.gov/Press_Releases/2003/August2003CoastalAccessOTDsFinal.doc> (last modified Aug. 19, 2003) [hereinafter "California State Lands Press Release"].

title and administer the tidelands and easements for the benefit of public.

The California Coastal Commission ("Coastal Commission") is the agency charged with protecting the public's rights to access the coast from harm by private development through the use of its permitting authority.¹⁰ The Coastal Commission can impose conditions on permits in order to carry out its policy of preserving the public's interest in the beach and mitigating harm to that interest caused by development.¹¹ That regulatory approach, however, has been vigorously challenged by private landowners, in especially where the Coastal Commission has imposed lateral access conditions (easements allowing the public to pass across the beach in front of the development) on the property owner.¹² In the battle between public and private rights, the issue whether these exactions are unconstitutional takings of private property continues to be a heated question.

This article focuses on the fight for the public's use of the beach and discusses how the state may combat or minimize challenges to lateral access conditions. It is proposed herein that the public's interest in the beach could prevail in litigation and be more effectively protected if: (1) the Coastal Commission shows that it has legal authority to impose lateral access conditions on new proposals for development by meeting the constitutional test for exactions, (2) the Coastal Commission and State Lands take additional steps to coordinate a campaign for public access, (3) State Lands takes a more proactive role in the fight for public access by initiating its own litigation on a common law nuisance claim, and (4) the

Coastal Commission additionally supports its exactions by applying background principles of nuisance law.

When the Coastal Commission initiates enforcement proceedings for compliance with the Coastal Act, or when a property owner brings a takings action, State Lands can bolster the Coastal Commission's efforts by bringing an action of its own against the property owner. This article suggests that State Lands can bring suit against a private landowner whose property use causes harm to public lands and limits public access, under the public nuisance doctrine. The state could exert twice the pressure on the landowner to comply with administrative mandates to provide public access, and the state could also premise its authority to require access on two different legal grounds, exerting both regulatory authority and property rights. In taking this double-barreled approach, the state would make the access requirement harder to defeat. Thus, the scale can be tipped back in favor of the public's rights as intended by the California State Legislature, thus equalizing the balance that has favored the private owner for so long.

In the ensuing pages, this article discusses the following: *Section II* sets forth (A) why the public should care about access to the coast, and (B) what legal rights the public has to access the coast; *Section III* introduces (A) the California Coastal Commission, (B) the State Lands Commission as the agencies responsible for protecting public access to the coast, and (C) how they coordinate; *Section IV* introduces the problem by (A) presenting the example of a case where the conflict between public and private rights

10. CAL. PUB. RES. CODE § 30211; See also CALIFORNIA COASTAL ZONE CONSERVATION COMM'N, CALIFORNIA COASTAL PLAN 153 (Dec. 1975).

11. *Id.*

12. Among others, see generally *Surfside Colony v. California Coastal Comm'n*, 226 Cal. App. 3d 1260 (1991); *Liberty v. California Coastal Comm'n*, 113 Cal. App. 3d 491 (1980); *Rohn v. Visalia*, 214 Cal. App. 3d 1463 (1989); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 828. (1987).

regarding access to the beach has recently been litigated, (B) explaining the harm to the public's rights, and (C) explaining the harm to the private property owner's rights; *Section V* sets forth the law applicable to takings challenges to exactions, including (A) the essential nexus test, (B) the rough proportionality test, and (C) the nuisance exception; *Section VI* applies the law to suggest tools for the agencies to overcome violations of lateral access easements and challenges to their exaction.

II. Public Access to the Coast

A. The Public's Interest in Beach Access

California is defined by its beautiful shoreline and weather that is perfect for enjoying the beach. Access to the beach seems to be an inherent right that comes with living in California, and for many people it was a primary factor in their choice to live there. Eighty percent of Californians live within an hour of the coast.¹³ Every year, millions of people from all over the world visit California's beaches and "[s]erving their needs provides California with jobs and income constituting a valuable part of the State's economy."¹⁴

Unfortunately, the southern coast of California faces severe public access problems.¹⁵ Only 433 of California's 1,072 miles of coastline are in public ownership.¹⁶ As the population and beachfront development have increased, more people have been crammed into less space on the available public beaches.¹⁷ "Visitor surveys, filled

campgrounds, and jammed parking lots make clear that even more visitors would be at the coast if there were room for them."¹⁸

Beachfront development has "cut off existing public access to the coastline, used up available road capacity and off-street parking, and precluded use of the coastline area for recreation."¹⁹ This problem is particularly prominent in Malibu, where thirteen miles of Pacific Coast Highway, which runs parallel to the coast, is flanked by residential development, blocking views and access to the beach.²⁰ People trying to reach the beach on summer weekends jam the highway.²¹ Frequent visitors to the area, including the author, can attest that it is not unusual to find Zuma, a public beach, crowded with people while Broad Beach, the privately developed beach next to Zuma, is relatively deserted.

Moreover, development on the beach has accelerated erosion, diminishing the amount of land available for public use.²² Not only does this put a further burden on public access to the beach, but it also costs the public money. Because beaches are so vital to coastal town economies and the way of life of the residents, the state must spend millions of dollars to restore sand to eroded beaches.²³ Taxpayer money would not have to be spent if erosion were prevented in the first place. "The principal means to prevent continued property damage and public cost should be to control developments in erosion hazard areas."²⁴

13. Egan, *supra*, note 1.

14. CALIFORNIA COASTAL ZONE CONSERVATION COMM'N, *supra* note 10, at 11.

15. *Id.* at 244.

16. *Id.* at 152. Of the remaining miles of coastline, 75.3 are "military lands generally not available for public recreation." *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 245.

21. *Id.* at 245-246.

22. This point is discussed, *infra*, at Section IV.B.

23. CALIFORNIA COASTAL ZONE CONSERVATION COMM'N, *supra* note 10, at 44.

24. *Id.*

While regulatory efforts to restrict development draw harsh criticism from private property owners whose rights may be burdened, without such actions by agencies like the Coastal Commission, the state would quickly lose what is left of its already disappearing coast. The beach would become a resource for the enjoyment of the wealthy alone and there would be no beach for Californians to take their grandchildren to play.

B. The Public Has a Right to Coastal Access

1. Use of the Tidelands Protected by the Public Trust

The public interest in natural resources has been recognized as far back as early Roman and English law.²⁵ The public trust doctrine, as carried over into American law, is the concept that “certain interests are so particularly the gifts of nature’s bounty that they ought to be reserved for the whole of the populace.”²⁶ Resources found to be within this public interest include navigable waters and the tidelands.²⁷

Tidelands are those lands lying between the lines of mean high tide and mean low tide.²⁸ Thus, all land seaward of the high water mark is sovereign land, belonging to the state and preserved for public use.²⁹ The public trust doctrine also has been applied at times to protect beach above the mean high tide line.³⁰ The state holds the tidelands in trust for the public and

must protect the public’s access to certain uses of the land, including their rights to fish, hunt, bathe, swim, boat, and general recreation.³¹ The state “may never alienate trust property by conveying it to a private owner.”³² The public, therefore, cannot lose its rights to access and use the tidelands.

As public beaches become increasingly overcrowded, the public’s interest in protecting its right to access and use of the shore also increases. The people have a right to use public trust lands “free from obstruction or interference from private parties.”³³ That public right is being encroached on by private development. Accordingly, the California Coastal Plan provides:

Because development adjacent to such public trust lands and waters can have an adverse impact on the public’s rights in them (e.g., development may block constitutionally guaranteed access to coastal waters or cause damage such as erosion . . .), development on or uses of public and private lands in the vicinity of trust areas that would significantly interfere with or harm the public values of these areas shall not be permitted.³⁴

The state legislature “is the ultimate administrator of the tidelands trust” and “must take into account the overarching principle of the public trust doctrine that trust lands belong to the public and are to

25. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970).

26. *Id.* at 484.

27. *Marks v. Whitney*, 6 Cal. 3d 251, 259-260 (1971).

28. *Id.* at 257.

29. *Lechuza*, 60 Cal. App. 4th at 235; CALIFORNIA COASTAL ZONE CONSERVATION COMM’N, *supra* note 10, at 190.

30. 6A-35 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 35.02 (2004).

31. *Marks*, 6 Cal. 3d at 259-260; Sax, *supra* note 25, at 477.

32. Sax, *supra* note 25, at 485-486.

33. CALIFORNIA STATE LANDS COMM’N, PUBLIC TRUST POLICY 2-3 (downloaded on Mar. 27, 2004, on file with *West-Northwest*) (updated version available at <http://www.slc.ca.gov/Policy_Statements/Public_Trust/Public_Trust_Policy.doc>).

34. CALIFORNIA COASTAL ZONE CONSERVATION COMM’N, *supra* note 10, at 190.

35. CALIFORNIA STATE LANDS COMM’N, *supra* note 33, 3-4.

be used to promote public rather than exclusively private purposes.³⁵ To promote the public interest, the legislature has made a policy pronouncement that “the interests of the people of the state in the preservation of the coastal zone are ‘fundamental,’³⁶ and has guaranteed the public’s right of access under the California Constitution.

2. State Constitutional Guarantee

Article X, Section 4 of the California Constitution declares that no private entity owning land fronting on navigable waters of the state may exclude the public’s “right of way to such water whenever it is required for any public purpose. . . and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.”³⁷ After its amendment in 1983, the constitution also provided that “Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects.”³⁸

3. California Coastal Act

The people of the state also demonstrated the importance they place on the preservation of the coast in passing the Coastal Initiative in 1976. The initiative created the California Coastal Act (“Coastal Act”), which declared the coast to be a valuable public resource and sought to protect the ecological balance and the “economic and social well-being” of the people by pre-

venting the deterioration of the coast.³⁹ A basic goal of the Coastal Act is to “[m]aximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources [sic] conservation principles and constitutionally protected rights of private property owners.”⁴⁰

In furtherance of this goal, the Coastal Act makes several key provisions. It prohibits development from interfering “with the public’s right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of the dry sand and rocky coastal beaches to the first line of terrestrial vegetation.”⁴¹ This public access across the beach is called “lateral” access. All new beachfront developments must provide “public access from the nearest public roadway to the shoreline and along the coast.”⁴² This type of access is called “vertical” access. (As introduced above, this article focuses on lateral access, so all references to “access” hereinafter occur in that context and exclude application to vertical access conditions.) Finally, the Coastal Act also declares the “scenic and visual qualities of coastal areas” to be “a resource of public importance,” requiring that “[p]ermitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas . . . and, where feasible, to restore and enhance visual quality in visually degraded areas.”⁴³

36. Notes of Decisions, CAL. PUB. RES. CODE § 30001, (citing *Sierra Club v. California Coastal Zone Conservation Comm’n.*, 58 Cal. App. 3d. 149 (1976)).

37. CAL. CONST. art. X, § 4.

38. *Id.* The section goes on to say: “except where (1) is inconsistent with public safety. . . (2) adequate access exists nearby. . . . Dedicated accessway shall not be required to be open to public use until a public agency or private asso-

ciation agrees to accept responsibility for maintenance and liability of the accessway.”

39. CAL. PUB. RES. CODE § 30001.

40. *Id.* § 30001.5(c)

41. *Id.* § 30211.

42. *Id.* § 30212.

43. *Id.* § 30251.

4. State Lands Act

The State Lands Act, passed in 1938, established the State Lands Commission and vested in it the “powers, duties, purposes, responsibilities and jurisdiction” of the state over public trust lands.⁴⁴ The legislature gave State Lands exclusive jurisdiction over the tidelands, therefore imposing a duty on State Lands to ensure that these lands are administered in a way that protects the public’s interest.⁴⁵ In view of public trust principles, the State Lands Act also provided that State Lands has authority over construction on or bordering on the tidelands, and that State Lands may only grant permission to any beachfront “owner to construct, alter or maintain, groins, jetties, sea walls, breakwaters, and bulkheads, or any one or more of such structures” on the tidelands if the structure does “not unreasonably interfere with the uses and purposes reserved to the people of the state.”⁴⁶ Consequently, no structure that unreasonably interferes with the public right of access to the tidelands may be permitted.

44. *Id.* § 6216(a).

45. *Id.* § 6301.

46. *Id.* § 6321.

47. *Grupe v. California Coastal Comm’n*, 166 Cal. App. 3d 148, 160 n.5 (1985). The Coastal Initiative was the precursor to the Coastal Act. The California Coastal Zone Conservation Plan was prepared thereunder by the California Coastal Zone Conservation Committee, which was the precursor to the California Coastal Commission.

48. CAL. PUB. RES. CODE § 30604. The “coastal zone” is not drawn according to any specific formula, but is drawn taking into consideration geological and topographical characteristics that

III. The Agencies Charged With Protecting the Public’s Right to Access

A. California Coastal Commission

In 1972, the Coastal Initiative created the California Coastal Commission and endowed upon it regulatory authority to implement the policies of the Coastal Zone Conservation Plan.⁴⁷ A landowner proposing any new development within the designated coastal zone must first obtain a Coastal Development Permit (“CDP”) from the Commission.⁴⁸ In following its duties, the Coastal Commission cannot approve a permit for a project that is inconsistent with the Coastal Act’s provisions for public access.⁴⁹ A denied proposal will be returned to the applicant with an explanation of why the project does not conform with the Act and directions as to what must be done to meet the Act’s requirements.⁵⁰

Where the landowner cannot modify the proposal to comply completely, the Commission may balance public and private interests and accept the development, subject to certain conditions that mitigate the burden to the public.⁵¹ Where a landowner’s application to build or alter a development interferes with the public’s right of access and would be denied, the Coastal Commission commonly requires the landowner to record an “offer to dedi-

make development more or less likely to affect the beach and ocean. Political factors are also taken into consideration. The coastal zone can range from less than a mile to many miles inward from the ocean, for example, at Topanga Canyon. *Id.* § 3064(d).

49. *Id.* § 30211; CALIFORNIA COASTAL ZONE CONSERVATION COMM’N, *supra* note 10, at 153.

50. Author’s experience (the author worked in the Legal Enforcement Division of the South Coast California Coastal Commission).

51. CAL. PUB. RES. CODE § 30212; *Liberty*, 113 Cal. App. 3d at 491; CALIFORNIA COASTAL ZONE CONSERVATION COMM’N, *supra* note 10, at 154-155.

cate” (“OTD”) a lateral access easement as mitigation for allowing the project to go forward.⁵² Such an easement enables the public to use the part of the sandy beach for passive recreational use, usually from the mean high tide line to a specified point landward, such as from the mean high tide line to twenty-five feet inland, the toe of an existing dune system, or the face of the seawall.⁵³

B. State Lands Commission

State Lands Commission Chair Cruz Bustamante stated that one of his “top priorities has been increasing public access to our beaches.”⁵⁴ Commissioner Steve Westly also declared that State Lands “is committed to guaranteeing Californians’ Constitutional right of access to their coast.”⁵⁵ State Lands carries out this goal primarily by accepting the OTDs for public access that were recorded as a condition of the Coastal Commission’s CDPs.

Title to the tidelands and the beach easements that State Lands accepts is held in trust for the public.⁵⁶ As trustee, State Lands holds legal title to the tidelands but must administer it for the benefit of the equitable title holders, who are the people of California.⁵⁷ Accordingly, when the devel-

opment of adjoining private land affects its interest in the trust lands, State Lands must ensure that the proposed use does not harm the needs of the public.⁵⁸

C. How the Agencies Currently Coordinate for Access

When an OTD is recorded pursuant to a condition imposed by the Coastal Commission on a CDP, that offer does not actually become available for public use until a government or nonprofit agency, in particular State Lands, accepts ownership responsibilities for it; at which point it becomes an easement held by the entity for the benefit of the public.⁵⁹ The easements become a piece of the public trust for perpetuity and cannot be abandoned by the state or returned to the property owner.⁶⁰

The Coastal Commission has been monitoring OTDs recorded since the early 1980s, but there was no program to encourage the OTDs to be accepted until the mid-1990s.⁶¹ At that time, the 21-year time limits on the offers were coming due and they would have been lost if left to expire.⁶² The Coastal Commission formed an active program to coordinate the acceptance of the OTDs, called the “Coastal Access Program,”

52. CAL. PUB. RES. CODE § 30212; *Grupe*, 166 Cal. App. 3d at 160; CALIFORNIA COASTAL ZONE CONSERVATION COMM’N, *supra* note 10, at 154-155. The access conditions are of three types: an offer to dedicate, an easement, or a deed restriction. The permit will either require the recording of a deed restriction or an offer to dedicate the specific segment of property. The deed restriction automatically subjects the property to the condition. An offer to dedicate becomes an easement after a public agency or a nonprofit group “picks up” the offer, agreeing to accept liability and upkeep responsibilities. CAL. PUB. RES. CODE § 30214.

53. E-mail comments from Steve Hudson, Supervisor of South Coast Legal Enforcement Division of California Coastal Commission, to the author (Oct. 8, 2004) (on file with author). “Passive recreational uses include those activities normally associated with beach use (e.g., walking, swimming, jogging, sun-

bathing, fishing, surfing). . . .Most *accessways* required to meet the provisions of Section 30212 of the [Public Resources Code] should provide for at least this range of uses. . . .” *Grupe*, 166 Cal. App. 3d at 162.

54. California State Lands Press Release, *supra* note 9.

55. *Id.*

56. CALIFORNIA STATE LANDS COMM’N, *supra* note 33, at 2-3.

57. For an understanding of basic trust principles, see REST. 3D TRUSTS § 2, *Definition of Trust* (1959).

58. *Id.*

59. Telephone Interview with Linda Locklin, Manager of Coastal Access Program, California Coastal Comm’n (Oct. 26, 2004).

60. *Id.*

61. *Id.*

62. *Id.*

which contacts State Lands, the local governments, and any nonprofit agencies that may be interested, and advises them of the OTDs that need to be accepted.⁶³ Since there is such a great backlog of OTDs, in order to ensure no offer is allowed to expire, the program addresses the OTDs oldest first.⁶⁴ Thus, it is usually many years after the recording of an offer before it is picked up.⁶⁵ However, in “special areas” the agency works by geography, making it top priority to get all the OTDs in the area accepted.⁶⁶

That was the case in Malibu. In the past few years, the critical need for access and protection of the fragile beach became apparent to both the Coastal Commission and State Lands. Consequently, the agencies have aggressively pursued opening the easements for public use.⁶⁷ By December of 2003, the last of the currently recorded Broad Beach OTDs had been accepted, and to date fifty-two of the one-hundred and eight properties on the beach have lateral public access easements—thirty-two from accepted OTDs and the remainder from deed restrictions.⁶⁸

IV. The Problem: Conflict of Public and Private Rights

Despite the acceptance of so many OTDs and their opening as easements available for public use, there is so much resistance from the beachfront landowners that Broad Beach is still virtually unused by the public. The following discussion demon-

strates the conflict between public and private interests that leaves neither side satisfied with the present status of their rights to the beach.

A. **Conflict Example: City of Malibu & Geffen v. Access for All & the California Coastal Commission**

Malibu homeowners may be justified in worrying about allowing the public on the beach in front of their homes when a public easement is imposed. Steven Spielberg, Danny Devito, Goldie Hawn, Pierce Brosnan, Kelsey Grammar, and Barbara Sinatra are just a few of the celebrities who make Broad Beach their home. Homeowners fear that opening the beach to the public will create new problems like sanitation and safety, since there are no public restrooms, trash service, parking, or lifeguards.⁶⁹ An extraordinary concern for celebrities like Entertainment mogul David Geffen is that public easements can give paparazzi and fans easy access to an invasion of their private lives.

Geffen, a resident of La Costa Beach, another private Malibu beach, once came into his living room to find that people had wandered in from the pathway alongside his house that was blocked off by a wooden gate.⁷⁰ Geffen had recorded lateral and vertical access OTDs in return for permission to develop his property, but after the offers were accepted by the nonprofit agency Access for All in 2002, Geffen filed suit seeking invalidation of the easement.⁷¹ Geffen

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* For more detailed information on which properties have public access easements, visit <http://www.coastal.ca.gov> and click on the “Broad Beach Public Easement Map” (researched and prepared in part by the author).

69. Egan, *supra* note 1.

70. *Id.* La Costa Beach suffers from the same development, erosion, and public access problems as Broad Beach.

71. 1st Am. Compl. ¶¶ 18-19, 22-23, 25-26, 32, *City of Malibu v. Access for All*, No. BC277034 (Cal. Super. Ct. L.A. County, Sept. 6, 2002). The City of Malibu was initially involved because it claims its interests in administering its Local Coastal Plan are prejudiced by the opening of certain public access ways.

claimed the Coastal Commission violated the Fifth Amendment's prohibition against the government "taking" private property for public use without just compensation.⁷²

In 1983, Geffen applied to the Coastal Commission for a CDP for "a lot line adjustment. . . , a 950 square foot addition to an existing garage, guest/maid's quarters and a deck, and construction of a swimming pool, spa and 100 foot long wooden bulkhead with 50 foot side return."⁷³ The Commission approved a CDP conditioned on the execution of OTDs for vertical and lateral access easements, with the latter to extend from the mean high tide line up to the foot of the seawall.⁷⁴ When Geffen later applied for further construction on the seawall, the Commission reiterated its condition requiring passive recreational use for the public and forbid him from interfering with the public's right of access in the easement.⁷⁵

Geffen's suit alleges that the Commission's policy of requiring "an applicant for a CDP to dedicate land for public access to and/or along the beach" does not require "any relationship between the impact of the requested development on public access and the required dedication of land."⁷⁶ Geffen claims that he has not "undertaken any activity which interfered with or otherwise adversely impacted the ability of the public to access the publicly-owned portion of the beach adjacent to the Prop-

erty" and without an "essential nexus" between his actions and the burden on the public access, the condition is not justified and the Commission has placed "an excessive, abnormal, and unreasonable burden on the Property."⁷⁷ That unjustified burden, he argues, violates the Fifth Amendment of the U.S. Constitution's prohibition against the "taking of private property for public use without due process and just compensation."⁷⁸ Geffen also argues it violates the California Constitution's prohibition of the same, and the Coastal Act's limitation on the Commission's power that it may not take or damage private property.⁷⁹

B. Harm to the Public's Right of Access

Property owners, or their homeowner's association, have directly interfered with the public's access on Broad Beach by erecting "No Trespassing" signs along the length of the beach. The erosional effects of private development on the beach also indirectly interfere with the public's rights by diminishing the public land on the beach available for access.

1. Property Owners Directly Interfere With Right of Access

Although the Coastal Commission attempts to protect public access to the beach by imposing permit conditions, having a right to cross the beach on paper does no

wide corridor paralleling the western most property line of the applicant's property and shall provide for a privacy buffer of at least 9' in width between the access way on developed property to the west of the applicant's holdings." *Id.* ¶ 18.

72. *Id.* ¶¶ 140-144.

72. *Id.* ¶¶ 140-144.

73. *Id.* ¶ 17.

74. The text of the condition read: "Lateral and Vertical Access. Prior to the transmittal of a permit, the applicant shall submit evidence of the acceptance of OTD easements for access along the shoreline from the mean high tide line to the toe of the approved bulkhead for the residence [lateral access] and for access to the shoreline over a vertical access easement coterminous with an existing 9' wide Cal Trans easement on the applicant's property. Said vertical access easement shall be located within an 18'

75. *Id.* ¶ 22.

76. *Id.* ¶ 124.

77. *Id.* ¶¶ 126, 129. The essential nexus test will be discussed in Section V.B, *infra*.

78. *Id.* ¶ 143.

79. *Id.* ¶¶ 148-150. California Constitution Article I § 19; CAL. PUB. RES. CODE § 30010.

practical good when property owners refuse to abide by their promises and interfere with public use. On Broad Beach, forty-four of the one hundred and eight properties are subject to conditions that require the owners to allow lateral access twenty-five feet inland on their property.⁸⁰ In 2003, fourteen of the properties that are required to allow public access across the property had posted “No Trespassing” signs like those quoted in the Introduction above.⁸¹ In maintaining such signs, the property owner interferes with the public’s right of access required by the conditions because the signs lead the public to believe that going any further on the beach is illegal when, in fact, it is not. Since discovering this problem, the Commission has imposed “no sign” conditions, seeking to prevent such interference to public access. However, in 2003, six of the fourteen properties with a “no sign” restriction were in violation.⁸² The eviction of beachgoers by security guards on ATVs provided by the homeowner’s association also directly interferes with the CDP requirements of public access because the public is chased off of the beach it has a right to use.

80. Author’s experience, *supra* note 50. (Based on author’s review of all property deeds and permits on those properties.) The majority of the conditions call for lateral access twenty-five feet inland from the mean high tide line. Alternative phrasing includes: between the mean high tide line and twenty-five feet inland from the daily ambulatory water line, or 25’ inland from the daily ambulatory water line. A couple of properties grant access from the MHTL to the first strip of vegetation or the toe of the bluff.

2. Science Shows Development Diminishes Beach Availability

In the Staff Report accompanying the CDP for Geffen’s construction of a seawall on the beach in front of his house, the California Coastal Commission made findings that the seawall would cause erosion to the beach. In explaining how the development would cause erosion and harm to the public’s rights, the report stated:

Scour is the removal of sand or other beach material from the base of a vertical surface, due to wave action. When waves impact a hard surface. . . some of the energy may be reflected downward. . . . This effect can remove material seaward of the [development] and create an erosional trench or scour trough.⁸³

. . . .

Even structures located above the mean high tide line. . . may have an impact on shoreline processes as wave energy reflected by those structures contributes to erosion and steepening of the shore profile and, ultimately, to the extent and availability of tidelands.⁸⁴

These findings are supported by independent scientific evidence. Understanding how the coastal process works helps to explain why development on the beach results in erosion. In a natural state, the amount of sand on the beach is balanced

81. *Id.*

82. *Id.* (Also based on two surveys of signs on the beach conducted by the author between June and August 2003.)

83. Coastal Development Permit Application No 4-99-268 (Geffen), at 16 (available for review in Ventura County Coastal Commission Office). For more on Staff Reports, see *infra* Section VI.A.

84. *Id.* at 25.

by a cycle of erosion and deposition of sediment, which is carried out by two types of currents: tidal and longshore.⁸⁵ Tidal currents act perpendicular to the shore. As waves retreat from the beach, they draw sand back with them, which would quickly erode the beach if the waves did not also deposit sand as they hit the beach.⁸⁶ Tidal currents carry in sand that has been transported from upcoast by longshore currents, which act parallel to the shore.⁸⁷

A structure on the beach interferes with the cycle of sand transport, causing greater erosion both because of tidal action at the foot of the structure and because of increased loss of sand to longshore currents.⁸⁸ Development on the beach increases both the height and strength of a wave because the wave energy is magnified as it is reflected by the impact.⁸⁹ Even when the development is not within the direct impact of the wave (such as a seawall), an upland structure (such as a home) can still increase the wave energy because it makes the shoreline harder and less absorbent of impacts.⁹⁰ The increased power of the wave hitting the beach causes greater scour, or erosion, at the base of the development.⁹¹ Normally, tidal action carries in approximately the

same amount of sand from longshore currents that it carries away from the beach.⁹² However, when there is greater scour as a result of development, tidal action carries more sand away than it deposits from the incoming longshore currents, creating an imbalance of erosion and sediment deposition.⁹³ Longshore currents then carry away the sand and it is lost from the local system.⁹⁴ Structures built on the beach can also redirect the natural currents and contribute to accelerated erosion.⁹⁵

The Coastal Commission's Staff Report accompanying the Geffen CDP also found that the effects of global warming could combine with development on the beach to further exacerbate erosion.⁹⁶ Global warming causes sea levels to rise and intensifies storms, which both result in increased wave heights and wave energy.⁹⁷ As discussed above, stronger waves accelerate erosion when they connect with the developed shore. Also, sea level rise exposes more landward beach to scour.⁹⁸ One scientist predicted that "sea level rise could cause beaches to erode as much as 200 feet" during this century.⁹⁹

As erosion continues over time, the mean high tide line gets closer to the devel-

85. CALIFORNIA COASTAL ZONE CONSERVATION COMM'N, *supra* note 10, at 43; ROBERT M. SORENSEN, BASIC COASTAL ENGINEERING 27-202 (Michael McCormick & Rameswar Bhattacharyya eds., 1978).

86. *Id.*

87. *Id.*

88. SORENSEN, *supra* note 85, at 196-202.

89. *Id.* at 27.

90. *Id.* at 180.

91. *Id.* at 202.

92. *Id.* at 198; CALIFORNIA COASTAL ZONE CONSERVATION COMM'N, *supra* note 10, at 43.

93. CALIFORNIA COASTAL ZONE CONSERVATION COMM'N, *supra* note 10, at 11.

94. SORENSEN, *supra* note 85, at 198.

95. *Id.* at 196-198.

96. Coastal Development Permit, *supra* note 83, at 24.

97. *Id.* See also STATE OF CALIFORNIA RESOURCES AGENCY, DEPARTMENT OF NAVIGATION & OCEAN DEVELOPMENT, ASSESSMENT & ATLAS OF SHORELINE EROSION ALONG THE CALIFORNIA COAST 39 (1977) ("A gradual but continuing trend in the rise of the sea level and subsidence of the land mass in localized areas are contributing factors to erosion.")

98. Coastal Development Permit application, *supra* note 83, at 24.

99. According to Stephen Leatherman, director of the Laboratory for Coastal Research and International Hurricane Center at Florida International University. Kevin Lollar, *Paradise at Risk: Most Erosion Stems From Human Actions*, The News-Press, July 28, 2002, at <<http://www.floridacapitalnews.com/erosion/stories/science1.htm>> (last visited October 11, 2004).

opment. Where there is not already a seawall in place, one will have to be built to protect the home from waves, and eventually the ocean will reach the wall.¹⁰⁰ Since the public lands reach up to the mean high tide line, if the water reaches the development, the only land that was available to public access and use will be underwater.¹⁰¹ Thus, erosion caused by the beachfront development harms the public's rights by eliminating the public's property.

Southern California has heavily developed its coastal areas; consequently, the region has suffered increased erosion of its beaches.¹⁰² For instance, historical aerial pictures provide evidence of actual erosion caused by development on Broad Beach, showing a narrowing of the beach since its development and an increasing number of seawalls constructed.¹⁰³ Although the natural processes can be restored and erosion corrected by reducing the intensity of use and development on the beach,¹⁰⁴ abandonment or removal of development is not politically feasible and "results in an economic and social loss."¹⁰⁵ Accordingly, the California Coastal Plan instructs the Coastal Commission to prevent additional erosion and property damage by controlling development "to the maximum extent possible."¹⁰⁶

C. Burden on the Private Right to Property

*No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*¹⁰⁷

The right to own private property is a fundamental American right. In enacting the Fifth Amendment, the Framers of the Constitution were addressing the concern that the government may unjustly redistribute the benefits and burdens of society by taking property, or one of the sticks in the bundle of rights that accompany property ownership, from one individual and giving it to another.¹⁰⁸ The government may only burden the individual's property rights in this way if the benefit flows to the public at large, and if so, the public must pay for it.¹⁰⁹

Property rights, though strictly guarded, are not absolute. Substantial public interest may justify placing a burden on the property owner.¹¹⁰ The courts have upheld land-use regulations that burden the private property owner where the state has "reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land."¹¹¹ "A use restriction on real property may constitute a 'taking' if it is not reasonably necessary to the effectuation of a substantial public purpose," and it "frustrate[s] the distinct investment-backed expectations" of the private property owner.¹¹²

100. *Id.*

101. *Id.*

102. STATE OF CALIFORNIA RESOURCES AGENCY, SUPRA NOTE 2, at 45

103. The Coastal Commission and the U.S. Army Corps of Engineers have aerial photos on file at their offices. Another good reference to see such photographs is the *Assessment & Atlas of Shoreline Erosion Along the California Coast*, supra note 2.

104. STATE OF CALIFORNIA RESOURCES AGENCY, supra note 102, at 38.

105. *Id.*

106. CALIFORNIA COASTAL ZONE CONSERVATION COMM'N, supra note 10, at 44.

107. U.S. CONST. amend. V.

108. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123 (1978).

109. *Id.* at 123-124.

110. *Id.* at 125.

111. *Id.*

112. *Id.* at 127.

Courts have consistently upheld the constitutionality of the use of the police power to regulate land use, including requiring the dedication of land as a condition of development.¹¹³ However, a condition restricting property use can only go so far in burdening the individual; at some point, the restriction ceases to be a proper exercise of the regulatory power and becomes a violation of the Fifth Amendment.¹¹⁴ When that turning point occurs is ultimately a question of fairness under the circumstances.¹¹⁵ According to the Coastal Commission, the “Coastal Plan recognizes fully that the ownership and use of private property are fundamental,” and does not restrict private property in a way that significantly affects the property owner’s expectations.¹¹⁶

V. The Law: Takings, Exactions, and Nuisances

A. History

The United States Constitution guarantees that private property will not be taken by the government for the public’s benefit without compensation. However, that right does not mean that a property owner may do whatever he pleases with the property. It is an axiom of common law that the “use of property is subject to reasonable restraints to avoid societal detriment.”¹¹⁷ Thus, the California Supreme Court has stated, “there is no constitutional right to

own property free from regulation.”¹¹⁸ The federal courts have also indicated that regulation of property to control a nuisance is not a taking.¹¹⁹ Not surprisingly, in 1971, when the California Supreme Court examined the constitutionality of land-use exactions in *Associated Homebuilders, etc., Inc. v. City of Walnut Creek*,¹²⁰ the court upheld the validity of a condition imposed on a development because there was a “reasonable relation” between the condition imposed and the need generated by the project.¹²¹ Although *Associated Homebuilders* arose in the context of a subdivision development and payment of a mitigation fee, in a string of cases decided in 1985, the California Courts of Appeals applied the *Associated Home Builders* “reasonable relation” standard to takings-based challenges to permits issued by the Coastal Commission.¹²² These decisions held that, while the condition must be related to the need generated by the development, the “relation” does not need to be a direct nexus.¹²³ Rather, “it is enough that the project ‘contributes, at least in an incidental manner’ to the need for a particular extraction.”¹²⁴

Similarly, in *Whaler’s Village Club v. California Coastal Commission*, the court rejected the claim that requiring an applicant to dedicate a lateral public access easement as a condition to build a rock revetment constituted a taking.¹²⁵ The court held that the

113. *Associated Home Builders, Inc. v. Walnut Creek*, 4 Cal. 3d 633, 638-640 (1971).

114. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-416 (1922).

115. *Penn Central*, 438 U.S. at 124.

116. CALIFORNIA COASTAL ZONE CONSERVATION COMM’N, *supra* note 10, at 19.

117. *Whaler’s Village Club v. California Coastal Comm’n*, 173 Cal. App. 3d 240, 253 (1985)(citing *People v. Byers*, 90 Cal. App. 3d 140, 147-148 (1979)).

118. *Id.* at 253.

119. *See, e.g., Mugler v. Kansas*, 123 U.S. 623

(1887); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Miller v. Schoene*, 276 U.S. 272 (1928); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

120. 4 Cal. 3d 633 (1971).

121. *Id.* at 648.

122. *See Remmenga v. California Coastal Comm’n*, 163 Cal. App. 3d 623, 627 (1985); *Whaler’s Village*, 173 Cal. App. 3d at 256; *Grupe*, 166 Cal. App. 3d at 171.

123. *Grupe*, 166 Cal. App. 3d. at 165.

124. *Whaler’s Village*, 173 Cal. App. 3d at 260-261.

125. *Id.* at 261.

public's right to use the tidelands for general recreation purposes must be protected, reasoning that there is a legitimate state interest in preserving public access to the shoreline, as evidenced by Article X, Section 4 of the California Constitution and by the Coastal Act, and because the tidelands are under the public trust.¹²⁶

B. Nollan: *The Essential Nexus Test*

Two years after the *Whaler's Village* decision, a takings challenge to the Coastal Commission's permit-conditioning practices reached the United States Supreme Court. In *Nollan v. California Coastal Commission*, the plaintiffs applied for a CDP to tear down the existing small bungalow on their Ventura beachfront property and build a new three-story house with a seawall.¹²⁷ The Commission agreed to issue a CDP subject to the condition that the plaintiffs grant a lateral access easement, allowing the public to pass across their beach property between the mean high tide line and the seawall.¹²⁸ The Commission justified the imposition of the condition on the basis of its findings that:

[T]he new house would increase blockage of the view of the ocean, thus contributing to the development of "a wall of residential structures" that would prevent the public "psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit." The

new house would also increase private use of the shorefront. These effects of construction of the house, along with other area development, would cumulatively "burden the public's ability to traverse to and along the shorefront."¹²⁹

In addressing the plaintiff's Fifth Amendment claims, Justice Scalia—who delivered the majority's decision—repeated the oft-stated rule that "the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property."¹³⁰ The Court found that, had this right to exclude others been taken away by simply requiring the easement in the absence of the plaintiff's application to develop the property, there undoubtedly would have been a constitutional violation.¹³¹ However, the easement required in the case differed from an outright taking because it occurred in the context of land use regulation, and the Court had "long recognized that land use regulation does not effect a taking if it 'substantially advances legitimate state interests.'"¹³² The Court held that there would be a legitimate use of the police power if the condition imposed served the same state interest that could have been the basis for denial of the permit altogether.¹³³ *Nollan*, thus, stands for the proposition that there must be an "essential nexus" between the state interest that would have been served by prohibiting the development, or the need created by the

126. See Section II, *supra*. "There is a clearly enunciated state public policy in favor of allowing public access to shoreline areas. [Citations] One of the objects of the 1976 version of the coastal act [sic] was to preserve existing public rights of access to the shoreline and to expand them for the future." *Whaler's Village*, 173 Cal. App. 3d at 254-255. See also *Grupe*, 166 Cal. App. 3d at 159-160. The court also held that the right of privacy does not extend to exclusion of the

public from access to public trust lands. *Whaler's Village*, 173 Cal. App. 3d at 255.

127. 483 U.S. 825, 828 (1987).

128. *Id.*

129. *Id.* at 828-829.

130. *Id.* at 831.

131. *Id.*

132. *Id.* at 834.

133. at 836-837.

development, and the exacted condition.¹³⁴

In *Nollan*, the Coastal Commission believed that imposing a condition for public access across the beach in front of the *Nollan* development was justified by the burden on public access that would be created consequent to the blocking of views of the beach by the new larger house.¹³⁵ Since the public would not be able to see the beach, the Coastal Commission reasoned, they would not realize there was beach available for their use beyond the house and would, instead, go to the nearby public beach, thereby increasing the use of that beach, creating congestion and burdening public access.¹³⁶ The Court, however, in applying its “essential nexus” test, held that the burden on public access to the beach created by the intensified development was not the *same type* of “access” sought to be mitigated by the permit condition.¹³⁷ By distinguishing between types of public access problems, the Court was drawing a narrow definition of the meaning of “same” in the connection required under the test. The Court found that the burdens on access created by the development were visual and psychological barriers and congestion problems on the nearby beach.¹³⁸ That is not the same burden, the Court said, that would be relieved by the granting of a lateral access easement.¹³⁹ Since the burden created

by the development did not have an essential nexus with the easement, the condition, therefore, constituted a taking requiring compensation.¹⁴⁰

While the essential nexus test as described by Scalia seems quite narrow, in practice, California courts have applied the standard somewhat more loosely. Following *Nollan*, California courts began requiring a “close,” or “substantial” connection between the burden created by the development and the condition imposed.¹⁴¹ Although still similar to the rational basis test, the essential nexus test has the practical result of requiring a finding that the development has a more direct, rather than incidental, effect on public access.¹⁴²

C. Dolan: The Rough Proportionality Test

State courts did not uniformly apply the *Nollan* rule after it was handed down. They differed as to how close of a connection the test required.¹⁴³ In *Dolan v. City of Tigard*, the United States Supreme Court clarified the issue. The Court not only reaffirmed the essential nexus requirement, but also added a second prong to the exactions test, requiring that the burden of the impact and the benefits of the condition imposed be “roughly proportionate” in degree to each other.¹⁴⁴

In *Dolan*, the Court held that even where an essential nexus exists between the

134. *Id.*

135. *Id.* at 828-829.

136. *Id.*

137. *Id.* at 838.

138. *Id.*

139. *Id.* at 838-839.

140. *Id.*

141. *Surfside Colony v. California Coastal Comm'n*, 226 Cal. App. 3d 1260 (1991); *Liberty v. California Coastal Comm'n*, 113 Cal. App. 3d 491 (1980); *Rohn v. Visalia*, 214 Cal. App. 3d 1463 (1989).

142. *Surfside Colony*, 226 Cal. App. 3d at 1270.

143. The state standards can be divided into three general groups: (1) deference is given to the agency's determination that there is an essential nexus; (2) the exaction must be “specifically and uniquely attributable” to the impact of the project, which means the connection must be direct; and (3) the rational-nexus test, which requires the connection to be substantial (California). Nicholas V. Morosoff, Note, “Take My Beach, Please!”: *Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U.L. Rev. 823, 864-870 (1989).

144. 512 U.S. 374, 388 (1994).

conditions imposed and the burdens created by the development, the “reasonable relationship test adopted by a majority of state courts” was not a definite enough standard to adequately balance the burdens.¹⁴⁵ Even where an essential nexus existed, the Court held that there would still be a taking if the degree of the burden that the condition imposed on the property owner was disproportionate to the burden of the project on state interests.¹⁴⁶ Hence, today’s exactions test consists of two parts:

We must first determine whether the “essential nexus” exists between the “legitimate state interest” and the permit condition exacted by the city. [Citation] If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development.¹⁴⁷

D. Public Nuisance Principles and the Lucas Exception

While the essential nexus and rough proportionality tests can be used to measure the legitimacy of the permitting authority’s exactions, nuisance law can be an alternative theory on the basis of which any property owner may prohibit the actions of an adjacent landowner,

or by which any sort of regulatory action may be justified. In the issue at hand, both public nuisance law, and the U.S. Supreme Court’s decision in *Lucas v. South Carolina Coastal Commission*, which created an exception from regulatory takings based on background principles of nuisance, may apply.

The common law rule allows public nuisance cause of action where (1) there is a public right, (2) there has been an interference with that right, and (3) such interference is unreasonable.¹⁴⁸ Circumstances under which a landowner’s activity may be found “unreasonable” include: conduct that significantly interferes with the public welfare, including comfort and convenience, conduct that has been prohibited by statute or administrative regulation, or conduct that has significant effects on the public right and is continually occurring or has a “long-lasting effect.”¹⁴⁹ A public official may bring suit to abate a public nuisance.¹⁵⁰

In *Lucas v. South Carolina Coastal Council*, South Carolina argued a public nuisance theory in response to a challenge to its Beachfront Management Act.¹⁵¹ The Act was passed by the state’s legislature in 1988 in response to erosion and public access problems caused by development, paralleling the situation faced by the California coast.¹⁵²

145. *Id.* at 387, 391.

146. *Id.*

147. *Id.* at 386.

148. REST. 2D TORTS § 821B, *Public Nuisance* (1979).

149. *Id.*

150. *Id.* § 821C.

151. 505 U.S. 1003, 1006 (1992).

152. The Act made the following findings:

(1) There is a public interest in the beach because it (a) serves as a protective barrier to property; (b) creates tourism that contributes significantly to the economy, (c) provides habitat, (d) and provides a place for citizens “to spend leisure time which serves their physical and mental well-being.

....
(3) Many miles of South Carolina’s beaches have been identified as critically eroding.

(4) Development unwisely has been sited too close to the beach/

dune system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and private interests to protect the system from unwise development.

(5) The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap . . . have increased the vulnerability of beachfront property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach

(6) Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/dune system. It is in both the public and private interests to allow the beach/dune system space to accrete and erode in its natural cycle. This space can be provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it.

(8) It is in the state’s best interest to protect and to promote increased public access to South Carolina’s beaches for out-of-state tourists and South Carolina residents alike.

S.C. Code Ann. § 48-39-250.

The petitioner Lucas had bought two beachfront lots with the intention to develop them for residential use, but the Beachfront Management Act “had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels.”¹⁵³ Lucas contended the regulations constituted a Fifth Amendment taking, but the South Carolina Supreme Court rejected the challenge, holding that the state had the power to regulate uses of property that constituted public nuisances without having to pay compensation and characterizing the South Carolina law as such a regulation.¹⁵⁴

On appeal, the U.S. Supreme Court held that, in a case of loss of all economically beneficial use of land, the state was justified in prohibiting the development without compensation if “background principles” of nuisance law would have prohibited the development, questioning only whether Lucas would have been prevented from building under those principles.¹⁵⁵ The Court stated:

Any limitation so severe [as to prohibit all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts - by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to

abate nuisances that affect the public generally, or otherwise.¹⁵⁶

In determining whether the land use regulation is justified by nuisance principles or is, in fact, a taking, the inquiry will entail:

[A]nalysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant’s proposed activities [citations], the social value of the claimant’s activities and their suitability to the locality in question [citations], and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government.¹⁵⁷

Under *Lucas*, therefore, even a total taking by a regulatory action may be constitutional if the government could have forbid the use of the property under background principles of nuisance law and could justify the regulation by balancing the public and private interests according to the factors above.

VI. A Proposed Solution: How the Agencies Can Apply the Law to Preserve Access in Malibu

The impetus has been building for a new look at the status of exactions jurisprudence in California in light of the *Nollan/Dolan* essential-nexus-plus-rough-proportionality test. The constitutionality of the California Coastal Commission’s exactions on beachfront development has been challenged by Geffen and is likely to continue to be controversial until a property owner is successful in getting his takings claims brought to the high courts and decided on the merits. The situation in Malibu contains the perfect ingredients to stir up such litigation since there has been a great deal of

153. *Lucas*, 505 U.S. at 1007.

154. *Id.* at 1010.

155. *Id.* at 1031.

156. *Id.* at 1029.

157. *Id.* at 1030-1031.

private development, public beach access is very limited, the agencies are aggressive with imposing and opening public access, and the beachfront landowners are powerful and affluent enough to fight. For those reasons, the suit filed by David Geffen has been used in this article as an example of the conflict and the arguments the beachfront property owners may make. How the state defends its permitting actions is important because it will determine the extent to which the state can protect public access to the beach and preserve the public tidelands.

This section shall discuss the following: (a) how the Coastal Commission meets the constitutional exactions test; (b) how involving State Lands in legal action in coordination with the Coastal Commission would make the case for public access stronger; (c) how State Lands can initiate its own litigation on a nuisance claim; and (d) how the Coastal Commission may use the nuisance argument to further support satisfaction of the exactions test.

A. The Coastal Commission Can Defeat Constitutional Challenges to Exactions

In the Geffen permit, which is standard and very similar to most other CDPs since *Nollan*, the Commission imposed access conditions after making findings that the development causes erosion to the beach and has a physical impact on the public trust lands and the public's ability to access the beach. Nonetheless, Geffen argued that the Coastal Commission did not comply with the constitutional requirements when imposing the lateral access easement on his

property because the Commission did not make findings determining whether the permit conditions had a rational relationship to, a nexus with, or were roughly proportional to the impacts generated by the development.¹⁵⁸

The Coastal Commission, however, claims that since *Nollan* the agency has paid diligent attention to ensuring its actions are justified under the constitutional standards.¹⁵⁹ Before issuing a permit, the Commission's procedure is to prepare a "Staff Report" that makes findings showing the connection between the condition imposed and the burden created by the development. These Staff Reports explain how the development creates a need for more beach access for the public and how the easement furthers public access.¹⁶⁰ In making such findings, the Coastal Commission examines the nature of the development and the characteristics of the surrounding area, the potential impacts of the development and its obligation to avoid those impacts, the need for the development and the advantages or disadvantages of any available alternatives, and explains why the condition is the best accommodation of both the private and the public needs.¹⁶¹

The Geffen Staff Report follows the same practice. In the Geffen Staff Report, the Coastal Commission made clear findings of the development's impacts and stated the connection between the impacts and the condition imposed. The Report's evaluation began with the following statement:

[P]ast Commission review of shoreline residential projects in Malibu has shown that such development re-

with CDP permit findings and conditions led her to believe that the Geffen permit is not unusual and can serve as a standard from which other similarly situated properties may also be analyzed.

161. See generally, Coastal Development Permit application, *supra* note 83.

158. 1st Am. Compl., *supra* note 71, ¶ 127.

159. E-mail comments from Steve Hudson, *supra* note 53.

160. Coastal Development Permit application, *supra* note 83, at 21-26. The author's experience

sults in potential individual and cumulative adverse effects to coastal processes, shoreline sand supply, and public access. Shoreline development, if not properly designed to minimize such adverse effects, may result in encroachment on lands subject to the public trust (thus physically excluding the public); interference with the natural shoreline processes necessary to maintain publicly-owned tidelands and other public beach areas; overcrowding or congestion of such tideland or beach areas; and visual or psychological interference with the public's access to and the ability to use public tideland areas. In order to accurately determine what adverse effects to coastal processes will result from the proposed project, it is necessary to analyze the proposed project in relation to characteristics of the project site shoreline, location of development on the beach, and wave action.¹⁶²

Based on scientific evidence (see Section IV.B.2, above), the Report explains in detail how Geffen's proposed seawall, as well as development on the beach generally, has the effect of eroding the beach.¹⁶³ The Report determines that erosion caused by the seawall would have the following effect on the public's access to the beach:

First, changes in the shoreline profile, particularly changes in the slope of the

profile . . . alter the usable area under public ownership. A beach that rests either temporarily or permanently at a steeper angle than under natural conditions will have less horizontal distance between the mean low water and mean high water lines. This reduces the actual area in which the public can pass on their own property. The second effect on access is through a progressive loss of sand as shore material is not available to nourish the bar. The lack of an effective bar can allow such high wave energy on the shoreline that beach materials may be lost far offshore where it is no longer available to nourish the beach. The effect of this on the public is again a loss of area between the mean high water line and the actual water. Third . . . bulkheads cumulatively affect public access by causing accelerated and increased erosion on adjacent public beaches.¹⁶⁴

In sum, the Report found that Geffen's building of a seawall would cause an acceleration of erosion to the beach, which impacted public access by diminishing the tidelands and reducing the area available for public use. The Report also considered the cumulative effect of Geffen's development with others' development,¹⁶⁵ and determined that the project would exacerbate the shrinkage of the public beach. Assuming the science is correct, the development harms

162. Coastal Development Permit application, *supra* note 83, at 9.

163. *Id.* at 9-10, 16-26.

164. *Id.* at 22.

165. It is of note that the Coastal Commission cannot consider the impacts of Geffen's development by itself, but must consider the effect of Geffen's development in light of its potential to have a greater effect when combined with the impacts of

nearby development. Although not at issue here, this analysis is required by the National Environmental Policy Act (applicable to federal agencies) and California's parallel statute, the California Environmental Quality Act (applicable to state agencies). *See also Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976) (Considering cumulative effects is a procedural requisite when analyzing environmental harms caused by development that occurs within the area of other approved or foreseeable projects.).

the public interest in access to the tidelands and is contrary to the principles of the Coastal Act, which is sufficient to allow the Coastal Commission to exercise the state's police power to prohibit the development altogether. In the interest of balancing public and private rights, however, the Coastal Commission allowed Geffen a CDP but, in return for that privilege, imposed a condition requiring Geffen to record an offer to dedicate an easement for public access across a strip of the private beach contiguous along the tide line. To pass constitutional muster, the condition imposed on Geffen must satisfy the two-pronged exactions test, establishing that the condition's connection is both essential and roughly proportionate to the project's impact.

Under the first prong, the essential nexus test asks whether the state interest that would have been served by denial of the permit is the same state interest that is served by imposing the mitigating condition. In this case, the proposed seawall would cause the width of the beachfront to be diminished by erosion, thus harming public access. Since the permit condition provides for public access across the beachfront, the condition satisfies *Nollan's* "essential nexus" test because the type of public access affected by the development is access *across* the beachfront, and the lateral access easement required by the permit would allow access *across* the beachfront.

Under the second prong, the rough proportionality test asks whether the degree of the burden on the property owner created by the condition is roughly proportionate to the burden on the state interest created by the development's impacts. Here, the impacts affecting the public's past,

present, and future interest in coastal access are sufficient to show that the burden on the state interest is significant and proportional to the burden on the landowner. This is especially so since the landowner derives at least some benefit from the conditions imposed.

Aerial photographs of the coast demonstrate that there has been significant erosion on Broad Beach since its development.¹⁶⁶ Past development by the property owner, such as Geffen's house, has already contributed to erosion and caused harm to the public beach. Additional development, like Geffen's proposed seawall, increases and intensifies erosion, as illustrated by the Staff Report. New development also lengthens the amount of time the development lasts, causing the accelerated erosion to continue to occur further into the future. Both the new addition and the existing structures, therefore, are likely to continue to cause erosion of the tidelands for years to come. The lateral access easement merely compensates the public for the continuing diminution of the public lands and, consequently, of the area available for public use. Hence, the burdens on the state interest and the landowner's interest already seem to be roughly proportional.

The case for rough proportionality, though, becomes even stronger when taking into account the fact that the landowner actually derives a benefit from the condition. As the *Nollan* Court recognized, "land use regulation does not effect a taking if it substantially advances legitimate state interests."¹⁶⁷ Since the Court did not question that public access to the beach was a legitimate state interest, the Coastal Commission could have denied Geffen a permit to add

166. See the text and citations at footnote 103. In particular, Map No. 105 designates Broad Beach's shoreline condition as "present devel-

opment critical."

167. *Nollan*, 483 U.S. at 834.

on to his house without effecting a taking of his property. Rather than prohibiting the development, the restriction allows Geffen to add onto the property, which directly increases the value of the property. As a California court has recognized:

[A property owner] has received a substantial benefit by being allowed to proceed with the development of his property and to thereby greatly increase its value. The benefit involved is that the development is permitted on the coast—an extremely limited resource—in exchange for provisions to ensure maximum public access to, and use of, the tidelands.¹⁶⁸

Geffen benefits from the condition by being able to do what he otherwise would not be able to do and thereby increasing the value of his property. Moreover, Geffen benefits from similar conditions placed on neighboring properties, as their unrestricted development would have caused erosion to the beach in front of Geffen's property, decreasing its value. Also, the increased value of the properties in the area indirectly increases the value of Geffen's own property. Thus, in light of the significant harms to the state interest that follow from the existing and additional development, and accounting for the ben-

efits that accrue to the landowner from the conditions imposed, the lateral access condition meets the rough proportionality test.

B. The Agencies Can Join Forces to Exert Legal Pressure

The Coastal Commission and State Lands are united in their missions to protect the public's right of access to the coast. As discussed in Section III, above, the Coastal Commission, through their Coastal Access Program, notifies the State Lands Commission's Division of Environmental Planning and Management¹⁶⁹ as to the particular OTD it wants accepted next. The agencies are, thus, cooperating with each other in the exchange of information, but they pursue their own actions thereafter without further consultation. The agencies could better serve their objectives if they extended their cooperation beyond regulation and administration by taking coordinated legal action against specific beachfront property owners who interfere with public access.

The Coastal Commission's success has been hampered by noncompliance with permit conditions¹⁷⁰ and constitutional challenges to its regulatory authority to exact easements from development applicants.¹⁷¹ Instead of leaving the Coastal Commission to

168. *Grupe*, 166 Cal. App. 3d at 176. In *Grupe*, the plaintiff applied for a permit to build a large home with a seawall on his beachfront lot. The California Coastal Commission required as a condition to the permit that Grupe dedicate a public access easement along the beach. *Id.* at 155-156.

169. State Lands created the Division of Environmental Planning and Management in order to, *inter alia*, "serve as the liaison between the [State Lands] Commission and the California Coastal Commission," and to monitor the whether approved projects are implementing mitigation measures. California State Lands Commission, *About DEPM*, at http://www.slc.ca.gov/Division_Pages/DEPM/About_DEPM.htm (last visited Oct. 15, 2004).

170. Author's experience, *supra* note 50. As an

intern in the Coastal Commission's Legal Enforcement Division, I had access to the violation complaint log book and permit files. It was readily observable to me that there were vastly more violations than the Coastal Commission has resources to handle. No regulatory scheme can be successful without "teeth," but neither can it be successful if there are teeth on paper but not enough money and staff to give it teeth in practice. One example of this is discussed in Section IV.B.1, above, where fourteen of the properties on Broad Beach that had permit conditions forbidding signs had posted the "No Trespassing" signs.

171. As discussed in Section IV; including the *Nollan* and *Geffen* cases, as well as *Remmenga*, *Whaler's Village*, and *Grupe*.

enforce permit violations and defend takings challenges alone, State Lands can take a more proactive role and become involved in the legal battle against the noncomplying property owner. While State Lands has successfully made easements available for public access through its authority as a government agency and pursuant to statutory grant, the agency has an untapped source of legal authority that can give it greater power to fight for public access—the public nuisance doctrine.

As discussed earlier, State Lands holds legal title to the tidelands and the beachfront easements as trustee for the people of the California. As trustee, State Lands has the duty to protect the people's property rights in those lands. Where an adjacent property owner's development is causing harm to the people's property rights in the tidelands and beach easements, as trustee of those public lands, State Lands can bring a public nuisance suit against the property owner to remove the harmful development. The legal right to protect the public's interest in the land as a consequence of its status as trustee is distinct from the statutorily granted authority that lies in State Lands as an agency. Thus, claiming authority to stop the development in this manner would be based on the public's common law property rights, rather than on the authority of a governmental agency.

By taking this action, State Lands can back up the Coastal Commission's defense of a specific permit against the noncompliant landowner. In that way, the agencies can take advantage of the legal rights belonging to both the regulatory agency and the general public at the same time. With the pressure of two agencies on the landowner, and possibly two lawsuits on the table, the landowner is more likely to accede to the conditions and comply.

C. State Lands Can Exert Property Rights Under Nuisance Principles

Common law public nuisance principles prohibit a landowner from using his land in such a way so as to cause harm to the public's rights.¹⁷² Here, nuisance law can be applied because: (1) There is a public property right in the tidelands and lateral easements, as well as a right to access those lands; (2) The adjacent beachfront development accelerates erosion of those public lands, which interferes with the public's rights because it diminishes the public's property and the land available for access. The property owner also interferes with public access by maintaining "No Trespassing" signs and guards who chase the public off the beach. Finally, (3) such interference is unreasonable because the public's comfort and convenience in using the beach is prevented; the Coastal Commission has prohibited the signs and guards and has restricted development, and the development constitutes a continuing nuisance with permanent effects because erosion continues and the sand is forever lost.

Since a public official may bring a public nuisance action, and because State Lands also has a duty to protect the rights of the public to the tidelands and the lateral access easements it holds, State Lands has the legal authority to be able to bring a nuisance claim against a beachfront property owner whose development threatens to erode the public's land. Such would be applicable in Geffen's case, where his seawall accelerates erosion of the beach.

In bringing a nuisance claim against the beachfront developer, the legal rights exerted by State Lands could be considered in the context of property law, rather than as regulatory action like the Coastal

172. REST. 2D TORTS § 821B, *supra* note 148.

Commission's. Doing so in conjunction with the Coastal Commission's enforcement action would make legal action against the violator a double threat. Moreover, the Coastal Commission may be able to avoid proving that it meets the more complicated *Nollan* and *Dolan* tests if nuisance litigation were first initiated by State Lands.

D. The Coastal Commission Can Apply Nuisance Principles To Support Exactions

The Coastal Commission may also be able to use nuisance principles to abate violations and support its exactions by applying the analysis in *Lucas v. South Carolina Coastal Council*. Once the permit condition is found to mitigate the harm caused by the development (which is the nuisance) such that the essential nexus test is satisfied, the *Lucas* decision can potentially be used to support a finding of rough proportionality under the takings test. Even in the context of all loss of economic value, the *Lucas* decision accepts that existing principles of nuisance are a sufficient basis for regulation.¹⁷³ Thus, it implicitly satisfies the rough proportionality prong because the condition imposed on the property owner (the regulation) is proportional to the harm caused by the development (the nuisance).

Under *Lucas*, where the landowner develops his land in a way that causes a nuisance to the public's rights, the Coastal Commission can prohibit the proposed new development, even if to do so would otherwise be a total regulatory taking. Having authority to outright prohibit the action, the Coastal Commission can, instead, impose a condition for that same reason.¹⁷⁴ The Coastal Commission can, therefore, argue that the condi-

tion must at least be roughly proportional to the harm, since the harm would have allowed the more stringent action of completely prohibiting the development.

Although the erosion may be found to constitute a nuisance to the public property in the easements and tidelands, *Lucas* does not automatically vindicate the regulation. The court must balance the interests at stake before the prohibition can support a possible noncompensable taking. The balancing factors set forth in *Lucas* included:

[1] the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities [citations], [2] the social value of the claimant's activities and [3] their suitability to the locality in question [citations], and [4] the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government.¹⁷⁵

First, the harm to public lands and resources is great. The public lands (the tidelands and easements) are harmed as erosion from adjacent development shrinks their area. The resource value of the beach is also harmed since the land available to public use is diminished along with the erosion. The public's use and enjoyment of the beach is also interfered with by the "No Trespassing" signs and policing of the beach by security guards.

Second, the people of the state have twice declared the preservation of the coast to be a social value of fundamental importance.¹⁷⁶ The social value to the private property owner is in his use of it as a beachfront residence, but the slight detri-

173. *Lucas*, 505 U.S. at 1010.

174. See *Nollan*, 483 U.S. 825, discussed at Section V.B, *supra*.

175. *Lucas*, at 1030-1031.

176. See Section II.B.3, *supra*.

ment to that value caused by enforcing the right of the public to use the tidelands and easements is outweighed by the greater public purposes. The state does recognize that there is social value in preserving the property rights of the individual (such rights are essential to the preservation of our democratic ideals) and does not want to prohibit all development on the beach, but it also needs to protect the public's interest. A 25-foot lateral access easement across the sandy beach seems to balance both interests by mitigating the harm to the public while still allowing the property owner to economically benefit from the development of his land.

Third, the sustainability of such development on the beachfront does not weigh in favor of the private owner. The Coastal Commission's archives are full of applications for the building of emergency revetments during winter storms and for rebuilding of homes that have crumbled from subsidence.¹⁷⁷ The tremendous amount of damage to beachfront homes, particularly in Malibu, from storms has been well documented by the media.¹⁷⁸ As the beach continues to erode away, development is further threatened. While natural processes of accretion could repair the erosion to the beach were the development completely removed, that would be unreasonable and would not be proportional to the harm to the property owner's rights. So long as the development must exist, the harm of erosion to the public's lands will continue to occur and cannot be avoided.

Fourth, allowing the public to walk across a portion of the beach fronting the

development can easily compensate for the harm to public access resulting from the erosion of the public lands. Where there is already an easement in place allowing the public to do so, and the property owner interferes with the right to cross by posting signs, the harm is easily avoidable simply by requiring him to remove them.

In so finding the beachfront landowner's use of his property to be outweighed by the public's use of the adjacent tidelands and easements, and having found previously that the erosion of the beach and the "No Trespassing" signs are a nuisance to the public trust lands and public access, the Coastal Commission could, therefore, argue that background principles of nuisance law would have given the agency power to abate the nuisance, so its exactions are constitutional. The practical result of getting an order of abatement for the nuisance would be to prohibit the development shown to cause erosion (such as the seawall in Geffen's case), or, as the case may be, require the beachfront landowner to remove the signs interfering with the public's use and enjoyment of the public lands.

VIII. Conclusion

In sum, the Coastal Commission's practice of requiring a lateral access easement in return for permitting development is constitutionally permissible. Should the landowner interfere with the public's access or bring a takings suit to invalidate the access condition, the Coastal Commission can satisfy the *Nollan* and *Dolan* tests by showing that the erosion caused by the development harms the public tidelands such that

177. Author's experience, *supra* note 50. The author reviewed all the permits for development on Broad Beach.

178. E.g., Eric Malnic & Julia Scheeres, *Re-prieve from the Rain Weather: Southland Gets a Break*

from Punishing Storms. The Exception is Malibu, Where Surf Batters Homes and Yards, L.A. TIMES, Feb. 10, 1998, at B1; Jeff Wilson, *Mudslides Add to Troubles in Malibu*, PORTLAND OREGONIAN, Feb. 9, 1994, at A3; Wire Reports Compilation, *Storm Rains More Grief on the Nation*, ORLANDO SENTINEL, Feb. 8, 1994,

there is an essential nexus with the lateral access condition, and that the erosion causes harm to the public that is roughly proportional to the burden on the property owner. The Coastal Commission can further support a finding of rough proportionality by showing that the erosion is a nuisance and can be regulated according to *Lucas*.

The case for public access could be made even more compelling by involving State Lands by taking the offense and initiating an action against the landowner who refuses to comply with the Coastal Commission's requirements. By invoking nuisance law, State Lands can protect the public's property rights from the harmful use of the adjacent property by the beachfront resident. The landowner will then have two forces with claims against him, and that additional pressure is likely to influence him to comply. Together, the California Coastal Commission and the State Lands Commission can be a powerful force in protecting the public's access.

Epilogue

A victory for the environment, Geffen was forced to drop his cause of action for an unconstitutional taking of private property. And in April of 2004, the Superior Court of California sustained the Coastal Commission's General Demurrer to the other causes of action (mostly issues of procedural compliance under CEQA), dismissing all claims objecting to the opening of the easement to public access.¹⁷⁹ In that ruling, the judge opined:

[Geffen] is pursuing his own economic interests by attempting, now that he has been permitted to develop his coastal property, to renege on his offers to dedicate public access to the beachfront that will otherwise be blocked by that development.¹⁸⁰

On October 1, 2004, Geffen filed a Sixth Amended Complaint, attempting to sufficiently plead the claims demurred with leave to amend, and, this time, the Coastal Commission cross-complained for declaratory relief and civil fines for violations of the Coastal Act.¹⁸¹ The Coastal Commission's cross-complaint could lead to further inquiry into the constitutionality of the agency's practice of conditioning permits upon the dedication of a lateral public access easement.

at A6.

179. General Demurrer to 4th Am. Compl., 1-3, *City of Malibu v. Access for All*, No. BC277034 (Cal. Super. Ct. L.A. County, Apr. 12, 2004).

180. *Id.* at 2.

181. The case history of proceedings and documents filed is available at the Los Angeles Superior Court website. Use the civil case summary search function and enter in the case number BC277034 at <http://www.lasuperiorcourt.org/civilCaseSummary/index.asp?CaseType=Civil>.