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Notes

A Loophole to Repair: "Repair and Maintenance" as a Way Around the Coastal Act's Prohibition Against Seawalls

JENNI KHUU*

INTRODUCTION

A. A PREMONITION

Powerful twelve-foot waves gave "Killer" Dana its name.1 Killer Dana had the best and largest surf on the West Coast.2 Nestled in the City of Dana Point, Orange County, it boasted one of California's most vital local surf scenes from the late 1930s through the 1960s.3 Now, as Surfer Magazine proclaimed, "Killer Dana is dead."4 In 1964, the Dana Point Chamber of Commerce sought government and military assistance for construction of a harbor.5 One year later Congress provided funds, and soon after, the first ten-ton boulder was laid.6 On August 29, 1966, the Army Corp of Engineers closed the beach to all "marine activities."7

Today, the only surf area remaining is Doheny Beach, which sits

* J.D. Candidate, 2007, University of California, Hastings College of the Law; B.A., Political Science 2004, University of California, Berkeley. This is dedicated to the surfers of Doheny Beach, Dana Point, for their passion and inspiration; the Surfrider Foundation for fighting a good fight; my fiancée Robert Katzer for sharing a love of surf; and my friends Karol Bailey, Mike Bailey, and Mark Fung for all of our "good times" in the water. A special thanks to Gavin Charlston, Professor Brian Gray, and Chad Nelsen for their guidance and efforts; and the entire staff of the Hastings Law Journal for all their hard work. All errors, of course, are my own.

2. Id.
4. Id.
5. Id.
6. Id.
7. Id.

[1297]
adjacent to an oversized parking lot.\textsuperscript{8} Referred to by \textit{Surfl ine} as a “children’s wave,” the large waves and vibrant reputation are but a lost memory.\textsuperscript{9} Surfers speak of Killer Dana nostalgically as they sit on their surfboards and wait for a set. Their nostalgia is reflected in \textit{Surfl ine}’s description of Doheny Beach:

Killer Dana is dead, and Doheny is its low-budget tombstone. Thirty years ago, a jetty and harbor transformed summer’s Orange County answer to Rincon (500-yard right-hand walls on big south swells) to a polluted children’s wave. Faithful old-timers still paddle out to catch its meager remnants, but they’re left pining for the past.\textsuperscript{10}

Some surfers resisted the change; others proposed a harbor design that would have saved part of the surf break.\textsuperscript{11} Killer Dana now rests in peace, buried somewhere underneath and behind the enormous riprap boulders.

Forty years later, enormous riprap boulders are finding their way onto Doheny’s northern neighbor—Strand Beach.

B. The Realization

Strand Beach is part of the area known as the Dana Point Headlands, which consists of 121.3 acres of majestic California coastal land.\textsuperscript{12} As one of Southern California’s last undeveloped coastal promontories,\textsuperscript{13} the Dana Point Headlands boasts of coastal bluffs,\textsuperscript{14} amazing and beautiful beaches, and a heavy beach break. The land spans from south of Dana Strands to north of Dana Point Harbor,\textsuperscript{15} and the hills rise upward to 288 feet above sea level.\textsuperscript{16}

On January 15, 2004, the California Coastal Commission (“Commission”) approved the City of Dana Point Local Coastal Land Program (“Proposal.”)\textsuperscript{17} The approval was contingent upon the City of Dana Point’s (“City”) adoption of “suggested modifications.”\textsuperscript{18} Approval of the Proposal allows Headlands Reserve LLC to develop 121.3 acres of

\begin{itemize}
\item \textsuperscript{8} Id.
\item \textsuperscript{9} BLAIR MATHESON, DOHENY BEACH TRAVEL INFO, SURFLINE, http://surfline.com/reports/report_travel.cfm?id=4848 (last visited Apr. 20, 2007).
\item \textsuperscript{10} Id.
\item \textsuperscript{11} See Heller, supra note 3.
\item \textsuperscript{12} Memorandum from Deborah Lee et al., Deputy Director, South Coast District, California Coastal Commission, to Commissioners and Interested Persons, City of Dana Point Local Coastal Program Amendment 1-03, at 11 (July 28, 2004), available at http://www.coastal.ca.gov/1bIW4a-8-2004.pdf [hereinafter Commission Findings].
\item \textsuperscript{13} Id.
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Id.
\item \textsuperscript{16} See id. at 3, 11.
\item \textsuperscript{17} Id. at 11.
\item \textsuperscript{18} Id. at 1.
\item \textsuperscript{19} Id.
\end{itemize}
the Dana Point Headlands, which include Strand Beach.  

The coastal bluff cited in the Proposal cannot naturally sustain development, including the construction of fixed, permanent structures for human habitation. The area right now is supported by a dilapidated and failing seawall that runs adjacent to Strand Beach. However, this existing seawall would not be able to support proposed new development or continue to stabilize the bluff. As a result, the Proposal seeks blanket authority for the City to construct and expand the seawall to stabilize development. This, the City argues, will prevent erosion at the bottom of the landslide-vulnerable area.

However, it is indisputable that shoreline protective devices such as seawalls alter shoreline conditions and result in beach loss adjacent to the seawall. For this reason, the California Coastal Act of 1976 promulgated a series of prohibitions and requirements, limiting the construction of these shoreline protective devices for coastal development. Section 30253 of the Coastal Act ("Coastal Act") forbids new development in the coastal zone that would require shoreline protection. However, repair and maintenance of an existing shoreline protective device under section 30610 does not require a coastal development permit, thereby avoiding review that would be subject to prohibitions under section 30253.

The City has made many arguments to support development that would necessitate shoreline protection, one of which asserts that the existing seawall may be repaired and maintained pursuant to section 30610, to stabilize the development on the bluff. The Commission, agreeing to that assertion, approved as repair and maintenance the excavation of the existing seawall foundation, the realignment of the seawall five to ten feet landward, and the reconstruction of the seawall with a significant amount of new material. This Note argues that the Commission’s approval betrayed the legislative intent behind the Coastal Act. Specifically, the Commission’s approval allows new development on
a coastal bluff requiring shoreline protection by evading the coastal permit process via re-categorizing shoreline protection as repair and maintenance pursuant to section 30610(d).

Part I briefly describes general coastal and bluff erosion, as well as the consequences and various types of shoreline protection employed to prevent erosion. Part I also explains the role of the California Coastal Commission and how it regulates the coastal zone.

Part II examines the Proposal with respect to sections of the Coastal Act that deal with shoreline protection devices. Specifically, section 30235 prohibits development that would require shoreline protection, and section 30253 provides an exclusive exception. The Commission found the Proposal inconsistent with both sections, but nevertheless approved it. The approval allows the City to evade the Coastal Act's prohibitions against shoreline protection by circumventing the coastal permit process pursuant to section 30610(d), which provides for repair and maintenance of an existing revetment.

Part III uses the California Coastal Plan and the Coastal Act to determine legislative intent behind shoreline regulation. The significant provisions of the Coastal Act are sections 30001, 30001.2, and 3007.5. Furthermore, Part III also examines section 30610, its parallel provision in the Administrative Code, and its legislative history to examine the themes and policy behind its enactment. Lastly, Part III looks at shoreline protection policies among other coastal states. After examining the goals of California and other states regarding shoreline protection, this Note concludes that the Commission's approval of the Proposal is contrary to the law.

I. THE PROBLEMS OF COASTAL EROSION

A. SEAWALLS, GENERALLY

California has a dynamic and constantly moving coastline. For the past twenty years, the California coastline has experienced accelerated erosion and accretion. Approximately 950 miles, or eighty-six percent, of California's coastline is actively eroding. Erosion occurs when wave forces acting on the shoreline move sand along the coast. The magnitude and direction of the waves combine so that some beaches erode while others accrete. The California Department of Navigation

32. CAL. PUB. RES. § 30235, 30253 (West 2007).
34. See id.
37. Id.
and Ocean Development found that beach erosion and cliff recession were fast becoming a significant problem.\textsuperscript{38}

Coastal erosion results in substantial public and private losses.\textsuperscript{39} Most notably, the 1982–83 El Niño episode, the strongest ever recorded in California, resulted in over $100 million in coastal losses.\textsuperscript{40} It destroyed thirty-three homes, damaged three hundred homes and nine hundred businesses, and caused $35 million in damages to public recreational facilities.\textsuperscript{1} However, most of these costs could have been greatly reduced if development had not been sited in areas of high geologic hazard, thereby reducing the call for government relief and expensive remediation.\textsuperscript{42}

To avoid the loss to property, particularly on eroding bluffs, development should be set away from the ocean so that erosion will not cause a problem, particularly those on eroding bluffs.\textsuperscript{43} For example, San Luis Obispo County, in its land use plan, requires that “new development or expansion of existing [development] on blufftops” must be able to “withstand bluff erosion and wave action” for a period of at least seventy-five years without shoreline protection.\textsuperscript{44} Many cities require more significant precautions for bluff-top development. For example, Malibu and the Santa Monica Mountains’ policies require a minimum set back of twenty-five feet from the top of the bluff in addition to seventy-five years of sustainability without shoreline protection.\textsuperscript{45} The City of Pismo Beach requires development be set at a safe distance from the top of the bluff in order to retain the structures for a minimum of one hundred years.\textsuperscript{46}

Another approach to combating coastal erosion is to “armor” the coastline with rocks, concrete, and steel.\textsuperscript{47} Commonly referred to as shoreline protective devices, this coastal ‘armor’ reduces wave attack and

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{40} Id.
\item \textsuperscript{41} Id.
\item \textsuperscript{42} CALIFORNIA COASTAL COMMISSION, RECAP PILOT PROJECT FINDINGS AND RECOMMENDATIONS: MONTEREY BAY REGION (Sept. 1995), http://www.coastal.ca.gov/recap/chap3.html.
\item \textsuperscript{43} See California Coastal Commission, Sample Policies for Planners for Developing, Amending, or Reviewing LCP Policies on Shoreline Protective Structures, Hazards, and Beach Erosion 1, available at http://www.coastal.ca.gov/la/docs/bear_ch5.pdf [hereinafter Sample Policy for Planners] (providing guidance to local commissions).
\item \textsuperscript{44} Id. at 15 (emphasis added).
\item \textsuperscript{45} Id. at 17.
\item \textsuperscript{46} Id.
\item \textsuperscript{47} See, e.g., id. at 10.
\end{itemize}
\end{footnotesize}
backshore erosion by stopping the landward erosion of the coast.\textsuperscript{48} One such shoreline protective device, a seawall, protects the shore from erosion and wave damage by separating land and water.\textsuperscript{49} A revetment is a type of seawall, built directly on a land surface such as the seaward slope of a dune or eroding bluff.\textsuperscript{50} In many discussions, seawalls, bulkheads, or revetments are referred to simply as seawalls.\textsuperscript{51}

Seawalls lead to increased beach degradation.\textsuperscript{52} "When [seawalls, bulkheads, and revetments are] built on a receding shoreline, the recession will continue and may be accelerated on adjacent shores. Any tendency towards loss of beach material in front of such a structure may well be intensified."\textsuperscript{53} Seawalls cause a narrowing of the beach seaward of the wall.\textsuperscript{54} When the structure is placed on an eroding shoreline, (as most shoreline protective devices are), the seawall increases the rate of beach loss due to increased wave reflection and energy surrounding the seawall, thereby actively degrading the recreational beach.\textsuperscript{55} This process, also called active erosion, is the process whereby factors attributable to the shoreline protection structure itself \textit{actively} increase the rate of beach loss.\textsuperscript{56} Although active erosion is site-specific, it uniformly results in the forward migration of the shore face, resulting in erosion of the recreational beach unless sand is replenished.\textsuperscript{57}

Another form of erosion that occurs with seawalls is referred to as passive erosion.\textsuperscript{58} Passive erosion occurs where the shoreline migrates landward beyond the structure due to the wall interacting with beach degradation, resulting in the loss of beach in the front of the seawall.\textsuperscript{59} There is a general consensus that passive erosion results from human interference with natural coastal erosion.\textsuperscript{60} Eventually passive erosion due to shoreline armoring to protect private coastal development will
destroy the recreational, and usually public, beach. Additionally, passive erosion results in deeper water in front of the seawall. Because a surf break requires shallow waters, passive erosion eventually destroys the surf.

Beach loss can be combated by bluff erosion, which, in addition to natural coastal erosion, contributes to sand on the beaches. But when bluff erosion is obstructed, beach loss results. In addition to coastal erosion due to the natural movement of water, bluff erosion also contributes to sand on beaches. A recent study that used light detection and ranging generated 3-D maps that allowed researchers to calculate the volume of bluff material that fell onto a beach. Another independent recent study utilized mineralogical fingerprinting to find the source of beach sand. The study determined that sea cliffs are an important source of sand to the beaches. Both independent studies, by way of different technologies, concluded that approximately fifty percent of the sand came from erosion of the bluffs and cliffs. After concluding that natural bluff erosion significantly contributes to sand on beaches, researchers cautioned, "Various types of concrete surfacing and reinforcement of bluffs as well as layering large boulders as rip-rap along the base of bluffs tend to 'armor' them, slowing or preventing such erosion." Because seawalls aggressively erode the recreational beach unless sand is replenished, decreased bluff erosion results in stagnant sand supply and accelerates coastal erosion, thereby actively contributing to the loss of the public beach.

Decreased bluff erosion and increased coastal erosion at one beach negatively affects adjacent beaches, thereby perpetuating a need for more shoreline protection. "When [seawalls, bulkheads, and revetments are] built on a receding shoreline, the recession will continue and may be

61. Id.
62. Id.
63. Id.
65. See id.
66. Id.
67. Id.
68. Id.
69. Id.
70. Id.
71. Id.
72. See Surfrider Foundation, Shoreline Structures, Responses to Erosion, http://www.surfrider.org/srui.aspx?uiq=structures/erosion (last visited Apr. 20, 2007) ("When waves hit a smooth, solid seawall, the wave is reflected back towards the ocean . . . . The reflected wave (the backwash) takes beach sand with it . . . . Seawalls can cause increased erosion in adjacent areas of the beach that do not have seawalls. This so-called 'flanking erosion' takes place at the ends of seawalls.").
accelerated on adjacent shores.\textsuperscript{74} Many protective shoreline devices trap sand to protect the area upcoast, but meanwhile increase downcoast erosion.\textsuperscript{75} This results in a "flanking effect" that causes increased erosion in adjacent areas of the beach,\textsuperscript{76} which forces neighboring property owners to utilize shoreline protection and leads to a proliferation of seawalls.\textsuperscript{77} For example, massive protective devices in Santa Barbara and Oceanside have severely accelerated erosion in neighboring beaches.\textsuperscript{78} Shoreline armoring creates a domino-effect whereby adjacent beaches require protection from resulting increased erosion caused by protective devices.\textsuperscript{79}

A degrading recreational beach results in a loss to the California public:

According to state and federal law, the beach below the mean high tide line is owned by the state and held in trust for the people. In many areas of California, the public owns the dry sand area of the beach, but even in areas where dry sand is privately owned, the public has the right to use the beach for access to the public land. If halting the natural retreat of the coastline narrows the recreational beach . . . [it] harms public property . . . .\textsuperscript{80}

Shoreline protection is employed to protect coastal development. Because shoreline protection results in loss of the recreation beach, it ultimately pits coastal developers against public beach users.

Interference with the natural process of erosion interrupts the natural supply of sand, and the beach changes shape or can disappear completely.\textsuperscript{81} Furthermore, because seawalls create a domino effect whereby shoreline protection increases the need for more shoreline protection, the California Coastal Commission discourages new development that requires seawalls.\textsuperscript{82}

B. CALIFORNIA COASTAL COMMISSION, GENERALLY

In 1972, Californians declared by voter initiative that "it is the policy
of the State to preserve, protect, and where possible, to restore the resources of the coastal zone for the enjoyment of the current and succeeding generations. As a result, “growing public consciousness of the finite quantity and fragile nature of the coastal environment” motivated California’s passage of Proposition 20. Proposition 20 created the California Coastal Zone Conservation Commission and six regional commissions and entrusted them to prepare a comprehensive Coastal Plan. The legislature eventually adopted the Coastal Plan as the Coastal Act of 1976 (“Coastal Act”). The Coastal Act is a land use regulatory scheme to protect California’s coastal zone.

California’s coastal zone extends from the Redwood forests of Oregon to the white sandy beaches of Mexico. Encompassing about 287 miles of shoreline, including the coastline surrounding nine islands, the coastal zone encompasses approximately 1.5 million acres of land. The zone starts three miles off the coast and extends to varying boundaries inland. Coastal management is generally executed in partnerships between state and local government. Local Coastal Programs and Land Use Policies are created to govern and set policy for development in the coastal zone and for protection of land, water, and marine resources. Proposed policies are submitted to the Commission for review and approval. Through the coastal permit system, the Coastal Act grants discretionary land use as well as environmental regulatory authority to the Commission. Development within the coastal zone requires approval by either the Commission or the partnered local authority. The Commission retains appellate authority over its decisions.

II. THE PROPOSAL AND THE COASTAL ACT

In 1834, when Richard Henry Dana saw the towering cliffs and bay that would later bear his name, . . . he describe[d] the area then known as Capistrano Bay as “the most romantic spot on the California
Dana Point Headlands consists of "a rolling mesa above sea cliffs and a stretch of sloping bluff" above Strand Beach. These headlands are the last undeveloped coastal promontory in Orange County and are one of the last in Southern California. Its isolation from other native habitats results in a variety of native plant and animal life. It boasts of native habitats that are now rare in Southern California and harbors similarly rare wildlife including the endangered Pacific pocket mouse, the threatened California gnatcatcher, and thirteen rare plant species. For many years, a condemned trailer park, several roads, retaining walls, abandoned buildings in severe disrepair, storm drains, county public access ways, and a lifeguard station exclusively occupied the Dana Point Headlands.

On January 14, 2004, the Commission conditionally approved the City of Dana Point Local Coastal Land Use Program, authorizing development of 121.3 acres of residential and commercial facilities on a landslide complex. This Proposal sought to construct 125 single family residential lots on 52.4 acres and planned to allot 4.4 acres for commercial land use. Because of the bluff's propensity for landslides, it is not suitable for fixed, permanent structures for human habitation. To stabilize the bluff, the City plans to manufacture a mass graded slope by removing one million cubic yards of material from the upper portion of the landslide complex and re-compacting the material with additional grading in the lower portion of the landslide complex. Also, to enable and stabilize development on the beach, the Proposal seeks to rebuild and enlarge the existing 2,240 foot long seawall that extends along the length of Strand Beach. The stated goals of the mass graded slope and revetment are to stabilize development and elevate the area to provide better coastal views. This Note will focus solely on the Commission's response to the City's arguments for the revetment, or seawall.
A. Coastal Act Section 30253

Section 30253 of the California Coastal Act states: “New development shall . . . assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.” The Draft Policy on Coastal Erosion explains:

Although protective devices have benefits, the adverse impacts of these structures can be substantial. These potential impacts include limiting public access to the shoreline, increasing erosion along adjacent areas, restricting sand input from armored bluffs, reducing the public beach area with the structural footprint, and disrupting the visual character of the coast. . . . This can lead to eventual failure of the device and create subsequent public nuisances or hazards along the beach.

The problems associated with shoreline protective devices led the Commission to severely discourage them. The Commission therefore recommends that local commissions require planners to “ensure that new development will not need a shoreline protective device for the duration of its economic life.” In doing so, it states:

New development should be sited far enough from the bluff edge, or

109. Coastal Act § 30253 states:

New development shall:

(1) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.

(2) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.

(3) Be consistent with requirements imposed by an air pollution control district or the State Air Resources Control Board as to each particular development.

(4) Minimize energy consumption and vehicle miles traveled.

(5) Where appropriate, protect special communities and neighborhoods which, because of their unique characteristics, are popular visitor destination points for recreational uses.

CAL. PUB. RES. § 30253 (West 2007).

110. Resources Agency of California, Draft Policy on Coastal Erosion Planning and Response and Background Material (2001) 6 [hereinafter Draft Policy]. The draft policy was developed through the coordination of many state agencies under Governor Gray Davis, who awarded ten million in grant funds to support projects that addressed coastal erosion issues. See id. Released and made available to solicit public comment, the Draft Policy was expected to be released in final form in the Fall of 2002. See id.; see also Press Release, California Coastal Coalition (March 29, 2001), available at http://www.calcoast.org/news/newapp.htm. When I called the California Resources Agency, I learned that the draft had been released for public comment. Telephone Interview with Christopher Potter, Ocean and Coastal Policy Analyst, California Resources Agency, in S.F., Cal. (June 4, 2007). However, the new administration under Governor Schwarzenegger abandoned the project. Id.

111. See generally Draft Policy, supra note 110.

top of bluff, that it will not require a seawall, revetment or any other bluff alteration for the full life of the development. This is a two step effort—determining a safe distance from the bluff edge for development, and determining the location and configuration of the bluff edge at some time in the future, often taken to be the life of the development.\textsuperscript{113}

The Commission’s heavy emphasis against relying on shoreline protection devices for new development parallels the Coastal Act’s explicit recognition that new development cannot require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.\textsuperscript{114}

Here, proposed development on the Dana Point Headlands would require construction of a new shoreline protective device. When asked about alternatives to a new seawall, the City responded it could instead create a soft sacrificial artificial slope on the beach that would naturally erode.\textsuperscript{115} Although this could assure geological stability of the development for its assumed design life of seventy five years, the City indicated it would not continue with this alternative because at the end of seventy five years, the first line of development would be compromised.\textsuperscript{116} In addition, the consequential erosion would adversely affect slope stability, public safety, and water quality.\textsuperscript{117} Thus, proceeding with the Proposal without securing additional shoreline protection would not be “consistent with good engineering practice, and could be construed as construction with the intent of ‘benign neglect.’”\textsuperscript{118} As this illustration demonstrates, geological stability of the development \textit{relies} on shoreline protection because other alternatives simply would not suffice.

The City argues that shoreline protection required for proposed development will not alter shoreline processes.\textsuperscript{119} The City further argues that because the area is naturally prone to landslides and progressive erosion, the effects of the proposed new seawall would not differ from the current effects of the existing seawall.\textsuperscript{120} This argument assumes that “shoreline processes” for purposes of section 30253 means the natural disposition of the beach, and therefore, because there is an existing seawall, its natural state has already been altered. The City concludes

\begin{itemize}
    \item \textsuperscript{113} \textit{Id.}
    \item \textsuperscript{114} \textit{Id.}
    \item \textsuperscript{115} Commission Findings, \textit{supra} note 12, at 129.
    \item \textsuperscript{116} \textit{Id.}
    \item \textsuperscript{117} \textit{Id.}
    \item \textsuperscript{118} \textit{Id.}
    \item \textsuperscript{119} \textit{Id.} at 132. Although the Commission believes that the intent of this statement appears to assert that the shoreline protective device will not “alter shoreline processes” within the meaning of § 30253, the same analysis can show that it would alter natural landforms for purposes of § 30253.
    \item \textsuperscript{120} \textit{Id.} at 133.
\end{itemize}
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that proposed development requiring a new seawall would not additionally alter shoreline processes. 121

However, the Commission could use a different baseline—whether development would alter existing conditions, not its natural disposition. 122 The Dana Point Headlands’ existing conditions involve ongoing, progressive deterioration of the existing revetment. 123 The Commission would argue that additional shoreline protection would alter these conditions. The consequences of this new seawall would differ from what would exist if the current seawall were allowed to deteriorate. 124 Furthermore, with recent contributions from bluff erosion studies, environmentalists understand that bluff erosion supplies sand to a beach. In some areas, the bluff was eroding over the old revetment and supplying sediment to the Strand. 125 A new seawall would prevent this natural beach replenishment, further altering existing conditions.

The City’s Proposal would result in development that would require shoreline protection. As the Commission acknowledged above, shoreline protection will result in a substantial alteration of natural landforms. Consequently, the Commission concluded that “this new shoreline protective device would be inconsistent with a prohibition against such development contained in Section 30253.” 126

B. COASTAL ACT SECTION 30235

The Coastal Act has an exclusive exception to section 30253. This exception, section 30235, applies only “when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion[,] and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply.” 127

The Commission nevertheless warns, “shoreline protective devices should only be authorized when necessary and only to protect those structures that cannot feasibly be protected in any manner.” 128 To

121. See id. at 132.
122. Id. at 133.
123. Id.
124. Id.
125. E-mail from Chad Nelson, Environmental Director, Surfrider Foundation, Southern California Chapter, to Jenni Khuu (Jan. 30, 2007) (on file with author).
126. Commission Findings, supra note 12, at 129.
127. Section 30235 of the California Coastal Act states:
Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Existing marine structures causing water stagnation contributing to pollution problems and fish kills should be phased out or upgraded where feasible.

CAL. PUB. RES. § 30235 (West 2007).
approve the revetment repairs under section 30235, the Commission would need to find (1) coastal dependent uses, existing structures, or public beaches (2) in danger from erosion, and (3) that the repairs are designed to mitigate adverse impacts on local shoreline sand supply. The Commission refused to apply section 30235 to the submitted Proposal because the Proposal did not satisfy any of these requirements.

First, development cited in the Proposal does not fit into any of the categories enumerated in the exception. “Residential development is not a coastal dependent use,” nor is it an existing structure. Existing structures cited by the City (“mobile home park including a road network, retaining walls, abandoned buildings in severe disrepair and a storm drain system[,] County public accessway[,]” and lifeguard station) as necessitating shoreline protection will be completely demolished in order to make room for new development. Thus, proposed development is not “existing” under section 30235; the development, yet to be built, is new. The Commission has “not allowed 30235 to be invoked to ‘protect... existing structures’ if the structures will be demolished as part of the ultimate development plan.” Even if the existing structures could continue to exist, the amount of upgrade needed to rehabilitate the abandoned buildings would be so significant as to render it new. Not only is new development not protected by section 30235, but it is also subject to the prohibitions of section 30253.

In reaching its decision, the Commission places existing structures into two categories: structures that do not need significant repairs, and structures that require considerable reconstruction. On the one hand, some structures, such as storm drains, may be used without significant repair or upgrade. The Commission warns that if the purpose of a new revetment is to preserve structures that are currently functional, “then there would likely be some shoreline protection options for this purpose that are far less extensive than a new shoreline protective device, including no present action at all.” Therefore, structures that may continue to be used without significant repair do not warrant sufficient justification for shoreline protection.

On the other hand, other structures are “are in such a severe state of
disrepair that their use would necessitate significant re-construction.\textsuperscript{139} This includes abandoned buildings, and perhaps roads and retaining walls. These require significant upgrade of the kind that would be considered “new development” which, according to section 30253, should be designed in a manner that does not require shoreline protection. that would substantially alter natural landforms along bluffs and cliffs.\textsuperscript{140} The Commission acknowledged that although there may be some argument for new shoreline protection to safeguard existing development, there are other options that are far less-extensive.\textsuperscript{141} For example, the City could repair the existing revetment, or use a much smaller revetment such as one that is a few hundred linear feet as opposed to 2,100 linear feet.\textsuperscript{142}

Therefore, the City failed to identify coastal dependent uses, existing structures, or public beaches that would necessitate shoreline protection, the first requirement of section 30235.

Second, section 30235 requires that structures allegedly needing shoreline protection must be in danger of erosion. Assuming, inter alia, the City succeeded in arguing that shoreline protection would benefit existing structures, the City would still fail to meet the requirements because it “ha[s] not submitted substantial evidence... [that existing structures] are in need of shoreline protection.”\textsuperscript{143}

Third, section 30235 requires that shoreline protection must be “designed to eliminate or mitigate adverse impacts on local shoreline sand supply.”\textsuperscript{144} The Commission found that “[n]either of the reasons identified in the proposed polic[y]—as justifying the reconstruction or repair and maintenance of the revetment—is contained in [s]ection 30235 of the Coastal Act.”\textsuperscript{145} Instead, the Proposal stated that seawall activity seeks to stabilize new development on a landslide slope and to provide better coastal views.\textsuperscript{146}

In sum, the Commission determined the Proposal failed to satisfy section 30235. And, as demonstrated earlier, the Commission also determined the Proposal is inconsistent with the prohibition against development requiring shoreline protection in section 30253.

\begin{footnotes}
\footnote{139. \textit{Id.}}
\footnote{140. \textsc{Cal. Pub. Res.} \textsection 30253 (West 1996) ("New development shall... [not] require the construction of protective devices.").}
\footnote{141. \textit{See Commission Findings, supra note 12, at 132.}}
\footnote{142. \textit{Id.}}
\footnote{143. \textit{See id. at 131.}}
\footnote{144. \textsc{Cal. Pub. Res.} \textsection 30235.}
\footnote{145. Commission Findings, \textit{supra} note 12, at 130.}
\footnote{146. \textit{Id.} at 123 ("To protect the development of the Strand area, and as part of the stabilization plan for the ancient landslide complex, the proposed LUP amendment would allow the rebuilding and enlargement of an existing... revetment... protecting development upcoast of the Headlands.").}
\end{footnotes}
C. Suggested Modifications

1. The Commission’s Findings

The Commission determined that proposed shoreline protection would result in “changes in the mobilization of beach sand, a reduction in beach access and impairment of recreational opportunities.” Although recognizing that predictions are not absolute, the Commission believed that these changes would alter coastal processes.

The Proposal was nevertheless approved, contingent upon adoption of the Commission’s recommendations. For example, because of section 30253’s prohibition against development that requires shoreline protection, the Commission recommended that the Proposal be modified to avoid review by the authorities. Repair and maintenance does not require a coastal permit and would not be subject to review, thereby avoiding section 30253 altogether.

The Commission’s rationale is clear: “Extending the life of the existing revetment through repair and maintenance would result in many of the same impacts that would come from the construction of a new revetment... Nevertheless, pursuant to section 30610(d) of the Coastal Act, [which exempts certain activities from obtaining a coastal development permit, thereby not subjecting the activity to the requirements of the Coastal Act] such work is exempt.”

Despite explicit recognition that repairs to the existing revetment will substantially alter coastal processes, despite explicit recognition of the prohibition of these shoreline protective devices, and despite explicit recognition of the Coastal Act’s apprehension and reluctance for exceptions, the Commission nevertheless permitted development on the Strand by suggesting a textual, and superficial, re-categorization. The anomaly is obvious: On the one hand, the Commission explicitly states that this re-categorization would “allow[] construction of new development on the Strand that relies on the upgraded revetment for its stability.” On the other hand, Coastal Act section 30253 explicitly prohibits development that would require shoreline protection “that would substantially alter natural landforms along bluffs and cliffs.”

Reasons for this re-categorization are unambiguous:

[If the revetment is solely to be repaired and maintained, its continued

147. Id. at 134.
148. See id. at 133–34.
149. Id. at 9.
150. See id. at 1.
151. See id.
152. Id. at 177.
153. Id. at 1.
154. CAL. PUB. RES. § 30253 (West 2007).
existence shouldn't be subject to any review, pursuant to Coastal Act section 30610(d). Thus, the suggested modifications to the [Proposal] are written to ensure that only the method of achieving the repair and maintenance would be subject to review . . . .

2. Coastal Act Section 30610(d)

The City argued that shoreline protection in the Proposal is permitted under section 30610(d). Coastal Act section 30610(d) states that no coastal development permit is required for "repair or maintenance activities that do not result in an addition to, or enlargement or expansion of, the object of those repair or maintenance activities[,] . . . [unless] methods of repair and maintenance involve a risk of substantial adverse environmental impact." Citing repairs to the Encinitas revetment in 2003 and repairs to the Strand revetment in the 1950's and 1960's, the City asserted that proposed shoreline protection similarly qualifies as repair and maintenance.

The City claims that repairs to the existing Strand revetment would not be different from the repairs the Commission authorized in 2003 to the Encinitas revetment. The Encinitas repairs allowed a portion of rock to be repositioned to prevent erosion and improve flood protection along Highway 101. Approximately 180 tons of material were redistributed, where rocks were removed from the highest parts of the revetment and placed on the lower parts of the revetment. In addition, riprap stone from the Encinitas revetment that migrated seaward was removed, collected, and replaced in the revetment.

The Encinitas repairs are distinguishable from the proposed repairs here. Here, the City plans to enhance the foundation and back slope, requiring a substantial amount of the rocks of the revetment to be repositioned and replaced. Furthermore, there are no plans to excavate

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156. See id. at 171–73.
157. California Coastal Act § 30610 states:

Notwithstanding any other provision of this division, no coastal development permit shall be required pursuant to this chapter for the following types of development and in the following areas:

. . . .

(d) Repair or maintenance activities that do not result in an addition to, or enlargement or expansion of, the object of those repair or maintenance activities; provided, however, that if the commission determines that certain extraordinary methods of repair and maintenance involve a risk of substantial adverse environmental impact, it shall, by regulation, require that a permit be obtained pursuant to this chapter.

CAL. PUB. RES. § 30610 (West 2007).
158. See Commission Findings, supra note 12 at 171–73.
159. Id. at 171.
160. Id.
161. Id. at 171–72.
162. Id. at 172.
163. Id.
any of the rock that has migrated from the main revetment structure, no plans to remove material from the beach, and no plans incorporate migrated material into the reconstructed revetment. Additionally, an unidentified volume of imported rock will add to the 789 cubic yards of stone placed in repairs to the Strand revetment in 1983.

In addition, the Encinitas repairs were aimed to prevent erosion and to improve flood protection along Highway 101. In the City of Dana Point’s Proposal, however, repairs and maintenance would allow development of permanent residential structures “on a sloping site consisting of an ancient landslide complex.” As the Commission acknowledged itself, “Without an upgrade, the existing revetment is not adequate to provide the kind of protection necessary to protect the new development contemplated in the [Proposal].” In Encinitas, repairs and maintenance protected Highway 101, and there were no plans of other land uses that would become dependent upon or increase the need for shoreline protection. However, in the City’s case, development and residential structures would require further protection for many years to come.

The City also claims that proposed repairs are similar to the authorized repairs to the Strand revetment in 1983. Previous Strand repairs are distinguishable from those proposed for four reasons. First, when the Strand revetment was originally constructed and later repaired, the goal remained the same—to protect a trailer park and associated appurtenances. In contrast, the repairs contemplated by the City now would allow new development and would demolish the trailer park. Second, in 1983, the repairs focused on areas of revetment and slope damage by wave run-up and erosion. However, as explicit in the City’s Proposal, the Proposal contemplates construction of residential and commercial infrastructure. Third, the 1983 repairs removed and replaced 5,500 cubic yards of existing rock and dirt where the revetment had failed or deteriorated. Here, the City instead proposes to import an unidentifiable volume of rock and does not plan to use or address
existing rocks. The Proposal, as submitted, does not suggest an amount or limitation for the amount of new rock. Only later, with the Commission’s recommendations, were any limitations incorporated into the Proposal. Lastly, whereas the former repairs sought to remedy past erosion, this Proposal seeks to prevent erosion to support development on a landslide complex.

3. California Code of Regulations Section 13252(b)

Section 13252(b) of the California Code of Regulations distinguishes the difference between repairs and replacement: “replacement of [fifty] percent or more of... revetment... is not repair and maintenance..., but instead constitutes a replacement structure requiring a coastal development permit.” The Commission suggests adding similar language to the Proposal: “up to [fifty] percent new rock by volume, including excavation and new bedding material and foundation shall constitute repair and maintenance of the existing revetment.”

However, the Commission narrowly construes the meaning of section 13252: fifty percent or less new rock by volume becomes the sole criterion of whether work can be considered repair or maintenance. The inquiry shifts from whether shoreline protection has detrimental consequences to whether shoreline protective activity has met the minimum requirements to constitute repair and maintenance. Once these minimum requirements are met, the revetment may be excavated, moved, and rebuilt five to ten feet away.

4. “Repair and Maintenance”

In its finding that the upgrade to the revetment could be classified as repair and maintenance, the Commission ignored the intent behind shoreline protection in order to enable development on a landslide complex. Intent does have a significant role in determining eligibility for section 30610(d). As the Commission noted, One “[k]ey aspect[] of the Encinitas project and the 1980’s Strand project that [is] used to claim that the work at the Strand can be considered repair and maintenance [is]...
justification for the repair." The justification for the Encinitas revetment was "to prevent erosion and improve flood protection along Highway 101." The justification for the previous Strand revetment was to minimize the potential erosion of the revetment itself from wave damage. Both of the reasons enabled upgrades to be considered repair and maintenance. To contrast, the Proposal here seeks to upgrade the Strand revetment to allow substantial commercial and residential development on a coastal bluff-top.

Also, both of those goals were inconsistent with the definitions of repair and maintenance. To repair is "to restore by replacing a part or putting together what is torn or broken." To maintain is "to keep in a state of repair, efficiency, or validity." Both definitions contemplate restoring or bringing something back to its previous state. However, the Commission broadly interprets the words to include not just its previous state, but also an improved and expanded one. This expanded definition includes the complete rebuilding of the seawall, realigning the seawall five to ten feet landward, and importing up to fifty percent new rock by volume.

In *Union Oil Co. v. South Coast Regional Commission*, the California Court of Appeal examined whether upgrades to an existing revetment were repair and maintenance under the equivalent section of the Coastal Act at the time. The most important factor was whether the new facility would be functionally equivalent to the original. Accordingly, the original Encinitas revetment protected Highway 101 and was repaired to continue to protect Highway 101. To contrast, the existing Strand revetment protected an existing residential mobile home park and associated appurtenances, but the current Proposal would require the repaired revetment to support substantial and significant residential and commercial development on a naturally eroding coastal bluff. The seawall's upgrade will seek to increase its functionality; not

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182. *Id.* at 171. The other significant consideration was whether the project included riprap repositioning. *Id.*
183. *Id.*
184. *Id.*
185. *See id.*
186. *WEBSTER'S* *NEW* *INTERNATIONAL* *DICTIONARY* 1923 (3d ed. 1993).
187. *Id.* at 1326.
189. 154 Cal. Rptr. 550, 522 (Ct. App. 1979) (discussing whether proposed reconstruction of a berth would require a permit when approximately seventy-five percent of the existing wharf structure would be replaced, and noting that because the new facility and portions retained from the original facility would be functionally the same as the original that no Commission permit was required for activity).
190. *See id.*
192. *Id.* at 172.
only will it have to support the coastal bluff as it is, it will be engineered to provide support for substantially more significant residential and commercial development.

Assuming, arguendo, that the realignment of the structure closer to shore and the importation of new rock simply reconstructs the revetment as it previously existed, rebuilding the revetment still alters coastal conditions. The Commission acknowledged, “just because the new revetment would occupy the same footprint does not mean that the new revetment would have the same performance or result in the same future coastal condition.” Specifically, because the existing condition contemplates the deterioration of the existing revetment, over time the coastal conditions that would exist with a new revetment in the same footprint would differ from what would exist if the existing revetment were allowed to continue on its natural path.

Also, earlier in the report, the Commission noted that the existing revetment alters coastal processes, local sand supply, beach access, and coastal recreation. Because, by the Commission’s reasoning, these conditions will continue in the future with either the existing revetment or with a new structure, the “contemplated reconstructed shoreline protection device would alter coastal processes and is subject to the requirements of section 30235 of the Coastal Act.” However, despite the above reasons, “[i]f upgrades to the existing revetment can be accomplished through activities that qualify as repair and maintenance, the object of that repair and maintenance would not be subject to such review . . . [and] would not be inconsistent with section 30235 of the Coastal Act.” This is appalling in light of the Commission’s earlier assertion that even a new revetment in the same footprint would alter natural processes. This demonstrates that although the suggested modifications allow development consistent with the text of the Coastal Act, the consequences thereof are inconsistent with the legislative intent of the Coastal Act.

Although the Commission suggests re-categorizing shoreline protection as repair and maintenance, such suggestions seek merely a change in classification without addressing the underlying negative

193. Id. at 133.
194. Id.
195. Id. at 135.
196. Id.
197. Id.
198. A consultant company warned, “[j]ust because the new revetment would occupy the same footprint, does not mean that the new revetment would have the same performance or result in the same future coastal conditions.” Id. at 133. Chad Nelsen, Environmental Director at Surfrider Foundation is also puzzled: “How such a major sea wall project ‘squares with the Coastal Act, I don’t know.” David Reyes, Environmental Challenge Revises Battle Over Dana Point Headlands, L.A. TIMES (Orange County), May 24, 2004, at B1.
consequences or giving credence to legislative intent.

III. WHAT SHOULD HAVE BEEN

The Commission's approval of the Dana Point Headlands project is inconsistent with the purposes of the Coastal Act. The Coastal Plan, from which the Coastal Act was adopted, and the legislative Findings and Declarations for the Coastal Act are explicit about their concern for preservation of natural coastal resources and discouragement of shoreline protection. Furthermore, examination of the exemptions of section 30610 lends considerable insight into its very limited purpose and intent. Lastly, looking at the shoreline protection policies of other coastal states reinforces the general opposition to shoreline protective devices. From investigating these sources, it becomes obvious that the Commission misread section 30610 to create a loophole in California's prohibition against development that would require shoreline protection.

A. THE COASTAL PLAN OF 1975

The Coastal Alliance is a coalition of environmental groups designed specifically to enact comprehensive legislation for preservation of the California coast. The Alliance authored Proposition 20 and submitted it to the voters for approval. The original language of the proposition was proposed by environmentalists and was enacted over a competing developer-friendly version of the bill. The passage of Proposition 20 led to the development of the California Coastal Plan of 1975 ("Coastal Plan.") The Coastal Plan was developed by the California Zone Conservation Commissions to respond to the people's call to the California government to adopt permanent protection policies for the coastal zone. The Coastal Plan addresses a wide variety of marine and coastal issues by organizing policies by assigning each issue a number, setting forth pertinent findings, and recommending solutions. The legislature eventually adopted the Coastal Plan as the Coastal Act of 1976.

Coastal Act section 30253 codified Policy 70 of the Coastal Plan. Policy 70 was written to prevent extensive protective works, which is the "best means of avoiding the many problems associated with construction of bluff protective works." Policy 70 states that development on bluffs and cliffs may be permitted only if design and setbacks are adequate to

199. Cardiff, supra note 52, at 263.
200. Id.
201. Id.
202. Id. at 264.
203. See CALIFORNIA COASTAL ZONE CONSERVATION COMMISSIONS, CALIFORNIA COASTAL PLAN 89 (1975) [hereinafter COASTAL PLAN].
204. Id.
assure stability and structural integrity. In addition, development must not create nor contribute significantly to erosion problems or geologic instability. With the only exception being Policy 19, which later became Coastal Act section 30235, development is prohibited if it would increase the need for shoreline protection. This unambiguous prohibition against bluff development dependent on shoreline protection is explicit and unwavering. The Coastal Plan’s use of the words “no new lot” signals its unequivocal ban on development on bluffs and cliffs. Furthermore, it forbids development if it would simply “increase the need” for protection devices; it need not in fact require protection.

The findings that support Policy 70 illustrate an awareness of the dangers of shoreline protection: bluff protective works “may interfere with access along the shore, may require continual sources of sand for replenishment, and must be carefully engineered to avoid beach erosion and shoaling elsewhere along the shoreline.” The findings also warn that artificial protective measures may interfere with natural bluff erosion processes and decrease sand supply.

As noted above, there is one enumerated exception: the Coastal Plan permits bluff protection if in accordance with Policy 19. Policy 19 allows shoreline protective devices if necessary to protect existing buildings and public facilities for beach protection and restoration. Specifically, shoreline protection will be permitted only when designed to eliminate or mitigate adverse impacts on shoreline sand systems and when required (1) to maintain public recreation areas or to serve necessary public service... where there is no less environmentally harmful alternative, or (2) to protect principal structures of existing development that are in danger from present erosion where the coastal agency determines that the public interest would be better served by protecting the existing structures than in protecting natural shoreline processes.

This exception was adopted into section 30235. The Coastal Plan’s exceptions to the prohibition against shoreline devices apply to two different situations. First, shoreline devices may be permitted when they are needed to maintain public needs. The caveat is that there must be

205. Id.
206. Id.
207. See Cardiff, supra note 52, at 266 (citing Coastal Plan, supra note 203, at 89).
208. See Coastal Plan, supra note 203, at 89.
209. Id.
210. Id.
211. Id.
212. Id. at 43-45.
213. Id. at 44.
214. Id. at 44-45.
no "less environmentally harmful alternative." This ensures that shoreline protection will be used only as a last resort, when all environmentally sound possibilities have been pursued and have failed. Second, these devices are permitted to protect "principal structures of existing development." There is another caveat: not only must shoreline protection be used for existing development, but it must be used for principle structures of existing development. Furthermore, actions must comply with overriding policy goals, such as the preservation of coastal resources. The Coastal Act similarly requires that the public interest must be better served by protecting principle structures of existing development than by protecting the natural shoreline process.

Policy 19 of the Coastal Plan permits shoreline protection in limited circumstances, but now without further requirements. Shoreline protection must incorporate mitigation measures to minimize and compensate for any impairment of local sand supply or adverse effects of sand movement. In addition, it must be designed to (1) be the minimum necessary for its purpose, (2) be as visually unobtrusive as possible, (3) be compatible with maximum possible shoreline access, and, conjunctively, (4) protect or enhance marine life conditions. The Coastal Agency retains the authority to eliminate the structure.

As policies 70 and 19 illustrate, the Coastal Plan has a general policy against shoreline protective devices, except in one enumerated situation. This is significant, as it expresses the intent of the California people, who voted for Proposition 20, which created the Coastal Plan that eventually became the Coastal Act:

[This Plan] speaks for the people of California, a Plan that can guide us in dealing with an uncertain future, a balanced Plan designed to meet two principle objectives:

1. Protect the California coast as a great natural resource for the benefit of present and future generations.

2. Use the coast to meet human needs in a manner that protects the irreplaceable resources of coastal lands and waters.

Legislative intent is clear. It demonstrates an explicit and unequivocal general prohibition of development that would require shoreline protection. In the exclusive exception, the Coastal Plan’s
findings still require a very strong showing that there are no other alternatives. The Coastal Plan makes it crystal clear that any doubt must be resolved in favor of protection of the coast and its irreplaceable resources.

B. THE COASTAL ACT AND OTHER LEGISLATION

Textual analysis of the Coastal Act also provides considerable insight to the Legislature's intent behind shoreline protection provisions. The first chapter of the Coastal Act is a series of sections that set forth "Findings and Declarations and General Provisions." The Legislature's Findings and Declarations explicitly state the general goals of the Coastal Act. Many of these goals are aimed at preserving the coastal zone, protecting the natural environment, and preventing deterioration and destruction of coastal resources. This subdivision will examine sections 30001, 30001.2, and 30007.5.

1. General Policy
   a. Coastal Act Section 30001

   The first section of the Coastal Act begins by acknowledging that the coastal zone is a delicately balancing ecosystem, and protection of its resources is of considerable concern. It is necessary to protect this balance to prevent deterioration and destruction of the coastal zone, and it is equally imperative to carefully develop and implement sound policies. The Findings and Declarations demonstrate that the Legislature, through implementation of the Coastal Act, sought to promote conservation of resources and to protect structures that have complied with the Coastal Act.

   b. Coastal Act Section 30001.2

   The Legislature further demonstrates the importance of preserving

224. The Coastal Act § 30001 states:
   The Legislature hereby finds and declares:
   (a) That the California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people and exists as a delicately balanced ecosystem.
   (b) That the permanent protection of the state's natural and scenic resources is a paramount concern to present and future residents of the state and nation.
   (c) That to promote the public safety, health, and welfare, and to protect public and private property, wildlife, marine fisheries, and other ocean resources, and the natural environment, it is necessary to protect the ecological balance of the coastal zone and prevent its deterioration and destruction.
   (d) That existing developed uses, and future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state and especially to working persons employed within the coastal zone.

CAL. PUB. RES. CODE § 30001 (West 2007).

225. Id.

226. Id.

227. See id.
coastal resources through section 30001.2, which states that protecting development may encompass drastic measures such as relocation:

The Legislature further finds and declares that... [even though coastal-dependent development] may have significant adverse effects on coastal resources or coastal access, it may be necessary to locate such developments in the coastal zone in order to ensure that inland as well as coastal resources are preserved and that orderly economic development proceeds within the state.  

By including this provision in the Coastal Act’s Findings and Policies and General Provisions, the Legislature emphasizes that coastal conservation must be protected, sometimes to the detriment of existing development. The Coastal Act explicitly and unequivocally states that coastal development is susceptible to relocation if it interferes with coastal resources. Willingness to use these extreme measures, like relocating the development itself, illustrates that preservation of coastal resources and “orderly” economic development is of the highest priority.

c. Coastal Act Section 30007.5

The Legislature, understanding that conflicts may arise between coastal resources and economic development, sought to ensure that conflicts are resolved to preserve coastal resources:

The Legislature further finds and recognizes that conflicts may occur between one or more policies of the [Coastal Act]. The Legislature therefore declares that in carrying out the provisions of this division such conflicts be resolved in a manner [that] on balance is the most protective of significant coastal resources.  

The Coastal Act unambiguously emphasizes protection of coastal resources in situations of such conflicts. Although these interests include protecting development, concern for preservation of natural resources and protection against coastal deterioration resoundingly and unequivocally prevails.

2. Coastal Act Section 30610
   a. The Section and Its History

The Commission approved development that would require shoreline protection because the existing seawall could be re-categorized as repairs and maintenance under section 30610. Section 30610, titled “Developments Authorized Without Permit” provides enumerated circumstances that would not require a coastal development permit, thereby allowing circumvention of the Coastal Act.  

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228. Id. at  
229. Id.  
230. Id. § 30007.5.  
231. Coastal Act § 30610 states that a coastal development permit is not required for:
Section 30610 waives the coastal development permit requirement for improvements to existing single-family residences or other structures, maintenance-dredging of existing navigation channels, and repair and maintenance to an existing revetment. Section 30610 also exempts the replacement of any structure destroyed by a disaster. All of these situations allow restoration of the structure to its previous state. Most of the items discussed relate to maintaining an already-existing device. These exceptions focus on preserving the status quo.

Whereas section 30610 contemplates improvements to single-family residences or other structures, the word “structure” is defined in the section as “landscaping and any erosion control structure or device which [sic] is similar to that which existed prior to the occurrence of the disaster.” This is consistent with the definition of repair and maintenance, which is to restore to a previous state of being. This emphasis on historical preservation is prevalent throughout the entire section, as reflected by how the section defines a “structure.”

Repair and maintenance to the existing Strand seawall does not comply with these themes. In fact, proposed activities to the Strand seawall include excavation, realignment, and addition of a significant amount of new material. These activities do not seek to restore the seawall to a pre-existing state. The City instead seeks to completely rebuild the seawall to support the new development of 121.3 acres on an unstable landslide complex. Even though the section contemplates limited situations where activities would restore structures to a pre-existing state, the City nevertheless employs the section to enlarge the revetment and expand its utility by requiring it to protect new development.

(a) improvements to an existing single-family residence, (b) improvements to any structure other than a single residence, (c) maintenance dredging of existing navigation channels, (d) repair and maintenance activities that do not result in an enlargement or expansion of that being repaired, (e) any category of development for which the commission has found no potential for any significant adverse effect, (f) necessary utility connections, (g) the replacement of any structure, other than a public works facility, that has been destroyed by a disaster, (h) among others.

CAL. PUB. RES. § 30610. However, section 30610(i)(2) states that these waivers “[do] not diminish, waive, or otherwise prevent the commission from asserting and exercising its coastal development permit jurisdiction over any temporary event at any time if the commission determines that the exercise of its jurisdiction is necessary to implement the coastal resource protection policies.” Id. 232. Id. § 30610 (a)–(d).

233. Coastal Act § 30610 (g)(1) states that a coastal development permit is not required for:

The replacement of any structure, other than a public works facility, destroyed by a disaster. The replacement structure shall conform to applicable existing zoning requirements, shall be for the same use as the destroyed structure, shall not exceed either the floor area, height, or bulk of the destroyed structure by more than 10 percent, and shall be sited in the same location on the affected property as the destroyed structure.

Id. § 30610(g)(1).

234. Id. § 30610(g)(2)(C).

235. See id. § 30610(d).
Section 30610 also exempts any category of development that the Commission has already identified as having "no potential for any significant adverse effect, either individually or cumulatively." Such categories of development will not negatively affect coastal resources or public access. This determination is based on either a previously-filed extensive coastal application or a previously-performed independent inquiry by the Commission. However, in the Strand Proposal, suggested activities to the Strand seawall have not been predetermined to be without adverse consequences. In fact, the Commission explicitly concluded that shoreline protection, whether new or in the same footprint as the existing structure, will lead to changes in coastal processes and accelerate coastal erosion.

The section also allows "the replacement of any structure, other than a public works facility, destroyed by a disaster." The term disaster is present in the definition of a structure: "any erosion control structure or device ... [that] existed prior to the occurrence of the disaster." A disaster is "a calamitous event ... occurring suddenly." Coastal erosion is not a disaster. Although coastal erosion may be calamitous, or

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236. Coastal Act § 30610(e) states that a coastal development permit is not required for:
Any category of development, or any category of development within a specifically defined geographic area, that the commission, after public hearing, and by two-thirds vote of its appointed members, has described or identified and with respect to which the commission has found that there is no potential for any significant adverse effect, either individually or cumulatively, on coastal resources or on public access to, or along, the coast and, where the exclusion precedes certification of the applicable local coastal program, that the exclusion will not impair the ability of local government to prepare a local coastal program.

Id. § 30610(e). See also Coastal Act section 30610(i)(1):
Any proposed development which the executive director finds to be a temporary event which does not have any significant adverse impact upon coastal resources within the meaning of guidelines adopted pursuant to this subdivision by the commission. The commission shall, after public hearing, adopt guidelines to implement this subdivision to assist local governments and persons planning temporary events in complying with this division by specifying the standards which the executive director shall use in determining whether a temporary event is excluded from permit requirements pursuant to this subdivision. The guidelines adopted pursuant to this subdivision shall be exempt from the review of the Office of Administrative Law and from the requirements of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

Id. § 30610(i)(1).

237. Id. § 30610(e).

238. Id. (providing exemption for "[a]ny category of development ... the commission ... has described or identified").

239. Commission Findings, supra note 12 at 177 ("Extending the life of the existing revetment through repair and maintenance would result in many of the same impacts that would come from the construction of a new revetment ... "). Because the existing condition contemplates the deterioration of the existing revetment, over time the coastal conditions that would exist with a new revetment in the same footprint would differ from what would exist if the existing revetment would be allowed on its natural path. Id. at 171–72.

240. CAL. PUB. RES. § 30610(g)(1).

241. Id. § 30610(g)(2)(C).

242. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 561 (1996 ed.).
disastrous,\textsuperscript{243} it is not sudden. Rather, it is gradual. As the Commission noted in their findings, "over the long-term... the revetment will continue to deteriorate."\textsuperscript{244} Therefore, the section did not contemplate replacing a revetment because of coastal erosion.

There is another theme lurking in section 30610—a short-lived time frame. Throughout the years, section 30610 has been modified to exempt from permits certain enumerated, provisional, and temporary activities. For example, before introduction of AB 1634, the section made an allowance for certain activities that the executive director found to be temporary and that would not result in an adverse impact.\textsuperscript{245} Introduced in 1993, AB 1634 proposed a categorical waiver from coastal development permits for certain temporary events lasting less than one week.\textsuperscript{246} The bill was not approved.\textsuperscript{247} Also in 1993, AB 1628 was introduced to exempt from development permits for motion picture filming and related activities in the coastal zone.\textsuperscript{248} Both bills have a momentary or temporary time aspect. In contrast, the situation in Dana Point does not have a similar short-term dimension. Rather the Proposal contemplates a long-term and permanent activity. Development of residential and commercial property on a landslide complex will require additional and permanent shoreline protection.

Most appalling is that the Commission approved the Proposal upon adoption of suggested amendments, which seek to re-categorize activities to the existing seawall as repair and maintenance pursuant to subsection (d). Subsection (d) allows "repair or maintenance activities that do not result in an addition to, or enlargement or expansion of, the object of those repair or maintenance activities."\textsuperscript{249} Repair and maintenance to the existing Strand seawall therefore is contrary to subsection (d); the excavation, realignment, and addition of new material will change the seawall itself, with the intention of significantly enlarging and expanding its use. These activities do not seek to protect what the original seawall sought to protect, but instead expect to accommodate a substantially different and much larger purpose: the development of residential and commercial property. Repairs and maintenance seek to significantly enlarge and expand the seawall's objectives and utility.

Furthermore, the section continues, repair and maintenance are

\begin{itemize}
  \item \textsuperscript{243} Id. at 294.
  \item \textsuperscript{244} Commission Findings, \textit{supra} note 12, at 133.
  \item \textsuperscript{245} Coastal Act § 30610(i).
  \item \textsuperscript{246} A.B. 1634, 1993-94 Reg. Sess. (Cal. 1993). The bill was not enacted because of administrative reasons. See \textit{Cal. Const.} art. IV, § 10(c).
  \item \textsuperscript{248} Id. A later attempt to exempt motion picture filming from coastal permit requirements succeeded with A.B. 848, which was enacted as sections 30610.9 and 30610.10. A.B. 848, 1999-00 Reg. Sess. (Cal. 1999).
  \item \textsuperscript{249} \textit{Cal. Pub. Res.} § 30610(d).
\end{itemize}
permitted by subsection (d) "provided, however, that if the Commission determines that... repair and maintenance involve a risk of substantial adverse environmental impact, it shall, by regulation, require that a permit be obtained pursuant to this chapter." Subsection (d) is not an absolute waiver from coastal development requirements. Repair and maintenance is not a free ticket to substantial adverse environmental impact. As the Commission found earlier, even a new revetment in the same footprint would alter natural processes, and would be inconsistent with section 30253. Therefore, even repairs and maintenance to the Strand seawall should require a coastal development permit and be required to comply with the Coastal Act regulations.

b. Administrative Code Title 14, Section 13252

The Commission, in approving the Proposal as repair and maintenance pursuant to section 30610(d), neglects to mention a great limitation. The permitted waivers are further restricted by the Administrative Code. Although the Commission noted in its suggestions that section 13252(b) limits repair and maintenance to the replacement of fifty percent or less of a seawall, the Commission ignored the other requirements of that section.

Administrative Code Section 13252 requires that where there are extraordinary methods of repair and maintenance, the developer must obtain a coastal development permit because such extraordinary methods involve a risk of substantial adverse environmental impact. A method of repair and maintenance would be considered "extraordinary" if 1) it would alter the foundation of the protective work, 2) solid materials would be placed on a beach or in coastal waters, 3) materials of

250. Id.
251. See supra Part II.A.
252. See supra Part II.C.5.
253. Administrative Code § 13252(a)(1) states:

(a) For purposes of Public Resources Code Section 30610(d), the following extraordinary methods of repair and maintenance shall require a coastal development permit because they involve a risk of substantial adverse environmental impact:

(1) Any method of repair or maintenance of a seawall revetment, bluff retaining wall, breakwater, groin, culvert, outfall, or similar shoreline work that involves:

(A) Repair or maintenance involving substantial alteration of the foundation of the protective work including pilings and other surface or subsurface structures;

(B) The placement, whether temporary or permanent, of rip-rap, artificial berms of sand or other beach materials, or any other forms of solid materials, on a beach or in coastal waters, streams, wetlands, estuaries and lakes or on a shoreline protective work except for agricultural dikes within enclosed bays or estuaries;

(C) The replacement of 20 percent or more of the materials of an existing structure with materials of a different kind; or

(D) The presence, whether temporary or permanent, of mechanized construction equipment or construction materials on any sand area, bluff, or environmentally sensitive habitat area, or within 20 feet of coastal waters or streams.

a different kind would comprise twenty percent or more of the existing structure, or 4) temporary mechanized construction equipment or materials would be placed on any sand area, bluff, environmentally sensitive habitat area, or within twenty feet of coastal waters or streams.\textsuperscript{254} Furthermore, any repair or maintenance work that is geographically close to a coastal bluff, an environmentally sensitive habitat, or coastal waters must seek a permit when there are plans to disrupt solid materials on the beach or use mechanized equipment or construction materials.\textsuperscript{255} In addition, this section gives the Commission executive director discretion to require coastal permits even if they are exempt pursuant to section 30610(d).\textsuperscript{256} For example, the Commission may require a permit for activities lasting more than two years.\textsuperscript{257}

Although the Commission recommended categorizing activities to the Strand seawall as repair and maintenance under section 30610(d), the Commission did not mention the Administrative Code's restrictions to that section.\textsuperscript{258} It is significant that the California Legislature provided clarification in the Administrative Code to shed light on section 30610(d). This action illustrates hesitation and reluctance in permitting general categorical waivers of coastal development requirements. The Commission's silence regarding these restrictions is misleading. Section 30610(d) does not confer blanket authority to unfettered repair and maintenance.

\textsuperscript{254} Id.

\textsuperscript{255} Administrative Code § 13252(a)(3) states that the following shall require a coastal development permit, despite Coastal Act § 30610(d), because they involve a risk of substantial adverse environmental impact:

(3) Any repair or maintenance to facilities or structures or work located in an environmentally sensitive habitat area, any sand area, within 50 feet of the edge of a coastal bluff or environmentally sensitive habitat area, or within 20 feet of coastal waters or streams that include:

(A) The placement or removal, whether temporary or permanent, of rip-rap, rocks, sand or other beach materials or any other forms of solid materials;

(B) The presence, whether temporary or permanent, of mechanized equipment or construction materials.

\textsuperscript{256} Administrative Code section 13252(e) states:

In any particular case, even though a method of repair and maintenance is identified in subsection (a) above, the executive director may, where he or she finds the impact of the development on coastal resources or coastal access to be insignificant, waive the requirement of a permit; provided however, that any such waiver shall not be effective until it is reported to the commission at its next regularly scheduled meeting. If any three (3) commissioners object to the waiver, the proposed repair and maintenance shall not be undertaken without a permit.

\textsuperscript{257} Administrative Code § 13252(d) ("Pursuant to this section, the commission may issue a permit for on-going maintenance activities for a term in excess of the two year term provided by these regulations."). Id. § 13252(d).

\textsuperscript{258} See supra Part II.C.1.
c. Other Coastal States

California's general policies against shoreline protection are similar to those of other coastal states. For example, Oregon, North Carolina, Texas, Rhode Island and Maine also prohibit seawalls. In fact, Oregon completely prohibits seawalls to protect development built after 1977. North Carolina also has an absolute prohibition against seawalls, regardless of when they were built. Similarly, in Texas, erosion response structures are prohibited "to protect individual private properties." Furthermore, Texas requires the removal of private structures on a beach if the first line of vegetation moves landward.

As these other states make clear, seawalls and other forms of shoreline protection are dangerous enough to warrant their absolute exclusion. The California Legislature, in adopting section 30253, also intended that shoreline protection be heavily discouraged and completely avoided.

CONCLUSION

The City, with the Commission willing, circumvented the prohibitions of section 30253 by characterizing the required shoreline protection as that of repair and maintenance to the existing seawall. Under section 30610(d) such activity does not require a coastal permit. Defined only by Administrative Code section 13252(b), repair and maintenance of a seawall requires that less than fifty percent of new rock may be used. However, by allowing the City to excavate the existing revetment foundation, realign the foundation five to ten feet landward, and construct and expand the revetment, the City impermissibly stretched the definition of "repair."

The Coastal Plan, from which the Coastal Act was based, illustrates the Legislature's concerns when it enacted policy limiting shoreline protection. The Coastal Plan discouraged the erection of shoreline development that depends on shoreline protection, allowing it for only the narrowest and most specific circumstances: when necessary to public service, when all other environmentally sound alternatives have been pursued, and when needed to protect principle structures of existing development. When the Coastal Plan was codified as the Coastal Act, the Legislature expressed similar intent in the Findings and Declarations and General Provisions sections. For example, the Legislature declared that the Coastal Act seeks to protect a balanced ecosystem and coastal

260. Id. (citations omitted).
261. Id. (citations omitted).
262. Id. (citations omitted).
263. Id. at 4 (citations omitted).
resources, as well as to prevent its deterioration and destruction. Although it is important to protect development on the coast, the Act protects only those developments that have been carefully planned and developed consistent with the Coastal Act. The Legislature made clear that when conflicts between development and coastal resources arise, concern for coastal resources dominate. For example, the Coastal Act cautions that it may be necessary to relocate developments in the coastal zone if such developments adversely affect coastal resources or access. Conflicts must be resolved in a manner that is most protective of coastal resources.

A further examination of section 30610, which the Commission used as a loophole around the Coastal Act’s prohibition against shoreline protection, reveals that the section contemplated situations that are aimed at restoration. These themes are not present in the rebuilding of the Strand Beach seawall, where development on the Headlands would require the excavation, realignment, and addition of substantial material to the existing revetment. Another theme of section 30610 contemplates actions that are small in scope. The removal and replacement of a seawall over 2240 feet is not small. An additional theme of the section contemplates situations where the Commission has predetermined that modifications to an existing seawall will not result in negative consequences. On the contrary, the Commission admitted that shoreline protection, whether new or in the same footprint as the existing structure, will lead to changes in coastal processes and accelerate coastal erosion. Another theme found within section 30610 is that of temporariness, or events that are of short duration. Once again, that theme is lacking here because repairs to the Strand revetment would support development that is long-term and permanent.

The Commission, entrusted to carry out regulation in the coastal zone pursuant to the Coastal Act, ran afoul of the Act’s intentions when it dodged the Legislature’s prohibitions against development requiring shoreline protection. The Commission did so by misinterpreting section 30610(d) in a manner contrary to the Coastal Act’s policies. What result? 264 For those whom surf and beach is a way of life, the pain felt at Strand Beach will be far worse than the pain felt from the death of Killer Dana:

264. The Surfrider Foundation and Sierra Club sued the Coastal Commission to challenge their approval of the Proposal, alleging their approval was an abuse of discretion. Both environmental groups filed temporary restraining orders and preliminary injunctions at almost every turn, pursing the conflict for approximately 3 years. However, June 15, 2005’s denial of the last preliminary injunction led to a “regretful consensus” that the Surfrider Foundation and Sierra Club must end their campaigns. Unfortunately, the Commission’s 7 to 5 approval of the Proposal may set a bad precedent for future California Coastal development. Chad Nelsen et al., A Sad Day for California’s Coastline: Surfrider Foundation Loses Campaign at California’s Dana Strand’s Beach, MAKING WAVES, Oct. 2005, at 8, available at http://www.surfrider.org/makingwaves/makingwaves21-4/8-9.pdf.
"[I]f you were surfing at Doheny, and you look up at the revetment that borders it . . . . [w]hat you see of that revetment at low tide is not as big as this one."}

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265. The Dana Strands Seawall, SURFER MAGAZINE, http://surfermag.com/features/oneyworld/headlands/index2.html (last visited Apr. 20, 2007). When surfing during low tide, there is less water between the surfboard and the ocean floor. Accordingly, the surfer is closer to the bottom, or "shorter." If using the revetment as a point of reference (as it sits on the ocean floor and does not move with the tide), the revetment looks "taller" because there is more vertical distance between the surfer and the revetment. The new revetment at Strand Beach will be larger than the one at Doheny Beach, even when the vertical distance between the surfer and the revetment is exaggerated, as it is in low tide.