No. 86-133

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,
Appellants,

v.

CALIFORNIA COASTAL COMMISSION,
Appellee.

On Appeal from the Court of Appeal of the State of California, Second Appellate District

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, AND NATIONAL LEAGUE OF CITIES; JOINED BY THE AMERICAN PLANNING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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QUESTIONS PRESENTED

1. Whether the Constitution requires this Court to review the wisdom of the legislative judgment of the people of California and their elected representatives that approval of new development along the coast should be conditioned on the provision of reasonable public access to the state-owned tidelands.

2. Whether the Constitution requires a complex takings analysis of the application of the public access requirement each time that a property owner has a philosophical disagreement with that requirement.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States, and the American Planning Association, an organization of local and regional planners and officials concerned with good planning and orderly urban development. *Amici* and their members have a vital interest in the legal issues that affect the powers and responsibilities of state and local governments to regulate land use in the public interest.

This case presents a challenge by the purchasers of a beachfront lot to the application of provisions of California's coastal zone legislation that are designed to preserve the public's constitutional right of access to the state-owned tidelands. More broadly, however, the challenge threatens the fundamental ability of state and local governments to apply reasonable conditions, such as a dedication requirement, to the approval of new developments, in order to avoid or ameliorate their adverse impact. Many state and local governments have long imposed conditions that restrict the use of land on landowners who seek to develop their properties. Imposing set-back and height restrictions, or requiring the dedication of land for streets, sidewalks, schools, parks, open space, and other public purposes, are not only familiar and constitutional exercises of the police power, but are necessary to preserve the quality of life in our communities.

The public access condition imposed in this case is simply one such police power regulation. The condition has minimal impact on owners of property along the coastline, but is essential to ensure continued public access to the state-owned tidelands. Regulation of land use affecting the tidelands is uniquely necessary; both the federal government and coastal states such as California have recognized that such lands are not only affected by many competing interests, but are also highly vulnerable. If the coastal states, which have been encouraged by the federal government to exercise their authority over their coastal zones, are not permitted to take appropriate action to protect the public interest, this important resource may suffer irreversible damage.

Appellants argue that the statutory access requirement is valid only if the administrative agency proves that each proposed development has a "direct and definable adverse impact on public access." Br. 34. Such a test ignores the cumulative effect that the actions of individual landowners have on each other and on the public

interest. Property owners do not use their property in isolation. The actions of a large landowner who develops a tract of a thousand acres and the actions of numerous individuals who develop smaller plots may equally imperil the rights of the public. The California Legislature could properly determine that an access condition in each instance was necessary to protect each landowner and the public interest.

Amici submit that the decision of the California Court of Appeal was correct. Because this Court's decision will have a direct effect on matters of grave importance to *amici* and their members, *amici* respectfully submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT OF FACTS AND INTRODUCTION

Amici agree with appellee's Statement and emphasize, in addition, the following facts.

Appellants have built a house on a narrow eroding beach lot on Faria Beach at the foot of the Rincon Mountain in Ventura County, California. The beach is located in a renowned surfing area commonly called the Rincon (J.A. 81, 255, 289), which the general public has been accustomed to using for many years. J.A. 85-86. Appellants' new two-story structure occupies most of the buildable space on the lot and completely blocks the ocean from view. J.A. 24-26. A high seawall, constructed to prevent the houses behind it from washing away, prevents the public from walking along the state-owned tidelands[2] during higher tides. J.A. 61, 68.[3] The sea-

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[1] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

[2] The terms "tidelands," "foreshore," and "wet sand," are used to refer to the area between mean low and mean high tides. J.A. 125; *see Borax Consolidated v. City of Los Angeles*, 296 U.S. 10, 25-27 (1935).

[3] See J.A. 262-64, 266; see also photograph from *Los Angeles Times*, App. A-1, *infra*.

wall also contributes to loss of beach sand along this unstable coastline.[4]

In 1972, when the people of California adopted the Coastal Initiative, this rocky beach was dotted with small vacation cottages. Their replacement over time with large permanent residences has created a wall between the public and the state-owned tidelands. J.A. 58-60. The Coastal Commission has granted permits for these new larger houses on the condition that the applicants offer deed restrictions designed to ensure that the public will be able to continue to walk along the shoreline.[5] J.A. 34. The terms of the deed restrictions for this beach were negotiated in 1979 with the representatives of the Faria family, who owned the entire beach tract. J.A. 48, 321-22. In 1982, the Faria family sold the property to the Faria Beach Trust. J.A. 312. Appellants purchased the property, which Mrs. Nollan's family had leased for more than forty years (J.A. 309-10), from the Trust during this litigation. Neither the Faria family nor appellants ever objected to the public's walking along the beach. In fact, Mr. Nollan testified that he had no objection to letting people continue to walk up and down the beach. Rather, his motivation for this appeal is based on "a difference in philosophy" as to what the law requires as a condition of building a new house. J.A. 313; 303.

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[4] See U.S. Army Corps of Engineers, *Shore Protection Manual* (1984) [Vol. 1, Ch. 5 on Seawalls, Bulkheads and Revetments]: "When built on a receding shoreline, the recession on adjacent shores will continue and may be accelerated. Any tendency toward the loss of beach material in front of such a structure may well be intensified." *Id.* 5-3. A 1976 study of the California Resources Agency notes that beach erosion along this beach is "critical." J.A. 257. The seawalls along this beach evidence scarring from beach stones during wave attacks. Photographs of the area show large boulders placed on the beach and against the seawalls in an effort to retard the erosion. J.A. 261-76.

[5] The deed restriction limits public lateral access to walking and running in a direction parallel to the mean high tide line. No sports, picnicking, or active recreation is allowed. J.A. 293, 313.

This appeal stems from appellants' application for permission to demolish a small (521 square foot) substandard vacation cabin and build a new permanent residence more than three times the size of the former structure. J.A. 23, 31. The permit was administratively granted, subject to the same condition that had been applied to forty-three other new houses in the tract: that the public be allowed to continue to walk along what amounts to at most a ten-foot stretch of beach between the seawall and the mean high tide line of the Pacific Ocean. J.A. 47-48, 50, 69-70, 85-86.[6]

Appellants sued to invalidate the condition, and the trial court remanded the matter to the Coastal Commission for further proceedings. J.A. 36-39. After an evidentiary hearing, the Commission determined that the new development individually and cumulatively burdened public access to the ocean and that lateral access along the coast was required by the State's Public Access Legislation (part of the Coastal Act), Cal. Pub. Res. Code § 30212, which provides, in part, that "[p]ublic access . . . along the coast shall be provided in new development projects." J.A. 322-25.

The trial court granted appellants' supplemental petition for writ of mandamus. J.A. 412-13. The Court of Appeal reversed, holding that the access condition was valid and supported by substantial evidence under well-established California law. J.A. 421. The California Supreme Court denied appellants' petition for review. Upon filing this appeal, appellants disclosed for the first time that they had already built their new house without a valid coastal permit.[7]

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[6] The actual location of the mean high tide line, appellants' seaward boundary, is uncertain and may at times be located landward of the seawall. J.A. 294.

[7] The Commission's appeal of the trial court's decision automatically stayed the trial court's order. Cal. Civ. Proc. Code §§ 916, 1110.

SUMMARY OF ARGUMENT

California's Coastal Act, including its Public Access Legislation, represents a reasonable accommodation of the public's right of access to the ocean's shores and the right of beachfront landowners to the enjoyment of their property. The common law principle that the tidelands are held in trust by the government for all the people traces its lineage to ancient Roman law and was acknowledged by this Court more than 100 years ago. The Court has repeatedly recognized that rights and interests in the tidelands are matters of local law, subject to the sovereignty of the States.

The State's obligation to protect the public's right of access to the tidelands has been enshrined in California's Constitution, reinforced by a 1972 popular Initiative, confirmed in a Coastal Plan, and implemented by the public access requirement. California's concern for public access to the shore, which is shared by at least twenty-one other States, has been encouraged by the federal government, which specifically approved California's Coastal Plan, including the public access requirement.

Development on the beach burdens the public's right of access to the tidelands and the ocean in numerous ways: by physically blocking use of the tidelands during higher tides, as in this case; and, in this and other cases, increasing erosion, blocking visual access to the sea, and channeling public users to overcrowded public beaches. The effects of beach development are cumulative, and they require legislative solutions that balance the rights of the individual property owners against the rights of other landowners and the public's constitutional right of access. California's public access requirement is similar to dedication requirements imposed by state and local governments on new development to offset burdens on streets, schools, parks, and other public facilities. The burdens of beachfront development are no less severe just because

it takes place in piecemeal fashion, rather than all at once, as in a subdivision.

Appellants argue that the Commission may apply its public access requirement only after independent study of each proposed individual development. The Constitution has not previously been held to require state and local administrative agencies to justify appropriate zoning standards each time that an applicant seeks a building permit. To impose such a burden would severely hamper state and local government efforts to solve complex land use problems by legislative solutions to the cumulative impact of indivdual developments. In comparable circumstances, this Court has deferred to congressional reliance on the cumulative impact of individual actions as the basis of regulation.

The public access requirement does not deprive appellants of any meaningful property right. This Court has held that the public's free speech and petition rights justified a requirement of public access to a privately owned shopping center. The public's ownership of the tidelands similarly justifies the minimal access along the coast behind appellants' house so that the public may exercise its right to walk along the ocean shore. The right of passage extends, at most, to a ten-foot stretch of beach seaward of the seawall that protects appellants' privacy. Appellants have, in fact, permitted such traversing without objection for many years. Their philosophical disagreement with the Commission's action cannot give rise to a constitutional violation. Appellants themselves benefit from the public access condition that has been imposed on their neighbors because it permits appellants to walk along the full length of the beach.

Traditional notions of federalism, comity, and separation of powers dictate that this Court should respect the California Legislature's solution to the complex problems resulting from the increasing urbanization of the State's coastline. Appellants have not complained that the rem-

edy provided in the State's own courts for the alleged abuse of the police power is constitutionally inadequate, but only that they were not exempted from a generally applicable dedication requirement. The California Court of Appeal, which is familiar with local conditions and with the background and purpose of the Coastal Act, found that the legislative conditions were satisfied; its judgment is entitled to deference.

ARGUMENT

I. CALIFORNIA'S COASTAL ACCESS LEGISLATION EFFECTS A REASONABLE ACCOMMODATION OF COMPETING LAND USES.

A. The Public Owns The Tidelands And Is Entitled To Access To Them.

From earliest times, it has been commonly understood that those who build their houses on the shores of the sea do so subject to the public's right of access to the tidelands, which are held by the government in trust for all the people. The public trust doctrine[8] traces its lineage from ancient Roman law[9] and was developed to

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[8] For excellent discussions on the evolution of the public trust doctrine from Roman times, see Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C.D.L. Rev. 195 (1980); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970), and Sax, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 Yale L.J. 762 (1970).

[9] The *Institutes of Justinian* established that certain types of property were *res communes*, common to all the people and incapable of private ownership. These included running waters in the sea and the land beneath them. "[T]he shores are not understood to be property in any man, but are compared to the sea itself, and to the sand or ground which is under the sea." (T. Cooper trans. 1812); *id.* 2.1 at 67-68. Under the doctrine, the sovereign may dispose of its ownership rights in certain trust lands, *i.e.*, the *jus privatum*, but always retains a continuing obligation to manage trust lands for the public interest, the *jus publicum*. *See Shively v. Bowlby*, 152 U.S. 1 (1894).

ensure that the public could make use of the shore as a public highway. English common law embraced the doctrine [10]; and this Court early recognized that "[t]he shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively." *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845). Since then, this Court has repeatedly acknowledged that "[r]ights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law." *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10, 22 (1935); *see also Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892).

California's Constitution affirms the State's obligation to protect the public's right of access to the tidelands. Article X, § 4 provides:

> No individual . . . possessing the frontage or tidal lands of a . . . navigable water in this State, shall be permitted to exclude the 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 always be attainable for the people thereof.

The public rights declared in the State Constitution were further explained in the 1972 Coastal Initiative adopted by the people of California. The Initiative recognized "that the California coastal zone is a distinct and valuable natural resource belonging to all the people and existing as a delicately balanced ecosystem" and directed all governmental agencies to develop a plan to "preserve, protect and where possible, to restore the resources of the coastal zone for the enjoyment of the

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[10] *See Blundell v. Catterall*, 5 B. Ald. 268, 287, 106 Eng. Rep. 1190, 1197 (K.B. 1821) (Best, J., dissenting): "[T]he interruption of free access to the sea is a public nuisance. . . ."

current and succeeding generations." Cal. Coastal Zone Conservation Act of 1972, Cal. Pub. Res. Code § 27000 *et seq.* (superseded). A Coastal Plan was prepared pursuant to the Initiative's mandate; that plan recited that the constitutionally guaranteed public access was being lost, and set forth the policy that "[n]ew development shall provide public accessways to the shoreline except in those individual cases where it is determined that public access is inappropriate." [11] The Coastal Plan recommended that legislation be enacted to continue the access requirements of the Coastal Initiative. The Public Access Legislation at issue in this case implements this recommendation.

California is not alone in its efforts to protect the public's right of access to the tidelands. Many coastal states have articulated coastal access policies. At least six other jurisdictions have enacted legislation designed to secure public access to the beach.[12] In other States, the public's right of access to public trust lands has been recognized by the state courts. For example, in *Matthews v. Bay Head Improvement Assn.*, 95 N.J. 306, 325, 471 A.2d 355, 366, *cert. denied*, 469 U.S. 821 (1984), the New Jersey Supreme Court held that the public trust doctrine warranted public use of the dry sand area subject to an accommodation of the interests of the owner. The Florida Supreme Court has recognized that "[t]here is probably no custom more universal, more natural or more ancient, on the seacoasts, not only of the United States, but of the world, than that of bathing in the salt waters of the ocean and the enjoyment of the wholesome recreation incident thereto." *White v. Hughes*, 139 Fla. 54, 58-59, 190 So. 446, 448-49 (1939). That court, like

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[11] California Coastal Plan, at 154 (December 1975) (hereinafter "Coastal Plan").

[12] North Carolina, Texas, Oregon, Hawaii, the Virgin Islands, and Guam. *See* Carmichael, *Sunbathers Versus Property Owners: Public Access to North Carolina Beaches*, 64 N.C.L. Rev. 159, 191-200 (1985), for a discussion of beach access legislation.

many others, observed that the shoreline is a "public highway." *Id.* at 58, 190 So. at 448.[13]

Federal law also encourages protection of public access to the coast. California's Coastal Plan was prepared with financial assistance from the Office of Coastal Zone Management under the provisions of the Federal Coastal Zone Management Act of 1972 (CZMA), which requires each coastal state to prepare such a plan. 16 U.S.C. § 1454 (a) (1) & (b) (7). California's plan, including the public access requirement, has been approved by the Secretary of Commerce. At least twenty-one other States have prepared coastal plans with beach access requirements pursuant to Section 1454(b) (7) of the CZMA.[14] In addition, public access may be required as a condition for certain federal permits. See, *e.g.*, 33 C.F.R. §§ 320.4(e), 320.4(g) (2), 325.4(a) (Corps of Engineers permit authority extends to safeguarding public access to navigable waters).

B. Public Access To The Tidelands Is Burdened By New Development On The Beach.

Development on the beach burdens the public's right of access to the tidelands and the ocean in numerous

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[13] *See also State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969), holding that the public had established a recreational easement over private beach lands by customary use; *Adams v. North Carolina Dept. of Natural and Economic Resources*, 295 N.C. 683, 693, 249 S.E.2d 402, 408 (1978), upholding beach access legislation as reasonably related to "the special and urgent environmental problems" of the coastal area; *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So.2d 73, 77 (Fla. 1974), holding that "[t]he beaches of Florida are of such a character as to use . . . as to require separate consideration from other lands . . . . The interest and rights of the public to the full use of the beaches should be protected."

[14] See Brower, "Beach Access Problems, Programs and Progress," in 2 *Coastal Zone '80* 1697 (B. Edge ed. 1980), *reprinted at* J.A. 123, 134.

ways. The specific development on appellants' property is particularly burdensome. As the photographic evidence shows, appellants' seawall physically prevents the public from using the tidelands during higher tides when the waves are breaking against the seawall. J.A. 262-64, 266; see also App. A-1, *infra*; J.A. 61, 68. During these times, small boats and surfers cannot land on the state-owned tidelands; and pedestrian access is completely blocked.

More generally, development diminishes the publicly owned tidelands by increasing erosion. Sandy beaches are created and diminished by natural coastal processes; and the works of man, such as the seawall in front of the appellants' house, may interfere with these processes by causing sand scour and exacerbating sand loss on this historically eroding beach.[15] The California Court of Appeal has, in another case, observed the physical law that seawalls " 'tend to cause a landward retreat of the mean high tide line, potentially affecting the boundary between public and private lands.' " *Whalers' Village Club v. California Coastal Comm.*, 173 Cal.App.3d 240,

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[15] See, *e.g.*, U.S. Army Corps of Engineers, *Shore Protection Manual* (1984) 4-1 *et seq.* [Vol. 1, Ch. 4, entitled Littoral Processes]; *California's Battered Coast: Proceedings from a Conference on Coastal Erosion* (J. McGrath ed. 1985) [see especially studies cited at 41; Inman, *Budget of Sand in Southern California* at 10; Pilkey, *Are We Ready To Consider Shoreline Buildings As Being Expendable?* at 243 ("[Sea]walls built in New Jersey to save the property of a very small number of people have destroyed a recreational resource belonging to many people."); *id.* at 244 ("The shoreline of California is retreating, essentially everywhere, but at highly variable rates.")]; "Beach Erosion: Some Good News," *Sunset* 72, 73 (July 1986) ("as much as [one] million cubic yards [of sand] drifts past the coast at Ventura each year."); *Coastal Zone '85* (O. Magoon ed. 1985) [*e.g.*, Dolan, *Coast of California Storm and Tidal Waves Study*, Vol. I at 72; Holmberg, *Vanishing Beaches: Erosion Control & Public Policy*, Vol. II at 2078]; see also authorities cited at n.4 *supra*.

260, 220 Cal.Rptr. 2, 13 (1985), *cert. denied*, 106 S.Ct. 1962 (1986) (citation omitted).

Development along the shoreline may also block the public's visual access to the sea. The large permanent residences that are replacing the small vacation cottages along this beach are radically changing the character of the area and creating an unbroken wall between the public and its tidelands. J.A. 60. In some areas of California and elsewhere along our nation's coast, one can drive for miles without realizing that the ocean is in the backyards of a string of houses. See government documents cited at J.A. 65; J.A. 161, 165. On the tidelands themselves, public access to sunlight is reduced through increased building heights and resulting shadows.

New development on the beach also burdens public access because people are intimidated from using the tidelands in close proximity to private residences. J.A. 61. As a result, the public is channeled to other, already over-crowded public trust lands. Near the public beaches, the use of streets intensifies and traffic activity increases; beach parking and other public facilities are overtaxed. J.A. 58-59.

These burdens are imposed on the public whether the scale of the development is large or small, whether for single- or multi-family use. California courts have taken judicial notice of burdens created by new development along the coast, with particular sensitivity to their cumulative effect. For example, in *Grupe v. California Coastal Comm.*, 166 Cal.App.3d 148, 167 n.12, 212 Cal.Rptr. 578, 589 n.12 (1985) (citations omitted), the court noted:

> Since 1972, permission has been granted to construct more than 42,000 building units within the land jurisdiction of the Coastal Commission. In addition, pressure for development along the coast is expected to increase since approximately 85 percent of California's population lives within 30 miles of the coast. . . .

> As noted by our Supreme Court, "[i]n recent decades, the People of California have become painfully aware of the deterioration in the quality and availability of recreational opportunities along the California coastline due to the combined factors of an increasing demand for its use and the simultaneous decreasing supply of *accessible land* in the coastal zone." . . . The ballot argument in support of the California Coastal Initiative appealed to this "painful awareness" when it stated: "'Our coast has been plundered by haphazard development and land speculation. Beaches formerly open for camping, swimming, fishing and picnicking are closed to the public.'" . . .
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> The California Court of Appeal has also warned that development along the coast is creating a wall between the People of California and the tidelands: "'The deleterious consequences of haphazard community growth in this state and the need to prevent further random development are evident to even the most casual observer.' This is particularly true of our 1,000-mile coastline. Visual, as well as physical, access to large segments of our beaches has been obstructed by residential, commercial and industrial development."

C. The Public Access Legislation Is A Proper Exercise Of The Power To Zone.

The people of California observed these burdens and others on the public's right of access to the state-owned tidelands and adopted the Coastal Initiative in response. The evidence was documented by the authors of the Coastal Plan and relied on by the Legislature in enacting the Public Access Legislation. The concept of the tidelands as a public highway invokes horn book law teaching that it is a nuisance to obstruct a public way.[16]

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[17] See, *e.g.*, Cal. Civ. Code § 3479; 78 Am. Jur. 2d, *Obstruction of, or Interference with, Waters or Navigation* § 96 (1975) (naviga-

The California Coastal Act can thus be seen as a traditional exercise of the police power to regulate activities that may harm the public interest. *See, e.g., Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (1926); *Gorieb v. Fox*, 274 U.S. 603, 608 (1927); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Mugler v. Kansas*, 123 U.S. 623 (1887).

Moreover, special treatment of the coastal zone has been repeatedly held a valid legislative classification under state and federal law.[17] Comprehensive planning to resolve the intense land use conflicts and protect this vanishing resource is encouraged by the CZMA, 16 U.S.C. §§ 1451(i) & (j), 1452(2) & (4), 1454. In implementing the State's responsibilities under the public trust doctrine, the Public Access Legislation reflects both the mandate of California's Constitution and federal law. On its face, the legislation discloses a balancing of public and private interests. California Pub. Res. Code § 30210 provides: "In carrying out the requirement of . . . the California Constitution, maximum access . . . shall be provided for all the people consistent with . . . the need to protect public rights, rights of private property owners, and natural resource areas from overuse." Section 30214, the legislative direction regarding the implementation of the public access policies, mandates that the Coastal Commission take into account "the privacy of adjacent property owners" and carry out the access policies "in a reasonable manner that considers the equi-

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ble waters constitute public highways; unauthorized obstruction a public nuisance); 64 C.J.S. *Municipal Corporations* § 1744 (1950). *Cf. White v. Hughes*, 139 Fla. at 58, 190 So. at 448 (shoreline is a public highway).

[17] *Secretary of Interior v. California*, 464 U.S. 312, 315-17 (1984); *Marquez-Colon v. Reagan*, 668 F.2d 611 (1st Cir. 1981); *James v. Inhabitants of the Town of West Bath*, 437 A.2d 863 (Me. 1981); *Lusardi v. Curtis Point Prop. Owners Assn.*, 86 N.J. 217, 430 A.2d 881 (1981); *Skagit Cty. v. State, Dept. of Ecology*, 93 Wash.2d 742, 613 P.2d 115 (1980).

ties and that balances the rights of the individual property owner with the public's constitutional right of access." Section 30010 prohibits application in a manner that would constitute an uncompensated taking of private property.[18]

The California courts, interpreting this legislation and particularly its balancing requirement, have held that "a finding of new development does not automatically impose a public access condition." *Whalers' Village Club*, 173 Cal.App.3d at 259, 220 Cal.Rptr. at 13. *See also Georgia-Pacific Corp. v. California Coastal Comm.*, 132 Cal.App.3d at 678, 701, 183 Cal.Rptr. 395, 409 (1982). Under the statutory scheme, projects that present little adverse impact on coastal resources are specifically exempt or may qualify for waiver. *See Whalers' Village Club*, 173 Cal.App.3d at 258, 220 Cal.Rptr. at 12.

When the Public Access Legislation is examined in its historical context and in its entirety, it clearly appears to be an intelligent compromise necessary to resolve intense land use conflicts that arise because of the nature of coastal property. In that respect, it is like other resource and historical preservation legislation. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

The public access requirement is also like the more familiar conditions imposed by local governments on new development to offset burdens on streets, schools, parks, and other public facilities. *See, e.g., Creative Environ-*

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[18] Section 30010 would appear to provide an adequate state remedy under *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Hudson v. Palmer*, 468 U.S. 517 (1984). *See MacDonald, Sommer & Frates v. Yolo County*, 106 S.Ct. 2561 (1986); *Williamson Cty. Reg'l Plan. Comm. v. Hamilton Bank*, 105 S.Ct. 3108 (1985).

ments, Inc. v. Estabrook, 491 F.Supp. 547 (1980), *aff'd*, 680 F.2d 822 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982); *Aunt Hack Ridge Estates, Inc. v. Planning Comm. of Danbury*, 160 Conn. 109, 273 A.2d 880 (1970); *Jenad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673 (1966); *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966). The tidelands are comparable to a sidewalk, a street, or an alley. If development in the coastal zone occurred all at once as it does in a subdivision, the required dedication would be commonplace. The only reason why the dedication requirement appears different, and the basis on which it is challenged in this case, is that the Commission must proceed in piecemeal fashion because the development does not occur all at once. *See Grupe*, 166 Cal.App.3d at 170, 212 Cal.Rptr. at 592. The burdens, however, are no less severe.

Appellants' property cannot be viewed in isolation from the property of their neighbors along the shore. All property owners in the development area are placed under the same restrictions for their mutual benefit as well as the general public interest. *See Agins*, 447 U.S. at 262.[19] Appellants share with other coastal property owners the benefits and burdens of the State's exercise of its police power. The scope of that police power is clearly broad enough to encompass this legislation as traditional zoning to prevent a nuisance (*see Euclid*; *Mugler*); or modern zoning for resource protection (*see Agins*), for historical preservation (*see Penn Central*), or to protect the quality of life (*Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

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[19] Because the Public Access Legislation has general applicability, it does not raise the concerns that a more limited or sporadic application might. *See Penn Central*, 438 U.S. at 138-40 (Rehnquist, J., dissenting).

II. APPELLANTS' PROPERTY HAS NOT BEEN TAKEN.

A. The Coastal Commission Should Not Be Required To Prove The Constitutionality Of The Legislation Each Time That It Is Applied.

The validity of the Coastal Act, the general law at issue in this case, and of the Public Access Legislation in particular, is not, and could not be, seriously questioned. It is supported by the California Constitution, the public trust doctrine, centuries of experience, and a wealth of studies. The people of California, who adopted the Coastal Initiative, and the State Legislature which implemented it by the public access requirement, determined, on the basis of substantial evidence, that new development along the coast individually and cumulatively burdens public lands and facilities. They adopted specific development standards for the coastal zone, taking into account the public's right of access, the need to protect the resource, and private property rights. The questions whether the development creates the need for the access condition and whether the developers proportionately benefit from a coastal permit have been addressed by the legislation, which provides the evidentiary nexus between the benefits to the developer and the burden on the public created by new development.

This Court has confirmed the constitutionality of general zoning legislation based upon experience that demonstrates that activities of certain types cumulatively result in an adverse impact on the surrounding environment. *See, e.g., Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Such legislation has been upheld even against a claim of infringement of fundamental constitutional rights.[20] In *City of Renton v. Playtime Theatres,*

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[20] Appellants had no vested property right under state law to build their new house, *see Avco Community Developers, Inc. v. South Coast Reg'l Comm.*, 17 Cal.3d 785, 132 Cal.Rptr. 386 (1976);

Inc., 106 S.Ct. 925, 930 (1986), the Court held the local government was not required to conduct new studies or produce independent evidence to justify a general zoning restriction on the location of adult movie houses; such a requirement imposed "an unnecessarily rigid burden of proof" on the City.

To require a *de novo* evidentiary hearing and a balancing of the burdens and benefits of a particular development each time that a legislative condition is applied would severely hamper state and local government efforts to solve complex land use problems. Eighty-eight percent of all communities in the United States require some form of land dedication in connection with development approvals. See Purdum and Frank, "Community Use of Exactions: Results of a National Survey" in *Development Exactions* ch. 4-3 (Frank and Rhodes ed. 1986). Such requirements rest on the cumulative impact of development and seek a general solution.[21]

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and therefore the requirement that they obtain a coastal permit imposed no unconstitutional condition. *See Board of Regents v. Roth*, 408 U.S. 564 (1972).

[21] See generally Annot., 43 A.L.R.3d 862, 865-66 (1972) [Subdivided Land, Dedication for Recreation], summarizing the prevailing rule that state and local enactments that require "dedication of land for park and recreational purposes have been held valid, both as falling within the general police power, or (in the case of local enactments) the specific standards of enabling legislation, or both, and as not violating prohibitions against confiscation . . . . The philosophical rationale [for these enactments is] that the combination of the growth of population and the shrinkage of open space justifies compulsory planning for preservation of recreation space, without the necessity of justifying the particular application upon the needs specifically created by an individual builder." *See, e.g., Billings Properties, Inc. v. Yellowstone Cty.*, 144 Mont. 25, 35, 394 P.2d 182, 188 (1964) (state authorizing legislation sufficient to satisfy the need); *Call v. City of West Jordan*, 606 P.2d 217 (Utah 1979) (court took judicial notice of the fact that development creates the need).

Appellants contend that each time that the public access requirement is applied, the Commission must make a new study and demonstrate by empirical evidence a "direct and definable adverse impact on public access" (Br. 34).[22] Administrative agencies are not generally required to prove the constitutionality of zoning standards or other regulatory conditions, such as set-backs, height limitations, and building codes, every time that an applicant seeks a building permit. *See Euclid*, 272 U.S. at 388-89; *United States v. Locke*, 471 U.S. 84 (1985).

The federal government frequently regulates individual activity because of the cumulative impact that the individual and others engaged in similar activity may have on federal interests. In *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942), the Court upheld the application of a marketing quota to a small farmer, stating: "That [his] own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." The Court deferred to the legislative judgment about which producers should be exempt,[23] noting (*id.* at 129; footnote omitted) that

> [i]t is of the essence of regulation that it lays a restraining hand on the self-interest of the regulated and that advantages from the regulation commonly fall to others. The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible leg-

[22] *Amici* agree with appellee that such evidence is present in this case, but we contend that it is unnecessary.

[23] The statutory scheme in this case similarly provides for exemptions for development that has minimal impact on the coast. *See supra* at 15-16.

> islative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do.

In numerous other contexts, Congress has relied on cumulative impact as the basis of regulation; and this Court has upheld that judgment. *See, e.g., Perez v. United States*, 402 U.S. 146 (1971) (criminal penalties for loan sharking); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (civil rights legislation). The federal Superfund program, for example, is based not on the impact of any particular producer or any particular type of hazardous waste, but on the increasing awareness that the cumulative impact of hazardous waste disposal severely and adversely affects the public interest. All producers of hazardous waste are now required to contribute to the Superfund clean-up program. See 26 U.S.C. §§ 4611, 4661, 4681; 42 U.S.C. § 9631.

The problem addressed by the public access requirement of the California Coastal Act bears a fundamental similarity to the problem faced by the federal government in the Superfund program. In each instance, the program seeks to counteract the cumulative impact of individual actions, whose separate effects on the resource that is the focus of the government's concern are exceedingly difficult to assess. Because the public access requirement is a valid measure to address the problem in the aggregate, the Commission should not be required to present independent evidence to prove the constitutionality of its application to each new development.

B. The Public Access Requirement Does Not Deprive Appellants Of Reasonable Value Or Use Of Their Property Or Any Reasonable Expectation To Exclude The Public.

Even if a case-by-case justification were required, the public access condition as applied to appellants would be valid. Purchasers of beach-front property must realize

by now that "[o]wnership does not always mean absolute dominion." *Marsh v. Alabama*, 326 U.S. 501, 506 (1946). Property rights "are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *see State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). "Rights and interests in the tideland, which are subject to the sovereignty of the State, are matters of local law." *See Borax*, 296 U.S. at 22.

Since early statehood, California has defined the public's right of access to public trust lands in its Constitution, legislation, and judicial decisions. Owners of property abutting public trust land correspondingly have acquired such property with knowledge that they may not exclude the public. This particular "stick" of property ownership has never been part of the "bundle" of coastal property rights. This Court has often stated the well-established rule that "a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980), *citing Euclid* and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

In *PruneYard*, this Court held that requiring public access to a shopping center so that the public could exercise its rights under the California Constitution to free expression and petition did not violate the owners' Fifth Amendment or due process rights. Just like the guarantees of free expression at issue in *PruneYard*, California's Constitution guarantees public access to state-owned tidelands. The reasoning of *PruneYard* is fully applicable to this case.

This Court observed in *PruneYard* that States have the right under their own constitutions to grant "individual liberties more expansive than those conferred by the Federal Constitution." 447 U.S. at 81. Finding that "there has literally been a 'taking' of [a property] right to the extent that the California Supreme Court has interpreted the State Constitution to entitle its citizens to exercise free expression and petition rights," the *PruneYard* Court noted that " 'not every destruction or injury to property by governmental action has been held to be a "taking" in the constitutional sense.' " *Id.* at 82-83 (footnotes and citation omitted). The Court then analyzed the takings claim according to (1) the character of the governmental action, (2) its economic impact, and (3) its interference with reasonable investment-backed expectations. The Court found that public access did not unreasonably impair the value or use of the property as a shopping center, and it therefore held that the requirement of access to shopping center property in the exercise of the state-protected rights of free expression and petition did not amount to a taking. *Id.* at 83, 84.

Like the public access required in *PruneYard*, the public access requirement in this case does not unreasonably impair the value of appellants' property for its intended use as a residence.[24] The public access is limited to passing along at most a ten-foot stretch of beach seaward of the existing seawall, which is over eight feet high and thus fully protects appellants' privacy. The history of this property shows that appellants could not have formed a reasonable expectation of excluding the public from the

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[24] In fact, public access does not impair the value or use at all. The rocky area seaward of appellants' seawall is periodically covered with water and not suitable for any continuous private use or cultivation. *See Borax*, 296 U.S. at 25; *Tona-Rama*, 294 So.2d at 77 ("The sandy portion of the beaches are of no use for farming, grazing, timber production, or residency—the traditional uses of land—but has served as a thoroughfare and haven for fisherment and bathers, as well as a place of recreation for the public.").

beach. *See Ruckelshaus v. Monsanto*, 467 U.S. 986, 1005-08 (1984). The record shows that the public has been crossing this property for many years (J.A. 85) and that appellants do not in fact object to the public's access. Their objection reflects only a philosophical disagreement with the Coastal Commission over what the law requires. J.A. 313; Br. 12.

This case bears no resemblance to *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), in which the owners had taken no action in an area regulated by the State. Here, appellants' application for a coastal permit triggered the police power to regulate the development. Appellants had no vested right under California law to build their new large house without a coastal permit. *See Avco Community Developers, Inc. v. South Coast Regional Comm.*, 17 Cal.3d 785, 132 Cal. Rptr. 386 (1976). They chose not to take advantage of their right to replace the existing structure or to build a house up to ten percent larger than the existing structure free of the access requirement. See Cal. Pub. Res. Code § 30212.

This case is also quite different from *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), in which the Army Corps of Engineers first told the developers that they were not required to obtain permits to develop a private marina. Then, after the improvements were finished, the government told the owners that they could not exclude the public. This Court held that the government's belated assertion of jurisdiction impermissibly interfered with reasonable investment-backed expectations. Significantly, the Court stated: "We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, or could have conditioned its approval of the dredging on petitioners' agreement to comply with various measures it deemed appropriate for the promotion of navigation." *Id.* at 179. In this case, appellants

purchased their property with full knowledge of the public access requirements for coastal development permits. In *Kaiser Aetna*, the Court also noted that, prior to the dredging, the pond was separated from navigable waters by a natural barrier beach and was always considered private under state law. *Id.* at 178, 179. By contrast, appellants' property is immediately adjacent to public tidelands (the seawall may even intrude onto such lands).

In short, none of the elements of a taking is present in this case. The character of the governmental action is merely the implementation of the constitutional policy of protecting public access to the tidelands; the so-called "physical invasion" is nothing other than the continuation of a long-established custom along this beach and others like it. The interference with private property rights is negligible. Appellants have built their house. It is separated by a high seawall from the tidelands, which appellants could not use for private purposes in any event. There is no adverse economic impact; in fact, appellants receive reciprocal benefits from the public access condition because they are able to walk along the full length of this shore. And there has been no interference with any reasonable investment-backed expectations because appellants purchased the property with full knowledge of the public access requirement.

III. THIS COURT SHOULD NOT SIT AS A SUPREME BOARD OF ZONING ADJUSTMENT.

The *Gorieb* Court recognized in 1927 that "[a]ll [zoning restrictions] rest for their justification upon the same reasons which have arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life." 274 U.S. at 608. Sixty years later, the urbanization of once rural beaches presents more complex, but not fundamentally different, problems than the increasing urban-

ization of the cities. Thus, the observation of the *Gorieb* Court in rejecting the claim that the set-back ordinance constituted a taking of property, serves equally to defeat appellants' claim (*id.* at 608):

> State Legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts, unless clearly arbitrary and unreasonable.

The Court has consistently adhered to this fundamental principle of separation of powers. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981) ("[W]e reiterate that it is up to legislatures, not courts, to decide on the wisdom and utility of legislation."); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240-43 (1984); *Renton*, 106 S.Ct. at 931 (" '[T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.' ") (citing *Young v. American Mini Theatres*, 427 U.S. at 71).

The *Gorieb* Court also followed well-established principles of federalism and comity by deferring to the judgment of the state court, stating (274 U.S. at 609):

> The highest court of the state, with greater familiarity with the local conditions and facts upon which the ordinance was based than we possess, has sustained its constitutionality; and that decision is entitled to the greatest respect and, in a case of this kind, should be interfered with only if in our judgment it is plainly wrong.

Plainly, the land use conflicts created by new development along the coast are complex, as more than a decade of efforts by state and local governments to devise acceptable coastal zone management plans attests. The judgment of the California courts, which have been interpreting the Coastal Act for many years, that the pub-

lic access requirement is constitutional, should not be disturbed. Lower federal courts, which are regularly presented with challenges to the Coastal Act and other state and local planning decisions, have wisely held that "[f]ederal courts must be wary of intervention that will stifle innovative state efforts to find solutions to complex social problems." *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092 (9th Cir. 1976); *see Construction Industries Assn. of Sonoma County v. City of Petaluma*, 522 F.2d 897, 906 (9th Cir.), *cert. denied*, 424 U.S. 934 (1976).

Appellants invite this Court to sit as a supreme board of zoning adjustment. It is an inappropriate role for this Court. *See Euclid*, 272 U.S. at 395; *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928).

CONCLUSION

For the foregoing reasons, the judgment of the California Court of Appeal should be affirmed.

Respectfully submitted,

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February 6, 1987