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PUBLIC ACCESS VS. PRIVATE PROPERTY: THE STRUGGLE OF COASTAL LANDOWNERS TO KEEP THE PUBLIC OFF THEIR LAND

*James D. Donahue**

I. INTRODUCTION

The power struggle between private coastal landowners and state governments has raged for decades.¹ While landowners seek to protect their constitutional rights and maintain the privacy of their oceanfront properties, states aim to break through private lot lines to make state-owned beaches more accessible to the public.² This struggle is particularly important in the nation's most populous state of California, where an estimated 80 percent of the state's thirty-four million citizens live within an hour's drive of the coast.³ For many decades, California landowners have enjoyed almost exclusive and private access to publicly owned beaches due to a lack of public access points along the privately owned coastline.⁴ The norm changed, however, in the 1970s with the creation of the California Coastal Commission and the passage of the Coastal Act of 1976, through which the state made an aggressive legislative push to open the beaches to the public by requiring coastal landowners to grant public easements across their properties.⁵

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1. Sean T. Morris, Comment, *Taking Stock in the Public Trust Doctrine: Can States Provide for Public Beach Access Without Running Afoul of Regulatory Takings Jurisprudence?*, 52 CATH. U. L. REV. 1015, 1016 (2003).

2. Robert Garcia & Erica Flores Baltodano, *Free the Beach! Public Access, Equal Justice, and the California Coast*, 2 STAN. J. C.R. & C.L. 143, 144 (2005).

3. Morris, *supra* note 1, at 1015.

4. Garcia & Baltodano, *supra* note 2, at 145; Morris, *supra* note 1, at 1016.

5. Morris, *supra* note 1, at 1016.

As California's population grows and the state continues to push for public access, many coastal landowners have resorted to the judicial process to challenge the state's power.⁶ This Note addresses the struggle between coastal landowners and the state, with a focus on the problematic and inefficient legislation through which the latter has effectively used its police power to infringe upon the constitutional property rights of the former.⁷ After a comprehensive discussion of the existing law followed by an in-depth critique, this Note offers a legislative proposal to effectively supersede the current law in the hopes of more effectively balancing state interests with those of coastal landowners.

II. STATEMENT OF EXISTING LAW

Public beach access has long been a source of contentious debate between coastal landowners and the government.⁸ With the hope of opening private beaches to the public, the government has relied upon the Public Trust Doctrine⁹ to prevent landowners from excluding the public from coastal zones.¹⁰ On the other hand, in hopes of maintaining privacy, property values, and exclusivity, landowners have asserted their Fifth Amendment rights under the Takings Clause of the Constitution¹¹ to prevent the government from seizing their lands for public access. In an attempt to solve this age-old problem, California established the California Coastal Commission ("Coastal Commission") by voter initiative in 1972,¹²

6. *Id.*

7. *See infra* Sections II.C.2–III.

8. Philip J. Hess, *A Line in the Sand: Oceanfront Landowners and the California Coastal Commissions Have Been Battling over Easements Allowing Public Access to Beaches*, L.A. LAW., Jan. 2005, at 24.

9. The Public Trust Doctrine states that "lands were held by the state, as they were by the king, in trust for the public uses of navigation and fishery, and the erection thereon of wharves, piers, light-houses, beacons, and other facilities of navigation and commerce." *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 457 (1892); *see also infra* Section II.A.

10. *See infra* Section II.A.

11. U.S. CONST. art. V; *see also* CAL. CONST. art. X (stating that "[n]o individual . . . claiming or possessing the frontage or tidal lands . . . or other 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 be always attainable for the people thereof.").

12. *Who We Are: Program Overview*, CAL. COASTAL COMM'N, <http://coastal.ca.gov/howeare.html> (last visited Oct. 25, 2014).

and later enacted the California Coastal Act of 1976 (“Coastal Act”).¹³

A. *The Public Trust Doctrine*

Dating back fifteen hundred years to the Roman emperor Justinian¹⁴ and subsequently adopted by the English common law, the Public Trust Doctrine is an important source of power for states asserting property rights against private landowners. However, it was not until 1892 that the Supreme Court entirely articulated the theory of Public Trust. In *Illinois Central Railroad Co. v. Illinois*,¹⁵ the Supreme Court explained that “lands were held by the state, as they were by the king, in trust for the public uses of navigation and fishery, and the erection thereon of wharves, piers, light-houses, beacons, and other facilities of navigation and commerce.”¹⁶ In regard to coastal access, “land below the high-water line is held in public trust by the state.”¹⁷ While there is no dispute that the states own the land below the mean high tide line, oftentimes the public has no way to access the coastal zones from public streets due to an uninterrupted string of private landownership along the coast.¹⁸ It is for this reason that states attempt to open public access points that allow people to enjoy the lands held in public trust, largely to the displeasure of private landowners.¹⁹

B. *The California Coastal Commission*

Given that more than half of the U.S. population lives and works within fifty miles of the coast, yet roughly 70 percent of the coastline is privately owned,²⁰ coastal access has presented major issues for state governments and the general public. In order to provide public access, California established the Coastal Commission in 1972 by

13. *Id.*

14. Bill Schneider, *Coastline Access: The Battle over Beachfront Ownership*, CNN (Aug. 9, 2002, 5:02 PM), <http://edition.cnn.com/2002/ALLPOLITICS/08/09/ip.pol.beach/>.

15. 146 U.S. 387 (1892).

16. *Id.* at 457.

17. Colin H. Roberts, *It's All Mine, Stay Off, and Let Me Do What I Please: An Abyss Between the Rights and Desires of Coastal Property Owners and Privileges and Protections?*, 18 OCEAN & COASTAL L.J. 255, 264 (2013).

18. *See Hess*, *supra* note 8, at 26.

19. *Id.* at 24–26.

20. *See Schneider*, *supra* note 14.

means of a voter initiative.²¹ In the spirit of the Public Trust Doctrine, “[t]he mission of the Coastal Commission is to protect, conserve, restore, and enhance environmental and human-based resources of the California coast and ocean for environmentally sustainable and prudent use by current and future generations.”²²

*C. The California Coastal Act of 1976
and the Offer to Dedicate*

In order to give the Coastal Commission the necessary power to carry out its mission, the California legislature passed the California Coastal Act of 1976.²³ Among the five basic goals laid out in the Coastal Act was the goal to “[m]aximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners.”²⁴ To increase the number of public access points along the largely privately owned California coast, the Coastal Act requires that “any person . . . wishing to perform or undertake any development in the coastal zone . . . shall obtain a coastal development permit.”²⁵

While the requirement to obtain a development permit seems neutral on its face, the Coastal Commission has used the Coastal Act to leverage private landowners into providing an Offer to Dedicate (“OTD”), otherwise known as a public access easement,²⁶ almost each and every time landowners seek to develop their lands.²⁷ OTDs do not become public easements immediately, as two conditions must be met before they are usable.²⁸ First, the OTD must be accepted by an entity that assumes the responsibility of opening and managing the access on terms acceptable to the Coastal Commission.²⁹ Second, the OTD acceptance must usually occur

21. See CAL. COASTAL COMM’N, *supra* note 12.

22. *Id.*

23. *Id.*

24. CAL. PUB. RES. CODE § 30001.5 (West 2014).

25. *Id.* § 30600.

26. *Coastal Access Program: Offer to Dedicate (OTD)—Public Access Easement Program*, CAL. COASTAL COMM’N, <http://www.coastal.ca.gov/access/otd-access.html> (last visited Oct. 25, 2014).

27. See Hess, *supra* note 8, at 26.

28. *Id.*

29. *Id.*

within twenty-one years of recordation.³⁰ If these two conditions are met, the OTD converts into a permanent public easement that will continuously burden the property.³¹ However, if the OTD is not accepted in a timely manner, the OTD “expires and the contingent obligation to provide public access is extinguished.”³²

1. Procedural Hurdles in Challenging an OTD

Naturally, private landowners who were given development permits on the condition that they offer an OTD for public access were unhappy.³³ While some easements were opened without a challenge, agitated and litigious landowners have sought judicial review regarding the constitutionality of granting development permits contingent on an OTD.³⁴ The Coastal Act lays out the very strict procedure for judicial challenge. The Coastal Act states that “[a]ny aggrieved person shall have a right to judicial review of any decision or action of the commission by filing a petition for a writ of mandate . . . within sixty days after the decision or action has become final.”³⁵ However, the statute of limitations bars petitions challenging Coastal Commission permits that are not filed by a writ of mandate within sixty days.³⁶

The strict time limit for judicial review of Coastal Commission permit decisions has sparked intense litigation. The California Court of Appeal has ruled that inverse condemnation—a cause of action resulting from “a public taking of (or interference with) land without formal eminent domain proceedings”—does not create an exception to the sixty-day statute of limitations.³⁷ Rather, “[t]he rule requiring timely writ holds true even when the aggrieved individuals asserting inverse condemnation are successors in interest to prior owners who

30. *Id.*; see also CAL. CIV. CODE § 1213 (West 2014) (“An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the Recorder’s office, with the proper officer, for record Every conveyance of real property or an estate for years therein acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees.”).

31. See Hess, *supra* note 8, at 26; see also Jessica A. Duncan, Article, *Coastal Justice: The Case for Public Access*, 11 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 55, 62 (2004).

32. See Hess, *supra* note 8, at 26.

33. *Id.*

34. *Id.*

35. CAL. PUB. RES. CODE § 30801 (West 2007).

36. *Serra Canyon Co. v. Cal. Coastal Comm’n*, 16 Cal. Rptr. 3d 110, 113 (Ct. App. 2004).

37. *Id.* at 114.

accepted the burdens and benefits of the Commission's conditional permits."³⁸ This means that even when a party assumes an interest in coastal land as a bona fide purchaser, it is unable to challenge an OTD given by a previous owner unless it does so within sixty days, even though it was not an interested party at the time the OTD was given.³⁹

2. State Police Power Versus the Takings Clause

If a landowner adheres to the strict requirements to obtain judicial review, courts are faced with a battle between the state's police power and the landowner's Fifth Amendment rights. California justifies its taking of private lands for public access as an exercise of its police power. Specifically, the California Constitution states that:

No individual . . . claiming or possessing the frontage or tidal lands . . . or other 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 be always attainable for the people thereof.⁴⁰

On the other hand, landowners assert that requiring an OTD or public easement in exchange for a development permit is a violation of the Takings Clause of the Fifth Amendment, which states, "private property [shall not] be taken for public use, without just compensation."⁴¹ In an attempt to add clarity to the legality of requiring OTDs and public easements for development permits, in 1987, the Supreme Court granted certiorari in *Nollan v. California Coastal Commission*.⁴²

38. *Id.*

39. *Id.*

40. CAL. CONST. art. X, § 4.

41. U.S. CONST. amend. V.

42. 483 U.S. 825, 831 (1987).

a. *Nollan v. California Coastal Commission
and the “nexus test”*

Like many judicial challenges arising in California against the Coastal Commission, the Nollans were private landowners who sought a permit to develop coastal property.⁴³ The Coastal Commission granted the permit subject to the Nollans’ recordation of a deed restriction granting a public easement.⁴⁴ The Nollans challenged the requirement of a public easement on the ground that their proposed development was not shown to have a direct adverse impact on public beach access.⁴⁵ In response, the Coastal Commission argued that “the new house would increase blockage of the view of the ocean, thus contributing to the development of ‘a wall’ of residential structures that would prevent the public ‘psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit.’”⁴⁶

The Supreme Court rejected the Coastal Commission’s arguments, stating that “[i]t is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans’ property reduces any obstacles to viewing the beach created by the new house.”⁴⁷ The Court pointed to the “lack of nexus between the condition and the original purpose of the building restriction”⁴⁸ Had the Coastal Commission attached a condition related to the public’s ability to see the beach, such as a height limitation, or even required a public viewing spot, the condition would have been constitutional.⁴⁹ However, “unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but “an out-and-out plan of extortion.”⁵⁰ In closing, the Court explained that California is free to pursue its “comprehensive program” by using its power of eminent domain, rather than police

43. *Id.* at 825.

44. *Id.* at 828.

45. *Id.*

46. *Id.* at 828–29.

47. *Id.* at 838.

48. *Id.* at 837.

49. *Id.* at 836.

50. *Id.* at 837.

power, unless the abridgement of property rights through the police power substantially advances a legitimate state interest.⁵¹

Nollan was a victory for private landowners since the Supreme Court's requirement of a nexus between the condition and the purpose of the building restriction "severely limited California's attempt to obtain beach access easements."⁵² Several cases following *Nollan*, such as *Surfside Colony, Ltd. v. California Coastal Commission*,⁵³ reached the same conclusion. The *Surfside* court explained that "*Nollan* requires a 'close connection' between the burden and the condition,"⁵⁴ and subsequently found that the Commission failed to demonstrate a nexus that could constitutionally force the appellants to grant a public access easement on their revetment.⁵⁵

However, the Supreme Court's decision in *Nollan* failed to clarify many of the important issues surrounding judicial review of Coastal Commission development permits, such as the standard of review to apply and the burden of proof to impose. In 1992, the California Court of Appeal addressed both the standard of review and burden of proof in *Antoine v. California Coastal Commission*.⁵⁶

*b. Antoine v. California Coastal Commission
and the standard of review*

The *Antoine* court explained the two available standards of review. The first, the independent judgment test, "applies where the decision of the administrative agency affects or involves a 'fundamental vested right'"⁵⁷ Using the independent judgment test, the court simply applies its independent judgment to the matter. If the decision does not involve a fundamental vested right, the court is to apply the substantial evidence test, in which a court is "limited to determining whether the administrative findings are supported by substantial evidence and whether the agency erred in its application

51. *Id.* at 841.

52. *See Morris, supra* note 1, at 1027.

53. 277 Cal. Rptr. 371, 371 (Ct. App. 1991).

54. *Id.* at 378.

55. *Id.* at 378–79; A revetment is a sloping structure, usually made of stone, that is placed on a bank or cliff to absorb the energy of incoming water. Revetments are installed to protect tidal lands from erosion caused by waves and ocean storms.

56. 10 Cal. Rptr. 2d 471, 471 (Ct. App. 1992).

57. *Id.* at 476.

of the law.”⁵⁸ The court went on to explain that “[a]s we read *Nollan*, there is no fundamental right to build a structure that detrimentally affects public access free of conditions designed to ameliorate the detrimental effect of the structure.”⁵⁹ Given this reading of *Nollan*, it became clear that the substantial evidence test would become the prevailing standard of review in challenging the Coastal Commission.⁶⁰

Antoine also addressed the question of which party has the burden of proof. Appellant landowners argued that the Coastal Commission had to prove the reasons behind the denial or conditions of a development permit, whereas the Coastal Commission argued that permit applicants were required to prove that they are not harming coastal resources or access. The *Antoine* court explained, “[a]lthough the Coastal Act does not expressly place the burden of proof on any party, the general rule applicable to land use permits is that the burden is on the applicant.”⁶¹ The court resolved that placing the burden of proof on the applicant is a just result because it is most protective of coastal resources.⁶² In the wake of the *Antoine* decision, it became clear that the burden was squarely on the agitated landowners.⁶³

D. Questions Remaining After *Nollan* and *Antoine*

Despite the implication that challenges to the Coastal Commission would be far less complicated and litigiously efficient following *Antoine*, this was not the case.⁶⁴ Over the past two decades, numerous landowners have filed suits to challenge the Coastal Commission’s permit conditions. A notable example is a 2002 writ of mandate filed by media mogul David Geffen challenging the Coastal Commission’s OTD condition on his development permit.⁶⁵ Even more recently, billionaire venture capitalist Vinod Kholsa filed a writ of mandate in 2013 challenging a

58. *Id.*

59. *Id.* at 476–77.

60. *Id.*

61. *Id.* at 478.

62. *Id.*

63. *Id.*; see also *infra* Section III.B.

64. See Hess, *supra* note 8, at 26–27 (discussing the number of OTDs that have been secured, as well as the litigious response of many landowners in challenging the approval of their development permit conditioned on the gift of a lateral easement).

65. *City of Malibu v. Cal. Coastal Comm’n*, 27 Cal. Rptr. 3d 501, 503 (Ct. App. 2005).

public easement across his land.⁶⁶ As a result of the inconsistent interpretations and rulings of California courts,⁶⁷ landowners and the Coastal Commission continue to litigate the hotly contested issue. As animosity between the two groups continues to grow, the state needs to establish a clear, concise, and coherent rule regarding government-imposed conditions on privately owned land for public benefit.

III. CRITIQUE OF EXISTING LAW

A. The California Coastal Commission as a Political Machine

After the Coastal Commission's creation in 1972, it was given nearly unfettered discretion in regulating coastal lands and public access points.⁶⁸ Due to the requirement that each and every development of private coastal land obtain a coastal development permit,⁶⁹ the Coastal Commission possesses immense power over private landowners, which ultimately goes unchecked.⁷⁰ This concentration of power, along with the strict procedural requirements defined by the Coastal Act in challenging an OTD, makes it extremely difficult for private landowners to challenge the government's taking of their private lands.⁷¹

When a landowner seeks to challenge the Coastal Commission's conditional requirement of an OTD in order to develop his or her land, the burden falls squarely on the landowner.⁷² In challenging an OTD, the determinations and decisions of the Coastal Commission are "accorded a 'strong presumption of correctness' by California courts, which resolve reasonable doubts in favor of the administrative decision and uphold it unless a reasonable person could not reach the same conclusion."⁷³ Furthermore, "a jury trial is not available by right in a mandamus proceeding, although the court

66. Katy Steinmentz, *Surfers Beat Billionaire in Landmark California Beach Case*, TIME (Sept. 24, 2014), <http://time.com/3426864/vinod-khosla-martins-beach-lawsuit/>.

67. *See infra* Section III.B.

68. *See Hess, supra* note 8, at 26.

69. CAL. PUB. RES. CODE § 30600 (West 2007).

70. *See Hess, supra* note 8, at 26.

71. *See supra* Section II.C.1.

72. *See Hess, supra* note 8, at 26–27.

73. *Id.* at 27.

has discretion to impanel a jury to determine essential issues of fact.⁷⁴

The strict time requirements in a mandamus proceeding, paired with the presumption of correctness in Coastal Commission decisions, make it extremely difficult for private landowners to challenge an OTD.⁷⁵ In protecting the Coastal Commission's administrative decisions by requiring only the showing of the reasonable person standard,⁷⁶ California courts have deferred to the Coastal Commission and protected the state's interests at the expense of the landowners' property rights. This means that a petitioner's land will diminish in value because of an OTD or public easement unless he or she can prove that the Coastal Commission's decisions fail to meet the minimalist reasonable person standard.⁷⁷ With the deck stacked against the petitioner, the Coastal Commission and its decisions are afforded great protection. As a result, it has become an almost untouchable political machine.

B. Ongoing Lack of Clarity and Consistency

Despite *Nollan* and *Antoine*, litigation in California has remained inconsistent and seemingly arbitrary.⁷⁸ Where some courts have no problem finding a substantial relationship,⁷⁹ others find none.⁸⁰ It is this lack of consistency and clarity that spurs additional litigation, which is both costly and burdensome.

1. Jonathan Club v. California Coastal Commission

Only one year after *Nollan*, the Jonathan Club ("Club") in Santa Monica filed a challenge after the Coastal Commission granted a coastal development permit on the condition that the Club adopt a nondiscriminatory membership provision.⁸¹ The Coastal Commission found that the "proposed project would permanently convert existing sandy beach to nonsandy beach use and benefit the Club's

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *See supra* Sections II.C.2.a–b.

79. *See infra* Section III.B.1; *see also* *Jonathan Club v. Cal. Coastal Comm'n*, 243 Cal. Rptr. 168, 178 (Ct. App. 1988).

80. *See infra* Section III.B.2; *see also* *Surfside Colony, Ltd. v. Cal. Coastal Comm'n*, 277 Cal. Rptr. 371, 376 (Ct. App. 1991).

81. *Jonathan Club*, 243 Cal. Rptr. at 171.

membership while inhibiting or preventing the general public from enjoying a publicly owned area of the beach.”⁸² Although the case did not involve an OTD, the court still used *Nollan* to support its holding.⁸³

In discussing whether a nexus between the condition and the expressed government purpose existed, as is required by *Nollan*, the court stated that there was a “direct connection between the governmental purpose of maximizing public access to state beach lands and the condition which is imposed. Again, by precluding discrimination against minorities . . . , the Commission maximized the possibility that all segments of the public will have access to the leased land.”⁸⁴ As California courts normally do, the *Jonathan Club* court yielded a “strong presumption of correctness”⁸⁵ to the Coastal Commission’s decision, resulting in a favorable decision for the state.

2. *Surfside Colony, Ltd. v. California Coastal Commission*

In 1991, Surfside Colony (“Surfside”), a private, gated, residential community, challenged the Coastal Commission’s conditional requirement of an OTD to build a revetment that would protect the beach from erosion.⁸⁶ More specifically, the Coastal Commission outlined four conditions, including an easement for public access and passive recreational use along the beach, an easement for the future construction of a boardwalk, an easement for pedestrian and bicycle access across Surfside property, and conspicuous signage to inform the public of its right to cross Surfside’s property.⁸⁷ Surfside promptly filed a petition with the superior court for a writ of mandate, asking the court to discard the conditions imposed by the Coastal Commission.⁸⁸

82. *Id.*

83. Although *Jonathan Club* does not revolve around an OTD, California Courts have used the *Nollan* standard to resolve nearly all cases that involve a conditional grant of a coastal development permit by the Coastal Commission. These cases, although factually different, involve the same legal principles and contribute to the understanding of OTD litigation and applicable legal standards.

84. *Jonathan Club*, 243 Cal. Rptr. at 178.

85. See Hess, *supra* note 8, at 27.

86. *Surfside Colony, Ltd. v. Cal. Coastal Comm’n*, 277 Cal. Rptr. 371, 374–75 (Ct. App. 1991).

87. *Id.* at 374.

88. *Id.* at 375.

Applying the substantial evidence test articulated in *Nollan*,⁸⁹ the court held that there was no substantial evidence to justify a nexus between the revetment and the public access requirement.⁹⁰ Based on expert studies on erosion and photographs of Surfside Beach submitted by the Coastal Commission, the court determined that “the Commission had *no* evidence at all establishing this revetment would cause erosion at this beach.”⁹¹ Rather, the court found that the photographs show a change for the better, indicating that the revetment at Surfside Beach may have actually reversed erosion.⁹² As a result, the *Surfside* court held that under *Nollan*, the public access requirement “must be deemed a ‘taking’ of [Surfside]’s property.”⁹³ Furthermore, the court explained that *Nollan*’s “close connection” entails, at the very least, evidence more substantial than general studies,⁹⁴ tacitly raising the standard of review for OTD challenges.

3. *Ocean Harbor House Homeowners Ass’n v. California Coastal Commission*

Much like in *Surfside*, in 2008 the Ocean Harbor House Homeowners Association (the “Association”) sought a coastal development permit to build a seawall to protect their condominium complex from structurally damaging erosion.⁹⁵ While the Coastal Commission granted the Association’s coastal development permit due to the serious threat to the structure’s integrity, it imposed a \$5.3 million fee to mitigate the loss of an acre of public beach and the loss of lateral beach access for public recreational use.⁹⁶

The Association was not happy with the size of the mitigation fees.⁹⁷ Specifically, the Coastal Commission’s environmental report determined that the loss of beach amounted to roughly \$1 million in land value, but there were other impacts of the proposed project that

89. See *supra* Section II.C.2.a; see also *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987).

90. *Surfside Colony Ltd.*, 277 Cal. Rptr. at 376.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 377–78.

95. *Ocean Harbor House Homeowners Ass’n v. Cal. Coastal Comm’n*, 77 Cal. Rptr. 3d 432, 435 (Ct. App. 2008).

96. *Id.* at 436–38.

97. *Id.* at 450.

should be taken into account.⁹⁸ One of the commissioners on the Coastal Commission then proposed \$5.3 million in mitigation fees, opining that the Coastal Commission was “underestimating the value of public land”⁹⁹ After some discussion, the Coastal Commission subsequently adopted the proposed \$5.3 million mitigation fee. This seems to be a direct contradiction to the standard of review enunciated in *Surfside*, which requires more than general studies, let alone opinions of individual commissioners, to constitute a “close connection.”¹⁰⁰ As a result, the Association challenged the condition in a timely mandamus proceeding.¹⁰¹

The *Ocean Harbor* court explained that the *Nollan* nexus is applicable to the case, and that the state’s interest in protecting the beach had a close connection with the mitigation fee condition.¹⁰² The greatest obstacle, however, was justifying the \$5.3 million fee. The court reasoned that Coastal Commission’s report determined the economic expenditure of beach visitors to be roughly \$13 per visit.¹⁰³ The Association challenged this figure, as there was no evidence that the public used this particular beach, nor had such a study been done specifically for Monterey County beaches.¹⁰⁴

In a direct rejection of *Surfside*’s requirement for specific studies to show a “close connection” or nexus, the court accepted the Commission’s report, which explicitly conceded that “[w]ith respect to economic value of Monterey’s beaches, there have been no specific economic studies done regarding the per-person beach expenditures in the Monterey area.”¹⁰⁵ The court was unfazed by the lack of specificity in the report, and was convinced that “\$13 per person per visit is probably a reasonable estimate for the consumer surplus of the beaches in the Monterey area.”¹⁰⁶ Once again, California courts were at odds with one another over the applicable standard of review in Coastal Commission condition cases.

98. *Id.* at 438.

99. *Id.* at 438–39.

100. *Surfside Colony, Ltd. v. Cal. Coastal Comm’n*, 277 Cal. Rptr. 371, 377–78 (Ct. App. 1991); *see also supra* Section III.B.2.

101. *Ocean Harbor*, 77 Cal. Rptr. 3d at 440.

102. *Id.* at 445.

103. *Id.* at 449.

104. *Id.* at 450.

105. *Id.* at 448.

106. *Id.* at 449 (internal quotation marks omitted).

C. *Lack of Compensation as a Non-Regulatory Taking*

Apart from the noise, foot traffic, and general nuisance that result after private lands are opened by way of a public easement, landowners are particularly outraged by the lack of compensation in what they consider an unjust regulatory taking of private property.¹⁰⁷ Once an OTD is properly recorded and converts into a public easement, landowners permanently lose title to the property that is the subject of the OTD.¹⁰⁸ The inconsistency and arbitrariness of the Coastal Commission's decisions and subsequent court rulings make it too easy for the Coastal Commission to infringe upon landowners' constitutional property rights.¹⁰⁹ Moreover, the remaining private land adjoining public easements often suffers depreciation in value due to the easement.¹¹⁰ Landowners subject to an OTD often invoke the Takings Clause of the Fifth Amendment,¹¹¹ asserting that the government has unconstitutionally taken land without just compensation.

1. *Lucas v. South Carolina Coastal Council*

In *Lucas v. South Carolina Coastal Council*,¹¹² the seminal Supreme Court case concerning governmental takings, the petitioner challenged South Carolina's Beachfront Management Act of 1988, which "had the direct effect of barring [the] petitioner from erecting any permanent habitable structures on his two parcels."¹¹³ Prior to the decision in *Lucas*, courts had a rudimentary understanding of the "maxim that, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'"¹¹⁴ In an effort to add clarity to what is considered "too far" in regard to regulatory takings, the Supreme Court enunciated two situations in which landowners subject to regulatory action must be compensated.¹¹⁵

107. See Duncan, *supra* note 31, at 64.

108. *Id.* at 62.

109. See *supra* Section III.B.

110. See Garcia & Baltodano, *supra* note 2, at 191–92.

111. U.S. CONST. amend. V.

112. 505 U.S. 1003 (1992).

113. *Id.* at 1007.

114. *Id.* at 1014–15 (quoting Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

115. *Id.* at 1015.

a. Regulations that compel a landowner to suffer a physical "invasion" of property

The first situation in which the government is required to compensate a landowner for a "taking" is when the landowner is compelled to suffer a physical "invasion" of property.¹¹⁶ The Supreme Court explained that "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, [courts] have required compensation" when the landowner has suffered a physical invasion.¹¹⁷ The Court illustrated just how minute a taking can be when it cited *Loretto v. Teleprompter Manhattan CATV Corp.*,¹¹⁸ in which "New York's law requiring landlords to allow television cable companies to emplace cable facilities in their apartment buildings constituted a taking, even though the facilities occupied at most only 1½ cubic feet of the landlords' property."¹¹⁹

While it may seem that the sacrifice of private lands for public access easements would entitle landowners to compensation, a conditional taking based on a permit application does not qualify as a physical invasion.¹²⁰ Rather:

A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired.¹²¹

Stated in other terms, whereas "the Fifth Amendment's just compensation provision is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,"¹²² a rational permit regulation scheme is imposed on the public as a whole to

116. *Id.*

117. *Id.*

118. 458 U.S. 419 (1982).

119. *Lucas*, 505 U.S. at 1015 (citation omitted).

120. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) ("Had California simply required an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.")

121. *Id.* at 845 n.2.

122. *Landgate Inc. v. Cal. Coastal Comm'n*, 953 P.2d 1188, 1195 (Cal. 1998) (internal quotation marks and citations omitted).

ensure that orderly development of real property, benefiting as well as burdening owners.¹²³

Thus, in considering regulations that require a landowner to suffer a physical invasion of property, courts have cited *Lucas* in concluding that landowners subject to giving up land as a condition of a coastal development permit are not protected under the Takings Clause.¹²⁴

b. Regulations that deny all economically beneficial and productive use of land

The second situation in which a landowner is entitled to compensation for a governmental taking “is where regulation denies all economically beneficial or productive use of land.”¹²⁵ The Supreme Court explained that:

[R]egulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.¹²⁶

The Supreme Court went on to hold that “when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”¹²⁷

Once again, landowners who are required to give an OTD as a condition of a coastal development permit are not protected by this situation under the Fifth Amendment. Unless a public easement denies *all* economic and productive use of the landowner’s property, the governmental regulation does not constitute a taking, and is therefore constitutional.¹²⁸ Unless the landowner can show that the condition imposed is unrelated to the proffered public purpose, the

123. *Id.*

124. *See, e.g., id.*

125. *Lucas*, 505 U.S. at 1015.

126. *Id.* at 1018.

127. *Id.* at 1019.

128. *Id.* at 1015–16.

condition will not be considered a taking under the Fifth Amendment.¹²⁹

IV. PROPOSAL

Given the lack of consistency in Coastal Commission decisions, the deference given to the Coastal Commission by California courts, and the important constitutional property rights at stake, the coastal development permit process needs to be corrected. This section proposes model legislation that should supersede the Coastal Act. This proposed legislation would: (1) clarify and heighten the standard of review to be used in OTD challenges, (2) refine the procedural process for challenging an OTD, (3) require mandatory mediation between landowners and the Coastal Commission as a prerequisite to litigation, (4) redirect the burden of proof to the state in conditioning an OTD on a coastal development permit, and (5) shorten the 21-year OTD acceptance period.

A. Clarify and Heighten the Standard of Review for OTD Challenges

One of the major downfalls of the Coastal Act is its failure to articulate the applicable standard of review for OTD challenges. Although *Nollan* introduced a standard of review in 1987, California courts have been inconsistent in applying the nexus test.¹³⁰ In 1994, the Supreme Court granted certiorari in *Dolan v. City of Tigard*,¹³¹ a factually similar case originating in Oregon. In *Dolan*, the petitioner challenged an Oregon court ruling that allowed the city to “condition the approval of her building permit on the dedication of a portion of her property for flood control and traffic improvements.”¹³² The Supreme Court explained that it granted certiorari “to resolve a question left open by [its] decision in *Nollan*, of what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development.”¹³³

129. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987) (holding that “unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but ‘an out-and-out plan of extortion’”).

130. *See supra* Sections II.C.2.a, III.B.

131. 512 U.S. 374 (1994).

132. *Id.* at 377.

133. *Id.* (internal citations omitted).

While the Court maintained the nexus test it articulated in *Nollan*,¹³⁴ it added an additional component to heighten a state's burden in "attempting to require easements across private property."¹³⁵ After satisfying the nexus test, courts must "determine whether the degree of the exactions demanded by the [government's] permit conditions bears the required relationship to the projected impact of petitioner's proposed development."¹³⁶ Worded differently, the state must "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."¹³⁷ The Supreme Court went on to say that "simply denominating a governmental measure as a 'business regulation' does not immunize it from constitutional challenge on the ground that it violates a provision of the Bill of Rights."¹³⁸ The Supreme Court believed that the Fifth Amendment was best encapsulated by this "rough proportionality" requirement.¹³⁹

In order to promote consistency in litigation resulting from conditional grants to coastal development permits, the state should implement legislation that clearly defines a standard of review that aligns with the Supreme Court's holdings in *Nollan* and *Dolan*. Such a standard would require the state to meet both *Nollan*'s nexus test and *Dolan*'s rough proportionality test. Not only will a clearly articulated standard of review promote efficiency in litigation, but it may also deter landowners from resorting to litigation if they are able to evaluate their cases based on an explicit and conspicuous standard found in state law.¹⁴⁰ Given the financial costs to both landowners and the state in litigation, it is within the state's interest to deter landowners from bringing suit over Coastal Commission decisions. By eliminating confusion and clearly articulating the applicable standard of review in OTD challenges, the state may be able to avoid subsequent suits from aggrieved landowners.

134. *Id.* at 397.

135. *See Morris*, *supra* note 1, at 1031.

136. *Dolan*, 512 U.S. at 388.

137. *Id.* at 375.

138. *Id.* at 392.

139. *Id.* at 391.

140. *See infra* Section V.B.2.

B. Refine the Procedural Process for Challenging an OTD

Landowners seeking to challenge a Coastal Commission decision requiring an OTD face strict procedural hurdles.¹⁴¹ To summarize, according to the Coastal Act, if a landowner seeks to challenge the Coastal Commission's OTD condition to a grant of a coastal development permit, he or she must file a writ of mandate within sixty days of the Coastal Commission's decision.¹⁴² Failure to file a writ of mandate within sixty days bars a landowner from judicially challenging the Coastal Commission's decision, as the statute of limitations has passed.¹⁴³ Given the importance of constitutional property rights, specifically in the context of the Takings Clause of the Fifth Amendment, a sixty-day statute of limitations seems inappropriately short. Numerous suits have been filed challenging the sixty-day statute of limitations.¹⁴⁴ In order to efficiently protect the property rights of affected landowners, the newly implemented legislation should stipulate a 120-day statute of limitations. Doubling the existing statute of limitations will give landowners additional time to consult with attorneys and experts and to consider judicial history before deciding to challenge the Coastal Commission's conditional approval of a coastal development permit.¹⁴⁵

C. Require Mandatory Mediation Between Landowners and the Coastal Commission as a Prerequisite to Litigation

In order to minimize the number of suits filed by aggrieved landowners, the newly implemented legislation should require all OTD challenges (as well as other coastal development permit challenges) to submit to mediation prior to filing a formal lawsuit. As previously discussed, it is in the state's best interest to minimize litigation over coastal development permit challenges due to the

141. *See supra* Section II.C.1.

142. CAL. PUB. RES. CODE § 30801 (West 2007).

143. *See supra* Section II.C.1.

144. *See* Cal. Coastal Comm'n v. Super. Ct., 258 Cal. Rptr. 567 (Ct. App. 1989) (holding that the petitioner's failure to file petition for writ of administrative mandate within 60 days of Coastal Commission's decision to grant permit rendered Coastal Commission's decision final); *see also* Serra Canyon Co. v. Cal. Coastal Comm'n, 16 Cal. Rptr. 3d 110, 114 (Ct. App. 2004) ("Once the Commission's permit decision becomes final, the affected property owner is estopped from relitigating the validity of the decision in a subsequent inverse condemnation action.").

145. *See* Hess, *supra* note 8, at 26–27 (describing the procedural hurdles in challenging OTDs, specifically the limited timeframe of sixty days).

extraordinary costs associated with the trial process.¹⁴⁶ This interest is exemplified by the fact that in OTD challenges, the state is the defendant, which forces the state to spend money to defend Coastal Commission decisions. In forcing the parties to submit to mediation, the state may be able to keep the sizable number of OTD challenges out of the court system, saving both petitioners and the state significant money, as well as alleviating the courts from having to spend valuable time and resources litigating otherwise resolvable cases.¹⁴⁷

Furthermore, requiring landowners to first submit to mediation will give them a preliminary look at the strength of their OTD challenge.¹⁴⁸ If a landowner is able to see that he or she has a weak case in mediation, he or she may be less likely to file a subsequent lawsuit challenging the OTD (or other coastal development permit condition). In regard to the procedural considerations of this mandatory mediation, the newly implemented legislation should place the costs associated with the process entirely on the state. As discussed, landowners who give OTDs are not entitled to compensation, despite losing title to part of their properties.¹⁴⁹ Thus, if the state seeks to take property from its citizens for public use without just compensation, it should bear the costs associated with the procedural formalities.¹⁵⁰

Mediation, as a non-binding process, will give landowners and the Coastal Commission an idea of the potential outcomes if the

146. See *supra* Section IV.A.

147. See Jeffery J. Dywan, *An Evaluation of the Effect of Court-Ordered Mediation and Proactive Case Management on the Pace of Civil Tort Litigation in Lake County, Indiana*, 2003 J. DISP. RESOL. 239, 240–41 (2003) (detailing two studies in the state of Indiana in which 82 percent and 65.8 percent of cases that submitted to mediation were settled through the mediation process as opposed to continuing to trial, respectively); see also Robyn E. McDonald, *The Critical Role of Mediation in Bridging the Access to Justice Gap*, COLO. LAW., Sept. 2014, at 69, 75 (“The Canadian Study reinforces the proposition that mediation can assist litigants (self-represented, indigent, modest means, or otherwise) to resolve disputes, thereby decreasing the caseload of the courts and the burden on the bench and staff.”).

148. See McDonald, *supra* note 147, at 75.

149. See *supra* Section III.C.

150. With varying rates among mediators, the newly implemented legislation should be clear in placing a maximum limit for mediation fees that will be covered by the state. In other words, it is not appropriate for a landowner to only agree to the presiding of an unreasonably expensive mediator. If the landowner insists upon having an unreasonably expensive mediator preside over the mediation, the landowner should be responsible for the mediator’s fees, less the state’s maximum limit.

proceeding were to result in formal litigation.¹⁵¹ Landowners and the Coastal Commission must mutually agree on the presiding mediator. This will help to prevent both parties from asserting bias or procedural unfairness if the result of mediation is not to their liking. If the parties decide not to agree to the mediator's recommendations and either party seeks formal judicial review, they shall have 120 days to file a formal lawsuit, in accordance with the previously mentioned refinement of the procedural processes.¹⁵²

D. Redirect the Burden of Proof to the State in Conditioning an OTD on a Coastal Development Permit

One of the most prominent problems with OTD challenges and its resultant litigation is the discrepancy between the parties in regard to resources, influence, and control.¹⁵³ The struggle between landowners and the state over OTDs and other coastal development permit conditions is reminiscent of the struggle between David and Goliath.¹⁵⁴ The Coastal Act gave the Coastal Commission unfettered discretion to grant or deny coastal development permits,¹⁵⁵ courts give great deference to the Coastal Commission's decisions,¹⁵⁶ and courts impose the burden of proof on the landowner to show that the condition constitutes a taking.¹⁵⁷ Given that state courts usually defer to Coastal Commission decisions,¹⁵⁸ it is extremely difficult for private landowners to overcome the political machine that protects state interests at the expense of its citizens.¹⁵⁹

While the *Antoine* court argued that placing the burden on the petitioner is an efficient way to protect coastal resources,¹⁶⁰ doing so severely compromises landowners' ability to protect their constitutional rights to property. Given that the state takes title to private lands after an OTD is recorded, it is only appropriate that the state carry the burden of proof in showing that the imposed condition

151. See McDonald, *supra* note 147, at 75.

152. See *supra* Section IV.B.

153. See *supra* Section III.A.

154. 1 Samuel 17.

155. CAL. PUB. RES. CODE § 30801 (West 2007).

156. See Hess, *supra* note 8, at 27.

157. *Antoine v. Cal. Coastal Comm'n*, 10 Cal. Rptr. 2d 471, 478 (Ct. App. 1992); see also *supra* Section II.C.2.b.

158. See Hess, *supra* note 8, at 27.

159. See *supra* Section II.C.2.b.

160. *Antoine*, 10 Cal. Rptr. 2d at 478.

is not an unconstitutional taking. The state has a nearly unlimited stream of resources, retains the exclusive control of coastal lands and the coastal permit process, and is afforded strong deference in the courts.¹⁶¹ Although it is virtually impossible to level the playing field between the state and private landowners since the state dwarfs the petitioners in terms of resources and influence, shifting the burden of proof to the state will help to deter the state from infringing upon its citizens' constitutional rights in an unchecked manner.

In shifting the burden to the state, the newly implemented legislation will require the state to show that there is indeed a nexus between the original purpose of the condition and the burden imposed¹⁶² and that the "dedication is related both in nature and extent to the impact of the proposed development."¹⁶³ Rather than giving the state unfettered discretion, shifting the burden will hold the state accountable and, simultaneously, work to protect the constitutional rights of private landowners. Therefore, the newly implemented legislation should clearly and conspicuously place the burden of proof on the state, in accordance with the proposed heightened standard of review in Section IV.A.¹⁶⁴

E. Shorten the Twenty-One-Year OTD Acceptance Period

Under the Coastal Act, the state has twenty-one years from the date of recordation to accept an OTD, after which the OTD is converted into a permanent public easement owned by the state.¹⁶⁵ If the state fails to accept the OTD, the OTD condition expires and the title of the property reverts to the landowner.¹⁶⁶ Newly implemented legislation should significantly reduce the timeframe that the state has to accept the OTD. A property owner with an outstanding OTD on his or her land will undoubtedly realize a lower appraisal value if he or she attempts to sell during the twenty-one-year OTD acceptance period. Potential bona fide purchasers will likely be unwilling to pay the same amount for a burdened piece of property as they would for an identical unburdened one, as the state's potential future acceptance of the OTD would decrease the value of the

161. *See supra* Section III.A.

162. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987).

163. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

164. *See supra* Section IV.A.

165. *See Hess, supra* note 8, at 26; *see also supra* Section II.C.

166. *Id.*

property in question. This uncertainty impedes the landowner's ability to sell his or her property for fair market value for over two decades from the time of the OTDs recordation.

To alleviate these concerns and to eliminate the uncertainty regarding the title of the landowner's property, the newly implemented legislation should require the state to accept the OTD within ten years of its recordation. Ten years gives the state ample time to find and approve of an entity that will be responsible for both opening and managing the public easement.¹⁶⁷ Given that private property rights are constitutionally protected,¹⁶⁸ the state should be required to accept the OTD in a timely manner. As it stands, the Coastal Act is unfair in that it requires petitioners to challenge Coastal Commission decisions within sixty days, yet it gives the state twenty-one years to accept an OTD.¹⁶⁹ In order to create a more fair, yet realistic and efficient, system, this twenty-one-year acceptance period should be limited to ten years.

V. JUSTIFICATION FOR THE PROPOSAL

As discussed throughout this Note, there are numerous reasons to replace the Coastal Act with more efficient, clear, and fair legislation. These reasons include both constitutional concerns and policy considerations.

A. Constitutional Concerns

The most pressing reason to replace the Coastal Act with a more clear, fair, and thorough legislative scheme is to better protect the constitutional property rights of landowners. Given that landowners receive no compensation for their properties when they give an OTD to the state,¹⁷⁰ are required to challenge an OTD within sixty days or lose title to their property,¹⁷¹ bear the burden of proof in demonstrating that an OTD is an unconstitutional taking,¹⁷² and are handicapped in selling their land for a twenty-one-year period,¹⁷³ their constitutional rights to property are significantly infringed. The

167. *Id.*

168. U.S. CONST. amend. V.

169. *See Hess, supra* note 8, at 26; *see also supra* Section II.C.

170. *See supra* Section III.C.

171. *See supra* Section II.C.1.

172. *See supra* Section II.C.2.b.

173. *See supra* Sections II.C, V.F.

only way to better protect these constitutional rights from the state, which controls both the administrative body and the courts, is to replace the Coastal Act with more fair and balanced legislation. Only then will landowners enjoy more adequate protection of their constitutional rights.

B. Policy Considerations

1. Provide Clarity and Consistency

The Coastal Act fails to create a clear and consistent process for OTD challenges. Specifically, the Coastal Act does not articulate the applicable standard of review,¹⁷⁴ assign the burden of proof in OTD challenges,¹⁷⁵ or provide general guidance in adjudicating OTD challenges. The failure of the Coastal Act to enunciate specific standards and applicable legal principles has created an arbitrary and unpredictable system.¹⁷⁶ By explicitly clarifying the applicable standard of review, placing the burden of proof squarely on the state, and providing revised time frames and procedures for OTD challenges, the proposed legislation will promote a more efficient, predictive, and cost-effective system.

2. Discourage Costly and Time-Consuming Litigation

Along with the lack of clarity and consistency regarding the standard of review comes increased litigation due to the unpredictability of the system. In defining a clear standard of review, assigning the burden of proof to the state, and requiring mandatory mediation prior to judicial review, the proposed legislation will discourage litigation, which is both costly and time consuming. Through the newly proposed legislation, landowners and the Coastal Commission will be able to reference a clear standard of review, evidentiary burdens, and the independent opinion of a mediator, all of which will give the parties a better understanding of their respective legal positions. This added knowledge will allow both parties to better evaluate if litigation will be successful. With this ability to better predict the outcome of litigation, it is possible that

174. *See supra* Sections II.C.2.a, III.B.

175. *See supra* Sections II.C.2.b, III.B.

176. *Id.*

many landowners who otherwise would have brought suit will be much more reluctant to do so.

3. Eliminate Discrepancies in Control, Influence, and Power Between the State and Private Landowners

With the passage of the Coastal Act, the state legislature gave the Coastal Commission a near-monopoly in regard to coastal control.¹⁷⁷ Furthermore, courts have almost completely deferred to Coastal Commission decisions in OTD judicial review, in addition to placing the burden of proof on the landowner.¹⁷⁸ This combination of factors makes it incredibly difficult for a petitioner to overcome the state's political machine that protects the state's interests at the expense of the landowners. By heightening the standard of review, refining the procedural process, placing the cost of mediation on the state, and shifting the burden of proof to the state, the proposed legislation will better balance state interests with landowner interests and lessen the stranglehold that the state has over the OTD challenge process.

VI. CONCLUSION

In sum, there are numerous important breakdowns within the Coastal Act that need to be resolved in order to pave the way for a more efficient and fair solution to the OTD issue. While the goals of the Coastal Act are valiant, the process, fairness, and efficiency of the coastal development permit and OTD challenge systems are severely deficient. The state has almost monopolized control over coastal development and has significantly impaired the constitutional rights of private landowners. In short, the system is broken.

While there is no doubt that litigation challenging future OTDs will continue, as some landowners will never simply accept the state's requirement of giving land for a public easement, the system can be replaced by a more complete, clear, and efficient one that will balance state interests with the interests of landowners in a more fair, equitable, and competent way. In clarifying and heightening the standard of review for OTD challenges, refining the procedural process, requiring mediation prior to judicial review, placing the burden of proof on the state, and shortening the state's OTD

177. *See supra* Section III.A.

178. *Id.*

acceptance period, new legislation will help to alleviate many of the underlying constitutional and policy concerns that plague the Coastal Act at the expense of the state's citizens. While the power struggle between private coastal landowners and the state has raged for decades, California has the opportunity to become a model for other states through the passage of the proposed legislation, which will supersede the unfair, unorganized, and ineffective Coastal Act.

