No. ____

In the
Supreme Court of the United States

MARTINS BEACH 1, LLC AND
MARTINS BEACH 2, LLC,
Petitioners,

v.

SURFRIDER FOUNDATION,
Respondent.

On Petition for Writ of Certiorari to the First Appellate District Court of Appeal of the State of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves a stretch of private property along the California coast known as Martins Beach. The California Coastal Commission and the County of San Mateo want Martins Beach to be open to the public, but they do not want to pay to purchase the property, or even for an easement. Instead, they have taken the position that the owner of the property cannot exclude the public unless it first obtains a *permit* deemed necessary for any change, including a decrease, in the "intensity" of the public's use of or access to the ocean under the California Coastal Act. In their view, because the previous owner of Martins Beach chose to allow members of the public to access the property upon payment of a fee, the current owner must do so as well—and on the exact same terms, no less—unless and until it obtains a permit allowing it to do otherwise.

Respondent Surfrider Foundation took up their cause and convinced the state courts to accept that capacious interpretation of the Coastal Act and to enjoin petitioner from excluding the public from its private property unless and until it obtains a "coastal development permit" allowing it to do so. While the court below recognized that this injunction against exercising the right to exclude constitutes a textbook physical invasion of private property, it nonetheless concluded—in a decision that deepens an entrenched split among the lower courts—that it is not a compensable taking because the possibility of obtaining a permit renders the physical taking "temporary," and only "permanent" physical takings qualify as *per se* takings. Thus, under the decision

below, petitioner is entitled to zero compensation for a compelled public easement across its private property because of the possibility petitioner could one day obtain a permit allowing it to exercise the most foundational property right, *i.e.*, the right to exclude.

The questions presented are:

1. Whether a compulsory public-access easement of indefinite duration is a *per se* physical taking.

2. Whether applying the California Coastal Act to require the owner of private beachfront property to apply for a permit before excluding the public from its private property; closing or changing the hours, prices, or days of operation of a private business on its private property; or even declining to advertise public access to its private property, violates the Takings Clause, the Due Process Clause, and/or the First Amendment.

PARTIES TO THE PROCEEDING

Defendants-appellants below, who are petitioners before this Court, are Martins Beach 1, LLC, and Martins Beach 2, LLC.

Plaintiff-appellee below, who is respondent before this Court, is Surfrider Foundation.

CORPORATE DISCLOSURE STATEMENT

Martins Beach 1, LLC and Martins Beach 2, LLC have no parent company, and no publicly held company owns 10% or more of the stock of either entity.

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PETITION FOR WRIT OF CERTIORARI

No property right is more fundamental than the right to exclude. It is what makes "private property" private. According to the decision below, however, owners of private beachfront property in California may not exercise that right without first obtaining the government's permission. Absent such a permit, a property owner is compelled to give the public access to private property on the same terms as prior owners, even if it means losing money and being forced to advertise the very access that the private property owner would like to foreclose.

Petitioner is the owner of Martins Beach, a stretch of private beachfront property along the California coast. After losing money operating a business of allowing the public to enter and use its private property for a fee, petitioner decided to shut down the business and keep its private property private. The California Coastal Commission and the County of San Mateo had other ideas. Citing a provision of the California Coastal Act that requires property owners to obtain a permit before taking any action that would alter the "intensity" of public access to the ocean, the government authorities demanded that petitioner obtain a permit before exercising its right to exclude. To be clear, all agree that petitioner owns the property in fee simple absolute. But the Coastal Commission and the County nonetheless declared the power not only to mandate that the property be kept open to the public unless petitioner obtains a permit to close it, but to dictate essential aspects of how petitioner must invite the public onto its private property—including the hours it must

allow access, the absurdly low price ($2) it may charge, and even the extent of advertising alerting the public of its ability to access petitioner's private property for a pittance.

The decision below embraced that exceptionally broad interpretation of the state statute, holding that the Coastal Act requires petitioner to obtain a permit to take actions as basic as closing its own gate, posting security guards on its own property to deter trespassers, and even painting over its own sign advertising access to the property. At the same time, however, the court recognized that compelling petitioner to keep its property open to the public compels a public-access easement over petitioner's property. The court even acknowledged that a public-access easement is a *per se* physical taking and would automatically require compensation if it were permanent. Yet the court nonetheless refused to apply that *per se* rule here, on the theory that the possibility of obtaining a permit rendered the physical taking that presently exists "temporary," and only "permanent" physical takings require compensation without regard to the regulatory taking balancing test.

That remarkable conclusion cannot be reconciled with this Court's takings precedents, and it is directly contrary to decisions from the Federal Circuit and several other state courts. Those decisions all recognize that when the government physically invades private property (or invites others to do so), the property owner is categorically entitled to just compensation, regardless of the invasion's duration. Just as was the case when the government

temporarily seized factories and coal mines during World War II, the duration of the physical invasion is relevant to the amount of compensation due, not to whether there was a compensable taking in the first place. When the government commands that private property owners allow the public to continuously and physically invade their private property, the government has imposed a public-access easement and effectuated a *per se* taking, full stop.

Precisely because a physical invasion is a *per se* taking even when its duration is indefinite, the Coastal Act, as interpreted by the decision below, works an unconstitutional taking. The government simply cannot command that parties open their private property to the public without compensation. And it certainly cannot command that parties keep their private property open to the public at a loss, and advertise the opportunity to "trespass" for a mere $2 fee, all without providing just compensation. The remarkable interpretation of the Coastal Act embraced by the decision below runs afoul of the Takings Clause, the Due Process Clause, and the First Amendment. This Court should grant certiorari to resolve the division among the courts over whether a physical invasion of private property is a *per se* taking without regard to its duration, and to confirm that the Coastal Act cannot constitutionally be applied to compel uncompensated physical invasions of private property.

OPINIONS BELOW

The California Court of Appeal's opinion is reported at 14 Cal.App.5th 238 and reproduced at App.1-66. The trial court's order granting injunctive

relief is available at 2014 WL 7010647 and reproduced at App.68-71. The trial court's statement of decision is available at 2014 WL 6634176 and reproduced at App.72-99.

JURISDICTION

The California Court of Appeal issued its opinion on August 9, 2017, and the California Supreme Court denied review on October 25, 2017. On January 12, 2018, Justice Kennedy extended the time for filing this petition to February 22, 2018. This Court has jurisdiction under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First, Fifth, and Fourteenth Amendments and the relevant provisions of the California Coastal Act are reproduced at App.100-102.

STATEMENT OF THE CASE

A. Factual Background

1. This case concerns approximately 89 acres of property along the California coast known as Martins Beach. Like many parcels of property along the California coast, Martins Beach is and always has been private property. The property borders the Pacific Ocean and is sheltered from the north and south by high cliffs that stretch out into the ocean, forming a cove. App.1. Given this natural physical geography, the only way to access the cove other than by boat is from the east. But the state has never purchased or leased any public right-of-way to access the cove; instead, the only access is via a private road that is part of the Martins Beach property. App.1-2. Unsurprisingly, this makes Martins Beach a very

attractive (and very valuable) piece of property, as nature has left it largely insulated from the outside world.

For roughly a century, Martins Beach was owned by a family called the Deeneys. Tr.2467.[1] While there was never any dispute that the property was their private property, the Deeneys chose to use it as a revenue-generating beach-access business. The Deeneys did not keep their private property open to the public at all times. Rather, on days and at times of their choosing, they would open the gate to their private road and allow patrons to enter and use their property upon payment of a fee. *Id.* After paying the fee set by the Deeneys, patrons could use the private road to enter the Deeneys' property, park in the parking lot the Deeneys built and maintained, and use the beach and other amenities the Deeneys built and maintained, including restrooms and a small convenience store. *Id.* To deter people from enjoying their private property without paying the fee, the Deeneys maintained "no trespassing" signs on their gate, which they opened and closed at their discretion. Tr.3121. While the Deeneys originally charged only $0.25 to access their beach, over time, they gradually increased the fee to $2 and ultimately $10. But by the 2000s, their business was no longer profitable, and they ultimately decided to sell the property. Tr.2468; RT879-880.

Petitioner purchased the property in July 2008. Tr.2468. Initially, petitioner was willing to give the

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[1] Citations to "Tr." refer to the Clerk's Transcript, and citations to "RT" refer to the Reporter's Transcript, in Case No. A144268 in the court below.

business a go, and continued to allow members of the public to access the property upon payment of a fee. Tr.3121; App.4. But petitioner soon faced the same problem the Deeneys had faced: The business was operating at a considerable loss, as the costs of keeping the beach, the parking lot, and other facilities in operable and safe condition significantly exceeded the fees the business generated. Nonetheless, for the time being, petitioner kept the business open, while painting over the billboard the Deeneys had erected advertising the business until petitioner could decide how to put it to more attractive use.

2. In February 2009, the first winter that petitioner owned the property, it followed the Deeneys' practice of temporarily closing the property to the public until the weather improved, and posted a sign on the gate stating "Beach Temporarily Closed." App.4. While that practice had never drawn any objection during the many decades the Deeneys followed it, this time it prompted an immediate "Informational Warning Letter" from San Mateo County. The County, which shares power with the California Coastal Commission to enforce the California Coastal Act, Cal. Pub. Res. Code §30000 *et seq.*, maintained that "any change in the public's ability to access the shoreline at Martins Beach triggers the need for a CDP [*i.e.*, "coastal development permit"] because it represents a 'change in the intensity of use of water or access thereto.'" App.4-5 (quoting Cal. Pub. Res. Code §30106). Accordingly, the County sought a schedule of the hours and days petitioner intended to open its private property to the public, and an explanation of "how the schedule relates to historic patterns of public use," so it could

evaluate whether petitioner engaged in unpermitted "coastal development" by closing its own gate to its own property. App.4. The County also sought an explanation for petitioner's decision to paint over its own sign, on the premise that this, too, may have produced a "change in the intensity of use of water or access thereto" and thus constitute unpermitted "coastal development."

Petitioner responded by explaining that the property was traditionally closed during the winter, and that although petitioner was not required to invite the public onto its private property, it "voluntarily intended to maintain the same amount and type of access as did [its] predecessors." App.5. As to the sign, petitioner explained that it had not decided what message, if any, to place on it and was unaware of authority requiring it to display a particular message on its own sign. Tr.2469, 3868.

Two months later, the County responded, again claiming that petitioner had to apply for a CDP before taking any action that might affect public access to the beach. App.5. The County also cited the California Coastal Access Guide, published by the California Coastal Commission, which stated that access to the beach was historically available year-round for a $2 fee. App.5; Tr.2470, 3870-73. The County advised petitioner that it must either: (1) immediately allow public access on a year-round basis for a $2 fee; (2) provide evidence documenting that the specific times, hours, terms, and fees under which petitioner was operating the beach were the same as those in place in 1973 (the year the CDP requirements took effect); or (3) apply for a CDP authorizing any changes in the

times and terms of public use. App.5-6; Tr.2470, 3870-73.

Petitioner again informed the County that although it was not legally required to do so, it was allowing paying members of the public to access the property on the same terms as the Deeneys had, and would continue to do so, except that it would raise the fee from $10 to $15 to help cover expenses. App.5; Tr.2470, 3875-78, 4219-22. Although the Deeneys had raised the fee several times over the years without objection, the County persisted in its view that *petitioner* must invite the public onto its property on the exact same terms and conditions—including the same $2 fee unadjusted for inflation—that governed *in 1973*, or else apply for a CDP. Tr.2470.

3. Frustrated with the persistent claims that it lacked the right to decide whether and on what terms to invite the public onto its private property, petitioner initiated a lawsuit in June 2009 against the County and the Coastal Commission seeking to resolve, by declaratory judgment, whether the Coastal Act actually requires a private property owner to obtain a development permit to exercise its right to exclude in ways that, if anything, would only decrease the "intensity" of the public's use of or access to the ocean. App.5. The trial court dismissed the action, concluding that the dispute was not yet ripe. App.5. At that point, petitioner decided to close its private property to the public altogether and cease operating the money-losing business. App.6.

Two years later, in September 2011, the Coastal Commission sent petitioner a letter claiming that "the erection of beach closure signs … as well as the

permanent closure of an existing gate … constitute development under the Coastal Act." App.6. The County followed up shortly thereafter with a Notice of Preliminary Determination of Violation claiming that petitioner had engaged in "unlawful" unpermitted coastal development. App.6-7; Tr.2473, 3889-92. At that point, petitioner implored the county to issue a Final Staff Determination of Violation so petitioner could formally contest that determination in court and finally adjudicate its property rights. Tr.2473, 4238-42. Instead, the County took no further action, just leaving the threat of massive penalties hanging over petitioner's head, in hopes of coercing petitioner to allow the public to access its private property. Tr.2473.

While the County and the Commission continued to pressure petitioner into allowing public access and to frustrate petitioner's efforts to seek legal recourse, an unincorporated association calling itself "Friends of Martin's Beach" ("FOMB") decided to take matters into its own hands and brought a lawsuit against petitioner. FOMB did not contend that petitioner was engaged in unpermitted "coastal development." Instead, FOMB claimed petitioner's private property actually belonged to the public, arguing that the Deeneys "dedicated" the property to the public when they invited people to access it upon payment of a fee. App.6-7. The trial court granted summary judgment for petitioner, ruling that Martins Beach is private property that the public has no legal right to access. The court of appeal affirmed in part, reversed in part, and remanded for a trial on FOMB's dedication claims. *Friends of Martin's Beach v. Martin's Beach 1, LLC*, 201 Cal. Rptr. 3d 516 (Cal. Ct. App. 2016). After a

bench trial, the trial court once again ruled for petitioner, concluding that FOMB failed to establish that the Deeneys dedicated their property to the public by allowing use and access upon payment of a fee. The court has now entered a final judgment confirming that petitioner owns Martins Beach in fee simple absolute and that the property is unencumbered by any right of public access. *See* Judgment, *Friends of Martins Beach*, Case No. CIV517634 (Cal. Super. Ct., San Mateo Cty., Jan. 29, 2018).

Consistent with that understanding, the California Legislature enacted legislation in 2014 giving the State Lands Commission the power to negotiate with petitioner to acquire "a right-of-way or an easement" for the public to use Martins Beach, and if the negotiations were unsuccessful, to try to obtain one through the exercise of eminent domain. *See* Cal. Pub. Res. Code §6213.5. To date, the Lands Commission has declined to attempt to exercise that power, thus leaving Martins Beach as the legislature recognized: private property.

B. Procedural History

In the midst of the FOMB litigation, another public interest group, Surfrider Foundation, initiated this separate litigation. Unlike FOMB, Surfrider did not claim that the public has any pre-existing legal right to access Martins Beach. *See* App.35 n.23. Instead, Surfrider took up the County's and the Coastal Commission's cause, claiming that, even assuming the property is in all respects private (which it is), petitioner engaged in unpermitted "coastal development" in violation of the Coastal Act when it

(1) closed its own gate to its private road; (2) painted over its own sign advertising its private business to the public; and (3) stationed security guards on the property to deter trespassing. App.7.

After a bench trial, the San Mateo County Superior Court entered judgment for Surfrider, ruling that petitioner violated the Coastal Act by closing its gate, painting over its sign, and taking measures to deter trespassers without first applying for a permit. App.8-10. The court entered an injunction requiring petitioner to unlock the gate and to allow the public to access its private property unless and until it obtains a permit to do otherwise:

> [Petitioner is] hereby ordered to cease preventing the public from accessing and using the water, beach and coast at Martins Beach until resolution of [a Coastal Development Permit] application has been reached by San Mateo County and/or the Coastal Commission. The gate across Martins Beach Road must be unlocked and open to the same extent that it was unlocked and open at the time [petitioner] purchased the property.

App.9.

Petitioner appealed, arguing that closing its own gate, painting its own sign, and using security guards to deter trespassers do not constitute "development" under the Coastal Act. Petitioner further argued that if the Coastal Act really does require a private property owner to seek a permit before it may exercise its fundamental right to exclude, or even change the message on a sign inviting the public to use its private

property, then the Act violates the Takings Clause, the Due Process Clause, and the First Amendment. Petitioner also argued that the injunction itself constitutes an unconstitutional taking, as it compels petitioner to keep its private property open to the public *right now* and provides no compensation for that government-mandated public easement.

The court of appeal affirmed. The court began by accepting the trial court's exceedingly broad interpretation of the Coastal Act, holding that *any* act with more than a *de minimis* impact—including a reduction—on the "intensity" of the public's use of or access to the ocean constitutes "coastal development" that requires a permit. App.10-21. Yet notwithstanding its holding that the Coastal Act compels petitioner to open its private property to the public unless and until the government gives it permission to do otherwise, the court rejected as "unripe" petitioner's claim that this permitting requirement violates the Takings Clause, reasoning that petitioner must apply for and be denied a permit before it may challenge the uncompensated public-access easement that the Act imposes. App.22-26.

At the same time, the court *agreed* with petitioner that "the trial court's injunction intrudes on [petitioner's] established property right to exclude others by allowing the public to access Martins Beach." App.27. The court also acknowledged that a court order compelling "a permanent public access easement is generally treated as a *per se* taking requiring compensation." App.41. But instead of following those propositions to their logical conclusion—*i.e.*, that the trial court had imposed an

unconstitutional uncompensated taking—the court concluded that no compensation was required because, in its view, a "temporary" physical invasion does not qualify as a *per se* physical taking.

Instead, according to the court of appeal, "for a physical invasion to be considered a *per se* taking, it must be permanent." App.50. And because there is at least a theoretical prospect that the court-ordered easement may one day end, the court concluded that the physical taking, while indefinite, did not qualify as "permanent." *See* App.42. The court therefore concluded that petitioner is not entitled to any compensation for the state-mandated easement across its private property that presently exists unless it can satisfy the multi-factor balancing test for *regulatory* takings, which the court concluded petitioner failed to do. App.56-60; *see Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

The Supreme Court of California denied review.

REASONS FOR GRANTING THE PETITION

The decision below sanctions an egregious invasion of private property rights—and does so by embracing the wrong side of an entrenched split among the lower courts. The rules governing physical takings of property are quite clear: When the government physically invades private property, it must pay the owner just compensation, period. If the government seizes a factory, bolts a cable box to a rooftop, or compels a public-access easement over private property, the Constitution imposes a categorical duty to compensate the property owner for the taking. The extent of the physical taking in terms of its comprehensiveness and duration may affect the

amount of compensation that is just, but it does not affect the duty to compensate. Thus, while this Court has sometimes used the word "permanent" to describe the government conduct effecting a *per se* physical taking, it has never suggested that the temporary or indefinite nature of a physical taking obviated the obligation to pay or required multi-factor balancing. Instead, the Court has recognized the commonsense principle that if the government seizes a factory for five years, it has a duty to pay just compensation for that five-year period.

The Federal Circuit and several other courts have accordingly correctly held that the duration of a physical invasion is relevant only to the amount of compensation, not to whether there was a taking in the first place. These courts recognize that the government cannot escape paying compensation for a physical invasion just by promising to end the invasion at some future time or by asserting that it had a very good reason for invading private property. Other courts, however—including the decision below—have placed determinative weight on the duration of the physical invasion, holding that "for a physical invasion to be considered a *per se* taking, it must be permanent." App.50. The disagreement among courts on this point is deep, longstanding, and intolerable. It makes no sense for the federal government and the state government to operate under different takings regimes in California just because the federal action will be challenged in the Federal Circuit while state action is litigated in state court.

Under a correct application of this Court's physical takings precedents, a physical taking always demands compensation. And under a correct application of those same precedents, petitioner's property has been unconstitutionally taken several times over. It has been taken by a trial court injunction that presently requires petitioner to hold its private property open to the public unless and until it obtains a government-issued permit to close it. It has been taken by the California Coastal Act, which the court below interpreted to give the trial court the power to impose that injunction. It has been taken by the lower court's extraordinary command that petitioner not only must hold its private property open to the public, but must do so at a loss, and at hours, days, and prices of the government's choosing. And on top of all that, the courts below interpreted the Coastal Act to force petitioner to continue to advertise the government-compelled opportunity to trespass on its property in plain violation of petitioner's First Amendment rights.

There is a name for a government mandate to allow the public to access private property—it is called a "taking," and a *per se* physical one at that, which requires compensation regardless of its duration. There is no name for a government mandate to maintain a privately owned sign alerting the public to the opportunity to trespass on private property for a pittance, at least not in this country—because the First Amendment so clearly prohibits it. This Court should grant certiorari and restore to property owners the freedom to exclude others from their private property, to close the doors of their businesses, to control the message on their signs, and to enjoy the

full panoply of property protections the Constitution promises.

I. The Court Should Grant Certiorari To Resolve A Division Of Authority Over Whether A Physical Invasion Must Be "Permanent" To Be A *Per Se* Taking.

The court below agreed that petitioner is presently subject to an injunction that compels a public-access easement over its private property. The court agreed, moreover, that a public-access easement ordinarily constitutes a *per se* physical taking. Yet the court nonetheless concluded that this physical taking is not compensable because it is not "permanent." That conclusion is irreconcilable with this Court's precedent and deepens an entrenched split among the lower courts over whether a physical taking must be "permanent" to be *per se* compensable.

A. The Decision Below Deepens a Split Among State and Federal Courts.

1. This Court has long recognized two types of takings: physical takings and regulatory takings. Determining whether a land-use regulation is a regulatory taking that demands compensation requires "complex factual assessments of the purposes and economic effects of government actions." *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992). The physical takings analysis, in contrast, is simple: If the government condemns, physically appropriates, or compels an easement over private property, then it must pay compensation. Indeed, this Court's physical-takings jurisprudence "is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules." *Tahoe-Sierra Pres.*

Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002). The *per se* rule that governs physical takings is: "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Id.*. And "compensation is mandated" even if that physical invasion is only "temporary." *Id.*

Consistent with that *per se* rule, the Federal Circuit and most other courts have held that a physical taking of private property *always* demands compensation, regardless of whether it is permanent, indefinite, or temporary. The Federal Circuit's leading case on the issue is *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991). There, the plaintiffs owned property near a hazardous waste disposal site, and the government installed wells to monitor the migration of the hazardous substances. *Id.* at 1369. When the plaintiffs alleged a *per se* taking, the government defended on the ground that the wells and monitoring devices were not "permanently" affixed to the plaintiffs' property, and so could not be a *per se* taking. *Id.* at 1375-76. The Federal Circuit disagreed. While the court acknowledged that this Court has used the word "permanent" when referencing physical takings, it explained that "'permanent' does not mean forever, or anything like it." *Id.* at 1376. "A taking can be for a limited term," and the court found that the government's entries onto plaintiffs' property were a *per se* "taking of the plaintiffs' right to exclude, for the duration of the period in which the wells are on the property and subject to the Government's need to service them." *Id.* at 1378.

The Federal Circuit has reaffirmed *Hendler*'s holding several times. In *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573 (Fed. Cir. 1993), for example, the U.S. Navy broke into and assumed control of a warehouse belonging to a subcontractor working at the Guantanamo Bay Naval Station. *Id.* at 1577. Although the subcontractor later abandoned the warehouse, the court held that it was entitled to compensation for the period preceding the abandonment. *Id.* at 1583. Reaffirming that "a 'permanent' physical occupation does not necessarily mean a taking unlimited in duration," the court held that the "limited duration of this taking is relevant to the issue of what compensation is just, and not to the issue of whether a taking has occurred." *Id.* at 1582-83; *see also, e.g.*, *Otay Mesa Prop., L.P. v. United States*, 670 F.3d 1358, 1363 (Fed. Cir. 2012); *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1357 (Fed. Cir. 2006).

The First Circuit has likewise held that a temporally finite appropriation of property is a *per se* taking. *See Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1 (1st Cir. 2007). That case addressed allegations that Puerto Rico's Secretary of the Treasury violated the Takings Clause by temporarily withholding insurance premiums to alleviate the Commonwealth's cash-flow problems. *Id.* at 6. In addressing the Secretary's qualified-immunity defense, the First Circuit held that plaintiff pleaded a Takings Clause violation by alleging that the Secretary physically took, "albeit temporarily," $173 million in insurance premiums. *Id.* at 30. The Secretary's "appropriation of the funds," the court

held, "is equivalent to a permanent physical occupation and a *per se* taking for which just compensation must be paid." *Id.* at 28.

New York's highest court has also held that physical invasions are *per se* takings without regard to duration. *See Seawall Assocs. v. City of New York*, 542 N.E.2d 1059, 1065 n.5 (N.Y. 1989). The city, seeking to ensure the availability of low-cost housing, prohibited owners of certain properties from doing anything with them for five years other than restore them to habitable condition and lease them at controlled rents. *Id.* at 1061. Finding that the law stripped property owners of their "fundamental rights to possess and to exclude," the court held that the law effected "a *per se* physical taking" even though it was not "permanent." *Id.* at 1065 & n.5.

Other state and territorial courts have reached the same conclusion. *See GTE Nw., Inc. v. Pub. Util. Comm'n of Oregon*, 900 P.2d 495, 504 (Or. 1995) (en banc) ("The *duration* of the 'taking' by physical invasion is not relevant to the determination of whether a 'taking' has occurred."); *Isely v. City of Wichita*, 174 P.3d 919, 923 (Kan. Ct. App. 2008) ("We conclude that temporariness … constitutes little more than relevant evidence in determining the amount of damages."); *Gutierrez v. Guam Power Auth.*, 2013 Guam 1, 11 (2013) ("The fact that GPA eventually removed the poles does not relieve GPA of its duty to justly compensate Gutierrez for the period in which the poles were continuously affixed to the property.").

2. In stark contrast, the decision below expressly held that, "for a physical invasion to be considered a *per se* taking, it must be permanent." App.50; *see also*

App.41. In doing so, the court exacerbated an already-entrenched division of authority among the lower courts.

For instance, Iowa's highest court recently held that a *per se* takings claim cannot proceed unless the alleged taking will last forever. In *Brakke v. Iowa Department of Natural Resources*, 897 N.W.2d 522 (Iowa 2017), landowners challenged an order that required them to quarantine land formerly used as a deer preserve for five years after deer harvested on the property tested positive for disease. *Id.* at 526. For that five-year period, the landowners were required to place fences on their property and to allow state employees to enter their property to kill deer. *Id.* at 528. The landowners alleged that this imposed a *per se* physical taking. The Iowa Supreme Court disagreed, insisting that "temporary takings are not *per se* violations but are instead analyzed under the multifactor *Penn Central* test." *Id.* at 548.

South Dakota's and Nevada's highest courts have imposed the same requirement. In *Benson v. State*, 710 N.W.2d 131 (S.D. 2006), the court held that "a physical occupation that is less than permanent, and amounts to no more than a temporary physical invasion does not constitute a classic *per se* regulatory physical taking." *Id.* at 150. And in *McCarran Int'l Airport v. Sisolak*, 137 P.3d 1110 (Nev. 2006), the court, after adopting the requirement that all *per se* takings must be "permanent," allowed a challenge to a height-restriction ordinance to go forward only because it found the "permanency" element satisfied. *Id.* at 1125.

The Second Circuit likewise has imposed a "permanency" requirement on *per se* takings claims. In *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992), a state law prohibited a property owner from developing its property in any way that would prevent deer from accessing it. *Id.* at 92. The owners alleged that the law "deprive[d] Southview of its right to exclude the deer from its property, which amounts to a physical occupation of the property." *Id.* After a lengthy explanation of the so-called "permanency aspect" of a physical takings claim, the court allowed the case to go forward only because it concluded that the complaint "satisfied the permanency aspect." *Id.* at 94; *see also Cablevision Sys. Corp. v. FCC*, 570 F.3d 83, 98 (2d Cir. 2009) ("Our own test for whether a regulation constitutes a permanent physical occupation … looks to (1) the permanency of the invasion….").

In sum, to say there has "been some confusion over the use of the terms 'temporary' and 'permanent' in the takings context," *Otay Mesa*, 670 F.3d at 1363, is a considerable understatement. Lower courts are squarely and intractably divided over whether a physical occupation of finite (or even *potentially* finite) duration qualifies as a *per se* taking. While the majority of courts correctly recognize that the duration of a physical taking goes to the compensation due, but does not obviate the duty to compensate, a growing minority treats anything except a permanent physical invasion as a regulatory taking. The split is deep, entrenched, and intolerable. The Federal Circuit hears the vast majority of takings claims against the federal government, and there is no coherent basis for subjecting federal and state (and

local) governments to different takings tests. This Court should grant review to resolve the division among the lower courts and make clear that a physical taking is *per se* compensable, no matter its duration.

B. The Permanency Rule Embraced By the Decision Below Is Wrong.

1. This Court's cases make crystal clear that any difference between "permanent" and "temporary" physical invasions goes only to the amount of compensation that is just, not the duty to compensate. In either scenario, the same categorical rule applies: "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, … even though that use is temporary." *Tahoe-Sierra*, 535 U.S. at 322. Because physical invasions "are relatively rare, easily identified, and usually represent a greater affront to individual property rights" than land-use restrictions, *id.* at 324, this Court has treated *all* direct and substantial invasions of private property as *per se* takings requiring compensation, even if the invasion is temporary.

Indeed, many of this Court's seminal takings cases involve a type of physical taking that is, by its nature, "temporary"—namely, physical appropriation of property during a war. This Court considered several cases, for instance, in which the government seized factories to ensure production during the Second World War. *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945). When the war ended and the government returned the factories to their owners,

the Court did not apply balancing tests or examine how much the seizure interfered with investment-backed expectations. The factory owners were categorically entitled to compensation for the time their property was invaded, and the limited duration of the taking was relevant only to the amount of compensation due. *See Gen. Motors*, 323 U.S. at 382-83.

2. The confusion over whether a taking must be "permanent" stems principally from this Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), which held that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.* at 426. But in context, it is clear that what animated the *Loretto* decision was not the duration of the taking but its physical character, and the "special kind of injury" a property owner suffers "when a stranger directly invades and occupies the owner's property." *Id.* at 436 (emphasis omitted). As the Federal Circuit thus has correctly recognized, in this context, "'permanent' does not mean forever, or anything like it." *Hendler*, 952 F.2d at 1376. It just means that there has been a physical *occupation* of the property, as distinguished from an interference with how the owner may use it.

Indeed, a true "permanency" requirement would be inconsistent with *Loretto* itself, as the physical occupation there was by no means "permanent" in the temporal sense. As the Court recognized, the landlord could have forced the removal of the cable box "by ceasing to rent the building to tenants." *Loretto*, 458 U.S. at 439 n.17. She also could have removed the

cable box if the cable company went out of business or the technology became obsolete. *See id.* at 448 (Blackmun, J., dissenting) ("[The state law] does not require appellant to permit the cable installation forever, but only '[s]o long as the property remains residential and a CATV company wishes to retain the installation.'"). None of those contingencies prevented this Court from treating the physical invasion as a *per se* taking.

Moreover, several cases on which *Loretto* relied to justify its *per se* rule involved takings that were limited in duration. For example, *Loretto* pointed to two more wartime cases that, like the factory seizures, involved short-term physical invasions. *See* 458 U.S. at 430-31 (citing *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951), and *United States v. Causby*, 328 U.S. 256 (1946)). The coal mine in *Pewee* was seized only to ensure wartime coal production, while the overflights in *Causby* were authorized only until "six months after the end of the national emergency." 328 U.S. at 258-59. Even though neither case involved a taking that was "permanent" in the temporal sense, *Loretto* relied on both as examples of *per se* takings. The historical sources on which *Loretto* relied likewise rejected any constitutional distinction between "permanent" and "temporary" physical invasions. *See, e.g.*, 1 P. Nichols, *Law of Eminent Domain* 309-10 (2d ed. 1917) ("land or other property cannot be actually put to use by public authority for a temporary purpose without compensating the owner"); J. Lewis, *Law of Eminent Domain in the United States* 197 (1888) ("Any invasion of property, … whether temporary or permanent, is a taking."). As those sources all make clear, "the duration of a physical taking pertains, not

to the issue of whether a taking has occurred, but to the determination of just compensation." *Otay Mesa*, 670 F.3d at 1363.

To the extent *Loretto*'s use of the word "permanent" does any work at all, what it means is that some governmental invasions are so transient and inconsequential that they do not meaningfully constitute "occupation" or deprive the property owner of the use and enjoyment of his property. *Hendler*, 952 F.2d at 1377. The Federal Circuit has used the example of a government "truckdriver parking on someone's vacant land to eat lunch," *id.*, and has rejected a claim seeking compensation for "extremely limited and transient" invasions by government owl surveyors, *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1357 (Fed. Cir. 2002). This Court similarly has upheld an NLRA provision requiring business owners to allow momentary entries by union organizers, *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 545 (1972), and has dismissed any takings concerns with the invasion by "firemen upon burning premises," *Nat'l Bd. of Young Men's Christian Ass'ns v. United States*, 395 U.S. 85, 93 (1969).

But there is a fundamental difference between recognizing a *de minimis* exception for truly fleeting and limited-purpose intrusions and deeming a complete denial of the right to exclude the public something less than a *per se* taking because it is not foreordained that it will be permanent. Here, of course, there is nothing fleeting or *de minimis* about the taking. Petitioner is currently subject to an injunction that compels it to keep its private property open to the public unless it obtains a government

permit allowing it to exclude. Unless and until petitioner gets the state's say-so, it must allow members of the public to use its private property. That is a textbook physical taking that demands compensation, no matter how long it lasts.

II. The Court Should Grant Certiorari To Decide Whether The California Coastal Act Is Unconstitutional As Applied Here.

The court below correctly recognized that petitioner's property has been physically taken by virtue of the trial court's injunction compelling a public-access easement unless and until petitioner obtains a permit. Accordingly, a holding that physical takings demand compensation even if they are not permanent would suffice to require vacatur of the injunction, which itself constitutes an uncompensated taking. After all, whether it acts "by statute" or "by judicial decree," "a State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980); *see also Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702 (2010).

That said, this Court's grant of certiorari should extend to reviewing the constitutionality of the underlying source of that injunction—namely, the California Coastal Act's command that a private property owner may not take *any* action that would impact the "intensity" of the public's use of or access to the ocean without first obtaining a permit. As applied to prevent property owners from reducing the intensity of use and access by excluding the public from their private property, or even changing the

hours, days, or prices on which they allow the public onto their property, the permitting obligation itself constitutes an out-and-out physical taking, as it demands—on threat of onerous and coercive civil fines—a public-access easement over private property without just compensation. As a general matter, California is free to impose the Orwellian obligation to obtain a development permit to reduce the extent of coastal development. But when California demands a permit before a private property owner may exercise the fundamental rights to close or alter the terms of a business and exclude the public from private property, it crosses a constitutional line. And when the state demands a permit before painting over a private sign informing the public of their right to trespass, yet another constitutional line is crossed.

The right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Loretto*, 458 U.S. at 433. It is what makes private property private. For that reason, the government violates the Takings Clause not only when it confiscates private property, but also when it mandates a public easement over private land, thereby depriving the owner of his right to exclude. That proposition, by now well-settled, was established in *Nollan*, another case involving the California Coastal Commission's efforts to coerce a private property owner to open its property to the public without compensation.

In *Nollan*, the Commission granted the Nollans a permit to build a house on their beachfront property, "subject to the condition that they allow the public an easement to pass across a portion of their property."

Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 828 (1987). The question was whether that coercive condition violated the Takings Clause. In the course of answering that question, this Court made clear that a *per se* taking would "obvious[ly]" result if a state simply declared a public-access easement: "Had California simply required the Nollans to make 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." *Id.* at 831.

This Court reaffirmed that principle in *Dolan*, when it again addressed an allegedly unconstitutional coercive permitting condition, and again began from the premise that declaring a public-access easement by *ipse dixit* would be *per se* unconstitutional: "Without question, had the city simply required petitioner to dedicate a strip of land … for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred." *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994). Likewise, in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013), this Court again confirmed that "if the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a *per se* taking." *Id.* at 2598-99.

The Coastal Act seizes an easement over Martins Beach in exactly the manner that *Nollan*, *Dolan*, and *Koontz* considered a *per se* taking. The Act requires

any person "wishing to perform or undertake any development in the coastal zone ... [to] obtain a coastal development permit." Cal. Pub. Res. Code §30600. The Act defines "development" as any "change in the intensity of use of water, or of access thereto." Cal. Pub. Res. Code §30106. By counter-intuitively interpreting a *reduction* in the intensity of use occasioned by exercising a previously unexercised right to exclude as "development," the decision below interprets the Coastal Act to simply demand a public easement (not to mention continued operation of a business at a loss and compelled speech) unless and until petitioner can obtain a permit. Thus, the hypothetical *per se* taking this Court posited in *Nollan*, *Dolan*, and *Koontz* describes this case to a tee: California has "simply required [petitioner] to make an easement across [its] beachfront available to the public." *Nollan*, 483 U.S. at 831. Under *Nollan*, *Dolan*, and *Koontz*, that is a *per se* physical taking.

The lower court nonetheless dismissed petitioner's takings challenge to the Coastal Act on "ripeness" grounds. But the court did not deem the challenge unripe because there was some unexhausted mechanism for obtaining compensation for the compelled easement, however long it lasted. To the contrary, neither the Coastal Commission nor the County has ever suggested that it would compensate petitioner for the public easement, and there is no mechanism for either to do so. Instead, the court found the takings claim "unripe" simply because it speculated that a permit might one day be granted. In other words, the court deemed petitioner's challenge to the Coastal Act (as opposed to the injunction)

"unripe" because it was "temporary"—or, more accurately, indefinite but not obviously permanent.

That just repeats the same error the court committed with respect to the injunction, this time under the rubric of "ripeness." But the court's reasoning is, if anything, even less defensible as a ripeness holding. If the government physically occupied petitioner's property, but provided an avenue through which petitioner could repossess the property, the latter avenue would not make the current physical taking unripe. Put differently, the possibility of abating an ongoing taking does not make the ongoing taking any less ripe for legal redress—especially when the government has no ready mechanism for compensating the ongoing taking as long as it lasts. In short, neither ripeness doctrine nor the possibility of a permit saves the Coastal Act from imposing a naked, ongoing public-access easement.

But the constitutional problems with California's novel conflation of the exercise of basic constitutional rights with "development" necessitating a permit do not end there. The lynchpin of California's decision to force petitioner to give the public access to its property is the fact that the prior owner (and petitioner briefly) offered the public access in exchange for a fee as part of a commercial enterprise. Based on that foothold, the government not only converted privately negotiated access into government-compelled access, but also required petitioner to grant the public access at times, days, and prices of the government's choosing—terms that generate ongoing losses—unless petitioner obtains a permit to change those terms. Indeed, petitioner must continue operating the beach

on exactly the same terms and at exactly the same prices (unadjusted for inflation) as when its predecessors operated the business *in 1973*. Petitioner cannot reduce its days or hours of operation and cannot increase the price of admission from a paltry $2 (35 cents in 1973 dollars) without the Commission's say-so, because those actions would (according to the Commission) change the "intensity" of access to the water and are therefore "development" requiring a permit.

The Coastal Act, as interpreted below, thus stacks multiple violations atop the core Takings Clause problem. By prohibiting petitioner from closing its business without first obtaining a permit, the Act contravenes petitioner's "absolute right to terminate his entire business for any reason he pleases." *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 268 (1965). And by prohibiting petitioner from raising the entry fee from that which prevailed in *1973* even to account for inflation, the Act violates constitutional prohibitions on confiscatory government-imposed rates. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989). Accordingly, while the imposition of an uncompensated public-access easement is a taking in and of itself, the Coastal Act as applied here actually imposes two takings—first, by physically invading the property, and second, by prohibiting petitioner from recouping the substantial costs of opening the property to the public. If the Coastal Act requires a permit to shut down a business or operate that business profitably, then the Coastal Act is unconstitutional.

Indeed, this Court in *Nollan*, *Dolan*, and *Koontz* considered the possibility of the government outright demanding a public-access easement rather than requiring it as a condition of some sought-after development permit. This Court had no difficulty labeling that possibility a *per se* taking. But this Court could not even conceive that the government would not only demand that a private property owner provide the public with an easement, but also force the property owner to furnish parking and soft drinks to the public at a loss. Yet that is what things have come to in California circa 2018.

But, wait, there is still more. The Coastal Act as interpreted below not only compels public access (with parking at 1973 rates) to private property, but even manages to compel speech. According to the California courts, petitioner engaged in unpermitted "development" by painting over a preexisting sign that advertised public access to the property, because changing how it *advertises* access might decrease "the intensity of use of water, or of access thereto." Cal. Pub. Res. Code §30106. But for the First Amendment, the facial absurdity of that definition of "development" would be Californians' problem. The First Amendment, however, makes compelled advertising of the opportunity to trespass for a pittance a constitutional problem. "[C]ompelling cognizable speech … is just as suspect as suppressing it, and typically subject to the same level of scrutiny." *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 480-81 (1997); *see also, e.g.*, *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781 (1988). Whatever power the state may have to compel speech (or its subsidization) from willing participants in a state-

regulated industry, the state does not have the power to compel someone to affirmatively advertise a public-access easement that he is not even willingly providing in the first place at bargain-basement prices.

In short, the government cannot condition a property owner's right to exclude on the permission of a government agency. Nor can it require a property owner to get the government's say-so before it may cease advertising the opportunity to trespass, park at 1973 rates, and enjoy a day on what all agree is at least nominally private property. By purporting to do all that and more, the Coastal Act is unconstitutional several times over.

III. The Questions Presented Are Exceptionally Important.

The decision below renders the California Coastal Act an extreme outlier that runs roughshod over all manner of constitutional rights. By the lower court's telling, private property owners can be compelled to invite the public onto their private property, to provide parking and soft drinks at Whip-Inflation-Now prices, and to advertise this extraordinary opportunity to the very public the property owner would like to exclude. The decision below thus interpreted the Act to impose at least two distinct unconstitutional takings, and to violate the Due Process Clause and the First Amendment to boot.

Left standing, that decision will throw private property rights in California into disarray. After all, petitioner is hardly the only private property owner along the vast California coast, or the only one who would prefer to exclude the public from its private

property. And petitioner will hardly be the last coastal property owner who wishes to cease operating a business or to change its prices or hours of operation. Anywhere but California, this *reduction* in the intensity of public use of the oceanfront might be a welcome antidote to "development" as conventionally understood. But in California, exercising the fundamental property right to exclude, the equally fundamental right to shutter a money-losing business, and the First Amendment right to refrain from engaging in unwanted advertising all constitute "development" necessitating a permit. As a matter of California law, California is, of course, free to interpret "development" as counter-intuitively as it pleases. But it is not free to interpret the term to run roughshod over petitioner's federal constitutional rights.

Put simply, the Coastal Act as interpreted below is not remotely consistent with the Constitution's command that the state may not take private property without paying just compensation. It is therefore imperative that this Court make definitively clear that states may not outright compel the very easements that the Court held they could not coerce in *Nollan* and *Dolan*, and that they may not avoid their obligation to pay just compensation by holding out the mere prospect that a physical taking may someday abate. This is an ideal case in which to reaffirm those bedrock propositions, as the decision below ultimately rests entirely on the court's erroneous holding that, "for a physical invasion to be considered a *per se* taking, it must be permanent." App.50. Once that fatal flaw is corrected, it is clear not only that the court-mandated easement cannot survive, but that the

Coastal Act cannot constitutionally be applied in the manner it has been applied here.

Accordingly, the Court should grant certiorari to resolve the deep, entrenched, and intolerable split over whether a physical taking must be "permanent" to be a *per se* taking. The rules for takings in California should not be different from those in the rest of the country. *A fortiori*, the rules for takings by the federal and state government within California should be the same. And California's bizarre effort to condition the rights to exclude, shutter a business, and avoid compelled speech on obtaining a permit from the Coastal Commission should be invalidated before it takes root.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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February 22, 2018

APPENDIX

TABLE OF APPENDICES

Appendix A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

A144268
A145176
(San Mateo County
Super. Ct. No. CIV520336)

SURFRIDER FOUNDATION,

Plaintiff and Respondent,

v.

MARTINS BEACH 1, LLC et al.,

Defendants and Appellants.

Filed August 9, 2017

Nestled in a cove, sheltered on the north and south by high cliffs, Martins Beach lacks lateral land access.[1] The only practical route to Martins Beach is down a road, known as Martins Beach Road, that

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[1] On our own motion, we take judicial notice of these geographical facts relating to Martins Beach. (Evid. Code § 452, subd. (h); *In re Nicole H.* (2016) 244 Cal.App.4th 1150, 1153; see also California Coastal Records Project <http://www.cacoast.org/6182> (as of Aug. 3, 2017).)

leads from Highway 1 in San Mateo County to the beach.

Appellants are two LLCs, Martins Beach 1, LLC and Martins Beach 2, LLC, that purchased Martins Beach and adjacent land including Martins Beach Road in July 2008. Respondent Surfrider Foundation (Surfrider) is a non-profit organization dedicated to the protection of oceans, waves, and beaches, including the preservation of access for recreation. A year or two after purchasing Martins Beach, appellants closed off the only public access to the coast at that site. Surfrider brought suit against appellants. The trial court held the California Coastal Act (Pub. Res. Code, §§ 30000-30900) (Coastal Act)[2] applied to the conduct of appellants, and they were required to apply for a coastal development permit (CDP) before closing public access. The court also issued an injunction that requires appellants to allow public coastal access at the same level that existed when appellants bought the Martins Beach property in 2008. We affirm the trial court's conclusion appellants' conduct is "development" requiring a CDP under section 30106 of the Coastal Act. Further, we conclude appellants' constitutional challenge to the Coastal Act's permitting requirement under the state and federal takings clauses is not ripe, and we reject appellants' contention that the trial court's injunction is a per se taking. Finally, we affirm the trial court's award of attorney fees to Surfrider.

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[2] All undesignated statutory references are to the Public Resources Code.

BACKGROUND

Before appellants purchased Martins Beach, the public was permitted to access the coast by driving down Martins Beach Road and parking along the coast, usually upon payment of a fee. Public access was only permitted during the daytime, and access in the winter varied based on the weather.[3]

A table (10.1) attached to San Mateo County's 1998 Local Coastal Program policies manual indicates that, while Martins Beach is privately owned, there is public access to the water and a high level of existing use. Prior to appellants' purchase of the Martins Beach property, appellants were told by San Mateo County that "[t]here is existing parking [and] access to the beach at Martins Beach. This access [is] also memorialized [and] required to be preserved (no exceptions) by the Local Coastal Program" and "the access is there & will have to remain."

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[3] The parties dispute the nature and extent of public access to Martins Beach prior to 2008. Appellants contend the previous owners "operated a business of allowing permissive access to their property upon payment of a fee." They argue the access was entirely permissive, pointing to testimony that the previous owners would "just close it down for any period [they] felt like closing it." We need not summarize all the evidence on the history of access to the coast at Martins Beach, because whether the public acquired a right of access through the history of public use is not at issue in the present litigation. As explained later in this background summary, whether there has been a dedication of a public use right *is* at issue in separate ongoing litigation to which Surfrider is not a party. (See *Friends of Martin's Beach v. Martins Beach 1 LLC, et al.* (Super. Ct. San Mateo County, CIV517634).)

Following the purchase of Martins Beach in July 2008, appellants continued to allow the public to access the coast upon payment of a parking fee. From July 2008 to September 2009, numerous vehicles paid the fee to access the coast.[4] Appellants stopped allowing public access in September 2009.[5] They closed the gate (requiring a remote control or key to open it), put a no-access sign on the gate, and painted over a billboard at the entrance to the property that had advertised access to the beach.

Prior to this complete closure, on February 6, 2009, the San Mateo County Planning and Building Department had sent appellants an "Informational Warning Letter" that, among other things, referenced observations that the gate allowing access to Martins Beach was closed and the billboard advertising access had been painted over. The County requested a schedule of operation and an explanation "of how the schedule relates to historic patterns of public use," to allow a determination of whether future beach closures "would trigger the need for a CDP." The County asserted that "any change in the public's ability to access the shoreline at Martins Beach triggers the need for a CDP because it represents a 'change in the intensity of use of water or access

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[4] According to the trial court's characterization of appellants' records, 1,044 vehicles paid the access fee during that period.

[5] In their discovery responses, appellants stated access was closed in the summer or fall of 2010. But at trial appellants' manager testified that logs recording payments of fees reflected the extent of access permitted to Martins Beach, and there is no access recorded in the logs after September 2009. In any event, the date when access was closed is not important for the purposes of the present appeal.

thereto.' " (See § 30106.) On February 9, appellants responded, informing the County they "voluntarily intended to maintain the same amount and type of access as did our predecessors." Appellants also stated the beach was usually closed in winter and they considered the public "invited guests."

In April 2009, the County responded to appellants' February letter, again asserting appellants were required to apply for a CDP before changing the public's access to Martins Beach. Among other things, the County requested additional information regarding the history of public access, referencing publications stating the public previously had year-round access to Martins Beach. In May, appellants again informed the County they would "provide access to the extent it was provided by the" prior owners, but appellants asserted they were not legally obligated to do so. Appellants also offered to "provide [the County] with affidavits" to support their contentions about the circumstances under which access and use had historically existed.

In June 2009, appellants filed a lawsuit against San Mateo County (the County) and the California Coastal Commission (the Coastal Commission), seeking a declaration that, among other things, they were not required to maintain public access to Martins Beach. In October, the trial court in the case sustained the defendants' demurrers without leave to amend, concluding appellants were obligated to "comply with the administrative process provided by the" Coastal Act before seeking a judicial determination of their rights.

In September 2009, appellants stopped allowing the public access to the coast at Martins Beach. Appellants did not apply for a CDP allowing them to do so.

In September 2011, the Coastal Commission sent appellants a letter asserting, among other things, that "the erection of beach closure signs . . . as well as the permanent closure of an existing gate . . . [at Martins Beach] would constitute development under the Coastal Act" and San Mateo County's Local Coastal Plan. In November, San Mateo County sent appellants a letter entitled in part, "Notice of Preliminary Determination of Violation." The letter asserted appellants' "closure of the coastal access" at Martins Beach was unlawful because appellants did not obtain a CDP. In December, appellants responded, arguing the beach closure was not a violation of the Coastal Act. Appellants asserted, "the road on Martins Beach is not subject to any access easement or any condition of any permit, but, rather, has historically been available to the public permissively at the voluntary election and sole discretion of the property owner." The parties do not refer to further enforcement efforts by the County or the Coastal Commission relating to closure of public access to Martins Beach.

In October 2012, an unincorporated association going by the name "Friends of Martin's Beach" filed a lawsuit against appellants seeking access to the coast at Martins Beach based on claims including a constitutional right of access or an express dedication of access. (*Friends of Martin's Beach v. Martins Beach 1, LLC, et al.* (Super. Ct. San Mateo County,

CIV517634).) The trial court in that case entered summary judgment in favor of appellants, concluding Martins Beach is private property not subject to any right of public access. The plaintiff appealed, and Division 2 of this court reversed in part. (*Friends of Martin's Beach v. Martin's Beach 1 LLC* (Apr. 27, 2016, A142035) review den. and opn. ordered nonpub. July 20, 2016.) As relevant here, the court of appeal held the plaintiff had "alleged facts sufficient to state a common law dedication claim" and appellants had "not shown that as a matter of law they are entitled to judgment" on the claim. (*Id.* at p. 45.) The court of appeal remanded for trial on the dedication claim. (*Id.* at p. 51.) The *Friends of Martin's Beach* case is still pending in the trial court; accordingly, the existence of public access rights to Martins Beach is presently undetermined.

In March 2013, Surfrider filed the present action. The complaint alleged appellants engaged in "development" (§ 30106) within the meaning of the Coastal Act by closing public access to the coast at Martins Beach. The complaint alleged appellants closed the gate to Martins Beach Road, added a sign to the gate stating "BEACH CLOSED KEEP OUT," covered over another sign that had advertised public access, and stationed security guards to deny public access. The complaint sought a declaration that appellants' conduct constituted development under the Coastal Act requiring a CDP, injunctive relief, imposition of fines, and an award of attorney fees under Code of Civil Procedure section 1021.5. Appellants filed a cross-complaint seeking a declaration that its conduct did not constitute

development under the Coastal Act and an injunction prohibiting trespassing.

Trial began in May 2014, and the trial court received testimony and documentary evidence over the course of six court days.[6] In November, the trial court issued a Final Statement of Decision holding that appellants had, without a CDP, engaged in "development" within the meaning of the Coastal Act by stopping the public's use of and access to Martins Beach.[7]

In December 2014, the trial court entered judgment in favor of Surfrider on its claims for declaratory and injunctive relief. The court declared, "[Appellants'] desire to change the public's access to and use of the water, beach and coast at Martins Beach constitutes development under the [Coastal Act]. [Citation.] Consequently, if [appellants] wish to change the public's access to and use of the water, beach and/or coast at Martins Beach, they are

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[6] Also in 2014, Senate Bill 968 was signed into law and codified at section 6213.5. (Stats. 2014, ch. 922, § 1.) That statute authorizes the State Lands Commission to negotiate with appellants "to acquire a right-of-way or easement . . . for the creation of a public access route to and along the shoreline . . . at Martins Beach" and, if necessary, "to acquire a right-of-way or easement, pursuant to Section 6210.9, for the creation of a public access route to and along the shoreline, including the sandy beach, at Martins Beach. . . ." (§ 6213.5, subds. (a)(1) & (b).) The parties cite to nothing in the record indicating that any such negotiations have occurred or that any such proceeding has been initiated.

[7] The trial court declined to impose fines on appellants, and the court rejected the claims in appellants' cross-complaint. Those claims are not at issue in the present appeal.

required to obtain a [CDP] prior to doing so." The court also declared, "[Appellants'] conduct in changing the public's access to and use of the water, beach and coast at Martins Beach, specifically by permanently closing and locking a gate to the public across Martins Beach Road, adding signs to the gate, changing the messages on the billboard on the property and hiring security guards to deter the public from crossing or using the Property to access the water, beach and coast at Martins Beach without a [CDP] constitutes a violation of the [] Coastal Act."

The judgment also provided the following injunctive relief: "[Appellants] are hereby ordered to cease preventing the public from accessing and using the water, beach and coast at Martins Beach until resolution of [appellants'] [CDP] application has been reached by San Mateo County and/or the Coastal Commission. The gate across Martins Beach Road must be unlocked and open to the same extent that it was unlocked and open at the time [appellants] purchased the property."

In December 2014, Surfrider filed a motion for attorney fees pursuant to section 1021.5 of the Code of Civil Procedure. Surfrider requested fees in the amount of $609,176.93 and costs in the amount of $15,511.01. That request included a voluntary reduction of over 25% from the lodestar total based on counsel's actual hours. In May 2015, the trial court granted the motion and awarded Surfrider $470,461.55 in attorney fees and $15,511 in costs.

Appellants appealed from both the judgment and the order granting attorney fees. Amici curiae briefs in support of Surfrider were filed by the Coastal

Commission (joined by the County) and Coastwalk California; an amici curiae brief in support of appellants was filed by the Pacific Legal Foundation, on its own behalf and on behalf of a number of business associations interested in the regulation of California coastal development.[8]

DISCUSSION

I. *Appellants' Conduct is "Development" Under the Coastal Act*

Appellants contend the trial court erred in concluding that their conduct in closing public access to Martins Beach constituted "development" requiring a CDP under section 30106 of the Coastal Act. Appellants' claim fails.[9]

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[8] This court previously deferred ruling on Surfrider's March 30, 2016 request for judicial notice of a January 2016 letter from the Coastal Commission to the chief of the Palos Verdes Estates Police Department regarding the interpretation of "development" as used in the Coastal Act. Because consideration of the letter is unnecessary to resolution of the issues on appeal, the request for judicial notice is denied.

[9] We reject the contention of amicus the Coastal Commission that appellants were required to exhaust their administrative remedies under *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072 (*Coachella Valley*), before presenting this claim. As in *Coachella Valley*, the issue in the present case is of "significant public interest," it is "purely legal and of a kind within the [court's] expertise," and "we have received the benefit of the [Coastal Commission's] views . . . through its [amicus brief] in this court." (*Id.* at p. 1083.)

Appellants also argue the public cannot be given access rights under the Coastal Act because title to the Martins Beach property is derived from a Mexican land grant confirmed by a federal patent issued in the 19th century. That claim is a

A. *The Coastal Act*

"The Coastal Act of 1976 (. . . § 30000 et seq.) was enacted by the Legislature as a comprehensive scheme to govern land use planning for the entire coastal zone of California. The Legislature found that 'the California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people'; that 'the permanent protection of the state's natural and scenic resources is a paramount concern'; that 'it is necessary to protect the ecological balance of the coastal zone' and that 'existing developed uses, and future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state . . . .' (§ 30001, subds. (a) and (d)). '[T]he basic goals of the state for the coastal zone' are to: '(a) Protect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and manmade resources. [¶] (b) Assure orderly, balanced utilization and conservation of coastal zone resources taking into account the social and economic needs of the people of the state. [¶] (c) Maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources

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challenge to the Coastal Commission's jurisdiction as to which appellants must exhaust their administrative remedies by applying for a CDP. (*Coachella Valley, supra*, 35 Cal.4th at pp. 1082-1083.) Among other things, and in contrast to appellants' claim regarding the meaning of the term "development," we have not received the benefit of the Coastal Commission's views regarding this contention, which has potentially broad implications for the operation of the Coastal Act.

conservation principles and constitutionally protected rights of property owners. [¶] (d) Assure priority for coastal-dependent and coastal-related development over other development on the coast. [¶] [and] (e) Encourage state and local initiatives and cooperation in preparing procedures to implement coordinated planning and development for mutually beneficial uses, including educational uses, in the coastal zone.' (§ 30001.5.)" (*Yost v. Thomas* (1984) 36 Cal.3d 561, 565-566 (fn. omitted); see also *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2007) 55 Cal.4th 783, 793-794 (*Pacific Palisades*).) The Coastal Act "shall be liberally construed to accomplish its purposes and objectives." (§ 30009; accord *Pacific Palisades*, at pp. 793-794.)

Under the Coastal Act, with the exception of certain emergency work, any person "wishing to perform or undertake any development in the coastal zone . . . shall obtain a coastal development permit," in addition to any other permits required by law. (§ 30600, subd. (a).)[10] Section 30106 provides that " 'Development' means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged

[10] The Coastal Act "requires local governments to develop local coastal programs, comprised of a land use plan and a set of implementing ordinances designed to promote the act's objectives of protecting the coastline and its resources and of maximizing public access. [Citations.] Once the Coastal Commission certifies a local government's program, and all implementing actions become effective, the commission delegates authority over coastal development permits to the local government." (*Pacific Palisades*, *supra*, 55 Cal.4th at p. 794.) San Mateo County has a certified Local Coastal Program.

material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act . . . , and any other division of land, . . . ; *change in the intensity of use of water, or of access thereto*; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber harvesting plan . . . ." (Emphasis added.) The Coastal Act also contains procedures for waiver of the permit requirement and categorical exclusions from the requirement. (§§ 30108.6, 30610.)

The Coastal Act also includes findings about the importance of public participation. Section 30006 provides, "The Legislature further finds and declares that the public has a right to fully participate in decisions affecting coastal planning, conservation and development; that achievement of sound coastal conservation and development is dependent upon public understanding and support; and that the continuing planning and implementation of programs for coastal conservation and development should include the widest opportunity for public participation."

B. *Statutory Interpretation Principles*

" 'As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate

the law's purpose.' [Citation.] We begin by examining the statutory language because the words of a statute are generally the most reliable indicator of legislative intent. [Citations.] We give the words of the statute their ordinary and usual meaning and view them in their statutory context. [Citation.] We harmonize the various parts of the enactment by considering them in the context of the statutory framework as a whole. [Citations.] 'If the statute's text evinces an unmistakable plain meaning, we need go no further.' [Citation.] 'Only when the statute's language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation.' " (*In re C.H.* (2011) 53 Cal.4th 94, 100-101.) "When a provision of the Coastal Act is at issue, we are enjoined to construe it liberally to accomplish its purposes and objectives, giving the highest priority to environmental considerations." (*McAllister v. California Coastal Com.* (2008) 169 Cal.App.4th 912, 928.)

C. *The Plain Language of the Coastal Act Controls*

The trial court held appellants' conduct in closing public access to Martins Beach was "development" under the Coastal Act because it decreased access to the water. (§ 30106 ["development" includes "change in the intensity of use of water, or of access thereto"].) Appellants argue, "the simple acts of closing a gate and painting a sign do not constitute 'development' that requires a permit. It is commonsense that these acts are nothing like those specifically covered by the statute—such as constructing or demolishing a building, dredging or mining the land, or subdividing

parcels." Similarly, they assert, "What the actions included in Section 30106's definition have in common is that they significantly change the nature of the land or a structure built on the land in question."

The Coastal Act has not been read as narrowly as appellants propose. Instead, the courts have given the term "development" an "expansive interpretation . . . consistent with the mandate that the Coastal Act is to be 'liberally construed to accomplish its purposes and objectives.' [§ 30009]." (*Pacific Palisades*, *supra*, 55 Cal.4th at p. 796; see also *Gualala Festivals Committee v. California Coastal Com.* (2010) 183 Cal.App.4th 60, 67 (*Gualala*) ["the statute provides an expansive definition of the activities that constitute development for purposes of the Act. It is the language of that definition that must be applied and interpreted, giving the words their usual and ordinary meaning."].) Thus, directly contrary to appellants' assertions, "the Coastal Act's definition of 'development' goes beyond 'what is commonly regarded as a development of real property' [citation] and is not restricted to activities that physically alter the land or water [citation]." (*Pacific Palisades*, at p. 796; see also *Gualala*, at p. 67 [fireworks display is development under plain language of section 30106, even though not "commonly regarded" as such]; *Surfrider Foundation v. California Coastal Com.* (1994) 26 Cal.App.4th 151, 158 ["the public access and recreational policies of the Coastal Act should be broadly construed to encompass all impediments to access, whether direct or indirect, physical or nonphysical"].) What is important for purposes of section 30106 in the present case is that appellants' conduct indisputably resulted in a

significant *decrease* in access to Martins Beach. *Pacific Palisades* specifically contemplated that such a change would be within the scope of the Coastal Act permitting requirement. (*Pacific Palisades*, at p. 795 ["section 30106, by using the word 'change,' signals that a project that would decrease intensity of use, such as by limiting public access to the coastline or reducing the number of lots available for residential purposes, is also a development"].) Accordingly, the nature of the conduct at issue does not undermine the conclusion that it is development under the plain language of section 30106.[11]

Appellants also contend the trial court erred in interpreting the Coastal Act because it "failed to differentiate between true 'public access'—the right of the public to freely traverse open lands—and 'permissive access'—where a private owner allows invitees to enter and use his or her lands." They suggest development under the Act should be read to encompass activities that result in a change in the intensity of access to water only where the access is pursuant to an *established public right of access*. They argue the contested language in section 30106 "was simply intended to require a property owner to obtain a permit if it wants to make changes that will impact a preexisting right of public use or access—i.e., limiting access to a public easement that has been

[11] Appellants also argue their conduct does not constitute development because the gate and sign allegedly predate the Coastal Act, the act does not regulate the content of signs, and the gate and fence are authorized because they are in an agricultural zone. Appellants' arguments are misplaced. It is the totality of appellants' conduct in closing access to Martins Beach that the court concluded fell within the definition of development.

granted, purchased, or otherwise acquired as matter of legal right—not when a property owner simply wants to limits the extent to which it will invite the public to use its concededly private property." Essentially, they argue section 30106 should be applied as if it read, "development" includes "change in the intensity of use of water, or of *established public right of* access thereto."

However, appellants point to nothing in the Coastal Act that would permit this court to add the limiting descriptive phrase "established public right of" to section 30106. (*People v. Massicot* (2002) 97 Cal.App.4th 920, 925 ["In construing a statute, it is the role of the judiciary to simply ascertain and declare what is in terms or in substance contained in the statute, not to insert what has been omitted."]; see also *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349 (*California Federal*).) Appellants focus on section 30211, in Article 2 of Chapter 3 of the act (entitled "Public Access"), which provides in part, "Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization. . . ." But that provision does not purport to modify the definition of development in section 30106.[12]

Next, appellants emphasize language in the Coastal Act providing assurances regarding the protection of private property rights. For example, section 30010 states, "The Legislature hereby finds

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[12] We need not decide for purposes of the present appeal whether section 30211 contemplates that findings about acquisition of use rights may be made in proceedings on a CDP.

and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States." However, that provision merely re-states the limitations imposed by the takings clauses. Nothing in that language or other provisions referenced by appellants provides any basis to adopt the narrowing interpretation they propose. Instead, one of the "basic goals of the state for the coastal zone" is to "*Maximize* 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." (§ 30001.5, subd. (c), emphasis added.) Thus, maximizing access is the goal, with the constitutional rights of property owners as the outside limit on access. The Legislature's determination to define "development" broadly and require consideration of property rights during the permitting process is sensible because it allows for public participation and the development of a full record regarding the nature and extent of the private and public property rights at stake.

Finally, appellants contend an interpretation of the Coastal Act permitting requirement that encompasses their conduct "would lead to all manner of absurd results. Must a private owner seek a permit

anytime he wishes to throw a party with guests, and then again before he asks his guests to leave? Must a private owner who has a permit to install a water pump seek a permit every time he wishes to turn the pump on or off? Is a permit necessary to have a garage sale at one's home situated on the Coast?" However, the Coastal Act recognizes and addresses the possibility that the broad definition of development could be applied in situations where it would be inappropriate to require a CDP. Thus, section 30610 (entitled "Developments authorized without permit") provides that no permit shall be required with respect to a number of specific listed activities; with respect to "temporary event[s]" that do "not have any significant adverse impact upon coastal resources" (§ 30610, subd. (i)(1)); and with respect to "[a]ny category of development, or any category of development within a specifically defined geographic area, that the commission . . . has described or identified and with respect to which the commission has found that there is no potential for any significant adverse effect, either individually or cumulatively, on coastal resources or on public access to, or along, the coast . . . ." (§ 30610, subd. (e); see also Cal. Code Regs., tit. 14, Div. 5.5, Ch. 6 ["Exclusions from Permit Requirements"].) Further, section 30624.7 authorizes the Coastal Commission to establish procedures for the executive director to issue "waivers from [CDP] requirements for any development that is de minimis" and defines "de minimis" as a development that "involves no potential for any adverse effect, either individually or cumulatively, on coastal resources . . . ." (See also *Pacific Palisades*, *supra*, 55 Cal.4th at p. 797 [noting that, through section 30624.7, the Coastal Act

"accounts for the possibility a proposed project may not affect coastal resources"]; *Gualala*, *supra*, 183 Cal.App.4th at p. 69 [citing section 30624.7 and stating "[t]hus, temporary or de minimis activity that does not adversely impact coastal resources is characterized in the statute as 'development' but may be exempted from the permit requirement"].)

That the Legislature adopted exceptions from the permitting requirement and authorized further exemptions for conduct that would literally constitute "development" under section 30106 shows the broad definition was meant to be taken literally and the possibility that it would be absurd to require a CDP for certain conduct would be addressed through the procedures for exceptions in the Coastal Act. Appellants fail to show that the exceptions procedures are inadequate. The *Gualala* court rejected an argument directly analogous to that made by appellants. There, the appellant argued construing development broadly enough to encompass its fireworks festival would lead to " 'absurd results,' " outlining various scenarios, as appellants do in the present case. (*Gualala*, *supra*, 183 Cal.App.4th at p. 69, fn. 3.) *Gualala* rejected the argument, stating "The exemption and waiver provisions, however, avoid [appellant's] hypothetical absurdities." (*Ibid.*) The court further explained, "Construing the Act to provide the [Coastal] Commission with both expansive jurisdiction to control even limited, temporary development and the authority to exempt from the permit process development that does not have 'any significant adverse impact upon coastal resources' provides the [Coastal] Commission the necessary flexibility to manage the coastal zone environment so

as to accomplish the statutory purposes." (*Id.* at pp. 69–70; accord *Pacific Palisades*, *supra*, 55 Cal.4th at p. 797.) The same reasoning applies here.[13]

Liberally construing the Coastal Act to accomplish its purposes and objectives (§ 30009), we conclude the trial court did not err in applying the plain language of section 30106.[14]

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[13] Arguably, interpreting section 30106 to encompass appellants' conduct would trigger the section 30212 requirement that "new development projects" provide public coastal access. (See *Whaler's Village Club v. California Coastal Com.* (1985) 173 Cal.App.3d 240, 258.) However, if the permit consideration process disclosed no basis to deny appellants a CDP allowing them to close public access to Martins Beach, it would likely be improper to impose that access requirement. Among other things, section 30214, subdivision (b), requires that "the public access policies of this article be carried out in a reasonable manner that considers the equities and that balances the rights of the individual property owner with the public's constitutional right of access."

[14] Because the plain language of section 30106 controls, it is unnecessary to address appellants' arguments based on the legislative history of the Coastal Act. (*People v. Flores* (2003) 30 Cal.4th 1059, 1063 ["When the language of a statute is clear, we need go no further."]; *California Federal*, *supra*, 11 Cal.4th at p. 349 ["When, as here, ' " 'statutory language is . . . clear and unambiguous there is no need for construction, and courts should not indulge in it.' " ' "].) In any event, none of appellants' arguments provide a persuasive basis to reject a plain language interpretation of section 30106. Appellants also point to section 6213.5, which directs the Coastal Commission to negotiate with appellants to obtain an easement or to acquire an easement by eminent domain. (See fn. 6, *ante*.) However, appellants do not explain how the enactment of section 6213.5 is relevant to our construction of "development" in the Coastal Act. Section 6213.5 reflects the Legislature's intent that public access to Martins Beach be preserved, but it does not affect our analysis.

II. *Appellants' Challenge to the Coastal Act's Permit Requirement is Not Ripe*

Appellants contend interpreting the Coastal Act to require they apply for a CDP would constitute an unconstitutional taking under the state and federal Constitutions. Surfrider and amicus the Coastal Commission argue that claim is not ripe for review. We agree.

A takings claim that challenges the application of regulations to particular property is not ripe until "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." (*Williamson Co. Regional Planning v. Hamilton Bank*

Appellants urge that their proposed interpretation of "development" avoids the difficult constitutional questions addressed in part III, *post,* of this decision. (See, e.g., *People v. Engram* (2010) 50 Cal.4th 1131, 1161 ["a statute must be construed, if reasonably possible, in a manner that avoids a serious constitutional question"].) However, appellants cite no authority such consideration provides a basis for disregarding the plain statutory language.

Finally, we reject appellants' suggestion in a July 10, 2017 letter submitted following oral argument that the California Supreme Court's recent decision in *Lynch v. California Coastal Com.* (2017) 3 Cal.5th 470, is relevant to the present appeal. Appellants assert that *Lynch* "underscores that if [appellants] were to apply for a permit to engage in 'development,' even while protesting the jurisdiction of the Coastal Commission over its conduct, [respondents] could try to argue that [appellants'] applying for and/or receiving some form of permit forfeited all challenges to the Coastal Commission's jurisdiction." Regardless of the applicability of *Lynch*'s forfeiture analysis to that situation, we have concluded appellants' conduct is "development" within the meaning of the Coastal Act.

(1985) 473 U.S. 172, 186; accord *Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal.4th 1006, 1018 (*Landgate*); see also *MacDonald, Sommer & Frates v. Yolo County* (1986) 477 U.S. 340, 348 ["an essential prerequisite . . . is a final and authoritative determination of the type and intensity of development legally permitted on the subject property"]; *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 12 ["The impact of a law or regulation on the owner's right to use or develop the property cannot be assessed until an administrative agency applies the ordinance or regulation to the property and a final administrative decision has been reached with regard to the availability of a variance or other means by which to exempt the property from the challenged restriction."]; *Boise Cascade Corp. v. United States* (Fed.Cir. 2002) 296 F.3d 1339, 1351-1352 (*Boise Cascade*) [collecting cases].) Such a final decision "informs the constitutional determination whether a regulation has deprived a landowner of 'all economically beneficial use' of the property, [citation], or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred, [citation]. These matters cannot be resolved in definitive terms until a court knows 'the extent of permitted development' on the land in question." (*Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 618; see also *Williamson*, at p. 191.)

Appellants' takings claim with respect to the Coastal Act permit requirement is necessarily distinct from its claim with respect to the trial court's injunction (see part III, *post*). The injunction was a final determination that actually required appellants to temporarily allow the public to access Martins

Beach. In contrast, it is undisputed that appellants have not obtained a final decision on an application for a CDP allowing them to close public access to Martins Beach; indeed, the record does not indicate any such application has been submitted. As amicus the Coastal Commission points out, "If the Coastal Act agencies grant [appellants] a permit to close their property to the public, or accept that denial of a permit would violate the provisions of [] section 30010 and adjust application of Coastal Act policies accordingly, or find that the public has existing rights of access to the property, those decisions would certainly inform determinations regarding the economic impact on [appellants] of Coastal Act regulation of their property as well as determinations regarding the character of the government action." Accordingly, appellants' claim the permit requirement itself effects a taking is not ripe. (See *Landgate, supra*, 17 Cal.4th at pp. 1017-1018, quoting *United States v. Riverside Bayview Homes, Inc.* (1985) 474 U.S. 121, 126-127 [" '[T]he mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking. . . . 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.' "].)

Appellants contend the ripeness requirement does not apply to them as the defendants, asserting that "ripeness is a prohibition on *plaintiffs* raising claims that do not yet warrant judicial attention." However, appellants' cases do not support that broad proposition; appellants' takings claim regarding the

permit requirement cannot be resolved for the reasons explained above, even though the claim is asserted as a defense to Surfrider's effort to enforce the permitting requirements of the Coastal Act. (See *Vandermost v. Bowen* (2012) 53 Cal.4th 421, 452 (*Vandermost*) [" 'the ripeness doctrine is primarily bottomed on the recognition that judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy.' "].)[15] Appellants also argue their challenge to the permit requirement is ripe because "neither the County nor the [Coastal] Commission could deny a request for a permit to exercise [the right to exclude] without violating the Takings Clause." It may be that appellants' CDP application will be granted because the reviewing authority concludes denial of a permit would violate appellants' property rights, contrary to section 30010 of the Coastal Act. That determination will depend on the record developed following a CDP application. But appellants present no authority for the proposition

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[15] *Horne v. Department of Agriculture* (2015) 135 S.Ct. 2419, does not support appellants' claim. There, the Supreme Court held raisin growers could present a takings defense in an enforcement action after they refused to surrender a quantity of raisins to the federal government pursuant to a regulation intended to stabilize prices. (*Id.* at p. 2056.) The court concluded the claim was ripe because it was not a situation where "the plaintiff 'ha[d] not yet obtained a final decision regarding the application of the . . . regulations to its property.' " (*Id.* at p. 2061.) Instead, "petitioners were subject to a final agency order imposing concrete fines and penalties at the time they sought judicial review." (*Id.* at pp. 2061-2062.) There is no comparable final order in the present case.

that the likelihood their permit will be granted affects this court's analysis of the ripeness of their claim. Finally, we reject appellants' apparent suggestion, also unsupported by authority, that ripeness is only at issue in regulatory takings claims. Appellants' claim is not ripe because the bare permit requirement is not a taking; that the outcome they oppose is allegedly a physical taking does not change the analysis.[16]

This court will not issue an "advisory opinion" (*Vandermost*, *supra*, 53 Cal.4th at p. 452) regarding the constitutionality of a hypothetical decision on a CDP application regarding closure of Martins Beach before the County or Coastal Commission is given an opportunity to render a decision.

III. *Appellants Have Not Shown the Trial Court's Injunction Is Unconstitutional*

The trial court's judgment provides the following injunctive relief: "Defendants are hereby ordered to cease preventing the public from accessing and using the water, beach, and coast at Martins Beach until resolution of Defendants' [CDP] application has been reached by San Mateo County and/or the Coastal Commission. The gate across Martins Beach Road must be unlocked and open to the same extent that it was unlocked and open at the time Defendants purchased the property." Appellants contend the

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[16] We recognize that the permit requirement means appellants are legally required to obtain a permit before closing public access, but appellants have not demonstrated that affects the ripeness analysis. The Coastal Commission has not sought to impose penalties for appellants' failure to seek a permit and we need not consider to what extent such penalties can be imposed on appellants, consistent with the takings clause.

injunction effects a per se physical taking. As we explain below, the United States Supreme Court is divided on the question of whether a judicial action may, itself constitute a taking. (See *Petro-Hunt, L.L.C. v. United States* (Fed.Cl. 2016) 126 Fed.Cl. 367, 378 (*Petro-Hunt*) ["The contours—and even the existence—of a judicial takings doctrine has been debated in federal courts and in legal scholarship."]; *Brace v. United States* (Fed.Cl. 2006) 72 Fed.Cl. 337, 358-359 ["Generally speaking, court orders have never been viewed themselves as independently giving rise to a taking."].) What is clear, however, is that judicial action that would be a taking if it were a legislative or executive act is unconstitutional, under either the takings clause or the due process clause. Pending a judicial ruling to the contrary, it is also clear that the trial court's injunction intrudes on appellants' established property right to exclude others by allowing the public to access Martins Beach pending a determination on appellants' application for a CDP. However, we reject appellants' contention that this temporary right of beach access is a per se taking. Because appellants do not contend the injunction is a taking under the ad hoc, multifactor test of *Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104 (*Penn Central*), or under any other multifactor analysis, we do not evaluate the trial court's injunction under such an analysis.

A. *If Appellants Established that the Trial Court's Injunction Effected a Taking, It Was Unconstitutional*[17]

"The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment [citation], provides that private property shall not 'be taken for public use, without just compensation.' " (*Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 536 (*Lingle*); see also Cal. Const., art. I, § 19 [takings clause in California constitution]; *California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 456, fn. 10 (*California Building Industry. Assn.*) ["In contexts comparable to that at issue in this case, past cases of this court have interpreted the state takings clause 'congruently' with the federal takings clause."].)[18] "As a general matter, so long as a land use regulation does not constitute a physical taking or deprive a property owner of all viable economic use of the property, such a restriction does not violate the takings clause insofar as it governs a property owner's future use of his or her property, except in the unusual circumstance in which the use restriction is properly found to go 'too far' and to constitute a 'regulatory taking' under the ad hoc, multifactored test discussed by the United States

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[17] At various points in this decision we phrase the question at issue as whether the trial court's injunction effected a "taking." But, consistent with our discussion herein, we mean that it would be considered a taking if done by the legislative or executive branches of government.

[18] There are significant differences between the state and federal takings clauses with respect to the timing of and procedures for just compensation. (See *Property Reserve, Inc. v. Superior Court* (2016) 1 Cal.5th 151, 185-188 (*Property Reserve*).)

Supreme Court in *Penn Central*[, *supra*, 438 U.S. 104]." (*California Building. Industry Assn.*, at p. 462.) Governmental action that constitutes a permanent physical invasion or deprives a property of all viable economic use is usually a " 'categorical' " taking requiring compensation. (*Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th at p. 774 (*Kavanau*).) The determination of whether a taking has occurred is "a question of law based on factual underpinnings." (*Bass Enterprises Prod. Co. v. United States* (Fed.Cir. 1998) 133 F.3d 893, 895.)

In *Stop the Beach Renourishment, Inc. v. Florida D.E.P.* (2010) 560 U.S. 702 (*Stop the Beach*), the United States Supreme Court considered the applicability of the takings clause to judicial action. There, a group of beachfront landowners contended the Florida Supreme Court took their property when it held that a state statute providing for beach restoration projects did not unconstitutionally deprive landowners of their right to littoral accretions (additions of sand, sediment, or other deposits to waterfront land). (*Stop the Beach*, at pp. 707-712.) The eight justices who took part in the case[19] held the Florida court's decision did not constitute a violation of the takings clause because it "did not contravene the established property rights of" the landowners. (*Id.* at p. 733.) The court reasoned, "[t]here is no taking unless petitioner can show that, before the Florida Supreme Court's decision, littoral-property owners had rights to future accretions and contact with the water superior to the State's right to fill in its

[19] Justice Stevens did not participate in deciding the case. (*Stop the Beach*, *supra*, 560 U.S. at p. 733.)

submerged land." (*Id.* at p. 730.) The landowners failed to make that showing. (*Id.* at pp. 730-733.)[20]

As relevant to the present case, in resolving *Stop the Beach*, the Justices considered whether a court decision can effect a compensable taking of property. Justice Scalia's plurality opinion for four Justices concluded a state court decision could effect a compensable taking if it reversed well-established property law. The plurality reasoned the takings clause "bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking." (*Stop the Beach*, *supra*, 560 U.S. at p. 715.) "If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." (*Ibid.*) But state court decisions that "merely clarify and elaborate property entitlements" are not judicial

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[20] The Florida statute designated the re-claimed beach as public property. (*Stop the Beach*, *supra*, 560 U.S. at p. 710.) The Florida Supreme Court concluded the legislation was not a taking because the doctrine of "avulsion . . . permitted the State to reclaim the restored beach on behalf of the public." (*Id.* at p. 712.) Justice Scalia's plurality opinion framed the relevant question under the takings clause as whether the Florida Supreme Court's interpretation of the relevant property law had "declare[d] that what was once an established right of private property no longer exists." (*Id.* at p. 715; see also Peñalver & Strahilevitz, *Judicial Takings or Due Process?* (2012) 97 Cornell L.Rev. 305, 365 ["If the Florida Supreme Court had in fact changed its law of avulsion . . . [t]he [Florida] courts would have been the instrumentality by which the government defendants . . . . took private property for public use, literally redefining private property as state property."].)

takings. (*Id.* at p. 727.) A state court decision that effects a taking should be reversed and the state legislature can decide to "either provide compensation or acquiesce in the invalidity of the offending features of the Act." (*Id.* at pp. 723-724.)

On the other hand, four other Justices declined to reach that issue, concluding it was unnecessary to determine whether the actions of a court can effect a taking. (*Stop the Beach*, *supra*, 560 U.S. at pp. 733-734 (conc. opn. of Kennedy, J.) ["[T]his case does not require the Court to determine whether, or when, a judicial decision determining the rights of property owners can violate the Takings Clause"]; *id.*, at p. 745 (conc. opn. of Breyer, J.) ["There is no need now to decide more than . . . that the Florida Supreme Court's decision in this case did not amount to a 'judicial taking.' "].) Justice Kennedy, joined by Justice Sotomayor, reasoned that exercise of the power to take property for public use (upon payment of compensation) has "as a matter of custom and practice" been within the province of "the political branches—the legislature and the executive—not the courts." (*Stop the Beach*, at p. 735 (conc. opn. of Kennedy, J.).) He expressed concern that a judicial takings doctrine would permit judges to exercise powers more appropriately resting in the legislative and executive branches and that there are unresolved questions as to, for example, the proper remedy for a judicial taking. (*Id.*, at pp. 736-741.) Justice Breyer, in his concurrence joined by Justice Ginsburg, warned that adoption of a judicial takings doctrine "would invite a host of federal takings claims without the mature consideration of potential procedural or substantive legal principles that might limit federal

interference in matters that are primarily the subject of state law." (*Stop the Beach*, at p. 743 (conc. opn. of Breyer, J.).)

Justice Kennedy argued in his concurrence that the Due Process Clause was the more appropriate place to look for limitations on judicial power. "The due process clauses of the state and federal Constitutions guarantee property owners 'due process of law' " prior to any deprivation of " 'property.' " (*Kavanau*, *supra*, 16 Cal.4th at p. 770; see also Cal. Const., art. I, § 7; U.S. Const., 14th Amend., § 1.) The due process clauses "guarantee appropriate procedural protections [citation] and also place some substantive limitations on legislative measures." (*Kavanau*, at p. 771.) Justice Kennedy reasoned that, "[i]f a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law. The Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power." (*Stop the Beach*, *supra*, 560 U.S. at p. 735 (con. opn. of Kennedy, J.); see also *id.* at p. 737 ["The Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is 'arbitrary or irrational' under the Due Process Clause."].) Without opining whether the act would be a violation of procedural or substantive due process, Justice Kennedy declared that "without a judicial takings doctrine, the Due Process Clause would likely prevent a State from doing 'by judicial decree what the

Takings Clause forbids it to do by legislative fiat.' " (*Ibid*.)

Thus, under the plurality's views and under Justice Kennedy's concurrence, a judicial act that would constitute a taking if done by another branch of government is unconstitutional.[21] We recognize the claimed judicial taking in the present case is

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[21] *Stop the Beach* does not seem the best case to serve as a foundation for an analysis of a judicial takings doctrine. The taking discussed by the plurality opinion originated in legislative action. Arguably, the judicial decision effectuated nothing more than a legislative taking and could have been analyzed as such. (See Stevens, J. (Ret.), *The Ninth Vote in the "Stop the Beach" Case* (2013) 88 Chi.-Kent L.Rev. 553, 557 ["if there had been any taking in the case, it would not have been a 'judicial' taking. Any taking that might have occurred was effected either when the Florida state legislature passed the statute authorizing the creation of new permanent unchanging property lines to replace the ever-changing common-law lines, or when the agency actually set the property lines that would preclude petitioners from acquiring further land by accretion."]; Snyder, *Unnecessary Expansion of the Takings Clause to the Judiciary: Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592 (2010)* (2011) 30 Temp. J. Sci. Tech. & Envtl. L. 347, 369 ["In light of the fact that the Florida Supreme Court simply interpreted a legislative act, the case should have been brought on appeal as a traditional legislative taking claim."]; Policicchio, *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection* (2011) 35 Harv. Envtl. L.Rev. 541, 552 ["Instead of a state legislature's statutory enactment or a state executive's action constituting a taking, now the state court will have performed the taking through its review and interpretation of the statute or executive action."]; see also *Stop the Beach*, *supra*, 560 U.S. at p. 729, fn. 11 [rejecting legislative takings claim on same basis as judicial takings claim]; *Petro-Hunt, supra*, 126 Fed.Cl. at pp. 379-380 [reviewing cases but identifying none that applied *Stop the Beach* to find an unconstitutional judicial taking].)

somewhat different from the one challenged in *Stop the Beach*. In that case, the claimed taking was an interpretation of property law that the landowners contended deprived them of their right to littoral accretions. (*Stop the Beach*, *supra*, 560 U.S. at pp. 707-712.) In the present case, the claimed taking is not an interpretation of property law. It is an injunction designed to enforce the permit requirements of the Coastal Act. Nevertheless, Surfrider does not contend that distinction affects the constitutionality of the injunction under *Stop the Beach*. Surfrider states that it "has no quarrel with the general proposition that under certain circumstances, an injunction can constitute a taking of private property (whether characterized as a 'judicial taking' or deprivation of due process)." The lesson we take from *Stop the Beach* is that where it has been determined that a court action eliminates an established property right and would be considered a taking if done by the legislative or executive branches of government, it must be invalidated as unconstitutional, whether under the takings or due process clauses.[22] It is to that issue that we now turn.

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[22] Some California decisions have applied the takings clause to injunctions. For example, in *Cox Cable San Diego, Inc. v. Bookspan* (1987) 195 Cal.App.3d 22, 25, the court of appeal held the trial court properly denied a cable company's request for a preliminary injunction enjoining a property owner from interfering with reconnection of its subscribers at an apartment building. Because reconnection would have required attaching cable equipment to the building, the court reasoned the injunction would have been an uncompensated taking. (*Id.* at pp. 26-27.) The court commented, "The physical invasion of private property is no less an invasion if it is authorized by the courts through the granting of a preliminary injunction than if

B. *The Trial Court's Injunction Temporarily Intrudes on Appellants' Established Right to Exclude Others*

At the outset, we reject Surfrider's suggestion that appellants' takings claim can be rejected simply because the injunction "only restores the historical status quo of public access, until and unless Appellants seek and obtain a CDP allowing them to end that use. It is no different than a court order enjoining a property owner from developing property without first applying for the permits required by law." We recognize, of course, that Surfrider *contends* the public has a right to access Martins Beach due to a dedication, which is an issue that will be determined in the separate *Friends of Martin's Beach* case (Super Ct. San Mateo County, CIV517634). However, Surfrider points to nothing showing the public has a right to access Martins Beach *that has been recorded or judicially determined*.[23] Accordingly, regardless of

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authorized by the Legislature enacting a statute mandating a right of access to cable companies. A taking of private property occurs in either case." (*Id.* at p. 27; see also *Judlo, Inc. v. Vons Companies* (1987) 211 Cal.App.3d 1020, 1027 [preliminary injunction requiring owner to permit plaintiff to place newsrack on owner's property "is an unconstitutional taking of private property without compensation"].)

[23] In its brief, amicus curiae Coastwalk California argues the public trust doctrine supports a public claim of right to cross appellants' property to access Martins Beach. (See Cal. Const., art. X, § 4; Cal. Civ. Code § 670; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 434 ["the English common law evolved the concept of the public trust, under which the sovereign owns 'all of its navigable waterways and the lands lying beneath them "as trustee of a public trust for the benefit of the people" ' "]; *Zack's, Inc. v. City of Sausalito* (2008) 165

the public access rights that may be legally established in the future, this court must presume the prior access was permissive and treat the trial court's injunction as temporarily restricting appellants' right to exclude the public from its property. (See *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1028-1029 [government cannot without compensation take easement that is not "a pre-existing limitation upon the land owner's title"]; *LT-WR, L.L.C. v. California Coastal Com.* (2007) 152 Cal.App.4th 770, 805 ["in the absence of a judicial determination that prescriptive rights exist for public use of [the property], the [Coastal] Commission's denial of a

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Cal.App.4th 1163, 1174 ["In 1850, when California was admitted to the Union, it acquired ownership of all tidelands and the beds of all inland navigable waters within its borders."].) It is not clear whether Coastwalk California contends the public trust doctrine *alone* provides the public the right to cross appellants' property to access the coast regardless of whether the history of use supports a finding of a dedication or a prescriptive right of access. (Compare *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, 832 (*Nollan*) [citing California cases as suggesting "that to obtain easements of access across private property the State must proceed through its eminent domain power," while acknowledging none of the cases "specifically addressed the argument that Art. X, § 4, allowed the public to cross private property to get to navigable water"] with *id.* at pp. 847-848 (dis. opn. of Brennan, J.) [suggesting that, in light of Article X, section 4, private landowner has no reasonable expectation of compensation where State acts to protect public access to coast].) In any event, we need not and do not determine whether appellants' takings claim can be rejected on the basis that the public has a right to access the coast under the California Constitution. Surfrider does not so argue, and, more fundamentally, we conclude appellants have not shown the trial court's injunction is a taking, even without considering the public trust doctrine.

permit for gates and signs on the ground that potential prescriptive rights exist was speculative"]; *City of Needles v. Griswold* (1992) 6 Cal.App.4th 1881, 1888 (*City of Needles*) ["A temporary taking ordered during the pendency of an action to determine whether the taking may be made permanent, enjoys no constitutional exception."].) Surfrider cites no authority to the contrary.

C. *The Trial Court's Injunction is Not a Per Se Taking*

"[T]he Takings Clause 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.' [Citation.] In other words, it 'is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.' [Citation.] While scholars have offered various justifications for this regime, we have emphasized its role in 'bar[ring] 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.' " (*Lingle*, *supra*, 544 U.S. at pp. 536-537.)

"In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests," the United States Supreme Court has identified only certain narrowly-defined categories of "government interference with property" that are considered per se (or "categorical") takings. (*Arkansas Game & Fish Commission v. United States* (2012) 568 U.S. 23, 31 (*Arkansas Game*); see also *Lingle*, *supra*, 544 U.S. at p. 538; *Powell v. County. of Humboldt* (2014) 222 Cal.App.4th 1424, 1436

(*Powell*).) These include "regulations that completely deprive an owner of 'all economically beneficial us[e]' of her property," as well as governmental action that "requires an owner to suffer a permanent physical invasion of her property—however minor." (*Lingle*, at p. 538; see also *Arkansas Game*, at pp. 32-33.) "[A]side from the cases attended by rules of this order, most takings claims turn on situation-specific factual inquiries." (*Arkansas Game*, at p. 32 [citing *Penn Central*, *supra*, 438 U.S. at p. 124].)

In *Penn Central*, *supra*, 438 U.S. 104, the Supreme Court prescribed "an 'ad hoc' factual inquiry" to determine when a regulation is a "restriction on the use of property that [goes] 'too far' " and, thus, constitutes a taking that requires compensation. (*Horne*, *supra*, 135 S.Ct. at p. 2427.) "That inquiry required considering factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action." (*Ibid.*) As *Lingle* explained, "The Court in *Penn Central* acknowledged that it had hitherto been 'unable to develop any "set formula" ' for evaluating regulatory takings claims, but identified 'several factors that have particular significance.' . . . The *Penn Central* factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or [deprivation of all economically beneficial use] rules." (*Lingle*, 544 U.S. at pp. 538-539; *see also Murr v. Wisconsin* (2016) 137 S.Ct. 1933, 1942-1943 (*Murr*).)

Appellants contend the trial court's injunction constitutes a per se physical taking exempt from the multifactor *Penn Central* analysis because it stripped them of their right to exclude the public from Martins Beach. We conclude that, although the trial court's injunction effected a physical invasion analogous to an easement, the temporary nature of the injunction means it may not be treated as a per se taking. Because appellants make no attempt to show the injunction effected a taking under the *Penn Central* test (or any other multifactor test), we affirm.[24]

1. *Compulsory Permanent Easements That Are Not Proper Conditions On Development Are Per Se Takings*

The proposition that permanent physical invasions are per se takings is rooted in *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419 (*Loretto*), which held that a state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking. The court emphasized, "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." (*Id.* at p. 435.) The court also stated, "physical *invasion* cases are special and . . . any permanent physical *occupation* is a taking." (*Id.* at p. 432; see also *Horne*, *supra*, 135 S.Ct. at p. 2429.) This is so "without regard to whether the action achieves an important

[24] We need not and do not decide whether the trial court's injunction is literally a regulatory taking that must be analyzed under the *Penn Central* test or whether another multifactor test applies to the type of temporary physical invasion at issue in the present case. (See Part III.D, *post*.)

public benefit or has only minimal economic impact on the owner." (*Loretto*, at pp. 434-435.)

In *Nollan*, *supra*, 483 U.S. 825, the Supreme Court applied *Loretto* in the context of a condition imposed on an owner seeking a development permit. There, the Coastal Commission required a beachfront property owner to convey an easement allowing the public to traverse a strip of the property to reach the shoreline as a condition of approval of the owner's permit to build a larger house. (*Id.* at pp. 828-829.) The court relied on *Loretto* in concluding the easement was "a 'permanent physical occupation' " of the property, because the public was "given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." (*Id.* at p. 832; see also *Dolan v. City of Tigard* (1994) 512 U.S. 374, 384 [following *Nollan* with respect to condition requiring dedication of a bike/pedestrian path for approval of store expansion].) Accordingly, "had the government simply appropriated the easement in question, this would have been a *per se* physical taking." (*Lingle*, *supra*, 544 U.S. at p. 546 [discussing *Nollan* and *Dolan*]; see also *California Building Industry Assn.*, *supra*, 61 Cal.4th at pp. 457-458 [same].)

The question in both *Nollan* and *Dolan* was "whether the government could, without paying the compensation that would otherwise be required upon effecting such a taking, demand the easement as a condition for granting a development permit the government was entitled to deny." (*Lingle*, *supra*, 544 U.S. at pp. 546-547.) *Nollan* ultimately held the

condition was an uncompensated taking because it did not "substantially advance the same government interest that would furnish a valid ground for denial of the permit." (*Lingle*, at p. 547; see also *Nollan*, *supra*, 483 U.S. at pp. 834-842; *Dolan*, *supra*, 512 U.S. at pp. 386-387.) In *Dolan*, although there was a relationship between the easement and the impact of the proposed store expansion, the Court concluded the city that imposed the easement condition had failed to demonstrate a " 'rough proportionality' " between the condition and "the impact of the proposed development." (*Dolan*, at p. 391; see also *id.* at pp. 395-396; *Lingle*, at p. 547; *Koontz v. St. Johns River Water Mgmt. Dist.* (2013) 133 S.Ct. 2586, 2595 [*Nollan* and *Dolan* allow "the government to condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal"].)

From *Nollan* and *Dolan*, as construed by *Lingle*, it is clear that government action imposing a permanent public access easement is generally treated as a per se taking requiring compensation, if not imposed as a proper adjudicative exaction. (*Lingle*, *supra*, 544 U.S. at p. 547 [*Nollan* and *Dolan* both involved "dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings"]; accord *California Bldg. Indus. Assn.*, *supra*, 61 Cal.4th at p. 460; see also *Alto Eldorado Partnership v. County. of Santa Fe* (10th Cir. 2011) 634 F.3d 1170, 1178 [the "permanent physical invasion[s]" in *Nollan* and *Dolan* were "easement[s] granting public way through private property"];

Property Reserve, *supra*, 1 Cal.5th at p. 196 ["It is well established that an easement may constitute a compensable property interest for purposes of the [state] takings clause."].)

2. *The Temporary Nature of the Trial Court's Injunction Means It May Not be Treated as a Per Se Taking*

Surfrider and amicus the Coastal Commission point to the language in *Loretto* describing the taking in that case as a "permanent physical invasion." (*Loretto*, *supra*, 458 U.S. at p. 432.) They emphasize the trial court's injunction is *not* permanent, because it only lasts until there is a decision on a CDP. We agree the temporary nature of the injunction means it may not be treated as a per se taking.

a. Loretto's *Permanency Requirement*

Loretto drew a distinction between the "permanence and absolute exclusivity of [the] physical occupation" in that case (cable company equipment attached to a building) and the "temporary limitations on the right to exclude" involved in other cases. (*Loretto*, *supra*, 458 U.S. at p. 435, fn. 12.) The classic "physical occupation," as defined by *Loretto* is a "permanent and exclusive occupation by the government that destroys the owner's right to possession, use, and disposal of the property. The Court defined the destruction of these interests as follows: (1) possession, 'the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space,' [citation]; (2) use, 'the permanent physical occupation of property forever denies the owner any power to control the use of the property; he

not only cannot exclude others, but can make no nonpossessory use of the property,' [citation]; and (3) disposal, 'even though the owner may retain the bare legal right to dispose of the occupied space . . ., the permanent occupation of that space . . . will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.' " (*Boise Cascade, supra,* 296 F.3d at p. 1353, quoting *Loretto*, *supra*, 458 U.S. at pp. 435-436.) Emphasizing the centrality of the permanency requirement to its per se rule, *Loretto* observed, "The cases state or imply that a physical invasion is subject to a balancing process, but they do not suggest that a permanent physical occupation would ever be exempt from the Takings Clause." (*Loretto*, at p. 432.)

As cases involving only "temporary limitations on the right to exclude," *Loretto* mentioned the decision in *PruneYard Shopping Center v. Robins* (1980) 447 U.S. 74, as well as "the intermittent flooding cases." (*Loretto*, *supra*, 458 U.S. at p. 435, fn. 12.)[25] In *PruneYard*, the Court upheld a state constitutional requirement that shopping center owners permit individuals to exercise free speech rights on their property. *Loretto* explained that "temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The

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[25] *Loretto* also referenced *Kaiser Aetna v. United States* (1979) 444 U.S. 164, in which the court held that owners who developed a marina by connecting a pond to the ocean could not be required to allow public access without compensation. (*Loretto*, *supra*, 458 U.S. at p. 435, fn. 12.) However, in *Lingle* the Supreme Court included *Kaiser Aetna* in a list of cases involving "permanent physical invasion[s]" that were per se takings. (*Lingle*, *supra*, 544 U.S. at p. 539.)

rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property." (*Ibid*; see also *Powell*, *supra*, 222 Cal.App.4th at p. 1440, citing *Boise Cascade*, *supra*, 296 F.3d at pp. 1352-1353 ["Transient occupation is not a per se taking under *Loretto*, however, as in a requirement to permit periodic onsite inspections."].) With regard to the flooding cases, *Loretto* stated, "this Court has consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within, on the other. A taking has always been found only in the former situation." (*Loretto*, at p. 428; see also *Arkansas Game*, *supra*, 568 U.S. at p. 38 [multifactor test applies in determining whether temporary government-induced flooding is a taking].)

The Supreme Court in *Nollan* and *Dolan* continued the distinction made in *Loretto* between permanent physical occupations and temporary limitations on the right to exclude. In finding the easement at issue was a per se taking, *Nollan* emphasized it gave individuals "a permanent and continuous right to pass to and fro . . . ." (*Nollan*, *supra*, 483 U.S. at p. 832.) Further, in distinguishing *PruneYard*, *Nollan* pointed out that the case did not involve "a classic right-of-way easement" and "permanent access was not required." (*Nollan*, at p. 832, fn. 1.) Similarly, *Dolan* distinguished *PruneYard* by pointing out that the shopping center owners could adopt time, place, and manner restrictions, while the shop owner in *Dolan* was forced to accept a "permanent recreational easement." (*Dolan*, *supra*,

512 U.S. at p. 394.) Thus, although *Nollan* and *Dollan* extended *Loretto* to a situation where the owners were not excluded from using the portion of their property at issue (see *Loretto*, *supra*, 458 U.S. at p. 435, fn. 12 [referring to the "absolute exclusivity of a physical occupation"]), the easements were per se takings because the owners were permanently required to allow others to access their properties on an ongoing basis.

Some Federal Circuit decisions, starting with *Hendler v. United States* (Fed.Cir. 1991) 952 F.2d 1364, have raised questions about *Loretto's* permanence requirement. In determining whether government activity relating to wells for monitoring contaminated ground water was a physical taking, *Hendler* stated, "In this context, 'permanent' does not mean forever, or anything like it." (*Hendler*, at p. 1376.) *Hendler* continued, "If the term 'temporary' has any real world reference in takings jurisprudence, it logically refers to those governmental activities which involve an occupancy that is transient and relatively inconsequential." (*Id.* at p. 1377.) In *Skip Kirchdorfer, Inc. v. United States* (Fed.Cir. 1993) 6 F.3d 1573 (*Skip Kirchdorfer*), the court stated that "a 'permanent' physical occupation does not necessarily mean a taking unlimited in duration. [Citation.] A 'permanent' taking can have a limited term. [Citation.] In *Hendler,* this court concluded that the distinction between 'permanent' and 'temporary' takings refers to the nature of the intrusion, not its temporal duration." (*Skip Kirchdorfer*, at p. 1582; see also *Otay Mesa Properties, L.P. v. United States*

(Fed.Cir. 2012) 670 F.3d 1358, 1367 (*Otay Mesa*) [expressing agreement with *Hendler*].)[26]

However, other courts have rejected any suggestion that *Hendler* can be read to "abrogate" the "permanency requirement" in *Loretto*. (*Boise Cascade*, *supra*, 296 F.3d at p. 1356.) *Boise Cascade* involved a lumber company's complaint that steps taken by the U.S. Fish and Wildlife Service (Service) to protect spotted owls on a parcel of land owned by the company constituted takings. (*Id.* at pp. 1341-1343.) Among other things, the company contended there had been a physical taking under *Loretto* based on "the requirement that it allow government personnel to enter the property to conduct owl surveys during the pendency" of a preliminary injunction. (*Boise Cascade*, at pp. 1342-1343; see also *id.* at p. 1352.) The court concluded the complained of intrusion was *not* a per se taking under *Loretto*, where "the Service briefly entered the land over a period of five months in order to conduct owl surveys needed for the resolution of a lawsuit initiated by Boise." (*Boise Cascade*, at p. 1356.) The court characterized the intrusion as "extremely limited and transient" (*id.* at p. 1357) and pointed out the Service did not make a "permanent incursion" or add "any kind of permanent (or even temporary) addition to the landscape" (*id.* at p. 1356). It reasoned, "[t]he government's incursion into Boise's

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[26] In *Skip Kirchdorfer*, *supra*, 6 F.3d at p. 1582, the Federal Circuit held the government's temporary seizure and occupation of a building constituted a per se taking, even though the owner retained some access. The court stated, "The limited duration of this taking is relevant to the issue of what compensation is just, and not to the issue of whether a taking has occurred." (*Id.* at p. 1583.)

property is more in the nature of a temporary trespass—though, obviously, sanctioned by the district court and therefore not unlawful—rather than a permanent physical occupation or an easement of some kind." (*Id.* at p. 1355.)

Boise Cascade acknowledged *Hendler*, but stated the decision had been "widely misunderstood and criticized as abrogating the permanency requirement established by the Supreme Court in *Loretto*." (*Boise Cascade*, *supra*, 296 F.3d at p. 1356.) *Boise Cascade* pointed out *Hendler's* discussion of the permanency requirement was dicta, because "[i]n *Hendler*, the government entered the land and placed upon it what were essentially permanent wells—wells that it intended to actively monitor over the years." (*Boise Cascade*, p. 1356.) *Boise Cascade* suggested that "in context, it is clear that the court [in *Hendler*] merely meant to focus attention on the *character* of the government intrusion necessary to find a permanent occupation, rather than solely focusing on temporal duration." (*Boise Cascade*, at p. 1356.) In *John R. Sand & Gravel Co. v. United States* (Fed.Cir. 2006) 457 F.3d 1345 (*John R. Sand & Gravel Co.)*, the Federal Circuit attempted to harmonize the *Hendler* and *Boise Cascade* decisions, concluding "the determination of whether government occupancy is 'permanent' is highly fact-specific. In any event, the installation of fixed physical structures, such as the cable and cable connections in *Loretto* or the groundwater monitoring wells in *Hendler* is typical of a 'permanent' occupation, while the transient entry of persons via government authority on a plaintiff's property is generally not 'permanent.' " (*John R. Sand & Gravel Co.*, at p. 1357.)

The California Supreme Court addressed *Loretto's* permanency requirement in *Property Reserve*, *supra*, 1 Cal.5th 151, adopting *Boise Cascade's* view of *Hendler*. That case involved a trial court order authorizing the California Department of Water Resources (the Department) to enter private property to conduct environmental studies and geological testing regarding "the feasibility of constructing a new tunnel or canal in the Sacramento-San Joaquin Delta as a means of delivering fresh water from Northern California to Central and Southern California." (*Property Reserve,* at p. 165.) The issue in the case was whether the statutory pre-condemnation procedure employed by the Department satisfied the requirements of the state takings clause.[27] (*Id.* at p. 167.) Although the court assumed for purposes of the decision that both the studies and the testing constituted "a taking or damaging of property for purposes of the state constitutional takings clause" (*ibid.*), the court nevertheless expressed doubt that the temporary physical invasions at issue could be considered per se takings.

Regarding the environmental studies, the state Court of Appeal had concluded "that in light of the number of days the trial court order permitted the Department's employees to enter and conduct the

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[27] The owners' claims could not rest on the federal takings clause because the federal clause "has not been construed to require a state to adopt any particular type of eminent domain procedure or to compel a public entity either to initiate an eminent domain proceeding or to pay just compensation before engaging in conduct that results in a taking of property within the meaning of the federal takings clause." (*Property Reserve*, *supra*, 1 Cal.5th at p. 185.)

specified environmental activities on the landowners' property—from 25 to 66 days over a one-year period, depending upon the size of the property—and the fact that the order permitted the Department to conduct the environmental activities throughout the properties, the order granted the Department a blanket temporary easement that constituted a compensable property interest for purposes of the state takings clause." (*Property Reserve, supra*, 1 Cal.5th at p. 195.) The California Supreme Court expressed doubt the environmental testing activities constituted a taking. (*Id.* at p. 196.) The Court reasoned that, although the number of days of activity was "not insignificant, the activities . . . consist primarily of surveying and sampling activities that have been limited by the trial court so as to minimize any interference with the landowner's use of the property. The landowner will retain full possession of the property and no significant damage to the property is intended or anticipated." (*Ibid.*)

Regarding the geological testing, the Court of Appeal had concluded the activity was a taking because, as characterized by the Supreme Court, "the Department proposed to fill the holes that it bored in the property with a type of grout that would be left in the holes after the Department completed its investigatory activities." (*Property Reserve*, *supra*, 1 Cal.5th at p. 209.) The Supreme Court disagreed with the lower court. It acknowledged the Department's 1 to 14 days of activity around boring sites "may cause substantial interference with the landowner's possession and use of a portion of its property during the time the drilling activities are occurring." (*Ibid.*) Nevertheless, the court reasoned, "In our view, the

Loretto decision cannot properly be interpreted to mean that a public entity that, after digging up soil or conducting other activities on private property that temporarily alter the property's condition, returns the property to the same or a comparable state as the property previously enjoyed, is to be viewed as having undertaken a permanent physical occupation of the property that amounts to a per se taking of a property interest." (*Id.* at p. 210.) The court continued, "Because here the Department would not retain possession of or any interest in the filling material after its testing is completed, the proposed geological activities do not involve any continued or permanent occupation of any portion of the landowners' property that would effectively impinge upon the owner's right to possess, use, or control the area in question. Under these circumstances, in our view the proposed drilling and refilling would not constitute a permanent physical occupation of a landowner's property within the meaning of the *Loretto* decision." (*Id.* at pp. 210-211.) The court quoted *Boise Cascade's* discussion of *Hendler* and noted that "[t]he facts of *Hendler* are quite different and distinguishable from the proposed geological activities at issue in this case." (*Property Reserve,* at p. 211, fn. 30.)

In sum, *Loretto* and its progeny demonstrate that for a physical invasion to be considered a per se taking, it must be permanent. Although the determination of whether an intrusion is permanent may in certain circumstances be highly fact-specific, it is nonetheless necessary for a finding there has been a per se taking. (*John R. Sand & Gravel Co., supra*, 457 F.3d at p. 1357; see also *Otay Mesa*, *supra*, 670 F.3d at p. 1364 [although the determination depends on the facts in

the particular case, "[w]hether a taking is temporary or permanent is a question of law"].)[28]

b. Loretto's *Permanency Requirement Is Not Inconsistent With the Body of Law on Temporary Takings*

As explained above, *Loretto* and its progeny exclude temporary physical invasions from the category of per se takings. Appellants argue that such an interpretation of *Loretto* is inconsistent with the well-established body of law providing that temporary takings can be compensable. We disagree.

Appellants are absolutely correct that there is a well-established body of caselaw recognizing temporary takings. As explained by the United States Supreme Court in *Arkansas Game*, *supra*, 568 U.S. at pages 32-33, "[O]ur decisions confirm that takings temporary in duration can be compensable. This

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[28] In *Otay Mesa, supra,* 670 F.3d 1358, the United States Border Patrol had placed sensors on private property to aid in the apprehension of border crossing violators. The sensors did not interfere with an owner's use of the property and would be removed whenever an owner notified the Border Patrol of an intention to develop an area on which a sensor was located. The issue in the case was whether the sensors effected a temporary or permanent taking, as relevant to the method of calculating just compensation. (*Id.* at p. 1364.) The court concluded the sensors were a permanent physical taking because only development or abandonment by the Border Patrol would end the occupation; also, the Border Patrol had "a 'perpetual' easement that reserves in the government the right to 'redeploy' the sensors in the case of" development of the property. (*Id.* at p. 1368.) Appellants point to no analogous circumstances that would make the trial court's injunction permanent. That the injunction will continue in place were appellants to fail to apply for a CDP does not convert the injunction into a permanent taking.

principle was solidly established in the World War II era, when '[c]ondemnation for indefinite periods of occupancy [took hold as] a practical response to the uncertainties of the Government's needs in wartime.' [Citation.] In support of the war effort, the Government took temporary possession of many properties. These exercises of government authority, the Court recognized, qualified as compensable temporary takings. . . . [¶] Ever since, we have rejected the argument that government action must be permanent to qualify as a taking. Once the government's actions have worked a taking of property, 'no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.' " (See also *Otay Mesa*, *supra*, 670 F.3d at p. 1363 ["Although there has been some confusion over the use of the terms 'temporary' and 'permanent' in the takings context, [citations] it is clear that courts recognize both types of physical takings."].)

Those general principles do not, however, mean that temporary physical invasions are per se takings. In *Arkansas Game*, the Supreme Court rejected a contention that government-induced temporary flooding was automatically exempt from the takings clause compensation requirement. (*Arkansas Game*, *supra*, 568 U.S. at p. 38.) In summarizing the court's jurisprudence, the court emphasized the limited role for bright lines, stating, "In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area." (*Id.* at p. 31.) The court further explained, "we have drawn some bright lines, notably, the rule that a permanent

physical occupation of property authorized by government is a taking. [Citing *Loretto*.] So, too, is a regulation that permanently requires a property owner to sacrifice all economically beneficial uses of his or her land. [Citation.] But *aside from the cases attended by rules of this order*, most takings claims turn on situation-specific factual inquiries. [Citing *Penn Central*]." (*Arkansas Game*, at pp. 31-32, emphasis added.) Ultimately, in rejecting the contention that temporary floods are *never* compensable, the court concluded, "When regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is . . . a factor in determining the existence *vel non* of a compensable taking." (*Id.* at p. 38.) Thus, as relevant to the present case, *Arkansas Game* reaffirmed the limited scope of *Loretto*'s per se rule.

Contrary to appellants' assertions, *Steinhart v. Superior Court* (1902) 137 Cal. 575 and *City of Needles*, *supra*, 6 Cal.App.4th 1881, do not support their per se takings claim. *Steinhart* held that, under the California Constitution, property may not be taken pending the final judgment in an eminent domain proceeding without prior compensation. (*Steinhart*, at p. 577 [in context of a proceeding to condemn a railroad right of way, rejecting proposition that court may "authorize the party seeking to condemn to take immediate possession and to use the property pending the proceeding, and such possession does not constitute a taking within the meaning of the [California] constitution"].) *City of Needles* held that, under the California Constitution, a City could not, without prior compensation, retain possession and use

of equipment belonging to the operator of a municipal golf course during the pendency of a proceeding relating to termination of the license to operate the course. (*City of Needles*, at pp. 1887-1889, 1892.) *Steinhart* and *City of Needles* make clear that temporary physical intrusions can be compensable takings under the California Constitution. But those cases did not characterize the temporary takings at issue as per se takings, and they did not suggest that *all* temporary physical invasions are per se takings under the state and/or federal Constitutions. Furthermore, as discussed previously, the California Supreme Court's recent decision in *Property Reserve* supports a conclusion that *not* all temporary physical invasions are takings that require prior compensation under the California Constitution. (*Property Reserve*, *supra*, 1 Cal.5th at pp. 196, 210-212 & fn. 30.)

Finally, we recognize the law has sanctioned the compensability of temporary easements. (See *Property Reserve*, *supra*, 1 Cal.5th at p. 199 & fn. 19 [referring to condemnation actions for "temporary construction easements"]; *id.* at p. 203, fn. 23 ["a number of out-of-state decisions have concluded that a public entity is required to condemn a temporary easement before undertaking significant precondemnation drilling or boring activities on private property"]; *id.* at p. 196 ["It is well established that an easement may constitute a compensable property interest for purposes of the takings clause."]; see also *United States v. Dow* (1958) 357 U.S. 17, 26 [referring to the possibility of compensation for "temporary use" of easement]; *Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 975 [regarding

compensation for temporary easements that interfere with an owner's intended use]; *City of Fremont v. Fisher* (2008) 160 Cal.App.4th 666, 676 [same].) However, none of those cases referred to the temporary easements as per se takings. It may be that certain types of temporary physical invasions are frequently and easily characterized as takings. But appellants cite no case supporting the proposition that the courts have created a category of per se takings covering temporary physical invasions, such that the invasions are always takings, "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." (*Loretto*, *supra*, 458 U.S. at pp. 434-435; see also *Arkansas Game*, *supra*, 568 U.S. at pp. 31-32 [alleged takings not covered by the recognized categorical rules are considered under a multifactor test, such as the *Penn Central* test].)[29]

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[29] In *Tahoe-Sierra P. Council v. Tahoe RPA* (2002) 535 U.S. 302 (*Tahoe*), the Supreme Court stated, "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner [citation] regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary." (*Id.* at p. 322.) The court cited *United States v. General Motors Corp.* (1945) 323 U.S. 373, in which the court determined just compensation where the government took "temporary occupancy of a portion of a leased building." (*General Motors*, at p. 375.) The language in *Tahoe* is dicta, because the issue in the case was whether a regulation that temporarily deprived a property of all economic use was a per se taking. (*Tahoe*, at p. 334.) But, in any event, even if *Tahoe* can be read to identify a new category of per se takings for temporary government occupations of property, there was no such exclusive

Because the trial court's injunction is not a permanent intrusion on appellants' right to exclude others, it is not a per se physical taking.

D. *Appellants Do Not Contend the Injunction is a Taking Under a Multifactor Analysis, Such as the* Penn Central *Test*

As noted previously, takings claims that are not encompassed within the United States Supreme Court's limited per se rules are analyzed under a multifactor test, generally the *Penn Central* framework for regulatory takings. (*Arkansas Game*, *supra*, 568 U.S. at pp. 31-32.) The trial court's injunction constitutes a physical invasion designed to enforce the Coastal Commission's regulatory authority. It is unclear whether the injunction should be regarded as an alleged regulatory taking that must be analyzed under the *Penn Central* test, or whether another multifactor test applies to the type of temporary physical invasion at issue. We recognize regulatory takings are generally described as restrictions on the use of property. (See, e.g., *Horne*, *supra*, 135 S.Ct. at p. 2427 [describing a " 'regulatory taking' " as a "restriction on the use of property that went 'too far' "]; but see *Lingle*, *supra*, 544 U.S. at p. 538 [characterizing a law requiring "an owner to suffer a permanent physical invasion of her property" as a type of "regulatory action" that is a per se taking].)[30]

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occupation in the present case. (See *Boise Cascade*, *supra*, 296 F.3d at p. 1357 [characterizing cases cited by *Tahoe* as "per se takings" but noting they involved temporary "total occupation of the property by the government"].)

[30] In the recent *Murr* decision, the United States Supreme Court referenced "the contrast between regulatory takings,

And, we also recognize that *Arkansas Game* held that takings claims based on temporary government-induced flooding (an apparent temporary physical invasion) are subject to a multifactor test different from the *Penn Central* test. (*Arkansas Game*, at p. 38-39.) Below, we briefly summarize the multifactor tests described in *Penn Central* and *Arkansas Game* and describe some of the relevant considerations in the present case. But, because appellants do not contend the injunction is a taking under a multifactor test, we need not and do not decide what multifactor test would apply, and we in any event lack the evidence necessary to perform such an analysis.

In *Penn Central*, the court explained, "The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the 'Fifth Amendment's guarantee . . . [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,' [citation], this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. [Citation.] Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the

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where the regulation affects the property's value to the owner, and physical takings, where the impact of physical appropriation or occupation of the property will be evident." (*Murr, supra,* 137 S.Ct. at p. 1944.)

government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.' " (*Penn Central*, *supra*, 438 U.S. at pp. 123-124.) The court identified several "significan[t] factors that guide "these essentially ad hoc, factual inquiries." (*Id.* at p. 124.) One is "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." (*Ibid.*) Another is "the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, [citation], than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." (*Ibid.*)

Although the United States Supreme Court in *Arkansas Game* did not appear to hold that takings claims based on temporary flooding are literally subject to the *Penn Central* test, the court outlined factors for consideration similar to those in *Penn Central*. Thus, the court stated that "time is indeed a factor in determining the existence *vel non* of a compensable taking." (*Arkansas Game*, 568 U.S. at p. 38.) Also relevant is the foreseeability of the invasion, "the character of the land at issue and the owner's 'reasonable investment-backed expectations' regarding the land's use," and the "[s]everity" of the interference. (*Id.* at p. 39.)

Clearly, whether under *Penn Central* or a different multifactor test, the analysis to determine whether a temporary physical invasion is a taking is complex. The analysis requires the courts to consider

the nature of the burden imposed on the claimant, in light of the factual and legal context. (See *Arkansas Game*, 568 U.S. at pp. 38-40; *Penn Central*, *supra*, 438 U.S. at pp. 128-137.) In this case, the relevant background would seem to include, among other things, the history of public access at Martins Beach, the record of communications between appellants and the County and the Coastal Commission, the purposes and functioning of the Coastal Act, and the public trust doctrine. The analysis also imposes an evidentiary burden on the party claiming to be subject to a taking, including the necessity of putting on evidence regarding the impact of the claimed taking (here, a temporary injunction requiring limited public access), including the degree of interference with " 'reasonable investment-backed expectations.' " (*Arkansas Game*, 568 U.S. at p. 39; see also *Penn Central*, *supra*, 438 U.S. at p. 124; *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, 485 [claimant bears burden of showing taking]; *Seiber v. United States* (Fed.Cir. 2004) 364 F.3d 1356, 1372 [claimants' "temporary takings claim also fails under the *Penn Central* test because they 'failed to introduce convincing evidence to show the amount, if any, by which the value of the relevant property . . . was reduced' by the alleged temporary taking"].)

Appellants in the present case elected *not* to assert a claim that the trial court's injunction is a taking under the *Penn Central* test or any other multifactor analysis. Appellants did argue below an injunction would constitute an unconstitutional taking. But completely absent from the record is any reliance by appellants on the *Penn Central* or any other multifactor test and any evidence presented by

appellants supporting such an analysis.[31] Appellants' briefs on appeal do not attempt to show the trial court's injunction is a taking under *Penn Central* or another multifactor test.[32] Finally, at oral argument counsel for appellants reaffirmed they contend only that the trial court's injunction is a per se taking. Accordingly, there is no basis to reverse the injunction under any multifactor test for finding a taking.[33]

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[31] No argument based on the *Penn Central* or another multifactor test can be found in appellants' trial brief, closing brief, objections to the trial court's tentative statement of decision, objections to the proposed judgment, or motion for new trial below.

[32] In support of a different argument that the trial court's injunction forced them to operate a parking business at a net loss, appellants point to testimony from the manager of Martins Beach that improvements, including a new bathroom, would cost over $500,000, and annual costs would exceed $100,000. However, the injunction does not obligate appellants to provide staff or any amenities. Instead, it requires, "The gate across Martins Beach Road must be unlocked and open to the same extent that it was unlocked and open at the time [appellants] purchased the property." Surfrider points out that, if appellants decided to stop spending funds on maintaining beach access, section 846 of the Civil Code would protect them from liability for any hazardous conditions that developed. Appellants do not dispute Surfrider's interpretation of that statute. Thus, appellants' claim that the injunction forced them to operate a business is without merit, and the evidence presented on that issue would not support a finding of a taking under a multifactor analysis, even if appellants had made such a claim.

[33] Appellants also contend the trial court's judgment violated their constitutional right to free speech because it included "changing the messages on the billboard on the property" in a list of actions appellants took without a CDP in violation of the Coastal Act. However, the injunction requires nothing with respect to the billboard, and appellants have not been assessed

IV. *The Trial Court Did Not Abuse Its Discretion in Awarding Attorney Fees*

Appellants contend the trial court erred in granting Surfrider's motion for attorney fees under California Code of Civil Procedure section 1021.5. A plaintiff is eligible for fees under that section when: (1) the action " 'has resulted in the enforcement of an important right affecting the public interest;' " (2) " 'a significant benefit, whether pecuniary or nonpecuniary has been conferred on the general public or a large class of persons;' " and (3) " 'the necessity and financial burden of private enforcement are such as to make the award appropriate.' " (*Woodland Hills Residents Assn. Inc. v. City Council of Los Angeles* (1979) 23 Cal.3d 917, 934-935 (*Woodland Hills*); see also Cal. Code Civ. Proc., §1021.5.) The trial court did not abuse its discretion.

"Whether the moving party has satisfied the statutory requirements so as to justify a fee award is a question committed to the discretion of the trial court; we review the ruling for abuse of discretion. [Citations.] An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice. [Citations.] This standard of review affords considerable deference to the trial court provided that the court acted in accordance with the governing rules

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penalties for violating the Coastal Act in that (or any other) respect. If the Coastal Commission denies appellants a CDP and requires them to advertise beach access, a free speech claim might be ripe for review. But the cases appellants cite do not establish a basis for relief at this time.

of law. We presume that the court properly applied the law and acted within its discretion unless the appellant affirmatively shows otherwise." (*Mejia v. City of Los Angeles* (2007) 156 Cal.App.4th 151, 158.)

As to the first factor, appellant contends the present action has not " 'resulted in the enforcement of an important right affecting the public interest' " (*Woodland Hills*, *supra*, 23 Cal.3d at p. 935) because it only resulted in enforcement of the Coastal Act permitting requirement as to Martins Beach. Appellants' cases do not demonstrate there is any such bright line rule. Appellants primarily rely on *Norberg v. California Coastal Com.* (2013) 221 Cal.App.4th 535, in which a property owner "sought to invalidate permit conditions affecting planned residential improvements on his privately owned oceanfront property." The court acknowledged that "the proper application of statutory language . . . is an important right," but rejected the proposition that "the private attorney general doctrine was designed to reward plaintiffs who, in pursuit of their own interests, just happened to bring about the enforcement of a statute that benefits the public." (*Norberg*, at p. 541; see also *Beach Colony II v. California Coastal Com.* (1985) 166 Cal.App.3d 106, 114 ["Section 1021.5 was not designed as a method for rewarding litigants motivated by their own pecuniary interests who only coincidentally protect the public interest."].) *Norberg* is inapposite: Surfrider brought the present action to enforce the Coastal Act for the benefit of the public, not its own narrow interests. (See *Landgate, supra*, 17 Cal.4th at p. 1018 ["a rational permit regulation scheme is imposed on the public as a whole to ensure the orderly development of real property"].)

As to the second factor, appellants dispute the action conferred a "significant benefit," again citing *Norberg*. However, *Norberg* is again inapposite. There, the action achieved only "the invalidation of a permit condition affecting one parcel of privately owned real property" and the trial court's decision had "no precedential value and, consequently, [did] not confer a substantial benefit, or any benefit, on a large class of persons." (*Norberg*, *supra*, 221 Cal.App.4th at p. 542; see also *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 167 ["The decision vindicated only the rights of the owners of a single parcel of property."].) In contrast, the present action resulted in a legal interpretation of the term "development" in the Coastal Act that, by virtue of the present decision, will have precedential value. The significance of that legal determination is attested by the amicus curiae briefs filed in support of both parties on appeal. Amicus the Pacific Legal Foundation argues, for example, "This [c]ourt's decision will extend far beyond this case, and may affect many ordinary coastal homeowners."

As to the third factor, appellants contend private enforcement by Surfrider was unnecessary because "the enforcement action was duplicative of activity already underway by *both* the County of San Mateo *and* the Coastal Commission." However, the record citations provided by appellants do not demonstrate the existence of enforcement actions sufficient to show an abuse of discretion. Instead, the record citations reveal a series of correspondence between appellants and the County and the Coastal Commission between 2009-2014. None of the record citations indicate any enforcement action had been commenced by the time

the present action was filed in March 2013. Indeed, in a December 2014 letter the Coastal Commission was still urging appellants to voluntarily remedy Coastal Act violations identified in a notice of violation dated September 2011. There is no indication in the record that the County or the Coastal Commission has at any point initiated a serious enforcement action, such as imposition of penalties under section 30821. Moreover, there is no indication in the record that appellants have filed for a CDP. Finally, although section 6213.5 authorizes the State Lands Commission to obtain an "access easement" by eminent domain, this action seeking to determine whether closure of beach access constitutes development under the Coastal Act is distinct. In sum, this is not a case in which "the public rights in question were adequately vindicated by governmental action." (*In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1215 (*Whitley*).)[34]

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[34] We also reject appellants' assertion that the cost of litigation did not transcend Surfrider's individual stake in the suit. Appellants have not shown Surfrider has the type of pecuniary interest that might justify denial of fees under that factor. (See *Whitley*, *supra*, 50 Cal.4th at p. 1211 ["a litigant who has a financial interest in the litigation may be disqualified from obtaining such fees when expected or realized financial gains offset litigation costs"].) Appellants cite no cases to support their novel assertion that boils down to an argument that fees should be denied to Surfrider because preserving beach access is part of the organization's mission. That perverse rule would discourage the valuable contributions of nonprofit organizations in private attorney general actions. (See *ibid.* ["We conclude that a litigant's personal nonpecuniary motives may not be used to disqualify that litigant from obtaining fees under Code of Civil

Appellants have not demonstrated the trial court abused its discretion in awarding attorney fees to Surfrider.

DISPOSITION

The trial court's judgment is affirmed. Respondent is awarded its costs on appeal.

Procedure section 1021.5."].) Revealingly, appellants make no attempt to defend the argument in their reply brief.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.

(A144268, A145176)

Appendix B

SUPREME COURT OF CALIFORNIA

Case No. S244410

SURFRIDER FOUNDATION,

Plaintiff and Respondent,

v.

MARTINS BEACH 1, LLC;
MARTINS BEACH 2, LLC,

Defendants and Appellants.

Filed October 25, 2017

ORDER

Petition for review denied.

Appendix C

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

Case No. CIV520336

SURFRIDER FOUNDATION, a non-profit organization,

Plaintiff,

v.

MARTINS BEACH 1, LLC, a California corporation; MARTINS BEACH 2, LLC, a California corporation; and DOES 1 through 20, inclusive,

Defendants.

AND RELATED CROSS-ACTION.

Filed December 1, 2014

JUDGMENT

Plaintiff SURFRIDER FOUNDATION ("Plaintiff") filed a citizen enforcement lawsuit under the California Coastal Act against Defendants MARTINS BEACH 1, LLC and MARTINS BEACH 2, LLC ("Defendants") for alleged unpermitted development of their property. The matter came on for a bench trial on May 8, 12-15, 19, and on July 16, 2014 in Department 22, the Honorable Barbara J. Mallach presiding. The appearances of counsel for each trial

day are as noted in the record. On June 30, 2014, the parties submitted closing trial briefs. On July 16, 2014 Plaintiff and Defendants presented their closing arguments, and the Court took the matter under submission. The Court issued its Tentative Statement of Decision on September 24, 2014.

On October 9, 2014, Defendants filed objections to the Court's Tentative Statement of Decision titled "Objections to Court's Tentative Statement of Decision" which contained thirty-three objections. On October 9, 2014, Plaintiff filed a "Request for Modification of Limited Portions of the Tentative Statement of Decision."

The Court, having read and considered the oral and written evidence, having observed the witnesses testifying in court, having considered the supporting and opposing memoranda and briefs of all parties, having heard and considered the arguments of counsel and responses to the Tentative Statement of Decision and good cause appearing therefore, issued a Final Statement of Decision on November 12, 2014, which is incorporated by reference into this Judgment.

By reason of the Final Statement of Decision, Judgment shall be entered in this matter as follows:

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that

I. PLAINTIFF'S COMPLAINT

A. First Cause of Action for Declaratory Relief

1. Judgment is entered in favor of Plaintiff.

2. Defendants' desire to change the public's access to and use of the water, beach and coast at Martins Beach constitutes development under the

California Coastal Act. *See* Pub. Res. Code § 30106. Consequently, if Defendants wish to change the public's access to and use of the water, beach and/or coast at Martins Beach, they are required to obtain a Coastal Development Permit prior to doing so.

3. Defendants' conduct in changing the public's access to and use of the water, beach and coast at Martins Beach, specifically by permanently closing and locking a gate to the public across Martins Beach Road, adding signs to the gate, changing the messages on the billboard on the property and hiring security guards to deter the public from crossing or using the Property to access the water, beach and coast at Martins Beach without a Coastal Development Permit(s) constitutes a violation of the California Coastal Act.

B. Second Cause of Action for Injunctive Relief

1. Judgment is entered in favor of Plaintiff.

2. Defendants are hereby ordered to cease preventing the public from accessing and using the water, beach and coast at Martins Beach until resolution of Defendants' Coastal Development Permit application has been reached by San Mateo County and/or the Coastal Commission. The gate across Martins Beach Road must be unlocked and open to the same extent that it was unlocked and open at the time Defendants purchased the property.

C. Third Cause of Action for Fines and Penalties

1. Judgment is entered in favor of Defendants.

2. The Court finds Defendants' conduct was in good faith, and that penalties and fines are not justified.

II. DEFENDANTS' CROSS-COMPLAINT

A. First Cause of Action for Declaratory Relief

1. Judgment is entered in favor of Plaintiff.

2. For the reasons stated in issuing Judgment for Plaintiff on claim for Declaratory Relief, and the reasons in the Court's Final Statement of Decision, Defendants' claim for Declaratory Relief is rejected. Defendants engaged in development under the Coastal Act without a permit.

B. Second Cause of Action for Injunctive Relief

1. Judgment is entered in favor of Plaintiff.

2. There is no evidence to support Defendants' contention that Plaintiff itself engaged in any unauthorized entry onto the property. Further, there is no evidence that Plaintiff "directed or authorized" any individual to enter Defendants' property. Finally there is no evidence that Plaintiff ratified the conduct of any individual who entered the property without permission. The evidence in the record shows that each individual who testified they entered the property after Defendants ceased allowing the public to do so, did so of their own volition.

Dated: DEC 01 2014

BARBARA J. MALLACH
Hon. Barbara J. Mallach
Judge of the Superior Court

Appendix D

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

Case No. CIV520336

SURFRIDER FOUNDATION, a non-profit organization,

Plaintiff,

v.

MARTINS BEACH 1, LLC, a California corporation; MARTINS BEACH 2, LLC, a California corporation; and DOES 1 through 20, inclusive,

Defendants.

AND RELATED CROSS-ACTION.

Filed November 12, 2014

FINAL STATEMENT OF DECISION

Plaintiff SURFRIDER FOUNDATION ("Plaintiff") filed a citizen enforcement lawsuit under the California Coastal Act against Defendants MARTINS BEACH 1, LLC and MARTINS BEACH 2, LLC ("Defendants") for alleged unpermitted development of their property. The matter came on for a bench trial on May 8, 12-15, 19, and on July 16, 2014 in Department 22, the Honorable Barbara J. Mallach presiding. The appearances of counsel for each trial day are as noted in the record. On June 30, 2014,

pursuant to the Court's Order, the parties submitted closing trial briefs. On July 16, the Plaintiff and Defendants presented their closing arguments. The Court took the matter under submission.

The Court issued its Tentative Statement of Decision on September 24, 2014. The decision was mailed to counsel for Plaintiff and Defendants with the traditional Affidavit of Mailing. For the convenience of counsel, copies were also e-mailed and sent by FAX to counsel for Plaintiff and Defendants.

The Court, having read and considered the oral and written evidence, having observed the witnesses testifying in court, having considered the supporting and opposing memoranda and briefs of all parties, having heard and considered the arguments of counsel and responses to the Tentative Statement of Decision and good cause appearing therefore, issues the Final Statement of Decision.

I. INTRODUCTION

The Court notes the legal limitations of a final statement of decision. The statement of decision need only apply to the principal controverted issues. *Coachilla v. Riverside County Airport Land Use Comm'n* (1989) 210 Cal App. Ed. 1277, 1292. The Court need not make any finding on subsidiary issues. *Wolf v. Lipsey* (1985) 163 Cal App. 3d. 633, 643. A statement of decision is legally adequate if it fairly discloses the Court's determination as to the ultimate facts and material issues in dispute, and no point by point response is necessary. *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal. App. 4th 1372, 1380.

A material issue is one that is relevant and essential to the judgment and closely related to the

trial court's determination of the ultimate issues in the case. *Kuffel v. Seaside Oil Co.* (1977) 69 Cal. App. 3d 555, 565. The statement of decision need not discuss issues unnecessary to its decision. *Vukovich v. Radulovich* (1991) 235 Cal App. 3d. 281,294.

The Defendants filed a response to the Court's Tentative Statement of Decision entitled "Objections to Court's Tentative Statement of Decision" which contained thirty-three objections. The Plaintiff filed a "Request for Modification of Limited Portions of the Tentative Statement of Decision." With regard to the Defendants' objections the Court notes that many of the objections by Defendants are either irrelevant or an attempt to re-argue matters already decided by the Court in its tentative decision. The Court will address the Plaintiff's Request for Modification separately. The Court responds to the Defendants objections as follows:

- Defendants' Objections Nos. 1-2:

The Court has read and considered those objections and overrules them.

- Defendants' Objections No. 3:

The Clerk's Minutes from May 8, 2014 are modified to reflect the following:

- Exhibit 25, pp. 26, 40 and 44 were admitted into evidence.

- Exhibit 27, pp. 42, 47 and 48 were admitted into evidence.

- Exhibit 17, pp. 1, 2 and 3 were admitted into evidence.

- Exhibit 26 was neither identified nor admitted into evidence. There was apparent

confusion with Page 26 of Exhibit 25, which was admitted.

- The final exhibit number for Plaintiff was Exhibit 39. Therefore, there were no Plaintiff Exhibits 40, 44 or 53. Again, there was apparent confusion with the page numbers to Exhibit 25.

The Clerk's Minutes from May 13, 2014 are modified as follows:

- Exhibit 149, p. 3 was admitted into evidence but not reflected in the Clerk's Minutes. The Clerk's Minutes are modified to note that addition.

The Clerk's Minutes from May 14, 2014 indicate that Exhibit 5 was not admitted. The Reporter's Transcript indicates that the Defendants had no objection to Exhibit 5 being admitted as "a request for judicial notice." However, Plaintiff did not specifically request that Exhibit 5 be admitted. The Clerk's Minutes are correct regarding the fact that Exhibit 5 was not admitted. (Tr. 541:11-25).

The Clerk's Minutes from May 14, 2014 have been modified to reflect:

- Exhibit 149, p. 7 was admitted into evidence.

- Defendants' Objections Nos. 4-8:

The Court has read and considered those objections.

- Defendants' Objections Nos. 9 and 10:

In response to Objection No. 9, the Court clarifies the language of the Tentative Statement of Decision to state: "After purchasing the property in 2008, the Defendants continued the practice of allowing the public to access and use Martins Beach in the daytime

upon payment of a fee to park a vehicle." Likewise, in response to the first portion of Objection No. 10, the Court clarifies the language of the Tentative Statement of Decision to state: "After purchasing the property in 2008, the Defendants continued the practice of allowing the public to access and use Martins Beach in the daytime upon payment of a fee to park a vehicle." As to the remainder of Objection No. 10, the Court declines to modify its ruling.

- Defendants' Objections Nos. 11-23:

The Court has read and considered those objections and overrules them.

- Defendants' Objections No. 24:

In response to this objection, the Court modifies its ruling to state: "Defendants did apply for a permit to construct an emergency rip-rap revetment. The application was deemed 'incomplete' and is still pending." (Tr. 882:9-13).

- Defendants' Objections Nos. 25-33:

The Court has read and considered those objections and overrules them.

- Plaintiff's Requests for Modification:

Plaintiff's Request for Modification of Limited Portions of the Tentative Statement of Decision discusses two of the five factors identified in Public Resources Code Section 30820: (1) whether the violation is susceptible to restoration or other remedial measures, which is the second factor and (2) the sensitivity of the resource affected by the violation, which is the third factor. The Plaintiff requests certain edits to the Tentative Statement of Decision with regard to those factors indicating as to the second factor that there can be no restoration of four years of

lost access. As to the third factor, the Plaintiff requests further edits indicating that there was a deprivation of a sensitive coastal resource for four years. As to both those factors, the Plaintiff requests that the Court indicate that it weighs in favor of issuing penalties and fines. While the Court acknowledges Plaintiff's position that the prior elimination of access cannot be restored by a permit application, it believes that all five factors set forth in Section 30820 should be weighed and considered carefully in terms of the totality of the circumstances in determining whether penalties and fines are justified. Therefore, the Court declines to adopt the Plaintiff's modifications.

II. THE PARTIES

Plaintiff SURFRIDER FOUNDATION is a volunteer, non-profit organization whose stated mission is to protect the world's oceans, beaches and access to them. Tr. 96:26-97:4; 98:8-12; 285:1-7.

Defendants MARTINS BEACH 1, LLC and MARTINS BEACH 2, LLC were formed in May 2008 (Ex. 103), and purchased the Martins Beach property ("Property") for $32.5 million in June 2008. Tr. 463:19-21, 787:19-21. It is undisputed that Martins Beach is private property.

III. THE CLAIMS AND DEFENSES ASSERTED

a. Plaintiff's Complaint

Plaintiff filed its Complaint on March 12, 2013, asserting three causes of action:

(1) Declaratory Relief that Defendants have engaged in development;

(2) Injunctive Relief ordering Defendants to cease the unpermitted development; and,

(3) Fines and Penalties under the Coastal Act as provided by law.

Defendants make four basic arguments in defense of their conduct: First, access is not development under the Coastal Act; second, waiting for an enforcement action instead of applying for a Coastal Development Permit ("CDP") is a method of complying with the Coastal Act; third, the Coastal Commission would not have approved a permit to block the public's access to the coast at Martins Beach; and, fourth, fines are improper because they acted in good faith.

b. Defendants' Cross-Complaint

Defendants filed their Cross-Complaint on April 25, 2013 asserting two causes of action:

(1) Declaratory Relief that no Coastal Development Permit is required; and

(2) Injunctive Relief to stop Plaintiff from trespassing.

Defendants' First Cause of Action raises the same issues and arguments as Plaintiff's Complaint. In response to the Second Cause of Action, Plaintiff contends there was no entry constituting a trespass, and, even if there was, there is no evidence that Plaintiff directed or authorized the entry or ratified the conduct of any individual who made such an entry.

IV. TRIAL

A court trial was held on each cause of action in the complaint and cross-complaint. The trial began on May 8, 2014 and consisted of six court days, including a half-day site visit to the Property. The site visit was requested originally by Defendants and Plaintiff joined in their request. Counsel represented both

parties and testimony was taken from seventeen witnesses, including three expert witnesses. Fifty-one exhibits were admitted into evidence. That total does not include the various pages of the exhibits which are delineated in the Reporter's Transcript and the Clerk's Minutes. Trial concerned the following issues:

- Is the Property located in a Coastal Zone?
- What were the circumstances of the public's use of and access to the coast at the Property prior to Defendants' purchase?
- What changes have Defendants made to the public's use of and access to the coast at the Property since their purchase?
- Have Defendants engaged in conduct which has changed the intensity of use of the water at the Property?
- Have Defendants engaged in conduct which has changed the public's ability to access the water at the Property?
- Was closing a gate permanently to the public across Martins Beach Road "development" under the Coastal Act?
- Was changing the message on the billboard on the Property along Highway 1 "development" under the Coastal Act?
- Was changing signs on and around the gate "development" under the Coastal Act?
- Was hiring and stationing security guards on the Property intermittently to deter the

public from crossing or using the Property "development" under the Coastal Act?

- Was a Coastal Development Permit obtained for the alleged "development"?
- Was Defendants' decision to engage in the alleged unpermitted "development" knowing and intentional under the Coastal Act?
- Did Surfrider Foundation trespass at the Property?
- Did Surfrider Foundation direct, authorize or ratify the conduct of any individuals who allegedly trespassed at the Property?

V. THRESHOLD FINDINGS

Defendants contend that they have a constitutional right to exclude the public from their private property. Defendants argue that there was no development under the law and that a change in access either to increase or decrease access is not development. Plaintiff contends that development includes conduct beyond physical changes to property and direct impediments to access. The Court rules as a matter of law that "development" under the Coastal Act does not require any physical change or alteration to land *(see DeCicco v. California Coastal Com.* (2011) 199 Cal.App.4th 947, 951), and goes well beyond "what is commonly regarded as development of real property." *Gualala Festivals Committee v. California Coastal Com.* (2010) 183 Cal.App.4th 60, 67.

Development includes building gates, fences and signs, regardless of their purpose. *See LT-WR, LLC v.*

California Coastal Commission (2007) 152 Cal.App.4th 770, 804-805. Activities which are not "commonly regarded as development of real property," such as increasing fees being charged to the public to access the coast, are subject to CDPs under the Act. *See Surfrider Foundation v. California Coastal Commission* (1994) 26 Cal.App.4th 151.

In that case, Surfrider Foundation sued the California Coastal Commission because the Commission had issued a CDP allowing installation of "fee collection devices" at state beaches, but did not approve the actual "imposition of fees" in the permit. *Id* at 157. While the court determined that no permit was required because there was no evidence of a change in intensity of use of the beaches at issue, the court concluded that conduct which causes indirect effects on access to the coast falls squarely within the scope of the Coastal Act:

> Preliminarily, we consider the scope of the Coastal Act's public access and recreational policies. . . . Is this type of indirect effect within the scope of the act's policies? We believe so. [¶] . . . [T]he concerns placed before the Legislature in 1976 were more broad-based than direct physical impedance of access. For this reason, we conclude the public access and recreational policies of the Coastal Act should be broadly construed to encompass all impediments to access, whether direct or indirect, physical or nonphysical.

Id at 157-58.

Because the Court concludes no physical change is required to prove "development" which triggers the need for a CDP, the Court's decision and analysis focuses on whether Defendants' conduct has resulted in a "change in the intensity of use of land," a "change in the intensity of use of water" or a change in the " access thereto." Pub. Res. Code § 30106.[1]

VI. PLAINTIFF'S COMPLAINT FOR VIOLATION OF THE COASTAL ACT

a. Findings of Fact

i. Defendants Admitted Engaging in Unpermitted Development

During trial, Defendants admitted their conduct changed the intensity of use of the water and the public's access to the water at Martins Beach. Steven Baugher, the manager of the LLCs, admitted changing the intensity of use of the coast and admitted changing the public's access to the coast by closing the gate across Martins Beach Road without a CDP. *See* Trial Transcript ("Tr.") at 456:15-23, 477:3-6, 515:25-516:l l.

ii. The Property

1. The Property is Subject to Jurisdiction Under the Coastal Act

The Property is in the Coastal Zone. Tr. 449:19-20; *see also* Ex. 29 at PE029.0004. The Property is subject to jurisdiction of the County and the Coastal Commission under the Coastal Act, meaning development at the Property requires a CDP. *See* Ex.

[1] All further citations to code sections are to Public Resources Code unless otherwise noted.

2 at PE002.0004 (explaining that the LLCs "concede[] that jurisdiction is controlled by Public Resources Code section 30600(a), which applies to any person wishing to perform or undertake development in the coastal zone"); Ex. 29 at PE029.0005 (Defendant's response to Request for Admission No. 2, admitting that development at the Property requires a CDP, so long as "development" is applied consistent with the United States and California Constitutions); Tr. 221:13-16; § 30600(a).

2. The Gate, Billboard and Signs, Before and After the Purchase

At the time of the purchase, there was a gate that was unlocked and open to the public during the day for a significant period of the year. Tr. 71:3-8, 93:18-21, 131:4-132:2, 141:12-24, 546:3-21. Rich Deeney testified that the gate was periodically closed during inclement weather in the wintertime, when parking attendants were not available and when there were private events. He also testified that the gate was locked at night. The current gate was constructed around 1991, replacing a portion of the original gate that was built in the late 1950s—and in fact motorizing the gate. Tr. 548:21-549:2, 570:23-571:18. There was a billboard inviting the public to access Martins Beach by driving down Martins Beach Road from Highway 1. *See* Ex. 25 at PE025.0024; Tr. 105:12-106:15. The fence, gate in some form and billboard have existed on the Property since at least the 1950's. After purchasing the property in 2008, the Defendants continued the practice of allowing the public to access and use Martins Beach in the daytime upon payment of a fee to park a vehicle. In the summer or fall of 2010,

the gate was closed and locked to keep the public out. Tr. 273:19-274:21, 457:20-458:22, 513:26-514:13. After purchasing the Property, the billboard was painted over and is currently a blank, dark green rectangle. *See* Ex. 36; *see also* Tr. 93:22-94:11, 105:12-106:3. At the time of the purchase there was a sign attached to the gate stating either "Beach Closed Keep Out" or "Beach Closed, Do Not Enter, No Exceptions" *See* Ex. 25 at PE025.0026; Tr. 489:26-490:5. There was also a sign on the gate stating "No Trespassing." *See* Ex. 25 at PE025.0026; Tr. 489:23-25. There were also signs adjacent to Martins Beach Road, near the gate which stated such things as "Toll Road" and "No Dogs Allowed". Ex. 149 at 149.003; Tr. 494:7-9; 496:26-497:16.

After purchasing the property, a sign was added to the gate stating, "Beach Temporarily Closed for Repair." Ex. 25 at PE025.0026; Tr. 491:17-493:4. It also appears that the signs adjacent to the gate were removed. *See* Ex.149-5. Then, in the spring of 2013, Defendants contracted to hire security guards to keep the public off the Property. 460:6-15; Ex. 24. The contract called for those guards to provide a visible presence to deter members of the public from accessing the Coast at the Property, albeit intermittently. Ex. 24 at PE024.0006; Tr. 460:6-25.

Defendants did not obtain a CDP to block access to the coast, to close the gate across Martins Beach Road, to change the billboard, to add, remove or change signs attached to the gate, to station security guards on the Property from time to time, or to remove or change the signs adjacent to Martins Beach Road near the gate. *See, e.g.,* Tr. 456:15-457:19.

iii. The Public's Use of and Access to Martins Beach has been Changed by Defendants' Conduct

The prior property owners, the Deeney Family, allowed the public to park on the property and access the coast, usually upon payment of a parking fee. Tr. 69:23-70:8, 100:13-18, 141:12-22, 402:6-8, 435:1-9, 557:8-9, 585:26-586:10. The public, on occasion, also accessed and used the coast and the beach at the Property by walking down the Martins Beach Road without payment of a fee. Tr. 99:14-101:1. However, the Deeneys or their employees would ask walk-in visitors to leave the property and return with a vehicle if they were made aware that someone had entered without paying a parking fee. The Deeneys allowed access, at minimum, upon payment of a parking fee, during the daytime and during the summer. Tr. 475:22-476:1.

The Deeneys did not permanently block the public's access to or use of the coast and always allowed the public to use and access the coast after temporary closures. Tr. 578:7-579:8. Prior to 2008, with very limited exceptions for individuals engaging in disruptive or illegal behavior, members of the public were not asked to leave the Property nor were they informed they were trespassing. Tr. 70:9-17, 100:22-101:1, 142:15-20, 361:13-15, 556:24-557:26.

As stated previously, for approximately two years after Defendants purchased the property in July 2008, they allowed the public to access and use the coast upon payment of a fee to park. *See* Ex. 22; *see also* Tr. 502:17-503:11. According to Defendants' records, from July 2008 to September 2009, 1,044 vehicles paid the

fee and accessed the coast. *See* Ex. 22. Defendants did not keep logs for 2010. Tr. 515:8-9. In the summer or fall of 2010, Defendants stopped allowing the public to access the coast. Tr. 457:20-458:22, 513:26-514:13. Since permanently closing the gate and blocking the public's access to the coast at Martins Beach, the LLCs' records reflect they have kicked at least 100 individuals off the property for purportedly "trespassing." *See* Ex. 23.

iv. Defendants' Lawsuit against San Mateo County and the Commission

In June 2009, after being told by the County that a CDP was required to cease allowing the public to access the coast and after informing the County they would allow the public to access the coast, Defendants sued San Mateo County and the Coastal Commission. *See* Ex. 1. The lawsuit sought a declaration and injunction that the LLCs were not required to maintain public access. *Id* at PE001.0012-0013. On October 16, 2009, Judge Grandsaert granted the County and Coastal Commission's demurrers, without leave to amend. *See* Ex. 2.

Judge Grandsaert's Order found the LLCs conceded that jurisdiction is controlled by Public Resources Code Section 30600(a), which applies to any person wishing to perform or undertake development in the coastal zone. The LLCs conceded that "public access to Martins Beach was provided . . ., that [the LLCs] acquired the [Property] in 2008, and that [the LLCs] now seek[] to discontinue allowing public access . . . " *Id.* at PE002.0005. "Before seeking a judicial determination in this Court, [the LLCs] must comply with the administrative process provided by

the California Coastal Act." *Id.* (emphasis added). The determination of whether a permit is required is not a pure question of law because there will be:

> issues of fact with regard to the precise circumstances under which access was provided by [the LLCs'] predecessors in interest, and therefore issues concerning the extent to which [the LLCs'] proposals constitute a '. . . change in the intensity of use of water, or of access thereto' (Public Resources Code sec. 30106) [and that] the exact circumstances of the prior access, and the extent to which [the LLCs] seek[] to change access, are appropriate factual inquiries to be submitted to the appropriate administrative body.

Id.

b. Conclusions of Law

Based upon the facts and evidence in this litigation, and in addition to the Court's threshold finding that development under the Coastal Act does not require any physical change or alteration to land, and goes beyond what is commonly regarded as development of real property (section IV., *supra),* the Court makes the following conclusions of law.

i. Changing the Intensity of Use or the Public's Access to Water is Development

Under the Coastal Act,

> Development means . . . change in the density or intensity of use of land, . . . change in the intensity of use of water, or of access thereto; . . . [¶] As used in this section, "structure"

> includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line. (quoting § 30106.)

In interpreting the statute's definition, the Court's "fundamental task . . . is to determine the Legislature's intent so as to effectuate the law's purpose." *In re C.H.* (2011) 53 Cal.4th 94, 100. "If the statute's text evinces an unmistakable plain meaning, [the court] need go no further. *Id.* Here, the text is unambiguous. Development includes any activity which changes the intensity of use of land or water or the public's access to the coast. *See* § 30106.

The plain meaning is supported by the legislative findings and purposes of the Coastal Act. The Coastal Act "was enacted by the Legislature as a comprehensive scheme to govern land use planning for the entire coastal zone of California." *Pacific Palisades Bowl Mobile Estates v City of Los Angeles* (2012) 55 Cal.4th 783, 793. This "scheme" was enacted because

> "the California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people"; that "the permanent protection of the state's natural and scenic resources is a paramount concern"; that "it is necessary to protect the ecological balance of the coastal zone" and that "existing developed uses, and future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state . . ."

Id. (quoting § 30001(a) and (d); citing *Yost v. Thomas* (1984) 36 Cal.3d 561, 565). The legislature also noted that the "permanent protection of the state's natural and scenic resources is a paramount concern to present and future residents of the state and nation." § 30001(b). The Coastal Act is to be "liberally construed to accomplish its purposes and objectives." § 30009. "Any person wishing to perform or undertake any development in the coastal zone must obtain a coastal development permit." *Pacific Palisades*, 55 Cal.4th at 794.

In 2012, the California Supreme Court ruled on the meaning of "development" under the Coastal Act and rejected the contention that "the Coastal Act is concerned only with preventing an *increase* in density or intensity of use." *Pacific Palisades*, 55 Cal.4th at 795 (italics in original). The Court explained, "by using the word 'change' . . . a project that would decrease intensity of use, such as by limiting public access to the coastline . . . is also a development." *Id.*

Defendants seek to distinguish this statement on the grounds that they are not engaging in a subdivision or "project." Defendants' distinction is immaterial. The Court's statement interpreting the definition of "development" under the Coastal Act was a clear statement of law. The Court's example of what would constitute development—"limiting public access to the coastline" (*id.*)—is exactly what Defendants have done. The Court rejected the idea a party could

> avoid the reach of the Coastal Act by asserting that its particular conversion will have no impact on the density or intensity of

> land use. . . . [T]he act accounts for the possibility a proposed project may not affect coastal resources by conferring authority on the executive director of the coastal commission, after a public hearing, to issue "waivers from coastal development permit requirements for any development that is *de minimus*." (Pub. Resources Code § 30624.7.).

Id. at 390; *see also Gualala Festivals*, 183 Cal.App.4th at 69-70 (finding the same).

ii. Defendants Engaged in Unpermitted Development

1. The Legislative History of the Coastal Act

Defendants contend the legislative history of the Coastal Act supports their argument that "access is not development," based upon the testimony of their expert, Norbert Dall. However, even if the Court were to consider Defendants' contentions regarding the legislative history, they are misplaced in this context.

Mr. Dall testified about changes made during the drafting process to what is now codified at § 30211. That section provides that "Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation." Pub. Res. Code § 30211. As Mr. Dall acknowledged, this section has nothing to do with whether the challenged conduct is or is not development, but instead is intended to provide guidance to the administrative agency reviewing a

permit application and is distinct from the definition of development, codified in Section 30106. Tr. 853:17-855:4. Section 30211 is simply not relevant to the question presented in this matter, namely, whether a CDP was required. The answer is yes, despite Mr. Dall's testimony and Defendants' arguments about Section 30211.

The argument puts the cart before the horse. Defendants admitted that "unless and until" a permit application is made, nobody can know how the County or Commission will rule on that application. Defendants' reliance on the legislative history of § 30211 does not and cannot demonstrate that their conduct is not "development" as defined by § 30106.

2. Defendants' Speculation about the Outcome of a Permit Application that has not Been Made

Defendants contend they were told by the California Coastal Commission that they would never receive a permit of any kind due to their decision to terminate decades of public access to the water and coast at Martins Beach. Defendants admitted that there is no written support for this contention (Tr. 777:9-26), and Mr. Baugher testified that unless and until the LLCs apply for a permit, nobody knows how the Commission would rule on such an application.

Not only have Defendants admitted that nobody can know how the administrative process would play out, but that is the only logical conclusion this Court can draw—nobody knows what would happen if Defendants had applied for a permit, because no permit application was ever made.

The Coastal Act "was enacted by the Legislature as a comprehensive scheme to govern land use planning for the entire coastal zone of California." *Pacific Palisades Bowl Mobile Estates v. City of Los Angeles* (2012) 55 Cal.4 783, 793. This scheme was enacted because the Legislature found that

> "[T]he California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people"; that "the permanent protection of the state's natural and scenic resources is a paramount concern to present and future residents of the state and nation"; that "it is necessary to protect the ecological balance of the coastal zone" and that "existing developed uses, and future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state. . ."
>
> *Id*. (quoting Pub. Resources Code § 30001(a)-(d)).

At the same time, Pub. Res. Code § 30010 states that the Coastal Commission cannot apply the Coastal Act in a manner that would violate the takings clauses in the state and federal constitutions. Section 30010 provides:

> The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or

> damage private property for public use, without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.

The Coastal Act thus emphasizes the importance of both the public's ability to access and enjoy the coast as well as the protection of private property rights. By directing Defendants to the Coastal Commission for resolution of its coastal development permit application, the Court trusts that the Commission will adhere to its responsibility to fairly balance the competing interests set forth in the Coastal Act.

VII. PENALTIES AND FINES

A. Penalties and Fines Are Not Justified Under the Facts

Plaintiff claims daily fines should be awarded under Section 30820, which provides that "Civil liability may be imposed . . . on any person who performs or undertakes development that is in violation of this division. . ." However, Defendants have established a defense based on the Court's decision in *No Oil, Inc. v. Occidental Petroleum Corporation* (1975) 50 Cal.App.3d 8, 29-30. There, the court found that *"a good faith belief reasonably entertained" is a defense* to the penalty provisions in the Coastal Act. The manager of the LLCs, Steve Baugher, repeatedly testified that he had a good faith belief that Defendants were *not* required to apply for a CDP:

- Mr. Baugher testified that he relied on the transcript from the Court's ruling on Surfrider's

demurrer to Defendants' Cross-Complaint to support his conclusion that he did not need to apply for a CDP. Tr. 739:21-741.

- Mr. Baugher testified that he relied on the Court's judgment and written ruling in the *Friends of Martins Beach* case to support his decision in this case that he did not need to apply for a CDP. Tr. 744:4-745:9.
- Mr. Baugher testified that he relied on the letters Ms. Gallo wrote to the County and the Coastal Commission to support his conclusion that he did not need to apply for a CDP. Tr. 724:1-725:8; 730:9-23; 732:11-734:2; 751:12-752:12.
- Mr. Baugher testified that County officials expressly admitted that the Red, White & Blue Beach was private property with a paid-for-parking business and closed its gate with no action by the Coastal Commission or Santa Cruz County. Tr. 704:19-7-8:25.
- San Mateo County responded to a Public Records Act request indicating that it had no records of an application for a CDP for any property owner requesting permission to "cease beach use and/or access" or "cease the operation of a business and did not seek to reopen a new business in its place." Pl. Exh. 110, 111.

Thus, Defendants' "good faith" belief that its failure to apply for a CDP was lawful is a complete defense to Plaintiffs claim that Defendants should be liable for penalties.

Further, Section 30820 sets forth various factors to be considered when determining the amount of civil liability, and each of those factors weighs against the

imposition of a fine in any amount. The factors to be considered are:

(1) The nature, circumstance, extent, and gravity of the violation.

(2) Whether the violation is susceptible to restoration or other remedial measures.

(3) The sensitivity of the resource affected by the violation.

(4) The cost to the state of bringing the action.

(5) With respect to the violator, any voluntary restoration or remedial measures undertaken, any prior history of violations, the degree of culpability, economic profits, if any, resulting from, or expected to result as a consequence of, the violation, and such other matters as justice may require. §30820.

The issue of whether Defendants are required to apply for a CDP to close the gate on its private property presents a legitimate dispute between the parties. While the failure to apply for a CDP here constitutes a violation of the Coastal Act, Defendants permissibly relied and acted upon the information provided by the County management staff (who have extensive Coastal Commission management experience); the Court Order from the *Friends of Martins Beach* case; language in Court rulings from the *Surfrider* case; and letters to and from attorneys and County and Coastal Commission staff.

As to the second factor, to the extent Defendants' failure to apply for a CDP is considered a violation of the Coastal Act, such violation can be restored or remedied by filing a CDP application. The Court

acknowledges Defendants' concerns and perceptions regarding the outcome of such a permit application. Mr. Baugher and Ms. Gallo both testified that in a meeting, the Coastal Commission told them that they would "never" allow Defendants to obtain a permit; that they "knew how to deal with people like [Defendants]"; and that they would "wrap [Defendants] up in red tape and use their leverage" to make sure they never got a hearing. Tr. 726:23-729:22; 616:10-617:17. The cost of making improvements necessary to make beach access to the public possible is not lost on the Court, and once again the Court reiterates its trust that the Coastal Commission will fairly determine the issue of Defendants' CDP application, keeping in mind the Coastal Act's requirement that the Commission not "exercise their power to deny or grant a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor." § 30010.

As to the third factor, there has been no loss of a sensitive resource as a result of Defendants not applying for a CDP. As the Court observed during its site visit, and as several witnesses testified during trial, some people are using Martins Beach notwithstanding the posted notices that it is private property. As to the fourth factor, there is no cost to the state of bringing the action, since it is being brought by the Surfrider Foundation. Finally, as to the fifth factor, there is no prior history of violations on the property. Rather, when told that a series of cypress trees mistakenly planted on the CalTrans easement required a permit to be moved and planted on Defendants' property, Mr. Baugher went to the

County to apply for the permit. When he found out the application for the permit would cost $16,000, he decided not to apply for the permit and removed the trees instead. Tr. 446:21-467:6. Further, Defendants did apply for a permit to construct an emergency rip-rap revetment. The application was deemed "incomplete" and is still pending. (Tr. 882:9-13). For these reasons, the Court finds there is no justification for the imposition of penalties in any amount.

VIII. DEFENDANTS' CROSS-COMPLAINT

Defendants' Cross-Complaint asserts two causes of action, one for declaratory relief that their conduct does not require a Coastal Development Permit, and one for Injunctive Relief seeking to prevent "Cross-Defendants [Surfrider Foundation], its agents, servants and employees, and all persons acting under, in concert with, or for them, from trespassing" at the Property.

A. Declaratory Relief

For the foregoing reasons, Defendants' claim for Declaratory Relief is rejected. Defendants engaged in development under the Coastal Act without a permit. This Court does not and cannot know how the California Coastal Commission would rule on a permit application that has not been made. As Judge Grandsaert explained in his order, the "final decision [of the Commission or County] may be reviewed by this Court by writ of mandamus." Ex. 2 at PE002.0005.

B. Injunctive Relief

There is no evidence to support Defendants' contention that Plaintiff itself engaged in any

unauthorized entry onto the Property. Further, there is no evidence that Plaintiff "directed or authorized" any individual to enter Defendants' Property. *See Huntingdon Life Sciences, Inc., v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1264. Finally, there is no evidence that Plaintiff ratified the conduct of any individual who entered Defendants' Property without permission. The evidence in the record shows that each individual who testified they entered the Property after the Defendants ceased allowing the public to do so, did so of their own volition. Tr. 111:14-20, 151:25-152:1.

IX. CONCLUSION

For the foregoing reasons, Judgment is entered in favor of Plaintiff on the First and Second causes of action in Plaintiff's Complaint, and in favor of Plaintiff on both causes of action in Defendants' Cross-Complaint. Judgment is entered in favor of Defendants on the Third cause of action in Plaintiff's Complaint for penalties and fines.

1. Defendants are hereby ordered to cease preventing the public from accessing and using the water, beach and coast at Martins Beach until resolution of Defendants' Coastal Development Permit application has been reached by San Mateo County and/or the Coastal Commission.

2. Defendants' desire to change the public's access to and use of the water, beach and coast at Martins Beach constitutes development under the California Coastal Act. *See* § 30106. Consequently, if Defendants wish to change the public's access to and use of the water, beach and coast at Martins Beach, they are

required to obtain a Coastal Development Permit prior to doing so.

3. Defendants' conduct in changing the public's access to and use of the water, beach and coast at Martins Beach, specifically by permanently closing and locking a gate to the public across Martins Beach Road, adding signs to the gate, changing the messages on the billboard on the property and hiring security guards to deter the public from crossing or using the property to access the water, beach and coast at Martins Beach without a Coastal Development Permit(s) constitutes a violation of the California Coastal Act.

4. The Court finds, however, that Defendants' conduct was in good faith, and that penalties and fines are not justified.

Plaintiff shall prepare a Judgment that accurately reflects the Final Statement of Decision.

Dated: NOV 12 2014

[handwritten: signature]
Hon. Barbara J. Mallach
Judge of the Superior Court

Appendix E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Cal. Pub. Res. Code §30106

"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511).

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

Cal. Pub. Res. Code §30600(a)

Except as provided in subdivision (e), and in addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, any person, as defined in Section

21066, wishing to perform or undertake any development in the coastal zone, other than a facility subject to Section 25500, shall obtain a coastal development permit.