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COMMENTS

PUBLIC ACCESS AND THE CALIFORNIA COASTAL COMMISSION: A QUESTION OF OVERREACHING

I. Introduction

The seventies signaled the beginning of a decade in which Californians would find new ways and means to acquire access to the Pacific Ocean. The costs associated with acquiring public accessways have traditionally been viewed as a governmental expense paid by public funds. Decrying the use of condemnation proceedings or litigation to establish prescriptive rights, the California Coastal Commission and six Regional Commissions are employing a regulatory scheme presumably authorized under recent coastal legislation, which shifts the

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1. In April 1976, the California State Legislature enacted the Coastal Act of 1976, Cal. Pub. Res. Code §§ 30000-30900 (West 1977 & Supp. 1980), a controversial piece of legislation that was primarily aimed at the regulation of land use within the coastal zone. The Coastal Act, to a large extent, was the Legislature's implementation of the policies and recommendations of the California Coastal Zone Conservation Plan (Coastal Plan) prepared by the California Coastal Commission (State Commission) pursuant to Proposition 20. The Act replaced the original Coastal Act of 1972, an initiative measure passed by California voters by a 55 to 45 percent margin. When Proposition 20 expired at the end of 1976, the provisions of the 1976 Act took effect. With the passage of the 1976 Act, six temporary Regional Commissions and one ongoing State Commission were established to exercise control over coastal development permits. The Act also transferred the responsibility of preparing a coastal plan from the commissions to each of the 15 counties and 53 cities along the coast. Each local government is responsible for developing a Local Coastal Plan (LCP) which brings local government plans and regulations into conformity with Coastal Act policies. When reviewed and certified by the State Commission as consistent with the Coastal Act, the LCP plan will become the coastal plan in that city or county. As such, the review authority for new development will be returned to local governments thereby phasing out the six Regional Commissions. The State Commission will continue to exercise permit jurisdiction over certain kinds of development and will continue to hear appeals and review amendments to certified LCP's. Every five years the State Commission is required to review the progress of local governments in carrying out the Coastal Act which will stay in effect. See generally REA Enterprises v. California Coastal Comm'n, 52 Cal. App. 3d 596, 603-04, 125 Cal. Rptr. 201, 205-06 (1975); Cal. Pub. Res. Code §§ 30500-30525 (West 1977 & Supp. 1980); Cal. Coastal Comm'n,
acquisition costs of public accessways to the coastal developer. This scheme largely parallels the subdivision exactions upheld in *Associated Home Builders v. City of Walnut Creek.* The coastal developer is required to dedicate land for public access to the beach as a precondition to approval of a coastal development permit.

One might dismiss the seriousness of these outlays by characterizing the coastal developer as a transient owner bent on maximizing profits. However, closer investigation reveals that the term "coastal developer" is not synonymous with the terms "subdivider" and "land developer" as used in the traditional sense. The term "coastal developer" as used in this comment derives its meaning from the Coastal Act's definition of "development" which encompasses any conceivable structure built, placed, or repaired between the sea and the nearest public road. Even where the terms "subdivider" and "land developer" are interchangeable with the term "coastal developer," the initial costs incurred by the subdivider are passed on to individual lot owners. The bottom line is somewhat alarming. Any person desiring to live on the coast or intensify his use of ocean front property, whether a subdivider, condominium owner, homeowner, or apartment dweller, is on notice that he will be made to pay for the public's access to the shoreline.

The State Commission and the six Regional Commissions view public access as a "top priority" of the Coastal Act. As a result, they have vigorously applied the public access policies and provisions of the Act in an attempt to enhance and secure a public accessway system along the California coastline. The commissions' enthusiastic application has been praised by many environmental interest groups such as the Sierra Club's Coastal Task Force and Coastwatch. This same enthusiasm

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2. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, appeal dismissed, 404 U.S. 878 (1971).
5. CAL. COASTAL COMM'N, COASTAL NEWS, Nov. 1979, at 4.
7. In the words of one Sierra Club Coastal Task Force representative speaking at a public hearing before the State Commission:

[O]ne of the greatest legacies of this Coastal Commission and the public
has drawn heavy criticism from coastal residents, developers, public interest groups, and local governments. One only need attend a public hearing on a Local Coastal Plan (LCP), for any one of the sixty-eight counties and cities engaged in the preparation of LCP's, to surmise that a large number of these individuals and groups feel the commissions' aggressive implementation of the access policies and provisions of the Act has run afoul of the legislative intent and express language of the Coastal Act. Sympathetic legislators have responded to these complaints, heightening the controversy. During the 1979 legislative session, two pieces of legislation were introduced which would have abolished the State Commission and returned permit controls under the Coastal Act to local governments, and precluded the State Commission from requiring any LCP to include exactions from private property owners.

In addition to these legislative efforts, coastal developers subject to the access related provisions of the Coastal Act have begun to mount an elaborate legal attack on the commissions' regulatory scheme. Developers and the Pacific Legal Foundation (Foundation) have assailed the proclaimed constitutional underpinning of the Act's access policies. Some developers are maintaining that the Legislature did not grant involvement in its processes will be some kind of public trail running from Oregon to Mexico unlike [sic] the Muir Trail in the mountains. We think that's one of the greatest benefits this Commission could bestow on present and future generations.

Administrative Record at 430, Georgia-Pacific, Inc. v. California Coastal Comm’n No. 74459 (San Francisco County Super. Ct. 1979) [hereinafter cited as Administrative Record Georgia-Pacific].

10. The hesitation on the part of developers can be attributed to the "economic realities" of protracted litigation and the "wait and see" attitude that prevailed with the earlier interim measure known as Proposition 20. Faced with a permanent coastal management program and the prospect of increased regulation at the local level a number of developers have initiated litigation as a last resort. Conversation with Sherman Stacy, (Jan. 28, 1980), attorney for plaintiffs, Benton v. South Coast Regional Comm’n, No. 238910 (Los Angeles County Super. Ct. 1978). See D. HAGMAN & D. MISZYNSKI, WINDFALLS FOR WIPROUTS: LAND VALUE CAPTURE AND COMPENSATION 347-48 (1978).
11. The Pacific Legal Foundation is a not-for-profit tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest.
the commissions the power to require the dedication of access as a condition to development when it enacted the public access component of the present Act. Others claim that the commissions are acting in excess of their statutory authority by requiring dedications prohibited by the express language of the enabling provision. Along the same lines, the Foundation has also challenged the State Commission's newly adopted "Statewide Interpretive Guidelines on Public Access" (Access Guidelines) as being inconsistent with the access provisions of the Coastal Act.

Recognizing these challenges and that local governments are in the midst of preparing LCP's which must be in conformity with the Coastal Act, the Act's access policies will be explored for the purpose of delimiting their requirements and prohibitions. This comment will also inquire into whether the access policies are constitutionally based and whether they authorize the commissions to condition coastal development upon the dedication of access or upon the payment of a fee in lieu thereof. After concluding that there is no apparent constitutional foundation for the enactment of the access policies and that the commissions are restricted to requiring access dedications, the comment will examine the limited nature of that authority. Finding that the enabling provision contains three inherent prohibitions, this comment will review the State Commission's Access Guidelines, highlighting the apparent inconsistencies. To better illustrate these inconsistencies, this comment examines the access conditions imposed on one developer's coastal development permit.


15. Pacific Legal Foundation v. California Coastal Comm'n, No. 268254 (Los Angeles County Super. Ct. 1980). The ultimate resolution of this case may have far reaching consequences. The Access Guidelines constitute the State Commission's interpretation of the access requirements of the Coastal Act and for all practical purposes are the primary means by which the commissions and local governments will implement their public accessway programs. CAL. COASTAL COMM'N, SUPPLEMENTS TO LOCAL COASTAL PROGRAM MANUAL INFORMATION ON COASTAL SHORELINE ACCESS POLICIES (1979) [hereinafter cited as LOCAL COASTAL PROGRAM MANUAL SUPP.].
II. AN OVERVIEW OF THE PUBLIC ACCESS COMPONENT

The 1976 Coastal Act is the most comprehensive and novel piece of environmental legislation enacted in California in the last decade. The Act was the center of debate in the Legislature and was passed only because of the last minute efforts of some environmentally minded legislators and lobbyists. In the struggle to pass the Act some of the more controversial provisions were the product of legislative compromise. As a result, some of these provisions contain language which is ambiguous or lacking any discernable legislative intent, leading to the basic unworkability of the provision. Other provisions fail to define key terms. This is particularly evident in the public access component of the Act, specifically sections 30210, 30211 and 30212, the gateway provisions to the component which presumably enable the commissions to require the dedication of accessways.

In an apparent attempt to cure any deficiencies in the Act which might become evident when the policies and provisions of the Act were applied, the Legislature charged the State Commission with the responsibility for promulgating "Interpretive Guidelines." These guidelines were "designed to as-

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16. A brief legislative history of the Coastal Act underscores that conflict: The original coastal bill, SB 1579 was introduced in the Senate in February 1976. After several hearings, the bill was approved in one committee but in June 1976, it failed to clear the Senate Finance Committee. For awhile it seemed as if coastal legislation was dead until next year, when the bill was quickly reviewed as amendments to a minor bill, SB 1277, [which] had already received Senate hearings and approval. In two months SB 1277 emerged from both houses of the Legislature as the basis of California's coastal management program.

17. CAL. PUB. RES. CODE §§ 30210-30212 (West Supp. 1980). Section 30210 provides:

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Section 30211 provides:

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.

18. Id. § 30620(a)(3) (West 1977).
sist local governments, the regional commissions, the commission and persons subject to the [development control] provisions . . . in determining how the policies of this division [the Act] shall be applied in the coastal zone prior to certification of local coastal programs . . . .” Access Guidelines were desperately needed by the commissions who were given the mandate that they “maximize access” without any real standards for determining when access conditions are warranted and the extent to which they are required. A close examination of the Access Guidelines reveals, however, that the State Commission did more than merely “assist” concerned parties. The State Commission essentially rewrote the public access component of the Act, particularly section 30212, misinterpreting the apparent meaning and intent of its terms and phrases, and in one instance exceeding its expressed authority.

The definitional shortcomings of the public access component are further accentuated by the Legislature’s and commissions’ misinterpretation of the meaning and effect of article X, section 4 (formerly article XV, section 2) of the California Constitution, and the so called “constitutional right of access” which emanates from this provision. This frequently misconstrued enactment is the mislaid cornerstone of the public access component.

19. Id.

20. Id. § 30001.5 (West Supp. 1980) in part states that one of the “basic goals of the state for the coastal zone” is to: “Maximize public access to and along the coast . . . consistent with sound resources conservation principles and constitutionally protected rights of private property owners.” (emphasis added).

21. See Cal. Pub. Res. Code § 30214 (West Supp. 1980). The Legislature recently enacted this section to require the commissions to take “into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances of each case.” While this section requires the commission to “regulate” access, they are still without statutory standards for determining when access conditions are warranted at the outset. The only standard in the Act, if any, is that the access condition imposed be “reasonable.” Id. § 30607 (West 1977). This begs the question. What is “reasonable,” and what criteria are necessary in making that determination? See Cal. Coastal Comm’n, Statewide Interpretive Guidelines on Public Access (Feb. 20, 1980) [hereinafter cited as 1980 Access Guidelines], which suggests that the key to the reasonableness standard lies in the construction of the term “new development projects” as used in section 30212.

22. See text accompanying note 51 infra.
III. ABSENCE OF A CONSTITUTIONAL UNDERPINNING FOR THE ACCESS POLICIES OF THE COASTAL ACT

Perhaps the most pressing challenge to the public access component of the Act concerns the alleged absence of any constitutional foundation for the Act's access policies contained in sections 30210, 30211, and 30212. The State Commission maintains that the Legislature enacted the access policies of the Act in an attempt to carry out the mandate of article X, section 4. Developers and the Pacific Legal Foundation argue that this constitutional enactment cannot provide the commissions with the legislative basis for requiring access dedications from upland developers. Such a claim, if successfully demonstrated, would significantly undermine the access conditioning powers presumably granted in section 30212(a).

The repercussions of a finding that there is no constitutional basis for the access dedications required of upland coastal developers are noteworthy. Such a finding would similarly stand for a rejection of the public's constitutional right of access over uplands to navigable waters. Access conditions imposed pursuant to sections 30210, 30211, and 30212 would not be accorded the same degree of deference accorded regulations designed to promote or safeguard a state constitutional right. Rather, the character and constitutional validity of the commissions' regulatory activity would be evaluated solely as a traditional exercise of the state's police power. Moreover,


26. To condition upland coastal development upon the provision of public access has been held to be within the scope of the state's police power to reasonably
the commissions’ regulatory activity could not be justified under the auspice of protecting the “public’s right of access,”

regulate the use of property for the protection of the public health, safety, and general welfare. Sea Ranch Ass’n v. California Coastal Comm’n, No. C-74-1320 (N.D. Cal. April 7, 1981); Frisco Land & Mining Co. v. California, 74 Cal. App. 3d 736, 753-54, 141 Cal. Rptr. 820, 830-31 (1977). The larger question, however, is whether such conditions go so far as to amount to a taking under the particular facts and circumstances of each case. E.g., Kaiser Aetna v. United States, 444 U.S. 164, 174-75 (1979).

Under federal takings analysis, several factors have been identified as having particular significance in determining whether governmental action effects a taking of private property. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124-28 (1978). Of the several factors enumerated by the Court in Penn Central, two have the most relevance in evaluating a taking challenge to the imposition of access conditions: 1) the character of the governmental action (i.e. whether it can be characterized as “a physical invasion by government,” as “reasonably necessary to the effectuation of a substantial public purpose,” or as “an acquisition of resources to permit or facilitate uniquely public functions”) and 2) whether the attempted regulation interferes with reasonable investment-backed expectations. See Kaiser Aetna v. United States, 444 U.S. 164, 175-80 (1979).

In Kaiser Aetna the government attempted to create a public right of access by requesting an injunction, which the Court of Appeals granted, to require the developer of a marina-styled subdivision community to allow public access to the waters of the marina (Kuapa Pond). The government claimed that the petitioners could not exclude the public from Kuapa Pond because they had a right of access over those waters by virtue of the federal navigational servitude over navigable waters of the United States. Id. at 170. After examining the two factors mentioned above, the Supreme Court rejected this claim, despite finding Kuapa Pond was navigable and subject to Congress’ power to regulate navigable waters and promote navigation. Id. at 172. The Court first noted that the government’s attempt to create a public access right was tenuously connected to the promotion of the purposes of the navigational servitude. Id. at 178. Then the Court proceeded to find that the “right to exclude” was such an important investment-backed expectancy on the part of Kaiser Aetna that it fell within the category of property interests which cannot be taken without just compensation. Id. at 179-80. Kaiser Aetna’s investment of “substantial amounts of money in making improvements” was justified on the grounds of the government’s prior acquiescence in the unconditional dredging of Kuapa Pond. Id. at 176, 179. In closing, the Court further characterized the governmental action by finding that if carried out it would “result in an actual physical invasion of the privately owned marina,” an intrusion which apparently would itself require the payment of just compensation. Id. at 180.

Cases involving a taking challenge to the access conditions imposed upon upland development will require a consideration of the factors addressed in Penn Central. The creation of a right of public access, whether over navigable waters or uplands adjacent thereto, will result in an actual physical invasion of privately owned property. This is an important, if not dispositive, factor. Compare Kaiser Aetna, 444 U.S. at 178 & n.9 and Penn Central, 438 U.S. at 124 with Kaiser Aetna, 444 U.S. at 180 (citing United States v. Causby, 328 U.S. 256, 265 (1946); Portsmouth Co. v. United States, 260 U.S. 327 (1922)). Whether the condition interferes with reasonable investment-backed expectations will turn on the nature, extent, and timing of the developer’s investment, provided that the investment leads to the fruition of expectancies constituting recognized property interests. Kaiser Aetna, 444 U.S. at 179; Penn Central, 438 U.S. at 124-25.
as defined in section 30211, since the commissions cannot protect that which does not exist.27 Lastly, the public would not have the right, nor would the commissions have the corresponding obligation, to control coastal uplands for public access purposes as a matter of public right.28 Denied standing to challenge a proposed upland development on the grounds that it interfered with a right of public access,29 the public would be forced to rely on the regulatory powers of the commissions as a means to guarantee public access.

A. Common Law Right of Public Access Across Public Trust Lands

Because the ebb and flow of the tide ultimately plays an integral role in defining the scope of the public's common law and constitutional right of access to the ocean, the distinction between upland and tideland areas must be drawn.30 In California, as in those states following the common law rule, the mean high tide line or ordinary high water mark separates tidelands from upland areas.31 Uplands are therefore comprised of the dry-sand area and the land area landward of the vegetation line.32 Tidelands are lands lying between the mean

27. See note 68 infra.

A number of considerations advanced by plaintiffs and amicus would call also for abdication of the tidelands trust and the substitution of regulation of tidelands development for the concept of the public's right to control such lands as a matter of right. . . .

The exercise of the police power has proved insufficient to protect the shorezone. The urgent need to prevent deterioration and disappearance of this fragile resource provides ample justification for our conclusion that the People may not be estopped from asserting the rights of the public in those lands.

29. See Marks v. Whitney, 6 Cal. 3d 251, 261-62, 491 P.2d 374, 381-82, 98 Cal. Rptr. 790, 797-98 (1971); Lafargue, Practical Legal Remedies to the Public Beach Shortage, 5 ENVIRONMENTAL AFFAIRS 447, 469 (1976).

30. One might argue that since navigability has recently been held to be the "touchstone in determining whether the public trust applies," navigability is a more appropriate gauge by which to define the scope of the public's right of access. California v. Superior Court ex rel. Lyon, No. 33981 (Cal. Sup. Ct. March 20, 1981). Nonetheless, the meaning of the term "navigable waters," as applied to the coastline, is largely synonymous with "tidewaters." See 65 C.J.S. Navigable Waters § 4 (1966).

31. 1 R. CLARK, Waters and Water Rights § 36.3(c) (1967).
32. Some commentators distinguish the dry-sand area from the area landward of the vegetation line which they refer to as "uplands." Comment, Hawaiian Beach Access, 26 HASTINGS L.J. 823, 824 n.11 (1975); Note, Public Access to Beaches, 22
high and mean low tides. Submerged lands, for purposes of discussion, will include all lands extending three miles seaward of the mean low tide, although they technically refer to all lands of the ocean floor lying seaward of the mean low tide. The shorezone is comprised of those lands between the high and low water levels in nontidal, navigable lakes and streams.

As a general rule, all tidelands, submerged lands, and the shorezone are subject to a public easement and servitude for purposes of commerce, navigation, and fisheries, commonly referred to as the jus publicum. Fee title to these trust lands and navigable waterways belongs to the state as an attribute of its sovereignty and is held in public trust for the benefit of all the people of the state. As trustee, the state has the absolute power and obligation to manage these trust lands for the benefit of the trust's beneficiaries, subject only to the restrictions imposed by the federal and state constitutions, specifically sections 3 and 4 of the 1879 California Constitution.

The public's rights under California's public trust doctrine include the right to use trust lands and navigable water-
ways for the following: traditional trust purposes such as navigation, commerce, and fishing; general recreational uses such as hunting, bathing, and swimming; and environmental uses, including the preservation of tidelands in their natural state. 41 Incident to the right of navigation, commerce, fishery, and recreation is the right of public ingress and egress over trust lands—the right of public access. 42 Although the scope of this common law right of public access is tied directly to the permissible uses of trust lands, these uses are not unchanging. 43 Nevertheless, the trust and the public right of access arising thereunder are inapplicable to uplands since California never acquired title to lands landward of the mean high tide. 44

During the last half of the eighteenth century the state of California sold thousands of acres of tidelands along the coastline to private individuals. 45 In some instances these conveyances freed these tidelands from the public easement and servitude which existed over these lands by virtue of California's public trust doctrine. 46 One of the more hard felt consequences of freeing tideland of the public trust was the extinguishment of the common law right of public access across trust lands and the right of free navigation over navigable waterways. 47 Article X, section 4 of the California Constitution was adopted primarily to restrict the plenary power of the state to alienate tidelands in promotion of the purposes of the public trust by making it unlawful for an alienee to ob-

43. See, e.g., Marks v. Whitney, 6 Cal. 3d 251, 259, 491 P.2d 374, 380; 98 Cal. Rptr. 790, 796 (1971) (citation omitted) ("the public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs").
45. "Perhaps 80,000 acres of tidelands (as distinguished from submerged lands) were conveyed to private parties before California Fish was decided [in 1913]." City of Berkeley v. Superior Court, 26 Cal. 3d 515, 524 n.9, 606 P.2d 362, 367, 162 Cal. Rptr. 327, 332 (1980) (citation omitted).
46. See, e.g., Eldridge v. Cowell, 4 Cal. 80, 87 (1854). The state has the authority as manager of the public trust to free tidelands and submerged lands from the public trust by one of two methods: "First, the legislature may determine and declare that certain trust lands are no longer essential for purposes of commerce, navigation and fisheries; second, the legislature may pass statutes enacted in aid of commerce, navigation and fisheries." Parker, supra note 40, at 159.
struct or interfere with the public's free access across tidelands and its free navigation over navigable waterways.\textsuperscript{48} The enactment effectively assured that the common law right of free public access and free navigation could not be extinguished by any state sale of tidelands.\textsuperscript{49}

B. Article X, Section 4 of the California Constitution

1. Constitutional Right of Access Across Trust Lands

Article X, section 4 was one of three provisions adopted during the Constitutional Convention of 1879 which sought to remedy the abuses which grew out of the mismanagement and sale of public tidelands by the state after California gained statehood in 1850.\textsuperscript{50} Section 4 provides:

No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this state shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.\textsuperscript{51}

To examine the scope of the so called “constitutional right of access” which emanates from this provision, it is best divided into two subparts: 1) a substantive element re-

\textsuperscript{48} Id. at 34, 127 P. at 160:
The legislature is without power to dispose of the tide lands of the state in a manner which would conflict with this provision of the constitution, or to provide for the alienation of a greater estate in such lands than that provision would permit. The provision is that no person possessing tidal lands of a bay, estuary, or other navigable water, whether the possession be lawful or unlawful, can be permitted to obstruct the free navigation thereof. The power of the legislature is limited by the provisions of the constitution, which are mandatory and prohibitory. Therefore, if it can dispose of, or authorize the disposition of, the underlying soil to private ownership, it cannot thereby authorize the alienee to obstruct the free navigation of such water.

\textsuperscript{49} Id.


\textsuperscript{51} CAL. CONST. art. X, § 4 (formerly art. XV, § 2).
straining grantees of tide and submerged lands from denying access to navigable waters, and 2) a mandate from the convention to the Legislature to liberally construe the measure. If the former is so broad as to encompass the right of public access over privately owned upland areas, then the commissions clearly have a constitutional basis for requiring access dedications as a precondition to development. However, if the provision is limited to a constitutional right of public access over tide and submerged lands, as will be shown, then the constitutional source of the commission's authority necessarily rests with the mandate. The failure of the State Commission, developers, and the Foundation to differentiate between the substance subpart and the mandate has generated considerable confusion as to the scope of the public's constitutional right of access and has jeopardized the viability of the access policies of the Act.

The substantive element of section 4 states that no private person or entity "claiming or possessing the frontage or tidal lands" shall deny public access to, or the free navigation of, any navigable or tidal waters. The terms "frontage" and "tidal lands" limit the prohibition to application against grantees of tidelands and the shorezone. Although the term "frontage" has no prescribed meaning under the public trust doctrine, it is clear that the term, as used on the floor of the constitutional convention, did not refer to areas landward of the mean high tide line, or the high water level in a nontidal, navigable lake or stream. Throughout the heated constitu-

52. The public will rarely exercise a right of access over submerged lands as they are by definition ordinarily covered by tidewaters. See text accompanying notes 31-35 supra.

53. 1 RALPH NADER TASK FORCE, POWER AND LAND IN CALIFORNIA IV-130 (1971); Note, Californians Need Beaches—Maybe Yours!, 7 SAN DIEGO L. REV. 605, 606-07 (1970). But see CAL. COASTAL ZONE CONSERVATION COMM'NS, CAL. COASTAL PLAN 152-55 (1975). In its findings on "Public Access To The Coast" the commissions stated that the "right of public access to all coastal tidelands is guaranteed by the California Constitution and has been expanded in scope by various statutes and court decisions." Id. at 152 (emphasis added).

54. CAL. CONST. art. X, § 4 (formerly art. XV, § 2) (emphasis added).

tional debate which occurred prior to the adoption of the article or “Harbors, Tide Waters, and Navigable Streams,” the terms “tidelands” and “frontages” were used interchangeably. The opening language of article X, section 3 (formerly article XV, section 3), which is identical to the language adopted at the constitutional convention of 1879, underscores that land fronting navigable waterways or frontages is synonymous with tidelands. Moreover, since the state is also capable of mismanaging the public trust in the shorezone by disposing of such lands to the exclusion of the public, the shorezone is very susceptible to being viewed as coming within the meaning of a “frontage land . . . of a . . . navigable water.”

Given the above construction of the physical area subject to the restrictions of the substantive subpart of section 4, the enactment does not prohibit private landowners from denying public access over upland areas. Rather, it operates to provide a public constitutional easement over certain tide and submerged lands. To reiterate, this easement entails both a

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56. The debate, quoted below, which ensued after one legislator moved to strike article X, § 3 (formerly art. XV, § 3) is illustrative:

Mr. Herrington. Mr. Chairman: I am just as much in favor of preserving the rights of the people to frontages as anybody else in the world; but it does strike me if this constitutional provision is adopted there will be no such thing as the reclamation of these tide lands for the purpose of constructing towns. . . . I am perfectly willing to place restrictions in every way to protect these frontages, but to say that all tide lands within two miles of an incorporated city or town in this state shall be withheld from grant or sale, it seems to me is not proper in a constitutional provision.

. . .

Mr. West. Mr. Chairman: I hope that the section will not be stricken out. . . . Now, whether these rights exist for individuals or corporations makes no difference. These frontages are held in this state to the exclusion of lawful traffic across these tide lands to the salt water.

2 Constitutional Debates, supra note 50, at 1438 (emphasis added) (the motion lost by a 34-54 vote).

57. Cal. Const. art. X, § 3 provides in pertinent part:

All tidelands within two miles of any incorporated city, city and county, or town in this state, and fronting on the water of any harbor, estuary, bay, or inlet used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations . . . .

58. See Constitutional Debates, supra note 50, at 1481.


right of public access across tidelands and the shorezone and
the right of free navigation on waters overlying public trust
lands. Whether the enactment has application against only
those tide and submerged lands where the public navigational
servitude has not been effectively determined by the state61
and where title to such lands has not been conveyed in fee
simple absolute as of the adoption of the 1879 constitution
remains unresolved. However, it has been suggested that this
is the "logical interpretation" of section 4.62

2. The Most Liberal Construction of Section 4

The mandate contained in the second subpart of section
4, that the "Legislature shall enact such laws as will give the
most liberal construction to this provision, so that access to
navigable waters of this State shall be always attainable for
the people thereof,"63 must provide the constitutional basis
for the access requirements contained in section 30212(a). The
State Commission claims that this language constitutes a
"constitutional provision mandating that access to public
tidelands be maximized."64 By substituting the term "public
tidelands" for "navigable waters" the State Commission has
transmuted this mandate into a strong public policy in favor
of securing public access over tidelands and uplands. Thus,
the State Commission argues that this policy was carried out
by the Legislature when it enacted the access policies.65 De-
velopers and the Foundation argue that although section 4
may constitute a policy in favor of maximum access to the
shoreline, it does not authorize the commissions to condition
development upon the provision of access over upland areas.66

The text of sections 30210 and 30211 reveal67 that the
Legislature enacted the access policies in an attempt to carry
out what it perceived to be the mandate of section 4—the
maximization of public access to public tidelands and the

61. See note 46 supra.
62. Parker, supra note 40, at 171.
63. CAL. CONST. art. X, § 4 (formerly art. XV, § 2) (emphasis added).
64. 1980 ACCESS GUIDELINES, supra note 21, at 3.
66. Pacific Legal Foundation Memorandum, supra note 24, at 26-30; Benton
Memorandum supra note 24, at 32.
67. See note 17 supra.
 Furthermore, section 30211 confirms that the Legislature misinterpreted the extent of the public's constitutional right of access. The Legislature viewed the substantive subpart of section 4 as the "legislative authorization" which established the public's right of access to the sea which includes "the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation."\(^{68}\) In short, the public's right of access was incorrectly interpreted as encompassing a right of access over uplands.\(^{70}\) With the public's right of access thus defined, the Legislature's interpretation of the mandate is necessarily suspect. The question that remains is whether the Legislature went beyond the "most liberal construction" of section 4 when it enacted the access policies.\(^{71}\)

C. The Availability of the Remedy of Eminent Domain

Judicial interpretation of section 4 has been limited to prohibiting tideland grantees from filling in lands subject to tidal action or from interfering with the public easement appurtenant to the public's navigational servitude.\(^{72}\) To date, no case has extended the applicability of the provision beyond tideland areas. Nonetheless, the State Commission maintains that when the strong public policy to assure access to navigable waters is liberally construed it may be utilized as the basis of the state's police power for the public access requirements of the Act.\(^{73}\) Certainly, the actions of upland developers in the

\(^{68}\) The statutory reference in section 30211 to section 4 is found in the words "legislative authorization." Under section 30211, the public's right of access, where acquired through legislative authorization, is stated to include a right-of-way over upland areas (i.e., dry sand and rocky coastal beaches). See Cal. Coastal Comm'n, Statewide Interpretive Guidelines of Public Access 3 (Aug. 3, 1979) (amended Feb. 20, 1980) [hereinafter cited as 1979 Access Guidelines].


\(^{70}\) See text accompanying note 60 supra.

\(^{71}\) The Foundation has framed the issue in terms of whether the commissions have improperly construed the mandate directed to the Legislature. Pacific Legal Foundation Memorandum, supra note 24, at 22-34. However, the construction that the right of public access to the sea includes the passage over upland areas is clearly the Legislature's interpretation of section 4.

\(^{72}\) See text accompanying note 42 supra.

\(^{73}\) Cal. Coastal Comm'n Memorandum, supra note 23, at 74. Cal. Pub. Res. Code § 30001 (West 1977) reveals that the provisions of the 1976 Coastal Act were enacted for the purpose of promoting the public health, safety, and welfare. The Act was therefore enacted in furtherance of the state's police powers, an alternative legis-
aggregate could effectively foreclose the public from gaining access to the Pacific Ocean in apparent contravention of the closing words of section 4. Moreover, the abuses committed in the disposition of tidelands belonging to the state prior to 1879 prompted the enactment of the substantive subpart of section 4.

Two major stumbling blocks to this liberal construction must be cleared before the mandate can be found as the basis for the Commission's authority to require access dedications from upland owners. First, by its own terms, the liberal construction directive of the mandate is to be afforded to section 4, not to the policy of forever assuring public access to navigable waters. Since the purpose of section 4 was to limit state grants of tide and submerged lands prejudicial to the public trust, even the most liberal construction would fail to eliminate the distinction between public trust lands and privately owned uplands. Second, to alleviate the foreclosure of public access by upland development, the state could exercise its sovereign power of eminent domain to condemn any privately owned uplands necessary for public trust purposes. In the absence of any case interpreting section 4 as affording a constitutional public easement over privately owned uplands, two post-1879 California Supreme Court decisions, Oakland v. Oakland Waterfront Co. and Bolsa Land Co. v. Burdick, indicate that the public's rights in trust lands does not entitle the public to a free access way across privately owned

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75. Those abuses included the monopolization of lands and wharves on the frontages of navigable waters, the extortion practiced by tideland grantees, and the outright exclusion of the public from tidelands. 3 Constitutional Debates, supra note 50, at 1523.

76. Section 4 states that the "[legislature] shall enact such laws as will give the most liberal construction to this provision . . . ." CAL. CONST. art. X, § 4 (formerly art. XV, § 2) (emphasis added).

77. The State Commission, by omitting the words "to this provision," interprets section 4 to require the Legislature to give the most liberal construction to the public policy of assuring access to navigable waters. Cal. Coastal Comm'n Memorandum, supra note 23, at 76. A more logical interpretation would be that this public policy is not the means of assuring access but rather the end to be achieved by a liberal construction of the constitutional right of public access over trust lands guaranteed in the substantive subpart of section 4.

78. 118 Cal. 160, 50 P. 277 (1897).

79. 151 Cal. 254, 90 P. 532 (1907).
uplands.

The central question in *Oakland Waterfront* involved the validity of a land grant by the state in 1852 to the newly incorporated City of Oakland of "lands lying . . . between [the] high tide and ship channel." Applying a strict construction of these words, Justice Beatty concluded that the grant was limited to a "strip of land bounded by the lines of ordinary high and low tide, and extending along the [Oakland] estuary and bay front of the town . . . ." The court rejected an interpretation of the grant which would have embraced close to eight thousand acres including all the lands underlying the estuary to the low tide line on the opposite side of the estuary. This construction was refuted, in part, on the grounds that the communities on that opposite side "had a natural right to the common use of this body of navigable water, [and] to unrestricted access to its shores . . . fully equal to that of the people of Oakland." The decision discussed the power of the legislature to alienate trust lands and acknowledged that the public's "unrestricted" right of access was qualified with regards to uplands.

It is true that the private ownership of the shore may prevent access to the navigable waters of the bay, but so does the private ownership of the uplands prevent access to the shore and to the navigable waters in the same sense and to the same extent. This, however, is a minor and temporary inconvenience for which our laws and the laws of all civilized states provide an ample remedy. *By the exercise of the right of eminent domain all necessary means of access from the uplands to the water front may be condemned for the public use.* . . . And there is no injustice in requiring this compensation to be made to the grantee of shore lands when his right to such lands is in other respects valid in law; for, like other holders of title derived from the state, he is presumed to have given what, at the time of the grant was deemed a fair equivalent for the land granted.

Thus, regardless of whether public access is precluded by private ownership of uplands or validly granted tidelands, the

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80. 118 Cal. at 169, 50 P. at 280.
81. *Id.* at 182, 50 P. at 285.
82. *Id.* at 172, 50 P. at 281.
83. *Id.* at 185, 50 P. at 286 (emphasis added).
power of eminent domain must be utilized to provide public access.

Ten years later, the *Bolsa Land* decision reaffirmed the rule announced in *Oakland Waterfront* in a different, more timely, factual context. There, plaintiff appealed the trial court's denial of a preliminary injunction to restrain defendants from trespassing on a large oceanfront tract of land which was used by the Bolsa Chica Gun Club members. Wholly enclosed within this tract of land was Bolsas Bay, an estuary subject to tidal action, and its tributary sloughs. The trespass complained of involved the defendants' destruction of plaintiff's fences and their entrance into the enclosure by both land and water for the purpose of hunting waterfowl. With regard to the propriety of defendants' overland access routes the court stated, "it is not asserted, and, indeed, it would require much rashness and temerity to assert that the public has a right to invade and cross private lands to reach navigable waters . . . ." Left without overland access, defendants claimed that the public was entitled to access on one of the tributary sloughs called the "Freeman River," as it constituted a navigable stream flowing into Bolsas Bay. But the *Bolsa Land* court found little difficulty in rejecting the lower court's implied finding of navigability, for the "Freeman River" was nothing more than a drainage ditch which was incapable of navigation by even a light skiff. Without a navigable stream by which to gain access to the waters of Bolsas Bay, the court was not compelled to reach the question of the navigability of the bay. The court found that:

Whether or not Bolsas Bay ever was, or, if it ever was, whether it is now, part of the navigable waters of the state, defendants certainly have no right to invade private property to gain access thereto. If to approach such waters a right of way becomes necessary over private lands, such right of way does not run to the public with the use of such waters. *It must be condemned and paid for by the public, as must any other right of way for public use.*

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84. 151 Cal. at 255, 258-59, 90 P. at 532, 534.
85. *Id.* at 259, 90 P. at 534.
86. *Id.*
87. *Id.* at 259-60, 90 P. at 534.
88. *Id.* at 260, 90 P. at 534-35 (emphasis added).
The holdings of *Oakland Waterfront* and *Bolsa Land* are consistent with the cases limiting the interpretation of section 4 to lands subject to the public tidelands trust. Some skepticism in the weight of these authorities has been expressed because they “did not consider the effect of Article XV, section 2 of the Constitution on the general law.” To be sure, the *Oakland Waterfront* decision dealt with the validity of a pre-1897 tideland grant. However, if as one commentator suggests, section 4 was merely a restatement of the already existing common law trust, then the *Oakland Waterfront* court was fully cognizant of the restrictions on the state’s power to alienate trust lands where such a disposition would fail to preserve public access to navigable waters. Moreover, recent statements by the California courts on the extent of the public navigational servitude clearly indicate that the failure of the *Bolsa Land* court to specifically address the impact of section 4 was because the section did not apply.

The availability of the remedy of eminent domain is also specifically guaranteed by section 1 of article X (formerly article IV, section 1) of the constitution to all frontages to navigable waters. The implication to be drawn from the simultaneous enactment of section 1 is evident. If the state desires to acquire access to navigable waters through lands which came into private ownership prior to the adoption of the constitution then the eminent domain powers of the state must be exercised regardless of whether access is sought over uplands or public trust lands. The closing remarks of Colonel James Ayers, the Chairman of the Committee on Harbors, Tide Wa-

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89. See note 60 *supra*.
92. 118 Cal. at 172, 190, 50 P. at 281, 288.
93. Colberg, Inc. v. California, 67 Cal. 2d 408, 420, 424-25, 432 P.2d 3, 11, 13-14, 62 Cal. Rptr. 401, 409, 411-14 (1967) (the state servitude on lands riparian or littoral to navigable waters does not extend to cases involving the actual physical invasion upon such lands); Bohn v. Albertson, 107 Cal. App. 2d 738, 757, 238 P.2d 128, 141 (1951) (the public may use navigable floodwaters for public trust purposes so long as they do so without trespassing on the lands underlying such floodwaters).
94. Forestier v. Johnson, 164 Cal. 24, 39, 127 P. 156, 162 (1912) (“The effect of the constitutional provision [article X, section 4] was not mentioned or involved in that case.”).
95. “The right of eminent domain is hereby declared to exist in the State to all frontages on the navigable waters of this State.” CAL. CONST. art. X, § 1 (formerly art. XV, § 1).
96. See text accompanying note 83 *supra*. 

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ters and Navigable Streams, to the constitutional delegates during the final debate on former article XV emphasizes the limited applicability of the article and any liberal construction which might be afforded section 4 at a later date:

Gentlemen have gone so far as to even say that this article, if engrafted upon the Constitution, will interfere with vested rights. How it can have any retroactive effect the gentlemen have not told us, and I cannot see. The gentleman from Marin said, with reference to his land bordering on the bay, that under this article if he had a wharf or bulkhead on his tidelands that he would be compelled to give it up or free access to it to whoever should ask it. It is not so. The only way in which access can be had over his lands to navigable water, is in the usual way, and for a public use, and in no other way, and that is the principle which underlies this Act.97

The two stumbling blocks addressed above are formidable impediments to the State Commission's fallback position98 on the question of whether the legislature went too far in enacting the access policies of the Act. Recent judicial interpretation of section 4 by the California Supreme Court in Gion v. City of Santa Cruz99 signals the heightened awareness of the counterveiling considerations which would be at work if courts were to construe the section as a legislative basis for the enactments. While noting that section 4 established "a clearly enunciated public policy . . . in favor of allowing the public access to shoreline areas,"100 the court expressed the following caveat: "Although article XV section 2 may be limited to some extent by the United States Constitution it clearly indicates that we should encourage public use of shoreline areas whenever that can be done consistently with the federal constitution."101 Whatever the interpretation adhered to by the courts, if the State Commission's position is adopted, then the access policies will surely constitute the most liberal construction of section 4 to date.

97. 3 Constitutional Debates, supra note 50, at 1481 (emphasis added).
98. See text accompanying note 73 supra.
100. Id. at 42, 465 P.2d at 58, 84 Cal. Rptr. at 170.
101. Id. at 43, 465 P.2d at 59, 84 Cal. Rptr. at 171.
IV. Statutory Authority to Require the Provision of Public Accessways

A. Section 30212(a)—Authority to Require Dedications

Section 30212(a) is the only operative provision in the Act which conceivably authorizes the commissions to require the provision of public accessways as a precondition to development between the sea and the nearest public road. A review of the Act demonstrates that it is the only section which contains any dedication language. In pertinent part, section 30212(a) provides:

Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.

Developers have argued that the language of section 30212(a) does not specifically authorize the commissions to require the developer to dedicate accessways or pay fees in lieu thereof as a condition to development. In advancing this argument they point out the three apparent weaknesses of section 30212(a): 1) it fails to state who is to provide access in new development projects; 2) it fails to state how access is to be provided, leaving it unclear whether the developer can be

102. Section 30210 is both a statement as to the tremendous importance the Legislature has placed on the attainment of public access to the sea in the Act, and a direction from it that where access was to be provided under other provisions of the Act, the mandate of article 10, section 4 of the Constitution requires that this access should be maximized consistent with the provisos listed therein.

103. CAL. PUB. RES. CODE § 30212(a) (West Supp. 1980) (emphasis added).

104. Pacific Legal Foundation Memorandum, supra note 24, at 13; Benton Memorandum, supra note 24, at 26.
required to dedicate accessways, pay fees in lieu of dedication, or both; and, 3) it is silent on the issue of whether the commissions are required to compensate individuals who provide access.\textsuperscript{108} They contend that if the legislature intended to delegate such powers, it could have done so in specific terms, citing section 27403 of Proposition 20,\textsuperscript{106} and section 66478.11 of the Government Code\textsuperscript{107} as examples of where the legislature has explicitly authorized the exaction of public access from developers.\textsuperscript{108} Developers conclude that the legislature contemplated the acquisition of access only by local agencies under subdivision map approval,\textsuperscript{109} and by the State Coastal Conservancy through the exercise of eminent domain powers pursuant to the State Coastal Conservancy Act of 1976.\textsuperscript{110}

The developers' claims are persuasive to the extent that no discernable legislative intent is apparent upon a reading of

\textsuperscript{105} Benton Memorandum, supra note 24, at 25. In an unpublished letter opinion, the Attorney General also noted the Act's silence on the right of compensation:

The act is silent with respect to giving compensation to the owner-applicant for giving the access right. This is a possible source of attack upon the constitutionality of the act if it is interpreted, as we do interpret it, to authorize the regional commissions to require such access as a condition to issuing a development permit.


\textsuperscript{106} CAL. PUB. RES. CODE § 27403 (West 1977) (repealed 1977 by CAL. PUB. RES. CODE § 27650 (West Supp. 1980)), provided in part: "All permits shall be subject to reasonable terms and conditions in order to ensure: (a) Access to publicly owned or used beaches, recreation areas, and natural reserves is increased to the maximum extent possible by appropriate dedication."

\textsuperscript{107} CAL. GOV'T CODE § 66478.11(a) (West Supp. Pamph. 1966-1979) provides in part:

\begin{quote}
No local agency shall approve either the tentative or final map of any subdivision fronting the coastline or shoreline which subdivision does not provide or have available reasonable public access by fee or easement from public highways to land below the ordinary high water mark on any ocean coastline or bay shoreline within or at a reasonable distance from the subdivision.
\end{quote}

\textsuperscript{108} Benton Memorandum, supra note 24, at 26-27.

\textsuperscript{109} See note 107 supra.

\textsuperscript{110} Benton Memorandum, supra note 24, at 25; Pacific Legal Foundation Memorandum, supra note 24, at 16. The State Coastal Conservancy is a division of the Resources Agency of California. It was created by the State Legislature in 1976 to help protect coastal resources in the coastal zone through a variety of planning, acquisition, and development techniques. Program areas include the provision of public accessways. In order to carry out this program the Conservancy is empowered to plan for, buy, sell, or develop land and provide grants to the State Public Works Board which was granted the power of eminent domain for public accessway condemnation. See generally CAL. PUB. RES. CODE §§ 31000-31405 (West 1977 & Supp. 1980).
The crux of the developers' argument is that the three weaknesses of the provision render it vague and ambiguous, thus demonstrating that the legislature chose not to accord the commissions the power to require developers to provide access as a condition to obtaining approval of a coastal development permit. However, this reasoning ignores the legislative history of section 30212(a). An examination of the legislative history suggests that the three weaknesses

111. Three assumptions must be made before one can conclude that section 30212 authorizes the commissions to require the dedication of public accessways as a condition to development. First, that the first sentence of section 30212(a) incorporates by reference the dedication language found in the second sentence of section 30212(a). Developers argue that the dedication language relates only to the responsibility of maintaining accessways. Second, that dedication of accessway is not a voluntary act on the part of the coastal developer. Third, that section 30212 is to be read in conjunction with section 30607, which appears in a latter chapter of the Coastal Act and essentially permits the commissions to condition development. Here lies the center of the controversy. There is no conditioning language in section 30212. In this regard, the trial judge in Isthmus Landowners Ass'n v. California Coastal Comm'n, No. 229879 (Los Angeles County Super. Ct. 1978), found that neither section 30607 nor any other provision in the Coastal Act authorizes the commissions to impose a mandatory dedication requirement as a condition of issuing a coastal development permit. But see text accompanying note 117 infra.

112. The original coastal bill, S.B. 1579, was essentially an attempt to incorporate the policies and recommendations of the Coastal Plan. California Research, State Coastal Report (February 17, 1979). Section 30274 of that bill was copied almost verbatim from Policy 123 of the Coastal Plan, quoted below in substantial part. The in lieu fee language of Policy 123a was copied verbatim. Section 30274, together with the entire public access article of the original coastal bill was deleted in its first amendment by the State Senate. S.B. 1579, Reg. Sess. 1976-1977 (April 19, 1976). An amended version of that same article eventually became the present public access article of the Coastal Act. S.B. 1277, Reg. Sess. 1976-1977 (August 12, 1976). Amendments made to the article and specifically to section 30212 largely reflect the legislature's dissatisfaction with the in lieu fee language of Policy 123a and not with the access dedication language of Policy 123a & b. In this regard, the absence of any reference to in lieu fees in section 30212 should be contrasted with the inclusion of the dedication language of the last sentence of Policy 123b. Section 30212 is best viewed as a merging of an amended version of the first sentence of Policy 123a and the last sentence of Policy 123b with the legislature's conscious rejection only of Policy 123a's in lieu fee language.

Policy 123a recommended in pertinent part that:

New developments shall provide public accessways to the shoreline except in those individual cases where it is determined that public access is inappropriate . . . . In developments where the provision of a public accessway is determined to be inappropriate, the project sponsor shall pay 'in lieu fees' . . . . to a fund for the acquisition, maintenance, and operation of public access at a suitable location elsewhere.

CAL. COASTAL ZONE CONSERVATION COMM'NS, COASTAL PLAN 154 (1975).

Policy 123b recommended in pertinent part that:

[I]n private developments public access shall be ensured (1) either by dedication of fee title or an easement for the reserved accessway to a
are attributable to the compromises that were struck in the senate in an effort to excise the in lieu fee dedication scheme proposed by the State Commission. Without a conscious effort on the part of the Legislature to remove the land dedication scheme, the better view would be that section 30212(a) does authorize the dedication of accessways as a condition to development. Conversely, the absence of any reference to in lieu fees in section 30212(a) and the legislative history of that section strongly suggest that the commissions do not have the authority to require the payment of fees in lieu of access dedication. 113

The only material difference between section 27403 of Proposition 20114 and section 30212(a) is the absence of the conditioning language which is found in the former section: "[A]ll permits shall be subject to reasonable terms and conditions." Following the developers' logic, this language saves

\[\text{public agency, or (2) by the recording of a deed restriction, at the owner's option. Dedicated accessways shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability for the accessway.} \]

\textit{Id.} at 155.

113. Neither the State Commission nor the six Regional Commissions presently require the payment of fees in lieu of access dedication as a condition to development in the coastal zone. \textit{But cf. Cal. Pub. Res. Code} § 30610.3 (West Supp. 1980), which allows the State Coastal Conservancy to purchase accessways from in lieu public access fees exacted from lot owners in subdivided areas in limited circumstances. Notwithstanding the lack of statutory authority in the Coastal Act, the State Commission has "instructed" local governments to incorporate such a scheme in their respective LCP's. Letter from Paul Jensen, Assistant Planner for the City of Pacifica to author (Jan. 31, 1980). Responding to this advice, San Mateo County and the City of Pacifica have already implemented provisions in their LCP's which would authorize the exacting of in lieu access dedication fees. San Mateo County, Local Plan Hearing Draft, Shoreline Access Component (Nov. 1979); City of Pacifica, Local Coastal Plan, Beach Access (1979).

Before final certification of any LCP which includes provisions similar to those adopted by San Mateo County and the City of Pacifica, city and county officials should address whether such revenue raising measures violate the prohibitions of Proposition 13. Specifically, do fees in lieu of access dedication fall within the "special taxes" meaning of article XIIIA, section 4 of the California Constitution and thus require approval from two-thirds of the qualified electors of the respective city or county? See \textit{generally Cal. Const. art. XIIIA, § 4}; \textit{Mills v. County of Trinity}, 108 Cal. App. 3d 656, 166 Cal. Rptr. 674 (1980); 62 Ops. Cal. Att'y Gen. 254 (1979) (development fees in lieu of land dedication for schools are "special taxes"); 63 Ops. Cal. Att'y Gen. 663 (1979) (development fees for local improvements are not "special taxes"); 62 Ops. Cal. Att'y Gen. 673 (1979) (development fees in lieu of building low and moderate income housing are "special taxes").

114. \textit{See} note 106 \textit{supra.}

the commissions from an allegation that they are required to compensate developers who dedicated access under Proposition 20.\textsuperscript{116} However, the failure of the legislature to include this language within section 30212(a) should not be fatal to a finding that this section incorporates by reference the conditioning language found in section 30607:

> Any permit that is issued or any development or action approved on appeal, pursuant to this chapter [Chapter 7, Development Controls], shall be subject to reasonable terms and conditions in order to ensure that such development or action will be in accordance with the provisions of this division [the Act].\textsuperscript{117}

While section 30607 appears in a later chapter than section 30212, under its express terms, the conditioning language applies to any permit issued under Chapter 7. Under section 30601 of Chapter 7, every applicant proposing a development between the sea and the nearest public road is required to obtain a coastal development permit from the appropriate commission.\textsuperscript{118} Thus, the necessary connection between section 30607 and 30212 seems to be satisfied with the access conditioning language of 30607 incorporated by reference into section 30212(a). As a result, section 27403 of Proposition 20 and section 30212(a) are materially the same provisions. Yet, the Foundation maintains that the former section “explicitly directed that the coastal development permits be issued on condition that the applicant dedicate rights of public access,” while the latter does not.\textsuperscript{119} Such a position seems both anomalous and inconsistent with the express wording of section 30607.

\textsuperscript{116} A permit subject to reasonable terms and conditions is viewed as an exercise of the state’s regulatory power to regulate reasonably the use of property for the protection of the general welfare, commonly referred to as the state’s police power. 11 E. McQuillin, THE LAW OF MUNICIPAL CORPORATIONS § 3204 (3d ed. 1964). An exercise of this power does not recognize a right to compensation as does an exercise of the power of eminent domain. \textit{Id.}

\textsuperscript{117} \textbf{CAL. PUB. RES. CODE} § 30607 (West 1977).

\textsuperscript{118} \textit{Id.} § 30601 provides that “a coastal development permit shall be obtained . . . for any . . . developments between the sea and the first public road paralleling the sea . . . .”

\textsuperscript{119} Pacific Legal Foundation Memorandum, \textit{supra} note 24, at 14.
B. Statutory Limitations on the Commissions’ Authority to Require Dedications

Notwithstanding the general authority of the commissions to condition development, three prohibitions appear to limit the authority delegated in section 30212(a). First, the commissions are restricted to conditioning “new development projects.” While both the commissions and developers agree that the commissions’ regulatory power is limited to conditioning “new development projects,” a controversy has arisen as to what constitutes a “new development project.” The term “new development projects” was left undefined in the Coastal Act. Second, the commissions are expressly prohibited from requiring dedications where public access is inappropriate. Access is inappropriate in three situations: “where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected.”

Under the rule of statutory construction that exceptions in statutes are to be strictly construed, these three exceptions to the access requirements of section 30212(a) are best viewed as absolute prohibitions on the commissions’ authority to require the dedication of public accessway easements. Lastly,

120. These limitations exist aside from the federal and state constitutional limits on the state’s exercise of its police power. For a discussion of the potential constitutional issues raised in California’s compulsory dedication cases see Heyman & Gilhool, The Constitutionality of Imposing Increased Community Costs on New Suburban Residents through Subdivision Exactions, 73 YALE L.J. 1119 (1964); Johnson, Constitutionality of Subdivision Control Exactions: The Quest for a Rationale, 52 CORNELL L.Q. 871 (1967); Bowden, Legal Battles on the California Coast: A Review of the Rules, 2 COASTAL ZONE MANAGEMENT J. 273 (1975); Note, Taking Without Compensation Through Compulsory Dedication—New Horizons for California Land Use Law, LOY. L.A. L. REV. 218 (1972); Note, Public Access to Beaches, 22 STAN. L. REV. 564 (1970).

121. CAL. PUB. RES. CODE § 30212 (West Supp. 1980).


123. The State Commission position, as reflected in their Access Guidelines, is that the public access policies and provisions of the Act should be liberally construed so that access to the shoreline should “always be attainable.” 1980 ACCESS GUIDELINES, supra note 21, at 1. The language of the constitutional enactment, however, clearly states that it is the legislature, not the State Commission, who is given the mandate to construe the enactment liberally. See text accompanying note 51 supra.
the commissions' authority is seemingly restricted to requiring "on site" dedications. Developers argue here that the wording of section 30212(a) is significant.\textsuperscript{124} In the phrase "[p]ublic access ... shall be provided in new development projects,"\textsuperscript{125} they contend that the word "in" is "used in the geographical sense meaning that access shall be provided within the geographical confines of the new development projects."\textsuperscript{126} This strict interpretation of the word "in" is favorable to an interpretation which would allow the commissions to require "off-site" dedications.\textsuperscript{127}

The legislature's conscious rejection of the in lieu dedication scheme proposed by the State Commission,\textsuperscript{128} a scheme which would have authorized the commission to require "off-site" access, stands for a similar rejection of "off-site" dedication measures. To require "off-site" dedications would essentially mean that "on-site" dedications were inappropriate, thus bringing the development within one of the three exceptions listed in section 30212(a).\textsuperscript{129} Thus, the commissions do not appear to have the authority to require "off-site" dedications on unaffected parcels of land owned by the applicant seeking approval of his coastal development permit.

V. Exceeding the Authority of Section 30212

In spite of the apparent limitations of section 30212, the commissions have required "off-site" dedication or mitigation measures,\textsuperscript{130} dedications where access was inappropriate,\textsuperscript{131} and dedications where the proposed project could not conceivably be deemed a "new development project."\textsuperscript{132} The State Commission's nonobservance of the three prohibitions of section 30212 stems, to a large degree, from the standards and policies of the Commission's Statewide Interpretive Guidelines on public access. The liberties taken in the guidelines indicate that the Commission has overreached the access con-

\begin{enumerate}
\item \textsuperscript{124} Georgia-Pacific Memorandum, \textit{supra} note 24, at 78.
\item \textsuperscript{125} \textit{Cal. Pub. Res. Cede} § 30212 (West Supp. 1980).
\item \textsuperscript{126} Georgia-Pacific Memorandum, \textit{supra} note 24, at 78.
\item \textsuperscript{127} For the Commission's position see note 123 \textit{supra}.
\item \textsuperscript{128} See note 112 \textit{supra}.
\item \textsuperscript{129} See text accompanying note 121 \textit{supra}.
\item \textsuperscript{130} Conversation with Don Neuwirth, Public Access Program Manager, California Coastal Commission (Jan. 15, 1980).
\item \textsuperscript{131} \textit{L.A. Times}, May 20, 1980, at 24, col. 1. \textit{See} note 65 \textit{infra}.
\item \textsuperscript{132} See text accompanying notes 39, 170-189 \textit{infra}.
\end{enumerate}
ditioning powers delegated in section 30212. Such an exercise would be in direct contravention of the enabling provision which states that "such guidelines shall not supercede, enlarge or diminish the powers or authority of any regional com-
mission, the commission, or any public agency."\textsuperscript{135}

A. New Development Projects

Although the term "new development projects" cannot be precisely defined, it seems clear that it is to be distinguished from the all inclusive term "development."\textsuperscript{134} Prior to a recent amendment to section 30212,\textsuperscript{135} the State Commission failed to maintain any distinction between the two terms. It conditioned all "development" upon the dedication of access, including ministerial repair and maintenance activities and the reconstruction of single family residences destroyed by natural disaster. In response to the State Commission's actions, the legislature amended section 30212 by adding subsection (b). Subsection (b) exempted four types of developments from the access dedication requirements of section 30212(a).\textsuperscript{136} The problem remaining is that the State Commission does not recognize any exceptions to the term "new development projects" other than those established by the legislature in subsection (b).\textsuperscript{137}

\begin{enumerate}
\item[133.] CAL. PUB. RES. CODE § 30620(a)(3) (West 1977).
\item[134.] \textit{Id.} § 30106. This section broadly defines development as "the placement or erection of any solid material or structure . . . grading . . . any materials . . . construction, reconstruction, demolition, or alteration of the size of any structure . . . ." Structure is defined in the same section as including "any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line." \textit{Id.}
\item[136.] CAL. PUB. RES. CODE § 30212(b) (West Supp. 1980) recognizes four types of projects or developments which are not to be characterized as "new development projects" for purposes of section 30212: (1) replacement of any structure, other than a public works facility, which does not exceed by more than 10 percent the floor area, height, or bulk of the destroyed structure as the destroyed structure; (2) demolition or reconstruction of a single family-residence which does not increase by more than 10% the floor area, height or bulk of the former structure and which is located in the same location as the former structure; (3) remodeling or improvement of a structure which does not block or impede public access, change the intensity of its use, or increase by more than 10% the floor area, height and bulk of the structure; and (4) any repair and maintenance activity which requires a coastal development permit pursuant to section 30610 unless the commissions find that such activity will have an adverse impact on lateral public access along the beach.
\item[137.] In attempting to define the term "new development project" in § 30212 the
The Pacific Legal Foundation has recently challenged the State Commission’s Access Guideline’s definition of “new development projects” on the grounds that it erodes the distinction which should be maintained between the terms “development” and “new development projects.” The State Commission’s Access Guidelines effectively define “new development projects” as synonymous with “development” minus the four limited exceptions established by the legislature in subsection (b) of 30212. The Foundation contends that the Access Guideline’s definition of new development projects “by incorporating all activities delineated in section 30106 (defining development), with minor exceptions, has obliterated the legislative distinction contained in the Coastal Act.” The Foundation concludes that the State Commission has therefore exceeded its statutory authority by promulgating Access Guidelines in conflict with the Coastal Act.

The State Commission’s position, as reflected in their guidelines, is that the legislature, by specifying certain types of development that are not to be construed as “new development projects,” meant to imply that all development not fitting within subsection (b) are necessarily new development projects. This position is not warranted upon an examination of the legislative history of subsection (b) of section 30212 and a review of the usage, scope, and meaning of the terms “new development project,” “new development,” “de-

State Commission has had considerable difficulty with the word “project.” The end result was that the term “new development project” was equated with the term “new development” resulting in the removal of the word “project.” Going one step further, the State Commission dropped the word “new” from the term “new development project” when it equated that term with the all inclusive term “development”:

[U]nless one of the three states exceptions [§ 30212(a)(1), (a)(2), (a)(3)] all ‘new development’ located between the first public roadway and the shoreline must provide for public access. For purposes of this section, project is interpreted to mean any activity constituting ‘new development’ as defined below [any development except for those developments recognized in § 30212(b)]. ‘New development’ as used in Section 30212 of the Coastal Act, includes all projects included in the definition in section 30106 of the Coastal Act, except in the following cases [the four types of development set out in § 30212(b)].

1979 ACCESS GUIDELINES, supra note 67, at 3.

138. Pacific Legal Foundation Memorandum, supra note 24, at 47.
139. See note 137 supra.
140. Pacific Legal Foundation Memorandum, supra note 24, at 54-55.
141. Id.
142. See text accompanying note 179 infra.
velopment project," and "project" in the Coastal Act.

1. The Calvo Bill and Subsection (b) of Section 30212

In 1979, a number of bills were introduced in the State Legislature proposing revisions of the Coastal Act. Assembly Bill 643, authored by Assemblyman Calvo, added subsection (b) to section 30212, designating four types of development which are not to be characterized as "new development projects" for purposes of section 30212(a). As demonstrated by the legislative history, subsection (b) was not intended to define "new development projects" as any "development" not coming within the parameters of subsection (b). Subsection (b) was the Legislature's attempt to set out what types of "development" were free from access requirements of section 30212(a) because of their ministerial impact on public access.148


144. When the Calvo Bill, A.B. 643, was first introduced it did not contain any language which amended section 30212. A.B. 643, Reg. Sess. 1979-80 (Feb. 26, 1979). The Bill was then amended to incorporate a proposed addition to section 30212 borrowing those additions from the Levine Bill, A.B. 117, Reg. Sess. 1978-79 (1979). After the amendment the Calvo Bill explicitly defined "new development project" as "any development, as defined in section 30106" with four exceptions. A.B. 643, Reg. Sess. 1978-79 (May 16, 1979). See note 136 supra. If the Calvo Bill had been passed in this form, then the legislature would have enacted the definition of "new development projects" which the State Commission adopts in their Access Guidelines. However, after the sponsors of the Calvo Bill discovered the "full implications" of such a definition an author's amendment was introduced removing any reference to § 30106 and rejecting the equation of the term "new development project" with the term "development." Declaration of Thomas H. Willoughby at 5, Georgia-Pacific v. California Coastal Comm'n, No. 744,590 (San Francisco County Super. Ct. 1980) [hereinafter cited as Willoughby Declaration]. Under the author's amendment only the reference to section 30106 was removed so that the four types of development previously recognized as exceptions to the term "new development projects" were retained. A.B. 643, with the author's amendment, passed both the Senate and the Assembly by a combined vote of 98-2 and was subsequently signed by the Governor.

145. An affidavit by Thomas H. Willoughby, Chief Consultant for the Committee on Resources, Land Use, and Energy of the California State Assembly is significant here. He assisted the author, Mr. Calvo, in the amendment to the Calvo Bill which removed the language defining "new development" as "any development, as defined in section 30106 . . . ." In it he stated:

As enacted by the Legislature . . . A.B. 643 contains no language whatsoever defining or purporting to define either the term 'new development' or the term 'new development project.' With respect to said terms, it was intended that the bill only set forth four types of activity that were definitely not to be considered within the rubric of 'new development.' The bill preserves the status quo ante with respect to the fact
2. The Significance of Leaving "New Development Projects" Undefined

While it seems clear that the State Commission's position on what constitutes a "new development project" is unfounded, every applicant whose development does not fit within the limited exceptions of subsection (b) still faces the likelihood that he will be required to dedicate access as a precondition to development. This leaves coastal developers in a precarious position; they simply do not know whether their developments come within the meaning of the term "new development projects." Nor is the legislature in a more knowing position. The legislature seems to know when a development is not a new development project, but it has elected not to codify the definition of the all important term. Rather, they seem more willing to incorporate new exceptions to subsection (b). Thus, the question that remains is how broadly can the commissions construe their access conditioning powers before the legislature perceives a need to delimit those powers.

The formulation of a definition for "new development projects" will occur largely at the expense of the coastal developer and the taxpayer. Inevitably, some coastal developers who feel that their developments do not constitute "new development projects" will find themselves in court with protracted litigation. Other coastal developers, lacking the time or money to finance such a demanding undertaking will have no other alternative but to acquiesce in the commissions' judgment on whether such development is a "new development project." As this comment has already demonstrated, that judgment is unsoundly based. A legal attack against the State Commission's Access Guidelines has merit but will probably achieve nothing more than having the State Commission retract its standards on what constitutes a "new development project." A more likely scenario has coastal developers challenging the Commission's characterization of their development on a case by case basis until it appears all the exceptions to the application of section 30212(a) are carved out.

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that neither the term 'new development' nor the term 'new development project' was or is defined anywhere in California Coastal Act. Willoughby Declaration, supra note 144, at 15.
3. New Development Projects as Developments Having a Significant Impact on Public Access

Ultimately, the question of what constitutes a "new development project" turns upon an inquiry of the term "new development project." In determining what the legislature intended by the use of a particular term, courts have looked to other provisions of the enactment where the term appears. However, the Coastal Act contains no other provision which employs the term "new development project." As such, the meaning of the term may best be discerned by reviewing the usage, scope, and meaning of the terms which make it up: "new development," "project," and "project development." The use of the term "new development" as opposed to "development" in several provisions of the Coastal Act indicates that the legislature intended to distinguish the two terms. Where the term "new development" has been used it has been associated with development which: 1) creates a need for public services; 2) has a potential to degrade highly scenic areas; 3) necessitates the provision of extension of transit services, attracts new residents, or creates a potential for increased use of coastal access roads; and, 4) is of such a


148. The following words have been used as prefixes to the term “development” in various sections throughout the Coastal Act: any, new, any new, existing, other, and permitted. Cal. Pub. Res. Code §§ 30236, 30250, 30251, 30412, 30518, 30519, 30715 (West 1977 & Supp. 1980). These same prefixes have been used alternatively within the same section, intimating that they are designed to give added meaning to the term “development” and providing a basis for distinguishing “new development” from “existing development” and “any development.” Id. §§ 30250 (new residential, commercial or industrial development and existing isolated development), 30251 (permitted development, new development, and other development), 30518 (new development and any development), and 30519 (any new development and any development).

149. Id. § 30250 (West Supp. 1980).
150. Id. § 30251.
151. Id. § 30252.
nature that it has the potential to be structurally unstable, contribute significantly to erosion, geologic instability, or destruction of the development site, air pollution, or impact energy consumption and vehicle miles traveled.\textsuperscript{152}

The legislature's insertion of the term "project"\textsuperscript{153} in section 30212 may also be significant in ascertaining the legislative intent behind the term "new development project." "Project" is used sparingly in the Act; either appearing by itself or within the term "development project." Provisions which use the term "project" or "development project" indicate that the terms have been used in connection with: 1) channelizations, dams, or other substantial alterations of rivers and streams designed to control floods or provide water to the public;\textsuperscript{154} 2) production, storage, transmission, and recovery facilities for the treatment of water and sewage;\textsuperscript{155} 3) facilities associated with the activities of ports such as roads or highways within port boundaries, office and residential buildings, hotels, motels, commercial fishing facilities, oil refineries, or petrochemical plants;\textsuperscript{156} 4) developments which amount to major public works projects or major energy facilities;\textsuperscript{157} 5) a state university or college.\textsuperscript{158}

The overall impression one gets from the usage, scope, and the meaning of the terms "new development," "project," or "development project," is that the legislature was addressing development which has a clear and substantial impact on coastal resources. It is hard to imagine that the legislature intended to bring the following developments within the purview of the access conditioning powers of the Commission: 1) remodeling of a house which increases the area, height, or bulk of a structure by more than 10 percent; 2) replacement of a shoreline revetment destroyed by a natural disaster where the replacement would deviate as little as one foot from the footprint of the destroyed structure; 3) planting of trees, shrubbery, and other plant life; 4) construction of an unattached tool shed, patio or other miniscule home improvement;

\textsuperscript{152} Id. § 30253.

\textsuperscript{153} See note 112 supra.


\textsuperscript{155} Id. § 30412.

\textsuperscript{156} Id. §§ 30620.6, 30715, 30719.

\textsuperscript{157} Id. § 30601.

\textsuperscript{158} Id. §§ 30605, 30606.
or, 5) erection of a single family residence in areas which have not demonstrated a public need for access. However, all the above mentioned developments presently come within the scope of section 30212(a) and the Commission stands ready to attach access conditions to their approval, regardless if they have a significant impact on public access.

In summary, a workable definition for the term “new development projects” which is consistent with the nature and purpose of section 30212(a) is needed for an equitable application of the Coastal Act’s access policies. Assigning a meaningful definition to the term would resolve much of the controversy surrounding the commissions’ aggressive implementation of the access requirements of section 30212(a). Under the present scheme the commissions simply have unrestricted discretion when determining what constitutes a “new development project.” Indeed, the State Commission’s present definition of “new development project,” as reflected in its Access Guidelines, is at odds with the legislative intent manifested in subsection (b) of section 30212.

Bearing in mind that when the legislature employed the terms “new development,” “project,” and “development project,” it was focusing on the environmental impact of the proposed development. A functional definition which relates the development to its impact or burden on public access would be a useful starting point. Additionally, since the legislature has demonstrated a willingness to exempt certain developments which typically have a minor impact on public access from the access policies of the Act, a “significant effect” test might be employed to distinguish a “new development project” from other developments. This type of test is also consistent with the Act’s usage of the terms “new development,” “project,” and “development project.” It is also the same test employed by public agencies under present statutory and administrative rules pursuant to the California Environmental

159. See note 136 supra.

160. Id. Cf. CAL. GOV’T CODE § 65928 (West 1966) (exempting “ministerial projects” from the definition of “development project”).

161. The state EIR Guidelines, CAL. ADMIN. CODE tit. 14, §§ 15000-15192 (1977) provide in part: “A project as defined in section 15037(1)(a) definition of projects specified by these guidelines . . . shall not require an Environmental Impact Report . . . unless it is a project which may have a significant effect on the environment.” Id. § 15070 (emphasis added). The state EIR Guidelines also exempt “ministerial projects,” including building permits from the application of CEQA. Id. § 15073(b).
Quality Act, which requires these agencies to "prepare . . . an environmental impact report on any project they propose to carry out or approve which may have a significant effect on the environment." To give added meaning to any functional definition that is derived, the commissions could be required to make a specific finding that the proposed project has placed a significant burden on public access.

B. When is Access Inappropriate?

Section 30212(a) explicitly sets out three circumstances where access is inappropriate and where the commissions seemingly have no authority to attach access conditions. A review of the Commission's guidelines reveals that these exceptions have been somewhat ignored. The State Commission's Access Guidelines treat these exceptions as merely limiting but not precluding the dedication of public access. Such a stance misconstrues the legislative intent expressed in the wording of section 30212(a).

Not only has the State Commission treated the three exceptions as discretionary; it has changed the meaning of the word "access" in the second exception so as to sidestep the application of the exception in situations where adequate lateral access exists nearby. The second exception in section 30212(a) prohibits the Commission from conditioning development where "adequate access exists nearby." The legisla-

The "Guidelines for Processing Permits for Development Projects" prepared by the State Office of Planning and Research for state agencies are found in S.A.M. §§ 1070-1099 (issued pursuant to CAL. GOV'T CODE § 65923). For a discussion of the problems of interpretation with the terms "projects" and "development project" under CEQA see Sahm, Project Approval Under the California Environmental Quality Act: It Always Takes Longer than You Think, 19 SANTA CLARA L. REV. 579, 600-07 (1979).


164. See text accompanying note 121 supra.

165. After listing the three states exceptions to the provision of access requirement of § 30212, the State Commission states:

In some instances, these exceptions may merely serve to limit but not totally preclude the requirement for provisions of public access in new development projects. Where at all possible, the public right of access should be preserved. By limiting the location or uses of accessways, public access and the protection of resources may be found to be compatible.

1979 ACCESS GUIDELINES, supra note 68, at 12.
ture did not distinguish between vertical and lateral access. Access, as used in the second exception, derives its meaning from the opening phrase of section 30212(a): “public access from the nearest public roadway to the shoreline [vertical access] and along the coast [lateral access] shall be provided . . . .”166 However, the State Commission’s Access Guidelines consider only the existence of vertical accessways in determining when adequate access exists nearby.167 Thus, under the Access Guidelines, if adequate lateral accessway existed in front of a proposed development project, the Commission could still require the developer to dedicate a vertical accessway. Again, this position is clearly contrary to the legislative intent of section 30212(a).

C. On Site Dedications

Closely connected with the three exceptions in subsection (a) of section 30212 is the prohibition restricting the commissions’ ability to require “on site” dedications. This prohibition is entirely consistent with and supportive of the three exceptions in subsection (a) where the developer is exempted from providing public accessways. In applying the two prohibitions, if adequate access exists nearby or access would be inconsistent with public safety, military needs, coastal resources, or agriculture, then access is inappropriate within the development project area. Under section 30212(a), if access is inappropriate for the above reasons then the new development project is exempted from its access requirements.

In an attempt to circumvent the second and third prohibitions the commissions have required “off-site” dedications and are now contemplating “off-site” mitigation measures at the local level.168 Both practices exceed the limited

166. CAL. PUB. RES. CODE § 30212 (West Supp. 1980).
167. “What constitutes adequate access nearby? The question of whether adequate access exists nearby applies to the siting of vertical accessways.” 1979 ACCESS GUIDELINES, supra note 68, at 13. Compare CAL. PUB. RES. CODE § 30212(b)(4) (West Supp. 1980) with the State Commission’s Access Guidelines. Section 30212(b)(4) requires the commissions only to consider the repair and maintenance activities’ impact on lateral public access in determining whether the activity qualifies as a “new development project,” however, the Access Guidelines allow the commissions to consider only the impact on vertical access.
168. Fees in lieu of access dedication has been proposed as one type of mitigation measure where public access would be inappropriate within a development. Local Coastal Program Manual Supplement, supra note 15, at 16.
authority granted in section 30212.

Requiring "off-site" dedications or mitigation measures clearly demonstrates the commissions' overly enthusiastic application of the Coastal Act's access policies. For example, suppose an applicant proposes to conduct an agricultural operation on one of his two detached and undeveloped ocean front parcels. Suppose further that the State Commission concedes that access would be inappropriate along or through the agricultural operation but decides to require the dedication of accessways in the remaining undeveloped parcel. As prime ocean front land, this parcel is desperately needed by the public to gain access to a unique stretch of the coastline. Besides exceeding the "on site" limitation of section 30212(a), there are two fundamental flaws in the State Commission's logic. First, the applicant's agricultural development has not generated an additional need for public access on the remaining parcel. Second, access is inappropriate within the agricul-

169. An access condition imposed on the other detached parcel is presumably valid only where there exists some nexus between the parcel and the public access needs generated by its development. No California court has upheld a subdivision exaction or a condition imposed on rezoning, a building permit, or a special use permit as "reasonable" without the existence of some relationship between the proposed land use and the public needs emanating from that use. The most permissive standard of reasonableness by which to evaluate the validity of the condition imposed is found in Associated Homebuilders, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, appeal dismissed, 404 U.S. 878 (1971). The court upheld section 11546 of the Government code which authorized a requirement of a dedication of land or an in lieu fee for park or recreational purposes as a condition to approval of a subdivision map, stating: "section 11546 can be justified on the basis of a general public need caused by present and future subdivisions" (emphasis added). Id. at 638, 484 P.2d at 610, 94 Cal. Rptr. at 634.

The ultimate basis for upholding access conditions as a valid exercise of the state's police power has been hinged on the general public need for access to the California coastline. Sea Ranch Ass'n v. California Coastal Comm'n, No. C-74-1320 (N.D. Cal. April 7, 1981). Yet whether public access is a public necessity or a matter of public convenience is unanswerable without examining the proposed "new development project." See note 26 supra. No other land use regulation has been upheld in California which bestows such a windfall to the public at such a great cost to the individual property owner. For example, to uphold coastal "exactions" for public accessways based on a general public need is to no longer require a direct nexus between the exaction and the proposed subdivision. This signals a dramatic move away from requiring the "subdivider" to "pay his way" to making him pay for the public's way. To require the coastal developer to dedicate upland accessways without carefully relating the public need for the condition or exaction with the proposed development is to require him to pay a disproportionate share of a public undertaking.

See, e.g., Ayers v. City Council of Los Angeles, 341 Cal. 2d 31, 42, 207 P.2d 1, 8 (1949) (exaction valid if reasonably related to meet the public needs emanating from subdivision); Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 422, 79 Cal.
tural development so that the applicant's development is exempted from access dedications. Alternatively, if the State Commission required the above applicant to improve existing accessways on some other ocean front lot under the guise of a mitigation measure, such a practice is miscalculated for an additional reason. As already demonstrated, section 30212 authorizes only the dedication of accessways. The statute simply does not mention or imply that the commissions have the power to require applicants to improve "off-site" accessways or perform any activity which is purportedly designed to mitigate the impact of his development on public access.

D. A Paradigm Case

An example of the State Commission's excessively broad interpretation of its statutory authority under section 30212 is found in Georgia-Pacific v. California Coastal Commission. Although it was a preguideline application of section 30212, the conditions imposed are consistent with a reading of the State Commission's present Access Guidelines and demonstrate the Commission's disregard of all three of the prohibitions contained in section 30212(a).

In 1978, Georgia-Pacific sought coastal development permits for four separate projects at its log-processing facility located at Fort Bragg in northern California. All four projects were to be undertaken within the ocean front parcel devoted to Georgia-Pacific's industrial operation—a parcel bounded by the Pacific Ocean on the west, Elm Street on the north, Highway 1 on the east, and Noyo Bay and Noyo River on the south. Georgia-Pacific owned two other ocean front parcels at Fort Bragg—the Noyo Headlands and the Elm Street parcel. The Noyo Headlands was immediately south of the Noyo River so that it was geographically separate from the industrial parcel. The Elm Street parcel was immediately north of Elm Street and contiguous to the industrial parcel. Both parcels remained undeveloped and unrelated to Georgia-Pacific's industrial lumber operation.

Rptr. 872, 880 (1969) (public needs caused by proposed development is the sine qua non of the condition's reasonableness); Mid-Way Cabinet Fixture Mfg. v. County of San Joaquin, 257 Cal. App. 2d 181, 192, 65 Cal. Rptr. 37, 44, (1967) (reasonableness of condition contingent upon some "real relationship" between the proposed land use and the condition imposed).

The first project was the replacement of a dilapidated six foot wooden fence which surrounded a portion of the industrial area with a six foot chain link security fence. The second project was the repair of an existing revetment or sea wall designed to protect several settling ponds from wave action by the sea. The revetment had been damaged by storm waves during the prior winter. Georgia-Pacific proposed to repair the sea wall in order to comply with the waste discharge requirements issued by the Water Quality Control Board. The third project was the construction of a helicopter pad and hangar. The fourth project was the construction of a forest information center for the public on Highway 1.

The Regional Commission unconditionally approved all four projects finding that adequate public access existed nearby\(^1\) and that in any event public access was “not desirable due to the inconsistency with the safety of people in the industrial plant and the city of Fort Bragg.”\(^2\) The Sierra Club and one private individual appealed the decision of the Regional Commission to the State Commission.\(^3\) On appeal, the State Commission consolidated all four projects and ultimately attached identical access conditions to the permits issued for each of the projects. In total five conditions were imposed. Two of the conditions, a lateral and vertical easement, were required on the undeveloped parcel north of Elm Street. The third and fourth conditions, a lateral and vertical easement, were required on the undeveloped parcel south of Noyo River. The last condition was that Georgia-Pacific record an open-ended offer to dedicate an easement for a trail running along the entire length of the industrial parcel to be accepted when Georgia-Pacific abandoned the industrial operation.

Georgia-Pacific sought a writ of mandate to compel the State Commission to grant approval of the coastal development permits for the four proposed projects minus the challenged access conditions. Georgia-Pacific contended, *inter*

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172. *Id.* at 82.
173. Any “aggrieved person” may appeal a Regional Commission’s decision to grant a coastal development permit without access conditions on the grounds that the development fails to provide adequate physical access. *Cal. Pub. Res. Code* §§ 30602, 30603, 30625 (West 1977). An “aggrieved person” is anyone “who, in person or through a representative, appeared at a public hearing of the ... regional commission in connection with the action appealed.” *Id.* § 30801 (West 1977).
alia, that the State Commission acted in excess of its statutory authority when it imposed the five dedication conditions since: 1) none of its four proposed projects were "new development projects" for purposes of applying the access requirements of section 30212(a),\textsuperscript{174} and 2) adequate access existed nearby within the meaning of section 30212(a).\textsuperscript{175}

The trial court found for Georgia-Pacific, concluding that the four proposed projects were not "new development projects" within the meaning of section 30212.\textsuperscript{176} However, the State Commission moved for a new trial based on the recent amendment to section 30212 which added subsection (b). The State Commission contended that this amendment constituted "newly discovered evidence,"\textsuperscript{177} justifying a new trial since it demonstrated that the trial court erred in ruling that Georgia-Pacific's projects were not "new development projects."\textsuperscript{178} The State Commission argued that the court would never have so ruled since:

This statute [amended § 30212] contains a definition of "new development" not found in the section in its original form. The definition excludes certain development from its purview, thereby including all other development, such as that for which Georgia-Pacific sought coastal permits from the Commission.\textsuperscript{179}

The trial court denied the State Commission's motion for a new trial.\textsuperscript{180} While the specific grounds for denying the motion were not given, it seems clear that the State Commission's interpretation of the meaning of the term "new development project" is at odds with the legislative intent of subsection (b).\textsuperscript{181} Additionally, the trial court's initial ruling is both consistent with the premise that "new development projects" have a significant impact on public access and with an application of the three prohibitions of section 30212(a).\textsuperscript{182}

\textsuperscript{174} Georgia-Pacific Memorandum, supra note 24, at 47.
\textsuperscript{175} Id. at 54.
\textsuperscript{176} Memorandum of Intended Decision, Georgia-Pacific v. California Coastal Comm'n, No. 744590 (San Francisco County Super. Ct. 1980).
\textsuperscript{177} Georgia-Pacific Memorandum, supra note 24, at 15.
\textsuperscript{178} Id. at 20-24.
\textsuperscript{179} Id. at 2.
\textsuperscript{180} Conversation with Steven Hock, attorney for plaintiffs (March 10, 1980).
\textsuperscript{181} See text accompanying notes 143-45 supra.
\textsuperscript{182} See text accompanying notes 120-29 supra.
The consolidation and subsequent conditioning of all four projects is in direct conflict with the first prohibition of section 30212(a). The repair of the security fence and the reconstruction of the sea wall are not "new development projects" within even the most liberal interpretation of the term. By their very nature these projects could not generate an additional need for public access. Georgia-Pacific was simply rebuilding what had been there for some time. The public had never used or desired to use the industrial parcel to gain access to the coast. As the Regional Commission stated, adequate access existed nearby. Additionally, public access through a heavy industrial area would be imminently dangerous both to the public and to the employees of Georgia-Pacific.

For public safety reasons, even if the forest center and the helicopter facilities were correctly deemed "new development projects," the second prohibition of section 30212(a) would exempt those projects from having to provide access. If access is inconsistent with public safety then access is inappropriate and dedications are not required. It is hard to imagine circumstances which would present greater dangers to public safety than a public trail through a log-processing facility.

Recognizing the public safety problem with a public accessway through the industrial parcel, the State Commission went a step further and triggered the third prohibition of section 30212(a) by requiring "off-site" dedications. The dedications required in the Noyo Headlands parcel are inconsis-

183. See text accompanying notes 134-63 supra.
184. See note 137 supra.
185. See text accompanying notes 164-65 supra.
186. The industrial parcel was subject to heavy industrial use, including heavy machinery, lumber mills, log decks, drying stacks, and an airstrip. In proceedings before the Regional Commission the Commission found that "[s]afety from the fire hazards cannot be assumed. Safety requirements around the airstrip could not be assumed with public access along Noyo Headlands." Administrative Record Georgia-Pacific, supra note 7, at 82.
187. The following remark by Commissioner Andresen during proceedings before the State Commission is illustrative:
I'm wondering, since this company has so many vast land holdings, if it wouldn't be possible to create an access route some other place that would be unobtrusive for them and possibly more interesting and harmless for the public.

Id. at 20-23.
tent with the "on-site" dedication requirement of section 30212(a). By requiring such dedications the State Commission conceded that access was inappropriate in the industrial parcel—the only parcel where any additional need for public access could have been conceivably generated by the construction of the helicopter facilities or forest center. It further stands to reason that if access was inappropriate in the industrial parcel then Georgia-Pacific projects had not created an additional need for public access thereby making their projects immune from the conditioning powers of the State Commission.\textsuperscript{188} The required vertical and lateral access conditions imposed on the Elm Street parcel to the north should be classified as "off-site" for purposes of section 30212. While the parcel was not technically geographically separate from the industrial parcel, it remained unrelated to Georgia-Pacific's logging operation. Indeed, the parcel was undeveloped.

In summary, all five conditions would seem to exceed the limited authority of section 30212(a). The conditions imposed on the fence repair and the revetment reconstruction clearly are not "new development projects" within the meaning of section 30212(a). The conditions imposed on the construction of the helicopter facilities and forest center are presumably invalid for three reasons. One, as stated by the Regional Commission, adequate access existed nearby. Two, providing access "in the new development project" area, which was an area restricted to Georgia-Pacific's industrial operations, would be inconsistent with public safety. Three, the Commissions are not authorized to require the dedication of accessways "off-site" from the development area. Such a practice would effectively sidestep one of the three listed exceptions of section 30212(a) that "[p]ublic access . . . shall be provided in new development projects except where . . . it is inconsistent with public safety."\textsuperscript{189}

VI. Conclusion

Many coastal developers and public interest groups have criticized the commissions' aggressive implementation of the access provisions of the Coastal Act. This criticism has recently resulted in a number of lawsuits which have focused on

\textsuperscript{188} See note 168 supra.
\textsuperscript{189} CAL. PUB. RES. CODE § 30212 (West Supp. 1980).
the scope of the public’s constitutional right of access and on the commissions’ application of the access requirements of section 30212.

An examination of article X, section 4 of the California Constitution reveals that it cannot provide the access policies with the constitutional underpinning for a right of public access across privately owned uplands. The public’s constitutional right of access is limited to an easement over public trust lands and does not extend over upland areas. There are also significant problems, outlined above, in utilizing the enactment’s legislative mandate as the legislative basis for the access policies. Although the courts have generally been receptive to arguments in favor of expanding public access, we should be mindful of the concerns of the 1879 convention delegates who clearly contemplated the exercise of eminent domain powers to obtain accessways over uplands, and tide and submerged lands freed of the public trust.

Besides authorizing the commissions to require the dedication of accessways, the express wording of section 30212 appears to limit that authority in three respects. The commissions are apparently restricted to: conditioning “new development projects;” requiring “on-site” accessways; and exacting access conditions where “on-site” access is appropriate. A review of the State Commission’s Access Guidelines reveals that these prohibitions have not been followed. Much of the controversy that surrounds the Access Guidelines centers on its definition of what constitutes a “new development project.” This comment has examined that definition and found it to be inconsistent with the meaning of the term and the legislative intent of section 30212. A definition employing a “significant effect” test would far better implement the legislative intent of section 30212 and the legitimate concerns of coastal developers.

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