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Coastline Crisis

Today, one of the major problems facing the State of California is the preservation of its coastal resources. The author reviews contemporary examples of unchecked private and governmental development of the California coastal area and discusses instances where development has been in derogation of public access to California beaches. It is the author's contention that state policy expressed in the state constitution and statutes, guarantees to the citizenry a right of access to beaches. In the face of reckless development of the state's coastal resources, tighter use restrictions are imperative. Finally, the author directs his attention toward a brief analysis of attempted but unsuccessful legislation introduced in the California Assembly during the 1970 Regular Session.

The State of California's priceless coastline and estuary systems are in trouble; they are being mismanaged, misused and degraded. While some progress has been attempted in recent years,¹ the State of California lacks an effective system for managing its coast, bays and estuaries. Efforts are being made by the legislature to solve the problem.² But, meanwhile, these natural resources, which are of great value to the general public, remain in a state of siege. Private interests and even governmental agencies are demanding that such resources be dredged and filled and built upon to make profits, to promote industry and expand the tax base, and to accommodate a population that is growing and shifting to suburban areas surrounding the large cities.³

According to one report, the California coastline covers a total of 1,272 miles.⁴ Of this total mileage, public ownership encompasses approximately 249 miles. This portion is further reduced to a figure of 149 miles for actual use for public recreation. The remaining 100 miles

¹ CAL. GOV'T CODE § 8800: (CAL. STATS. 1967, c. 1642, § 1, p. 3934). . . . to be the policy of the State of California to develop, encourage, and maintain a comprehensive, coordinated state plan for the orderly, long-range conservation and development of marine and coastal resources which will insure their wise multiple use in the total public interest.

² S.B. 371, A.B. 2131, A.B. 730, A.B. 640, 1970 Regular Session.

³ Sacramento Union, Sept. 1, 1970, at 1, col. 2.

⁴ OUTDOOR RECREATION RESOURCES REVIEW COMMISSION, REPORT 4 (1962).

Beach (miles)	TYPE		Public	OWNERSHIP	
	Bluff	Marsh		Restricted	Private
283	883	106	149	100	1023

is restricted for military use and other governmental functions prohibiting public usage.

Based on official 1960 census figures,⁵ there are approximately 100,000 people in the state for each 1 mile of publicly owned coastline. The situation is compounded by the fact that most Californians live within easy commuting distance of the coast.⁶ There are predictions that the Los Angeles-San Francisco region, by the year 2000, will become a vast megalopolis some 600 miles in length with a population of 44.5 million persons.⁷

The problem thus becomes one of developing a solution to protect the ecology of the coastline and the public's interest in access to the beach areas from such an anticipated massive impact of development and population density. It should be readily apparent that vast ownership of the coastline by private interests will eventually result in developments of one type or another which will effectively restrict public access to the beach areas.⁸ The need for protection of the public interest in the coastline is best summarized by Dr. Norman K. Sanders:

Socially, the beaches serve a very important function in California society. The coast is the only convenient place left where city dwellers can get away from the pollution and tension of present urban conditions. If this safety valve is made inaccessible, the urban crises could become critical.⁹

Coastal Development Propensities of Private Owners

Continued influx of population density to the coastal areas has brought about a rise in dollar value of available building sites.¹⁰ The logical result has been an increase in property tax which has forced

⁵ BUREAU OF THE CENSUS: U.S. POPULATION (Official Census), 1890-1960. Total population of California in 1960 was 15,717,204. The preliminary count for the 1970 census showed California with a population of 19,696,840. (Sacramento Union, Sept. 1, 1970, at 1, col. 2).

⁶ In California alone over 13 million people now live within a one hour drive of the ocean. By 1980 this population will increase to 20 million. Commission on Ocean Resources, Resources Agency of California, CALIFORNIA AND THE OCEAN, 161 (1966).

⁷ CONSERVATION FOUNDATION: A REPORT ON ENVIRONMENTAL ISSUES, (May 1970).

⁸ A.B. 2090, as introduced during the 1969 Regular Session, originally included the following declaration:

The Legislature hereby finds and declares that . . . 90 percent of California's population lives on 8 percent of the land area, largely concentrated in metropolitan areas in the coastal zone, and this concentration is increasing; that access to the shoreline is diminishing with respect to the increasing population; and that approximately 60 percent of the shoreline held in private ownership, and much of the publicly owned shoreline, is subject to development inconsistent with the highest public interest.

⁹ Dr. Norman K. Sanders, *California's Coastline . . . The Shattered Resource*, prepared for Senate Natural Resources Committee Hearing, (Jan. 1969).

¹⁰ See note 6 *supra*.

some owners to dispose of their properties for development purposes while others have undertaken development plans of their own.

Private development in the 70's will increasingly be carried on by organizations that treat land development as only one of a variety of investments. Major industrial organizations will be investing heavily in real estate. The reasons are readily apparent: Land has traditionally been a hedge against inflationary periods. More importantly, many concerns manufacturing consumer products see land development as a synergistic operation which will help to merchandise other goods or services provided by the industry What can be expected (is) a major invasion of the real estate field by companies who 10 years ago had no interest at all

These organizations have vast resources. Unlike many smaller developers, they can sweat out the customary delays put forward by municipal bodies to discourage development they do not favor. Secondly, these developers will usually be talking about very large tracts of land and very significant developments. They will be interested in special concessions and will, in effect, want local regulation to be cut to favor the pattern of their development.¹¹

Some such developments are far beyond the planning stages, as evidenced by the progress of Castle & Cooke's "Sea Ranch" in Sonoma county and American-Standard's development on the Santa Cruz coastline. Both of these corporate enterprises were able to function exactly as described above.

The "Sea Ranch" development was held up for a period of time due to a zoning ordinance requiring the developer to establish public access to the beach. Since this requirement was not in the best interest of the developer, Castle & Cooke was able to "wait-it-out" while the regulation was modified, allowing it to eventually file its subdivision plan without providing any access to the water for the general public. The result, for all intents and purposes, is private beach frontage for the residents of "Sea Ranch." A continuation of this type of policy would eventually mean no public access to coastal beaches without subjecting the public to prosecution for trespass¹² on the privately owned upland property.¹³ However, the specific problem of access through future subdivisions

¹¹ Babcock, *Regulatory Devices*, AMERICAN SOCIETY OF PLANNING OFFICIALS (1969).

¹² CAL. PEN. CODE § 602(k).

¹³ CAL. CIV. CODE § 830:

Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tide water, takes to ordinary high-water mark. . . .

"Upland" in this Note refers to coastal property bordering on the beach. It extends landward from the vegetation line or other natural boundary of the dry-sand beach.

has been approached by the enactment of Chapter 1308 in the 1970 legislative session. The addition of section 11610.5 to the Business and Professions Code provides that no city or county shall approve a subdivision map without a provision for "reasonable public access" to the shoreline, unless reasonable access is otherwise available.

American-Standard Corporation, a large manufacturer of plumbing supplies, has undertaken a substantial development near the city of Santa Cruz. The development has a dual corporate purpose: profits from the sale of manufactured lots to builders and a ready market for the corporation's primary products installed in the new construction.

As further evidence of corporate ability to gain concessions from affected municipalities, American-Standard was able to have its outlying development annexed to the city of Santa Cruz. The subsequent configuration is based on the "dumb-bell"¹⁴ principle, because the required number of other private land owners did not favor annexation at the present time. The final result is generally considered as poor urban planning.¹⁵

Private Interest Influence and Governmental Cooperation

There are numerous instances of local governmental agencies disposing of coastal properties to private interests with the net result being destruction of the natural beauty of the area or a blocking of public access to the shoreline. Generally, the driving force behind the municipalities' action stems from an effort to increase the tax base by appealing to industrial or commercial development in their area. Consequently, many things are done which a regional scheme of planning would tend to eliminate.

In the small community of Morro Bay, located in San Luis Obispo County, a portion of bay front property was put up for sale after it had been abandoned as an amphibian base after World War II. The ostensible reason given by the county Board of Supervisors was the fact that the property was currently unproductive. The subsequent purchaser, Pacific Gas & Electric Co., undertook the construction of a 116 million dollar power plant. The result was two fold: the towering smoke stacks completely dominate the landscape, all but blotting out the 576 foot high Morro Rock, a land-mark of natural beauty in the area, and

¹⁴ The "dumb-bell" principle is the method of joining an outlying area to the existing city limits by annexing a narrow strip in between thus giving it the shape of a bar-bell or "dumb-bell." *Portland General Electric Co. v. City of Estacada*, 194 Or. 145 165, 241 P.2d 1129, 1136 (1952).

¹⁵ R. BABCOCK, *THE ZONING GAME* 122-23 (1966).

from time to time heavy damage is caused to the surrounding residential areas when the plant switches from natural gas consumption to burning of fuel oil.¹⁶

Unfortunately, there was no basic planning to be adhered to in order to answer the question:

[S]hould a generating plant be located on some of the most beautiful and accessible California shoreline? If we decide that the coast should no longer be subject to casual and random development, then we must look insistently to the state government for an over-all coastline use plan and laws to give it meaning.¹⁷

Perhaps one of the most telling examples of the tendency of private enterprise and local government toward cooperative development of the coastline is to be found in the planned development of Upper Newport Bay in southern California.

At the start of this century, there were 28 sizable estuaries in southern California. Three of the estuaries have disappeared and 10 others have been drastically modified. Most of the remaining 15 are either in the process of being severely changed or are scheduled for profound alteration. In all of California, over 60% of such estuarine areas already have been destroyed. Upper Newport Bay is the last major baylike body of water remaining in a fairly pristine condition along 400 miles of coast between Morro Bay and Estero de Punta Banda in Mexico.¹⁸

The development of Newport Bay has been of concern since the early part of the 20th century. With increasing demands for boating, swimming, and other recreational facilities, and the growing demand for marina-type residential areas, the development of Upper Newport Bay has become a critical issue in recent years. There has been a number of proposals concerning the development of the area.¹⁹ Some of these primarily represent the needs of single-interest groups, but none, until recently, considered more than superficially the ecological effects of such developments on the bay.²⁰

The plan that appears to be favored by the Orange County Board of Supervisors is one that involves a land exchange of county-owned waterfront property for upland property currently owned by the Irvine Company. The result would be to give entire control of the waterfront in

¹⁶ Morro Bay Sun, May 26, 1966, at 1A, Col. 1.

¹⁷ Loveridge and Yount, *The Towering Stacks of Morro Bay*, CRY CALIFORNIA 33 (Fall 1967).

¹⁸ CALIF. DEPT. OF FISH AND GAME, REPORT ON NATURAL RESOURCES OF UPPER NEWPORT BAY AND RECOMMENDATIONS CONCERNING THE BAY'S DEVELOPMENT 15 (Resources Agency, March 1970).

¹⁹ *Id.*

²⁰ *Id.*

the bay to the Irvine Company. Their proposed plan consists of developing Upper Newport Bay into a marina-residential complex with provisions for water-oriented commercial and recreational facilities. Deleterious effects on the living resources can be predicted if the Bay is developed as proposed by this plan.²¹

Governmental Activity in the Coastline Area

Of all state and local governmental agencies, the Division of Highways probably creates more havoc in the coastal areas than any other.

A prime example of such activity is reflected in the plan for a freeway to be constructed in Santa Monica. The project consists of an earthfill causeway of some 200 million cubic yards of dirt to be built across Santa Monica Bay. Most of the fill, approximately 120 million cubic yards, is to be excavated from the nearby Santa Monica Mountains.²² Numerous engineering questions regarding the project remain unanswered. Can a man-made beach be constructed on the ocean side of the new freeway? What would be the effect of the change in the current flows in the bay itself? What effects would such a vast removal of earth from the mountains have on the ecology of that area?

In spite of these unanswered questions, the proponents of the plan are anxious for it to be undertaken. Oil company geologists believe there are oil reserves under the present site of the Santa Monica Beach State Park. Needless to say, these interests would be concerned with the subsequent availability of such exploration and possible exploitation.²³

Real estate developers, in turn, envision a dual wind-fall. They see not only the possibility of creating high-rise apartments around the enclosed water area, but also the development of a marina to enhance the value of these apartment locations. Secondly, the removal of huge quantities of earth fill from the mountains would create building sites for subsequent residential developments.²⁴

One of the most staggering proposals of the Division of Highways is the plan for a freeway in an area of unparalleled natural beauty, Prairie Creek Redwoods State Park in northern California. The plan involves Gold Bluffs Beach which was recently made a part of the park. Three routes have been proposed: (1) through the center of the park; (2) across the top of the cliff overlooking the ocean; or (3) right down on

²¹ *Id.*

²² Gentry, *Iron Heel on the California Coastline*, CRY CALIFORNIA 4, 7 (Fall 1968).

²³ *Id.*

²⁴ *Id.*

the beach itself.²⁵ In any of the three alternatives there will be destruction of that which was sought to be preserved initially: the enjoyment of beauty in its natural state by people today and long into the future.

These are, assuredly, isolated incidents of coastline problems, but they are only a small sampling of many others that have or will have the same destructive effect. The problem, then, is one of devising some method or procedure to deal with these problems on a state-wide basis since present methods have led to continual erosion and piece-meal destruction of the coast.

Public Access to Beaches

Throughout the years there has been strong policy favoring public ownership of shoreline areas as evidenced by Civil Code section 830.²⁶ That section states that absent specific language to the contrary, private ownership of uplands ends at the high-water mark. Decisions of the courts have interpreted this provision to create a presumption of public ownership of land between high and low tide.²⁷ There is also a clearly enunciated public policy in the California Constitution in favor of allowing the public access to shoreline areas.²⁸ Recreation is among the "public purposes" mentioned in the constitutional provision.²⁹ There are numerous other legislative enactments that indicate the strong public policy in favor of according public access to the coastline.³⁰

One of the major problems, however, is implementing this policy for the benefit of the citizenry. The Supreme Court of Oregon³¹ used a rather novel approach in protecting public access to the beach. The

²⁵ Vladimir and Nada Kovalik, *Life and Death Along the California Coast*, CRY CALIFORNIA 17 (Fall 1967).

²⁶ See note 13 *supra*.

²⁷ Kimball v. MacPherson, 46 Cal. 103, 108 (1873); Upham v. Hosking, 62 Cal. 250, 258 (1882); Long Beach Land & Water Co. v. Richardson, 70 Cal. 206, 209 (1886); Freeman v. Bellegarde, 108 Cal. 179, 185 (1895); People v. California Fish Co., 166 Cal. 576, 591-596 (1913); Abbott Kinney Co. v. City of Los Angeles, 53 Cal. 2d 52, 57 (1959).

²⁸ CALIF. CONST. art. XV, § 2.

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. . . .

²⁹ Bohn v. Albertson, 107 Cal. App. 2d 738, 752 (1951).

³⁰ (1) CALIF. CONST. art. I, § 25 (guaranteeing the right to fish); (2) CAL. GOV'T CODE §§ 54090-54093 (relating to discrimination in beach access); (3) CAL. GOV'T CODE §§ 39933-39937 (implementing CAL. CONST. art. XV, § 2 and requiring municipalities to maintain access to navigable waters); (4) CAL. FISH & GAME CODE § 6511 and CAL. PUB. RES. CODE § 6008 (restrictions on sales and leases of public lands in Humboldt Bay in order to preserve public access); (5) CAL. PUB. RES. CODE § 6210.4 (requiring the state to reserve convenient access to navigable waters in connection with the sale or other disposition of shoreline lands); (6) CAL. PUB. RES. CODE § 6323 (forbidding structures on artificially accreted lands so that such accretions will remain an unobstructed and open beach).

³¹ State ex rel. Thornton v. Hay, 462 P.2d 671 (Oreg. 1969).

case involved an injunction to prevent construction of a fence across the "dry-sand" area.³² In affirming the granting of injunctive relief, the court rejected implied dedication and prescriptive easement arguments. The decision was based on the English doctrine of Custom.³³ In this case, at least, it turned out to be a rather effective legal argument.

California approached the problem differently in two cases decided in February, 1970.³⁴ These cases involved protection of public access across private land to the beach area itself. The court, in both instances, determined that the public had acquired an easement across private lands through application of the doctrine of implied dedication.³⁵ In carrying out stated public policy, however, the court did express the view that:

[F]or a fee owner to negate a finding of intent to dedicate based on uninterrupted public use for more than five years, therefore, he must either affirmatively prove that he has granted the public a license to use his property or demonstrate that he has made a bona fide attempt to prevent public use.³⁶

It appears that private upland owners may effectively prohibit any future acquisition of public easements by making sure the test for implied dedication is not met on their property. Such close guardianship of their rights would have the affect of further reducing public access to that area of the beach already declared to be under public ownership. The actual public ownership is meaningless if the access is unavailable.

Additional Problems of Human Occupancy of the Coast

In addition to the court's attitude of attempting to enforce public policy, the desirability of beach areas alone has prompted private owners of frontage to cut off public access. The real dichotomy in the situation is that unrestricted public access to the coastline may in itself have far reaching effects in damaging the ecology of the area. This

³² *Id.* at 672. "This will be assumed to be the land lying between the line of mean high-tide and the visible line of vegetation."

³³ *Id.*

Test for Doctrine of Custom:

- (1) It must be ancient.
- (2) Right must be exercised without interruption.
- (3) Use must be peaceable and free from dispute.
- (4) Use must be reasonable.
- (5) Certainty—as to boundaries of use.
- (6) Custom must be obligatory.
- (7) Custom must not be repugnant or inconsistent with other customs or laws.

³⁴ *Gion v. City of Santa Cruz*, 2 Cal. 3d 29 (1970). *Dietz v. King*, 2 Cal. 3d 29 (1970).

³⁵ *Union Transp. Co. v. Sacramento Co.*, 42 Cal. 2d 235, 240 (1954).

³⁶ *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 41 (1970).

point should be kept in mind while attempting to come up with a solution that will observe both public and private rights of ownership.³⁷

A large influx of the populace would involve disruption of the delicate environmental interaction along the coast and in waters off-shore which follows as a result of massive human activity.³⁸ For instance, once the effect of a misplaced hindrance has taken place, even a successful lawsuit may not be enough to repair the damage. A misplaced hindrance is best described as the construction of such things as quays, breakwaters or any other activity which has a damaging effect on the ecology or disturbs and sometimes changes the natural flow of the currents along the coastline. Sometimes the law may refuse to recognize the rights of the affected parties. Such was the case for the citizens of Santa Barbara in their attempt to gain relief from oil pollution as a result of off-shore drilling.³⁹

State's Coastal Conservation Policy

So far, the problems regarding the protection of the entire coastline have been expressed in a general manner by the legislature and the people of the state.

That it is in the best interest of the state to maintain, preserve, conserve and otherwise continue in existence open space lands for the production of food and fiber and to assure the use and enjoyment of natural resources and scenic beauty for the economics and social well-being of the State and its citizens.⁴⁰

Such an expression is nothing more than a policy statement with no mechanism for enforcement.

The legislature, in 1967, created the California Advisory Commission on Marine and Coastal Resources declaring it

to be the policy of the State of California to develop, encourage, and maintain a comprehensive, coordinated state plan for the orderly, long-range conservation and development of marine and coastal resources which will ensure their wise multiple use in the total public interest.⁴¹

Unfortunately, the Commission is exactly what it says—"Advisory." It has no real powers to ensure "wise multiple use in the total public interest."⁴²

³⁷ Dr. Norman K. Sanders, *California's Coastline . . . The Shattered Resource*, prepared for Senate Natural Resources Committee hearing (Jan. 1969).

³⁸ *Id.*

³⁹ *County of Santa Barbara v. Hickel*, 426 F.2d 164 (1970); *County of Santa Barbara v. Malley*, 426 F.2d 171 (1970).

⁴⁰ CALIF. CONST. art. XXVIII.

⁴¹ CAL. GOV'T CODE § 8800 (CAL. STATS. 1967, c. 1642, p. 3934, § 1).

⁴² CAL. GOV'T CODE §§ 8815-25.

The furthest step taken so far by the legislature toward managing a specific portion of salt-water shoreline has been the creation and extension⁴³ of the Bay Conservation and Development Commission.⁴⁴ Fortunately, this commission not only has the power to draw up a plan⁴⁵ for the Bay Area, but also has the power to enforce the plan through issuance or denial of a permit for any proposed project "making any substantial change"⁴⁶ within the area of the Commission's jurisdiction.

Except for BCDC, the public has no effective means for protecting its interest in coastal resources. This is true in spite of a recent decision by the California Supreme Court recognizing the right of public access to beaches.⁴⁷ However, even that right may not be compatible with protection of the resources, *i.e.*, unrestricted public access may be harmful to the ecology. In any case, no court can solve the access problem without some legal theory on which to base its decision.

Adequate and well-planned legislation seems to be the appropriate step for a lasting solution. So far, the legislature has seen fit to enact only policy statements; the only exception being the creation and extension of BCDC.⁴⁸ However, there were several legislative proposals dealing with these problems introduced during the 1970 Regular Session.⁴⁹

Legislative and Judicial Approach

The basic issue in this dilemma seems to be one of how the state can solve these problems while taking into account the rights of both public and private sectors. It develops into the common legal practice of balancing the rights of the public against the interests of the private owners.

The legislature has expressed its concern for the public interest. The courts can use this expression as a guideline in deciding the balancing issue.⁵⁰ It has been further expressed as follows:

⁴³ CAL. GOV'T CODE § 66659.

The commission shall continue in existence until such time as the Legislature provides for the termination of the existence of the commission or for the transfer of the commissions functions and duties to some other permanent agency.

⁴⁴ CAL. GOV'T CODE §§ 66600-66661.

⁴⁵ CAL. GOV'T CODE § 66603.

⁴⁶ CAL. GOV'T CODE § 66604.

⁴⁷ *Gion v. City of Santa Cruz*, 2 Cal. 3d 29 (1970).

⁴⁸ See note 44 *supra*.

⁴⁹ A.B. 493 and A.B. 2418, 1970 Regular Session (Access bills). S.B. 371, A.B. 2131, A.B. 730 and A.B. 640, 1970 Regular Session. (Coastline conservation bills).

⁵⁰ *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 43 (1970):

Art. XV, § 2 . . . clearly indicates that we should encourage public use of shoreline areas whenever that can be done consistently with the federal constitution.

The Legislature finds that the rapid growth and spread of urban development is encroaching upon or eliminating many open areas and spaces of varied size and character, including many having scenic or aesthetic values, which areas and spaces, if preserved and maintained in their present open state would constitute important physical, social, aesthetic or economic assets of existing or impending urban and metropolitan development.⁵¹

This policy, coupled with those expressed earlier,⁵² apparently favor state action that would provide some method of control over areas of natural beauty, including the coastline. The method of control under study at present concerns the creation of a comprehensive zoning plan for the entire coastal strip.⁵³

Although the exercise of the police power in the form of zoning restrictions may diminish the value or utility of private property in individual instances,⁵⁴ the very essence of the police power as distinguished from the power of eminent domain is that the deprivation of some individual rights in property without compensation cannot prevent the operation of the police power, once it is shown that its exercise is proper and that the method of its exercise is reasonable within the meaning of due process of law.⁵⁵

The creation of a comprehensive zoning plan usually involves lengthy study and hearings before the responsible administrative authority. Consequently, it is imperative, if the ultimate plan adopted is not to be largely defeated by activity of nonconforming use during the interim period, that some preliminary enactment or regulation be adopted to maintain the status quo until the details of the regulations can be worked out and the complete plan finally adopted.⁵⁶ Such emergency enactments and interim regulatory measures are as much a part of a comprehensive general zoning plan as if embraced in the general zoning law, provided they are duly and regularly passed by a legislative body in contemplation of a general zoning law and prove to be reasonably related to the general plan and the public welfare.⁵⁷

There is little question but that the prevention of further development of the lands and waters of the California coastline during preparation of a comprehensive plan for this area is a valid exercise of the state's po-

⁵¹ CAL. GOV'T CODE § 6951. (CAL. STATS. 1959, c. 1658, § 1, p. 4031).

⁵² See note 30 *supra*.

⁵³ A.B. 2131, A.B. 730 and A.B. 640, 1970 Regular Session.

⁵⁴ Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515 (1962), *appeal dismissed*, 83 Sup. Ct. 145 (1962).

⁵⁵ Beverly Oil Co. v. Los Angeles, 40 Cal. 2d 552 (1953).

⁵⁶ Lima v. Woodruff, 107 Cal. App. 285 (1930).

⁵⁷ Miller v. Bd. of Pub. Wks., 195 Cal. 477, *error dismissed*, 273 U.S. 781 (1925).

lice power and does not require payment of compensation to affected private interests. It is an established rule of constitutional law that the police power may be used unless it can be shown to bear no reasonable relationship to the public health or welfare or is applied arbitrarily.⁵⁸

The U.S. Supreme Court in *Berman v. Parker*⁵⁹ stated:

The concept of public welfare is broad and inclusive The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.⁶⁰

Even though *Berman v. Parker* did not deal directly with zoning, it has been held to "consider such distinction to be immaterial in considering the scope of the police power and its exercise to promote the general welfare."⁶¹ California courts early recognized these principles as applied to changing conditions in a rapidly growing state.⁶²

Later decisions have demonstrated a stronger trend by the courts to uphold the validity of state acts aimed at improving or preserving lands for public use.⁶³ The question of whether the regulation may, in essence, be a "taking" was well answered in *Dept. of Pub. Wks. v. Curtis*:

It is beyond question today that well-recognized property values may be substantially impaired by certain kinds of governmental action without payment of compensation.⁶⁴

⁵⁸ B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, PART II, THE RIGHTS OF PROPERTY 227 (1965).

What the Supreme Court said in *Berman v. Parker* should be a powerful inducement to courts throughout the land to repudiate the notion that the police power may not be employed to promote aesthetic progress—whether through zoning or other regulatory measures.

⁵⁹ *Berman v. Parker*, 348 U.S. 26, 33 (1954).

⁶⁰ *Id.*

⁶¹ *State v. Wieland*, 269 Wis. 262, 69 N.W.2d 217, 223 (1955).

⁶² *Miller v. Bd. of Pub. Wks.*, 195 Cal. 477 (1925):

. . . the police power, as such is not confined within the narrow circumspection of precedents, resting upon past conditions . . . obviously calling for revised regulations to promote the health, safety, morals, or general welfare of the public . . . as a commonwealth develops politically, economically and socially, the police power likewise develops . . . to meet the changed and changing conditions.

See *McCarthy v. Manhattan Beach*, 41 Cal. 2d 879 (1953); *Ayres v. City of L.A.*, 34 Cal. 2d 31 (1949); *Consolidated Rock Prods. Co. v. City of Los Angeles*, 57 Cal. 2d 515; *appeal dismissed*, 371 U.S. 36 (1962); *Bringle v. Board of Supervisors*, 54 Cal. 2d 86 (1960).

⁶³ *People ex rel. Dept. of Pub. Wks. v. Curtis*, 255 Cal. App. 2d 378 (1967); *Gion v. City of Santa Cruz*, 2 Cal. 3d 29 (1970); *Dietz v. King*, 2 Cal. 3d 29 (1970).

⁶⁴ *People ex rel. Dept. of Pub. Wks. v. Curtis*, 255 Cal. App. 2d 378, 383 (1967): Within judicially declared constitutional minimum standards . . . the legislative power may be exercised to inflict economic loss where necessary to accomplish a legitimate public purpose. Thus, it is established that an uncompensated dedication of land for public use can constitutionally be required by a local planning body as a condition of giving official approval to private development of other property.

Such "governmental action" could even consist of regulations protecting the public's interest before approval of any development project is granted.⁶⁵

An analysis of several California cases⁶⁶ has led to the conclusion that:

. . . California courts will continue to . . . sustain regulations even though there are some analogous precedents available to invalidate them. Courts cannot ignore the consequences of their rulings, and the consequences of unfavorable rulings on regulations would be substantially detrimental to what might be described as the long-run public interest in planning to cope with problems spawned by rapidly increasing urban chaos.⁶⁷

A workable approach to the enforcement of such governmental regulations involves an obligation of the judiciary to uphold reasonable attempts to protect the public interest. This appears to be the only feasible solution to the problem of preservation of the coastline or any other environmental problem.

Proposed Federal and State Legislation

The primary coastal zone management focus is now on Congress, where a number of bills are pending.⁶⁸ Though there are significant differences, all are cast in the same mold, offering grants to states as incentives to develop and implement comprehensive management plans for coastal areas. The bills do not make any state action mandatory. States would have the primary responsibility for establishing coastal management plans. The federal government would have authority to review plans and implementation procedures to be sure they are effective and for the public's benefit as a condition for approval of grants. The federal government would be authorized to make grants to coastal states for comprehensive coastal zone planning and management, provided a state program meets a wide range of planning development and environmental protection prerequisites.

These prerequisites include such things as designation of a single state agency to develop a plan and administer the program, formulation of a plan for balanced coastal land and water use, authority to im-

⁶⁵ 11 A.L.R.2d 537.

The contention that conditions imposed upon approval of a proposed subdivision plat or map are invalid as constituting a veiled attempt to exercise the power of eminent domain has, under the facts and circumstances disclosed in the particular cases, been consistently rejected.

⁶⁶ See note 62 *supra*.

⁶⁷ Hyman, *Regulation Legal Questions*, POWERS, Vol. I (1968).

⁶⁸ S. 2802, S. 3183, S. 3460, H.R. 14730 & 14731, H.R. 14845, H.R. 15099, 91st Cong., 2nd Sess. (1970).

plement the plan, power to issue land use or zoning regulations, ability to acquire lands through condemnation or other means, power to issue or withhold permits for state, local and private projects, depending on whether they are consistent with the plan, plus numerous other provisions of lesser importance. Basically, these bills are designed to promote direct action by the states through federal grants. It is neither a new nor a novel approach to a solution but at least it will set up guidelines to be followed on a national scale.

The California Legislature, in the 1970 Regular Session, initially undertook the study of several bills which would have created a coastal zone conservation and development commission.⁶⁹ Subsequent to the introduction of the bills in the California Assembly, the Assembly Natural Resources and Conservation Committee recommended passage of A.B. 2131,⁷⁰ favoring it over two other measures supported by conservationist groups. In spite of this, a conservation group spokesman reported the measure is "better than nothing."⁷¹

Essentially, A.B. 2131, was to be known and cited as the California Coastal Zone Conservation and Development Act,⁷² and declared that the people of California "have a paramount interest in the protection of California's coastal zone."⁷³ To implement this policy, A.B. 2131 would have required the creation of the California Coastal Zone Conservation and Development Authority hereafter called the Authority. This group was to consist of 13 persons to be designated in accordance with the provision of the Act.⁷⁴ In addition, there was a provision for the California Advisory Commission on Marine and Coastal Resources⁷⁵ to act as a technical advisory committee to the Authority.

The primary function of the technical advisory committee was to draft, within 90 days after passage of the enactment, recommended criteria to be followed by local agencies in formulating zone plans or to govern agencies in the granting of permits for proposed use of the

⁶⁹ A.B. 2131, A.B. 640, A.B. 730, S.B. 371, 1970 Regular Session.

⁷⁰ Sacramento Bee, June 24, 1970, at A5, col. 1.

⁷¹ *Id.*

⁷² A.B. 2131, 1970 Regular Session, proposed Div. 15 CAL. PUB. RES. CODE.

⁷³ *Id.* Proposed CAL. PUB. RES. CODE § 24002.

⁷⁴ *Id.* Proposed CAL. PUB. RES. CODE § 24041 provided:

There is in the state government a California Coastal Zone Conservation and Development Authority, consisting of 13 members, each of whom shall have an equal vote:

- (a) The Lieutenant Governor.
- (b) The Secretary of the Resources Agency.
- (c) The Secretary of the Business and Transportation Agency.
- (d) The chairman of each of the five boards.
- (e) Five public members appointed by the Governor with the advice and consent of the Senate who shall be residents of California experienced and knowledgeable in matters of conservation and use of marine and coastal resources.

⁷⁵ CAL. GOV'T CODE §§ 8800 *et seq.*

coastal zone prior to completion of the final zoning plan. It also would have had the power to review any such permits granted by local agencies.

The bill itself designated the areas of emphasis to be covered in the recommended criteria: increased beach access, beach conservation, water quality and resources. Also, certain specified activities were to be prohibited such as dredging and filling or any reduction of public beaches within the zone. The prohibitions were to be in effect only until adoption of the criteria by the Authority. Thereafter agencies could grant permits for uses conforming to established criteria.

The development of the over-all state plan called for transmission by the Authority of adopted criteria to the five zone boards and all affected local agencies. The five zone boards referred to above were to be created and each was to have jurisdiction over a designated area of the coastline as provided in section 24111 of Assembly Bill 2131.⁷⁰ Each zone board would have had jurisdiction over all local agencies within its particular area with regard to any use of the coastal zone. The boards would also have been responsible for the compilation of a comprehensive zone plan for its designated area. Therefore, within 18 months after receipt of criteria each local agency would have been required to submit its element of the plan to the appropriate zone board for incorporation into the zone plan. Any portion not conforming to the criteria would be remanded to the submitting agency. All the zone boards were to combine the elements into a zone plan within 24 months from effective date of enactment and submit the plan to the Authority for approval. Within 30 months from enactment, the Authority was to have developed a single, comprehensive land use plan for the entire coastal zone.

The functions of the agencies and zone boards revolved around a permit system for proposed coastal development during compilation of the state plan. During the interim period between the effective date of this division and Authority approval of the criteria, certain uses such as dredging, filling and reduction of public beaches were to be temporarily prohibited unless a permit was issued and approved by both the local agency involved *and* the appropriate zone board. Upon adoption of criteria by the Authority, however, the interim control referred to above terminated and the local agencies could have granted permits for conforming uses *subject to review* by the zone boards. The review was to take place before any such use was effected and the zone boards could have required any supporting documents or evidence to be forwarded

⁷⁰ A.B. 2131, 1970 Regular Session, proposed CAL. PUB. RES. CODE § 24111.

to it. The board, within a 30 day period, was to either approve the use or notify the party or agency that the use failed to conform to the adopted criteria.

If a board found that the proposed use did not conform to the adopted criteria then it would have withheld approval and notified the agency in writing of the particulars in which the proposed use failed to conform. Whoever proposed the use could then petition the board for approval of a revised permit and unless the revision was made to conform, the agency would not grant a permit. This appeared to be the only method of appeal available to any prospective user of the "coastal zone."⁷⁷

Since the state plan was to be developed from the local level on up, the above permit system would have remained in affect until the adoption of the final state plan. Therefore, the local agency would have been required to measure any proposed use against its "element"⁷⁸ of the plan until the element was superseded by the adoption of the zone plan. While the zone plan was in effect, all uses were to have been measured against it until it was finally superseded by the state plan. At this point, the state plan would have been the measuring device which guided all local agencies in issuing permits. The entire structure of development of the plan and the overriding permit system more or less would have resembled a pyramid beginning at the local level and ending with one complete plan for the state's entire "coastal zone."

Unfortunately, A.B. 2131 had some built-in weaknesses. The provisions would have become inoperative and of no force or effect after January 1, 1974. One of the powers given to the Authority by A.B. 2131 was to

[S]ue and be sued in all actions and proceedings and in all courts and tribunals of competent jurisdiction to obtain remedy, including prohibitory and mandatory injunctions to restrain violations of the provisions of this division.⁷⁹

This meant that there would no longer be a legal entity with standing to sue for enforcement of the state plan. In other words, there would be a supposedly enforceable plan on file with no one to see that the plan was adhered to.

In addition, A.B. 2131 undoubtedly would have suffered from the inherent weakness of the creation of two many levels of authority. For example, the development of planning criteria was the function of the technical advisory committee, the criteria approval was the responsibility of the Authority and then the implementation of the criteria was the re-

⁷⁷ *Id.* Proposed CAL. PUB. RES. CODE § 24027.

⁷⁸ *Id.* Proposed CAL. PUB. RES. CODE § 24029.

⁷⁹ *Id.* Proposed CAL. PUB. RES. CODE § 24081(d).

sponsibility of the local agencies. This unduly cumbersome process supposedly repeated itself again when the local agencies submitted their element plans to the zone boards for compilation, and then the final plan was to be approved by the Authority. In theory, this arrangement was called workable because the local agencies were supposedly bound by the established criteria in the first place. It may even have been interesting to see if such an arrangement could have completed its purpose within the thirty month time frame the bill called for. But it more readily brings to mind the old saying that a camel is really a horse designed by a committee.

Prior to its demise at the hands of the California State Senate, A.B. 2131 was passed by the Assembly over two other bills, A.B. 640 and A.B. 730.⁸⁰ Both of these latter bills were favored by conservation groups over A.B. 2131 because of their apparently more stringent regulations. Therefore, it may be worthwhile to briefly examine the contents of these two bills.

In essence, both bills covered the same basic area of the California coastline. However, A.B. 640 defined its area as a "coastal zone" extending one mile inland and three miles seaward from mean high-tide.⁸¹ A fairly rigidly defined area. On the other hand, A.B. 730 designated a "coastal-marine zone" as the land and water from the landward limit of the sea to the highest elevation of the nearest mountain range and seaward to the outermost limit of the state's jurisdiction.⁸² However, the real jurisdiction zeros in on a "primary area", which is that part of the "coastal-marine zone" lying within one-half mile inland from the sea.⁸³

Even though both bills called for the creation of a "commission", A.B. 640 divided the coastal area into five regional commissions while A.B. 730 created four district boards. Both of these sub-entities were to be responsible for the issuance of development permits based, however, on different criteria. A.B. 640 required a permit for any "substantial change" which was defined as any irreversible modification, construction or excavation totalling in excess of \$10,000 dollars.⁸⁴ A.B. 730's district boards would have required a permit for any "development."⁸⁵ This term was rather loosely defined to include placement of fill and building of piers; discharge of sewage or any waste liquid or solid; grading, moving, dredging, mining or extraction of material or any construction or removal of trees.

⁸⁰ A.B. 640 and A.B. 730, 1970 Regular Session.

⁸¹ A.B. 640, 1970 Regular Session, proposed CAL. PUB. RES. CODE § 20103.

⁸² A.B. 730, 1970 Regular Session, proposed CAL. PUB. RES. CODE § 14102.

⁸³ *Id.* Proposed CAL. PUB. RES. CODE § 14105.

⁸⁴ A.B. 640, 1970 Regular Session, proposed CAL. PUB. RES. CODE § 20105.

⁸⁵ A.B. 730, 1970 Regular Session, proposed CAL. PUB. RES. CODE § 14103.

As in A.B. 2131, the legislation involved here called for the development of a state plan. Both commissions were to be responsible for preparing and adopting a comprehensive and enforceable coastal zone plan for the balanced long-range conservation and development of the resources of the coastal zone. The key words were "comprehensive" and "enforceable." The former from a constitutional view point and the latter to give the commission the necessary power. In A.B. 640, however, each regional commission was to make a detailed comprehensive and enforceable plan for its coastal zone. The other bill did not extend such duties to its district boards but rather kept the responsibility for the plan's creation with the commission.

A.B. 640 was somewhat similar in its approach to development of the plan as was the case in A.B. 2131. The regional commissions were responsible for development of an interim plan within a certain period of time. Such plan was to be submitted to the state commission for approval to see that it was drawn up in accordance with the specified criteria. Presumably, the interim plan of A.B. 640 would have acted as a guide for issuance of permits before the total statewide plan was developed and put into effect.

The method of enforcing the plan revolved around the permit system. In both A.B. 640 and A.B. 730, the initial filing for a permit was to be done through the regional commissions or district boards. Any person or government agency wishing to make a "substantial change" or engage in "development" of the coastal area would be required to file for a permit. Where the affected city or county also required a permit for development then such application was to be made to the city council or county board of supervisors. After an investigation and a public hearing of the proposed development, the council or board of supervisors were to file a report with the regional commission or district board.

All of the procedures for obtaining a permit required a certain amount of time in which the regional commissions or district boards must act. Within this time frame, they could have either approved or denied the permit. If the commission or board failed to act within the prescribed period then the permit would automatically have been granted. The reasoning behind such a provision was obvious, otherwise the regional commission or district board would have had almost unlimited power to frustrate any development at all.

Both A.B. 640 and A.B. 730 provided for a method of appeal in case a permit was denied at the regional or district level. A.B. 640 made provision for reapplication to the regional commission or a direct appeal to the state commission. The decision of the state commission, by ma-

jority vote, on appeal would be final. A.B. 730 granted permission to appeal to the commission but it also established procedures for declining to hear appeals that it determined raised no substantial issues of fact or policy. In such a case, the decision of the district board became final. Even if the commission failed to act on an appeal within 60 days after filing, the board action became final. A.B. 730 also included a 90 day statute of limitations for starting any court proceeding to contest denial of a permit application.

Each bill contained a provision for a final commission report and termination of the existence of the commission. At this time, it would be the legislature's duty to study the effect of the commission and determine whether it had carried out its primary function. If the results were affirmative, then the legislature could vote to extend the life of the commission.

It is readily apparent why the above bills were favored by conservation groups over A.B. 2131. In essence, they were stronger bills calling for centralization of power on a state-wide level. Consequently, the bills were opposed by many organizations who stress the local government concept over usurpation of such powers by larger governmental entities. Perhaps A.B. 2131's own built-in weaknesses were responsible for its proceeding in the legislative process as far as it ultimately did before failing. In any case, coastal conservation remains an expressed policy of the state but the state is without the means of enforcing that policy.

Conclusion

Little doubt should remain that protection of the values and priceless natural resources of the coastal zone is the concern of all of the people of California and that it is a statewide purpose of the highest importance and priority to realize the coordinated planning and use of the coastal zone as a unitary, finite, precious resource. It is not the function of the judiciary to initiate such steps nor do local coastal county governments seem to be equipped or inclined to act in concert to solve the problem. The legislature, therefore, must be put on notice by the public itself that it is time to act. Areas of great natural beauty, once destroyed, cannot be replaced. It is up to the legislature to see that they remain for the benefit and enjoyment of present and future generations.

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