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The California Coastal Commission and Regulatory Takings

WARD TABOR*

One of the principle concerns behind adoption of the California Coastal Act of 1976 was enhancement of public access to coastal shorelines. Californians have a constitutional right of access to navigable waters of the state. The California and the United States Constitutions, however, provide that private property may not be taken for public use without the payment of just compensation. Determining when a regulatory provision for access is a compensable taking has been a difficult task. The matter is not yet completely resolved.

The state legislature authorized the California Coastal Commission (hereafter Commission) to carry out California’s constitutional mandate of public access to waters of the state. From the beginning of its work, the Commission has vigorously enforced its mandate. Indeed, the Commission has been accused of regulating the coastline beyond

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The views expressed herein are those of the author and should not be attributed to the Land and Natural Resources Division of the United States Department of Justice.

1. CAL. PUB. RES. CODE §§30000-30900.
2. Id. §§30210, 30212, 30214.
3. CAL. CONST. art. X, §4; see also CAL. PUB. RES. CODE §30210.
4. CAL. CONST. art. I, §19; U.S. CONST. AMEND. V.
5. CAL. PUB. RES. CODE §§30210-30900. At the end of 1984 there were 1,817 permits issued with access conditions. California Coastal Commission and California Coastal Conservancy, Coastal Access Program Fifth Annual Report, at 8 (1985).
all standards of rationality. Among the reported abuses is the case of Robert and Caroline Bailey who were told by the Commission to give to the state the entire beach area of their property. During the winter of 1978, high winds, unusually high tides, and strong waves were threatening to undermine and erode the sand from under the Bailey’s house and the houses of their neighbors. The Baileys and their neighbors employed a contractor to place rocks directly in front of their homes. After having survived the storm, the Baileys were informed that they had acted illegally by installing the rocks without a county and a coastal development permit. They applied for a permit and went through five months of administrative procedures. The Baileys then were told that they could obtain a permit but only on the condition that they give up their privately owned beach area. At no time had they prevented the public from using the beach area. Such administrative abuse triggers the constitutional proscription against taking private property for public use without just compensation.

A “taking” may arise from restricting the use of property as well as taking title. The right to exclude others from one’s private property is a fundamental element of ownership, one of the “sticks within the bundle of rights” that we label property. This right falls within the category of interests that the government cannot take without compensation.

If property is taken by excessive regulation, the property owner’s usual remedy is an action entitled “inverse condemnation,” whereby the owner sues the government and seeks an award of just compensation for the injuries and damages sustained. The California Supreme Court has denied the existence of an inverse condemnation cause of action when the government acts pursuant to land-use-regulation police

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7. Id. at 58.
8. Id. at 58-9.
9. This is only one of many reported alleged abuses of private property rights by the Commission. See Gughemetti & Wheeler, supra note 6, at 48-69.
10. When the government over-regulates property through its police power, such regulation may be a taking within the meaning of the fifth amendment of the United States Constitution. Kaiser Aetna v. United States, 444 U.S. 164, 178 (1979). The “just compensation” clause of the fifth amendment is binding not only on the Federal Government, but applies to the states through the “due process” clause of the fourteenth amendment. Chicago, Burlington and Quincy R.R. Co., 166 U.S. 226, 241 (1896).
13. Id.
power authority. The precise issue has not yet been authoritatively decided by the United States Supreme Court.

This article explores the question of when the California Coastal Commission may require the dedication of an easement as a condition to a permit for development without thereby invoking the “just compensation” and “due process” clauses of the California and United States Constitutions. Initially, the focus will be on the relationship between the California Constitution and statutes and the administrative practices of the Commission regarding access to the coastline. Second, the pertinent doctrines of California statutory and common law dedication of private property for public use will be analyzed. The third section will deal with case law of the United States Supreme Court on regulatory takings and the Constitution. The need for just compensation will be analyzed by applying Supreme Court precedents to facts arising under the Coastal Act.

Easement dedication conditions applied to large scale project developers will be shown to be constitutional because of the potential impact such developers have on the coastal resources of the state. Under other circumstances, however, the easement dedication requirements used by the Commission may amount to taking of private property for public use for which the California and the United States Constitutions require just compensation.

CALIFORNIA COASTAL ACT

The California Coastal Act of 1976 was enacted as the coastal zone management program of the state required to satisfy the Federal Coastal Zone Management Act of 1972. Among the basic goals of the California Coastal Act are to:

(c) Maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners.
The legislature specifically declared that the Coastal Act "is not intended and shall not be construed as authorizing" state or local governments to exercise their authority, pursuant to the Act, to grant or deny a permit in a manner which will "take or damage private property for public use, without the payment of just compensation." 20

A. Development Control Provisions of the Coastal Act

Any person wishing to perform or undertake any development in the coastal zone, with certain limited exceptions, 21 must obtain a coastal development permit. 22 The permit program is administered by the California Coastal Commission 23 or a local government that has established approved procedures for its local coastal program. 24 A coastal development permit will be issued only if the issuing local agency, or the Commission on appeal, finds that the proposed development is in conformity with the certified local coastal program. 25 Every coastal development permit issued for any development between the shoreline of any body of water within the coastal zone and the nearest public road must include a specific finding that such development is in conformity with the public access and public recreation policies 26 of the Act. 27

Any permit issued or any development or action approved on appeal is subject to reasonable terms and conditions to ensure that the development is in accord with the Act. 28 The Coastal Act provides for exemptions to permit requirements. 29 One who seeks to develop under such conditions, however, must seek a certification of exemption from the administering agency. 30 Some of these permit "exemptions" will be discussed below.

20. Id. §30010. This provision further states: "This section is not intended to increase or decrease the right of any owner of property under the Constitution of the State of California or the United States." Id. These provisions essentially are restatements of property protection doctrines embodied in state and federal constitutions.

21. See id. §25500. Energy related facilities are regulated by the Energy Commission. See id. §§25000 et seq.

22. Id. §30600.

23. Id.

24. Id. §30600. The Coastal Act was initially administered by the Commission and six regional commissions. See e.g. Georgia-Pacific v. California Coastal Commission, 132 Cal. App.3d 678, 686, 183 Cal. Rptr. 295 (1982). The regional commissions were abolished as local governments in the coastal zone prepared approved local coastal plans. See id. §§30500 et seq.

25. Id. §30604(b).

26. Id. §30200-30265.5.

27. Id. §30604(c).

28. Id. §30607.

29. Id. §30610-30611.

30. Id. §30610.2.
B. Public Access Provisions of the Coastal Act

The public access provisions of the Coastal Act\(^3\) were intended to carry out Section 4 of Article X of the California Constitution.\(^2\) The constitutional provision relates to the public's right of access to navigable waters of the state and provides:

No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water of 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.\(^3\)

The Act provides that maximum access and recreation opportunities should be provided, consistent with public safety needs, the need to protect public and private property rights, and the need to protect natural resource areas from overuse.\(^3\) Also, developments should not interfere with the public’s right of access to the sea, when that right has been acquired through use\(^3\) or through legislative authorization.\(^6\) In addition, the Public Resources Code provides that public access to the shoreline from the nearest public road and along the coast should be provided in new development projects, with certain exceptions.\(^3\)

\(31.\) Id. §§30210-30214.

\(32.\) Id. §30210.

\(33.\) CAL. CONST. art. X, §4 (section renumbered June 8, 1976, originally adopted 1879).

\(34.\) CAL. PUB. RES. CODE §30210. The legislature has provided for exemptions to these access requirements for certain types of developments. Id. §30212(a). They include (1) replacement of certain structures; (2) improvements that do not substantially increase the size or surface area, and which do not impede public access and do not amount to a seaward encroachment; (3) the reconstruction of any seawall that is not seaward of the former structure; and (4) any repair or maintenance activity for which the Commission has determined that a coastal development permit will be required. Id. §§30212, 30610 (emphasis added). This last exception, however, does not apply when the Commission has determined that a particular repair or maintenance activity will have an adverse impact on lateral public access along that beach. Id. §30212(b)(5). The legislature provided for various factors to be taken into account in implementing the public access policies of the Coastal Act. Id. §30214. Among these are (1) the geologic and topographic characteristics (2) the capacity of the site to sustain use (3) the appropriateness of limiting access due to fragility of the natural resources and the proximity to adjacent residential areas (4) the need to protect the privacy of adjacent land owners and (5) the management needs for protection of aesthetic values (i.e., collection of litter). Id.

\(35.\) Id. §30211. This, apparently, is a reference to the rights of the public acquired through the doctrine of implied dedication. See infra notes 120-125 and accompanying text (a discussion of this doctrine).

\(36.\) Id. §30211. Legislative authorization would probably include any statutory provisions that would allow the government to require dedications as a condition to development. See infra notes 104-117 and accompanying text (discussion of statutory dedication).

\(37.\) CAL. PUB. RES. CODE §30212(a).
The specific intent of the legislature was that the public access policies of the California Coastal Act of 1976 be carried out in a reasonable manner. This includes consideration of the equities and balancing the rights of the individual property owner with the public's constitutional right of access pursuant to Article X, Section 4 of the California Constitution.

A repeated aspect of these access policies is the protection of private property rights. The statutory language implies that a parity exists between the strength of the constitutional protection of private property and that of the public's right of access to the shoreline. While the police power permits reasonable conditions upon a landowner's development proposal, not all conditions are valid. A grant of public privilege may not be conditioned upon giving up constitutional rights. Public access dedication conditions imposed on the grant of a coastal development permit are valid if reasonably conceived to fulfill public needs emanating from the property owner's proposed use. The following section describes the Commission's interpretation of the public access provisions of the Act and how they relate to the constitutional rights of access.

C. Public Access Interpretive Guidelines

As part of its regulatory duties, the Commission was directed to prepare a set of guidelines explaining its interpretation of the public access provisions of the Coastal Act. The guidelines are the for-
mulation of general policy intended to govern future permit decisions. 46 The guidelines do not require the Commission to impose access conditions in any particular circumstance. 47 Rather the guidelines claim to adopt a flexible approach and the Commission is to determine the appropriateness of access exactions on a case-by-case basis. 48 Nevertheless, the presence of the guidelines may have a tendency to inhibit property owners from planning improvements on their land because of the possibility of a requirement for access conditions when an actual permit is applied for. 49

According to the Commission, public prescriptive rights must be protected wherever they exist. 50 Action taken by the Commission, therefore, should not diminish the potential prescriptive rights in any way. 51 Evidence of prescriptive use indicates the need for dedication areas required under Section 30212 of the Act. 52 The conclusion of the Commission is that all new development which results in any intensification of land use generates sufficient burdens on public access to require conditions in permits for access dedication. 53

The guidelines describe two types of access dedications: lateral and vertical. 54 Lateral access allows the public to move freely along all

46. Pacific Legal Foundation v. California Coastal Commission, 33 Cal.3d 158, 168, 655 P.2d 306, 312, 188 Cal. Rptr. 104, 111 (1982). The guidelines discuss the policy behind the statutory provisions on public access. Id. Unregulated coastal development was individually and cumulatively precluding public access to state-owned tidelands. California Coastal Commission, Statewide Interpretive Guidelines, as amended December 16, 1981, at 12. The Commission, before adoption of the public access statutes, recommended that private development be regulated to assure that development will not directly or indirectly preclude access to the shoreline. Id. at 11-13. A troubling aspect of these guidelines is that the Commission has not complied with procedures required for the adoption of regulations. See CAL. GOV'T CODE §§11346-11446. (West Supp. 1985). These provisions apply to the exercise of any quasi-legislative power, unless expressly exempted by statute. Id. §11346. The required procedures include publication of notice of proposed rules, id. §11346.4; a hearing on the proposed rule, id. §11346.8; review by the Office of Administrative Law, id. §11349.8; review by the Office of Administrative Law, id. §11349.1. Rules which have not been properly adopted as regulations may be declared invalid. Id. §11350(a).

47. Pacific Legal Foundation, 33 Cal. 3d at 174, 655 P.2d at 316, 188 Cal. Rptr. at 115.

48. Id. The Commission has discretion in most cases to determine the appropriateness of access dedication. See generally CAL. PUB. RES. CODE §§30212(a), 30214(a).

49. Pacific Legal Foundation, 33 Cal. 3d at 173, 655 P.2d at 315, 188 Cal. Rptr. at 114.


51. Interpretive Guidelines, supra note 49 at 11.

52. Id. at 12.

53. Id. at 13. Admitting the legislative exceptions to access dedications, the Commission concludes that they relate to the appropriateness of access itself, rather than the type of development. Id.

54. Id. at 14.
the tidelines. The Commission’s interpretation specifies a twenty-five foot area of dry sand beach at all times. This view is based on what is necessary to allow reasonable use by the public of state-owned tidelands. Vertical access dedications are required to provide access from the first public road to the shoreline.

The Commission accepts that property owners have privacy rights and generally considers that a ten-foot buffer between the structure and the accessway is sufficient. The guidelines do not discuss the other “property” rights of such owners.

Although the language of the statute requires access to be provided only when access does not exist nearby, the view of the Commission is that existing access along the shoreline is almost never adequate to serve the public need, due to the uniqueness of each stretch of the coastline. Lateral access is generally required along all stretches of sandy beach.

D. Case Law Relating to Coastal Public Access

Relatively few reported cases have dealt with the issue of dedications under the Coastal Act, especially in relation to constitutionality. The cases can be separated into three groups: (1) seawall cases; (2) single family home cases; and, (3) large scale development cases. In the reported case regarding the rebuilding of a seawall, the action arose from a disagreement between the Commission and the home owner over the propriety of a permit condition requiring the owner to dedicate a lateral easement for public access. During the unusually severe winter storm of 1978, high waves threatened damage to property owners’ residences. The owners improved the existing seawall by adding rock below the sandy surface. The Commission subsequently

55. Id.
56. Id. In this regard, the Commission has attempted to enlarge the public’s constitutional right of access to navigable waters. See J. J. Guhembre and E. D. Wheeler, supra note 6 at 48. The constitutional right is to access, not a contiguous 25-foot wide easement. See Cal. Const. art. X, Section 4.
57. Interpretive Guideline, supra note 49 at 16.
58. Id. at 22. Additionally, the Commission has created on its own the concept of bluff-top access. Id. at 21. This is to allow public viewing of the shoreline, and its rationale is found in the need for mitigating a project’s otherwise inconsistency with the Act. Id.
59. Id. at 19-21.
60. Id. at 22.
61. Id. at 25.
62. Id.
64. Id. at 164, 665 P.2d at 309, 188 Cal. Rptr. at 107. The facts of this situation are strikingly similar to those of the Baileys. See supra notes 8 and 9 and accompanying text.
notified them that a permit was required for the repair which had been made. A permit was granted on the condition they dedicate the entire sandy beach from the mean high tide level to the toe of the seawall. The trial court invalidated the condition for three reasons: (1) the seawall had no adverse impact on the supply of sand to the beach; (2) the seawall did not in any way interfere with the natural processes of the shoreline; and, (3) there was insufficient evidence to support the finding of the Commission that the seawall improvement adversely affected public access to or across the beach. The Commission appealed, but later dismissed the appeal. The case reached the California Supreme Court on a complicated and, for the purpose of this discussion, irrelevant issue, i.e., attorneys fees for landowners.

The second general situation discussed in the case law is that of the single family home. In *Sea Ranch Association v. California Coastal Commission*, the plaintiffs alleged that the Coastal Act was unconstitutional as applied to them in that the Act took their property for public use without just compensation and denied them due process and equal protection. The plaintiffs sought declaratory and injunctive relief. Permits of individual lot owners were conditioned upon dedications for public beach access and view easements. The court granted summary judgment for the Commission, finding that the public access conditions were valid and within the ambit of the Commission’s regulatory power. The court concluded that the Commission would have violated the Coastal Act if the Commission had not formulated and imposed the challenged conditions. This decision seems reasonably based upon the stated policies of the Coastal Act to maximize public access and views. The effect of final buildout of the Sea Ranch and other similar developments would increase local population and tourism and therefore would increase the needs for public access.

In the second case, *Grupe v. California Coastal Commission*, the owner of a single-family home lot sought invalidation of an access

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65. *Pacific Legal Foundation*, 33 Cal. 3d at 164, 655 P.2d at 309, 188 Cal. Rptr. at 108.
66. *Id.* 655 P.2d at 311, 188 Cal. Rptr. at 110. The request for attorneys fees was denied because rather than protecting a public right under the private attorney general doctrine, the plaintiffs had protected merely personal rights. *Id.* at 167, 655 P.2d at 311, 188 Cal. Rptr. at 110.
68. *Id.* at 391.
69. *Id.* at 395.
70. *Id.* at 393.
71. *Id.* at 395.
condition and damages for violation of federal constitutional rights under Title 42 U.S.C. section 1983. The owner had sought a permit to build a single-family home. The application was approved subject to a condition requiring a dedication of an easement for public access and passive recreational use covering about 9,000 square feet, representing some two-thirds of the entire lot. The trial court awarded $150,000 damages, but only if the Commission failed to invalidate the condition on the basis that the condition (1) amounted to a taking of private property without just compensation; and (2) violated substantive due process.

The Court of Appeal reversed, holding that only an indirect relationship existed between the imposed exaction and the public need to which the development contributed. As the owner’s beach front home was one more brick in the wall separating the people of California from the tidelands of the state, the project contributed to the cumulative severe limitation on public access. The court classified the easement exaction as a “limited economic regulation of the use of real property imposed for the public welfare,” as the easement was reasonably related to a legitimate public purpose — public access to state tidelands. Further, the appellate court found no taking without just compensation. Analogizing to the Subdivision Map Act cases, the court found reciprocal benefits to the landowner in being permitted to build a home on the coast. Therefore, requiring the homeowner to bear this burden was not unjust.

The courts are quite willing to allow the Commission to go rather far, i.e. taking two-thirds of a lot, without finding any federal constitutional violations. A relationship always exists, however, between providing access and coastal recreational opportunities and property which is adjacent to the coastline. That alone should not create constitutional validity. The public right is that of access to navigable waters, not a right to have beach available for passive recreational use. Clearly, the state could not, absent the development permit system,
require a property owner to convey property to the state without just compensation. Under the guise of the police power, however, the Commission appears to be doing just that.

The final set of cases represent regulation and easement exactions aimed at large scale developers. The cases are quite distinct, but demonstrate the extent of the Commission’s authority, as well as its limitations. The first was Liberty v. California Coastal Commission,\(^8\) in which the landowner had applied for a permit to construct a restaurant.\(^4\) One of the conditions attached to his permit was to provide one parking space for every fifty square feet of floor space and to make the lot available for free public parking every day until 5 p.m. for thirty years.

The court noted, preliminarily, that the proper mechanism for testing the propriety of the imposition of a permit condition is a writ of mandamus rather than inverse condemnation.\(^5\) The court compared the free parking condition with that of access to beach or lagoon areas, stating:

> [T]he State Commission may require the dedication of property for access to or along the coast, and we are not called upon to consider the propriety of that condition in the subject permit since Liberty has agreed to it. By contrast, requiring a landowner to provide access to the beach and lagoon areas over a route to which the public may have acquired a prescriptive easement (see §30211) differs substantially from requiring the landowner to dedicate land for free public parking to which the public has no apparent right.\(^6\)

The court held that the condition for free public parking was unreasonable and unfair, reasoning that to impose the burden on one property owner to an extent beyond his own use unfairly shifts the burden of the government to a private party.\(^7\) In other words, police power is unreasonably exercised when the imposed conditions are not related to the use being made of the property, but instead are imposed because the government conceives a way of shifting the burden of providing a government benefit to one not responsible for or only remotely benefiting from the governments benefit.\(^8\) An arbitrarily

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\(^{83}\) 113 Cal. App. 3d 491, 170 Cal. Rptr. 247 (1980).
\(^{84}\) Id.
\(^{85}\) Id. at 498, 170 Cal. Rptr. at 251.
\(^{86}\) Id. at 500, 170 Cal. Rptr. at 252-53.
\(^{87}\) Id. at 504, 170 Cal. Rptr. at 255. The court also found no deprivation of equal protection or substantive due process. Id. at 499, 170 Cal. Rptr. at 252.
\(^{88}\) Id. at 502, 170 Cal. Rptr. at 254.
achieved exaction will be nullified as a disguised attempt to take private property for public use without resort to eminent domain.\textsuperscript{89}

The second case deals with the regulation by the Commission of improvements to a coastal industrial complex. In \textit{Georgia Pacific Corp. v. California Coastal Commission},\textsuperscript{90} the Commission conditioned development permits on the dedication of public access easements.\textsuperscript{91} As to a vertical access easement proposed by the Commission, the court concluded that it coincided with the route then used by the public for access to the coastline with Georgia Pacific's permission, and was proper.\textsuperscript{92} As to a so-called "conditioned lateral access easement," the court held the Commission had abused its discretion, as the easement requirement was based on speculation that Georgia-Pacific might change the use of its land.\textsuperscript{93} Access conditions on the basis of such speculation could, under the Commission's rationale, be exacted of any permit applicant at any place and any time. The court, however, held that the Commission's rationale was contrary to law.\textsuperscript{94}

As to a third easement dedication requirement, one on a non-contiguous parcel, the court found that no relationship existed between the site of the proposed easement and the construction project.\textsuperscript{95} The access conditions were imposed pursuant to the Public Reserves Code,\textsuperscript{96} which requires a provision for public access to the shoreline "\textit{in} new development projects."\textsuperscript{97} The court discussed this as a limit on the Commission's power, stating:

The word "\textit{in}" is subject to the provision of the Coastal Act requiring that the enactment be liberally construed. (§30009, \textit{see also} \textit{CAL. CONST. art. X, §4.}) Its ordinary meaning nevertheless requires that it be interpreted to mean that access conditions imposed in a permit for a "new development project" must bear some reasonable relationship to the site of the project.\textsuperscript{98}

To summarize the case law, the Commission (or the local authority enforcing the Act) may constitutionally condition a coastal development permit on a dedication of an easement for public coastal access

\begin{itemize}
  \item \textsuperscript{89} \textit{Id.} at 503, 170 Cal. Rptr. at 254.
  \item \textsuperscript{90} 132 Cal. App.3d 678, 183 Cal. Rptr. 395 (1982).
  \item \textsuperscript{91} \textit{Id.}
  \item \textsuperscript{92} \textit{Id.} at 699, 183 Cal. Rptr. at 408.
  \item \textsuperscript{93} \textit{Id.} at 700, 183 Cal. Rptr. at 408.
  \item \textsuperscript{94} \textit{Id.}, 183 Cal. Rptr. at 408.
  \item \textsuperscript{95} \textit{Id.} at 701, 183 Cal. Rptr. at 408-09.
  \item \textsuperscript{96} \textit{CAL. PUB. RES. CODE} §30212.
  \item \textsuperscript{97} \textit{Id.} (emphasis in original) (citing \textit{CAL. PUB. RES. CODE} §30212).
  \item \textsuperscript{98} \textit{Id.}
\end{itemize}
in the interests of the general welfare. This is because such conditions are reasonably related to one of the principal objectives of the Act, providing maximum public access. Apparently, the courts feel that a route historically used by the public is a particularly appropriate location for a proposed easement dedication.

Such conditions for dedication are invalid, however, when they are based on regulatory speculation about what the applicant might do with its land in the future. Further, such a requirement is invalid when the access easement does not bear some reasonable relationship to the site of the development project. No authority exists for a permit to be conditioned on the provision of free public parking until 5:00 p.m. daily even though providing parking is a legitimate concern of government. Finally, such a condition may not be attached to a permit for the reconstruction or improvement of a seawall when either (1) the seawall has no adverse impact of the beach sand supply; (2) the seawall does not interfere with natural shoreline processes; or (3) evidence is lacking of an adverse effect on the access of the public to or along the shore.

Other forms of dedication are possible in California, and a discussion regarding them is applicable in part to dedications achieved through the Coastal Act. The courts analyzing the constitutionality of easement dedication conditions applied by the Commission rely on the precedents relating to statutory dedication and implied dedication. The Commission also relies on the doctrine of implied dedication to determine the need for public access. Pursuant to statute, developers who subdivide may be required to dedicate land for specified purposes as a condition to development. Furthermore, the common law doctrine of implied dedication has been applied to create easements in the public, when the proper elements can be found (usually connected or associated with access to navigable waters). These two forms of dedication will be examined in the following sections.

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99. Id. at 699, 183 Cal. Rptr. at 407.
100. Id., 183 Cal. Rptr. at 407-08.
101. Id., 183 Cal. Rptr. at 408.
102. Id. at 700, 183 Cal. Rptr. at 408.
103. Id. at 701, 183 Cal. Rptr. at 409.
105. Pacific Legal Foundation, 33 Cal. 3d at 164, 655 P.2d at 309, 188 Cal. Rptr. at 107.
107. Grupe, 166 Cal. App. 3d at 170, 212 Cal. Rptr. at 592.
108. Id. at 158, 212 Cal. Rptr. at 583. See also supra notes 49-51 and accompanying text.
OTHER FORMS OF DEDICATION IN CALIFORNIA

A. Dedications Through the Subdivision Map Act

Pursuant to state statute, the governing body of a city or county may require, as a condition to the approval of a final subdivision map, the dedication of land, the payment of fees in lieu of land, or a combination of both for park or recreational purposes. This statute and its predecessor have been upheld against constitutional challenges that they violate the "due process" and "taking without just compensation" clauses of the United States and California Constitutions. When analyzing the constitutionality of the dedication requirements of the Coastal Commission, the courts have relied heavily on these precedents.

The legislative purpose of this dedication mechanism is to maintain and preserve open space for the recreational use of residents of new subdivisions. The California Supreme Court rejected the argument that a particular subdivision must create the need for such dedication. The local government in requiring a dedication is not acting under its powers of eminent domain. Rather, the developer who seeks the advantage of subdivision has the duty to comply with reasonable conditions for dedication. The subdivider realizes a profit from governmental approval of a subdivision since the land is made more valuable by subdivision. In return for this benefit the city may require a dedication for park purposes.

One limit on this power is that of the "reasonableness" of the dedication condition. The constitutionality of the exaction does not depend, however, on the exclusive use by subdivision residents.

The rationale behind these rules requiring the dedication of land

109. CAL. GOV'T CODE §66477.
112. See, e.g., Grupe, 166 Cal. App. 3d at 164-66, 212 Cal. Rptr. at 587-90.
113. Associated Home Builders, 4 Cal. 3d at 637, 484 P.2d at 609, 94 Cal. Rptr. at 633.
114. Id. at 638, 484 P.2d at 610, 94 Cal. Rptr. at 634.
116. Associated Home Builders, 4 Cal. 3d at 644, 484 P.2d at 615, 94 Cal. Rptr. at 639.
117. Ayres, 34 Cal. 2d at 37, 207 P.2d at 5. Another limitation is that land or fees so dedicated may not be diverted to any purpose other than park or recreational facilities which will be available for use by the residents of the subdivision. Associated Home Builders, 4 Cal. 3d at 640 n.5, 484 P.2d at 612 n.5, 94 Cal. Rptr. at 636 n.5.
118. Associated Home Builders, 4 Cal. 3d at 640 n.5, 454 P.2d at 612 n.5, 94 Cal. Rptr. at 636 n.5.
or the payment of fees as a condition precedent to development is that development is an act of a voluntary nature.\textsuperscript{119} Even though the development cannot proceed without regulatory approval, the developer voluntarily decides whether to develop or not to develop.\textsuperscript{120} Development is considered to be a privilege and not a right.\textsuperscript{121} As long as the dedications are reasonably related to health and welfare, the exactions are likely to be upheld.\textsuperscript{122}

The distinction between these statutory dedications applied to sub-dividers and those applicable through the Coastal Act is that the Coastal Act is applicable to all developers, whether the owner of a lot for a single family or a major developer of residential or commercial subdivision. The subdivider has the real possibility of earning a profit on the subdivision, and the act of subdividing and developing creates a new and substantial burden on public resources. These notions would also attach to a subdivider subject to regulatory dedication requirements under the Coastal Act. An owner of a lot suitable solely for a single family home, however, will not be getting the same benefits nor creating the same burdens. By developing, the owner of a single family home gains new value, but not in the same sense of “profit” envisioned by the developer. Secondly, by development on a lot suitable for a single family home, normally only slight increased burdens are placed on public resources, including public access to navigable waters. Therefore, the precedents under the subdivision dedication laws should not be applied indiscriminately to all planned development projects under the Coastal Act.

B. Implied Dedication Doctrine

The Commission rationalizes many of its requirements for easement dedications on the doctrine of implied dedication.\textsuperscript{123} This doctrine gives rise to public prescriptive rights. In the Access Guidelines, the Commission asserts that such rights must be protected wherever they exist.\textsuperscript{124} According to the California Supreme Court, a common law dedication of property to the public can be proved either by (1)

\begin{itemize}
  \item \textsuperscript{119} Trent, 114 Cal. App. 3d at 328, 170 Cal. Rptr. at 691.
  \item \textsuperscript{120} Id.
  \item \textsuperscript{121} Id.
  \item \textsuperscript{122} Id.
  \item \textsuperscript{123} Grupe, 166 Cal. App.3d at 158, 212 Cal. Rptr. at 583. The Commission in fact argues, in response to the taking argument, that no property rights of the landowner are affected by access conditions because an easement has already impliedly been dedicated to the public. Id.
  \item \textsuperscript{124} Interpretative Guidelines, supra note 49, at 11.
\end{itemize}
showing acquiescence of the owner in the use of land under circumstances which negate the idea that the use is under a license or (2) establishing open and continuous use by the public for the prescriptive period. When a litigant seeks to prove dedication by adverse use, the question is whether the public has used the land for a period of more than five years with full knowledge of the owner, without asking or receiving permission to do so and without objection being made by anyone. If the land involved is a beach or shoreline area, a showing must be made that the land was used as if the land were a public recreation area. Evidence that the public used the property for the prescriptive period is sufficient to establish dedication. Although use of the land as a beach or recreation area is certainly public use of private property, does requiring dedication because of the public use amount to an unconstitutional taking?

Analysis by the California Supreme Court of the constitutional limits of the common law dedication doctrine has been rather terse, placing most emphasis on Article X, Section 4, of the California Constitution, relating to public access to shoreline areas, and ignoring the

126. In determining the adverse use necessary to raise a conclusive presumption of dedication, analogies to the law of adverse possession and prescriptive easements can be misleading. Gion v. City of Santa Cruz, 2 Cal. 3d 29, 39, 84 Cal. Rptr., 162, 168, 465 P.2d 50, 56 (1970). In adverse possession and prescriptive easements, an individual is acting to gain a personal property right and the test is whether he acted as if he claimed the legal right. What must be shown in common law dedication is that persons used the property, believing the public had a right to such use. Union Transportation, 42 Cal. 2d at 240, 267 P.2d at 13; Gion, 2 Cal. 3d at 39, 465 P.2d at 56, 84 Cal. Rptr. at 168 (1970).
127. Gion, 2 Cal. 3d at 39, 465 P.2d at 56, 84 Cal. Rptr. at 168. The Gion case represents two separate sets of facts, amounting to, according to the court, implied dedication. In one situation, the parcel in question was located between the sea and the first parcel road, containing an old road bed and sea cliff. Id. at 34-36, 465 P.2d at 52-54, 84 Cal. Rptr. at 164-66. The area had been mostly used by the public for access to the ocean. Id. The city over many years had posted "cliff" warning signs, improved the property for parking, and maintained trash receptacles. Id. The other case involved an unimproved dirt road which provided access to an ocean beach. Id. at 36-38, 465 P.2d at 54-55, 84 Cal. Rptr. at 166-67. The public had used the beach and the road in excess of 100 years. None of the previous owners had ever objected to the use of the road by the public. Id.
128. Id. at 40-41, 465 P.2d at 57-58, 84 Cal. Rptr. at 169-70. A fee owner who seeks to negate a finding of intent to dedicate based on uninterrupted public use for more than five years must provide either that (1) The fee owner was granted a license in the public to use the property or (2) the owner has made a bona fide attempt to prevent public use. Id. at 41, 465 P.2d at 57, 84 Cal. Rptr. at 169. The question of adversity of use is one of fact, giving consideration to all the circumstances and references that may be drawn therefrom. Id. at 40-41, 465 P.2d at 57, 84 Cal. Rptr. at 169. Another fact question is whether public use of privately owned lands is under a license of the owner. Id. at 41, 465 P.2d at 57, 84 Cal. Rptr. at 169. If the owner has not made significant attempts to halt public use, it will be held as a matter of law that the owner intended to dedicate the property or an easement therein to the public. Id., 465 P.2d at 58, 84 Cal. Rptr. at 170.
129. Id. at 42-43, 465 P.2d at 58-59, 84 Cal. Rptr. at 170-71.
United States Constitution. In *Gion*, the court declared:

Although article [X] section [4] 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.  

This is the only discussion in the *Gion* decision of federal constitutional rights for the protection of property rights. Certainly property rights cannot be taken arbitrarily through state judicial process without the provision of constitutional protection for the landowners involved. Yet the court delineates none of the protections which are applicable. Thus far, this article has shown how private property has been dedicated to public use in California without the exercise of eminent domain power. When dealing with property rights, rights generally based on state law notions, the realm of federal constitutional law becomes relevant and important, especially when private property is being publicly used and not acquired through eminent domain. Although the fact that property may be regulated is almost universally accepted, the state courts do not seem to have appropriate sensitivity to the protections of the United States Constitution. The following sections explore how the United States Supreme Court has reviewed challenges to governmental regulations that are alleged to take private property. The discussion of the federal approach to available remedies is highly relevant here in view of the rejection by California courts of a money damage award for regulatory “takings.”

**The United States Supreme Court and Regulatory Taking Cases**

Despite recent state and United States Supreme Court decisions and an abundance of scholarly commentary, the constitutional analysis

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130. *Id.* at 43, 465 P.2d at 59, 84 Cal. Rptr. at 171. According to the court, once property is dedicated to the public by adverse user for more than five years, nothing can be done by the owner to take back what was previously private property. *Id.* at 45, 465 P.2d at 60, 84 Cal. Rptr. at 172. Subsequent to *Gion*, the legislature held a hearing on the subject in which it was suggested that any taking by implied dedication is conceivably a compensable taking. B. Reynolds, California Land Title Association, in Assembly Interim Committee on the Judiciary, Hearing on Implied Dedication, Feb. 1977 in Los Angeles, p. 12. It is a great leap from providing reasonable beach access to the confiscation of private property. J. Fadem, in Assembly Interim Committee on the Judiciary, Hearing on Implied Dedication, p. 19-20. When the particular governmental body affirmatively decides that additional recreational property is needed, it should purchase the property. *Id.* at 23. The position of some government entities after *Gion*, however, is that such land as it has been used by the public, even though in private ownership, has only a nominal $1 value. C. Turner, City Attorney for Long Beach, in Assembly Interim Committee on the Judiciary, Hearing on Implied Dedication, p. 26. Whether proceeding under eminent domain and paying $1 or suing for rights through the doctrine of implied dedica-
of "regulatory takings" is in disarray. The term "regulatory takings" encompasses a wide variety of regulations, ordinances, statutes, and administrative actions of governmental entities, including land use and zoning ordinances, environmental statutes, and regulation affecting use of public streets. In these cases, the use restriction has been promulgated pursuant to the government's police power. The restrictions are challenged by private property owners, who claim the effect of the restriction is so severe that the restriction is a "taking" without just compensation.

One of the earliest cases developing the doctrine that some land use regulations may constitute a taking is Pennsylvania Coal Co. v. Mahon. An exercise of eminent domain results and compensation must be made when a regulation reaches a certain magnitude in restricting the use of property. Justice Holmes said in Mahon:

The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

In subsequent cases, however, the court has upheld regulations which greatly restrict the owner's use rights. The Court's most thorough analysis of "takings" jurisprudence was in Penn Central Transportation Co. v. City of New York. The Court admitted its inability
to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by governmental action be compensated, rather than disproportionately remain concentrated on a few persons.\textsuperscript{143} The court did however, establish the following factors that should be considered in determining whether a police power regulation effects a taking: (1) the character of the invasion; (2) the diminution in the value of the affected property resulting from the regulation; (3) the existence of reciprocal benefits to the affected party; and (4) the extent to which the regulation interferes with investment backed expectations.\textsuperscript{143}

The court has focused on the character of the invasion as the most relevant factor when a physical invasion of private property exists, as demonstrated in \textit{Loretto v. Teleprompter Manhattan CATV Corp.}\textsuperscript{144} In \textit{Loretto}, the Court held that a "permanent physical occupation by the government is a taking without regard to the public interests that it may serve."\textsuperscript{145} Most regulatory takings, however, fall into the category of non-physical interference with property rights.\textsuperscript{146} In addition to \textit{Kaiser Aetna v. United States},\textsuperscript{147} a physical invasion "takings" case, two non-physical "takings" cases handed down by the Supreme Court are relevant: \textit{Agins v. City of Tiburon}\textsuperscript{148} and \textit{San Diego Gas \\& Electric Co. v. City of San Diego}.\textsuperscript{149} These latter two cases are especially relevant in regard to the remedy available to a property owner whose property has been taken through the regulatory power of the government. In both cases the Court strongly suggests that a damage remedy for regulatory taking is appropriate.\textsuperscript{150}

\textsuperscript{143} Id. at 124.
\textsuperscript{144} 458 U.S. 419 (1982). The government's action allowed the installation of fixtures and cables on plaintiff's building for purposes of transmitting cable television signals. Id. at 423.
\textsuperscript{145} Id. at 426.
\textsuperscript{146} Kelso, supra note 131 at 9. The argument is made that non-physical regulatory "takings" should be analyzed under substantive due process analysis to protect property owners against excessive regulation. Id. at 14.
\textsuperscript{147} 444 U.S. 164 (1979). See infra notes 146-160 and accompanying text.
\textsuperscript{148} 447 U.S. 255 (1980).
\textsuperscript{149} 450 U.S. 621 (1981).
\textsuperscript{150} In \textit{Agins}, the California Supreme Court held that a plaintiff could not recover damages by suing for inverse condemnation based on the effect of a zoning ordinance on his property. \textit{Agins}, 447 U.S. at 258. The state court held that the sole remedies were declaratory relief or mandamus. Id. at 259. In \textit{Agins}, the plaintiff was not prohibited from all use, but was limited to building one to five dwellings on the five acre parcel. Id. at 271. The state court was concerned that the availability of a damage remedy challenging zoning or land use regulations would restrict the flexibility of local government in dealing with urban growth problems. Id. at 276. The United States Supreme Court affirmed, but only on the rationale that the plaintiff still had the ability to use the property for his intended purposes (residential), thus
Perhaps the most significant case of the United States Supreme Court relevant to regulatory “takings” as effected by development dedication conditions is *Kaiser Aetna v. United States.* The next section will explore the reasoning of the Court in that case and the interplay between police power and the constitutional mandate of just compensation.

*Kaiser Aetna* is most relevant to the issue under discussion in that the government was attempting in *Kaiser* to invoke a public easement over private property. The attempt to exercise the police power in this way was sought to be justified on policy grounds similar to those used by the California Coastal Commission, i.e., to protect the public’s right of access to navigable waters.

In *Kaiser Aetna*, the United States Supreme Court undertook to resolve the question of whether a private property owner, who voluntarily develops land and thereby changes the character of the property so that activities there may be regulated under the government’s police power, can be forced to give to the public a perpetual easement. The Court held that if the government wanted to transform private property into a public aquatic park after the owner had pro-

there was no taking. *Id.* at 259. “Because no taking has occurred, we need not consider whether a state may limit the remedies available to a person whose land has been taken without just compensation.” *Id.* at 263. Similarly, a ruling on the proper remedy was foreclosed in *San Diego Gas & Electric* case due to the peculiar procedural stance of the proceeding. *San Diego Gas & Electric*, 450 U.S. at 623. In the *San Diego Gas & Electric* case, the utility had acquired a 412-acre parcel for a future power plant. *Id.* The city took three actions which affected the utility’s land: (1) downzoned a portion from industrial to agriculture; (2) adopted an open-space plan identifying the utility’s parcel as “open-space”; and (3) proposed a bond issue to obtain funds to acquire open-space land, including that of the utility. *Id.* at 624-25. The utility filed suit claiming the city had taken its property without just compensation, in violation of the California and United States Constitutions. *Id.* at 625-26. The utility was awarded a judgment for $3,000,000 which was affirmed by the court of appeal. *Id.* at 627-28. Upon appeal to the California Supreme Court, that court remanded it to the Court of Appeal for reconsideration in the light of its decision in *Agins*. *Id.* at 628. Upon review, the Court of Appeals reversed the trial court and denied any other relief, basing its decision on *Agins*. *Id.* at 629-30. In a split decision, a majority of the United States Supreme Court concluded that because the trial court’s decision was reversed, there was no finding of a taking, and thus no final judgment from which to review the legal issue of just compensation for regulatory takings. *Id.* at 633. The interesting aspect of the court’s handling of the case is that a majority of the members of the court were apparently of the view that money damages was the appropriate remedy in regulatory “takings” cases. *Id.* at 633, 658-61. This majority of justices included concurring Justice Rehnquist, who agreed with the court’s opinion, that there had been no final judgment from which appeal to the court was proper. *Id.* at 633. Dissenting Justice Brennan, with whom Justices Stewart, Marshall and Powell joined, concluded that the California court’s approach ignored the United State’s Supreme Court precedents on the availability of a damage remedy when the government’s police power works to effect a taking. *Id.* at 658-61.

152. *Id.* at 170.
ceed as far as it had, the government could not require free public access without invoking its eminent domain power and paying just compensation.\(^{153}\)

In *Kaiser*, the developers of a marina subdivision had connected a shallow pond to the adjacent bay through a natural beach sand barrier. They were advised by the United States Army Corps of Engineers (COE) that permits were not required for development and operation within the pond. The developers made further improvements that included deepening the channel, constructing vast marina facilities, and developing a marina shopping center.

In 1972, a dispute arose between the developers and the COE concerning (1) whether the developer was subject to future permitting authority of the COE, pursuant to section 10 of the Rivers and Harbors Act of 1899,\(^ {154}\) for subsequent construction, excavation or filling in the marina; and (2) whether the developer could prevent public access to the marina.\(^ {155}\) The COE contended that as a result of the developer's improvements, the pond, now connected with other navigable waters, had become a navigable water of the United States and subject to federal police power authority.\(^ {156}\) Justice Rehnquist framed the issue for the Court as follows:

> [W]hether . . . petitioners' improvements to Kuapa Pond caused its original character to be so altered that it became subject to an overriding federal navigational servitude, thus converting into a public aquatic park that which petitioners had invested millions of dollars in improving on the assumption that it was a privately owned pond leased to them.\(^ {157}\)

The developer did not challenge the lower court's holding that the marina was within the scope of the regulatory power of Congress and, therefore, subject to regulation by the COE pursuant to its authority under section 10 of the Rivers and Harbors Act. The United States argued that since the federal government had regulatory power over "navigable waters of the United States," the public thereby acquired a right to use the pond as a continuous highway for navigation, and that the COE could obtain an injunction to force the developers to allow public access.\(^ {158}\)

\(^{153}\) Id. at 180.

\(^{154}\) 33 U.S.C. §403.

\(^{155}\) *Kaiser Aetna*, 444 U.S. at 168.

\(^{156}\) Id.

\(^{157}\) Id. at 169.

\(^{158}\) Id. at 170.
The Court said, however, that by being forced to allow public access, the developer would have "... somehow lost one of its most essential sticks in the bundle of rights that are commonly characterized as property — the right to exclude others."\(^{159}\) When the government wishes to acquire dry lands, the government is required by the Eminent Domain Clause of the fifth amendment to condemn and pay fair value for that interest.\(^{160}\) The attempt by the government to create a public right of access to the improved pond went so far beyond ordinary regulation or improvement for navigation as to amount to a taking under the logic of *Pennsylvania Coal Co. v. Mahon*.\(^{161}\) This is not a case in which the government is exercising its regulatory power causing only an insubstantial devaluation of private property; rather, the government is imposing a navigational servitude amounting to an actual physical invasion of the privately owned marina.\(^{162}\)

The United States Supreme Court held that the "right to exclude," a fundamental element of the property right, falls within the category of interests that the government cannot take without compensation.\(^{163}\) Even if the government physically invades only an easement in property, just compensation must be paid.\(^{164}\) In discussing the overlapping of use of the government's police and eminent domain power, the Court concluded:

Thus, if the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after petitioners have proceeded as far as they have here, it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredged pond while petitioners' agreement with their customers calls for an annual $72 regular fee.\(^{165}\)

One important distinction in the constitutional analysis of regulatory "takings" is whether a physical invasion exists. Restricting the use of property for the purpose of the public's interest in land use or aesthetics, as in *Penn Central* without creating any possessory or use rights in the public may be distinguished from a case in which the government seeks to create a use right in the general public or for a particular individual, causing physical invasion to occur. The right

\(^{159}\) Id. at 176.
\(^{160}\) Id. at 177.
\(^{161}\) Id. at 178; Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
\(^{162}\) *Kaiser Aetna*, 444 U.S. at 180.
\(^{163}\) Id. at 179-80.
\(^{164}\) Id. at 180.
\(^{165}\) Id.
to exclude has been lost in the latter case, and this right is fundamental to our notion of property.

The section that follows attempts to apply the analysis of the United States Supreme Court to the Commission's requirement of easement dedications from development applicants. Although the *Kaiser Aetna* situation is not completely analogous, the analysis of the relationship between police power regulation, private property and the federal constitution is relevant. Three distinct factual circumstances will be analyzed according to the *Kaiser Aetna* rationale.

**THE APPLICATION OF SUPREME COURT PRECEDENTS TO EXAMPLES OF COMMISSION ACTIONS**

**A. Whaler's Village Homeowners**

In *California Coastal Commission v. Whaler's Village Homeowners Association*, certain homeowners built single family residences on beach-front property prior to enactment of the Coastal Act.¹⁶⁶ Their property extended to the mean high tide line.¹⁶⁷ The homes were constructed on concrete slabs, anchored on the sea-facing portion by cement caissons sunk to a depth of twelve feet.¹⁶⁸ In 1978, high-storm seas and high tides washed out the supporting ground and sand from beneath their homes.¹⁶⁹ Immediate action was necessary to save the homes, and rocks were placed to provide support and to allow beach sand to be trapped in and behind the rocks.¹⁷⁰

Shortly thereafter, the homeowners applied to the Regional Coastal Commission for a permit to make the rock protection permanent.¹⁷¹ The Commission staff approved the permit, but with a condition that the homeowners irrevocably deed to the state their entire privately owned beach area, calling it a "grant of an easement for public access and passive recreational use."¹⁷² The homeowners withdrew their application.

Subsequently, more severe storms were experienced and as an

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¹⁶⁶. *California Coastal Commission v. Whaler's Village Homeowners Association*, Statement of Intended Decision, Case No. SP50494, Superior Court for the County of Ventura, at 2. This example is quite similar to that of the Baileys. *See supra* notes 8 and 9 and accompanying text. *See also Pacific Legal Foundation*, 33 Cal. 3d 158, 655 P.2d 306, 188 Cal. Rptr. 104.


¹⁶⁸. *Id.*

¹⁶⁹. *Id.*

¹⁷⁰. *Id.* at 3.

¹⁷¹. *Id.*

¹⁷². *Id.*
emergency measure additional rocks were placed under and on the other rocks.\textsuperscript{173} The Coastal Commission notified the homeowners that placing these rocks constituted a "new development" under the Coastal Act and either a permit would be required or the rocks would have to be removed.\textsuperscript{174} The homeowners applied for a permit, which was approved but with the same condition for an easement dedication as described earlier. The court granted the homeowners a writ of mandate invalidating the condition, stating:

[The condition requiring the petitioners to deed their entire private beach to the State or lose their homes to the sea constitutes an unlawful taking of private property without justification or the payment of just compensation.\textsuperscript{175}]

The effect of the Commission’s condition would have been similar to the proposal of the government in \textit{Kaiser Aetna v. United States} i.e., the exaction of an easement because of the location of the development, coupled with protection of the public policy of access to navigable waters.\textsuperscript{176} Governmental power to assure the public a free right of access to navigable waters, however, does not answer the question of whether a particular statute or regulatory action amounts to a taking.\textsuperscript{177} Like the pervasive nature of congressional regulation of national waters, the State of California has the authority to oversee an orderly process of planning for the future development of its coastline.\textsuperscript{178} Among the factors to be utilized to examine the "takings" question are (1) economic impact of the regulation (2) its interference with investment backed expectations and (3) the character of the governmental action.\textsuperscript{179}

With respect to the character of the governmental action, an important inquiry is the public policy being served.\textsuperscript{180} In \textit{Kaiser Aetna}, the policy behind the navigational servitude was protection of the flow of interstate waters and the commerce thereon.\textsuperscript{181} In the Coastal Act, the public policy being served is protection of the public’s right of
access to navigable waters for essentially the same public trust uses as that of the federal navigational sevitude. In both situations, private property owners contiguous to a navigable body of water have invested substantial amounts of money in purchasing the land and making improvements. In both cases the government contends that as a result of the present or proposed improvements the owner should somehow lose one of the most essential parts of the property right — the right to exclude others.

The federal navigational servitude, as derived from the Commerce Clause of the United States Constitution, gives rise to an authority in the federal government to assure that navigable waters retain their capacity for navigation. Likewise, the state has the duty to protect the public's right to access to navigable waters. In both cases, however, the government's attempt to create a public right of access over private property may go so far beyond ordinary regulation as to amount to a taking under the logic of Pennsylvania Coal v. Mahon.

The imposition of a public easement results in an actual physical invasion of privately owned land. Even if the government physically invades only an easement in property, it must nonetheless pay just compensation. Thus, whether the government wants either to create a public aquatic park or a public beach or accessway thereto, it may not do so unless it invokes its eminent domain power and pays just compensation. In the following section, the analysis is applied to a different factual situation, the large project developer.

B. The Hypothetical Condominium Developer

Unlike the individual home owner at Whaler's Cove, a condominium developer creates different impacts and implicates other interests of the state. A condominium development generally takes a large tract of land, and, if seaward of the first paved road, creates potential aesthetic and natural resource impact problems. A large development

184. Id. at 176. See also Georgia-Pacific, 133 Cal. App.3d at 699, 183 Cal. Rptr. at 407-08.
185. Kaiser Aetna, 444 U.S. at 177.
186. See CAL. PUB. RES. CODE §30210.
188. Id. at 180.
189. Id.
190. Id.
is more likely to adversely affect access to the shoreline.\textsuperscript{191} This type of development is similar to that regulated by the Subdivision Map Act discussed above, and it usually entails great potential for profit and creates the potential of a major impact on many public resources.\textsuperscript{192} How, if at all, can this situation be distinguished from \textit{Kaiser Aetna}?

One distinction is that in \textit{Kaiser Aetna}, in reliance on the assertion of the Corps of Engineers of lack of regulatory jurisdiction, the developer expended substantial sums in creating the marina.\textsuperscript{193} Although such representations may not amount to estoppel, they may justifiably lead to reasonable expectations embodied in the concept of property.\textsuperscript{194} The \textit{Kaiser Aetna} court noted that the government could probably have initially prohibited the marina development due to impairment of navigation, or have conditioned approval on compliance with measures for the promotion of navigation.\textsuperscript{195}

The coastal condominium developer is in a different position from that of \textit{Kaiser Aetna} in that its only financial outlay has been for land and initial preparation. Secondly, there is no reasonable reliance on representations regarding non-regulation by the Commission. The developer voluntarily proceeds with the full realization of the potential regulatory constraints.\textsuperscript{196} Reasonable conditions for public access to shoreline on a permit to build condominiums appear justified because of a reasonable relationship to the public interests being served. Where does the owner of a single lot who wishes to build a single family home fit into the picture?

\textbf{C. Building the Family Home on the Coast}

\textit{Agins} has demonstrated that no taking occurs when a beneficial use remains after government regulation.\textsuperscript{197} The Commission or its local counterpart certainly has the regulatory power to establish reasonable limitations on land use. But does that power extend to requiring an ease-
ment for public access before getting a development permit? As with the hypothetical condominium builder, there is no reliance on the government’s representation of non-regulation. In the usual circumstance, however, there is no similar profit potential or impact on public resources exists. The condominium developer is building on the speculation of making money on the development. The party seeking to build a single family home is usually investing substantial sums for the development. Investment in the land alone certainly carries with it an "investment-backed expectation." In the usual case, a single family home developer should not be forced to give up land to the state, because his impact on public access is negligible. For instance, the landowner in *Grupe* had no intention of interfering with the public's right to walk along the shoreline. The landowner's complaint is that there is no public right, constitutional or otherwise, to passive or active recreation on the private property of others. The right guaranteed by the California Constitution is the right of access to navigable waters. This is clearly an admirable right, but like any right should not be exercised to the severe detriment of the rights of others. By building his home, a single family home developer simply has not affected the public right of access. When the Commission seeks to exercise its police power in such an expansive way, claiming to serve public constitutional rights, it is in effect violating fundamental rights of the private property owner, the rights to peaceful enjoyment and to exclude others.

Such an owner should not be required to give up constitutional rights for the mere privilege of building a home near state tidelands. This may not be true, of course, if the single family home constitutes a palacial estate. In the latter case, due to the increased likelihood of impact on public access, an easement dedication as a condition to development may be appropriate.

**CONCLUSION**

As previously shown, when a government restricts the use of land under regulatory action, a taking may result which requires just compensation. This is especially so when the regulation causes a physical invasion of private property. California’s regulatory scheme for coastal development has been applied in some instances in ways which result in such a taking. As a condition to obtaining a development permit, landowners frequently

198. *Grupe*, 166 Cal. App. 3d at 148, 212 Cal. Rptr. at 578.
have been forced to give an easement of valuable property to the government. In some circumstances, the effect and impact of development may justify such a dedication. In other cases, it amounts to a taking and triggers the constitutional requirement of just compensation.