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THERMIDOR IN LAND USE CONTROL?

In the summer of 1987, the United States Supreme Court jolted the legal community by its ruling in *Nollan v. California Coastal Commission*. The Coastal Commission, a California state agency, in 1982 had granted a permit to James and Merilyn Nollan for demolishing their delapidated beachfront bungalow in Ventura County, California, and replace it with a considerably larger, three-bedroom house. The Commission had granted this permit, though, subject to the condition that the Nollans cede a lateral access easement to the public to pass across their beach between the mean high tide on one side, and a seawall on the other. The Nollans had objected that this condition amounted to an uncompensated "taking" of their property and so constituted a violation of the takings clause of the fifth amendment of the United States Constitution. After unsuccessfully battling their way through the California courts, the Nollans had appealed to the United States Supreme Court. In 1987, the latter in a landmark opinion sided with plaintiffs and invalidated the access condition on the ground that it indeed pirated the Nollans' constitutionally protected property right.

The Supreme Court's holding in *Nollan* seemed quite a slap in the face of the California Coastal Commission. The agency, operative since 1972, before long had risen to national prominence for its assertive approach in matters of coastal conservation, public access, energy development and the like. In due time, however, the Coastal Commission's record had become highly controversial. In 1981, the California legislature gave in to massive criticism and removed the agency's authority to provide for low and
moderate income housing in the coastal zone. In 1982, the new state governor, George Deukmejian, substantially cut the Coastal Commission's budget, though he did not succeed in "abolishing" the agency as he had vowed to do in his election campaign. One hardly needs a conspiracy theory, then, to suspect that the Supreme Court acted out of judicial vengeance against an agency deemed too rash for these no-nonsense times. But before exploring the significance of this conservative turn in the Court's jurisprudence of takings, it may be useful to review the historical antecedents of the Coastal Commission and take a closer look at some of the agency's doings through the 1970's and 1980's.

Quiet Revolution

In 1971 the Council on Environmental Quality (CEQ) issued a report bearing the ominous title, The Quiet Revolution in Land Use Control. The report struck a responsive cord in both academic and professional circles; since its date of publication, it has been among the most frequently cited documents in writings on land use policy. In the introduction to the report the arrival of the so-called "quiet revolution" was announced in the following sentences:

This country is in the midst of a revolution in the way we regulate the use of our land. It is a peaceful revolution, conducted entirely within the law. It is a quiet revolution, and its supporters include both conservatives and liberals. It is a disorganized revolution, with no central cadre of leaders, but it is a revolution nonetheless.

The metaphor of revolution continued when the villain of the plot was introduced:

The ancien regime being overthrown is the feudal system under which the entire pattern of land development has been controlled by thousands of individual local governments, each seeking to maximize its tax base and minimize its
social problems, and caring less what happens to all others.

The essential features of this revolutionary movement were described thus:

The tools of the revolution are new laws taking a wide variety of forms but each sharing a common theme--the need to provide some degree of state or regional participation in the major decisions that affect the use of our increasingly limited supply of land.

In their diagnosis of the modern ills of land use governance in the United States, the authors of the report singled out (1) the nearly exclusive reliance on zoning and (2) the parochial nature of this instrument:

The real problem is the structure of zoning itself, with its emphasis on very local control of land use by a dizzying multiplicity of local jurisdictions... It has become increasingly apparent that the local zoning ordinance, virtually the sole means of land use control in the United States for over half a century, has proved woefully inadequate to combat a host of problems of statewide significance, social problems as well as problems involving environmental pollution and destruction of vital ecological systems, which threaten our very existence.

The conventional system of land use governance, as it had been shaped in the early decades of the present century, also included master planning and subdivision control. But neither of these secondary instruments of land use control, according to the CEQ-report, had succeeded in transcending the pervasive localism that accounted for the failure of zoning.

The bulk of The Quiet Revolution consisted of a review of nine innovative public programs of land use control in nine different states. The earliest of these programs dated from 1961, but most of them had been instituted only in the latter half of the 1960s. Though widely differing in scope and technique, all nine programs equally departed from the conventional mode of local growth management and control: they shared, in the words of the report, "a regional and land resource orientation that
attempts to preserve and protect a vital resource—land—for the use of the region as a whole." Precisely this is the way in which they were said to "quietly revolutionize our land regulatory systems." A new breed of administrative organizations had been established to implement these revolutionary programs. The CEQ-report discussed the records of agencies such as the San Francisco Bay Conservation and Development Commission, the Twin Cities Metropolitan Council, the New England River Basins Commission, and quite a few more. While the California Coastal Commission was not enlisted (it did not exist yet at the time the report came out), it undoubtedly did incorporate all the essential features of the new breed reported on in The Quiet Revolution.

The nation-wide movement for land use reform, according to some observers, showed signs of exhaustion in the second half of the 1970s. The environmental impulse that had lent vigor to the movement earlier now was subsiding. Other social issues, notably energy, unemployment and inflation, seemed to have overtaken land use reform. So one could interpret the failure of Congress to pass the National Land Use Policy and Planning Assistance Act in 1974, after legislators had been debating different versions of a national land use bill since 1974. More significantly still, after 1974 no attempt was ever made to revive such a national land use bill.

This view of a spent revolution missed an important point though. It failed to acknowledge that the offspring of the first generation of state land use reform legislation, i.e., the new land use agencies, continued to make plans, develop programs, exercise controls. In this respect too the California Coastal Commission may be thought typical. Throughout the 1970s the agency remained very much alive and well. And it did suffer the aforementioned setbacks at the hands of the legislature and the governor in
the early 1980s only because of its enduring vitality and assertiveness. Even after these defeats, the Coastal Commission far from backed down. On the contrary, it pursued the goals of its mandate and carried out its mission as doggedly as ever. And nowhere more clearly so than with respect to "coastal access."

Coastal Access

The concern for improving public access to the coast has played a central role in the life of the Coastal Commission from its very inception. Back in 1971, a movement to "Save Our Coast" had been organized by the Coastal Alliance, a loose federation of groups interested in coastal preservation. After the California legislature had failed to enact coastal protective bills for a number of successive years, the Alliance in 1972 launched a campaign to pass the California Coastal Zone Conservation Act by way of initiative legislation. In November 1972, the California electorate approved Proposition 20, thereby creating the California Coastal Zone Conservation Commission (CCZCC). In 1976, the California legislature provided a permanent footing for the temporary CCZCC, renaming the agency into California Coastal Commission.

The agenda of the Coastal Alliance was by no means exclusively "conservationist." One of the founding members of the Alliance was COAAST: Californians Organized to Acquire Access to State Tidelands. Bil Kortum, the prime mover of COAAST, was the first president of the Coastal Alliance. The success of Proposition 20 itself has been attributed to this explicit concern for public access. According to William Duddleson, "(t)he 'Yes-on-20' campaign emphasized public-access problems, and the access issue probably was the key one for most voters." Duddleson bases this view
on a close reading of public opinion polls held during the campaign, as well as on the personal conviction of campaign manager Janet Adams who "felt that the overriding issue was access."5

The Coastal Commission's legislative mandate reflected this concern for "public access" in a number of ways. The California Coastal Zone Conservation Act of 1972 had authorized the temporary CCZCC to make a study of "the ecological planning principles and assumptions needed to ensure conservation of coastal resources," and to prepare, based on that study, "a comprehensive, coordinated, enforceable plan for the orderly, long-range conservation and management of the natural resources of the coastal zone." This Coastal Plan had to be submitted to the legislature no later than December 1, 1975. In addition to these planning duties, CCZCC was given a regulatory task to ensure that any development occurring in the permit area during the study and planning period would be consistent with the objectives of the Coastal Act.

The 1972 Coastal Act listed a number of elements the Coastal Plan had to include. One of these was "a public access element" intended to guarantee "the maximum visual and physical use and enjoyment of the coastal zone by the public." The Coastal Act also prescribed that all development permits issued by CCZCC would be subject to reasonable terms and conditions in order to ensure, among other things, that "access to publicly owned or used beaches, recreation areas, and national reserves is increased to the maximum extent possible by appropriate dedication."

Both in the exercise of its planning duties and in its regulatory work, CCZCC took these legislative instructions highly seriously. Permits allowing new development were routinely required to provide for public access in one way or another, depending on local circumstances and on the nature of the project. The Commission's regulatory experience can be
retraced in the Coastal Plan which CCZCC, on schedule, delivered at the close of 1975. The section of the Coastal Plan devoted to "Public Access to the Coast" presented the rationale of the strict access policies CCZCC had elaborated over the previous years. The legal rights of public access to the coast, according to the Commission, were protected by the California Constitution, recognized by the courts of California, and acquired through historic use and custom. To effectively guarantee these rights the Commission had consistently required, and now proposed in its Coastal Plan, that in new developments public accessways to the coastline be provided, both from the nearest public road to the shoreline and along the coast. To this end a deed restriction covering the reserved accessway could be recorded, or the fee title or an easement for the reserved accessway could be dedicated to a public agency. However, dedicated accessways were never, and should not be required to be opened to public use until a public agency or private association agreed to accept responsibility for maintenance and liability for the accessway.

There was another restrictive condition affecting the access policies of CCZCC. In its Coastal Plan, the Commission identified a number of instances in which it considered it "inappropriate" to demand public access: where (1) adequate access existed nearby, or (2) the topography made access dangerous, or (3) the proposed development was too small to include an accessway, or (4) the coastal resources were too fragile to accommodate general public use, or (5) public safety or military security precluded public use, or (6) the public accessway would adversely affect agricultural uses. Instead of requiring access, the Commission in such cases wanted the project sponsor to pay "in lieu" fees to a fund for the acquisition, maintenance, and operation of public access at a suitable location elsewhere.
Equality of Access

The access policies of CCZCC also contained a concern for what the agency habitually referred to as "the less affluent" or "low and moderate income people." This social concern was intertwined with the career of a citizens group called PACE: People, Access, Coastal Environment. PACE was not part of the original core of the Coastal Alliance, but grew out of the Lake Merced Coastal Preservation Council and the Coastal Heritage Foundation, two organizations that had been founded with $100,000 from the 1974 out-of-court settlement of a suit between three San Francisco High School students and a large development firm. Jonathan Hoff, one of the students, in August 1975 decided to withdraw for a year from the University of California, Berkeley, to help found and direct the new organization. In fact, PACE grew into a union of a great many small community groups based throughout the state. Peverill Squire and Stanley Scott, relying on interviews with Hoff, describe the character of the organization thus:

PACE saw itself as pushing "people" issues, rather than "ecological" issues, the latter already being a major concern of other environmental organizations [such as Sierra Club, Audubon Society, Friends of the Earth and their like]. Consequently PACE adopted coastal access as its major issue and worked to organize at the community level, promoting itself as a "hardline," steadfast environmental organization. This strategy was adopted so that PACE, with its uncompromising positions, could force the other environmental groups to "stay honest" and perhaps less likely to compromise.6

PACE organized local workshops on coastal problems, monitored the activities of CCZCC, lobbied the legislature in Sacramento, and remained active also after the latter had established a successor agency to CCZCC in 1976.

The Coastal Commission turned out to be quite sensitive to these "people" issues. In 1974, for example, in deciding on a permit application
to build a warehouse for a marine boiler plant in San Diego, the Commission asserted its special concern for protecting "low income neighborhoods near the shoreline" and for guaranteeing "people of moderate means to enjoy the amenities of homes in the coastal zone." The Commission justified its position by citing those provisions of the Coastal Act that required the "maintenance, restoration, and enhancement of the overall quality of the coastal zone environment, including, but not limited to, its amenities and aesthetic values" and the "orderly, balanced utilization and preservation...of all living and nonliving coastal zone resources."

The Commission in 1975 in a variety of permit cases strengthened and further elaborated its position with respect to low and moderate income housing. It repeatedly denied applications for the demolition of single-family residencies and the construction of apartment buildings in their place in Venice. In another series of decisions, it refused to allow conversion of apartment buildings into condominiums. The extent of the agency's commitment to this cause can also be judged from the case of a 100-unit apartment building for the elderly in Santa Monica. Back in 1960, the Santa Monica Redevelopment Agency had acquired a particular area for urban renewal. By the time CCZCC came into being, one redevelopment project, consisting of high-rise structures of moderately high-income residencies, had been completed and was occupied. In November, 1973, the Commission had denied an application to permit further construction in the redevelopment area. The denial was based, among other things, on a lack of housing for low income residents of that community, particularly those displaced by the original 1961 relocation. Subsequently the Santa Monica Redevelopment Agency agreed to the conditions imposed by CCZCC and arranged for construction of a 100-unit apartment building specially for elderly low-income people.
In the interpretation of the Coastal Commission, the commitment to protect or provide for low and moderate income housing is directly linked to the statutory mandate regarding public access. This position is most clearly expressed in a permit decision of 1975 in which CCZCC conditionally approved the construction of 6.4 miles of freeway near Eureka by the State Department of Transportation. The Commission held that

(under the provisions of the Coastal Act, access to the coastal zone resources must be provided for all people. The exclusion of the less affluent from visiting and living on the coast is a fundamental concern of this Commission. Public actions such as this freeway construction must not further reduce opportunities of low and moderate income people to live in coastal communities.

On similar grounds CCZCC refused to have a motel demolished to make room for a condominium complex. The Commission declared that "motels such as that occupying the subject parcel provide effective access for the public to the coast."

This peculiar interpretation of public access, and its various implications, were systematically discussed in the Coastal Plan of 1975. The Plan's element on "Public Access to the Coast" had a special section called "Equality of Access." This section proposed policies to provide lower-cost tourist facilities in the nearcoast area, and to increase coastal access for low- and moderate-income persons. The latter policy specifically meant to avoid decreasing low- and moderate-income housing opportunities, to provide new low- and moderate-income housing, and to regulate condominium conversions.

Zealous Administrators

The Coastal Act of 1976 restated and reinforced the importance of coastal access, though different from the 1972 Coastal Act the legislature now
expressly stated that access requirements should not interfere with the rights of private property owners. The new Coastal Act held the legislative mandate on this point to be the following: "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." Of course, strictly speaking the last part of this clause was redundant, since constitutional rights are always binding on statutory provisions, not just when legislatures say so. But the explicitness of the Coastal Act indicated the controversial character these access policies had assumed in just a few years time.

Yet apart from this emphasis on private property rights, the section on public access in the new Coastal Act essentially followed the philosophy of coastal access that had been put forward in the 1975 Coastal Plan. The Coastal Act started by saying that development along the coast was not to interfere with vested public rights of access to the sea. The following regulatory task was formulated, including the restrictions that had been first systematically presented in the Coastal Plan: "Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected." In addition, the Coastal Act formalized the policy that had been devised by CCZCC and proposed in the Coastal Plan: "Dedicated accessways shall not be required to be opened to public use until a public agency or a private association agrees to accept responsibility for maintenance and liability of the accessway."
It was only natural, then, that the reconstituted Coastal Commission after 1976 turned out as zealous about coastal access as its predecessor, CCZCC, had been before. By the end of 1980, the Commission boasted in one of its own reports, it had significantly increased the amount of coastline available for public access and recreational use. Since 1973, over 320 public accessways had been opened for public use, both from nearby public roads down to the beach and along the shore. At the same time, some 200 additional access easements had been offered but were still closed to public use because a sponsor was lacking. New public access signs had been posted to guide visitors to the beach. Substantial sums of new state and federal funds had become available for the acquisition and development of access facilities. The Commission also proudly referred to its own report on innovative funding and management techniques which sought greater reliance on the private sector and on volunteer programs for the operation and maintenance of coastal access facilities.

The Commission in the same report offered the following examples of cases where the agency itself had directly contributed to new public access and recreational opportunities:

An accessway easement in Malibu has opened a small sandy beach for public day use. The accessway dedication was part of a permit condition to allow construction of a restaurant next door to the beach. Coastal access in Malibu is a controversial issue, since only 8½ miles of its 27-mile shore is available to the public. This accessway was the site of the first official posting of a coastal accessway.

Three-quarters of a mile of San Francisco's beach front will be opened in mid-1981 to public access. The stretch of beach will tie together ten miles of publicly controlled shoreline from the Golden Gate through Thornton Beach in Daly City. Formerly part of the Olympic Club's holdings, the beach will be legally open to the public under an agreement with the National Parks Service (NPS). The Coastal Commission required the Club to offer to dedicate the beach easement as a condition to a 1977 permit to construct additional Club facilities. The agreement with the NPS will involve the Golden Gate Recreation Area (GGNRA) staff in maintaining and improving the accessway.
At Newport Beach in San Diego County, where parking at the beaches is a problem during weekends, a permit condition provides for a shuttle bus service to four beaches from a downtown bank. The permit to build a bank and neighboring condominiums established the free shuttle which runs every thirty minutes between the bank and the beaches, over a mile away.

The new Coastal Act also included the notion of equality of access. It was now statutorily determined that lower cost visitor and recreational facilities as well as housing opportunities for persons of low and moderate income should be "protected, encouraged, and, where feasible, provided." Thus equality of access, as invented by CCZCC, had found its way from the 1975 Coastal Plan into the 1976 Coastal Act, and hence it was to be one of the principles guiding the policies of the new Coastal Commission. And indeed, the Commission, in the years after 1976, openly and self-consciously professed a radically inclusionary conception of coastal access.

In the aforementioned report, issued by the agency itself early in 1981, the Commission referred to housing opportunities as "a type of access" and held that "in the absence of state policies, affordable housing near the coast would not be available to citizens of every economic segment." In this vein, by the end of 1980 over 6000 affordable housing units had been required by decisions on permits and local planning programs. (Of these, the Commission admitted, only 900 had been actually constructed and only 400 were actually occupied, though in addition, the Commission reported, agreements for the construction of over 1600 affordable units had been executed.)

Communities such as Pacifica and Long Beach, the Commission pointed out, traditionally housed and employed many persons of feeble incomes. The new local coastal plans these communities had to come up with under the Coastal Act emphasized protection of housing for the less affluent. These
plans, the Commission noted with much approval, encouraged restoration of older homes, required replacement of demolished houses, and limited condominium conversions. To increase the availability of affordable housing, the Commission had employed a variety of techniques (e.g., density bonuses) to encourage a greater concentration of houses in areas that could handle a larger population. Rancho Palos Verdes, for example, offered sites for 200 affordable housing units under its local coastal plan.

By the early 1980s, the Commission required as a matter of strict policy that new residential projects of five or more units included a percentage of low and moderate cost units. Criticism of the expensive nature of this policy the Commission rejected: "Experience has shown that inclusionary housing—affordable spaces within a larger, more expensive complex—is in most cases economically feasible for the developer within the coastal zone." The local coastal plan of Carpenteria, for example, required that, where feasible, 20 percent of new multi-family homes be affordable to persons of low and moderate income.

A last instance of its equality of access policy the Commission mentioned in this report was San Pedro, where increased port-related job opportunities had caused a sharp drop in the low and moderate income housing supply. In response, the Commission stated, it had approved a luxury condominium project with a condition that the applicant dedicate one acre of land to the Los Angeles Housing Authority for the construction of affordable housing.

Abuse, Excess, Bureaucratic Bungling

Yet while the Coastal Commission thus boasted about its accomplishments, precisely these access and affordable housing policies were becoming more
and more controversial. The most strident criticism of the Commission's record is to be found in a book entitled *The Taking*, written in 1981 by Joseph Gughemetti, a trial attorney, and Eugene D. Wheeler, a private urban planning consultant.10 Gughemetti and Wheeler, mixing histories of outraged permit applicants with those of desperate local planning officials, depicted the Coastal Commission as a bad case of "abuse, excess and bureaucratic bungling." They summed up their none too subtle judgment thus: "In the name of 'saving the coast,' radical bureaucrats, without restraint or accountability, had built their own system of dictatorial policy. Extortion, misrepresentation, abuse of constitutional rights and social engineering followed as the natural aftermath."

The most notorious dispute over access the Coastal Commission got entangled in concerned Sea Ranch, a planned residential community on a 10-mile stretch of the rugged California coast 110 miles north of San Francisco. In 1963, Oceanic, Inc., bought what was then a 5200-acre sheep ranch and projected some 5000 houses on it. When Oceanic in 1968 sought subdivision and zoning approvals from Sonoma County, citizens unsuccess- fully protested the loss of public access to the 10 miles of Sea Ranch-shoreline. In fact, that defeat mobilized Bill Kortum of Petaluma to organize the aforementioned citizens group called COAASST (Californians Organized to Acquire Access to State Tidelands). Kortum, as was also mentioned already, subsequently became the Coastal Alliance's first chairman. So one might say that Sea Ranch was in part responsible for the Coastal Commission!

By the time Proposition 20 was approved in 1972, 1700 lots had been sold and about 300 houses built. Long and bitter negotiations evolved between the Coastal Commission, Oceanic, the Sea Ranch Association (representing the homeowners), and individual lotowners seeking a building
permit. Eventually the total buildout of the Sea Ranch subdivision was reduced by half from 5200 down to 2400 residential units. Half a dozen lawsuits were brought against the Coastal Commission, but the latter came out victorious in all of them. Main bone of contention was the requirement the Commission imposed on the Sea Ranch Association to go along with the creation of five public accessways and a 3-mile bluff-top trail before the Commission would grant individual building permits. In the end, the Sea Ranch controversy was settled only in 1981 by a legislative compromise. The Sea Ranch Association was paid $500,000 out of the newly created state Energy and Resources Fund in exchange for the five accessways and the trail demanded by the Coastal Commission. The agreement also exempted the remaining single-family lots at the Sea Ranch from the entire coastal development process in exchange for view easements sought by the Commission.

In their review of the Sea Ranch controversy, Richard Babcock and Charles Siemon show outrage over the hundreds of unfortunate lotowners who were caught in the squeeze for almost ten years: these individuals could only watch interest rates and inflation soar, and meanwhile were denied the right to build. Babcock and Siemon blame the Coastal Commission; the 1981 legislative compromise is presented as a sure sign of administrative defeat, another instance of the Commission's loss of support: "The zealosity of the Commission administrators, their indifference to fair play, and their use of what amounted to extortion against lotowners finally caught up with them and the legislature turned on them."

Criticism of the Coastal Commission indeed had been mounting in the late 1970s not only among those dependent on coastal development permits, but in legislative chambers as well. Year after year bills were introduced to amend the Coastal Act, or even to abolish the statute entirely. In 1979,
legislation was passed obliging the Coastal Commission to designate specific areas where a coastal permit would no longer be required. By the end of 1980, the Commission accordingly had designated over 100,000 acres. In addition, the legislature exempted from coastal permit requirements the rebuilding of structures destroyed by natural disaster. In 1980, the legislature further amended the Coastal Act to prohibit the Commission from establishing overnight room rates for low and moderate income persons. In 1981, the legislature altogether removed the authority of the Coastal Commission to regulate affordable housing and returned that power to local government.

Yet Babcock and Siemon's suggestion that legislative support for the Coastal Commission had completely eroded is mistaken. True, the legislature in Sacramento in some ways deliberately did curb the powers of the Commission. And true, George Deukmejian, a lifelong opponent of the Commission, who was elected state governor in 1982, immediately forced through a reduction of the agency's budget. At the same time, however, the Commission's mandate in other ways was significantly strengthened. Particularly with respect to coastal access, new impulses were given and additional resources made available. Three companion bills that were passed in 1979 officially established the so-called Coastal Access Program, a joint project of the Coastal Commission and the Coastal Conservancy designed to facilitate the opening of new coastal accessways.

The Coastal Conservancy had been created in 1976 as a sister agency to the Coastal Commission, with a responsibility for acquisition and restoration that was intended as a necessary adjunct to the planning and regulatory authority of the Coastal Commission. Among other things, the Conservancy provided grants and technical assistance to local governments and citizens' groups to acquire, develop and operate accessways. The new
1979 legislation made the Coastal Commission and the Coastal Conservancy jointly responsible for coordinating all local, state and federal efforts to implement coastal access policies. Throughout the 1980s, the Coastal Access Program remained a central preoccupation of the officials of both agencies. And consequently the Coastal Commission's treatment of individual permit applications, such as the one submitted by the Nollan family in 1982, increasingly came to be determined by the broader policies elaborated in that context.

Coastal Access Program

The Coastal Commission and the Coastal Conservancy since 1979 have jointly administered the Coastal Access Program, and in that function have vigorously implemented the renewed legislative mandate "to maximize coastal access." In general, two methods have been employed to this end. First, considerable public funds were made available to the Conservancy for acquisition and development of shoreline lands. When established in 1976, the Conservancy already had been allocated $10 million as part of a $290 million bond issue intended for coastal and wetland acquisition. In 1980 another state bond issue of $285 million was passed, with $90 million allocated for use by the Conservancy. And in 1984 two more bond measures were approved totalling $455 million for parks, recreation and habitat enhancement, with $80 million to be used by the Conservancy. As of 1986, approximately 46 percent of the 1,072-mile California coast was publicly owned and accessible, while the remaining 54 percent was owned privately or was held by federal, state or local government and was not open to the public. The Department of Parks and Recreation alone at that time managed some 250 miles of coast, distributed among more than 100 coastal units."
The second method used to secure or increase coastal access was implied in the regulatory powers of the Coastal Commission. The latter was authorized to grant development permits subject to certain conditions, and landowners in exchange for receiving such a permit could be required to submit deed restrictions or dedications giving the public the right to cross private property in order to reach the shoreline. As was discussed previously, lands thus "dedicated" could be actually opened to the public only after an agency or private party had accepted responsibility for their management.

An integral part of the Coastal Access Program was the promulgation of "guidelines," "standards" and "recommendations" of coastal access as these had been elaborated and, already in 1979 and 1980, formalized in concert by the Commission and the Conservancy.¹³ Lateral access (i.e., access along the ocean, parallel to the shore) was to be provided through deed restrictions or dedications of a 25-foot wide easement extending inland from the mean high tide line. Vertical access (i.e., access from the nearest public road or area to the shoreline) as a rule meant a 10-foot wide path allowing pedestrian access to the water. Under normal conditions, where public safety was not threatened, lateral accessways could not come closer than 10 feet away from existing single family homes; for vertical accessways, that distance was 5 feet. In rural areas, the standard of the maximum distance between vertical accessways was one-half mile. In urban areas, the standard was stricter: up to one accessway per six residential units, or every 500 feet.

Of course, access requirements as imposed by the Coastal Commission were also dependent on the outcome of the local coastal planning process, and hence were to a large extent determined by local circumstances including topography, specific recreational needs or opportunities, the
nature of the proposed development, the adequacy of existing access
facilities, and the need to protect the landowner's right to privacy. Apart
from this type of pathways, coastal access took many forms: bike trails,
parking lots, transportation services, scenic vistas et cetera. Depending
on the size and location of a project, landowners might be asked to provide
a variety of access easements or services. As the Manager of the Coastal
Access Program, Don Neuwirth, declared in an interview in July 1982,
although most permit applicants would pay a fee rather than provide direct
public access across their property, the Coastal Commission generally
discouraged the practice as frustrating the intent of its Coastal Access
Program.\textsuperscript{14}

From the passage of Proposition 20 in 1972 till the end of 1983, the
Coastal Commission granted a total of 1,439 permits with lateral or
vertical access conditions attached. (This total represents only
approximately 2 percent of all coastal permits approved in that period.)
Of these 1,439 permits, however, only about one third (501) had found
sponsors for maintenance and liability and thus could be opened to public
use under the rules of the Coastal Access Program.\textsuperscript{15}

These two methods of providing "maximum coastal access" intersected in
the experiments the Coastal Commission and the Coastal Conservancy carried
out jointly with new ways of developing and managing accessways. The
Commission and the Conservancy issued two reports, "Innovative Management
and Funding Techniques for Coastal Accessways" in 1981, and "The
Affordable Coast: A Citizen Action Guide to California Coastal Accessway
Management" in 1982. As reported in the 1986 study by Michael Heiman,\textsuperscript{16}
representative examples include a coastal trail and handicapped access at
Stillwater Cove in Sonoma County; improved access to Bolsa Chica State
Beach in Huntington Beach; nature-observation trails in Arcata Marsh in
Humboldt County; and a coastal stairway in Del Norte County. The
Conservancy helped Mendocino County acquire 12 acres of developed gardens
and a 5-acre headland easement. In the San Francisco Bay Area the
Conservancy cooperated closely with the San Francisco Bay Conservation and
Development Commission (BCDC) on access projects for park and trail
development along the bayshore. Other notable projects included bluff-top
parking and stairs to a popular Santa Barbara surfing and sunbathing beach,
the start of a comprehensive accessway effort in Santa Cruz, and the
installation of stairways and access paths to the coast in many other
areas. All along the coast improved access accompanied waterfront
restoration, open space preservation, lot consolidation, and other
activities undertaken by the Conservancy. By the end of 1983 in this way
some $4 million in access grants had been funded by the Conservancy.

Funds were also specifically made available to nonprofit organizations
and land trusts to help them assume responsibility for accessway
maintenance and protection. Thus a multitude of local nonprofit
organizations, but also private organizations of statewide and national
scope such as the Nature Conservancy and the Trust for Public Land, became
officially sponsors of some public access dedication required under the
Coastal Commission's permit system.

In addition, much was done to inform the public about the opportunities
for coastal recreation, and to encourage private and public support for
providing accessways. On behalf of the Coastal Commission, the University
of California Press in 1981 published the California Coastal Access Guide,
a 240-page handbook listing and describing all open public accessways,
beaches, parks, and recreational areas along the coast, including
addresses, phone numbers, transit information, hours of use, and
descriptions of facilities and type of environment for each site. The Guide
is divided into sections for each county and local area, with accompanying maps that locate each accessway. The book turned out a bestseller, and new, expanded editions were issued in 1982 and again in 1983.

Why, then, was this high-reaching but, on the face of it, not unreasonable set of administrative coastal access policies shot down by the nation's highest court in 1987?

**Scalia v. Brennan**

*Nollan v. California Coastal Commission*, which was handed down by the U.S. Supreme Court, on June 26, 1987, is an unusually tangled case. Justice Scalia wrote the majority opinion, in which he was joined by Chief Justice Rehnquist and the Justices White, Powell and O'Connor. Justice Brennan filed a lengthy dissenting opinion, in which Justice Marshall joined. Justice Blackmun filed another dissenting opinion. Justice Stevens filed a third dissenting opinion, in which Justice Blackmun joined. Particularly Brennan's dissent ranged widely and was extremely critical of the majority opinion, calling the latter "an aberration" and expressing the hope "that a broader vision ultimately prevails."

These same complications plague the reception of *Nollan* among professional legal commentators. *Nollan* is generally discussed in conjunction with 3 other cases, all decided by the Supreme Court in its 1986-1987 term: *First English Evangelical Lutheran Church v. County of Los Angeles*, *Keystone Bituminous Coal Association v. DeBenedictis* and *Hodel v. Irving*. All 4 cases turn around the fifth amendment's takings clause; 3 of these 4 (*Nollan, First English and Keystone*) involve land use regulations. Yet while *Nollan* and its 3 sister cases are considered legal landmarks, interpretations of their precise meaning or consequences amply diverge. The
Columbia Law Review, in December 1988, devoted an entire issue to articles analyzing the impact of these four decisions on the Supreme Court's "jurisprudence of takings." While some of the contributors, following Justices Brennan and Stevens in their dissenting opinions, argue that Nollan et al. signal the end of judicial deference toward land use control, others, like, e.g., Frank Michelman, think that "there appears less than meets the eye in these apparent doctrinal turns to heightened...judicial scrutiny of the instrumental merit of land-use regulation."^18

Arguably the most confusion surrounds the Court's reasoning in Nollan. Justice Scalia, and thus the majority, found that in this case there was lacking the necessary "nexus" between the lateral access easement imposed by the Coastal Commission and the essential purpose for which regulatory powers had been given to the Commission. According to Scalia, "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'"

But what about the Commission's contention that the Nollans' new house interfered with "visual access" to the public beach, and so created a "psychological barrier" to "access"? The Commission claimed, on this ground, that the requirement of providing lateral access on the beach was directly related to one of the central objectives of its regulatory authority, and hence a legitimate exercise of the latter. Scalia, however, rejected this argument as merely "a play on the word 'access.'" In fact, he found the argument specious: "It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any 'psychological barrier' to using the public beaches, or how it helps to
remedy any additional congestion on them caused by construction of the Nollans' new house."

The position defended by Justice Brennan in his dissent is antipodal to that of Justice Scalia. Brennan was appalled, first, by Scalia's newly introduced nexus test of takings and, second, by its application in this particular case. According to Brennan, the majority here "imposes a standard of precision for the exercise of a State's police power that has been discredited for the better part of this century." But also, Brennan thought, the lateral access in this case required by the Coastal Commission directly did respond to the burden created by the Nollans' new house, and so clearly satisfied even this strict nexus test ("the Court's cramped standard," Brennan calls it). A third problem Brennan found with Scalia's arguments was that these were at fault with the settled interpretation of the constitutional protections invoked in this case. According to Brennan, "a review of those factors deemed most significant in [the Court's traditional] takings analysis makes clear that the [Coastal] Commission's action implicates none of the concerns underlying the Takings Clause."

Hence landowners could make no claim that their reasonable expectations were being disrupted by conditions regularly attached by the Coastal Commission to the permit approvals granted to these landowners. And thus, Brennan concluded, the Court had no ground for striking down a regulation that represented the Commission's "eminently reasonable effort" to respond to intensified development along the California coast.

All three of Brennan's counterpoints feed on a conception of the Coastal Commission's administrative task and responsibility that is activist and responsive, and therefore fundamentally at odds with the more limited and much stricter view of the agency's mandate relied on by Scalia. Indeed, the Coastal Commission could not have wished for a better advocate
than Justice Brennan to defend its record, that is, to defend the assertive
mission the agency has pursued ever since 1972. Here is Brennan's glowing
appraisal, and the crux of his dispute with Scalia:

The Commission has sought to discharge its responsibilities
in a flexible manner. It has sought to balance private and
public interests and to accept tradeoffs: to permit
development that reduces access in some ways as long as
other means of access are enhanced. In this case, it has
determined that the Nollans' burden on access would be
offset by a deed restriction that formalizes the public's
right to pass along the shore. In its informed judgment,
such a tradeoff would preserve the net amount of public
access to the coastline. The Court's insistence on a
precise fit between the forms of burden and condition on
each individual parcel along the California coast would
penalize the Commission for its flexibility, hampering the
ability to fulfill its public trust mandate.

For Scalia, of course, whether or not a public authority operates in a
"flexible," "balanced," "informed" manner, a taking is a taking.

For Brennan, it is essential to judge the legitimacy of the permit as
granted by the Coastal Commission to the Nollan family not by abstract
legal-constitutional standards, but by the concrete policies the Commission
itself has devised and elaborated since 1979 in the context of its Coastal
Access Program. The Nollan house was located on Faria Beach, a tract of
land in northern Ventura County along which the Commission had similarly
required lateral access conditions from 43 out of 60 coastal development
applicants. Of the 17 permits not so conditioned, 14 had been approved when
the Commission did not yet have its administrative regulations in place
allowing imposition of the condition, while the remaining 3 had not
involved shorefront property.

It is clear, then, that there was a coherent practice of imposing
lateral access conditions on coastal development permits in the area of the
Nollan property, i.e., Faria Beach. In general, as was pointed out above,
the Commission's Coastal Access Program supplied the rule that lateral
access was to be provided through 25-foot wide easements extending inland
from the mean high tide mark. But the Commission's own Guidelines acknowledged the need to adapt this rule to local needs and circumstances in order to minimize conflicts between public and private uses resulting from these very access provisions. Brennan cited the Guidelines stating that on occasion less than the normal 25-foot wide accessway along the dry sand could be required when this might be necessary to "protect the privacy rights of adjacent property owners." Brennan also cited the criteria, listed in the Guidelines, under which the type of public use permitted in access areas could be restricted to "pass and repass":

"Where topographic constraints of the site make use of the beach dangerous, where habitat values of the shoreline would be adversely impacted by public use of the shoreline or where the accessway may encroach closer than 20 feet to a residential structure, the accessway may be limited to the right of the public to pass and repass along the access area. For the purposes of these guidelines, pass and repass is defined as the right to walk and run along the shoreline. This would provide for public access along the shoreline but would not allow for any additional use of the accessway. Because this severely limits the public's ability to enjoy the adjacent state owned tidelands by restricting the potential use of the access areas, this form of access dedication should be used only where necessary to protect the habitat values of the site, where topographic constraints warrant the restriction, or where it is necessary to protect the privacy of the landowner."

In the case of the Nollan permit, the Coastal Commission, applying these very policies, had restricted the width of the area of passage to 10 feet, as this was, at its widest, the distance between the Nollans' seawall and the mean high tide line; and also the Commission, accommodating the need to provide access to the need to protect the Nollans' privacy, had chosen the least intrusive use of the property: a mere right to pass and repass.
Thermidor in Land Use Control?

For Justice Brennan, the legitimacy of conditioning coastal development permits on access requirements as done by the Coastal Commission in the Nollan case largely depended on the quality of the policies the agency had incorporated in its Coastal Access Program. For Justice Scalia, on the other hand, that program was utterly irrelevant in this context. The Commission may well be right, Scalia stated, that the public interest will be served by a continuous strip of publicly accessible beach along the coast, "but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization."

Therefore, Scalia concluded his opinion, "California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose'...; but if it wants an easement across the Nollans' property, it must pay for it." Thus the significance of an aspiring administrative undertaking is curtly reduced to zero.

What does all this imply for the new breed of land use agencies of which the California Coastal Commission, as was pointed out above, is but a specimen? Is the judiciary operating on a thermidorean scheme? Indeed, that is what Nollan seems to signal. But even on this point, i.e., "What exactly does the Court say in Nollan?," Brennan and Scalia fundamentally disagree. On the reasonable assumption that its action was justified under the normal standard of review for determining legitimate exercises of a state's police power, the Coastal Commission in defending its position in court had not thought it necessary to specify the particular threat to lateral access created by the Nollans' new house. But in light of the Court's novel, more demanding standard, Brennan contended, the Commission in the future could easily demonstrate how certain provisions for access directly responded to
particular types of burden on access created by new development. Thus the Commission, according to Brennan, "should have little problem presenting its finding in a way that avoids a takings problem."

Not so, Scalia replied immediately: "We view the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." According to Scalia, Nollan nicely fitted in the Court's settled jurisprudence of takings that identified the condition under which property rights might be abridged through the police power as a "substantial advancing of a legitimate State interest." Then Scalia sounded this warning: "We are inclined to be particularly careful about the adjective [i.e., "substantial"] where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective."

These remarkably antagonistic judicial proclamations, where do they leave the Coastal Commission and similar standard-bearers in the erstwhile revolution in land use control? It is hard to say. Should the agencies take Scalia on his word? Or can they trust Brennan's advice? As suggested earlier, the numerous law review articles generated by Nollan and its sister cases equally waver on this matter of practical reason. One thing is certain, though. Until these legal disputes are resolved, but most likely thereafter as well, the agencies cannot do without, and so will continue to rely on, the time-honored virtues of administrative prudence.


7. The case was extensively discussed, and its significance emphasized, in California Coastal Commission, "Annual Report 1974."

8. The references to and citations from cases are based on "Appeal Summaries" and "Staff Recommendations." The Coastal Commission did not issue written opinions. Instead it accepted, rejected or amended the "Staff Recommendation" or "Appeal Summary" prepared by its own staff for each individual case.


15. These figures are presented in California Coastal Commission and California Coastal Conservancy, "1984 Coastal Access Program Fourth Annual Report."


18. Ibid., p. 1601.

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