Case Nos. A144268 and A145176

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION 5

SURFRIDER FOUNDATION,

Plaintiff and Respondent,

v.

MARTINS BEACH 1, LLC, ET AL.

Defendant and Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF SAN MATEO COUNTY,
THE HONORABLE BARBARA J. MALLACH, JUDGE
(Case No. CIV520336)

RESPONDENT'S BRIEF

---

*Eric Buescher (SBN 271323)
Cotchett Pitre & McCarthy
840 Malcolm Road - Suite 200
Burlingame, CA 94010
Tel. (650) 697-6000
Fax: (650) 697-0577
Email: ebuescher@cpmlegal.com

Herb Fox (SBN 126747)
THE LAW OFFICE OF HERB FOX
15 W. Carrillo Street, Suite 211
Santa Barbara, CA 93101
Tel. (805) 899-4777
Fax: (805) 899-2121
Email: hfox@foxappeals.com

Mark A. Massara (SBN 131699)
1642 Great Hwy
San Francisco, CA 94122
Tel. (415) 665-7008
Fax: (415) 665-9008
Email: markmassara@coastaladvocates.com

Attorneys for Plaintiff and Respondent Surfrider Foundation

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, First APPELLATE DISTRICT, DIVISION Five	Court of Appeal Case Number: A144268 & A145176
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Mark A. Massara 131699 — Law Offices of Mark A. Massara 1642 Great Highway San Francisco, CA 94122 TELEPHONE NO.: 805.895.0963 FAX NO. (Optional): E-MAIL ADDRESS (Optional): markmassara@coastaladvocates.com ATTORNEY FOR (Name): Surfrider Foundation	Superior Court Case Number: CIV520336 FOR COURT USE ONLY
APPELLANT/PETITIONER: Martins Beach 1, LLC and Martins Beach 2, LLC RESPONDENT/REAL PARTY IN INTEREST: Surfrider Foundation	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Surfrider Foundation

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date:

March 29, 2016

(TYPE OR PRINT NAME)

▶ _____

(SIGNATURE OF PARTY OR ATTORNEY)

TABLE OF CONTENTS

Page

I. INTRODUCTION 11

II. PROCEDURAL BACKGROUND OF THIS CASE 12

A. The Parties 12

1. Plaintiff Surfrider Foundation 12

2. Defendants Martins Beach 1, LLC and Martins Beach 2, LLC 13

B. The Complaint 13

C. The Trial Court's Statement of Decision 14

1. Findings of Fact 15

a. The Property is Subject to Jurisdiction under the Coastal Act 15

b. The Gate, Billboard and Signs, Before and After the Purchase 15

c. The Public's Use of Martins Beach was Changed by Appellants' Conduct 16

2. Conclusions of Law 18

a. Threshold Legal Determination 18

b. Statutory Interpretation of "Development" under the Coastal Act 18

c. The LLCs' Conduct Constitutes Development, and their Failure to Apply for a Permit Violates the Coastal Act 20

D. The Court's Judgment 22

E. The Post-Trial Motions 23

1. The LLCs' Motion for a New Trial is Denied 23

2. The Court Grants Surfrider's Application for Attorneys' Fees 23

TABLE OF CONTENTS

Page

III. OTHER LITIGATION RELATED TO THE MARTINS BEACH PROPERTY 24

A. Appellants Suit against San Mateo County and the Coastal Commission is dismissed on Demurrer because no CDP Application had been made ... 24

B. The Friends of Martins Beach Litigation and Appeal 25

C. Criminal Trespassing Charges are Filed and then Dropped against Five Members of the Public who were using Martins Beach 26

IV. OTHER RELEVANT FACTUAL BACKGROUND 26

A. Appellants were repeatedly notified of the Public's Ability to Access Martins Beach and the Requirement to Seek a Permit if They Wished to Change or Stop that Access 27

B. Correspondence between Surfrider and the LLCs 29

C. Senate Bill 968 Becomes Law 30

V. STANDARD OF REVIEW 31

VI. ARGUMENT 33

A. The Coastal Act Requires a Permit Application to Change the Public's Use of and Access to Martins Beach 33

1. All Development in the Coastal Zone Requires a CDP 33

2. California Courts Interpret "Development" to include a Host of Non-Physical Changes to Property 36

3. There was Substantial Evidence that Appellants' Conduct Changed the Access to and Use of the Water and Coast at Martins Beach 42

B. Appellants' Claim of a Taking is Unripe and Unfounded 46

1. Appellants' Takings Claim is not Ripe 48

2. Even if the Claim is Ripe, There Has Been No Taking of Private Property 51

3. Appellants have not been Deprived of the "Right to Exclude" 53

C. The Court's Decision Does Not Implicate Appellants' First Amendment Rights 54

D. The Court Properly Awarded Attorneys' Fees to Surfrider 55

1. The Litigation Vindicated Important Rights Affecting the Public Interest 56

2. The Judgment Conferred a Benefit on a Large Class of Persons 58

3. Private Enforcement was Necessary and Appropriate 59

VII. CONCLUSION 61

ATTORNEY'S CERTIFICATE OF COMPLIANCE 63

TABLE OF AUTHORITIES

Page

California Cases

Action Apartment Ass'n v. City of Santa Monica (2008) 47
166 Cal.App.4th 4

Allegretti & Co. v. County of Imperial (2006) 52
138 Cal.App.4th 1261

Beach Colony II v. California Coastal Com. (1985)..... 58
166 Cal.App.3d 106

Buckley v. California Coastal Com. (1998).....52. 53
68 Cal.App.4th 178

Baggett v. Gates (1982)..... 32
32 Cal.3d 128

City of Dana Point v. California Coastal Com. (2013)..... 53
217 Cal.App.4th 170

Conservatorship of Whitley (2010) 55
50 Cal.4th 1206

DeCicco v. California Coastal Com. (2011) 36
199 Cal.App.4th 947

Ebbetts Pass Forest Watch v. California Dept. of Forestry and Fire Protection 56
(2010) 187 Cal.App.4th 376

Ermoian v. Desert Hospital (2007) 31
152 Cal.App.4th 475

Friends of "B" Street v. City of Hayward (1980) 56, 57
106 Cal.App.3d 988

Golden Cheese Co. v. Voss (1991) 41
230 Cal.App.3d 727

TABLE OF AUTHORITIES

Page

Gualala Festivals Committee v. California Coastal Com. (2010) 36, 37
183 Cal.App.4th 60

Healing v. California Coastal Com. (1994) 47
22 Cal.App.4th 1158

Hensler v. City of Glendale (1994)..... 48
8 Cal.4th

In re C.H. (2011) 33
53 Cal.4th 94

In re Marriage of Arceneaux (1990) 31
51 Cal.3d 1130

In re M.M. (2012).....39
54 Cal.4th 530

Judson Steel Corporation v. Workers' Compensation Appeals Board (1978) 32
22 Cal.3d 658

Kavanau v. Santa Monica Rent Control Bd. (1997)..... 41
16 Cal.4th 761

Mejia v. City of Los Angeles (2007) 55
156 Cal.App.4th 151

Monks v. City of Rancho Palos Verdes (2008)..... 49
167 Cal.App.4th 2

O'Hagen v. Board of Zoning Adjustment (1971) 42
19 Cal.App.3d 151

Pacific Legal Foundation v. California Coastal Com. (1982)..... 44, 58
33 Cal.3d 158

TABLE OF AUTHORITIES

Page

Pacific Palisades Bowl Mobile Estates v. City of Los Angeles (2012).....passim
55 Cal.4th 783

People ex rel. Lockyer v. Shamrock Foods Co. (2000).....32
24 Cal.4th 415

Shaw v. County of Santa Cruz (2008).....31, 32
170 Cal. App. 4th 229

Surfrider Foundation v. California Coastal Com. (1994).....37, 45
26 Cal.App.4th 151

Vasquez v. State (2008).....55
45 Cal.4th 24

Yost v. Thomas (1984).....35
36 Cal.3d 561

Federal Cases

Goldblatt v. Hempstead (1962).....41
369 U.S. 590

Horne v. Dept. of Agriculture (2013).....50, 51
___ U.S. ___ [133 S.Ct. 2053]

Koontz v. St. Johns River Water Mgmt. Dist. (2013).....50
___ US ___ [133 S.Ct. 2586]

Lawton v. Steele (1894).....42
152 U.S. 133

Lingle v. Chevron, USA, Inc. (2005).....47
544 U.S. 528

Loretto v. Teleprompter Manhattan CATV Corp. (1982).....534
458 U.S. 41

TABLE OF AUTHORITIES

Page

MacDonald Sommer & Frates v. Yolo Couunty (1986) 512
477 U.S. 340

Pennsylvania Coal Co. v. Mahon (1922) 47
260 U.S. 393

Palazzolo v. Rhode Island (2001) 48
533 U.S. 606

Suitum v. Tahoe Reg'l Planning Agency (1997) 48
520 U.S. 725

Whaler's Vill. Club v. Cal. Coastal Com (1985) 55
173 Cal.App.3d 2

Williamson County Reg'l Planning Com. v. Hamilton Bank (1985) 48
473 U.S. 172

California Constitution

Cal. Const., art. X, §4. ..... 55, 56

Statutes

California Code of Civil Procedure
Civ. Pro. §1021.5 ..... passim
Civ. Pro. §1032 23
Civ. Pro. §1032.5 23

California Public Resources code (Coastal Act)
Pub. Res. Code §6213.5 30
Pub. Res. Code §30001 27
Pub. Res. Code §30001(a)-(d) ..... passim

TABLE OF AUTHORITIES

Page

Pub. Res. Code §30001.5.....34
Pub. Res. Code §30004(a).....36
Pub. Res. Code §30010.....19
Pub. Res. Code §30106.....passim
Pub. Res. Code §30211.....40
Pub. Res. Code §30212(a).....54
Pub. Res. Code §30600.....47
Pub. Res. Code §30600(a).....10. 29, 54
Pub. Res. Code §30600.5.....46
Pub. Res. Code §30620.5.....46
Pub. Res. Code §30620.6.....46
Pub. Res. Code §30621.....46
Pub. Res. Code §30622.....46
Pub. Res. Code §30801.....46
Pub. Res. Code §30803(a).....60

I. INTRODUCTION

This case presents a narrow and straight forward issue: Whether ending a century of public use of and access to the coast constitutes a change in intensity of use or a change in public access thereto. As the Superior Court ruled after a full trial, the answer is yes. The Coastal Act, interpretations of the Act by the Coastal Commission and the California Supreme Court, and simple logic, compel the same result here.

This case is not about the overarching constitutional principles claimed by Appellants Martins Beach 1, LLC and Martins Beach 2, LLC ("Appellants" or "the LLCs"). A landowner who is required by the Coastal Act to apply for a Coastal Development Permit ("CDP") has not suffered a constitutional taking. Instead, just as each court and agency that has considered the question here has determined, properties that are within the "coastal zone," and subject to the Coastal Act, require approval of "development" in the form of a CDP. The Coastal Act does not forbid development, and does not necessarily forbid the conduct in which Appellants seek to engage. It does, however, forbid development – and Appellants' conduct herein – absent a CDP.

Appellants' contention that their property rights, privacy rights and constitutional rights have been violated, are misplaced and premature. Appellants admitted during trial that they changed the use of, and access to, the coast by greatly reducing the public's ability to reach and use Martins Beach; that they did not seek a CDP under the Coastal Act before doing so; that nobody knows how the Coastal Commission would have ruled

on their non-existent CDP application; and that they intended to stop, and have stopped, public use of Martins Beach that until their actions, had existed for a century.

The trial court's decision should be affirmed on the basis of these admissions alone, thereby requiring Appellants to apply for a CDP if they wish to change historical public access to and use of Martins Beach. The Coastal Commission will then consider their application when it is made, following the law and the Constitution in doing so. If it does not, Appellants may then raise the concerns they prematurely raise here.

II. PROCEDURAL BACKGROUND OF THIS CASE

A. The Parties

1. Plaintiff Surfrider Foundation

Surfrider Foundation is a non-profit grassroots, environmental organization dedicated to the protection and enjoyment of the world's oceans, waves and beaches, for all people. (1 CT 4.)[1] Surfrider, with more than 250,000 supporters and members in the United States, operates through an activist network made up largely of volunteers. (1 CT 4.) The San Mateo County Chapter of Surfrider Foundation is one of 80 local chapters in the United States. (1 CT 4.) It has an interest in the enforcement of the Coastal Act, including the Act's policies to promote public access to the coast. Surfrider members previously enjoyed the coastal resources that belong to the public at Martins Beach, and its interests have been harmed by the unpermitted development at Martins Beach (1 CT

[1] Consistent with Appellants' citations to the record, citations to "CT" and "RT" are to the record in Case No. A144268 and citations to "CT2" and "RT2" are to the record in Case No. A145176.

4.) Surfrider has worked to protect the California coast, including Martins Beach, through beach cleanups in San Mateo County and spends substantial resources on advocacy and public education efforts protecting, promoting and preserving its interest. (1 CT 4; 5 RT 186:10-189:9.)

2. Defendants Martins Beach 1, LLC and Martins Beach 2, LLC

Appellants are two LLCs formed for the purpose of purchasing and owning the property known as Martins Beach. (1 CT 4-5.) Martins Beach 1 LLC and Martins Beach 2 LLC are both California entities whose sole member is the KFT Trust UTA dated 11/17/1986, which is controlled by Vinod Khosla and Neeru Khosla. (14 CT 4192 - 15 CT 4217.)

B. The Complaint

On March 12, 2013 Surfrider filed its complaint seeking declaratory relief, injunctive relief and fines and penalties under the California Coastal Act. (1 CT 1-16.) The complaint alleged the LLCs engaged in "development" (Pub. Resources Code, §30106[2]) by preventing the public from accessing the coast and water at Martins Beach, by closing the gate across Martins Beach Road, adding signage to the gate stating "BEACH CLOSED KEEP OUT," by painting over the billboard on the property that had advertised public access, and by stationing security guards on the property to deny beach access to the public. (1 CT 1-16.)

[2] All subsequent statutory references are to the Coastal Act (Pub. Res. Code §§30000-30900) unless otherwise stated.

The complaint sought a declaration that the LLCs' conduct constituted development under the Coastal Act requiring a CDP; injunctive relief for the irreparable harm being caused to the public while they were prevented from accessing the coast at Martins Beach; fines and penalties under the §30820(b) for knowingly and intentionally engaging in unpermitted development, and for attorneys' fees under Code of Civil Procedure §1021.5. (1 CT 10-11.)

C. The Trial Court's Statement of Decision

Trial began on May 8, 2014 and consisted of six court days, including a half-day site visit to the property. (11 CT 3118.) Seventeen witnesses testified, including three experts, and 51 exhibits were admitted into evidence. (11 CT 3118.) At issue were the following questions of law and fact:

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

- Was a CDP obtained?

(11 CT 3118.)

On November 12, 2014, Judge Barbara Mallach issued a Final Statement of Decision. (11 CT 3113-3131.) That Decision held that Appellants had engaged in "development" under the Coastal Act by engaging in conduct that changed the public's use of and access to Martins Beach, and had done so without a CDP. (11 CT 3120, 3122.)

1. Findings of Fact

a. The Property is Subject to Jurisdiction under the Coastal Act

The property is in the coastal zone. (11 CT 3020; see also 7 RT 539:9-19; 13 CT 3619-3622; 14 CT 4147-4148.) Because it is in the coastal zone, the property is subject to the Coastal Act, including jurisdiction of both San Mateo County and the Coastal Commission. (See §30600(a).)

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

Under the prior ownership, and at the time the LLCs purchased the property, there was a gate, constructed around 1991, that was unlocked and open to the public during the day. (11 CT 3020-21; see also 5 RT 161:1-6, 183:16-19, 221:2-26; 8 RT 636:10-21, 662:12-661:3.)[3] There was a billboard on the side of Highway 1 inviting the public to access Martins Beach by driving down Martins Beach Road. (11 CT 3021; 5 RT 195:15-

[3] Contrary to Appellants' assertion (AOB 47-48), the automatic gate had not been at the property prior to the adoption of the Coastal Act. It was installed in the 1990s. (8 RT 660:12-661:23.)

196:13; see also Plaintiff's Trial Exhibit 25 at p. PE25.0024.) Additionally, there were other signs adjacent to Martins Beach Road, near the gate. (11 CT 3021; 15 CT 4336.)

After purchasing the property, Appellants painted the billboard a blank, dark green rectangle. (11 CT 3121; 5 RT 183:20-184:9, 195:23-196:1; 14 CT 3182.) Further, a sign was added to the gate, stating, "Beach Temporarily Closed for Repair." (11 CT 3121; 14 CT 4117; 7 RT 581:21-582:20.) Then, in the summer or fall of 2010, approximately two years after Appellants' purchase of the property, the gate was closed and locked for the purpose of keeping the public from accessing Martins Beach. (11 CT 3121; 6 RT 363:19-364:21, 7 RT 547:17-548:19, 603:11-25.) In the spring of 2013, the LLCs hired security guards to provide a visible presence to deter members of the public from accessing the beach. (7 RT 549:23-550:21; 14 CT 4104.)

Appellants "did not obtain a CDP to block access to the coast, to close the gate across Martins Beach Road, to change the billboard, to add, remove or change signs attached to the gate, to station security guards on the property from time to time, or to remove or change the signs adjacent to Martins Beach Road near the gate." (11 CT 3121.)

c. The Public's Use of Martins Beach was Changed by Appellants' Conduct

Prior to the transfer of ownership to Appellants, the public used Martins Beach and was allowed to drive down Martins Beach Road across the property and park along the coast, usually, but not always, upon payment of a parking fee. (11 CT 3122; 5 RT 159:10-160:6, 181:16-21, 189:24-190:25, 231:10-20, 7 RT 446:19-26, 492:6-8, 525:1-9,

8 RT 675:25-676:9.) The public could also park along Highway 1 and then walk down to the coast, in which case they were not required to pay a fee. (11 CT 3122; 5 RT 189:24-190:5.) The prior owners allowed access, at minimum, upon payment of a parking fee, during the daytime and during the summer. (11 CT 3122; 7 RT 565:17-22.) Prior to 2008, with very limited exceptions for individuals engaging in disruptive or illegal behavior, members of the public were not asked to leave the property nor were they informed they were trespassing. (11 CT 3122; 5 RT 160:7-15, 190:17-25, 231:24-232:18, 7 RT 451:3-5, 8 RT 646:24-648:14.)

For approximately two years after Appellants purchased the property in July 2008, they allowed the public to access and use the coast upon payment of a parking fee. (11 CT 3122; 7 RT 593:4-25; 13 CT 3899 - 14 CT 4095.) From July 2008 to September 2009, 1,044 vehicles paid the fee and accessed the coast. (11 CT 3122, 13 CT 3899 - 14 CT 4095.)

In the summer or fall of 2010, Appellants stopped allowing the public to access the coast. (11 CT 3122; 7 RT 547:17-548:19, 602:10-604:25.) Since permanently closing the gate and blocking the public's access to the coast Appellants ejected over 100 people for purportedly "trespassing." (11 CT 3122.)

During trial, Appellants admitted these facts and admitted that their conduct changed the intensity and density of use of the land and water at Martins Beach as well as the public's access to the water and coast. (11 CT 3120; 7 RT 565:17-567:1.) As found by the trial court "Steven Baugher, the manager of the LLCs, admitted changing the intensity of use of the coast and admitted changing the public's access to the coast by

closing the gate across Martins Beach Road without a CDP." (11 CT 3120; 7 RT 546:12-547:16, 566:24-567:1, 605:6-605:22.)

2. Conclusions of Law

a. Threshold Legal Determination

The trial court made a threshold determination on the overarching legal issues, including the interpretation of the Coastal Act and addressing Appellants' contentions that they have a constitutional right to exclude the public. (11 CT 3119-3120.)

The trial court found that, "as a matter of law . . . development under the Coastal Act does not require any physical change or alteration to land [citation] and goes well beyond what is commonly regarded as the development of real property." (11 CT 3119 [citation and quotation omitted].)

The trial court further explained that physical changes, including building gates, fences and signs also constitute development, regardless of their purpose. (11 CT 3119.)

Accordingly, because "no physical change is required to prove development [] trigger[ing] the need for a CDP, the Court's decision and analysis focuses on whether Defendants' conduct has resulted in a change in the intensity of use of land, a change in the intensity of use of water or a change in the access thereto." (11 CT 3120 [citations and quotations omitted].)

b. Statutory Interpretation of "Development" under the Coastal Act

The Coastal Act defines "development" to mean a

> change in the density or intensity of use of land, . . . change in the intensity of use of water, or of access thereto; . . . [¶] As used in this section, "structure" includes, but is not limited to, any building, road,
>
> pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line.

(11 CT 3123 (quoting §30106.)

The trial court analyzed the case law interpreting "development" under the Coastal Act, as well as the legislative history of the statute. (11 CT 3124-3125.) It ruled that:

> The Coastal Act "was enacted by the Legislature as a comprehensive scheme to govern land use planning for the entire coastal zone of California." (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 793.) This scheme was enacted because
>
> > "[T]he California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people"; that "the permanent protection of the state's natural and scenic resources is a paramount concern to present and future residents of the state and nation"; that "it is necessary to protect the ecological balance of the coastal zone" and that "existing developed uses, and future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state . . ." *Id*. (quoting §30001(a)-(d)).

(11 CT 3124 – 3125.)

The trial court continued:

> At the same time, Pub. Res. Code §30010 states that the Coastal Commission cannot apply the Coastal Act in a manner that would violate the takings clauses in the state and federal constitutions. Section 30010 provides
>
> > The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing body, or

> local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.
>
> The Coastal Act thus emphasizes the importance of both the public's ability to access and enjoy the coast as well as the protection of private property rights. By directing Defendants to the Coastal Commission for resolution of its coastal development permit application, the Court trusts that the Commission will adhere to its responsibility to fairly balance the competing interests set forth in the Coastal Act.

(11 CT 3126-3127.)

c. The LLCs' Conduct Constitutes Development, and their Failure to Apply for a Permit Violates the Coastal Act

The LLCs admitted to changing the public's ability to access the coast at Martins Beach, admitted changing the intensity of use of the beach and water at Martins Beach, and admitted that they did not apply for or receive a CDP from San Mateo County or the Coastal Commission. (11 CT 3020, 3022.) Thus, the trial court rejected Appellants' position that they had not engaged in "development" as defined by the Coastal Act.

Additionally, the trial court addressed Appellants' arguments that there was no need to apply for a CDP, that the Coastal Commission had no discretion but to grant a CDP application, and the LLCs' claim they were told no CDPs would ever be granted. (11 CT 3126.) In reviewing the testimony and evidence related to those matters, the trial court found:

> Defendants contend they were told by the California Coastal Commission that they would never receive a permit of any kind due to their decision to terminate decades of public access to the water and coast at Martins Beach. Defendants admitted that there is no written support for this contention [9 RT 866:9-26], and Mr. Baugher testified that unless and until the LLCs apply for a permit, nobody knows how the Commission would rule on such an application.
>
> Not only have Defendants admitted that nobody can know how the administrative process would play out, but that is the only logical conclusion this Court can draw – nobody knows what would happen if Defendants had applied for a permit, because no permit application was ever made.

(11 CT 3126 [emphasis added].)

Ultimately, the trial court concluded:

> Defendants' desire to change the public's access to and use of the water, beach and coast at Martins Beach constitutes development under the California Coastal Act. See §30106. Consequently, if Defendants wish to change the public's access to and use of the water, beach and coast at Martins Beach, they are required to obtain a Coastal Development Permit prior to doing so.
>
> Defendants' conduct in changing the public's access to and use of the water, beach and coast at Martins Beach, specifically by permanently closing and locking a gate to the public across Martins Beach Road, adding signs to the gate, changing the messages on the billboard on the property and hiring security guards to deter the public from crossing or using the property to access the water, beach and coast at Martins Beach without a Coastal Development Permit(s) constitutes a violation of the California Coastal Act.

(11 CT 3131.)

D. The Court's Judgment

The trial court entered judgment on December 1, 2014, finding in favor of Surfrider on the Declaratory and Injunctive Relief claims. (11 CT 3154-3158.)[4] The Court ordered the following declaratory relief:

> Defendants' desire to change the public's access to and use of the water, beach and coast at Martins Beach constitutes development under the California Coastal Act. See Pub. Res. Code §30106. Consequently, if Defendants wish to change the public's access to and use of the water, beach and/or coast at Martins Beach, they are required to obtain a Coastal Development Permit prior to doing so.
>
> Defendants' conduct in changing the public's access to and use of the water, beach and coast at Martins Beach, specifically by permanently closing and locking a gate to the public across Martins Beach Road, adding signs to the gate, changing the messages on the billboard on the property and hiring security guards to deter the public from crossing or using the Property to access the water, beach and coast at Martins Beach without a Coastal Development Permit(s) constitutes a violation of the California Coastal Act.

(11 CT 3155.)

The Court ordered the following injunctive relief:

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

(11 CT 3156.)

[4] The Judgment also found in favor of Surfrider on Defendants' cross-complaint and in favor of Defendants on the claim for fines and penalties. These claims are not part of this appeal.

E. The Post-Trial Motions

1. The LLCs' Motion for a New Trial is Denied

Appellants moved for a new trial or for "alternative relief." They argued that Senate Bill 968 constituted "new evidence," that the evidence did not support the judgment, and that the judgment constituted both a regulatory and judicial taking. (11 CT 3224-3251.) None of these arguments were supported by the evidence or the law, and the motion was denied. (12 CT 3444-3470; 3572.)

2. The Court Grants Surfrider's Application for Attorneys' Fees

Surfrider filed an application for attorneys' fees pursuant to C.C.P §1021.5. (1 CT2 166-184.) Surfrider requested reasonable attorneys' fees in the amount of $609,176.93[5] and reimbursement of costs pursuant to C.C.P. §§1032, 1033.5 in the amount of $15,511.01. (1 RT2 184.) The requested fees were 73.46% of the unadorned "lodestar." (1 RT2 183.)

Appellants opposed the motion, although did not contest the reasonableness of counsel's hourly rates. (1 CT2 226-243; 1 RT2 4:10-13.)

On May 15, 2015, the trial court granted the application, awarding Surfrider $470,461.55 in attorneys' fees and $15,511 in reimbursable costs. (2 RT2 302.) The trial court found that the total lodestar was $829,257.00, that the rates of counsel were

[5] Surfrider also offered to accept a fee award equivalent to the amount Defendants' counsel was paid for its work on the litigation, believing that would also represent a reasonable fee. (1 CT2 183.) Defendants did not disclose their lodestar.

reasonable, and that Surfrider's voluntary reduction of hours sought supported a finding of reasonableness. (2 RT2 302.)

III. OTHER LITIGATION RELATED TO THE MARTINS BEACH PROPERTY

A. Appellants' Suit Against San Mateo County and the Coastal Commission is Dismissed on Demurrer Because No CDP Application Had Been Made

In June 2009, after receiving a letter from San Mateo County stating that a CDP was required to block the public's access to the coast at Martins Beach, the LLCs sued the County and the Coastal Commission. (11 CT 3122; 13 CT 3601-3615, [*Martins Beach Land 2, LLC v. County of San Mateo, et al.,* San Mateo County Superior Court Case No. CIV485116]). That lawsuit sought declaratory and injunctive relief that the LLCs were not required to maintain public access to Martins Beach. (11 CT 3122-3123; 13 CT 3606-3607, 3612.) On October 16, 2009, Judge Grandsaert of the San Mateo County Superior Court sustained demurrers brought by both San Mateo County and the Coastal Commission, without leave to amend. (11 CT 3123; 13 CT 3616-3622.)

Judge Grandsaert held that the Coastal Commission had jurisdiction over the property under §30600(a). (13 CT 3620.) Judge Grandsaert also found that the LLCs had conceded that public access at Martins Beach was available prior to the LLCs acquiring the property in 2008 and that the LLCs sought to discontinue allowing public access. (11 CT 3123; 13 CT 3620-3621.)

Ultimately, Judge Grandsaert stated that "before seeking a judicial determination in this Court, [the LLCs] must comply with the administrative process provided by the California Coastal Act." (13 CT 3621 [emphasis added].) The determination of whether the LLCs' proposals constitute a "change in the intensity of use of water or of access thereto" would depend on the "precise circumstances under which access was provided by [the LLCs'] predecessors in interest" as well as the "extent to which [the LLCs] seeks to change access." Those proposals were required to be submitted to the "appropriate administrative body" – the County or Coastal Commission. (13 CT 3621.) Appellants never applied for a CDP or submitted proposals.

B. The Friends of Martins Beach Litigation and Appeal

In October 2012, the "Friends of Martins Beach," an unincorporated association, filed a complaint against the LLCs raising different issues and seeking different relief than the present litigation. (1 CT 169-170, 179-201, 3 CT 602 [San Mateo County Superior Court, Case No. CIV517634; [First District Court of Appeal Case No. A142035].) The *Friends of Martins Beach* case sought to quiet title to the property for the benefit of the public based upon a constitutional right of access or an express dedication, and a determination that the owners be forever barred from closing the gate across Martins Beach Road. (1 CT 179-201; 3 CT 602.)

The *Friends of Martins Beach* case is factually and legally distinct and independent from this appeal, and the outcome of this suit is not impacted or dependent on the outcome of the *Friends of Martins Beach* case. This difference was recognized by the Hon. Judge Buchwald of San Mateo County Superior Court in his order on summary

judgment in that case. As Judge Buchwald wrote: "the Court's decision here does not disturb, in any way, two important rights that belong to the public: . . . (2) the authority of the California Coastal Commission to make real estate development permits subject to some public access." (10 CT 2878-2879.)

The admission by the LLCs that the Coastal Commission and San Mateo County have jurisdiction over their property forecloses their contention that they do not have to apply for a CDP.[6] Judge Mallach's decision was consistent with Judge Grandsaert's prior dismissal of the LLCs' complaint against the County and the Coastal Commission: Development at the property falls under the jurisdiction of the Coastal Act and the LLCs' obligation to follow the law is not changed, altered or eliminated by the trial court's decision in *Friends of Martins Beach*.

C. Criminal Trespassing Charges are Filed and then Dropped against Five Members of the Public who were using Martins Beach

On October 21, 2012, five surfers were on the beach at the property when Appellants contacted San Mateo County Sheriff under the mistaken belief that those people were "trespassing." (6 CT 1638-1639.) The sheriff arrived at the property and cited the surfers, and the San Mateo County District Attorney initiated trespassing actions actions against them. (6 CT 1638-1639.) On February 7, 2013, the charges against each

[6] Friends of Martins Beach appealed the trial court's decision in that case, and at the time this Respondents Brief is filed, that matter remains pending in this Court (Case No. A142035). Surfrider filed an amicus brief in this Court in in that appeal. While the outcome of that litigation may impact how the Coastal Commission might rule on a CDP application, nothing about that litigation allows the property owners to refuse to submit a CDP application.

of those individuals were dropped. (6 CT 1639.) There was no question that each of the individuals had entered Martins Beach without the owners' permission, but despite that fact, the District Attorney determined there was insufficient evidence to prosecute the trespassing claim. (6 CT 1639.)

IV. OTHER RELEVANT FACTUAL BACKGROUND

A. Appellants Were Repeatedly Notified of the Public's Ability to Access Martins Beach and the Requirement to Seek a Permit if They Wished to Change or Stop that Access

Prior to purchasing the property in the summer of 2008, Appellants were told by San Mateo County that "there is existing parking [and] access to the beach at Martins Beach. This access IS also memorialized [and] required to be preserved (no exceptions) by the Local Coastal Program" and that "the access is there and will have to remain." (13 CT 3857-1358.)[7]

On February 6, 2009, San Mateo County sent Appellants a letter stating "any change in the public's ability to access the shoreline at Martins Beach triggers the need for a CDP because it represents a 'change in the intensity of use of water or access thereto.'" (13 CT 1865 [quoting §30106].) The letter further requested information "to evaluate whether future beach closures would trigger the need for a CDP," and provided that County staff "suggested that a schedule of operation be provided, along with an

[7] See also 13 CT 3795 [1998 San Mateo County Local Coastal Plan, Table 10.1, Number 26, Martins Beach].

explanation of how the schedule relates to historic patterns of public use." (13 CT 1864-1865.) Appellants never provided the County with that information. (7 RT 571:10-25.)

In response, on February 9, 2009, Appellants informed the County they "intend[ed] to maintain the same amount and type of access as did [their] predecessors." (13 CT 3867.)

In April 2009, the County wrote to Appellants explaining they had not received the information necessary to "establish a baseline of public use, and to determine if there have been changes in the public's ability to access the shoreline that trigger the need for a Coastal Development Permit." (13 CT 3870.) The County explained that if Appellants wished to change the public's access to Martins Beach, they must apply for a CDP. (13 CT 3871.) However, if they did not do so, they were required to either offer public access year round for $2 per vehicle, as reflected in the San Mateo County Local Coastal Plan in effect when the Coastal Act was enacted, or provide evidence documenting the current public access had not changed from the access offered when the Coastal Act took effect. (13 CT 3871.) Appellants chose to do none of those things.

In May 2009, Appellants again informed the County they would "provide access to the extent it was provided" by the prior owners and offered to "provide [the County] with affidavits" to support their contentions about the circumstances under which access and use had historically existed. (13 CT 3877.) Appellants did not provide the information. Instead, the next month, they sued San Mateo County and the Coastal Commission. (See §III.A., *supra*.) The LLCs lost that suit because they had not applied for a CDP, and instead of either doing so or standing by their commitment to offer access,

they closed the beach to the public without informing the County or Coastal Commission. (7 RT 567:25-569:16.)

In November 2011, the County sent Appellants a "Notice of Preliminary Determination of Violation." (13 CT 3889-3892.) The letter explained that the "unpermitted blockage of a significant coastal access way" was not "minor in nature" and that Appellants' conduct was unlawful. (13 CT 3891.) Ultimately, the LLCs' representative Steven Baugher told the County that the LLCs "expected the matter to be resolved in court rather than through the permit process." (9 RT 966:24-967:3.)

The correspondence sent to Appellants by the County and the Coastal Commission stated that Appellants would need a CDP to stop or limit the public's access to Martins Beach by closing the gate, changing signs or using security guards. (7 RT 624:22-625:20.)

B. Correspondence between Surfrider and the LLCs

Prior to this litigation, Surfrider worked to achieve a resolution, including an effort to negotiate directly with Mr. Khosla. (5 RT 202:2-205:12, 244:25-245:26, 7 RT 375:11-376:10.) On August 3, 2011, two Surfrider representatives, including the volunteer chair of the San Mateo County Chapter, sent a letter to Mr. Khosla "in the spirit of mutual cooperation" seeking his "assistance in reopening Martin's Beach to the public" and explaining that its "abrupt closure has frustrated a growing number of concerned local families, who have come to us for assistance." (13 CT 3898.)

Counsel for Mr. Khosla responded on September 12, 2011, explaining that they were "waiting . . . for an enforcement action" to be filed. (13 CT 3896-3897.)

Surfrider's enforcement action was therefore necessary to reach a resolution of this matter.

C. Senate Bill 968 Becomes Law

Senate Bill 968 was signed into law in 2014. The law (codified at §6213.5) states:

> Public access route to and along shoreline at Martins Beach
>
> (a) (1) The [State Lands] commission shall consult, and enter into any necessary negotiations, with the owners of the property known as Martins Beach, consisting of two parcels of land, APN: 066-330-230 and APN: 066-330-240, in the unincorporated area of the County of San Mateo, to acquire a right-of-way or easement, pursuant to Section 6210.9, for the creation of a public access route to and along the shoreline, including the sandy beach, at Martins Beach at the South Cabrillo Highway.
>
> (2) This section does not prohibit the owners of the property from voluntarily providing public access to and along the shoreline at Martins Beach upon terms acceptable to the commission.
>
> (b) If the commission is unable to reach an agreement to acquire a right-of-way or easement or the owners do not voluntarily provide public access pursuant to subdivision (a) by January 1, 2016, the commission may acquire a right-of-way or easement, pursuant to Section 6210.9, for the creation of a public access route to and along the shoreline, including the sandy beach, at Martins Beach at the South Cabrillo Highway, in accordance with the procedures set forth in Title 7 (commencing with Section 1230.010) of Part 3 of the Code of Civil Procedure.
>
> (c) The commission shall consult and enter into negotiations with local stakeholders, including, but not limited to, nonprofit entities and local and regional governments and governmental entities, to address the ongoing management and operation of any property acquired pursuant to this section.

SB968 was a response to the continued intransigence of the Appellants and their continued refusal to comply with the law. It does not confirm a taking occurred. It

directs the State Lands Commission to try to negotiate with the LLCs to address the loss of public beach access and allows the State Lands Commission to use eminent domain to rectify that problem, if necessary. Whether an easement exists now or in the future, development at the property remains subject to the Coastal Act.

The fact that SB968 allows the State Lands Commission to "acquire" an easement does not change any facts which were presented to the trial court. Nothing in the Statement of Decision or Judgment, nor any evidence presented at trial, indicates that the trial court believed there was an easement or relied upon the existence of an easement in reaching its conclusion that Appellants had violated the Coastal Act. Regardless of whether an easement now or later exists, "development" requires a CDP.

V. STANDARD OF REVIEW

"A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) "Under the substantial evidence standard of review, this Court's review begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the trial court's factual determinations . . ." (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 501 [*citations omitted*].)

Whether a governmental action constitutes a taking is a mixed question of law and fact. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 269-270.) The Appellate court's review is neither entirely de novo nor entirely limited by the substantial evidence rule. (*Ibid*.)

"Mixed questions of law and fact involve three steps: (1) the determination of the historical—what happened; (2) selection of the applicable legal principles; and (3) application of those legal principles to the facts. The first step involves factual questions exclusively for the trial court to determine; these are subject to substantial evidence review; the appellate court must view the evidence in the light most favorable to the judgment and the findings, express or implied, of the trial court. [Citations.]" (*Shaw v. County of Santa Cruz, supra,* 170 Cal.App.4th at pp. 269-270.)

The Court of Appeal does not apply de novo review to factual findings underlying the trial court's judgment, instead applying the substantial evidence rule. (*Shaw v. County of Santa Cruz, supra,* 170 Cal.App.4th at pp. 269-270.) Only the second and third steps involve questions of law, which is reviewed de novo. (*Ibid.*)

The interpretation of a statute is a pure question of law. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.) But when an administrative agency is charged with enforcing a particular statute, its interpretation of the statute will be accorded great respect by the courts and will be followed if not clearly erroneous. (*Judson Steel Corporation v. Workers' Compensation Appeals Board* (1978) 22 Cal.3d 658, 668.)

Attorney fee awards under C.C.P. §1021.5 are reviewed for abuse of discretion. (*Baggett v. Gates* (1982) 32 Cal.3d 128, 142-143.)

VI. ARGUMENT

A. The Coastal Act Requires a Permit Application to Change the Public's Use of and Access to Martins Beach

In interpreting a statute, the "fundamental task [of the court] . . . is to determine the Legislature's intent so as to effectuate the law's purpose." (*In re C.H.* (2011) 53 Cal.4th 94, 100.) "If the statute's text evinces an unmistakable plain meaning, [the court] need go no further." (*Ibid.*) Here, the text is unambiguous, and the plain meaning is supported by the legislative findings and goals, by the Coastal Commission and the County's interpretations of the statute, and by case law.

1. All Development in the Coastal Zone Requires a CDP

The purpose of the Coastal Act is to protect one of California's most valuable natural resources. As stated by the Legislature in passing the Coastal Act:

> (a) That the California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people and exists as a delicately balanced ecosystem.
> (b) That the permanent protection of the state's natural and scenic resources is a paramount concern to present and future residents of the state and nation.
> (c) That to promote the public safety, health, and welfare, and to protect public and private property, wildlife, marine fisheries, and other ocean resources, and the natural environment, it is necessary to protect the ecological balance of the coastal zone and prevent its deterioration and destruction.
> (d) That existing developed uses, and future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state and especially to working persons employed within the coastal zone.

(§30001.)

The Legislature further explained that the "basic goals of the state for the coastal zone" were to:

> (a) Protect, maintain, and where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources.
> (b) Assure orderly, balanced utilization and conservation of coastal zone resources taking into account the social and economic needs of the people of the state.
> (c) Maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners.
> (d) Assure priority for coastal-dependent and coastal-related development over other development on the coast.
> (e) Encourage state and local initiatives and cooperation in preparing procedures to implement coordinated planning and development for mutually beneficial uses, including educational uses, in the coastal zone.

(§30001.5.)

The Legislature also determined that public participation was essential to effective coastal management:

> The Legislature further finds and declares that the public has a right to fully participate in decisions affecting coastal planning, conservation and development; that achievement of sound coastal conservation and development is dependent upon public understanding and support; and that the continuing planning and implementation of programs for coastal conservation and development should include the widest opportunity for public participation.

(§30006.)

In order to ensure that these goals and findings were achieved, the Coastal Act explicitly and expansively defined development to mean, inter alia, any "change in the density or intensity of use of land . . . [or] intensity of use of water, or of access" to water:

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

(§30106.)

This "comprehensive scheme to govern land use planning for the entire coastal zone" was enacted because the coastal zone is a "distinct and valuable natural resource of vital and enduring interest to all the people . . . and that existing developed uses, and future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic social and well-being of the people of this state." (*Pacific Palisades Bowl Mobile Estates v. City of Los Angeles, supra*, 55 Cal.4th at p. 793 [quoting §30001 subds. (a), (d)] [citing *Yost v. Thomas* (1984) 36 Cal.3d 561, 565].)

Accordingly, the Coastal Act "requires local governments to develop local coastal programs . . . designed to promote the act's objectives of protecting the coastline and its resources and of maximizing public access" (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles, supra,* 55 Cal.4th at p. 794 [emphasis added]), and relies on local governments in order to achieve "maximum responsiveness to local conditions, accountability, and public accessibility." (§30004(a).) San Mateo County's Local Coastal Plan describes Martins Beach as a location with a "high" level of existing use, particularly for "sunbathing" and "fishing," and indicates there was no fencing restricting access as of 1998, long before the LLCs' purchase. (13 CT 3625, 3792-3797, 3800.)

The Coastal Act is to be "liberally construed to accomplish its purposes and objectives." (§30009.) "Any person wishing to perform or undertake any development in the coastal zone must obtain a coastal development permit." (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles, supra,* 55 Cal.4th at p. 794.)

2. California Courts Interpret "Development" to include a Host of Non-Physical Changes to Property

"Development" under the Coastal Act does not require any physical change or alteration to land. (See *DeCicco v. California Coastal Com.* (2011) 199 Cal.App.4th 947, 951.) "Development" goes beyond "what is commonly regarded as development of real property." (*Gualala Festivals Committee v. California Coastal Com.* (2010) 183 Cal.App.4th 60, 67.) Development includes building and using gates, fences and signs, regardless of their purpose. (See *LT-WR, L.L.C. v. California Coastal Com.* (2007) 152 Cal.App.4th 770, 804-805.)

Included in the host of conduct which is not "commonly regarded as development of real property" (*Gualala Festivals Committee v. California Coastal Com., supra,* 183 Cal.App.4th at p. 67), yet constitutes development under the Coastal Act, is anything that changes the public's access to the coast or ability to use the coast, such as increasing the fees charged to access the coast (see *Surfrider Foundation v. California Coastal Com.* (1994) 26 Cal.App.4th 151), or subdividing property in the Coastal Zone (see *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles, supra,* 55 Cal.4th 783). The Coastal Commission also interprets "development" to include "nonphysical impediments, such as threatening behavior intended to discourage public use of the coastline" because they "represent[] a change of access to water." (See Surfrider's Request for Judicial Notice, Exhibit 1.)

Surfrider Foundation v. California Coastal Commission is instructive in this regard. There, Surfrider sued over the issuance of a CDP that allowed installation of "fee collection devices" at state beaches (physical "development"), but did not address or approve the "imposition of fees" (non-physical "development"). (*Surfrider Foundation v. California Coastal Com.*, *supra,* 26 Cal.App.4th at p. 157.) The appellate court determined that no additional CDP was needed <u>because there was no evidence of a change in use or access</u> resulting from the higher fees. However, the Court made clear that even indirect effects of non-physical actions on access to the coast are within the scope of the Coastal Act:

> Preliminarily, we consider the scope of the Coastal Act's public access and recreational policies. . . . Is this type of indirect effect within the scope of the act's policies? We believe so. [¶] . . . [T]he

> concerns placed before the Legislature in 1976 were more broad-based than direct physical impedance of access. For this reason, we conclude the public access and recreational policies of the Coastal Act should be broadly construed to encompass all impediments to access, whether direct or indirect, physical or nonphysical.

(*Id.* at pp. 157-158 [emphasis added].)

In 2012, the Supreme Court further interpreted "development," in reviewing a suit over subdivisions in the coastal zone. The Supreme Court rejected the contention that "the Coastal Act is concerned only with preventing an *increase* in density or intensity of use." (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles, supra*, 55 Cal.4th at p. 795 [italics in original].) The Court explained, "by using the word 'change' . . . a project that would decrease intensity of use, such as by limiting public access to the coastline . . . is also a development." (*Ibid.* [emphasis added].)

Appellants seek to distinguish and limit the holding in *Pacific Palisades* by asserting that its logic only applies to subdivisions. (AOB 44-46.) This contention misses the point.

Pacific Palisades confirmed two basic tenets of the definition of "development." First, subdividing land in the coastal zone requires a CDP under the Coastal Act. (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles, supra*, 55 Cal.4th at pp. 798, 803-805.) Second, "development" is not limited to preventing increases in use of the coast, but instead is substantially broader and includes any change in the use of or access to the coast. (*Id.* at p. 795.) That holding was not limited to the subdividing of land in the coastal zone, but applies to all conduct that changes use of or the ability to access the coast because it is Coastal Act "development."

Appellants also rely on the testimony of Norbert Dall on the legislative history of the Coastal Act. This, too, is misplaced. First, there is no need to resort to the legislative history of the act to determine the meaning of "change in intensity of use of water or of access" to water. (See §30106.) The phrase is not ambiguous, and there is no need to resort to the extrinsic aids, including legislative history, contemporaneous administrative constructions, the statutory scheme or public policy. (*In re M.M.* (2012) 54 Cal.4th 530, 536.)

Second, Mr. Dall's interpretation of the legislative history did not concern whether Appellants engaged in development, but instead on what the legislative history teaches about whether a permit could be granted were Appellants to submit a CDP application. Mr. Dall testified about changes made during the drafting process to what is now §30211. (9 RT 898:11-918:5.) That section provides:

> "Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation."

(§30211.)

As Mr. Dall acknowledged, this section has nothing to do with whether Appellants' conduct is or is not development, but instead is intended to provide guidance to the administrative agency reviewing a CDP application. Mr. Dall's analysis is wholly distinct from the definition of development. (9 RT 942:12-943:25.) Here, §30211 is irrelevant because the question is not whether a CDP allowing Appellants to conduct development was consistent with, or in contravention of, the Coastal Act. The question

here is whether a CDP was required – and whether Appellants are required to apply for one – and the answer is yes.

Third, Mr. Dall's recitation of the legislative history is cherry-picked to avoid the fact that the Coastal Act's statutory scheme and legislative history support Surfrider. Surfrider's expert witness, Justice Jerry Smith (Ret.), one of the authors of the Coastal Act, testified both about the legislative history and the goals and purposes of the act. As Justice Smith explained, the goals and purposes of the act are to "maximize access to the beach" (6 RT 306:8), to "maximize citizen participation [in] the hearing process, with permits granted by the Commission" (6 RT 307:4-5), and to balance those goals with protection and respect for private property rights (6 RT 306:5-11), which is accomplished by the development permit hearing process. (6 RT 307:16-308:20.)

Thus, while Mr. Dall's testimony was myopically focused on §30211, it is clear from the overall legislative history, the purposes and goals of the act, the statutory scheme, and the statute's command that it be liberally construed (§30009), that whether development has occurred is a much broader (and simpler) question than whether a specific development proposal is consistent with the goals of the Act.

Appellants' takings and constitutional arguments put the cart before the horse and misinterpret or misconstrue what they were ordered to do. The LLCs have been ordered to apply for a CDP. Nothing in the Superior Court's judgment limits or instructs the LLCs in any way as to what they can request to do in their CDP application. The LLCs engaged in development without a CDP. Whether the LLCs could or should receive a

CDP from the County or the Commission is not at issue and is not relevant to this Court's considerations.[8]

Appellants suggest that if its activities constitute "development" under the Coastal Act, then the Coastal Act is unconstitutional. (AOB 55-61.) But even an ordinance that completely prohibits a beneficial use to which the property has previously been devoted is not necessarily unconstitutional.

Whether this land use regulation effects a compensable taking is determined based on whether the regulation substantially advances a legitimate state interest and whether it denies an owner substantially all economically viable use of his land. (See *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 774-775.)

Every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of police powers, the fact that it deprives the property of a beneficial use does not render it unconstitutional. (See *Goldblatt v. Hempstead* (1962) 369 U.S. 590, 592; see also *Golden Cheese Co. v. Voss* (1991) 230 Cal.App.3d 727, 737.)

The classic statement of the rule in *Lawton v. Steele* is still valid today:

> To justify the state in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably

[8] Appellants have long contended based on Mr. Dall's testimony and their constitutional arguments raised here that the County and Commission would have no choice but to grant a permit application. Their belief this is the case is belied by their refusal to participate in the administrative process, despite being ordered to do so by the San Mateo County Superior Court in two separate cases. In any event, Appellants cannot ignore or avoid the requirement to apply for a CDP simply because they believe their application will be granted or denied.

> necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

(*Lawton v. Steele* (1894) 152 U.S. 133, 137; see also *O'Hagen v. Board of Zoning Adjustment* (1971) 19 Cal.App.3d 151, 159.)

When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts but for the Legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome. (*Sproles v. Binford* (1932) 286 U.S. 374, 388-389.)

3. There was Substantial Evidence that Appellants' Conduct Changed the Access to and Use of the Water and Coast at Martins Beach

There is no dispute that Appellants changed the intensity of use of the beach, water and coast at Martins Beach and no dispute that they changed the public's access to the coast at Martins Beach. (11 CT 3120.) The prior owner allowed the public to park on the property and access the coast, usually upon payment of a parking fee. (5 RT 159:10-160:6, 181:16-21, 189:24-190:25, 231:10-20, 7 RT 446:19-26, 492:6-8, 525:1-9, 8 RT 675:25-676:9.) The public also used and accessed the coast via car without paying to park. (5 RT 159:10-160:6, 181:16-21, 189:24-190:25, 231:10-20, 7 RT 446:19-26, 492:6-8, 525:1-9, 8 RT 675:25-676:9.) Members of the public also accessed and used the coast by walking down Martins Beach Road. (5 RT 189:10-190:5.)

The prior owners never did what Appellants have done: permanently block the public's access and use of Martins Beach or permanently close the gate. (7 RT 668:7-669:8.) Prior to 2008, with very limited exceptions for individuals engaging in disruptive

or illegal behavior, members of the public were not asked to leave the property nor were they threatened with trespassing charges. (5 RT 160:7-15, 190:17-25, 231:24-232:18, 7 RT 451:3-5, 8 RT 646:24-648:14.)

For approximately two years after the LLCs purchased the property in July 2008, they allowed the public to access and use the coast upon payment of a fee to park. (7 RT 593:4-25; 13 CT 3899 - 14 CT 4095.) "Parking logs," kept by Appellants, show how many vehicles paid to park at Martins Beach. (7 RT 591:22-592:26; 13 CT 3899 - 14 CT 4095.)

From July 2008 to September 2009, 1,044 vehicles paid the fee and accessed the coast. (11 CT 3097 [Appellants' Objection No. 17], 3116 [overruling the objection], 3122; 13 CT 3899 - 14 CT 4095; 5 RT 121:18-122:1.) During the months of July, August, September and October 2008, Martins Beach was open for just 49 of 123 days, and 277 vehicles paid to park at Martins Beach on those days. (13 CT 3899 - 14 CT 4095.) Appellants then closed the beach from November 1, 2008 through May 1, 2009. (13 CT 3899 - 14 CT 4095.) From May 2, 2009 through September 9, 2009, the beach was generally open to the public and 767 vehicles paid to park at the property on those days. (13 CT 3899 - 14 CT 4095.) No logs were kept for 2010. (7 RT 604:19-25.) In the summer or fall of 2010, Appellants stopped allowing the public to access the coast. (7 RT 547:17-548:19, 602:10-604:25.)

Between September 10, 2009 and the time of the judgment, the gate was closed to the public and hundreds of people were kicked out of the property for trespassing. (11 CT 3122; see also Plaintiff's Trial Exhibit 23.) This changed the use of the coast and the

ability to access Martins Beach, and Appellants admitted as much during the trial. (7 RT 546:12-547:16, 565:17-567:1, 605:6-605:22.)) As trial court found, "Steven Baugher, the manager of the LLCs, admitted changing the intensity of use of the coast and admitted changing the public's access to the coast by closing the gate across Martins Beach Road without a CDP." (11 CT 3120; 7 RT 546:12-547:16, 566:24-567:1, 605:6-605:22.)

The LLCs contend the stifling of access to the coast by individual members of the public is not "development" because, taken alone and dissembled, this conduct does not resemble traditional development. This argument asks this Court to disregard the factual record and the trial courts well-reasoned determinations, as well as the plain language of the Coastal Act and the case law construing §30106.

Even in cases where physical changes themselves are minimal, the consequences of small physical or nonphysical changes for purposes of Coastal Act "development" can have a much larger impact, import and result for purposes of land use planning and permitting requirements, as well as the "social well-being of the people of this state." (§30001(d).)

The concern over adverse impacts of activities in the coastal zone on public access goes back in the legislative history at least as far as 1975 and the California Coastal Zone Conservation Commission's California Coastal Plan. (See *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 162-163.)

> The 1975 plan also warned of indirect or nonphysical impediments to access, including reduction of road capacity and off-street parking, unavailability of low-cost housing and tourist facilities, and the proliferation of expensive recreational facilities. Thus, the

> concerns placed before the Legislature in 1976 were more broad-based than direct physical impedance of access.

(*Surfrider Foundation v. California Coastal Com.*, *supra*, 26 Cal.App.4th at p. 158.)

The trial court found that when the LLCs purchased the property, it contained a billboard and other signage that welcomed public access, prominently displayed along Pacific Coast Highway 1 and that the LLCs painted over that same billboard in order to eliminate public access. (11 CT 3121.)

Appellants assert that every property owner has a constitutional right to paint on their property. While non-objectionable on its face, this argument fails when viewed from the context and perspective of the Coastal Act's mandate to protect existing access from development, which, whether intended or not, changes the intensity of use of the coastal zone and the public's access to the coast. (§30106.)

The same analysis applies to the security guards. They were hired to keep the public out (14 CT 4102-4104) – and while a property owner certainly has a right to protect themselves and their property, the consequence of Appellants' conduct was to reduce the public's access.

By covering the billboard, using security guards, and permanently closing the gate to block the public's use of Martins Beach Road, Appellants impacted the public's use of the coast. (5 RT 160:20-24, 162:22-163:22, 200:11-26, 240:2-243:3, 7 RT 449:25-451:2, 546:12-547:16, 565:17-567:1, 605:6-605:22.) For that reason, the trial court ordered the LLCs to apply for a CDP in order to provide the Coastal Commission with an opportunity

to examine, mitigate, suggest alternatives and ultimately approve or deny the proposed development.

This is Coastal Act development and requires a CDP.

B. Appellants' Claim of a Taking is Unripe and Unfounded

Appellants argue the trial court's order that it maintain historical public access until and unless it applies for a CDP to change that access is a "regulatory taking." This is not the law.

Appellants' takings arguments demonstrate a misunderstanding of the Coastal Act and misconstrue the trial court's judgment. The obligation to apply for a CDP before engaging in development within the coastal zone is not a pre-determination of the legitimacy of proposed development activity. Instead, development is the trigger for the need for a CDP. (6 RT 307:16-308:20.) In reality, whether development is allowable is a determination the County or Commission makes, based upon the Coastal Act's legislated policies and application. (6 RT 308:4-20; see also §§30600, 30600.5.) Once Appellants file an application there will be a public deliberative process (see §§30620.5, 30620.6, 30621, 30622), and if Appellants (or anyone else) disagrees with the determination, they may then initiate judicial review. (See §30801.) That is the appropriate venue for the LLCs to raise its takings concerns.

Viewed in this light, the Commission's jurisdiction and right of review, combined with the LLCs' refusal to submit a CDP application, makes their arguments on the merits of the review of that application unripe for review. Ripeness only arises following a decision on a CDP application.

Surfrider has no quarrel with the general proposition that under certain circumstances, an injunction can constitute a taking of private property (whether characterized as a "judicial taking" or deprivation of due process). Those circumstances do not exist here because the trial court's order only restores the historical status quo of public access, until and unless Appellants seek and obtain a CDP allowing them to end that use. It is no different than a court order enjoining a property owner from developing property without first applying for the permits required by law.

A "regulatory taking" occurs when a governmental agency, in the exercise of its police power, adopts or enforces a regulation that "goes too far" (*Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415), either by failing to substantially advance legitimate state interests or by denying the owner all economically beneficial use of his land (*Lucas v. S.C. Coastal Council* (1992) 505 U.S. 1003 [hereafter, "*Lucas*"]; see also *Healing v. California Coastal Com.* (1994) 22 Cal.App.4th 1158, 1169.)

Our courts have identified two discrete categories of regulatory action that constitute a taking. The first type of taking is a direct government appropriation or physical invasion of private property, and the second is when the regulation constitutes an exaction that amounts to a per se physical invasion (*i.e.* when a public entity conditions approval of a proposed development on the dedication of property to public use). (See *Lingle v. Chevron, USA, Inc.* (2005) 544 U.S. 528, 538, 548; see also *Action Apartment Ass'n v. City of Santa Monica* (2008) 166 Cal.App.4th 456, 460.)

1. Appellants' Takings Claim is not Ripe

A takings claim that challenges the application of regulations to particular property, must be ripe for consideration. Such a claim is not ripe until "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." (*Williamson County Reg'l Planning Com. v. Hamilton Bank* (1985) 473 U.S. 172, 186.)

The reason for this rule is that such a final decision allows a court to make the constitutional determination whether a regulation has deprived a landowner of "all economically beneficial use" of the property, such that a taking has occurred. These matters cannot be resolved in definitive terms until a court knows "the extent of permitted development on the land in question." (*Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 618.) The threshold question in resolving this issue of the extent of permitted development, is whether the landowner has obtained a final decision from the agency that determines the permitted use of the land. (*Ibid*.)

In *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, our Supreme Court explained that the impact of a regulation on the owner's right to use or develop property cannot be assessed until a final administrative decision has been reached, because the court "cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes.'" (*Id.* at p. 12.)

Finality is satisfied "when there is no question how the regulation applies to the property, and where the land-use agency has no discretion to modify or adjust the

application of the regulation to the property." (*Suitum v. Tahoe Reg'l Planning Agency* (1997) 520 U.S. 725, 739.)

Thus, the impact of a regulation on an owner's right to use or develop property

> cannot be assessed until an administrative agency applies the ordinance or regulation to the property and a final administrative decision has been reached with regard to the availability of a variance or other means by which to exempt the property from the challenged restriction. A final administrative decision includes exhaustion of any available review mechanism. Utilization of available avenues of administrative relief is necessary because the court cannot determine whether a regulation has gone too far unless it knows how far the regulation goes. A claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.

(*Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263, 281 [citations and quotations omitted].)

In *Lucas*, the Supreme Court analyzed whether a claim for a taking was ripe in the context of a development statute. In response to Justice Blackmun's dissenting opinion contending that the newly amended ordinance rendered the takings claim unripe, because the property owner had not applied for the newly-allowed permit (*Lucas, supra,* 505 U.S. at pp. 1041-1042), the majority held that "such a submission would have been pointless, as the [State] stipulated below that no building permit would have been issued under the 1988 Act, application or no application." (*Id*. at p. 1014, fn. 3.)

Lucas teaches, therefore, that when an ordinance utterly prohibits development of a property, without exception, and without the opportunity to seek variances or appeals, and the land use agency admits that no permit would be issued even if an application was

submitted, the property owned need not file any application in order to ripen the takings claim. But that is not the situation here where the Coastal Act does not prohibit development and the property owner has not sought a CDP.

Appellants' reliance on *Koontz v. St. Johns River Water Mgmt. Dist.* (2013) ___ US ___ [133 S.Ct. 2586] is misplaced. There, the property owner made a permit application for development, which was denied after the District "suggested" the owner " "could obtain approval by signing over [an] interest [in his land]." (*Id.* at p. 2591.) The Supreme Court held that there is no difference between a regulatory agency granting a conditional permit and denying one on the basis of the landowner's refusal to accept a condition (*Id.* at p. 2597.) But Appellants have not applied for a CDP, and no one knows whether the Coastal Commission will go "too far" in a manner that might constitute a taking.

Nor is the trial court requiring Appellants to operate or seek a CDP to operate an unprofitable business.

Appellants claim that public usage of the beach was low in 2008 and 2009 after they purchased the property, is of no legal significance to this appeal. The reduction in public access was the result of the Appellants' actions that were intended to minimize the historical use. (7 RT 617:25-618:8, 9 RT 883:22-26; 14 CT 4182.) That Appellants' unpermitted development activities were successful in reducing public access has no bearing on whether such development requires a CDP.

Nor is *Horne v. Dept. of Agriculture* (2013) ___ U.S. ___ [133 S.Ct. 2053] controlling. There, plaintiffs appealed an administrative law judge's determination that

they were 'handlers" and not "producers" of raisins, based on which a judicial officer imposed $200,000 in fines and $492,000 in assessments. Plaintiffs claimed that the fine was an illegal taking; the Supreme Court agreed that the plaintiffs had a right to assert a takings defense to the fines and assessments. Here in contrast there are no fines or assessments. *Horne* states that a takings claim is premature until the government "has both taken property and denied just compensation." (*Id.* at p. 2062.) Here, neither has happened meaning the claim is premature. (See *MacDonald v. County of Yolo* (1986) 477 U.S. 340.)

In short, Appellants' takings claim is premature unless and until Appellants apply for a CDP and the Coastal Commission acts to take their property without paying them just compensation.

2. Even if the Claim is Ripe, There Has Been No Taking of Private Property

Further, even if the takings claim were ripe, the trial court order does not constitute a taking.

First, there has been no factual determination that the Coastal has deprived Appellants of "any reasonable economic use" of the property or rendered it valueless. (*Lucas*, at p. 1009.) Indeed, Appellants' counsel, Joan Gallo, testified that it was "nonsense" that the existence of public access across Martins Beach Road would make the property "useless" to the owner. (8 RT 717:15-18, 718:12-14.) Even if enforcement of the Coastal Act significantly reduces the value of the property, that reduction is

insufficient to constitute a confiscatory taking. (*Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1278-1279.)

Second, Appellants were aware prior to their purchase of the property that parking and public access existed and would have to continue, and that closure of the beach was development under the Act. (13 CT 3857-3858.) Appellants purchased the property in the Coastal Zone 32 years after the passage of the Coastal Act and with actual knowledge that the property was subject to public access and public parking. (See §IV.A., *supra*.)

In this context, Appellants have not been deprived of any economic use of the property, let alone a sufficient deprivation to constitute a taking.

> Whether the owner has been denied substantially all economically viable use of the property is a factual inquiry that requires the analysis of such factors as the economic impact of the regulation, interference with the landowner's reasonable, investment-backed expectations and the character of the government action. The basis of the inquiry is the owner's entire property holdings at the time of the alleged taking, not just the adversely affected portion.

(*Buckley v. California Coastal Com.* (1998) 68 Cal.App.4th 178, 193 [citations omitted].)

Here, the trial court's findings, supported by substantial evidence, show the LLCs were aware of the existence and requirement to maintain access for the public before they purchased the property. (13 CT 3857-3858; 7 RT 606:20-607:6, 609:20-612:5.) Thus, even if the takings claim was "ripe," there was no evidence that San Mateo County, the Coastal Commission, or the trial court's judgment impacted the LLCs' reasonable investment-backed expectations.

Nor has the trial court ordered Appellants to "run a business." Appellants are only required to maintain the historical status quo of allowing the public to access and use

Martins Beach until they apply for (and receive) a CDP allowing a that use and access. The trial court has not required Appellants to pay a parking attendant to be present, as long as the gate remains open. Nor did the trial court order Appellants to repair bathrooms or hire employees.

3. Appellants Have Not Been Deprived of the "Right to Exclude"

Nor have the LLCs been deprived of any economic use of the property. The trial court merely ordered Appellants to maintain the historical beach access until and unless it applied for and receives a CDP allowing it to curtail or modify that historical use. There has been neither a temporary or a permanent regulatory taking. To the extent the trial court order deprives Appellants of the "right to exclude," that right was no longer extant when the LLCs acquired the property. (See *Buckley v. California Coastal Com., supra,* 68 Cal.App.4th at p. 193.) If the LLCs now want to change the historical use by blocking public access to the coast, it must first apply for and obtain a CDP.

Nor is that right as absolute as Appellants contend. In reality, the "right to exclude," while an essential property right, is only violated where there is a "permanent physical invasion." (*Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 432.) Because there is no "permanent physical invasion" of Appellants' property, even if their claim of a taking was ripe, their right to exclude has not been violated.

Ultimately, one of the core principles of the Coastal Act is to maximize public access to the coast, to the extent feasible, while balancing sound resources conservation principles and constitutionally protected rights of private property owners. (*City of Dana Point v. California Coastal Com.* (2013) 217 Cal.App.4th 170, 185.) Thus, subject to

certain exceptions, the Coast Act requires that "[P]ublic access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects." (§30212(a).)

There is no constitutional right to own property free from regulation, and neither the state nor the federal constitutions guarantees any person absolute liberty of action. (*Whaler's Vill. Club v. Cal. Coastal Com* (1985) 173 Cal.App.3d 240, 253.) Property ownership rights that are "reserved to the individual by constitutional provision, must be subordinated to the rights of society. It is now a fundamental axiom in the law that one may not do with his property as he pleases; his use is subject to reasonable restraints to avoid societal detriment." (*Ibid*.)

C. The Court's Decision Does Not Implicate Appellants' First Amendment Rights

Appellants suggest the trial court "compelled" certain speech in violation of its First Amendment Rights. (AOB 67-69.) But the trial Court's order does not require Appellants to take any action regarding the billboard; it did not order Appellants to restore the billboard to its prior message or to otherwise do anything with the billboard.

The trial court merely found that Appellants' act of painting over the billboard language, which invited the public to use the beach, was "development" under the Coastal Act because it was conduct that changed the intensity of use of the beach. (11 CT 3074.)

The Coastal Commission can regulate signage related to beach access, and such signage is development within the meaning of §30106. (See *LT-WR, L.L.C. v. California*

Coastal Com., supra, 151 Cal.App.4th at p. 805; see also §30210: In carrying out the Constitutional mandate guaranteeing the public a right to "maximum access to the coast" that access shall be "conspicuously posted." (Cal. Const., art. X, §4.)

D. The Court Properly Awarded Attorneys' Fees to Surfrider

The trial court's Order granting Surfrider's Motion for Attorneys' Fees considered all of the relevant factors in accordance with C.C.P. §1021.5. (*Mejia v. City of Los Angeles* (2007) 156 Cal.App.4th 151, 158.) Surfrider Foundation acted on behalf of the public to restore access to Martins Beach and require compliance with the Coastal Act, and it successfully achieved those goals.

Prior to the filing of this case, Appellants refused to apply for a CDP, had ignored San Mateo County's instruction to do so, had ignored the Coastal Commission's instruction to do so, and ignored Judge Grandsaert's order instructing them to do so.

As a result of this litigation, Appellants are now required to provide access to the public "on the same terms and conditions" as their predecessor, and are required to apply for a CDP if they wish to change that historical access. Appellants' contention that this case did not restore "access" and therefore the goals of the suit were not achieved, is disingenuous.

Ultimately, whether Surfrider is eligible for fees under C.C.P. §1021.5 is not dependent on whether Appellants obey the Superior Court's Judgment. Instead, Surfrider is entitled to fees because the legal relationship between Appellants and the public has been changed by this litigation. (See *Vasquez v. State* (2008) 45 Cal.4th 243, 259.)

Surfrider, as the prevailing party, demonstrated that the lawsuit resulted in the enforcement of an important right affecting the public interest, that the benefit was conferred on a large class of persons, that private enforcement was necessary and that the financial burden of enforcement warrants an award of fees. (See *Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1214.)

The trial court agreed that Surfrider had done so. On appeal, Appellants must now affirmatively demonstrate an abuse of discretion. (*Ebbetts Pass Forest Watch v. California Dept. of Forestry and Fire Protection* (2010) 187 Cal.App.4th 376, 381.) Appellants do not meet that burden.

1. The Litigation Vindicated Important Rights Affecting the Public Interest

Surfrider filed this lawsuit on behalf of the public's interest in enforcing the Coastal Act and the constitutional guarantee of access to the coast and ocean. (§30210; Cal. Const., art. X, §4; see also 1 RT2 3, 4, 7; 1 RT2 289; 2 RT2 300.) The enforcement of statutes that protect the public interest are sufficient to demonstrate the vindication of important public rights under C.C.P. §1021.5. In *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, attorneys' fees were sought under C.C.P. §1021.5 in a lawsuit to require compliance with CEQA by requiring the defendant to prepare an environmental impact report. On appeal, the defendant argued that no important right was vindicated until the EIR was prepared

> because the failure to have an EIR prepared was merely a procedural error and was not of statewide importance or effect. The trial court, however, correctly determined that plaintiff's suit effectuated the

> strong State policy expressed in [CEQA] and had the result of enforcing important environmental laws.

(*Friends of "B" Street v. City of Hayward, supra,* 106 Cal.App.3d at p. 993 [quotations omitted].)

The Court explained that, in passing CEQA, the legislature

> enacted a logical and carefully devised program of wide application and broad public purpose. In many respects the EIR is the heart of CEQA. The report . . . may be viewed as an environmental "alarm bell" whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return. An important statutory policy was effectuated in the present case, and the private attorney general theory (as codified in Code Civ. Proc. §1021.5) may encompass effectuation of statutory as well as constitutional rights.

(*Friends of "B" Street v. City of Hayward, supra,* 106 Cal.App.3d at pp. 993-94.)

The same is true here. The legislature, in adopting the Coastal Act, created a program with a wide application and a broad public purpose. The legislature identified those purposes as promoting maximum public access, protecting the coastline and ensuring that all development is taken in a manner that is "carefully planned" and "consistent with the policies of" the Coastal Act. (See §30001(d).) This is consistent with the testimony of both Justice Smith (Ret.) and Norbert Dall, the parties' experts. (6 RT 305:9-308:20, 9 RT 895:25-896:11.)

These rights and interests are constitutional in origin and promote the people's and the legislature's enactment of an overall scheme to protect the coast and promote the

public's ability to use and access the coast.[9] A fee award under C.C.P. §1021.5 is justified when the litigation effects a fundamental constitutional or statutory policy, even without a "concrete gain." (*Beach Colony II v. California Coastal Com.* (1985) 166 Cal.App.3d 106, 112.)

This right to coastal access is an important public right, and Appellants' suggestion that nobody was harmed when they closed the beach and elected not to abide by the Coastal Act is misguided.

2. The Judgment Conferred a Benefit on a Large Class of Persons

Appellants claim the judgment only impacts one property, and therefore it cannot have conferred a benefit on a large class of persons. This ignores that members of the public were prevented from going to Martins Beach as a result of Appellant's conduct. Appellants ignore their own visitor logs (13 CT 3899 - 14 CT 4095) showing the loss of access of thousands of people, and ignore the Declarations submitted by members of the public who were prevented from going to the beach because of Appellant's unpermitted closure of the gate (1 CT2 220-223).

Appellants cite *Pacific Legal Foundation v. California Coastal Com.*, *supra*, 33 Cal.3d 158, but they turn the reasoning of that case on its head. There, the Supreme Court found that the property owners, by vindicating their own private property rights,

[9] The Coastal Act was originally passed as a citizen initiative in 1972 known as Proposition 20. That Proposition had a sunset provision requiring the Coastal Commission to formulate a coastal plan and required the legislature to act to either create a new Coastal Commission or allow it to lapse at the end of 1976. The legislature eventually passed what is now the Coastal Act in 1976. (See 6 RT 301:13-305:8.)

did not confer a "significant benefit" on a large class of people. (*Id*. at p. 167.) The situation here is the reverse. The private property owner lost, and the rights of the general public were vindicated. The class of persons who benefits, includes everyone who has used Martins Beach in the past and who will do so in the future, the six million people who live within an hour of the San Mateo County coast, and the public who has an interest in preserving the statutory policies under the Coastal Act. (7 RT 426:11-427:5.)

Appellants also claim that there is no significant benefit to requiring them to apply for a CDP, because the trial court did not, by its order, "restore" public access. This argument, too, is misplaced and is contradicted by the findings and evidence. The trial court found Appellants' unpermitted conduct impaired public access to and use of Martins Beach and it ordered Appellants to cease preventing the public from accessing the water, beach and coast until resolution of a CDP application. (11CT 3122, 3156.)

3. Private Enforcement was Necessary and Appropriate

Appellants contend that both San Mateo County and the Coastal Commission were pursuing enforcement over the same conduct. This argument lacks merit. Appellants ignore that prior to Surfrider's filing of this lawsuit, the County and the Commission requested that the LLCs apply for a CDP, and that the LLCs responded with litigation against the County and the Commission, which it lost. (13 CT 3616-3622.)

Further, In September, 2011 Appellants explicitly told Surfrider they would not voluntarily restore beach access and were waiting to be sued in an enforcement action. (13 CT 3896-3897.) By March 2013, when Surfrider filed this enforcement action in response to Appellants' invitation, no other suit had been brought by any public entity.

The Coastal Act relies on citizen participation, both through the reporting of unpermitted development, the participation in hearings and investigations into permit applications, and the filing of citizen suits to enforce the Coastal Act. (See §30803(a).)

Appellants' contention that Surfrider has interests of its own that were sufficient to prosecute the lawsuit without the possibility of an attorneys' fee award, fares no better and is baseless speculation. Surfrider acknowledges that it has an interest in seeing Martins Beach open – but the purpose of the litigation and the rationale for bringing the lawsuit go well beyond Surfrider's interests as a non-profit organization.

Surfrider became involved in Martins Beach because of requests from the community, not just its own membership. (5 RT 193:4-12.) Surfrider was working on of both itself and the general public. (5 RT 193:4-12.) Additionally, several trial witnesses were not members of Surfrider, yet were harmed by Appellants' conduct and were vindicated by the judgment. (See 5 RT 152-184 and 7 RT 444-456.)

Additionally, Surfrider worked actively for years to avoid litigation, and specifically sought and offered to work with Mr. Khosla to find a compromise solution on behalf of the community at large. (13 CT 3898.) Mr. Khosla's response, through his counsel, was, effectively, "sue me." (13 CT 3896-3897.) It is disingenuous for Appellants to now claim that the lawsuit was unnecessary and that Surfrider's own interests are protected by its victory.

The trial court considered the relevant and necessary criteria for an attorneys fee award under C.C.P. §1021.5 and the amount awarded was undisputedly reasonably.

Appellants fail to meet their burden that the order was an abuse of discretion, and the trial court's order should not be disturbed.

VII. CONCLUSION

For all of the foregoing reasons, Respondent Surfrider Foundation respectfully prays for an Opinion that affirms the trial court's judgment and attorney fee award in their entirety, and for an award of attorney's fees and costs on appeal.

Respectfully submitted,

Date: March 30, 2016

Eric Buescher

Attorneys Certificate of Compliance (Rule of Court 8.204(c)(1))

1. I, Eric Buescher, am counsel of record for Respondents in the proceeding entitled *Respondent's Brief.* In that capacity, I drafted and assumed responsibility for preparation of *Respondent's Brief.*

2. I have used the software program Microsoft Word to count the words in the brief. The word count according to that program is 13,702. The Brief therefore complies with the maximum words allowed by the Rules of Court.

I declare that the foregoing is true under the penalty of perjury under the laws of the State of California.

Date: March 30, 2016

Eric Buescher

PROOF OF SERVICE

(CCP §§1013(a)(1)(3), 1013(c))

STATE OF CALIFORNIA, COUNTY OF SANTA BARBARA

I am a citizen of the United States of America and a resident of the county aforesaid. I am employed in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action. My business address is 15 West Carrillo Street, Suite 211, Santa Barbara, California 93101.

On March 30, 2016, I served a copy of the attached *Respondent's Brief* on the interested parties in this action as follows:

Hon. Barbara J. Mallach
San Mateo Superior Court
800 North Humboldt Street
San Mateo, CA 94401

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783
(Electronically per CRC 8.212 (c)(2)(A)(i))

{X] MAIL: By placing true copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States Postal Service mail box in the City of Santa Barbara, addressed as above. That there is delivery service by the Unites States Postal Service at the place so addressed or that there is a regular communication by mail between the place of mailing and the place so addressed.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed March 30, 2016 at Santa Barbara, California.

Debra Wheels