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RECENT DEVELOPMENT

BILLIONAIRE CAN'T BUY THE BEACH

D'ereka Bolden¹

I. INTRODUCTION

The present case, *Surfrider v. Martins Beach 1 LLC, et al.*, balances issues of the public's entitlement to the use and enjoyment of open land against the demands of business corporations seeking to own and develop coastal land. The parties here are the greatest examples of these interests. The appellant is a billionaire, credited with co-founding the Sun Microsystems company, who purchased the beach property in question for thirty-seven million dollars.² The appellees are a nonprofit foundation galvanized towards preserving the public's access to beaches for recreation.³ The California Coastal Act that governs the interpretation of the facts in this case is rooted in considerations for the environment, and the inclusion of the public on matters pertaining to development. There are many perspectives at play here, but the most prominent is that of the state of California itself.

On a larger scale, this case is but one in a long line of legislation that evidences the state of California's hold on all attempts of private property owners to fully exercise their property rights over their own land. California has utilized its power to curtail the property rights of private owners across many cases since the passing of their California Coastal Act in 1972.⁴ *Surfrider v. Martins Beach 1 LLC, et al.* shows California's agenda to promote environmental conservation at all costs. In this case, the court opted for a literal interpretation of the definitions provided in the Coastal Act to ultimately decide in favor of the appellees, the Surfrider Foundation.

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² Bill Chappell, *California Court Orders Venture Capitalist to Reopen Disputed Beach*, National Public Radio (August 11, 2017, 1:30PM), <http://www.npr.org/sections/thetwo-way/2017/08/11/542827955/california-court-orders-venture-capitalist-to-reopen-disputed-beach>.

³ *Surfrider Foundation v. Martins Beach 1, LLC*, 14 Cal. App. 5th 238, 1 (2017).

⁴ The California Coastal Act, CAL. PUB. RES. CODE § 30000-0900 (Deering 1982).

II. BACKGROUND / HISTORICAL DEVELOPMENT

A. *Procedural History of Surfrider Foundation v. Martins Beach LLC et al.*

Prior to the appellant's purchase of Martins Beach, the public was permitted to access the beach by entrance from Martins Beach Road using an adjoining parking lot.⁵ Officials from the governing county of San Mateo also informed appellant that there was existing public access to the beach that was "required to be preserved by the Local Coastal Program."⁶ In September 2009, appellants prevented the public from accessing the beach by closing the gate at the entrance, posting a sign that read "no access," and painting over a billboard that advertised admission to the beach and the public parking lot.⁷ Appellees also stated that security guards were employed to prevent the public from entering.⁸ These actions prompted the San Mateo County Planning and Building Department to send an "Informal Warning Letter" to appellants stating that they may be found to be in violation of the Coastal Act because they were changing the, "intensity of use of water or access thereto," by limiting the public's use of the beach.⁹ Seeing no change in the appellants' actions, the California Coastal Commission and the San Mateo County government sent additional notices to appellant stating that the closure of the beach was unlawful without a coastal development permit, because their actions constituted "development" under the Coastal Act.¹⁰ Appellants responded to these notices stating that the public's access to the beach was conditioned on the property owner's discretion, and was exempt from government regulation because there was no easement granted on the property.¹¹

This response, and the continued dismissal of the public from Martins Beach, led the Surfrider Foundation to file suit in March of 2013, requesting injunctive and declaratory judgments. The trial court decided appellant had participated in "development" as defined by the Coastal Act and

⁵ *Surfrider Found.*, 14 Cal. App. 5th 238 at 2.

⁶ *Id.* at 245.

⁷ *Id.* at 245-246.

⁸ *Id.* at 247.

⁹ *Id.* at 246.

¹⁰ *Id.* at 246-247.

¹¹ *Id.* at 247.

entered judgment in favor of appellee in December of 2014.¹² Attorney's fees and other costs were also awarded to Surfrider in May of 2015.

Appellants appealed this decision, and argued that limiting the public's access to the beach was not a form of development, since the court incorrectly interpreted the meaning of development under the Coastal act. Appellant also argued the requirement to apply for a coastal development permit under this Act was a constitutional violation of the federal and state Takings Clauses. Next, appellants argued the lower courts injunction requiring them to allow the public access to Martins Beach was a per se physical taking. Lastly, appellants argued that the trial court's injunction was a violation of their fundamental property right of exclusion.

The holding of this case would have impacted anyone involved in development, including the public that are impacted by the development of land. The interpretation of the term development, as it was applied under the Coastal Act, provided the state with broad regulatory power. As noted in the case, the term "development" was examined with an "expansive interpretation."¹³ The court makes it clear that development is not confined to its basic meaning that would encompass actions such as, "constructing or demolishing a building."¹⁴ It is the liberal interpretation of the term development that propels this case forward, where other arguments are quickly shut down in this opinion.

B. *The California Coastal Act*

The California Coastal Act was enacted to carry out the environmental policy passed by Congress, in order to provide tools to local municipalities to manage the Nation's coastlines and related natural resources.¹⁵

¹² *Id.* at 248.

¹³ *Id.*

¹⁴ *Id.* at 251-252.

¹⁵ The California Coastal Act, PUB. RES. CODE § 30001.5 (Deering 1982). This section of the Code provides the "Basic Goals" of the Act which are 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 coop-

Congress passed Title 16 U.S.C. 1451-1464 in 1972, which provided the policy guidelines for the California State Legislature to pass legislation provisions, like the Coastal Act, that would provide much guidance to the court in deciding this case.¹⁶ This Act is also a source for the court's definition of the term "development," which subsequently became a major dispute raised by the appellant in this case. Section 30106 of the Act, which defines "development as, "on land, in or under water... change in the intensity of use of water, or of access thereto..., " played a major role in the analysis of the appellant's argument.¹⁷

"The [California] Coastal Act of 1976 was enacted by the Legislature as a comprehensive scheme to govern land use planning for the entire local zone of California."¹⁸ A stated purpose of the Act is "protection of the state's natural and scenic resources...."¹⁹ Another stated purpose of this legislation is to, "maximize public access to and along the coast and maximize public recreation opportunities in the coastal zone...."²⁰ These purposes, in addition to other stated goals of the Act, are evidence that there were many policy rationales that could have also swayed the court's opinion in this case.

III. ANALYSIS

A. *Effect of this holding on the interpretation of development*

Whether the appellants violated the terms of the Coastal Act was dependent on the court's interpretation of the term "development." The broad application of this term influenced the decision against the appellant and is one of the larger factors that caused the appellant to lose the case. It is admitted, in this opinion, that the definitions given to the term, "development," are not those of conventional wisdom; instead section 30106 of the Coastal Act explains what is within the realm of development.²¹ This

eration in preparing procedures to implement coordinated planning and development for mutually beneficial uses, including educational uses, in the coastal zone."

¹⁶ *Id.*

¹⁷ *Surfrider Found.*, 14 Cal. App. 5th at 246-48.

¹⁸ *Id.* at 249.

¹⁹ *Id.*

²⁰ *Id.* at 250.

²¹ This section of the Coastal Act includes the following in its definition of development, "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

section states that the activities encompassed in the term “development” are categorized as such because they, “significantly change the nature of the land or a structure built on the land in question.”²² This quote gives some explanation as to why the term must be interpreted so broadly that it affects a range of environmental activity. As previously stated, the Act was created with the intention to conserve environmental resources, and provide a means to ensure the public’s continued use of these resources. This statutory motivation further adds to the appellee’s argument to allow the continued access and use of the beach to the public.

B. *Effect of this holding on the constitutional interpretation of the Takings Clause*

The holding pertaining to the Takings Clause²³ did not greatly affect the law, as the court found the appellant’s argument for a violation of the Takings Clause²⁴ was not ripe to be reviewed.²⁵ It was held that appellant’s claim was not ripe for review because their claim was dependent upon having actually applied for a coastal development permit.²⁶ Ultimately, the court found that there was no taking of appellant’s land because their actions required that they follow the appropriate administrative process to apply for a development permit.²⁷ The court’s explanation was as follows, “a requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself ‘take’ the property in any sense, after all, the very existence of a permit system implies that permission may be granted.”²⁸ Therefore, this premise of the appellant’s argument was not ripe for consideration until they had exhausted the administrative process available to them. The court found it could not evaluate the appellant’s argument

any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes.....” *Id.* at 250.

²² *Id.* at 251.

²³ U.S. CONST. amend. V.

²⁴ *Id.*

²⁵ *Surfrider Found.*, 14 Cal. App. 5th 238, at 259.. The Takings Clause of the United States Constitution guarantees that no person’s property will be taken by the government, without being compensated fairly for its value. The fifth amendment of the constitution guarantees this. “nor shall private property be taken for public use without just compensation” U.S. Const. amend. V.

²⁶ *Id.* at 258.

²⁷ *Id.* at 257.

²⁸ *Id.*

on this issue, but then proceeded to evaluate the argument anyway to show how it was unsuccessful. By notifying appellant that there were still administrative options to be pursued, prior to bringing suit, there was too much legislative deference to those enforcing the provisions of the Coastal Act, when the court could instead evaluate the permissibility of the terms of the Act itself. For example, there was no explanation to justify the administrative provisions that the appellant must pursue to receive a solution for their problem. The court merely states the appellant needs to pursue the process provided by the Act, and then appeal to the court as a last resort.

However, this was the crux of the court's evaluation of the appellant's argument because Martins Beach 1, LLC attempted to argue that there were other constitutional violations of the Takings Clause, including a per se physical taking,²⁹ where the lower court's injunction allowed the public to enter Martins Beach.³⁰ Appellant's argument was again rejected, but this time it was stated that their decision was based on the appellant's lack of providing factors as support for their argument.³¹ It was then held that there may be support for this issue where it can be shown that regulation passed by another branch of government, namely the legislative branch, essentially diminishes an owner's rights to their property.³² Multiple scenarios where a per se taking of property has been found were provided, including, "regulations that completely deprive an owner of all economically beneficial use of her property, as well as government action that requires an owner to suffer a permanent physical invasion of her property."³³ It was also stated that aside from these instances, per se takings arguments must be evaluated on a case-by-case basis because they, "turn on situation-specific factual inquiries."³⁴ Other factors should be provided by a party arguing this issue as support for their argument as stated in this opinion, including "the economic impact of the regulation.... and the character of the government action."³⁵ Because the appellant failed to provide an argument that showed that they were negatively affected by some legislative regulation, and also failed to use any of these stated factors, there was not a holding in their favor on this issue.

²⁹ U.S. CONST. amend. V.

³⁰ *Surfrider Found.*, 14 Cal. App. 5th at 263

³¹ *Id.* at 272.

³² *Id.* at 258-59

³³ *Id.* at 264.

³⁴ *Id.*

³⁵ *Id.* at 265.

The evaluation of appellant's per se takings claim assisted the property owner here because the court hints at ways their argument could have been strengthened. It appears as though the court was trying to layout the applicable information for this claim that should be used by a party in order to present a fully supported argument. However, it now seems as though the private property owner has no dog in the fight against the legislator for the court to find they should be able to exercise their full range of rights over their own property, namely being able to exclude the public from using its property.

Feduniak v. California is a similar case where the California Coastal Commission won in a battle against private landowners regarding the use of their property.³⁶ In 2000, the Feduniak's purchased a home in Pebble Beach California for thirteen million dollars.³⁷ When the couple purchased their property, the prior owners, the Bonanno family, already installed a three-hole golf course.³⁸ Sometime during the 1980's, the Bonanno family granted an open space easement to the Coastal Commission that limited development on their property because it was found to be in an "environmentally sensitive habitat area".³⁹ Despite the fact that the Commission stated that their property contained endangered dune vegetation, the Bonanno family still installed a three-hole golf course that they knew violated their easement.⁴⁰

In 2002 the Coastal Commission sought to enforce an open space easement against the Feduniaks that would require them to remove the golf course and begin a plan to restore the vegetation native to the area.⁴¹ After the Feduniak's refusal to comply with their easement, the Commission sought to enforce restoration orders that would require them to restore the dune vegetation native to their property.⁴²

The Coastal Commission won this case, and it was decided that the Feduniaks could not use estoppel to prevent the Commission from requiring them to comply with the open space easement.⁴³ The court was not swayed in favor of the Feduniaks by their claims that the cost of removal was an un-

³⁶ *Feduniak v. California Coastal Commission*, 148 Cal. App. 4th 1346 (2007).

³⁷ *Feduniak*, 148 Cal. App. 4th at 1354-5.

³⁸ *Id.* at 1354.

³⁹ *Id.* at 1352.

⁴⁰ *Id.* at 1354.

⁴¹ *Id.* at 1355.

⁴² *Id.* at 1355-6.

⁴³ *Id.* at 1378.

fair burden to them, and that they would lose significant enjoyment of their property if they had to remove the golf course.⁴⁴ It was stated that, “the real injury is that they would no longer be able to own, see, and use a private golf course.”⁴⁵ Despite the fact that the permit went unenforced for many years, the court found that the Feduniaks had no equitable argument against the Commission. Even testimony from multiple government officials showing they ignored the issue posed by the golf course for many years went ignored. One official testified that as a former member of the Commission, he had no knowledge of the open space easement on the Feduniak’s property, and that he knew the golf course existed for many years prior to the Commission’s enforcement of the easement.⁴⁶ Another official testified that the Commission was so backed-up that it could not enforce compliance with permits due to a lack of staff and funding stating it was, “humanly impossible to continue to visit each parcel to monitor compliance with permit conditions.”⁴⁷ These admissions showing the Commission’s inability to keep up with the work, which was meant to be achieved under the Coastal Act, did not result in a ruling for the Feduniaks.

This holding begs the question of when do we hold the state government accountable, and allow for owners to enjoy their property in the way they see fit? Although this case does not involve an issue of public use of an individual’s property, this is another example of the California government intruding on the rights of the individual in order to supposedly preserve the environment.

C. Effect of this holding on the right to exclude others from your property

In this case, it was found that there was no violation of the appellant’s rights as property owners even though they were not allowed to exercise their right to exclude the public from Martins Beach, due to the lower court’s injunction. The appellees argued there was an established public use of the property that entitled them to access the land, which the court declined to accept.⁴⁸ It was instead decided that despite this historical practice, there was no right of the public that was, “recorded or judicially deter-

⁴⁴ *Id.* at 1379.

⁴⁵ *Id.* at 1380.

⁴⁶ *Id.* at 1356.

⁴⁷ *Id.*

⁴⁸ *Surfrider Found.*, 14 Cal. App. 5th 238 at 26-7.

mined,” which would have created a permanency for the public to be able to access the land.⁴⁹ There was a compromise on this issue because they found the injunction could only temporarily restrict appellant’s rights to exclude the public from their land until a further judicial determination was made. This determination allowed the appellant’s a small win because the court acknowledged that aside from the injunction, there was other evidence of judicial action that could show the public was entitled to long-term use of their land. Despite the ruling on the other issues presented in this case, which clearly put the rights of society above that of the individual, the court was reluctant to state this in their holding, and rightfully so. The court’s hesitation to agree with the appellees in this case, and portray a broad holding on this issue, shows some restraint in its decision that works in favor of the appellant, the majority of this holding.

D. Effect of the Supreme Court’s denial of certiorari in this case

Perhaps viewing the direction of this holding as inspiration to carry forward, appellant Vinod Khosla continued his legal pursuit to reaffirm the protection of individual property rights by petitioning the Supreme Court. Mr. Khosla cited his decision to continue litigation in this matter on his belief that the protection of individual property rights needed to be reaffirmed.⁵⁰ In his words “once you’re there in principal, you can’t give up principal.”⁵¹ Mr. Khosla’s final appeal to the Supreme Court posed a risk to the strength of the California Coastal Act and the miles of coastal land it was enacted to protect, but in his opinion, it was worth it as he stated “I don’t want to weaken it by winning.”⁵² “But property rights are even more important.”⁵³ Proponents of Khosla have argued that the repercussions of a decision in his favor from the Supreme Court could greatly affect beach access in locations beyond the area of their dispute.⁵⁴

⁴⁹ *Id.*

⁵⁰ See Nellie Bowles, *Every Generation Gets the Beach Villain it Deserves*, NEW YORK TIMES (Aug. 30, 2018), <https://www.nytimes.com/2018/08/30/technology/vinod-khosla-beach.html?module=inline>,

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See Martin Wisckol, *Martins Beach Access: Supreme Court Declines to Hear Challenge of California Coastal Act*, THE ORANGE COUNTY REG. (Oct. 1, 2018 at 7:45 am),

Ultimately, On October 1, 2018 the Supreme Court denied certiorari to rule on the issues presented by this suit.⁵⁵ Counsel for the Surfrider foundation applauded this denial, and stated its importance to “secure beach access for all people.”⁵⁶ In no hurry to conceded to defeat, Khosla stated that he and his legal team would next pursue actually completing the administrative process required by the Coastal Commission to request a permit in order to limit the access of the public to the beachfront property.⁵⁷

IV. CONCLUSION

Although the appellant did not win over the California Court of Appeals with any of his arguments, it’s ruling initially showed promise for a new pattern to be established in some areas of the law. The interpretation of the term “development” by this court is notable because of how expansionist it is. Although the court notes it applied a literal interpretation of the term according to what was provided by the Coastal Act, the expanded interpretation of the term is arguably the basis to allow the act to have such a far regulatory reach. Despite this expansion in legal interpretation, the court also made it clear in its past decisions that they are unlikely to decide against the state government, even where they have grounds to do so. The court’s holding in this case and in *Feduniak* showed the courts deference to the Commission to carry out the legislative purpose of the Coastal Act. The court proved that they were only willing to go but so far to establish the appellees, as representatives of the general public, had grounds to argue the existence of an established right to access the appellant’s land.

Despite this interpretation by the California State Court, appellant’s pursuit to challenge the California Coastal Act’s triumph over individual property rights will never be heard before the ultimate authority, the Supreme Court of the United States. The Court’s denial of certiorari to hear this argument shows the balance between coastal conservation and individ-

<https://www.ocregister.com/2018/10/01/martins-beach-access-supreme-court-declines-hearing-challenge-to-california-coastal-act/>.

⁵⁵ *Martins Beach 1, LLC v. Surfrider Foundation*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/martins-beach-1-llc-v-surfrider-foundation/>. (last visited Jan. 1, 2019).

⁵⁶ See Martin Wisckol, *Martins Beach Access: Supreme Court Declines to Hear Challenge of California Coastal Act*, THE ORANGE COUNTY REG. (Oct. 1, 2018 at 7:45 am), <https://www.ocregister.com/2018/10/01/martins-beach-access-supreme-court-declines-hearing-challenge-to-california-coastal-act/>.

⁵⁷ *Id.*

ual property rights, including that of exclusion, are balanced in favor of environmental preservation. The Court is clearly not ready to limit the protections afforded to the environment or to curtail the availability of the public to access these spaces, even if it means infringing on the rights of an individual to enjoy and exclude others from their property.