

CASE No. D074132

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE**

JAMES LINDSTROM and KARLA LINDSTROM

Plaintiffs and Respondents and Appellant,

v.

CALIFORNIA COASTAL COMMISSION

Defendant and Appellant and Respondent.

**SURFRIDER FOUNDATION'S APPLICATION FOR LEAVE TO
FILE *AMICUS CURIAE* BRIEF AND [PROPOSED] BRIEF IN
SUPPORT OF CALIFORNIA COASTAL COMMISSION**

On Appeal From San Diego Superior Court
Case No. 37-2016-00026574-CU-WM-NC
Hon. Ronald F. Frazier

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**TO THE HONORABLE PRESIDING JUSTICE AND JUSTICES OF
THE FOURTH DISTRICT COURT OF APPEAL:**

Pursuant to Rule 8.200(c) of the California Rules of Court, Surfrider Foundation (“Surfrider”) respectfully requests leave to file the attached *amicus curiae* brief in support of California Coastal Commission.

HOW THIS BRIEF WILL ASSIST THE COURT

Surfrider’s proposed amicus brief will assist the Court in two ways. First, it will present the scientific background about how coastal armoring like seawalls can cause the disappearance of sandy beaches, and will highlight the need for forward-thinking development policies that keep coastal armoring from being built. Second, the brief will address fundamental, unresolved questions regarding the interpretation of the California Coastal Act, arguing in particular that the Act authorizes the Commission to prevent the construction of coastal armoring for all new development. The party briefs do not fully address these issues, which are critical to understanding the questions before the Court.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Surfrider is a grassroots nonprofit organization headquartered in Orange County, California and dedicated to the protection and enjoyment of the world’s oceans, waves and beaches. It has more than 500,000 supporters, activists, and members who live in the United States and over

eighty local Chapters and ninety-five school clubs nationwide, including the volunteer-based San Diego County Chapter.

Surfrider has a particular interest in the outcome of the present litigation. The construction of coastal armoring, motivated in part by inadequate setbacks for construction on bluffs, leads to the loss of the sandy beaches that it is Surfrider's mission to protect. The particular beach at issue in this case, in Encinitas, California, is one that Surfrider's members, supporters, and staff regularly use and enjoy for activities such as surfing, swimming, sunbathing, picnicking, walking, jogging, and observing native plants and animals. Moreover, Surfrider participated in the administrative proceedings related to the present dispute by offering public comments. Given its mission, Surfrider also has a general interest in the California Coastal Commission's ability to carry out its legal obligations to protect beaches and maximize public beach access and recreational opportunities in the coastal zone.

STATEMENT REGARDING PREPARATION OF BRIEF

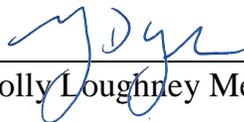
No party or counsel in the pending case authored the proposed *amicus curiae* brief in whole or in part, or made any monetary contribution intended to fund the preparation or submission of the brief. No person other than the proposed *Amici Curiae* made any monetary contribution intended to fund the preparation or submission of this brief.

REQUEST FOR LEAVE TO FILE

Because the decision of this Court will directly affect Surfrider, and because its proposed *amicus* brief brings a unique perspective to bear on this matter, Surfrider respectfully requests that the Court grant leave to file this *amicus curiae* brief.

DATED: April 25, 2019

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INTRODUCTION

California's spectacular shoreline may seem timeless, but in reality its sandy beaches, steep cliffs, and rocky headlands are a work of art endlessly in progress, continually re-sculpted by waves, winds, and tides. Some eighteen thousand years ago, when the glaciers of the last ice age began to melt, the California coastline was five to fifteen miles west of where it lies today. It has been steadily moving landward ever since. Sea-level rise due to climate change will only accelerate this process.

Even as the coast recedes, California's iconic sandy beaches can persist: they will simply migrate landward with the coastal bluffs as long as natural processes of erosion continue to furnish a supply of sand. Manmade coastal armoring¹ interferes with these natural erosion processes by fixing the back of the beach in place, blocking any landward migration or bluff erosion. Wave energy reflecting off a hardened surface then scours the sand in front of the armoring, dissipating the beach. At the same time, the coastal armoring itself obstructs natural sand replenishment, interrupting sediment transport from the bluffs to the beach. Ultimately, armoring leads to the narrowing and eventual disappearance of the beach in

¹ "Coastal armoring" is a general term embracing a variety of artificial structures built along the coast, including riprap (piles of large rocks), revetments (structurally reinforced riprap), seawalls (walls built at the back of the beach), and bluff stabilization devices (usually concrete reinforcement of bluffs). Gary Griggs et al., *Living With the Changing California Coast* 118-25 (2005) [hereinafter *Changing California Coast*].

front of it, with the loss of significant recreational and ecological benefits for the public.

Fortunately, careful planning can make coastal armoring unnecessary. In California, ultimate authority for coastal planning is lodged in the California Coastal Commission, which the California Coastal Act tasks with protecting coastal resources and public access along the coast. The case now before the Court began when the Commission approved a permit for the construction of a new home in Encinitas, attaching to the permit several special conditions designed to protect the local beach by ensuring that no coastal armoring would be constructed in the future. One condition required the owners to set back the house at least sixty feet from the edge of the bluff, while another required them to sign an agreement that no coastal armoring would ever be built for their project. Both conditions – along with the other protective conditions the Commission required – embody sound policy and are consistent with both the Encinitas Local Coastal Program, which governs initial permitting decisions, and the Commission’s broader legal obligations under the Coastal Act, grounded in the California Constitution and the common law public trust doctrine.

The Court’s decision on these permit conditions will establish important precedent for the interpretation of the Coastal Act and the power of the Commission to carry out its mandate of promoting public access to

and conservation of the California coast. California's sandy beaches provide enormous ecological, recreational, and economic value, which the use of coastal armoring threatens to destroy. If the Commission does not have the ability to stop new development from obstructing the natural processes that sustain our beaches even with rising sea-levels, the people of California will ultimately face the loss of beloved sandy beaches and tidelands up and down the coast.

ARGUMENT

I. California's Sandy Beaches Provide Enormous Recreational, Ecological, and Economic Value and Are Protected by State Law and Policy.

California's 1,100 miles of coastline include 310 miles of long sandy beaches.² These areas are a precious public good for the people of the state. Eighty percent of California's nearly forty million people live within an hour of the coast,³ and about two-thirds of Californians visit one of the state's beaches every year.⁴ Nor are Californians the only visitors: between a fifth and a quarter come from elsewhere in the country or from abroad.⁵ In total, southern California beaches receive an average of 129 million

² Gary Griggs, *Introduction to California's Beaches and Coast* (2010) 184 [hereinafter *Introduction*].

³ *Id.* at 1.

⁴ Linwood Pendleton & Judith Kildow, *The Non-Market Value of Beach Recreation in California*, 74 *Shore & Beach* 34, 34 (2006).

⁵ California Department of Boating and Waterways and State Coastal Conservancy, *California Beach Restoration Study* 3-5 (2002).

visits total per year.⁶ In 2016, electronic counters at eight beaches in Encinitas alone logged 2,953,613 visitors.⁷ Altogether, California's beaches receive twice as many visitors annually as do all our national parks combined.⁸ Beaches and the recreational opportunities they offer have profoundly shaped the state's culture, identity, and global image.⁹

These visits naturally have a major economic impact: beach-goers in California spent an estimated \$14 billion on beach-related expenditures in 1998—almost \$22 billion in 2019 dollars—generating further billions in indirect fiscal impacts and tax revenue.¹⁰ The additional non-market value of beaches (the contribution to consumer well-being that is not captured by dollars spent, e.g. in pure enjoyment) was estimated at between \$2.25 and \$7.5 billion in 2006.¹¹

Beaches also have enormous ecological importance for non-human life, providing vital nesting habitat, nursery areas, and haul-out sites

⁶ Ryan H. Dwight et al., *Beach attendance and bathing rates for Southern California Beaches*, 50 *Ocean & Coastal Mgmt.* 847, 850 (2007) (estimating visitors in Los Angeles, Orange, and San Diego Counties).

⁷ City of Encinitas Beach Attendance Report 2016.

⁸ *California Beach Restoration Study*, *supra* note 5, at 9-2.

⁹ *See, e.g.*, the Beach Boys, *Surfin' USA* (1963) (stating that “if everybody had an ocean, across the U.S.A., they'd all be surfin', like California,” and naming various California beach communities, including Del Mar and La Jolla in San Diego County).

¹⁰ Philip King, *The Fiscal Impact of Beaches in California* 3 (1999). The amount in 2019 dollars was computed using the online CPI inflation calculator provided by the Bureau of Labor Statistics at <https://data.bls.gov/cgi-bin/cpicalc.pl>.

¹¹ Pendleton & Kildow, *supra* note 3, at 36.

important for birds, fish, marine mammals and other animals.¹² Many endemic and endangered species in California are dependent on beach environments: for example, grunion need a sandy beach environment in order to reproduce and survive, the California clapper rail is dependent on marshes and wetlands, and the black abalone requires rocky intertidal habitat.¹³ Sandy beaches also provide many crucial ecosystem services: they store and transport sediment, protect inland ecosystems as storm buffers, recycle nutrients, store water in dune aquifers, and filter and purify water.¹⁴

Preserving the coastline, and public access thereto, has accordingly long been a priority in state law and policy. The importance of beaches is fundamentally recognized in the common law public trust doctrine, which provides that the state owns all coastal land below the ordinary high tide line, Cal. Civ. Code § 670, and has continuing supervisory control and a corollary affirmative fiduciary duty to preserve coastal resources for the benefit of the public. *See Illinois Central Railroad v. Illinois*, 146 U.S. 452, 460 (1892) (holding that the state keeps public trust property “in trust for the people of the state that they may enjoy [it] . . . freed from the

¹² California Coastal Commission, *Sea Level Rise Policy Guidance* 63 (2018), https://documents.coastal.ca.gov/assets/slr/guidance/2018/0_Full_2018AdoptedSLRGuidanceUpdate.pdf.

¹³ *Id.*

¹⁴ Omar Defeo et al., *Threats to sandy beach ecosystems: A review*, 81 *Estuarine, Coastal, and Shelf Science* 1, 3 (2009).

obstruction or interference of private parties.”). Traditionally, the public trust doctrine protected “the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes.” *Marks v. Whitney*, 6 Cal. 3d 251, 259 (1971). More recently, California courts have held that the public trust also protects ecological values. *National Audubon Soc’y v. Superior Court*, 33 Cal. 3d 419, 434-35 (1983). This right of public access to the shoreline is indeed so important that it was enshrined in California’s first post-statehood Constitution in 1879 and has remained there ever since. Cal. Const., art. X, sec. 4 (“the navigable waters of this State shall be always attainable for the people thereof”).

Today these common law and constitutional protections for California beaches are given statutory form in the California Coastal Act, which established the Coastal Commission as a permanent agency with broad authority to regulate coastal development. Originally enacted in 1972 as a voter initiative in response to unchecked private development threatening access to beaches, the Coastal Act was subsequently codified by the Legislature to provide permanent protection of coastal access and

resources.¹⁵ The Legislature declared the coastal zone a “valuable natural resource,” the preservation of which is a “paramount concern” to residents of California and the nation. Cal. Pub. Res. Code § 30001(a-b).¹⁶ It moreover prioritized public access to the coast, implementing the guarantee enshrined in the State’s Constitution. § 30210.

II. Coastal Armoring and Shortsighted Development Can Destroy Sandy Beaches.

California’s iconic beaches are not boundless: there are only twenty-four square feet of beach sand area per California resident, about enough space for one or two beach towels.¹⁷ Preserving this public good for the public’s enjoyment, as well as for its broader economic and ecological benefits, requires forward-looking and science-based coastal management policies. One particularly important policy objective should be to avoid the use of coastal armoring, which can lead to the narrowing and loss of precious public beaches.

The lifeblood of a healthy, functioning beach ecosystem is a continuous supply of sand.¹⁸ Sediment weathered from upland rocks and carried to the coast in rivers and streams accounts for most of the sand on

¹⁵ California Coastal Commission, *California Coastal Commission: why it exists and what it does*,

https://www.coastal.ca.gov/publiced/Comm_Brochure.pdf.

¹⁶ All undesignated statutory references are to the California Public Resources Code.

¹⁷ *Introduction*, *supra* note 2, at 1.

¹⁸ *Id.* at 480.

California beaches; much of the rest comes from eroding cliffs along the shore.¹⁹ Waves and currents distribute these deposits along the shoreline, with some sand lost along the way to offshore sinks.²⁰ As a result, beaches become wider in the summer months after winter rains have swelled rivers and delivered sand to the coastal zone.²¹ During the winter storm months, by contrast, waves are higher, steeper and more frequent, moving sand seaward and narrowing the beach.²²

While sandy beaches perennially expand and contract in this seasonal cycle, the bluffs behind them move in just one direction – gradually but irreversibly shifting landward, eroded by the constant motion of sand and water against the cliff face.²³ Retreat can also be episodic, with sudden large bluff erosion events occurring to a greater extent during occasional severe storm events or during El Niño than at other times.²⁴ The erosion rate depends on the geology of a specific location, but in the Encinitas region rates of up to half a foot per year have been observed.²⁵ Even as bluffs erode and the coastline moves back, however, sandy beaches

¹⁹ *Id.* at 46-49.

²⁰ *Id.* at 40-43, 56.

²¹ *Id.*

²² *Introduction, supra* note 2, at 161-164.

²³ National Research Council, *Sea-Level Rise for the Coasts of California, Oregon, and Washington: Past, Present, and Future* 110-11 (2012), <https://www.nap.edu/read/13389/chapter/8>.

²⁴ *Changing California Coast, supra* note 1, at 76.

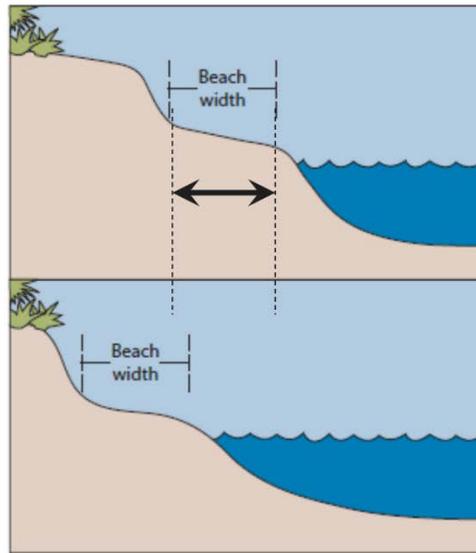
²⁵ Benjamin T. Benumof and Gary Griggs, *The Dependence of Seacliff Erosion Rates on Cliff Material Properties and Physical Processes: San Diego County, California* 67 Shore & Beach 29, 32 (1999).

will be regenerated each year—so long as a supply of sand to the shore is maintained.

Coastal armoring can dramatically disrupt this dynamic cycle.²⁶ In addition to negative visual impacts, impediments to public access, and loss of the beach area taken up by the protective structures, coastal armoring artificially freezes the location of the coastline, preventing the armored bluffs and the beach below from migrating landward as they naturally would. (See Figure 1.) As adjacent, unarmored stretches of the bluff continue to recede, the armored portion of the shoreline is left behind as an artificial headland or peninsula. (See Figure 2.) Sediment transport from bluff to beach is cut off, thereby diminishing sand replenishment. Eventually the sandy beach in front of the protective structure narrows or entirely disappears, scoured away by waves.

²⁶ See generally *Changing California Coast*, *supra* note 1, at 130-34; Molly Loughney Melius & Margaret R. Caldwell, *California Coastal Armoring Report: Managing Coastal Armoring and Climate Change Adaptation in the 21st Century* 8-9, Stanford Law School, Environment and Natural Resources Law & Policy Program Working Paper (2015). <https://www-cdn.law.stanford.edu/wp-content/uploads/2015/07/CalCoastArmor-FULL-REPORT-6.17.15.pdf>

Normal Beach Retreat



Blocked Beach Retreat

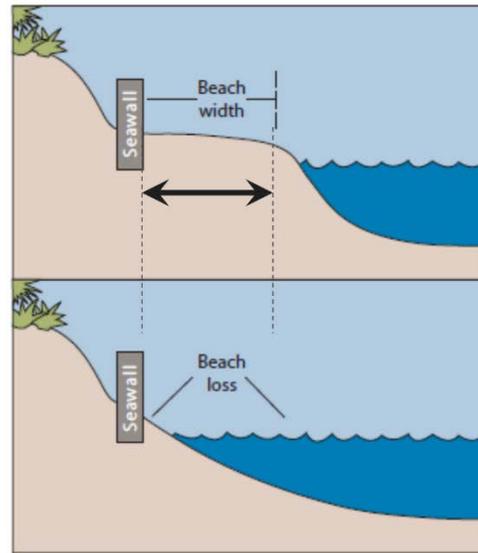


Fig. 1. Diagram showing how armoring prevents beach migration and will lead to the total loss of the beach over time.

Unfortunately, due in part to improvident development, the percentage of the California coastline with coastal armoring quadrupled between 1971 and 1992, reaching one tenth of the entire California coast by 2000²⁷ – and putting the State’s beaches under serious threat. Beach loss due to costal armoring is a particularly serious issue for Southern California beaches, some of which are already at risk of long-term, non-reversible erosion.²⁸ These beaches get up to 60% less sand from local rivers, which are small to begin with due to low rain levels and are often dammed or made to flow in concrete channels.²⁹ Sand replenishment therefore depends

²⁷ *Changing California Coast*, supra note 1, at 108, 130.

²⁸ *Introduction*, supra note 2, at 228.

²⁹ *Id.* at 159-161, 178-180; *Changing California Coast*, supra note 1, at 478.

to an important extent on the erosion of sandy coastal cliffs – precisely what coastal armoring prevents.



Fig. 2. Riprap placement led to the peninsula effect and beach loss in southern Monterey Bay, California. (The building pictured has since been removed.)

By decreasing beach area, coastal armoring restricts constitutionally protected access and destroys an important public good. Less beach means reductions in the overall quality of the experience for visitors, in overall beach attendance, and ultimately in expenditures from beachgoers.³⁰ A 2002 survey of impacts on use associated with beach changes, including

³⁰ See Linwood Pendleton, et al., *Estimating the Potential Economic Impacts of Climate Change on Southern California Beaches*, 109 *Climate Change* S277 (2011), <http://link.springer.com/article/10.1007/s10584-011-0309-0> (discussing beach attendance impacts from reduced beach size).

erosion, found that “at already narrow beaches like Carlsbad, many people responded that further erosion would deter them from visiting.”³¹

Beach loss from coastal armoring likewise reduces or eliminates habitat for shorebirds and coastal plants and animals.³² A study performed in southern Santa Barbara County found that armored beaches had significantly fewer and smaller intertidal invertebrates, three times fewer shorebirds, and more than four times fewer gulls compared to unarmored beaches.³³ Many endemic and endangered species such as the California clapper rail or the black abalone depend on the full spectrum of coastal environments to survive.³⁴

By exacerbating beach erosion on adjacent waterfront properties, coastal armoring can also damage surrounding property values. One study found that while armoring increases the value of the individual waterfront property that it shields, it decreases the value of neighboring inland or non-waterfront properties.³⁵ And if half of all waterfront properties build

³¹ *California Beach Restoration Study*, *supra* note 6, at 3-18, 3-19; *see also* Linwood Pendleton, et al., *Size Matters: The Economic Value of Beach Erosion and Nourishment in Southern California*, 30 *Contemporary Economic Policy* 223 (2012),

<https://onlinelibrary.wiley.com/doi/full/10.1111/j.1465-7287.2011.00257.x>.

³² Jenifer E. Dugan et al., *Ecological Effects of Coastal Armoring on Sandy Beaches*, 29 *Marine Ecology* 160 (2008),

<https://onlinelibrary.wiley.com/doi/full/10.1111/j.1439-0485.2008.00231.x>.

³³ *Id.* at 164-65.

³⁴ *Sea Level Rise Policy Guidance*, *supra* note 12, at 63.

³⁵ Warren Kriesel & Robert Friedman, *Coping with Coastal Erosion: Evidence for Community-Wide Impacts*, 71 *Shore & Beach* 19, 21-22

armoring, their gain is erased while the value of non-waterfront property still falls. Thus, while coastal armoring may (temporarily) protect one individual property owner, it does so at the expense of neighbors and to the serious detriment of the larger community – a “classic ‘tragedy of the commons’” situation.³⁶

Once a beach is narrowed, few good options remain. Poorly planned construction immediately along the shoreline is now directly threatened by the sea and can require emergency protection, like riprap or supportive pylons, that in some cases covers over the remaining sandy area and cuts off public access.³⁷ To save the beach, communities often resort to renourishment, i.e. artificially adding sand – a process that is both extremely expensive and impermanent, the coastal equivalent of Sisyphus rolling his rock up the hill.³⁸ At Torrey Pines, south of Encinitas, the sand added as part of a 2001 renourishment project costing \$17.5 million all washed offshore in a single storm; although some later returned to the

(2003), <http://coastalchange.ucsd.edu/pdfs/KrieselFriedman.pdf>.

³⁶ *Id.* at 20.

³⁷ *Introduction, supra* note 2, 252

³⁸ *Id.* at 189-90 (“The major concerns with any nourishment project are how much it will cost, who bears the cost, and how long the sand will last. . . . It is unrealistic to expect sand added artificially to a stretch of shoreline to remain when no sand accumulated there naturally.”).

beach, 300,000 cubic meters of sand has been lost.³⁹ A \$160 million beach renourishment project is now planned for the region.⁴⁰

III. Setbacks for Coastal Construction Are a Safe and Forward-Thinking Alternative to Coastal Armoring.

The San Diego region's coastal bluffs are beautiful but treacherous, composed of weak sedimentary rock that is often faulted and cracked.⁴¹ Rates of coastal retreat in the area have already increased significantly since the late 1970s,⁴² and they will likely increase more: current projections for La Jolla's tide gauge, roughly 20 miles south of Encinitas, indicate 1.2 to 2 feet of sea level rise by 2050.⁴³ Within the next thirty-years, sea-level rise will also exacerbate the effects of large El Niño-driven storm events – resulting in unprecedented property damage, erosion, and flood losses.⁴⁴

Given the destructive effects of coastal armoring on public beaches, the best solution to protect coastal property from erosion is to require that all new construction is adequately set back from the coastline. The natural process of bluff erosion in the San Diego area has come to be viewed as a

³⁹ B. C. Ludka et al., *Nourishment evolution and impacts at four southern California beaches: A sand volume analysis*, 136 *Coastal Engineering* 96, 101 (2018).

⁴⁰ *Id.* at 96.

⁴¹ *Changing California Coast*, *supra* note 1, at 478.

⁴² *Introduction*, *supra* note 2, at 262 (discussing the Pacific Decadal Oscillation).

⁴³ *Sea Level Rise Policy Guidance*, *supra* note 12, at 303 ().

⁴⁴ Margaret R. Caldwell et al., *Coastal Issues*, in *Assessment of Climate Change in the Southwest United States: A Report Prepared for the National Climate Assessment* 169 (Gregg Garfin et al. eds., 2013).

“particularly vexing problem” primarily because earlier coastal development was “less than prudent,” often due to “insufficient setback from the cliff edge.”⁴⁵ Such imprudent development led to armoring covering thirty-three percent of the coastline in Southern California.⁴⁶ Setback requirements, such as the one imposed by the Commission in this case, protect private property owners from costly property damage in the future in a way that also respects beaches and the public’s constitutionally protected right to enjoy them. In order for the Commission to fulfill its mandate of promoting public access to and conservation of the California coast, it must have the authority to prevent the construction of coastal armoring by requiring adequate setbacks instead.

Setback requirements for new development are nationally recognized as an effective and forward-thinking alternative to coastal armoring as a means of protecting both private property and public beaches. For example, in Rhode Island, new single-family homes must be set back at least fifty feet from the inland boundary of any coastal feature or thirty times the mean annual erosion rate, whichever is greater.⁴⁷ In Maryland,

⁴⁵ *Changing California Coast*, *supra* note 1, at 474.

⁴⁶ Gary Griggs, *The effects of armoring shorelines—The California experience*, in *Puget Sound Shorelines and the Impacts of Armoring—Proceedings of a State of the Science Workshop 77* (Shipman et al. eds., 2010).

⁴⁷ Rhode Island Coastal Resources Management Program, R.I. Code Regs. Title 650, Chapter 20, 1.1.9(C), <https://rules.sos.ri.gov/regulations/part/650-20-00-1>.

new development must be set back 100 feet or in some cases 200 feet from tidal waters or a tidal wetland.⁴⁸ In Kaua'i County, Hawaii, all structures must be set back a minimum of forty feet from the shoreline and in some cases much more, including up to sixty feet plus seventy times the annual coastal erosion rate.⁴⁹

The particular methodology used by the Commission to calculate the setback required in the permit in this case is supported by the latest science on the evolution of the California coastline and climate change. It is furthermore consistent with a straight-forward and reasonable reading of both the Coastal Act and the Encinitas Local Coastal Program. Section 30253 of the Coastal Act mandates that new construction “[a]ssure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area.” The Encinitas Local Coastal Program implements this provision by requiring that all new development be accompanied by a geotechnical report certifying that the proposed project “will have no adverse affect [sic] on the stability of the bluff, will not endanger life or property, and that any proposed structure or facility is expected to be reasonably safe from failure

⁴⁸ Md. Code Regs. 27.01.09.01, MD Code Ann., Natural Resources, § 8-1808.10.

⁴⁹ Kaua'i County Code, Title IV, Sec. 8-27.3-4, <https://qcode.us/codes/kauaicounty/>.

and erosion over its lifetime without having to propose any shore or bluff stabilization to protect the structure in the future.”⁵⁰

The language in the Program “failure *and* erosion over its lifetime” requires that planning for new development take account of both of the two broad forms in which bluff retreat occurs: sudden slope failure (like landslides involving the entire bluff) and gradual erosion over time. AR 249-50. The setback required by the Commission is designed to ensure that even after seventy-five years of gradual erosion the development would still be safe from sudden slope failure. This was achieved by adding the long-term gradual erosion setback to the setback required for sudden slope failure – a logical approach that should be a model for new development on the coast. In this way, the construction would still be safe from sudden slope failure even at the very end of its predicted economic life – and thus practically guaranteed to never need coastal armoring. Use of this method naturally implies that the new development would be set back at a greater distance than older neighboring structures already further along in their economic life. *Id.* 3725.

This additive methodology is hardly novel or unusual. Since at least 2000, the Commission has used the setback methodology applied in the Lindstrom case throughout the State wherever no local coastal program has been certified. AR 3838. Moreover, the practice of adding the distance

⁵⁰ Encinitas Municipal Code § 30.34.020(D) (emphasis added).

assured by a safety factor of 1.5 today to an expected bluff retreat over an extended lifespan has been adopted by other municipal governments. For example, Point Arena's Local Coastal Program requires new development on a bluff top to "be setback from the bluff edge a sufficient distance to ensure that it will be stable for a projected 75-year economic life."⁵¹

Similar language is found in Fort Bragg's program, which requires an even more expansive 100-year economic lifespan for new development.⁵²

Even if the Commission has not maintained its position on setback methodology with perfect consistency in every case over time, deference is still due. After all, an agency "is not disqualified from changing its mind." *Henning v. Industrial Welfare Comm'n*, 46 Cal. 3d 1262, 1269 (1988) (citing *NLRB v. Iron Workers*, 434 U.S. 335, 351 (1977)). When an agency interpretation shifts, a court must continue to apply a deferential standard of review, unless courts have definitively established another statutory construction precluding the change, which has not occurred in this case. *Id.* at 1269-1270. Such flexibility to change is especially appropriate for an agency charged with reacting to evolving environmental circumstances along a dynamic coastal ecosystem in the era of climate change. While current models indicate a definite trend of rising sea levels, many physical

⁵¹ Point Arena General Plan/Local Coastal Plan, VII.3.3(12) (defining stability in the same manner as Encinitas, i.e. "as maintaining a minimum factor of safety against sliding of 1.5").

⁵² Fort Bragg Coastal General Plan, 7(H), Policy SF-1.4.

processes, such as the dynamics of ice-sheets, glaciers, and oceanic heat uptake, are not fully understood.⁵³ Faced with uncertain projections, increased rapidity of coastal transformations, and constant development of our scientific understanding, the Coastal Commission may need to set new standards in the future.⁵⁴ Such deliberative shifts in response to new information are not a failure of the administrative process, but rather examples of it functioning as intended.

IV. The Coastal Act Authorizes the Commission to Use Waivers to Prevent the Construction of Coastal Armoring for New Development.

The condition imposed by the Commission in this case, requiring the Lindstroms to agree never to build any “bluff or shoreline protective devices,” is supported by the science showing that coastal armoring causes the loss of sandy beaches. A permit for an as-of-yet unbuilt house represents the most straightforward scenario in which such conditions are necessary and fair. Given what we understand today about the dynamics of coastal retreat, the Commission had the responsibility to impose the condition in order to protect public resources and access to the beach.

⁵³ National Research Council, *supra* note 29, at 7.

⁵⁴ As Commissioner Vargas stated at the Lindstrom’s appeal hearing, “as we learn more and more about sea level rise and . . . episodic coastal erosion, bluff-top erosion episodes . . . [we’ve] adapted our policy . . . to fit the new reality and the better ideas we have about climate change.” AR 3757.

Legally, the Commission’s decision to impose the condition is grounded in the Encinitas Local Coastal Program, which states that the city “will encourage the retention of the coastal bluffs in their natural state to minimize the geologic hazard and as a scenic resource” and that “structures for bluff protection shall only be permitted when an existing principal structure is endangered and no other means of protection of that structure is possible.”⁵⁵ This provision, which explicitly implements Sections 30235 and 30253 of the Coastal Act, creates no right to coastal armoring—especially not for a structure that is only planned and thus not yet “existing.” The condition moreover served to directly promote the Program’s stated goal of retaining the coastal bluffs “in their natural state.”

But even if the Encinitas Local Coastal Program were less clear on this point, the Commission could still impose the condition under Section 30253 of the Coastal Act, which bans coastal armoring for all new development. The Coastal Act sets minimum, state-wide standards that the Commission is empowered to enforce in its appellate decisions. Section 30235 does introduce a limited exception to the ban on coastal armoring, but only to allow some coastal armoring for the protection of “existing structures.” This language is most reasonably read as referring to structures already existing at the time of the Act’s entry into force in 1977. When

⁵⁵ Encinitas General Plan, Resource Management Element, Goal 8, Policy 8.5. *See* AR 3843, 3846.

Sections 30235 and 30253 are read together, there is no ambiguity: coastal armoring is not allowed to be built to protect new development.

Even if the Act could be reasonably construed differently, however, the “existing structures” language in Section 30235 should certainly not be read to guarantee a right to coastal armoring for development still in the permitting stage. The Lindstroms ask for the most unnaturally broad reading of the phrase “existing structures,” such that it even includes structures that *do not yet exist*. It would be absurd to apply Section 30235 to a permit analysis, when there is no “existing structure” in play but only a request to build a brand-new house.

On the Lindstrom’s reading, the only thing that Section 30235 would actually prevent would be the preemptive construction of armoring before any structure had been built for it to protect. Once any structure had been built – however improvidently situated – the owners could immediately claim the right, for the sake of an “existing structure,” to build a coastal armoring device. Such abuses have occurred in the past.⁵⁶ To permit them would fundamentally frustrate the Legislature’s aim in the Coastal Act to protect California’s unique coastal resources.

⁵⁶ For example, just after a new cliff-top home in Pismo Beach was built in 1997, the homeowners applied for a seawall to protect the house. The Coastal Commission eventually approved the seawall for the now “existing” house. *Changing California Coast*, *supra* note 1, at 146-47.

A. Waivers Are an Appropriate Way of Enforcing Section 30253 of the Coastal Act, Which Bans Coastal Armoring for All New Development.

The fact that the Act gives municipalities responsibility for implementing the Coastal Act through local coastal programs does not mean that it “giv[es them] sole power . . . to control their land use.” *Douda v. Cal. Coastal Comm’n*, 159 Cal. App. 4th 1181, 1187 (2008). Even once a local coastal program is in place, the Coastal Act still remains the basic law of the state, “set[ting] minimum standards and policies with which local governments within the coastal zone must comply.” *Yost v. Thomas*, 36 Cal. 3d 561, 572 (1984).

The seawall prohibition for new structures in Section 30253 of the Coastal Act is an example of how the Act sets certain clear statewide standards that all municipalities must obey. The section mandates that “[n]ew development shall . . . neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area *or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.*” § 30253 (emphasis added). As discussed above, coastal armoring and similar protective devices transform bluffs and lead to the destruction of beaches, thus necessarily “substantially alter[ing] natural landforms.” The Act therefore effectively bans coastal armoring for all new development on the California coast.

This ban is crucial to furthering the mission of the entire Act. The statute establishes as basic goals of the State to “protect [and] maintain . . . the overall quality of the coastal zone environment,” as well as to “maximize public access” and “public recreational opportunities in the coastal zone.” § 30001.5(a), (c). The ban on coastal armoring for new development furthers these goals by preventing the narrowing and loss of sandy beaches.

The Coastal Commission’s imposition of Special Condition 3(a) to ensure no coastal armoring will be built is a logical and appropriate way of prospectively enforcing the ban in Section 30253. Since at least the late 1990s, the Commission has imposed many deed restrictions on new development like the waiver added to the Lindstrom’s permit.⁵⁷

Given the evolving scientific understanding of the devastating effects of seawalls on public beaches, the mandatory language in Section 30253 of the Act in fact *requires* the Commission to take *some* action to ensure that new development does not require coastal armoring. Although the Commission could have simply waited for the Lindstroms to apply for a permit to construct armoring (and then denied it), imposing the deed restriction in advance was much more fair and efficient, putting not only the Lindstroms but also future owners of the property on notice about the policy mandated by the Coastal Act.

⁵⁷ *Sea Level Rise Policy Guidance, supra* note 12, 165.

B. Section 30235 Allows Coastal Armoring Only to Protect Structures That Already Existed When the Coastal Act Was Passed.

Alongside its ban on coastal armoring for new development, the Coastal Act also includes a narrow exception, permitting limited coastal armoring for development constructed before the Act introduced more careful regulation of coastal construction. Section 30235 thus states that “construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or *to protect existing structures* or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply.” § 30235 (emphasis added). The Encinitas Local Coastal Plan contains parallel language.⁵⁸ A careful reading of the Act makes clear that the phrase “existing structures” should be read as a grandfather clause, which refers only to structures that already existed when the Coastal Act came into force at the beginning of 1977. The Lindstroms thus never actually waived any “right” to build a protective device, since there is no right under the Coastal Act to use coastal armoring to protect *new* development.

⁵⁸ AR 2231; Encinitas General Plan, Public Safety Element, Goal 1, Policy 1.6(e): “bluff repair and erosion control measures. . . *shall be permitted when required to serve coastal-dependent uses or to protect existing principal structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply.*” The italicized words are drawn verbatim from the Coastal Act, with the exception of the word “principal,” which is added in the Local Coastal Program, in an example of a municipality imposing protections higher than the floor found in the Coastal Act.

Statutory terms “must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.” *Dyna-Med, Inc. v. Fair Emp’t & Hous. Comm’n*, 43 Cal. 3d 1379, 1387 (1987). Section 30235 must therefore first of all be interpreted in light of the Coastal Act’s overall purposes, which include protecting the quality of the coastal environment while maximizing public access and recreational opportunities. Given how dramatically coastal armoring damages beaches, the goals of the Act are better served by a narrower exception to the ban than by a broader one, supporting the view that this is a grandfather clause.

Reading Section 30235 as a grandfather clause also avoids an outright conflict with the ban on coastal armoring to protect new development in Section 30253. It is a “cardinal principle of statutory construction . . . that all related statutory provisions must be read together and harmonized.” *Indus. Welfare Comm’n v. Superior Court of Kern Cty.*, 27 Cal. 3d 690, 723 (1980). Individual provisions of the Coastal Act in particular “cannot be considered in isolation” and instead should be interpreted “in light of other provisions of the Act.” *Sierra Club v. Cal. Coastal Comm’n*, 19 Cal. App. 4th 547, 561 (1993). When the “existing structures” language is read as a grandfather clause, the harmony is perfect and clear: Section 30235 governs structures built before the Act’s entry into

force, while Section 30253 imposes a coastal armoring ban for structures built later.⁵⁹

Even if the two sections did express conflicting mandates, the Legislature has specifically declared that conflicts between provisions of the Coastal Act should “be resolved in a manner which on balance is the most protective of significant coastal resources.” § 30007.5. So if the sections conflict, it is the ban on seawalls for new development in Section 30253 – the provision which is more protective of significant coastal resources – that must govern. *See Sierra Club*, 19 Cal. App. 4th at 562 (holding that Section 30233 of Act, according to which “diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted,” did not prevent the Commission from imposing mitigation alternatives, given the conflict-resolution provision in Section 30007.5 and other provisions generally requiring protection of marine resources).

Interpreting Section 30235 as a grandfather clause is buttressed by a consideration of the Act’s other uses of the term “existing.” While not every use of the word in the Act refers unambiguously to the time of passage, some do. A particularly significant example is found in the legislative findings at the beginning of the Act: “That *existing developed*

⁵⁹ An identical policy has been adopted by Oregon as Statewide Planning Goal 18. “Permits for beachfront protective structures shall be issued only where development existed on January 1, 1977.” Or. Admin. R. Chapter 660, Division 15.

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” § 30001(d) (emphasis added).⁶⁰ Here the legislature drew a careful and deliberate distinction between existing development, the construction of which had not been subject to the Act’s requirements, and future development, which would be. Pre-1977 construction would, for instance, almost certainly not have been subject to the kind of scientific setback requirements that the Commission imposed in this case. It is precisely this fundamental distinction between pre- and post-Coastal Act construction that is invoked by the reference to “existing structures” in Section 30235.

C. The Coastal Act Sets Minimum Standards for the Entire State that the Commission Is Empowered to Enforce.

With respect to the basic goals of coastal preservation and access, “a fundamental purpose of the Coastal Act is to ensure that state policies prevail over the concerns of local government.” *Charles A. Pratt Constr. Co., Inc. v. Cal. Coastal Comm’n*, 162 Cal. App. 4th 1068, 1075 (2008).

Within the coastal zone, the Act restricts the traditional latitude granted to municipalities to manage land use in favor of a regime that safeguards a

⁶⁰ Other examples of “existing” in the Act where the word most likely refers to what was in existence at the time of passage include § 30007 (“existing law or any law hereafter enacted”), § 30701(b) (treating “[e]xisting ports” as synonymous with “established commercial port districts”), and § 30703 (“ports shall not eliminate or reduce existing commercial fishing harbor space”).

unique public good held in common by all the people of the State. The Act thus provides for “final [permit] approval to be done by a statewide agency with an eye to statewide policies and limitations,” precisely because the determination of conformity with the Coastal Act “*cannot be completely delegated* to the local entity where it is likely to be subject to local economic and political pressures which cannot so readily influence the Commission.” *City of Chula Vista v. Superior Court*, 133 Cal. App. 3d 472, 489 (1982).

Municipalities may of course impose *more* stringent standards on coastal development, regulate areas like architectural aesthetics that the Coastal Act does not touch, or provide more specific guidance in places where the Act’s mandate is broad or vague. What local governments cannot do is go *below* the Act whenever it sets a clear floor. *Yost*, 36 Cal. 3d at 572. And it is ultimately the Act which the Commission can and must enforce.

These basic principles are illustrated by the Act’s own procedural provisions. Not only must specific local coastal programs be certified by the Commission as complying with the Coastal Act, but prior to approval local governments must pass a resolution that their local coastal program “is intended to be carried out in a manner fully in conformity” with the Act. § 30510. Future amendments to programs must also be approved by the Commission. § 30514(a). Once the Commission certifies a program, the Commission retains appellate jurisdiction over whether permit decisions are

consistent with the program and the Act's coastal access policies. § 30519 (a), § 30603(b). When considering appeals, the Commission reviews each appeal de novo and is empowered to enforce the provisions of the Act directly by imposing "reasonable terms and conditions in order to ensure that [the proposed] development or action will be in accordance with the provisions" of the Act. § 30607. The Commission's appeals decisions then "shall guide local governments . . . in their future actions." § 30625(c). This meticulous statutory scheme makes clear that the Legislature intended for local coastal programs to be interpreted in line with the provisions of the Act, thus guaranteeing a fair and consistent application of the statute along the entire California coast.

The Act does require that appeals to the Commission must be made on the basis of non-conformity with either the local coastal plan or with the public access provisions of the Act. § 30603(b). But this does not mean that the Act's other provisions are irrelevant once a decision has been appealed. As noted above, in considering permit appeals the Commission is empowered to impose "reasonable terms and conditions" to ensure compliance "with the provisions *of this division*" (i.e. of the entire Coastal Act). § 30607. So whatever the original grounds for the appeal, the Commission is allowed, indeed obliged, to consider whether the particular permit is in compliance with all of the law's provisions.

CONCLUSION

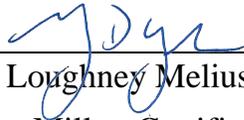
The Coastal Act states that “to protect public and private property . . . it is necessary to protect the ecological balance of the coastal zone and prevent its deterioration and destruction.” § 30001(c). This legislative finding expresses two important insights that undergird the seminal statute. First, the special permitting regime for the coastal zone exists because the coastline itself is an important *public* good, held in trust by the State for the benefit and use of all Californians. The Coastal Commission’s imposition of the waiver and setback to prevent the construction of coastal armoring fulfilled this responsibility mandated by the Act. Second, the forward-looking conservation of the coastal environment is not in tension with, but is in fact a means for, the protection of private property. In this case, the setback requirement imposed by the Commission serves to protect the Lindstroms’ project over the full course of its economic life, while also respecting the public’s right to access and enjoy the beach. The Court should uphold the Commission’s conditions.

DATED: April 25, 2019

Respectfully submitted,

ENVIRONMENTAL LAW CLINIC
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By: _____


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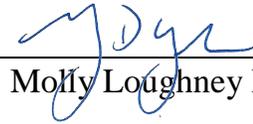
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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I hereby certify that this brief contains 6,902 words, including footnotes, but excluding the Application, Tables, and Certificates. I have relied on the word count of the Microsoft Word program used to prepare this Certificate.

DATED: April 25, 2019



Molly Loughney Melius

PROOF OF SERVICE

ANA VILLANUEVA declares:

I am over the age of eighteen years and not a party to this action. My business address is 559 Nathan Abbott Way, Stanford, California 94305-8610.

On April 25, 2019, I served the foregoing **SURFRIDER FOUNDATION’S APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] BRIEF IN SUPPORT OF RESPONDENT CALIFORNIA COASTAL COMMISSION** on each person identified below by placing a true and correct copy thereof in a sealed envelope, with postage thereon fully prepaid, in the United States Mail at Stanford, California, addressed respectively to each recipient as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed April 25, 2019 at Stanford, California.



ANA VILLANUEVA