

CASA MIRA HOMEOWNERS V. CALIFORNIA COASTAL COMMISSION AND LESSONS FOR CONSERVATION AND CLIMATE ADAPTATION

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INTRODUCTION

Approximately seventy percent of Californians live in coastal communities.¹ That is no accident. The State’s coastline is iconic and central to its identity.² Moreover, California’s marine economy employs approximately 600,000 people, provides \$26.4 billion in wages, and generates \$51.6 billion in GDP.³ Californians have long known the value of their coast and worked to protect it. In 1931, the State Legislature passed a resolution recognizing the coast as “one of the most valuable assets of the State of California” and directing the Department

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1. Deborah A. Sivas, *California Coastal Democracy at Forty: Time for a Tune-up*, 36 STAN. ENV’T L.J.109, 114 (2016).
2. *Id.*
3. NOAA OFFICE FOR COASTAL MGMT., 2022 MARINE ECONOMY REPORT: CALIFORNIA, <https://perma.cc/Z4E3-ZNRJ>.

of Natural Resources to study coastal conservation.⁴ And in the early 1970s, amidst concerns of coastal privatization and a massive oil spill off the coast of Santa Barbara, California citizens passed Proposition 20, a precursor to the California Coastal Act—the State’s comprehensive plan for preserving the California Coast.⁵ In part, the Act established a permitting system—administered by the California Coastal Commission—to regulate coastal development.⁶

But that conservation system is straining. The California Coastal Commission has always faced organized opposition. Monied interests fought the passage of the Coastal Act at every step.⁷ After the Coastal Act passed, those same interests sought to undermine the California Coastal Commission in the courts.⁸

*Casa Mira Homeowners v. California Coastal Commission*⁹ is the latest attack in a decades long effort to frustrate California’s coastal conservation priorities. The case revolves around the use of the word “existing” in the statute’s legacy clause,¹⁰ requiring the Commission to permit protective barriers for some subset of vulnerable structures. The Commission argued that the clause only protected structures that existed before the Coastal Act’s passage.¹¹ The Superior Court interpreted that clause to protect all currently existing structures along the coast.¹² If the Superior Court’s interpretation stands, every property along the California Coast endangered by sea level rise would be entitled to a seawall. The California Coast would transform from a state treasure into a rocky barricade against an encroaching ocean. In the process, vast expanses of California beach would likely disappear.¹³

4. Janet Adams, *Proposition 20—A Citizens’ Campaign*, 24 SYRACUSE L. REV. 1019, 1020 (1973).

5. See generally *id.*; *infra* Part II.C.

6. Earth Alert, *Heroes of the Coast - the Documentary*, YOUTUBE, at 32:04–36:10 (Apr. 12, 2016) <https://perma.cc/UXH6-6ZET> (explaining mechanics of the Coastal Commission).

7. See generally Adams, *supra* note 4.

8. See *infra* Part III; Earth Alert, *supra* note 6, at 39:29–42:20.

9. See Tentative Decision After Court Trial/Hearing on Petition for Writ at 10, *Casa Mira Homeowners Ass’n v. Cal. Coastal Comm’n*, 19-CIV-04677 (Super. Ct. Cal. 2023) [hereinafter “*Casa Mira* Decision”].

10. Some scholarship refers to this reading of the Coastal Act as a “grandfather clause.” See, e.g., Jesse Reiblich & Eric Hartge, *The Forty-Year-Old Statute: Unintended Consequences of the Coastal Act and How They Might be Redressed*, 36 STAN. ENV’T L.J. 63, 66 (2016); Todd T. Cardiff, *Conflict in the California Coastal Act: Sand and Seawalls*, 38 CAL. W. L. REV. 255, 262 (2001). The term “grandfather clause” references discriminatory voting practices that disenfranchised Black people unless they were descendants of a voter. Ngozi Okeh, *Say This Instead: “Grandfathering”*, PRACTICALESG.COM (July 30, 2021), <https://perma.cc/A5R2-WGML>. For the sake of more inclusive language, I use “legacy clause” instead throughout this Comment.

11. See Respondents Cal. Coastal Comm’n and John Ainsworth’s Opposition to Writ at 11–25, *Casa Mira Homeowners Ass’n v. Cal. Coastal Comm’n*, 19-CIV-04677 (Super. Ct. Cal. 2023) [hereinafter “Commission Opposition to Writ”].

12. *Casa Mira* Decision.

13. See Cardiff, *supra* note 10, at 255–56 (“Seawalls damage virtually every beach they are built on. If they are built on eroding beaches—and they are rarely built anywhere else—they

It is important not to downplay the challenge Californians face. Sea level rise will increase coastal flooding by episodic storms and permanent inundation.¹⁴ Modeling from United States Geological Survey scientists suggests hundreds-of-thousands of Californians could be affected.¹⁵ Many of the communities affected will include vulnerable populations without the economic resources to adapt their homes, recover from catastrophe, or move out of harm's way.¹⁶ For many, sea level rise will cause displacement that touches every aspect of their lives.¹⁷ Simply denying permit applications will not produce equitable outcomes or prevent the totalizing impacts of climate displacement. The State must adopt policies that support coastal communities in all manner of adaptation to the impacts of climate change, including relocation if necessary. California's recent legislative action on climate change is a promising sign that the State is proactively addressing climate change. The State's policy tools should backstop the Commission's permitting system, so when the Commission denies a seawall permit other State programs can step into the breach.

Part I discusses the facts of *Casa Mira Homeowners v. California Coastal Commission*, and the Superior Court's interpretation of the Act's legacy clause. Part II analyzes the text and history of the Coastal Act and concludes that a reviewing court should reverse the Superior Court's interpretation of the Act. Part III discusses the lessons to be learned from *Casa Mira Homeowners* for jurisdictions and advocates interested in conserving public resources like the California Coast while equitably mitigating the impacts of climate change on coastal communities.

I. CASA MIRA HOMEOWNERS V. CALIFORNIA COASTAL COMMISSION

From 2003 to 2014, the coastal bluff behind the Casa Mira condominium complex retreated slowly: about 0.3 feet per year.¹⁸ But in the winter of 2016, twenty feet of that bluff collapsed.¹⁹ That collapse threatened a section of the

eventually destroy the beach.”) (citing CORNELIA DEAN, *AGAINST THE TIDE: THE BATTLE FOR AMERICA'S BEACHES* 53 (1999)).

14. See GABRIEL PETEK, *WHAT THREAT DOES SEA-LEVEL RISE POSE TO CALIFORNIA* 3 (2020), <https://perma.cc/NA2K-Q7R8>.

15. Patrick L. Barnard et al., *Dynamic flood modeling essential to assess the coastal impacts of climate change*, 9 *SCI. REPS.* 1, 3–4 (2019).

16. See PETEK, *supra* note 13, at 6.

17. Hannah Perls, *U.S. Disaster Displacement in the Era of Climate Change: Discrimination & Consultation Under the Stafford Act*, 44 *HARV. ENVTL. L. REV.* 512, 514 (2020) (“Displacement is a totalizing phenomenon, affecting virtually every aspect of a person’s life.”) (internal quotations and citations omitted).

18. Complaint for Inverse Condemnation, Declaratory and Injunctive Relief at 15, *Casa Mira Homeowners Ass’n v. Cal. Coastal Comm’n*, 19-CIV-04677 (Super. Ct. Cal. 2019) [hereinafter “Casa Mira Plaintiffs’ Complaint”].

19. *Id.*

California Coastal Trail, a sewer line under the Trail, ten townhomes owned by the Casa Mira housing nonprofit landward of the Trail, and an apartment complex located at 2 Mirada Road.²⁰ In response to the bluff collapse, Casa Mira LLC and the owners of the 2 Mirada apartment complex applied to the California Coastal Commission for an emergency coastal development permit.²¹ With the Commission's permission, the petitioners installed 4,000 tons of protective riprap.²²

Riprap is a layered collection of rocks along the coastline that prevents erosion.²³ As with other types of shoreline armoring, like seawalls, riprap can be extremely helpful. They can stabilize coastal land and protect infrastructure by holding back the sea and preventing erosion.²⁴ But shoreline armoring also restricts the natural movement of sediments that might otherwise replenish the landward beachfront, worsens erosion along adjacent beachfront, and destroys coastal marine ecosystems by preventing their landward migration as sea levels rise.²⁵ Jurisdictions can replenish beaches, but that process is expensive and its benefits are short-lived.²⁶ Entire ecosystems are much harder to restore.²⁷

20. *Id.*

21. *Id.* at 16.

22. *Id.*

23. OHIO DEP'T OF NAT. RES., OHIO STREAM MANAGEMENT GUIDE: RIPRAP REVETMENTS, <https://perma.cc/SD2J-J3DL>.

24. *What is shoreline armoring?*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN (Jan. 20, 2023), <https://perma.cc/FVW7-6GB6>.

25. *Id.*; *The Coastal Squeeze: Changing Tactics for Dealing with Climate Change*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN. (June 14, 2019), <https://perma.cc/NC5F-QFWG>; Mario Koran, *Seawalls ease property owners' fears of erosion—but not for their neighbors*, THE GUARDIAN (Aug. 3, 2022), <https://perma.cc/RHL7-YLT2>; Daniel A. Gross, *Can Seawalls Save Us?*, THE NEW YORKER (Nov. 5, 2023), <https://perma.cc/LJ9U-A2TT> (quoting the California Coastal Commission as saying “[s]eawalls damage beaches by preventing sand from reaching the beach, which eventually causes beaches to shrink until they disappear”); Cardiff, *supra* note 12, at 258 (“Shoreline armoring destroys the beach in three main ways: occupation loss, passive erosion, and active erosion. Occupation loss is simply the area of the public beach that is physically occupied by the seawall. Passive erosion is the narrowing of the beach in front of a seawall because seawalls fix in place the back end of the beach, preventing the retreat of the bluff or shoreline, while the lower beach continues to erode. Active erosion is sand loss caused by waves rebounding off of the seawalls themselves and scouring away the sand.”).

26. Cardiff, *supra* note 12, at 256, 256 n.7.

27. See David Moreno-Mateos et al., *The Long-term Restoration of Ecosystem Complexity*, 4 NATURE ECOLOGY & EVOLUTION 676, 676 (2020) (“Assessments of the restoration performance over different ecosystems worldwide show that, when traditional restoration guidelines based on the recovery of . . . simple metrics are followed: (1) restored ecosystems may only recover part of their lost biodiversity, functions and benefits to societies, even after decades or centuries; and (2) active restoration efforts may not yield better results than naturally regenerating ecosystems.”).

The riprap was effective in arresting further bluff collapse or erosion.²⁸ But the revetment was only an emergency solution. In 2016, the petitioners applied for a regular coastal development permit.²⁹ The plaintiffs initially sought to make their existing revetment permanent. But after discussions with Coastal Commission staff, they applied for a seawall instead.³⁰ To offset the impacts of a new seawall on the local shoreline land supply, the Coastal Commission staff developed a “mitigation package” with the petitioners.³¹ That package included *inter alia* improvements to increase public access to the beach, pursuant to the Commission’s statutory mandate.³²

As part of that discussion, Coastal Commission staff made a number of findings. They found that the Casa Mira townhomes and 2 Mirada apartments would be at risk “within the next two or three storm season cycles” without further protection.³³ They found it unfeasible to relocate the existing structures or the Coastal Trail while maintaining their proximity to the beach,³⁴ or to implement “planned or managed retreat” for lack of a formal program with regulatory guidance and requirements.³⁵ The Coastal Commission staff ultimately recommended that the Commission approve the project because the California Trail was a coastal use and the 2 Mirada apartments were built before the Coastal Act’s enactment in 1972, qualifying them for armoring under Section 30235 of the Act.³⁶ Coastal Commission staff found the project to be consistent with the Coastal Act and recommended that the Commission approve the project.³⁷

The Commission disagreed. The Commission wanted to be consistent in its policy: if it was encouraging managed retreat for private applicants elsewhere, it should do the same for the Coastal Trail.³⁸ So the Commission eliminated the portion that protected the Coastal Trail and planned to relocate the Trail inland.³⁹ The Commission denied a seawall for the Casa Mira townhomes and the sewer line because they were built in 1984—after the Coastal Act’s passage—and did not qualify for protection under Section 30235. So, the Commission

28. Casa Mira Plaintiffs’ Complaint, *supra* note 17, at 16.

29. *Id.*

30. *Id.*

31. *Id.* at 17.

32. *Id.* These public access improvements included a new beach access stairway incorporated into the seawall design, dedicated private blufftop land for public access, landscape improvements to facilitate public access, removal of abandoned timber piles on the beach, a \$10,000 donation to build a second public access stairway to the beach north of the project site, and an agreement that Casa Mira would pay to maintain these public access improvements. *Id.*

33. *Id.* at 18.

34. *Id.* at 18–19.

35. *Id.* at 20.

36. Commission Opposition to Writ, *supra* note 10, at 8–9.

37. Casa Mira Plaintiffs’ Complaint, *supra* note 17, at 17, 21.

38. *Id.* at 25.

39. Commission Opposition to Writ, *supra* note 10, at 8–9.

approved a smaller seawall to protect the apartments at 2 Mirada.⁴⁰ Casa Mira filed suit in the California Superior Court.⁴¹

The plaintiffs sought an order requiring the Coastal Commission to rescind its denials of the planned seawall and a more permanent riprap revetment.⁴² In the alternative, the plaintiffs alleged that the Commission's actions were an unconstitutional taking and sought just compensation.⁴³ Petitioners eventually bifurcated that action for adjudication at a later time, in exchange for the Commission allowing the existing emergency revetment to remain, pending litigation.⁴⁴

The plaintiffs argued that since Section 30235 protected the Casa Mira townhomes as currently "existing" structures, the Commission's permit denial violated the Coastal Act.⁴⁵ Section 30235 reads:

Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such 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.⁴⁶

Under the plaintiffs' theory, Section 30235 entitled the Casa Mira townhomes to protection because it protects all structures that "exist" when they apply for a seawall permit.⁴⁷ The Commission contends the Coastal Act allowed it to deny the plaintiffs' permit application because Section 30235 only protects structures that "existed" before the legislature enacted the Coastal Act in 1976.⁴⁸

On January 10, 2023, the Superior Court entered a tentative decision holding the plain language of the Coastal Act required the Coastal Commission to issue the plaintiffs a permit for a seawall or revetment.⁴⁹ The Superior Court reasoned that because the phrase "shall be permitted" was in the future tense, and the phrase "to protect existing structures" was in the present tense, "a natural

40. Casa Mira Plaintiffs' Complaint, *supra* note 17, at 25.

41. *Id.* at 25–26.

42. *Id.* at 26, 39, 55–57.

43. *Id.* at 54–56.

44. Casa Mira Decision, *supra* note 11, at 2.

45. Casa Mira Plaintiffs' Complaint, *supra* note 17, at 31, 44.

46. CAL. PUB. RES. CODE § 30235 (West 2023) (emphasis added).

47. Casa Mira Plaintiffs' Complaint, *supra* note 17, at 31, 44. The plaintiffs made a similar claim with regard to the Coastal Trail. *Id.* at 28. They argued that the Coastal Trail was a "coastal dependent use" under the Coastal Act since its value was in its aesthetic and recreational value derived from adjacency to the ocean and beach. *Id.* The Commission could not reroute the trail away from the beach consistent with the Coastal Act. *Id.* While this aspect of the case is important, consideration of the Coastal Act's application to the Coastal Trail is beyond the scope of this Comment.

48. Casa Mira Decision, *supra* note 11, at 6.

49. *Id.* at 2, 5–6.

and ordinary reading of the statute is that if a structure *exists* presently, and the existing structure is now in danger from erosion, a seawall or revetment shall be permitted” as long as appropriate mitigation measures are in place.⁵⁰ The Superior Court then rejected the Commission’s reading because it (1) added language to the statute; (2) did not harmonize the statute any more than the plaintiffs’ reading; (3) was contrary to the stated purposes of the Coastal Act; and (4) was an unreasonable interpretation of an unambiguous statute.⁵¹

The Superior Court first argued that the Commission’s interpretation of the Coastal Act inserted the words “prior to the enactment of this statute” into the term “existing” in the relevant section of the Coastal Act.⁵² It reasoned that “adding language to a statute—especially where, as here, the statutory language can be applied as written—is not appropriate. The Coastal Act does not permit the Court to add limiting descriptive phrases to its statutory language.”⁵³

The Superior Court next rejected the Commission’s argument that construing the Coastal Act to protect all structures existing prior to a permit application conflicts with Section 30253 of the Coastal Act.⁵⁴ Section 30253 states that “[n]ew development shall... [a]ssure the stability and structural integrity, and neither create or 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.”⁵⁵ The court—acknowledging its duty to “harmonize the various elements of the Coastal Act”⁵⁶—reasoned that protecting all existing structures did not conflict with this provision of the Coastal Act because the section implicitly prohibited any new development requiring protection.⁵⁷ Thus any development that currently exists but needs protection from coastal erosion cannot be “new development” in violation of Section 30235, but existing development which the Commission must protect.⁵⁸ Because the Court’s reading was reasonable and the Commission’s was not, the statute was unambiguous.⁵⁹

50. *Id.* at 5–6.

51. *Id.*

52. *Id.* at 7.

53. *Id.* (Citing *Surfrider Found. v. Martins Beach 1, LLC*, 14 Cal. App. 5th 238, 253 (2017)).

54. *Id.* at 8–9.

55. *Id.* at 8.

56. *Id.* (citing *Sierra Club v. Cal. Coastal Comm’n*, 35 Cal. 4th 839 (2005)).

57. *Id.* at 8–9.

58. *Id.* (“If a person already had a house on coast-side property, i.e., development that had already been considered by authorities and approved to build and is built, and the situation arises that subsequent erosion necessitates that a seawall (or other fortification) be built to protect the existing (previously approved) home, then Section 30235 would allow such seawall construction.”).

59. *Id.* at 7.

As such, the Superior Court did not need to look to legislative history or purpose to interpret the Coastal Act.⁶⁰

Still, the Superior Court looked to the statute's stated purposes and the Commission's current practices to support its reading of the statute. According to the court, the Act's purpose was to balance the economic interests of property owners along the coast against Coastal Conservation.⁶¹ This balance, according to the Superior Court, ruled out the Commission's ostensible position that all property built after the Coastal Act "that become[s] endangered or unstable or damaged due to erosion should be allowed to deteriorate and collapse... and [that] private property rights are insignificant."⁶²

Moreover, the Commission's current practice of requiring new developments to "waive all rights to request fortifications [i]n the future" suggested the Coastal Act's protection for existing structures covers all property existing at the time of a permit application.⁶³ By the Superior Court's logic: "[i]f Section 30235 allegedly only applies to structures 'existing' prior to 1976, then why is [the Commission] requiring applicants to waive Section 30235 in order to obtain approval to build *new* structures post-1976? The waiver condition makes no practical sense unless Section 30235 applies in the first place."⁶⁴ Thus, the Superior Court held that the Coastal Act requires the Coastal Commission to approve seawalls for all currently existing property along the California Coast.⁶⁵

II. ANALYSIS

When interpreting a statute, California Courts seek to "determine the Legislature's intent so as to effectuate the law's purpose."⁶⁶ Courts will start with the text.⁶⁷ But if that text is ambiguous, California Courts look to "extrinsic aids" to resolve that ambiguity.⁶⁸ The Superior Court held that Section 30235 was unambiguous on the text alone.⁶⁹ But a closer reading of the statute shows the text is at least ambiguous. Section 30235's statutory context and the history of the Coastal Act's passage tips the scales even further—the Act's legacy clause was only ever meant to protect structures that existed at the time of the

60. *Id.* (citing *Surfrider Found. v. Martins Beach 1, LLC*, 221 Cal. Rptr. 3d 382, 397 n.14 (Cal. Ct. App. 2017)).

61. *Casa Mira* Decision, *supra* note 11, at 9–10.

62. *Id.* The Superior Court began making this argument in its decision, but stopped mid-sentence. *Id.* at 10.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Pac. Palisades Bowl Mobile Estates, LLC v. City of Los Angeles*, 288 P.3d 717, 727 (Cal. 2012).

67. *Id.*

68. *Id.*

69. *See supra* Part I.

Coastal Act’s passage. Part A discusses the textual arguments for a narrower reading of Section 30235’s protections. Part B then considers the broader structural context of the Coastal Act to show ambiguity should be resolved in the direction most protective of the coast. Part C confirms this understanding with a discussion of the Coastal Act’s history. Still, adopting this interpretation will eventually require the court to address a Takings Claim related to a seawall permit denial, whether it be in this case or another. Part D discusses this Takings analysis and the role that the court’s interpretation of Section 30235 may play in that analysis.

A. Textual Analysis

A closer look at the Coastal Act’s text suggests that the California legislature meant Section 30235 to protect only pre-Coastal Act properties.⁷⁰ First, the Superior Court’s use of tenses to eliminate ambiguity in Section 30235 is not sound.⁷¹ Courts may consider verb tense significant in statutory interpretation, but significant does not mean dispositive.⁷² It is a well-worn rule of statutory interpretation in California that “[a] statute is regarded as ambiguous if it is capable of two constructions, both of which are reasonable.”⁷³ In isolation, the Court’s reading is plausible. But the legislature just as plausibly could have meant: if coastal erosion threatens a structure that exists today, as we are passing the Coastal Act, the Commission shall issue a permit for a seawall or revetment. The verb tenses in the statute’s text do not foreclose that alternative reading. Thus, this analysis alone cannot resolve the clause’s ambiguity.

The Superior Court’s other attempts to disqualify the Commission’s narrower reading of Section 30235 are similarly flawed. First, the argument that the Commission’s interpretation impermissibly inserts words into the statute is not illuminating. If, as the Superior Court claims, the Commission’s interpretation inserts “at the time of the statute” after the word “existing,” the Court’s interpretation similarly inserts “at the time of the permit” after “existing.” The logic of this “non-insertion rule” applies to nearly every case of statutory interpretation, and again leaves the clause ambiguous.

70. See *People v. Gonzalez*, 394 P.3d 1074, 1076 (Cal. 2017) (“As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature’s intent so as to effectuate the law’s purpose . . . We begin by examining the statute’s words, giving them a plain and commonsense meaning.”) (citation omitted).

71. *Casa Mira* Decision, *supra* note 11, at 5–6.

72. See *Hughes v. Bd. of Architectural Exam’rs*, 952 P.2d 641, 649 (1998) (holding verb tenses alone could not resolve question of whether legislature intended provisions of statute governing architect licensing to include misconduct occurring prior to licensure or after licensure).

73. *E.g., id.*

So, the Superior Court argued precedent ruled out the Commission's reading,⁷⁴ citing *Surfrider Foundation v. Martins Beach 1, LLC*.⁷⁵ In *Surfrider*, the defendants purchased a beach and an adjoining road that the public used to access the coast.⁷⁶ After the purchase, the defendant closed the beach and the road to the public, despite the County's directions to maintain public access.⁷⁷ The plaintiff—a coastal conservation nonprofit—sued, arguing the defendants' interference with public beach access constituted “development” requiring a Coastal Development Permit under the Coastal Act.⁷⁸ The Act defines “development,” to include a “change in the intensity of use of water, or of access thereto.”⁷⁹ The statute then lists a series of actions constituting development.⁸⁰ The defendants argued that because the other actions in the definition significantly changed the nature of the land in question, the statute required a permit only if their public access limitations changed the nature of the beach.⁸¹ The court rejected this limiting construction because the Coastal Act mandates it be “liberally construed to accomplish its purposes and objectives.”⁸²

The *Casa Mira* court interpreted *Surfrider*'s language that “appellants point to nothing in the Coastal Act that would permit this court to add [a] limiting descriptive phrase . . . to section 30106” to prohibit implying any limitation

74. *Casa Mira* Decision, *supra* note 11, at 7.

75. 221 Cal. Rptr. 3d 382 (Cal. Ct. App. 2017).

76. *Id.* at 388.

77. *Id.* at 388–89.

78. *Id.* at 388, 390.

79. *Id.* at 393.

80. CAL. PUB. RES. CODE § 30106 (West 2023) (“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, 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.”) (internal quotations and citations omitted).

81. *Surfrider*, 221 Cal. Rptr. 3d. at 394 (“Appellants argue[] the simple acts of closing a gate and painting a sign do not constitute development that requires a permit. It is commonsense that these acts are nothing like those specifically covered by the statute—such as constructing or demolishing a building, dredging or mining the land, or subdividing parcels. Similarly, they assert, [w]hat the actions included in Section 30106's definition have in common is that they significantly change the nature of the land or a structure build on the land in question.”) (internal quotations omitted).

82. *Id.* (citing CAL. PUB. RES. CODE § 30009 (West 2023); *Pac. Palisades Bowl Mobile Estates, LLC v. City of Los Angeles*, 288 P.3d 717, 721 (Cal. 2012)).

on the meaning of individual phrases into the Coastal Act.⁸³ But *Surfrider* is properly understood to say courts, in interpreting the Coastal Act, should favor constructions that are more protective of the coast over limiting ones. Thus, the Superior Court erred in relying on *Surfrider*.

Section 30235's text suggests the legacy clause applies only to pre-Coastal Act structures. First, the Superior Court's interpretation would violate California's canon against surplusage.⁸⁴ Omitting "existing" entirely would leave the statute reading: "[r]evetments... that alter[] natural shoreline processors shall be permitted when required to... protect [] structures or public beaches."⁸⁵ Structures in existence at the time of the permit application would still be protected, and the word under construction would be needless surplusage.

The Act's other uses of "existing" are less instructive. Some sections of the Act unambiguously include post-enactment activity in their use of "existing." For example, Section 30705(b) provides as part of the Act's directions to create and maintain ports that "[t]he design and location of new or expanded facilities shall... take advantage of existing water depths, water circulation, siltation patterns, and means available to reduce controllable sedimentation so as to diminish the need for future dredging."⁸⁶ It would not make sense for a newly constructed "facility" to take advantage of marine conditions that existed at the time of the Coastal Act's passage but may not exist today. Instead, the legislature must have been referring to conditions existing at the time of facility construction or expansion. Any other reading would be absurd.

Still other sections use "existing" to refer to conditions present at the time of the Coastal Act's passage. Take Section 30001(d): "The Legislature hereby finds and declares . . . [t]hat 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 [California]."⁸⁷ The legislature made a clear distinction between those

83. *Casa Mira* Decision, *supra* note 11, at 7 (citing *Surfrider*, 221 Cal. Rptr. 3d at 395).

84. *See* Cardiff, *supra* note 13, at 268; Brennon B. v. Superior Ct. of Contra Costa Cnty., 513 P.3d 971, 989 (Cal. 2022) ("We seek to avoid interpretations that render any language surplusage.") (internal quotations and citation omitted); *People v. Franco*, 430 P.3d 1233, 1237 (Cal. 2018) ("[C]ourts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage.") (citations omitted). For a broader discussion on approaches to statutory construction, canons of construction, and the necessity of background norms in statutory interpretation, *see generally* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

85. *See* Cardiff, *supra* note 13, at 268 (citing CAL. PUB. RES. § 30235).

86. CAL. PUB. RES. § 30705(b).

87. *Id.* § 30001(d). The Act similarly distinguished between "existing" and new facilities in providing access to the sea's shoreline in its 2008 legislation creating a fund to facilitate public access to the shoreline. *See* 2008 Cal. Stat. ch. 760. While this clause is not indicative of what the California legislature intended at the time of the Act's passage, it does suggest the 2008 California legislature took "existing" not to include facilities constructed after the passage of the 2008 legislation.

developments that currently exist, and those that will exist in the future. If “existing” in this section includes future developments, the subsequent reference to future development would be surplusage.

The plain text of Section 30235 is at least ambiguous. The text of Section 30235’s legacy clause in isolation forecloses neither the Court’s nor the Commission’s interpretation of “existing.” If anything, the canon against surplusage would favor the Commission’s construction. But the legislature was also inconsistent in its use of “existing” elsewhere in the Coastal Act. For any more clarity, a reviewing court must look to Section 30235’s statutory context.

B. Statutory Context

Section 30235’s statutory context suggests the Act’s legacy clause only protects pre-Coastal Act structures. Section 30009—the Coastal Act’s construction clause—says the Act “shall be liberally construed to accomplish its purposes and objectives.”⁸⁸ In a 2008 decision, the California Court of Appeals interpreted the construction clause to include the corollary that courts must strictly construe any exception to that main purpose.⁸⁹ But the goals of the Act conflict with one another.

The Coastal Act protects both the California Coast as a public resource, as well as the economic interests of coastal communities. Its stated purposes reflect that difficult balance. For example, Section 30001 finds both “[t]hat the California coastal zone is a distinct and valuable natural resource,” the “permanent protection” of which “is a paramount concern to present and future residents of the state and nation[;]” and “[t]hat 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 [California.]”⁹⁰ Similarly, in Section 30001.5, the Act lays out its six major goals.⁹¹ Two of these goals unequivocally protect the California Coast.⁹² The rest of the Act’s goals attempt to balance environmental and economic interests.⁹³

88. CAL. PUB. RES. § 30009.

89. *Burke v. Cal. Coastal Comm’n*, 85 Cal. Rptr. 3d 909, 916 (Cal. Ct. App. 2008).

90. CAL. PUB. RES. § 30001.

91. *Id.* § 30001.5.

92. *See id.* § 30001.5(a) (“Protect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources.”); *id.* § 30001.5(f) (“Anticipate, assess, plan for, and, to the extent feasible, avoid, minimize, and mitigate the adverse environmental and economic effects of sea level rise within the coastal zone.”).

93. *See id.* § 30001.5(b) (“Ensure orderly, balanced utilization and conservation of coastal zone resources taking into account the social and economic needs of the people of the state.”); *id.* § 30001.5(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.”); *id.* § 30001.5(d) (“Ensure priority for coastal-dependent and coastal-related development

The Superior Court rightly identified this balancing act. It erred, however, in deciding the Commission's interpretation of Section 30235 ran counter to the Act's purposes.⁹⁴ The Commission's position does not mean it will decline all permits for seawalls to protect post-Coastal Act properties. It only means the Commission is not required to issue a seawall for every Coastal structure, and may consider its conservation mandate in permitting decisions for structures built after the Coastal Act. What is more, the Act includes a tiebreaker clause in Section 30007.5 for its competing policies: when "conflicts . . . occur between one or more policies of the [Act]," they should "be resolved in a manner which on balance is the most protective of significant coastal resources."⁹⁵ Given the destructive effects shoreline hardening can have on the coast,⁹⁶ the Commission's interpretation of the Act is entirely consistent with the Act's balancing mandate and tiebreaker clause.

California's Courts of Appeal have adopted this expansive interpretation of the Coastal Act's conservation goals before. In *Surfrider Foundation v. Martins Beach 1, LLC*, the Court of Appeal described the Coastal Act's goals as "maximizing access . . . with the constitutional rights of property owners as the outside limit on access."⁹⁷ And in *Burke v. California Coastal Commission*, the Court of Appeal again described the Coastal Act as having "overriding environmental and ecological objectives."⁹⁸ The California Supreme Court is not bound by the reasoning of these intermediate appellate decisions. But interpreting Section 30235 to protect every structure along the California Coast would conflict directly with the Act's text and the intermediate appellate court's considered precedent.

Section 30235 also works with other sections of the Act to form a coherent policy that the Court should preserve.⁹⁹ Section 30235 guarantees a seawall or

over other development on the coast."); *id.* § 30001.5(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.").

94. See *supra* Part I; *Casa Mira* Decision, *supra* note 11, at 10 ("[T]he Coastal Act requires a weighing and consideration of protection and enjoyment of nature *and* protection and enjoyment of private property.").

95. CAL. PUB. RES. § 30007.5.

96. See *supra* note 24 and accompanying text.

97. *Surfrider Found. v. Martins Beach 1, LLC*, 221 Cal. Rptr. 3d 382, 396 (Cal. Ct. App. 2017).

98. *Burke v. Cal. Coastal Comm'n*, 85 Cal. Rptr. 3d 909, 916 (Cal. Ct. App. 2008).

99. The Act is replete with similar policy units, reflecting legislative compromises between the Act's conservation and policy goals. Take, for example, the Act's treatment of California's agricultural industry. Neither Article 4's protections for the coast's aquatic ecological systems nor Article 6's restrictions on developments exempt California's agricultural industry. See CAL. PUB. RES. §§ 30230–30237, 30250–30255. But Agricultural and coastal-dependent industry still receive priority on private land over even visitor-serving commercial recreational opportunities—a core aim of the act. *Id.* § 30222. The Act also expressly directs land use authorities to prevent the conversion of agriculturally viable land to nonagricultural or

other form of protection from coastal erosion to “existing” structures,¹⁰⁰ while Section 30253 prohibits new development requiring similar protection.¹⁰¹ The State would not disrupt existing reliance interests in non-agricultural coastal land uses, but it would not allow new ones to take hold either. The Act then delegated the implementation of that plan to the Coastal Commission, State agencies, and local authorities,¹⁰² with direction to resolve the Act’s internally conflicting goals in the direction of conservation.¹⁰³

To be fair, the Superior Court is not the first entity to suggest courts should interpret “existing” to mean the Commission is required to protect all structures in existence at the time of application for a seawall.¹⁰⁴ Indeed, the Coastal Commission has previously argued “existing” applies to all buildings existing at the time of the permit application.¹⁰⁵ But the Commission also walked away from that interpretation beginning as early as 1999.¹⁰⁶ That delay makes sense as the Commission permitted structures built shortly after the Coastal Act because they were in stable areas at the time, consistent with the Act’s prohibition on new construction that would require armoring.¹⁰⁷ It was only with the increasing instability of the shoreline that previously stable coastal properties would

urban uses. *Id.* §§ 30241(b), (d), 30242. The bargain that the Coastal Act struck was one that prioritized agricultural over competing non-agricultural uses of coastal land.

Sections 30234, 30234.5, and 30224 similarly represent a compromise with California’s recreational boating industry. Section 30234.5 recognizes fishing activities as being of “economic, commercial, and recreational importance” to the State. *Id.* § 30234.5. Section 30224 expresses the State’s intent that the Coastal Act encourage “increased recreational boat use of coastal waters” by “providing additional berthing space in existing harbors.” *Id.* § 30224. Section 30234 facilitates that goal by protecting “[e]xisting commercial fishing and recreational boating harbor space,” unless there is no longer demand for those facilities or an adequate substitute “has been provided.” *Id.* § 30234. But all three operate in the shadow of Article 4’s general protection for marine resources and biological productivity, *id.* §§ 30,230, 30,231, and the Act’s global tiebreaker clause, *id.* § 30007.5. These Sections, taken together, form a functional unit broadly protecting marine resources and biological productivity, but protecting and expanding access to recreational boating on the coast as well.

100. *Id.* § 30235.

101. *Id.* § 30253(b).

102. *See id.* § 30004 (“To achieve maximum responsiveness to local conditions, accountability and public accessibility, it is necessary to rely heavily on local government and local land use planning procedures and enforcement. To ensure conformity with the provisions of this division . . . it is necessary to provide for continued state coastal planning and management through a state coastal commission.”).

103. *Id.* § 30007.5.

104. *See* Meg Caldwell & Craig Holt Segall, *No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access Along the California Coast*, 34 *ECOLOGY L. Q.* 533, 563 (2007) (summarizing argument that since the Act modifies other uses of “existing” with a date, the use of existing in section 30235 without modification suggests existing was intended to refer to contemporary structures and not those that predated the Act’s passage in 1976).

105. *See Casa Mira* Decision, *supra* note 11, at 7.

106. *See* Commission Opposition to Writ, *supra* note 10, at 19–20.

107. *See id.* at 21; CAL. PUB. RES. § 30253.

become unstable due to erosion. Thus, it is no surprise that the Commission only confronted this latent ambiguity decades after the statute's passage. If anything, the Commission's early interpretation and permitting decisions reflect the difficulty of forecasting the risk erosion poses to properties. The Commission made mistakes in their coastal development approvals. Adopting a broad view of Section 30235 would only compound those mistakes and contravene the Statute's codified goals.

The evidence surveyed thus far supports reading Section 30235 to only protect pre-Coastal Act properties. But holding otherwise would not only contradict the Act's text, the intermediate appellate court's reasoned precedent, and Section 30235's statutory context. It would also contradict the history of the Coastal Act's adoption.

C. *History of the Coastal Act*

In the decades leading up to the Coastal Act's passage,¹⁰⁸ “the People of California [had] become painfully aware” of how overuse and privatization were harming the California Coast as a public good.¹⁰⁹ The 1969 Santa Barbara oil spill pushed that awareness into action. Five miles off the California Coast an offshore oil drilling rig burst, spilling millions of gallons of oil onto the Santa Barbara beach.¹¹⁰ The spill coated thirty miles of coastline in an acrid stench, and cleanup efforts were largely ineffective at mitigating the environmental harm.¹¹¹ California residents responded with a ballot initiative: Proposition 20.¹¹² The proposition directed state and local officials to create a holistic plan that would manage coastal development and protect public coastal access.¹¹³ That holistic plan became the California Coastal Act of 1976.¹¹⁴ Proposition 20 provides a

108. For a history of Environmental law leading up to the 1970s, see generally RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* (2d ed. 2023).

109. *Pac. Legal Found. v. Cal. Coastal Comm'n*, 655 P.2d 306, 307 (Cal. 1982).

110. *California v. Norton*, 311 F.3d 1162, 1165–66 (9th Cir. 2002); see Keith C. Clarke & Jeffrey J. Hemphill, *The Santa Barbara Oil Spill: A Retrospective*, 64 *ASSOC. OF PAC. COAST GEOGRAPHERS* 157, 158 (2002).

111. *Norton*, 311 F.3d at 1165–66.

112. Ariel Rubissow Okamoto et al., *Cherishing the Coast: California Goes Long*, 10 *GOLDEN GATE UNIV. ENV'T L.J.* 1, 5 (2018).

113. *Id.* at 5.

114. *Id.* at 5–6; CAL. PUB. RES. CODE § 30002 (West 2023) (“The Legislature further finds and declares that: (a) The California Coastal Zone Conservation Commission, pursuant to the California Coastal Zone Conservation Act of 1972 (commencing with [Proposition 20]), has made a detailed study of the coastal zone . . . and that, based on the study, the commission has prepared a plan for the orderly, long-range conservation, use, and management of the natural, scenic, cultural, recreational, and manmade resources of the coastal zone. (b) Such plan contains a series of recommendations which require implementation by the Legislature and that some of those recommendations are appropriate for immediate implementation as provided for in this division while others require additional review.”).

unique indication of what voters intended the Coastal Act to achieve and what legislators believed their voters intended as they were considering the bill. Thus, Californian's advocacy for Proposition 20 should at least color the Court's analysis.¹¹⁵

Proposition 20 was a direct response to the development of the California Coast. In 1970, a collection of two-hundred cities, counties, and state and federal agencies managed the coast.¹¹⁶ In that fragmented environment, conservationists regularly lost public debates at town and city councils across the State.¹¹⁷ Those conservationists turned to the State legislature, but still to no avail. In 1970, the legislature passed hands from pro-development Republican to more conservation-minded Democratic control—in part because many conservation advocates spent that year managing political campaigns to elect pro-conservation legislators.¹¹⁸ Still, California's conservation movement saw their legislation to protect the Coast watered down and defeated by opposition interests in both the 1971 and 1972 legislative sessions.¹¹⁹

So, the Coastal Coalition turned their focus to the initiative process—passing Proposition 20.¹²⁰ Just four months before voters would cast their ballots for the Proposition, the Coastal Alliance had about a tenth of the resources of an organized opposition made up of large developers and oil companies.¹²¹ Still, elected officials at every level of government spoke out in favor of Proposition 20, some even making it a central piece of their campaigns.¹²² Grassroots volunteers took monumental efforts to reach their neighbors.¹²³ The Alliance even successfully petitioned the Federal Communications Commission for equal airtime with the opposition on radio and television under the Fairness Doctrine.¹²⁴ By the end of the campaign over seven hundred groups had joined the Coastal Alliance, and the movement was receiving editorial support from major newspapers like the *Los Angeles Times* and school papers across California.¹²⁵ On November 7, 1972, the Coastal Initiative passed with 55.1 percent of the vote.¹²⁶

115. *Cf.* *People v. Valencia*, 3 Cal. 5th 347, 364 (2017) (examining “materials that were before the voters” to interpret the provisions of an enacted Proposition).

116. Janet Adams, *Proposition 20—A Citizens' Campaign*, 24 SYRACUSE L. REV. 1019, 1022–23 (1973).

117. *Id.* at 1023.

118. *Id.* at 1024.

119. *Id.* at 1025–1034.

120. *Id.* at 1034.

121. *Id.* at 1036–37, 1036 n. 34.

122. *Id.* at 1037.

123. *Id.* at 1039 (“In Orange County, where a million-plus votes were at stake and the voters were reportedly in an anti-conservation mood, one phenomenal young volunteer turned her home into an Alliance headquarters, formed a powerful committee, ran a big volunteer campaign, and carried Orange County for Proposition 20 Every voter in Orange County was a called twice.”).

124. *Id.* at 1039–40.

125. *Id.* at 1041.

126. *Id.* at 1042.

Proposition 20 established the California Coastal Zone Commission—the predecessor of the modern Coastal Commission—and directed the State to develop a plan for long-term management of the coast.¹²⁷ Over the next two years, the Commission held 259 public hearings and hundreds of public workshops throughout the state to develop this long term plan.¹²⁸ That plan became the “legislative blueprint” for the Coastal Act.¹²⁹ That legislation did not sail to passage after its introduction in 1976.¹³⁰ The Act struggled to get out of committee in the State Senate.¹³¹ But after intense lobbying by Governor Jerry Brown, the Coastal Act of 1976 passed “on the last hour of the last day of the legislative session, by a margin of one vote in the Senate.”¹³²

As Professor Cardiff has argued, the Coastal Act’s legislative history suggests the legacy clause was only meant to cover properties existing at the time of the Act’s passage.¹³³ Early versions of Section 30235 did not include the word “existing” before the word “structure.”¹³⁴ The word was inserted in committee.¹³⁵ At the same time, legislators were considering a competing “developer friendly” version of the bill that did not include “existing” in Section 30235.¹³⁶ The legislature ultimately rejected the “developer friendly” bill, instead enacting SB 1277 with “existing” included in Section 30235.¹³⁷

This legislative history supports interpreting Section 30235 only to protect pre-Coastal Act properties. The Coastal Act was a unique democratic moment for Californians. The Coastal Coalition reached hundreds of thousands of Californians to pass Proposition 20. And the Coastal Commission held hundreds of hearings to craft the Coastal Act. Both of those efforts centered on specific calls to protect the coast from degrading private uses. Moreover, that mass mobilization motivated elected officials to speak publicly in support of Proposition 20, run on Coastal preservation, and ultimately to pass the Coastal Act. That history speaks to the “evils” the California citizens and legislators sought to remedy with the Coastal Act—the unrestrained privatization of the

127. JORDAN DIAMOND ET AL., *THE PAST, PRESENT AND FUTURE OF CALIFORNIA’S COASTAL ACT* 5 (2016)

128. Earth Alert, *supra* note 6, at 36:19–36:40 (quoting former California Coastal Commission Chair Naomi Schwartz).

129. *Id.*

130. *Id.* at 40:00–41:00.

131. *Id.*

132. *Id.*

133. Cardiff, *supra* note 12, at 267.

134. *Id.* (“Early versions of SB1277 stated in section 30204 (later renumbered section 30235), “Revetments, breakwaters, groins . . . seawalls, cliff retaining walls and other such construction that alters the natural shoreline process shall be permitted when required to serve coastal-dependent uses or to protect structures, developments, beaches, or cliffs in danger from erosion.”).

135. *Id.*

136. *Id.*

137. *Id.*

Coastline.¹³⁸ Interpreting the Coastal Act to require seawalls to protect every coastal property would recreate exactly this evil by allowing private property owners to commandeer and destroy the coastline through seawall construction. Second, the fact that the legislature inserted the word “existing” into the bill and rejected a competing “developer friendly” version of the legislation should confirm what the text, statutory context, and history already point to. The legislature intended Section 30235 as a limited legacy clause, applicable only to structures that predated the Coastal Act. Still, deciding so does not resolve the claims altogether. Although not at issue in this exact proceeding,¹³⁹ a future court will have to grapple with the looming constitutional issue: Takings.

D. Takings Liability

The *Casa Mira* plaintiffs’ original complaint included a regulatory takings claim.¹⁴⁰ They argued the Commission’s permit denial “prevent[ed] all economically beneficial or productive use” of their property by blocking their efforts to prevent damage from coastal erosion.¹⁴¹ The parties eventually bifurcated and stayed that claim in a separate case pending the outcome of litigation interpreting Section 30235.¹⁴² If the Coastal Commission wins on appeal, the plaintiffs will likely revive their Takings claim. Resolving that claim will involve a fact-intensive inquiry on the actual effects of the Commission’s permit denials on the properties at issue here.¹⁴³ And even if the plaintiffs chose not to, if the Coastal Commission continues to pursue managed retreat through its permitting authority, it will eventually face a similar Takings Claim.¹⁴⁴ Thus, this

138. *Pac. Palisades Bowl Mobile Estates, LLC v. City of Los Angeles*, 288 P.3d 717, 727 (Cal. 2012) (“[W]here, as here, a statute’s terms are unclear or ambiguous, we may look to a variety of extrinsic aids including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.”).

139. *See infra* note 141 and accompanying text.

140. *Casa Mira Plaintiffs’ Complaint*, *supra* note 17, at 51.

141. *Id.* at 52–53.

142. Stipulation and [Proposed] Order Staying Case at 3–4, *Casa Mira Homeowners Ass’n v. Cal. Coastal Comm’n*, No. 21-CIV-03202 (Super. Ct. Cal. 2023).

143. *See, e.g., Bridge Aina Le’a, LLC v. Land Use Comm’n*, 950 F.3d 610, 625 (9th Cir. 2020) (“Generally, courts determine whether a regulatory action is functionally equivalent to the classic taking using essentially ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances.”) (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002)) (internal quotation marks omitted).

144. In 2022, the California legislature amended the Coastal Act to direct the Commission to “take into account the effects of sea level rise in coastal resources planning and management policies and activities to identify, assess, and, to the extent feasible, avoid and mitigate the adverse effects of sea level rise.” CAL. PUB. RES. CODE § 30270 (West 2022). The provision likely forecloses any argument that the Commission is not empowered to use its permitting authority to try to relocate at risk communities and structures away from the coast.

section argues first that the Commission's permit denial should not constitute a *per se* taking under *Lucas v. South Carolina Coastal Council*.¹⁴⁵ Second, it argues that sea level rise, the Coastal Act's longstanding regulatory presence, and the Appellate Court's interpretation of Section 30235 should play a role in the reasonable investment-backed expectations portion of a Takings analysis.

1. *The per se takings doctrine does not apply.*

The plaintiffs' takings claim raises a threshold question: is the Commission's permit denial a *per se* unconstitutional total taking? *Lucas v. South Carolina Coastal Council* is the leading case on total takings in coastal conservation.¹⁴⁶ There, petitioner bought two residential lots on the South Carolina Coast to build single family homes.¹⁴⁷ Two years later the South Carolina legislature enacted the Beachfront Management Act, which prohibited construction seaward of a coastal baseline set by the South Carolina Coastal Council.¹⁴⁸ The Council set this baseline landward of Lucas' lots, stopping him from building his planned homes.¹⁴⁹ The Supreme Court held that because the Commission's building prohibition "denie[d] [Lucas] all economically beneficial or productive use of [the] land," it constituted a total taking unless background principles of property and nuisance law barred plaintiff's construction of the homes in the first instance.¹⁵⁰ The Court's holding hinged on the trial court's finding that Lucas's beachfront lots were valueless if the South Carolina Coastal Council enforced its coastal-zone construction ban.¹⁵¹

But the Supreme Court subsequently limited *Lucas* in *Palazzolo v. Rhode Island*.¹⁵² There, the Court considered whether the Rhode Island Coastal Resources Management Council enacted a taking when they denied a plaintiff's permit application to fill in 11 acres of marshland with gravel for property development.¹⁵³ The petitioner filed an inverse condemnation claim under *Lucas*.¹⁵⁴ The *Palazzolo* Court declined to apply *Lucas* to the case, however, because the lower court found the parcel retained \$200,000 in development value and the landowner could still build a "substantial residence" on the portion of the parcel

145. 505 U.S. 1003 (1992).

146. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

147. *Id.* at 1006–07.

148. *Id.* at 1008–09.

149. *Id.*

150. *Id.* at 1015, 1031.

151. *Id.* at 1020.

152. 533 U.S. 606 (2001).

153. *Id.* at 611, 615–16.

154. *Id.* at 615.

not affected by the State's regulations.¹⁵⁵ Instead, the Court remanded the case for analysis under *Penn Central's* balancing test.¹⁵⁶

A court could resolve this case under *Lucas's* nuisance exception.¹⁵⁷ California's nuisance law is primarily statutory.¹⁵⁸ California's civil code defines a nuisance as any "obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway."¹⁵⁹ California Civil Code goes on to define a public nuisance as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."¹⁶⁰

Under California law, to constitute a public nuisance, the homeowners' actions would have to result in substantial and unreasonable interference with public rights.¹⁶¹ Normally, those inquiries would be objective looks at whether ordinary persons would find the defendant's conduct substantially disturbing such that its harms outweigh its social utility.¹⁶² But in 1974, the California Court of Appeals upheld the validity of Proposition 20 against a procedural Due Process challenge, as California law has long recognized "the power of the state to declare acts injurious to the state's natural resources to constitute a public nuisance."¹⁶³ Seawalls are coastal structures that result in the destruction of beachfront, both between the seawall and the protected property and adjacent to the protected property.¹⁶⁴ That beachfront is arguably held in the public trust,¹⁶⁵ the destruction of which interferes with the public's ability to freely access the coast as guaranteed by the Coastal Act—a type of "nuisance" statute—and

155. *Id.* at 630–32.

156. *Id.* at 632.

157. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015, 1031 (1992).

158. *Mangini v. Aerojet-General Corp.*, 230 Cal. App. 3d 1125, 1134 (Cal. App. 1991) ("California nuisance law is a creature of statute.").

159. CA. CIV. CODE § 3479 (West 2023).

160. *Id.* § 3480.

161. *People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 1104–05 (1997).

162. *Id.* at 1105.

163. *CEED v. Cal. Coastal Zone Conservation Comm'n*, 43 Cal. App. 3d 306, 318–319, 334 (Cal. Ct. App. 1974) (citing *People v. K Hovden Co.*, 215 Cal. 54, 56 (1932)) (characterizing a precursor to the California Coastal Act as "nuisance legislation").

164. See *supra* note 24 and accompanying text.

165. See Lee A. Kaplan, *Whose Coast is it Anyway? Climate Change, Shoreline Armoring, and the Public's Right to Access the California Coast*, 46 ENV'T L. REP. NEWS & ANALYSIS 10971, 10973–75 (2016) (citing *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 454 (1892)) (arguing California law recognizes public trust principles); Chloe Angelis, *The Public Trust Doctrine and Sea Level Rise in California: Using the Public Trust to Restrain Coastal Armoring*, 19 HASTINGS W. NW. J. ENV'T. L. & POL'Y 249, 251–57 (2013) (same).

California's general public nuisance laws.¹⁶⁶ Thus, the Commission's denial of a seawall is not a *per se* Taking (or any Taking for that matter), since no property owner has a preexisting right to impose a nuisance on the public.¹⁶⁷

If a court decides that the Coastal Act does not qualify for *Lucas'* nuisance exception, the Supreme Court's reasoning in *Palazzolo* should apply. The Coastal Commission's permit denial does not deny the plaintiffs all economically beneficial or productive use of their land. Courts have recognized *Lucas* as a "relatively narrow' . . . taking category, 'confined to the extraordinary circumstance when no productive or economically beneficial use of land is permitted.'"¹⁶⁸ Even without a seawall, the plaintiffs could modify their existing structures and reap economic benefits from their ownership of the land.¹⁶⁹ The Coastal Act's permit denial only prohibited plaintiffs from building a seawall. Plaintiffs still have every other option and economically beneficial use available to them.

Still, the plaintiffs will likely argue that given what we know about climate change and sea level rise, the Commission's denial of the seawall permit leaves the property at risk of total collapse by erosion, depriving them entirely of future use of the property.¹⁷⁰ To settle that question, the court must decide the extent to which the takings analysis should consider the value of the property's future uses, and the role the Coastal Act's regulatory scheme should play in a regulatory Takings analysis.

2. *The role of the Coastal Act in a Takings analysis.*

The Ninth Circuit considers three factors in its *Penn Central* Takings analysis: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation interferes with distinct investment-backed expectations, and (3) the character of the governmental action.¹⁷¹ The court's interpretation

166. See *CEED*, 43 Cal. App. 3d at 318–19.

167. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) (explaining a total taking cannot do "more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise."); see also *Joslin v. Marin Mun. Water Dist.*, 67 Cal.2d 132, 143 (1967) ("While plaintiffs correctly argue that a property right cannot be taken or damaged without just compensation, they ignore the necessity of first establishing the legal existence of a compensable property interest.").

168. See *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 626 (9th Cir. 2020).

169. See *Lindstrom v. California Coastal Commission*, 40 Cal. App. 5th 73, 106–07 (Cal. Ct. App. 2019) (holding condition on construction permit preventing future seawall construction did not deny plaintiffs of all economically beneficial or productive use even if structures on the lot would become uninhabitable due to bluff failure because plaintiffs or successors would still own the real property and could replace, modify, or relocate structures on the lot).

170. See *Casa Mira Plaintiffs' Complaint*, *supra* note 17, at 51–53.

171. *Bridge Aina Le'a*, 950 F.3d at 625–26.

of the California Coastal Act affects both the first and second prongs of that analysis.

First, a court will have to decide what the relevant parcel of land is to determine the economic impact of the regulation. The Ninth Circuit performs this analysis by comparing “the value that has been taken from the property with the value that remains in the property.”¹⁷² Of course, that requires deciding what property interests are relevant to this value determination.

The Supreme Court held in *Murr v. Wisconsin* that the geographic and regulatory context of the property should play a role in that determination.¹⁷³ The *Murr* petitioners inherited two adjacent lots along the St. Croix river.¹⁷⁴ Because of local regulations, their common ownership of the two lots unified and triggered environmental regulations that limited their ability to sell or develop the lots.¹⁷⁵ The petitioners sued, claiming the combination and consequent regulation of the lots constituted a taking, since they could no longer sell the smaller lot independent of the larger one.¹⁷⁶

The *Murr* Court adopted an objective test, asking what division the property owner would reasonably expect when they purchased the property, considering “background customs and the whole of our legal tradition” and whether “the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation.”¹⁷⁷ The Court held that the State Court of Appeals correctly analyzed petitioners’ property as a single unit because (1) state and local regulations were in effect at the time of the petitioners’ acquisition of the lots officially merged their properties; (2) the petitioners could have anticipated regulation given their property abutted a heavily regulated river at the time of purchase; and (3) the two lots had a special relationship such that combining them seemed to increase their value.¹⁷⁸

Murr addressed how to define the property under consideration in a Takings claim when the answer may vary across space. *Casa Mira* implicates the same problem, but across time. Like the property at issue in *Murr*, the *Casa Mira* property has been subject to California’s coastal permitting system since the Act’s passage in 1976.¹⁷⁹ Moreover, the plaintiffs’ property is on the Califor-

172. *Id.* at 630–31.

173. *See Murr v. Wisconsin*, 582 U.S. 383, 397 (2017).

174. *Id.* at 388.

175. *Id.* at 390.

176. *Id.* at 404.

177. *Id.* at 397–98.

178. *Id.* at 403–04, 406.

179. *See supra* Part II.C.; CAL. COASTAL COMM’N, CALIFORNIA COASTAL VOICES 131 (2017); Secretary of the Interior v. California, 464 U.S. 312, 315–17 (1984) (describing applicability of Federal Coastal Zone Management Act to coastal regions); *Murr*, 582 U.S. at 403 (“Petitioners could have anticipated public regulation might affect their enjoyment of their property, as the Lower St. Croix was a regulated area under federal, state, and local law long before petitioners possessed the land.”).

nia Coast, an environmentally sensitive area subject to significant federal, state, and local regulation like the St. Croix river.¹⁸⁰ Both of these factors suggest the plaintiffs' should have reasonably expected that future regulatory actions by the State may affect their use of the property. At least, the plaintiffs cannot have reasonably expected that their property would be free from either government regulation or the effects of coastal erosion. *Murr* instead suggests that the court should discount or exclude future losses attributable to the Commission's permit denial and subsequent erosion risk,¹⁸¹ both of which the plaintiffs' should have reasonably anticipated when they bought and developed property in the Coastal zone.

The Coastal Act also plays a role in the second prong of the *Penn Central* factors: interference with reasonable investment-backed expectations. As the Ninth Circuit explained in *Bridge Aina*, "what is relevant and important in judging reasonable expectations is the regulatory environment at the time of the acquisition of the property. Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."¹⁸² There, the Hawaii Land Use Commission ordered the reversion of 1,060 acres of vacant land from a conditional urban land use classification to its prior agricultural use classification.¹⁸³ The Commission imposed the reversion because the developer who owned the land promised and failed to develop the area consistent with the requirements of the conditional urban use order.¹⁸⁴ The developer then challenged the reversion as an unconstitutional taking.¹⁸⁵

The Ninth Circuit held that the reversion did not interfere with the developer's investment-backed expectations because the developer knew about and agreed to the conditions of the urban use classification when it bought the land, and the reversion was a lawful exercise of the Commission's regulatory authorities.¹⁸⁶ The *Casa Mira* plaintiffs did not agree to any analogous conditions when they purchased their property. But they did purchase the land with the knowledge that it was in a heavily regulated area where coastal development would be subject to the Commission's permitting authority under the Coastal Act. Thus, a court should not consider the Commission's use of its lawful permitting authority to interfere with the plaintiffs' reasonable investment-backed expectations.

180. *Murr*, 582 U.S. at 398 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 505 (1992) (Kennedy, J., concurring)) ("Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.").

181. *Id.*

182. *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 634 (9th Cir. 2020) (internal quotations omitted).

183. *Id.* at 617–618.

184. *Id.* at 621–22.

185. *Id.* at 621–23.

186. *Id.* at 635.

The contextual Takings analysis above has two attractive features. First, it brings the *Murr* property definition analysis in line with the *Penn Central* regulatory Takings analysis. Both doctrines include consideration of reasonable investment-backed expectations to understand what a reasonable property owner would have expected at the time that they purchased the property. There is no justification for distinguishing between the two types of cases. Second, adopting this more contextual reasoning would create a Takings doctrine that is better suited for climate adaptation. In a forthcoming piece in the Stanford Law Review, Professor Mark Nevitt argues that *Penn Central*'s reasonable investment-backed expectations test is ripe for adaptation to climate problems.¹⁸⁷ He notes the need for a more flexible Takings jurisprudence, and the role that climate science can play in providing landowners facing climate related threats notice such that they can reasonably be expected to factor climate change into their investment decisions, especially if given notice by governmental actors.¹⁸⁸ Applying *Murr* and *Penn Central* by factoring in the expectations of landowners in regulated areas vulnerable to sea level rise is one way to craft a doctrine that incentivizes notice while allowing governments the necessary flexibility to mitigate the effects of climate change.

The outcome of this flexible analysis depends—at least in part—on how the appellate court in *Casa Mira* interprets Section 30235. If the California appellate courts were to adopt a broad interpretation of “existing,” property owners could claim the Coastal Act provided them an entitlement to a seawall in the case of erosion threatening the structures on their property. Thus, their reasonable investment-backed expectation was that if their property needed a seawall, it would get one. They had no notice that the Commission may reject their permits. But if the California Supreme Court adopts the more limited interpretation of Section 30235, the Commission can more easily argue that because it has always had the discretion to deny seawall permit applications, the plaintiffs should have reasonably expected that they may not receive a seawall if erosion threatened their property. Thus, the outcome of the Takings claim here and in similar cases may turn largely on the instant question of Section 30235's interpretation.

III. *CASA MIRA* HOMEOWNERS IS A LESSON FOR STATE AND LOCAL GOVERNMENTS

Casa Mira is important not only because of its implications for the California Coast. It is also representative of many of the challenges states will face as they try to mitigate their climate related risks. First, jurisdictions should

187. Mark Nevitt, *The Legal Crisis Within the Climate Crisis*, 76 STAN. L. REV. (forthcoming 2024) (manuscript at 29–33) (on file with the Harvard Environmental Law Review).

188. *Id.* at 32–33.

anticipate significant pushback from private interests through litigation. After California established the Coastal Commission in 1976, the Pacific Legal Foundation and other organizations representing U.S. business interests across the Pacific Coast immediately began challenging the Commission's requirements as unauthorized or unconstitutional.¹⁸⁹ Those early cases—often brought on behalf of private landowners—involved challenges to “Commission guidelines requiring easements for public access in connection with certain development,” “more than a dozen land use cases contesting the legality of local zoning ordinances and building permit requirements,” and cases focused on the burdens additional zoning restrictions and permit requirements would place on development.¹⁹⁰

Over time, propertied interests have organized and succeeded at opposing conservation at the highest levels of the U.S. legal system. For example, in the 1990s, Pacific Legal Foundation joined with a number of “public interest” legal foundations across the country to represent developers and develop takings law in their favor.¹⁹¹ In its three decades of litigation, this corporate coalition has notched significant wins in high profile cases¹⁹² including *Sackett v. EPA*,¹⁹³ *Koontz v. St. Johns River Water Management District*,¹⁹⁴ *Knick v. Township of Scott, Pennsylvania*,¹⁹⁵ and *United States v. Robertson*.¹⁹⁶ At the state level, the Pacific Legal Foundation has maintained a constant stream of litigation in California challenging decisions made by the Coastal Commission and seeking to weaken the Coastal Act.¹⁹⁷ Of the most recent suits, one got a permit granted,¹⁹⁸

189. Oliver A. Houck, *With Charity for All*, 93 *YALE L.J.* 1415, 1470 (1984).

190. *Id.* at 1470–72.

191. Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 *B.C. ENV'T AFFS. L. REV.* 509, 510–11 (1998). Kendall and Lord call this group of corporate interests the Takings Project. *Id.* at 539.

192. *See id.* at 582.

193. 566 U.S. 120 (2012).

194. 570 U.S. 595 (2013).

195. 139 S. Ct. 2162 (2019).

196. 875 F.3d 1281 (9th Cir. 2017), *cert. granted, judgment vacated, and case remanded*, 139 S. Ct. 1543 (2019); *see also* James Pollack, *The Takings Project Revisited: A Critical Analysis of This Expanding Threat to Environmental Law*, 44 *HARV. ENVTL. L. REV.* 235, 253–56; 258–61 (2020).

197. *See* Petition for Writ of Mandate, *Coastal Rts. Coal. v. Cal. Coastal Comm'n*, No. 30-2018-00994285-CU-WM-CJC (Super. Ct. Cal. 2018); *Lent v. Cal. Coastal Comm'n*, 277 Cal. Rptr. 3d 106, 116–17 (Cal. Ct. App. 2021); Appellants Opening Brief at 1, 7, *Pietro Fam. Invs., LP v. Cal. Coastal Comm'n*, No. H049920 (Cal. Ct. App. 2022); *Couple fights unlawful Coastal Commission limbo to build wheelchair-friendly home*, PAC. LEGAL FOUND., <https://perma.cc/U58H-ES65>; *California Coastal Commission ignores local ordinances, vetoes local building permits*, PAC. LEGAL FOUND., <https://perma.cc/J9KX-34NS>.

198. *See Couple fights unlawful Coastal Commission limbo to build wheelchair-friendly home*, PAC. LEGAL FOUND., <https://perma.cc/U58H-ES65> (Coastal Commission approves plaintiffs' permits as part of settlement).

the Supreme Court denied cert for another,¹⁹⁹ and a third was thrown out on procedural grounds.²⁰⁰ Others are still pending in courts.²⁰¹

The Pacific Legal Foundation is not litigating *Casa Mira*. Instead an ideologically driven law firm “rooted in the belief that government—[a]t the Federal, state and even the local level—has grown too large and complex” is litigating the case.²⁰² But that only underscores the legal risk. Whether or not they face organized opposition from the likes of the Pacific Legal Foundation, jurisdictions will face litigation from private litigants and specialty firms. *Casa Mira* is just one example showing the market for such services is alive and well.

Second, *Casa Mira* illustrates the ways that the incentives of an elected state judiciary may impact the implementation of conservation statutes like the Coastal Act. The Coastal Act has been effective because it solves a problem of constituency: it moved the locus of coastal development decision to a “larger than local constituency.”²⁰³ Communities further from the coast could register their interests in the Coast by supporting the Coastal Commission. But Superior Court judges in California are elected at the county level, where those hyperlocal interests may reassert themselves.²⁰⁴ Without imputing any intent on the part of judges in this case, one can appreciate that Superior Court judges elected by members of a coastal community likely feel intense political pressure to favor the rights of their constituents. The connection between that local constituency and the decisionmaker is weaker on appeal, where justices are nominated by the Governor for 12-year terms and are subject to statewide retention elections.²⁰⁵ But Superior Court judges can still shape the case on appeal through the trial record and their findings of fact. The ramifications of that decision are especially important for Takings claims, which are notoriously ad-hoc, fact intensive

199. See *Massive—and unconstitutional—beach access fines threaten family home*, PAC. LEGAL FOUND., <https://perma.cc/4SRS-PX7E> (describing outcome in *Lent v. California Coastal Commission*).

200. *California coastal homeowners at risk by Coastal Commission's illegal seawall policy*, PAC. LEGAL FOUND., <https://perma.cc/B4TY-ARNH>.

201. *California Coastal Commission ignores local ordinances, vetoes local building permits*, PAC. LEGAL FOUND., <https://perma.cc/J9KX-34NS>.

202. See *Our Firm Philosophy*, LAW OFFICES OF THOMAS D. ROTH, <https://perma.cc/W9NY-8RJ8>. The firm has also litigated several cases against the Coastal Commission, and advertises its expertise in challenging the Commission. *What We Do*, LAW OFFICES OF THOMAS D. ROTH, <https://perma.cc/4G4E-8RMZ>.

203. Earth Alert, *supra* note 6, at 47:20-47:30 (quoting former California Coastal Commission Director Michael Fisher).

204. *Judicial Selection: How California Chooses Its Judges and Justices*, JUDICIAL BRANCH OF CAL., <https://perma.cc/29VS-TU82>.

205. *Id.*; *Appellate Retention Elections*, JUDICIAL BRANCH OF CAL., <https://perma.cc/CV9P-ERY7>. These retention elections generally are not competitive. A 2011 study showed that the mean affirmative vote in California judicial elections has been above 70% since 1998. Larry Aspin, *The 2010 Judicial Retention Elections in Perspective: Continuity and Change from 1964 to 2010*, 94 JUDICATURE 218, 220 (2011).

inquiries.²⁰⁶ But at the same time, this dynamic suggests conservation advocates may substantively support the Coastal Commission's enforcement authority by focusing resources on Superior Court elections in coastal counties.

Imposing Takings liability would have a similar localizing effect, but one that advocacy cannot easily address. Holding that the Commission's permit denials constitute a regulatory taking would concentrate power in the hands of individual property owners.

From a justice perspective, that outcome may seem attractive. Disadvantaged communities cornered into climate vulnerability should not have to bear the costs of displacement alone. Imposing Takings liability on the State would theoretically give those communities a bargaining chip against regulatory action. In practice, however, inequities in access to legal services would likely prevent equitable outcomes arising from the extension of Takings liability.²⁰⁷ To assert their Takings claims, low-income communities would have to have the money for protracted litigation. The *Casa Mira* plaintiffs filed their complaint on August 12, 2019.²⁰⁸ The Superior Court officially entered its judgment on August 1, 2023—over four years after the initial filing.²⁰⁹ So, in practice, plaintiffs who have the resources to litigate a case that long will be the ones who can assert a Takings claim. Socioeconomically disadvantaged plaintiffs on the other hand will not be able to sustain litigation and will receive little to no constitutional protection.

Moreover, the budgetary risk that Takings liability would create would have a significant chilling effect on states' ability to address climate change.²¹⁰ Many jurisdictions would likely avoid making any policy on this contentious and prohibitively expensive issue, leaving communities to resort to inequitable unmanaged retreat,²¹¹ increasingly without the shelter of private insurance.²¹² It would make an already difficult problem that much more difficult to solve. And constitutionalizing that power dynamic would make it near impossible to unwind, even with zealous advocacy.

206. See *supra* Part II.D; *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (“Our regulatory takings jurisprudence . . . is characterized by essentially ad hoc, factual inquiries designed to allow careful examination and weighing of all the relevant circumstances.”) (internal citations and quotations omitted).

207. See LEGAL SERV. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 13–14 (2017).

208. *Casa Mira* Plaintiffs Complaint, *supra* note 17, at 1.

209. *Casa Mira* Decision, *supra* note 11, at 1.

210. Elected officials in California are already sensitive to the budgetary impact mitigation efforts may have. See Annie C. Mulkern, *Newsom vetoes bill to buy houses threatened by rising seas*, CLIMATEWIRE (Oct. 12, 2021), <https://perma.cc/95C6-76UN>.

211. Nevitt, *supra* note 185, at 15.

212. See, e.g., Justine McDaniel, *Citing Climate Change risks, Farmers is Latest Insurer to Exit Florida*, WASH. POST (July 12, 2023), <https://perma.cc/2J5R-RZ8S>; Aimee Pichee, *Homes in parts of the U.S. are “essentially uninsurable” due to rising climate change risks*, MONEYWATCH (Sept. 20, 2023), <https://perma.cc/VN6Q-APKL>.

There is no substitute for proactive policymaking in this instance. In fact, such policymaking may reduce a jurisdiction's legal risk through notice that impacts contextual analyses like Takings,²¹³ or by making litigation less attractive than using mitigation policy levers. Luckily, California seems headed in the right direction. In 2016, the California legislature amended the Coastal Act to include environmental justice and equality as guiding principles for the Coastal Commission.²¹⁴ In 2021, the legislature passed a bill directing the Commission to "mitigate the adverse environmental and economic effects of sea level rise within the coastal zone," and allocating \$100 million per year to achieve those mitigation goals.²¹⁵ And in 2022, the legislature passed legislation establishing a revolving loan program that local governments could use to purchase vulnerable coastal properties.²¹⁶ Governor Newsom ultimately vetoed that legislation,²¹⁷ but it still demonstrates that the legislature has the will to pursue policies that will help communities adapt to climate change and preserve the California Coast.

CONCLUSION

If upheld, the Superior Court's decision in *Casa Mira Homeowners v. California Coastal Commission* would have significant consequences. Granting every coastal property owner a statutory right to a seawall would, over time, transform the California Coast into a collection of seawalls as the beach erodes away. That outcome is not just undesirable for Californians, but is also antithetical to the text, history, and aims of the Coastal Act. It would also severely undermine arguments that the Takings clause should not apply to the Commission's permit denials in a contextual regulatory Takings analysis.

More broadly, *Casa Mira* is illustrative of the risks and considerations jurisdictions face as they attempt to address climate change. Across the country, policymakers are trying to make good use of policy tools like permitting to protect their residents from the effects of climate change and preserve valuable public goods. Those decisions will inevitably impact the private parties, some of whom have the resources to litigate those claims. That litigation may wear away existing regulatory structures, or even result in a more sclerotic constitutional framework that impedes future efforts at equitably mitigating the effects of climate change. Regardless of the outcome of *Casa Mira*, there is just no substitute for proactive policy that is designed with litigation risks in mind.

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213. See Nevitt, *supra* note 185, at 62 (advocating for "notice-suspend-retreat" strategy to address climate risk).

214. CAL. PUB. RES. CODE § 30013 (West 2023).

215. 2021 Cal. Legis. Serv. Ch. 236 (SB1) (West).

216. *SB-1078 Sea Level Rise Revolving Loan Pilot Program*, CAL. LEG. INFO., <https://perma.cc/DBE7-2B6G>.

217. *Id.*