

# Martin's Beach Litigation and Eroding Public Access Rights to the California Coast

## INTRODUCTION

Martin's Beach, a privately owned, rugged, photogenic strip of sand south of Half Moon Bay on California's Pacific coast, has become a flashpoint for a changing state. When billionaire Vinod Khosla—new owner of the beach and abutting property—closed Martin's Beach to the public in 2009, environmentalists, surfers, and local government joined forces to restore public access. Shrinking coastline due to sea-level rise, a growing and diversifying statewide population, and widening wealth disparities cast the fight for public access to Martin's Beach in an almost existential light: Who really enjoys the right to go to the beach, and for how much longer? For generations, California's world-famous beaches have been endemic to the culture of the state and the identity of its residents. The movement to protect the rights of all Californians to enjoy the beach culminated in the 1972 passage of Proposition 20, which mandated public access to the entire coast and sought to protect the beaches from encroaching development.<sup>1</sup> Decades later, the fight to protect access has been renewed in the courtroom, as a handful of wealthy individuals up and down the coast have sought to limit public beach access and erode a fundamental part of California life.<sup>2</sup>

Recent decisions in two cases—the latest in an ongoing tangle of litigation—leave the right of Californians to access beaches in jeopardy. In *Friends of Martin's Beach v. Martin's Beach I, LLC (Friends I and Friends II)*, two separate courts found that there was no historical right of public access to

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1. See CEED v. California Coastal Zone Conservation Com., 118 Cal. Rptr. 315, 319 (describing how voters approved the initiative measure, which became known as the Coastal Conservation Act of 1972).

2. See Rosanna Xia, *A Beach Behind Lock and Key is Turning into a Fight over Social Justice in California*, L.A. TIMES (July 9, 2018), <http://www.latimes.com/local/lanow/la-me-opal-cliffs-environmental-justice-2018709-story.html>; Dan Weikel, *Two Malibu Property Owners Fined \$5.1 Million for Blocking Access to Public Beach*, L.A. TIMES (Dec. 9, 2016), <http://www.latimes.com/local/lanow/la-me-headlines-coastal-fines-20161208-story.html>; Erika I. Ritchie, *Strand Beach Access Gates are Removed After 6-Year Fight*, ORANGE COUNTY REG. (Dec. 9, 2016), <https://www.ocregister.com/2016/12/09/strand-beach-access-gates-are-removed-after-6-year-fight/>.

Martin's Beach.<sup>3</sup> The California Court of Appeal ruled that the public trust doctrine does not apply to the property at issue, and, on remand, the San Mateo County Superior Court found that there had been no implied dedication of a public easement over the private property.<sup>4</sup> In *Surfrider Foundation v. Martin's Beach I, LLC*, however, the California Court of Appeal ruled that the public must be allowed to access Martin's Beach, though only on a temporary basis.<sup>5</sup> Taken together, the rulings set a dangerous precedent that not only leaves future access to Martin's Beach unclear, but also could exacerbate growing inequities in access to California beaches and undermine the mission of the California Coastal Act.<sup>6</sup>

## I. BACKGROUND

### A. *Martin's Beach*

Martin's Beach Road, the only access point to Martin's Beach, runs across private property from Highway 1.<sup>7</sup> That property has been privately occupied since it was granted by the Mexican government in 1839, and title to the land was certified to the Alviso family under 1851 legislation implementing the Treaty of Guadalupe Hidalgo.<sup>8</sup> The land came under the ownership of the Deeney family around 1900.<sup>9</sup> Throughout the twentieth century, the public enjoyed considerable access to Martin's Beach via Martin's Beach Road, encouraged by the Deeney family's construction of a general store, public

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3. *Friends of Martin's Beach v. Martin's Beach 1, LLC (Friends I)*, 201 Cal. Rptr. 3d 516, 520 (Ct. App. 2016). The decision was ordered non-published at the request of the California Coastal Commission and Surfrider Foundation, due to concern about confusion in this area of law and the effect of the opinion on ongoing litigation. This concern over the opinion is further evidence of the high stakes of the legal questions at issue. *See* Order Certifying Controlling Question of Law that Warrants Statewide Appellate Resolution at 2–3, *Friends of Martin's Beach v. Martins Beach 1, LLC*, (Nos. CIV 517634, A 142035, S 2350392016), 2016 WL 6137666, at \*2.

4. Order Certifying Controlling Question of Law that Warrants Statewide Appellate Resolution at 2–3, *Friends of Martin's Beach v. Martins Beach 1, LLC*, (Nos. CIV 517634, A 142035, S 2350392016), 2016 WL 6137666, at \*2; *Friends of Martin's Beach v. Martins Beach 1, LLC (Friends II)*, No. CIV517634, 2018 WL 747859, at \*11–13 (Cal. Super. Ct. Jan. 29, 2018). *See also* Bob Egelko, *Judge Hands Martin's Beach Owner One Legal Victory in Access Fight*, SFGATE (Nov. 15, 2017), <http://www.sfgate.com/bayarea/article/Judge-hands-Martins-Beach-owner-one-legal-victory-12360905.php>.

5. *Surfrider Found. v. Martin's Beach 1, LLC*, 221 Cal. Rptr. 3d 382, 388 (Ct. App. 2017), *petition for cert. filed*, (U.S. Feb. 22, 2018) (No. 17-1198). While earlier rulings also led to temporary restoration of public access, entrance has never been guaranteed, and the gate remained shut weeks after Surfrider's August victory. *See* Paul Rogers, *Sheriff Says Visitors to Martins Beach Won't be Arrested if They Go Around Gates Locked by Billionaire Vinod Khosla*, MERCURY NEWS (Aug. 18, 2017), <https://www.mercurynews.com/2017/08/18/sheriff-martins-beach-gate-remains-locked-but-visitors-wont-be-cited/>.

6. All references to "the Coastal Act" refer to the "California Coastal Act," not to be confused with the federal Coastal Zone Management Act, passed in 1972, four years before the Coastal Act.

7. *Friends I*, 201 Cal. Rptr. 3d at 520. While Martin's Beach and the abutting land is privately owned, the property line ends at the high-tide line. *Friends II*, 2018 WL 747859, at \*1.

8. *Friends I*, 201 Cal. Rptr. 3d at 520–21.

9. *Id.* at 521.

restrooms, parking, and a highway billboard inviting use of the private beach.<sup>10</sup> In 2008, the Deeney family sold the property to two limited liability corporations controlled by Khosla, who initially allowed the public continued access to and use of the beach for a nominal fee.<sup>11</sup> In September 2009, however, the owners closed and locked a gate across Martin's Beach Road, put up "No Trespassing" signs, painted over the billboard inviting visitors, and hired security to prevent public access.<sup>12</sup> Khosla resisted repeated pressure from the community, San Mateo County, and the California Coastal Commission to restore access or apply for a permit to continue preventing access, and two separate groups sued to reopen the gate to Martin's Beach.<sup>13</sup>

*B. The Friends Litigation: No Public Access Right*

After failed efforts to pressure Khosla to allow public access, a group of beachgoers organized as Friends of Martin's Beach (Friends) and filed a complaint in October 2012 asserting public rights and interests to the beach and the road.<sup>14</sup> The trial court granted summary judgment to Khosla.<sup>15</sup> On appeal, Friends argued, first, that the public trust doctrine secured a public easement over the property, and second, that historical use of the property constituted an implied dedication of a public easement.<sup>16</sup> The court of appeal rejected the public trust doctrine theory, holding that neither the state of California nor the federal government had "any public interest" in the land and refused to impose a public access easement, but reversed dismissal of the public dedication claim, remanding it to the trial court.<sup>17</sup> In November 2017, the San Mateo County Superior Court ruled that Friends had failed to prove that the actions of the Deeney family had dedicated the road and beach to public use.<sup>18</sup>

Friends' argument that the public trust doctrine conveyed a public right of access to Martin's Beach failed on both common law and constitutional grounds.<sup>19</sup> The public trust doctrine is a common law concept that is central to California's legal framework for coastal management, navigation rights, and water resource regulation.<sup>20</sup> Combined with Article X of the California

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10. *Id.*

11. Court records indicate that at certain times the Deeney family had also charged an entrance fee.

*Id.*

12. *Id.*; *Surfrider Found. v. Martin's Beach 1, LLC*, 221 Cal. Rptr. 3d 382, 390 (Ct. App. 2017), *petition for cert. filed*, (U.S. Feb. 22, 2018) (No. 17-1198).

13. *Surfrider*, 221 Cal. Rptr. 3d at 389–90.

14. *Friends I*, 201 Cal. Rptr. 3d at 521–22.

15. *Id.* at 523.

16. *Id.* at 522–23.

17. *Id.* at 531, 535, 544.

18. *Friends II*, No. CIV517634, 2018 WL 747859, at \*1 (Cal. Super. Ct. Jan. 29, 2018).

19. *Friends I*, 201 Cal. Rptr. 3d at 524.

20. Robert García & Erica Flores Baltodano, *Free the Beach! Public Access, Equal Justice, and the California Coast*, 2 STAN. J. C.R. & C.L. 143, 178 (2005). The public trust doctrine has its roots in the

Constitution and the Coastal Act, the public trust doctrine also provides a general right of beach access to the public, even if the land above the high-tide line is privately owned.<sup>21</sup>

While the public trust doctrine can protect access rights over private land,<sup>22</sup> the U.S. Supreme Court declined to extend that protection to private land certified under the 1851 federal law implementing the Treaty of Guadalupe Hidalgo, where the federal or state government had not asserted an interest in title proceeding.<sup>23</sup> Therefore, the court of appeal in *Friends I* found that, because the Martin's Beach property had been certified under the 1851 law without any mention of a public interest and never passed into state ownership, there could be no common law public trust easement over the land to the water.<sup>24</sup> And while California courts hold that Article X, section 4 of the California Constitution affirms and codifies "at least in part" the public trust doctrine of coastal access,<sup>25</sup> "absent clear legislative intent to the contrary," the access requirements do not apply retroactively.<sup>26</sup> Applying this constitutional principle, the court held that section 4 could not protect public access to Martin's Beach since it was passed decades after the property became privately owned.<sup>27</sup>

Friends also argued that past action of the property owners had dedicated a use of the property for beach access to the public.<sup>28</sup> Common law dedication resulting in a grant or gift of land to the public has two elements: an intent to dedicate or offer the land, and acceptance by the public.<sup>29</sup> California case law suggests that the intent to dedicate can be manifested by actions alone, and that

codes of Roman Emperor Justinian, which held "common to mankind: the air, running water, the sea, and consequently the shores of the sea." Institutes of Justinian § II(I)(1).

21. See García & Baltodano, *supra* note 20, at 178–79 (discussing the evolution of the public trust doctrine through federal and state jurisprudence, culminating in *National Audubon Society v. Superior Court*, where the California Supreme Court held that recreational use—not just navigation or fishing—was among the purposes protected by the public trust doctrine). See *Nat'l Audubon Soc'y v. Super. Ct.*, 33 Cal. 3d 419, 435 (1983).

22. Gilbert L. Finnell, Jr., *Public Access to Coastal Public Property: Judicial Theories and the Taking Issue*, 67 N.C. L. Rev. 627, 641 (1989).

23. *Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198, 209 (1984) (holding that California must have expressly presented its sovereign interest over the land during the federal patent proceedings in order to assert its public trust easement).

24. *Friends I*, 201 Cal. Rptr. 3d at 526–31.

25. *Id.* at 532 (referring to *Forestier v. Johnson*, 164 Cal. 24, 34 (1912)). Section 4 reads in part: "No individual, partnership, or corporation, claiming or possessing the tidal lands . . . shall be permitted to exclude the right of way to such water whenever it is required for any public purpose . . . [A]ccess to the navigable waters of this State shall always be attainable for the people thereof." Cal. Const. Art. X, § 4. See also García & Baltodano, *supra* note 20, at 179–80.

26. *Friends I*, 201 Cal. Rptr. 3d at 536.

27. *Id.*

28. "Under the common law, an owner of property, through words or conduct, may convey the intent to dedicate an interest in land to the public, and the public may accept the offer to dedicate in various ways." *Id.*

29. *Id.* at 540.

acceptance of the gift need not be formal or conducted by a public entity.<sup>30</sup> The court of appeal held that the facts were “sufficient to establish the elements of common law dedication, if they can be proven at trial.”<sup>31</sup> On remand, however, the trial court held that Friends did not show that the previous owners of the property had intended to dedicate part of the property to public use.<sup>32</sup> The trial court found that by charging an entrance fee, the Deeney family made use of the road and beach by permission, rather than by invited use, negating an intent to dedicate the property to the public.<sup>33</sup> As there was no intention or offer to dedicate use of the land to the public, Friends’ second argument for public access failed.<sup>34</sup>

### C. Surfrider’s Legal Challenge Under the Coastal Act

In response to the continued closure of the gate on Martin’s Beach Road, a second group, the nonprofit Surfrider Foundation, filed suit under the Coastal Act to keep the gate open.<sup>35</sup> Surfrider argued that closing the gate constituted “development” under the Coastal Act, and thus required a coastal development permit (CDP).<sup>36</sup> The trial court agreed, ruling in December 2014 that the gate must be “unlocked and open” while Khosla pursued a CDP.<sup>37</sup> In August 2017, the court of appeal affirmed, and as of early October, the public could again access the beach.<sup>38</sup> While the California Supreme Court declined to consider Khosla’s appeal of the judgment,<sup>39</sup> Khosla filed a petition for certiorari in the U.S. Supreme Court in February 2018.<sup>40</sup>

One of the primary goals of California’s 1976 Coastal Act is to “[m]aximize public access to and along the coast and maximize public recreational opportunities[.]”<sup>41</sup> Consistent with this broad language, the Coastal Act created the Coastal Commission and over time, yielded a system of statutes and regulations that provide significant tools for protecting public beach access.<sup>42</sup>

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30. See *id.* at 540–44 (discussing implied versus express dedication and acceptance of the dedication).

31. *Id.* at 544.

32. *Friends II*, No. CIV517634, 2018 WL 747859, at \*10 (Cal. Super. Ct. Jan. 29, 2018) (stating that the burden of proof was on Friends).

33. *Id.* at \*7.

34. *Id.* at \*13.

35. *Surfrider Found. v. Martins Beach 1, LLC*, 221 Cal. Rptr. 3d 382, 388 (Ct. App. 2017), *petition for cert. filed*, (U.S. Feb. 22, 2018) (No. 17-1198).

36. *Id.* at 390.

37. *Id.* at 391.

38. *Id.*

39. Eric Kurhi, *Martins Beach: California Supreme Court Declines to Hear Billionaire’s Appeal*, MERCURY NEWS (Oct. 26, 2017), <https://www.mercurynews.com/2017/10/26/martins-beach-california-supreme-court-declines-to-hear-billionaires-appeal/>.

40. *Martins Beach 1, LLC v. Surfrider Foundation*, SCOTUSblog, <http://www.scotusblog.com/case-files/cases/martins-beach-1-llc-v-surfrider-foundation/> (last visited July 22, 2018).

41. Cal. Pub. Res. Code § 30001.5 (West 2016).

42. García & Baltodano, *supra* note 20, at 180–83.

Under the Coastal Act, a CDP is required for any “development,” which includes any change in “intensity of use of land, including . . . [a] change in intensity of use of water, or of access thereto.”<sup>43</sup> California courts have broadly construed development under the Coastal Act, requiring a CDP to “encompass all impediments to access, whether direct or indirect, physical or nonphysical.”<sup>44</sup>

In *Surfrider*, the court of appeal cited the public access goal of the Coastal Act and found that under the required broad interpretation of the statute’s language, limiting beach access by closing the gate constituted development.<sup>45</sup> Because the actions of the owners “indisputably resulted in a significant decrease in access to Martin’s Beach,” blocking access met the statutory threshold requiring a CDP.<sup>46</sup> Significantly, the court found that a “change in the intensity of access to water” would be development even if no public right of access had been established.<sup>47</sup> Thus, the success of *Surfrider*’s claim did not depend on the success of Friends’ claims.

The court also found that the particular injunctive relief sought by *Surfrider*—opening of the gate—was not an unconstitutional taking of private property.<sup>48</sup> While acknowledging that public easements without compensation—or a judicial order that amounts to the same—could be an unconstitutional taking, the court concluded that the temporary easement here was not a taking, citing the U.S. Supreme Court’s *Nollan-Dolan* precedent.<sup>49</sup> The trial court’s order to stop preventing public access essentially created a public easement, but the order was intended to remain in effect only “until resolution of Defendants’ [CDP] application has been reached.”<sup>50</sup> Because the injunction and resultant easement were only temporary, due to end at the conclusion of the permitting process, the

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43. Cal. Pub. Res. Code § 30106 (West 2016).

44. *Surfrider Found. v. Martins Beach 1, LLC*, 221 Cal. Rptr. 3d 382, 394 (Ct. App. 2017), *petition for cert. filed*, (U.S. Feb. 22, 2018) (No. 17-1198).

45. *See id.* at 392–97.

46. *Id.* at 394. The ruling agreed with the arguments of the Coastal Commission, which had indicated in a 2011 letter to the property owners that beach closure would constitute development and would require a CDP, as closing the gate both constituted placement of “solid material” and limited the “intensity” of access to water. *Id.* at 390, 393.

47. *Id.* at 395.

48. *Id.* at 405. The Fifth Amendment’s “takings clause” provides that no “private property be taken for public use without just compensation.” U.S. CONST. amend. IV. The property owners also argue that requiring application for a CDP is an unconstitutional taking, but the court concluded that a permit requirement in itself is not a taking, and thus the takings claim is not ripe. This particular takings claim is not relevant to this In Brief. *See Surfrider*, 221 Cal. Rptr. 3d at 397–99.

49. *Id.* at 403–07 (discussing *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)). The *Nollan-Dolan* line of takings cases create an important distinction between permanent and temporary easements: permanent easements, if not imposed as part of the proper adjudicative process (e.g., as a condition for receiving a CDP) are generally treated as unconstitutional takings. More specifically, *Nollan* and *Dolan* allow government exaction of an easement as a condition on a permit “so long as there is a ‘nexus’ and ‘rough proportionality’ between the property that the government demands and the social costs of the applicant’s proposal.” *Surfrider*, 221 Cal. Rptr. 3d at 406.

50. *Id.* at 399–400.

court of appeal concluded that the easement could not be an unconstitutional taking under existing case law.<sup>51</sup>

## II. ANALYSIS AND IMPLICATIONS

### A. *Rulings Put Public Access to Martin's Beach on Shaky Ground*

By holding that implied dedication and the public trust doctrine did not establish public access rights to Martin's Beach, the courts have weakened a key protection of coastal access. In *Friends II*, the trial court rejected Friends' implied dedication claim despite a history of public use, undermining the landmark California beach access ruling, *Gion v. Santa Cruz*.<sup>52</sup> In *Gion*, the California Supreme Court established the ingredients of a common law public dedication theory.<sup>53</sup> A dedication claim can be shown by proving the owner's intent to dedicate the land to public use, as described above, or in the absence of an intent to dedicate, by proving that persons had used the land "as they would have used public land" for more than five years.<sup>54</sup> Even a creative reading of the facts shows that the public used Martin's Beach Road and Martin's Beach for generations—easily satisfying the five-year threshold—and that the owners clearly did not "halt public use in a significant way," which could defeat an implied dedication claim.<sup>55</sup> By misreading the *Gion* test, the *Friends II* court abandoned decades of precedent and significantly altered the requirements for a common law implied dedication claim.<sup>56</sup> Because the public dedication theory has been instrumental in opening beaches and preventing development in many states, limiting its use to establish easements could have consequences far beyond Martin's Beach.<sup>57</sup>

The *Surfrider* ruling, while allowing access in the short-term, is temporary and does not resolve any of the lingering issues regarding public access to private beaches. As noted above, the injunction is only in effect until resolution of the CDP permit process, offering no certainty or guarantee that the result of the

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51. See *id.* at 407. In seeking review in the U.S. Supreme Court, however, Khosla argues that the distinction between permanent and temporary easements is not dispositive, and that even a temporary easement is still a compensable taking. Petition for Writ of Certiorari, *Martins Beach 1, LLC v. Surfrider Found.*, (U.S. Feb. 22, 2018) (No. 17-1198), at 22.

52. See discussion *supra* Part I.B; *Friends II*, No. CIV517634, 2018 WL 747859, at \*8–10 (Cal. Super. Ct. Jan. 29, 2018); 465 P.2d 50 (Cal. 1970).

53. See Finnell, Jr., *supra* note 22, at 644–45.

54. "If the land involved is a beach or shoreline area, they should show that the land was used as if it were a public recreation area. If a road is involved, the litigants must show that it was used as if it were a public road." *Gion*, 465 P.2d at 56.

55. The Court specifically notes that in the case of "an attractive seashore property," "No Trespassing" signs are not sufficient to show an attempt to prevent use. *Id.* at 58.

56. *Friends II*, 2018 WL 747859, at \*14.

57. 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, 556 (2007). See also Finnell, Jr., *supra* note 22, at 633–37.

injunction—public access—will continue.<sup>58</sup> Contrary to Surfrider’s own conclusion that the ruling “properly ensures the Coastal Act’s protection of beach access, and means that public access to [the beach] cannot be cut off in violation of the Coastal Act,” the *Surfrider* court did not take up the public access question at all.<sup>59</sup> Instead, the court expressly rejected Surfrider’s claim that the injunction “restores the historical status quo of public access,” and assumed that no public access rights had been established, holding only that limiting access by closing the gate constituted development, prohibited without the proper permit.<sup>60</sup> Further, as the court declines to consider the “constitutionality of a hypothetical decision” on a CDP to close Martin’s Beach, it is uncertain whether current public access could be cut off through the permit process.<sup>61</sup>

The *Surfrider* decision forecasts serious doubts about the likelihood of attaining a permanent public easement through the administrative process. The court concluded that if the trial court’s injunction had imposed a permanent easement instead of a temporary one, it would be an unconstitutional taking.<sup>62</sup> The court sets up a future legal fight over a public easement exacted through the permitting process in the vein of *Nollan* and *Dolan*: the question in both cases was whether the government could claim a public access easement “as a condition for granting a development permit the government was entitled to deny.”<sup>63</sup> In the view of the *Surfrider* court, “the easements [in *Nollan* and *Dolan*] were per se takings because the owners were permanently required to allow others to access their properties on an ongoing basis” without compensation.<sup>64</sup> The court gives no indication it would view an easement to access Martin’s Beach any differently, noting that Khosla’s right to exclude—“one of the most treasured strands in an owner’s bundle of property rights”—has clearly been restricted here, albeit temporarily.<sup>65</sup>

Khosla’s legal team has seized these openings, focusing its petition for certiorari explicitly on the temporary nature of the easement and whether the Coastal Act can constitutionally require a permit for Khosla to restrict access.<sup>66</sup> Khosla argues that it does not matter that an injunction-imposed easement is temporary, as any physical taking is compensable (or unconstitutional without

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58. *Surfrider Found. v. Martins Beach 1, LLC*, 221 Cal. Rptr. 3d 382, 391 (Ct. App. 2017), *petition for cert. filed*, (U.S. Feb. 22, 2018) (No. 17-1198).

59. Sarah Damron, *Appeals Court Reaffirms Win, Access to Martins Beach and CA Supreme Court Denies Review*, SURFRIDER FOUND. (Aug. 10, 2017), <https://www.surfrider.org/coastal-blog/entry/appeals-court-reaffirms-win-access-to-martins-beach>.

60. “[T]his court must presume the prior access was permissive,” as opposed to by right. *Surfrider*, 221 Cal.Rptr.3d at 404. In fact, the court concluded that the “existence of public access rights . . . is presently undetermined.” *Id.* at 390.

61. *Id.* at 399.

62. *See id.* at 406–07.

63. *Id.* at 406.

64. *Id.* at 408.

65. *Id.* at 406.

66. *Petition for Writ of Certiorari, Martins Beach 1, LLC v. Surfrider Found.*, (U.S. Feb. 22, 2018) (No. 17-1198), at ii.



compensation), and moreover that this easement is not temporary but indefinite, as he has not yet applied for a CDP.<sup>67</sup> Khosla asserts that the public access easement here was imposed in “exactly the manner” as the easements prohibited in *Nollan* and *Dolan*, and must therefore be a compensable taking.<sup>68</sup> If the Coastal Act truly requires a permit to limit access across private land simply because such access existed in the past, the petition concludes, the Coastal Act itself must be unconstitutional.<sup>69</sup>

Finally, while state compensation for an easement would make any taking legal, the failure of a year-long effort to negotiate the purchase of a public easement is evidence of the great difficulty of securing government compensation that both parties feel is just.<sup>70</sup> The consequences of losing a takings challenge are severe and well known to state and local officials: the nearby City of Half Moon Bay is still struggling to rebound from an \$18 million penalty, levied for an unlawful taking from a private developer in 2007.<sup>71</sup> Concerns that Khosla could win a penalty that amount or higher from the Coastal Commission or San Mateo County (both named as defendants by Khosla in an affirmative takings suit in federal court)<sup>72</sup> could impact future easement negotiations and litigation decisions.

#### *B. Growing Equity Issues Undermine Public Beach Access and the Coastal Act Mandate*

Any discussion of public access to California’s beaches—whether protected by historical use and the public trust doctrine or by enforcement of the Coastal Act—is incomplete without the context of increasing inequities of such public access. Common understanding of the public trust doctrine, as echoed in Article X, section 4 of the California Constitution, protects access to navigable waters for “the people.”<sup>73</sup> Likewise, the mandate of the Coastal Act is described as securing “maximum access . . . and recreational opportunities . . . for all the

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67. *Id.* at 25–26.

68. *Id.* at 28.

69. *Id.* at 30–31.

70. A 2014 law directed the State Lands Commission to negotiate with Khosla for purchase of an easement over the property, but Khosla was unwilling to sell an easement for the offered price, and negotiations collapsed. Aaron Kinney, *Martins Beach: Can California Afford to Buy Public Access from Vinod Khosla?*, MERCURY NEWS (Jan. 10, 2016), <https://www.mercurynews.com/2016/01/10/martins-beach-can-california-afford-to-buy-public-access-from-vinod-khosla/>.

71. Esther Hahn, *City Loses Arbitration over Insurance Proceeds*, HALF MOON BAY REV. (July 9, 2015), [http://www.hmbreview.com/news/city-loses-arbitration-over-insurance-proceeds/article\\_9ca029e2-2659-11e5-8d3f-dbc7bb2380a7.html](http://www.hmbreview.com/news/city-loses-arbitration-over-insurance-proceeds/article_9ca029e2-2659-11e5-8d3f-dbc7bb2380a7.html).

72. Khosla filed a complaint against members of the Coastal Commission, state officials, and San Mateo County officials, alleging due process and equal protection violations, among other claims. *See* Complaint of Martins Beach 1, LLC, *Martins Beach 1, LLC v. Turnbull-Sanders*, No. 16-5590 (N.D. Cal. Sept. 30, 2016), <http://publicfiles.surfrider.org/martins/gov.uscourts.cand.303618.1.0.pdf>.

73. Caldwell & Segall, *supra* note 57, at 559.

people.”<sup>74</sup> Yet the history of coastal access suggests that “the people” is a gross misnomer for whom California law has protected access.<sup>75</sup>

Political, economic, and environmental realities suggest that contrary to enshrined goals of access, California beaches are not equally accessible for all Californians. The sandy beach is a scarce resource, which, if divided evenly among California residents, amounts to less than one inch of beach per person.<sup>76</sup> Further, the share of the population that can easily access the coast is disproportionately whiter, older, and wealthier compared to the rest of the population.<sup>77</sup> Such inequity is expected to worsen due to a growing population, increasing property values and coastal development, and a widening income gap.<sup>78</sup> Khosla is only the latest wealthy landowner to try to keep the public off his private beach, and, in the words of his appeal to the U.S. Supreme Court, he “will hardly be the last.”<sup>79</sup> Further, accelerating impacts of climate change are leading to erosion and rapid sea level rise, leaving increasingly less beach to access in the first place.<sup>80</sup>

In the context of climate change and diminishing coastline, and the realities of inequitable access, any limits on public access must be considered especially carefully.<sup>81</sup> The fight for public access to Martin’s Beach may be seen as a proxy battle for securing and increasing public access along the California coast.<sup>82</sup> The actions of local government, from the Coastal Commission and state and county legislators to the court system, weigh the fundamental goals of maximizing coastal access for “all the people” against the property and business rights of Khosla.<sup>83</sup> Whatever conclusion is ultimately reached about Martin’s Beach will

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74. Cal. Pub. Res. Code § 30210 (West 2016).

75. See generally García & Baltodano, *supra* note 20 (discussing the history of racial exclusion from California beaches).

76. Caldwell & Segall, *supra* note 57, at 541.

77. Using 2010 Census data to create a hypothetical proportionate distribution of demographic groups throughout the state, researchers found that “within 1km of coastal access, there are roughly 25% more white people and 30% more senior citizens, while at the same time there are 52% fewer Hispanic or Latino people, 60% fewer Black or African American people, 57% fewer American Indians, and 18% fewer households below the poverty line as compared to their population predicted by a proportionate distribution.” Dan R. Reineman et al., *Coastal Access Equity and the Implementation of the California Coastal Act*, 36 STAN. ENVTL. L.J. 89, 96 (2016).

78. *Id.* at 93.

79. Petition for Writ of Certiorari, *Martins Beach 1, LLC v. Surfrider Found.*, (U.S. Feb. 22, 2018) (No. 17-1198), at 34. For other examples of similar conduct, see *supra* note 2 and *infra* note 83.

80. Caldwell & Segall, *supra* note 57, at 536–44.

81. For a stronger conclusion, see García & Baltodano, *supra* note 20, at 191 (“Cutting off public access to the beach disproportionately benefits white people, who disproportionately own and have access to private beachfront property.”).

82. The CEO of Surfrider Foundation makes a similar argument. See Chad Nelsen, *California’s Beaches Belong to the Public—Not to the One Percent*, L.A. TIMES (June 30, 2017), <http://www.latimes.com/opinion/op-ed/la-oe-nelsen-public-access-martins-beach-surfrider-vinod-khosla-20170630-story.html>.

83. Khosla’s economic rights are on full display in hiring attorney Paul Clement to draft his petition for certiorari. Clement, a former Solicitor General and extremely experienced Supreme Court litigator,

have significant consequences for beach access in general. If legal challenges to exclusion like those brought by Friends and Surfrider ultimately fail, the public will have to seek other routes to secure their constitutional rights.

#### CONCLUSION

The open gate to Martin's Beach is no more than a pyrrhic victory for the conservationists and government entities fighting for public access. Friends' defeat in the legal fight over public access rights means that public access to Martin's Beach now relies on the Coastal Commission's permitting process, and any easement exacted through that process faces an uncertain future. While language tucked into the 2018–2019 budget includes new funding for the state to potentially purchase an easement or even acquire an easement using eminent domain if no deal is reached, it is unclear if the state will exercise either option.<sup>84</sup> Even the injunction keeping the gate open may not last until the resolution of the CDP process, depending on the outcome of the appeal to the U.S. Supreme Court and the ongoing litigation in lower federal court.<sup>85</sup> If Californians cannot gain access to such a popular, historically enjoyed strip of sand with the help of decades of court-sanctioned public use protections and well-resourced environmental lawyers, the future of public access to other parts of the coastline is uncertain. In a time of changing demographic and environmental conditions, it is necessary to reexamine how we value and enforce public rights to access natural places, and how fundamental and equitable those rights are. This has never been more urgent. If you turn off Highway 1 onto Martin's Beach Road today, the gate might be open. But tomorrow it may be shut.

*Paul Balmer*

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charges over \$1300 an hour for his work. Ryan C. Black & Ryan J. Owens, *The Success of Former Solicitors General in Private Practice: Costly and Unnecessary?*, 2016 MICH. ST. L. REV. 325, 326 (2016).

84. Paul Rogers, *Martins Beach: New Law Could Force Billionaire Vinod Khosla to Sell Public Path to Beach He Closed*, MERCURY NEWS (June 28, 2018), <https://www.mercurynews.com/2018/06/28/martins-beach-new-law-could-force-billionaire-vinod-khosla-to-sell-public-path-to-beach-he-closed/>. The \$1 million the state now has to purchase an easement is far less than the \$30 million price Khosla has apparently demanded for public use of the road.

85. See *Complaint of Martins Beach 1, LLC, Martins Beach 1, LLC v. Turnbull-Sanders*, No. 16-5590 (N.D. Cal. Sept. 30, 2016), <http://publicfiles.surfrider.org/martins/gov.uscourts.cand.303618.1.0.pdf>.

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