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INTRODUCTION

The California shoreline is a unique and valuable natural resource. Within its 1,072 mile length can be found species of flora and fauna located nowhere else in the state, as well as some of the most spectacular scenery in the world.

The beauty of the coastal area and its accessibility (about 84% of California's population live within thirty miles of the shoreline), make it a highly desirable location for many competing activities. Until recently, the land use controls were meager and were exercised only on a local level. Each community managed its particular segment of the coastal area to maintain optimum benefits for its vicinage.

As a result of this emphasis on local economic interests commercial, industrial and residential uses have been favored over agricultural and recreational uses. The effect of this piece-meal approach to coastal area planning has been a rapid and severe degradation of the special problems involved in coastal land use control evidenced by the Federal Coastal Zone Management Act of 1972 (FCZMA).[1] The FCZMA states that it is the national policy to preserve, protect, develop and, where possible, to restore or enhance the resources of the coastal zone.[2]

The key provisions of FCZMA authorize the Secretary of Commerce to make annual grants to any coastal state for the purpose of assisting in the development of a management program for the

1. 16 U.S.C. § 1451-1464 (Supp. 1973).
2. *Id.* at § 1452.

land and water resources of the state's coastal area, provided that the proposed program complies with the specific federal guidelines.[3] The act also provides for annual grants to any coastal state for the purpose of implementing its management program.[4]

California environmentalists and conservationists have long recognized the seriousness of the problems confronting coastal resources. Since the late 1960's the California legislature has considered, on several occasions, legislation aimed at protecting the coast. Due in part to political pressure applied by special interest groups, those measures were not enacted.

The voters of California, however, have responded to the need for controls where the legislature has failed. The November 7, 1972 ballot contained an initiative measure, Proposition 20, proposed the California Coastal Zone Conservation Act of 1972 (CCZCA).[5] The purpose of the CCZCA is to provide for the establishment of a comprehensive, co-ordinated and enforceable management program for the orderly, long range conservation and management of the natural resources of the coastal zone. This management program, called The California Coastal Zone Conservation Plan ("The Master Plan"), is to be based upon detailed studies of all factors that significantly effect the coastal area. The CCZCA specifies that the Master Plan must be consistent with the following objectives: (a) the maintenance, restoration and enhancement of the over-all quality of the coastal zone environment, including its amenities and aesthetic value; (b) the continued existence of optimum populations of all living things; (c) the orderly and balanced utilization and preservation of all coastal zone resources; (d) the avoidance of irreversable and irretrievable commitments of the coastal zone resources.[6]

A land use plan encompassing as many diverse interests and factors as the California Plan will take several years to research and draft. If uncontrolled development were allowed while the Master Plan was being formulated, the plan could become obsolete before it was completed. To prevent this from happening, the CCZCA also contains provisions for land use regulation and controls while the Master Plan is being formulated.

The interim permit control provisions of CCZCA require that anyone who plans any development within the permit area (gen-

3. *Id.* at § 1454.
4. *Id.* at § 1455.
5. CAL. PUB. RES. CODE §§ 27001-27650 (West Supp. 1973).
6. *Id.* at § 27302.

erally the first 1000 yards inland of the mean high tide line) must obtain a permit authorizing the project before work can begin.[7]

The CCZCA creates a total of seven commissions to prepare the Master Plan and to administer the interim permit controls. There are six regional Coastal Zone Conservation Commissions (regional commissions) and the California Coastal Zone Conservation Commission (state commission).[8]

Each of the six regional commissions exercise original jurisdiction over all permit applications for development within its respective regions. For any substantial proposed development the regional commission will hold public hearings, invite comments from interested persons, have its staff research the proposal and submit a written report with recommendations. The regional commission will then vote on whether or not the permit should be issued.[9]

The regional commissions also perform important functions in the preparation of the Master Plan. Each holds public hearings to assist the state commission in appraising public opinion on the future uses of the coast. The regional commissions also formulate those coastal zone policies that involve primarily regional issues.[10]

The state commission hears all appeals of final decisions made by the regional commissions. If an appeal is sought by either an unsuccessful applicant or any other person aggrieved by a regional commission's action, the state commission will review the decision. If it determines that substantial issues are presented, the state commission will independently investigate and vote on the application.[11]

In addition to deciding permit appeals, the primary responsibility of the state commission is to research and prepare the California Coastal Zone Conservation Plan. They perform the basic inventory and analysis, formulate all coastal zone policies which have state-wide implications, and draft the final Master Plan.[12]

The Master Plan is to be submitted to the legislature on or before December 1, 1975[13] and it would be premature at this time to

7. *Id.* at § 27400.
8. *Id.* at §§ 27200-27201.
9. 16 U.S.C. § 27420 (Supp. 1973).
10. *Id.* at § 27320.
11. *Id.* at § 27423.
12. *Id.* at § 27300.
13. *Id.* at § 27320.

deal with it in detail. The following discussion is therefore limited to the interim permit control provisions of the CCZCA, and is divided into four parts: The first part deals with the necessity of compliance with the permit provisions; the second will describe the various types of permits and outline the steps in the permit process; the third deals with the criteria used for approval or disapproval of applications for permits in various contexts; the fourth will discuss the constitutional issues raised by the CCZCA.

COMPLIANCE

Generally, compliance with the Coastal Zone Conservation Act may be achieved by the acquisition of a permit from a regional commission before commencing construction on any property within the permit area.[14] Each regional commission's power to require permits is limited geographically to the statutorily defined "permit area", and substantively by the statutory definition of "development."

The CCZCA contains explicit exemptions for certain improvements to single-family residences,[15] the maintenance of navigation channels,[16] and statutory vested rights.[17] The procedures for applying for both permits and permit exemptions are detailed in Title XIV, California Administrative Code, Section 13001 *et seq*, and are discussed below.

The permit area is generally defined in California Public Resourec Code section 27104 as the coastal land and water area between the seaward limit of state jurisdiction and one thousand yards landward from the mean high tide line. At some places the jurisdiction extends further if any portion of a body of water which is not subject to tidal action lies within the one thousand yard area. The permit area is thereby increased to the extent of that body of water together with a strip of land one thousand feet wide surrounding it.[18] For example, Lake Merced in San Francisco is within one thousand years of the ocean. The entire lake and all of the land within one thousand feet of the lake's shoreline is included within the permit area irrespective of whether lands on its eastern shore would otherwise be within one thousand yards of the mean high

14. CAL. PUB. RES. CODE § 27400 (West Supp. 1973).
15. *Id.* at § 27405(a).
16. *Id.* at § 27405(b).
17. *Id.* at § 27404.
18. *Id.* at § 27104(b).

tide line of the ocean. The area under the jurisdiction of the San Francisco Bay Conservation and Development Commission (BCDC) is excluded from the permit area.[19] Also excluded from the permit area is urban land which is either residentially zoned, stabilized and developed to a density of four or more dwelling units per acre on or before January 1, 1972, or is commercially or industrially zoned, stabilized and developed before January 1, 1972. Stabilization results when 80% of the lots are built to the maximum density permitted by the applicable zoning regulations of January 1, 1972.[20]

Anomalous results may occur where lot sizes vary substantially or where zoning classifications may have been amended since Jan- maximum permitted before the effective date of the CCZCA. For example, an area zoned for two-family residential use which was predominately developed with single family dwellings on twenty five hundred square foot lots would not meet the requirement of 80% of the lots being developed to the maximum two-family density, even though the density exceeds four dwelling units for each acre. If the property had been rezoned on March 1, 1972, to single family, the property currently would meet the maximum density requirement, but still would not meet the statute's technical date requirement. Hence, any single undeveloped lot within such an area would have to comply with the permit requirement.

Each regional commission has been required to map the precise boundaries of its jurisdiction within sixty days after its first meeting.[21] A copy of the map is on file in the county clerk's office of each county within the region.

Although federal lands are within the permit area, the Commission's jurisdiction does not include such property. State law is preempted by federal jurisdiction. Moral and political persuasion remain the strongest environmental tools the public have where federal lands are concerned.[22]

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19. *Id.* at § 27104(a). BCDC jurisdiction includes only the Bay and the land within 100 feet of the shoreline. The other 2,900 feet have been excluded by AB606 passed October 1, 1973. Before passage of AB606, the California Coastal Zone Conservation Commission exerted no jurisdiction over the inland 2900 feet contiguous to the BCDC jurisdictional area because the Attorney General advised that BCDC exclusion totally exempted San Francisco Bay as a basis of any coastal jurisdiction. The title insurance industry, however, questioned that opinion, maintaining that a cloud on title could result. *See generally* McKnight, *Title to Lands in the Coastal Zone: Their Complexities and Impact on Real Estate Transactions,* 47 CAL. ST. B.J. 408 (1972).

20. CAL. PUB. RES. CODE § 27104(c) (West Supp. 1973).

21. *Id.* at § 27104(d).

22. The lead agency which proposes a significant federal development is required

"Development" is broadly defined in California Public Resources Code Section 27103 to prevent any adverse changes to the coastal environment. Each stage of a project is included within the definition to preclude, for example, the strategy of filling tidelands and destroying the ecology intended to be protected by the permit requirement before applying for the permit. Included within "development" are (1) the erection of any solid material or structure on land, in or under water, which would include placement of piers or other foundations; (2) discharge or disposal of dredged materials or other waste; (3) any grading, removing, dredging or mining; (4) any changes in the density or intensity of use of land, including subdividing lands, lot splits, or building conversions[23]; (5) change in the intensity of use of water and its related ecology or of access to the water; (6) any construction, reconstruction, demolition or alteration of the size of any structure, regardless of private or public ownership. The section further provides that "structure" includes, but is not limited to, any road, pipe, flume, conduit, siphon, aqueduct, telephone line, power transmission line or building. Read alone, this section defines separably each phase of a construction project as well as minor improvements on existing developments to be a "development." No other section limits the number of permits for a project to one, but for most developments no purpose consistent with the CCZCA's environmental goals is furthered by requiring more than one permit per project.[24]

The CCZCA does not deal explicitly with the scope of activities which may be ancillary to a permit issued by a regional commission. That issue is being raised in the context of vested rights and is discussed in greater detail below.

A second permit from the regional commission will be required where substantial changes in building plans occur between the time of obtaining a permit and that of actual construction.[25] The problem is to define substantial change in a project where modifications

to file an environmental impact statement under the National Environmental Policy Act. Hopefully, no project would be pursued which has a substantial negative impact.

23. The CCZCA does not attempt to define precisely how a change in the intensity of a land use may be measured. The regional commissions have adopted an *ad hoc* approach to the problem with both performance standards and zoning standards being used.

24. Where a project is being developed under more than one building permit, and at least one of the permits has been acquired after February 1, 1973 the state commission is requiring the developer to apply for a coastal zone permit for that portion of the project which does not have vested rights under CAL. PUB. RES. CODE § 27404.

25. 14 CAL. ADMIN. CODE § 13610.

are expected. One approach is to require a second CCZCA permit if a second building permit were required. For example, the San Francisco Building Code provides that drawing changes which result in a change of project cost of 10% or more must have a new building permit.[26] Usually a change of this magnitude would affect the project's size or general appearance sufficiently to warrant review of the application by the regional commission. If, however, the change only affected a building's interior, review by the regional commission could well be superfluous.

Another approach to the problem is to leave it to the discretion of the regional commission staff. If the change will not materially alter the design concept or otherwise adversely affect the environment, no new permit should be required. This is the approach followed by the state commission. Developers however, should be aware that a new building permit may trigger the regional commission to review the development and possibly require a new coastal zone permit application.[27]

Permit Exemptions

The CCZCA exempts certain classes of minor improvements which are not expected to adversely affect the coastal environment. Repairs and improvements which do not exceed $7500 may be made on single family dwellings provided that "the commission shall specify by regulation those classes of development which involve a risk of adverse environmental affect and may require that a permit be obtained.[28]" This section is parallel to the California Environmental Quality Act exemption of ministerial acts from the requirement of an environmental impact statement.[29] The coastal exemption, however, is narrower in that the repairs must be made on single family dwellings. The reason for defining the exemption in terms of the type of occupancy, however, is not clear.

Other types of buildings, while not qualifying for an exemption, may qualify for an administrative permit for repairs or improvements to existing structures not in excess of $25,000.[30] Routine

26. San Francisco, Cal., Building Code § 302.A.10 (1972).
27. Presently municipalities are not notifying the regional commissions when building permits are issues in the zone. The regional commissions rely heavily on reports from local environmentalists if the developer does not himself notify the regional commission.
28. CAL. PUB. RES. CODE § 27405(a) (West Supp. 1973).
29. *Id.* at § 21080(b).
30. CAL. PUB. RES. CODE § 27422 (West Supp. 1973).

repair of elevators and interior repainting in high-rise apartment buildings qualify for permit treatment, although the review of repair or improvements affecting only the interior of an existing building appears unnecessary. Only if the purpose of the CCZCA were to ban all buildings other than single family dwellings in the coastal zone and amortization procedures were provided would the regulation as written be reasonable. The CCZCA, however, provides no rationale for treating single family dwellings differently than other classes of buildings.

Also qualifying for exemption is maintenance dredging of existing navigation channels or moving dredged materials from such channels to a disposal area outside the permit area.[31] This provision is intended to permit harbor maintenance. In the San Francisco Bay Area, the exemption is not meaningful since BCDC controls bay dredging and Coastal Zone Commission jurisdiction excludes the areas under BCDC jurisdiction.

Vested Rights

A vested right to construct without a permit from the Regional Commission is acquired if a person has obtained a building permit and ". . . has in good faith and in reliance upon the building permit diligently commenced construction and performed substantial work on the development and incurred substantial liabilities for work and materials necessary therefor."[32] Several issues can be isolated: what is a building permit; what kind of work is required to meet the substantial work criterion; if more than one building permit is required for the project, does reliance on that one building permit vest rights in the entire project? Since major and minor construction projects typically require substantial lead time for site acquisition, financing, planning and governmental approval, the question of when rights vest can have a widespread impact.

The CCZCA specifies only that a city or county have issued a building permit prior to February 1, 1973.[33] A building permit is a somewhat imprecise word of art in the construction industry. Most California cities, including San Francisco, follow the Uniform Building Code. Each separate structure requires a building permit. Where a project consists of a single building, the normal construction procedure includes separate permits for grading, filling, and exca-

31. *Id.* at § 27405(b).
32. *Id.* at § 27404.
33. *Id.* at § 27400.

vating as well as a site improvement permit. A site improvement permit is the basic building permit for all projects exceeding $500,000.00 in estimated construction costs, including superstructure permits, slab permits, partition permits, etc.[34] The holder of the site permit has no assurance that building approval for the entire building will be granted; approvals for each subsequent phase of the construction phase is treated as addenda to the original site permit rather than new or separate building permits, unless a substantial change is made. If a substantial change is made, a new site improvement permit must be acquired. Once the basic building permit has been issued for the building and construction has commenced, changes in municipal building standards which occur previous to the issuance of supplemental addenda to the permit, but subsequent to the issuance of the site improvement permit, as in the Van Ness Holiday Inn[35], do not affect the right to complete the entire structure.

Furthermore, the building permit must be valid before rights may vest pursuant to the permit. The GBI development at Lake Merced Hills was held not exempt from the requirement of a coastal zone permit because the developer had not relied materially on the building permit issued on January 24, 1973, but which was not administratively final until February 3, 1973.[36] The ten day period for appeal after approval of a building permit application resulted in final issuance of the permit after the effective date of the act.

Several California cases have held that no vested rights are acquired in equity prior to the issuance of a valid building permit.[37] No vested rights are acquired for preliminary work done under grading permits, for architectural fees and costs incurred getting governmental approvals. In *Spindler Realty v. Monning*[38], the developer had acquired a grading permit prior to obtaining a building permit for a hotel. Before the building permit was issued, the property was rezoned. The court reasoned that substantial sums of money could not have been expended in reliance merely on the "probability

34. San Francisco, Cal.; Building Code § 302.A.7 (1973); SPUR v. Central Permit Bureau, 30 Cal. App. 3d 920, 106 Cal. Rptr. 670 (1973).
35. *Id.*
36. Allan Riley v. Gerson Bakar, Inc., NO. 658931, Opinion and Minute Order, (San Francisco Super. Ct. May 1, 1973).
37. Anderson v. City Council, 229 Cal. App. 2d 79, 40 Cal. Rptr. 41 (1968); Russian Hill Improvement Ass'n v. Board of Permit Appeals, 66 Cal. 2d 34, 423 P.2d 824, 56 Cal. Rptr. 672 (1967); Spindler Realty Corp. v. Monning, 243 Cal. App. 2d 255, 51 Cal. Rptr. 7 (1966).
38. Spindler Realty Corp. v. Monning, 243 Cal. App. 2d 255, 53 Cal. Rptr. 7 (1966).

that a building permit for R-5 construction would be issued."[39] Even though the regulations of the Department of Buildings and Safety require that a grading permit on hillside property be granted for building purposes, the owner knew that a building permit was necessary before the structure could be erected. Since the privilege cannot ripen until a permit is issued, the developer is taking a calculated risk whenever he expends money or incurs liability prior to obtaining the permit.

Although "substantial work" has often been litigated in equitable vested rights cases, the recent case of *San Diego Coast Regional Commission v. See the Sea, Limited*[40] appears to have made the standard discussed above more ambiguous. Without citing any of the equitable cases, the California Supreme Court construed the facts in *See the Sea*[41] to be "overwhelming evidence that defendant . . . not only obtained a building permit but also engaged in substantial lawful work and incurred substantial liabilities."[42] The work was described as the demolition of a motel on the site and expenditures of $79,000 in construction costs.[43] By failing to ennumerate the activities for which the $79,000 was spent, and including the motel demolition, the court appears to be setting a new standard for vested rights under the Coastal Zone Conservation Act. The motel demolition generally would be considered preliminary work. While the $79,000 would qualify as actual construction, the implication of the opinion is that any substantial expenditures will qualify.

Similarly, a superior court, in determining whether rights had vested prior to the effective date of the Coastal Zone Conservation Act, relied on expenditures incurred before the building permit's issuance and noted that planning of the project had commenced in 1970.[44] Defendant purchased the property after issuance of the

39. *Id.* at 268, 53 Cal. Rptr. at 14.
40. 9 Cal. 3d 888, 513 P.2d 129, 109 Cal. Rptr. 377 (1973).
41. *Id.* at 890, 513 P.2d at 130, 109 Cal. Rptr. at 378.
42. *Id.* at 893, 513 P.2d at 132, 109 Cal. Rptr. at 380.
43. The building permit was issued on December 6, 1972. Prior to November 7, 1972, when the CCZCA was passed, $22,000 had been spent on plans, specifications, engineering and legal fees. The motel building was demolished in the first week of January, 1972, at a cost of $7,500. Loan commitment was obtained January 12, 1973 and financing charges of $72,000 in connection with the loan were paid. Thereafter, $79,000 was expended for actual construction, i.e. placement of footings, reinforcements for the entire project, three walls for the garage and part of the electrical underground. Actual construction occurred between mid-January and February 1, 1973. San Diego Coast Regional Comm. v. See the Sea, Ltd., San Diego County Superior Court NO. 340206, Memorandum Order, March 16, 1973.
44. Schillinger v. Topodynamics, Inc., Santa Barbara County Superior Court NO. 98491, Memorandum of Intended Decision, March 22, 1973.

permit just twenty days prior to the February 1, 1973 effective date of the CCZCA and immediately began construction. In equity, the court recognized "a case of fortuity, where the long, systematic, and costly work of several years was forced by others to culminate in the interim period between November 7, 1972, when the CCZCA was passed and February 1, 1973, when the CCZCA takes effect."[45] Although these two cases relied on previous work, the strong line of precedent holds that actual construction under a building permit must be commenced in order to acquire a vested right.

If more than one building permit is required for a project, the CCZCA is unclear as to whether rights may vest for the entire project or for only that portion of the project on which work has already been commenced. Section 27404 of the California Public Resources Code refers only to a "building permit." The State Commission is maintaining that a coastal zone permit is required for any building permit issued after February 1, 1973 regardless of whether or not the structure is part of a larger integral development. The issue has not been judicially determined.

In *Friends of Mammoth v. Board of Supervisors of Mono County*[46] the court held that the definition of a project must be interpreted in light of the legislative purpose. The definition of "development"[47] should be considered, therefore, within the designated objective of the CCZCA[48] to maintain, restore and enchance the overall quality of the coastal zone environment by orderly utilization and preservation and avoidance of irreversible commitments of coastal zone resources. Aspects of a project which are integral should be reviewed and approved in a single coastal zone permit. For example, a single family dwelling with a detached garage would require two building permits, but the development requires both parts in order to be complete. Especially where zoning requirements, for example, require the off-street parking for the dwelling, and the laying of a foundation for the house precludes location of the garage at any location other than the one indicated, a requirement of a coastal zone permit becomes bureaucratic red tape. Justification for getting a coastal zone permit rather than an exemption for an ongoing project should require a showing that the improvement can be deleted from the project, that the improvement could be located in a more

45. *Id.*
46. 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).
47. CAL. PUB. RES. CODE § 27103 (West Supp. 1973).
48. *Id.* at § 27302.

desirable part of the lot, and/or that other conditions could be imposed on that improvement alone which would make the improvement conform more to the coastal zone objectives.

A developer of a large planned unit development consisting of several buildings would maintain that California Public Resources Code, Section 27404 requires only that work be done in reliance on "a building permit." Strength for this argument comes from several sources. The CCZCA was patterned after BCDC which requires only one permit for each project.[49] In setting out prerequisites for gaining a permit, the Coastal Zone Commission requires that each applicant get approval, where necessary, of the project in concept from local planning authorities[50].

The Attorney General[51] has reasoned that a developer who has performed substantial work and incurred substantial liabilities would not be required to obtain a coastal zone permit if the development was a "single interdependent concept." The Attorney General relied on *The People ex. rel. San Francisco Bay Conservation and Development Commission v. Town of Emeryville*[52] for the criterion that a project must have a concretized plan, sufficiently delineated to permit prudent commencement of the project. In deciding that the town of Emeryville had not acquired a vested right to continue filling operations after the effective date of the BCDC, the court made specific findings that no financing had been arranged for the entire development as then conceived, or of the fill portion; that the first phase of a three-phase plan formally approved only four days before the effective date of the BCDC; that implementation of the plan was not to occur until the second phase; that rulings from the IRS for tax exempt bonds to finance the project were still needed; that the Corporations Commissioner had not authorized issuance of securities; that a firm bid for harbor dredging, land fill and harbor construction had not been obtained; that an engineering report confirming construction feasibility had not been obtained and that the town had not acquired an opinion from the Attorney General that residential development on tideland trusts lands was constitutionally permissible. For those reasons, the court held Emeryville was subject to the jurisdiction of the subsequently created BCDC. Had Emeryville been filling the bay as a part of a finalized development plan at the time of BCDC's creation, the town conversely should have had a

49. CAL. GOVT. CODE § 66632 (West Supp. 1973).
50. 14 CAL. ADMIN. CODE § 13210.
51. 56 Ops. Atty. Gen. NO. 72, Feb. 19, 1973.
52. 69 Cal. 2d 533, 446 P.2d 790, 72 Cal. Rptr. 790 (1968).

vested right to continue with its entire project. The question, therefore, becomes one of fact whether or not a development is proceeding in conformity with a single interdependent concept.

Balancing of the equities is an integral part of the determination of vested rights. Where the developer has performed substantial work and incurred substantial liabilities in good faith reliance on a building permit, the courts in equity have estopped governmental bodies from barring completion of the work contemplated in the building permits. Even if the development can be separated into distinct units, the courts have applied the interdependent building concept to provide fairness to the developer. Deciding when to apply the interdependent building concept is a question of fact for the court.

TYPES OF PERMITS

Having determined that the proposed development is within the jurisdiction of the CCZCA, that it is not entitled to an exemption, and that the developer has not previously obtained a vested right, the next step in the permit procedure is to determine the type of permit required. There are basically two types of permits, administrative and ordinary.

An administrative permit may be issued directly by the Executive Director of a regional commission. Such a permit is appropriate in an emergency, and where repairs, improvements or other works of a minor nature are contemplated.

All permits other than administrative permits require the filing of a detailed application with the regional commission. In those cases where the Executive Director determines that the project is de minimus with respect to the purposes and objectives of the CCZCA, there is a simplified procedure for approval known as the consent calendar. Projects not qualifying for the consent calendar must go through a more complex approval procedure including a public hearing.

Administrative Permits

California Public Resources Code, Section 27422 provides for the issuance of a permit directly by the Executive Director in cases of emergency, repairs or improvements to existing structures not in excess of $25,000, and other developments not in excess of $10,000. Unlike other permits, those granted pursuant to this section do not

require a public hearing or a vote of the full regional commission for approval.

1. *Emergency*

An emergency is defined as a situation which poses an immediate danger to life, health or property.[53] In such a situation application for a permit is made to the Executive Director of the appropriate regional commission by letter. If time does not allow application by letter the applicant may contact the Executive Director by telephone or in person.[54]

The applicant must inform the Executive Director of a) the nature of the emergency, b) the location, and c) the work proposed to be performed.[55] If time allows the Executive Director must verify these facts.[56] He should also, when feasible, consult with the chairman or vice-chairman of the regional commission before granting the permit.[57]

Before a permit may issue the Executive Director must make two findings; first, that an emergency does in fact exist which requires action more quickly than permitted by procedures for other permits; second, that the work for which the permit is requested is consistent with the policies of the CCZCA.[58]

Within five working days after the issuance of the permit the recipient of the permit must deliver to the Executive Director descriptive material sufficient to describe the proposal and to support the assertion that the work is within the criteria of California Public Resources Code, Section 27422.[59]

The Executive Director is required to report, in writing, to the regional commission the emergency permits he has approved and issued. The report must include a description of the work authorized and is to be mailed to those who have requested such notification.[60]

II. *Non-Emergency*

An administrative permit is appropriate in cases of non-emer-

53. 14 CAL. ADMIN. CODE § 13010.
54. *Id.* at § 13470.
55. *Id.* at § 13471.
56. *Id.* at § 13480.
57. *Id.* at § 13481.
58. *Id.* at § 13482.
59. *Id.* at § 13483.
60. *Id.* at § 13484.

gency repairs or improvements to existing structures not in excess of $25,000, and other developments not in excess of $10,000.[61] When applying for such a permit the applicant should state that the development is within the criteria established by Section 27422 of the California Public Resources Code, and attach copies of whatever maps, drawings, plans, etc., necessary to describe the proposal.[62]

In order to approve the permit the Executive Director must find that: (a) the work consists of repairs or improvements to existing structures not in excess of $25,000, or other developments not in excess of $10,000; (b) there will be substantial adverse environmental or ecological effect; and (c) the project is consistent with the policy and objectives of the CCZCA.[63]

If the Executive Director determines that the proposal does not fall within the criteria of California Public Resources Code, Section 27422, he will return the application to the applicant with an explanation.[64] If the application is properly filed but the Executive Director determines not to grant a permit he will notify the applicant, in writing, of the decision and the reasons for it.[65] In either of the above instances the applicant has ten working days to appeal the decision to the regional commission. If nothing is filed within ten days, the application is deemed to have been denied by the regional commission as of the day the Executive Director returned the application.[66] Since the applicant is allowed only ten days following the denial of a permit by a regional commission to appeal the decision to the state commission,[67] it appears that unless the applicant files an appeal with the regional commission within ten days of the Executive Director's decision he will be precluded from appealing to the state commission.

The Executive Director may place reasonable terms and conditions on a project before approving the application.[68] They should be for the purpose of minimizing any desirable effects of the project. For example, if an applicant wishes to build a garage or outbuilding the Executive Director may make issuance of the permit conditional on the structure being located out of the line-of-sight from the highway. If the applicant and Executive Director can not

61. CAL. PUB. RES. CODE § 27422 (West Supp. 1973).
62. 14 CAL. ADMIN. CODE § 13411.
63. *Id.* § 13410(a); CAL. PUB. RES. CODE § 27402 (West Supp. 1973).
64. 14 CAL. ADMIN. CODE § 13430.
65. *Id.* at § 13431.
66. *Id.* at § 13432.
67. *Id.* at § 13700.
68. *Id.* at § 13420.

agree on terms or conditions to be imposed the applicant may appeal to the entire regional commission.[69] This appeal will be treated as an application for an ordinary permit.[70]

The Executive Director is required to report to the regional commission at each meeting the administrative permits he has approved since the last meeting. The report must describe the work approved and copies are to be mailed to interested persons.[71] No non-emergency administrative permit is valid until the close of the meeting at which the report concerning its issuance was presented to the regional commission.[72] If two commissioners object, the permit will not become valid. In this event the application for an administrative permit will be treated as an application for an ordinary permit and will be deemed filed as of the date of the meeting.[73]

Consent Calender Permits

The consent calender is an administrative device intended to speed the process of regional commission approval of minor projects. The application procedures and requirements are identical to those for ordinary permits, set out below. The important difference is that, if after reviewing a permit application the Executive Director is of the opinion that the project is *de minimus* with respect to the purposes and objectives of the CCZCA, the application will be placed on the consent calender. All applications on the consent calender are scheduled together at one public hearing where they are considered as a single permit application.[74]

At the public hearing anyone may object to any application being placed on the consent calender. If three commissioners agree that an application should be removed from the consent calender, it will be considered as a single permit application.[75] All applications not removed from the consent calender are routinely approved by the regional commission.

Ordinary Permits

When any proposed project also requires a permit from any city or county the application will not be considered by the regional

69. *Id.* at § 13451.
70. *Id.* at § 13453.
71. *Id.* at § 13440.
72. *Id.* at § 13454(a).
73. *Id.* at § 13454(b).
74. *Id.* at § 13340.
75. *Id.* at § 13342.

commission until the city or county concerned has granted their approval in concept of the project.[76] A project is approved in concept when the local agency's approval has become final and the proposal is no longer subject to rejection in principle unless a substantial change in the development is proposed.[77]

The local agency must notify the regional commission in writing of its decision. The notification from the local agency must include a description of the contents of the application it approved and its reasons for approval. The local government may also include any information, comments, or questions it wishes to forward to the regional commission.[78]

The intent of the requirement of the local approval is to enable local governments to consider the project's effect on their community before it is considered by the regional commission.[79] This provides for a preliminary screening of projects which are likely to be unacceptable.

The actual application is made on a form approved by the state commission. Each application must contain all information, statements, drawings, maps, etc., reasonably necessary to determine if the project complies with the policies and objectives of the CCZCA.[80] Information about land and water areas in the vicinity of the project, whether or not owned or controlled by the applicant, must also be included. The purpose of this is to inform the regional commission as completely as possible of present uses and future plans for the general vicinity of the proposed project.[81] This provides a context in which the project can be placed to better determine its effect on the area in which it is to be located.

The burden of proof as to the acceptability of a project is on the applicant.[82] It is important, therefore, that the application is thorough in its description of the proposal, and that the information is well organized and easily understandable.

Upon receipt of an application the Executive Director prepares a summary of the information it contains. The summary may include initial staff recommendations as to whether a permit should

76. *Id.* at § 13210.
77. *Id.* at § 13222.
78. *Id.* at § 13222.
79. *Id.* at § 13211(b).
80. *Id.* at § 13231.
81. *Id.* at § 13232.
82. CAL. PUB. RES. CODE § 27402 (West Supp. 1973).

be granted or denied. Staff comments pointing out questions of fact, applicability of the policy of the CCZCA, related previous application, and other relevant matters may be attached to the summary.[83] The summary is mailed to all commissioners, the applicant, and all affected cities and counties. It must also be made available to any interested individual or organization, including neighboring property owners. The summary and any attachments must be distributed no less than fiftten days prior to the scheduled public hearings.[84]

Not later than ninety days nor sooner than twenty-one days from the filing of the application a public hearing must be held.[85] At the public hearing the application is identified and the Executive Director presents a summary of correspondence received relating thereto. The applicant (or his representative) then makes his presentation. Anytime after the applicant's presentation, the commissioners may direct questions to the speaker. Time is alloted for speakers for and against the proposal.[86] The speakers should be brief and no speaker will usually be allowed the floor more than once for each application.[87] Ordinarily the public hearing will be completed in one regional commission meeting. The commissioners may, however, vote to continue the hearing on an application to a subsequent meeting.[88]

Following the hearing the Executive Director performs whatever investigations, research, etc., necessary to answer questions posed at the hearing and to prepare his recommendations. Upon completion of all staff investigations, the Executive Director submits his report to the regional commission. The report includes any questions not yet answered, the recommendation of the Executive Director, and a proposed resolution.[89]

The proposed resolution may require that approval be made subject to reasonable terms and conditions aimed at minimizing any adverse effects of the project. These terms and conditions are ordinarily perpetual but the commission may set an expiration date or provide that they shall apply only to the applicant and not to subsequent owners.[90] Immediately after the Executive Director

83. 14 CAL. ADMIN. CODE § 13270.
84. *Id.* at § 13271.
85. *Id.* at § 13260.
86. *Id.* at § 13302.
87. *Id.*
88. *Id.* at § 13305.
89. *Id.* at § 13310.
90. *Id.* at § 13322.

presents his recommendations, a representative of the applicant is allowed a chance to comment on the recommendations.[91]

Normally the regional commission will vote on the application at the next meeting following the public hearings, but the vote may be taken at any time upon the recommendation of the Executive Director.[92] The CCZCA states that several specific types of projects require a two-thirds majority for approval while a majority affirmative vote is sufficient for approval of projects not included in this requirement.[93]

Appeals to the State Commission

An applicant whose application for a permit has been denied, or who wishes to challenge conditions on a permit issued, or any person aggrieved by approval of a permit, may appeal the decision of the regional commission to the state commission.[94] A person is deemed to have been aggrieved by approval of a permit when dissatisfied with the decision and either opposed the application or would have opposed it had they not, for good cause, been prevented from doing so. The aggrieved person need not be a resident of the region in which the development is located.[95] An appeal must be filed within ten days of that final decision of the regional commission.[96]

On appeal the state commission first determines if a substantial issue is raised by the appeal. If no substantial issue is raised the state commission may decline to hear the appeal.[97] At the first meeting of the state commission following the filing of an appeal

91. *Id.* at § 13332.
92. *Id.* at § 13321.
93. CAL. PUB. RES. CODE § 27401 (West Supp. 1973), "No permit shall be issued for any of the following without the affirmative vote of two-thirds of the total authorized membership of the regional commission, or of the commission on appeal:
(a) Dredging, filling, or otherwise altering any bay, estuary, salt marsh, river mouth, slough, or lagoon.
(b) Any development which would reduce the size of any beach or other area usable for public recreation.
(c) Any development which would reduce or impose restrictions upon public access to tidal and submerged lands, beaches and the mean high tideline where there is no beach.
(d) Any development which would substantially interfere with or detract from the line of sight toward the sea from the state highway nearest the coast.
(e) Any development which would adversely affect water quality, existing areas of open water free of visible structures, existing and potential commercial and sport fisheries, or agricultural uses of land which are existing on the effective date of this division."
94. 14 CAL. ADMIN. CODE § 13700.
95. *Id.* at § 13700.1.
96. *Id.* at § 13700.
97. *Id.* at § 13701.

(or as soon as practicable) the staff submits a recommendation as to whether or not the appeal should be heard.[98] A majority affirmative vote of the state commission is required in order for the appeal to heard.[99]

Where the regional commission has granted a permit there will be no substantial issue raised if there is no indication that there will be a substantial adverse environmental or ecological effect, and there is no indication that the development is inconsistent with the policy or objectives of the CCZCA.[100] If the permit was denied by the regional commission the appeal will not be heard if there is support for the determination made by the regional commission that there will be adverse effects or that the development is inconsistent with the CCZCA.[101]

Substantial issues may always be deemed to have been raised if the regional commission incorrectly used the majority vote standard rather than the two-thirds vote standard,[102] or a determination is necessary for uniformity of precedent.[103]

If the state commission declines to hear the appeal, or fails to act within sixty days of its filing, the decision of the regional commission becomes final. If the state commission decides to hear the appeal the same procedures are followed as for an application before a regional commission, except that final action must be taken within sixty days.[104] These procedures include a *de novo* public hearing, notification of interested parties, staff reports and investigations.

The requirements of *de novo* investigations and hearings on appeal are a recognition of the fact that there may be conflicts between regional and statewide interests and policies. The state commission conducts its own investigation and should there be such a conflict the state-wide interests will be given proper consideration.

THE PERMIT CRITERIA

Since Commission decisions are predicated on the Act's objectives, rather than detailed guidelines, commission decisions set prec-

98. *Id.* at § 13705.
99. *Id.* at § 13701.
100. *Id.* at § 13702.
101. *Id.* at § 13703.
102. CAL. PUB. RES. CODE § 27401, note 93 (West Supp. 1973).
103. 14 CAL. ADMIN. CODE § 13704.
104. *Id.* at § 13707.

edents for future action in given fact situations. The factors being considered by the commissions in reviewing applications can be illustrated by reference to state commission action on permits for housing developments. Four basic situations can be identified: (1) the single house or duplex; (2) the subdivision where lots are sold for development by the purchaser; (3) the subdivision where the developer himself usually constructs a condominium or town house development; (4) the high-rise structure. In some cases, the third and fourth situations may exist in combination.

A balancing test is used to judge the desirability of granting a permit. The factors involved in decision-making are not static, but several of the following considerations are frequently made. Is the surrounding area presently developed? Would a view of the ocean be obstructed? Is the structure's design compatible with the environment? Is there an erosion or landslide potential on the site? Will the development increase traffic? Does the project conform to zoning regulations? Is there present access to the beach from the site? Is it a wildlife breeding area? Will water quality be affected by construction? Will area density be increased? Is an alternative site available? The most pertinent factors depend on the particular development facts.

Single House or Duplex Development

A single low density structure generally has little effect on the coastal environment unless located in a critical geologic or view area. Such developments, consequently, do not reach the state commission on appeal.

A permit for a single duplex was approved in the crowded Newport Beach area after the applicant agreed to provide two off-street parking spaces rather than the one required by the city zoning ordinance.[105] Two major considerations were weighed. The area presently was developed with a mixture of single family residences and duplexes, but the high demand for residences close to the beach indicated an expectation of conversion of more units to duplexes. Newport Beach attracts as many as 170,000 people on a summer weekend. Streets are jammed; parking is difficult to find. The particular project would not deter access to the beach. With an additional two parking spaces the commission believed that the du-

105. Appeal of Dana Smith, NO. 54-73 (Cal. Const. Zone Conservation Comm'n, July 18, 1973).

plex would not increase traffic congestion or parking problems significantly. The duplex would satisfy its own parking needs. Density and parking, therefore, were the critical factors in this approval.

Development of a single house in an urban area usually presents only architectural design problems. Density is a minor consideration. If the building is adjacent to a beach park or is the last site on a bluff, however, the public use issue may arise. Until the coastal plan is finished, the commission is reluctant to commit any parcel which may provide beach access (especially if the access is within 50 feet of the mean high tide line) or public vistas of the ocean.

Single House Development in a Subdivision

The single house being developed by the purchaser in a subdivision presents a slightly different fact situation than the previous case. The same considerations obtain with respect to views, landslide potential, etc., but the commission has a greater concern with cumulative effect. Although an individual building does not necessarily foster development of others in the same subdivision, the commission is concerned about setting a development precedent.

A permit for a single-family home in a subdivision seven miles north of Bodega Bay was temporarily denied.[106] Eighteeen of the twenty lots in the subdivision were undeveloped. All roads and underground utilities for the subdivision were complete. Although the lot was below the grade of the adjacent highway, the commission reasoned that an approval would represent one more step in residential development from Bodega Bay to the Russian River. Because the area is close to the dense urban population of the San Francisco Bay Area and has beaches suitable for recreational use, the Commission held that public recreation should have priority over private use. Although the State Department of Parks and Recreation had taken no action to condemn the property for a park, the director of the department stated that Wright's Beach was high on the priority list for acquisitions. The State's long-range acquisition program had not been finalized. The commission, however, recognized a persuasive private interest in this application. The owner was retired, had purchased the property before Proposition 20 was proposed and intended to develop the lot with his permanent resi-

106. Appeal of Carl Schreffler, NO. 88-73 (Cal. Coast. Zone Conservation Comm'n, August 1, 1973).

dence. Consequently, the Commission decided to deny the permit temporarily, but with the condition that a permit be granted in a year if a governmental agency had not made by that time a firm commitment to purchase the property.

That case indicates the strong concern of the Commission to preserve beach areas for recreational use. Other secondary concerns mentioned in the case which may indicate important planning trends are the use of the residence as a primary residence rather than second home and the preference for planned unit developments with substantial open areas for public enjoyment, rather than single lot developments which use more open area.

Subdivision Developed by Developer

Where the subdivision will be developed before sale to customers, the commission has a greater opportunity to impose developmental conditions to mitigate any effects on the coastal environment. Nonetheless, the commission weighs carefully whether or not the project should be disapproved because of an irreversible commitment of a large parcel. In the subdivision case considered above, the land was already subdivided and ownership atomized, thereby reducing potential alternative uses of the lots remaining undeveloped. In this situation, the commitment to subdivision is the prime consideration because alternative uses are still possible.

At Moss Beach, a permit to erect the first four single family homes in a twenty-wo unit development was approved.[107] The commission imposed conditions on the permit for design and landscaping review and for a maximum height limit of twenty feet, since an architectural precedent for future development was being set. The applicant was prohibited from constructing a stairway or other access for the use of the public or of residents from the top of the bluff on which the houses were to be sited to the marine preserve below. Since the applicant was proposing a relatively small scale development in an area which has similar development, the commission considered the development appropriate so long as the marine preserve would not be damaged by public use.

An application to build one hundred and sixteen single-family homes in the Carpenteria Creek area was denied.[108] The parcel

107. Appeal of Huffman, NO. 145-73 (Cal. Coast. Zone Conservation Comm'n, Sept. 19, 1973).
108. Appeal of Reeder Development Corp., NO. 69-73 (Cal. Coast. Zone Conservation Comm'n, August 1, 1973).

consisted of approximately thirty acres, seven of which were in the coastal zone. The developer proposed to dedicate 4.8 acres for park use. The surrounding area was developed residentially, and the commission had approved a one hundred and forty-four unit development at the nearby Polo Fields. The commission noted that the Polo Field development had innovatively preserved a large recreational area, whereas the subject proposal offered nothing more than a dedication of open space. The commission expressed its concern that it would be difficult to deny similar projects in the same area without being subject to legal attack for arbitrary and capricious decision-making should this undistinguished proposal be approved. Additionally, the rapid population growth in this area was being questioned by the Carpinteria Planning Commission. The commission raised the policy question of priority of agricultural uses over urban development in this area, since this land has valuable prime alluvial soil for growing lemons and avocadoes. Although the property lay "in the path of development," the commission refused to create a precedent for conversion of adjacent orchards into subdivisions and suggested that "bedroom" communities for the Santa Barbara and Oxnard areas should be constructed in alternate inland areas. Housing in this area would increase the traffic problems in the beach area and pressure the Carpinteria authorities to cater more to day use by local residents than the current regional overnight use which was viable. Futhermore, the commission was concerned about permitting a significant conversion of open space at an early stage of its planning process.

Similarly, an application for a large planned unit development, consisting of one hundred and fifty apartments, a one hundred and fifty unit motel, several restaurants, a service station, an office park and possible commercial center on a one hundred and sixty acre parcel on the outskirts of Arcata was denied.[109] The commission pointed to the value of the land as a wildlife habitat and as open space. Its present use was agricultural and soil studies indicated a mixture of prime and lesser grades suitable for continued farming. Such a project would induce expansion of the limits of Arcata. Although further coastal planning might indicate a use for the property other than agriculture, the commission noted that Arcata has available land for this type of development. Urban sprawl should not be encouraged at the price of substantial coastal lands.

109. Appeal of Atopak Development Corp., NO. 64-73 (Cal. Coast. Zone Conservation Comm'n, Sept. 5, 1973).

Large commitments of coastal lands to planned unit developments are being strongly discouraged. Where the property is agricultural or in rural areas, as in many of these cases, the possibility of obtaining a permit is small. The commission is concerned about retaining agricultural lands, retaining open space and preserving its planning options. Projects in predominately developed urban areas may be approved if the applicant demonstrates that open space will be provided not only to the residents of the development, but also to the public.

High-Rise Development

High-rise development may be in planned unit developments as well as single structures. The economic trend toward high-rise condominiums has been reflected in large numbers of applications in urban areas for permits.

In the San Francisco area, the Playland-at-the-Beach proposal was approved subject to several conditions.[110] The commission noted that no real consideration of public purchase of this land for public recreation had been made or was expected. Six hundred and sixty condominium units with underground parking and 151,000 square feet of commercial space were approved. to increase open space in the development, however, the commission required a reduction of thirty-six units in one building and the dedication of at least 7500 square feet of additional open space park area. The condominium homeowner's association was required to maintain the area after dedication. All park areas had to be dedicated prior to any construction. To improve views from the meadow area of Sutro Heights, the eastern-most building was reduced in size by eliminating four units. To improve the views of Sutro Heights from the beach area, the number of units in the westernmost building was reduced by ten units. The commercial building was redesigned to present a more open appearance to the ocean view. Because the site presented soil stability problems, especially during the construction phase, the developer was required to make cuts in the cliffside which would minimize erosion and erect access barriers to the Sutro Park area to prevent careless destruction of flora. Although the development substantially increased the number of dwelling units in the area and the commercial floor space, the commission concluded the project would have no adverse effect because of density.

110. Appeal of San Francisco Chapter of California Coastal Alliance, et. al, NO. 49-73 (Cal. Coast. Zone Conservation Comm'n, July 5, 1973).

The beach area was served by municipal transportation, and the adjacent Great Highway has the capacity to absorb the additional traffic which would be generated by the project. Despite the fact that a large parcel was being committed to development, the commission considered as mitigating effects the additional park areas being provided and public deck areas on the third floor of the shopping center which have ocean vistas. Because of the unique setting of the project below Sutro Hill and its proximity to the Golden Gate Park and the beach, the commission concluded the project would have no cumulative effect as a precedent for development in other urban areas in the coastal zone. The project had no adverse effect on public accessibility to the beach.

In contrast, a four story, fifty-four unit building sited on the bluffs on Encinitas was disapproved.[111] The applicant also proposed an alternative of three buildings and ten foot side yards. Pressure for development in the area north of San Diego had increased substantially. Although much of the Encinitas bluff was already developed[112], the area had several vacant lots and the commissioners feared high-rise condominium development on those lots as well as conversion of existing older buildings to luxury condominiums. The commission concluded that approval of the development would commit the bluff to luxury condominiums, preempting the Commission's planning options in the area. The commission recognized that the alternate proposal combined with ocean vista points and an offer to provide a public easement for hiking between the edge of the bluff and the building were mitigating measures, but insufficient to overcome the negative effects.

In high-rise developments, the issue of density is more important than in other developments. Concentration of large populations in the coastal zone can threaten coastal flora. Traffic congestion often accompanies development in coastal areas. Commitments of large parcels and the erection of high walls blocking the views of the coean usually result from high-rise development.

CONSTITUTIONAL ISSUES

The planning trends emerging from the ongoing review of permits indicate potential constitutional problems. During the interim

111. Appeal of Matrix I, NO. 107-73 (Cal. Coast. Zone Conservation Comm'n, Sept. 5, 1973).

112. The developer alleged that 90% of the area capable of being developed in condominiums was already developed.

planning period, no significant problems regarding the taking issue may occur. Nonetheless, conflict with local governmental agencies over "home rule" is possible and a freeze on the issuance of construction permits may spur litigation by property owners. The legal issues raised by these interim period problems are set out below. The taking issue is also discussed in the context of some planning problems which may arise upon adoption of the final plan, such as mapping conservation districts and requiring access to beach areas as a condition precedent for development.

"Home Rule"

The California Constitution provides cities and counties broad discretion in governing their areas.[113] In the absence of state statutes regulating zoning, cities may enact zoning regulations as an exercise of home rule powers. However, state zoning legislation does regulate the procedure by which counties and general law cities enact, amend and administer zoning laws.[114] In designing zoning regulations, charter cities[115] are restricted only by the statutes which require a general plan[116] and which set minimum procedural due process requirements.[117] Charter cities may "make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters . . . with respect to municipal affairs shall supersede all laws inconsistent therewith."[118] Since zoning generally has been considered a municipal affair,[119] the Coastal Zone Conservation Act, by giving zoning powers to regional commissions, may violate local government home rule powers.

The purpose of the home rule provisions is to prevent the state legislature from interfering in local affairs.[120] Section 11 of the Ar-

113. CAL. CONST. art. 11, § 7, "A county or city may make and enforce within its limits all local police, sanitary and alter ordinances and regulations not in conflict with general laws."

114. CAL. GOVT CODE § 65800 *et seq.* (West 1966). § 65803, however, expressly excludes charter cities, unless the charter adopts state enabling procedure.

115. A city with a population exceeding 3,500 may frame a charter for its own government. CAL. CONST. art. 11, § 8a. In the coastal zone there are 17 charter cities.

116. CAL. GOVT. CODE § 65302 (West Supp. 1974).

117. *Id.* at § 65804.

118. CAL. CONST. art. 11, § 5a.

119. Brougher v. Board of Public Works, 205 Cal. 426, 271 P. 487 (1928); Fletcher v. Porter, 203 Cal. App. 2d 313, 21 Cal. Rptr. 452 (1962); Hunter v. Adams, 180 Cal. App. 2d 511, 4 Cal. Rptr. 776 (1960).

120. Peppin, *Municipal Home Rule in California*, 30 CAL. L. REV. 1 (1941); Comment, *Regulation of San Francisco Bay*, 55 CAL. L. REV. 728, at 760-761 (1967).

ticle XI bars the legislature from delegating power "to perform any municipal function whatever." Prior to constitutional limitation,[121] the legislature appointed commissions having power over municipal indebtedness and taxation and control over some city functions such as the fire department. The prevention of fiscal interference appeared to be the primary concern for enactment of this section.[122]

Local governments have relied on the general language of section 11 of Article XI to preserve autonomy in municipal affairs.[123] Since the 1970 constitutional amendment omitted "special commissions" from the scope of section 11, the section on its face does not apply to the California Coastal Zone Conservation Act (CCZCA).[124] The CCZCA establishes special commissions which are not private bodies for the purpose of coastal zone management. The Coastal Zone Commission has no authority to tax, to float bonds or to appropriate local funds. The coastal zone activities of planning for the coastal zone and issuing or denying interim permits are not locally funded. The source of funds for these activities is legislative appropriation from the state general fund. Consequently, the primary fiscal concern of section 11 is not violated by the Coastal Zone Conservation Act.[125]

The potential conflict with the home rule provisions occurs in the permit process.[126] An applicant is required to obtain all necessary permits or approval in concept from appropriate local agencies prior to application for the coastal zone permit. Along with the no-

121. CAL. CONST. art. 11, § 13 provided, "The Legislature shall not delegate to any special commission, private corporation, company, association, or individual any power to make, control, appropriate, supervise or in any way interfere with any county . . . or municipal improvement, money, property, or effects . . . or perform any municipal function whatever." § 13 was amended and replaced by § 11 in 1970); § 11 is substantially the same, but does not prohibit delegation of powers to "special commissions."

122. Comment, *Regulation of San Francisco Bay*, 55 CAL. L. REV. 728, at 760-761 (1967).

123. The People ex rel. San Francisco Bay Conservation and Development Commission v. Town of Emeryville, 69 Cal. 2d 533, 446 P.2d 790, 72 Cal. Rptr. 790 (1968).

124. The Constitution Revision Commission commented on § 11 as follows: "This . . . section prohibits delegation by the Legislature of certain powers over local matters. It restates the substance of related existing provisions without change in meaning except the proposal only prohibits delegation to private persons or bodies whereas the existing provision extends to 'special commissions.'" CALIFORNIA CONSTITUTION REVISION COMMISSION, PROPOSED REVISIONS OF THE CALIFORNIA CONSTITUTION 65 (1968).

125. The only three cases in which the California Supreme Court has found a violation of § 13 all involved local financing: Merchants National Bank v. Escondido Irrigation Dist., 144 Cal. 329, 77 P. 937 (1904); City of Los Angeles v. Teed, 112 Cal. 319, 44 P. 580 (1896); and Yarnell v. City of Los Angeles, 87 Cal. 603, 25 P. 767 (1891).

126. *See* note 124, *supra.*

tification of permit approval by the local governmental agency, the regional commission receives a statement of the reasons for granting local approval.[127] The regional commission, judges the application in terms of adverse impact on the coastal environment.[128] To the extent that the local planning body may assign other planning factors a higher priority in decision-making, a conflict may result.

Charter cities may claim their discretion in zoning practice is being pre-empted when coastal zone permits are denied or a permit is issued subject to conditions not required by local agencies. This claim overlooks the fact that an alleged municipal affair may have a statewide concern. A long line of cases have held that activities which produce effects outside the municipality may be regulated by a municipality, but that in the event of a conflict, the question becomes one of predominance or superiority of state general laws or local regulations.[129]

The recent California Supreme Court case validating the Tahoe Regional Planning Agency (TRPA) against charges of home rule violations,[130] appears to be the controlling precedent. Even though the counties affected by the Tahoe Regional Planning Compact were required to pay for TRPA's operations, the Court held that constitutional home rule provisions were not violated. TRPA was granted the same powers the counties possess with respect to the adoption of zoning, planning, and other regulations. The test for granting these powers to TRPA was regional concern of the subject matter. The Court had no difficulty finding regional concern.

> The water that the Agency is to purify cannot be confined within one county or state; it circulates freely throughout Lake Tahoe. The air which the Agency must preserve from pollution knows no political boundaries. The wildlife which the Agency should protect ranges freely from one local jurisdiction to another. Nor can the population and explosive development which threatens

127. 14 CAL. ADMIN. CODE § 13222.
128. CAL. PUB. RES. CODE §§ 27402, 27403, 27302 (West Supp. 1973).
129. Bishop v. City of San Jose, 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969); Pacific Telephone and Telegraph Company v. City and County of San Francisco, 51 Cal. 2d 766, 336 P.2d 514 (1959); Eastlick v. City of Los Angeles, 29 Cal. 2d 661, 177 P.2d 558 (1947); Pipoly v. Benson, 20 Cal. 2d 366, 125 P.2d 482 (1942); Wilson v. City of San Bernadeno, 186 Cal. App. 2d 603, 9 Cal. Rptr. 43 (1960); County of San Mateo v. City Council, 168 Cal. App. 2d 220, 335 P.2d 1013 (1959); Cralle v. City of Eureka, 136 Cal. App. 2d 808, 289 P.2d 509 (1955).
130. The People ex rel. Younger v. County of El Dorado, 5 Cal. 3d 480, 487 P.2d 1193, 96 Cal. Rptr. 553 (1971).

> the region be contained by any of the local authorities which govern parts of the Tahoe Basin. Only an agency transcending local boundaries can devise, adopt, and put into operation solutions for the problems besetting the region as a whole. Indeed, the fact that the Compact is the product of the cooperative efforts and mutual agreement of two states is impressive proof that its subject matter and objectives are of regional rather than a local concern.[181]

The Court looked to the environment to be affected and to the stated purpose of TRPA to find regional concern.

The Coastal Zone Conservation Act explicitly states its purpose to be protection and enhancement of the coastal environment and coastal resources. Like TRPA, the coastal zone has a common water resource, the ocean. The granting of any permit for construction, even for a single family dwelling, alters the coastal zone in a manner which may have detrimental effects, such as improper sewage treatment, water pollution, erosion of the coastline, reduction of usable open space, and the shifting of public use and burden to other areas. No individual city controls all the factors which affect the coastal zone. Without regional control, each community optimizes its planning objectives which may be to the detriment of adjacent communities.[132] The problems inherent in managing the coastal zone parallel those in the Tahoe basin. The Coastal Zone Commission, therefore, should evaluate all permits which conceivably may affect the coastal environment. The fact that trivial cases which have only local effect may occur does not obviate the need for the regional agency to make its determination from a coastal perspective.

Finally, the home rule problem appears minimal because the Coastal Zone Conservation Act was patterned after the Bay Conservation and Development Commission (BCDC).[133] BCDC has concurrent regional jurisdiction with local jurisdictions over planning for the San Francisco Bay and the land within one hundred feet

131. *Id.* at 493-494, 96 Cal. Rptr. at 561.
132. *See generally, Marks and Taber, Prospects for Regional Planning in California,* 4 PACIFIC L.J. 117 (1973).
133. Jackson and Baum, *Regional Planning: The Coastal Zone Initiative Analyzed in Light of the BCDC Experience,* 47 CAL. ST. B.J. 427, at 428-430 (1972); Comment, *Regulation of San Francisco Bay,* 55 CAL. L. REV. 728, at 764-768 (1967).

of the shoreline. California courts twice have upheld the validity of BCDC jurisdiction. In *San Francisco Bay Conservation and Development Commission v. Emeryville*,[134] the California Supreme Court upheld the jurisdiction of BCDC over the town of Emeryville which wanted to continue planning without BCDC interference in the review process of a large development which included substantial fill. In *Candlestick Properties, Inc. v. San Francisco Bay Conservation and Development Commission*,[135] the court held that the provisions creating BCDC jurisdiction over bay development were controlling over the provisions governing development in the legislatively created Hunters Point Reclamation District in San Francisco because BCDC was more recent in time and its regional legislative purpose in controlling bay development was "abundantly clear." The regional concern test thus has been the criterion for upholding BCDC jurisdiction.

In conclusion, conflicts between the Commission and local governments in regulating land uses in the coastal zone may occur. However, the regional concern test clearly applies when the purposes of the Act are measured against the coastal zone's regional environmental problems, and thus indicates that the Act does not violate the home rule provisions of the California constitution.

Temporary Moratorium

Without a specifically declared temporary moratorium on construction in the coastal zone, a moratorium may be effected by the regional commissions' denying construction permits for land on which they want to retain planning options. Since the coastal plan will not be presented to the legislature for approval until 1976,[136] the practical effect of a policy to retain open planning options would be a temporary moratorium lasting at least as long as the CCZCA's interim planning period. Common types of property for which permits may be denied would be relatively large development sites and rural land in an urban "path of development," because proposed development of such property would probably alter significantly the surrounding coastal environment.

The issue is whether the denial of a construction permit until adoption of the coastal plan results in an unconstitutional taking of

134. 69 Cal. 2d 533, 446 P.2d 790, 72 Cal. Rptr. 790 (1968).
135. 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970).
136. CAL. PUB. RES. CODE § 27600 (West Supp. 1973).

property. The answer is that a temporary moratorium generally may be upheld if the restriction is reasonable.[137] Reasonableness may depend on the length of the moratorium, the purpose of the regulations, and the relation of the restriction to the regulatory purpose.

I. Duration

what constitutes a reasonable length of time for a coastal moratorium? That question may be answered by analogy to the statutory regulations and case law permitting interim zoning, along with BCDC precedent.

Local governments are permitted to impose interim zoning controls pending completion of final plans and ordinances.[138] Unless the local agency complies with the procedural prerequisites in California Government Code, Section 65858, for enacting a zoning ordinance, an emergency ordinance may not be effective for more than four months. The emergency ordinance may be extended twice if notice is given, a public hearing is held and the legislative body adopts the extension by a four-fifths vote.[139] The first extension may be for eight months and the second extension may be for one year. An extension is explicitly premised on due process considerations; the time limits are clearly imposed to prevent permanent ordinances from being passed without prior notice and public hearings.

Since interim zoning is a municipal affair, charter cities may provide for or exclude interim zoning. The duration of the interim ordinance is controlled by the charter.[140] If the charter is silent on the question of duration, an interim ordinance will terminate within a reasonable time.[141] In the landmark case of *Miller v Board of Public Works*,[142] the City of Los Angeles enacted a moratorium on construction of multiple family residences in a residence district. No express expiration date was provided. The court upheld the

137. Annot., 136 ALR 844 (1942). A majority of jurisdictions uphold temporary ordinances.

138. CAL. GOVT. CODE § 65858 (West Supp. 1974) establishes procedure for interim ordinances as emergency measures. This section applies to general law cities and to counties.

139. Alternatively, CAL. GOVT. CODE § 65858 (West Supp. 1974) provides that an emergency regulation may be effective for one year if preceded by notice and a public hearing. Subsequently it may be extended for one year.

140. Lima v. Woodruff, 107 Cal. App. 285, 290 P. 480 (1930).

141. Metro Realty v. County of El Dorado, 222 Cal. App. 2d 508, 35 Cal. Rptr. 480 (1963); Mang v. County of Santa Barbara, 182 Cal. App. 2d 93, 5 Cal. Rptr. 724 (1960).

142. 195 Cal. 477, at 495-496 (1925).

validity of the ordinance as a temporary ban until a master plan was developed. The court said:

> The good faith of the council in enacting the ordinance in question is not challenged nor is it asserted that the council will not proceed in good faith to the enactment of a general zoning ordinance, and in the absence of any issue concerning the good faith of the council, the presumption of fair dealing on the part of the council, and the further presumption that they will not fail in the performance of an official duty must prevail. That being so, . . . the ordinance in question, being as it declares, an initial unit in the general zoning of the city, is part and parcel of a comprehensive plan which has relation to the welfare of the city as a whole . . .[143]

The date of enactment of the general zoning ordinance was posited as the termination date of the interim ordinance. Because of the presumption that planning will be accomplished in a reasonable time, the Court held that the landowner has the burden to show bad faith on the part of the council in carrying out the planning requisite to the adoption of an ordinance.

The interim zoning ordinance cases do not control the coastal zone permit situation since the Commission's status is that of a special regional commission rather than a local government. Nonetheless, the standard of a reasonable time for the planning period should be relevant. the courts presumably would not hold special commissions having legislative powers to a time standard more restrictive than the reasonable time standard of analogous charter cities.

In fact, the planning period for BCDC, the model for the Coastal Zone Conservation Act, was four years.[144] Although the length of the planning period was not expressly at issue, the reasonableness of withholding a permit temporarily "while it [was being]

143. *Id.* at 496. Legislative power has been directly granted the commission by the electorate rather than by delegation from the Legislature. The resultant status of a special commission with legislative functions, however, is not affected by the ultimate source of power. The critical distinction is between local government and regional commission. The commissions have a direct delegation of police power so that an enabling act is not necessary. The law which establishes the special commission empowers and limits the functions analogously to a charter in a charter city.

144. CAL. GOVT. CODE § 66650 (West Supp. 1974). The 1969 amendment adopted the Bay Plan and rewrote section.

determined how the bay should be developed in the future" was validated in *Candlestick Properties, Inc. v San Francisco Bay Conservation and Development Commission.*[145] The Coastal Zone Commission's planning phase has a statutory duration of three years.[146] Given the similarity of the mandate to plan for the coastal zone and the BCDC mandate to plan for the bay, the withholding of a construction permit in the coastal zone during its shorter three year planning period would appear to be within court approved reasonable duration standards.

II. Purpose

The duration of the moratorium must be considered in terms of its purpose and whether or not that purpose is achieved by a reasonable exercise of the police power.

A moratorium may be an integral step in the development of a comprehensive plan or the enactment of a zoning ordinance. The court in *Miller v. Board of Public Works* took judicial notice that planning takes "much time to work out the details."[147] Where the purpose of the moratorium is to conduct planning studies, develop a master plan and enact a zoning ordinance, the moratorium can be upheld as a reasonable exercise of police power. "[O]bviously it would be destructive of the plan if, during the period of its incubation parties seeking to evade the operation thereof should be permitted to enter upon a course of construction which might progress so far as to defeat in whole or in part the ultimate execution of the plan."[148] Indeed, the moratorium appears to be both a reasonable and a necessary step in the land use planning process.

When the reasonableness of BCDC restrictions on filling in the San Francisco Bay were challenged,[149] the court held that the legislative statements of purpose in the Act whereby BCDC was established "clearly define the public interest in San Francisco Bay and establish a rational basis" for preventing fill. The court said:

> [T]he Legislature has determined that the Bay is the most valuable single natural resource of the entire region and changes in one part of the Bay may also affect all other parts; that the present,

145. 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970).
146. CAL. PUB. RES. CODE § 27650 (West Supp. 1973).
147. 195 Cal. 477, 496 (1925).
148. *Id.* at 496.
149. Candlestick Properties, Inc. v. San Francisco Bay Conservation and Development Com., 11 Cal. App. 557, 8a Cal. Rptr. 897 (1970).

> uncoordinated, haphazard manner in which the Bay is being filled threatens the Bay itself and is therefore inimical to the welfare of both present and future residents of the Bay Area; and that a regional approach is necessary to protect the Bay during the formulation of the conservation and development plan for the Bay the Commission must have the power to regulate any proposed project that involves placing fill in the Bay.[150]

Likewise, the Coastal Zone Conservation Act specifically states its purpose to be the protection and enhancement of the coastal zone resources.[151] Denial of permits to preserve planning options must be viewed as a concomitant effect of coastal planning. Twenty-six to thirty building permits for major construction projects in the coastal zone were issued between November 8, 1972 and February 1, 1973.[152] The number of these projects illustrates the acceleration of coastline development in recent years and underlines the fact that the need to regulate any proposed project is as great for the Coastal Zone Commission as for BCDC.

A moratorium may not, however, be a valid exercise of police power if the legislative objective is discriminatory. Enacting a moratorium on construction to depress land values prior to public acquisition has been held to be unconstitutional.[153] Also, an interim ordinance directed at a specific applicant for a building permit was not upheld.[154] "A city cannot unfairly discriminate against a particular parcel of land, and the courts may properly inquire as to whether the scheme of classification has been applied fairly and impartially in each instance."[155] When twenty-seven thousand acres of land, which included the eight hundred acres of an applicant for a trailer park, were temporarily zoned agricultural preliminary to a zoning study, the applicant alleged that the ordinance did not treat

150. *Id.* at 571-572.
151. CAL. PUB. RES. CODE § 27302 (West Supp. 1973).
152. San Diego Coast Regional Commission v. See the Sea, limited, 9 Cal. 3d 888, 513 P.2d 129, 109 Cal. Rptr. 377 (1973).
153. Kissinger v. Los Angeles, 161 Cal. App. 2d 454, 327 P.2d 10 (1958).
154. An "emergency" ordinance prohibiting commercial uses in a cemetery association applied for a building permit to construct a mortuary in a cemetery, was held invalid. Sunset View Cemetery Assn. v. Krainz, 196 Cal. App. 2d 115, 16 Cal. Rptr. 317 (1961). A moratorium preliminary to the spot zoning of a parcel to prevent low-income housing was not "a legitimate governmental purpose." G and D Holland Construction Co. v. City of Marysville, 12 Cal. App. 3d 989, 91 Cal. Rptr. 227 (1970).
155. Wilkins v. City of San Bernadino, 29 Cal. 2d 332, 338, 175 P.2d 542, 547 (1946).

all property equally. The court diagreed. The interim ordinance was a reasonable attempt "to meet the various serious problems arising as a result of population influx."[156] The presumption is in favor of the legislative body because of the separation of powers concept,[157] but if the facts indicate potential discrimination the courts will review the facts. A moratorium will not be upheld if it does not further a legitimate governmental purpose.

Another illustration is the landmark case of *Golden v. Planning Board of the Town of Ramapo*[158] The court permitted the town to deny a construction permit because of inadequate sewage treatment facilities. The court concluded that the sewage treatment problem was temporary since the town had a formally adopted development timing program based on three six-year capital improvement programs to provide sewage treatment facilities in phases. A temporary moratorium lasting eighteen years was thereby imposed on property in certain areas. *Ramapo* distinguished the situation where a community uses inadequate sewage facilities as an excuse to prevent further population growth permanently.[159]

Since the Coastal Zone Conservation Act originated by initiative, an individual property owner could not reasonably allege that the aim of the electorate was to discriminate against his specific property. The legislative purpose was to protect and plan for the coastal zone.[160] Neither does the Coastal Zone Conservation Act contemplate directly the acquisition of coastal property. Thus the purpose of the CCZCA cannot be depression of property values. The Coastal Zone Conservation Act was enacted for the valid, nondiscriminatory governmental purpose of regional planning.

III. Relation of Restriction to Purpose

Reasonableness of the restriction is a matter of degree. "A temporary restriction upon land use may be . . . a mere inconvenience where the same restriction indefinitely prolonged might possibly metamorphize into oppression."[161] A permanent moratorium on construction would in effect be inverse condemnation. Tempo-

156. Mang v. County of Santa Barbara, 18 Cal. App. 2d 93, 101, 5 Cal. Rptr. 724, 730 (1960).
157. Metro Realty v. County of El Dorado, 222 Cal. App. 2d 508, 35 Cal. Rptr. 480 (1963).
158. 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E. 259 (1972).
159. Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970); National Land and Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965).
160. CAL. PUB. RES. CODE § 27302 (West Supp. 1973).
161. 222 Cal. App. 2d 508, 516, 35 Cal. Rptr. 480, 485 (1963).

rary moratoriums have been held to be valid exercises of police power. The injury to the property owner occasioned by the temporary moratorium is not a relevant consideration for determining degree. For example, a permit to build a motel in a redevelopment area was denied because a redevelopment plan was not finalized. The court said:

> The "freezing" resolution was reasonably necessary to serve a public purpose for the general welfare. The injury to appellants is incidental. There is no finding that appellants have been deprived of their property or that their property has been or will be depreciated in value. The only deprivation suffered is the "expense" of preparing plans and the "expense" occasioned by the delay in erecting the contemplated structure.[162]

In validating interim ordinances, the courts generally assume that the economic burden on the property owner is minor.[163] In many cases an economic return is possible if the owner is willing to continue with agricultural or grazing uses, or to develop residential units with a low density. Because interim controls are temporary, the court recognizes that development and profit are merely delayed, not permanently foreclosed. Opportunity value is never judicially recognized. In *Metro Ralety v. County of El Dorado* the court noted that the subject property had been "unused and unusable for generations." "The only present value, therefore, which the lands would seem to have is a speculative one . . . [S]ome uncompensated hardships must be borne by individuals as the price of living in a modern enlightened and progressive community."[164] Since planning is expected to result in controls which benefit the public walfare, the ultimate development, if the developer is permitted to develop at the end of the interim period, may even have larger economic returns. For all these reasons, economic injury has not been the criterion for reasonableness in moratorium cases.

Assuming that a moratorium may be a valid interim zoning concept, a reasonable relationship must exist between the particular restriction and the regulatory purpose of the ordinance. An ordi-

162. Hunter v. Adams, 180 Cal. App. 2d 511, 523-524, 4 Cal. Rptr. 776, 784 (1963).
163. 2 Ass'n Bay Area Gov'ts, How to Implement Open Space Plans, 90-91 (1973).
164. 222 Cal. App. 2d 508, 517, 35 Cal. Rptr. 480, 486.

nance which established a freeze for the stated purpose of preventing sewer overloading was invalidated because the city had not demonstrated the relationship of the freeze to the stated purpose. The court described the grounds for its decision:

> The city's' affidavits displayed a series of abstract circumstances without demonstrating their relevance to the particular regulatory action. Although a real problem of municipal sewage disposal existed, the affidavits exhibited only a chimerical connection between that problem and the highly selective reduction of population density in a single block of the neighborhood. The affidavits did not tie this selective rezoning to an existing general plan. Although the urgency clause of the interim ordinance had mentioned "proposals" for rezoning the entire area consistently with residential uses, the affidavits cited no tangible proposals of the sort. They revealed no connection between such "proposals" and the reclassification of a single square block from R-4 to R-3; exhibited no relationship between pending urban renewal studies and reduction in the maximum apartment units permitted on that single block; showed no change in general neighborhood conditions since the 1966 rezoning of that same block.[165]

The moratorium must be a reasonable legislative response to a valid governmental purpose.

For the usual situations where a building permit in the coastal zone will be denied to prevent a change of use from agricultural or grazing use to residential subdivisions, the moratorium fits within the above described framework. The necessity of preserving planning options in the coastal area which the public has designated critical and unique justifies the imposition of a building permit freeze on very large parcels.[166] The incidental economic harm to the building permit applicant will not be considered. The only con-

165. G and D Holland Construction Co. v. City of Marysville, 12 Cal. App. 3d 989, 995-96, 91 Cal. Rptr. 227, 230-231 (1970).

166. Only in the rare situation where a single small parcel is denied a coastal zone permit for construction typical of a much larger surrounding area does the reasonableness issue arise. Unless the Commission can demonstrate a unique coastal factor distinguishing that parcel from its neighbors, it would appear the Commission may have abused its dsicretion in denying the permit. Such an example, however,

straint on denial of construction applications, therefore, is that a reasonable relation must exist between the restriction and the objective. The barring of construction must be necessary to achieve the planning objective.

IV. Summary

The denial of construction permits during the three-year planning phase of the Coastal Zone Conservation Act as a rule should be judicially permissible. Just as interim zoning ordinances enacted for a valid governmental purpose have been upheld as the valid exercise of police power, so should the interim planning phase of the Coastal Zone Conservation Act be valid. Like the BCDC, after which it is patterned, the Coastal Zone Commission denies permits only as necessary to preserve and enhance the coastal environment. Since preserving planning options is a valid purpose, denial of permits during the planning phase should not result in unconstitutional taking of private property.

The Taking Issue

Since denial of permits during the interim planning phase probably will be considered only a temporary inconvenience which owners must bear for better coastal planning, the primary concern of property owners shifts to the master plan. Land use controls will be specified in the plan to control coastal growth and prevent ecologically detrimental development. A permanent coastal commission will probably be established to review building proposals and to update the plan. Althought the plan will resemble municipal master plans, the coastal plan may not plot Euclidean use districts. The planning approach to the coastal zone probably will adopt the more flexible conditional use approach for all development in order to set particularized development conditions. A condition requiring access to beach areas from coastal developments is almost certain. Also, the plan will probably map some areas as conservation districts to promote recreational use or to protect unique coastal resources. Property owners might allege a taking where conservation areas are mapped or where access to beaches requires a right of way across their property.

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would not invalidate the interim permit process. Instead, the action of the Commission with respect to that individual parcel would be invalid.

The permit applicant's remedy would be a writ of mandamus to compel issuance of the permit. Generally, no damages may be recovered from the public agency. Salby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 109 Cal. Rptr. 799, 514 P.2d 111 (1973).

The legal grounds for determining whether a law results in a taking or is a valid regulation not requiring compensation are ambiguous. Several theories have been advanced in the courts to explain a taking: the invasion theory, the noxious use theory, the diminution of value theory, the reasonable exercise of police power theory. But none of these can predict the outcome of all cases.

One of the earliest theories is the invasion theory. If the government takes an interest in or physically appropriates private property for its own use, the owner must be compensated. For example, overflights have been held to be an invasion of private airspace.[167] The governmental strategy of setting height limits on property near airports in order to prevent interference with landing and take-off patterns has also been held to an invasion.[168] Similarly, zoning land for township sewage treatment, water supply facilities, and public recreational uses was a taking because only the township could operate the facilities specifically provided for by the ordinance.[169] If the governmental agency can show, however, that a legitimate governmental purpose may be served by the zoning, a technical "invasion is avoided and no compensation is required.[170]

The noxious use theory presupposes that one property owner creates a harm to adjacent properties. The proscribed uses are not nuisances per se, but are similar to nuisances and injurious in a specific location. For example, ornamental cedar trees were validly regulated because of the rust danger posed to nearby apple orchards.[171] A brick yard was held to have nuisance-like effects on residences being constructed in the vicinity.[172] Likewise, operation of a quarry in an area being developed residentially was considered a noxious use.[173] The test provides little predictability, because the "problem is not one of noxiousness or harm-creating activity at all; rather it is a problem of inconsistency between perfectly innocent and independently desirable uses."[174] Brickyards and quarries provide useful and desirable products to cities. Only as the city bound-

167. Griggs v. Allegheny County, 369 U.S. 84 (1962); U.S. v. Causby, 328 U.S. 256 (1946); State v. City of Columbus, 3 Ohio St. 2d 154, 209 N.E.2d 405 (1965), *cert. denied.* 383 U.S. 925 (1966).

168. Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963); Annot., 36 A.L.R.3d 1314.

169. Morris County Land Improvement Co. v. Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963).

170. Sax, *Taking and the Police Power,* 74 YALE L.J. 36, 46-48 (1964).

171. Miller v. Schoene, 276 U.S. 272, 280 (1928).

172. Hadocheck v. Sebastian, 239 U.S. 394 (1915).

173. Consolidated Rock Products Co. v. Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, appeal dismissed, 371 U.S. 36 (1962).

174. Sax, *Taking and the Police Power,* 74 YALE L.J. 36, 54-60 (1964).

aries neared these facilities could they be considered in any sense noxious or harmful to other properties. But the courts generally designate as noxious the single incompatible use or the less numerous of the mutually incompatible uses.[175] Where only two beneficial uses are incompatible, no grounds for determining which should be labeled noxious are set.

Since *Pennsylvania Coal Co. v. Mahon*[176] the diminution of value theory has been widely cited but appears as the controlling theory somewhat less frequently. The theory rests on the proposition that property values may not be wholly or substantially destroyed by governmental action. As one commentator concluded after studying approximately fifty cases, "[T]he loss of use value in the cases where the ordinances were upheld was about the same as the loss proved in the cases where an opposite result was reached."[177] The California Supreme Court, in its landmark decision in *Consolidated Rock Products Co. v. Los Angeles* upheld an ordinance which left the property virtually valueless.[178] The diminution of value test definitely appears to be of little value in California after that decision.

For lack of a better theory, the reasonable exercise of police power theory is often used. Reasonableness is determined on a case by case basis. Land use regulations attacked as compensable takings are upheld if there is a reasonable legislative basis for the regulation.[179] The principle is "elastic" and courts vary in applying it. Therefore, predictability depends on the closeness of the fact situation in the case being considered to the facts in previously decided cases dealing with that issue.

I. Conservation District Mapping

In the final plan, some coastal areas may be mapped for recreational use or for conservation as wildlife breeding areas. The

175. Comment, *Regulation of San Francisco Bay*, 55 CAL. L. REV. 728, 737 (1967).
176. 260 U.S. 393 (1922).
177. R. ANDERSON, AMERCAN LAW OF ZONING, 101 (1968).
178. 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962), appeal dismissed, 371 U.S. 36, 9 L. Ed. 2d 112, 83 S.C. 145 (1962); Appeal to the U.S. Supreme Court was dismissed shortly after the Supreme Court ruled in Goldblatt v. Hempstead, 396 U.S. 590 (1962), an almost identical fact situation, that compensation could not be awarded since the plaintiff presented no evidence of dimunition of value. In Consolidated Rock Products, dimunition of value awas undisputed.
179. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Consolidated Rock Products Co. v. Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962); Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381 (1925).

mapping *per se* does not constitute a taking.[180] California courts recognize that planning cannot proceed unless general plans can be developed with illustrative maps.

> If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use . . . the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land.[181]

But a taking may result if the Commission actually intends to condemn for public use and then acts unreasonably in issuing precondemnation statements and by delaying excessively the eminent domain proceedings.[182] Zoning to depress fair market value before public acquisition is not a valid governmental purpose.

Limiting the use of coastal property to recreation use may reduce property values significantly. Nonetheless, the court in *Consolidated Rock Products* rationalized the zoning by the noxious use theory. The use as a rock quarry was inconsistent with the general residential use developing in the vicinity. Mere construction of a house in the coastal zone may be more difficult to conceive as a noxious use. The precedent for declaring it to be a noxious use is *Just v Marienette County*.[183] The stated purpose of the Wisconsin Shoreland Protection Act, which was under attack in that case, is to regulate land lying within 1000 feet of navigable lakes and 300 feet of rivers and streams to "prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structures and land uses; and preserve shore cover and natural beauty . . ."[184] The purpose of the California Coastal Zone Conservation Act is similar. Therefore similar results should be reached under the two acts. Furthermore, management of coastal resources appears to be an appropriate form of regulation given the previous decisions on BCDC and TRPA. In these decisions, no attempt was made to describe the regulation in any manner other than as beneficial to public welfare.

180. Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 109 Cal. Rptr. 799, 514 P.2d 111 (1973). Klopping v. Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).
181. Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 120 (1973).
182. Klopping v. Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).
183. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).
184. Navigable Waters Protection Law, WIS. STAT. ANN. ch. 144.26 (West Supp. 1973).

Even though recreational use may be indicated for an area, recreational use does not preclude a profitable use by a private owner. In *McCarthy v. City of Manhattan Beach,*[185] the court held that the owner had failed to show that his beach property zoned "beach-recreation" could not be commercially used as zoned. Nonetheless, the holding did not depend on economics; the court recognized that every exercise of police power is apt to affect adversely the property interest of someone. The validity of the ordinance turned on its reasonableness in municipal planning. The court citing *Clemons v. City of Los Angeles* defined the taking criterion to be:

> A zoning ordinance enacted pursuant to a comprehensive plan of community development, 'when reasonable in object and not arbitrary in operation,' will be sustained as a proper exercise of the police power; every intendment is in favor of its validity and the court will not, 'except in a clear case of oppressive and arbitrary limitation,' interfere with the legislative discretion; it is presumed to be adopted to promotion of the public health, safety, morals and general welfare; and though the court may differ with the zoning authorities as to the 'necessity or propriety' of the regulation, so long as it remains a 'question upon which reasonable minds might differ,' there will be no judicial interference with the municipality's determination of policy.[186]

In *McCarthy* the court found that beach use was reasonable. Not even the fact that public authorities periodically bargained with the owner for public acquisition resulted in a taking.

Successful attacks by property owners on recreational use or conservation mapping will probably be few. Judicial precedent in California indicates that as long as a community engages in comprehensive planning a public benefit results; regulation pursuant to the plan will be upheld.

II. Beach Access

Public access to beaches undoubtedly will be required when-

185. 41 Cal. 2d 879, 264 P.2d 932 (1953).
186. *Id.* at 885-886.

ever subdivisions are permitted.[187] Already the Coastal Zone Commission is indicating in its review of interim permit applications that wherever feasible, access to beaches should be provided. The question is whether a requirement to dedicate property for public access to a beach should be considered a compensable taking if the requirement is imposed as a condition precedent for granting a coastal zone permit.

Public access and park dedication cases may be considered analogous to the beach access situation in the coastal zone. Public access and park dedication cases have been generally upheld by the courts as noncompensable acquisitions by the local governing body.[188] In park dedication cases park land or fees in lieu of land have been upheld as dedication requirements for subdivision approval.[189]

The basis for permitting conditional dedication of land for parks in the subdivision cases is that the subdivision creates the need for additional recreation areas by using up existing open space and by increasing population. The cost of providing additional space should be borne by the developer rather than by the community. The governmental agency need not prove an exact correlation between the amount of land required to be dedicated and the need for more park land. The court explicitly held in *Associated Home Builders of the Greater East Bay v. City of Walnut Creek:*

> We see no persuasive reason in the face of these urgent needs caused by present and anticipated future population growth on the one hand and the disappearance of open land on the other to hold that a statute requiring the dedication of land by a subdivider may be justified only upon the ground that the particular subdivider upon whom an exaction has been imposed will, solely by the development of his subdivision, increase the need for recreational facilities to such an ex-

187. CAL. PUB. RES. CODE §§ 10000-10043 (West Supp. 1974), provide that no local government may approve a tentative or final map of a proposed subdivision sited on a public waterway, river or stream which does not provide reasonable public access by easement or fee from a public highway to the bank of the waterway.

188. 2 Ass'n Bay Area Gov'ts, *How to Implement Open Space Plans*, 23 (1973).

189. Associated Home Builders of the Greater East Bay v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971); Ayres v. City of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949); Heyman and Gilhool, *Constitutionality of Imposing Increased Community Costs on New Subdivision Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964).

> tent that additional land for such facilities will be required.[190]

Although the court stated in *Walnut Creek* that this holding does not extend to the state enabling act for public access to waterways, the same arguments can be made. With the recognition of the coast as a public resource,[191] the elastic and expanding concept of the public benefit should include public access to beaches generally. Land which is suitable for beach access is in scarce supply. Such land is more valuable to the developer because of its unique location, and the development of such property results in corresponding loss of open space and puts a heavier burden on remaining available beach property to provide public access. Public benefit should not be subordinated to private development interests where, with good planning, both may coexist.

This extension of the *Walnut Creek* argument to beach access was successfully made in a superior court decision in Mendocino County.[192] The court found that a Planning Commission requirement of a subdivider to provide ocean access was not a compensable taking. Where the requirement is part of a subdivision, therefore, no problem with a taking should exist. But the same reasoning used in the subdivision cases should also apply to any large development, since reasonable conditions may also be applied to building permits generally.[193] The question of reasonable application should turn on the size and location of the development, but be acceptable in concept for all developments. Only where direct public use makes all other beneficial use impossible should compensation be given.[194]

III. Summary

Coastal regulation should withstand judicial scrutiny. California courts have not been tied to the invasion theory, the noxious

190. 4 Cal. 3d 633, 639, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).

191. CAL. PUB. RES. CODE § 27302 (West Supp. 1973). *See generally* Gion v. Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970); People v. Hecker, 179 Cal. App. 2d 823, 4 Cal. Rptr. 334 (1960); CAL. BUS. AND PROF. CODE § 11610.5 (West Supp. 1974); CAL. CIV. CODE § 670; CAL. PUB. RES. CODE §§ 10000-10043 (West Supp. 1974); Krueger, *Coastal Zone Management: The California Experience*, 47 CAL. ST. B.J. 402 (1972).

192. Hudson v. Mendocino County Board of Supervisors, 3 ERC 1415 (1971).

193. Ayers v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949); Southern Pacific Co. v. City of Los Angeles, 242 Cal. App. 2d 38, 51 Cal. Rptr. 197 (1966), appeal dismissed *per curiam*, 385 U.S. 647 (1967).

194. Morris County Land Improvement Co. v. Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963); Sax, *Taking and the Police Power*, 47 YALE L.J. 36 (1964).

use theory, or the diminution of value theory. A strong presumption exists that a valid legislative purpose is served by planning and land use controls.

CONCLUSION

The Coastal Zone Conservation Act is a public response to widespread construction along the California coastline. Although most of the coastline is privately held, Californian citizens and the courts are recognizing that the coastal property is more than private; a valid public interest in coastal resources. To protect these resources until a comprehensive plan can be developed, an interim permit procedure patterned after BCDC has been established. At the end of the planning phase of permanent coastal commission to monitor development and update plans will undoubtedly replace the interim commission. Flexible land use controls will probably be the approach to the plan.

Property owners hoping to use the courts to stop and turn back the planning impetus will probably be unsuccessful. The coastal zone is a resource not controllable by local authorities. Therefore, "home rule" objections should not prevail. Nor should claims of lost property value and opportunity be upheld during the interim planning period. The final plan will result in compensable takings only if a property owner can show the regulation of his property was not an appropriate means to the governmental purpose—a difficult burden of proof indeed in California.