Sand or Concrete at the Beach? Private Property Rights on Eroding Oceanfront Land

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INTRODUCTION

Solana Beach is a small coastal city located along the Northern San Diego County coastline. Its 1.7 miles of shoreline consists of a narrow strip of sandy beach backed by seventy-five foot bluffs.[1] Homes and sprawling condominium complexes cover the bluffs.[2] Because the bluffs are susceptible to erosion, owners protect the properties from high tides and storms by reinforcing and armoring the bluff faces with concrete walls.[3] Without these walls, storms and waves would naturally break down the bluffs and homes would fall to the beach below.[4]

The seawalls save the homes, but there is a significant price. The walls sit on the sandy shoreline, occupying space and covering beach areas that the public could otherwise use for recreation.[5] In addition, the walls confine the narrow beach.[6] Because the concrete walls fix the bluffs in place, the bluffs cannot naturally erode landward and deposit new sand on the shoreline.[7]

Although a city ordinance regulates activities that negatively affect the beach,[8] the city often grants bluff retention wall permits under an emergency provision that exempts the walls from comprehensive environmental review.[9] Owners apply for these permits even when the ocean is still many feet from the base of their homes. They believe that without seawalls their homes might fall at any time.[10]

Despite the potential for homes to be lost, the city has serious concerns about

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[1] Brief for Appellant at 3, Surfrider Found. v. City of Solana Beach, 2006 WL 3614210 (Cal. Ct. App. 4th Dist. 2006) (No. D048880).

[2] *Id.*

[3] Terry Rodgers, *Sea-wall Fee Is Labeled an Unfair Tax*, SAN DIEGO UNION TRIB., Dec. 14, 2005, *available at* 2005 WLNR 20463627.

[4] Brief for Appellant, *supra* note 1, at 4.

[5] Adam Kaye, *Coastal Panel Sued by Solana Beach Condo Association*, NORTH COUNTY TIMES, Dec. 14, 2005, *available at* http://www.nctimes.com/articles/2005/12/14/news/coastal/21_16_1012_13_05.txt (discussing how seawalls damage the public beach due to the physical space the walls occupy as well as storm erosion).

[6] *Id.*

[7] Brief for Appellant, *supra* note 1, at 5; *see also* Denis Devine, *Bluff Policies Bombarded in 2005*, NORTH COUNTY TIMES, Jan. 8, 2006, *available at* http://www.nctimes.com/articles/2006/01/08/opinion/devine/20_42_041_7_06.txt (explaining that some shoreline is lost because of the physical space the structures occupy); Paul Sisson, "*Study: Bluffs Contribute Most of the Sand on Local Beaches*" NORTH COUNTY TIMES, Oct. 16, 2005, *available at* http://www.nctimes.com/articles/2005/10/16/news/top_stories/20_10_3210_15_05.txt.

[8] SOLANA BEACH, CA., MUN. CODE. § 17.62.020 (2007), *available at* http://www.codepublishing.com/ca/SolanaBeach.html; Brief for Appellant, *supra* note 1, at 6.

[9] *Id.*

[10] Brief for Appellant, *supra* note 1, at 46.

the impact that seawalls have on the beach.[11] The concrete walls are eyesores that detract from the natural beauty of the sandstone bluffs. However, there is a more significant concern. At high tide the ocean meets the seawalls in many places along the city's shorefront.[12] A walk along Solana Beach's shoreline becomes impossible. The city is in danger of losing its remaining sandy beaches.

The city prepared a Local Coastal Plan ("LCP") to address the problem. The LCP proposes a comprehensive strategy for current and future shoreline development that promotes rebuilding and reclaiming the public beach.[13] With respect to seawalls, a major component of the plan allows the property owners at least seventy-five years to use and enjoy their bluff-top properties.[14] After seventy-five years, the plan calls for removal of the seawalls, allowing the bluffs to erode under natural conditions.[15] The city, landowners and some environmental groups tentatively support this "planned retreat" policy.[16]

Rather than focus on the merits of specific LCP proposals, this Article discusses the legal doctrines that constrain seawall regulation and oceanfront development. Specifically, the Article examines how the Fifth Amendment Takings Clause applies to the problem. The Article considers whether the landowners have a right to continue to line the beach with concrete walls — and if so, whether there is an entitlement to compensation should such a right be taken away.

Part I traces the evolution of the takings doctrine, discussing the differences between physical invasions and regulatory takings. It further explains the Supreme Court decision in *Lucas v. South Carolina Coastal Council* and how the Court clarified that background principles of land ownership will bar some takings claims.

Part II applies current takings law to the problem in Solana Beach. The analysis begins with physical invasions and discusses the unique factors that exist on oceanfront land. The Article examines the doctrine of avulsion, how it relates to a physical takings argument, and whether it is appropriate to apply the doctrine to eroding ocean bluffs.

The Article then analyzes the situation in Solana Beach from a regulatory takings perspective. It considers "total" takings claims in light of the *Lucas v.*

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[11] For a comprehensive explanation of the Solana Beach Draft Local Coastal Plan, see JAMES LOUGH, SOLANA BEACH DRAFT LCP: EXECUTIVE SUMMARY 1-18 (Aug. 15, 2006), *available at* http://www.ci.solana-beach.ca.us/uploads/CD_Coastal%20Executive%20Summary.pdf.

[12] Interview by Jeffrey Kaye with Paul Santina, President of Beach and Bluff Conservancy on *The News Hour with Jim Lehrer* (PBS television broadcast Aug. 22, 2003) [hereinafter Santina Interview], *available at* http://www.pbs.org/newshour/bb/environment/july-dec03/beach_8-22.html.

[13] LOUGH, *supra* note 11.

[14] *See* Devine, *supra* note 7.

[15] *Id.*

[16] *Id.*

South Carolina Coastal Council decision, and "partial" takings claims under the test developed in *Penn Central Transportation Company v. City of New York.* The analysis concludes that under either a *Lucas* or *Penn Central* test, bluff-top landowners are not entitled to compensation should they lose properties due to seawall regulations. This conclusion suggests a strategy for the city to pursue in future negotiations.

Part III discusses possible ways to reconcile the landowners' property expectations with those of the public and city. A difficult problem exists when landowners do not want compensation, but rather, wish to continue living on eroding oceanfront property. In light of the previous analysis that affirms the city's defenses to takings claims, the Article proposes several recommendations. The proposals attempt to balance the owners' private property rights with the public's interest in an accessible coastline.

I. THE TAKINGS DOCTRINE

The Takings Clause of the Fifth Amendment states that the government cannot take private property for public use without providing just compensation.[17] The Fifth Amendment does not affirmatively give the government power to take private property, nor prohibit it from doing so. Instead, the Fifth Amendment implicitly confirms that the government has the power as long as it pays "just compensation" to the owner.[18] As stated by the Supreme Court, the purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens, which in all fairness and justice should be borne by the public as a whole."[19]

A. Physical Invasions

Certain government actions that affect private property are always takings. Courts have determined that any "permanent physical invasion" of property is a taking.[20] In these cases, the magnitude of the invasion is not a factor. For example, in *Loretto v. Teleprompter Manhattan CATV Corporation*, the government authorized a cable company to enter a private building to install a cable box.[21] The Supreme Court found that allowing the cable company access to the private property was a physical invasion of the owner's property.[22] The Court held that a fundamental right of ownership is the right to exclude others.[23]

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[17] U.S. CONST. amend. V.

[18] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005).

[19] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[20] *See, e.g., Lingle*, 544 U.S. at 537.

[21] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[22] *Id.* at 438.

[23] *Id.* at 435.

If a property owner loses this right of exclusion, the property has effectively been taken under the Fifth Amendment and compensation is due.

Although physical invasions usually occur when the government permanently occupies private property,[24] the Supreme Court also finds a physical invasion when the government requires a landowner to allow the public to access private property.[25] The principle here is the same: however minimal the intrusion, if the government physically occupies, or in some cases, trespasses or allows the public to trespass on a property, courts will find a taking.

B. Regulatory Actions

The other types of takings are regulatory actions. Local governments often restrict or regulate property use without paying owners for the effect these regulations have on their property value. This is the basis of land use planning and modern zoning laws.[26] However, if a regulation goes "too far" courts recognize it as a taking of private property.[27] Determining how far is "too far" can be a difficult challenge for courts.[28] Often, courts apply the factors set forth by the Supreme Court in *Penn Central Transportation Company v. City of New York*.[29] *Penn Central* does not create a clear line for a taking;[30] rather, it lists a set of factors for a court to weigh.[31] First, the court considers the economic impact of the regulation.[32] Second, the court looks at the extent that the regulation has interfered with distinct investment backed expectations.[33] Finally, the court classifies the character of the governmental action focusing on whether it promotes the common good or singles out a particular owner who must disproportionately bear the burden of the regulation.[34]

For regulatory actions alleged to be takings, courts followed *Penn Central's* balancing approach until 1992. In 1992, the Supreme Court decided to treat certain regulations differently.[35] In *Lucas* v. *South Carolina Coastal Council*, the Court decided that regulations that deprive an owner of "all economically beneficial use" of property are a complete taking.[36] The Court further

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[24] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831-32 (1987).

[25] *Id.*

[26] Vill. of Euclid v. Ambler Realty, 272 U.S. 365, 388-89 (1926).

[27] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[28] *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005).

[29] *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 (1986) (deciding that it was not taking when city restricted height of building).

[30] *Id.*

[31] *Penn Central*, 438 U.S. at 124.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017-19 (1992).

[36] *Id.* at 1019.

articulated that these regulatory takings are no less intrusive, or compensable, than physical invasions.[37]

In *Lucas*, the South Carolina Coastal Council decided that a developer could not build on his vacant beach lot because the Beachfront Management Act required a buffer zone between the ocean and new development.[38] Given the nature of the lot, the act essentially made the property valueless.[39] After the state Supreme Court upheld the council's decision, Lucas appealed to the United States Supreme Court arguing a taking due to the complete building restriction. The Court agreed with Lucas. It held that unless a common law nuisance or "background principle" of land ownership justified the complete prohibition the State owed Lucas compensation.[40]

Although the decision expanded the scope of government actions considered takings, the nuisance or "background principle" exception the Court carved out was an important one. It means that not all regulations that make property valueless are compensable takings.[41] Unfortunately, the Court did not provide an inclusive list of these "background principles" of land ownership. Instead, the Court stated that restrictions must "inhere in the title itself" and be part of the State's existing law of property and nuisance.[42] Common law nuisances as defined in the Restatement of Torts qualify.[43] In addition, the Court alluded to the federal navigational servitude as another background principle and discussed the likelihood that there were other pre-existing limitations on a landowner's title.[44]

II. ARE SEAWALL REGULATIONS SUBJECT TO A PHYSICAL TAKING, *LUCAS*, OR *PENN CENTRAL* ANALYSIS?

Laws that prohibit or otherwise regulate seawalls are likely subject to a takings challenge. Bluff-top owners will claim the removal of the walls triggers the takings clause, and the city owes them compensation for their affected properties. However, as the following discussion will show, Solana Beach has valid defenses to any takings challenge owners might bring.

A. Physical Taking

Before challenging a seawall regulation under the principles set out in *Lucas*

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[37] *Id.*

[38] *Id.* at 1009.

[39] *Lucas*, 505 U.S. at 1007.

[40] *Id.* at 1031-33.

[41] *Id.* at 1027.

[42] *Id.* at 1029.

[43] *Id.* at 1031.

[44] *Id.* at 1029.

or *Penn Central*, owners might first argue that removing seawalls is a permanent physical invasion of their property.[45] Unlike regulatory actions analyzed under *Lucas or Penn Central*, permanent physical invasions are always compensable takings.[46] To determine whether this argument has merit, it is important to discuss the doctrine of avulsion.

1. The Avulsion Doctrine

When an owner bought bluff-top land, the property boundary may have extended to the end of the bluff.[47] However the bluff that falls to the beach may no longer be private property. In California, the public trust doctrine places all lands below mean high tide in public ownership.[48] An important question is whether the doctrine of avulsion is applicable to oceanfront bluffs. If so, the owner may simply reclaim the bluff and fix the property boundary as it was before the collapse. If the city prevents the reclamation, in effect, it is physically invading the owner's land and compensation is due. However if the avulsion doctrine does not apply to oceanfront bluffs, the fallen land belongs to the public beach.

Ordinarily, the law of avulsion applies to lands "suddenly" lost to natural forces.[49] The law stems from English common law, and in California, the civil code incorporates the doctrine.[50] The California law distinguishes land lost suddenly from land that disappears due to ongoing erosion.[51] If the land avulses, the owner can reclaim it within one year, but the owner cannot reclaim land that gradually erodes due to ongoing natural forces.[52] Deciding whether land disappeared due to avulsive or erosive forces is unique to each circumstance. Historically, however, the determination seemed to hinge on whether the change

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[45] Whether nuisances or background principles are a defense to physical occupations is not discussed here, but some authors suggest a nuisance would be a complete defense to a physical taking as well. For a comprehensive discussion of possible background principles in light of the *Lucas* decision, see Michael C. Blumm & Louis Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 341-54 (2005).

[46] *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005).

[47] A discussion of property boundaries in Solana Beach is beyond the scope of this Article. It is assumed that private properties extend to the edge of the bluff.

[48] CAL. CONST. art. X, § 3. For a discussion of the public trust, see, for example, National Audubon Soc'y v. Superior Court, 658 P.2d 709 (Cal. 1983); People v. Cal. Fish Co., 138 P. 79, 82-90 (Cal. 1913).

[49] *See, e.g.*, Nebraska v. Iowa, 143 U.S. 359 (1892).

[50] CAL. CIV. CODE §§ 1014, 1015 (West 2007).

[51] *Id.*

[52] *Id.* For a general discussion of erosion and avulsion principles, see City of Oakland v. Buteau, 179 P. 170, 172 (Cal. 1919), and Lechuza Villas West v. Cal. Coastal Comm'n, 70 Cal. Rptr. 2d 399, 416 (Ct. App. 1997).

in land was sudden and perceptible or gradual and imperceptible.[53]

In California, no published decision specifically applies the avulsion doctrine to eroding ocean bluffs.[54] However, the court of appeal has applied the doctrine to coastal lands.[55] In the 1980s just a few miles south of the bluffs in Solana Beach, the court had to decide whether the doctrine applied to coastal property lost during a flood. If avulsive forces led to the property loss, owners could reclaim their land, if not, the owners had lost the submerged land to the public trust.[56]

In *Beach Colony II v. California Coastal Commission*, the San Dieguito River flooded an undeveloped coastal lot carrying away a large section of private property along the riverbank.[57] After the flood, the coastal lagoon inundated the landowner's property.[58] The Coastal Commission determined this newly submerged area was part of the historical lagoon.[59] The Commission put a choice to the owners. If the owners wanted to reclaim the parcel and build a retaining wall to prevent future lagoon flooding, they would have to dedicate a similarly sized parcel to the public trust.[60] When the landowners appealed the decision, the court found the condition invalid.[61] Under the avulsion doctrine, the owners had a right to reclaim property that was suddenly lost in a flood.[62]

The lagoon is just a few miles from the bluffs in Solana Beach so the court's rationale in *Beach Colony II* should apply to bluff owners. If owners cannot reclaim the collapsed bluff, or protect their properties from high tides and storms with seawalls, they can argue that the city has physically invaded their private property. However, there was a key difference in *Beach Colony II.* The land in that case was lost to an overflowing river not to ocean forces. At best, it is unclear whether the law of avulsion applies to ocean lands. Only two, nearly hundred-year-old cases from the east coast have found that a landowner may reclaim lands lost to the sea.[63]

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[53] *See* Oklahoma v. Texas, 260 U.S. 606, 634-38 (1923); Nebraska v. Iowa, 143 U.S. 359, 367 (1892).

[54] Brief for Appellant at 5, Lechuza Villas West v. Cal. Coastal Comm'n, (No. B131770), 1998 WL 34290198 (Cal. App. 2 Dist. 1998).

[55] Beach Colony II v. Cal. Coastal Comm'n, 199 Cal. Rptr. 195, 202 (Ct. App. 1984) (discussing *Bohn v. Albertson*, 238 P.2d 128 (Cal. Ct. App. 1951), stating it is the only case in California which even peripherally discusses a landowners right to reclaim flooded land).

[56] *Beach Colony II*, 199 Cal. Rptr. at 202.

[57] *Id.* at 197-98.

[58] *Id.*

[59] *Id.* at 198-99.

[60] *Id.*

[61] *Id.* at 198-200.

[62] *See id.* at 197-200 (stating that Coastal Commission did not present enough evidence to show flooding was result of erosion or that newly submerged land was part of historical lagoon).

[63] *See* City of New York v. Realty Assocs., 176 N.E. 171, 172 (N.Y. 1931) (holding that when shore land was avulsed, private property owner still retained title to it); Schwartzstein v. B.B.

The Supreme Court has applied the avulsion doctrine only to large rivers.[64] In those cases, the court considered the context of the event, including the historical nature of the waterway in deciding whether the event was erosive or avulsive.[65] Whether the shift in the land's boundary was sudden as opposed to gradual was an important factor — but not a conclusive one.[66] In *Oklahoma v. Texas*, the court stated that there is a strong presumption that where water and land meet a change in the waterline is due to erosive rather than avulsive forces.[67] Similarly, in *Nebraska v. Iowa*, when huge sections of riverbank suddenly fell into the swollen Missouri River, the Supreme Court decided the forces were erosive.[68] Rather than the suddenness of the event, the Court focused on the nature of the soils along the Missouri, the seasonal forces of the river,[69] and the fact that when the riverbank disintegrated into the flowing water there was no possible way to determine where the land went.[70] Likewise, an appeals court in Texas, citing the Supreme Court precedents, stated that erosion is not necessarily an imperceptible event.[71] In *City of Corpus Christi v. Davis*, the court assumed the doctrine of avulsion could apply to lands affected by ocean forces. Nevertheless, the court found that the loss of shoreline property following a series of storms, although occurring quickly, was the result of seasonal erosion.[72] In its determination, the court focused on the regularity of storms along the Texas coastline and the inherent difficulties in holding a sandy shoreline to fixed boundaries.[73]

In contrast, in *Beach Colony II,* the court applied the avulsion doctrine to an unusual and rare event. Landowners could not have predicted that the normally placid San Dieguito River would have sufficient force to carry away a large section of land.[74] The sudden loss of land was not seasonal, nor the flooding common. In both *Nebraska v. Iowa* and *Oklahoma v. Texas,* the Supreme Court decided the avulsion doctrine did not apply because the rivers had a "habit" of flooding.[75] By analogy, waves and storms along the coastline in California are

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Bathing Park, Inc., 197 N.Y.S. 490, 492 (1922) (finding that landowners could install bulkhead and reclaim land torn away by violent storms).

[64] *See* Oklahoma v. Texas, 260 U.S. 606, 634-38 (1923); Nebraska v. Iowa, 143 U.S. 359, 367 (1892).

[65] *See Oklahoma*, 260 U.S. at 634-38.

[66] *Id.*; *see also Nebraska*, 143 U.S. at 370.

[67] *See Oklahoma*, 260 U.S. at 638-39.

[68] *Nebraska*, 143 U.S. at 368.

[69] *Id.*

[70] *Id.*

[71] City of Corpus Christi v. Davis, 622 S.W.2d 640, 646 (Tex. App. 1981).

[72] *Id.*

[73] *Id.* at 644.

[74] Beach Colony II v. Cal. Coastal Comm'n, 199 Cal. Rptr. 195, 197-99 (Ct. App. 1984).

[75] *See* Oklahoma v. Texas, 260 U.S. 606, 637 (1923).

expected. It is inevitable that without a solid barrier of concrete, storms and tides will erode the bluffs in Solana Beach. Sometimes large pieces fall at once, other times the loss is gradual.[76] In either case, as with soils along the banks of large rivers or sands on a coastal beach, ongoing natural forces — not sudden unpredictable events — lead to the loss of bluff property.

Drawing a precise line where the ocean ends and land begins ignores the shifting nature of coastlines.[77] Applying the avulsion doctrine to bluffs and beaches in California would simplify the debate, but it would also make it easier for owners to build where dramatic effects to the shape and condition of the land are foreseeable.[78]

2. Increased Erosive Effects

If the avulsion doctrine is unavailable, bluff-top landowners could still argue that by removing seawalls and allowing the bluffs to erode naturally, the city has committed a physical invasion. As previously discussed, the civil code and case law affirm that a landowner cannot reclaim land that is lost to "ordinary" erosion.[79] Therefore, for this argument to have merit owners must show that the government sponsored or engaged in activities that *increased* the erosive rate of lands.

For example, in *Owen v. United States*, a landowner's home fell into the Tombigbee River after the Army Corps of Engineers modified the riverbed.[80] The modification caused the river's waters to flow more swiftly against the bank.[81] The Federal Claims court determined the Corps activities caused the increased bank erosion leading to the loss of the home.[82] The court stated that construction equipment does not need to encroach onto property to have a

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[76] *California's Coastal Bluffs*, *in* CALIFORNIA COASTAL COMMISSION, COASTAL RESOURCE GUIDE (Univ. of Cal. Press 1987), *available at* http://ceres.ca.gov/ceres/calweb/coastal/bluffs.html (last visited Jan. 6, 2008).

[77] *See* Miramar Co. v. City of Santa Barbara, 143 P.2d 1, 2-4 (Cal. 1943) (holding that transformations to shoreline are continually occurring and reflect changes in action of ocean).

[78] Courts have had difficulty applying the avulsion or erosion doctrine to shorelines. *See* People v. William Kent Estate Co., 51 Cal. Rptr. 215, 219 (Ct. App. 1966) (stating that if there are wide variations in beach widths in summer compared to the winter, they cannot meet the definitions of natural accretion); McLeod v. Reyes, 40 P.2d 839, 845 (Cal. Ct. App. 1935) ("The wash of the ocean and the shifting sands constantly change the line of high tide."). It is possible that these opinions only apply to the "sandy" portions of the beach that by nature are in constant flux. Here the property at issue is not sand dunes or loose sediments but rather solid bluffs, which are fixed in place.

[79] *See* CAL. CIV. CODE §§ 1014-1015 (West 2007); People v. Ward Redwood Co., 37 Cal. Rptr. 397 (Ct. App. 1964).

[80] Owen v. United States, 851 F.2d 1404, 1405 (Fed. Cir. 1988).

[81] *Id.*

[82] *Id.* at 1408.

taking.[83] The physical effects caused by that equipment was sufficient.[84]

Along these lines, Solana Beach owners argue that the beach has been lost because an upstream dam blocks new beach sand from reaching the shore.[85] Although recent studies show that the majority of new beach sand comes from the bluffs, the river probably has contributed sand to the Solana Beach coastline.[86] However, even if the municipal dam blocks sand from reaching the shore, the argument's flaw is that the sand does not belong to the private property owners. This sand originates from the waters and bed of the river. Ocean and wave action shifts and deposits the sand along the shoreline. Ultimately, the sand comes from beneath the ocean before it reaches the bluffs in Solana Beach. Because its source is below the tides, this sand is part of the public trust.[87] Owners therefore, never had a right to the river sand and they cannot claim they lost a property right when the sand no longer reaches the shore beneath their homes.

3. Unconstitutional Permit

The final physical taking argument owners could make would be a claim similar to the one homeowners made in *Nollan v. California Coastal Commission*. There, the Nollans, coastal landowners, sought a permit to expand their small beach home.[88] Worried about the impact on the public's view of the ocean, the Coastal Commission attached an easement condition to the permit.[89] The easement condition would allow the public access across the Nollans' land.[90] The Nollans challenged the condition as an uncompensated taking of their property.[91] Ultimately, the Supreme Court agreed with the Nollans and struck down the easement requirement.[92] The Court found that there was not

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[83] *See id.* at 1411-12; Banks v. United States, 314 F.3d 1304 (Fed. Cir. 2003) (finding Army Corps of Engineers exacerbated erosion problem on lakefront properties leading to physical invasion and takings claim by affected landowners).

[84] *Owen*, 851 F.2d at 1412.

[85] For claims that seawalls are a small problem contributing to sand loss on the beaches, see Beach & Bluff Conservancy, Frequently Asked Questions, http://www.beachandbluff.org/main.php/faq (last visited Mar. 15, 2008) (claiming dams and other factors, not seawalls, are main reason for sand loss on beach).

[86] *See* Paul Sisson, *Study: Bluffs Contribute Most of the Sand on Local Beaches*, NORTH COUNTY TIMES (San Diego), Oct. 16, 2005, *available at* http://www.nctimes.com/articles/2005/10/16/news/top_stories/20_10_3210_15_05.txt.

[87] *See* Pitman v. United States, 457 F.2d 975, 978 (Fed. Cir. 1972) (holding that land from beneath navigable waters still belongs to the state even if it later emerges and attaches to an owners land); People v. Ward Redwood Co., 37 Cal. Rptr. 397, 403-04 (Ct. App. 1964).

[88] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 828 (1987).

[89] *Id.*

[90] *Id.*

[91] *Id.* at 829.

[92] *Id.* at 831.

sufficient relation between the easement requirement and the alleged goal of improving the public view of the beach.[93] The Court stated that if the city wanted the easement for public access it would have to pay for it.[94] The Court was concerned that an agency could use a permit condition to create a physical invasion of similar degree as if the government actually occupied the land.[95]

This case is different. Here the goal is to improve the quality of the beach and public access to the shore. A permit that denies a seawall directly relates to this concern and does not raise the "unconstitutional conditions" issues that concerned the Court in *Nollan*. In addition, the easement at issue in *Nollan* theoretically allowed the public continuous access across the Nollans' land to reach the beach. Their land would have been subject to a permanent trespass. Here, the public is not actually crossing the owners' land. Rather, people cross the beach beneath the homes, land always open to public access.

It seems harsh to prevent an owner from protecting his home against future damages when there is a reliance on protective mechanisms.[96] However, as this discussion shows, the city has solid defenses to a physical takings claim. Extending the doctrine of avulsion and a physical taking argument to seawall removal completely ignores the nature of coastal lands. The risks of owning ocean front land were obvious. Almost 100 years ago, when coastal development was sparse, the courts recognized the continually changing conditions along California's coastline. The courts noted, "California has over 1000 miles of coastline to which land is constantly being taken and added."[97] From a physical takings perspective, accepting that the boundary between the ocean and land shifts should be a risk bluff-top landowners agreed to accept. As Solana Beach has now learned, a static shoreline boundary leads to unsustainable conditions that allows for neither secure development nor maintenance of a sandy beach.

B. Is There a Complete Regulatory Taking Such that Lucas *Applies?*

If Solana Beach is not physically invading the owners' land by removing or otherwise regulating seawalls, owners must rely on a regulatory takings claim to receive compensation for lost homes. At first glance, similar to the way the Beachfront Management Act in *Lucas* made the developer's land valueless, a regulation that prohibits seawalls seems to make bluff-top property worthless. Land that might collapse without protection has little value. However, no one

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[93] *Id.* at 841.

[94] *Id.* at 842.

[95] *Id.* at 837.

[96] As previously noted, the city permitted the bluff development, allowed seawalls in the past, and a municipal dam is probably partially responsible for the diminishing beach. *See supra* notes 8-15, 85-87 and accompanying text.

[97] Strand Improvement Co. v. City of Long Beach, 173 Cal. 765, 770 (1916).

can say exactly when the bluffs will erode and homes will be lost.[98] Some owners may have many years to enjoy their homes before the properties become unsafe. This raises the initial question of how courts should determine when a total regulatory taking occurs.

1. The Denominator Problem

The Supreme Court consistently finds that property must lose all value before *Lucas* applies.[99] Therefore, an owner who loses ninety-five percent of the property value may be entitled to nothing under a *Penn Central* balancing analysis, whereas if the entire property value is lost, *Lucas* applies and the government owes the owner compensation unless a nuisance or background principle of property ownership applies.[100] It is hard to justify an argument that a one hundred percent property loss is unduly burdensome and similar to a physical invasion whereas a balancing test is appropriate when regulations lead to a ninety-five percent loss of property value.[101] Despite this apparent inconsistency, it makes sense to set a high threshold before courts apply the *Lucas* principle. Determining when property has lost all value is a relatively easy problem. However, if courts drew the line at a seventy, eighty or even ninety-five percent loss the courts would struggle to distinguish many current land use restrictions from total regulatory takings.[102] As it stands now, courts have clear direction on when to apply the *Penn Central* balancing test and when to apply *Lucas*.

A closely related problem is whether a takings claim exists based on a discrete impact to part of the property, or only by looking at the impact regulations have on entire parcel. For example, absent a successful avulsion claim, land that falls to the beach is gone. A landowner might argue that although the remaining property has value, he has lost the entire portion that needed seawall protection. Regarding this "denominator" problem, the Supreme Court recognizes that in some takings cases it is difficult to decide whether

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[98] *See* Phil Diehl, *Solana Beach Residents Debate Bluff Protection*, NORTH COUNTY TIMES, Apr. 27 2004, *available at* http://www.nctimes.com/articles/2004/04/28/news/coastal/23_22_004_27_04.txt (spokesperson for condominium owners claims that there is immediate need for home protection).

[99] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 330 (2002); Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001) (stating that leaving a token interest will not be a defense to a taking challenge, but also citing *Lucas* for the proposition that an approximate 95% drop in investment value does not make a property valueless).

[100] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1064 (1992) (Stevens, J., dissenting).

[101] *Id.*

[102] One possible result of this situation is that a landowner faced with a regulation that will seriously affect her land loses any incentive to mitigate a project to comply with the regulation. An owner is encouraged to stick to her original plan and argue that the effect of the regulation diminishes the value completely.

portions of an owner's property should be valued independently when specific areas have great value.[103]

A Solana Beach bluff owner has a strong incentive to argue that the denominator, or relevant parcel of land for a takings claim, is the oceanfront portion. From an owner's perspective the very edge of the bluff is the most valuable. Because the shoreline is seventy to ninety feet below the cliffs, homes need to be as close to the edge as possible to have a view of breaking waves and whitewater. In some instances, moving property away from the bluff edge by a few feet could have a significant impact on the view. Additionally, even if a home or condominium is set back from the edge, without seawall protection portions of the bluff will gradually erode until the loss is complete. If we ignore the denominator problem, and view the whole parcel as a single unit, the property owner will have to wait until the property erodes to nothing to claim a total loss.

The Supreme Court acknowledges this is a complicated issue.[104] However, the Court has decided that land use regulations will frequently affect some proportion of an owner's property rights.[105] Zoning or land use planning would be impossible if compensation was due each time an owner could identify a regulation that restricted property uses. As the Court stated in *Andrus v. Allard*, "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking."[106] Thus, the oceanfront portion of land in need of seawall protection should be viewed as only one strand, albeit a significant one, in the bluff owners' property rights bundle.

Regardless of consideration of the denominator issue, owners would likely argue that *Lucas* principles apply. If the city removes seawalls, the properties — even if habitable for a number of years — have effectively lost all future value. Under the terms of the LCP, Solana Beach seems to agree. The draft LCP assumes that immediate seawall removal would trigger a total regulatory taking entitling owners to fair market value for their land.[107] However, the city's position may be unnecessary. It does not recognize that the *Lucas* background

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[103] *See, e.g.*, *Lucas*, 505 U.S. at 116-17 n.7; Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 497 (1987). *See generally* Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L.J. 663 (1996); Patrick Wiseman, *May the Market do what Takings Jurisprudence Does Not: Divide a Single Parcel into Discrete Segments?*, 19 TUL. ENVTL. L.J. 269 (2006).

[104] *See* Lisker, *supra* note 103.

[105] Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 130 (1986); *see also* Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001) (acknowledging this is a troubling issue, but declining to address anything but the whole parcel). *But see* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) (deciding that the portion of property that needed permit and was denied one could be considered "taken").

[106] Andrus v. Allard, 444 U.S. 51, 65-66 (1979).

[107] *See* LOUGH, *supra* note 11, at 1 (stating that when owners' land is acquired, Solana Beach will pay full market value).

principle exceptions apply. A background principle of property ownership might mean owners never had the right to protect their homes with walls on the beach.[108]

2. Nuisances and Background Principles of Land Ownership

Under the *Lucas* holding, nuisance law and other background principles of land ownership can prevent a property owner from bringing a successful takings claim.[109] This holds even if regulations completely deprive the owner of the property's value.[110] The *Lucas* exception recognizes well-settled law that a property owner does not have a right to cause harm to neighbors or the community.[111]

The Supreme Court discussed this principle over 120 years ago in *Mugler v. Kansas*. In *Mugler*, the Court held a property owner did not have a valid takings claim when the state ordered him to stop producing liquor on his property without a permit.[112] The Court stated that it was not a taking to abate a threat to the "health, safety and morals" of the community.[113] Since *Mugler*, the Supreme Court repeatedly affirmed the position that nuisance law is a limit on private property rights.[114] For example, a city can decide that a noisy factory is no longer compatible with a residential area or that a horse stable is unacceptable in a downtown business district. Because local government determined these uses were nuisances, the government does not owe the property owner for the lost property value when it orders an end to the uses.[115] Further, the Court has held that even unintentional activities that cause public harm can be nuisances.[116] As the Supreme Court stated in *Miller v. Schoene*, "the state does not exceed its constitutional powers when it decides one class of property may be destroyed in order to save another."[117] The Court decided that part of a state's police power includes this weighing of public and private interests.[118]

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[108] For a thorough discussion of many of the following background principles, see generally Blumm & Ritchie, *supra* note 45.

[109] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

[110] *Id.* at 1029-31.

[111] *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 n.20 (1987); Lawton v. Steele, 152 U.S. 133, 140 (1894); Mugler v. Kansas, 123 U.S. 623, 660 (1887).

[112] *Mugler*, 123 U.S. at 668.

[113] *Id.*

[114] Miller v. Schoene, 276 U.S. 272, 280 (1928); Hadacheck v. Sebastian, 239 U.S. 394, 411 (1915); Reinman v. City of Little Rock, 237 U.S. 171, 176-77 (1915).

[115] *Hadacheck*, 239 U.S. at 411; *Reinman*, 237 U.S. at 171.

[116] *See Schoene*, 276 U.S. at 280 (recognizing that to protect economically valuable apple orchards from spread of destructive fungus, diseased trees needed to be declared nuisance and removed).

[117] *Id.* at 279.

[118] *Id.*

As *Schoene* illustrates, qualifying a land use as a nuisance can severely limit property rights. Deciding how to define a nuisance becomes an important issue. Traditionally, courts find public nuisances by weighing the harm to the owner in ceasing the activity versus the benefit the public gains by abatement.[119] However, because our views change on what constitutes acceptable harms and benefits, the concept of a nuisance evolves along with our social and cultural priorities.[120] Certain activities and land uses, not nuisances in the past, may become nuisances under current conditions. For example, a local city council can decide it is a nuisance to park a broken-down car in a residential front yard.[121] While it is debatable that the benefit to the community outweighs the harm to the owner, the court deferred to the judgment of local officials. The court decided that local officials are in a better position to decide which uses are harmful or incompatible within their communities.[122]

The *Lucas* decision was a slight departure from this view. The Court rejected the notion that the legislature could simply declare a property use a nuisance to avoid having to compensate a property owner for an extreme land use restriction. The Court worried that local legislatures would apply nuisance law too broadly to justify significant property-restricting regulations.[123] Therefore, the Court stated that a nuisance determination must be an "objectively reasonable application of relevant precedents."[124] This statement means that a solid historical basis must exist before a use qualifies as a "background principle" of property ownership.

3. Seawalls a Nuisance

According to *Lucas*, to qualify for the background principle exception, Solana Beach could not simply decide that although it has allowed seawalls in the past, the walls are now a public nuisance and ban them. However, the city does not need a new ordinance stating seawalls are a nuisance. Due to the changed conditions along the shore, Solana Beach can look to common law.

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[119] RESTATEMENT (SECOND) OF TORTS §§ 826-28, 830-31 (1979).

[120] *See* John A. Humbaugh, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1 (1993).

[121] City of Costa Mesa v. Soffer, 13 Cal. Rptr. 2d 735, 738 (Ct. App. 1992).

[122] *Id.*

[123] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1026 (1992).

[124] *See id.* at 1032 n.18 (suggesting that key issue in modern takings analyses is whether nuisances or other background principles can be newly legislated). In *Lucas*, the court was concerned that the legislature could justify any new regulation as nuisance and necessary to protect public. *Id. But see id.* at 1035 (Kennedy, J., concurring) (discussing his concern about Court restricting legislature's power). Justice Kennedy wondered why courts are in a better position than the legislature to determine what constituted a valid regulation in a particular community stating, "[t]he State should not be prevented from enacting new regulatory initiatives in response to changing conditions . . . ." *Id.*

For at least 150 years, courts have recognized that the obstruction of a park, highway, or other public place is a nuisance.[125] In California, both the civil and penal code codifies this type of nuisance.[126] In 1997, the court of appeal applied these statutes to homeowners living on a sandy spit of land located just a few miles south of their neighbors in Solana Beach.[127]

In *Scott v. City of Del Mar*, the court found that property owners created a nuisance per se when they constructed beachfront patios and retaining walls that blocked a historical public right of way that ran parallel to the beach.[128] Further, the court rejected the owners' arguments that the city owed them compensation for their lost property value when Del Mar removed the patios and protective structures.[129] The court stated that because the structures blocked a public way Del Mar reasonably exercised its police power when it ordered the removal of the improvements.[130]

The situation in Solana Beach is similar. When high tides reach the seawalls, the walls impede public access across the beach.[131] The court's rationale in *Scott* applies to Solana Beach landowners. The seawalls are barriers to passage along the shoreline just as the patios and retaining walls in *Scott* blocked a historical public roadway. There is only one major difference. In Solana Beach, where a narrow strip of sand remains for the public to cross, the city would have to argue that even if the walls do not currently obstruct passage it is only a matter of time before they will.

This leads to the question of whether courts can enjoin a nuisance before an actual harm exists.[132] Understandably, courts might be reluctant to find a "prospective" nuisance where the expected harm may not ultimately develop. In many cases, it would be unfair to prohibit private land uses that "might" someday develop into nuisances. In *Lucas*, the Court focused on whether a current nuisance or background principle or justified a complete building restriction. The Court did not discuss prospective nuisances.

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[125] Richardson v. City of Boston, 60 U.S. 263, 270 (1856); *see also* Strong v. Sullivan, 181 P. 59, 60 (Cal. 1919) (finding that despite license to park lunch cart on sidewalk, it was public nuisance because it was blocking an owners access to property); City and County of San Francisco v. Buckman, 43 P. 396, 398 (Cal. 1896) ("[A] city, as the representative of the state, has the right to pursue all the ordinary civil remedies for enjoining or abating a public nuisance upon its streets or squares . . . ."); People v. Gold Run Ditch & Mining Co., 4 P. 1152, 1155-57 (Cal. 1884) (identifying hydraulic mining that blocked navigable river as nuisance because it interfered with public use of navigable river).

[126] CAL. CIV. CODE §§ 3479, 3480 (West 2007); CAL. PENAL CODE § 370 (West 2007).

[127] Scott v. City of Del Mar, 58 Cal. App. 4th 1296 (Ct. App. 1997).

[128] *Id.* at 1306.

[129] *Id.* at 1307.

[130] *Id.*

[131] *See* Santina Interview, *supra* note 12.

[132] For a more complete discussion of how likely a harm must be before a nuisance is enjoined, see Blumm & Ritchie, *supra* note 45, at 339.

Nevertheless, in certain instances the Restatement of Torts supports enjoining nuisances before the harm occurs.[133] If harm is imminent and certain, it makes little sense to wait until the harm actually occurs before taking action. For example, it would be ridiculous to allow a polluter to dump harmful substances into a waterway 100 miles upstream from a city because the harm to the city's residents would not develop for several hours.[134]

Admittedly, building a wall to protect a home is quite different from polluting a water supply. Enjoining a prospective seawall because it might obstruct public passage someday could be an unpopular and politically dangerous decision. Still, it is often only by looking forward that we can effectively mitigate harms. For example, what would the beach look like today if Solana Beach implemented a beach restoration plan including seawall removal when it first identified the harm? At a minimum, property values would have been lower.[135] If the city ultimately decided to use the power of eminent domain, it could have purchased more land for a lower price putting fewer burdens on taxpayers. Of equal importance, owners would have had less of an expectation in their property investment — and perhaps less of an attachment to living on the bluffs. The cost to improve the beach increases as time passes.[136] In this case, a strong argument can be made for enjoining current nuisances and those that are certain to develop.

4. The Public Trust

Nuisances, although the most common and frequently discussed limitation on property rights, are not the only background principle of land ownership that could limit bluff owners' rights. Since California statehood in 1849, the public trust doctrine has existed as a principle of land ownership.[137] As previously mentioned, the doctrine places all navigable waterways and tidal lands below mean high tide in state ownership.

The overarching principle behind the public trust is a negative view towards

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[133] *See id.* at 339.

[134] *See* Machipongo Land & Coal Co. v. Dep't of Envtl. Prot., 799 A.2d 751, 775 (Pa. 2002) ("We see no reason to require the Commonwealth to prove that the alleged pollution is practically certain to occur.").

[135] *See* Solana Beach Civic & Historical Society, *City of Solana Beach History*, http://www.ci.solana-beach.ca.us/ContentPage.asp?ContentID=89 (last viewed Mar. 15, 2008) (discussing how property values have increased significantly since incorporation in 1986).

[136] *See* Angela Lau, *Two approaches Eyed to Shore up Fletcher Cove*, SAN DIEGO UNION TRIB, Sept. 23, 2006, *available at* http://www.signonsandiego.com/uniontrib/20060923/news_7m23reefs.html. According to the Army Corps of Engineers it will cost 6 million dollars to build a 100-foot wide beach at Fletcher Cove in Solana Beach. This beach would need to be replenished at a cost of 2.1 million dollars every five years. *Id.*

[137] CAL CONST. art. X § 3.

private uses on trust land.[138] Traditionally, any development on affected trust lands must advance the "public interest" and be closely related to navigation and commerce.[139] In *Boone v. Kingsbury*, the court held that the State could at any time remove structures from the ocean, "[i]f it determines they substantially interfere with navigation or commerce."[140] Over the last seventy-five years, however, the law concerning the public trust has expanded. Now, courts recognize that the public trust covers broad uses such as the public's right to hunt, swim and walk along the shoreline.[141]

Despite its focus on the public interest, the trust does not mandate specific uses, nor does it require removal of all existing private structures from trust land. When longstanding structures exist on trust land, the California Supreme Court uses a balancing approach that considers the public interest as well as the land's historical and current uses.[142] For example, in *City of Berkeley v. Superior Court,* a decision that involved the San Francisco tidelands, the court held that ripping up filled land and buildings along the San Francisco Bay made little sense because modifications already covered the shoreline.[143] The court decided that property that was no longer "physically adaptable" to trust purposes could be free of trust obligations.[144]

Similar to the filled tidelands at issue in *Berkeley*, owners in Solana Beach may argue that where ocean now meets the bluff, the beach is physically incapable of sustaining historical trust uses. Tearing down the walls would be similar to removing filled tidelands in San Francisco Bay. In addition, the Coastal Commission frequently reviews and approves seawall permits.[145] Instead of refusing to allow seawalls, the Commission imposes fees, indicating that something less extreme than total seawall removal balances affected interests.[146] Presumably, the Coastal Commission believes that the value of the existing private property is too great to allow the unstable bluffs to fall.[147]

The California Supreme Court however, recognizes that priorities do exist in evaluating uses of trust land. In a landmark decision, *National Audubon Society*

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[138] City of Long Beach v. Mansell, 476 P.2d 423, 434-38 (Cal. 1970).

[139] *Id.*

[140] Boone v. Kingsbury, 273 P. 797, 816 (Cal. 1928).

[141] Marks v. Whitney, 491 P.2d 374, 379-81 (Cal. 1971).

[142] City of Berkeley v. Superior Court, 606 P.2d 362, 373-74 (Cal. 1980).

[143] *Id.*

[144] *Id.*

[145] *See* CAL. PUB. RES. CODE § 6873.1 (West 2007) (setting forth that seawalls, revetments or similar enclosures may be placed at any location approved by the commission under a lease heretofore or hereafter issued pursuant to this article); Rodgers, *supra* note 3 (noting that commission routinely approves seawalls).

[146] Rodgers, *supra* note 3.

[147] *See* Carstens v. Cal. Coastal Comm'n, 227 Cal. Rptr. 135, 143 (Ct. App. 1986) ("We find nothing in Article X section 4 to preclude the commission from considering commerce as well as recreational and environmental needs in carrying out the public trust doctrine.").

v. Superior Court, the court broadly defined the boundaries of the public trust doctrine.[148]

The *Audubon* decision concerned Mono Lake, a remote inland sea in northeastern California. To meet its urban water needs hundreds of miles away, Los Angeles diverted the mountain streams that sustained the lake.[149] Historically, the public trust included only waters that were navigable. Therefore, because Los Angeles diverted water from non-navigable streams, and not directly from the lake, it did not violate the trust. However, in *Audubon*, the court decided that the public trust encompassed these small non-navigable streams as well.[150] Although Los Angeles took water from the streams and not the lake, the court found the result indistinguishable — the lake's water level was falling.[151] As a result, the court required water appropriation agencies to review Los Angeles' diversions in light of trust obligations.[152] Ultimately, the city reduced the amount of water it diverted from the streams and the lake's water level began to rise.[153]

In many respects, there are parallels between Mono Lake and the eroding bluffs and disappearing sand in Solana Beach. Both Mono Lake and the beach below high tide are subject to the trust. Mono Lake exists only if new flows from the streams replenish the water that is lost to evaporation. Similarly, the beach exists only if the bluffs deposit new sand on the shoreline.[154] The lake could not maintain its water level unless Los Angeles allowed the streams to flow into it. Likewise, the beach is unsustainable unless the bluffs can retreat and replenish the sand that storms and tides sweep away. Including the bluffs within the public trust appears to be consistent with the court's view of the doctrine in *Audubon.*

In addition, *Audubon* provides guidance on what it means for the public trust to serve the public interest. The court rejected Los Angeles' argument that the city was entitled to the Mono Lake water because it served the public interest by delivering water to a water starved region.[155] The court stated that when considering the trust purposes, preferred uses favor "protecting the people's common heritage of streams, lakes, marshlands and tidelands."[156] If Los

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[148] 658 P.2d 709, 715-21 (Cal. 1983).

[149] *Id.* at 713-16.

[150] *Id.* at 719-21.

[151] *Id.* at 728-29.

[152] *Id.*

[153] JOSEPH L. SAX ET.AL., LEGAL CONTROL OF WATER RESOURCES, 620-21 (5th ed. 2006).

[154] *See* Scott Ashford & Neal Driscoll, *Relationship Between Bluff Erosion and Beach Sand Supply for the Oceanside Littoral Cell* (Cal. Sea Grant Program, Paper PPEngin06_01, 2006), *available at* http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1117&context=csgc (indicating that studies suggest over half the sand on the beach comes from eroding bluffs).

[155] *Nat'l Audubon Soc'y*, 658 P.2d at 728-29.

[156] *Id.* at 724.

Angeles could not satisfy its public interest obligation by asserting its need for an urban water supply, it is difficult to see how a small number of private property owners can do so by asserting an overriding need for oceanfront homes.

5. Other Principles of Land Ownership

a. Custom

When seawalls cover sand and block access to the ocean, many feel that the walls block something the public has the right to enjoy. In two coastal states, Oregon and New Jersey, courts support the idea that in certain instances, the public has acquired a "customary" right to access the ocean.[157] This is true even when the coastal land is above mean high tide and is privately owned.[158]

In *Stevens v. City of Cannon Beach*, an Oregon city denied a developer a permit to build a seawall on a sandy beachfront lot.[159] The court did not conclude that a seawall would be a nuisance or that the developer had lost the right to build on his beachfront lot. Rather, the court found the city properly denied the permit because the public's customary use of the beach was a background limitation on the owner's private property right.[160] Similarly, in *Raleigh Avenue Beach Association. v. Atlantis Beach Club, Inc.*, the New Jersey Supreme Court weighed public trust principles against the need for public access to the shore. Noting the public's longstanding and historical use of the disputed parcel, the court decided that the beach club could not deny the public access to its private beach.[161]

It is an open question whether a California court would find that "custom" is a similar background restriction on land ownership. It seems more likely that a court would focus on established doctrines like nuisance, or the public trust. However, the "custom" argument appeals to common sense. The sandy areas of Solana Beach are currently open to the public and always have been.[162] Moreover, when a community has relied on this access, recognizing "custom" as a background principle of land ownership might be the appropriate response to owners' argument that they have relied on seawall approval.

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[157] *See* Raleigh Ave. Beach Ass'n v. Atlantis Beach Club Inc., 879 A.2d 112 (N.J. 2005) (holding respectively that public had customary use to beach, and where there was demand for access and public had used beach as access point in past, private owners had to allow access across private beach to public use for fee); Stevens v. City of Cannon Beach, 854 P.2d 449 (Or. 1993).

[158] *Raleigh Ave. Beach Ass'n*, 879 A.2d at 123-24.

[159] *Stevens*, 854 P.2d at 450-51.

[160] *Id.*

[161] *Raleigh Ave. Beach Ass'n*, 879 A.2d at 123-24.

[162] *See City of Solana Beach History, supra* note 135 (discussing how Fletcher Cove has been open to public access since 1924).

b. Natural Conditions

Going one step further from the idea of "customary rights" as a limiting principle of land ownership is the view that it is *preferable* to keep certain lands in their natural state. Under this view, private property owners would not have an inherent right to alter the natural conditions of unique areas.

The *Just v. Marinette County* decision supports a "natural conditions" principle of land ownership.[163] In that case, the Wisconsin Supreme Court held it was acceptable for a Wisconsin county to require the Justs to obtain a permit for a private development that would negatively affect neighboring public wetlands.[164] The court held the Justs did not have an absolute and unlimited right to change the natural character of their property when their proposed use would be incompatible with the natural state of the area.[165] The court was concerned that unrestrained private development would have harmful effects on shared public lands.[166]

The "natural conditions" principle has not gained much traction since the Wisconsin court decided *Just* in 1972.[167] Therefore, it would be easy to dismiss *Just* as an anomaly, distinguishable on its facts, and a far-reaching decision followed by few courts. Still, the court's opinion is not as surprising as it might seem when viewed in the context of established environmental laws. Popular and accepted environmental statutes such as the Clean Water Act and Clean Air Act address the need to improve the quality of shared natural resources.[168] Congress passed these statutes with the goal of returning common resources such as air and water to a more natural state.[169] When shared resources are affected, stringent requirements are reasonable.

Burdening a private property owner with a "natural conditions" principle of land ownership is not so different from burdening society with comprehensive environmental regulations that aim to protect our air and water. Like air, water, or the wetlands at issue in *Just*, the public beach is a unique resource that is difficult to replace. Making coastal development consistent with the natural conditions of the land would preserve the qualities that make coastal areas like Solana Beach a desirable place to visit, recreate and live.

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[163] Just v. Marinette County, 201 N.W.2d 761, 767-69 (Wis. 1972).

[164] *Id.*

[165] *Id.* at 767-68.

[166] *See id.* at 18 (noting case does not deal with isolated swamp unrelated to navigable stream, in which case there might not be harm to public rights).

[167] *See* Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1438 (1993) (discussing Justice Scalia's view that states may not require landowners to maintain their property in a natural state).

[168] Clean Water Act, 33 U.S.C. §§ 125 (a)(1)-(7) (2006); Clean Air Act, 42 U.S.C. §§ 7401(a), (b) (2006).

[169] Clean Water Act, 33 U.S.C. § 1251(a)(1) (stating ambitious and arguably unattainable goal of completely eliminating pollutants in nation's navigable waterways).

Whether it is the public trust doctrine, nuisance principles, or an acknowledgment that coastal lands are a shared resource that are fundamentally unique, Solana Beach can point to several principles of land ownership that may be inherent limitations on developing these shorefront properties. If one of these arguments were successful, to establish an unconstitutional taking landowners would need to rely on a partial taking argument and the *Penn Central* test.

C. Penn Central — *A Partial Taking?*

As previously discussed, the *Penn Central* test applies to regulations that are less burdensome than those that result in a complete loss of property value.[170] If landowners could not demonstrate a total regulatory taking, courts would apply a *Penn Central* analysis. Again, the factors courts consider are: 1) the economic effect of the regulation; 2) the impact on "investment-backed expectations"; and 3) the character of the regulation.[171]

The first consideration is the economic effect of the regulation. Here, a regulation capping the life of a seawall at a finite number of years would have a serious economic effect on property value. Without a seawall, many homes face destruction.[172] The properties would become unmarketable as people would be unwilling to buy homes that might disappear after a series of storms.

In response to this, the city could assert that landowners do not have an inherent right to maximize the potential value of their land.[173] Accordingly, each year of actual property use and enjoyment should be discounted against the economic impact. For instance, the longer owners remain on the land, the corresponding economic effect of a seawall regulation decreases. The owners have realized value that corresponds to the number of years of property

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[170] Before applying the *Penn Central* factors, there is the question of whether a balancing is even necessary if a nuisance or other background limitation on land ownership exists. In *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 U.S. 470, 491 (1986), the court hesitated to find a taking when the State restrains the use of property to prohibit a nuisance. A recent decision by the Court of Appeals of Arizona traced a series of decisions in state and federal courts and concluded this is the correct approach. *See* Mutschler v. City of Phoenix, 129 P.3d 71, 73-76 (Ariz. Ct. App. 2006) ("We can perceive no valid reason why the nuisance exception as narrowed by *Lucas* should apply to the rare situation in which the government regulatory action renders the property valueless but not to the run of the mill *Penn Central* case in which the property retains some economically beneficial use.").

[171] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). Additionally, it might be argued that nuisance or other background principles should be factored into *Penn Central*. In other words, creating a nuisance would tend to create an unreasonable investment backed expectation (*Penn Central's* second factor), or the character of the government action is compelling because it has a strong interest in abating nuisances (addressing the third factor). Common sense says that if a nuisance were a bar to compensation when the taking is complete it would also be a bar when the taking is less than complete.

[172] *See* Diehl, *supra* note 98.

[173] *See Penn Central*, 438 U.S. at 130-31 (stating landowner has no inherent right to realize property expectation that maximizes its value).

enjoyment. A regulation that phased seawalls out over a number of years should apply this principle.[174]

The second *Penn Central* factor considers the extent that the removal of seawalls interferes with "reasonable investment backed expectations." When applying this factor, one must initially ask how reasonable it was to build homes on the edge of an eroding cliff. In hindsight, it is easy to see it was a poor decision to allow homes so close to the bluff edge. In fact, the city admits it was a mistake.[175] After all, coastal erosion should not catch anyone by surprise. Buyers should know that bulky structures are necessary to protect their homes. Presumably, sellers and buyers discussed the location, the need for permits to build the seawalls, and the impacts the walls have on the city's beaches. Whether a seawall is a reasonable expectation of ownership should depend not only on the consequence of its denial, but also on whether the buyer considered the physical condition of the land. There is an obvious risk involved with living on the edge of a cliff.

However, owners may counter that as the bluffs began to erode, they relied on the city approval of seawalls.[176] Additionally, the Court of Appeal recognizes that when houses are in danger, the city has the authority to grant emergency seawall permits without environmental review.[177] Therefore, an owner might define his reasonable investment-backed expectation as the continued use of the property as it existed at the time of purchase.[178]

The Supreme Court has no precise formula to guide courts in deciding whether a regulation has undermined a reasonable investment backed expectation. For example, in *Palazzolo v. Rhode Island,* the Court assumed that regulations that would cause a drop in property value from over 3 million dollars to roughly 200,000 dollars would not necessarily undermine a reasonable investment and constitute a taking per se.[179] Losing beachfront homes in the future would certainly eliminate some of the owners' property investment. However, even if the land value decreased by over ninety percent as the land in

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[174] For example, under Solana Beach's proposed coastal plan, the economic loss is minimal if discounting effects are considered. In 75 years, current owners will have realized most of the property value they imagined when they purchased their homes.

[175] LOUGH, *supra* note 11, at 1.

[176] *See* Jim Jaffee, *The Walling of Solana Beach*, 17 MAKING WAVES, Feb.-Mar. 2001, at 10, *available at* http://www.surfrider.org/makingwaves/makingwaves17-1/10-11.pdf (discussing the regular approval of seawalls in Solana Beach and other coastal cities).

[177] Calbeach Advocates v. City of Solana Beach, 127 Cal. Rptr. 2d 1, 7-8 (Ct. App. 2003). It is possible to read the Court's decision narrowly. The court states if a permit is granted it can be approved without CEQA review. It provides no guidelines as to when a permit must be approved. *Id.*

[178] This might fit with an underlying *Penn Central* presumption that current uses are deemed reasonable. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 143 n.6 (1978).

[179] *See* Palazzolo v. Rhode Island, 533 U.S. 606, 621-22, 630-31 (2001) (stating that *Penn Central* partial taking analysis is appropriate in this situation).

Palazzolo did, it would not necessarily constitute the loss of a reasonable expectation.[180] An "investment-backed expectation" is more than monetary value. The owner's use of the property must also be reasonable. Indeed, from the perspective of most landowners who do not own coastal property, it is unreasonable for a few private property owners to "capture" a public resource despite the significant personal loss to individual owners.

Finally, the remaining *Penn Central* factor looks at the character of the regulation. The court is to consider whether the regulation promotes the common good or if owners are unfairly "singled" out. There is little dispute over whether Solana Beach has compelling reasons for restricting seawalls.[181] The LCP lists a series of reasons why the city opposes them.[182] These reasons include the aesthetics of the natural shoreline, loss of tourism and visitors to city beaches, and lack of access to the shore.[183] Additionally, although the city has almost two miles of shoreline, the beach is visible from few areas. A wall of homes, apartments, and condominiums blocks both access and viewing of the ocean from the coastal road.. Apart from a few public stairways sandwiched between homes, public views of the beach primarily exist only at the northern end of Solana Beach and from a small park in the center of the city.[184] For a coastal city that gains substantial revenue from tourism, the public interest in improved beach access is obvious.[185]

Showing a compelling public interest is integral to the Penn Central analysis and to evaluating this final factor. However, until recently it was unclear whether finding a significant public interest might be a complete defense to a takings challenge. In 2005, in *Lingle v. Chevron* the Supreme Court was clear. The Court rejected the idea that the government can defend a takings challenge by solely arguing that regulations advance a substantial state interest.[186] In fact, the Court stated that any takings defense presupposes a substantial public benefit.[187] Because of the *Lingle* decision, it is an open question on whether

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[180] *See id.*

[181] Additional support for removing the walls can be found in the Coastal Act, which provides that where a conflict exists in carrying out the provisions of the act, the conflict should be resolved in a manner that is "most protective of coastal resources." CAL. PUB. RES. CODE § 30007.5 (West 2007).

[182] LOUGH, *supra* note 11, at 1.

[183] *Id.*

[184] City of Solana Beach, CA, *Marine Safety, Beaches of Solana Beach*, http://www.ci.solana-beach.ca.us/contentpage.asp?ContentID=205 (last visited Mar. 15, 2008).

[185] *See* ROBERT GARCIA & MICHAEL MCCUTHEON, CTR. FOR LAW IN THE PUBLIC INTEREST, EQUAL ACCESS TO CALIFORNIA BEACHES 3 (2006), *available at* http://www.cityprojectca.org/pdf/beachpolicybrief.pdf (according to Center for Law in the Public Interest, three percent of all economic activity in California is attributable to coastal recreation).

[186] Lingle v. Chevron, 544 U.S. 528, 548 (2005).

[187] *See id.* at 543 (recognizing that takings clause presupposes government has acted pursuant to valid public purpose).

finding a compelling public interest tilts this final factor in favor of the city's need to regulate seawalls.[188]

As this discussion shows, applying the *Penn Central* factors does not lead to a definitive result. The first factor probably weighs in favor of the landowners; the economic loss would be great if a seawall prohibition takes effect soon.[189] Although property modifications might mitigate the loss, the economic burden is hard to deny. Some homes would fall into the ocean.

The second factor cuts equally. In the past, the courts, city, and Coastal Commission were willing to approve seawall permits. Perhaps, the owners reasonably relied on the approvals and believed that when they bought a bluff-top property they would be able to protect it indefinitely.[190] However as the beach disappears, the owners' expectation to continue to cover large sections of bluffs with concrete becomes increasingly unreasonable. At some point, owners have accepted both the risk and consequence of buying crumbling oceanfront property.

The final factor arguably favors the city and public's interest in a beach without walls. While the result is harsh, owners were on notice that the city disapproved of seawalls. The Solana Beach Municipal Code restricts structures that adversely affect adjacent public property, natural resources, or use of the beach.[191] Additionally, in Southern California, where the coastline is almost entirely developed, public beaches are valuable "open space" providing essential recreational and economic resources. Access and availability of a public beach is a priority.[192] Unless the city can protect its coastline without removing seawalls, owners will have difficulty showing they are unfairly singled out, or that the public interest is not sufficiently compelling to support seawall removal.[193]

Due to the nature of a *Penn Central* analysis, it is far from certain that owners

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[188] Despite the strong public interest in an accessible shore, Solana Beach does not have the only public beaches in the area, and nowhere does the Coastal Act mandate that homes must be torn down if public access is inhibited. Shoreline to the north and south of Solana Beach is easily accessible to the public, those in search of a wide sandy beach have to travel only a few miles.

[189] While not determinative, a loss in value has frequently been used as the dividing line between regulatory inconveniences and takings. *See* First Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 329 (1987).

[190] Jaffee, *supra* note 176.

[191] SOLANA BEACH, CA., MUN. CODE. § 17.62.020 (2007); Whaler's Village Club v. Cal. Coastal Comm'n, 220 Cal. Rptr. 2, 7-10 (Ct. App. 1985).

[192] LOUGH, *supra* note 11, at 12.

[193] It is important to note that less restrictive alternatives to seawall removal have been proposed. Examples are infilling bluffs rather than walling them, engineering the shoreline to retain more sand, and pumping sand from offshore to replenish the beach. *See* Adam Kaye, *Coastal Panel Sued by Solana Beach Condo Association*, NORTH COUNTY TIMES, Dec. 14, 2005, *available at* http://www.nctimes.com/articles/2005/12/14/news/coastal/21_16_1012_13_05.txt (discussing damages as mitigation).

would convince a court that the multi-factor test tips in their favor. As this discussion indicates, a fundamental problem with *Penn Central* is that the factors can reasonably point in either direction. The "test" depends on how much weight an individual factor is given and whose values one most identifies with. Some critics suggest that under a *Penn Central* analysis the government can always avoid a taking[194] and it is often a matter of public policy to provide compensation, not a requirement.[195] Therefore, in the bluff owners' case, the *Penn Central* test provides little practical help in deciding whether landowners are entitled to compensation if seawall regulations affect their homes.

III. GOING FORWARD

A. The Local Coastal Plan

Until recently, there were few seawall regulations. But the disappearing beach and worry that concrete walls will cover the coastline has forced the city to address the conflict.[196] In the summer of 2006, the city submitted its Local Coastal Plan to the Coastal Commission. The plan is described as a compromise that represents the views of concerned citizens, local politicians and private property owners.[197] The centerpiece of the coastal plan gives owners seventy-five years to enjoy their homes. The plan allows seawalls when properties are in immediate danger. By 2081, the hope is that the owners will remove the walls and the bluffs can erode in a "planned retreat."[198] The city would then acquire the unprotected bluffs at fair market value.[199]

Although the plan attempts to phase out seawalls, it ultimately gives owners a great deal of control. They can remain in their homes for at least seventy-five years and a proposed twenty-year renewal option extends the possibility of a resolution indefinitely.[200] Interested groups state the LCP is a compromise.[201]

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[194] For a discussion of the *Kelo* decision and the misplaced criticism of the courts broad interpretation of takings done for public use, see Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412 (2006).

[195] *Id.* at 1449.

[196] *See* Jaffee, *supra* note 176.

[197] LOUGH, *supra* note 11, at 1.

[198] *See id.* at 16. If the homes cannot be protected without walls, permits for 20-year extensions would be available. If sand mitigation methods increase the width of the beach, or the walls are deemed necessary to protect the public they will be allowed to remain. Other components of the plan give the city a right of first refusal if an owner wishes to sell, provide incentives for voluntary setbacks, set parameters for wall construction, encourage bluff "in fills" rather than walls and state that land lease fees will be stored in an account established to restore the beach. *Id.*

[199] *See id.* at 3-4.

[200] *Id.* at 1.

[201] Erin Spry, *City Council Moves Quickly on Solana Beach Seawall Compromise*, DEL MAR TIMES, Jan. 20-26, 2006, *available at*

However, if owners choose to remain in their homes for seventy-five years it is difficult to see how the compromise will improve the beach. Further, if the city eventually decides to acquire the properties, it seems unfair that the city will bear a substantial cost while longtime members of the community will perhaps never see improvements to the beach. Given the weakness of owners' physical invasion claims, and the strength of the city's regulatory arguments, why did the city adopt such owner-friendly standards in the LCP?

Perhaps one reason is that for many owners, agreeing in principle to have seawalls removed in seventy-five years is a major concession. Purchasing a home on the edge of the ocean is likely the product of a lifetime of work and savings. Owners would like to stay in their homes, enjoy them, and at the end of their lives sell or pass the properties on to their children. This is a sympathetic position and it is impossible to dismiss the owners' claims as entirely unwarranted or selfish.

Nevertheless, in coastal cities like Solana Beach, the public is becoming less willing to accept the status quo.[202] Additionally, global warming is likely to have increasingly significant effects on coastal properties.[203] Even with seawalls, it might not be possible to maintain current conditions along the coastline for the next seventy-five years. A better compromise is necessary.

B. Future Negotiations

In the current plan, it is clear that Solana Beach does not consider taking the land or prohibiting seawalls without compensating owners with fair market value.[204] Undoubtedly, political concerns caused the city to take this approach. Forcing people from their homes is unpopular and controversial even if the purpose is for a compelling public benefit.[205] The threat of regulations that would lead to the loss of multi-million dollar properties would attract powerful and vocal opponents.

However, as the LCP is further discussed, it is important for Solana Beach to assert its right to pass additional seawall regulations. The preceding analysis shows that the city can maintain defenses to takings claims. By using its legal

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http://www.delmartimes.net/archives/articles012006.html#seawall.

[202] Other coastal communities in California have struggled with the issue of seawalls and have reached mixed results. *See* Andrew Scutro, *A Wall at the Beach*, MONTEREY COUNTY WEEKLY, Nov. 18, 2004, *available at* http://www.montereycountyweekly.com/issues/Issue.11-18-2004/news/Article.news1 (discussing similar seawall dispute in Monterey County which led to Coastal Commission imposing 5.3 million dollar sand mitigation fee in exchange for owners rights to build 585-foot wall).

[203] *See* James G. Titus, *Rising Seas, Coastal Erosion and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 57 MD. L. REV. 1279 (1998) (discussing inevitability of rising seas and private property conflicts).

[204] LOUGH, *supra* note 11, at 4.

[205] *See* Bell & Parchomovsky, *supra* note 194.

right to prohibit seawalls and allow the bluffs to erode, the city has a powerful negotiating tool. It can use this "tool" to reach a more equitable result that supports the public's interest in maintaining beaches. It is doubtful that either the public or the affected landowners appreciate that it is not an absolute legal right to maintain homes on the bluffs. Negotiating with this principle in the background creates a strong incentive for owners and the city to work towards a more balanced and permanent solution.

C. Proposals

When discussions begin, the city should clearly state that regulations that eliminate seawalls in the near future are an option. The city should then offer a series of proposals that will limit the hardship on owners. The following ideas are approaches the city might consider:

1) In the LCP, the city proposes drawing a twenty-five foot limit line on the bluff. The plan prohibits new structures west of the line unless owners show that they meet special circumstances.[206] Creating a development boundary is a good idea. However, rather than setting the line at twenty-five feet, the city should complete a comprehensive geologic study. By identifying areas of the bluff that are more or less prone to collapse, the city can better define a safe limit for structures along the bluff. In addition, the boundary line should represent a limit where neither the beach nor the property expectations will be undermined in the near future. A development line that looks 100 or 150 years ahead makes more sense. Drawing a line further landward allows for permanent planning and provides a buffer for unforeseen events.

2) Wherever the line is drawn, the city should aim for relatively quick removal of homes that are west of it. To avoid disputes over whose land is more of a nuisance or has more of an impact on the shoreline, all properties inside the unstable zone should be treated equally. This treatment should apply regardless of whether a seawall currently protects a home or how narrow the beach is beneath the homes. The alternative would allow owners to keep seawalls in place until the danger is imminent, resulting in variable bluff erosion where the beach expands in some areas but shrinks in others.

3) Move homes east of the bluff edge as far as possible. In some cases, the remaining lot size will not be large enough to support a livable home. A novel way to compensate for the land lost on the bluff edge would be to replace the two-lane road and sidewalk with a one-way street that parallels

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[206] LOUGH, *supra* note 11, at 18.

the homes. By narrowing the road, removing the sidewalks, and eliminating the shoulder for street parking, owners could relocate some homes away from the dangerous bluff zone.

4) The city could swap inland property for those along the bluff. The city could purchase this land, or convert existing parkland offering it as a trade for bluff-top parcels. For homes west of the stable boundary, that owners cannot move, this proposal gives owners an opportunity to live by the ocean. The economics of this transaction would be complex. There are few inland areas that the city owns or could acquire to make the trade. The point is some owners would get what they want; a home near the ocean, and the city would preserve its valuable beaches.

In the alternative, the city could select a stable beachfront site that is currently furthest from the tides and crumbling bluffs. The city could acquire the site and design a high density development that provides homes for owners who have difficulty relocating. Solana Beach currently has a densely developed bluff; a well designed complex located on stable land far from the bluff edge could eliminate many of the shoreline properties that currently require seawalls.

5) Finally, some property owners will be unable or unwilling to move. The city should put those who are west of the boundary line on notice. Instead of seventy-five years with twenty-year extensions, the city should implement a shorter time limit with smaller incremental extensions. At the end of the set time limit, owners would have the option to sell the properties to the city. When compensating the owners, the city could discount the final price taking into account the number of years the owners remained on the properties.[207] Where owners choose to sell the property to the city before the end of the time limit, the city could temporarily rent properties as vacation rentals. This would allow the city to further compensate owners and recuperate some of the cost of purchasing the land.[208]

Inevitably, Solana Beach owners will face regulatory burdens so that the community and region can maintain an important public resource.[209] The

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[207] In a lawsuit against the city, an environmental group also argues that the city should use the discounting effect. *See* Brief for Appellant, *supra* note 1, at 32-35.

[208] *See* LOUGH, *supra* note 1,1 at 7 (proposing Shoreline District Account that would include monies city earns from leasing Bluff Properties); *see also* Brief for Appellant, *supra* note 1, at 35. Providing compensation to all the owners is not a reasonable option. The city has estimated the cost of buying the properties at over 360 million dollars.

[209] *See* Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 490 (1987) (stating that while private property is burdened by regulations, society benefits from the restrictions).

question is how far is the city willing to go to assert is regulatory rights. Unfortunately, the controversial *Kelo v. New London* decision does not help with the city's ability to negotiate with landowners.[210] That decision fueled a recent backlash against private property takings, causing the public to become increasingly skeptical of cities taking private property. [211] At its worst, *Kelo* forced owners out of their homes so a city could provide valuable land to large developers. At its best, the decision affirmed that owners would receive fair value for their land so that the coastal Connecticut city could implement a wide range of community benefits.[212] *Kelo* shows how carefully government should act when it decides that private property rights must yield to improve public benefits. The decision reinforces that the benefit to the public must be substantial and identifiable. Most important, the exchange must be fair. While immediately displacing owners is not a desirable or viable option, waiting another seventy-five years to deal with the problem will not make tough choices any easier. In Solana Beach, the goals of private land development, environmental protection, and public recreation cannot coexist without further compromise.

CONCLUSION

Private property owners in Solana Beach have valuable investments, but the competing land uses along this narrow strip of shoreline are in an unsustainable state. No one wishes to remove people from their homes. However, regardless of the money spent to fix the problem, a natural and accessible shoreline may not be possible without removing homes from the bluff edge. The predicament facing landowners and the city shows how important it is to engage in thoughtful planning. If the developers who sold the bluff land had balanced the short term profit against the long term costs to the city and beach, the real cost of maintaining this narrow strip of land would have been apparent.

Unfortunately, when the Supreme Court announced a new class of regulatory takings in *Lucas*, the Court made it more difficult for local governments to engage in long term planning. What occurred on the South Carolina coastline after *Lucas* demonstrates the consequences of not allowing cities and states to have greater regulatory control to limit development in sensitive areas.[213] A few years after the Supreme Court decided *Lucas*, developers built on the beach

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[210] Kelo v. City of New London, 545 U.S. 469, 480-85 (2005).

[211] *See* John M. Broder, *States Curbing Right to Seize Private Homes*, N.Y. TIMES, Feb. 21, 2006, at A1.

[212] *Kelo*, 545 U.S. at 480-85.

[213] *But see* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) (appreciating need to engage in long term comprehensive planning when it decided temporary building moratoria in Lake Tahoe Basin was not taking).

lots.[214] During a stormy year, the beach eroded to within a few feet of the homes.[215] Finding sandbags to be inadequate protection, owners sought special permits to use large barriers to protect their homes from anticipated wave damage.[216] The coastal council had to make an immediate decision. Would landowners have the right to protect their homes using any means necessary or would the overriding concern be preservation of the existing beach?[217]

The dilemma was avoidable. In *Lucas,* the Supreme Court could have recognized that the Beachfront Management Act was a necessary and valid regulation designed to control future coastal development and avoid inevitable conflicts between public and private interests. Although the act denied a private property owner the right to develop a valuable lot, it addressed the obvious need for a buffer zone between the ocean and homes. As Justice Kennedy stated in a concurring opinion, coastal lands are unique and there might be compelling reasons for giving them special protection.[218]

In coastal towns, creative and unconventional approaches are necessary to balance competing public and private property values. A shorter sea wall phase-out period, a land exchange, and redesigning public sidewalks and streets are some options Solana Beach could explore. This is not a question of public rights replacing those of private property owners. Rather, the preceding analysis recognizes that in areas where rights are in conflict, they need to coexist without sacrificing one interest at the expense of the other.[219]

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[214] ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY 780-81 (4th ed. 2003).

[215] *Id.* at 780.

[216] *Id.*

[217] The council decided in favor of the beach, denying the owner's request, allowing only removable sandbags. PERCIVAL, *supra* note 187, at 781.

[218] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1035 (1992).

[219] *See* Sax, *supra* note 167, at 1451-52 (discussing change in societal views and increased importance of environmental values).