For landowners along California’s coast, maintaining the right to build a seawall or other protective device can mean the difference between preserving one’s home or having it fall into the sea during the next winter storm. The **California Coastal Act** recognizes the importance of preserving landowners’ rights to protect their property. Indeed, the Act expressly provides that **“existing structures” have the right to a seawall or other protective device**, so long as it is designed to mitigate environmental side-effects. But the Act also requires that “new development” be constructed in such a way that it not **“in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.”** The interplay of these provisions raises a critical question of statutory interpretation:

What distinguishes an “existing structure”—which has the right to a protective device—from a “new development”—which has no statutorily guaranteed right?

Perhaps somewhat surprisingly given **its well-justified reputation of antagonism toward property rights**, the California Coastal Commission (the state agency responsible for superintending the Act’s implementation) had taken a property-owner-friendly view on this issue for some time. That is, the Commission regularly used to interpret “existing structures” to mean those buildings in existence at the time an application for a protective device is submitted. (See, for example, the Commission’s appellate brief in *Surfrider Foundation v. California Coastal Commission*, **attached as Appendix 4 to our OAL seawall waiver policy petition**).

This position is in sharp contrast to the view of the environmental and “managed retreat” crowds (*see, e.g.*, Todd Cardiff’s 2001 article ***Conflict in the California Coastal Act: Sand and Seawalls***), which holds that “existing structures” are those that were in existence when the Coastal Act went into effect (January 1, 1977). Thus, these groups contend (and the Commission appears increasingly to agree) that the Act’s allowance for protective devices is exceptionally meager and, with the passage of time, will become non-existent

(**a view that AB1129 (2017) (Stone) would have legislated**).

Which side has the better of the argument? In my view, it is the Commission’s original view—“existing structures” mean structures in existence at the time a permit application is made, regardless of when the structures were built.

First, plain meaning. Those who argue for a grandfather-clause interpretation of “existing structures” fail to appreciate that the normal interpretation of a statutory rule is to apply its terms in the context of the timing of the relevant regulated activity. For example, if a statute were to provide, “All new houses shall be painted in red,” no one would think that the statute could be satisfied only by painting new houses with red paint *that was in existence at the time the statute was enacted*. The Coastal Act’s allowance for “existing structures” is like the hypothetical statute’s requirement for red paint: you may construct a new protective device, but only to protect an existing structure (whether or not recently constructed); just as, you may construct a new house, but only if you paint it red (regardless of whether the red paint has been recently manufactured).

Second, parallel usage. The Coastal Act actually contains a number of “existing” clauses, many pertaining to the on-the-ground “existing” conditions that would inform a permitting decision. *See, e.g.*, Pub. Res. Code §§ 30224, 30233, 30250. It would make little sense to interpret “existing” in these provisions to mean the conditions that were present in 1977, as opposed to the conditions present at the time of a permit application. For example, Section 30250(b) directs that “new hazardous industrial development shall be located away from existing developed areas.” Could it really be that the Legislature only wanted to protect “developed areas” that were “existing” as of January 1, 1977, from the dangers of nearby hazardous industrial development? Of course not. By the same token, it would make little sense to determine what the qualifying “existing structures” are for processing a permit application for a new protective device based on which structures were “existing” decades prior to the permit application. The more generous interpretation of “existing structures” is therefore also congruent with the canon of interpretation that counsels for the consistent interpretation of a word or phrase used in the same manner but in different parts of the same statute. *E.g.*, *Ste. Marie v. Riverside County Regional Park and Open–Space District,* 46 Cal.4th 282, 288–289 (2009) (“[A] word given a particular meaning in one part of a law should be given the same meaning in other parts of the same law.”).

Third, relationship with “new development.” Critics of the Commission’s interpretation contend that it renders the Act’s protective-device limitations for “new development” superfluous. Recall that the Act requires new development to be constructed to avoid the need for protective devices. The critics therefore argue: if post-Coastal Act development (that is, “new development”) can still be entitled to a protective device, then what is left of the Act’s requirement that protective devices generally should not be available for new development? To begin with, the complaint proceeds on a false sentiment, as it were—for the Act does *not* generally prohibit *all* protective devices for new development. Rather, it prohibits only those that would *substantially alter bluffs and cliffs*. Thus, even for new development, the Act is rather generous toward minor protective devices. But more to the point, the superfluity critique is unconvincing because it fails to appreciate the unpredictability of coastal erosion. The Legislature could quite reasonably have concluded that new development should be designed to avoid the need for a protective device, *but also* that homeowners should not be denied the ability to protect their property simply because the unforeseeable or the unlikely happens and their residences are now threatened by erosion, notwithstanding best (and presumably Commission-approved) design efforts to avoid the risk.

Fourth, the avoidance canon. A basic principle of construction counsels against interpretations that would raise a serious constitutional question. *E.g.*, *People v. Garcia* , 2 Cal. 5th 792, 804 (2017) (“[A] statute should not be construed to violate the Constitution.”). Adopting the grandfather-clause interpretation of “existing structures” would violate this canon, because it would frustrate the ability of coastal landowners to “protect[] property,” a right secured by **Article I, section 1, of the California Constitution**. To be sure, coastal property owners do not enjoy an absolute right to protect their property, free of any government regulation. *Whaler’s Vill. Club v. Cal. Coastal Comm’n* , 173 Cal. App. 3d 240, 252-53 (1985). But the narrow interpretation of “existing structures” would deny their owners *any* right to do so, an evisceration of the constitutional guarantee that, incongruously, would leave these owners in a worse position than proponents of “new development” who, as discussed above, still (by implication)

may use protective devices that do not entail substantial bluff or cliff alternation. In any event, the right guaranteed to “existing structures” is not an absolute one, but rather is conditioned on the protective device’s “design[] to eliminate or mitigate adverse impacts on local shoreline sand supply.”

Fifth, statutory and legislative history. Proponents of the narrow interpretation of “existing structures” often emphasize that (a) the 1975 **California Coastal Plan**, on which the Coastal Act is largely based, recommends a very circumscribed right to protective devices, and (b) the bill that became the Coastal Act was amended to add the word “existing” shortly before passage. Neither point is really that persuasive. Of course, the Coastal Plan is not a very property-rights-friendly document, but let’s not forget that the Legislature enacted the Coastal Act, not the Coastal Plan. Indeed, the August, 1976, committee report from the Senate Committee on Natural Resources and Wildlife underscores that “the bill [which became the Coastal Act] d[id] not incorporate all of the policy recommendations of the Coastal Plan.” As to the late-in-the-game addition of “existing,” that isn’t decisive at all, especially in light of the Legislature’s concern about the unpredictability of erosion, discussed above, and its consequent desire to harmonize the encouragement of prudent coastal construction with a respect for the rights of coastal property owners.

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