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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

**FOURTH APPELLATE DISTRICT COURT OF APPEAL-4TH DIST. DIV. 3
FILED**

DIVISION THREE

OCT 12 1999

Deputy Clerk

**NEWPORT COAST DRIVE DEFENSE
FUND,**

Plaintiff and Appellant,

v.

**SAN JOAQUIN HILLS
TRANSPORTATION CORRIDOR
AGENCY et al.,**

Defendants and Respondents.

G020843

(Super. Ct. No. 736471)

OPINION

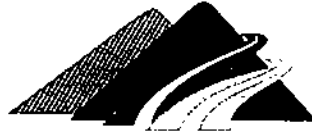
Appeal from a judgment of the Superior Court of California, County of Orange, William F. McDonald, Judge. Affirmed.

Toledano & Wald and James Toledano for Plaintiff and Appellant.

Nossaman, Guthner, Knox & Elliott, Robert D. Thornton, John J. Flynn III, Laurence M. Watson, County Counsel, and Edward N. Duran, Deputy County Counsel, for Defendants and Respondents.

San Joaquin Hills
Corridor Agency

Chairwoman:
Linda Lindholm
Laguna Niguel



TRANSPORTATION CORRIDOR AGENCIES

Foothill/Eastern
Corridor Agency

Chairman:
Peter Herzog
Lake Forest

July 12, 2004

Mr. Ronald Kennedy
4741 Sleeping Indian RD
Fallbrook CA. 92028-8875

Re: Newport Coast Drive Litigation

Dear Mr. Kennedy,

Mr. Robert Hernandez, a member of the Board of Directors of the Foothill/Eastern Transportation Corridor Agency, has asked me to respond to your e-mail to him regarding the construction of State Route 73 on a portion of the former Newport Coast Drive.

As your e mail to Mr. Hernandez recognizes, the issue of whether the San Joaquin Hills Transportation Corridor Agency complied with the law in its construction of State Route 73 as a toll road has been fully resolved after exhaustive review of this issue by the California courts and the California Attorney General. I have enclosed the October 12, 1999 decision of the Court of Appeal in the case of *Newport Coast Drive Defense Fund v. San Joaquin Hills Transportation Corridor Agency* and Opinion No. 93-1205 issued by the California Attorney General on May 12, 1994 for your information. The Court of Appeal and the California Attorney General rejected the claims by the Newport Coast Drive Defense Fund that the construction of State Route 73 as a toll road on a portion of Newport Coast Drive violated state law.

The issues you raise were fully evaluated by a Superior Court Judge, three Justices of the California Court of Appeal and the Attorney General. The claims that the San Joaquin Hills Transportation Corridor Agency violated State law were found to be without merit.

Sincerely,

W.D. Kretzen
Chief Executive Officer

Enclosures

c: Director Bob Hernandez, F/ETCA Board

Walter D. Kretzen, Chief Executive Officer

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Subj: **Mr Robert Hernandez TCA Board of Directors / Anaheim City Councilman**
 Date: 9/6/04 10:34:42 PM Pacific Daylight Time
 From: Otrkennedy
 To: SRay@anaheim.net
 CC: ocletters@latimes.com, Christopher.cox@mail.house.gov

Greetings Councilman Hernandez: Will you please forward this letter with Coastal Commission Findings to MR. Kreutzen CEO. at the TCA. So they may be aware of this breach of California Law. Also my reply 7/19/04 to his letter of 7/12/04 through your good offices has not been answered.

"Newport Coast Drive Defense Fund" Our only goal was to keep the Original Newport Coast Drive from PCH. To Macarthur BLVD. Open as a Free Road as was called out in the Irvine Coast Development Agreement, as Coastal Mitigation. As such the County and Cities did not have the Right to use their Police Powers to Amend any Part of the Quid Pro Quo Coastal Mitigation, for the Development Permit. But The Best Government Money can Buy in Orange County & the AG. Office as usual had their way with the Citizen they're supposed to protect.

This Free Road right of way can Also be found in.

IRREVOCABLE OFFER OF DEDICATION as Recorded in Official Records of Orange County Calif. as Document # 88-417100 as "This Irrevocable Offer Of Dedication ("offer") of the right-of-way for the proposed San Joaquin Hills Transportation Corridor (the "Corridor") August 19, 1988 Exhibit "D" Legal Description Pelican Hills Road (now Newport Coast DR). "Construction Easement within the San Joaquin Hills Transportation Corridor."

IRVINE COAST DEVELOPMENT AGREEMENT COUNTY OF ORANGE as Recorded in Official Records of Orange County Calif. as Document #88-272903 Jun 9 1988.

Exhibit C. has the "findings" for the California Coastal Commission, and further calls out, Exhibit D. as the "Irvine Coast Development Agreement Benefits to "The County And Its Residents"

The Public rights to this Stolen Road is found on page. D-9 "Previously Exacted Benefits:" at line D. "Early construction of four lanes of Pelican Hills Road from Pacific Coast Highway to MacArthur Boulevard;" Who stole this free Road?

I also have a List of OC. Resolutions calling out the same Public Right for this road In the County's acceptance of this Required Coastal Commission Mitigation.

Monday, September 06, 2004 America Online: Otrkennedy

PK ADD
THIS 8 2 07

Sincerely, Ronald D Kennedy 9-6-04

4741 Sleeping Indian RD.
Fallbrook CA. 92028-8875
otrkennedy@aol.com
760-723-4357

LAW OFFICES

NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP

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Date: 7/9/2004 **Time:** 2:41 PM **Pages (including cover page):** 21

To: Mr. Walter Kreutzen
Firm: Transportation Corridor Agencies
Fax: (949) 789-3514 **Main No.:** 92604

File No: 190477-9999

From: Robert D. Thornton **e-mail:** rthornton@nossaman.com

Comments:

Documents regarding Newport Coast Drive response letter.

ORIGINAL WILL:

<input type="checkbox"/>	BE SENT BY MAIL	<input type="checkbox"/>	BE SENT BY FEDEX/OVERNIGHT COURIER
<input type="checkbox"/>	BE SENT BY MESSENGER	<input checked="" type="checkbox"/>	NOT BE SENT

IF YOU DO NOT RECEIVE THE NUMBER OF PAGES INDICATED ABOVE,
PLEASE CALL Leanne Boucher **AT** (949) 477-7690

ATTENTION:

This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, and exempt from disclosure under applicable law. If you are not the intended recipient, you are hereby notified that any use, dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return this original message to us at the above address via the U.S. Postal Service. Thank you.

This is the latest installment in seemingly endless litigation surrounding the San Joaquin Hills Transportation Corridor (the Corridor), a 17-mile toll road between San Juan Capistrano and Newport Beach.¹ The San Joaquin Hills Transportation Corridor Agency (the Agency) is the public agency² charged with overseeing the construction and administration of the Corridor. This case, brought by the Newport Coast Drive Defense Fund (NCDDF), against the Agency and the County of Orange (collectively the Agency unless the context indicates otherwise) is a challenge to the legality of including a 1.35-mile segment of Newport Coast Drive³ into the Corridor. The trial court entered judgment in favor of the Agency and the County after granting their joint motion for summary judgment. NCDDF raises numerous issues on appeal, none of which have merit. We affirm.

* * *

Newport Coast Drive is a major arterial highway which opened in 1991. As originally constructed, it begins at Pacific Coast Highway just east of Corona Del Mar, travels north through the Newport Coast development, crosses San Joaquin Hills Road and Bonita Canyon Road, and ends to the west at MacArthur Boulevard north of Newport Beach. Prior to the Corridor's construction, State Route 73 (SR-73) included a freeway which ran from Interstate-405 in the west and terminated roughly at the intersection of

¹ Judicial decisions involving construction of the Corridor include *San Joaquin Hills Transportation Corridor Agency v. Superior Court* (April 29, 1994) G015487 (nonpub. opn.); *Laguna Greenbelt, Inc. v. San Joaquin Hills Transportation Corridor Agency* (May 27, 1993) G012060 (nonpub. opn.); *Natural Resources Defense Council v. United States Department of the Interior* (9th Cir. 1995) 57 F.3d 1077 (nonpub. disposition); *Laguna Greenbelt, Inc. v. U.S. Dept. of Transp.* (9th Cir. 1994) 42 F.3d 517.

² It was established in 1986 pursuant to the Joint Exercise of Powers Act. (Gov. Code, § 6500 et seq.)

³ Throughout the briefs and the record, Newport Coast Drive is also referred to as Pelican Hill Road, the name originally given to the road. For convenience, we will only refer to it as Newport Coast Drive.

Jamboree Road and MacArthur Boulevard. From that point on, MacArthur Boulevard was designated SR-73 until its end at Pacific Coast Highway.

The Corridor, which now bears the SR-73 designation was completed several years later.⁴ It runs from Interstate-5 in San Juan Capistrano, then joins the original SR-73 freeway at Jamboree Road and continues west to Interstate-405 in Costa Mesa. When the Corridor was constructed, the western end of Newport Coast Drive, 1.35 miles, was incorporated into its alignment and became part of the toll road. Toll booths were installed at the Corridor/Newport Coast Drive interchange. Newport Coast Drive was realigned to terminate on Bonita Canyon Drive, another arterial road.

As an example of what this means to drivers using Newport Coast Drive: when originally constructed, an automobile could travel northwest on Newport Coast Drive to its end at MacArthur Boulevard, and from there get directly onto the toll-free portion the SR-73 freeway. Now a driver on Newport Coast Drive traveling northwest to the freeway must either get onto the Corridor and pay a 50-cent toll to drive the last segment of the Corridor before the toll-free segment begins, or must bypass the Newport Coast Drive toll booth by taking the newly aligned Newport Coast Drive to Bonita Canyon Road and then to MacArthur Boulevard.

The Complaint

NCDDF filed its complaint on September 29, 1994, challenging the incorporation of the original alignment of Newport Coast Drive into the Corridor. It claimed the public had an absolute right to free travel along all of Newport Coast Drive as originally constructed. The imposition of a toll on any portion of Newport Coast Drive would significantly alter existing traffic patterns, negatively affecting citizens who live along the route and all who used the original Newport Coast Drive.

⁴ The Corridor was not completed at the time this lawsuit was filed, but was completed while it was pending.

J

NCDDF's complaint is premised on assertions that Newport Coast Drive was constructed by The Irvine Company as a mitigation measure for the Newport Coast development. In May 1988, the County and The Irvine Company entered into a statutory development agreement (Gov. Code, § 65864 et seq.) by which The Irvine Company agreed to construct Newport Coast Drive. NCDDF alleged that neither the development agreement, the environmental reviews and permits for Newport Coast Drive and the Newport Coast development, nor the environmental documents and permits for the Corridor envisioned or gave the public notice of the inclusion of Newport Coast Drive in the Corridor's final alignment. It was not until 1994, when The Irvine Company dedicated Newport Coast Drive to the County, that it was finally revealed it would be included in the Corridor.

The complaint contained causes of action for declaratory and injunctive relief. It sought a declaration that the Agency had no legal authority to include any portion of Newport Coast Drive in the Corridor and had not complied with the provisions of the California Environmental Quality Act (Gov. Code, § 21000 et seq., CEQA) in so doing; that the use of bond proceeds for the inclusion of Newport Coast Drive in the Corridor was illegal; and that the Agency could not use federal highways funds to incorporate Newport Coast Drive into the Corridor. NCDDF also sought to enjoin the Agency from incorporating Newport Coast Drive into the Corridor.

The Summary Judgment Motion

The Agency sought summary judgment on the grounds there were no triable issues of fact on the following issues: 1) the Agency had legal authority to incorporate Newport Coast Drive into the Corridor; 2) Newport Coast Drive was originally constructed with the understanding and intent that it would ultimately become part of the Corridor; 3) adequate notice of Newport Coast Drive's inclusion in the Corridor was given in the environmental impact report (EIR) for the Corridor and at numerous public hearings; 4) the action is barred by the statutes of limitations under CEQA, the California

Coastal Act (Pub. Resources Code, § 30000 et seq.) and various acts validating the bonds used to finance construction of the Corridor (see Stats. 1993, chs. 10, 341, 342); and 5) no federal funds had been used to construct the Corridor. The Agency's separate statement of undisputed material facts was supported by declarations of Gene Foster, manager of the Agency, and Kenneth R. Smith, Director of Transportation for the County; both declarations were accompanied by various documents.

Smith declared the Corridor, in its present alignment, was added to the County's Master Plan of Arterial Highways (MPAH) in 1976 and has been part of the transportation element of the general plan since 1979. In 1988, the County and The Irvine Company entered into the Development Agreement for the Newport Coast development. The development agreement provided for early construction of Newport Coast Drive, as an interim facility until the Corridor was completed. It obligated The Irvine Company to make an early dedication of the designated right-of-way for the Corridor between Sand Canyon Avenue and MacArthur Boulevard and give it fee credits for the "value of [Newport Coast Drive] improvements within the [Corridor] right-of-way." That northwestern end of Newport Coast Drive where it originally connected to MacArthur Boulevard, was never shown on the MPAH because it was planned and designed as an interim facility until the Corridor was completed; the MPAH always showed Newport Coast Drive ending at Bonita Canyon Road, as it now does.

Foster declared the Agency was formed in 1986 to finance and build the Corridor. After numerous public hearings, the joint powers agreement forming the Agency was amended in 1987 to permit the Agency to impose and collect tolls on the Corridor. In September 1990, the Agency, Caltrans, and the Federal Highway Administration issued a draft environmental impact report (DEIR) on the Corridor. It specifically described Newport Coast Drive's inclusion in the Corridor: "Construction has commenced on [Newport Coast Drive], a new four and six lane highway connecting existing SR-73 (MacArthur Boulevard) and SR-1 (Coast) Highway by bypassing Corona

Del Mar. The [Newport Coast Drive] project follows the existing alignment of Bonita Canyon Road and the proposed alignment of the Corridor between MacArthur Boulevard and the proposed Ford Road extension. It then follows the proposed Corridor alignment between proposed Ford Road and the proposed Corridor/ Pelican Hill Road interchange. The project then constructs [Newport Coast Drive] on its ultimate alignment between the Corridor and SR-1." The DEIR depicted toll booths at the Corridor/Newport Coast Drive interchange and concluded imposing a 50 cents per trip toll at that point would not "impede travel demand that would otherwise suffer a time delay along the conjecture route."

Among comments received on the DEIR were objections from community associations to the Corridor's "usurp[ing]" the end of Newport Coast Drive, which was intended as a bypass route for traffic, and to the imposition of tolls at the Corridor/Newport Coast Drive interchange. The group believed this would greatly increase traffic in the area. The final EIR incorporated the Agency's comments on the objections. It stated the "by-pass route" would be enhanced by the Corridor's alignment. The toll booths at the Newport Coast Drive interchange would impose only a nominal 50-cent toll and not impede traffic. Additionally, traffic going from Corona Del Mar to the existing SR-73 at the Jamboree interchange would move faster because of Newport Coast Drive's inclusion in the Corridor.

During the public hearings on the DEIR, the inclusion of Newport Coast Drive in the Corridor was discussed. At one public hearing in 1990, Foster explained, "[L]et me state very clearly that those roads [Newport Coast Drive, Coyote Canyon Road, and the Corridor,] will not lie next to each other. One road takes the place of the other one sequentially in the following fashion. Coyote Canyon Road exists today. [¶] It will be replaced with [Newport Coast Drive], and ultimately [Newport Coast Drive] will be replaced by the Corridor."

The final EIR for the Corridor was certified, and a notice of determination issued on March 14, 1991. On April 23, 1993, the California Coastal Commission issued a Coastal Development permit for the Corridor, and in May 1993, issued a Consistency Certification. The Agency accepted dedication of the Corridor right of way from the City of Irvine in September 1993. The Agency received no federal funds for construction of the Corridor, and the bonds for construction were issued and offered for sale on March 11, 1993.

The Ruling

The trial court declined to consider NCDDF's opposition to the Agency's motion for summary judgment. It was filed too late and was 40 pages too long. The trial court granted the motion, finding the Agency had legal authority to incorporate Newport Coast Drive into the Corridor; the development Agreement between the County and The Irvine Company did not preclude incorporation of Newport Coast Drive into the Corridor and, in fact, supported its inclusion; and the Agency had given adequate notice of Newport Coast Drive's incorporation into the Corridor in the final EIR certified March 14, 1991. The court also found the complaint was barred by the 30-day statute of limitations applicable to CEQA actions (Pub. Resources Code, § 21167, subds. (c) & (e)), the 60-day statute of limitations contained in the California Coastal Act (Pub. Resources Code, § 30801), and the 6-month statute of limitations contained in the First, Second, and Third Validating Acts of 1993 which validated the bond sales of the Agency. (Stats. 1993, chs. 10, 341, 342.)

I

NCDDF first contends the trial court abused its discretion by denying a continuance of the hearing on the summary judgment motion so it could file adequate opposition. It has grossly mischaracterized the events leading up to the hearing. We find no abuse of discretion.

The summary judgment motion was filed on July 11, 1996, and the hearing was set for August 9. NCDDF's opposition was due July 26. No opposition was timely filed.

On August 2, a full week *after* the due date for its opposition, NCDDF filed an ex parte request to file a late opposition and to continue the hearing. Counsel complained the Agency had not included complete copies of documents which accompanied the motion, and because the motion was "massive," he would need additional time. The Agency's points and authorities were only 15 pages long, but several documents accompanied the declarations. The trial court granted the request. It gave NCDDF until August 8 to file its opposition and continued the hearing to August 16. The Agency was ordered to file its reply by August 12.

No opposition was filed on August 8. Instead, counsel for NCDDF sent a letter to the court advising he had a 70-page draft, was working on cutting it down and would probably file it the next morning along with a request to file an overlong brief. He failed to file the opposition the next morning.

On August 12, NCDDF filed a 60-page opposition along with an application to file late and overlong papers. Included in that opposition was NCDDF's own request for summary judgment. The opposition did not include any written objections to the evidence submitted by the Agency. NCDDF did not request a court reporter at the hearing. The trial court declined to consider the late opposition.

NCDDF's argument that the trial court abused its discretion by not granting it an additional continuance or permitting it to file its late opposition is specious. Code of Civil Procedure section 437c, subdivision (h), gives the trial court discretion to grant a continuance, "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented" Despite the fact that NCDDF failed to satisfy the statutory requirements for a continuance, the trial

court graciously gave it additional time. NCDDF did not seek another continuance. Rather, it allowed that extension to run out and four days later attempted to file its opposition. The trial court is not required to grant an unlimited number of continuances. (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 547.) In view of NCDDF's complete indifference to deadlines imposed by Code of Civil Procedure section 437c and the trial court, we see no abuse of discretion in the court's refusal to consider the late opposition.

II

NCDDF next contends all the declarations submitted by the Agency, and all the documents supporting them, are inadmissible hearsay. Thus, it concludes, there was no competent evidence upon which to grant summary judgment. It has waived its objections to the evidence.

A party wishing to make evidentiary objections to evidence submitted in support of a summary judgment motion must either make the objections in writing or arrange to have a court reporter present at the hearing. (Cal. Rules of Court, rule 343.) If the objections are written, they must be filed at least three days before the hearing. (Cal. Rules of Court, rule 345.) Orange County Superior Court Rules, rule 514D separately requires evidentiary objections be filed in writing at the time the opposition is filed. NCDDF argues both rules are made ineffective by the proviso in Code of Civil Procedure section 437c, subdivision (b) that, "Evidentiary objections not made at the hearing shall be deemed waived." It urges it is implicit in this section that *any* objections, written or oral, may be made at the time of the hearing. We disagree.

Nothing in Code of Civil Procedure section 437c precludes the courts from fashioning rules regarding the efficient processing of *written* objections, and there is no record of oral objections at the hearing. NCDDF filed its written objections to the declarations at the time of the hearing, violating both California Rules of Court, rule 354 and Orange County Superior Court Rules, rule 514D.

Additionally, NCDDF neither requested a court reporter be present at the hearing, nor that the court make rulings on the evidentiary objections. Counsel's failure to request rulings on the objections waives the objections on appeal. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1.) Even if "the objections appear meritorious, for purposes of . . . appeal we must view the objectionable evidence as having been admitted in evidence and therefore as part of the record." (*Ibid.*)

III

Among the many reasons the trial court gave for granting summary judgment was that the action filed in September 1994 was barred by several statutes of limitations. First, it found the complaint was barred by the 30-day limitations period applicable to actions challenging the acts of a public agency under CEQA. (Pub. Resources Code, § 21167, subs. (c) & (e).) That statute of limitations commences with the filing of a notice of determination, which in this case was filed March 14, 1991. Second, the court found the action was barred by the 60-day statute of limitations for challenging decisions or actions taken by the Coastal Commission. (Pub. Resources Code, § 30801.) That statute of limitations commences on the date a Coastal Commission action becomes final. Here, the Coastal Commission issued a coastal development permit for the Corridor and certified the Corridor as being consistent with the Coastal Act in April 1993. Finally, the trial court found the complaint was barred by the six-month limitations period contained in the First, Second and Third Validating Acts of 1993. (Stats. 1993, ch. 10, § 8; Stats. 1993, ch. 341, § 8; Stats. 1993, ch. 342, § 8.) Those special bills were enacted to, among other things, validate the bonds of public agencies. Each provides that any action contesting the validity of any action taken by a public agency in connection with the issuance of bonds, must be commenced within six months of the effective date of the act.

NCDDF argues its complaint is not time-barred. But noticeably absent from its brief is *any* citation to *any* legal authority in support of its contention. It does not

even bother to cite the relevant statutes on which the trial court relied. In a 49-page opening brief, it devotes three short paragraphs to these three grounds for dismissal of its action and simply states that because it is not specifically challenging actions taken under those laws, but rather merely seeks to enforce the rights of the public under them, the statutes of limitations are not applicable.

Even if we could decipher NCDDF's argument, we would not. It is not this court's responsibility to make an appellant's argument or to find law to support his or her position. The judgment or order appealed from is presumed correct. (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532.) The appellant must affirmatively demonstrate error. "This court is not required to discuss or consider points which are not argued or which are not supported by citation to authorities or the record." [Citation.] (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) In light of NCDDF's failure to provide any proper legal support for its contention, we need not consider it. (*Ojavan Investors, Inc. v. California Coastal Com.* (1997) 54 Cal.App.4th 373, 391; *In re Marriage of Ananeh-Firempong* (1990) 219 Cal.App.3d 272, 278.) Furthermore, these grounds for granting summary judgment are dispositive.

IV

Although we affirm for the reasons stated in part III above, we will briefly address NCDDF's contention that there is no legal authority permitting the Agency to incorporate any part of the original alignment of Newport Coast Drive into the Corridor or to charge tolls or fees for its use. The argument is utterly without merit.

As a joint powers agency, the Agency may exercise any power common to its constituent agencies. (Gov. Code, §§ 6502 & 6508.) The Agency's members include the County and several cities. Counties and cities have express statutory authority to

make any portion of a street in their jurisdiction part of a freeway⁵ or expressway. (Sts. & Hy. Code, §§ 941.1 & 1800.) Hence, the Agency has authority to incorporate any portion of a street, including Newport Coast Drive, into the Corridor. Additionally, the Agency is specifically authorized by Government Code section 66484.3, subdivision (f) to impose and collect tolls to pay for the costs of construction of "major thoroughfares." (See 77 Ops. Cal. Atty. Gen. 94 (1994).)

The judgment is affirmed. Respondents are awarded their costs of appeal.

SILLS, P. J.

WE CONCUR:

RYLAARSDAM, J.

BEDSWORTH, J.

⁵ Contrary to NCDDF's misconstruction of the term, "freeway" does not refer to the cost (or lack thereof) of using a road, rather it refers to the access to the road (or lack thereof) by abutting properties. "Freeway" means a highway in respect to which the owners of abutting lands have no right or easement of access to or from their abutting lands or in respect to which such owners have only limited or restricted right or easement of access. . . ." (Sts. & Hy. Code, 23.5.)