IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

No. B243015

SDS FAMILY TRUST,
Appellant,

v.

CALIFORNIA COASTAL COMMISSION,
Respondent.

On Appeal from the Judgment of the Superior Court of California
County of San Luis Obispo
Department 3
Case No. CV100611, Honorable Dodie Harman, Judge
(805) 781-5677

APPELLANT SDS FAMILY TRUST'S PETITION FOR REHEARING

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INTRODUCTION

Appellant SDS Family Trust ("SDS" or "family") respectfully requests that the Court grant rehearing in this matter, pursuant to California Rule of Court 8.268. The Court's Opinion in this case, dated March 18, 2014, contains mistakes of law and misstatements of material facts. Given the scope and potential impact of the Court's central holding, the Opinion threatens to produce unintended and harmful consequences for SDS, permit applicants across the State, and the court system. For these reasons, SDS urges the Court to grant this petition.

ARGUMENT

I

MISTAKES OF LAW

A. The Opinion Misstates the Substantial Evidence Test for Review of Administrative Decisions

The Opinion states the wrong standard for reviewing Respondent California Coastal Commission's findings. The Opinion correctly says that, in challenges to agency findings under Code of Civil Procedure section 1094.5, the Court of Appeal's role is the same as the trial court's: to "determine whether the Commission's decision is supported by substantial evidence." Opinion at 3. But the Opinion goes on to misstate the rules for reviewing the evidence under that standard:

> In viewing the evidence, we look only to the evidence supporting the prevailing party. (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 872). We discard evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the trier of fact. (*Ibid.*). Where the trial court or jury has drawn reasonable inferences from the evidence, we have no power to draw different inferences, even though different inferences may also be reasonable. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 376, p. 434.). The trier of fact is not required to believe even uncontradicted testimony. (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1028.)

Opinion at 4.

The Opinion articulates an "outmoded" version of the substantial evidence test that the California Supreme Court rejected nearly 45 years ago. *Bixby v. Pierno*, 4 Cal. 3d 130, 159 n.22 (1971) (describing as "outmoded" the "attempt[] [in section 1094.5 cases] to isolate only the evidence which supports the [agency's] findings and thus disregard[] relevant evidence in the record"). In *Boreta Enterprises, Inc. v. Dep't of Alcoholic Beverage Control*, 2 Cal. 3d 85 (1970), the supreme court held that "[u]nder section 1094.5, the trial courts must consider 'the whole record' ***and may not isolate only the evidence which supports the [agency's] findings and thus disregard relevant evidence in the record***." *Id.* at 160 n.27 (emphasis added) (interpreting section 1094.5(c)'s mandate that the court review "the whole record"). Because the Court of Appeal sits in the same position as the trial court in section 1094.5 actions, they too must review the *entire* record—including evidence that detracts from the agency's findings. *Bedoe v. Cnty. of San Diego*, 215 Cal.

App. 4th 56, 60-61 (2013) ("On appeal, we stand in the shoes of the trial court and apply the same standard of review."). As such, it is not bound by the trial court's conclusions, but rather reviews the record *de novo*. *Envtl. Prot. Info. Ctr. v. Cal. Dep't of Forestry and Fire Prot.*, 44 Cal. 4th 459, 479 (2008); *see also Sierra Club v. California Coastal Comm'n*, 19 Cal. App. 4th 547, 557 (1993) ("[T]he conclusions of the superior court, and its disposition of the issues . . . are not conclusive on appeal.").

Boreta represents a clean break from the way courts used to review agency actions under section 1094.5. Summarizing the leading treatise on administrative law, the Third District explained:

> "Before 1970, courts generally held that application of the substantial evidence test in [Code of Civil Procedure] section 1094.5 cases required the agency's findings on evidentiary questions to be upheld if substantial evidence, contradicted or uncontradicted, supported the findings. In 1970, the [S]upreme [C]ourt made it clear that the so-called isolation test (i.e., isolating evidence supporting the agency's findings and disregarding conflicting relevant evidence in the record) was outmoded and that the substantial evidence test requires the trial court to review the entire record."

Cal. Youth Auth. v. State Pers. Bd., 104 Cal. App. 4th 575, 585 (2002) (quoting Cal. Administrative Mandamus (Cont. Ed. Bar 2d ed. 1989), "Scope of Review Under CCP § 1094.5," § 4.162, pp. 205-206).

The Third District in *California Youth Authority* concluded that, in section 1094.5 cases, "all evidence [must] be considered, including that which fairly detracts from the evidence supporting [the agency's] decision." *Cal.*

Youth Auth., 104 Cal. App. 4th at 586. **This District agrees**. In another challenge to a Coastal Commission decision, this District adopted the Fourth District's summary of how Courts of Appeal must review section 1094.5 actions:

> The "in light of the whole record" language means that the court reviewing the agency's decision cannot just isolate the evidence supporting the findings and call it a day, thereby disregarding other relevant evidence in the record. Rather, the court must consider all relevant evidence, including evidence detracting from the decision, a task which involves some weighing to fairly estimate the worth of the evidence. That limited weighing is not an independent review where the court substitutes its own findings or inferences for the agency's. It is for the agency to weigh the preponderance of conflicting evidence. Courts may reverse an agency's decision only if, based on the evidence before the agency, a reasonable person could not reach the conclusion reached by the agency.

La Costa Beach Homeowners' Association v. Cal. Coastal Comm'n, 101 Cal. App. 4th 804, 814 (2002) (quoting *Sierra Club*, 19 Cal. App. at 557) (internal quotation marks omitted); *see also Desmond v. Cnty. of Contra Costa*, 21 Cal. App. 4th 330, 335 (1993) (Fourth District: "Under current interpretations of the substantial evidence test as applied in review of administrative agency action, we must examine all relevant evidence in the entire record, considering both the evidence that supports the administrative decision and the evidence against it, in order to determine whether or not the agency decision is supported by 'substantial evidence.'").

The two cases and the one Witkin provision that the Opinion cites concern the standard of appellate review in ordinary, non-writ actions. *GHK Associates v. Mayer Group, Inc.*, 224 Cal. App. 3d 856 (1990); *Sprague v. Equifax, Inc.*, 166 Cal. App. 3d 1012 (1985); 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 376. They do not apply to the specialized area of review of agency decisions under section 1094.5.

The Court should correct this misstatement of the substantial evidence test, which materially affected its review of the record in this case.

B. The Opinion Mistakes the Law Governing Walton Emmick's 2002 Roof and Deck Repairs

1. The County LCP—the Only Relevant Legal Authority—Exempted the 2002 Repairs From CDP Requirements

Referring to the repair permits that SDS's patriarch, Walton Emmick, obtained from the County in 2002, the Opinion states: "But because SDS's property is in the coastal zone, the County's building permits alone are not sufficient. A CDP is also required." Opinion at 7. That is wrong as a matter of law. Emmick did not need a CDP in addition to the building permits the County already had issued him.

The law governing the question of CDP exemptions is the County's Local Coastal Program (LCP), as certified by the Commission. Under the Coastal Act, each local government within the coastal zone must prepare a LCP to govern land-use development within its jurisdiction. Pub. Res. Code

§ 30500(a). The content of the LCP "shall be determined by the local government . . . in full consultation with the Commission and with full public participation." *Id.* § 30500(c). The Commission must certify that the LCP conforms with the Coastal Act before it can become effective. *Id.* § 30512.2. Once certified, the LCP is the law that governs land use within the local government's jurisdiction, and the local government is delegated all "development review authority," including the authority to issue CDPs. *Id.* §§ 30519(a), 30604(b). Not even the Commission denies that the County's certified LCP is the law governing questions concerning the applicability and application of CDP requirements within the County's jurisdiction. Resp. Brief at 3 (reciting background of LCP law and citing Pub. Res. Code §§ 30519(a), 30600.5(a)-(c)).

The County's LCP plainly exempts property owners from having to obtain a CDP for most repairs—including Emmick's roof and deck repairs. The relevant LCP provision is codified at section 23.03.040(4) of the County Code, entitled "Exemptions from Permit Requirements." That provision states:

> The following types of development within the coastal zone are exempt from the land use permit requirements of this title [i.e., CDP requirements[1]]:

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[1] The title referred to is Title 23 (Coastal Zone Land Use). The "land use permit requirements" for Title 23 refer specifically to requirements for a CDP. *See* County Code §§ 23.01.031, 23.03.

> (A) All repair and maintenance activities that do not result in any change to the approved land use of the site or building, or the addition to, enlargement or expansion of the object of such repair or maintenance . . . .

San Luis Obispo County Code § 23.03.040(d)(1) (emphasis added).

The evidence in the record is uncontradicted as to the very limited scope of Emmick's repairs. Official County records describe the full extent of the repairs on his home as follows: "tear off existing rolled roofing," "re-sheet [roof]," "reroof with comp shingles," "repair eve dry rot," and perform "deck repair." AR 802, 804. The Commission itself described the work as "repair dry rot" and "reroof." AR 630 n.7. Roof and deck repairs constitute all the work the family has ever performed on the property. AR at 900 (County official making unequivocal that "no work has been done since then."). There is no evidence in the record—and the Commission never has pointed to any evidence—that Emmick or SDS performed work beyond the completed repairs.[2]

Importantly, the roof and deck repairs "[did] not result in any change to the approved land use of the site or building, or the addition to, enlargement or expansion of the object of such repair." County Code § 23.03.040(d)(1).

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[2] As described in more detail below, the repairs were *different* both in nature and in scope to the work identified in the CDP-1 application. CDP-1 was for: (1) installation of a septic system, (2) connection to an existing well, and (3) rebuilding of the exterior of the house to accommodate a bathroom and rehabilitation of the home's interior. AR 514. None of this work had anything to do with roof and deck repairs.

Again, there is no evidence in the record to the contrary. The repairs were legally exempt under the LCP, as evidenced further by the undisputed facts that (1) the County unhesitatingly and unqualifiedly issued Emmick over-the-counter permits for those repairs (as opposed to CDPs), and (2) the County signed off on the completion of those repairs on January 27, 2003. AR 630 n.7 (Commission recognizing that the County issued over-the-counter building permits, not CDPs, for the repairs); AR 802, 804 (County recognizing that all repairs were complete by January 27, 2003).

2. The Legal Authorities That the Opinion Cites Do Not Make the 2002 Repairs Subject to CDP Requirements

In concluding that the 2002 repairs required a CDP, the Opinion makes no reference whatever to the LCP—the *only* applicable law on CDP-exemptions. Nor does the Opinion rely on any evidence in the record establishing that Emmick or his family undertook more than roof and deck repairs, because there is none; the Commission has never even pretended otherwise. Instead, the Opinion relies on faulty legal authorities and claims: (1) section 30600(a) of the Coastal Act for the general proposition that most coastal-zone development requires a CDP; (2) a County inspector's mistaken legal conclusion that Emmick needed a CDP for the repairs; and (3) a purported legal conclusion that the County allegedly, ***but never actually***, made when it removed the easement condition in CDP-2—namely, that Emmick was "currently in violation" of that condition as imposed in CDP-1.

First, section 30600(a) of the Coastal Act does not apply here. That provision states in full:

> Except as provided in subdivision (e), and in addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, any person, as defined in Section 21066, wishing to perform or undertake any development in the coastal zone, other than a facility subject to Section 25500, shall obtain a coastal development permit.

Section 30600(a)'s *general* instruction that coastal-zone "development" requires a CDP is qualified by a later section's *specific* list of exemptions. Civ. Code § 3534 ("Particular expressions qualify those which are general."). Section 30610 of the Act—aptly entitled "Developments authorized without permit"—identifies a number of CDP-exempted activities, including "[r]epair or maintenance activities that do not result in an addition to, or enlargement or expansion of, the object of those repair and maintenance activities."[3] Pub. Res. Code § 30610(d). Of course, this is precisely the language that the County's LCP tracks—and that the Commission certified as consistent with the Act. Thus, the Opinion mistakenly relies on a general provision of the Coastal Act that does not apply to the specific circumstances of this case, where the

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[3] Section 30610(d) includes the proviso that "if the commission determines that certain extraordinary methods of repair and maintenance involve a risk of substantial adverse environmental impact, it shall, by regulation, require that a permit be obtained pursuant to this chapter." Pub. Res. Code § 30610(d). But there is no regulation applicable to Emmick's roof and deck repairs, and the Commission never has claimed otherwise. *See* 14 Cal. Code of Regs. § 13252.

controlling law (the County's LCP) plainly exempts most repairs—including Emmick's 2002 repairs.

In addition to relying on the wrong law, the Opinion points to a County building inspector's request that Emmick stop its repair work until CDP-1 authorized it. Opinion at 2. The inspector made no factual findings concerning the nature and scope of the work performed on the property that would contradict what we otherwise know to be incontrovertibly true about that work: Emmick performed only roof-and-deck repairs. Thus, the inspector's statement reflects, at most, the mistaken ***legal conclusion*** that the LCP applied to his repairs. That legal conclusion did not—and could not—render Emmick's otherwise lawful and permitted repairs "illegal." And it certainly did not—and could not—trump the LCP and its exemption provision.

Third, the Opinion relies on a "finding" that the County allegedly made. That Opinion states:

> The County approved the CDP-2 application, including removal of the coastal access condition. The County removed the condition in spite of finding that SDS is "currently in violation" of the lateral easement condition because the remodeling of the residence had begun but SDS has not recorded an offer to dedicate.

Opinion at 3.

The problem is that the County made no such "finding." Indeed, nowhere in its decision approving CDP-2 without an easement condition does

the County make any mention of SDS being in "violation" of anything. AR 404-12 (entirety of County's CDP-2 decision). The Court likely had in mind a County planner's memorandum submitted to the County Board of Supervisors when the Board was considering CDP-2. AR at 330 (Planner Ryan Hostetter memorandum to Board). In that memorandum, the planner recommended a partial easement condition across SDS's property, alleging that the family was "in violation of this condition of approval." AR 331. According to the planner, "remodeling of the existing residence has begun (it has subsequently been temporarily suspended due to a stop work order)." *Id.* But the County Board rejected the planner's proposed resolution—including her allegation against the family—and approved CDP-2 without the exaction. AR 404-12 (entirety of County's CDP-2 decision). As the final authority for the County, the Board's decision superseded the planner's proposed resolution, findings, and conclusions. County Code § 23.01.042(b)(2); AR 330 (Planner's memorandum marked "SUPERSEDED"). Thus, the County's position is that the family is not—and never has been—in violation of any easement condition.

Even if the County had adopted it, the planner's memorandum says absolutely nothing about whether Emmick's repairs were exempt from the CDP requirements. The only pertinent findings are that he worked on the property before being asked to stop, and that the family did not record an offer to dedicate an easement. These are uncontroversial facts. The memorandum

says nothing about the nature or scope of the completed work that could justify the conclusion that such work required a CDP. And the claim of a "violation" is nothing more than a conclusion of law that neither rendered the repairs illegal nor overrode the LCP's exemption provision.

C. The Opinion Does Not Recognize The County's Broad Modification Power and That the Commission's CDP-2 Decision Imposed a New, Independent Easement Exaction

The Opinion makes passing reference to SDS's argument that "a permit condition can be modified." Opinion at 5. But the Opinion takes SDS to task for pointing to no authority that "would compel ***the Commission*** to modify the access easement condition." *Id.* The Opinion misapprehends the full nature and effect of the County's power to modify permits.

The LCP grants the County broad power to modify prior permit decisions, including those made by inferior bodies like the Planning Department. The relevant LCP provision authorizes "[c]hanges to approved project[s]" and requires that, when a "change relates to a project feature that was specifically addressed in conditions of approval of a minor use permit . . ., a new minor use permit . . . shall be obtained." County Code § 23.02.038(b). The only criteria are that "the change requested [be] in conformity with the standards of this title," and that "[s]uch change . . . be requested in writing with appropriate supporting materials and explanation of the reasons for the request." County Code § 23.02.038. Also, the County must justify its

modification. "After a project has been approved and while it is still being developed a mitigation measure or condition of approval may be changed or deleted if the measure has been found to be impractical or unworkable." *Lincoln Place Tenants Ass'n v. City of Los Angeles*, 130 Cal App. 4th 1491, 1508-09 (2005). Of course, a request to modify or delete a condition may be denied, but that discretion is limited by legal—and, in this case, constitutional—mandates. In either case, a reasoned justification must be provided. Code of Civ. Proc. § 1094.5(b) (requiring decisions to be consistent with law, and supported by findings and evidence); *see also Lincoln Place*, 130 Cal. App. 4th at 1509 (requiring the agency "to state a legitimate reason" and to "support that statement of reason with substantial evidence"); *Katzeff v. Cal. Dep't of Forestry & Fire Protection*, 181 Cal. App. 4th 601, 614 (2010) (same).

Here, CDP-1's easement exaction was impractical and unworkable (because of its effect on agriculture, among other things), and was unconstitutional—and the County had the full authority to repudiate it. *Loebner v. Franchise Tax Bd.*, 193 Cal. App. 3d 64 (1986) ("The supremacy of a constitution over a statute has been unchallenged."). The County did so with fully supported findings of fact and conclusions of law. AR at 408-09. If the CDP-2 application is to be treated as a request to modify CDP-1, as the

Opinion appears to do, then the family and the County fully complied with the requirements of section 23.03.038 of the LCP.

On appeal from the County's CDP-2 decision, the family did not argue—as the Opinion claims—that the LCP "compell[ed]" the Commission to modify CDP-1. That misunderstands the role of the Commission in reviewing the County's CDP-2 decision. The Commission's role was simply to apply the governing law it certified—specifically, section 23.03.038 of the LCP—to determine whether its criteria were met. Pub. Res. Code §§ 30519(a), 30604(b) (the LCP, once certified, is the standard of review in appeals of local projects to the Commission). By reversing the County's decision to delete the condition, the Commission overrode the LCP and the broad power it grants the County to modify permit decisions.

The Commission simultaneously imposed its own, independent easement exaction. Part III.D explains why, as a factual matter, the Commission's exaction differs from the exaction imposed in CDP-1. Whatever the effect of the collateral estoppel doctrine on the family's ability to challenge CDP-1 (discussed in the following subsection), it cannot answer the question whether a similar exaction in a different permit decision by a different agency at a different time under different circumstances includes an unconstitutional condition. The Court erred, as a matter of law, in conflating the County Planning Department's and the Commission's two separate

easement exactions, thereby allowing the Commission to escape its constitutional obligation to demonstrate ***its*** exaction's nexus and rough proportionality to the family's remodel project. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

D. The Nature and Implications of The Court's Central Holding Are Unclear

The Opinion's holding in this case, and its implications for SDS and other applicants, are unclear. On the one hand, the Court appears to agree that a necessary condition of binding an applicant to a permit's burdens is the applicant's acceptance of the permit's benefits. Opinion at 7 (recognizing that relevant precedents hold that an applicant is bound by a permit's conditions "when he fails to challenge the permit ***and accepts its benefits***" (emphasis added)). The Opinion cites, with apparent approval, the line of precedents that have so held. *Id.* at 6-7 (citing *County of Imperial v. McDougal*, 19 Cal. 3d 505, 510-11 (1977) (purchaser of property was bound by unchallenged land-use permit that seller had fully exercised and complied with); *Ojavan Investors, Inc. v. Cal. Coastal Comm'n*, 26 Cal. App. 4th 516, 527 (1994) (Successor-in-interest could not challenge permits after predecessors-in-interest had "specifically agreed to and complied with the condition and accepted the benefits afforded by the permits . . . ."); *Rossco Holdings, Inc. v. The State of California*, 212 Cal. App. 3d 642, 646 (1989) (holding that "acceptance of a permit and compliance with its conditions . . . constitute

waiver of the right to attack those conditions"); *Serra Canyon Co., Ltd. v. Cal. Coastal Comm'n*, 120 Cal. App. 4th 663, 668-69 (2005) (Successor-in-interest could not challenge the requirement to "Offer to Dedicate" (OTD) as a condition of receiving a permit to expand a mobilehome park, after predecessor-in-interest "executed and recorded the OTD, then proceeded to expand its mobilehome park as allowed by the permit.")). This line of precedents is consistent with the view that "much administrative action should be subject to a qualified or relaxed set of rules concerning res judicata." *Hollywood Circle v. Dep't of Alcoholic Beverage Control*, 55 Cal. 2d 728, 732 (1961); *George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd.*, 49 Cal. 3d 1279, 1290 (1989) ("[W]hile res judicata rules are generally applicable to administrative orders, their enforcement is more flexible in this context."); *see also* 7 Witkin, Cal. Proc. 5th (2008) Judgment, § 359, p. 975 (discussing the "[l]imited [a]pplication of [the] doctrine" to administrative agency decisions).

If this is actually the Court's holding, and if the Court applies the correct standard of review, then SDS must prevail. The evidence establishes that the family performed only repairs and did not accept any of the benefits for which it sought approval in its CDP-1 application. There is no evidence to the contrary in the record. *See* Part II.B, *infra.*

On the other hand, the Opinion can be construed to create a harsh, new collateral estoppel rule for land-use permit applicants—with no regard to the serious public policy consequences on those applicants and the courts. *See Lucido v. Superior Court*, 51 Cal. 3d 335, 342-43 (1990) ("We have repeatedly looked to the public policies underlying the doctrine before concluding that collateral estoppel should be applied in a particular setting."). As the Opinion states on its first page: "After the time for appeal [of an administratively issued land-use permit] has passed, the party may not collaterally attack the permit." Opinion at 1. In other words, failure to appeal a permit decision within just days of its issuance (in this case, 14 days), and to thereafter timely file a lawsuit challenging that permit, automatically renders all of the permit's conditions—whether lawful or not—"final and ***binding***" on the applicant. Opinion at 4, 5 (emphasis added). Importantly, the Opinion suggests that conditions become final and binding even if the applicant accepts none of the permit's benefits. Opinion at 6 ("Collateral estoppel is not based on a party's acceptance of the result of a judicial or quasi-judicial determination."). If this is the Court's holding, then it should reconsider in light of its severe consequences on SDS, current and future applicants, and the court system.

First, there is no precedent for binding applicants to the conditions of a permit he does not exercise; the relevant precedents in this area of the law are those that the Opinion cites approvingly, which require at a minimum

acceptance of a permit's benefits before conditions become binding. Opinion at 6-7. The Opinion relies on *Mola Dev. Corp. v. City of Seal Beach*, 57 Cal. App. 4th 405 (1997), and *Patrick Media Group, Inc., v. Cal. Coastal Comm'n*, 9 Cal. App. 4th 592 (1992). Opinion at 4. But neither case justifies this Court's apparent and dramatic expansion of collateral estoppel.

Mola and *Patrick Media* protect a permitting agency from damages claims arising out of a land-use permit decision. They preclude a permit applicant from pursuing an inverse condemnation claim for damages, unless the applicant has first exhausted available procedures that give the agency the opportunity to modify its decision to avoid those damages. *Mola*, 57 Cal. App. 4th at 411. The purpose behind applying collateral estoppel to the claims in *Mola* and *Patrick Media* was to protect a municipality's choice. *Patrick Media*, 9 Cal. App. 4th at 612 ("The requirement that challenges to administrative actions constituting takings be brought initially by administrative mandamus assures that the administrative agency will have the alternative of changing a decision for which compensation might be required.").

That purpose is not served here. When the County Planning Department imposed the easement exaction in CDP-1, SDS did not file an inverse condemnation suit for damages against the County. That would have been an attempt to deprive the County of the choice between (1) deleting the

condition (and avoiding the obligation to pay just compensation for the taking) and (2) standing by the condition (and paying just compensation). *Mola* and *Patrick Media* would have disallowed such an attempt. To the contrary, SDS availed itself of lawful procedures that respected the County's choice to correct or stand by its Planning Department's mistake. The County exercised that choice, lawfully approving CDP-2 without an unconstitutional easement condition. If anything, SDS's course of action is precisely what *Mola* and *Media Group* endorse.

Second, the Opinion does not consider the new rule's undue burdens on permit applicants and judicial resources. *Lucido*, 51 Cal.3d at 342-43 (requiring consideration of public policy before applying collateral estoppel). With this Opinion, every applicant with a newly issued permit decision will face two costly choices, regardless of whether he wants to exercise the permit: (1) sue over the permit to challenge every undesirable term, condition, finding and conclusion, or (2) be forever bound by them.

This Opinion also may spur litigation over permit *denials*, if the findings and conclusions supporting such denials would otherwise become final and binding. The absurdity and waste of litigating permit denials are especially pronounced where the applicant and the permitting agency know full well that the applicant will simply modify its application and try again to obtain a permit. Normally, the applicant faced with a permit denial simply

submits a modified application[4]; but this Opinion may encourage him to sue over the denial to ensure that future applications are not conclusively set by the denial's findings and conclusions. Litigation would also help to ensure that such findings and conclusions do not bind him as against another agency that might use them to justify the terms and conditions of a different permit.

Of course, the choice of whether to litigate or submit will, in most cases, be made within days of the permit decision, after which the time to administratively appeal typically expires. Many applicants may not receive actual notice of that decision until the time for initiating an administrative appeal has passed. Thanks to this Opinion, those applicants will be forever bound by whatever unhappy terms and conditions the permit may contain—or will at least have to litigate the question of whether adequate notice was given.

This kind of preventive litigation will significantly burden applicants, many of whom do not have the means to litigate permit decisions. And it will significantly burden judicial resources, as courts will see an ever-increasing

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[4] Indeed, in order to ripen a federal taking claim based on an agency's denial of use of a property owner's land, the owner often is required to submit a series of modified permit applications until the extent to which the agency's regulations affect his property use becomes clear. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985) (holding that no claim was "ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue").

stream of litigation over permit conditions and permit denials. The Opinion does not account for these adverse consequences on the court system.

Certainly, the rule is a boon to permitting agencies. Agencies will be able to more easily secure valuable concessions from unwitting applicants who miss the invariably short deadlines for filing administrative appeals; from those who cannot afford protracted litigation; and from those who can, but rationally conclude that the cost of such litigation outweighs the likelihood of success. The Court's new rule significantly raises the cost to all land-use permit applicants of avoiding otherwise unlawful—and in some cases, like this one, unconstitutional—permit decisions. As the United States Supreme Court aptly observed in a recent unconstitutional-conditions case:

> [L]and-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.

Koontz v. St. Johns River Water Management Dist., 133 S. Ct. 2586, 2594-95 (2013) (holding that the unconstitutional conditions doctrine applies to permit

denials based on an applicant's refusal to accede to conditions and to monetary exactions). (Citations omitted.)

Finally, clarification as to the Opinion's implications for SDS is needed. The Opinion suggests the Planning Department "conclusively determined" in its CDP-1 decision that SDS must convey the easement. Opinion at 5. The Opinion notes that collateral estoppel in this case "does not depend on the permit" and "applies even in cases where no permit is involved." *Id.* at 5. In light of these statements, it is unclear what, if anything, SDS is estopped from arguing in future legal actions against it to enforce the easement condition.

Does the Opinion legally obligate SDS to record the offer to dedicate a public-access easement? Assuming SDS rejects CDP-2 as approved by the Commission, does the Opinion create a claim in a third party to quiet title to a public easement on the SDS property? In that case, will SDS be estopped from arguing that no easement exists and that it would be a taking to enforce one? These are important questions that the Opinion leaves unanswered and that rehearing can provide.

II

MISSTATEMENTS OF MATERIAL FACTS

A. The Work Identified in the Repair Permits Differs in Nature and Scope from the Work Identified in the CDP-1 Application

The Opinion states: "While the [CDP-1] application was pending, in June 2002, Emmick applied to the County for construction permits covering much of the same work as the CDP application." Opinion at 2. Not so. The evidence in the record is undisputed. Emmick's application for over-the-counter permits for roof-and-deck repairs was completely separate and different from his CDP-1 application.

Emmick first filed his CDP-1 application in March, 2002. AR 92, 100, 514. At that time, the application was for approval ***only*** to connect his house to an existing well. *Id.* Three months later, in June, he sought and obtained over-the-counter permits for roof-and-deck repairs. AR 802-05. Obviously, a well connection—a significant utility project—has nothing to do with roof-and-deck repairs.

Six months later—in December, 2002—Emmick added two new items to his CDP-1 application as he was wrapping up his roof-and-deck repairs: (1) installation of a septic system and (2) rebuilding of the exterior of the house to accommodate a bathroom and rehabilitation of the interior of the house. AR

514. Again, these utility and remodeling activities do not cover roof-and-deck repairs.

While he lawfully completed all roof-and-deck repairs in January, 2003 (AR 802-05), neither he nor his family ever started any of the work identified in his CDP-1 application. The evidence in the record is unanimous on that point. AR 900, 980, 986, 988. Conversely, there is no evidence in the record that the family ever began work on the well connection, the septic system, the bathroom project, or the interior remodel.

The chronology of events is enough to disprove the claim that the repair permits "cover[ed] much of the same work as the CDP application." The repair permits—obtained in June, 2002—had nothing whatsoever to do with the only item contained in the CDP-1 application at that time: the well connection. Moreover, the repairs were practically complete by the time Emmick supplemented his CDP-1 application with the bathroom addition and interior remodel work—again, activities that differ in kind and in scope from the roof-and-deck repairs.

It is true that the Planning Department's CDP-1 decision identifies the roof-and-deck repairs in its list of "[a]pproved [d]evelopment." AR 248. But this is not "evidence" that the CDP-1 ***application*** covered the repair work (as the Opinion claims), or that the already-permitted repair work also required a CDP. It simply represents the Planning Department's mistaken legal

conclusion that the repairs, whose nature and scope are factually undisputed (AR 630 n.7, 802, 804), triggered the CDP requirements as a matter of law.

B. The Family Did Not Accept CDP-1's Benefits

The Opinion states, in reference to CDP-1, that "SDS accepted the benefit of the house restoration and improvements, and that benefit continues to this day." Opinion at 6. The record belies this assertion.

Emmick and his family accepted the benefits only of the 2002 repair permits. AR 802-05. The record contains no evidence and no factual findings from ***any*** permitting authority (whether it be the County or the Commission) to support the conclusion that they also took the benefits sought in the CDP-1 application. There is no evidence in the record that Emmick or his family connected the well, installed the septic system, performed the exterior bathroom work, or remodeled the interior of the home. Again, the only evidence in the record establishes that Emmick completed repairs in January, 2003, and, thereafter, performed no further work—let alone the work authorized in CDP-1. AR 767, 802-05, 980. It is simply contrary to all the evidence in the record to say that the family "accepted the benefit of the house restoration and improvements" for which it applied.

The Opinion contains other related misstatements of fact. The Court says the family's work on the property constituted "illegally constructed improvements" that it failed to "remove." Opinion at 7. It also states that the

family was "wait[ing] for the proper permit [*i.e.*, CDP-1] to legally construct improvements" and notes that the family did not "withdraw its application for CDP-1 once the improvements were completed." *Id.*

First, the family has never "constructed" anything on the property, let alone "illegally." The roof-and-deck repairs—much of which consisted of dry-rot removal—did not involve construction of any kind. AR 630 n.7, 802, 804. And it's difficult to imagine how the family could "remove" the completed repairs, even if it wanted or were required to; the family would have to replace the new roof with a dilapidated one, return the deck to its original damaged state, and re-introduce dry rot into the structure. Again, the Court wrongly assumes—contrary to all the facts in the record—that the family did more than roof-and-deck repairs.

Second, there was no reason for the family to withdraw its CDP-1 application after Emmick completed his repairs in January, 2003. Emmick did not seek authorization for the repairs in the CDP-1 application, because a CDP was not required for such work. AR 92, 100, 514. The family may have been waiting for CDP-1 approval to connect its well, install a new septic system, re-construct portions of the exterior of the house, and make interior improvements; but it was not waiting for CDP-1 approval for the repairs that Emmick had completed a year earlier under duly issued over-the-counter permits—and that did not require a CDP to begin with.

C. The County Approved CDP-1 Without a Finding of Violation

The Opinion states that, in its CDP-2 decision, the "County removed the condition in spite of finding that SDS is 'currently in violation' of the lateral easement condition because the remodeling of the residence had begun but SDS has not recorded an offer to dedicate." Opinion at 3. As mentioned above, the County made no such finding. AR 404-12 (entirety of County's CDP-2 decision). The exact opposite is true.

The County specifically repudiated the alleged factual finding in CDP-1 purporting to justify an easement condition—*i.e.*, that the family's improvements would change the intensity of the property's use. Opinion at 2. Instead, the County made detailed factual findings establishing that the family never should have been obligated to offer up an easement in the first place:

> Lateral access is not required because there will be no additional structures constructed, there will be no change in the historic use of the property, lateral access will interfere with agricultural use of the property, the proposed barn will be a replacement structure, and the value of the proposed improvements will be far less than the value of required lateral access such that there will be no nexus between the proposed improvements and the requirement for coastal access.

Id. at 408-09.

D. The Commission's Easement Exaction in CDP-2 Differs from the One Contained in CDP-1

The Opinion says that the Commission's easement condition "goes no further than requiring compliance with CDP-1" and "does not expand the

requirement." Opinion at 6. The Opinion quotes language from the Commission's Staff Report that purports simply to require compliance with CDP-1. *Id.* But the Court ignores the pertinent language from the Staff Report that establishes the difference between the Commission's easement condition and the one in CDP-1.

In CDP-1, the Planning Department imposed an easement condition pursuant to section 23.04.420(d)(3) of the LCP. AR 1024. That LCP provision states:

> All new development shall provide a lateral access dedication of 25 feet of dry sandy beach available at all times during the year. Where topography limits the dry sandy beach to less than 25 feet, lateral access shall extend from the mean high tide to the toe of the bluff. Where the area between the mean high tide line (MHTL) and the toe of the bluff is constrained by rocky shoreline or other limitations, the County shall evaluate the safety and other constraints and whether alternative siting of accessways is appropriate.

Id. (quoting the LCP).

CDP-1's easement condition was undefined. In particular, because the up-coast portion of the family's property has a rocky shoreline and steep bluffs, the Planning Department was required to "evaluate the safety and other constraints and whether alternative siting of accessways is appropriate." The Planning Department did not undertake that analysis or seek to define the scope of its easement condition. AR 1025 n.11. But, by the plain terms of the LCP, the easement's width along the up-coast was expected to range from 0

feet (if the mean high-tide line coincided with the location of the bluff toe) to a maximum of 25 feet—certainly, not *more* than 25 feet.

By contrast, the Commission defined the scope of its easement condition, and it is more expansive than what the LCP contemplates. AR 1025. The down-coast half of the property has sandy beach and is to be impressed with a public-access easement of a 25-foot width. But because the beach area of the up-coast half of the property is rocky and hazardous, the Commission wants the family to offer an easement that "include[s] both 25 feet of sandy beach at the toe of the bluff and . . . an additional 25 feet of bluff top area." *Id.* In other words, the Commission demands that the family record an offer to dedicate a mile-long public-access easement that is 50-feet-wide along the up-coast portion of the family's shoreline. And the Commission's demand is not based on any individualized determination that the family's remodel project causes impacts that would justify that width (let alone the easement itself). *Dolan*, 512 U.S. at 391.

The Commission's easement condition differs, in detail and scope, from the condition imposed by the Planning Department in CDP-1. But the two conditions are equally unconstitutional, because they bear no relationship to the impact of the family's remodel project.

CONCLUSION

For the all the reasons stated above, the Court should grant SDS's petition for rehearing.

DATED: April 1, 2014.

Respectfully submitted,

PAUL J. BEARD II
DAMIEN M. SCHIFF

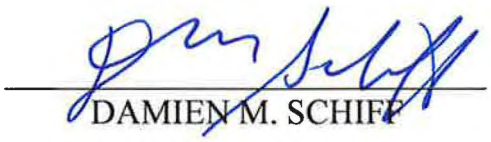
By 
DAMIEN M. SCHIFF

Attorneys for Appellant
SDS Family Trust

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing SDS FAMILY TRUST'S PETITION FOR REHEARING is proportionately spaced, has a typeface of 13 points or more, and contains7,004 words.

DATED: April 1, 2014.



DAMIEN M. SCHIFF

DECLARATION OF SERVICE BY MAIL

I, Pamela Spring, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

On April 1, 2014, true copies of APPELLANT SDS FAMILY TRUST'S PETITION FOR REHEARING were placed in envelopes addressed to:

Christina Arndt
Office of the Attorney General
300 South Spring Street, Suite 1702
Los Angeles, California 90013

Honorable Dodie A. Harman
Superior Court of California
San Luis Obispo County
1035 Palm Street, Room 385
San Luis Obispo, California 93408

which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I further certify that a single electronic copy was submitted to the California Court of Appeal, Second Appellate District, through the court's Electronic Document Submission portal for service on the California Supreme Court.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 1st day of April, 2014, at Sacramento, California.

PAMELA SPRING