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November 3, 2014

VIA FEDEX

The Honorable Tani Cantil-Sakauye
Chief Justice of California, and
The Honorable Associate Justices of the
SUPREME COURT OF CALIFORNIA
350 McAllister St., Room 1295
San Francisco, CA 94102

Re: ***Barbara Lynch et al. v. California Coastal Commission***
Supreme Court Case No.: S 221980
[4th District, Div.1, No. D064120]

Amicus Letter in Support of Petition for Review
[CRC, Rule 8.500(g)]

To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

On behalf of the CALIFORNIA BUILDING INDUSTRY ASSOCIATION, the CALIFORNIA FARM BUREAU FEDERATION, and the CALIFORNIA CATTLEMEN'S ASSOCIATION, *amici curiae,* this Court is respectfully requested to grant review of the anomalous Court of Appeal decision in this case.

It is important that the Court should grant review in this case in order to restore and secure "uniformity of decision," and to "settle important questions of law" as called for under Rule 8.500(b) of the California Rules of Court, regarding the constitutional and statutory limits on exactions and conditions of approval, as well as the fundamental rights of access to the courts for judicial review of unlawful governmental conditions of permit approval.

The decision by the majority of the appellate court panel in this case (the "decision") conflicts with existing authority in many significant areas, including rights of Californians to timely seek and pursue judicial review unreasonable or unlawful conditions of permit approval, exactions, or similar over-reaching demands that arise with increasing frequency in administrative permitting processes before governmental agencies, many of which are composed of un-elected officials which otherwise have little or no accountability. The majority opinion contradicts and misstates decisions by this Court describing the limited circumstances in which an alleged "waiver" may be found as to the rights of permit applicants to seek review of unconstitutional conditions imposed by state agencies such as the Coastal Commission.

The decision also ignores, and creates conflicts with, existing case law recognizing and protecting the rights of permit applicants to seek judicial review of questionable conditions of approval or permit issuance, under protest, even while "accepting the benefits" of the permit in dispute by proceeding with development or construction activities. (E.g., *Sterling Park L.P. v City of Palo Alto* (2013) 57 Cal.4th 1193, 1200; *Uniwill, L.P. v. City of Los Angeles* (2004) 124 Cal.App.4th 537, 542-44; *Williams Communications, LLC v City of Riverside* (2003) 114 Cal.App.4th 642, 657-661; *Salton Bay Marina v. Imperial Irrigation District* (1985) 172 Cal.App.3d 914; *Bright Development v. City of Tracy* (1993) 20 Cal.App.4th 783, 791.)

Indeed, in rejecting the trial judge's factual determination that the petitioners had in fact preserved – and had not "waived" – their rights to seek invalidation of the offending conditions of approval, the majority appear to have tacitly (and without explanation) repudiated an earlier decision by the same Division One of the Fourth Appellate District, *Salton Bay Marina v. Imperial Irrigation District, supra,* 172 Cal.App.3d 914. The decision in this case does not even mention *Salton Bay Marina*, in which this same appellate court soundly distinguished the cases upon which the majority opinion now rests. The *Salton Bay Marina* court pointed out that those older cases finding a waiver of rights had either involved claims for money damages for inverse condemnation -- rather than invalidation of unconstitutional conditions -- or that there had been no protest or timely legal challenge to the conditions, unlike this case. Many other existing authorities (discussed below) are to the same effect, and strongly support the trial judge's rejection of the Commission's "waiver" defense on the facts of this case, as explained in the thoughtful dissenting opinion.

The decision is also inconsistent with existing authority as to the statutory and constitutional limits on governmental demands for property rights as conditions of approving land use and building permit conditions. (Cf., *Koontz v. St John's River Water Management District* (2013) __ U.S. ___, 133 S.Ct. 2586; *Nollan v. California Coastal Commission* (1987) 483 U.S. 825; *San Remo Hotel L.P. v. City & County of San Francisco* (2002) 27 Cal.4th 643; *Bowman v. California Coastal Commission* (10/23/14, on rehearing, No. B243015) ___ Cal.App.4th ___.) The majority opinion also creates troubling new legal issues as to the scope of the constitutional protections afforded by the Due Process Clause, as well as the proper interpretation and application of the California Coastal Act (Public Resources Code §§ 30000 et seq.).

The inconsistencies with existing law, and the potentially far-reaching and destructive implications of this anomalous decision strongly call for this Court to grant review (or to at least decertify the opinion).

Interests of the *Amici*

The **California Building Industry Association** ("CBIA") is a statewide nonprofit association with over 3,000 members active in all aspects of the housing and home-building industry throughout California. Members of the Association are routinely subjected to a multitude of legally-questionable exactions and other conditions of approval in the course of seeking governmental permission to build homes for the residents of California, and are directly affected by appellate court deviations from the constitutional standards declared by this Court and the United States Supreme Court, as well as by new and inconsistent appellate court applications of California statutes and judicial precedents protecting the rights of permit applicants to obtain effective judicial review of unlawful conditions of approval.

The **California Cattlemen's Association** ("CCA") is the predominant organization of cattle grazers in California, with over 1700 producer members throughout California. The Association is a mutual benefit corporation organized under California law as an "agricultural and horticultural, non-profit, cooperative association" to promote the interests of the industry. Its membership is open to any person or entity engaged in breeding, producing, maturing, or feeding cattle, or who leases land for cattle production. Members of the California Cattlemen's Association own or lease property and graze cattle upon land subject to the jurisdiction of the California Coastal Commission throughout many of California's coastal counties. CCA members have also instituted Association policy establishing a Coastal Subcommittee with the stated purpose "to help members located in this state's coastal zone with land use issues."

The **California Farm Bureau Federation** ("Farm Bureau") is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing nearly 78,000 agricultural, associate and collegiate members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

The *amici* CBIA, the CCA, and the Farm Bureau, and their respective members, are directly affected by land use policies and by decisions of state and local agencies that establish requirements for the dedication of land or easements, payment of fees, or the exaction of other property interests, rights, or improvements as conditions of granting land use permits or development approvals, such as the Coastal Commission's unlawful demands that are the subject of this case. The amici associations and their members are also directly affected, and placed at serious jeopardy, by judicial decisions that threaten to curtail or severely limit the right of access to the courts for judicial review of such conditions of approval or permit issuance, or that

threaten to justify an involuntary forfeiture of rights to such judicial review, in disregard of equities or evidence demonstrating necessity or duress, or otherwise demonstrating the absence of voluntary and knowing waiver.

Grounds for Granting Supreme Court Review:

The majority opinion by the Court of Appeal wreaks radical changes on the existing, settled, law regarding "waiver" in the context of the right to judicial review of conditions of permit issuance or governmental approvals. The decision not only creates new conflicts in the law regarding the rights of property owners and permit applicants to seek judicial review of unlawful conditions of permit approval, but also is inconsistent with many other authorities (including at least one of the appellate court's own prior decisions) as to challenging unconstitutional conditions of approval imposed under exigency, duress or in other similarly 'adhesive' situations in the absence of voluntary acceptance of the condition.

Moreover, it is necessary for the Supreme Court to grant review of this appellate court decision in order to settle important issues of law as to the unconstitutionality of the Commission's unreasonable and unjustified conditions of approval purporting to extinguish vested property rights, demanding easements and restrictive covenants, and making land use and building permits subject to arbitrary "expiration" dates, jeopardizing fundamental rights.

The majority opinion in this case calls for review by the Supreme Court for several reasons, further detailed below.

A. The Decision Creates New Conflicts in the Law Regarding "Waiver" of the Right to Judicial Review of Unlawful Permit Conditions:

The decision creates new conflicts in the law and misstates the holdings of this Court by inventing a new version of what the majority opinion refers to as "the general waiver rule" (Slip Opn. 5. 6). The majority opinion cites a few readily-distinguishable older cases, and *dicta*, for its novel description of the purported "general rule: "If the property owner complies with the condition, the property owner waives the right to legally challenge it." (Slip Opn. p. 5.)

The decision is inconsistent with existing law as to the circumstances which may be found to justify a purported "waiver" of rights to seek review of unlawful permit conditions. None of the cases cited in the decision, however, support such an over-broad mis-statement of the circumstances in which a finding of waiver may be found.

To the contrary, the majority opinion misstates the holdings of those cases – including this Court's holdings as to the requirements for finding a waiver of rights to review permit conditions. This Court's prior decisions have required that the party claiming the defense of "waiver" must show more than mere ostensible "compliance with" permit conditions in order to

support a finding of a waiver of the right to seek review of the permit conditions. Moreover, it does not appear that the petitioners here actually "complied with" the conditions that they seek to invalidate in the pending mandamus action merely because they were compelled to sign the deed restriction document demanded by the Commission (as distinct from the disputed conditions requiring expiration of the permit in 20 years and prohibiting reconstruction of the stairway).

Existing case law (some of which is described below) has consistently recognized many situations in which permittees have "complied with" permit conditions *without* being deemed to have "waived" their rights to seek judicial review of the validity of the condition. Consequently, the majority opinion in this case creates substantial inconsistencies and conflicts in the case law.

1. The Decision Is Inconsistent With *Edmonds v. County of Los Angeles*:

The oldest case cited by the majority, and the supposed origin of the majority's assertion of grounds for waiver, is *Edmonds v. County of Los Angeles* (1953) 40 Cal.2d 642, 650. In *Edmonds*, however, the Court carefully described and limited the bases for its finding of a waiver, and it is easily distinguishable from this case. The Court in *Edmonds* emphasized that "never once during the entire proceedings" leading up to the conditional granting of the permit for a zoning exception did plaintiff there object or assert a claim to be free of the conditions. (*Id.* at p. 650.) The Court pointed out that if plaintiffs had thought the conditions objectionable, "they would have relied on the courts for vindication," but instead the plaintiffs had proceeded "as if they claimed no right" contrary to the conditions. The finding of "waiver" in *Edmonds* was thus based on both (a) the absence of any objection or protest during the permit process, and (b) the plaintiff's failure to file suit to challenge the permit conditions.

The purported "general waiver rule" as asserted in the majority opinion is thus inconsistent with this Court's holding in *Edmonds*. And it is apparent that *Edmonds* does not support the appellate fact-finding of "waiver" in this case. Even the majority opinion here acknowledges that "[r]espondents objected to these special conditions during the application process" (Slip Opn. p. 3) and the dissent details the petitioners' written and verbal objections to the offensive conditions during the administrative proceedings (Dissenting Opn., pp. 6 – 7). And, in contrast to the plaintiffs in *Edmonds*, here the petitioners did promptly and timely seek relief from the conditions in court, filing a petition for writ of mandate.

2. The Decision Is Inconsistent With *County of Imperial v. McDougal*:

The majority opinion next cites *County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510-511, but misstates the critical part of the Court's observations as to when a waiver of rights to challenge a permit might be found. In *McDougal*, the Court first summarized the evidence showing that the property owner/defendant's predecessor in title had affirmatively accepted the County's conditions on a use permit, without protest or objection, and subsequently "accepted

the benefits" of the permit and had not sought to challenge them in court. Rather than announcing an ostensible general rule of waiver, the Court cited *Edmonds* (and five non-California cases) and observed: "A number of cases have held that a landowner of his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by either [1] specifically agreeing to the condition or [2] failing to challenge its validity, and accepted the benefits afforded by the permit." (19 Cal.3d at 511, emphasis and brackets added.)

The Court concluded that the successor-permitted "is estopped to assert" that the conditions in the permit were invalid when the County sought to enforce them, because his predecessor had both (1) failed to challenge their validity, and (2) had accepted the benefits afforded by the permit. (*Id.* at p. 510.)

McDougal thus required more than just an "acceptance of benefits" by the permittee in order to justify a possible finding of waiver or estoppel to litigate the permit conditions; rather it also required a second evidentiary showing, either (a) specific agreement to the condition or (b) the permittee's failure to take timely action to challenge the validity of the permit conditions.

The majority opinion erroneously deletes one of the two (2) elements that this Court expressly relied upon in order to justify a finding of waiver – the failure to challenge the validity of the permit conditions. As a result of that deletion, the majority opinion would significantly change and grossly distort "the general waiver rule" as stated by this Court's decisions. Had the majority properly recognized that waiver may not be found unless there is a "failure to challenge" the validity of the conditions, as this Court explained in *McDougal*, the majority could not have found a waiver of the petitioners' right to challenge the unlawful conditions in this case, because it is undisputed that the petitioners not only objected during the permit process but also brought such a timely challenge to the permit conditions.

3. The Decision Erroneously Relies On Distinct and Inapposite Cases Requiring Pursuit of Mandamus Relief Prior to Seeking Damages in Inverse Condemnation, and Ignores This Court's Holding in *Selby Realty v. City of San Buenaventura* Affirming the Right to Seek Invalidation of Unlawful Governmental Actions:

The majority opinion also erroneously relies on cases that are quite distinct from the *Lynch* case, and which simply stand for the proposition that a permittee must challenge offending governmental action by way of mandamus before or concurrently with filing a claim for damages or compensation for inverse condemnation.

The majority opinion thus erroneously invokes the inapposite appellate decision in *Pfeiffer v. City of La Mesa* (1977) 69 Cal.App.3d 74 (and other distinct cases citing *Pfeiffer*) to support its finding of waiver in this case – which did not seek inverse condemnation damages. *Pfeiffer,* however, is widely misunderstood as having held that all rights to seek judicial review of a permit condition may be deemed waived if the permittee "complies with" the permit conditions. *Pfeiffer*, of course, did not so hold, and the majority opinion here erroneously cites *Pfeiffer* to support its new and over-broad theory of waiver of rights to seek judicial review.

The actual holding of *Pfeiffer* (as distinct from its unsupported concluding *dicta*) is not consistent with the new ostensible "rule" that the majority opinion would derive from it. In *Pfeiffer*, a building permit condition required the permittee to build storm drain improvements on the developer's property, allegedly in excess of needs caused by the developer. The permittee built the improvements, and then filed suit for 'inverse condemnation' damages for the costs of the improvements, contending that there had been no feasible opportunity to suspend work on the project to seek a writ challenging the condition, without incurring economic ruin. Without taking evidence on this otherwise "fact issue," however, the appellate court referred to plaintiff's failure to first file for a writ as akin to a "waiver" of the right to seek any compensation or inverse condemnation damages for the costs of complying with the offending permit condition. The appellate court explained that the permittee should not be able to convert an invalid permit condition into a compensable "taking" without first challenging the condition's validity in a mandamus action, and thereby allowing the government to retract its condition if found to be invalid, rather than to pay compensation in inverse condemnation.

Pfeiffer is thus best understood as an early illustration of the distinct California rule that mandamus must ordinarily be sought to review governmental action before pursuing a claim of damages in inverse condemnation based on that action. (See, e.g., *Rezai v. City of Tustin* (1994) 26 Cal.App.4th 443, 447; *California Coastal Commission v. Ham* (1989) 210 Cal.App.3d 1488; *Rossco Holdings v. State of California* (1989) 212 Cal App.3d 642, 654.)

Thus, the majority's statement of the "general waiver rule" is inconsistent with *Pfeiffer*, and this case is distinguishable from *Pfeiffer* in at least two important ways. First, the petitioners here did first file a writ petition to challenge the conditions. Second, the petitioners do not seek damages for inverse condemnation, but rather seek invalidation of the unlawful conditions.

Indeed, Division One of the Fourth Appellate District previously interpreted *Pfeiffer* as just such a limited holding, in *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914. There, the appellate court explained *Pfeiffer* as simply holding that a landowner who [1] accepts and [2] "complies with" the conditions of a building permit generally cannot later sue the issuing public entity for inverse condemnation for the cost of compliance. And, as *Salton Bay Marina* explained, even in such inverse condemnation settings, there would be no

finding of waiver from "compliance" alone, but there must also be evidence of voluntary "acceptance" of the permit conditions. (172 Cal.App.3d at 94 [emphasis added]):

> "Generally, a landowner who accepts and complies with the condition of a building permit cannot later sue the issuing public entity for inverse condemnation for the cost of compliance." (*County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510; *Pfeiffer v. City of La Mesa* (1977) 69 Cal.App.3d 74, 76.) Instead, the property owner is generally limited to having the condition invalidated by a proceeding for writ of mandate. (See *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 128.)

Similarly, the majority opinion erroneously relies on *Rezai v. City of Tustin, supra*, 26 Cal.App.4th 443 as support for its otherwise unsupported effort to broaden the existing "waiver rule." However, *Rezai* like *Salton Bay Marina* recognized that *Pfeiffer* only applied a "waiver" where (1) the permittee sought inverse condemnation damages, and (2) the permittee had failed to first challenge the condition in mandamus. (*Rezai v. City of Tustin, supra*, 26 Cal.App.4th at 449 ["Rezai did the same thing here [as in *Pfeiffer*]. He complied with the second conditional use permit... and then sought damages. He never pursued administrative mandamus to challenge the conditions.") Neither *Rezai* nor *Pfeiffer* support the majority opinion.

The reason for limiting this rule of "exhaustion of remedies" to the context of inverse condemnation cases was again explained in *Hurwitz v. City of Orange* (2004) 122 Cal.App.4th 835 (emphasis added):

> "The point is simple. Before the taxpayers should have to pay good money for some kind of "taking" action by an administrative agency (or local government entity), the government agency (or entity) should have the chance to mend its ways and stop short of the costly undertaking. In essence there should be one last chance for a court to yell 'halt' and save the taxpayers from the burden of incurring a debt that might still be prevented. That is the basis of the doctrine of exhaustion of administrative remedies in this context – give the government a chance to remedy its land use determination without paying money . . . . Invalidation, rather than forced compensation, would seem to be the more expedient means of remedying legislative excesses."

That --"invalidation"-- is precisely the course of action that petitioners timely pursued here, as this Court suggested in *Selby Realty v. City of San Buenaventura* (1973) 10 Cal.3d 110, 128 [a claimant must first bring a petition for writ of mandate to challenge an allegedly unlawful condition in order to pursue a claim for compensation for inverse condemnation]. Once again, the majority opinion here is in conflict with this Court's decisions.

Similarly, in *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, this Court noted that the rationale for requiring "exhaustion of administrative remedies" as discussed in *Pfeiffer* distinctly applies in actions alleging a "regulatory taking" and seeking inverse condemnation damages. (*Hensler*, 8 Cal.4th at 18-19.) That rationale does not apply in a case like this, where the permittee has timely filed and is pursuing a writ of mandate action to invalidate the offending conditions, and the decision here is inconsistent with existing law.

4. The Decision Is Inconsistent With Existing Law Requiring a Showing of "Prejudice" In Order to Support a Finding of Waiver or Estoppel

The part of the decision concluding that the petitioners should be deemed (as a matter of law?) to have forfeited any right to judicial review of the offending conditions of approval merely by executing unconscionable deed restrictions as demanded by the Commission (which themselves contained provisions for judicially 'severing' any provisions ultimately found to be invalid), would grossly distort the current law of "waiver."

As both the trial judge and the dissenting appellate justice observed, the deed restrictions were only signed after petitioners made written and verbal protests, and after petitioners had timely filed a petition for writ of mandate challenging the conditions, and the petitioners were under the imminent threat of permanent damage to their property and loss of their homes.

Existing California law is clear that a party asserting a "waiver" claim has the burden of producing evidence to show that it has suffered substantial "prejudice" as a result of relying on the other party's alleged conduct. See, e.g., *St. Agnes Medical Center v. PacificCare of Californ*ia (2003) 31 Cal.4th 1187, 1203: "prejudice is critical in a waiver determination." (See also, e.g., *Tesoro del Valle Master HOA v. Griffin* (2011) 200 Cal.App.4th 619, 639 [in the absence of evidence of substantial prejudice it is reversible error to refuse to set aside 'waiver' of right to jury trial].)

There was no such evidence of prejudice to the Commission in allowing the petitioner to obtain judicial review of the validity of its conditions of approval. The Commission could not claim it was "prejudiced" by being deprived of the opportunity to rescind the permit conditions rather than pay compensation, because "compensation" is not sought in petitioners' action, and because the Commission would still have that option. Similarly, the Commission could not claim prejudice by being deprived of the opportunity to take advantage of the petitioners' distress

to enforce conditions of approval that the trial court found to be unconstitutional. The majority opinion indulges in mere speculation as to the possibility that the Commission could have, or would have, come up with alternative – and constitutional – conditions of approval if the petitioners had refused to sign the deed restrictions while the writ action ran its course (and their homes fell into the sea).

B. The Decision Is Inconsistent With Existing Authorities as to the Right to Proceed with Development or Construction While Continuing to Protest Conditions of Approval

The decision is inconsistent with existing case law by purporting to find only two narrow "exceptions" to the ostensible "general waiver rule" that it describes.

The decision in this case is inconsistent with judicial authorities going back to at least 1861 in California, recognizing the right to seek judicial review of unlawful governmental exactions of property or money obtained under duress or in the absence of a clear, unambiguous, and voluntary waiver. (See, e.g., *Brumagin v Tillinghast* (1861) 18 Cal. 265, 271; *Pimental v. The City of San Francisco* (1863) 21 Cal. 351, 362; *Simms v. Los Angeles County* (1950) 35 Cal.2d 303, 316 [no statutory authority is necessary in order to require government to restore charges paid under protest]; *Sterling Park, :L.P. v. City of Palo Alto* (2013) 57 Cal.4th 1193, 1200; *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854.)

1. Existing California Law Requires That a Purported "Waiver" Is NOT Effective Unless It Is VOLUNTARY

"Generally, 'waiver' denotes the voluntary relinquishment of a known right." (*Platt Pacific Inc. v Andelson* (1993) 6 Cal.4th 307, 315 [emph. added].) "A waiver ... is not effective unless it is voluntary." (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1052.)

Historically, many California courts recognized that a permit applicant should be allowed to pay disputed fees imposed as permit conditions or otherwise "comply with" permit conditions under protest – and that such performance "under protest" indicates it is not voluntary. Therefore, such payment or performance under protest is commonly recognized, at common law as well as by statute, as preserving the right to seek judicial invalidation of the conditions -- to avoid hardship and promote public interests.

California courts have long recognized "performance under protest" as a form of duress or otherwise indicating the absence of "voluntary" compliance with unlawful conditions. See, e.g. *Kelber v. City of Upland* (1957) 155 Cal.App.2d 631 (review denied), disapproved, on other grounds, by *The Pines v. Santa Monica* (1981) 29 Cal.3d 656) (affirmed refund of subdivision fees paid under protest); *P.I. Wilsey & Co. v. County of San Bernardino* (1957) 155 Cal.App.2d

145; *City of Belmont v. Union Paving Company* (1957) 156 Cal.App.2d 214, 217. See also, *Longridge Estates v. City of Los Angeles* (1960) 183 Cal.App.2d 533 (sewer charges paid under protest); *Newport Building Corp. v. City of Santa Ana* (1962) 210 Cal.App.2d 771, 778 (disapproved, on other grounds, in *The Pines v. Santa Monica* (1981) 29 Cal.3d 656); *Codding Enterprises v. City of Merced* (1974) 42 Cal.App.3d 375 (park in-lieu fees paid under protest as condition of lot-split approval); *Wright Development v. City of Mountain View* (1975) 53 Cal.App.3d 374 (overruled demurrer to developer's complaint seeking refund of park in-lieu fees paid under protest and affirmed developer's entitlement to a refund of fees); *Hirsch v. City of Mountain View* (1976) 64 Cal.App.3d 425 (park fees paid under protest; developer's action for a refund rejected on its merits); *Regents of the Univ. of California v. City of Santa Monica* (1978) 77 Cal.App.3d 130 [affirmed refund of permit fees paid under protest].)

2. Existing California Law Does NOT Limit Relief from Unlawful Conditions to Cases Involving Monetary Fees:

Equitable relief against invalid conditions of approval has not been limited to "fees" but courts have also granted relief where permit applicants have been compelled by economic circumstances to "comply" with other types of conditions under duress or protest. (See, e.g., *Short Line Associates v. City & County of San Francisco* (1978) 78 Cal.App.3d 50 [relief granted where city unlawfully compelled applicant to purchase easement rights for the city, easement deed rescinded]; *Uniwill, L.P. v. City of Los Angeles* (2004) 124 Cal.App.4th 537, 542-44 [developer entitled to relief from easement conveyed under duress in compliance with city demands].)

As development fees, exactions, and other burdensome (and legally dubious) conditions of approval became more prevalent, the Legislature recognized the counterproductive effects of forcing a developer to make a "Hobson's choice" between (A) working on an approved project (and risk being deemed to have "waived" objections to any conditions of approval (like *Pfeiffer*) and (B) stopping work and spending years in court litigating the validity of the conditions, and in 1984 and 1985 enacted statutes codifying the "pay-or-perform under protest" in 1984 and 1985 (now at Government Code §§ 66020 and 66021). (See, *Sterling Park, supra*, 57 Cal.4th at 1205.) Such protests preserve rights, without any need for showing hardship or duress.

The majority opinion in this case is inconsistent with the text of those statutes ("any party may protest .. any fees, dedications, reservations, or other exactions..."), and inconsistent with existing case law, by asserting that those statutes do not allow relief for "non-fee" conditions of approval. (See, e.g., *Sterling Park, supra*, 57 Cal.4th at 1205 [relief under protest statutes from conditions exacting property interests as well as monetary fees; *Bright Development v. City of Tracy, supra,* 20 Cal.App.4th783 [relief from invalid city condition of approval requiring installation of underground utilities].)

The majority opinion is thus at wide divergence with a large body of existing case law, and would either create inconsistencies or confusion with regard to the circumstances which may justify a finding of "waiver" of rights to seek invalidation of unlawful conditions of approval.

C. The Decision Conflicts With Existing Authorities on the Standard of Review

The decision conflicts with existing authorities as to the standard of review, and applied an inconsistent standard of review in reversing the trial court's factual finding that petitioners had effectively preserved their rights to seek judicial review of the unlawful conditions and finding that petitioners had not "waived" those rights.

"Waiver" is an affirmative defense, and therefore, the burden is generally on the defendant to produce evidence to show every necessary element of the defense. (*People v. Tehama County* (2007) 149 Cal.App.4th 422, 431.) As this Court stated in *St. Agnes Medical Center, supra*, 31 Cal.4th at 1195, "the party seeking to establish a waiver bears a heavy burden of proof.") California law generally "abhors" forfeitures or waivers of important rights, and it is deemed to be error to imply a waiver. (*Nasir v. Sacramento County* (1992) 11 Cal.App.4th 976, 986, n. 5).

As recently summarized in *Murray v. Town of N. Hempstead* (E.D.N.Y. 2012) 853 F.Supp.2d 247:

> The Supreme Court has held, in a number of varying contexts, that a waiver of constitutional rights must be based upon clear and convincing evidence to demonstrate that the waiver is knowing, voluntary, and intelligent. *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (right to counsel); *CurtisPubl'g Co. v. Butts*, 388 U.S. 130, 145, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967) (First Amendment rights); see also *Doe v. Marsh*, 105 F.3d 106, 111 (2d Cir. 1997) (noting that Supreme Court and Second Circuit jurisprudence "suggests that the waiver of a fundamental right in the context of civil cases must be made voluntarily, knowingly and intelligently") (citing *United States v. Local 1804-1*, 44 F.3d 1091, 1098 n.4 (2d Cir. 1995))

The trial court found, as a matter of fact, that the petitioners had not waived their rights. Nevertheless, the majority opinion reflects an unusual appellate re-weighing of the evidence, and the majority concluded that a finding of waiver was compelled apparently as a matter of law. This was inconsistent with existing authority as to the applicable standards of review. See, e.g., *Bickel v Piedmont, supra*, 16 Cal.4th at 1052: "Whether there has been a waiver is a question of

fact." (Cf., *St. Agnes Medical Center, supra*, 31 Cal.4th at 1195, confirming that the determination of a waiver is "generally a question of fact.")

D. The Decision Conflicts With Existing Authorities as to the Unconstitutionality of Unreasonable Conditions of Permit Approval

The decision creates new conflicts in the law regarding the unconstitutionality of conditions of permit approval purporting to extinguish vested property rights, and demanding exactions of property interests without showing any reasonable relationship to deleterious public impacts caused by the applicant or showing any reasonable mitigation of impacts caused by the applicant. (Cf., *Koontz v. St John's River Water Management District* (2013) __ U.S. ___, 133 S.Ct. 2586; *Nollan v. California Coastal Commission* (1987) 483 U.S. 825; *San Remo Hotel L.P. v. City & County of San Francisco* (2002) 27 Cal.4th 643; *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854.)

The decision is inconsistent with existing California case law on the constitutional and statutory limits of the Coastal Commission's power to demand conditions of approval. (E.g., *Bowman v. California Coastal Commission* (10/23/14, on rehearing, No. B243015) ___ Cal.App.4th ___; *Security National Guarantee Inc. v California Coastal Commission* (2008) 159 Cal.App.4th 402; *Ocean Harbor House Homeowners Association v. California Coastal Commission* (2008) 163 Cal.App.4th 215; *Liberty* v. *California Coastal Commission* (1980) 113 Cal.App.3d 491.)

The decision creates new conflicts in the law, and creates new uncertainty as to the invalidity of the Commission's attempt to issue a building permit subject to an arbitrary "expiration date," despite the Commission's knowledge and expectation that the permit applicants must rely upon the permit by expending substantial money, effort, and resources in making physical improvements to maintain and preserve their existing homes and property rights. (E.g., *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519.)

Many of these new conflicts in the law and inconsistencies with existing authority are noted and questioned in the dissenting opinion by Justice Nares.

Each of the foregoing reasons, individually, would be sufficient to warrant the Court granting the petition for review pursuant to Rule 8.500(b); cumulatively, the multiple inconsistencies and new conflicts raised by the decision strongly call for the petition for review to be granted in this case.

Conclusion

The appellate decision in this case stands in stark contrast with existing California case law, mis-states or misapplies this Court's holdings as to the true "general waiver rule" and its limited applicability, and creates new conflicts in the law on this important and recurring issue of access to the courts. The majority opinion apparently creates a new "general rule" requiring a finding of "waiver" of fundamental rights as a matter of law, even where the permittee has timely protested the conditions and timely filed for mandate review of the offending condition, in conflict with existing case law. The appellate decision injects new inconsistencies and confusion into an already complex area of the law.

The decision unduly narrows the existing case law allowing judicial review of permit conditions and exactions of property where the permittee has timely challenged the condition and has "complied with" the unlawful condition under protest and under duress or otherwise under circumstances negating the essential "voluntary acceptance" of the agency's demands.

For each of the foregoing reasons, these amici, CBIA, CCA, and the Farm Bureau respectfully request that the Court grant review of this matter. CRC Rule 8.500.[1]

Thank you for your consideration of these requests.

Very truly yours,

RUTAN & TUCKER, LLP

David P. Lanferman

DPL:2378

Proof of Service [Attached]

Cc: Nick Cammarotta, Esq., California Building Industry Ass'n
Kirk Wilbur, California Cattlemen's Association
Christian Scheuring, Esq., California Farm Bureau Federation

[1] Alternatively, in view of the many substantial inconsistencies with existing case law and aberrant statutory "interpretation" presented in the lead opinion, as detailed above, these amici respectfully submit the accompanying request that the Court order that the opinion by the Court of Appeal be decertified and ordered not published, as provided by CRC Rule 8.1125.

DECLARATION OF SERVICE

I, Shannon Lacerda, declare as follows:

I am a resident of the State of California, residing or employed in Palo Alto, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 3000 El Camino Real , Suite 200, 5 Palo Alto Square, Palo Alto, California 94306.

On November 3, 2014, true copies of a AMICUS LETTER IN SUPPORT OF PETITION FOR REVIEW were placed in envelopes addressed to:

Hayley Elizabeth Peterson Office of the Attorney General 110West A Street, Suite 1100 San Diego, CA 92101	Clerk of the Court Fourth District Court of Appeal, Division One Symphony Towers 750 B Street, Suite 300 San Diego, CA 92101
Clerk of the Court San Diego County Superior Court North County Division 325 South Melrose Drive Vista, CA 92081	Jonathan C. Corn AXELSON & Corn, P.C 160 Chesterfield Drive, Suite 201 Cardiff by the Sea, CA 92007
Paul J. Beard Jennifer Thompson PACIFIC LEGAL FOUNDATION 930 G Street Sacramento, CA 95814	

Which envelopes, with postage thereon fully prepaid, were then sealed and deposited in the mailbox regularly maintained by the United State Postal Service in Palo Alto, California.

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SHANNON LACERDA