

FRED GAINES
SHERMAN L. STACEY
LISA A. WEINBERG
REBECCA A. THOMPSON
NANCI S. STACEY
KIMBERLY RIBLE
ALICIA B. BARTLEY

LAW OFFICES OF
GAINES & STACEY LLP
1111 BAYSIDE DRIVE, SUITE 280
CORONA DEL MAR, CALIFORNIA 92625

TELEPHONE
(949)640-8999
FAX
(949)640-8330

October 31, 2014

The Honorable Chief Justice
And Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102-4797

Re: Amicus Curiae letter in support of Petition for Review
Lynch, et al. v. California Coastal Commission
Fourth Appellate District, Division One, Case No. D064120

Honorable Justices:

This letter is written under Rules of Court Rule 8.500(g) in support of the Petition for Review filed by Barbara Lynch and Thomas Frick from the decision of the Court of Appeal, Fourth Appellate District, Division One, in Case No. D064120. The undersigned is an attorney who has practiced in the area of land use regulation for the past 40 years, including more than 1,000 administrative and judicial hearings involving the Coastal Commission related to properties throughout the state. My representation has included other property on Neptune Avenue in Encinitas where the Petitioners' homes are located. The issues which are addressed in the Petition for Review are important issues which need resolution such that property owners can know how to protect their property both from natural disaster and from unlawful administrative conditions.

The Honorable Chief Justice
And Associate Justices
California Supreme Court
October 31, 2014
Page 2

1. **The Finding of Waiver is Unsupported and Injurious to the Rights of Citizens to Petition the Courts for Redress of Grievances against the Government.**

The decision of the Court of Appeal finds a waiver of the right to challenge unreasonable conditions. The Coastal Commission chose to demand their conditions be satisfied “prior to issuance of the permit”. This is a standard Coastal Commission provision and can be found in almost every permit decision that contains special conditions. For Lynch and Frick, the Coastal Commission required a Deed Restriction on the Coastal Commission’s form be recorded “prior to issuance of the permit.” This too is the standard procedure at the Coastal Commission.

The effect of these “prior to issuance of permit” conditions is to refuse to allow Lynch and Frick to protect their homes under extremely adverse circumstances, without signing the exact documents on which the Court of Appeal found a waiver. Construction of the seawall to protect their homes was the second factor on which waiver of a right to challenge was found. Such construction was essential to the protection of the homes.

By the Court of Appeal’s analysis, the homeowner must as a matter of course anxiously wait through a lengthy administrative and judicial process while their homes are in peril. This creates an unconscionable advantage in favor of the state. As though Snidely Whiplash were tying

The Honorable Chief Justice
And Associate Justices
California Supreme Court
October 31, 2014
Page 3

Nell to the railroad tracks, Lynch and Frick could see the train coming. Dudley do Right is nowhere to be found. Lynch and Frick were faced with the Hobson's choice to risk their homes falling from the bluff or cave into the State's demands. If private parties acted like the Coastal Commission acted here (and acts in many cases) it would be considered criminal.

The risk to the homes is not short lived. Even before the failure of the previous seawall, Lynch and Frick knew it was not adequate. They had sought to protect their property by filing an application with the Commission on April 27, 2009, the preparation of which must have begun much earlier. The Coastal Commission did not hear this application until January 15, 2010. No action was taken on the application.

While still awaiting action by the Coastal Commission, the Petitioners' seawall failed in December 2010, placing their homes in peril. An emergency permit issued by the Coastal Commission only allowed the removal of debris from the failed wall. A new Coastal Commission application was filed on April 11, 2011. The Coastal Commission considered the matter in June 2011 but reached no decision. Finally, on August 10, 2011, the Coastal Commission took action. In my experience, the Coastal Commission proceeded quickly on this application as many permit decisions require six to nine months before action. But the problem becomes more acute in the judicial process after the decision.

The Honorable Chief Justice
And Associate Justices
California Supreme Court
October 31, 2014
Page 4

The Coastal Act provides a 60 day statute of limitations to challenge a Coastal Commission decision. Public Resources Code §30801. Petitioners filed their action on October 7, 2011. An action to challenge a permit action by the Coastal Commission must proceed under Code of Civil Procedure §1094.5. *State of California v. Superior Court (Veta)* (1974) 12 Cal.3d 237, 248. The challenge most often asserted is whether or not there was an abuse of discretion. Abuse of discretion is established if the agency's findings are not supported by substantial evidence, or if the findings made by the agency do not support the decision. *Sierra Club v. California Coastal Commission* (1993) 19 Cal.App.4th 547, 556. An administrative record of the proceedings before the Coastal Commission is required. *Sierra Club v. California Coastal Commission* (2005) 35 Cal.4th 839, 863. In my experience the Coastal Commission takes eight to ten months to produce an administrative record. As it is not a local agency, the Coastal Commission does not consider itself bound by even the 190 day limit contained in Code of Civil Procedure §1094.6.

Once an administrative record is produced, it often takes four to six more months to get a hearing on the CCP 1094.5 petition for writ on calendar in the Superior Court. So the homeowner is at risk for a minimum of eight months in the administrative process and then twelve to sixteen months in the judicial process. These time periods are borne out in this case where from the date the Petition for Writ of Mandate was filed (October 7, 2011) to the date of trial on the writ (March 7, 2013) was fifteen months. This is normal.

The Honorable Chief Justice
And Associate Justices
California Supreme Court
October 31, 2014
Page 5

Once you have a trial decision, it is subject to appeal. If a writ of mandate is granted, the filing of an appeal alone stays the decision of the agency. Code of Civil Procedure §1094.5(g). The agency decision was to approve a permit. If the agency decision is stayed, then there is no permit authority to proceed with the protection of the home. So now the Court of Appeal considers the matter. The Coastal Commission's appeal was filed in this case on June 27, 2013. A decision was rendered on September 9, 2014. These are not uncommon periods of time.

So from April 2009 through today, five and one-half years, the Court of Appeal majority would require Lynch and Frick to endure the peril of the loss of their homes. Faced with what could be irreparable loss, Lynch and Frick acted reasonably. The Coastal Commission decision was timely challenged. When accepting the Deed Restriction at issue here and issuing the permit, the Coastal Commission knew the challenge was pending. The Coastal Commission did not notify Lynch and Frick that proceeding would waive the challenge. The majority decision accuses Lynch and Frick of subterfuge by signing the documents essential to protect their home while simultaneously challenging them. There can be no subterfuge when all of the facts are known to both parties. The Coastal Commission knew there was an action pending when it issued the permit.

It is the Coastal Commission that engaged in subterfuge. The Coastal Commission accepted the documents that were essential to the protection of the homes and issued the permit. The Coastal Commission

The Honorable Chief Justice
And Associate Justices
California Supreme Court
October 31, 2014
Page 6

had full knowledge that a proceeding challenging conditions was pending, but did not disclose to Lynch and Frick that such an act would waive the right to challenge and render their Petition for Writ of Mandate moot. That disclosure was delayed for a year until the Coastal Commission could spring it on Lynch and Frick in a motion to dismiss.

My clients have faced this Hobson's choice in numerous cases for many years. The Coastal Commission insulates itself from many challenges simply by imposing external costs and risks on a property owner. The cost and peril of years of delay while unlawful conditions are litigated places the individual under an irresistible pressure to concede. The anguish that property owners endure over accepting an excessive ruling, or delaying their lives and fortunes to challenge it, is real.

Property owners along the coast, and throughout the state, are entitled to some assurance that the government not enjoy an oppressive advantage arising from the cost and peril associated with challenging a decision. A party which has timely challenged conditions imposed in an administrative action should be allowed to proceed with the development without waiving the right to that challenge. Conditions required by the Coastal Commission that refuse permission to proceed unless the challenge to their authority is withdrawn are not reasonable.

The Honorable Chief Justice
And Associate Justices
California Supreme Court
October 31, 2014
Page 7

2. **The Petition for Review Should be Granted to Determine the Scope of the Commission Power under Public Resources §30235.**

In my experience, the Coastal Commission has sought to minimize the application of Public Resources Code §30235 and restrict the ability of property owners to protect their property. Public Resources Code §30235 assures property owners that they will be able to protect their homes and other structures in danger from erosion by constructing protective devices in the event that they are threatened by erosion.

The limitation of Public Resources Code §30235 has taken many forms that have evolved over time. First, the Coastal Commission has limited the structures allowed to be protected to be principal structures only. A homeowner may have a lovely yard with patios, pools or other amenities, but those are not structures which the Coastal Commission will allow to be protected.

Second, the structure must be in some imminent peril. It is not enough to show that erosion will place the structure in peril in the future, the peril must have already arisen. A landowner must watch his land fall away into the ocean until the structure is imperiled.

Third, the Coastal Commission began to calculate a theoretical loss of sand which would otherwise have eroded from a bluff and required the

The Honorable Chief Justice
And Associate Justices
California Supreme Court
October 31, 2014
Page 8

homeowner to pay a “mitigation fee” to a public agency which would take responsibility to replace that sand from other sources. Lynch and Frick’s fee was first calculate at \$22,693.00 for a 30 year period with an obligation to pay additional amounts after 30 years. (See Special Condition 2, Staff Report dated December 30, 2009.) By July 27, 2013, the amount was \$31,542.72 for 20 years. (See Special Condition 5, Staff Report dated July 27, 2013).

Fourth, new construction must waive any right to protection under Public Resources Code §30235. The Coastal Commission reads Public Resources Code §30253 to require that no new construction is entitled to protection under §30235.

Fifth, if a property owner is able to get a permit for a protective device, the protective device can only protect the existing residence and cannot be relied upon to protect any new development on the property. So if Lynch and Frick expend the large amounts necessary to protect your property (including the \$31,542.70 sand mitigation fee, see Special Condition No. 5), neither of them can tear down their existing house and build a new one if the expensive seawall and bluff protection is necessary for the safety of the new house.

Each of these limitations that evolved over many years may or may not be justified. They are not at issue here. But in the case of Lynch and Frick, the 20 year limitation is not justified. Public Resources Code §30235

The Honorable Chief Justice
And Associate Justices
California Supreme Court
October 31, 2014
Page 9

does not say that you can protect a home in danger from erosion for just 20 years. Under the Coastal Commission decision, Lynch and Frick have no permit after 20 years and the protection would be required to be removed if they do not obtain a new permit. So Lynch and Frick are required to repeat the entire administrative process under administrative or legislative rules that may differ from what exists today. Indeed, the Coastal Commission is a likely advocate of such administrative and legislative changes. The Coastal Commission is the proponent of many legislative bills each year to expand their powers.

The Coastal Commission limit to 20 years tells Lynch and Frick that the Coastal Commission was loathe to grant the permit, but compelled by law to do so. But in 20 years, Lynch and Frick better watch out for the new laws that might apply because the same protection may be denied and their homes destroyed. This is indeed the power grab which is described by the trial court and the dissent. It is very real.

In my experience, this is the first time that the Coastal Commission has imposed a time limitation on a protective device. As the evolving staff reports on the Lynch and Frick applications demonstrate, this time limitation was not included in the first staff report dated December 30, 2009, but became included in the staff report dated July 27, 2011.

If the time 20 year time limitation contained in the Coastal Commission decision for Lynch and Frick is upheld, then this will become

The Honorable Chief Justice
And Associate Justices
California Supreme Court
October 31, 2014
Page 10

the standard Coastal Commission and no shoreline protective devices will be approved for more than 20 years. This is not authorized by Public Resources Code §30235. It is tantamount to adding new words to Section 30235 stating that “...seawalls ... **shall be permitted for periods not in excess of 20 years** to protect ... existing structures in danger from erosion.” Reading statutes as though additional words that an agency wishes were included, but were not included, exceeds the Coastal Commission’s authority. *Schneider v. California Coastal Commission* (2006) 140 Cal.App.4th 1339.

I encourage the Supreme Court to grant the Petition for Review and protect individuals against the overwhelming power of the state.

Respectfully submitted,



SHERMAN L. STACEY

cc: Paul J. Beard, Esq.
Jennifer F. Thompson, Esq.
Jonathon Corn, Esq.
Hayley Peterson, Esq.

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 1111 Bayside Drive, #150, Corona del Mar, CA 92625.

On October 31, 2014, I served the foregoing document described as Amicus Curiae letter in support of Petition for Review on the parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Paul J. Beard, Esq.
Pacific Legal Foundation
930 G Street
Sacramento, California 95814

Hayley Peterson
Deputy Attorney General
Office of the Attorney General
110 West A Street, Suite 1100
San Diego, CA 92101

Jennifer F. Thompson, Esq.
Pacific Legal Foundation
930 G Street
Sacramento, California 95814

Jonathan C. Corn
Axelson & Corn
160 Chesterfield Dr., Suite 201
Cardiff By The Sea, CA 92007

Each envelope was then, on October 31, 2014, sealed and deposited in the United States Mail Corona del Mar, California.

Executed on October 31, 2014, at Corona del Mar, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



Donna Contino