IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION SIX

SDS FAMILY TRUST, Appellant, **v.** **CALIFORNIA COASTAL COMMISSION,** Respondent.	Case No. B243015

San Luis Obispo County Superior Court, Case No. CV 100611
Hon. Dodie Harmon, Judge

CALIFORNIA COASTAL COMMISSION'S PETITION FOR REHEARING

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INTRODUCTION

This Court granted rehearing on its own motion to consider the standard of review. Having articulated the applicable substantial evidence standard of review — including that the Court would not substitute its judgment for the Coastal Commission's and would not reverse the Commission's decision unless no reasonable person could so find — the Court proceeded to change course entirely, based on facts that were different than those before the Commission and a legal theory undeveloped in the record below.

The Court acknowledged that the Commission applied law that "ordinarily" is appropriate. But the Court based its new opinion on a factual recitation that is contrary to the facts SDS explicitly presented to the Commission, to the trial court, and even to this Court in its opening brief. Relying on those new facts, the Court found that a previously-existing permit condition was an unconstitutional taking, and therefore it would be inequitable for the Commission to enforce it. But the Commission did not evaluate the constitutionality of the easement condition, because it did not impose it. Thus, the Court determined that there was a taking based on a record that did not and could not even address that issue.

Relying on its new factual understanding, rather than the chronology that SDS presented to the Commission, and then concluding that a taking was obvious, this Court substituted its judgment for the Commission's. The opinion after rehearing does not evaluate whether substantial evidence supports the Commission's decision, but rather finds simply that the Commission's decision is inequitable, based on the Court's independent judgment. Thus, although the decision states that the substantial evidence standard of review applies, it improperly applies the independent judgment standard of review. For this reason, the Court should order rehearing.

STATEMENT OF FACTS

The Commission will not engage in a complete recitation of the facts here, but believes the following facts are critical to its petition.

In May 2002, Walton Emmick (SDS's predecessor in interest) applied to the County for a coastal development permit (CDP-1) to rehabilitate an uninhabitable residence on coastal property and connect it to a well. (5 AR 799; 1 AR 155; see also Appellant's Opening Brief (AOB), p. 3.) While the County was processing that permit application, Emmick started doing some of the work that it would cover. He pulled over-the-counter building permits and began work. When a county inspector learned that he had started doing work before the County had issued the coastal development permit, he asked Emmick to stop. Emmick stopped. (5 AR 900.) At this point, he had completed some work under the over-the-counter permits, which covered roofing and deck repair. (5 AR 802, 804.) The work was a necessary component of the overall project to make the house habitable.

The County issued CDP-1, which covered the roofing and deck repair as well as additional interior and exterior renovation, and new septic and well connections. (1 AR 248.) Because this work was all necessary to make the abandoned house habitable again for residential use, the County found that it constituted a change in the intensity of use. The County therefore conditioned the permit upon SDS offering to dedicate a lateral easement public access easement along its shoreline. (1 AR 244.) The County also included a permit condition specifying that the approval authorized the restoration and rehabilitation of the house which included, among other things, the replacement of deteriorated exterior materials such as siding and roofing and the replacement of a porch. (1 AR 248.)

SDS did not challenge the permit conditions. Rather, it allowed them to become final, and then applied for another permit, CDP-2, that would, among other things, remove the previous easement condition. The record is

clear that SDS's CDP-2 application sought to remove an *existing* condition that currently bound it. (1 AR 262 [SDS application to "delete" condition]; 1 AR 329, 347, 349 [County reports stating that project includes "removal of coastal access requirement"].) The County Board of Supervisors agreed to remove the easement condition entirely.

On appeal to the Coastal Commission, the Commission considered, de novo, the same issue that was before the County: should it remove the easement condition that already burdened the property? The Commission determined that it would adversely impact public access to remove the easement condition, and declined to do so.

BACKGROUND

After the trial court denied SDS's petition for writ of mandate, SDS filed a timely notice of appeal on August 2, 2012. The Court heard argument on December 11, 2013 and on March 18, 2014, issued an opinion affirming the lower court decision.

The March 2014 opinion held that because SDS did not challenge CDP-1's access easement condition, it could not collaterally attack it with a second permit application. The County issued CDP-1 burdened with the access easement condition based on its determination that the renovation of the house and other improvements would result in an increased use of the property. SDS failed to challenge the permit condition, and therefore the issues it determined were conclusively decided. SDS could not ask the County — and then the Commission — for an entirely new appraisal of the merits of the condition. For that reason, the Commission properly concluded that the property was already subject to the easement condition when SDS requested its removal, and that SDS had not shown that removing the condition would comply with the Coastal Act.

SDS petitioned the Court for rehearing, and the Court denied that petition. But the March 2014 opinion's discussion of the appropriate standard of review included one paragraph citing case law outside the area of administrative writs of mandate. Seeking to avoid confusion in this area of the law, the Commission wrote to the Court suggesting that it remove that one paragraph from the opinion.

The Court ordered rehearing on its own motion, and requested additional briefing on the standard of review of administrative writs of mandate. The parties both submitted letter briefs on May 1, 2014. The Court's online docket does not reflect that it filed the Commission's letter brief. However, the Commission confirmed with the clerk that the Court received the Commission's letter.

After it ordered rehearing and requested the letter briefs on the standard of review, the Court did not request any further briefing and did not hear oral argument. Rather, the Court issued an opinion reversing the judgment. The Court now holds that collateral estoppel does not apply, under principles of equity. The decision after rehearing concludes that CDP-1 did not cover the work performed under the building permits, and therefore SDS never received the benefits of that permit. The decision further concludes that the access easement condition was unconstitutional, and therefore enforcing it would be inequitable.

ARGUMENT

I. THE COURT RELIES ON A FACTUAL RECITATION THAT WAS NOT BEFORE THE COMMISSION.

The Court's decision on rehearing changed its factual summary, and now recites facts that are not only directly contradicted by the record, but are also contrary to SDS's representations to the Commission, to the trial court, and even to this Court. In particular, the opinion after rehearing

states that the CDP-1 permit application was only for a well connection, and then Emmick (SDS's predecessor) pulled unrelated building permits. (Opinion, p. 2.) But this is not the sequence of events that SDS presented to the Commission. Rather, the facts before the Commission were that Emmick applied for a coastal development permit (CDP-1) to rehabilitate his entire house on May 7, 2002. (5 AR 799, 1 AR 155.) In June 2002, he pulled over-the-counter building permits for some of the work that the coastal development permit later authorized: roofing and deck repair. (5 AR 802, 804.)

SDS's lawyer before the Commission explained that *after* SDS applied for CDP-1 that would authorize a wide array of rehabilitation work, "but prior to its approval, the property owner did apply for, and receive" the building permits. (5 AR 880.) This was the same coastal development permit that authorized work that included roofing, interior and exterior restoration, demolition and reconstruction of a porch area, a new septic tank, and well connection. (1 AR 248; 5 AR 879-880.)

The communication of both SDS's attorney and land manager includes a timeline of events showing that Emmick applied for the restoration permit, CDP-1, in May 2002, and then pulled building permits a month later. (5 AR 765, 879-880.) The same representatives also appeared at the Commission hearing, even referencing the timeline in the written correspondence. (5 AR 980.) Thus, this chronology of events — that Emmick applied for a coastal development permit for a great deal of rehabilitation work, then pulled building permits for some of that work and started working — is based on substantial evidence in the record.

Indeed, this is the factual story that SDS consistently presented in this case, right up until SDS's reply brief to this Court. The sequence of events that the Court articulates in its opinion after rehearing — that the CDP-1 application was for a well connection, and the building permits for roofing

and deck repairs were unrelated to that permit application — was first proposed in SDS's reply brief. It was not the explanation of facts that SDS presented to the Commission, or to the trial court. Indeed, *it is contrary to the facts SDS presented to this Court in its opening brief*, where SDS stated: "On May 7, 2002, Mr. Emmick applied to the County for authorization to (1) restore the interior and exterior of the ranch house, (2) install a new septic system, and (3) connect the house to an existing well." (AOB, p. 3.) SDS then goes on to state that "[a]t about the same time in 2002, Mr. Emmick separately applied for authorization to perform minor repairs on the house . . . ." (*Ibid.*)

It was well within the bounds of reason for the Commission to accept SDS's recitation of events. Indeed, the Commission would have had no grounds to imagine the factual sequence that this Court articulated in its opinion on rehearing. At that time, no one had suggested that the CDP-1 application sought anything other than complete restoration of the house, which subsumed the subsequent building permits. Hence, the evidence before the Commission clearly showed that the CDP-1 application encompassed the work performed under the building permits. Thus, CDP-1 authorized that work after-the-fact and gave SDS the benefit of legalizing Emmick's prior work.

The Court will ordinarily not consider issues raised for the first time in a reply brief. (*American Indian Model Schools v. Oakland Unified School District* (2014) 227 Cal.App.4th 258, 275.) But even if the Court accepts SDS's belated contention that the the CDP-1 application initially sought approval only for establishing a domestic well, the County subsequently determined that the CDP was necessary for the entirety of the work involved in rehabilitating the house. Indeed, it is a bit obvious that the building permits were part of CDP-1, because they permitted work that was necessarily part of the greater restoration project. It would make no

sense to replace only the roof on an uninhabitable house. The County's explicit determination to that effect was in the record before the Commission. (1 AR 248.) SDS did not question that determination when it appeared before the Commission and cannot challenge it now.

The court places great emphasis in its discussion of the standard of review that its ruling must be *based on the evidence before the Commission.* But the facts it goes on to articulate were not the facts that SDS itself presented to the Commission. By relying on that new and different factual scenario, the Court bases its decision on rehearing on an erroneous foundation.

II. THERE IS NO RECORD FROM WHICH THE COURT COULD CONCLUDE THAT THERE IS NO PROPORTIONALITY BETWEEN THE ACCESS EASEMENT CONDITION AND THE FIRST PERMIT.

The opinion after rehearing notes that the Commission did not undertake a analysis of the "rough proportionality" of the easement condition to the development that CDP-1 approved, under *Nollan v. California Coastal Com.* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374. That issue was not before the Commission, which was not considering the CDP-1 application that imposed the easement condition. If any governmental entity was to undertake that analysis, it would have been the County when it imposed the easement condition on CDP-1. Because the Commission never addressed this issue when the CDP-2 matter was before it, neither did it address the merits on judicial review. But the Court concludes that it is obvious that there is "no rational nexus, no less rough proportionality between the work on a private residence a mile from the coast and a lateral public access easement." (Opinion, p. 5.) The Court apparently based its conclusion solely on SDS's unrebutted argument.

Both public entities that considered the CDP-2 application understood that the easement condition was already in place by virtue of CDP-1. Thus, there is no basis for the Court to reach its conclusion about a taking, because there is nothing in the record before the Commission for CDP-2 that would allow it to consider whether the easement was a taking. While the Commission could have undertaken an analysis of the proportionality of the burden were it imposing an easement condition in the first instance, it did not here, because it was not imposing a condition — rather, it was letting an existing condition stand. Thus, there is an inadequate record for the Court to reach this conclusion. Unfortunately, this conclusion informs the rest of the Court's analysis.

III. THE COURT IMPROPERLY SUBSTITUTED ITS JUDGMENT FOR THE COMMISSION'S.

The Court accurately articulates the standard of review, noting that its review is under the substantial evidence standard. (Opinion, p. 4.) In other words, the Court does not exercise its independent judgment, but must uphold the Commission's findings as long as substantial evidence supports them. (Code Civ. Proc., § 1094.5, subd. (c).) Likewise, the Court stated that it may not substitute its judgment for the Commission's, and that it may reverse only if no reasonable person could have concluded as the Commission did. (Opinion, p. 4; *La Costa Beach Homeowners' Association v. California Coastal Com.* (2002) 101 Cal.App.4th 804, 814.)

The Court notes that "SDS argues that we must make our own determination of the credibility and weight of the evidence," (Opinion, p. 5), but the Court neither accepts nor rejects this argument. SDS's argument is manifestly incorrect. (See *La Costa Beach Homeowners' Association v. California Coastal Com.*, *supra*, 101 Cal.App.4th at p. 814.) The administrative agency is the only arbiter of conflicts within the evidence

and credibility of the witnesses. The agency "is the sole judge of the credibility of the witnesses; may disbelieve them even though they are uncontradicted if there is any rational ground for doing so, one such reason for disbelief being the interest of the witnesses in the case; and, in the exercise of sound legal discretion, may draw or may refuse to draw inferences reasonably deducible from the evidence." (*Pescosolido v. Smithe* (1983) 142 Cal.App.3d 964, 970-971.) Thus, discretion to determine facts is vested solely in the Commission. (*West Chandler Blvd. Neighborhood Ass'n v. City of Los Angeles* (2011) 198 Cal.App.4th 1506, 1517.) This Court does *not* "reweigh the evidence but indulge[s] in all presumptions and resolve[s] all conflicts in favor of the agency's decision." (*Bedoe v. County of San Diego* (2013) 215 Cal.App.4th 56, 61.)

Thus, the Court was required to examine whether there was substantial evidence in the record that supported the Commission's findings. The Court acknowledged that the Commission's legal framework was correct — that a party's failure to challenge a quasi-judicial decision, such as a permit issuance, "ordinarily" gives rise to collateral estoppel effect. (Opinion, p. 5.) Thus, the Commission "ordinarily" correctly concluded that CDP-1's access easement condition bound SDS after it failed to challenge it. Nevertheless, even though the Commission followed the ordinary law and applied it to the facts SDS presented, the Court applied a standard of review other than the substantial evidence standard in order to find that the Commission's decision was inequitable.

In fact, it was only in reliance on the new chronology that was not before the Commission and its conclusion about the unconstitutionality of the easement condition that the Court found that the Commission's decision could not be upheld. Thus, the Court substituted its independent judgment for the Commission's, effectively applying the independent judgment standard of review rather than the substantial evidence standard of review.

CONCLUSION

Having articulated the correct standard of review, the Court did not apply it. The Court should order rehearing to consider whether substantial evidence, as contained in the Commission's administrative record, supports the Commission's decision.

Dated: November 7, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached CALIFORNIA COASTAL COMMISSION'S PETITION FOR REHEARING uses a 13 point Times New Roman font and contains 2,772 words.

Dated: November 7, 2014

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **SDS FAMILY TRUST v. CALIFORNIA COASTAL COMMISSION**
No.: B243015

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On **November 7, 2014**, I served the attached **CALIFORNIA COASTAL COMMISSION'S PETITION FOR REHEARING** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **November 7, 2014**, at Los Angeles, California.

Pamela Van Kesteren
Declarant

P. Van
Signature

LA2012306406