IN THE COURT OF APPEAL OF THE STATE OF

CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 5

GREENE, et al., Appellants, v. CALIFORNIA COASTAL COMMISSION, Respondent.	Court of Appeal No. B293301 Superior Court No. BS165764

On Appeal from the Superior Court, County of Los Angeles
Honorable James C. Chalfant, Judge

APPELLANTS' OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL Second **APPELLATE DISTRICT, DIVISION** 5	COURT OF APPEAL CASE NUMBER: B293301
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 317377 NAME: Jeffrey W. McCoy FIRM NAME: Pacific Legal Foundation STREET ADDRESS: 930 G Street CITY: Sacramento STATE: CA ZIP CODE: 95814 TELEPHONE NO.: 916-419-7111 FAX NO.: 916-419-7747 E-MAIL ADDRESS: jmccoy@pacificlegal.org ATTORNEY FOR (*name*): Mark. I Greene and Bella Greene	SUPERIOR COURT CASE NUMBER: BS165764
APPELLANT/ PETITIONER: Greene, et al. RESPONDENT/ REAL PARTY IN INTEREST: California Coastal Commission	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Mark I. Greene and Bella Greene

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APPELLANTS' OPENING BRIEF

INTRODUCTION

In 2016, Appellants Dr. Mark Greene and Bella Greene (the Greenes) began planning a remodel for their retirement home. After spending a lot of time, energy, and money working with an architect, they came up with plans that fit with their vision, and complied with local building codes and zoning laws. Administrative Record (AR) at 000053; AR000490–91; AR000574; AR000529. The City of Los Angeles quickly approved their plans, but Respondents California Coastal Commission (Commission) rejected their plan because it felt it would impair public access to this beach:

AR000027 (map); AR000527–38 (City Permit); AR000003–04 (Commission staff report); AR00769 (Commission decision).

In order to receive a permit for a remodel, the Commission is forcing the Greenes to rehire an architect and eliminate 400–500 square feet of home from their plans. AR000004; AR000747. The Commission will not allow the Greenes to build within five feet of their rear property line, even though local zoning ordinances require only a one-foot setback. AR000004; AR000053. In fact, many neighboring properties are one foot or closer to their respective rear property lines. AR000712.

Not only do the Greenes have to comply with the Commission's newly created requirements, they have to record the five-foot restriction in their deed, permanently restricting the use of the property. AR00011. The Commission had no reasonable justification to impose this condition on the Greenes' property. Therefore, they respectfully request that this Court set aside the Commission's decision on their coastal development permit.

STATEMENT OF THE CASE

This is an appeal from the Los Angeles Superior Court's denial of a petition for writ of administrative mandate. *See* Joint Appendix (JA) at 394. In the Greenes' First Amended Petition for Writ of Administrative Mandate, the Greenes requested that the superior court issue a writ directing the Commission to set aside

its March 9, 2017, decision on Coastal Development Permit 5–16–0757. *See* Code of Civ. Proc. § 1094.5(f). The Greenes argued that the decision to impose Special Condition 1 was an abuse of discretion, because the administrative record does not support the decision. JA 145-146; *see* Code of Civ. Proc. § 1094.5(b). Alternatively, the Greenes alleged that the Commission proceeded in excess of jurisdiction and not in the manner required by law in imposing the Special Condition 1 because it is an unconstitutional condition. JA 144–145; Code of Civ. Proc.§ 1094.5(b).[1]

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[1] At the superior court, the Greenes also challenged the imposition of Special Condition 3, which requires the Greenes to waive their right to construct a shoreline protective device. AR000007–9. Originally, the Greenes requested a writ of administrative mandate and declaratory relief on this claim, but stipulated to dismissing the declaratory relief claim. JA 72–73. At the hearing on the Petition, the Greenes argued that their consultant's failure to object to Special Condition 3 should be excused and the superior court should decide the issue on the merits. JA 230–31; JA238–245. Specifically, the Greenes argued that objecting to Special Condition 3 would have been futile because the Commission imposes this Condition on nearly every similar coastal development permit it approves. *Id.*

The superior court held that the Greenes failed to exhaust their objection to Special Condition 3. JA 355–56. The Greenes have decided to not appeal their allegations related to Special Condition 3. At the Commission's request, pleadings related to the Special Condition 3 allegation are included in the joint appendix.

After a hearing on the writ, the superior court denied the Greenes' petition. JA 361; JA 389–392. The superior court determined that many of the Commission's justifications for imposing Special Condition 1 were not supported by substantial evidence. JA 361. However, it found that one justification—what that Commission labeled as privatization—was supported by substantial evidence. *Id*. As a result of these mixed findings, the court ordered supplemental briefing on whether a remand to the Commission was appropriate so that it could clarify whether the decision to impose Special Condition 1 was based on the justification it deemed supported by substantial evidence. JA 342. After another hearing, the superior court held that because that the Commission implicitly based its decision on all of the justifications listed in the staff report and, because one justification was supported by substantial evidence, the decision to impose Special Condition 1 was supported by substantial evidence. JA 389–392.

The superior court also rejected the Greenes' alternative constitutional challenge to Special Condition 1. JA 359. The court held that the Greenes failed to exhaust the constitutional argument because the Greenes' consultant, who is not a lawyer,

failed to articulate the constitutional arguments at the Commission hearing on the permit. JA 355. In the alternative, the court held that Special Condition 1 is not an unconstitutional condition. JA 359.

STATEMENT OF APPEALABILITY

This is an appeal from a final judgment (JA 394) resolving all issues between the parties, pursuant to Code of Civ. Proc. § 904.1(a)(1).

STATEMENT OF FACTS

I. The Greenes' Property and Its Surroundings

The Greenes' home sits in the middle of a block on Speedway, between 65th Ave. and 66th Ave in Playa Del Rey, Los Angeles. AR000027; AR000036; AR000664. The rear, seaward, edge of the Greenes' property is approximately 550 feet from the mean high-tide line of the Pacific Ocean. AR000018. The adjacent public beach is bisected by a bike path, approximately 273 feet from the edge of the Greenes' property. AR000697; AR000737. The public may access the beach from 66th Ave. on the south end of the block, or from 65th Ave. at the north end of the block. AR00027; AR000661; AR000745.

There are no public access points through or immediately adjacent to the Greenes' property. AR000533. The Greenes' block consists of four houses to the north of the Greenes' house, and one house to the south. AR000027; AR000712. The four houses to the northwest of the Greenes' property are set back 0.5 feet, 1 foot, 12.6 feet, and 4.1 feet, from their respective seaward property lines. AR000712. The house immediately southeast of the Greenes' house has a setback of 0.6 feet from its rear, seaward property line. *Id.*

The seaward property line of the block of homes abuts the location of a 12-foot wide right-of-way held by the City of Los Angeles (City). AR000002. The City originally planned to build a boardwalk on this right-of-way in the 1960s, but only intermittent portions of the walk have been constructed over the past 50 years. AR000002. In fact, the only parts of this "Ocean Front Walk" that have been constructed are those portions constructed by a few property owners. AR00013–14. These property owners constructed portions of the boardwalk in exchange for the City's approval of temporary permission to make private use of the space. *Id.* The City has no current plans to

construct the boardwalk on the portion of Ocean Front Walk adjacent to the Greenes' property. AR000014

II. The Greenes' Planned Remodel for Their Retirement Home

In early 2016, the Greenes began the process of securing the necessary permits to remodel the home. AR000503. The Greenes' plans would expand the floorplan of their home to within 1.5 feet of the seaward property line on the ground floor. AR000555. The plans also included a deck on the second floor that would extend to their property line. AR000559.

The Greenes' architect, Mark Appel, developed plans that fit with the Greenes' vision for the home and ensured that those plans complied with applicable laws and regulations. *See* AR000572–74. The Greenes' plans for the home include reinforcing the existing structure to meet more modern standards concerning earthquakes, increasing the interior square footage and exterior deck space, and adding a short staircase and chair glide to allow Bella Greene to avoid the use of stairs and the potential exacerbation of knee problems. *See* AR000571; AR000572 (noting that existing staircase will be removed and

reconstructed); AR000595; JA 140 (Verified First Amended Petition ¶ 11).

As with all new remodels, the Greenes' plans would comply with the City's current building codes for safety and green building requirements. *See* AR000574 (explaining that the new construction will require adherence to Los Angeles green building requirements); AR000529 (stating as a condition of City's coastal development permit that construction will comply with City building code). Based on Mr. Appel's work, the City of Los Angeles approved a permit for the Greenes' proposed remodel in June of 2016. AR000527–38.

III. The Greenes Begin the Permit Process

Once approved by the City, the Greenes submitted an application for a coastal development permit to the Commission pursuant to the Commission's "dual permit" jurisdiction. AR000490. On September 19, 2016, the Commission sent the Greenes a notice of incomplete application, requiring additional architectural plans, a stringline study, a description of proposed landscaping, and a description of how the proposed remodel would impact water quality. AR000540–42. The Greenes quickly complied with the request, but received a second notice of

incomplete application on October 19, 2016. AR000546. The second notice requested information on whether the scope of the project changed since the City issued its approval, whether the City required construction of the boardwalk on the portion of Ocean Front Walk, and the submittal of an increased fee. AR000546–47. On October 24, 2016, Mr. Appell responded to the second request and informed the Commission staff that the City did not require construction of the boardwalk. AR000600.

Two and a half months later, on January 5, 2017, the Commission again contacted the Greenes with a third request, this time requesting "a wave uprush study prepared by an appropriately licensed professional" that analyzed whether the proposed renovations "could be subject to erosion, wave attack or wave run-up, the frequency of occurrence, consequences and options for siting or designing the project to avoid or minimize impacts over the life of the structure." AR000605. The Greenes complied with this request and hired GeoSoils, an experienced engineering firm to complete the study. AR000037. The Greenes submitted the study to the Commission on January 16, 2017. *Id.* The study concluded, among other findings, that "[t]he proposed development will neither create nor contribute significantly to

erosion, geologic instability, or destruction of the site or adjacent area." AR000051.

IV. The Commission Staff Report and Hearing

On February 23, 2017, the Commission staff published a report on the Greene's coastal development permit application. AR000002. The report did not recommend approving the Greenes' permit as submitted, but rather as modified by several special conditions. AR000003–4. Special Condition 1, the subject of this appeal, requires the Greenes to modify their plans to remove 400–500 square feet of home, so that the building footprint extends no more than five feet from their rear property line. AR000004; AR000747. This request is contrary to the one-foot setback permitted by local ordinances and the 1.5-foot setback sought by the Greenes and approved by the City. AR000536.

Furthermore, Special Condition 1, like all of the permit's Special Conditions, must be recorded as a deed restriction, imposing the conditions as "covenants, conditions and restrictions on the use and enjoyment of the Property." AR000011. The staff report's purported justifications for Special Condition 1 were that it was necessary to protect the California Coastal Act's public access, recreation, and hazard goals. AR000012–17; AR000020.

The Commission held a hearing on the permit on March 9, 2017, almost six months after the Greenes originally applied for a permit from the Commission. AR000727. During the hearing, both the Commission staff and a consultant hired by the Greenes made presentations concerning Special Condition 1. Then Commissioner Howell moved to remove Special Condition 1 from the permit. AR000749. After a spirited discussion with Commissioners offering differing reasons for and against supporting Commissioner Howell's motion, the motion failed seven to four. AR000752. Subsequently the Commission unanimously approved the coastal development permit with Special Condition 1. AR000754.

ARGUMENT

I. The Commission's Decision To Impose Special Condition 1 Was an Abuse of Discretion Because the Staff's Findings Are Based on Speculation, Incorrect Facts, and a Misinterpretation of the Law

The staff report lays out its findings for Special Condition 1 in two sections of the report, arguing that Special Condition 1 is necessary to further the goals set out in various portions of the Coastal Act. AR00012; AR000017. In the first section, entitled "public access and recreation," the staff report cites several

sections of the Coastal Act that cover public access and the rights of private property owners along the coast. AR00012. The second section, entitled "hazards," cites to Section 30253 of the Coastal Act, which regulates properties in areas of high risk of natural disasters, as well as properties along bluffs and cliffs. AR000017. As articulated below, the decision to impose Special Condition 1 is not supported by the staff's findings, and the staff's findings are not supported by substantial evidence.

A. Standard of review

Under California Code of Civ. Proc. § 1094.5(b), "[a]buse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." The role of the Court of Appeal in reviewing the denial of a writ petition is identical to that of the trial court, with respect to the weighing of evidence in the record and questions of law. *Sierra Club v. California Coastal Com.*, 12 Cal. App. 4th 602, 610 (1993).

"Whether the judicial review of the administrative decision should be restricted to determining if such decision is supported by substantial evidence on the whole record or should be

extended to an independent examination by the court" is decided on a case-by-case basis. *Bixby v. Pierno*, 4 Cal. 3d 130, 144 (1971). Independent judgment review governs when an administrative decision affects fundamental vested rights. *Id.* In cases where the court does not exercise independent judgment, the court "must still review the entire administrative record to determine whether the findings are supported by substantial evidence and whether the agency committed any errors of law." *Id.*

In the latter type of case, a reviewing court "must scrutinize the record and determine whether substantial evidence supports the administrative agency's findings and whether these findings support the agency's decision," resolving doubts in favor of the agency. *Topanga Ass'n for a Scenic Cmty. v. Cty. of Los Angeles*, 11 Cal. 3d 506, 514 (1974). Substantial evidence is not "synonymous with 'any' evidence" but instead must be reasonable, credible, and of solid value. *Kuhn v. Dep't of Gen. Servs.*, 22 Cal. App. 4th 1627, 1633 (1994) (quotations omitted).

A finding is not supported by substantial evidence if it is based on "inferences that are the result of mere speculation . . . ." *Kuhn*, 22 Cal. App. 4th at 1633. Similarly, an opinion "does not constitute substantial evidence if based on incorrect facts or legal

theory or on surmise or conjecture." *Chu v. Workers' Comp. Appeals Bd.*, 49 Cal. App. 4th 1176, 1182 (1996). Instead, for a decision to be supported by substantial evidence, the agency "must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." *Topanga Ass'n*, 11 Cal. 3d at 515. Importantly, substantial evidence review is not another name for rational basis review. *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal. 4th 952, 966 (1999) (comparing review under unconstitutional conditions doctrine, substantial evidence, and the "most deferential review" that California courts apply to legislative land use determinations).

This Court reviews questions of law *de novo*, giving no deference to the agency's interpretation of the law. *Bixby*, 4 Cal. 3d at 144; *McAllister v. Cal. Coastal Comm'n*, 169 Cal. App. 4th 912, 921 (2009); *Schneider v. Cal. Coastal Comm'n,* 140 Cal. App. 4th 1339, 1344 (2006) ("A court does not . . . defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature.") (internal citation omitted); *Burke v. California Coastal Comm'n*, 168 Cal. App. 4th 1098, 1106 (2008) (same); *Duncan v. Dep't of Pers. Admin.*, 77 Cal. App. 4th 1166, 1174 (2000); *Gilbert v. City of Sunnyvale*, 130

Cal. App. 4th 1264, 1275 (2005) ("In resolving questions of law on appeal from a denial of a writ of mandate, an appellate court exercises its independent judgment."). Therefore, in reviewing the decision to impose Special Condition 1, this Court should set aside the decision if it was based on speculation, incorrect facts, or a misinterpretation of law. *Chu*, 49 Cal. App. 4th at 1182; *Topanga Ass'n*, 11 Cal. 3d at 515; *Kuhn*, 22 Cal. App. 4th at 1633.

B. The imposition of Special Condition 1 will not further the Commission staff's stated public access and recreation goals.

Section IV-C of the staff report lays out the purported public access and recreation justifications for imposing Special Condition 1. AR000012–16. In laying out these findings, the report concludes that imposing Special Condition 1 will further the goals set out in five sections of the Coastal Act. AR000012–13. That is incorrect. Not only does the staff report misstate the goals of the Coastal Act, the staff report fails to demonstrate that Special Condition 1 will achieve even the misstated goals the staff seeks to achieve by imposing the condition.

1. Coastal Act Section 30210 does not justify Special Condition 1 because the condition fails to balance all the stated goals of that Coastal Act Section.

Section 30210 of the Coastal Act lays out one of the central goals of the Coastal Act:

> In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Cal. Pub. Res. Code § 30210. While the Coastal Act does set out a goal of "maximum access", this access must be consistent with other needs, including the "rights of private property owners" like the Greenes. *Id.* The Coastal Act demonstrates "the Legislature's recognition of the need to balance competing interests" and "[m]aximization of public access is one of several goals articulated in the Act." *Carstens v. California Coastal Com.*, 182 Cal. App. 3d 277, 290 (1986).

Section 30210 does not require the Commission to provide maximum access at all costs, rather it instructs the Commission to balance competing interests. The Greenes' permit application, however, does not raise a difficult question of how to balance

public access and private property rights. Instead, the Greenes' proposed remodel of their home does not interfere at all with access to the beach or other needs of the public.

If the Commission had approved the Greenes' permit without Special Condition 1, it would have achieved all of the stated goals in Section 30210. But in imposing Special Condition 1, the Commission interfered with the Greenes' use of their property without any corresponding benefit for any other goals of the Coastal Act.[2]

[2] In its order denying the Petition, the superior court stated that "the supremacy of these statewide policies over local, parochial concerns is a primary purpose of the Coastal Act, and the Commission is therefore given the ultimate authority under the Act and its interpretation." JA 345 (citing *Pratt Construction Co. v. California Coastal Comm'n*, 162 Cal. App. 4th 1068 (2008)). *Pratt* stands for the proposition that "the Legislature made the Commission, not the County, the final word on the interpretation of the LCP [local coastal plan]." *Id.* at 1078. *Pratt* is inapposite to the Greenes' situation because the Commission and the City have not adopted an LCP for Playa Del Rey. AR000024. Contrary to the superior court's statements, the legislature cannot, and did not, remove the judiciary's authority to interpret statutes like the Coastal Act. *McAllister*, 169 Cal. App. 4th at 921; *Schneider*, 140 Cal. App. 4th at 1344.

2. Coastal Act Sections 30211 and 30212 do not justify Special Condition 1 because the Greenes' remodel does not interfere with public access of the beach.

Coastal Act Sections 30211 and 30212 lay out more specific requirements for managing public access. Section 30211 provides:

> Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

Cal. Pub. Res. Code, § 30211. The relevant portions of 30212 quoted in the staff report provide:

> (a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where:[. . .]
>
> (2) adequate access exists nearby, ...
> Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.

Cal. Pub. Res. Code § 30212; AR000013. These two sections protect the right of the public to access the beach from public roadways. Due to the location of the Greenes' house, their proposed remodel cannot violate these two sections and the Commission cannot rely on them to impose Special Condition 1. AR000027; AR000036.

The Greenes' proposed development will not intrude into public property and, thus, cannot physically restrict public access. AR000027; AR000036; AR000664. Furthermore, the Greenes' home is located in the middle of the block, making it impossible to even minimally affect access from the nearest roadway. *Id.* The nearest possible access point to the beach is adjacent to the Greenes' neighbor's property to the southeast on 66th Avenue. *Id.* This neighboring house is set back only one-half foot from the property line AR0000712. The Greenes' proposed remodel would set the house farther back than the neighboring house that actually abuts the public access road. *Id.*

In addition to access on 66th Avenue, there are three other public access points to the beach in the area. AR000027; AR000712. There is wide public access one block farther south, there is public access on 65th Avenue to the north, and the public can access the ocean from the bike path that runs along the beach. AR000027; AR000712. The public's access to the beach is not currently impeded, and the Greenes' plans cannot change that fact whatsoever.

Thus, the development does "not interfere with the public's right of access to the sea . . . ." Cal. Pub. Res. Code § 30211.

Likewise, the development will not impact "[p]ublic access from the nearest public roadway to the shoreline . . . " because the Greenes' house is in the middle of the block. *Id.* § 30212. In the City's words, the Greenes' "project will neither interfere nor reduce access to the shoreline or beach." AR000533. The staff mistakenly relied on Coastal Act Sections 30211 and 30212 to support Special Condition 1.

3. Coastal Act Section 30214 does not justify Special Condition 1 because that section does not regulate coastal development and, regardless, there are no demonstrable privatization concerns with the Greenes' remodel.

California Coastal Act Section 30214 provides, in relevant part:

> (a) The public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case including, but not limited to, the following . . .
>
> (3) The appropriateness of limiting public access to the right to pass and repass depending on such factors as the fragility of the natural resources in the area and the proximity of the access area to adjacent residential uses.
>
> (4) The need to provide for the management of access areas so as to protect the privacy of adjacent property

> owners and to protect the aesthetic values of the area by providing for the collection of litter.

Cal. Pub. Res. Code § 30214. The staff relied on a misinterpretation of this section to support what it calls privatization concerns with development in Playa Del Rey. AR000015–17. The Commission, however, cannot rely on the cited portions of Section 30214 to impose conditions on coastal development permits because the section does not regulate development.

The subsections cited by the staff do not speak to managing development (like Sections 30211 and 30212), but rather managing the public's access. Cal. Pub. Res. Code § 30214. Specifically, the section provides that the Commission should "limit[] public access" and "manage[] . . . access areas" to protect the rights of property owners. *Id.* § 30214(a)(3),(4). The Commission cannot rely on a section that gives it authority to restrict access rights of the public, to impose restrictions on the Greenes' property. *See Chu*, 49 Cal. App. 4th at 1182 (conclusions based on incorrect legal theories do not constitute substantial evidence).

The superior court correctly recognized that Section 30214 protects property owners by managing public access, rather than regulating development along the coast. JA 359 (footnote 9). The superior court also recognized that "Commission staff found support for its [privatization] position in Cal. Pub. Res. Code § 30214 . . . ." JA 350. Yet, the court still concluded the staff's "privatization based concerns are prudent . . . ." JA 359.

A concern based on a misinterpretation of the Coastal Act is, by definition, an abuse of discretion. California Code of Civ. Proc. § 1094.5(b); *Chu*, 49 Cal. App. 4th at 1182. Because the staff's arguments for imposing Special Condition 1 rely heavily on its misinterpretation of Section 30214, this Court should set aside the decision to impose Special Condition 1. AR000016 (citing Coastal Act Section 30214).

But even assuming that the Commission could rely on Section 30214 to justify its "privatization" concerns, there is no evidence in the record to support those concerns. The staff feared that if the Greenes were allowed to construct their home as proposed, that there would be conflicts between the Greenes and members of the public wishing to recreate on the beach. AR000016. The staff's concerns are unfounded.

The record contains no evidence of any conflicts between the residents of Playa Del Rey and members of the public. For decades, the Greenes' neighbors have been allowed to construct within one foot, and even closer, of the property line. AR000738. Yet the Commission was unable to point to a single complaint by a member of the public about a resident of Playa Del Rey. It is hard to imagine how the Greenes' proposed plans would suddenly create conflicts where there currently are none. If the Greenes' plans were approved, the house would be farther back than the immediate neighbors, and farther back than most of the other houses on the same street. AR000704–715

Lacking concrete evidence of actual conflicts between the public and property owners in Playa Del Rey, the staff speculates about potential future conflicts along Ocean Front Walk. AR000013–14. Specifically, the report raises hypothetical conflicts that may occur if the City eventually decides to finish the now 50-year-old plan to build the boardwalk. AR000002; AR000016. This conjecture is not substantial evidence.

The City originally designated this land for a boardwalk in the 1960s, but it is still incomplete and the City has no plans to complete it. *See* AR00013–14; AR000734. In its current condition

the area is, in the words of Commissioner Luevano "essentially a piece of land that runs in front of these properties." AR000744; AR000747 (Commissioner Vargas stating that Ocean Front Walk is "a paper street so you know we're fighting here to protect something that doesn't even exist."); AR000533 (Ocean Front Walk "is not improved as a usable pedestrian right-of-way."). Any decision based on the assumption that the boardwalk will be completed is pure conjecture.

But even assuming the boardwalk will be completed, the Greenes' proposed remodel would not interfere with the use of the boardwalk. The planned renovations will keep the house 1.5 feet from Ocean Front Walk, consistent with the local ordinances. AR000053. To the extent that the public wishes to currently recreate on this piece of land, including the piece of land next to the Greenes' property, the Greenes' remodel will not prevent anyone from doing so.[3] The public is also free to use this piece of land to move north and south along the beach, although that is

[3] But, as Commission Vargas stated at the Commission hearing, "it's a silly argument to say that somebody is going to . . . dig in their beach umbrella right next to . . . Ocean Front Walk when you have 599 extra feet in front of it that could be closer to the ocean." AR000747. But to the extent that someone wanted to do that, the Greenes would not interfere.

not the typical means that the public uses to access the ocean. S*ee* AR000745 (Commissioner Luevano stating that walking along Ocean Front Walk "isn't the way that the public accesses the beach . . . .").

Recognizing that the Greenes' house would not intrude on public space, the staff report then speculates about hypothetical conflicts between the Greenes' neighbors and the future public. The staff report states that because the City has temporarily authorized some houses to occupy portions of the right-of-way, there is an "appearance that the areas designated for future public access . . . are actually private." AR000014.

Based on this unsubstantiated opinion, the staff report concludes that "[*i]f* homeowners refuse to remove their property, or even *if* they do remove it but then act in other ways to discourage public use of the pathway . . . this *would* cause conflicts with the public access policies of the Coastal Act" AR000016 (all emphasis added). The staff feared that neighboring homeowners "*may* attempt to restrict or modify public access to the public walkway in front of their homes." AR000016 (emphasis). This is all speculation that other homeowners, who are not the Greenes, may act illegally in the

future. It is an abuse of discretion to impose a condition on the Greenes based on what others might do. *Georgia-Pac. Corp. v. California Coastal Commission*, 132 Cal. App. 3d 678, 700 (1982) ("It is clearly inferable from the Commission's references to what Georgia-Pacific 'might' do . . . that the body was speculating without evidence reasonably supporting an inference that the portended events would occur.").

Even to the extent that the Commission's speculative concerns are true, those problems would not be caused by the Greenes. Rather any concern is with those homes that have actually been built past the property line. *See also* AR000745 (Mr. Schmitz commenting that neighboring "cinder block walls . . . are violations."). The Commission cannot justify imposing conditions on the Greenes based on speculative future illegal activity of their neighbors.

Overall, even if it were foreseeable that the boardwalk will be constructed, it is still not foreseeable that the Greenes' development will violate any use or access of the beach. The Commission has not provided any evidence of the speculated conflicts in other areas of the coast that have boardwalks next to residences. Instead, the staff report is full of conjecture. The staff

speculated that the way some homes are built "*could* lead to potential conflicts between the public and homeowners . . . ." AR000016 (emphasis added).

Even the more fleshed out hypotheticals are still pure speculation. For example, the report suggests that the Greenes would not have enough room to maintain the outside of their house without interfering with use of the Ocean Front Walk boardwalk. AR000015. Again, the Commission provides no examples of whether maintenance has been a problem in similarly situated communities along the Coast. Further, the report contains no information or analysis about the frequency or necessity of maintenance for the Greenes' home.[4]

Instead of providing data that would actually illustrate the relevant factual situation in Playa Del Rey, the staff instead cited two irrelevant examples of conflicts between the public and

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[4] Even if one were to assume that "normal maintenance" would cause problems in the future, the Commission would be able to address the problem without imposing Special Condition 1. Although certain maintenance activity is normally exempt from the coastal development permit process, the Commission has the authority to assert "its coastal development permit jurisdiction over any temporary event at any time if the commission determines that the exercise of its jurisdiction is necessary to implement the coastal resource protection policies of Chapter 3 . . . . " Cal. Pub. Res. Code § 30610.

private property owners that "have come before the Commission . . . ." AR000016.

The first example further demonstrates the misapplication of Sections 30214 to the Greenes' permit. AR000016 (citing Coastal Development Permit No. A-1-MEN-16-0040); AR000078 (staff recommendation on A-1-MEN-16-0050). It concerns objections to a proposed construction of a trail along Pelican Bluffs. AR000078. Homeowners apparently reported privacy concerns with the proposed trail. AR000016. This situation does not provide any insight into the need to impose Special Condition 1. Pelican Bluffs involved a new trail being constructed against the homeowners' wishes.[5] It did not involve a situation, like here, where the homeowners are aware of potential privacy concerns, but weigh those concerns with the benefits of remodeling their house. Privacy concerns are relevant to whether the Commission decides to allow construction of a trail because Section 30214 regulates the public's conduct on the coast. But any privacy

[5] Despite the homeowners' privacy concerns with the proposed trail, the Commission staff still recommended it be built. AR000078.

concerns are irrelevant to the Greenes' permit because Section 30214 does not regulate coastal development.

The staff's second example also fails to provide any relevant commentary on Playa Del Rey or the Greenes' home. AR000016 (citing CCC-05-09); AR0003000 (CCC-05-CD-09). In 2005, the Coastal Commission sent a cease and desist order to the Trancas Property Owners Association in Malibu because it had erected "private property" signs and fencing on the beach, and hired security guards on All-Terrain-Vehicles to patrol the beach. AR000300. These illegal actions directly interfered with the public's use of and access to the beach. But it is quite a stretch to compare those acts to the Greenes' remodeling their house consistent with local zoning regulations. The Greenes have no desire to interfere with the public's use of the beach, now or in the future.

The staff's "privatization" concerns are based on a misinterpretation of Section 30214 of the Coastal Act and pure speculation about how some homeowners in Playa Del Rey might act in the future. This flawed analysis cannot support the imposition of Special Condition 1.

4. Section 30221 does not justify Special Condition 1 because the Greenes' remodel does not interfere with public recreation.

The final provision of the Coastal Act the staff report cites in its "public access and recreation" section is Section 30221:

> "Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreation activities that could be accommodated on the property is already adequately provided for in the area."

Cal. Pub. Res. Code § 30221. Section 30221 cannot justify Special Condition 1 because the remodel does not interfere with the public's use of the beach. The public will be able to use the entire beach, whether or not the Greenes remodel their home. Furthermore, the beach is over 550-feet wide, which provides "adequate[]" areas to recreate. Cal. Pub. Res. Code § 30221. These areas will remain available for recreation for the "foreseeable future." *Id.*[6]

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[6] The staff did not mention sea level rise in the "Public Access and Recreation" section of its staff report. AR000012–17. But even taking into account sea level rise, the beach will have adequate areas to recreate for the foreseeable future. As further discussed below, the GeoSoils study concluded, based on the Commission's assumptions for sea level rise, that the mean high-tide line would advance, at most, 150 feet over the next 75 years. AR000049. That would leave 400 feet of beach, and the high-tide would not even reach the bike path.

Even taking as true the staff's speculative concerns about a public boardwalk that may someday be built on the public beach to the west of the Greene's property line, those purported problems will not occur in the foreseeable future. The boardwalk has not been built in 50 years and, contrary to the superior court's findings, the City has no current plans to build it in the foreseeable future. AR00014; AR000744; AR000747; AR000533; JA 359 (superior court findings). As the Greenes' permit from the City demonstrates, the City is not asking residents to help build the walk, as it has in the past. AR000600. Any speculative impact of the development on the use of the boardwalk will not occur in the "foreseeable future." Cal. Pub. Res. Code § 30221. Therefore, contrary to the staff's conclusions, Special Condition 1 cannot further the goals of Section 30221 of the Coastal Act.

5. The staff's misstatements of key facts further demonstrate the lack of substantial evidence in support of Special Condition 1.

Further demonstrating the abuse of discretion in imposing Special Condition 1 are the staff's false statements in the staff report and at the hearing. For example, the staff report's analysis of Special Condition 1 is based on the false notion that "normally

required rear yard setback for a structure on the subject site is 15 feet" and that the City permit "included a reduction in the normally required setback . . . ." AR00015. This is simply not true. The applicable zoning ordinance for the Greenes' property, and the zoning ordinances applicable to the houses on neighboring blocks, set a seaward building line of one foot. AR000053; AR000054; AR000055. Findings based on incorrect facts lack substantial evidence. *Chu*, 49 Cal. App. 4th at 1182.

Moreover, this false statement affected the Commission's decision to impose Special Condition 1. Commissioner Vargas stated during the meeting: "I'm hearing our staff talk about the fact that it's usually been a 15 . . . a 15-foot setback and they're kind of compromising here with five feet." AR000747. But the staff's recommendation was not a compromise. In this area of Playa Del Rey, the zoning ordinances allow homeowners to build within one foot of the rear property line. Therefore, the decision to impose Special Condition 1 was an abuse of discretion because it was based on the false belief that the Greenes' plan does not comply with the local zoning ordinances. *L.A. Unified Sch. Dist. v. Workers' Comp. Appeals Bd.*, 116 Cal. App. 3d 393, 401 (1981) (an opinion based on incorrect facts is not substantial evidence).

6. The record does not support the Commission staff's conclusion that the Greenes' proposed remodel will interfere with public access and recreation in Playa Del Rey.

A finding "does not constitute substantial evidence if it is based on incorrect facts or legal theory or on surmise or conjecture." *Chu*, 49 Cal. App. 4th at 1182; *see also Georgia-Pacific Corp.*, 132 Cal. App. 3d at 700 (it is an abuse of discretion to impose a condition based on speculation or based on justifications not authorized by the Coastal Act). The Commission's "public access and recreation" justifications for Special Condition 1 suffer all of these flaws.

The staff report misinterprets several sections of the Coastal Act and, as a result, misstates the goals it should be seeking to achieve through the imposition of Special Condition 1. But even assuming that the staff correctly stated the goals of the Coastal Act, the record fails to demonstrate that Special Condition 1 will further those goals.

Instead, the staff report speculates, based on no concrete evidence, about future hypothetical problems it deems necessary to address. The Commission cannot impose a condition based on speculative problems. Even worse, even if these hypothetical

problems were to come true, Special Condition 1 does nothing to address them. The Greenes' proposed remodel will not interfere with the public's use of the beach because it does not intrude on public property, and the house will be set back farther than most neighboring properties. AR000712. Thus, the decision to impose Special Condition 1 should be set aside because it fails to address any actual or perceived problem resulting from the Greenes' remodel. This Court should reverse the judgment of the superior court that the Commission's privatization, privacy, and maintenance concerns justify the imposition of Special Condition 1. JA 361.

C. The imposition of Special Condition 1 will not further the Commission staff's stated goals of protecting against hazards.

The second set of justifications for Special Condition 1, laid out in the "Hazards" section, are equally flawed as the public access and recreation justifications. AR00017–19. As demonstrated below, the superior court correctly determined that the staff's sea level rise and potential future hazards concerns cannot justify the imposition of Special Condition 1. JA 360–61.

The Hazards section of the staff report cites Coastal Act Section 30253, which provides:

> New development shall:
>
> (a) Minimize risks to life and property in areas of high geologic, flood, and fire hazard
>
> (b) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantial alter natural landforms along bluffs and cliffs.

Cal. Pub. Res. Code § 30253. This Section of the Coastal Act cannot provide justification for Special Condition 1 because the Greenes' property is not in an area of high geologic, flood, and fire hazard. AR000050–51. Additionally, the Greenes' property is not along any bluffs or cliffs. AR000050.

Even taking into account future sea level rise, the Greenes' property is not at risk from any hazards. The GeoSoils study analyzed future conditions in Playa Del Rey based on the Commission's recommended projection of a five-foot rise in sea level over the next 75 years. AR000049; AR00018.[7] Based on this projection, GeoSoils concluded that that the shoreline is estimated to move between 75 feet to 150 feet "over the life of the

[7] The Commission based its recommendation on a 2012 National Research Council report, which is the best available science on sea level rise projections. AR000049.

development" and, because the house is more than 550 feet from current mean high-tide line, "it is unlikely that wave runup will reach the site . . . ." AR000049. Even if the mean high-tide line increases 150 feet, the ocean will not reach the bike path that is approximately 273 feet from the edge of the Greenes' property. AR000018; AR000697; AR000737. There would still be 400 feet of beach between the ocean and the Greenes' property.

GeoSoils concluded that "[t]he overtopping waters over the next 75 years most likely will not reach the subject site even under extreme design conditions." AR000047; AR00018. The staff report does not dispute this conclusion, and even recognizes that "[a]s long as the wide sandy beach is intact, the new development should be safe from sea level rise." AR00018. Instead of accepting the evidence, however, the staff report speculates that "if something were to happen that would cause damage to the beach, then shoreline retreat may occur." *Id.* But the Commission cannot impose conditions based on something that may happen. *Georgia-Pacific Corp.*, 132 Cal. App. 3d at 700. As the superior court correctly determined, "[r]eliance on the beach as a dynamic environment is not, by itself, evidence of a flood risk." JA 361.

As with the "public access and recreation" section, the "hazards" section attempts to cite an example to justify its speculative conclusion. It is unavailing. In 2015, one resident of Playa Del Rey expressed a concern at a Commission hearing about the length of a proposed berm for Venice Beach, Dockweiler State Beach, and Hermosa Beach. AR000018. At the hearing, the homeowner mentioned a few instances where flooding has previously occurred around the sides of the then existing berm, and requested that the length of the proposed berm be extended. *Id.* But the staff report does not mention whether the homeowner's concern was addressed by extending the length of the bern.[8] In fact, the staff report does not mention the current state of flooding or the current berms in the area at all.

That necessary information is contained in the GeoSoils study, which analyzed the impact of the berms on flooding. AR000040; AR000042; AR000047. Based on the current

[8] The staff report also fails to mention where this homeowner lived, beyond saying that he purportedly represented the "West Playa del Rey Homeowners Association . . . ." AR000018. It is possible that he lived on the Northwest side of Playa Del Rey, near Ballona and closer to water. *See* AR00027. That might explain why his property would be more susceptible to flooding compared to the Greenes' property.

conditions of the beach, and the best available science on sea level rise, the study concludes that the Greenes' house is not at significant risk of flooding for the next 75 years. AR000047. Thus, the Commission's findings that concerns about flooding justify Special Condition 1 are not supported by substantial evidence.

Instead of recognizing the conclusions of the GeoSoils study, the staff misrepresented the threat of sea level rise to the Commission during the hearing. Notably, in response to a question from Commissioner Turnbull-Sanders about sea level rise projections, a Commission staffer incorrectly stated that "we didn't receive from the applicant enough information to say how close to the house the wave up rush would get." AR000748. But the GeoSoil's study is clear, the shoreline is estimated to move between 75 feet to 150 feet "over the life of the development" and, because the house is more than 550 feet from current mean high-tide line, "it is unlikely that wave runup will reach the site . . . ." AR000049. The staff's misrepresentation of the facts further demonstrates the inadequacy of the findings. *Chu*, 49 Cal. App. 4th at 1182 (an opinion "does not constitute substantial evidence if based on incorrect facts."); *L.A. Unified Sch. Dist.*, 116 Cal. App. 3d at 401.

Like the findings of the "public access and recreation section" the staff's "Hazards" findings are based on misinterpretation of the law, incorrect facts, and speculation. The staff's conclusion that Special Condition 1 is necessary to further the goals of Section 30253 is not supported by substantial evidence. This Court should reverse the judgment of the superior court and vacate the Commission's permit decision.

II. In Imposing Special Condition 1, the Commission Did Not Bridge the Analytic Gap Between the Evidence and the Decision To Impose Special Condition 1.

As demonstrated above, the decision to impose Special Condition 1 is not supported by the staff's findings, and the staff's findings are not supported by substantial evidence. That alone is sufficient for this Court to reverse the judgment of the superior court.

The superior court, however, disagreed and held that, while the staff's flooding concerns were not supported by substantial evidence, the privatization concerns could support the decision to impose Special Condition 1. JA 361. Assuming that the superior court were correct that some, but not all, of the staff's stated justifications were supported by substantial evidence, this Court

should still reverse the judgment. The Commission failed to clearly articulate its reasons for imposing Special Condition 1, calling into question whether the decision was based on what the superior court considered proper justifications. In order to correct this problem, this Court should vacate the decision and remand the case to the Commission.

A. Standard of Review.

Under California Code of Civ. Proc. § 1094.5 "the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." *Topanga Ass'n*, 11 Cal. 3d at 522. If a court is unable to "discern the analytic route" an agency "traveled from evidence to action" then the proper course of action is to set aside the decision and remand to the agency. *W. Chandler Boulevard Neighborhood Ass'n v. City of Los Angeles*, 198 Cal. App. 4th 1506, 1522 (2011).

B. The Commission failed to articulate sufficient findings to support its decision to impose Special Condition 1.

Requiring agencies to issue clear findings in support of their decisions is crucial to the rule of law. While administrative agencies may be vested with broad authority, agency decisions

must be clear, able to be understood, and include findings that allow for effective judicial review. In short, a "findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions." *Topanga Ass'n*, 11 Cal. 3d at 516. In turn, this enables "the reviewing court to trace and examine the agency's mode of analysis." *Id.*

The Commission failed to issue findings to bridge the analytic gap between the staff's findings and its decision. Instead, several commissioners stated differing reasons for imposing Special Condition 1. *See* AR000727–755. At best, the Commissioners' statements at the hearing support the conclusion that imposing Special Condition 1 was based primarily on concerns over sea level rise, a concern the superior court held was not supported by the evidence in the record. JA 361. Several Commissioners specifically stated that they were concerned about sea level rise, and indicated that their votes were based on that concern. For example, Commissioner Vargas stated that "when I first kind of started contemplating this project I thought about

this in terms of sea level rise and how you know, we're going to have to make tough decisions . . . ." AR000747. Similarly, Commissioner Brownsey stated that "we must pay attention to sea level rise" when the Commission makes decisions. AR000743.

Commissioner Turnball-Sanders was the most clear about her motivations. She stated that "we've got to think more strategically about sea level rise and policies for the future and for that reason I'm going to be supporting the motion" of the staff to approve the permit with Special Condition 1. AR000748. In an attempt to understand the evidence about sea level rise, she asked the Commission staff about the projected rise in sea level. *Id.* In response, the Commission staff member falsely stated that "we didn't receive from the applicant enough information to say how close to the house the wave up rush would get." *Id.* In fact, the Greenes provided that information, at the request of the Commission staff. AR000047; AR000605.

All three Commissioners who expressed concerns about sea level rise voted to impose Special Condition 1. AR000751–520. As the superior court correctly determined, the staff's sea level rise concerns were not supported by substantial evidence. JA 360–61; *see* Section I-C, *supra*. If the staff had given these three

Commissioners the correct information, and they changed their votes as a result, Special Condition 1 would have been removed by a vote of seven to four. AR000752 (original vote to remove Special Condition 1 failed on a vote of seven to four).[9] If just two of the three Commissioners changed their vote, Special Condition 1 would have been removed. *Id.*

It is possible, although unlikely, that these three Commissioners would have still voted to impose Special Condition 1 even if they knew that the sea level rise justification was not supported by substantial evidence. But this Court cannot base its decision on the Commission's hypothetical justifications for imposing Special Condition 1, it must review the decision based on the Commission's stated justification. Code of Civ. Proc. § 1094.5 "leaves no room for the conclusion that the Legislature would have been content to have a reviewing court speculate as

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[9] The Superior Court did not believe that the staff's misstatements were dispositive because the statements were mitigated by information in other parts of the record. JA 360. But this view underrates the importance of the hearing and, importantly, fails to recognize that it is the Commission that is required to bridge the analytic gap between the evidence and the order. *Topanga Ass'n*, 11 Cal. 3d at 515. The Commissioners' statements at the hearing are what should bridge the analytic gap. If that bridge is corroded by incorrect facts and an incomplete analysis, the Commission's decision must be set aside.

to the administrative agency's basis for decision." *Topanga Ass'n*, 11 Cal. 3d at 515. If it is not clear that the Commission imposed Special Condition 1 based on justifiable findings, this Court must vacate the decision.

Although the Commission was not required to issue formal findings of fact analogous to those issued by a court, it was still required to issue discernable findings in support of its decision. *Hadley v. City of Ontario*, 43 Cal. App. 3d 121, 128 (1974). And "*where the action of the administrative agency may be on any one of several bases, failure to make findings is prejudicial* and a writ of mandate will issue to require the agency to *hold a new hearing with appropriate findings*." *Id.* at 128–29 (emphasis added).

That is the case here. The Commission's decision could be based on justifications the superior court deemed acceptable or, as is more likely, the decision could be based on unsupportable justifications. It is impossible to conclude that the Commission bridged the analytic gap between the evidence and the decision.

There are some cases where a court can uphold an agency's decision when only one of several stated findings is supported by substantial evidence. *See Sinaiko v. Superior Court,* 122 Cal. App. 4th 1133, 1145–46 (2004) (comparing and contrasting

situations when an agency decision with multiple justifications should be remanded). This is not one of those cases, however, because the Commission did not clearly state its findings. If the Commission expressly adopted several different findings in support of its decision, and only one superfluous finding was not supported by substantial evidence, then it would be appropriate to uphold the decision. *See, e.g., Desmond v. County of Contra Costa*, 21 Cal. App. 4th 330 (1993).[10] Here, however, it is not clear what, if any, findings support the Commission's decision.

It is also impossible to presume the Commission's findings in this case. Although a court can imply findings from an agency's decision in some cases, "[t]he rule of presumed findings will obviously not apply where the decision might be based on one or more of several theories, each relating to different factual considerations." *Mahoney v. San Francisco City & Cty. Employees' Ret. Bd.*, 30 Cal. App. 3d 1, 5 (1973). When, like here, there are several different possible justifications for a decision, each with different factual bases, a court cannot presume

[10] In *Desmond* the Board of Supervisors issued written findings to support its decision, which allowed the court to effectively review the Board's decision. *Desmond*, 21 Cal. App. 4th at 333.

findings. *Id.* When an agency does not clearly state its findings, "a reviewing court is unable to 'determin(e) whether there is sufficient evidence to support' the presumed findings, or if the decision is 'based upon a proper principle'." *Id.* (quoting *Swars v. Council of City of Vallejo*, 33 Cal. 2d 867, 871 (1949)).

The superior court, however, presumed the Commission's findings. Relying on 14 C.C.R. § 13096, the court concluded that the Commission implicitly adopted all of the staff's findings for imposing Special Condition 1. JA 391. That conclusion was incorrect.

The regulation provides that

> [u]nless otherwise specified at the time of the vote, an action taken consistent with the staff recommendation shall be deemed to have been taken on the basis of, and to have adopted, the reasons, findings and conclusions set forth in the staff report as modified by staff at the hearing.

14 C.C.R. § 13096. In this case, however, several Commissioners did specify the reasons for their votes around the time of the vote.

Several Commissioners clearly based their decision to impose Special Condition 1 on sea level rise concerns, a justification the superior court correctly rejected as improper. Commissioner Vargas stated that "I thought about this in terms of sea level rise," AR0000747, Commissioner Brownsey urged

fellow commissioners to "pay attention to sea level rise," AR000743, and Commissioner Turnball-Sanders "support[ed] the [staff] motion" because of "sea level rise and policies for the future . . . ." AR0000748.

Four other Commissioners clearly, and completely, rejected all the findings of the staff in support of Special Condition 1 and voted to remove the Condition. AR000752. Commissioner Luevano correctly recognized that Playa Del Rey "is a very unique situation." AR000745. Commissioner Uranga voted to remove Special Condition 1 because "the precedence is already there." AR0000746. Commissioner Howell opposed Special Condition 1 because the remodel would not encroach into the public right-of-way, and Commissioner Cox appeared to agree. AR000749. All of the Commissioner's justifications for their votes were stated immediately prior to the vote to remove Special Condition 1 from the Greenes' Coastal Development Permit. AR000752.

To the superior court, this discussion, and the Commissioners' explicitly stated justifications for and against imposing Special Condition 1, was entirely meaningless. To the court, it only matters that the staff report listed one appropriate

justification for imposing Special Condition 1, whether or not the Commissioners endorsed that justification. But 14 C.C.R. § 13096 recognizes that justifications "specified at the time of the vote" override the staff's justifications. By construing the regulation in the manner it did, the superior court effectively made the Commission staff the decision-maker over coastal development permits. This is inconsistent with the regulations, and inconsistent with the principle that the Commissioners render decisions, not the staff. *See* Cal. Pub. Res. Code § 30320(a) ("[P]rinciples of fundamental fairness and due process of law require that the commission conduct its affairs in an open, objective, and impartial manner free of undue influence and the abuse of power and authority.").

The Commission staff can make findings and recommend dations, but it is the Commission that must bridge the analytic gap between those findings and the ultimate decision. *Topanga Ass'n*, 11 Cal. 3d at 515. A court cannot implicitly adopt findings on behalf of the Commission, the Commission itself must state the findings. And if, as here, the Commission does not clearly state those findings, the court must vacate the decision. *W. Chandler Boulevard Neighborhood Ass'n*, 198 Cal. App. 4th at

1522. Therefore, unless this Court holds that all of the staff's justifications are supported by substantial evidence, it must vacate the permit decision and remand to the Commission for further hearings.

III. The Commission Failed To Proceed in a Manner Required by Law in Imposing Special Condition 1 Because It Is an Unconstitutional Condition

As the foregoing analysis makes clear, the imposition of Special Condition 1 was an abuse of discretion. But even if the condition were supported by the record, it is an unconstitutional condition on the Greene's coastal development permit. Special Condition 1 effectively conveys a negative easement to the Commission as a condition of permit approval. This condition violates the unconstitutional conditions doctrine because the easement bears no logical nexus or rough proportionality to any alleged (or even plausible) adverse public impact of the Greenes' proposed remodel.

The court can avoid the constitutional question by holding that the permitting decision is not supported by the evidence in the record. If this Court, however, holds that the decision is supported by the record, it should still reverse the judgment of the superior court based on constitutional grounds.

A. Standard of review

A court must set aside a decision when the agency "has proceeded without, or in excess of jurisdiction" or when the agency "has not proceeded in the manner required by law." Code of Civ. Proc. § 1094.5(b). Whether an agency imposed an unconstitutional condition on a permit is a pure question of law and this Court must exercise its independent judgment in answering that question, giving no deference to the agency's view or decision. *Gilbert*, 130 Cal. App. 4th at 1275 ("In resolving questions of law on appeal from a denial of a writ of mandate, an appellate court exercises its independent judgment."); *McAllister,* 169 Cal. App. 4th at 921; *Schneider,* 140 Cal. App. 4th at 1344 ("A court does not . . . defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature.") (internal citation omitted).

B. Special Condition 1 is an unconstitutional condition.

The Takings Clause of the Fifth Amendment, incorporated against the states through the Fourteenth Amendment, protects a right to use, enjoy, and protect property. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). Property rights, including

"the right to build on one's own property," "cannot remotely be described as a 'governmental benefit.'" *Id.* at 833 n.2. The unconstitutional conditions doctrine protects individuals from government pressure to give up their property rights without a lawful basis and without compensation in exchange for a permit. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604–05 (2013) ("[L]and-use permit applicants are especially vulnerable to . . . coercion . . . [and] [e]xtortionate demands."); *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 876 (1996) (plurality opinion) ("Where the regulatory land use power of local government is deployed against individual property owners through the use of conditional permit exactions, the *Nollan* test helps to secure that promise by assuring that the monopoly power over development permits is not illegitimately exploited . . . .").

The Supreme Court explained and applied the unconstitutional conditions doctrine in the context of land-use permitting in both *Nollan* and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Those cases establish that the government may only exact a private interest in property for the benefit of the public when the exaction bears an "essential nexus" and "rough

proportionality" to an adverse public impact caused by the proposed project. *Nollan*, 483 U.S. at 837 (requiring an "essential nexus" between a permit condition and the adverse impacts caused by the proposed project); *Dolan*, 512 U.S. at 391 (requiring "rough proportionality" between the exaction and the impact); *see also Koontz*, 570 U.S. at 614–15. Otherwise, the condition is unconstitutional. *See Dolan*, 512 U.S. at 385 (describing unconstitutional conditions in the context of land use); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005) ("[T]he government may not require a person to give up a" constitutionally protected property right "in exchange for a discretionary benefit" such as a land-use permit.) (internal quotation and citation omitted).

The California Supreme Court has interpreted *Nollan* and *Dolan* by stating that "[t]he 'sine qua non' for application of *Nollan/Dolan* scrutiny is thus the 'discretionary deployment of the police power' in 'the imposition of land-use conditions in individual cases.'" *San Remo Hotel L.P. v. City & Cty. of San Francisco,* 27 Cal. 4th 643, 670 (2002) (quoting *Ehrlich*, 12 Cal. 4th at 869 (plurality opinion)).

1. The Greenes' properly exhausted their constitutional objection to Special Condition 1.

Below, the superior court held that the Greenes failed to exhaust their unconstitutional conditions claim at the Commission hearing and were precluded from raising it in their Petition for Writ of Administrative Mandate. JA 354–55. This was incorrect. The Greenes properly exhausted the claim and the Commission was sufficiently on notice to make a determination about whether Special Condition 1 was an unconstitutional condition.

At the hearing, the Greenes' consultant, who is not a lawyer (AR000743) made several objections to Special Condition 1. These objections satisfied the purpose of the exhaustion doctrine "which is to provide the public agency with an opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review." *Mani Bros. Real Estate Grp. v. City of Los Angeles*, 153 Cal. App. 4th 1385, 1396 (2007) (citations omitted).

Notably, the Greenes' consultant specifically, and repeatedly, mentioned one of the key arguments made by the Greenes in support of their Petition: that there is a difference

between a legislatively adopted ordinance and an adjudicatively imposed condition for a permit. *See San Remo Hotel L.P.,* 27 Cal. 4th at 670; JA 358 (superior court summary of Greenes' argument); AR000734 ("[T]he city council took the *legislative action to establish a specific setback of one foot . . . .*" (emphasis added)); AR000735 ("This was land use planning and they took that legislative action."). The consultant also explained why Special Condition 1 lacks a nexus and rough proportionality with the alleged public impacts of the development, stating that "the project will not conflict with any public access or public recreations policies of the coastal act" and addressing the arguments about potential wave uprush and sea level rise. AR000736. He expressly cited to the portions of the Coastal Act that are at issue in this case. *Id.* Although the consultant did not utter "*Nollan*" or "*Dolan*", he articulated the principles of those decisions. He also provided evidence to allow the Commission to respond to the argument that Special Condition 1 does not further, *i.e.*, lacks a nexus with, the purposes of the Coastal Act and is not a proportional response to any Commission concern.

Furthermore, it is clear that the Commission was on notice that it must consider the requirements of *Nollan* and *Dolan* when

deciding on a coastal development permit application. *E. Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified Sch. Dist.*, 210 Cal. App. 3d 155, 176–77 (1989), *modified* (May 23, 1989) (holding that Plaintiffs exhausted administrative remedies because, among other things, the "School Board was well aware of the specific statutes and Guidelines applicable to its decision . . . ." (citing *Citizens Ass'n for Sensible Dev. of Bishop Area v. Cty. of Inyo*, 172 Cal. App. 3d 151, 162–63 (1985))). Not only was the Commission a party in *Nollan*, the administrative record clearly demonstrates that the Commission was on notice about the requirements of *Nollan* and *Dollan*. AR000947.

The California Coastal Commission Sea Level Rise Policy Guidance lays out "potential private property takings issues" with the development permit process. AR000946.[11] One of those issues is with "government permitting decisions that require a property owner either to convey a property interest or to pay a mitigation fee as a condition of approval." AR000947 (citing

[11] Below the parties agreed, at the Commission's request, to supplement the administrative record with the Guidance because it was "discussed in several parts of the current Administrative Record." *See* JA 264.

Nollan, *Dolan*, and *Koontz*). The Guidance explains that, in these situations, the Commission must ensure that there is a nexus and rough proportionality between the condition and the impacts of the project. For the Commission to argue that *Nollan* and *Dolan* arguments were raised for the first time in ligation ignores the agency's own guidance documents.

The superior court, however, believed it was dispositive that the consultant never spoke the lawyerly words of takings, the Fifth Amendment, or due process in the presentation.[12] Ultimately, the superior court failed to recognize that "'less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding' because . . . parties in such proceedings generally are not represented by counsel." *Mani Bros. Real*, 153 Cal. App. 4th at 1396 (quoting *Citizens Ass'n*, 172 Cal. App. 3d at 163). Under the superior

[12] Communications to the Commission expressly mentioned takings. AR000645. The superior court determined that these communications were irrelevant to the question of exhaustion because the Commission did not receive them with time to review before the hearing. JA 355. This conclusion is debatable because the letter indicates that it was hand delivered to the Commissioners on the day of the hearing. AR000643. Regardless, the letter just further demonstrates that the Commission is on notice about taking issues when it issues permits.

court's understanding of exhaustion, every applicant would need to hire an attorney solely to make objections on legal matters the Commission already received legal advice about.

The superior court's decision does not further the purpose of the exhaustion doctrine. The Greenes' consultant satisfied the requirement to exhaust the administrative remedies on this issue, and the Commission was on notice that coastal development permits are subject to the requirements of *Nollan* and *Dolan*. The Commission had every opportunity to resolve the issue prior to litigation, it merely disagreed that Special Condition 1 was an unconstitutional condition. This Court should not turn a disagreement about the merits of a claim into a refusal to decide the claim. This Court should reverse the judgment of the superior court and hold that the Greenes exhausted their constitutional claim.

Alternatively, because this is a constitutional claim, it concerns an important public policy question of statewide concern. *Pub. Employment Relations Bd. v. Superior Court*, 13 Cal. App. 4th 1816, 1827 (1993) (listing exceptions to exhaustion including "where important questions of constitutional law or public policy governing agency authority are tendered"). Thus,

even if this Court determines that the Greenes failed to exhaust their constitutional claim, it can and should still decide the claim on the merits.

2. Special Condition 1 is an exaction covered by the requirements of *Nollan/Dolan*.

Ruling in the alternative, the superior court held that Special Condition 1 is not subject to *Nollan* and *Dolan* scrutiny. JA 357–59. The court was mistaken. Special Condition 1 is an adjudicative land use decision that requires the Greenes to convey a property right to the Commission, and record that conveyance as a deed restriction.

The Greenes' right to build within one foot of their rear property line is recognized by Los Angeles' zoning ordinances. In 1964, the City passed Ordinance No. 127,701 to establish a one-foot setback for development on the blocks southeast of 65th Ave., including the Greenes' property. AR000053; AR000734; AR000663; AR000014. The City subsequently adopted similar ordinances for the other blocks on Ocean Front Walk. AR000054; AR000055; AR000734–35; AR000665.

The City's longstanding, legislatively adopted zoning ordinances allow for a one-foot seaward setback on all homes on

Ocean Front Walk. AR000053. The Greenes' plans for their property complied with this requirement, as reflected by the fact that they did not need any variance for the City to approve their development. AR000536. Now, the Commission seeks to exact a deed restriction over that portion of the property through an adjudicative land-use process. *See Dolan*, 512 U.S. at 391 n.8 ("Here . . . the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel."); *San Remo Hotel L.P.*, 27 Cal. 4th at 669–70 (discussing difference between legislatively and adjudicatively imposed conditions); *Ehrlich*, 12 Cal. 4th at 906 (Kennard, J., concurring and dissenting) (same).

The Commission has effectively demanded that the Greenes convey a negative easement for the purported benefit of the public. A negative easement imposes "specific restrictions on the use of property." *Wooster v. Dep't of Fish & Game*, 211 Cal. App. 4th 1020, 1026 (2012). It "prevent[s] acts from being performed on the property [and] may be created by grant, express or implied." *Wolford v. Thomas*, 190 Cal. App. 3d 347, 354 (1987). Special Condition 1 imposes specific restrictions on the use of the Greenes' property that are not generally applicable to

neighboring properties, effectively imposing a four-foot negative easement across the rear boundary of their parcel. Under Special Condition 9, the Greenes must record the condition as a deed restriction, which runs with the land. AR000023–24. As a result, the Commission has made effectively the same type of demand that it did in *Nollan*, as it has required a property owner to convey an easement for the public benefit in exchange for a coastal development permit.

That the easement here is a negative easement, rather than a positive easement like in *Nollan*, is of no legal significance. A negative easement is property within the meaning of the Takings Clause, and when the government subjects land to a negative easement the government must pay for it. *S. Cal. Edison Co. v. Bourgerie*, 9 Cal. 3d 169, 172–73 (1973).

Indeed, even the Commission admits that Special Condition 1, along with Special Condition 9, requires the Greenes to convey a property interest, referring to the deed restriction as a "covenant[]." AR000011. Whether this Court defines Special Condition 1 as a negative easement or a restrictive covenant is immaterial, as both interests are protected by the Takings Clause. *See Adaman Mut. Water Co. v. United States*, 278 F.2d

842, 849 (9th Cir. 1960) ("[U]nder the Fifth Amendment a restrictive covenant imposing a duty which runs with the land taken constitutes a compensable interest.").

Therefore, Special Condition 1 is not merely a land-use decision, as the superior court determined. JA 358. In reaching its decision, the superior court chiefly relied on *California Bldg. Indus. Ass'n v. City of San Jose* (*CBIA*), 61 Cal. 4th 435 (2015). But *CBIA* concerned a legislatively enacted ordinance, not an adjudicatory decision by an administrative body. *Id.* at 455–56. Furthermore, the ordinance at issue in *CBIA* did "not require a developer to give up a property interest for which the government would have been required to pay just compensation under the takings clause outside of the permit process." *CBIA*, 61 Cal. 4th at 461.

Here, the opposite is true. Special Condition 1 is an adjudicative decision by an administrative body that requires the Greenes to convey a negative easement (or a restrictive covenant) to the Commission. "A negative easement . . . prevent[s] the possessor of the land from doing acts upon it which, were it not for the easement, he would be privileged to do." Restatement (First) of Property § 452 (1944). Absent Special Condition 1, the

Greenes would have been allowed, pursuant to the local zoning ordinances, to use their land to build within one foot of their seaward property line. AR000053; AR000054; AR000055. Had the Commission merely demanded that the Greenes convey a negative easement, it would have had to pay just compensation. *S. Cal. Edison Co.*, 9 Cal. 3d at 172–73.

Thus, Special Condition 1 is subject to heightened scrutiny under *Nollan/Dolan*. This case does not involve a variance, which is the type of case where substantial evidence review applies. *See Topanga Ass'n*, 11 Cal. 3d at 514–16; *Santa Monica Beach, Ltd.*, 19 Cal. 4th at 966 (citing *Topanga Ass'n* as an example of when substantial evidence review, rather than *Nollan/Dolan*, applies). Instead, this case involves a "conveyance of some identifiable protected property interest," *CBIA*, 61 Cal. 4th at 460, and requires the Greenes to record the conveyance in their deed. AR000023. As a result, Special Condition 1 is constitutional only if it satisfies the nexus and proportionality requirements articulated in *Nollan* and *Dolan*. *See Dolan*, 512 U.S. at 386.

3. Special Condition 1 lacks a nexus between the Greenes' development and an adverse public impact.

A condition imposed on the issuance of a development permit is unconstitutional if the condition "fails to further the end advanced as the justification" for the condition. *Nollan*, 483 U.S. at 837. As demonstrated above, all of the staff report's recommendations are based on speculation. These findings are the type of "very generalized statements as to the necessary connection between the required dedication and the proposed development" the Court rejected in *Dolan*. 512 U.S. at 389. The Commission cannot justify the significant impacts of Special Condition 1 with the speculative impacts to public access cited in the staff report. *Id.* at 395–96; *cf. Georgia-Pac. Corp.*, 132 Cal. App. 3d at 700 (Commission cannot justify easement requirement based on what might occur at some future time). Special Condition 1 lacks rough proportionality to the impact of the proposed development and, therefore, is unconstitutional.

Furthermore, even if this Court were to accept the superior court's finding that the staff's privatization concerns are supported by substantial evidence, those concerns do not withstand scrutiny under *Nollan* and *Dolan*. An interest in

protecting the clear distinction between public and private property is no different than the Commission's "psychological barrier" interest the Supreme Court rejected in *Nollan*. *See Nollan*, 483 U.S. at 838–39. As a result, there is no nexus between the Greenes' development and the public's use of the beach for recreation. This Court should reverse the judgment of the superior court and hold that Special Condition 1 is an unconstitutional condition.

CONCLUSION

For the reasons discussed above, this Court should reverse the judgment of the district court and vacate the Commission's decision on the Greenes' coastal development permit.

DATED: March 12, 2019.

Respectfully submitted,

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By: /s/ Jeffrey W. McCoy
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPELLANTS' OPENING BRIEF is proportionately spaced, has a typeface of 13 points or more, and contains 12,756 words.

DATED: March 12, 2019.

/s/ Jeffrey W. McCoy
JEFFREY W. MCCOY

DECLARATION OF SERVICE

I, Iza A. Rodriguez, 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 March 12, 2019, a true copy of APPELLANTS' OPENING BRIEF was electronically filed with the Court through Truefiling.com. Notice of this filing will be sent to those below who are registered with the Court's efiling system. Those who are not registered will receive a hard copy via first-class U.S. Mail, postage thereon fully prepaid, and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 12th day of March, 2019, at Sacramento, California.

/s/ Iza A. Rodriguez
IZA A. RODRIGUEZ