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13 SUPERIOR COURT OF CALIFORNIA

14 COUNTY OF SAN DIEGO - NORTH COUNTY DIVISION

15 BEACH & BLUFF CONSERVANCY, ) No. 37-2013-00046561-CU-WM-NC  
)  
16 Plaintiff and Petitioner, ) **PETITIONER BEACH & BLUFF**  
) **CONSERVANCY'S OPPOSITION**  
17 v. ) **TO THE CITY OF SOLANA**  
) **BEACH'S DEMURRER AND TO**  
18 CITY OF SOLANA BEACH, et al. ) **THE CALIFORNIA COASTAL**  
) **COMMISSION'S DEMURRER**  
19 Defendant and Respondent, )  
) **[Request for Judicial Notice Filed**  
20 CALIFORNIA COASTAL COMMISSION, ) **Concurrently]**  
) **[IMAGED FILE]**  
21 a state agency, )  
) **[IMAGED FILE]**  
22 Defendant/Respondent-Intervenor. )

Date: February 27, 2015  
Time: 1:30 p.m.  
Dept: N-31  
Judge: Hon. Timothy M. Casserly

Trial Date: Not Set

Date Action Filed: April 26, 2013

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1 LUP.<sup>2</sup> Contrary to the City’s assertion, the relevant starting date for this litigation is October,  
2 2011, when after years of negotiating with the Commission’s staff, the City submitted its seventh  
3 draft of the LUP to the Commission.<sup>3</sup> Second Amended Complaint/Petition (SAC) ¶ 16. At its  
4 hearing on March 7, 2012, the Commission rejected the City’s LUP and instead approved a  
5 different version, one with substantial modifications made by its own staff. *Id.* ¶ 17. Believing  
6 that the Commission’s action in essentially re-writing the City’s LUP violated the Coastal Act’s  
7 requirement that local governments determine the “precise content” of their LUPs, and that the  
8 Commission’s role be limited strictly to determining whether the LUP conforms to the Coastal Act,  
9 Petitioners Steinberg and BBC filed suits against the Commission on May 3, 2012. *See* BBC’s  
10 Request for Judicial Notice (RJN), Exh. 3. On November 27, 2013, this Court sustained the  
11 Commission’s demurrers in those cases, for failure to name the City as a party to those actions.<sup>4</sup>  
12 *See* RJN, Exh. 1. This Court did not reach the merits of Petitioners’ claims regarding the legality  
13 of the LUP.

14           Meanwhile, the City’s process of obtaining a Commission-certified LUP continued. On  
15 February 27, 2013, the City adopted the Commission’s modified version of the document. SAC  
16 ¶ 18. BBC then filed this action against the City in order to challenge the City’s adoption of the  
17 LUP. Petitioners Steinberg and HOA filed actions on the same day, also challenging the City’s  
18 adoption of the LUP. *See* RJN, Exh. 3. On May 22, 2013, the City adopted amendments to the  
19 LUP, and Petitioners amended their Complaints and Petitions on August 20, 2013, to reflect those  
20 amendments. SAC ¶ 19; RJN, Exh. 3.

21           The City then filed a demurrer in the *Homeowner’s Association* case, arguing that the  
22 HOA’s failure to name the Commission as a party warranted dismissal. *See* RJN, Exh. 3. This  
23

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24 <sup>2</sup> Those actions are: *Steinberg v. City of Solana Beach, et. al.*, Case No. 37-2013-00044897-CU-  
25 WM-NC, and *Homeowner’s Association of the Solana Beach & Tennis Club, et al. v. City of*  
*Solana Beach, et al.*, Case No. 37-2013-00046245-CU-WM-NC. This Court has deemed all three  
26 actions related.

27 <sup>3</sup> All of the relevant dates regarding the City’s LUP process and the litigation in this case and the  
related cases are collated in a chart as Exhibit 3 to BBC’s Request for Judicial Notice.

28 <sup>4</sup> Steinberg and BBC chose not to pursue appeals of those rulings.

1 Court rejected that argument and overruled the City’s demurrer on December 12, 2013. *HOA v.*  
2 *City*, Minute Order, RJN, Exh. 1. The City filed a Petition for Writ of Mandate/Prohibition and  
3 Request for a Stay in the Fourth District Court of Appeal to challenge that ruling. That court  
4 denied the Petition. *City of Solana Beach v. Superior Court*, Order Denying Writ, RJN, Exh. 2.  
5 Because this Court held that the Commission is not a necessary or indispensable party to actions  
6 against the City challenging its adoption of the LUP—and because the court of appeal refused to  
7 consider that ruling—BBC continued to litigate this action against the City.

8 In early 2014, the Commission chose to intervene in this action as a Respondent on the  
9 City’s behalf. At that time, the LUP amendment process was still in flux. On January 9, 2014,  
10 the Commission rejected the City’s May 2013 amendments to the LUP and proposed a modified  
11 version of the amendments that it returned to the City for consideration. SAC ¶ 20. On June 11,  
12 2014, the City accepted the modified amendments. *Id.* ¶ 21. On August 13, 2014, the  
13 Commission’s Executive Director reported the City’s acceptance of the modified LUP amendments  
14 to the Commission, thereby finally certifying them. *Id.* ¶ 22. Because the LUP had been changed  
15 again, BBC sought to amend its Complaint/Petition to conform it to the most recent, and final,  
16 version of the LUP.

17 In the process of so amending its Complaint, BBC decided to name formally the  
18 Commission as a Respondent-Defendant in light of its August, 2014 action.<sup>5</sup> While BBC does not  
19 believe that doing so was necessary—in light of this Court’s ruling that actions against the City  
20 need not name the Commission—it did so out of an abundance of caution. It feared that either the  
21 City, or the Commission, or both, might try and renew arguments that each is a necessary and  
22 indispensable party in actions against the other. It also feared that although the Commission  
23 intervened in this action, it could drop out of the litigation if it so chose. In light of the allegations  
24 in the City’s and the Commission’s demurrers, that BBC’s failure to name the City in its original  
25 action against the Commission—an action that concluded in November, 2013—is fatal to BBC’s

26 \_\_\_\_\_  
27 <sup>5</sup> Neither the City, nor the Commission contest BBC’s right to challenge the City’s acceptance of  
28 the LUP amendments or the Commission’s August 13, 2014 action finally certifying those  
amendments. It is undisputed that BBC’s challenge to the LUP amendments is timely.

1 case against the City *in this action*, BBC’s caution was justified.

2 On October 3, 2014, this Court granted Petitioners’ Joint Motion for Leave to File Verified  
3 Second Amended Complaints/Petitions, over objection by both the City and the Commission. This  
4 Court deemed those Complaints filed as of that date.

### 5 STANDARD OF REVIEW

6 A demurrer lies only where a defect appears on the face of the challenged pleadings. Code  
7 of Civ. Proc. § 430.30. The Court must “deem to be true all material facts that were properly  
8 pled,” along with “those facts that may be implied or inferred from those expressly alleged.” *City*  
9 *of Morgan Hill v. Bay Area Quality Mgmt. Dist.*, 118 Cal. App. 4th 861, 869 (2004). On demurrer,  
10 the complaint “must be liberally construed, with a view to substantial justice between the parties.”  
11 Code of Civ. Proc. § 452; *Stevens v. Superior Court*, 75 Cal. App. 4th 594, 601 (1999).

### 12 ARGUMENT

#### 13 I

### 14 BBC’S CLAIMS ARE NEITHER 15 TIME-BARRED NOR PRECLUDED BY RES JUDICATA

#### 16 A. All of BBC’s Claims Against the City Are Timely and Justiciable

17 BBC initiated this action against the City in April, 2013 to challenge its adoption of the  
18 LUP. It has yet to obtain a final judgment on the merits of its claims. For that reason, the City’s  
19 assertion that BBC’s “challenge to the original LUP” and “policies unaffected by the LUP  
20 [amendments] . . . is barred by res judicata” is meritless. City’s Memorandum in Support of  
21 Demurrer at 7. The City does not contend that BBC’s challenge to the LUP amendments is barred  
22 by res judicata.

23 “‘Res judicata’ describes the preclusive effect of a final judgment on the merits.”  
24 *Mycogen Corp. v. Monsanto Co.*, 28 Cal. 4th 888, 896 (2002). A party alleging it as a defense  
25 must show: (1) “the issue decided in the prior adjudication is identical to the issue in the present  
26 action”; (2) “[t]here was a final judgment on the merits of that issue”; and (3) “[t]he party against  
27 whom the doctrine is asserted was a party to or in privity with a party to the prior adjudication.”  
28 *Miller v. Campbell*, 162 Cal. App. 4th 1331, 1342 (2008).

1 The City has not, and cannot, satisfy that standard. The issue in this action is whether the  
2 City’s adoption of a specific set of policies in the City’s LUP violates the Coastal Act and the  
3 Federal Constitution. This Court has never decided that issue. (Nor has any other court). As a  
4 result, there is no final judgment on the merits of that issue.

5 The City makes the confusing argument that BBC’s case against it—at least as regards its  
6 challenge to unamended LUP policies—is barred by res judicata because of BBC’s prior,  
7 unsuccessful action against the Commission. But, BBC’s claims in this case against the City are  
8 not barred by the prior lawsuit against the Commission that did not involve the City in any way.  
9 Indeed, this Court already ruled that an action against the City challenging its LUP may go forward  
10 without the Commission as a party. *HOA v. City*, Minute Order, RJN, Exh. 1. The cases cited by  
11 the City that the LUP cannot be challenged are all inapplicable because they involve instances  
12 where a plaintiff failed to file a timely writ action challenging a government administrative  
13 decision. *See Citizens for Responsible Dev. v. City of W. Hollywood*, 39 Cal. App. 4th 490, 505  
14 (1995) (city’s administrative decision immune from collateral attack where plaintiffs failed to  
15 challenge it via mandamus); *Patrick Media Group, Inc. v. Cal. Coastal Comm’n*, 9 Cal. App. 4th  
16 592, 607-08 (1992) (where plaintiff never properly challenged a permit decision via administrative  
17 mandamus, it could not do so later via an eminent domain action). None of those cases concern  
18 a challenge to a City’s legislation adoption of an LUP.

19 Moreover, the City’s claim that BBC is trying to initiate a new lawsuit, or to achieve a  
20 “redo” of its prior action against the Commission is untrue.<sup>6</sup> BBC continues to litigate its claims  
21 against the City, in this action, which it first initiated in April, 2013. The fact that BBC has had  
22 to twice amend its Complaint to reflect the changes to the LUP, and to keep up with the procedural  
23 history of the LUP amendment process, does not make this a new lawsuit. *See, e.g., Klopstock v.*  
24 *Superior Court*, 17 Cal. 2d 13, 19 (1941) (affirming the “very liberal” right to amend a complaint  
25 provided the amendment does not “present an entirely different set of facts”). The fact that the  
26 Commission chose to voluntarily intervene in this lawsuit also does not make this a new action.

27 \_\_\_\_\_  
28 <sup>6</sup> BBC does not seek to re-litigate the question of whether the City is a necessary and indispensable  
party to a lawsuit challenging the Commission’s certification of an LUP.

1 See *W. Heritage Ins. Co. v. Superior Court*, 199 Cal. App. 4th 1196, 1207 (2011) (an intervening  
2 party becomes “a party to the [existing] action”). Neither does the Commission’s intervention  
3 render BBC’s claims against the City precluded on any basis. It is undisputed that the Commission  
4 is a proper party in light of the Commission’s August 13, 2014 action on the LUP amendments.  
5 See Code Regs. tit. 14, § 13537(d) (Commission’s certification of LUP is final agency action); Pub.  
6 Res. Code § 30801 (specifying 60-day statute of limitations for challenging final Commission  
7 actions). For all of these reasons the City’s demurrer argument based on res judicata fails.

8 **B. BBC’s Claims Against the Commission Vis-à-Vis**  
9 **the LUP Amendments Are Timely and Justiciable**

10 The Commission does not contest BBC’s right to challenge its August 13, 2014 final action  
11 on the LUP amendments. See Pub. Res. Code. § 30801. There is no legal bar against BBC  
12 bringing that claim against the Commission in this action. *Nat’l Secretarial Serv., Inc. v.*  
13 *Froehlich*, 210 Cal. App. 3d 510, 519 (1989) (affirming that a plaintiff may amend a complaint  
14 under CCP 472 to add a new defendant). There is no basis for sustaining the Commission’s  
15 demurrer as regards BBC’s challenge to its action on the LUP amendments. Neither the City nor  
16 the Commission argues to the contrary.

17 **C. The Commission Chose to Voluntarily Intervene in**  
18 **BBC’s Action Against the City Challenging the LUP**

19 The Commission claims any facial challenge to the LUP is time-barred because this Court  
20 sustained its demurrer without leave to amend in BBC’s original action against the Commission.  
21 But the Commission ignores this Court’s ruling in the related *Homeowners’ Association* case that  
22 a facial challenge to an LUP may move forward as against the City, without the Commission as  
23 a party. That is exactly what BBC was in the process of doing when the Commission voluntarily  
24 intervened in this action.

25 The Commission is now trying to claim that even though it voluntarily intervened in this  
26 case to defend the LUP, it should not be bound by an adverse judgment rendered against the City.  
27 The Commission cannot have it both ways. Weil & Brown, Cal. Practice Guide: Civ. Proc. Before  
28 Trial (2014 ed.), § 2:463 (“As a party to the action, the intervenor is subject to the same procedural

1 rights, remedies and liabilities as the original parties . . . .”); *W. Heritage Ins. Co. v. Superior*  
2 *Court*, 199 Cal. App. 4th at 1206 (“ “[A]n intervener becomes an actual party to [a] suit by virtue  
3 of the order authorizing him to intervene.””) (quoting *Deutschmann v. Sears, Roebuck & Co.*, 132  
4 Cal. App. 3d 912, 916 (1982)). But should the Court rule otherwise, such a ruling does not impact  
5 BBC’s ability to seek redress against the City on both the LUP and the LUP amendments. And  
6 the Commission does not contest the timeliness of BBC’s challenge to its August 13, 2014  
7 certification of the LUP amendments.

8 As a practical matter, the Commission’s attempt to distinguish between the LUP and the  
9 LUP amendments is a non-issue. If BBC prevails on the merits of its claim as to those portions  
10 of the unamended LUP, it will be incumbent upon the City to make the necessary modifications  
11 to its LUP, in exactly the same matter as if BBC prevails on the merits of its claim as to those  
12 portions of the LUP that were amended. There is no practical difference in terms of how a merits  
13 ruling will affect the Commission. Again, since the Commission chose to voluntarily intervene  
14 in this action, it cannot now complaint about the possibility that it might be bound by an adverse  
15 judgment.

16 **II**

17 **THE PETITION APPROPRIATELY SEEKS**  
18 **DECLARATORY RELIEF AND TRADITIONAL MANDATE**

19 The City’s adoption of the LUP and later amendments thereto are actions that are quasi-  
20 legislative in nature and properly challenged by declaratory relief and traditional mandate. *See,*  
21 *e.g., DeVita v. County of Napa*, 9 Cal. 4th 763 (1995) (ruling on merits of claim for declaratory  
22 relief and traditional mandate challenging land us plan amendment). The City and the Commission  
23 cite no cases holding that administrative mandamus is the proper means to challenge the City’s  
24 action here, apparently conceding that point. Instead, both the City and the Commission focus  
25 exclusively on the claim that BBC may not maintain those actions against the Commission. They  
26 also argue that because BBC did bring those actions against the Commission, it’s entire action is  
27 subject to demurrer. That is false.

28 ///

1 While Code of Civil Procedure section 1094.5 may govern challenges to *permit* decisions,  
2 BBC does not challenge a permit decision.<sup>7</sup> It is challenging *policies*, and declaratory relief is the  
3 appropriate vehicle to challenge the Commission’s actions here. Pub. Res. Code § 30803 (“Any  
4 person may maintain an action for declaratory . . . relief to restrain any violation of this division  
5 [i.e., the Coastal Act] . . . .”); *State v. Sup. Ct.*, 12 Cal. 3d at 249-51 (declaratory relief claims  
6 against the Commission challenging its jurisdiction and the constitutionality of the Coastal Act  
7 were viable and adjudicated). Moreover, a section 1085 writ petition against the Commission is  
8 appropriate, since it (along with the City) co-drafted the LUP policies at issue and the Commission  
9 was acting in a “quasi-legislative” function when doing so. Code of Civ. Proc. § 1085; *Schwartz*  
10 *v. Poizner*, 187 Cal. App. 4th 592 (2010) (authorizing 1085 writ actions against quasi-legislative  
11 challenges).

12 The City and the Commission cite section 30801 of the Coastal Act, which says that “[a]ny  
13 aggrieved person shall have a right to judicial review of any decision or action of the commission  
14 by filing a petition for a writ of mandate in accordance with Section 1094.5.” But that is the  
15 remedy for challenges to permit conditions, not challenges to laws. In any event, section 30801  
16 does not provide the exclusive remedy for all challenges under the Coastal Act. The Act makes  
17 clear that the 1094.5 remedy in section 30801 “shall be *in addition* to any other remedies available  
18 at law.” Pub. Res. Code § 30800 (emphasis added). Certainly, section 1085 is available to  
19 challenge quasi-legislative action by agencies. And, as noted, section 30803 provides that “[a]ny  
20 person may maintain an action for declaratory . . . relief to restrain any violation of [the Coastal  
21 Act].”

22 The City also cites *San Mateo Cnty. Coastal Landowners’ Ass’n v. County of San Mateo*,  
23 38 Cal. App. 4th 523 (1995), for the proposition that the Commission’s certification of LUPs and  
24 amendments thereto can be challenged only under 1094.5. But there, the court did not dismiss the

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25 <sup>7</sup> The City cites a number of cases for the sweeping proposition that the Commission is immune  
26 from declaratory relief actions. But those cases, or the relevant parts thereof, concern challenges  
27 to permit decisions, which no one disputes are governed by section 1094.5. *State v. Superior*  
28 *Court*, 12 Cal. 3d 237, 249 (1974) (declaratory relief unavailable to challenge “denial of the  
permit”); *Rosco Holdings, Inc. v. State*, 212 Cal. App. 3d 642, 657 (1989) (same); *Walter H.*  
*Leimert Co. v. Cal. Coastal Comm’n*, 149 Cal. App. 3d 222, 230 (1983) (same).

1 plaintiff's action on demurrer because it failed to bring a 1094.5 writ. To the contrary, the court  
2 reached the merits of the plaintiff's claims. In discussing the case's procedural history and the fact  
3 that the plaintiff should have brought a 1094.5 action, the court decided to "review [the] claim  
4 despite appellants' failure to advance it by way of an appropriate writ petition." *San Mateo Cnty.*  
5 *Coastal Landowners' Ass'n*, 38 Cal. App. 4th at 539-40 n.9. Neither the City, nor the Commission,  
6 cite to a single case supporting the proposition that the failure to plead a 1094.5 action is grounds  
7 for demurrer.<sup>8</sup>

8 Furthermore, *San Mateo's* admonition that LUP challenges be brought under 1094.5 relies  
9 principally upon an older case, *City of Chula Vista v. Superior Court*, 133 Cal. App. 3d 472 (1982).  
10 Struggling with how to characterize the Commission's role in reviewing Local Coastal Programs  
11 or parts thereof (like an LUP), the *City of Chula Vista* court concluded that its role "more nearly  
12 resembles the adjudicatory task," because the Commission "does not create or originate any land  
13 use rules and regulations," and "cannot itself draft any part of the coastal plan." *Id.* at 488  
14 (emphasis added). While the Commission may have had a purely reviewer's role in *City of Chula*  
15 *Vista*, its role here was far different: It wrote large parts of the City's LUP, including many of the  
16 policies BBC challenges. Unlike in *City of Chula Vista*, the Commission's role here was more  
17 legislative, making section 1085 an appropriate vehicle to challenge the policies against the  
18 Commission. Again, like in *San Mateo*, the court in *City of Chula Vista* did not hold that the  
19 failure to plead 1094.5 was fatal, or grounds for sustaining a demurrer. To the contrary, the *City*  
20 *of Chula Vista* court reached and ruled on the merits of the plaintiff's claim.

21 Even if BBC should have pursued a section 1094.5 writ against the Commission, its  
22 reliance on section 1085 is not fatal. It has pled facts sufficient to allege a cause of action under  
23 section 1094.5, including exhaustion of administrative remedies, timely filing of its claims, and

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24  
25 <sup>8</sup> The Commission cites to a series of cases challenging Commission permit decisions or  
26 jurisdiction under 1094.5. None of those cases involved dismissal of an action for failure to bring  
27 an administrative writ; they are simply examples of unsuccessful 1094.5 actions. *DeCicco v. Cal.*  
28 *Coastal Comm'n*, 199 Cal. App. 4th 947, 949 (2011) (court sustained demurrer in 1094.5 action  
for failure to exhaust administrative remedies); *Citizens for a Better Eureka v. Cal. Coastal*  
*Comm'n*, 196 Cal. App. 4th 1577, 1583, 1590 (2011) (plaintiff brought an unsuccessful 1094.5  
action); *Hines v. Cal. Coastal Comm'n*, 186 Cal. App. 4th 830, 835 (2010) (same); *Mt. Holyoke*  
*Homes, LP v. Cal. Coastal Comm'n*, 167 Cal. App. 4th 830, 833, 836 (2008) (same).

1 | allegations that the Commission abused its discretion (by drafting, approving, and seeking to  
2 | enforce unlawful policies). “Where the entitlement to mandamus relief is adequately alleged, a  
3 | trial court may treat a proceeding brought under . . . section 1085 as one brought under . . . section  
4 | 1094.5 and should deny a demurrer asserting that the wrong mandamus statute has been invoked.”  
5 | *Cnty. of San Diego v. State*, 15 Cal. 4th 68, 109 (1997). Accordingly, if necessary, this Court may  
6 | construe BBC’s 1085 writ action against the Commission as a 1094.5 writ action, or allow it to file  
7 | an amended pleading that specifically references 1094.5 as a remedy.

8 | **III**

9 | **THE PETITION PROPERLY STATES A CAUSE OF**  
10 | **ACTION FOR UNCONSTITUTIONAL CONDITIONS**

11 | BBC challenges a number of policies on their face, on the ground that they require the  
12 | imposition of permit exactions that unconstitutionally “burden the right not to have property taken  
13 | without just compensation.” *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2596  
14 | (2013) (“As in other unconstitutional conditions cases in which someone refuses to cede a  
15 | constitutional right in the face of coercive pressure, the impermissible denial of a governmental  
16 | benefit is a constitutionally cognizable injury.”). A facial constitutional challenge to a policy  
17 | succeeds where the policy is shown to be unconstitutional “in the *generality* or *great majority* of  
18 | cases.” *San Remo Hotel, L.P. v. City & Cty. of San Francisco*, 27 Cal. 4th 643, 673 (2002). When  
19 | no relationship exists between a permit exaction and the alleged public impacts of the owner’s  
20 | proposed use of his property, the exaction is unconstitutional. *See, e.g., Nollan v. Cal. Coastal*  
21 | *Comm’n*, 483 U.S. 825, 839-42 (1987); *San Remo Hotel*, 27 Cal. 4th at 671.

22 | Contrary to the City’s and the Commission’s assertions, facial unconstitutional conditions  
23 | claims are judicially cognizable. *See, e.g., San Remo Hotel, L.P.*, 27 Cal. 4th at 672-77  
24 | (adjudicating the merits of plaintiff’s facial takings claim); *Levin v. City & County of*  
25 | *San Francisco*, No. 3:14-cv-03352-CRB, 2014 WL 5355088 (N.D. Cal. Oct. 21, 2014)  
26 | (adjudicating facial unconstitutional conditions challenge to city ordinance and finding it  
27 | unconstitutional). Whether those claims succeed on the merits is not a proper consideration on  
28 | demurrer. “‘A demurrer tests only the legal sufficiency of the pleading.’ In reviewing the ruling

1 on a demurrer, ‘the question of [a] plaintiff’s ability to prove [its] allegations, or the possible  
2 difficulty in making such proof does not concern the reviewing court.’” *Ferrick v. Santa Clara*  
3 *Univ.*, 231 Cal. App. 4th 1337, 1341 (2014) (citations omitted).

4 But on the merits, BBC’s unconstitutional conditions claims succeed because the City  
5 cannot apply the challenged policies constitutionally “in the *generality* or *great majority* of cases.”  
6 *San Remo Hotel, L.P.*, 27 Cal. 4th at 673. BBC lacks the space here to argue the merits of every  
7 one of its unconstitutional conditions claims. But to take just one example, Policy 4.19 forces  
8 bluff-top owners applying for a permit for new or additional development to forever waive their  
9 constitutional right to protect their property in the future, if the property succumbs to erosion. *See*  
10 Cal. Const. art. I, § 1 (guaranteeing right to protect property). The City and Commission cannot  
11 apply Policy 4.19 constitutionally to any applicant, because the forced-waiver of the fundamental  
12 right to protect property bears no relationship to whatever impacts might be attributable to using  
13 one’s land. BBC’s second amended complaint “allege[s] facts sufficient to state a cause of action”  
14 that Policy 4.19 is facially unconstitutionally. *Ferrick*, 231 Cal. App. 4th at 1341. That is all that  
15 is required to survive demurrer.

16 The City and Commission do not contest the absence of a relationship between many of  
17 their policies and the impacts of the otherwise lawful use of property (e.g., building a home on a  
18 residential lot). Nor do they contest the general viability of facial challenges under the Federal  
19 Constitution. Instead, they claim a special exemption for facial *takings* claims against *LUP*  
20 *policies*. No such special exemption exists, and their authorities are completely inapposite.

21 The City and Commission cite section 30010 of the Coastal Act, which says that the Act  
22 is not intended, and shall not be construed as authorizing the commission . . . or  
23 local government acting pursuant to this division to exercise their power to grant  
24 or deny a permit in a manner which will take or damage private property for public  
use, without the payment of just compensation therefor.

25 Pub. Res. Code § 30010. They interpret that provision as “specifically limit[ing] takings claims  
26 to permit decisions,” to the exclusion of facial takings claims. Comm’n Memo at 4. Yet section  
27 30010 says no such thing. The provision simply insulates *the Coastal Act* itself from a successful  
28 facial takings claim. Section 30010 does not describe, let alone limit, the claims that plaintiffs can

1 bring against LUP policies. Otherwise, section 30010 would decrease owners’ rights to assert  
2 federal constitutional claims—an interpretation that would fly in the face of the same section’s  
3 concluding admonition: “This section is not intended to increase *or decrease* the rights of any  
4 owner of property under the Constitution of the State of California or the United States.” Pub. Res.  
5 Code § 30010 (emphasis added).

6 Section 30010’s plain meaning is consistent with *Sierra Club v. Cal. Coastal Comm’n*, 12  
7 Cal. App. 4th 602 (1993), which the City and Commission rely upon. There, a group challenged  
8 the Commission’s certification of a county LUP, for its failure to designate lands containing  
9 “pygmy forests” as environmentally sensitive habitat area (ESHA) and, therefore, undevelopable.  
10 *Id.* at 609. The county defended the Commission on the grounds that the ESHA designation would  
11 have resulted in takings of property without just compensation in violation of section 30010. *Id.*  
12 at 617. The court of appeal rejected that argument, holding that section 30010 is “designed to  
13 foreclose any claim that *the Coastal Act* authorizes takings *without compensation*, a construction  
14 which would leave *the Act* open to a facial challenge.” *Id.* at 618 (emphasis added). In other  
15 words, section 30010 is nothing more than a shield against facial taking challenges to the *Coastal*  
16 *Act*. BBC does not challenge the Coastal Act, but rather LUP policies, which section 30010 does  
17 not insulate from challenge. *Sierra Club* does not say that section 30010 (or any other law) strips  
18 BBC of the right to mount a facial taking challenge to LUP policies.

19 The City also cites *San Mateo County*, 38 Cal. App. 4th 523, which involved the validity  
20 of a voter-adopted measure amending a county’s local coastal program. City’s Memo at 6-7. The  
21 court in that case rejected a facial challenge to two of the measure’s policies, because the plaintiffs  
22 “ha[d] not shown that unconstitutional application of these policies by the County [was]  
23 unavoidable” since the measure gave the county “flexibility to avoid potentially unconstitutional  
24 application” of the policies if they “‘[went] too far’ as specifically applied to a particular parcel of  
25 property.” 38 Cal. App. 4th at 547. *San Mateo* is inconsistent with subsequent decisions.

26 First, *San Mateo* articulates a stringent standard for facial constitutional challenges that is  
27 no longer good law. As the California Supreme Court made clear in *San Remo Hotel*, a facial  
28 constitutional challenge succeeds where the law is shown to be unconstitutional “in the *generality*



1 See City’s Request for Judicial Notice, Exh. 3. The City and the Commission also explicitly note  
2 which policies at issue were amended, and which were not, in their demurrers. Since both  
3 Defendants have easily identified which policies have been altered, their claims that BBC’s  
4 complaint is uncertain for that reason are meritless.

5 They also offer no case for the proposition that BBC was obligated to explicitly state on  
6 the face of its Second Amended Complaint which policies it challenges were amended. By  
7 contrast, Code of Civil Procedure Section 425.10(a)(1) requires only “[a] statement of the facts  
8 constituting the cause of action, in ordinary and concise language.” See *Bandini Estate Co. v.*  
9 *Payne*, 10 Cal. App. 2d 623, 628 (1935) (“The general rules of pleading apply also to *mandamus*  
10 proceedings.”). BBC has done that. Moreover, when BBC filed its Motion for Leave to File Its  
11 Second Amended Complaint, it described in great detail exactly which lines and paragraphs the  
12 amendments to the complaint altered, pursuant to Rule of Court 3.1324(a)(2)-(3).<sup>9</sup> Defendants  
13 were therefore on notice of exactly which parts of the complaint changed. As a result, the  
14 defendants assertion that BBC’s complaint is uncertain is meritless.

15 V

16 **THE PETITION DOES NOT SEEK TO REVIVE**  
17 **CLAIMS AGAINST DISMISSED DEFENDANTS**

18 The City wrongly accuses BBC of seeking to revive claims against parties who were long  
19 ago dismissed from this action. BBC’s complaint—as the City recognizes—explicitly recites the  
20 fact that certain members of the City Council and the City Manager were originally sued but  
21 subsequently dismissed with prejudice. SAC ¶¶ 5-6. The City cites to no case for the proposition  
22 that including the names of previously dismissed defendants on the face of an amended  
23 complaint—where that complaint explicitly recognizes the dismissal of those parties—is grounds  
24 for sustaining a demurrer.

25 ///

26 ///

27 \_\_\_\_\_  
28 <sup>9</sup> See Motion for Leave to File SAC, RJN, Exh. 4.

1 **CONCLUSION**

2 Neither the Commission, nor the City, has identified any valid legal grounds for sustaining  
3 their demurrers. Their continuing insistence that BBC's case is fundamentally flawed because of  
4 litigation decisions made in its prior, now concluded case against the Commission, conflicts with  
5 this Court's demurrer ruling in the *Homeowner's Association* case. Rather than follow the  
6 Defendants down that rabbit hole, BBC urges this Court to overrule the demurrers so that BBC  
7 may finally obtain an adjudication on the merits of its claims.

8 DATED: February 13, 2015.

9 Respectfully submitted,

10 JAMES S. BURLING  
11 JENNIFER F. THOMPSON  
12 JONATHAN C. CORN  
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14 By  \_\_\_\_\_  
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**DECLARATION OF SERVICE**

I, Tawnda Elling, 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 February 13, 2015, true copies of PETITIONER BEACH & BLUFF CONSERVANCY'S OPPOSITION TO THE CITY OF SOLANA BEACH'S DEMURRER AND TO THE CALIFORNIA COASTAL COMMISSION'S DEMURRER were e-mailed and placed in envelopes addressed to:

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

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 13th day of February, 2015, at Sacramento, California.

  
TAWNDA ELLING