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California Coastal Commission

**No Fee Pursuant to Government
Code Section 6103**

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN DIEGO
11
12

13 **BEACH & BLUFF CONSERVANCY,**

14 Plaintiff and Petitioner,

15 v.

16 **CITY OF SOLANA BEACH; CITY**
17 **COUNCIL OF THE CITY OF SOLANA**
18 **BEACH, COUNCIL MEMBERS MIKE**
19 **NICHOLS, THOMAS M. CAMPBELL,**
20 **LESA HEEBNER, DAVID A. ZITO and**
21 **PETER ZAHN, in their official capacities;**
22 **CITY MANAGER DAVID OTT, in his**
23 **official capacity, and DOES 1 through 50,**
24 **inclusive,**

25 Defendants and
26 Respondents,

27 **CALIFORNIA COASTAL COMMISSION,**
28 **a state agency,**

Intervenor,

Case No. 37-2013-00046561-CU-WM-NC

**CALIFORNIA COASTAL
COMMISSION'S REPLY IN SUPPORT
OF DEMURRER TO SECOND
AMENDED PETITION; OBJECTION TO
EXHIBIT 3 IN PETITIONER'S
REQUEST FOR JUDICIAL NOTICE**

Date: February 27, 2015

Time: 1:30 p.m.

Dept: N-31

Judge: The Honorable Timothy M.
Casserly

Trial Date: not set

Action Filed: April 26, 2013

1 only be imposed at the permit stage. The mere certification of an LUP policy does not give rise
2 to an unconstitutional condition challenge. For all of these reasons, the Commission requests that
3 the Court sustain its demurrer.

4 The Commission also object to Exhibit 3 in Petitioner's Request for Judicial Notice.
5 Petitioner has failed to provide any evidentiary support – documentary or testimonial – to support
6 Exhibit 3. Therefore judicial notice should be denied.

7 ARGUMENT

8 I. PETITIONER'S CHALLENGE TO THE LUP IS TIME-BARRED.

9 A. Petitioner timely challenged the Commission's LUP certification but failed 10 to name the City; Petitioner cannot now resurrect its challenge to the City's LUP.

11 Petitioner acknowledges that it is now attempting to challenge the original LUP.
12 (Opposition to Demurrer, p. 1, lines 1-3.) That challenge is time-barred. The Commission's
13 action certifying the LUP was final on June 12, 2013. (City's Request for Judicial Notice, Exh. 1,
14 p. 2.) Any challenge to that certification had to have been filed within 60 days and thus by
15 August 13, 2013. (Pub. Resources Code § 30801.) Petitioner timely sued the Commission over
16 its certification of the LUP but failed to timely name the City. This Court sustained the
17 Commission's demurrer without leave to amend. Petitioner appealed but the appeal was
18 dismissed. Under any scenario, Petitioner's facial challenge to the underlying LUP is time-barred.

19 B. Absent a timely challenge to the Commission's certification that the LUP is 20 consistent with the Coastal Act, the LUP cannot be collaterally attacked in a lawsuit against the City alone.

21 Petitioner fundamentally misunderstands the Coastal Act process and the Commission's
22 role in that process. The Commission's action in certifying an LUP is quasi-judicial. (*Yost v.*
23 *Thomas* (1984) 36 Cal.3d 561, 572.) The Commission determines whether the LUP meets the
24 minimum standards of the Coastal Act. (*Ibid.*) It bears remembering that LCPs are not solely a
25 matter of local law but embody state policy. (*Pacific Palisades Bowl Mobile Estates, LLC v. City*
26 *of Los Angeles* (2012) 55 Cal.4th 783, 794, citing *Charles A. Pratt Construction Co. v. California*
27 *Coastal Commission* (2008) 162 Cal.App.4th 1068, 1075.) A fundamental purpose of the Coastal

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1 Act is to ensure that state policies prevail over the concerns of local government. (*Pacific*
2 *Palisades Bowl Mobile Estates, LLC v. City of Los Angeles, supra*, 55 Cal.4th at p. 794.)

3 The Court of Appeal recently summarized the Coastal Act LCP process in *Hagopian v.*
4 *California Coastal Commission* (2014) 223 Cal.App.4th 349, 362, 363:

5 The Coastal Act “[e]ncourage[s] state and local initiatives and cooperation in
6 preparing procedures to implement coordinated planning and development ... in the
7 coastal zone.” (§ 30001.5, subd. (e).) Toward that end, the Coastal Act requires each
8 local government lying within a coastal zone to “prepare a local coastal program for
9 that portion of the coastal zone within its jurisdiction.” (§ 30500, subd. (a).) (The
10 parties and case law abbreviate “local coastal program” as “LCP.”) A local coastal
11 program comprises “a local government’s (a) land use plans, (b) zoning ordinances, (c)
12 zoning district maps, and (d) within sensitive coastal resources areas, other
13 implementing actions, which, when taken together, meet the requirements of, and
14 implement the provisions and policies of, this division at the local level.” (§ 30108.6.)
15 (The parties and case law abbreviate land use plan or program as LUP and local
16 implementation plan as LIP.) “ ‘Land use plan’ means the relevant portions of a local
17 government’s general plan, or local coastal element which are sufficiently detailed to
18 indicate the kinds, location, and intensity of land uses, the applicable resource
19 protection and development policies and, where necessary, a listing of implementing
20 actions.” (§ 30108.5.)

21 The Commission reviews a proposed local coastal program to determine
22 whether it comports with the policies of the Coastal Act. (§§ 30500–30522.) After
23 such review, the Commission may approve or disapprove the program. (*City of Chula*
24 *Vista v. Superior Court* (1982) 133 Cal.App.3d 472, 488, 183 Cal.Rptr. 909.) The
25 Commission may approve only a portion of the program, for example the land use
26 portion, but reject the implementation portion. (§§ 30511, subd. (b), 30513.) Once the
27 Commission approves both the land use and implementation portions of a local
28 coastal program, the program is certified in full, and development permitting
authority passes to the local government. (§§ 30519, subd. (a), 30600, subd. (d).)

19 If the Commission determines not to certify an LUP, it must provide a written explanation and
20 may suggest modifications which, if adopted by the local government, shall cause the LUP to be
21 deemed certified upon examination of the executive director. (Pub. Resources Code, § 30512,
22 subd. (b).) Local government may elect to meet the Commission’s refusal of certification in a
23 manner other than as suggested by the Commission and may resubmit the LUP. (*Ibid.*)
24 Additionally, if the local government requests that the Commission not recommend or suggest
25 modifications, the Commission shall refuse certification with the required findings only. (*Ibid.*)
26 Thus, as the Coastal Act requires, it is ultimately the local government that determines the precise
27 content of its LUP, not the Commission. (Pub. Resources Code, § 30512.2, subd. (a).)

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1 Here, the City did not ask the Commission to refrain from suggesting modifications.
2 Instead, the City accepted the Commission’s suggested modifications. The City’s LUP was thus
3 deemed certified when the executive director reported the City’s action to the Commission and
4 the Commission concurred on June 12, 2013. The fact that the Commission suggested
5 modifications did not convert the Commission’s quasi-judicial action to a quasi-legislative one,
6 despite Petitioners’ allegations to the contrary. (Second Amended Petition, ¶s 29, 36, 42, 48, 54.)
7 The City ultimately decided what language and policies to include in its LUP, and the
8 Commission determined whether those policies met the requirements of the Coastal Act – a
9 fundamentally quasi-judicial act. (*Yost v. Thomas, supra*, 36 Cal. 3d at p. 572 [“The Commission
10 performs a judicial function when it reviews a local government’s LCP - it determines whether the
11 LCP meets the minimum standards of the act.”]). Petitioners’ reliance on *Pacific Legal*
12 *Foundation v. California Coastal Commission* (1982) 33 Cal.3d 158 is misplaced. In that case,
13 the court held that the Commission’s adoption of administrative regulations is a quasi-legislative
14 act, but it did not consider, much less overturn, its holding in *Yost* that an entirely different type of
15 Commission action, its review of an LCP, is quasi-judicial. (*Id.* at p. 168.)

16 Because Petitioner timely-challenged the Commission’s certification but failed to timely
17 name the City resulting in dismissal of his case, the Commission’s finding that the LUP as
18 modified is consistent with the Coastal Act is final and cannot now be collaterally attacked. (Pub.
19 Resources Code, § 30801 [challenge to any Commission decision or action must be filed within
20 60 days]; *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 768; *Serra Canyon Company*
21 *LTD v. California Coastal Commission* (2004) 120 Cal.App.4th 663, 666-668; *Ojavan Investors,*
22 *Inc. v. California Coastal Commission* (1994) 26 Cal.App.4th 516, 524-525; *California Coastal*
23 *Commission v. Superior Court (Ham)* (1989) 210 Cal.App.3d 1488, 1501.) While *Serra Canyon,*
24 *Ojavan* and *Ham* involved Commission permit decisions, there is no different statute of
25 limitations to challenge an LUP, hence the reasoning in those cases applies here. Having failed to
26 timely challenge the Commission’s certification of the LUP, Petitioners are barred from bringing
27 a facial challenge to the LUP in this case.

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1 **C. The Commission intervened to raise the indispensable party argument.**

2 The Commission filed its complaint in intervention expressly arguing that it was a
3 necessary and indispensable party to any challenge to its certification of the LUP. By intervening,
4 the Commission did not waive that argument. The Commission's intervention did not cure
5 Petitioner's failure to timely name the Commission as a party in this case.

6 **II. UNCONSTITUTIONAL CONDITIONS CLAIMS REGARDING THE LUPA ARE UNRIPE.**

7 Petitioner claims the LUPA policies would result in unconstitutional conditions. (Second
8 Amended Complaint, Fourth and Seventh Causes of Action.) The Fourth Cause of Action
9 challenges Policy 4.19 which did not change and thus cannot now be challenged. But even if it
10 could be challenged, Petitioner's claims are premature. Takings claims under the Coastal Act are
11 not ripe until the permit stage. As the Court of Appeal held in *Sierra Club v. California Coastal*
12 *Commission* (1993) 12 Cal.App.4th 602, 618:

13 [Public Resources Code] section 30010 speaks of permit-stage actions, not LUP or
14 LCP approvals. This is consonant with the judicial view that takings decisions must
15 await as-applied challenges and are usually not ripe until the permit stage. "[I]f a
16 State provides an adequate procedure for seeking just compensation, the property
17 owner cannot claim a violation of the Just Compensation Clause until it has used the
18 procedure and been denied just compensation." (*Williamson Planning Comm'n v.*
19 *Hamilton Bank, supra*, 473 U.S. 172, 195, 105 S.Ct. 3108, 3121; see also *First*
20 *Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 312, fn. 6, 107 S.Ct.
21 2378, 2384 fn. 6, 96 L.Ed.2d 250.) Both the over-regulation and just-compensation
22 components of a regulatory taking claim generally require final administrative action
23 as to specific land. (*McDonald, Sommer & Frates v. Yolo County* (1986) 477 U.S.
24 340, 348-350, 106 S.Ct. 2561, 2565-67, 91 L.Ed.2d 285.) If vague, anticipatory
25 takings concerns guided ESHA determinations at the LUP-approval stage, then
26 sections 30107.5 and 30240 might never have force.

27 The Court of Appeal in *Gherini v. California Coastal Commission* (1988) 204 Cal.App.3d 699,
28 714, also found inverse condemnation claims were not ripe where the Commission had not yet
29 certified an LUP, much less applied it to proposed development. (See also, *Calprop Corp. v. City*
30 *of San Diego* (2000) 77 Cal.App.4th 582, 586; *Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309,
31 325; *Milagra Ridge Partners, Ltd. v. City of Pacifica* (1998) 62 Cal.App.4th 108, 117.)

32 Petitioner's reliance on *Koontz v. St. Johns River Water Mgmt. Dist.* (2013) 133 S.Ct. 2586
33 is misplaced. In *Koontz*, the Supreme Court extended the requirements for nexus and rough
34 proportionality between a proposed development's impacts and government-imposed conditions

1 to demands for payment of money as well as dedication of land. (*Id.* at pp. 2598-2602.) The
2 unconstitutional conditions doctrine applies only when the government seeks to pressure property
3 owners to accept an uncompensated taking of their property for public use. (*Id.* at p. 2594.) The
4 doctrine protects the Fifth Amendment right to just compensation for property the government
5 takes when owners apply for land use permits. (*Ibid; accord, Powell v. County of Humboldt*
6 (2014) 222 Cal.App.4th 1424, 1437-1441.) And where, as here, the Commission has approved
7 only an LUP with no implementing zoning ordinances or other implementation measures and no
8 permit approvals applying the LUP, it cannot be said with certainty that an uncompensated taking
9 will ever occur. Such claims are simply not yet ripe.

10 The cases Petitioner cites in support of the unconstitutional conditions argument are
11 inapplicable here. Petitioner seeks to challenge Policy 4.19 as unconstitutional. (Opposition, p.
12 11.) However, Policy 4.19 was part of the LUP and was not amended in the LUPA. (City's
13 Request for Judicial Notice, Exh. 3, p. 4.) Any facial challenge to Policy 4.19 is now time-barred.

14 **III. COMMISSION ACTIONS CAN ONLY BE CHALLENGED IN ADMINISTRATIVE**
15 **MANDATE; TRADITIONAL MANDATE AND DECLARATORY RELIEF ARE**
16 **UNAVAILABLE.**

17 Petitioner contends that the Commission's actions were quasi-legislative and may be
18 challenged in traditional mandate and declaratory relief. Not so. As explained above, the
19 Commission's action in certifying an LUP is quasi-judicial and thus the sole means of
20 challenging the Commission's action is by way of administrative mandamus. Public Resources
21 Code section 30801 "gives anyone who appears at a public hearing or informs the Commission of
22 concerns the right to judicial review by filing a petition for writ of mandate pursuant to Code of
23 Civil Procedure section 1094.5." (*Ocean Harbor House Homeowners' Ass'n v. California*
24 *Coastal Commission* (2008) 163 Cal.App.4th 215, 226; *La Costa Homeowners' Ass'n v.*
25 *California Coastal Commission* (2002) 101 Cal.App.4th 804, 814.) This section does not apply
26 solely to permit actions, as Petitioner claims (without support). Public Resources Code section
27 30801 applies to "any decision or action" of the Commission. By its very terms, the section is not
28 limited to a single type of Commission decision. Declaratory relief is not available to review a
Commission decision. (*Walter H. Leimert Co. v. California Coastal Commission* (1983) 149

1 Cal.App.3d 222, 230-231.) Traditional mandate is also unavailable to review the Commission's
2 action on the LUPA. (*City of Chula Vista v. Superior Court* (1982) 133 Cal.App.3d 472, 48.)

3 Petitioner mistakenly argues that it is entitled to declaratory relief pursuant to Public
4 Resources Code sections 30800 and 30803. Public Resources Code section 30800 provides that
5 the provisions of Chapter 9 regarding judicial review, enforcement and penalties "shall be in
6 addition to any other remedies available at law." That provision simply recognizes that if there
7 are other remedies regarding violations, they are not foreclosed. For example, if a citizen sues for
8 illegal grading resulting in a loss of subjacent support giving rise to a tort claim against the
9 alleged violator, the tort claim would not be precluded. However, under established law, any
10 claim against the Commission, for example for inverse condemnation, can only be brought if a
11 petition for writ of mandate is timely filed challenging the Commission's decision. (*Hensler v.*
12 *City of Glendale* (1994) 8 Cal.4th 1, 13.)

13 Public Resources Code section 30803 provides in relevant part: "[a]ny person may
14 maintain an action for declaratory and equitable relief to restrain any violation of this division, of
15 a cease and desist order issued pursuant to Section 30809 or 30810, or of a restoration order
16 issued pursuant to Section 30811." (Pub. Resources Code, § 30803(a).) Section 30803 embodies
17 the equitable enforcement tool which the Commission, or members of the public, may use against
18 landowners who fail to obtain a permit before developing within the coastal zone or who obtain a
19 permit but violate the permit's conditions. (See, *California Coastal Com. v. Tahmassebi* (1998)
20 69 Cal.App.4th 255, 259 ["Under [section 30803 of] the Public Resources Code, the Commission
21 may bring actions in the Superior Court for injunctive and declaratory relief . . . for violations of
22 the permit requirements of the Coastal Act.].") However, because a Commission action on an
23 LUP or an LUP amendment is not a "violation" of the Coastal Act, such action is not subject to
24 declaratory relief pursuant to Public Resources Code section 30803. In a challenge to a decision
25 by the Commission's predecessor under the earlier version of the Coastal Act, the Court of
26 Appeal described the distinction between an action to restrain a threatened violation of the act and
27 an action for judicial review of Commission decisions, observing:

28 ///

1 The purpose of the lawsuit was to review the administrative actions of both the
2 regional and state coastal commissions concerning the permits issued by the regional
3 commission to build 24 individual homes. This is not an action for declaratory or
4 equitable relief to restrain a violation of the Coastal Act under former section 27425
5 [now 30803]. It is not an action to compel the regional or state commission to
6 perform a specific act required by law. Petitioners are seeking to have the trial court
7 review administrative actions with respect to the commission's alleged abuse of
8 discretion.

9
10 (*Venice Canals Homeowners v. Superior Court* (1977) 72 Cal.App.3d 675, 681.)

11 Petitioner cannot challenge the Commission's approval of the LUPA by way of declaratory
12 relief or in traditional mandate. The Commission's demurrer to the declaratory relief and
13 traditional mandate claims should be denied without leave to amend.

14 **IV. THE COURT SHOULD DECLINE TO JUDICIALLY NOTICE EXHIBIT 3.**

15 The Commission only objects to Exhibit 3 in Petitioners' Request for Judicial Notice.
16 Exhibit 3 is a chart of events; however, Petitioner has failed to provide any evidence –
17 documentary or testimonial – in support of the chart. Therefore, the Court should decline to take
18 judicial notice of Exhibit 3.

19 **CONCLUSION**

20 For the foregoing reasons, the Commission requests that the Court sustain its demurrer
21 without leave to amend as to the claims for declaratory relief and traditional mandate, that the
22 Court sustain its demurrer without leave to amend as to claims regarding the original LUP and
23 that the Court allow leave to amend to eliminate the confusion resulting from Petitioners'
24 conflation of the LUP and LUPA policies.

25 Dated: February 20, 2015

Respectfully Submitted,

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Attorney General of California



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Supervising Deputy Attorney General
Attorneys for Intervenor
California Coastal Commission

DECLARATION OF SERVICE BY E-MAIL and U.S. Mail

Case Name: **Beach & Bluff Conservancy v. City of Solana Beach**
No.: **37-2013-00046561-CU-WM-NC**

I declare:

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

On February 20, 2015, I served the attached **CALIFORNIA COASTAL COMMISSION'S REPLY IN SUPPORT OF DEMURRER TO SECOND AMENDED PETITION; OBJECTION TO EXHIBIT 3 IN PETITIONER'S REQUEST FOR JUDICIAL NOTICE** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 20, 2015, at San Diego, California.

C. Valdivia
Declarant



Signature