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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, NORTH COUNTY DIVISION

BEACH & BLUFF CONSERVANCY,

Plaintiff and Petitioner,

v.

CITY OF SOLANA BEACH; et al; and DOES 1 through 50, inclusive,

Defendant and Respondent.

CALIFORNIA COASTAL COMMISSION,

Defendant-Intervenor.

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

CITY OF SOLANA BEACH'S NOTICE OF HEARING ON DEMURRER AND DEMURRER TO SECOND AMENDED COMPLAINT FOR DECLARATORY RELIEF AND PETITION FOR WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[City's Request for Judicial Notice Filed Concurrently]

[IMAGED FILE]

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

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 27, 2015, at 1:30 p.m., in Department N-31 of the North County Division of the San Diego Superior Court located at 325 S. Melrose Drive, Vista, California, the Court will hear the Demurrer of the City of Solana Beach ("City") to the Second Amended Complaint for Declaratory Relief and Petition for Writ of Mandate ("SAC") filed by Plaintiff and Petitioner Beach and Bluff Conservancy ("B&BC") in this action. The demurrer is based on this notice and demurrer, the memorandum of points and authorities in support of the demurrer, the request for judicial notice and lodging of exhibits in support of the demurrer, the pleadings on file in this case and such argument as the Court may hear.

DATED: November 3, 2014

RICHARDS, WATSON & GERSHON
STEVEN H. KAUFMANN
GINETTA L. GIOVINCO

By: _____
Steven H. Kaufmann
Attorneys for Defendant and Respondent
CITY OF SOLANA BEACH

DEMURRER

The City of Solana Beach ("City") demurs to the Second Amended Complaint for Declaratory Relief and Petition for Writ of Mandate ("SAC") filed by Plaintiff and Petitioner Beach and Bluff Conservancy ("B&BC") on the following grounds:

1. The SAC, in its entirety, fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10 (e).) Declaratory relief and traditional mandate (Code Civ. Proc., § 1085) are unavailable to challenge a quasi-judicial decision of the Coastal Commission, including the Commission's decision to certify the Solana Beach Land Use Plan ("LUP") and amendments thereto. The sole cause of action available to challenge a Commission decision on an LUP or an amendment to an LUP is administrative mandamus, pursuant to Public Resources Code section 30801 and Code of Civil Procedure section 1094.5.

2. The Fourth and Seventh Causes of Action of the SAC fail to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10 (e).) A takings claim is not permissible in a challenge to a decision to certify the LUP amendment here. A takings claim may only be raised at the permit stage. Only then would such a claim be ripe for judicial review. Thus, the Fourth and Seventh Causes of Action of the SAC fail to state a cause of action for "unconstitutional conditions."

3. The First, Third, Fourth, and Fifth Causes of Action of the SAC fail to state facts sufficient to constitute a cause of action. (Code Civ. Proc. § 430.10 (e).) The First and Third through Fifth Causes of Action attempt to again challenge the original policies of the certified LUP, and therefore are barred by res judicata. The Court previously sustained a demurrer to the B&BC's challenge to the Coastal Commission decision to certify the LUP without leave to amend in *Beach and Bluff Conservancy v. California Coastal Com.*, SDSC No. 7-2012-00053289-CU-WM-NC and *Steinberg v. California Coastal Com.*, SDSC No. 37-2012-00053290-CU-WM-NC. The appeals by the B&BC and Steinberg from the Court's order dismissing both actions were subsequently dismissed, and that lawsuit and the

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certified LUP and policies contained therein are now final and immune from a renewed or collateral attack in this lawsuit.

4. The SAC, in its entirety, is uncertain because it conflates LUP policies which cannot now be challenged and thus are conclusively valid with subsequent amendments to the LUP the Coastal Commission recently certified. (Code Civ. Proc. § 430.10 (e).)

5. There is a defect or misjoinder of parties and the SAC fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10 (d) and (e).) The B&BC's original complaint and petition named not only the City of Solana Beach, but the individual Councilmembers and the City Manager in their official capacities. Thereafter, the B&BC dismissed the Councilmembers and City Manager with prejudice, and the SAC alleges that in fact to be the case. The SAC, however, again names the Councilmembers and City Manager. The Councilmembers and City Manager are not proper or necessary parties to this lawsuit and were previously dismissed with prejudice from the suit, and therefore cannot be sued again in this case.

Therefore, the City of Solana Beach respectfully requests that the Court sustain its demurrer to the SAC filed by filed by Plaintiff and Petitioner Beach and Bluff Conservancy ("B&BC") in its entirety without leave to amend.

DATED: November 3, 2014

RICHARDS, WATSON & GERSHON
STEVEN H. KAUFMANN
GINETTA L. GIOVINCO

By: _____
Steven H. Kaufmann
Attorneys for Defendant and Respondent
CITY OF SOLANA BEACH

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I. INTRODUCTION

In November 2013, this Court sustained without leave to amend the Coastal Commission's demurrers to the initial lawsuits filed by Plaintiff and Petitioner Beach and Bluff Conservancy ("B&BC") and Joseph Steinberg ("Steinberg") challenging the Commission's 2012 certification of the City of Solana Beach Land Use Plan ("LUP"). The Court ruled there was a fundamental procedural defect – failure to timely name the City of Solana Beach ("City") as a necessary and indispensable party. The B&BC and Steinberg appealed, but the appeals were subsequently dismissed. As a consequence, the LUP and the policies certified therein are thus final and can no longer be challenged. More recently, the Commission certified certain amendments to the certified LUP ("LUPA"). With leave of court, the B&BC, Steinberg, and several homeowner associations ("HOAs") have now filed second amended complaints/petitions in the separate, related actions which challenge not only the LUPA decision, but also attempt to resurrect the failed challenge to the 2012 certification of the LUP. Each of the amended pleadings these parties have filed suffers from essentially the same procedural defects, and therefore the City has filed similar demurrers in each of the three cases. [1]

Specifically, the City has demurred to the Second Amended Complaint/Petition ("SAC") filed by the B&BC for multiple reasons. First, the SAC fails to state a cause of action for declaratory relief and traditional mandate. A challenge to an LUP or amendments to an LUP ("LUPA") is available only in administrative mandamus. (Pub. Res. Code, § 30801; *San Mateo Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 558.) Second, the SAC (fourth and seventh causes of action) fail to state a cause of action for a taking based on "unconstitutional conditions" because a takings claim may not be made in a challenge to an LUP or LUP; it can only be made at the permit

[1] The Coastal Commission has separately demurred to the SAC filed by the B&BC, and the City joins in that demurrer. Both demurrers are set for the same day, February 27, 2015.

stage. (*San Mateo Coastal Landowners' Assn., supra,* 38 Cal.App.4th at 549; *Sierra Club v. California Coastal Com.* (1993) 12 Cal.App.4th 602, 618.) Third, several causes of action (the first, third, fourth, and fifth causes of action) are barred by res judicata because they purport to challenge original, certified LUP policies that were unaffected and unchanged by the LUPA. (*Citizens for Responsible Development v. City of West Hollywood* (1995) 39 Cal.App.4th 490, 505; *Patrick Media Group, Inc. v. California Coastal Com.* (1992) 9 Cal.App.4th 592, 607-608.) Fourth, the SAC (first, third, fourth, and fifth causes of action) is also subject to demurrer for uncertainty because it conflates those original, certified LUP policies, which cannot now be challenged, with the amendments to the LUP that the Commission more recently certified. Finally, there is both a defect or misjoinder of parties and the SAC fails to state facts as to the individual Solana Beach Councilmembers and the City Manager, all of whom the B&BC previously named and then dismissed from this action with prejudice.

II. FACTUAL AND PROCEDURAL BACKGROUND

For purposes of this demurrer, the relevant procedural starting point is May 2012, when the Beach and Bluff Conservancy ("B&BC") and Joseph Steinberg ("Steinberg") filed separate actions challenging the Commission's March 2012 certification of the City's LUP. (*Beach and Bluff Conservancy v. California Coastal Com.*, SDSC No. 7-2012-00053289-CU-WM-NC; *Steinberg v. California Coastal Com.*, SDSC No. 37-2012-00053290-CU-WM-NC.) This Court then sustained the Commission's demurrers to both petitions/complaints without leave to amend, ruling that failure to name the City as a necessary and indispensable party with the 60-day statute of limitations in the Coastal Act was fatal to both lawsuits. (City's Request for Judicial Notice ("RJN"), Exh. 1.) Steinberg and B&BC appealed this Court's ruling. The Court of Appeal dismissed Steinberg's appeal for failure to file an opening brief. B&BC thereafter voluntarily dismissed its appeal. (City's RJN, Exh. 2.) This Court's decision is now final. The consequence is that the Commission's decision to certify the City's LUP and the coastal policies set forth in the certified LUP can no longer be challenged.

The SAC is purposely murky about the nature the challenge B&BC now seeks to initiate. It pleads that on March 7, 2012, the Commission denied certification of the City's LUP and instead certified a different LUP that contained substantial modifications demanded by the Commission's staff. (SAC, ¶ 16.) It makes no reference to the Court's ruling on its challenge to the LUP or the finality of that ruling. It alleges that on February 2013, the Solana Beach City Council adopted the LUP. The City did not "adopt" the LUP, but rather, as required by the Coastal Act (§ 30511(d)) and the Commission's regulations (14 Cal. Code Regs., § 13544.5), the City "adopted" the Commission's suggested modifications to the LUP.[2] (SAC, ¶ 18.) The SAC omits that on June 12, 2013, the Commission's Executive Director reported the City Council's approval of the suggested modifications to the Commission, in accordance with the Commission's regulations (14 Cal. Code Regs., §§ 13537(d), 13544.5). At that time, the City's LUP and the Commission's action to certify it became final. (14 Cal. Code Regs., §§ 13537(d).)

On May 22, 2013, the Solana Beach City Council adopted amendments to the LUP (the "LUPA"), which the City then submitted to the Commission. (SAC, ¶ 19.) On August 20, 2013, B&BC filed its first amended complaint/petition challenging the City's proposed amendments. On January 9, 2014, the Commission approved the LUPA, but with suggested modifications to the LUPA. (SAC, ¶ 20.) On June 11, 2014, the City Council, in turn, accepted the Commission's suggested modifications. (SAC, ¶ 21.) On August 13, 2014, the Commission's Executive Director reported the City Council's approval of the suggested modifications to the Commission, in accordance with the Commission's regulations (14 Cal. Code Regs., §§ 13537(d), 13544.5). At that time, the City's LUPA and

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[2] In seeking leave to file the SACs, the joint motion filed by the B&BC, Steinberg, and the HOAs explained that the City Council then instructed its staff to prepare *amendments* to the LUP in order to modify some of the key LUP provisions relating to blufftop development and shoreline protection, "the very provisions that Petitioners are deeply concerned about." (Jt. Motion, Memo, p. 2, ls 8-9.) They stated: "No one could know at the time which policies would ultimately be amended (or how), so to protect their rights, Petitioners sued the City in April 2013 . . . ." (*Id.*, ls 9-13.)

the Commission's action to certify it became final. (14 Cal. Code Regs., §§ 13537(d), 13555.)

III. THE SAC, IN ITS ENTIRETY, FAILS TO STATE A CAUSE OF ACTION FOR DECLARATORY RELIEF OR TRADITIONAL MANDATE

The SAC seeks, by its prayer, declaratory relief and a writ of traditional mandate under CCP sections 1060 (declaratory relief) and 1085 (traditional mandate). (SAC, caption and p. 13.) Each cause of action, however, pleads only a declaratory relief cause of action. Regardless, neither declaratory relief nor traditional mandate, are available to challenge the Commission's decision.

It is well established that declaratory relief is not available to challenge a decision of the Coastal Commission. (*Leimert v. California Coastal Com.* (1983) 149 Cal.App.3d 222, 230-231.) Likewise, a Commission decision cannot be challenged in traditional mandate. (*State of California v. Superior Court* (1974) 12 Cal.3d 237, 247-249; *Sierra Club v. Cal. Dept. of Parks and Recreation* (2012) 202 Cal.App.4th 735, 740-741.) The sole and proper remedy for judicial review of a Commission quasi-judicial decision, and specifically a challenge to the approval of a local coastal program or land use plan, is an action in administrative mandamus, pursuant to Code of Civil Procedure section 1094.5. (*San Mateo Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 558; *Rossco Holdings, Inc. v. State of California* (1989) 212 Cal.App.3d 642, 654.) This follows from Public Resources Code Section 30801, which provides: "Any aggrieved person shall have a right to judicial review of any decision or action of the commission by filing a petition for a writ of mandate in accordance with Section 1094.5 of the Code of Civil Procedure, within 60 days after the decision or action has become final."

Thus, neither declaratory relief nor traditional mandate is an available remedy to challenge the Commission's decision to certify a Local Coastal Program LUP or LUPA. In *San Mateo Coastal Landowners' Assn. v. County of San Mateo, supra,* landowners and nonprofit organizations filed actions in traditional (not administrative) mandate and for declaratory relief challenging a Coastal Commission decision to certify a local coastal

program adopted as a local initiative measure. The Court rejected the challenge, explaining:

> "This claim is clearly a 'backdoor' challenge through traditional mandate and declaratory relief to the Commission's certification of Measure A as consistent with the Coastal Act. As noted before (fn. 11), the proper method for such challenge is through bringing of a petition for a writ of administrative mandamus pursuant to Code of Civil Procedure section 1094.5. [Citations.] It is established the Commission acts in a quasi-judicial role when it reviews a LCP or LCP amendment for consistency with the Coastal Act. [Citations.] Consequently, challenge to the Commission's actions in LCP certification decisions is via Code of Civil Procedure section 1094.5."

(38 Cal.App.3d at 558.)

The SAC therefore plainly fails to state any legally cognizable cause of action, either for declaratory relief or traditional mandate.

IV. THE FOURTH AND SEVENTH CAUSES OF ACTION FAIL TO STATE A CAUSE OF ACTION FOR AN UNCONSTITUTIONAL TAKING

The Fourth and Seventh Causes of Action of the SAC allege that LUP Policies 2.60.5 and 4.19 all violate what they term as the "unconstitutional conditions doctrine" as a "taking" in violation of Fifth and Fourteenth Amendments to the U.S. Constitutions. The allegation is that certain policies impose conditions which, on their face, bear no "essential nexus" or "rough proportionality" to the present impact of the development proposed. (SAC, ¶ 50.b) It is well settled, however, that a takings claim may not be made, as proposed here, in a challenge to certification of a land use plan. The courts have long held that a takings claim must be made, if at all, at the permit stage.

In *Sierra Club v. California Coastal Com.* (1993) 12 Cal.App.4th 602, the Sierra Club challenged Coastal Commission approval and certification of a county's land use plan, contending the Commission was required to confer protected status for pygmy forest habitat as protected environmentally sensitive habitat area ("ESHA"). The trial court agreed. On

appeal, the county contended that the Commission was entitled to balance concerns that granting ESHA status might constitute a prohibited taking, citing Coastal Act Section 30010, which states: "The Legislature hereby finds and declares that this division [the Coastal Act] is not intended, and shall not be construed as authorizing the commission . . . *to exercise [its] power to grant or deny a permit* in a manner which will take or damage private property for public use, without payment of just compensation therefor." (Italics added.) The Court of Appeal rejected the argument, explaining:

> ". . . [Section 30010 speaks of permit-stage actions, not LUP or LCP approvals. This is consonant with the judicial view that takings decisions must await as-applied challenges and are usually not ripe until the permit stage."

(12 Cal.App.4th at 618.)

As noted, in *San Mateo Coastal Landowners' Assn v. County of San Mateo*, *supra*, landowners and non-profit organizations challenged a Coastal Commission decision to certify a local coastal program adopted as a local initiative measure. They argued that a policy requiring an applicant for a land division to grant the County conservation/open space or agricultural easements as a condition of approval constituted a violation of due process and a taking. The Court of Appeal held that if viewed as an "as applied" challenge, it was not ripe because no subdivision plan or application for permit or variance which been submitted or conclusively denied. (38 Cal.App.4th at 546.) The Court further held that if viewed a facial challenge (the case here):

> "Appellants have not shown that unconstitutional application of these policies by the County is unavoidable. Not only do various uses of their property remain open to appellants following application of policies 1.9a and 5.16, but section 8 of Measure A specifically provides [like Section 30010 of the Coastal Act]: 'The provisions of this ordinance shall not be applicable to the extent, but only to the extent, that they would violate the constitution or laws of the United States or the State of California.' The County has the flexibility

to avoid potentially unconstitutional application of easement requirements, should these requirements 'go too far' as specifically applied to a particular piece of property."

(*Id.* at 547.) Finally, the Court rejected the contention that the land use policies at issue there amounted to "unconstitutional conditions" (the term utilized here in the SAC). The Court explained:

"Any purported 'as applied' challenge in this case fails on ripeness grounds. The easement requirement would not arise unless and until a property owner submitted an application to divide land in the coastal zone. At that point an adjudicative decision would be made as to the appropriateness and extent of the easement requirement."

(*Id.* at 549.)

Here, the SAC makes a facial challenge to LUP Policies 2.60.5 and 4.19. A takings claim is not permissible in a challenge to a decision to certify the LUP here. It can only be raised at the permit stage. Only then would such a claim be ripe for judicial review. Thus, the Fourth and Seventh Causes of Action of the SAC fail to state a cause of cause for "unconstitutional conditions."

V. THE FIRST, THIRD, FOURTH, AND FIFTH CAUSES OF ACTION, WHICH ATTEMPT TO AGAIN CHALLENGE THE ORIGINAL POLICIES OF THE CERTIFIED LUP, ARE BARRED BY RES JUDICATA

While the SAC purports to challenge the Commission's certification of the LUPA, it also attempts to resurrect the B&BC's challenge to the original LUP and several policies unaffected by the LUPA. This is barred by res judicata.

First, in the First, Third, and Fourth Causes of Action, the B&BC purports to challenge LUP policies 4.19 (4th cause of action), 4.22 (1st cause of action), and 4.39 (3rd cause of action). These policies were not submitted to the Commission as part of the LUPA, and as the policy comparison chart attached as Exhibit 3 to the City's Request for Judicial Notice demonstrates, they were not affected or changed by the decision the SAC

now seeks to challenge.[3] As discussed below, these previously certified LUP provisions cannot now be challenged in this lawsuit.

In the Fourth Cause of Action, the B&BC challenges the sand mitigation and public recreation fees which LUP policy 4.50, together with LUP policy 4.39, authorize as a condition of a permit to construct a bluff retention device. (Steinberg SAC, ¶¶ s 46-47.) The policy comparison chart (City's RJN, Exh. 3) demonstrates that the policy language authorizing the fees was unaffected by the LUPA. The LUPA simply added language addressing how the fees, once collected, need to be expended for public access and recreation, and provided an additional option in lieu of paying the fee. The fee provision cannot now be challenged in this lawsuit.

Like the Petitioners in the related cases, the B&BC has intentionally lumped together its attempt to again challenge the original certified LUP with its challenge to the LUPA. The result is an effort to make it difficult to determine what LUPA policies the B&BC purports to challenge and whether the SAC continues to attempt to challenge now final and valid policies as certified in the original LUP.

The original certified LUP cannot now be challenged. It is settled that a quasi-administrative decision that has not been overturned through administrative mandamus, which was the case here, is "absolutely immune" from collateral attack. (*Citizens for Responsible Development v. City of West Hollywood* (1995) 39 Cal.App.4th 490, 505; *Patrick Media Group, Inc. v. California Coastal Com.* (1992) 9 Cal.App.4th 592, 607-608.) In the LCP certification context, every Commission decision on an LUP or LCP is entitled to a presumption that it was correct and that the Commission properly and regularly carried out its official obligations under the Coastal Act and applicable law. (Evid. Code, § 664; *McAllister v. California Coastal Com.* (2008) 169 Cal.App.4th 912, 913.) If the

[3] The chart provides a summary comparison (City's RJN, Exh. 3) of the LUP policies originally certified by the Commission (City's RJN, Exh. 4) and the amendments to the LUP policies that the Commission subsequently certified (City's RJN, Exh. 5).

Commission's decision is not timely or properly challenged, then the presumption is conclusive, and the decision is "absolutely immune" from collateral challenge. (*Citizens for Responsible Development, supra.*) The B&BC cannot now renew its failed challenge to the originally certified LUP policies in the now final 2012 lawsuit against the Commission. In certifying the LUPA, the Commission did not recertify the original LUP. It did nothing more than certify, with modifications, specific amendments to the certified LUP which the City subsequently proposed. (See City's RJN, Exh. 3.)

Accordingly, the First, Third, Fourth, and Fifth Causes of Action, which purport to renew a challenge to the Commission 2012 decision and to certified LUP policies 4.19, 4.22, 4.39, and 4.50 are plainly barred by res judicata. The B&BC cannot achieve a "redo" through its SAC.

VI. THE SAC IS UNCERTAIN BECAUSE IT CONFLATES LUP POLICIES WHICH CANNOT NOW BE CHALLENGED WITH SUBSEQUENT AMENDMENTS TO THE LUP.

The SAC is also uncertain because, as explained in the preceding Argument, in an effort to avoid the bar of res judicata, the SAC intentionally conflates the original certified LUP policies, the subject of the B&BC's and Steinberg's failed lawsuit against the Commission, with the subsequent amendments to the LUP that the Commission subsequently certified. Consequently, the demurrer for uncertainty also lies as to the First and Third through Fifth Causes of Action.

A demurrer for uncertainty may be used to expose the bar of res judicata. In *Powell v. Lampton* (1938) 30 Cal.App.2d 43, plaintiff sued to quiet title to money in a fund in another action, the progress of which he described in the complaint. The Court of Appeal held that might have stated a good cause of action to quiet title by a general allegation of ownership, but, since the plaintiff elected to plead the detailed facts for the purpose of identifying the fund, he was bound to do so with certainty. The Court explained: "In the present case, from the facts alleged it is apparently that title to the identical fund which is here involved, has either been determined adversely to this plaintiff, or that the previous

suit involving the same issue is now pending, in either of which cases the plaintiff cannot state a good cause of action." (*Id.* at 47.)

Here, as explained, this Court previously ruled that Steinberg's and the B&BC's prior challenge to the Commission's decision to certify the LUP was barred for failure to name the City as a necessary and indispensable party. (City's RJN, Exh. 1.) Steinberg and the B&BC appealed the Court's ruling and their appeals were subsequently dismissed, and those cases are now final. (City's RJN, Exhs. 2-3.) Accordingly, as a matter of law, the original LUP policies certified are now final and valid. They cannot be collaterally attacked or somehow disguised in a subsequent challenge following certification of the LUPA. (*Citizens for Responsible Development, supra, 39 Cal.App.4th at 505; Patrick Media Group, Inc. v. California Coastal Comm, supra* 9 Cal.App.4th at 607-608.) Exhibit 3 to the City's Request for Judicial Notice demonstrates that the originally certified LUP policies – 2.60, 4.19, 4.22, 4.40 [later renumbered 4.39], and 4.52 [later renumbered 4.50] – were not changed or otherwise affected by the LUPA, except as to policy 2.60 the changes to which simply favored the property owners. Because the SAC clearly conflates a challenge to the LUPA with a renewed challenge to original certified LUP policies which cannot now be collaterally attacked, the City's demurrer for uncertainty should be sustained as the First, Third through Fifth Causes of Action.

VII. THE SAC FAILS TO STATE A CAUSE OF ACTION AGAINST THE INDIVIDUAL COUNCILMEMBERS OR THE CITY MANAGER, WHO PETITIONER BEACH AND BLUFF CONSERVANCY PREVIOUSLY DISMISSED FROM THE ACTION WITH PREJUDICE

The SAC does not set forth any specific charging allegations as to the individual Solana Beach Councilmembers named or the Solana Beach City Manager. It is settled that incumbent members of a board are not indispensable or necessary parties to a mandamus proceeding. (*Moran v. Bd. of Medical Examiners* (1948) 32 Cal.2d 301, 314-315; *Garfield v. Board of Medical Examiners* (1950) 99 Cal.App.2d 219, 231.)

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The original complaint/petition filed in this case likewise named the individual Councilmembers and City Manager. However, on July 13, 2013, B&BC filed a Request for Dismissal with prejudice as to each of the Councilmembers and the City Manager, which the Court entered on July 18, 2003. Indeed, in Paragraphs 5 and 6 of the SAC, the B&BC alleges that these Defendants and Respondents were sued in their "official capacity in the original capacity in the original complaint, but subsequently dismissed with prejudice on July 18, 2013."

Accordingly, the previous dismissal with prejudice now bars the B&BC from attempting to resurrect the action as to those parties, and the City's demurrer should be sustained for this further reason.

VIII. CONCLUSION

For all the foregoing reasons, the City of Solana Beach respectfully requests that the Court sustain its demurrer to the Second Amended Complaint and Petition.

DATED: November 3, 2014

Respectfully submitted,

RICHARDS, WATSON & GERSHON
STEVEN H. KAUFMANN
GINETTA L. GIOVINCO

By: _____
Steven H. Kaufmann
Attorneys for Defendant and Respondent
CITY OF SOLANA BEACH

PROOF OF SERVICE

I, Mary Greer, declare:

I am a resident of the State of California and over the age of eighteen years and not a party to the within action. My business address is 355 South Grand Avenue, 40th Floor, Los Angeles, California 90071-3101. On **November 3, 2014**, I served the within document(s) described as:

CITY OF SOLANA BEACH'S NOTICE OF HEARING ON DEMURRER AND DEMURRER TO SECOND AMENDED COMPLAINT FOR DECLARATORY RELIEF AND PETITION FOR WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

on the interested parties in this action as stated below:

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[X] (BY MAIL) By placing an original of the foregoing document(s) in a sealed envelope addressed as set forth above. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on **November 3, 2014**, at Los Angeles, California.

Mary Greer
(Type or print name)

Mary Greer
(Signature)