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[EXEMPT FROM FILING FEES PURSUANT TO GOVT. CODE § 6103]

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,

Defendants and Respondents;

CALIFORNIA COASTAL COMMISSION,

Defendant-Intervenor.

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

CITY OF SOLANA BEACH'S REPLY MEMORANDUM IN SUPPORT OF DEMURRER TO SECOND AMENDED COMPLAINT FOR DECLARATORY RELIEF AND PETITION FOR WRIT OF MANDATE

[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

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I. INTRODUCTION

Petitioner's lawsuit raises two distinct challenges. First, Petitioner challenges certain Land Use Plan ("LUP") policies that the Coastal Commission conceived and required in its March 2012 approval of the City of Solana Beach LUP. This challenge constitutes an impermissible collateral attack on the City's action to accept the Commission's decision and is barred by res judicata. This Court previously rejected Petitioner's direct challenge to the Commission's LUP decision for failure to timely name the City as a party. Appeals from that ruling have been dismissed, and the Court's decision is now final. The result is the Commission's decision and required policy changes are now final, compliant with the Coastal Act, and constitutionally valid. The Second Amended Complaint and Petition ("Petition") is further flawed because the sole method to review a decision to certify an LUP is administrative mandamus, not declaratory relief or traditional mandate. And, Petitioner's claim of "unconstitutional conditions" is premature and must be raised, if at all, at the permit stage.

Petitioner comes closer to the mark in its challenge to certain more recent amendments to the LUP ("LUPA"). The Commission and City are now parties in this case, avoiding as to the LUPA the flaw that resulted in dismissal of Petitioner's initial lawsuit against the Commission over the LUP. To mask the res judicata issue, however, Petitioner has lumped together its two challenges by general reference to the "LUP," leaving the Petition uncertain.

The City therefore requests that the Court sustain its demurrer without leave to amend as to Petitioner's claims regarding the original LUP, its claims for declaratory relief and traditional mandate, and its premature claims regarding purported "unconstitutional conditions." The City further requests that the Court grant leave to amend to permit Petitioner to properly replead this case as to the LUPA alone to eliminate Petitioner's conflation of the LUP and LUPA policies.

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

The First, Third, Fourth, and Fifth Causes of Action are barred by res judicata because they constitute an impermissible collateral attack on the original Land Use Plan ("LUP") policies, which

the Commission adopted in its March 2012 approval of the City's LUP.

A. The Commission and City Must be Timely Named in An Action Challenging Policies That the Commission Conceived and Required in Approving the LUP.

As discussed at length in the Commission's Reply Brief (at pp. 2-3), Petitioner fundamentally misconceives the LUP review process. In brief, the local government submits the LUP portion of its Local Coastal Program ("LCP") to the Commission for review. The Commission exercises a quasi-judicial function by determining whether the City's submittal comports with the policies of the Coastal Act. (*Hagopian v. State of California* (2014) 223 Cal.App.4th 349, 362.) If the Commission determines not to certify an LUP, it must provide a written explanation, or findings, and, as relevant here, it may suggested modifications ("suggested modifications"), which, if adopted by the local government, cause the LUP to be deemed certified upon confirmation by the Commission's executive director. (Pub. Res. Code, § 30512(b).) The local government then has only two options: (1) accept the Commission's suggested modifications *without* change or (2) make further revisions and resubmit the LUP to the Commission to start the review process over again. (Pub. Res. Code, § 30512(b); Tit. 14, Cal. Code Regs., § 13541.) The City here opted for the former.

Despite this statutory scheme, Petitioner argues, in effect, that it may bypass judicial review of the Commission's decision and its suggested modifications to LUP policies, and instead need only sue the City for its subsequent action to accept the suggested modifications. Under the Coastal Act, the Commission (1) reviews the City's LUP submittal; (2) analyzes the submittal for consistency with the Coastal Act; (3) produces a staff report which formulates suggested modifications and provides the legal and factual justification for revisions to land use policies in written findings; (4) conducts a full public hearing and permits written and oral testimony so aggrieved parties may exhaust their administrative remedies, as legally required; and (5) makes the quasi-judicial decision which the City is left to accept without change or reject. Ignoring the Commission's foregoing statutory duties under the Coastal Act, Petitioner's thesis is that the Commission's decision is irrelevant. According to Petitioner, it can simply attack the City's action to accept the Commission's quasi-judicial determination, need not name the Commission as a party

(timely or otherwise), and can raise statutory and constitutional issues concerning the Commission's decision in its absence. This makes no sense. Petitioner's argument literally stands the Coastal Act on its head. It is precisely why the Commission intervened in this lawsuit, despite having prevailed in the prior lawsuit brought by Petitioner challenging the LUP.

Here, the Petition alleges the City submitted its draft of the LUP to the Commission for certification in October 2011, and "at its hearing 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 Commission staff." (Petition, ¶¶ 16-17.) Thereafter, the Council adopted a resolution accepting the Commission's suggested modifications. (*Id.*, ¶ 18.)

Petitioner failed to properly sue the Commission on its March 2012 decision and suggested modifications to policies in the LUP. This Court properly ruled that the action was barred because Petitioner failed to timely name the City as a party to that action within the Coastal Act's 60-day statute of limitations. (*Beach and Bluff Conservancy v. California Coastal Com.*, SDSC No. 37-2012-00053289, and *Steinberg v. California Coastal Com.*, SDSC No. 37- 2012-00053290.) Appeals from the Court's correct ruling were subsequently dismissed. The lawsuit challenging the Commission's LUP decision is now final. (City's RJN, Exhs. 1-2.)

B. Petitioner Cannot Cure Failure to Challenge the Commission's Approval of the LUP Through this Lawsuit.

Petitioner is completely dismissive of the Court's ruling, its finality, and its consequence. The ruling is now res judicata, and it bars this further lawsuit against the City, which seeks, through the "backdoor," to challenge the policies the Commission required in its quasi-judicial administrative process. Especially in the context of Commission actions, a quasi-judicial decision that is not timely challenged and has not been overturned through administrative mandamus – the situation 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.) A Commission LUP decision is presumed to be correct and to have properly applied the law (Evid. Code, § 664; *McAllister v. California Coastal Com.* (2008) 169 Cal.App.4th 912, 913), and if not properly or timely

challenged, the presumption is conclusive, and the decision is "absolutely immune" from collateral challenge. (*Citizens for Responsible Development, supra, 169 Cal.App.4th at 913.*) In this case, it means that because Petitioner failed to properly challenge the Commission's decision and the changes it required to LUP policies, those policies are now deemed proper, compliant with the Coastal Act, and constitutional. Petitioner is not entitled to a redo by suing the City.

The bar of res judicata applies even if the issue raised is one of constitutional dimension. In *California Coastal Com. v. Superior Court ("Ham")* (1989) 210 Cal.App.3d 1488, a beachfront property owner sued the Commission, alleging that a condition requiring a public access dedication amounted to a taking. The lawsuit followed the High Court's decision in *Nollan v. California Coastal Com.* (1987) 483 U.S. 825, invalidating the same type of condition as an unconstitutional taking. The *Ham* Court held that despite *Nollan*, because the landowner failed to timely challenge the Commission's decision, the decision was res judicata. (*Ham*, 210 Cal.App.3d at 1495-1500.)

Petitioner argues it is not challenging the Commission's decision on the LUP or seeking a "redo" of its failed lawsuit against the Commission, but rather is challenging the City's action to accept the Commission's decision. (BBC Opp., p. 5.) This is inaccurate. The Petition directs each claimed statutory and constitutional violation to both "Defendants" City and Commission. (*E.g.*, Petition, ¶¶ 32-33, 45-46, 51-52, 57-58.) And, as to whether declaratory relief and traditional mandate are appropriate remedies here (discussed further below), Petitioner erroneously asserts that a "section 1085 writ petition against the Commission is appropriate, since it (along with the City) co-drafted the LUP policies at issue and the Commission was acting in a 'quasi-legislative' function when doing so." (BBC Opp., p. 8.)

Petitioner additionally notes that in *Homeowner's Association of Solana Beach & Tennis Club v. City of Solana Beach,* this Court ruled that the case against the City could go forward without the Commission as a party. (BBC Opp., p. 1.) At the time, the Court's decisions in the BBC and Steinberg cases against the Commission were on appeal, and thus were not final. Thereafter, the appeals were dismissed, and the Court's ruling in those cases is now final and thus res judicata here. (City RJN, Exhs. 1-2.)

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In short, the Commission adopted the suggested modifications to LUP policies and made its record in doing so. Petitioner failed to properly challenge the Commission's decision, asserting the statutory and constitutional claims now raised here as to those LUP policies. As a matter of law, Petitioner is not entitled to a redo by directing its collateral attack on the Commission's decision at the City. Res judicata bars the First, Third, Fourth, and Fifth Causes of Action.

III. THE COMPLAINT AND PETITION FAILS TO STATE A CAUSE OF ACTION FOR DECLARATORY RELIEF OR TRADITIONAL MANDATE

Petitioner argues it was entitled to challenge the LUP and LUP amendment policies at issue in this case by way of declaratory relief and traditional mandate. It is, however, well-settled that the sole and proper remedy for judicial review of a challenge to a Commission decision approving an LCP, or the LUP component of the LCP, is an action in administrative mandamus pursuant to CCP Section 1094.5. (*San Mateo Coastal Landowners Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 558 [rejecting a challenge to a Commission decision to certify an LCP by declaratory relief and traditional mandate].) This follows from Section 30801 of the Coastal Act, which provides: "Any aggrieved person shall have a right to judicial review of *any decision or action of the Commission* by filing a writ of mandate in accordance with Section 1094.5." (Italics added.)

Petitioner argues the remedy in Section 30801 is just for challenges to "permit" conditions, not to "laws" – *i.e.*, a Commission action in the LCP context. (BBC Opp., p. 8.) That, however, is not what Section 30801 states. Section 30801 says "a right to judicial review of *any* decision or action of the Commission." (Italics added.) Case law is equally clear that when the Commission reviews an LCP and its policies for consistency with the Coastal Act, it acts in a quasi-judicial role, and that can only be challenged in an action in administrative mandamus. (*San Mateo Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 558; *City of Chula Vista v. Superior Court* (1982) 133 Cal.App.3d 472, 488.) There is no authority to the contrary. As stated in *San Mateo Coastal Landowners*:

> "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. [Citation.] Consequently, challenge to the Commission's action in LCP certification decisions is via Code of Civil Procedure, section 1094.5."(38 Cal.App.4th at 558.)

Petitioner's assertion that the Commission's involvement was "clearly 'quasi-legislative'" is, therefore, flatly wrong. (BBC Opp., p. 6, l. 21.)

Equally wrong is Petitioner's assertion, noted above, that the Commission is merely a "co-drafter" of the LUP policies and that somehow makes its role quasi-legislative. (BBC Opp., p. 8.) Rejecting the argument the Commission acts in a legislative manner when it reviews the consistency of an LCP for its conformity with the Coastal Act, the Court in *City of Chula Vista v. Superior Court*, *supra*, 133 Cal.App.3rd at 489, explained:

> ". . .The entire scheme of the [Coastal] Act provides for the initial planning to be done locally and the final approval to be done by a statewide agency with an eye to statewide policies and limitations. The function of the statewide agency would be trivial and its existence unjustifiable if its function were purely to review City's action for rationality, for conceivable conformity to state standards rather than actual compliance. Clearly, the Commission must exercise its independent judgment to decide if such conformity has been achieved because that decision cannot be completed delegated to the local entity where it is likely to be subject to local economic and political pressures which cannot so readily influence the Commission."

Petitioner also erroneously dismisses the *City of Chula Vista* case as one in which the Commission "played a purely reviewer's role." (BBC Opp, p. 8.) The Court in *City of Chula Vista* noted:

> "On May 4, 1979, the regional commission suggested extensive revisions and amendments to the City's LCP and approved the program conditioned upon such revisions. The plan with the regional commission's recommendations was submitted for further review to the Commission, and City objected to the revisions before the statewide Commission. However, after extensive hearings, the state Commission on September 18, 1979, adopted some of the proposed findings of the regional commission and granted conditional approval of the LCP." (133 Cal.App.3d, at 477.)

The Commission's action here was no different. As Petitioner alleges in its Petition: "At its hearing 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 Commission staff." (Petition, ¶ 17.)

Petitioner further argues that Section 30801 is not the exclusive remedy here and that Section 30800 of the Coastal Act makes clear that the remedy in Section 30801 "shall be in addition to any other remedies available at law." (BBC Opp., p. 8.) As previously noted, case law establishes that judicial review of an LUP decision is by way of administrative mandamus (*San Mateo Coastal Landowners, supra,* 38 Cal.App.4th at 558.) Section 30800 also cannot avoid

the bar of res judicata, as here. In *Ham, supra,* 210 Cal.App.3d at 1497, the Court addressed the res judicata effect of a final administrative decision and explained: "Section 30801 did not eliminate any prior remedies available to aggrieved landowners and thus section 30800 is not implicated. *Rather, long-standing principles of res judicata apply to affect the timing of the additional remedies. We do not discern in section 30800 any legislative intent to abrogate this well-settled doctrine.*" (*Id.* at 1497; italics added.) Thus, it is irrelevant whether the City's subsequent action to accept the Commission's suggested modifications is termed "administrative" or "quasi-legislative." Res judicata, addressed above, is fatal to this action against the City insofar as it impermissibly seeks to collaterally challenge the original LUP policies required by the Commission.

Lastly, Petitioner contends that under the Coastal Act, declaratory and injunctive relief are broadly available to review possible "violations" of the Coastal Act, citing Coastal Act Section 30803. (BBC Opp., p. 8.) While that is true, the "violations" referred to in Section 30803 are those associated with enforcement – activities undertaken without a permit, contrary to a permit or term thereof, or contrary to a Commission cease and desist order or restoration order. Section 30803(a) provides, in relevant part: "Any person may maintain an action for declaratory and equitable relief to restrain any violation of this division, of a cease and desist order issued pursuant to Section 30809 or 30810, or of a restoration order issued pursuant to Section 30811." (*California Coastal Com. v. Tahmassebi* (1998) 69 Cal.App.4th 255, 259.) A Commission action to approve an LCP, LUP, or LUPA is not a "violation" of the Coastal Act. Indeed, Petitioner's interpretation of the Act would render Section 30801, providing for the administrative mandamus remedy, meaningless. *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, also provides no assistance here. That case involved a challenge to certain "guidelines" adopted by the Commission, and the Court held the guidelines were "unquestionably" quasi-legislative, as opposed to quasi-judicial or adjudicatory," and therefore were reviewable by an action for declaratory relief or traditional mandate. (*Id.* at 168-169.) The decision at issue here was unquestionably quasi-judicial in nature.

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

It is settled that a takings claim, as alleged in the Fourth and Seventh Causes of Action, may not be made in a challenge to the approval of a land use plan. (*San Mateo Coastal Landowners' Assn*, *supra*, 38 Cal.App.4th 523, 546; *Sierra Club v. California Coastal Com.* (1993) 12 Cal.App.3d 602, 618.) The California courts have long held that a takings claim must be made, if at all, at the permit stage. There is no case to the contrary.

Petitioner's attempt to distinguish the *San Mateo Coastal Landowners* and *Sierra Club* cases is misplaced. (BBC Opp., pp. 12-13.) In *Sierra Club*, the Court rejected a takings claim in the context of a Commission decision approving a county land use plan. The Court cited Section 30010, which states 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." The Court explained that the Section "appears designed to foreclose any claim that the Coastal Act authorizes takings without compensation, a construction that would leave the Act open to facial challenge." (12 Cal.App.4th at 618.) It then held: "[S]ection 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." (*Id.*) Petitioner ignores this holding, but it is dispositive here.

San Mateo County Landowners is equally dispositive. There, the Court rejected a facial challenge to an LCP policy requiring an applicant for a land division to grant the county a conservation/open space or agricultural easement as a condition of approval on grounds it constituted a due process violation and a taking. The LCP stated that "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" U.S. or California. (38 Cal.App.4th at 547.) The Court noted first that the county "has the flexibility to avoid potentially unconstitutional application of easement requirements." (*Id.*) The same is equally true here. Under the Coastal Act, an LCP consists of two distinct parts – the LUP, as here, and the implementation or zoning ordinances. (*Yost v. Thomas* (1984) 36 Cal.3d 561, 566.) Here, the Commission has certified only the former. The LCP's implementation or

zoning ordinances have not yet been prepared, submitted to the Commission, or acted upon, and thus, as in *San Mateo County Landowners*, it cannot be said at this point that an uncompensated taking would necessarily occur. Further, consistent with *Sierra Club*, the Court explained that an "as applied" challenge would fail on ripeness grounds because the easement requirement "would not arise unless and until a property owner submitted an application to divide land in the coastal zone" – i.e., at the permit stage. (38 Cal.App.3d at 549.)

Petitioner points out that under *San Remo Hotel, L.P. v. City and County of San Francisco* (2002) 27 Cal.4th 643, 673, a facial constitutional challenge is permissible where the law is shown to be unconstitutional "in the generality or great majority of cases." (BBC Opp., p. 10.) It also cites *Koontz v. St. Johns River Water Mgmt. Dist.* (2013) 133 S. Ct. 2586, where the High Court held that the unconstitutional conditions doctrine applies when government seeks to pressure property owners to accept an uncompensated taking of their property for public use. (BBC Opp., p. 13.) But neither case is apposite here. First, as shown above, Petitioner's effort to collaterally attack the Commission's LUP decision – what Petitioner misleadingly refers to as a facial constitutional challenge – is barred by res judicata. Second, Petitioner simply ignores the point made in *San Mateo County Landowners*. Here, the Commission approved only an LUP without the second part of the LCP – the zoning ordinance or other implementation measures. It cannot be said with certainty that a taking will ever occur. Until the zoning ordinance and implementation are formulated, reviewed and approved, it cannot be shown that the LUP is categorically unconstitutional. The claim is premature, and Petitioner's "unconstitutional conditions" claims – the Fourth and Seventh Causes of Action – are barred for that reason.

V. THE PETITION IS UNCERTAIN BECAUSE IT CONFLATES LUP POLICIES NOW IMMUNE FROM CHALLENGE WITH SUBSEQUENT LUP AMENDMENTS

In June 2014, the Commission approved the LUPA, with suggested modifications. Rather than specifically challenge those amended policies, Petitioner chose to lump all of its claims together by reference to the "LUP." Consequently, the Petition does not differentiate between policies that have been amended and policies that have not. As the City's opening memorandum

explains, LUP policies 4.19, 4.22, and 4.40 (which was simply renumbered) were not changed by the amendments to the LUP. Petitioner's challenge to those policies is both time-barred and barred by res judicata. (*Patrick Media Group, Inc v. California Coastal Com., supra,* 9 Cal.App.4th at 607.) Petitioner's response is that the City produced a chart/exhibit demonstrating that and can figure it out. (BBC Opp., p. 14.) That, however, misses the point. The claims directed to those policies are barred, and a demurrer for uncertainty may be used to expose the bar of res judicata. (*Powell v. Lampton* (1938) 30 Cal.App.2d 43, 47.). Because the Petition conflates a challenge to the LUPA with a renewed challenge to the original certified LUP policies, which are now immune from collateral attack, the demurrer for uncertainty should be sustained as to the First, Third, Fourth, and Fifth Causes of Action.[1]

VI. CONCLUSION

Accordingly, for the foregoing reasons and those set forth in the City's opening memorandum, the City of Solana Beach respectfully requests the Court to sustain its demurrer without leave to amend as to (1) claims regarding the original LUP, (2) claims for declaratory relief and traditional mandate, and (3) premature claims regarding purported "unconstitutional conditions." The City further requests that the City's demurrer be sustained with leave to amend to permit Petitioner to replead this case as to the LUPA alone and to eliminate the confusion resulting from Petitioner's conflation of the LUP and LUPA policies.

Dated: February 20, 2015

Respectfully submitted,

RICHARDS, WATSON & GERSHON

By: _____
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CITY OF SOLANA BEACH

[1] The Second Amended Complaint and Petition again names the Councilmembers and City Manager but sets forth no charging allegations as to those individuals and concedes they were previously dismissed from the case. (Petition, ¶¶ 5-6.) The Councilmembers and City Manager are neither indispensable nor necessary parties to this proceeding (*Garfield v. Board of Medical Examiners* (1950) 99 Cal.App.2d 219, 231; *Moran v. Bd. of Medical Examiners* (1948) 32 Cal.2d 301, 314-315), and, as public officials against whom no relief is sought, they should not be forced to bear the stigma of being sued. To eliminate confusion, the demurrer should be sustained as to those individuals without leave to amend.

PROOF OF SERVICE

Beach & Bluff Conservancy v. City of Solana Beach, et al.
San Diego Superior Court
Case Number 37-2013-00046561-CU-WM-NC

I, Marcella Sanchez, 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 **February 20, 2015**, I served the within document(s) described as:

CITY OF SOLANA BEACH'S REPLY MEMORANDUM IN SUPPORT OF DEMURRER TO SECOND AMENDED COMPLAINT FOR DECLARATORY RELIEF AND PETITION FOR WRIT OF MANDATE

in the interested parties in this action as stated below:

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[X] (BY MAIL) By placing a true copy 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.

[X] (BY E-MAIL) By transmitting a true copy of the foregoing document(s) to the e-mail addresses set forth above.

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

Executed on February 20, 2015, at Los Angeles, California.

Marcella Sanchez
(Type or print name)

Marcella Sanchez
(Signature)