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16 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**  
17 **FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT**  
18

19  
20 MARK I. GREENE and BELLA GREENE,  
21 Petitioners,  
22 vs.  
23  
24 CALIFORNIA COASTAL COMMISSION,  
25 Respondent.

Case No.: BS165764  
**PETITIONERS' REPLY BRIEF IN  
SUPPORT OF PETITION FOR WRIT OF  
ADMINISTRATIVE MANDATE**  
  
Dept.: 85  
Judge: Hon. James C. Chalfant  
Trial Date: July 24, 2018  
Time: 1:30 p.m.  
Action Filed: May 5, 2017

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1 The Commission argues that it is justified in preventing the Greenes from remodeling their  
2 house consistent with local ordinances in order to protect access to this beach:



11 AR000027.

12 No reasonable analysis of the Greenes' home and its relationship to beach access as shown  
13 in the above photo could lead to a conclusion that their proposed remodel will have *any* impact,  
14 let alone a significant impact surmised by the Commission, on public access. What is clear,  
15 however, is that the conditions imposed on the Greenes' permit, on the basis of sheer speculation,  
16 will meaningfully impact the use and value of the Greenes' home. Over the objections of four  
17 Commissioners, the Commission imposed Special Condition 1. AR000752. In its brief, the  
18 Commission attempts to downplay the impact of Special Condition 1, arguing that it restricts the  
19 Greenes' right to develop on "just four feet" more "than that which the City" allows. Opposition  
20 Br. at 21. Of course, "just four feet" truly means a 400-500 square foot reduction of the footprint  
21 of the house. AR000747. While the reduction in square footage is significant, more important is  
22 how the condition detrimentally affects how the Greenes' plan to use that space. AR000588-595.  
23 Special Condition 1's increased restrictions will require the Greenes to hire an architect to design  
24 completely new plans. *See* AR000595. These changes will not be a mere simple fix. The current  
25 designs utilized the space to make changes to the foundation, thereby making the house safer and  
26 more structurally secure. *Id.* Changes to the foundation will impact the design of the entire house.

27 Special Condition 3 also imposes significant costs to the Greenes. Even though it is  
28 unlikely that the Greenes will ever need to construct a shoreline protective device, Special

1 Condition 3 negatively impacts the Greenes' home value. Special Condition 3 must be recorded  
2 as a deed restriction; a deed restriction that does not appear on most of the deeds of neighboring  
3 homes.

4 The Commission's Special Conditions are not consistent with the law and are not supported  
5 by substantial evidence. As a result, this Court should issue a writ of administrative mandate setting  
6 aside the Commission's permitting decision, and directing it to remove Special Conditions 1 and  
7 3 on remand.<sup>1</sup>

## 8 ARGUMENT

### 9 I

#### 10 This Court Exercises Its Independent Judgment on Questions of Law

11 The Greenes' causes of action argue both that the Commission did not proceed in a manner  
12 required by law and that the Commission's findings are not supported by evidence. California  
13 Code of Civil Procedure 1094.5(b) provides that "Abuse of discretion is established if the  
14 respondent has not proceeded in the manner required by law, the order or decision is not supported  
15 by the findings, or the findings are not supported by the evidence." "Where it is claimed that the  
16 findings are not supported by the evidence" the standard of review will be either *independent*  
17 *judgment* or abuse of discretion. *Id.* at §1094.5(b).

18 Whereas, the substantial evidence standard arises "[w]here it is claimed that the findings  
19 are not supported by the evidence," *id.*, questions of law are always interpreted under an  
20 independent review standard. *Cf. San Lorenzo Valley Cmty. Advocates for Responsible Educ. v.*  
21 *San Lorenzo Valley Unified Sch. Dist.*, 139 Cal. App. 4th 1356, 1375 (2006). Thus, contrary to the  
22 Commission's assertions, this Court exercises its independent judgment on those claims where the  
23 Greenes allege that the Commission did "not proceed in the manner required by law."

### 24 II

#### 25 The Greenes Are Entitled to a Writ of Mandate 26 Directing the Commission to Remove Special Condition 1

##### 27 A. Special Condition 1 is unconstitutional

28 <sup>1</sup> This Court "may order respondent to take such further action as is specially enjoined upon it by  
law ..." Code of Civ. Proc. § 1094.5(f).

1           **1. The Greenes exhausted their administrative remedies with respect to their**  
2           **constitutional claim**

3           In an attempt to avoid the Greenes’ constitutional argument, the Commission argues that  
4 the Greenes failed to exhaust their administrative remedies with respect to this claim. Opposition  
5 Br. at 19. The objections made by the Greenes’ consultant, who is not a lawyer (AR000743),  
6 satisfied the purpose of the exhaustion doctrine “which is to provide the public agency with an  
7 opportunity to receive and respond to articulated factual issues and legal theories before its actions  
8 are subjected to judicial review.” *Mani Bros. Real Estate Grp. v. City of Los Angeles*, 153 Cal.  
9 App. 4th 1385, 1396 (2007) (citations omitted).

10           Notably, the Greenes’ consultant specifically, and repeatedly, mentioned the key argument  
11 advanced by the Greenes in their opening brief: that there is a difference between a legislatively  
12 adopted ordinance and an adjudicatively imposed condition for a permit. *See* Opening Br. at 11;  
13 AR000734 (“the city council took the *legislative action to establish a specific setback of one foot*  
14 *....*” (emphasis added)); AR000735 (“This was land use planning and they took that legislative  
15 action.”). The consultant explained why Special Condition 1 lacks a nexus and rough  
16 proportionality with the alleged public impacts of the development, stating that “the project will  
17 not conflict with any public access or public recreations policies of the coastal act” and addressing  
18 the arguments about potential wave uprush and sea level rise. AR000736. He expressly cited to  
19 the portions of the Coastal Act that are at issue in this case. *Compare id.* with Opening Br. at 13.  
20 Although the consultant did not utter “*Nollan*” or “*Dolan*,” he articulated the principles of those  
21 decisions and provided evidence to allow the Commission to respond to the argument that Special  
22 Condition 1 does not further the purposes of the Coastal Act.<sup>2</sup>

23  
24  
25 <sup>2</sup> Furthermore, as the Commission acknowledges, communications to the Commission expressly  
26 mentioned takings. AR000645. Additionally, because this is a constitutional claim, it concerns an  
27 important public policy question of statewide concern. *Pub. Employment Relations Bd. v. Superior*  
28 *Court*, 13 Cal. App. 4th 1816, 1827 (1993) (listing exceptions to exhaustion including “where  
important questions of constitutional law or public policy governing agency authority are  
tendered.”).

1           Ultimately, the Commission’s argument fails to recognize that “less specificity is required  
2 to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding”  
3 because ... parties in such proceedings generally are not represented by counsel.” *Mani Bros. Real*,  
4 153 Cal. App. 4th 1396 (quoting *Citizens Assn. for Sensible Dev. of Bishop Area v. Cty. of Inyo*,  
5 172 Cal. App. 3d 151, 163 (1985)). The Greenes’ consultant satisfied the requirement to exhaust  
6 the administrative remedies on this issue, and this Court should hear their constitutional claims.

7           **2.       Nollan and Dolan apply to Special Condition 1**

8           The California Supreme Court has interpreted *Nollan* and *Dolan* by stating that “[t]he ‘sine  
9 qua non’ for application of *Nollan/Dolan* scrutiny is thus the ‘discretionary deployment of the  
10 police power’ in ‘the imposition of land-use conditions in individual cases.’” *San Remo Hotel L.P.*  
11 *v. City And Cty. of San Francisco*, 27 Cal. 4th 643, 670 (2002) (quoting *Ehrlich v. City of Culver*  
12 *City*, 12 Cal. 4th 854, 869 (1996) (plurality opinion)). Here, the Commission used its discretion to  
13 impose Special Condition 1 on the Greenes, overriding the legislatively enacted zoning laws of  
14 the City of Los Angeles.

15           The Commission’s reliance on *California Bldg. Indus. Assn. v. City of San Jose (CBIA)*,  
16 61 Cal. 4th 435 (2015) is misplaced. *CBIA* concerned a legislatively enacted ordinance, not an  
17 adjudicatory decision by an administrative body. *Id.* at 455–56. Furthermore, the ordinance at issue  
18 in *CBIA* did “not require a developer to give up a property interest for which the government would  
19 have been required to pay just compensation under the takings clause outside of the permit  
20 process.” *CBIA*, 61 Cal. 4th at 461.

21           Here, the opposite is true. Special Condition 1 is an adjudicative decision by an  
22 administrative body that requires the Greenes to convey a negative easement to the Commission.  
23 *See* Opening Br. at 11–12. “A negative easement ... prevent[s] the possessor of the land from  
24 doing acts upon it which, were it not for the easement, he would be privileged to do.” Restatement  
25 (First) of Property § 452 (1944). Absent Special Condition 1, the Greenes would have been  
26 allowed, pursuant to the local zoning ordinances, to use their land to build within one foot of their  
27 seaward property line. AR000053; AR000054; AR000055. Had the Commission merely  
28



1 demanded that the Greens convey a negative easement, it would have had to pay just  
2 compensation. *S. Cal. Edison Co. v. Bourgerie*, 9 Cal. 3d 169, 172–73 (1973).

3 Thus, Special Condition 1 is subject to heightened scrutiny under *Nollan/Dolan*. This case  
4 does not involve a variance, which is the type of case where substantial evidence applies. *See*  
5 *Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 514-516 (1974));  
6 *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal. 4th 952, 966 (1999) (citing *Topanga Assn.*  
7 as an example of when substantial evidence review, rather than *Nollan/Dolan*, applies). Instead,  
8 this case involves a “conveyance of some identifiable protected property interest,” *CBIA*, 61 Cal.  
9 4th at 460, and requires the Greens to record the conveyance in their deed. AR000023. As a result,  
10 the condition is constitutional only if it satisfies the nexus and proportionality requirements  
11 articulated in *Nollan* and *Dolan*. *See Dolan v. City of Tigard*, 512 U.S. at 374, 386 (1994).

12 **3. Special Condition 1 lacks nexus and rough proportionality**

13 The Commission believes that it satisfied *Nollan* and *Dolan* because it approved the  
14 Greens’ permit. Opposition Br. at 21. But the question is not whether the Commission approved  
15 the permit, it is whether the conditions imposed on that approval are unconstitutional. Special  
16 Condition 1 does not satisfy the *Nollan/Dolan* test because it does not mitigate any of the public  
17 impacts alleged by Commission to justify the condition. Opening Br. at 12–15. And contrary to  
18 the Commission’s argument, the “rough proportionality” prong of the test does not turn on how  
19 significant the burden of the condition is to the Greens. Opposition Br. at 21. Rather, the relevant  
20 question is the impact of the Greens’ proposed development on the public. Because the impact of  
21 the Greens’ proposed development is *de minimis*, the Commission may only impose similar minor  
22 conditions. Opening Br. at 15–17.

23 **B. The imposition of Special Condition 1 is not supported by substantial**  
24 **evidence.**

25 Even if the *Nolan/Dolan* does not apply, the Commission’s findings in support of imposing  
26 Special Condition 1 lack substantial evidence. Contrary to the Commission’s assertions,  
27 substantial evidence review is not another name for rational basis review. Opposition Br. at 17;  
28 *see Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal. 4th 952, 966 (1999)(comparing review

1 under *Nollan/Dolan*, substantial evidence, and the “most deferential review” that California Courts  
2 apply to legislative land use determinations). Instead, for a decision to be supported by substantial  
3 evidence, it “must set forth findings to bridge the analytic gap between the raw evidence and  
4 ultimate decision or order.” *Topanga Assn*, 11 Cal. 3d at 515 (1974). The Commission’s findings  
5 in support of its decision to impose Special Condition 1 fail to bridge that analytic gap.

6 The Commission’s findings, and the evidence in the record, fail to demonstrate how the  
7 Greenes’ proposed development would interfere with any Coastal Act policy. *See* Opening Br. at  
8 12–15. The Commission argues that Special Condition 1 is justified by the Act’s policies of  
9 protecting public access to the coast and protecting oceanfront land suitable for recreational use.  
10 Opposition Br. at 16 (citing Cal. Pub. Res. Code §§ 30211, 30212, 30221). The Court need only  
11 look at the photograph above to recognize the flaws in this argument. The nature of the Greenes’  
12 property within the community it is located, and the limited scope of the proposed development,  
13 ensure that public access is unchanged. Opening Br. at 11. The wide beach ensures that  
14 “adequate[]” areas will remain available for the “foreseeable future.” Cal. Pub. Res. Code § 30221;  
15 *see also* Opening Br. at 11.

16 The Commission incorrectly argues that Sections 30214(a)(3) and (a)(4) of the Coastal Act  
17 require the Commission to minimize potential conflicts between visitors and beachfront  
18 landowners. Opposition Br. at 16. But those sections do not authorize managing development (like  
19 sections 30211 and 20212), but rather allow the Commission to manage the public’s access. Cal.  
20 Pub. Res. Code § 30214. Specifically, the statute explains that the Commission should “limit[]  
21 public access” and “manage[] ... access areas” to protect the rights of property owners. *Id.* at §  
22 30214(a)(3),(4). The Commission cannot rely on this section, which limits the access of the public,  
23 to impose restrictions on the Greenes. *See Chu v. Workers’ Comp. Appeals Bd.*, 49 Cal. App. 4th  
24 1176, 1182 (1996) (conclusions based on incorrect legal theories do not constitute substantial  
25 evidence).

26 In any event, the administrative record contains no evidence that the Greenes’ development  
27 will result in any conflicts between the Greenes and the public. Neither the Commission nor the  
28 staff analyzed how the public and the property owners on the Greenes’ block interact. Instead of

1 providing evidence, the Commission could only speculate about the impacts of the Greenes’  
2 development. AR000015; AR000018. Such pure speculation is not substantial evidence. *Chu*, 49  
3 Cal. App. 4th at 1182.

4 The Commission devotes significant time discussing the proposed boardwalk adjacent to  
5 the Greenes’ property. Opposition Br. at 17–18. But the existence of that right-of-way does not  
6 justify the imposition of Special Condition 1. In the words of the City of Los Angeles, “Ocean  
7 Front Walk is designated as a Local Street, but is not improved as a usable pedestrian right-of-  
8 way.” AR000533. To that end, the City did not require the Greenes to construct any portion of the  
9 boardwalk or pay an in-lieu fee to finance the boardwalk’s construction. AR000600.

10 Regardless, the Greenes’ development will not interfere with the right-of-way because, as  
11 the City correctly determined, “[t]he project is subject to the limitations of the one-foot building  
12 line and does not propose any permanent structures in the right-of-way (Ocean Front Walk).”  
13 AR000536. The record contains no concrete evidence related to any potential conflicts between  
14 property owners and the public on Ocean Front Walk. Accordingly, the Commission’s speculative  
15 impacts to the Walk do not amount to substantial evidence required to justify the imposition of  
16 Special Condition 1.

17 The Commission also argues that concerns about flooding justify the imposition of Special  
18 Condition 1. Although the staff report mentions such concerns, it failed to justify those concerns  
19 with evidence. AR000018. Instead, the report merely cites one instance where a resident of Playa  
20 Del Rey expressed a concern at a Commission hearing about the length of a proposed berm for  
21 Venice Beach, Dockweiler State Beach, and Hermosa Beach. *Id.* At the hearing, the homeowner  
22 mentioned a few instances where flooding has previously occurred around the sides of the then-  
23 existing berm, and requested that the length of the proposed berm be extended. *Id.* The staff report  
24 does not mention the current state of flooding or the current berms in the area. That information,  
25 however, is contained in the GeoSoils study, which analyzed the impact of the berms on flooding.  
26 AR000040; AR000042; AR000047. The study concludes that it is unlikely that overtopping waters  
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1 will reach the Greenes house over the next 75 years. AR000047. Thus, the Commission’s findings  
2 that concerns about flooding justify Special Condition 1 are not supported by substantial evidence.<sup>3</sup>

3 For similar reasons, the Commission’s citation to the Sea Level Rise Policy Guidance is  
4 also unavailing. The GeoSoils study based its findings on the Guidance estimates for sea level rise.  
5 See AR000037; AR000044. Those estimates are based on the “best available science” on sea level  
6 rise. AR000793; AR00049. The Staff Report’s response that the GeoSoils study conclusions might  
7 underestimate impacts “if something were to happen that would cause damage to the beach” is  
8 pure speculation and is not substantial evidence as a matter of law. AR000018.

9 Finally, the staff report’s discussion of cumulative effects is merely a discussion of the  
10 hypothetical future actions of the Greenes’ neighbors, not any actual impacts or even reasonably  
11 foreseeable impacts of the Greenes’ development. AR000015. The staff report states that a one-  
12 foot setback could cumulatively impact public access because other “homeowners have been  
13 allowed to use the public area” and those homeowners might “refuse to remove their property” in  
14 the future. AR000015–16. But those other homeowners are not the Greenes. The Greenes have no  
15 permission to privately use the public area and have not proposed to do so. Furthermore, any  
16 impacts that *might* arise from the Greenes’ neighboring properties will not be made worse by the  
17 Greenes’ development. The Greenes’ house, in the middle of the block, will still be setback further  
18 than most of the other neighboring houses. AR000712. Any impact to public access is caused by  
19 those houses, and such impact is in no way mitigated by forcing the Greenes to build further back  
20 from their property line and much further back than their neighbors.

21 This is not a dispute over two competing views of the evidence, as the Commission  
22 contends, and this Court does not have to weigh competing evidence. The Greenes’ argument is  
23 supported by expert opinions based on the best available science. The Commission’s arguments  
24 are based on speculation. Accordingly, this Court should set aside Special Condition 1.

25 **III**  
26 **Special Condition 3 Must Be Set Aside**

27 **A. Objecting to Special Condition 3 would have been futile**

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<sup>3</sup> Furthermore, the Greenes’ development cannot affect any flooding potential of the area.

1 The Greenes' proffered evidence demonstrates that the Commission consistently imposes  
2 shoreline protective device waivers on coastal properties owners similarly situated to the Greenes.  
3 The Commission imposes these waivers even over the objection of property owners. *See, e.g.*,  
4 Motion to Augment Administrative Record Exhibits 60, 78. Thus, it would have been futile for the  
5 Greenes to object to Special Condition 3.

6 The Commission argues that the Greenes' proffered evidence is inadmissible under Code  
7 of Civil Procedure Section 1094.5. Opposition Br. at 14. The Commission's argument reflects a  
8 misunderstanding of the purpose of the evidence. The evidence is being introduced for the limited  
9 purpose of proving the allegations in the Greenes' First Amended Petition that objecting to Special  
10 Condition 3 would have been futile. *See* Memo in Support of Motion to Augment Administrative  
11 Record at 2. This Court exercises its independent judgment on the question of whether the futility  
12 exception applies and, thus, the evidence is admissible under section 1094.5(e). *Id.* at 3.<sup>4</sup>

13 Regardless, this Court does not need to rely on the Greenes' proffered evidence to conclude  
14 that objecting to Special Condition 3 would have been futile. The Sea Level Rise Policy Guidance,  
15 recently added to the administrative record, demonstrates in the Commission's own document that  
16 it is the Commission's *policy* to require shoreline protection waivers for development and  
17 redevelopment of shoreline properties. AR000907; AR000910. An objection to Special Condition  
18 3 would have been futile, because removing it would have gone against the Commission's stated  
19 policy of requiring these waivers on new development or redevelopment along the coast.

20 **B. The Greenes have a right to construct a shoreline protection device and the**  
21 **Commission did not proceed in a manner required by law when it required**  
22 **the Greenes to waive that right**

23 The Commission argues that the Greenes have no right to construct a shoreline protection  
24 device. Opposition Br. at 15. That assertion is contradicted by the plain language of the California  
25 Constitution and the Coastal Act. Cal. Const. art. I, §1; Cal. Pub. Res. Code § 30235. The  
26 Commission emphasizes the word "existing" in Section 30235, but the Greenes' are not proposing

27 \_\_\_\_\_  
28 <sup>4</sup> The title of the Greenes' motion, *i.e.* to augment the record, is irrelevant to the nature of the  
motion. This Court can "admit the evidence at the hearing on the writ" even it chooses not to add  
it to the administrative record. California Code of Civil Procedure § 1094.5(e).

1 to tear down their house and build a new home. Instead much of the “existing” structure will  
2 remain, along with their right to protect that structure. If redevelopment transforms an existing  
3 structure into a new one, as the Commission implies, every home built on the coast effectively  
4 ceases to exist for purposes of seawall protection over time through repair and maintenance.

5 Furthermore, the Commission’s position that the Greenses have no right to construct a  
6 shoreline protective device is inconsistent with the language of Special Condition 3 itself. Special  
7 Condition 3 requires the Greenses to “waive, on behalf of themselves and all successor and assigns,  
8 any rights to construct such devices that may exist under applicable law.” AR000008. If the  
9 Greenses have no right to construct a shoreline protective device, then Special Condition 3 is  
10 unnecessary, and there is no justification for imposing it.

11 On the other hand, if the Greenses do have a right to construct such a device, then the  
12 Commission must follow the law if it is to impose Special Condition 3. That is not the case here,  
13 as the Commission’s stated justification is that Section 30253 requires it to impose Special  
14 Condition 3. AR000020. But Section 30253 contains no such language. Furthermore, the section  
15 does not even pertain to the Greenses’ property, but only to areas of “high geologic, flood, and fire  
16 hazard.” Cal. Pub. Res. Code § 30253(a). Even if it did apply, the imposition of Special Condition  
17 3 does not help “[m]inimize risks” to the property. *Id.* While the risks of flooding are remote,  
18 preventing the Greenses from ever building a protective device increases the risk to the property as  
19 it forecloses the possibility of protecting the house.

20 Finally, that the Greenses will not need to construct a shoreline protection device does not  
21 present a “logical anomaly.” Whether or not the Greenses will ever exercise their right to protect  
22 their property in the future is irrelevant to the inquiry of whether it is lawful for the Commission  
23 to require the Greenses to waive that right. Special Condition 3 diminishes the Greenses’ property  
24 value because it must be recorded with a deed restriction that potential future buyers will see and  
25 be bound by. AR000023. Accordingly, this Court should set aside Special Condition 3.


### 26 CONCLUSION

27 This Court should grant the Greenses’ requested Petition for Writ of Administrative  
28 Mandate.

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Dated: July 6, 2018.

**PACIFIC LEGAL FOUNDATION**

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**DECLARATION OF SERVICE**

I, Iza A. Rodriguez, declare as follows:

I am a resident of the State of California, 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 July 6, 2018, a true and correct copy of **PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF ADMINISTRATIVE MANDATE** was placed in an envelope addressed to:

Erica B. Lee  
Deputy Attorney General  
Andrew M. Vogel  
Deputy Attorney General  
Land Law Section  
California Department of Justice  
300 S. Spring Street  
Los Angeles, CA 90013

which envelope, with postage thereon fully prepaid, were then sealed and delivered via FedEx in Sacramento, California. A true and correct copy was also e-mailed to Andrew.vogel@doj.ca.gov and Erica.lee@doj.ca.gov.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 6th day of July, 2018, at Sacramento, California.

  
IZA A. RODRIGUEZ