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14
15 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
16 **FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT**
17

18
19 MARK I. GREENE and BELLA GREENE,

20 Petitioners,

21 vs.

22
23 CALIFORNIA COASTAL COMMISSION,

24 Respondent.

Case No.: BS165764

**PETITIONERS' OPENING BRIEF IN
SUPPORT OF PETITION FOR WRIT OF
ADMINISTRATIVE MANDATE**

**[FILED CONCURRENTLY WITH
MOTION TO AUGMENT THE
ADMINISTRATIVE RECORD]**

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TABLE OF CONTENTS

1

2 TABLE OF AUTHORITIES 3

3 INTRODUCTION 6

4 STATEMENT OF FACTS 6

5 A. The Greenes’ Property and its Surroundings 6

6 B. The Greenes planned remodel for their retirement home 7

7 C. In August of 2016, the Greenes begin the process of securing
8 a coastal development permit from the Commission..... 7

9 D. In 2017, the Commission publishes a staff report and holds a
10 hearing on the Greenes’ Coastal Development Permit Application..... 8

11 E. On May 1, 2017, the Greenes commence this litigation..... 9

12 STANDARD OF REVIEW 9

13 ARGUMENT..... 10

14 I. Special Condition 1 Must Be Set Aside 10

15 A. The Commission failed to proceed in the manner required by law in
16 imposing Special Condition 1 because the condition is unconstitutional..... 10

17 1. Special Condition 1 requires the Greenes to dedicate a negative easement..... 11

18 2. Special Condition 1 lacks a nexus between the Greenes’ development
19 and an adverse public impact..... 12

20 3. Special Condition 1 is disproportionate to any alleged impact
21 of the Greenes’ development..... 15

22 B. The Commission’s findings in support of imposing Special Condition
23 1 are not supported by substantial evidence because they based upon
24 incorrect facts, incorrect legal theories, and conjecture..... 17

25 II. Special Condition 3 Must Be Set Aside..... 18

26 A. Objecting to Special Condition 3 would have been futile because
27 the Commission consistently acts on its belief that it is required by
28 law to impose the condition 18

29 B. The Commission failed to proceed in the manner required by law
30 in imposing Special Condition 3..... 20

31 CONCLUSION..... 20

1 **TABLE OF AUTHORITIES**

2 **CASES**

3 *Adaman Mut. Water Co. v. U.S.*,
4 278 F.2d 842 (9th Cir. 1960) 11

5 *Chu v. Workers' Comp. Appeals Bd.*,
6 49 Cal. App. 4th 1176 (1996) 16

7 *de novo. Duncan v. Dep't of Pers. Admin.*,
8 77 Cal. App. 4th 1166 (2000) 9

9 *Dolan v. City of Tigard*,
10 512 U.S. 374 (1994)..... passim

11 *Ehrlich v. City of Culver City*,
12 12 Cal. 4th 854 (1996) 9, 10

13 *Georgia-Pac. Corp. v. Cal. Coastal Comm'n.*,
14 132 Cal. App. 3d 678 (1982) 15, 17

15 *Green v. City of Oceanside*,
16 194 Cal. App. 3d 212 (1987) 17

17 *Grier v. Kizer*,
18 219 Cal. App. 3d 422 (1990), *modified* (May 2, 1990) 18

19 *JKH Enterprises, Inc. v. Dep't of Indus. Relations*,
20 142 Cal. App. 4th 1046 (2006) 9

21 *Koontz v. St. Johns River Water Mgmt. Dist.*,
22 133 S. Ct. 2586 (2013)..... 9, 10

23 *Kuhn v. Dep't of Gen. Servs.*,
24 22 Cal. App. 4th 1627 (1994) 16, 17

25 *L.A. Unified Sch. Dist. v. Workers' Comp. Appeals Bd.*,
26 116 Cal. App. 3d 393 (1981) 17

27 *Lingle v. Chevron U.S.A. Inc.*,
28 544 U.S. 528 (2005)..... 10

1	<i>McAllister v. Cal. Coastal Comm'n,</i>	
2	169 Cal. App. 4th 912 (2009)	8
3	<i>Nollan v. Cal. Coastal Comm'n,</i>	
4	483 U.S. 825 (1987).....	9, 11, 14
5	<i>S. Cal. Edison Co. v. Bourgerie,</i>	
6	9 Cal. 3d 169 (1973)	11
7	<i>San Remo Hotel L.P. v. City And Cty. of S.F.,</i>	
8	27 Cal. 4th 643 (2002)	10
9	<i>Schneider v. Cal. Coastal Comm'n,</i>	
10	140 Cal. App. 4th 1339 (2006)	8
11	<i>Tidewater Marine W., Inc. v. Bradshaw,</i>	
12	14 Cal. 4th 557 (1996)	18
13	<i>Topanga Ass'n for a Scenic Cmty. v. Cty. of L.A.,</i>	
14	11 Cal. 3d 506 (1974)	9
15	<i>Wolford v. Thomas,</i>	
16	190 Cal. App. 3d 347 (1987)	11
17	<i>Wooster v. Dep't of Fish & Game,</i>	
18	211 Cal. Appl. 4th 1020 (2012)	10
19	STATUTES	
20	Cal. Pub. Res. Code § 30211	12
21	Cal. Pub. Res. Code § 30212	12
22	Cal. Pub. Res. Code § 30214	12
23	Cal. Pub. Res. Code § 30221	12, 13
24	Cal. Pub. Res. Code § 30235	19
25	Cal. Pub. Res. Code § 30253	passim
26	Cal. Pub. Res. Code § 30253(b).....	19
27	Code Civ. Proc. § 1094.5(b)	8
28	Code Civ. Proc. § 1094.5(f)	5

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CONSTITUTIONAL PROVISIONS

Cal. Const. art I, §1 19

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INTRODUCTION

Pursuant to Local Rule 3.231(i) and this Court’s December 11, 2017 scheduling order, Petitioners Mark and Bella Greene (the Greenes) submit this Opening Brief in support of their Verified Petition for Writ of Administrative Mandate. For the reasons set forth below, the Greenes respectfully request that this Court issue a writ of administrative mandate directing Respondent California Coastal Commission (Commission) to set aside its March 9, 2017 decision on Coastal Development Permit 5-16-0757 (Permit) and to issue a new decision approving the Permit without Special Conditions 1 and 3. *See* Code of Civ. Proc. § 1094.5(f).

STATEMENT OF FACTS

10 The Greenes own a home in Playa Del Rey and, in anticipation of their upcoming
11 retirement, contracted with an architect to remodel the home. AR000490–91. The architect worked
12 with the Greenes to ensure that the designs fit with their vision of their anticipated final home and,
13 equally as important, complied with local zoning codes and state law. *See* AR000574. The City of
14 Los Angeles approved the Greenes’ remodel plans but the Commission did not. AR000527–38;
15 AR000002–4. The Permit’s Special Condition 1 requires the Greenes to discard the architect’s
16 design for their home, at significant expense and for an inferior home, to create a larger setback
17 that is not required either by local zoning codes or state law. AR000004. Moreover, Special
18 Condition 3 requires that the Greenes encumber their title with a waiver of their constitutional and
19 statutory right to protect their home. AR000020.

A. The Greenes’ Property and its Surroundings

20
21 The Greenes’ home sits in the middle of a block on Speedway, between 65th Avenue and
22 66th Ave. AR000027; AR000036. The rear, seaward, edge of the Greenes’ property is
23 approximately 550 feet from the mean high tide line of the Pacific Ocean. AR000018. The adjacent
24 public beach is bisected by a bike path, approximately 273 feet from the edge of the Greenes’
25 property. AR000697; AR000737. The public accesses the beach from 66th Ave. on the south end
26 of the block, or from 65th Ave. at the north end of the block. AR00027; AR000661; AR000745.

27 There are no public access points through or immediately adjacent to the Greenes’
28 property. AR000533. The Greenes’ block consists of four houses to the north of the Greenes’

1 house, and one house to the south. AR000027; AR000712. The four houses to the northwest of the
2 Greenes' property are set back 0.5 feet, 1 foot, 12.6 feet, and 4.1 feet, from their respective seaward
3 property lines. AR000712. The house immediately southeast of the Greenes' house has a setback
4 of 0.6 feet from its rear, seaward property line. *Id.*

5 The seaward property line of the block of homes abuts the location of a 12-foot-wide public
6 boardwalk that has been planned and intermittently constructed since the 1960s by the City of Los
7 Angeles. AR000002. Since the 1960s, the only portions of the "Ocean Front Walk" that have been
8 constructed are those portions constructed by property owners in exchange for the City's approval
9 of temporary permission to make private use of the space. AR00013–14. The City has no current
10 plans to construct the boardwalk on the portion of Ocean Front Walk adjacent to the Greenes'
11 property. *Id.*

12 **B. The Greenes planned remodel for their retirement home**

13 In early 2016, the Greenes began the process of securing the necessary permits to remodel
14 the home. AR000503. The Greenes' plans for the home include reinforcing the existing structure
15 to meet more modern standards concerning earthquakes, increasing the interior square footage and
16 exterior deck space, and adding a short staircase and chair glide to allow Bella Greene to avoid the
17 use of stairs and the potential exacerbation of a chronic knee meniscus tear. *See* AR000571;
18 AR000595; Verified First Amended Petition ¶ 11. The Greenes' plans would expand the floorplan
19 of their home to within 1.5 feet of the seaward property line on the ground floor. AR000555. The
20 plans also included a deck on the second floor that would extend to their property line. AR000559.
21 The Greenes' architect, Mark Appel, developed plans that fit with the Greenes' vision for the home
22 and ensured that those plans complied with applicable laws and regulations. *See* AR000574. In June
23 2016, the City of Los Angeles approved a permit for the Greenes' proposed remodel. AR000527–38.

24 **C. In August of 2016, the Greenes begin the process of securing**
25 **a coastal development permit from the Commission**

26 Once approved by the City, the Greenes submitted an application for a coastal development
27 permit to the Commission pursuant to the Commission's "dual permit" jurisdiction. AR000490.
28 On September 19, 2016, the Commission sent the Greenes a notice of incomplete application,

1 requiring additional architectural plans, a stringline study, a description of proposed landscaping,
2 and a description of how the proposed remodel would impact water quality. AR000540-42. The
3 Greenes complied, but received a second notice of incomplete application on October 19, 2016.
4 The second notice requested whether the scope of the project changed since the City issued its
5 approval, whether the City required construction of the boardwalk on the portion of Ocean Front
6 Walk, and the submittal of an increased fee. AR000546-47. On October 24, 2016, Mr. Appell told
7 the Commission staff that the City did not require construction of the boardwalk. AR000600.

8 Two and a half months later, on January 5, 2017, the Commission again contacted the
9 Greenes to demand “a wave uprush study prepared by an appropriately licensed professional” that
10 analyzed whether the proposed renovations “could be subject to erosion, wave attack or wave run-
11 up, the frequency of occurrence, consequences and options for siting or designing the project to
12 avoid or minimize impacts over the life of the structure.” AR000605. The Greenes complied with
13 this request and hired GeoSoils, an experienced engineering firm to complete the study.
14 AR000037. The Greenes submitted the study to the Commission on January 16, 2017. *Id.* The study
15 concluded, among other findings, that “[t]he proposed development will neither create nor contribute
16 significantly to erosion, geologic instability, or destruction of the site or adjacent area.” AR000051.

17 **D. In 2017, the Commission publishes a staff report and holds a hearing**
18 **on the Greenes’ Coastal Development Permit Application**

19 The Commission staff’s report concerning the Greenes’ coastal development permit
20 recommended approval but only with the Special Conditions 1 and 3, which are the subject of this
21 litigation. AR000003-4. Special Condition 1 requires the Greenes to modify their plans so that the
22 building footprint extends no more than five feet from their rear property line. *Id.* This request is
23 contrary to the one-foot setback permitted by local ordinances and, and the 1.5 foot setback sought
24 by the Greenes and approved by Los Angeles. AR000536. The staff report’s purported
25 justifications for Special Condition 1 were that it was necessary to protect present and future public
26 access to the beach and Ocean Front Walk. AR000012-17; AR000019.

27 The report also recommended approval of Special Condition 3, which further requires the
28 Greenes to waive any future right they may have to protect their property from erosion or other

1 natural hazards with a shoreline protective device. AR000020. The staff report purports that
2 Special Condition 3 is required by Section 30253 of the Coastal Act. *Id.*

3 The Commission held a hearing on the permit on March 9, 2017. AR000727. During the
4 hearing, after presentations concerning Special Condition 1 by Commission staff and the Greenes’
5 consultant, Commissioner Howell moved to remove Special Condition 1 from the permit.
6 AR000749. The motion failed seven to four. AR000752. Subsequently the Commission unanimously
7 approved the coastal development permit with the conditions challenged herein. AR000754.

8 **E. On May 1, 2017, the Greenes commence this litigation**

9 The Greenes filed this action on May 1, 2017, seeking a writ of administrative mandate to
10 invalidate the Commission’s imposition of Special Conditions 1 and 3. On January 10, 2017, the
11 Commission filed a demurrer against the Greenes’ Second Cause of Action, arguing that the
12 Greenes failed to exhaust administrative remedies with respect to Special Condition 3. On
13 February 22, this Court sustained the demurrer, granting the Greenes leave to amend. On March
14 8, 2018, the Greenes filed a First Amended Petition for writ of administrative mandate. The
15 Commission answered the First Amended Petition on April 12, 2018.

16 **STANDARD OF REVIEW**

17 The Greenes seek a writ of administrative mandate to set aside the Commission’s decision
18 on the permit and directing the Commission to remove Special Conditions 1 and 3. In imposing
19 those conditions, the Commission has failed to proceed in the manner required by law, and the
20 Commission’s findings lack substantial evidence. *See* Code Civ. Proc. § 1094.5(b).

21 In determining whether an agency has failed to proceed according to the law, the Court
22 exercises its independent judgment, giving no deference to the agency’s interpretation of the law.
23 *McAllister v. Cal. Coastal Comm’n*, 169 Cal. App. 4th 912, 921 (2009); *Schneider v. Cal. Coastal*
24 *Comm’n*, 140 Cal. App. 4th 1339, 1344 (2006) (“A court does not ... defer to an agency’s view
25 when deciding whether a regulation lies within the scope of the authority delegated by the
26 Legislature.”) (internal citation omitted).

27 To the extent that an agency has acted within its jurisdiction and according to law, a
28 reviewing court still “must scrutinize the record and determine whether substantial evidence

1 supports the administrative agency’s findings and whether these findings support the agency’s
2 decision,” resolving doubts in favor of the agency. *Topanga Ass’n for a Scenic Cmty. v. Cty. of*
3 *L.A.*, 11 Cal. 3d 506, 514 (1974). A determination that substantial evidence supports the agency’s
4 decision and its findings must be made “in light of the whole record.” *JKH Enterprises, Inc. v.*
5 *Dep’t of Indus. Relations*, 142 Cal. App. 4th 1046, 1057 (2006). Regardless of the standard of
6 review, a court always reviews questions of law *de novo*. *Duncan v. Dep’t of Pers. Admin.*, 77 Cal.
7 App. 4th 1166, 1174 (2000)

8 **ARGUMENT**

9 **I**

10 **Special Condition 1 Must Be Set Aside**

11 **A. The Commission failed to proceed in the manner required by law in
12 imposing Special Condition 1 because the condition is unconstitutional**

13 The Takings Clause of the Fifth Amendment, incorporated against states through the
14 Fourteenth Amendment, protects a right to use, enjoy, and protect property. *See Nollan v. Cal.*
15 *Coastal Comm’n*, 483 U.S. 825 (1987). Property rights, including “the right to build on one’s own
16 property,” “cannot remotely be described as a ‘governmental benefit.’” *Id.* at 833 n.2. The
17 unconstitutional conditions doctrine protects individuals from government pressure to give up their
18 property without a lawful basis and without compensation in exchange for a permit. *See Koontz v.*
19 *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594–95 (2013) (“[L]and-use permit
20 applicants are especially vulnerable to ... coercion ... [and] [e]xtortionate demands”); *Ehrlich v.*
21 *City of Culver City*, 12 Cal. 4th 854, 876 (1996) (plurality opinion) (“Where the regulatory land
22 use power of local government is deployed against individual property owners through the use of
23 conditional permit exactions, the *Nollan* test helps to secure that promise by assuring that the
24 monopoly power over development permits is not illegitimately exploited ...”).

25 The Supreme Court explained and applied the unconstitutional conditions doctrine in the
26 context of land-use permitting in both *Nollan*, 483 U.S. 825, and *Dolan v. City of Tigard*, 512 U.S.
27 374 (1994). Those cases establish that government may only exact a private interest in property
28 for the benefit of the public when the exaction bears an “essential nexus” and “rough
proportionality” to an adverse public impact caused by the proposed project. *Nollan*, 483 U.S. at

1 837 (requiring an “essential nexus” between a permit condition and the adverse impacts caused by
2 the proposed project); *Dolan*, 512 U.S. at 391 (requiring “rough proportionality” between the
3 exaction and the impact); *see also Koontz*, 133 S. Ct. at 2600. Otherwise, the condition is
4 unconstitutional. *See Dolan*, 512 U.S. at 385 (describing unconstitutional conditions in the context
5 of land use); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005) (“[T]he government may not
6 require a person to give up a” constitutionally protected property right “in exchange for a
7 discretionary benefit” such as a land-use permit.) (internal quotation and citation omitted).

8 **1. Special Condition 1 requires the Greenes to dedicate a negative easement**

9 Here, the Commission’s decision to impose Special Condition 1 forces the Greenes to give
10 up property rights, recognized by Los Angeles’ zoning ordinances, in exchange for a coastal
11 development permit. In 1964, the City passed Ordinance No. 127,701 to establish a one-foot
12 setback for development on the blocks southeast of 65th Ave., including the Greenes’ property.
13 AR000053; AR000734; AR000663; AR000014. The City subsequently adopted similar ordinances
14 for the other blocks on Ocean Front Walk. AR000054; AR000055; AR000734–35; AR000665.

15 The City’s longstanding, legislatively adopted zoning ordinances allow for a one-foot
16 seaward setback on all homes on Ocean Front Walk. AR000053. The Greenes’ plans for their
17 property complied with this requirement, as reflected by the fact that they did not need any variance
18 for the City to approve their development. AR000536. Now, the Commission seeks to exact a deed
19 restriction over that portion of the property by an adjudicative land-use process. *See Dolan*, 512
20 U.S. at 391 n.8 (“Here ... the city made an adjudicative decision to condition petitioner's
21 application for a building permit on an individual parcel.”); *San Remo Hotel L.P. v. City And Cty.*
22 *of S.F.*, 27 Cal. 4th 643, 669–70 (2002) (discussing difference between legislatively and
23 adjudicatively imposed conditions); *Ehrlich*, 12 Cal. 4th at 906 (Kennard, J., concurring and
24 dissenting) (same).

25 The Commission has effectively demanded that the Greenes convey a negative easement
26 for the purported benefit of the public. A negative easement imposes “specific restrictions on the
27 use of property.” *Wooster v. Dep’t of Fish & Game*, 211 Cal. Appl. 4th 1020, 1026 (2012). It
28 “prevent[s] acts from being performed on the property [and] may be created by grant, express or

1 implied.” *Wolford v. Thomas*, 190 Cal. App. 3d 347, 354 (1987). Special Condition 1 imposes
2 specific restrictions on the use of the Greenes’ property that are not generally applicable to
3 neighboring properties, effectively imposing a four-foot negative easement across the rear
4 boundary of their parcel. The Greenes must record the condition as a deed restriction, which runs
5 with the land. AR000023–24. As a result, the Commission has made effectively the same type of
6 demand that it did in *Nollan*, as it has required a property owner to convey an easement for the
7 public benefit in exchange for a coastal development permit.

8 That the easement here is a negative easement, rather than a positive easement like in
9 *Nollan*, is of no legal significance. A negative easement is property within the meaning of the
10 Takings Clause, and when the government subjects land to a negative easement the government
11 must pay for it. *S. Cal. Edison Co. v. Bourgerie*, 9 Cal. 3d 169, 172–73 (1973); *see also Adamant*
12 *Mut. Water Co. v. U.S.*, 278 F.2d 842, 849 (9th Cir. 1960) (“under the Fifth Amendment a
13 restrictive covenant imposing a duty which runs with the land taken constitutes a compensable
14 interest”). Therefore, the Commission can only impose Special Condition 1 if it satisfies the nexus
15 and proportionality requirements articulated in *Nollan and Dolan*. *See Dolan*, 512 U.S. at 386.

16 **2. Special Condition 1 lacks a nexus between the Greenes’**
17 **development and an adverse public impact**

18 A condition imposed on the issuance of a development permit is unconstitutional if the
19 condition “fails to further the end advanced as the justification” for the condition. *Nollan*, 483 U.S.
20 at 837. The staff report provides purported justifications for Special Condition 1 in two sections
21 of the report. In the first section, entitled “public access and recreation,” the staff report cites
22 several sections of the Coastal Act that protect the public’s right to access the sea. AR00012. The
23 second section, entitled “hazards,” cites to Section 30253 of the Coastal Act. In reality, the two
24 sections are concerned with the same interest, protecting public access. *See* AR000019 (providing,
25 in the “hazards” section, that Special Condition 1 is necessary to ensure no obstruction or
26 interference with public access). These purported justifications do not meet with Commission’s
27 burden to demonstrate that Special Condition 1 is constitutional.
28

1 There is no nexus between the Greenes' development and public access to the beach. As
2 the City of Los Angeles determined, their "project will neither interfere nor reduce access to the
3 shoreline or beach." AR000533. The Greenes' proposed development will not intrude into public
4 property. Furthermore, the Greenes' home is located in the middle of the block, and the nearest possible
5 access point is adjacent to their neighbor's property to the southeast on 66th Avenue. The neighboring
6 house adjacent to 66th Avenue has a half-foot setback, so the Greenes' proposed development would
7 be farther away from the public property than the house that abuts the public access. AR000712.

8 In addition to access on 66th Avenue, there is wide public access one block south, there is
9 public access on 65th Avenue to the north, and the public can access the ocean from the bike path
10 that runs along the beach. AR000027. Most importantly, there are no public access points adjacent
11 to or through the Greenes' property because their house sits between two neighboring properties.

12 The portions of the Coastal Act cited by the staff report are further unavailing. See
13 AR0000012-13. The development does "not interfere with the public's right of access to the sea
14" Cal. Pub. Res. Code § 30211. Likewise, the development will not impact "[p]ublic access
15 from the nearest public roadway to the shoreline ..." because the Greenes' house is in the middle
16 of the block. *Id.* § 30212. Section 30214 provides for "regulat[ing] the time, place, and manner of
17 public access" That means that Section 30214 is concerned with limiting and regulating how
18 the public accesses the coast, not with how development impacts public access and, thus, Section
19 30214 is irrelevant to the Greenes' remodeling plans. As a result, none of these three sections can
20 provide justification for the imposition Special Condition 1.

21 Furthermore, there is no nexus between the Greenes' development and public recreation
22 on the beach. The report cites Section 30221 of the Coastal Act, which provides that "Oceanfront
23 land suitable for recreational use shall be protected for recreational use and development unless
24 present and foreseeable future demand for public or commercial recreation activities that could be
25 accommodated on the property is already adequately provided for in the area." Cal. Pub. Res. Code
26 § 30221. However, Section 30221 cannot justify the condition because the beach is over 550 feet
27 wide, which provides "adequate[]" areas to recreate and these areas will remain available for
28 recreation for the "foreseeable future." *Id.*

1 In an attempt to justify Special Condition 1, the staff report also speaks extensively about
2 the proposed Ocean Front Walk Boardwalk. AR000013–14. But the Greenes’ proposed
3 development does not intrude on the boardwalk. AR000749. The planned renovations will keep
4 the house 1.5 feet from Ocean Front Walk, consistent with the local ordinances. AR000536.

5 Moreover, any speculative impact of the development on the use of the boardwalk will not
6 occur in the “foreseeable future,” Cal. Pub. Res. Code § 30221, because it is not foreseeable that
7 the boardwalk will be built. The City originally designated this land for a boardwalk in the 1960s,
8 but it is still incomplete. *See* AR000734. The only portions of the boardwalk that are constructed
9 are those portions where the City has allowed homeowners to build past their property lines in
10 exchange for privately funding the construction of the boardwalk. In its current condition the area
11 is, in the words of Commissioner Luevano, “essentially a piece of land that runs in front of these
12 properties.” AR000744; AR000747 (Commissioner Vargas stating that Ocean Front Walk is “a
13 paper street so you know we’re fighting here to protect something that doesn’t even exist.”);
14 AR000533 (Ocean Front Walk “is not improved as a usable pedestrian right-of-way.”).

15 To the extent that the public wishes to recreate on this piece of land, including the piece of
16 land next to the Greenes’ property, the Greenes’ development will not prevent anyone from doing
17 so.¹ The public is also free to use this piece of land to move north and south along the beach,
18 although that is not the typical means that the public uses to access the ocean. *See* AR000745
19 (Commissioner Luevano stating that walking along Ocean Front Walk “isn’t the way that the
20 public accesses the beach . . .”).

21 The staff report speculates that development along Ocean Front Walk has led to “the
22 appearance that the areas designated for future public access . . . are actually private.” AR000014.
23 To the extent that this is true, it is not caused by the Greenes’ requested development, but rather
24 those homes that have actually been built past the property line. *See also* AR000745 (Mr. Schmitz
25 commenting that neighboring “cinder block walls . . . are violations.”). Furthermore, an interest in
26

27
28 ¹ But, as Commission Vargas stated at the Commission hearing, “it’s a silly argument to say that
somebody is going to . . . dig in their beach umbrella right next to . . . Ocean Front Walk when you
have 599 extra feet in front of it that could be closer to the ocean.” AR000747.

1 protecting the appearance of public land is no different than the Commission's "psychological
2 barrier" interest rejected by United State Supreme Court in *Nollan*. See *Nollan v. The Cal. Coastal*
3 *Comm'n* 483 U.S. 825, 838-39 (1987). As a result, there is no nexus between the Greenes'
4 development and the public's use of the beach for recreation.

5 Finally, there is no nexus between the Greenes' development and the justifications
6 articulated in the "Hazards" portion of the staff report. AR000017-18. The staff report cites
7 Section 30253, which provides that:

8 New development shall:

9 (a) Minimize risks to life and property in areas of high geologic, flood, and fire
10 hazard.

11 (b) Assure stability and structural integrity, and neither create nor contribute
12 significantly to erosion, geologic instability, or destruction of the site or
surrounding area or in any way require the construction of protective devices that
would substantial alter natural landforms along bluffs and cliffs.

13 Cal. Pub. Res. Code § 30253. This section of the Coastal Act cannot provide justification for
14 Special Condition 1 because the Greenes' property is not in an area of high geologic, flood, and
15 fire hazard, based on the geography of the beach. AR000050-51. Even the staff report admits that
16 the GeoSoils study the Greenes submitted "states that even with an approximate 5-foot rise in sea
17 level rise over the next 75 years, the proposed improvement are reasonable safe from flooding and
18 wave runup erosion." AR000018. Additionally, the Greenes' property is not along any bluffs or
19 cliffs, so Section 30253 cannot provide justification for Special Condition 1. AR000050.

20 None of the Commission's stated interest in beach access or recreation are impacted by the
21 Greenes' proposed development. Accordingly, Special Condition 1 is an unconstitutional
22 condition on the Greenes' right to use their property.

23 **3. Special Condition 1 is disproportionate to any**
24 **alleged impact of the Greenes' development**

25 Even if there were a nexus between Special Condition 1 and the public's access to the
26 beach, the condition is not "related both in nature and extent to the impact of the proposed
27 development." *Dolan*, 512 U.S. at 391. Any impact of the Greenes' development is speculative
28 and speculative impacts cannot provide justification for imposition of a condition. See *Dolan*, 512

1 U.S. at 395-96 (a city’s mere conclusion that a condition for a development permit *could* offset a
2 particular impact fails the rough proportionality requirement). Instead, a condition must be
3 proportional to the actual impacts caused by a proposed development.

4 The staff report justifies the imposition of Special Condition 1 on hypothetical scenarios.
5 For example, the staff report speculates that outdoor maintenance of the home could interfere with
6 the public’s future use of Ocean Front Walk. AR000015. Even if one accepts the Commission’s
7 conjecture as true, Special Condition 1 is not a proportional response to the alleged impact. One
8 the basis of a wholly imagined hypothetical, the Commission is demanding that the Greenes scrap
9 the redesign of their retirement home at considerable expense only to make it less functional for
10 their present and actual needs.

11 Finally, the “hazards” section of the staff report also engages in raw speculation contrary
12 to all evidence in the record, stating that Special Condition 1 is necessary to protect future access
13 to the beach in the event that sea level rise is significant enough to erode the beach. AR000019.
14 Yet, the GeoSoils study, based on the Commission’s own projections of sea level rise over the next
15 75 years, concluded that “[t]he overtopping waters over the next 75 years most likely will not reach
16 the subject site even under extreme design conditions.” AR000047; AR00018. The staff report
17 does not dispute this conclusion, and even recognizes that “[a]s long as the wide sandy beach is
18 intact, the new development should be safe from sea level rise.” AR00018. Instead of accepting
19 the evidence, however, the staff report speculates that “if something were to happen that would
20 cause damage to the beach, then shoreline retreat may occur.” *Id.* But the Commission cannot
21 impose conditions based on something that may happen, it can only impose conditions that are
22 proportional to actual impacts of the proposed development. *Dolan*, 512 U.S. at 395-96.

23 All of the staff report’s statements are the type of “very generalized statements as to the
24 necessary connection between the required dedication and the proposed development” the Court
25 rejected in *Dolan*. 512 U.S. at 389. The Commission cannot justify the significant impacts of
26 Special Condition 1 with the speculative impacts to public access cited in the staff report. *Id.* at
27 395–96; *cf. Georgia-Pac. Corp. v. Cal. Coastal Comm’n.*, 132 Cal. App. 3d 678, 700 (1982)
28 (Commission cannot justify easement requirement based on what might occur at some future time).

1 Special Condition 1 lacks rough proportionality to the impact of the proposed development and,
2 therefore, is unconstitutional.

3 **B. The Commission’s findings in support of imposing Special Condition**
4 **1 are not supported by substantial evidence because they based upon**
5 **incorrect facts, incorrect legal theories, and conjecture**

6 Additionally, this Court should direct the Commission to remove Special Condition 1
7 because the agency’s finding that Special Condition 1 is necessary to protect public access to the
8 beach is not supported by substantial evidence. Substantial evidence is not “synonymous with
9 ‘any’ evidence” but instead must be reasonable, credible, and of solid value. *Kuhn v. Dep’t of Gen.*
10 *Servs.*, 22 Cal. App. 4th 1627, 1633 (1994) (quotations omitted). A finding is not supported by
11 substantial evidence if it is based on “inferences that are the result of mere speculation” *Id.*
12 Similarly, an opinion “does not constitute substantial evidence if based on incorrect facts or legal
13 theory or on surmise or conjecture.” *Chu v. Workers’ Comp. Appeals Bd.*, 49 Cal. App. 4th 1176,
14 1182 (1996).

15 Special Condition 1 was based upon incorrect facts stated in the staff report and during the
16 Commission Hearing. For example, the staff report’s analysis of Special Condition 1 is based on
17 the false notion that the “normally required rear yard setback for a structure on the subject site is
18 15 feet” and that the City permit “included a reduction in the normally required setback” This
19 is simply not true. The applicable zoning ordinance for the Greenes’ property, and the zoning
20 ordinances applicable to the houses on neighboring blocks, set a seaward building line of one foot.
21 AR000053; AR000054; AR000055.

22 The staff also made incorrect statements at the hearing. Notably, in response to a question
23 from Commissioner Turnbull-Sanders about sea-level rise projections, Deputy Director Steve
24 Hudson incorrectly stated that “we didn’t receive from the applicant enough information to say
25 how close to the house the wave up rush would get.” AR000748. In fact, the GeoSoils study
26 provides that the shoreline is estimated to move between 75 feet to 150 feet “over the life of the
27 development” and, because the house is more than 550 feet from current mean high-tide line, “it
28 is unlikely that wave runup will reach the site ...” AR000049.

1 owners in circumstances analogous to the Greenses'. *Grier v. Kizer*, 219 Cal. App. 3d 422, 431
2 (1990), *modified* (May 2, 1990), and *disapproved of on other grounds by Tidewater Marine W.*
3 *Inc. v. Bradshaw*, 14 Cal. 4th 557 (1996).

4 In the words of the Commission staff, typically “in cases of substantial improvements to a
5 principal structure that could be affected by wave uprush or sea level rise, the Commission imposes
6 special conditions requiring ... No Future Shoreline Protective Device(s)” Motion to augment
7 the administrative record Exhibit 1 at 4. Despite the evidence of the wave uprush study, the
8 Commission determined that “shoreline retreat may occur.” AR00018. Therefore, because the
9 Commission believed that there was a chance that the development could be impacted, there was
10 no additional evidence that the Greenses could have presented, and no objection they could have
11 made, that would have led to the Commission abandoning its demand for Special Condition 3.

12 This has been the practice of the Commission for years. Since 2015, the Commission has
13 consistently required owners of oceanfront residential homes to waive their right to construct a
14 shoreline protective device when they seek a coastal development permit that would expand the
15 home seaward. The Greenses’ research has found that, since 2015, the Commission has issued 62
16 coastal development permits for new residential oceanfront development, including the Greenses’
17 permit. *See*, Motion to augment the administrative record, Exhibits 1–91. Of those 62 permits, only
18 seven escaped the permit process without a condition similar to Special Condition 3. *See Id.*
19 Exhibits 15, 18, 45, 47, 55, 59, 60.² Three of those permits did not request development that would
20 move the structure closer to the sea, making them unlike the Greenses’ development. *See id.* Exhibit
21 1, 18, 55. Also, one permit was issued without a similar condition only because the condition was
22 removed when the Orange County Superior Court issued a writ of mandate invalidating the
23 condition. *Id.* Exhibit 60. Therefore, only three times out of 55 analogous situations did the
24 Commission fail to impose a condition similar to Special Condition 3.

25
26
27 ² It is unclear whether one other permit imposed the condition because it incorporated special
28 conditions from a 2004 coastal development permit. *Id.* Exhibit 59 at 4. However, the
Commission issued a similar permit for a nearby property around the same time that did include
a shoreline protective device waiver. *See id.* Exhibit 58.

1 **B. The Commission failed to proceed in the manner**
2 **required by law in imposing Special Condition 3**

3 The California Constitution establishes inalienable rights of “acquiring, possessing, and
4 *protecting property*, and pursuing and *obtaining safety*, happiness, and privacy.” Cal. Const. art I,
5 §1 (italics added). The right to protect one’s home from erosion or other hazards is further
6 guaranteed to property owners by Coastal Act Section 30235. Special Condition 3 requires the
7 Greenes to waive this right in exchange for a coastal development permit.

8 The Commission’s justification for Special Condition 3 is that it will “minimize the
9 project’s potential future impact on shoreline processes and public access” and “to put the
10 applicants and future owners on notice that Section 30253 limits their ability to ever construct a
11 protective device to protect the new development” AR00020. But Special Condition 3 does
12 not satisfy the nexus and proportionality requirements of *Nolan* and *Dolan* and is not authorized
13 by Section 30253 of the Coastal Act.

14 As demonstrated above, the undisputed record evidence shows that future sea level rise in
15 the next 75 years will not impact shoreline processes and public access. *See* AR000050–51, p. 16,
16 *supra*. Thus, the proposed development will “neither create nor contribute significantly to erosion,
17 geologic instability, or destruction of the site or surrounding area” and, over the life of the building,
18 will not “requires the construction of protective devices ...” Cal. Pub. Res. Code § 30253(b).³ In
19 fact, the conclusion of the GeoSoils study mirrors the language of Section 30253 of the Coastal
20 Act, and concludes that the development will not impact the public beach. AR000051. The Coastal
21 Commission’s speculative “potential future impact” cannot justify the requirement that the
22 Greenes waive their right to protect their home. Accordingly, the Commission failed to proceed in
23 a manner required by law when it imposed Special Condition 3.

24 **CONCLUSION**

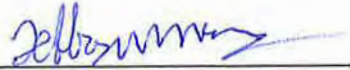
25 This Court should grant the Greenes’ requested Petition for Writ of Administrative
26 Mandate.

27 _____
28 ³ Furthermore, the Greenes’ property is not along “bluffs and cliffs.” Cal. Pub. Res. Code
§ 30253(b).

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Dated: May 24, 2018.

PACIFIC LEGAL FOUNDATION

By: 
JEFFREY W. MCCOY
Attorney for Petitioners

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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 May 24, 2018, a true and correct copy of **PETITIONERS' OPENING 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 24th day of May, 2018, at Sacramento, California.


IZA A. RODRIGUEZ