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31 October 2014

*By Hand Delivery*

The Honorable Chief Justice Tani Cantil-Sakauye
And Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

*Subject*: *Lynch v. California Coastal Commission* (case no. S221980)

***Amici Curiae Letter of***
**Beach and Bluff Conservancy,**
**Protect the Beach.org,**
**Seacoast Preservation Association, and**
**Coastal Property Owners of Santa Cruz County**
***In Support of the Petition for Review***

Dear Chief Justice Cantil-Sakauye and Associate Justices:

California has covenanted first-and-foremost that its people have the "inalienable" constitutional rights of "defending life", "pursuing and obtaining safety", and "protecting property". (Cal. Const. art. I. § 1.) So paramount are these rights that Californians may use even *lethal* force to defend themselves and their families in their homes. (Pen. Code § 197(2).) Along the coast, Californians seeking protection from the sea sometimes need to build seawalls—a need that may become only more acute as sea level rises and increased inland urbanization chokes off sediment flows to beaches. These Californians have found refuge in the plain language of the Coastal Act, which mandates that seawalls "shall be permitted when required … *to protect existing structures* … , and when designed to eliminate or mitigate adverse impacts … ." (Pub. Res. Code § 30235, emphasis added.)

But the Coastal Commission does not like seawalls or the law that mandates their approval. The Commission issues only temporary permits for seawalls, as it did here. As justification, the Commission offers only its *hope* that the law will change so as to

allow the outright denial of seawall permits in the future. And the Commission takes the position that even those temporary seawalls cannot be built while litigation challenging any part of their permits is pending. The Commission's position puts lives and homes along the coast at grave risk. Yet here, a divided Court of Appeal sided with the Commission. (*Lynch v. Cal. Coastal Comm'n* (2014) 229 Cal.App.4th 658.)

The U.S. Supreme Court has rejected similar earlier efforts by the Commission to require coastal homeowners to give up their property. In *Nollan*, the Commission refused to permit the redevelopment of a home unless its owners agreed to dedicate the beach in their front yard to the public, even though the new house would cause no new adverse impacts to public access to the coast. (*Nollan v. Cal. Coastal Comm'n* (1987) 483 U.S. 825, 829.) The Court held that, because there were no public-access impacts related to the redevelopment, the public-access condition did not "substantial[ly] advanc[e]" any legitimate governmental interest and thus violated the homeowners' constitutional rights. (*Id.* at 841, quotation marks and citation omitted.) Along the way, the Court also denied the Commission's motion to dismiss, which argued that the homeowners had waived their right to challenge the condition by redeveloping their home while the litigation was pending. (479 U.S. 1015; *see also* Response Of Appellants To Motion Of Appellee California Coastal Commission To Dismiss (filed 9 December 1986) ("Opposition to Motion to Dismiss"), U.S. Supreme Court case no. 86-133, at 7-12 (excerpt attached[1]).) The Commission's insistence here—now approved by the Court of Appeal—on temporary seawalls that cannot even be built until litigation ends, based not on any long-term impact of the seawall but solely on the hope that the law may eventually change, fails *Nollan* and recklessly endangers life and property.

Amici Beach and Bluff Conservancy, Protect the Beach.org, Seacoast Preservation Association, and Coastal Property Owners of Santa Cruz County support the petition for review in this case because the protection of lives and homes along the coast is an exceptionally important issue, and because the decision of the Court of Appeal conflicts with decisions of this Court, the U.S. Supreme Court, the plain language of the Coastal

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[1] Because this pleading is not readily accessible, it is attached to this letter per CRC Rule 8.500(g)(1) and Rule 8.504(e)(1)(C).

Act, and the Constitution. While this letter focuses on the first two issues raised in the petition, the third issue should also be reviewed for the reasons stated in the petition.

**INTERESTS OF THE AMICI**

*Beach and Bluff Conservancy* is an organization that represents about 1,500 people in San Diego County. It is devoted to promoting public safety and the protection of public infrastructure and private homes put in danger by eroding and unstable bluffs. It is interested in this case because of the public and private importance of seawalls.

*Protect the Beach.org* is a 501(c)(3) nonprofit whose mission includes supporting the preservation of the property rights guaranteed by the Coastal Act and helping to educate the public about the value of maintaining safe beaches in California. The organization is interested in this case because the right to have a seawall for protection is guaranteed by the Coastal Act, and seawalls can help maintain safe beaches. (Five beach-goers have been killed by collapsing natural bluffs in northern San Diego County since 1990.)

*Seacoast Preservation Association* is a California non-profit corporation, founded in 1971, that is now the largest organized oceanfront-homeowners group in Southern California, with approximately 1,200 members. The organization is interested in safe beaches, which seawalls can promote.

*Coastal Property Owners of Santa Cruz County* is a 501(c)(4) civic league that represents the interests of the approximately 2,200 coastal-property owners in Santa Cruz County. It has 464 paid members. It is dedicated to promoting a legislative and regulatory environment where coastal-property owners can protect their homes and businesses from coastal erosion. It is interested in this case because permanent seawalls can be an important part of protecting those properties.

**REASONS FOR GRANTING REVIEW**

**1. Lives And Property Should Not Be Subject To The Commission's Mere Hope For A Change In The Law**

The plain text of the Coastal Act mandates that the Commission "shall" issue a seawall permit when two conditions are met: (i) "when required … to protect existing

structures", and (ii) "when designed to eliminate or mitigate adverse impacts on local shoreline sand supply." (Pub. Res. Code § 30235.) There is no dispute that these two conditions are met here: the seawall is necessary to protect Petitioners' existing houses in the wake of a disastrous storm that destroyed their previous seawall, and the Commission admits that the new seawall is "designed and conditioned to mitigate its impact on coastal resources". (*Lynch*, *supra*, at 676, 682 (dissent, quoting Commission finding).) Because these conditions are met, the Commission had no discretion to outright deny the permit.[2]

So instead of outright denial, the Commission *conditioned* the permit on it being only temporary. The Commission was admirably candid about its intentions; it straightforwardly acknowledged that the condition's intent was to allow for the seawall's "potential removal" in the future should the law change:

> To ensure that this project does not prejudice future shoreline planning options, including … legislative change, judicial decisions etc. [,] staff recommends that this approval be conditioned for a twenty-year period. … The intent of these conditions is … to allow for potential removal of the approval seawall … .

(*Lynch*, *supra*, at 682-683 (dissent, quoting Commission Staff Report (8 August 2011) Permit Application #6-88-464-A2 (Lynch & Frick) at 33-34.[3]) The majority in this case blessed the Commission's approach, holding that the condition was justified because "shoreline protection strategies are evolving". (*Id.* at 669.)

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[2] The majority quotes language from an earlier case that "section 30235 is permissive". (*Lynch* at 670, quoting *Ocean Harbor House Homeowners Assn. v. Cal. Coastal Comm'n* (2008) 163 Cal.App.4th 215, 241.) But neither the majority nor *Ocean Harbor* held that the Commission has discretion to deny a seawall permit when the conditions of section 30235 are met; they held instead that section 30235 does not restrict what other conditions the Commission may impose when approving a seawall that otherwise meets the conditions of section 30235.

[3] http://documents.coastal.ca.gov/reports/2011/8/W17b-8-2011.pdf.

The majority's decision, if it stands, has potentially sweeping application. The Commission now uses this kind of temporal condition as boilerplate in seawall permits. (*See* Commission Staff Report (10 August 2010) Permit Application #3-09-042 (O'Neill Seawall) at 5 ("[t]o ensure that this project does not prejudice future shoreline planning options … staff recommends that this approval be conditioned for a twenty-year period")[4]; Commission Staff Report (12 October 2010) Permit Application #6-09-33 (Garber, et al.) at 3 (same)[5]; Commission Staff Report (13 August 2013) Permit Application #3-12-055 (East Cliff Drive-Twin Lakes State Beach Improvements) at 10 ("[i]n many past cases, the Commission has addressed [seawalls] through identifying a twenty-year term")[6].) So resolving whether this boilerplate is legal will affect not just Petitioners' permit, but likely many seawall permits processed in the future. And if, as the majority held, "evolving" planning strategies are sufficient justification here, then there is nothing to stop the Commission from imposing time limits on *all* permits in the hope that some future Legislature will outlaw other kinds of coastal development.[7]

But there should be no doubt that this type of condition is illegal:

- The California Constitution guarantees the "inalienable" rights of "defending life", "pursuing and obtaining safety", and "protecting property" (Cal. Const. art. I. § 1). But here, the condition is *intended* to allow for these rights to be alienated after 20 years.
- *Nollan* held that there must be an "essential nexus" between a development's impact and any condition imposed on that development, such that the condition be designed to mitigate an actual impact from the development. (*Nollan*, *supra*, at 837.) But here, the condition is designed merely to allow for the *possibility* that the law will change within 20 years,

[4] http://documents.coastal.ca.gov/reports/2010/8/W16b-8-2010.pdf.

[5] http://documents.coastal.ca.gov/reports/2010/10/Th16c-10-2010.pdf.

[6] http://documents.coastal.ca.gov/reports/2013/8/Th23c-8-2013.pdf.

[7] This is not so far-fetched. At the hearing on this permit, one Commissioner voiced her hope that the homes on this coastal bluff "wither away".

not to mitigate some impact that the seawall is actually expected to cause 20 years hence.[8]

- The Legislature enacted the Coastal Act to ensure that existing development along the coast is protected. (*See* Pub. Res. Code § 30001(d) ("existing developed uses … are essential to the economic and social well-being of the people of this state"); Pub. Res. Code § 30001.5 ("the basic goals of the state for the coastal zone are to: (a) Protect … artificial resources").) But here, the condition is intended to allow for the *removal* of protections for existing homes.

The condition imposed by the Commission, and the majority's decision to uphold it, will have devastating consequences for property owners all along the coast. What bank would issue a 30-year mortgage to purchase a house protected by a seawall permitted for only 20 years? What insurance company would offer a homeowners' policy to a bluff-top home without the security of a permanent seawall? And what young family would *want* to purchase such a house? The condition has the potential to cloud the title of thousands of coastal properties. By clouding title, the majority's decision may end up destroying much of the investment-backed value that coastal residents have built in their homes. This Court should grant review so the majority's decision below can be reversed.

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[8] Nor does the majority's suggestion (at page 669) that the houses protected by the seawall might be redeveloped in about 20 years satisfy *Nollan*. The proposal before the Commission was to build a seawall now, not new houses in 20 years. Under *Nollan,* the Commission may impose conditions that have a nexus to an impact caused by the seawall, but not conditions that might have a nexus to some speculative future project. If a redevelopment project comes before the Commission in 20 years, the Commission may impose appropriate conditions to mitigate that project's impacts then, not now.

**2. Seawall-Permit Holders Should Not Have To Choose Between Their Right To Self-Defense And Their Right To Challenge Unconstitutional Conditions**

The majority below also held that, as a matter of law, Petitioners waived their right to challenge the permit's conditions when they built their seawall. (*Lynch*, *supra*, at 664.) In the petition for review, Petitioners thoroughly demonstrated why this proposed rule has no basis in the case law and would make bad policy. (Petition for Review at 12-20.) It is also unconstitutional, contrary to the Coastal Act, and puts life and property at risk.

It is unconstitutional because, as the Nollans put it in their successful opposition to the same argument the Commission made to the U.S. Supreme Court, it would force coastal residents into the "Hobson's choice" of picking and choosing between their constitutional rights: they can either exercise their right to defend themselves and their property by building a seawall, but abandon their right to petition the courts for relief from unlawful conditions, or they can exercise their right to petition while foregoing their right to self-defense. (Opposition to Motion to Dismiss at 8; 479 U.S. 1015 (order denying motion).) This Court has consistently rejected efforts to condition even governmental *privileges* on the recipient's waiver of constitutional rights. (*See* Opposition to Motion to Dismiss at 9 (collecting cases).) There should be no question but that conditioning one constitutional *right* on the waiver of another is unconstitutional.

It is also contrary to the Coastal Act. The majority opinion derived its rule from the equitable maxim that a person "who takes the benefit must bear the burden." (*Lynch*, *supra*, at 664, quoting Civil Code § 3521.) Not so for the Coastal Act. The Coastal Act contains a severability provision that allows invalid permit conditions to be stricken while valid conditions remain in effect:

> If any … application [of the Coastal Act] to any person or circumstances is held invalid, such invalidity shall not affect other … applications of the [Coastal Act] which can be given effect without the invalid … application … .

(Pub. Res. Code § 30900.) So Coastal Act benefits may be indeed be taken without the bearing of invalid burdens. Because the reason for the majority's rule fails, so too must the rule itself. (Civil Code § 3510.)

And the rule would recklessly put life and property at risk. It would require coastal residents whose seawalls have been destroyed to go without the projection of a new seawall—potentially for years—until any litigation over the seawall permit is final. Devastating waves, such as those from a storm or tsunami, can strike at any time with little to no notice. The majority opinion tries to reassure that coastal residents in "immediate danger" can apply for an "emergency permit". (*Lynch*, *supra*, at 665 n.2.) But the regulations governing emergency permits do not allow for immediate relief in the face of such immediate danger.[9] No Californian should have to put their family and home at risk to challenge a permit condition in court.

**CONCLUSION**

The petition for review should be granted.

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[9] Public notice is required, which takes time. (14 Cal. Code Regs. § 13142.) The Commission's executive director must also make a finding that the emergency work is consistent with the Coastal Act, which presumably requires the applicant to marshal expert evidence. (14 Cal. Code Regs. § 13142(c).) An emergency permit can be put on hold indefinitely by the mere request of one-third of the Coastal Commissioners. (Pub. Res. Code § 30624(b).) And while the executive director presumably acts fairly even on emergency seawall applications from people who are at the same time also suing the Commission over a seawall permit, all emergency permit applications may still be denied "solely at the discretion of the executive director." (14 Cal. Code Regs. § 13143(c).)

Sincerely yours,

BRISCOE IVESTER & BAZEL LLP

Peter S. Prows
Counsel for Amici Curiae
Beach and Bluff Conservancy,
Protect the Beach.org,
Seacoast Preservation Association, and
Coastal Property Owners of Santa Cruz
County

Attachment
cc: All counsel

**Exhibit 1**

No. 86-133

In The
# Supreme Court of the United States
October Term, 1986

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JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

*Appellants,*

v.

CALIFORNIA COASTAL COMMISSION,

*Appellee.*

---

**On Appeal from the Court of Appeal of the State of California, Second Appellate District**

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## RESPONSE OF APPELLANTS TO MOTION OF APPELLEE CALIFORNIA COASTAL COMMISSION TO DISMISS

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**Appeal Docketed July 29, 1986**
**Probable Jurisdiction Noted October 20, 1986**

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California cases in which a court has found a condition on a permit issued by the commission to be invalid have applied this remedy. *See Georgia-Pacific Corp. v. California Coastal Commission,* 132 Cal. App. 3d 678 (1982); *Liberty v. California Coastal Commission,* 113 Cal. App. 3d 491 (1980).

The commission's Motion cites no case of this Court for authority for its contention that this Court will not take jurisdiction of a challenge to a state statute based on the "Taking" Clause unless a prayer for damages was prosecuted in the lower courts. There are, however, a number of precedents supporting jurisdiction to review a "taking" claim in the absence of any claim for money damages. *See, e.g., Keystone Bituminous Coal Association v. Duncan,* No. 85-1092 (argued Nov. 10, 1986); *Hodel v. Virginia Surface Mining and Reclamation Association,* 452 U.S. 264 (1981); *Kaiser Aetna v. United States,* 444 U.S. 164 (1979); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922).

The federal constitutional issue presented in this case was raised and decided in the courts below. Jurisdiction in this Court is not defeated by the Nollans' decision to pursue only the invalidation remedy, which is the remedy established under state law as the preferred remedy for the Nollans' constitutional claim.

## II

## THE NOLLANS HAVE NOT WAIVED THE RIGHT TO CHALLENGE THE ACCESS CONDITION UNDER STATE LAW

Contrary to the assertion by the commission there is no general rule under California state law that a permit applicant has no option but to comply with unlawful

demands of a public agency in order to obtain promptly a permit for which he or she is fully eligible. Such a rule, if it existed, would raise serious state and federal constitutional questions if applied to force a permit applicant to the Hobson's choice of waiving a constitutional right or foregoing the permit to which he or she is otherwise entitled.

The possibility for serious abuse of individual rights under such a rule is amply demonstrated by the conduct of the commission in the Nollans' case. The Nollans offered the required deed restriction, asking only to reserve the right to have a court of law review the dedication requirement for conformance with constitutional standards. The commission rejected this offer and instead required "the Nollans to submit an offer . . . that does not contemplate a legal challenge to the Commission's action on the permit." Appendix to Motion at A-3 and A-9.[3]

In California, "the act of filing suit against a governmental entity represents an exercise of the right of petition and thus invokes constitutional protection." *City of Long Beach v. Bozek,* 31 Cal. 3d 527, 534 (1982). Thus, the commission demanded that the Nollans sacrifice two constitutional rights. They were ordered to give up both the right not to have their property taken without just compensation and the right to petition the courts for redress of a constitutional grievance.

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[3] In its reply to the supplemental petition for writ of administrative mandamus the commission admitted the allegations in Paragraph Nos. 6 and 35 concerning the offer of dedication with reservation of rights as set out in footnote No. 2, *supra.*

California law prohibits state agencies from conditioning government benefits on the recipient's waiver of constitutional rights. In *Bagley v. Washington Township Hospital District*, 65 Cal. 2d 499 (1966), the California Supreme Court ruled that public employment could not be conditioned upon employees agreeing to refrain from political campaign activities. In *Parrish v. Civil Service Commission of the County of Alameda*, 66 Cal. 2d 260 (1967), the California Supreme Court invalidated a statute requiring welfare recipients as a condition of continued aid to submit to warrantless searches of their homes. In *Atkisson v. Kern County Housing Authority*, 59 Cal. App. 3d 89 (1976), the California Court of Appeal ruled that recipients of low-income housing could not be forbidden from living with someone of the opposite sex not related by blood or marriage. Recently in *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252 (1981), the California Supreme Court ruled that Medi-Cal assistance to pregnant women could not be conditioned upon forfeiture of their constitutional rights to choose an abortion.

Federal law is in accord. In *Perry v. Sindermann*, 408 U.S. 593 (1972), this Court made it clear that a governmental benefit could not be conditioned on the waiver of a constitutional right.

> "For if the government could deny a benefit to a person because of his constitutionally protected [rights], his exercise of those freedoms would in effect be penalized and inhibited." 408 U.S. at 597.

Numerous cases of this Court applying this general principle were collected in the *Perry* opinion. *Id.*

The commission's suggestion that the Nollans should be deemed to have waived their rights to seek judicial review of the unconstitutional obligation imposed on them can have no merit in light of the clear authority against unconstitutional conditions and coerced waivers of constitutional rights. The commission's argument rests primarily on the case of *Pfeiffer v. City of La Mesa,* 69 Cal. App. 3d 74 (1977). In *Pfeiffer* the city placed a condition on a permit approval requiring the landowner to construct certain improvements which the landowner alleged were to benefit other property. The landowner constructed the improvements and then brought an action in inverse condemnation seeking damages from the city for the costs of the improvements. *Id.* at 76. Contrary to the commission's assertion, the court did not rule that no claim could be stated against the city. It held that "the proper method to test the validity of conditions in a building permit is a proceeding in mandamus under Code of Civil Procedure section 1094.5." *Id. Pfeiffer* is an articulation of the rule stated by the California Supreme Court in *Agins v. City of Tiburon, supra,* that a landowner "may attempt through declaratory relief or mandamus to invalidate the ordinance as excessive regulation in violation of the Fifth Amendment . . . . He may not, however, elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into an unlawful taking for which compensation in eminent domain must be paid." 24 Cal. 3d at 273. The recognized rationale for the rule in California is to protect "governmental fiscal planning" from the threat of unforeseen claims for "substantial monetary damages." *Air Quality Products, Inc. v. State of California,* 96 Cal. App. 3d 340, 352 (1979). The Nollans complied with this rule; they

challenged the unlawful permit condition in an action for mandamus under California Code of Civil Procedure § 1094.5 and did not request damages. Appendix to Motion at A-1.

The commission's reliance on *County of Imperial v. McDougal,* 19 Cal. 3d 505 (1977), and *J-Marion Co. v. County of Sacramento,* 76 Cal. App. 3d 517 (1977), is also misplaced. These cases hold that a subsequent property owner cannot challenge a condition which his predecessor in interest accepted without protest or voluntarily agreed to have included in a land use approval. These cases have no relevance here. The Nollans are not attempting to avoid commitments voluntarily made by their predecessor in interest and passed to them. They steadfastly maintained before the commission that the access condition was invalid and that they would refuse to make the dedication unless they could retain the right to seek judicial review of its validity.

Any illusion that a property owner who has accepted a permit retains no cause of action under California law to challenge an unlawful condition was recently dispelled by the California Supreme Court in *Candid Enterprises, Inc. v. Grossmont Union High School District,* 39 Cal. 3d 878 (1985). To satisfy a condition on the approval of a condominium project Candid Enterprises was required under a secured agreement with the school district to pay certain "school-impact fees" at the time it commenced construction. *Id.* at 883. When Candid began construction it paid some fees under protest and brought an action in mandamus to set aside the agreement and require return of the fees paid. *Id.* at 884 The school district argued that by commencing construction under the permit Candid had waived both

the right to challenge the agreement and the right to seek return of the fees paid. Because the court ruled that the district could collect the fees, it did not reach the question of whether Candid had waived its right to seek return of the fees paid. *Id.* at 891 n.7. However, the court did address and decide the question of whether the requirement to pay such fees was subject to challenge, clearly ruling that the mandamus remedy had not been waived:

> "Respondents also press the procedural point that their demurrer should have been sustained. This argument, however, is untenable. Although the writ of administrative mandate does not lie because the Board was not required by law to grant petitioner a hearing . . . the writ of ordinary mandate is available." *Id.* at 885 n.3.

The cases relied on by the commission do not stand for the constitutionally questionable proposition that applicants for a government permit in California may be required to waive a constitutional right as a condition of obtaining a permit for which they are otherwise eligible. Although California land use law does not recognize a damages remedy for unlawful permit conditions and although fees once paid may not be recoverable, a property owner may challenge such condition by a proceeding in mandamus. The Nollans have conformed to this requirement. Their action in proceeding to demolish and reconstruct the home on their property does not alter their continuing dispute with the commission over whether they must execute and record the deed restriction required by their permit.

---o---

## CONCLUSION

For the reasons set forth above, the Motion of Appellee, California Coastal Commission, to Dismiss should be denied.

DATED: December 9, 1986.

Respectfully submitted,

Of Counsel

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I, Linda Chloupek, of lawful age, being duly sworn, upon my oath state that I did, on the 8 day of **December 1986**, place in the U.S. Post Office in Omaha, NE 1 package(s) containing 3 printed copies of **RESPONSE OF APPELLANTS TO MOTION TO DISMISS** in the following case:

No. 86-133

JAMES PATRICK NOLLAN and MARILYN HARVEY NOLLAN, Appellants,
v.
CALIFORNIA COASTAL COMMISSION, Appellee.

that the proper first class postage was affixed to said envelope(s) and that they were plainly addressed to the following:

Mr. John K. Van de Kamp
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Andrea Sheridan Ordin
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Linda Chloupek
Affiant

Subscribed and sworn to before me this 8 day of December 1986.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

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Notary Public

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## PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to this action. I am employed in the City and County of San Francisco and my business address is 155 Sansome St., Suite 700, San Francisco, California 94104.

On October 31, 2014, at San Francisco, California, I served the attached document(s):

***AMICI CURIAE LETTER OF* BEACH AND BLUFF CONSERVANCY, PROTECT THE BEACH.ORG, SEACOAST PRESERVATION ASSOCIATION, AND COASTAL PROPERTY OWNERS OF SANTA CRUZ COUNTY *IN SUPPORT OF PETITION FOR REVIEW***

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on October 31, 2014 at San Francisco, California.

Margaret Howlett