IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

BARBARA LYNCH and THOMAS FRICK, Plaintiffs and Respondents, **v.** **CALIFORNIA COASTAL COMMISSION,** Defendant and Appellant.	Case No. D064120

San Diego County Superior Court, Case No. 37-2011-00058666-CU-WM-CTL
Earl H. Maas, III, Judge

APPELLANT CALIFORNIA COASTAL COMMISSION'S OPENING BRIEF

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INTRODUCTION

The California Coastal Commission approved Respondents' coastal development permit application to build a large seawall to protect their homes at the top of an eroding coastal bluff. All parties agree that the seawall will have impacts on the public beach below. The seawall's longer-term effects, however, are extraordinarily difficult to determine because of uncertainty about how quickly sea level rise will accelerate in coming decades, about potential future alternative responses to shoreline erosion, and about future development patterns. The Commission reasonably responded to this uncertainty by authorizing the seawall for 20 years and requiring Respondents to apply to retain, modify, or remove the seawall at the end of the 20-year period. If the seawall is still necessary then, the Commission will be in a much better position to determine what mitigation is appropriate for the seawall's continued impacts.

The Commission denied Respondents' request to replace a collapsed private stairway down the bluff face because the City of Encinitas local coastal program expressly prohibits the construction of new private stairways and calls for existing private stairways to be phased out.

Respondents accepted the permit, recorded deed restrictions that include an express, irrevocable covenant to comply with the permit conditions, and went forward and built the seawall. Despite this, Respondents pursued an action against the Commission to invalidate the permit conditions. Under long established precedent, acceptance of a permit's benefits and construction of the permitted development waives any ability to challenge the permit's conditions. The trial court erred in allowing their lawsuit to proceed.

On the merits of their challenge, the Commission properly conditioned approval of the seawall to address the seawall's adverse impacts on the public beach below and on neighboring properties. The 20-

year authorization period for the seawall, at the end of which Respondents may seek to reauthorize the seawall if it remains necessary to protect their existing homes, allows the Commission to evaluate the seawall's condition in 20 years; to evaluate additional alternatives that may become available that would protect the existing principal structures while minimizing adverse impacts; to evaluate the seawall's as-yet unmitigated longer-term impacts on public access and recreation, scenic views, sand supplies, and other coastal resources; to evaluate the need for additional mitigation, particularly in light of accelerating sea level rise, to address such impacts; and to evaluate whether an opportunity exists to remove or modify the existing seawall in a manner that would eliminate or reduce identified impacts, taking into consideration the requirements of the City's local coastal program. Respondents acknowledged revisiting mitigation in the future would be appropriate, but objected to the possibility that the Commission might require removal of the seawall in the future even if it is no longer needed. Ignoring the fact that the Commission approved the seawall, the trial court found the 20-year authorization period was a regulatory taking and in essence approved a seawall in perpetuity with mitigation for only the first 20 years of impacts.

The Commission also properly denied Respondents' request to rebuild the private stairway on the bluff. The City of Encinitas local coastal program, which the Coastal Act requires the Commission to enforce, expressly prohibits the construction of private stairways on coastal bluffs and calls for existing private stairways to be phased out.

Substantial evidence in the record supports the Commission's decision. The conditions are needed to balance the public's rights and interest in the beach at the toe of the bluff and the Respondents' rights to protect their existing homes. The trial court judgment should be reversed.

STATEMENT OF THE CASE

Respondents own adjacent properties located at 1500 and 1520 Neptune Avenue in Encinitas, California. (Administrative Record (AR) 735.) Each property has a relatively flat, developed blufftop area and a steep bluff face that cascades down to the Pacific Ocean. (AR 735.) Respondents' properties and the entire Encinitas shoreline are mapped "Generally Susceptible" or "Most Susceptible" to landslides. (AR 1694-1695, 1720.)

Respondents applied to amend an earlier, Commission-issued coastal development permit to remove their then-existing shoreline protection and build a new 100-foot long, 29-foot high shotcrete seawall and new mid-bluff geogrid protection. (AR 1677.) They also sought to rebuild the lower portion of a private access stairway tied into the seawall. (AR 1677.)

Respondents built the previous seawall, consisting of wooden telephone poles, along with a bluff face stairway in 1986 without first obtaining a coastal development permit. (AR 1909.) The Commission eventually approved a coastal development permit after-the-fact, determining that removal of the seawall and the stairs could "render the bluff unstable and increase the danger to the existing residence resulting from bluff failure." (AR 9, 1695, 1767.) The Commission expressly pointed out that Respondents' decision to build the seawall and stairway first and request permission later prevented the Commission from evaluating their compliance with Coastal Act requirements. In 2005, Respondents, again without permits, installed concrete footings around the base of the seawall's supporting timbers. (AR 38.) Respondents applied for a permit amendment only after the Commission's enforcement division issued a stop work notice. (AR 38.) In 2010, much of the seawall and stairway collapsed during a storm. (AR 735.)

After a public hearing, the Commission approved the new seawall. The Commission approved the entire 100-foot seawall across both properties even though it found that a protective device was not currently needed to protect the blufftop home at 1520 Neptune Avenue. (AR 1678.) The Commission approved the entire span because it found that a need for a seawall to protect the residence at 1520 was likely to arise in the near future and because extending the wall across both properties at this time would provide a more stable wall, would allow the wall to be moved up to 8 feet landward of its previous location to increase the beach area, and would decrease the visual impacts of separate patchwork wall designs. (AR 1678.)

The Commission approved the seawall for 20 years with conditions to mitigate its impacts during the 20-year period. Respondents must apply prior to expiration of the 20-year period to retain, modify, or remove the seawall, depending on whether the seawall is still needed and the availability of alternative measures. An application to retain the seawall must address its future, as-yet unmitigated, impacts on coastal resources, including public access, recreational use, and shoreline sand supply. (AR 1682 [Special Condition 2], 1683-1684 [Special Condition 3].)

The Commission set out the various impacts seawalls in general and this seawall in particular have on public resources and on neighboring private properties. Seawalls impact the character of the shoreline and visual quality. (AR 1702.) They may also substantially alter natural shoreline processes, including preventing the creation or augmentation of sandy beaches because bluff retreat is one of several ways that beach area and beach quality sand is maintained and added to the shoreline. (AR 1702.) Retreat is a natural process resulting from many different factors such as erosion by wave action causing cave formation, enlargement, and eventual collapse; saturation of the bluff soil from ground water causing the bluff to slough off; and natural bluff deterioration. When a seawall is

constructed on the beach at the toe of the bluff, it directly impedes these natural processes. (AR 1702.)

Seawalls also adversely impact adjacent unprotected properties. Numerous studies indicate that when continuous protection is not provided, unprotected adjacent properties experience a greater retreat rate than they would if the seawall were not present. (AR 1709.) This is due primarily to wave reflection off the protective structure and from increased turbulence at the terminus of the seawall. (AR 1709.) These impacts are particularly problematic here because Respondents' seawall is an isolated structure in a stretch of largely unprotected shoreline. (AR 1709.)

Seawalls may also adversely impact public access and recreational use. (AR 1713.) The Commission found that Respondents' proposed seawall would currently be located inland of the mean high tide line on private property but, with sea level rise accelerating over time, the mean high tide elevation will likely adjust to a higher level, and the wall location will become the inland limit for the mean high tide line, impacting the public beach. (AR 1714-1715.) As waves reach the seawall with greater frequency and force, the beach will narrow until it disappears entirely.

The Commission included conditions to address the seawall's more immediate and quantifiable impacts. Special condition 1.f requires Respondents to submit plans detailing the construction method, texturing, and coloring of the seawall and to demonstrate that the design will blend into the adjacent natural bluff to minimize the seawall's impacts on the adjacent bluffs. (AR 1682.) Special condition 5 provides mitigation for the seawall's impacts to sand supply by requiring payment in lieu of providing

sand to replace the sand and beach area that are anticipated to be lost over the seawall's first twenty years.[1]

The Commission included special conditions 2 and 3, the conditions at issue, to allow the Commission to respond to potential changes and uncertainties. The special conditions require Respondents to apply for an amendment to the seawall permit prior to the expiration of the 20-year authorization period. Respondents can apply to either retain the seawall and provide mitigation for the ongoing impacts of the seawall based on the proposed remaining life of the seawall, change its size or configuration, or remove the seawall. (AR 1682-1683, 1711.) These conditions allow the Commission to reassess the need for continued armoring and its effects in twenty years when circumstances may differ greatly from today and to assess the physical condition of the seawall after twenty years of existence. (AR 1710.)

The Commission also conditioned its approval on Respondents removing reconstruction of the private bluff stairway from their plans. (AR 1679, 1681 [Special Condition 1.a].) The Commission found reconstruction of the stairway was inconsistent with the City's local coastal program that prohibits the construction of new private access stairways over the bluff and requires phasing out of existing private bluff face stairways. (AR 1679.)

Special condition 17, which Respondents did not challenge, requires Respondents to record a deed restriction indicating that the Commission has authorized development on the subject properties subject to terms and conditions that restrict the use and enjoyment of the property and imposing

[1] Respondents had proposed mitigation for 30 years of impacts on sand supply; the Commission pro-rated the amount to reflect the 20-year authorization period. (AR 1706.) Despite striking the 20-year term, the court did not allow the Commission to readjust the mitigation.

the special conditions as covenants, conditions, and restrictions on the use and enjoyment of the subject properties. (AR 1689 [Special Condition 17].)

On August 31, 2001, the Commission sent a Notice of Intent to Issue Permit to Respondents. (AR 1784-1795.) The Notice incorporated the 18 special conditions. (*Ibid.*) The Notice includes an Acknowledgment for the applicant to sign, which reads, "The undersigned permittee acknowledges receipt of this Notice and fully understands its contents, including all conditions imposed." (Joint Appendix (JA) 32-43, 52-62.)

Respondents accepted the conditions and recorded the deed restrictions. Frick signed and dated the Acknowledgment on September 26, 2011. (JA 53.) On September 30, 2011, he recorded a Deed Restriction with the San Diego County Recorder's Office. (JA 45-62.) The Deed Restriction reads in part:

> V. WHEREAS, on August 10, 2011, the Commission conditionally approved coastal development permit number 6-88-464-A2 . . . subject to, among other conditions, the conditions listed under the heading "Special Conditions" . . . .
>
> VI. WHEREAS, the Commission found that, but for the imposition of the Special Conditions, the proposed development could not be found consistent with the provisions of the Act and that a permit could therefore not have been granted; and
>
> VII. WHEREAS, *Owner(s) has/ve elected to comply with the Special Conditions, which require, among other things, execution and recordation of this Deed Restriction, so as to enable Owner(s) to undertake the development authorized by the Permit* . . . .
>
> NOW, THEREFORE, in consideration of the issuance of the Permit to Owner(s) by the Commission, the undersigned Owner(s), for himself/herself/themselves and for his/her/their heirs, assigns, and successors-in-interest, *hereby irrevocably covenant(s) with the Commission that the Special Conditions (shown in Exhibit B hereto) shall at all times on and after the date on which this Deed Restriction is recorded constitute for all purposes covenants, conditions and restrictions on the use and*

> *enjoyment of the Property* that are hereby attached to the deed to the Property as fully effective components thereof.

(JA 45-46, italics added.) Respondent Lynch signed the Acknowledgment and recorded a Deed Restriction containing the same language on November 23, 2011. (JA 24-43.)

Despite Respondent Frick's having just recorded deed restrictions covenanting to comply with the conditions, Respondents filed a petition for writ of mandate on October 7, 2011 challenging special conditions 1.a., 2, and 3. (JA 1-7.)

After confirming Respondents complied with all of the prior-to-issuance permit conditions, including recording the Deed Restrictions covenanting to comply with all of the conditions, the Commission issued Respondents' permit. (JA 65.) Respondents proceeded to construct the seawall.

After learning that Respondents went forward and completed construction of the seawall, the Commission moved for judgment on the pleadings based on Respondents' acceptance of the permit and completion of the seawall. (JA 13-20.) The trial court denied the Commission's motion, finding that Respondents had not "specifically agreed to" or "necessarily accepted" the conditions." (JA 101.)

Respondents then moved for judgment on their writ of administrative mandamus. (JA 102-103.) The trial court granted the motion for judgment. (JA 201-205.) The trial court ruled that Respondents were only repairing and not replacing the private access stairway and, therefore, the policies prohibiting "new" stairways did not apply. (JA 204.) The trial court further ruled that substantial evidence did not support the twenty-year authorization period and also found that the twenty-year authorization period was a taking. (JA 204.)

The trial court entered judgment on April 24, 2013. (JA 228-232.) The trial court also issued a writ, directing the Commission "to immediately upon receipt of this writ to remove . . . Special Conditions 1(a), 2, and 3 from Coastal Development Permit No. 6-88-464-A2." (JA 227.)

The Commission appealed. (JA 239-240.)

SUMMARY OF THE COASTAL ACT

The California Coastal Act of 1976 (Pub. Resources Code, §§ 30000-30900)[2] provides a "comprehensive scheme to govern land use planning for the entire coastal zone of California." (*Pacific Palisades Bowl Mobile Estates v. City of Los Angeles* (2012) 55 Cal.4th 783, 793, quoting *Yost v. Thomas* (1984) 36 Cal.3d 561, 565.) The Legislature adopted the Coastal Act to "protect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources." (§ 30001.5, subd. (a).) To achieve this goal, Chapter 3 of the Coastal Act contains policies which constitute the standards by which the Commission judges the adequacy of local coastal programs and the permissibility of proposed development. (§§ 30200-30265.5.) "The Coastal Act must be 'liberally construed to accomplish its purposes and objectives.'" (55 Cal.4th at pp. 793-794, quoting § 30009.)

Under the Coastal Act, local governments and the Commission share coastal development planning. Local governments must develop local coastal programs that contain the policies and plans for coastal development within their jurisdictions. (§ 30500.) Local coastal programs consist of two major components: a land use plan and an implementation plan. The land use plan is "the relevant portions of a local government's general plan, or local coastal element, which are sufficiently detailed to

[2] All further statutory references are to the Public Resources Code unless otherwise indicated.

indicate the kinds, location, and intensity of land uses, the applicable resource production an development policies, and where necessary, a listing of implementing actions." (§ 30108.5.) The implementation plan includes zoning ordinances and other actions which implement the land use plan's policies. (§ 30108.4.)

If the Commission is satisfied the local coastal program conforms to the Coastal Act's policies and standards, the Commission certifies the local coastal program, and the local entity assumes most permitting authority. (*Pacific Palisades Bowl Mobile Estates v. City of Los Angeles, supra,* 55 Cal.4th at p. 794; §§ 30512, subd. (c); 30513.) The Commission retains jurisdiction over amendments to permits the Commission issued prior to certification of the local coastal program. (AR 868 [Encinitas Municipal Code, § 30.80.020.E.].) When the Commission considers an amendment to such a permit, the Commission reviews the amendment for consistency with the local coastal program and the recreation and public access policies of Chapter 3 of the Coastal Act. (AR 1680; § 30604, subds. (b), (c); Cal. Code of Regs., tit. 14, § 13166, subd. (c).)

The City of Encinitas has a certified local coastal program. (AR 814-869.) Therefore, the Commission reviewed the proposed development for consistency with the City's local coastal program and the Coastal Act's public access and public recreation policies. (§ 30604, subds. (b), (c).)

STANDARD OF REVIEW

The standard of review for the Commission's decision is the substantial evidence test. (*Sierra Club v. California Coastal Commission* (1993) 19 Cal.App.4th 547, 556-557; *Grupe v. California Coastal Com.* (1985) 166 Cal.App.3d 148.) In reviewing the Commission's decision, the trial court determines whether the Commission proceeded without or in excess of its jurisdiction, there was a fair hearing, or the Commission abused its discretion. (*Ross v. California Coastal Commission* (2011) 199

Cal.App.4th 900, 921.) On appeal, the reviewing court's role is "precisely the same as that of the trial court." (*Sierra Club, supra,* 19 Cal.App.4th at p. 557.) Thus, this Court does not review the trial court's decision for error, it reviews the Commission's decision to determine whether it is supported by the evidence and whether the Commission proceeded properly. (*Ibid.*)

An administrative agency's decision is presumed to be supported by substantial evidence; the burden is on the petitioner to show there is no substantial evidence whatsoever to support the findings of the agency. (*Taylor Bus Service, Inc. v. San Diego Bd. of Education* (1987) 195 Cal.App.3d 1331, 1341; *Ross v. California Coastal Commission, supra,* 199 Cal.App.4th at p. 921.) When reviewing the Commission's decision, the court examines the whole record and considers all relevant evidence, including evidence that detracts from the decision. (*Ross, supra,* at p. 921.) Although this task involves some weighing to fairly estimate the worth of the evidence, that limited weighing does not constitute independent review where the court substitutes its own findings and inferences for that of the Commission. (*Id.* at p. 922.) Rather, it is for the Commission to weigh the preponderance of conflicting evidence, as the court may reverse its decision only if, based on the evidence before it, a reasonable person could not have reached the conclusion reached by the Commission. (*Ibid.*; *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493, 503.)

The court may not disregard or overturn a finding of fact of an administrative agency simply because it considers that a contrary finding would have been equally or more reasonable. (*Boreta Enterprises, Inc. v. Department of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94.) The court may only overturn the factual findings of the agency if the evidence is insufficient as a matter of law to sustain the findings. (*Barrie v. California Coastal Commission* (1987) 196 Cal.App.3d 8, 14.)

Substantial evidence is evidence of ponderable legal significance, reasonable in nature, credible, and of solid value, and relevant evidence that a reasonable mind might accept as adequate to support a conclusion. (*Young v. Gannon* (2002) 97 Cal.App.4th 209, 225.) Substantial evidence upon which the Commission may base its decision includes opinion evidence of experts, oral presentations at the public hearing, photographic evidence, and written materials prepared by staff. (*Whaler's Village Club v. California Coastal Commission* (1985) 173 Cal.App.3d 240, 261.) In determining whether substantial evidence supports the Commission's decision, a court must resolve any reasonable doubts in favor of the Commission. (*Paoli v. California Coastal Commission* (1986) 178 Cal.App.3d 544, 550; *City of San Diego v. California Coastal Commission* (1981) 119 Cal.App.3d 228, 232.) The Commission is the sole arbiter of the evidence and sole judge of the credibility of the witnesses. (*Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 970-971.) If any one of the Commission's findings is supported by substantial evidence and warrants denial of the stairway component of the project, defects in other findings will not prejudice petitioner. (S*aad v. City of Berkeley* (1994) 24 Cal.App.4th 1206, 1215.)

Courts review questions of law *de novo* but, due to the Commission's special familiarity with the regulatory and legal issues, they defer to the Commission's interpretation of the statutes and regulations under which it operates as well as its interpretation of local coastal program provisions. (*Ross v. California Coastal Com., supra,* 199 Cal.App.4th at p. 938 ["Courts must defer to an administrative agency's interpretation of a statute or regulation involving its area of expertise unless the challenged construction contradicts the clear language and purpose of the interpreted provision."]; *Hines v. California Coastal Com.* (2010) 186 Cal.App.4th

830, 849 [court gives "broad deference" and "great weight" to Commission's interpretation of local coastal program]; *Reddell v. California Coastal Com.* (2009) 180 Cal.App.4th 956, 965-966 [courts give deference to Commission's interpretation of the LCP appropriate to the circumstances of the agency action]; *Alberstone v. California Coastal Com.* (2008) 169 Cal.App.4th 859, 866 ["We review the Commission's determination of whether a substantial issue has been raised for abuse of discretion; we grant broad deference to the Commission's interpretation of the [local coastal program] since it is well established that great weight must be given to the administrative construction of those charged with the enforcement and interpretation of a statute."]; § 30625, subd. (e) [Commission decisions to guide future actions of local governments].)

"[T]he Legislature made the Commission, not the [local government], the final word on the interpretation of the [local coastal program]." (*Charles A. Pratt Constr. Co. v. California Coastal Com.* (2008) 162 Cal.App.4th 1068, 1072; see also *Reddell v. California Coastal Com., supra,* 180 Cal.App.4th at pp. 966-967.) "The Commission has the ultimate authority to ensure that coastal development conforms to the policies in the state's Coastal Act." (162 Cal.App.4th at p. 1075.) The Commission's interpretation of the Encinitas local coastal program is therefore entitled to deference.

ARGUMENT

I. RESPONDENTS WAIVED THEIR RIGHT TO CHALLENGE THE PERMIT CONDITIONS BY ACCEPTING THE PERMIT AND PROCEEDING WITH THEIR PROJECT

But for Respondents' express, irrevocable covenant to comply with all the permit conditions, the Commission would not have issued their coastal development permit. Respondents accepted the permit and its conditions

and proceeded with their project. Respondents did not proceed "under protest"; they willingly recorded deed restrictions, agreeing to comply with the conditions. By accepting the benefits of their permit and completing their project, Respondents waived the right to challenge the conditions.

Acceptance of a permit's benefits constitutes acceptance of the permit's burdens and precludes any challenge to such burdens. The Supreme Court has stated, "[I]f the permittee exercises its authority to use the property in accordance with the permit, it must accept the burdens with the benefits of the permit." (*Sports Arenas Properties, Inc. v. City of San Diego* (1985) 40 Cal.3d 808, 815; see also *County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510-511; *Pfeiffer v. City of La Mesa* (1977) 69 Cal.App.3d 74, 78.) Because Respondents chose to accept the permit's conditions, recorded signed and notarized deed restrictions to that effect, and completed construction of their project, they were barred from proceeding with their mandate petition.

"[A] landowner or his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by specifically agreeing to the condition or failing to challenge its validity, and accepted the benefits afforded by the permit." (*County of Imperial v. McDougal, supra,* 19 Cal.3d at 510-511.) In *County of Imperial*, the County issued a permit to a property owner to allow commercial sales of water from his residential well subject to a restriction that the water could be sold or used only within the County. The property owner's successor-in-interest asserted that he was not required to obtain a conditional use permit to sell the water outside of the county because the geographic restriction was invalid. The Court held that he was estopped to assert that the prohibition was invalid, and the Court need not reach the issue of its validity. (*Id.* at 511 & fn. 3.)

In *Pfeiffer v. City of La Mesa, supra,* 69 Cal.App.3d 74, landowners elected to comply with their permit's condition "under protest" and thereafter brought an action for inverse condemnation. The landowners argued that a petition under Code of Civil Procedure section 1094.5 would have been inadequate because their lease agreement with the state "compelled" them to complete the building additions and improvements without delay or risk cancellation of their lease. (*Id.* at 77-78.) The Court rejected their claim:

> If plaintiffs in this instance were "compelled" to accept the conditions of the permit and proceed with the construction rather than challenge the conditions in a mandamus proceeding, the compulsion was of their own making. . . . As the trial judge pointed out in ruling on the motion, economic detriment frequently results when a delay is incurred in obtaining a building permit. . . . If every owner who disagrees with the conditions of a permit could unilaterally decide to comply with them under protest, do the work, and file an action in inverse condemnation on the theory of economic coercion, complete chaos would result in the administration of this important aspect of municipal affairs.

(*Id.* at 78.) "It is fundamental that a landowner who accepts a building permit and complies with its conditions waives the right to assert the invalidity of the conditions and sue the issuing public entity for the costs of complying with them. Plaintiffs have supplied no authority and no convincing argument to indicate this fundamental principle is not applicable because they unilaterally announced they were proceeding under protest . . . ." (*Ibid.*)

Under the Coastal Act, there is no provision that allows a permittee to accept the benefits of a permit and still challenge the permit conditions. In contrast, the Legislature enacted the Mitigation Fee Act to provide a procedure whereby a developer can pay fees or comply with conditions

under protest under certain circumstances. In *Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, the court explained:

> Prior to the enactment of this statute, a developer could not challenge the validity of fees imposed on a residential development without refusing to pay them. (*Pfeiffer v. City of La Mesa* (1977) 69 Cal.App.3d 74, 78.) Since payment is a condition of obtaining the building permit, a challenge meant that the developer would be forced to abandon the project. The bill was drafted to correct this situation. It provided a procedure whereby a developer could pay the fees under protest, obtain the building permit, and proceed with the project while pursuing an action to challenge the fees.

(*Id.* at p. 241.)

But the Mitigation Fee Act applies only to exactions imposed by local agencies. (Gov. Code, § 66020, subd. (a).) The Legislature could have expanded its reach to state agencies and statewide programs such as the Coastal Act, but it did not.

Respondents did not purport to or ask to accept the conditions "under protest." They expressly stated they were electing to comply with the conditions, and they recorded deed restrictions that "irrevocably covenant[] . . . that the Special Conditions . . . shall at all times . . . constitute for all purposes covenants, conditions and restrictions on the use and enjoyment of the Property . . . ." (JA 25, 46.) The Commission issued the permit in reliance on Respondents' express, irrevocable covenants. Because Respondents chose to go forward and construct the seawall and covenanted to comply with the special conditions, the trial court erred when it found Respondents had not "specifically agreed to" or "necessarily accepted" the conditions and allowed them to proceed to challenge the permit conditions. (JA 101.) The Court should reverse the trial court judgment.

II. THE COMMISSION PROPERLY AUTHORIZED THE SEAWALL FOR TWENTY YEARS SUBJECT TO RE-AUTHORIZATION

The Commission approved Respondents' application to build a seawall, but conditioned it to ensure its consistency with the City's local coastal program. The conditions include special condition 2, which authorizes the seawall for twenty years from the date of approval (AR 1682), and special condition 3, which requires Respondents to submit an application before the permit expires for a permit amendment to retain, modify, or remove the seawall (AR 1683). Substantial evidence supports the Commission's decision to include these conditions.

The Encinitas local coastal program contains a number of policies related to the seawall, including the following:

Resources Management Policy 8.5 states:

> The City will encourage the retention of the coastal bluffs in their natural state to minimize the geologic hazard and as a scenic resource. *Construction of structures for bluff protection shall only be permitted when an existing principal structure is endangered and no other means of protection is possible*. . . .

(AR 844, italics added.)

Section 30.34.020(C)(2)(b) sets out specific findings the approving agency must make to approve a seawall:

> (1) The proposed measure must be demonstrated in the soils and geotechnical report to be substantially effective for the intended purpose of bluff erosion/failure protection, within the specific setting of the development site's coastal bluffs. The report must analyze specific site proposed for development. . . .
>
> (2) The proposed measure must be necessary for the protection of a principal structure on the blufftop to which there is a demonstrated threat as substantiated by the site specific geotechnical report. . . .
>
> (3) The proposed measure will not directly or indirectly cause, promote or encourage bluff erosion or failure, either on site or for an adjacent property, within the site-specific setting as

> demonstrated in the soils and geotechnical report. Protection devices at the bluff base shall be designed so that additional erosion will not occur at the ends because of the device.
>
> ****
>
> (5) The proposed device/activity will not serve to unnecessarily restrict or reduce the existing beach width for use or access.

(AR 853.)

The City's certified implementation plan requires that shoreline protective structures be designed to protect natural scenic qualities of the bluffs and not significantly alter the bluff face. In particular, section 30.34.020(B)(8) states:

> The design and exterior appearance of buildings and other structures visible from public vantage points shall be compatible with the scale and character of the surrounding development and protective of the natural scenic qualities of the bluffs.

(AR 850.) Section 30.34.020(C)(2)(b)(4) states that the proposed measure must be "visually compatible with the character of the surrounding area" and "not cause a significant alteration of the natural character of the bluff face."

Respondents' project included removing the remaining portions of the prior 100-foot long timber pole and wood lagging system that lies at the toe of the bluff and building a new 100-foot long tiedback concrete seawall in its place. (AR 1693, 1727-1728 [Existing Site Plans], 1729 [Proposed Lower Bluff Tied-Back Wall Profile].) Respondents also removed the 4-foot diameter concrete footings, which they had installed without permits and which extended seaward of the existing permitted seawall. (AR 1694.) The new seawall is located up to eight feet landward of the previous seawall. (AR 1694.)

The Commission determined that a seawall is needed to protect the existing home at 1500 Neptune Avenue. (AR 1698.) Even though the Commission found that a seawall is not currently needed to protect the existing home at 1520 Neptune Avenue, it approved the entire span because it found that a need for a seawall to protect the residence at 1520 was likely to arise in the near future and because extending the wall across both properties at this time would provide a more stable wall, would allow the wall to be moved up to 8 feet landward of its previous location to increase the beach area, and would decrease the visual impacts associated with two separate patchwork wall designs. (AR 1678.)

If a shoreline protective device is necessary, the applicant must still eliminate or mitigate its adverse effects on shoreline sand supply, public access, recreation, and the visual quality of the shoreline under the City's local coastal program and the Chapter 3 policies of the Coastal Act for projects between the sea and the first public road. (AR 1701.) "[T]he Commission has broad discretion to adopt measures designed to mitigate all significant impacts that the construction of a seawall may have." (*Ocean Harbor House Homeowners Assn. v. California Coastal Com.* (2008) 163 Cal.App.4th 215, 242; *see also* § 30607.)

The Commission included conditions to mitigate the seawall's impacts on coastal resources such as scenic quality, geologic concerns, and shoreline sand supply. (AR 1679.) Respondents had proposed a payment of $45,385.92 to mitigate for the associated impacts of the development on regional sand supply. Their geotechnical engineer stated that the proposed seawall will have an estimated 30-year design lifetime and used the 30-year duration to calculate the proposed mitigation payment. (AR 1679, 1735-1738.) Because the Commission approved the seawall for 20 years subject to reauthorization, the Commission reduced the mitigation payment to $31,542.72 to mitigate for the associated impacts of the seawall on regional

sand supply prorated over the 20-year authorization period. (AR 1679, 1684-1685 [Special Condition 5].) The Commission also found that the proposed seawall would currently be located inland of the mean high tide line, which would open up new beach area; therefore, the Commission found it was unlikely to result in direct impacts to public access and recreational use over its 20-year authorization period. (AR 1679.) Therefore, "at the present time," the Commission found no mitigation for impacts to public access and recreational use was needed. (AR 1679.)

The Commission included the 20-year authorization period to allow the Commission to assess the seawall's condition in 20 years, assess the continued need for the seawall and the availability of alternatives and "to re-evaluate the need for mitigation to address direct impacts to public access and recreational use associated with the presence of the seawall." (AR 1679-1680; 1683-1684 [Special Condition 3].)

The conditions will also ensure that the project does not prejudice future shoreline planning options, including with respect to changing and uncertain circumstances that may ultimately change policy and other coastal development decisions (including not only climate change and sea level rise, but also due to legislative change, judicial determinations, etc.). (AR 1709-1710.) Despite Respondents' projections that the seawall will have a 30 year life, the Commission relied on its staff's experience that shoreline armoring, particularly in such a high-hazard area as this project, tends to be augmented, replaced, or substantially changed within about 20 years. (AR 1710; *Coastal Southwest Dev. Corp. v. California Coastal Zone Conservation Com.* (1976) 55 Cal.App.3d 525, 535-536 [holding that staff opinions constitute substantial evidence].) "Rising sea levels and attendant consequences will tend to further delimit such a time period in the future, potentially dramatically, depending on how far sea level actually rises." (AR 1710.)

The 20-year authorization period allows the Commission to reassess the need for continued armoring and its effects in twenty years when circumstances may differ greatly from today and to assess the physical condition of the seawall after twenty years of existence. (AR 1710.) Although there is scientific consensus that sea level rise will accelerate in coming decades, there is substantial uncertainty about exactly how quickly it will rise. This uncertainty makes long-term projections about the impacts of structures such as seawalls extraordinarily difficult to make. The Commission expressly found that "it is possible that physical circumstances as well as local and/or statewide policies and priorities regarding shoreline armoring are significantly unchanged from today, but it is perhaps more likely that the baseline context for considering armoring will be different – much as the Commission's direction on armoring has changed over the past twenty years as more information and better understanding has been gained regarding such projects, including their effect on the California coastline." (AR 1710.)

As conditioned, the Commission has a mechanism to evaluate the seawall's future impacts and require mitigation to address such impacts. For example, special condition 5 only mitigates the seawall's impacts to sand supply over the 20-year authorization period. Another example is that the Commission found that mitigation for direct public access/recreational use impacts was not required at this time. Without the requirement that Respondents seek reauthorization, the Commission will be unable to re-evaluate conditions and determine if further mitigation is warranted in twenty years in light of accelerating sea level rise and other changes. (AR 773.)

The conditions also require Respondents to acknowledge that future redevelopment of the lots cannot rely on the seawall to establish geologic stability or protection from hazards as the City's local coastal program

requires. (AR 1680, 1682-1683.) Special condition 2 provides that "[a]ny future redevelopment of the blufftop residential parcels shall not rely on the permitted seawall to establish geologic stability or protection from hazards. Redevelopment on the sites shall be sited and designed to be safe without reliance on shoreline or bluff protective devices." (AR 1682-1683.) The Encinitas local coastal program allows seawalls and other shoreline protection devices but only to protect existing development, consistent with the Coastal Act (§ 30235). New development must be built a safe distance back from the bluff edge and must be designed and located so that it will neither be subject to nor contribute to significant geologic instability throughout the life span of the project. (AR 848 [§ 30.34.020(B)(1)(a)], 855 [§ 30.34.020(D)].) Requiring new development to be located a safe distance back from the bluff edge stops the perpetuation of development in non-conforming locations that would eventually lead to complete armoring of the bluffs and long-term, adverse impacts to the adjacent public beach and State tidelands. (AR 1711.)

Without the ability to reevaluate the need for the seawall in the future, the Commission has no mechanism to require removal of the seawall if Respondents or their successor-in-interest redevelop the bluff tops, even if the new structures could be set far enough back from the bluff edge to obviate the need for the seawall. The 20-year authorization period places Respondents on a level-playing field with other coastal owners. Without the Commission's permit condition, Respondents could build the seawall to protect their existing homes and then, upon completion of the seawall, submit an application to demolish the existing homes and replace them with more intensive development reliant upon the seawall.

Respondents have not argued that the seawall will not have impacts beyond the 20-year authorization period. To the contrary, they tacitly admitted it will when they suggested the Commission could include a

condition that required periodic consideration of the seawall's impacts in lieu of the 20-year authorization period. (RT at p. 5.) But the trial court struck the conditions that would allow the Commission to mitigate any such impacts. Essentially, the trial court authorized a seawall in perpetuity, but with mitigation for only the first 20 years of impacts.

Special Conditions 2 and 3 provide a mechanism for the Commission to ensure the seawall remains necessary to protect Respondents' private properties and does not have unmitigated future impacts on the public's property. Substantial evidence supports the Commission's findings that these conditions are needed for the seawall to conform to the City's local coastal program.

III. THE COMMISSION HAD AUTHORITY TO CONDITION ITS APPROVAL OF THE SEAWALL

The trial court improperly relied on Respondents' argument that, because the Commission had no power to deny the seawall, it had no power to condition it. (JA 204.) The Court of Appeal rejected this very same argument in *Ocean Harbor House Homeowners Assn. v. California Coastal Commission, supra,* 163 Cal.App.4th at pp. 240-242, holding that "the Commission has broad discretion to adopt measures designed to mitigate all significant impacts that the construction of a seawall may have." (*Id.* at p. 242; *see also* § 30607.)

This Court has also recognized the Commission's authority to condition seawalls, including imposing time restrictions. In *Barrie v. California Coastal Commission, supra,* 196 Cal.App.3d 8, this Court upheld the Commission's requirement that Del Mar homeowners between 24th and 26th Streets remove an emergency seawall within a specified time period. The homeowners spent in excess of $300,000 to build a 480-foot long seawall in front of their residences in light of severe storm and high tide predictions for Fall 1983. While construction was underway, the

homeowners applied for an emergency permit. The Commission issued an emergency permit conditioned on the homeowners applying for a regular coastal development permit and, if they did not receive a regular permit, removing the seawall within 150 days. (*Id.* at p. 478.) The homeowners applied to make the seawall permanent. (*Id.* at p. 479.) The Commission approved the application, but subject to the homeowners moving the seawall inland. This Court rejected the homeowners' challenge to the condition.

While *Barrie* involved an emergency permit, it nonetheless supports the Commission's balancing of interests and imposing conditions. "The Commission . . . was faced with balancing probabilities – the probability of beach erosion caused or contributed to by the seawall and the probability there will be future storms which will threaten beachfront residences. They weighed the need to protect the public beach against the Homeowners' need to protect their homes. The conditions requiring relocation of the seawall was a reasonable accommodation of these two needs since it mitigated the negative impact on the beach while still affording the Homeowners the opportunity to protect their homes. Moreover, this accommodation must be viewed in light of another purpose of the Coastal Act, that of insuring public access." (196 Cal.App.3d at p. 484-485.)

Here, the Commission balanced the interests of Respondents and the public. The Commission approved the seawall to protect Respondents' existing homes, but it included a mechanism to protect the public and require additional mitigation if sea levels rise and the public beach diminishes as a result of the seawall or require removal of the seawall in twenty years – if Respondents choose to redevelop their properties and no longer need the seawall or if alternative measures with less significant impacts than the seawall become available.

The Commission imposed the 20-year authorization period in order to analyze the impacts of the seawall which cannot be quantified at this point given uncertainty regarding the pace of future sea-level rise and associated erosion. As Respondents tacitly admitted when they argued that the Commission should have just required them to revisit mitigation at intervals, the seawall will continue to have impacts. (RT at pp. 5-6.) The Commission imposed the 20-year authorization period not only to address the seawall's future adverse impacts but also to address its continued need to protect the existing structures in light of potential redevelopment of the blufftops or regional shoreline protection measures as well as to address legislative or judicial changes.

The trial court erred in refusing to follow *Ocean Harbor* .

IV. THE 20-YEAR AUTHORIZATION PERIOD IS NOT A REGULATORY TAKING

The trial court held that Special Conditions 2 and 3 are regulatory takings. (JA 229.) The court found that there was no link between the seawall's specified adverse impacts and the 20-year authorization period and accepted Respondents' argument that therefore the conditions are improper under *Nollan v. California Coastal Com.* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374. (JA 229.) The trial court erred because the *Nollan/Dolan* test does not apply under these circumstances; even if it did, the condition meets the test.

First, the Commission's decision merely requires Respondents to come back in twenty years and seek reauthorization of the seawall. Requiring a permit for a use of property is not a taking. (*United States v. Riverside Bayview Homes* (1985) 474 U.S. 121, 127.) If the Commission improperly denies their request in 20 years, Respondents can challenge the Commission's decision at that time. The possibility that the Commission

may not reauthorize the permit in 20 years takes nothing from Respondents now.

Second, the Commission's decision is not subject to the *Nollan/Dolan* test. That test and line of cases only apply when a government entity requires the dedication of land or an interest in land and to ad hoc monetary exactions. (*Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528, 546; *Koontz v. St. Johns River Water Management Dist.* (2013) 133 S.Ct. 2586; *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 881.) The 20-year authorization period does not take an interest in Respondents' property or constitute an ad hoc monetary exaction. Therefore, heightened scrutiny under *Nollan-Dolan* does not apply to the Commission's decision.

Finally, assuming the *Nollan-Dolan* test applied, the conditions easily satisfy the requirements. "It is beyond dispute that California has a legitimate interest in protecting and maintaining its beaches as recreational resources." (*Ocean Harbor House Homeowners Assn. v. California Coastal Com., supra,* 163 Cal.App.4th at p. 231.) "[T]he Commission has broad discretion to adopt measures designed to mitigate all significant impacts that the construction of a seawall may have." (*Id.* at p. 242.)

As discussed in Section II above, the Commission found that the 20-year authorization period was a needed mechanism to allow reevaluation of the seawall and its impacts in 20 years. As the Commission explained in its findings, the Commission mitigated the seawall's current impacts as best it could, but circumstances and impacts may be far different in 20 years than they are now, particularly related to sea level rise. Respondents themselves recognized that the seawall's impacts will change over time when they suggested that the Commission include a condition requiring them to revisit mitigation at intervals rather than having a set authorization period. (RT at pp. 5-6.)

Ignoring the long-term impacts the seawall will have on the public beach and neighboring properties, the trial court focused on the Commission's alleged agenda to deny the seawall in 20 years, determining that "the 20 year limit is simply a power grab designed to obtain further concessions in 20 years, or force removal of seawalls at a later time." (JA 204.) The trial court seemingly speculated regarding what the Legislature, the courts, or the Commission may do in the future in striking the 20-year authorization period. (JA 204.)[3]

More importantly, if the Legislature does amend the Coastal Act or the courts determine that seawalls are inappropriate and the Commission denies reauthorization of the seawall on that basis, Respondents would be in the same position as other similarly situated property owners. There is no basis for treating Respondents differently from the homeowner whose house is not currently threatened but becomes threatened 20 years from now and who must apply for a permit under then-existing policies. If the Commission denies Respondents' future reauthorization request based on future legislative or judicial changes, Respondents and any other interested party will have an opportunity to challenge the constitutionality of such a ban or other legislation. This future possibility cannot constitute a taking now, and the trial court judgment should be reversed.

[3] Respondents requested the court take judicial notice of various documents, including two unsuccessful assembly bills and a bill analysis to argue that the Commission had a hidden agenda to deny all future seawalls. (JA 128-140.) The Commission objected to the request on the grounds that extra-judicial evidence is not allowed in writ proceedings. (JA 173-176.) The Commission specifically addressed its objections at the hearing (RT 56-57), but the court did not issue a ruling and appears to have relied on the extra-record evidence.

V. THE TRIAL COURT ERRED WHEN IT FOUND THE STAIRWAY WAS EXEMPT FROM COASTAL DEVELOPMENT PERMIT REQUIREMENTS

The Encinitas local coastal program prohibits the construction of new private stairways on coastal bluffs and calls for existing private stairways to be phased out. Despite these clear requirements, the trial court ruled that the local coastal program allows construction of a stairway to replace the collapsed stairway and that the replacement stairway is not subject to Coastal Act or local coastal program permitting requirements. The court, however, improperly relied on provisions that do not apply to construction on coastal bluffs.

The trial court held that the City's local coastal program restricts only "new" private accessways on the coastal bluffs and found that was not the case here. "If [Respondents] were attempting to install a new stairway or completely replace a stairway, such policies would bar their application. However, here, [Respondents] simply seek to repair a portion of a stairway. . . . The Commission's finding that the stairway is not exempt from the [coastal development permit] requirements pursuant to [Encinitas Municipal Code] § 30.80.050(E) is not supported by substantial evidence." (JA 204.)

The trial court and Respondents focused on whether a disaster destroyed the stairway or whether the reconstruction could be considered repair and maintenance. (JA 203.) But regardless of whether a disaster caused the destruction or whether reconstruction of the entire lower portion of the stairway could be considered a repair, the stairway stills require a coastal development permit because the Coastal Bluff Overlay regulations govern bluff-face development.

The City's local coastal program exempts nine categories of development projects from the requirement for a coastal development

permit. (AR 868-869 [Encinitas Municipal Code, § 30.80.050].) But the exemptions apply only if the proposed development project is "in conformance with all other provisions of the Municipal Code (i.e.[,] no use permit, variance or other discretionary entitlement is required and *the development is not governed by the Coastal Bluff Overlay regulations of Chapter 30.34 of the Municipal Code*)." (AR 868 [Encinitas Municipal Code, § 30.80.050], italics added.)

No one disputes that the Coastal Bluff Overlay Zone requirements apply. The Coastal Bluff Overlay Zone requirements apply "to all areas of the City where site-specific analysis of the characteristics of a parcel of land indicate the presence of a coastal bluff." (AR 847 [Encinitas Municipal Code, § 30.34.020, subd. (A)].) The City applied the Coastal Bluff Overlay Zone requirements (AR 1850-1853), and Respondents argued the project was in compliance. (AR 329 [Response to Note 7], 336-339.) Because the Coastal Bluff Overlay Zone requirements apply, the Commission properly reviewed Respondents' proposed stairway for compliance with the City's local coastal program.

In the court below, Respondents argued that, to the extent the City's local coastal program requires a permit, the City has exceeded its authority. (JA 182.) They argued that, because the Coastal Act exempts replacement of a structure destroyed by disaster (§ 30610, subd. (g)(2)), the City cannot narrow the exemption in its local coastal program. (JA 182.) This argument fails because the City's provision mirrors the Coastal Act and, in any event, the City could impose stricter requirements. Because the trial court found the City did exempt the stairway, it did not address this issue.

The City's provision is not stricter than the Coastal Act. Under Public Resources Code section 30610, subdivision (g)(2), the replacement of a structure destroyed by a disaster also must conform to applicable existing zoning requirements. (§ 30610, subd. (g)(2).) Because the stairway is

inconsistent with the City's Coastal Bluff Overlay Zone zoning requirements, the Coastal Act would not exempt the stairway from permit requirements either.

The City also has the authority to adopt stricter provisions to address local conditions. Section 30005 of the Coastal Act provides, "No provision of this division is a limitation on any of the following: [¶](a) Except as otherwise limited by state law, on the power of a city of county or city and county to adopt and enforce additional regulations, not in conflict with this act, imposing further conditions, restrictions, or limitations with respect to any land or water use or other activity which might adversely affect the resources of the coastal zone." (§ 30005.)

Respondents' argument not only ignores the above provision, it runs counter to the whole purpose of local coastal programs, which are intended to address local issues and concerns while still considering the important statewide interest in protecting coastal resources. Under the Coastal Act, local governments "have the discretion to be more restrictive than the act." (*Yost v. Thomas, supra,* 36 Cal.3d at p. 572.) "The Coastal Act sets minimum standards and policies with which local governments within the coastal zone must comply; it does not mandate the action to be taken by a local government in implementing local land use controls." (*Ibid.*)

Here, the City of Encinitas properly adopted specific requirements to address the hazards presented by its coastal bluffs, and the Commission certified these requirements as consistent with the Coastal Act. The Encinitas shoreline is mapped "Generally Susceptible" or "Most Susceptible" to landslides. (AR 873-875 [Division of Mines and Geology, Landslide Hazards in the Encinitas Quadrangle Report], 1694-1695, 1720.) Respondents pointed out in their papers the unique dangers posed by the bluffs in North San Diego County, noting that "[s]ince 1995, 5 beachgoers have been killed by sudden and unexpected bluff collapses in North San

Diego County alone." (JA 110.) They attribute the collapse of the coastal bluff on their properties to the "relentless shoreline erosion and severe winter storms." (JA 108.)

The City properly adopted regulations "to preserve [its] significant natural and cultural resources" and "to prevent future development or redevelopment that will represent a hazard to its owners or occupants." (AR 829 [Encinitas Public Safety Element, Policy 1.3], 836 [Introduction to Resource Management Element].)

Because the Respondents' properties are in the Coastal Bluff Overlay Zone, the proposed development projects were not exempt from the requirement to obtain a coastal development permit. The trial court erred when it found otherwise, and this Court should reverse the trial court's judgment. (JA 202-204, 229.)

VI. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT THE STAIRWAY IS INCONSISTENT WITH THE ENCINITAS LOCAL COASTAL PROGRAM

The Commission required that Respondents delete the stairway component from their project as a condition of approval of their coastal development permit. (AR 1681.) The Commission found that reconstruction of the private access stairway that collapsed and no longer exists was inconsistent with the City's local coastal program, which prohibits the construction of new private access stairways over the bluff, requires phasing out of existing private access stairways, and generally prohibits development on or at the toe of the coastal bluffs. Substantial evidence supports the Commission's finding.

The Encinitas Local Coastal Program includes provisions that not only prohibit the construction of private stairways on the bluffs but also provide for the "phase out" of existing private access stairways. The provisions include Public Safety Policy 1.6, which states, in part:

> The City shall provide for the reduction of unnatural causes of bluff erosion, as detailed in the Zoning Code, by:
>
> a. Only permitting public access stairways and *no private stairway*s, and otherwise discouraging climbing upon and defacement of the bluff face;
>
> ***
>
> f. Requiring new structures and improvements to existing structures to be set back . . . 40 feet from coastal blufftop edge with exceptions to allow minimum coastal blufftop setback of no less than 25 feet. . . . [¶]This does not apply to minor structures that do not require a building permit, *except that no structures, including walkways, patios, . . . temporary accessory building not exceeding 200 square feet in area, and similar structures shall be allowed within five feet from the bluff top edge*; and
>
> g. Permanently conserving the bluff face within an open space easement or other suitable instrument.

(AR 829-831 [City of Encinitas Public Safety Element, Policy 1.6], italics added.)

Policy 6.7 of the City's Circulation Element provides that the City shall "[d]iscourage and phase out private access to the beach over the bluffs. New private accessways shall be prohibited."

The City also regulates nonconforming structures and uses "to accomplish the regulation and eventual elimination of nonconforming uses and structural nonconformities . . . ." (AR 860 [Encinitas Municipal Code, § 30.76.010].) A "structural nonconformity" is a "physical aspect of a building, structure, or improvement" that does not conform to City's development standards, but which was lawfully built in compliance with the development standards in effect at the time the structure was built and which has not been terminated in accordance with the provisions of the Nonconformities Chapter. (AR 861 [Encinitas Municipal Code,

§ 30.76.030].) Repair and maintenance, but not replacement, of structural nonconformities is allowed. (AR 861 [Encinitas Municipal Code, § 30.76.050].)

The City's zoning code includes the Coastal Bluff Overlay Zone regulations, Encinitas Municipal Code section 30.34.020. These regulations apply in addition to any other development and design regulations and, in the case of a conflict, the more restrictive regulations apply. (AR 847 [Encinitas Municipal Code, § 30.34.020, subd. (B)].)

The Coastal Bluff Overlay regulations prohibit any "structure, facility, improvement or activity on the face or at the base of a coastal bluff" with three exceptions, none of which includes private stairways. (AR 849 [Encinitas Municipal Code, § 30.34.020, subd. (B)(2).) The exceptions to the ban are: (1) public beach access facilities, (2) protective devices (e.g., seawalls) when necessary to protect a principal structure on the blufftop, and (3) landscape maintenance. (AR 849 [Encinitas Municipal Code, § 30.34.020, subd. (B)(2)(a)-(c)].)

Substantial evidence in the record supports the Commission's finding that Respondents' proposal to rebuild their private access, bluff face stairway is inconsistent with multiple, independent provisions of the local coastal program.

Under the Coastal Bluff Overlay regulations, "existing legal structures and facilities . . . on the face of the bluff may remain unchanged" and "routine maintenance" of existing facilities is allowed. (AR 849 [Encinitas Municipal Code, § 30.34.020, subd. (B)(4)].) Neither of these provisions applies to Respondents' stairway. Reconstruction of the entire lower half of the stairway is not "routine" maintenance. The trial court improperly determined that replacement of less than 50 percent of the stairway was an exempt repair. (JA 203.) The trial court erred factually because Respondents were proposing much more than replacement of half the

stairway. The stairway reconstruction was but one component of a much larger project that also included complete reconstruction of the seawall. (AR 1677.) Standing alone, it would be difficult to determine if more or less than 50 percent of the stairway was destroyed. In combination with the complete demolition and reconstruction of the seawall, there is no question that the project went far beyond the 50 percent threshold.

Nor do Respondents have an "existing" structure. The trial court erred in finding that Respondents were not proposing a "new" stairway. Respondents do not *have* an existing stairway; they *had* a stairway. The entire lower portion of the stairway collapsed, and only the upper portion and landing remain. (AR 418 [photo].)[4] In *Barrie v. California Coastal Commission* (1987) 196 Cal.App.3d 8, a group of homeowners made a similar argument in applying for permanent status of a seawall they had built under an emergency permit. They argued that because it was already built, the seawall was not "new development." This Court rejected the argument, noting that the approval that the homeowners were seeking was for a new development, i.e., a permanent seawall, not an emergency temporary seawall. (*Id.* at p. 20.) Here, the trial court ruled that the stairway was not "new" because it had previously existed, even though it did not currently exist. (JA 204.) This ruling cannot be reconciled with this Court's holding in *Barrie* or with the City's policy to "discourage and phase out private access to the beach over the bluffs." (AR 822 [Circulation Policy 6.7].)

[4] The Commission's decision does not require Respondents to remove the upper portion of the stairway and landing, which can remain as a view platform. If over time natural processes continue to threaten the remaining portions of the stairway, Respondents will be responsible for removing the debris from the bluff and beach. (AR 1720.)

Substantial evidence also supports the Commission's finding that the stairway was inconsistent with the City's nonconforming structure provisions. (AR 1718.) The City's local coastal program allows repair and maintenance of structural nonconformities, but it does not allow their replacement. (AR 861 [Encinitas Municipal Code, § 30.76.050]; 1718.) The Commission found that Respondents were proposing to replace the lower half of the stairway that was destroyed and removed following the bluff collapse. (AR 1718.) The Commission found that, based on the scope of the proposal, it constituted replacement of the stairway rather than repair. (AR 1718.) Because the Commission is the trier of fact and because the Commission is the agency with primary responsibility for implementing the Coastal Act, the trial court should have deferred to the Commission's determination and interpretation of the local coastal program; instead the trial court improperly second guessed the Commission. (*Ross v. California Coastal Com., supra,* 199 Cal.App.4th at pp. 921-922; *Bolsa Chica Land Trust v. Superior Court, supra,* 71 Cal.App.4th at p. 503; *Charles A. Pratt Constr. Co., supra,* 162 Cal.App.4th at pp. 1072, 1075; §§ 30330, 30625, subd. (c).) Moreover, to the extent the Coastal Bluff Overlay Zone regulations, which only authorize "routine" maintenance, are stricter, they would apply and prohibit the proposed stairway. (AR 847 [Encinitas Municipal Code, § 30.34.020, subd. (B)].)

The City is entitled to phase out nonconforming structures. (*Dienelt v. County of Monterey* (1952) 113 Cal.App.2d 128, 131.) Courts consistently uphold requirements to terminate a structure or use within a prescribed grace period as a justifiable protection against the indefinite continuance of nonconforming uses. (*National Adver. Co. v. County of Monterey* (1970) 1 Cal.3d 875; *County of San Diego v. McClurken* (1951) 37 Cal.2d 683.) Cities may also prohibit reconstruction following destruction. (See *County*

of San Diego v. McClurken, supra, 37 Cal.2d 683; *Rehfeld v. City & County of San Francisco* (1933) 218 Cal. 83.)

When the Commission approved an after-the-fact permit for a stairway at this location in 1989, the Commission found it conformed to applicable development standards. (AR 1718.) But the City of Encinitas subsequently adopted its local coastal program, and the stairway no longer conforms to the policies and zoning requirements set forth above. (AR 1718.)

Substantial evidence supports the Commission's finding that the proposed private bluff-face stairway does not conform to the City's local coastal program. Therefore the Commission properly removed reconstruction of the stairway from the proposed project. The trial court erred in requiring the Commission to strike Special Condition 1.a from the permit, thus allowing Respondents to construct the new stairway.

VII. THE TRIAL COURT EXCEEDED ITS AUTHORITY BY ORDERING DELETION OF THE CONDITIONS WITHOUT REMANDING THE MATTER TO THE COMMISSION FOR FURTHER CONSIDERATION

The trial court erred when it issued a writ commanding the Commission "immediately upon receipt of this writ to remove . . . Special Conditions 1(a), 2 and 3 from Coastal Development Permit No. 6-88-464-A2." (JA 227.) The proper remedy was to remand the matter to the Commission for further consideration in light of the Court's ruling. (Code Civ. Proc., § 1094.5.)

Code of Civil Procedure section 1094.5, subdivision (f) provides:

> The Court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, but

> the judgment shall not limit or control in any way the discretion legally vested in the respondent.

Striking special conditions 1(a), 2 and 3 without remanding the matter to the Commission improperly limited the Commission's discretion. (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1174.) Without a remand, the Commission had no opportunity to revise or to consider revisions to the conditions. For example, although the Commission required mitigation for only 20 years of impacts on shoreline sand supply, the trial court did not give the Commission the opportunity to require additional mitigation in light of the trial court's decision to authorize the seawall in perpetuity. At the writ hearing, even Respondents' counsel suggested that the Commission could have revisited mitigation at shorter intervals instead of imposing the 20-year authorization period. (RT at p. 5.) And the trial court suggested conditions for the stairway that could have mitigated some of its impacts, e.g., sand color to disguise it and designing it to avoid erosion. (RT at p. 41.) But the trial court's decision prevented the Commission from considering any such conditions and allowed the project to go forward with identified, unmitigated impacts.

CONCLUSION

For the reasons set forth above, the Commission respectfully requests that this Court reverse the trial court's judgment.

Dated: December 19, 2013 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached APPELLANT CALIFORNIA COASTAL COMMISSION'S OPENING BRIEF uses a 13 point Times New Roman font and contains 10,735 words.

Dated: December 19, 2013

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