IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S221980

BARBARA LYNCH and THOMAS FRICK,
Petitioners,

v.

CALIFORNIA COASTAL COMMISSION,
Respondent.

After an Opinion by the Court of Appeal,
Fourth Appellate District, Division One
(Case No. D064120)

On Appeal from the Superior Court of San Diego County
(Case No. 37-2011-00058666-CU-WM-NC,
Honorable Earl Maas III, Judge)

PETITIONERS' REPLY BRIEF

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INTRODUCTION

The Petitioners, Barbara Lynch and Thomas Frick (the "Homeowners") hereby respectfully submit the following Reply to the Answer Brief on the Merits of the California Coastal Commission.

I

SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING THAT THERE WAS NO WAIVER OF THE RIGHT OF JUDICIAL REVIEW

The Homeowners timely filed a petition for writ of mandate pursuant to Code of Civil Procedure § 1094.5, challenging the permit conditions imposed by the California Coastal Commission. Despite timely seeking judicial review through the means required by statute (Pub. Res. Code § 30801), the Commission argues that the Homeowners should not be allowed to proceed on their petition for writ of mandate. According to the Commission, the Homeowners waived their right to judicial review by recording the conditions against the property as a deed restriction, or CC&R (covenants, conditions and restrictions), and thereby allegedly agreeing to the challenged conditions.

In its Answer Brief, the Commission does not dispute that waiver rests upon intent. *City of Ukiah v. Fones*, 64 Cal. 2d 104, 107 (1966) ("Waiver always rests upon intent."). As this Court stated, "To constitute a waiver, there must be an existing right, knowledge of the right, and an **actual intention to**

relinquish the right." *Bickel v. City of Piedmont*, 16 Cal. 4th 1040, 1053 (1997) (emphasis added).

After reviewing the evidence, the trial court made a factual finding that the Homeowners "neither specifically agreed to the conditions nor failed to challenge their validity." Joint Appendix (JA) 101 (minute order, 12/21/2012). The Commission agrees that this Court reviews "the trial court's finding of waiver under the deferential 'substantial evidence' standard." *Bickel*, 16 Cal. 4th at 1053. Answer Brief at 16.

A. The Deed Restriction Does Not Demonstrate an "Actual Intention To Relinquish" the Right to Judicial Review

The Commission's argument rests upon language within the deed restriction stating that, after the date of recording, the Special Conditions shall "constitute for all purposes *covenants, conditions and restrictions* on the use and enjoyment of the Property." Answer Brief at 18 (quoting deed restriction at JA 24-25, 45-46) (emphasis added). But the Commission inflates the significance of converting the conditions into CC&Rs.

When the Homeowners recorded the deed restrictions, they correctly understood that the legal effect was that the Special Conditions would constitute, or become, covenants, conditions and restrictions. That is obvious from the express language of the deed restriction. However, it is a leap beyond this straightforward language to then assert that because the conditions are converted into CC&Rs, they are therefore insulated from judicial review. The

plain language of the deed restriction simply does not go that far. Rather, the language cited by the Commission does nothing more than recognize that these conditions will be enforceable as CC&Rs. But nothing about converting the conditions into CC&Rs means that the Homeowners had an "actual intention to relinquish" their right to judicial review and invalidation of the challenged CC&Rs.

In addition to the plain language, the procedural context demonstrates there was no such intent. Homeowner Frick recorded his deed restriction on September 30, 2011. JA 45. The timely petition for writ of mandate was filed on October 7, 2011. JA 2. Homeowner Lynch recorded her identical deed restriction on November 23, 2011. JA 24.

If the deed restriction constituted an actual intention to relinquish the right to judicial review, as argued by the Commission, it would be completely nonsensical for the Homeowners to be contemporaneously filing the petition for writ of mandate. Obviously, the actions of the Homeowners in going through the effort to timely file their petition under Code of Civil Procedure § 1094.5 was to exercise that right. The fact that the Homeowners exercised their right of judicial review, while contemporaneously recording the deed restrictions, is strong evidence that they had no intent to relinquish the very right of review that they were exercising.

Significantly, the Commission can point to no language in the deed restriction stating that the Homeowners were thereby specifically relinquishing

their right of judicial review. In contrast, there is express language in the deed restriction acknowledging that if any conditions are "held to be invalid," no other conditions or provisions will be affected or impaired. JA 26 (severability clause); *see* Petitioners' Opening Brief at 15.

With respect to the severability clause, the Commission responds that the purpose of the clause is to "address unforeseen actions" such as future legislation retroactively invalidating a condition. Answer Brief at 19. Homeowners agree with the Commission that the severability clause is plenty broad enough to allow severance of conditions rendered unenforceable by retroactive legislation. After all, the severability clause broadly states:

> If any provision of these restrictions is **held to be invalid**, or **for any reason becomes unenforceable**, no other provision shall be affected or impaired.

JA 26 (emphasis added). However, as is obvious from the plain language, the severability clause is also broad enough to allow for severance of a condition that is "held to be invalid" by a court. Moreover, the Commission does not dispute that the only method of judicially attacking the validity of the conditions is through a timely petition for writ of mandate. Of course, that procedure is exactly what the Homeowners were pursuing, and the severability clause expressly allows the relief the Homeowners sought, *i.e.*, severance from the other CC&Rs if the challenged conditions are held to be invalid.

In short, the language of the severability clause is consistent with the Homeowners' action and corroborates that the Homeowners did not intend through the deed restriction to waive their right to judicial review under Code of Civil Procedure § 1094.5. Rather, the severability clause allows for, and contemplates, a judicial challenge even though the conditions are converted into CC&Rs.

The Commission cannot deny that CC&Rs can be held invalid by a court, as occurred in *Shelly v. Kraemer*, 334 U.S. 1 (1948), and *Barrett v. Dawson*, 61 Cal. App. 4th 1048, 1051-52 (1998). In response, the Commission points out that in these cases, it was a third party challenging the CC&Rs. But that is an irrelevant distinction. For purposes here, the point of those cases is that courts have authority to find CC&Rs invalid and hold them unenforceable. On this point, the Commission has no response.

If permit conditions are to be challenged, they must be challenged within the short time limits pursuant to Code of Civil Procedure § 1094.5 and Public Resource Code § 30801. That is the procedure followed by the Homeowners, and they were correct to do so. And as *Shelly* and *Barrett* recognize, the courts are empowered to hold deed restrictions invalid. Of course, that is the relief being sought in this case, the severability clause allows for that relief, and the Homeowners' actions are consistent with the trial court's finding that there was no intent to waive the right to judicial review.

B. The Construction of the Seawall Does Not Constitute Waiver of the Challenge to the 20-Year Permit Expiration Date

The Commission contends that because the Homeowners were issued the seawall permit, and then actually constructed the seawall, they necessarily waived any challenge to the 20-year expiration date for the seawall permit. But the legal authorities cited by the Commission all have a common defect. In every instance, the challenge to the permit condition came long after the permit was issued and was through a collateral attack, rather than pursuant to a timely petition for writ of mandate under Section 1094.5. **This is the critical distinction**. And this distinction was highlighted by the Homeowners in the Petitioners' Opening Brief at 21-24. But throughout its brief, the Commission ignores this very significant fact.

For example, the Commission first cites to *Sports Arenas Properties, Inc. v. City of San Diego*, 40 Cal. 3d 808, 815 (1985), for the general proposition that one who accepts the benefits of a permit also accepts the burdens of the permit. In that case, a conditional use permit was issued in 1962 for a nonprofit senior citizen housing complex. *Id.* at 813. The project was built, and **17 years later**, in 1979, a subsequent owner applied to convert the use to condominiums. *Id.* at 814. That proposed use was denied and so the new owner brought suit in an effort to free itself from the original interpretation of the conditions. Obviously, the Homeowners here are in a *completely different position*. They brought a timely challenge to the 20-year

expiration date pursuant to the statutory procedure for seeking judicial review. In *Sports Arenas*, no such action was brought in 1962 to the original issuance of the conditional use permit. Accordingly, *Sports Arenas* simply has no bearing on the issues before this Court, other than perhaps to highlight the significant contrast with the present case.

The Commission next cites to *County of Imperial v. McDougal*, 19 Cal. 3d 505 (1977). Homeowners agree that this is a very important and relevant case. That is why it was discussed at length in Petitioners' Opening Brief at 22. But the Commission merely states the conclusion that the subsequent owner of the property was estopped from challenging the condition which prohibited selling water outside of the county. Tellingly, the Commission ignores the basis for the decision. *Compare* Answer Brief at 23 *to* Petitioners' Opening Brief at 22.

McDougal provides strong support to the Homeowners. The original owner, Simpson, did not challenge the condition restricting sales of water to within the county borders. 19 Cal. 3d at 507. Five years later, the new owner, McDougal, wanted to sell water outside of the county borders, but by then it was far too late to challenge the permit condition. This Court explained:

> It is equally clear, however, that McDougal is subject to the limitations in the permit under which he claims, and that he can assert no greater rights therein than Simpson enjoyed. Simpson, **by failing to challenge** the limitations imposed upon him by the

> permit, **waived his right to object** to the condition prohibiting the sale of water for use outside the county.

Id. at 510 (emphasis added).

> A number of cases have held that 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 either specifically agreeing to the condition **or failing to challenge its validity**, and accepted the benefits afforded the permit.

Id. at 510-11 (emphasis added).

Despite being highlighted in the Opening Brief, the Commission completely ignores this Court's reason for decision. As ruled by the trial court, the Homeowners here did not "specifically agree" to the conditions, **nor** did they fail to challenge the conditions. The Homeowners here followed the correct procedure. Accordingly, under *McDougal*, there has been no waiver of rights by the Homeowners.

The Commission next cites *Pfeiffer v. City of La Mesa*, 69 Cal. App. 3d 74, 78 (1977), but again, the Commission ignores the key factual distinction, and the statement of law set forth in that case. *Compare* Answer Brief at 23 *to* Petitioners' Opening Brief at 21. The owner in *Pfeiffer* failed to challenge the permit conditions through Section 1094.5, and instead built the project and subsequently brought a collateral challenge through an inverse condemnation action. While clever, this procedure was not legally sufficient.

> If the conditions imposed by the city in their permit were invalid, Code of Civil Procedure **section 1094.5 provided plaintiffs with the right and procedures to eliminate them**.

> By declining to avail themselves of those procedures, plaintiffs cannot convert that right into a cause of action in inverse condemnation.

Pfeiffer, 69 Cal. App. 3d at 78. Again, the key factual distinction is apparent. The Homeowners here did **not** "decline to avail themselves" of the Section 1094.5 procedure for timely challenging the permit condition. They followed the law. They should not now be denied their day in court.

The Commission also cites *California Coastal Commission v. Superior Court of San Diego County (Ham)*, 210 Cal. App. 3d 1488 (1989). Answer Brief at 21. The Commission states in conclusory fashion that "Ham establishes that a petitioner may waive a permit challenge." *Id.* But that is hardly a remarkable proposition. What is remarkable is that the Commission once again completely ignores the analysis. *Compare* Answer Brief at 21 *to* Petitioners' Opening Brief at 23.

In *Ham*, the Commission required dedication of a public access easement as a condition to a permit. But significantly, "Ham never sought mandate relief." 210 Cal App. 3d at 1499. Ham's attempt three years later to collaterally attack the condition through an inverse condemnation action was rejected because of that fatal defect. The court ruled that an "administrative mandate proceeding provides the proper vehicle for such a challenge." *Id.* at 1496.

Finally, it is worth noting that one more case deals directly with the California Coastal Commission and, again, the critical distinction is at the heart of the decision. *Rossco Holdings Incorporated v. State*, 212 Cal. App. 3d 642, 654, 656 (1989) (following *Pfeiffer* and *McDougal* and noting that the owner "never petitioned for an administrative writ of mandate as required by section 30801 and Code of Civil Procedure section 1094.5"). In its Answer Brief, the Commission completely ignores this authority, not even appearing in its Table of Authorities.

In summary, the Commission is unable to provide any authority that there is a waiver of the right to judicial review of a permit condition when the statutory procedure for bringing a challenge is followed. Here, the Homeowners did what they were supposed to do. They followed the law, brought a timely challenge under Section 1094.5, and all of the applicable law establishes that following this procedure is the key element to avoid waiver of the right to judicial review. The Commission fails to meet the force of this key fact. Under the circumstances here, if justice means anything, the Homeowners should have their day in Court.

C. The Homeowners Are Not Asking the Court To Create a New Exception to the Waiver Rule

The Commission characterizes the Homeowners as seeking a new exception to the existing law regarding waiver. Answer Brief at 24. But that is **not** what the Homeowners seek, *or require*. As just discussed, existing law

fully supports that the Homeowners have not waived their right to judicial review. They exercised their right. They complied with the law. They timely brought their legal challenge, as required and authorized by the Coastal Act. Pub. Res. Code § 30801.

> Any aggrieved person shall have the **right to judicial review** of any decision or action of the commission by filing a petition for writ of mandate in accordance with section 1094.5 of the Code of Civil Procedure, within 60 days after the decision or action becomes final.

Id. (emphasis added).

The trial court found that under the facts of this case, the Homeowners "neither specifically agreed to the conditions nor failed to challenge their validity." JA 101 (minute order, 12/21/2012). The deed restriction expressly contemplates that a condition may be "held to be invalid" and severed from other valid conditions. In applying existing law, there simply has been no waiver under the facts here.

D. The Commission's Policy Arguments Are Contrary to Its Own Findings

Homeowners recognize that there may be other situations where the nature of the permit condition is such that one could not realistically challenge the condition and simultaneously proceed with construction. Waiver is a factual question for determination by the trial court (*Bickel*, 16 Cal. 4th at 1052) and under different facts, there may be a different result.

Likewise, under the facts here, there is no problem with providing a remedy. This was discussed in Petitioners' Opening Brief at 17-19. *See Sterling Park L.P. v. City of Palo Alto*, 57 Cal. 4th 1193, 1206-07 (2013), *quoted in* Petitioners' Opening Brief at 18. But the nature of the permit conditions here are such that construction of the seawall does not present any problem with the remedy of invalidating the 20-year expiration date on the seawall permit. *Id.* at 18-19.

The Commission responds that if the expiration date is held to be invalid, but the seawall is already built, the Commission will have

> no ability to review the seawall to assess its impacts after 20 years in existence, when circumstances may differ greatly from today, and determine the need for mitigation to address such impacts. Without this ability, the Commission might have approved a smaller seawall or another alternative.

Answer Brief at 26.

Really? Would the Commission have approved a smaller seawall if the 20-year expiration date was not included? This speculation is hard to believe from the record. In fact, the record proves otherwise. The Commission approved the seawall because it was the best design, both for providing **more** beach access and **better** visual mitigation. As found by the Commission:

> However, in this particular case, the proposed seawall will not be located directly on public beach, but rather will be located upland of the mean high tide. In fact, the proposed project places the seawall as far as **approximately eight ft. landward of the originally approved seawall**, which creates the potential for **additional beach to become available to the public** and is a **significant reason** for approving the proposed 100 ft. wall that

> includes protecting 1520 Neptune Avenue, rather than only approving the smaller 50 linear ft. portion below 1500 Neptune Avenue.

Administrative Record (AR) 1715. The record shows that the Commission approved the 100-foot wall because it provided the **most public beach access**, *not because it placed a 20-year expiration date on the permit*.

Likewise, the Commission recognized that the visual impacts would be best mitigated with a 100-foot seawall. As explained by the Commission:

> One of the principal reasons for approving the entire 100 ft. seawall is the improved visual character of the wall. If only 50 feet were approved (to protect 1500 Neptune Avenue only), the remaining portion of the timber pile wall below 1520 Neptune Avenue would create a patchwork look. . . . To mitigate the visual impacts of the proposed seawall, the applicants propose to color and texture the seawall. The visual treatment proposed is similar to visual treatment approved by the Commission in recent years. . . . Today, seawalls typically involve sculpted and colored concrete that upon completion more closely mimic the natural surface of the lower bluff face.

AR 1721. The length of the wall was approved because it had the least impact on coastal resources. The speculation that a smaller seawall might have been approved if the 20-year expiration was invalidated is simply not supported by the record.

> In addition, the resulting 100 ft.-long colored and textured seawall will have **fewer impacts on coastal resources** than allowing the existing timber seawall at 1520 Neptune Avenue to remain and/or be repaired or replaced in the future.

AR 1701 (emphasis added). As the Commission found, the state-of-the-art seawall "has been designed and conditioned to mitigate its impact on coastal

resources such as scenic quality, geologic concerns, and shoreline sand supply." AR 1679.

In short, the record does not support that the approval of the design of the seawall would be any different if the 20 year expiration date is invalidated.

Finally, the Commission argues that the Mitigation Fee Act (Gov't Code § 66000, *et seq*.) would not be necessary if Homeowners are correct in their arguments. If anything, the Mitigation Fee Act demonstrates that it is good policy to allow a process for challenging permit conditions. But the Mitigation Fee Act does much more than provide a procedure to challenge unlawful fees. It also "sets forth the procedures a local agency must follow prior to enacting a development fee." *Centex Real Estate Corp. v. City of Vallejo*, 19 Cal. App. 4th 1358, 1361 (1993) (citing Gov't Code § 66001).

> As its legislative history evinces, the Act was passed by the Legislature "in response to concerns among developers that local agencies were imposing development fees for purposes unrelated to development projects."

Sterling Park, 57 Cal. 4th at 1205 (quoting *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 864 (1996)). In short, while the Mitigation Fee Act establishes important procedures for local government, it has no bearing on whether the Homeowners here waived their statutory right to judicial review. The Homeowners exercised that right, and as argued above, they have not waived that right.

The Court should rule that the Homeowners have properly invoked their right to judicial review, the deed restriction does not amount to a waiver of that right, and the case law concerning waiver is fully in support of the Homeowners. Accordingly, the Court should so rule and proceed to the merits of the challenge to the conditions.

II

THE CONDITION IMPOSING A 20-YEAR PERMIT EXPIRATION IS UNLAWFUL

A. The Permit Expiration Does Not Mitigate an Identified Adverse Impact and Therefore Violates the Coastal Act

The Homeowner's have a right to protect their property. The California Constitution guarantees—as "inalienable"—the rights of "acquiring, possessing, and **protecting** property, and pursuing and **obtaining safety**, happiness, and privacy." Cal. Const. art. I, § 1 (emphasis added). The Commission does not argue otherwise.

Moreover, the right to protect private property is recognized in the Coastal Act. The Act provides that a seawall "**shall be permitted** when required . . . to protect existing structures . . . in danger from erosion." Pub. Res. Code § 30235 (emphasis added).

Of course, a protective structure such as a seawall must be designed to mitigate impacts on the shoreline. The statute is clear that the structure shall be permitted "*when designed* to eliminate or mitigate adverse impacts on the local shoreline sand supply." Pub. Res. Code § 30235 (italics added).

Accordingly, the statute strikes the appropriate balance that protective structures shall be permitted, but the structure must likewise mitigate its adverse impacts.

The problem is that the Special Conditions 2 and 3 impose a 20-year expiration date on the seawall permit without identifying any impact actually caused by construction of the seawall that justifies terminating the permit in 20 years.

The Commission responds first by arguing that the condition imposing the 20-year expiration needs only be consistent with the local coastal program, and not the Coastal Act itself as codified in Public Resources Code § 30235. Of course, the local coastal program has many provisions dealing with the design of seawalls (*see*, *e.g.*, Encinitas Municipal Code § 30.34.020(C)(2)(b) (referring to seawall design)), but nothing in the local coastal program insulates the Commission's conditions from not complying with the basic requirement of Public Resources Code § 30235. Nor does the Commission identify any such local policy. Indeed, it is clear that the conditions imposed by the Commission must be designed to mitigate impacts that would be caused by the construction of the seawall. Pub. Res. Code § 30235; *Ocean Harbor House Homeowners Association v. California Coastal Commission*, 163 Cal. App. 4th 215, 242 (2008).

The Commission takes several pages in its brief identifying the many design requirements that a seawall must meet in order to be approved. Answer Brief at 28-29. The Homeowners do not disagree. Moreover, those design requirements were all met, and that is why the seawall was approved.

The 20-year expiration date is not justified based on the design of the seawall, or due to any impacts attributable to the seawall itself. Rather, the expiration is to allow the Commission in the future to respond to unknown circumstances and changes in legislative policy.

> To ensure that this 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.**), staff recommends that this approval be conditioned for a twenty-year period.

AR 1709-10 (emphasis added). Of course, such unknown circumstances or policy changes are not attributable to the Homeowners or the design of their seawall.

1. The 20-Year Expiration Is Not Warranted for Addressing Changes in Physical Circumstances

The Commission argues that Special Conditions 2 and 3 are warranted so that the Commission can evaluate the impacts of the seawall in 20 years. The Commission contends that there may be sea level rise, and while the degree of sea level rise is unknown, such a potential changed circumstance may warrant some form of different design. The Commission relies on "staff's

experience" that shoreline protective devices often need augmentation after 20 years. The Commission points out that the Homeowners' prior timber pile seawall required significant repair work after 25 years and even failed in the 2010 storms.

The problem with the Commission's argument is that any future failure or damage, or necessary redesign, will require an amended coastal development permit *anyway*. The Homeowners cannot unilaterally alter the seawall, or make repairs or design modifications, without going through the permitting process. If modifications are needed, the Commission will have its opportunity to review the proposed changes and include the conditions that are warranted at that time. But rather than waiting and seeing if there are, in fact, any changed physical circumstances, the Commission is requiring that the permit be terminated anyway, *even if no changes are necessary*. Significantly, the Commission cannot say whether or not there will be any changes that warrant a redesign, repair, or modifications to the seawall. The Commission admits in its findings:

> Of course, it is possible that physical circumstances as well as local and/or statewide policies and priorities regarding shoreline armoring are significantly **unchanged** from today.

AR 1710 (emphasis added). Nevertheless, the Commission thinks it is "more likely" that the "baseline context for considering armoring will be different." *Id*.

The heart of the issue is best understood by distinguishing between changed **physical circumstances** and **changes in policy**. With respect to physical changes (sea level rise, alterations in the bluff, partial failures, etc.), anything that is significant enough to impair the effectiveness of the seawall, or that requires modifications, is going to be addressed through a new application anyway. This is no different than when the Homeowners' old timber pile seawall was no longer effective, the Homeowners had to initiate an application for the new design.

Most significantly, this scenario of potential changed physical circumstances does not in any way warrant automatic 20-year termination of the existing permit. Rather, this scenario is fully covered by other Special Conditions which are not challenged by the Homeowners. As stated in the Commission's findings:

> Special Conditions Nos. # 6 and 7 advise the applicants that ongoing maintenance and repair activities which may be necessary in the future could require permits. Section 30610(d) exempts repair and maintenance activities from coastal development permit requirements unless such activities enlarge or expand a structure or the method of repair and maintenance presents a risk of substantial adverse environmental impact. The Commission's regulations identify those methods of repair and maintenance of seawalls that are not exempt (see California Code of Regulations Section 13252). Special Condition # 6 requires that the applicants monitor the wall on an annual basis to determine if repairs/maintenance are necessary and Special Conditions #6 and 7 require the applicants to consult with the Commission to determine whether any proposed repair and maintenance work requires a permit.

AR 1712.

> The monitoring will ensure that the permittees and the Commission are aware of any damage to or weathering of the seawall and can determine whether repairs or other actions are necessary to maintain the seawall in its approved state.

Id.

In short, with respect to necessary physical changes to the seawall, whether resulting from sea level rise or bluff failure or something else, these conditions provide the Commission with ample opportunity to review and approve or disapprove of the modifications. Accordingly, the automatic 20-year expiration of the existing permit cannot be justified on this basis. As stated above, there may be no change in physical circumstance at all, but under Special Conditions 2 and 3, the permit expires anyway.

The dissent by Judge Nares got it right:

> The 20-year seawall expiration is unnecessary because, with or without a permit expiration, both the City and the Commission have power to evaluate the seawall's condition at any time, and to address any actual or potential threat to life or property that the seawall may pose in the future. As the trial court observed, the City and the Commission have the power to force repair or change should the seawall become unsafe, or in need of repair or change.

Dissenting slip op. at 15-16.

2. Potential and Unknown Policy Changes Do Not Justify the 20-Year Permit Expiration

Nor do potential changes in policy warrant an automatic expiration of the seawall permit. The Commission wants to ensure itself of the opportunity to apply potential and unknown future policies to the existing seawall. But any

potential changes in policy are **not attributable** to the Homeowners, or to the design of this seawall.

Public Resources Code § 30235 provides mandatory language that seawalls to protect existing homes "shall be permitted." But for these Homeowners, their seawall is not permitted as that term is normally understood. It is only a temporary authorization. By imposing a condition that converts a permanent seawall, costing approximately a million dollars, into a temporary seawall, is a clear violation of the command of section 30235.

The Commission cites *Barrie v. California Coastal Commission*, 196 Cal. App. 3d 8 (1987), for the proposition that time restrictions on seawalls have been upheld. But that case lends further support to the Homeowners. *Barrie* highlights the distinction between a **temporary seawall** authorized under Public Resources Code § 30264, as contrasted with a **permanent seawall** to protect existing structures under Public Resources Code § 30235.

In *Barrie*, the coastal owners faced incoming severe storms and applied for an emergency permit for a temporary protective structure, as is authorized under section 30264. In approving the permit, Condition No. 4 specifically stated that the "emergency work is considered temporary work done in an emergency situation." 196 Cal. App. 3d at 12-13. As explained by the court:

> The permit here was not a permit for a permanent seawall at that location; it was an emergency permit, issued without a prior hearing, for a temporary seawall. By its terms, the permit

> authorized a seafwall only for 150 days. At the end of 150 days, the homeowners were required to apply for permanent approval.

Id. at 15.

The distinction between a temporary permit in an emergency situation and a permanent seawall was recognized by the court as follows:

> The Coastal Act provides for permits without complying with the Coastal Act's procedures when there is an emergency . . . . An emergency permit may be issued without a hearing, without an opportunity for the public to participate or for the Commission to fully consider the facts and circumstances of the case. Issuance of such a permit circumvents the act's procedures which are designed to ensure protection of the coastline . . . .

Id. at 17.

Of course, the Homeowners in the present case have applied for a permanent seawall and were subject to all the normal procedures designed to ensure protection of the coastline. Yet, the Homeowners here still only received temporary approval. The court in *Barrie* recognized that section 30235 allows the Commission to approve seawalls to protect existing structures, and that such permits are considered an approval *for a permanent structure*.

> The approval the Homeowners are seeking here is for a new development, ***i.e.*** a permanent seawall . . . not a temporary seawall.

Id. at 20.

Barrie thus underscores that the seawall applied for and authorized under Public Resources Code § 30235 to protect existing structures is considered a permanent seawall. The Commission violates that provision by converting that authority into a temporary seawall.

3. Future Redevelopment of the Parcels Does Not Justify the 20-Year Permit Expiration

In an effort to find some nexus to potential actions of the Homeowners to justify expiration of the permit, the Commission suggests that the 20-year termination date is warranted just in case the seawall becomes unnecessary because of redevelopment by the Homeowners. As stated in the Commission's brief:

> In the absence of the conditions, the Commission will have no ready mechanism to require removal of the seawall even if Plaintiffs or their successors-in-interest redevelop the blufftops in a manner that eliminates the need for a seawall.

Answer Brief at 33. This asserted justification is ridiculous. **If** the Homeowners ever redevelop their blufftop homes, they will need a coastal development permit from the Commission in order to do so. If such redevelopment renders the seawall unnecessary, that permit process will provide ample opportunity to address that circumstance. Nor can the Homeowners rely on the seawall to protect any future redevelopment. The seawall is authorized only to protect the **existing** structure, as is spelled out by Public Resources Code § 30235. This is reinforced by Special Condition No. 4, which includes:

> Any future redevelopment on the lots shall not rely on the subject shoreline protective devices to establish geological stability or protection from hazards.

AR 1684.

In short, the Homeowners are entitled to a permanent seawall under Public Resources Code § 30235. The Commissions unjustified condition converting that seawall into a temporary structure violates the Coastal Act and should be struck down.

The law and policy to be applied is the current law, and current law says that because the design meets all the requirements of the code, it shall be permitted.

B. The 20-Year Expiration Is an Unconstitutional Condition

The Commission cannot deny that Homeowner's have a constitutional right to protect their property. Article I, section 1, of the California Constitution guarantees the rights of "acquiring, possessing, and **protecting property**." Cal. Const. art. I, § 1 (emphasis added).

Here, the Homeowners are forced to relinquish that right after 20 years. The Commission responds that its 20-year expiration condition merely requires the Homeowners to apply for a permit again. But a new application does not render the expiration condition any less objectionable. Rather, a new application merely provides the hope that the Homeowners might be able to re-establish the right to protect their property. Nor is there any guarantee that the Homeowners will be able to secure another permit in the future. Most

significantly, whether the condition meets the requirements of the unconstitutional conditions doctrine must be determined by the facts known today. If the condition does not bear a nexus to mitigating identified adverse impacts of the seawall, it is revealed as being "the type of coercion that the unconstitutional conditions doctrine prohibits." *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586, 2594 (2013); *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987).

The Commission argues that the unconstitutional conditions doctrine is inapplicable because the condition does not require dedication of land or money to the government. While such examples are typical applications, the unconstitutional conditions doctrine applies to any condition that requires a person to give up a constitutional right in exchange for a permit.

> "[T]he government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by government . . . ."

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 547 (2005) (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994)). In the present case, the Commission has not disputed that the Homeowners have a constitutional right to protect their private property. Accordingly, that right can only be forced to be given up if the Homeowners' project has adverse impacts that warrant extinguishment of that right. The unconstitutional conditions doctrine applies in this circumstance.

Of course, as has already been discussed, there is nothing in the design of the Homeowners' seawall that creates a need to extinguish the right to protect the existing home in 20 years. As the Commission has admitted, the permit expiration condition is grounded on speculation that there may be physical changes in the future, or that there may be policy changes in the future. But neither of these reasons is the result of the Homeowners. The Commission has not identified with any particularity the nature and extent of future impacts or policies. Nor could it, because such identification is merely a guess. Nevertheless, the Commission takes the most aggressive approach possible, the most extreme action, and requires that the permit itself be terminated and forces the Homeowners to enter the fray of permitting all over again. The dissenting opinion below got it right:

> Here, the Commission's condition that the seawall permit expires in 20 years unconstitutionally forces the homeowners to waive their rights and property interests without any nexus or "rough proportionality" to potential adverse impacts caused by the seawall.

Dissenting slip op. at 19.

> The condition forces the homeowners to waive their present and future rights to protect their homes, as guaranteed to them by section 30235 of the Coastal Act and the California Constitution. Despite substantial evidence establishing that the homes will continue to be threatened, the condition effectively extinguishes their right to protect their properties, beginning in 2031.

Id.

In summary, the permit-expiration is an unconstitutional condition that has not been shown to be roughly proportional to adverse impacts of the seawall. The very fact that future impacts are unknown, unquantified, and may not even exist, can only mean that the most extreme condition of terminating the permit goes too far. The Court should so rule.

III

THE COMMISSION'S STAIRWAY PROHIBITION IS UNLAWFUL

Under Public Resources Code § 30610(g) a coastal development permit is not required to replace a structure destroyed by a disaster. The Commission does not deny that the Homeowners' shared stairway was destroyed by a natural disaster.

The Commission's only substantive contention is that stairways are no longer allowed under the local coastal program. However, all the local policies that the Commission can identify are provisions precluding **new** stairways. *See* Petitioners' Opening Brief at 37-40. The Commission does not identify any local policy that precludes replacement of a previously established stairway that is destroyed by a disaster.

The Commission argues that the "Coastal Bluff Overlay Zone" (CBOZ) prohibits repair of the stairway. Again, the CBOZ only prohibits **new** development on the face of a coastal bluff. Encinitas Municipal Code § 30.34.010(B)(2). It does not prohibit replacement of existing structures

destroyed by a natural disaster, as in the case here. Indeed, the same code section provides that "**[e]xisting legal structures and facilities** within 40 feet of a bluff edge or on the face of a bluff **may remain unchanged**." Encinitas Municipal Code § 30.34.010(B)(4) (emphasis added). This is consistent with the authority under section 30610(g)(1) for the replacement of structures destroyed by disaster. The whole point of allowing a replacement structure is so that the development status of a parcel remains unchanged, despite the arbitrary consequences of a disaster.

The stairway has existed for multiple decades in the same location. Under the authority of Public Resources Code § 30610, the Homeowners have a right to replace the stairway destroyed by the natural disaster in 2010. The local coastal policies do not preclude the effectiveness of this statute. It is urged that the Court so rule.

CONCLUSION

The Homeowners exercised their right to judicial review by filing a timely petition for writ of mandate. As ruled by the trial court, the Homeowners never waived that right. The deed restriction includes the severability clause, expressly acknowledging that the challenged conditions can be "held to be invalid," thereby corroborating that the deed restrictions are not inconsistent with the intent to seek judicial review through the writ of mandate procedure. The Court is urged to rule that under the facts here, there has been no waiver of the right of judicial review.

On the merits, for the reasons set forth above, the Court is urged to rule that the 20-year permit-expiration condition does not mitigate any identified adverse impacts caused by the Homeowners' seawall. Accordingly, the condition violates the Coastal Act § 30235 and the federal unconstitutional conditions doctrine. Finally, the condition prohibiting replacement of the stairway is contrary to the authority under the Coastal Act § 30610(g)(1) and is unlawful.

DATED: June 29, 2015.

Respectfully submitted,

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By /s/ John M. Groen
JOHN M. GROEN

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing PETITIONERS' REPLY BRIEF is proportionately spaced, has a typeface of 13 points or more, and contains 6,711 words.

DATED: June 29, 2015.

/s/ John M. Groen
JOHN M. GROEN

DECLARATION OF SERVICE BY MAIL

I, Tawnda Elling, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

On June 29, 2015, true copies of PETITIONERS' REPLY BRIEF were placed in envelopes addressed to:

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Clerk of the Court
San Diego County Superior Court
North County Division
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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 29th day of June, 2015, at Sacramento, California.

/s/ Tawnda Elling
TAWNDA ELLING