IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

No. D064120

BARBARA LYNCH and THOMAS FRICK,
Plaintiffs and Respondents,

v.

CALIFORNIA COASTAL COMMISSION,
Defendant and Appellant.

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

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE	Court of Appeal Case Number: D064120
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APPELLANT/PETITIONER: Barbara Lynch and Thomas Frick RESPONDENT/REAL PARTY IN INTEREST: California Coastal Commission	

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Date: April 11, 2014

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INTRODUCTION

Faced with constant natural threats to their bluff-top homes, Respondents Barbara Lynch and Thomas Frick ("Owners") sought permits to replace an older, already-permitted seawall with a new state-of-the-art and aesthetically pleasing seawall that has a 75-year life. The Owners' application also included a request to remove and reconstruct an older permitted beach stairway during the course of the seawall construction. Finding the proposed project consistent with its zoning laws and policies, the City of Encinitas approved the application in its entirety.

As required by Respondent California Coastal Commission, the Owners separately applied to the Commission for a Coastal Development Permit (CDP). While this application was pending, a severe winter storm caused a catastrophic bluff collapse that completely destroyed the old seawall and the bottom half of the beach stairway, leaving the top portion of the stairway suspended in mid-air about halfway down the 80-foot bluff. In 2011, the Commission approved the CDP with two unlawful conditions. One condition required the seawall permit to expire 20 years from the date of approval, after which it would have to be removed if not re-authorized by an entirely new permit. A second unlawful condition on the seawall permit required the Owners to delete any reference to the stairway reconstruction from their building plans, forcing the Owners to leave the remaining portion of the

stairway dangling in place. The Owners vigorously and repeatedly objected to the conditions both prior to and at the Commission's hearings, and they timely filed suit challenging the conditions under Civil Procedure Code section 1094.5.

The trial court agreed with the Owners and struck down the two conditions. The Commission now appeals the trial court's ruling and subsequent issuance of a peremptory writ of mandate. It claims the Owners waived their right to challenge the conditions when they signed a mandatory form deed restriction acknowledging that their seawall permit includes numerous, yet unnamed, conditions. On this issue, the Commission has a heavy burden to overcome: Substantial evidence easily supports the trial court's finding that the Owners did not waive their rights. Not only have the Owners always kept the Commission on notice that they would *not* accept the conditions, the Owners timely filed suit challenging the conditions under section 1094.5 before both signed and recorded the mandatory deed restrictions. The law required nothing more of the Owners for them to preserve their rights. In any event, waiver must be intentional, and the Owners had no choice but to sign the Commission's form deed restriction; if they had refused to sign the document, the Commission would not have issued the CDP, and the Owners could have lost their family homes.

Furthermore, the Commission's seawall and stairway conditions are unlawful. The seawall condition violates the Coastal Act, which *mandates* the approval of a needed seawall when its design mitigates for adverse impacts on sand-supply loss. The Owners established their need for the seawall and paid the Commission a hefty sum—an in-lieu mitigation fee of $31,542—to account for regional sand loss. In addition, the seawall condition effects an unconstitutional condition. It requires the Owners to give up constitutional rights and property interests in exchange for a permit that the Commission was obligated to approve anyway, without any proof that the conditions address adverse impacts attributable to the seawall.

The stairway denial is also unlawful, because the Commission has no jurisdiction over its reconstruction. Because a disaster destroyed the lower portion of the stairway, the Coastal Act and the City's Local Coastal Program (LCP) both exempt its reconstruction from the Coastal Development Permit requirement; in other words, the Owners do not need approval from the Commission to rebuild the stairway. Nothing in the City's Code that the Commission relies upon is inconsistent with, or otherwise trumps, the exemptions that the Coastal Act and the City's LCP clearly provide. Thus, the Commission went beyond its authority in denying the stairway.

For all these reasons, the Court should affirm the trial court's judgment striking down the Commission's seawall condition and stairway denial.

FACTUAL AND PROCEDURAL BACKGROUND

I

THE OWNERS AND THEIR HOMES

Barbara Lynch and Thomas Frick own adjacent residential properties located atop an 80-foot oceanfront bluff on Neptune Avenue, in Encinitas, California. Administrative Record (AR) 61. The easterly and westerly property lines for their homes are Neptune Avenue and the mean high-tide line of the Pacific Ocean, respectively. Thus, the properties consist of the bluff top areas improved with the Owners' homes, the steep coastal bluffs improved with a shared staircase that goes down to the beach, and the sandy beach area from the toe of the bluff to the mean high-tide line. AR 1660. Similar to many properties along this stretch of coast, the shared staircase connects the homes to the beach area below. AR 335 (historical site photo), 1660.

The staircase was built more than 40 years ago, prior to the enactment of the Coastal Act of 1976 or its predecessor law, the Coastal Zone Conservation Act of 1972. AR 380. In 1973, the staircase partially collapsed and was reconstructed under a permit issued by the County of San Diego[1] following certification from the Coastal Zone Conservation Commission (the Commission's predecessor agency) that its reconstruction was exempt from

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[1] The County of San Diego approved the project because the City of Encinitas was not incorporated until 1986.

state permit requirements. AR 380-84. Since that time, the Owners have enjoyed the use of their shared staircase on a daily basis (AR 1660, 2274), and they have regularly maintained it (AR 2329). The staircase is important to the Owners, because it provides the only direct access to the beach portion of their properties. The access afforded by the staircase is especially important for Mrs. Lynch, given her age and health limitations. AR 2275-76, 2329.

In 1986, the Owners constructed a beach-level seawall and mid-bluff retention structure. AR 613, 1982 (photograph). In 1989, the Commission determined that these structures, along with the staircase, were consistent with the Coastal Act and issued a CDP authorizing them to remain ***in perpetuity***. That is, the CDP for these structures had no expiration date. AR 2-22, 1690.

II

THE CITY APPROVES THE STAIRCASE REPAIR AND THE NEW SEAWALL

In 2003, the Owners applied to the City of Encinitas for a permit to replace the aging seawall with a state-of-the-art, textured concrete seawall system that included structural tiebacks and mid-bluff geogrid protection (the "Project"). AR 38-39, 870. The Project was designed to protect, not just the Owners' homes, but also the beach-going public. AR 405. Since 1995, sudden and unexpected bluff collapses have killed five beach-goers in North San Diego County alone. The permit application specified that portions of the staircase would be removed and then replaced to facilitate construction.

AR 711-13. The new seawall system's useful life would be 75 years, as certified by its engineers. AR 212.

After considerable governmental delays, in February 2009, the City voted unanimously in favor of the Project. The City found that the Project was consistent with the City's Local Coastal Program, and that it would "not adversely affect the policies of the Encinitas General Plan or the provisions, regulations, conditions or policies imposed by the Municipal Code." AR 1844, 1849-53. As to the staircase, the City's Resolution of Approval states:

> A stairway currently exists on the bluff face and will remain. However, portions of the stairwell most adjacent to the existing mid-bluff retaining wall and lower seawall will be removed as necessary to allow for the installation of the proposed improvements and will be replaced to its original configuration with the same materials, dimensions, and colors once the construction of the shotcrete walls are completed.

AR 1849 (emphasis added).

III

THE OWNERS APPLY TO THE COMMISSION FOR A CDP

As required by the City's approval, the Owners filed an application with the Commission to amend their existing seawall permit. On December 30, 2009, the Commission issued its first of three staff reports for this Project. In this first report (Staff Report No. 1), Commission staff recommended approval of a 50-foot seawall below Mrs. Lynch's home, but recommended denial of any seawall to protect Mr. Frick's home, denial of the entire-mid-bluff

structure, and denial of the replacement of any portion of the staircase removed to facilitate the seawall's construction. AR 24. Importantly, the staff recommended no expiration date for the seawall; instead, it simply recommended that, in 30 years, the Commission re-evaluate the need for any additional mitigation that the seawall's impacts on sand loss might require. AR 24.

On January 15, 2010, there was a hearing on the Owners' CDP application. However, the Commission staff incorrectly analyzed the Owners' geological site assessment and building plans, and the hearing was continued to a later date to resolve the misunderstanding. AR 403.

In December 2010, while the Owners' application for an amended CDP was still pending before the Commission, a rapid series of large winter storms descended on Southern California. The storms caused unprecedented flooding and major property damage along the coast. AR 2347-48. As a result, President Obama declared San Diego County to be an emergency disaster relief area. Joint Appendix (JA) at 130-32. On December 24, 2010, in the immediate aftermath of this severe storm, the Owners' bluff suffered a large-scale collapse, followed by additional collapses. These collapses destroyed the existing seawall system and the lower portion of the staircase. AR 408, 409, 421-31, 1690.

The Owners amended their CDP application to reflect the new realities, and the Commission scheduled a second hearing for June 15, 2011. AR 734. Due to the new conditions caused by the bluff collapses, in its second staff report dated June 1, 2011 (Staff Report No. 2), the Commission staff recommended a full length, 100-foot seawall protecting both Owners' homes, and a mid-bluff structure not to exceed 75 linear feet. However, it once again recommended denial of the staircase reconstruction. This was disappointing to the Owners, who believed that they had successfully compromised the staircase dispute by offering a lateral access easement across the beach to the public in exchange for the Commission's approval of the staircase reconstruction. AR 1656-57. Like Staff Report No. 1, Staff Report No. 2 did not include or mention a CDP expiration date for the seawall. That is, the staff recommendation was, once again, for a seawall permit in perpetuity. The Commission staff merely proposed a requirement that the Owners and the Commission would re-evaluate the need for any additional mitigation in 20 years (as opposed to the original 30). AR 735.

The hearing on the Owners' CDP application took place on June 15, 2011. However, the Commission continued the hearing to allow itself further time to consider the Owners' arguments and evidence. AR 2304-05.

On July 21, 2011, Commission staff published its third and final report (Staff Report No. 3)—the report that the Commission ultimately adopted in

support of its permit decision. AR 1677, *et seq.* Although just seven weeks had elapsed since the Commission's publication of Staff Report No. 2, Staff Report No. 3 eliminated the idea of re-evaluating the need for additional mitigation after 20 years and instead proposed that the seawall permit expire after 20 years from the date of approval. In other words, the Owners would be entitled to have seawall protection for only 20 years, after which they would have to remove the seawall or re-apply for a new CDP to keep it (Special Conditions 2 and 3). The expiration requirement was justified as a means of protecting the Commission's "future shoreline planning options," in the event future political and legal changes allowed the Commission to outright ban seawalls. AR 1709-10. Under Special Condition 1.a., the staff also recommended outright denial of the repair of the lower portion of the stairway. AR 1681.

Staff Report No. 3 also outlined the adverse impacts of seawalls generally as follows: (1) physical occupation of beach area, (2) long-term beach loss, (3) entrapment of bluff sand, and (4) impacts to unprotected adjacent bluffs. AR 1702, 1709. With regard to the specific impacts of the project, the Staff Report found that general impacts (1) and (2) did not apply because the seawall "will open up approximately 425 sq. ft. of new beach area." AR 1679. General impact (3) was mitigated through a $31,542

payment and general impact (4) was mitigated through engineering and design of the seawall. AR 1679, 1706, 1709.

The Owners vehemently objected to the seawall and the stairway conditions, both in written objections submitted to the Commission prior to hearing on August 10, 2011, and in oral testimony at the hearing itself. AR 1658-64, 1770-74, 2325-31. The Commission nevertheless adopted Staff Report No. 3, requiring the seawall permit to expire in 20 years and denying the stairway reconstruction. AR 2359.

The Owners timely filed a Petition for Writ of Mandate on October 25, 2011. JA at 1. In November 2011, the Owners paid $31,542 in sand mitigation fees and satisfied the myriad other conditions precedent required to obtain the Commission's CDP, including execution of deed restrictions simply recognizing the objected-to seawall and stairway conditions. Finally, on December 6, 2011, the Commission formally issued the seawall permit, and the Owners proceeded with their Project.

On October 29, 2012, the Commission filed a Motion for Judgment on the Petition for Writ of Administrative Mandamus, on the grounds that the Owners had waived their right to challenge the seawall and stairway conditions, because they had executed the deed restrictions. JA at 13. The trial court found no waiver and denied the motion. The court held that the

Owners "have neither specifically agreed to the conditions nor failed to challenge their validity." JA at 101.

Thereafter, the Owners filed a Motion for Judgment on the Petition, arguing that the seawall and stairway conditions are unlawful. JA at 102. The trial court agreed, holding that the Commission's denial of the stairway violated Encinitas's Municipal Code and the Coastal Act, and that the Commission's imposition of the 20-year expiration date on the seawall violated the Coastal Act and was unconstitutional. JA at 229.

STANDARD OF REVIEW

The Commission's appeal raises two questions: (1) whether the Owners have waived their right to challenge the seawall and stairway conditions, and (2) whether those conditions are unlawful. The Court must review each issue under a different standard of review.

First, "[w]hether a waiver has occurred is a factual question" for the trial court. *Savaglio v. Wal-Mart Stores, Inc.*, 149 Cal. App. 4th 588, 598 (2007). This Court reviews the trial court's resolution of that factual question under "the deferential 'substantial evidence' standard." *Bickel v. City of Piedmont*, 16 Cal. 4th 1040, 1052-53 (1997), *superseded by statute on other grounds* (discussing appellate review of trial court's "waiver" decisions); *see also Savaglio*, 149 Cal. App. 4th at 598 (same). Under this deferential standard, the trial court's conclusion "is presumed to be correct," *GHK*

Associates v. Mayer Group, Inc., 224 Cal. App. 3d 856, 872 (1990), and the evidence is viewed "in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor," *Bickel*, 16 Cal. App. 4th at 1053. Indeed, "the appellate court will look only at the evidence supporting the prevailing party and will disregard the contrary showing; the evidence is not to be weighed by the appellate court." *GHK Associates*, 224 Cal. App. 3d at 872. In practice, reversal for "insufficient" evidence is relatively rare. *Whiteley v. Philip Morris Inc.*, 117 Cal. App. 4th 635, 678 (2004) ("Defendants raising a claim of insufficiency of the evidence assume[] a daunting burden." (internal quotation marks omitted)).

Second, the Owners challenge the conditions as unlawful. "In an action for administrative mandamus, the court's inquiry extends to whether the agency acted in excess of jurisdiction or abused its discretion in the manner required by law." *Schneider v. Cal. Coastal Comm'n*, 140 Cal. App. 4th 1339, 1343 (2006). Where, as here, there are no disputed material facts, the standard of review is *de novo*, with no deference to the agency's own jurisdictional determinations or its opinion of the legality of its actions. "[T]he application of . . . statutory provisions to undisputed facts" triggers *de novo* review; deference to the Commission—including on issues concerning whether it has jurisdiction—is inappropriate. *Silvers v. Board of Equalization*, 188 Cal. App.

4th 1215, 1219 (2010); *Schneider*, 140 Cal. App. 4th at 1344 ("'A court does not, in other words, defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature.'" (internal citation omitted)).

ARGUMENT

I

THE OWNERS PRESERVED THEIR RIGHT TO CHALLENGE THE COMMISSION'S CONDITIONS

A. The Owners Preserved Their Right To Challenge the Conditions

The Coastal Act sets forth the requirements that a permit applicant must satisfy in order to preserve his right to challenge permit conditions in court. The applicant must first inform the Commission of his objections, either at or prior to the Commission's hearing on the permit. Pub. Res. Code § 30801. Here, the Owners did just that. In fact, they did it over and over again.

Before the Commission's August 10, 2011, hearing on their CDP, the Owners submitted written objections to the proposed seawall and stairway conditions. JA at 74; AR 1658-64. They objected to Condition 1.a., requiring deletion of the stairway from their building plans, and to Conditions 2.1 and 3, limiting the seawall permit to 20 years. JA at 74; AR 1658-61. The Owners also appeared at the Commission hearing to object in person to these conditions. JA at 74; AR 1671-73.

Having exhausted their administrative remedies, the Owners then pursued their right under the Coastal Act to challenge the conditions in court. Pub. Res. Code § 30801. They filed a writ of mandate under Civil Procedure Code section 1094.5 within the 60-day limitations period, on October 7, 2011. *Id.*; JA at 76. They also timely and personally served the Commission with the lawsuit on October 25, 2011. JA at 76.

In sum, the Owners conscientiously followed *all* of the legal requirements necessary for challenging the CDP conditions—both before the Commission and in the trial court. By taking those steps, the Owners unequivocally put the Commission on notice of their continued objections to the conditions and their intent to challenge them legally. There was nothing more that the Coastal Act, or any other provision of law, required the Owners to do in order to preserve their right to challenge the conditions.

B. Substantial Evidence Supports the Trial Court's Conclusion That the Owners Never Waived Their Right To Sue

The Commission argued in the trial court that the Owners waived their right to challenge the CDP conditions. The burden was on the Commission to prove waiver to the trial court by "clear and convincing evidence." *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal. 4th 1, 31 (1995). The Commission pointed to the fact that, in September and November 2011, it forced the Owners to execute deed restrictions acknowledging the permit conditions just so they

could obtain the already-approved permit necessary for their much-needed seawall. The trial court found no waiver, because the Owners "neither specifically agreed to the conditions nor failed to challenge their validity." JA at 101 (Minute Order, 12/21/2012). Substantial evidence supports the trial court's finding.

1. Waiver of a Right Will Not Be Found Absent an Express Agreement or Unequivocal Evidence of Intent To Waive

Waiver is the voluntary relinquishment of a known right. *Platt Pacific, Inc. v. Andelson*, 6 Cal. 4th 307, 314 (1993). The standard for proving waiver is exacting. There must be an "existing right, knowledge of the right, and an actual intention to relinquish the right." *Bickel*, 16 Cal. 4th at 1053 (citation omitted). Importantly, the party waiving the right must do so intentionally and voluntarily. *City of Ukiah v. Fones*, 64 Cal. 2d 104, 107 (1966) (quotation marks and citations omitted) ("Waiver always rests upon intent."); *Old Republic Ins. Co. v. FSR Brokerage, Inc.*, 80 Cal. App. 4th 666, 678 (2000) ("'The pivotal issue in a claim of waiver is the intention of the party who allegedly relinquished the known legal right.'" (citations omitted)).

The burden of demonstrating those factors, by clear and convincing evidence, falls to the party arguing waiver. *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga*, 175 Cal. App. 4th 1306, 1320 (2009); *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Café & Takeout III, Ltd.*, 30 Cal.

App. 4th 54, 60 (1994). If there is any doubt on the matter, courts must resolve the issue against waiver. *DRG/Beverly Hills, Ltd.*, 30 Cal. App. 4th at 60. Given that demanding standard, courts generally will not find waiver absent an express agreement that clearly evidences a party's knowing and voluntary decision to waive a claim or right. *See, e.g., McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 176 Cal. App. 3d 480, 488-89 (1985); *Reisman v. Shahverdian*, 153 Cal. App. 3d 1074, 1088 (1984); *see also Guseinov v. Burns*, 145 Cal. App. 4th 944, 954 (2006); *Lovett v. Carrasco*, 63 Cal. App. 4th 48, 53 (1998).

Courts will find waiver by implication only where a party acts so inconsistently with regard to enforcing a right, that the other party could honestly believe he intended to waive it. *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1559 (9th Cir. 1991) ("California courts will find waiver when a party intentionally relinquishes a right, or when that party's acts are so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished."); *see also E.D. McGillicuddy Contr. Co. v. Knoll Recreation Ass'n, Inc.*, 31 Cal. App. 3d 891, 901 (1973) ("[A] waiver will not be implied contrary to the intention of the party whose rights would be injuriously affected unless by his conduct the opposite party was misled, to his prejudice, into the honest belief that such waiver was intended."). In other words, a court may rely on a party's actions as evidence

of an intent to waive where those actions are unequivocal. *See, e.g.*, *Waller*, 11 Cal. 4th at 33; *E.D. McGillicuddy Const. Co.*, 31 Cal. App. 3d at 901.

In the land-use context, courts likewise will find waiver absent an express agreement only where a party, by his actions, manifests a clear intent to waive. The only difference between waiver in this context, as opposed to other areas of the law, derives from the unique nature of land-use permitting. Because land-use permits are attached to a particular parcel of land, as opposed to a particular person, the conditions on those permits are normally incorporated as covenants that run with the land and bind subsequent owners. As a result, it is the intent of the party who ***originally*** obtained the permit that matters. When subsequent owners bring challenges to permit conditions, courts must, of necessity, look solely to the actions of the original permittee to determine whether there was an intent to waive.

It is within that unique context—not present here—that the California Supreme Court articulated the rule that "a landowner or his successor in title is barred from challenging a condition imposed upon the granting of a . . . permit if he has acquiesced therein by either specifically agreeing to the condition or failing to challenge its validity, and accepted benefits afforded by the permit." *County of Imperial v. McDougal*, 19 Cal. 3d 505, 510-11 (1977). In *County of Imperial*, the California Supreme Court considered a challenge to a conditional land use permit authorizing sales of well-water within the

county. *Id.* at 507-08. The landowner who obtained the permit sold water to the County, and never challenged the geographical limit. *Id.* at 507, 510. Several years later, his successor in interest violated the terms of the permit by selling water to Mexico. *Id.* at 507-08. The county filed suit to enforce the terms of the permit and the landowner argued in defense that he had a vested right to sell water and that the geographical limit on the permit was invalid. *Id.* at 508.

The Court reasoned that because the conditional use permit ran with the land, the current owner was only entitled to whatever benefits the original permittee enjoyed. *Id.* at 510. And because the original permittee never challenged the geographical limit, but instead accepted the permit's benefits and complied with its terms by selling water only within the County, the permittee waived his right—and, therefore, the right of all successors-in-interest—to challenge the geographical condition. *Id.* As a successor-in-interest to that waiver, the current permit holder was bound by the same limitation. *Id.* at 511.

The California Supreme Court relied on the *County of Imperial* rule in another case, *Sports Arenas Properties, Inc. v. City of San Diego*, 40 Cal. 3d 808, 815 (1985). There, however, the Court refused to hold the successor-in-interest to the terms of an existing conditional use permit because the original permittee never complied with those terms. *Id.* at 818-19. In

Sports Arenas, a nonprofit organization obtained a conditional use permit to build and operate nonprofit housing for senior citizens. *Id.* at 812-13. That organization failed to pursue the project, which a for-profit corporation built instead. *Id.* at 813. After that developer defaulted on its financing, the property changed hands several times before a different successor in interest sought to convert the housing into condominium units. *Id.* at 813-14. When the city denied that request, the landowner argued it was not bound by the original permit conditions because those conditions were not included as express limitations on the permit. *Id.* at 814.

The Court rejected that argument, finding that the limitations on the permit were sufficiently clear. *Id.* at 816-18. It nonetheless refused to enforce those limits because the project was neither built nor operated in accordance with the permit's terms. *Id.* at 818-19. Thus, the current owner was not bound by the conditions on the permit because the original permittee never complied with them. *Contra id.* at 815 ("[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."). And, there was no waiver of the right to challenge those conditions in court. *See id.* at 819.

Finally, in *Pfeiffer v. City of La Mesa*, 69 Cal. App. 3d 74, 76 (1977), the California Fourth District Court of Appeal articulated a similar waiver rule that applies to inverse condemnation actions. The property owner in *Pfeiffer*

obtained a building permit conditioned on his granting the city an easement across his property and building a storm drain at his own expense. *Id.* at 76. After granting the easement, constructing the storm drain, and building the permitted improvements, the owner sued the city in inverse condemnation seeking to recover the costs of the storm drain construction. *Id.*

The court found that the property owner brought the wrong cause of action. *Id.* at 77-78. Because the crux of his argument was that the permit conditions were invalid, the owner was required to have brought a writ petition under Code of Civil Procedure section 1094.5 to challenge those conditions. *Id.* at 78. That avenue could have afforded the owner relief from the offending conditions without placing the city in the unfair position of having to retroactively reimburse the owner for the costs of complying with those conditions, should a court render them invalid. *Id.* at 78. Thus, the court announced the rule 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." *Id.* at 78. And it found that the property owner could not sue to recover his costs under that rule. *Id.*

The foregoing authorities, along with substantial evidence in the record, support the trial court's "no waiver" finding. To prove waiver, the Commission had to demonstrate to the trial court that the Owners intentionally

and voluntarily waived their right to bring this legal challenge. *City of Ukiah*, 64 Cal. 2d at 107. And to show such intent, the Commission had to prove that the Owners "acquiesced" to the permit conditions by "specifically agreeing" to and failing to challenge them. *County of Imperial*, 19 Cal. 3d at 510-11. Even assuming, for the sake of argument, that *Pfeiffer* governs this case, the Commission must still demonstrate that the Owners "complie[d]" with the permit conditions. *Pfeiffer*, 69 Cal. App. 3d at 78. The Commission could not prove any of these facts to the trial court.

First, there is no evidence that Respondents intentionally and voluntarily waived their right to challenge the CDP conditions. They never entered any agreement expressly waiving that right. To the contrary, the Owners made both written and oral statements to the Commission specifically noting their objections to the stairway and seawall conditions. JA at 74; AR 1658-64, 1671-73. And then they filed a timely writ action to challenge those conditions in court. JA at 1-7, 76. Those actions, far from demonstrating an unequivocal intent to waive, show the opposite: the Owners explicitly intended to pursue this legal challenge.

Moreover, the Owners filed their writ action before the Commission issued the CDP. JA at 65. It therefore would have been unreasonable for the Commission to rely on their alleged acceptance of the permit as evidence of waiver when the Commission knew—before it issued the permit—that they

were pursuing their right to judicial review of the permit conditions. *Cf. Intel Corp.*, 925 F.2d at 1559 (reciting rule that courts will only imply waiver when a "party's acts are so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished").

Second, there is no evidence the Owners acquiesced to the permit conditions by specifically agreeing to or complying with them, or failing to challenge them. In *County of Imperial*, the California Supreme Court found that the plaintiffs' predecessor-in-interest had specifically agreed to the permit condition limiting sales of well-water geographically, because, rather than challenge that condition, he abided by it for years. *County of Imperial*, 19 Cal. 3d at 510-11. By contrast, the same Court in *Sports Arenas* refused to find any waiver of the right to challenge permit conditions where the original permittee never abided by the conditions requiring it to operate the property as non-profit senior citizen housing. *Sports Arenas*, 40 Cal. 3d at 819. And in *Pfeiffer*, this Court found that the plaintiff had complied with the permit condition because, by the time he filed his inverse condemnation action, he had already built and paid for the contested storm drain. *Pfeiffer*, 69 Cal. App. 3d at 78. Here, the Owners have taken no actions to either abide by the conditions or comply with them, and they have obviously not failed to challenge them since they timely filed this legal action.

The Commission argues, nonetheless, that the Owners waived their right to challenge the CDP conditions by (1) accepting the permit; (2) building the project; (3) executing form deed restrictions; and (4) failing to note they were proceeding "under protest." AOB at 13-14. But none of those actions are sufficient to demonstrate waiver.

First, the Commission issued the Owners the CDP, and they constructed the seawall and stairway, only *after* filing their writ action challenging the permit conditions. JA at 1, 65. Thus, neither acceptance of the permit nor construction of the project demonstrates that the Owners intended to waive their right to challenge the CDP conditions. More importantly, accepting a permit and building a project do not satisfy the waiver standard under *Sports Arenas*, *County of Imperial*, or *Pfeiffer*—the very cases that the Commission argues govern this case. AOB at 14. Under those cases, it is not enough to accept a permit and build the project or engage in the permitted activity; the permittee must also comply with the conditions. Whereas here, the Owners have accepted the permit and built the project, but not complied with the permit conditions, there is no waiver.

Second, the Commission cannot show that the Owners complied with the seawall and stairway conditions by executing form deed restrictions that it forced them to sign if they wanted to save their family homes. The Commission points to the following language as evidence of compliance:

> Owners . . . hereby irrevocably covenant 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.

AOB at 16; JA at 25.

Agreeing that the permit's conditions will attach to the property's deed is not the equivalent of *complying* with those conditions. More importantly, that language in the form deed restrictions says nothing about the Owners' right under the Coastal Act to seek judicial review of the permit conditions, nor does it say anything about waiving that right. On their face, the forms actually contemplate the possibility that the restrictions may be invalidated in the future, because they contain a severability clause. JA at 26 ("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.").

In the absence of express waiver language in the deed restrictions, the Commission argues that the Owners cannot challenge the conditions because the Commission would not have issued the CDP if they had not signed the deed restrictions. AOB at 13. Be that as it may, it is insufficient to demonstrate waiver, for under the law, "a waiver will not be implied contrary to the intention of the party whose rights would be injuriously affected unless by his conduct the opposite party was misled, to his prejudice, into the honest belief that such waiver was intended." *E.D. McGillicuddy Contr. Co.*, 31 Cal.

App. 3d at 901. Here, the Commission could not honestly have believed that the Owners intended to waive their rights to challenge the permit conditions by signing the deed restrictions when they filed their writ action before the Commission issued the permit. Instead, the Commission's attempt in the trial court (and now, in this appeal) to end this case without review on the merits is merely an effort to escape an adverse judgment with tactical legal arguments. The Commission could have filed its own declaratory relief action to resolve the waiver question, or taken other proactive measures to assuage its concerns after the Owners filed their lawsuit, before it issued the permit. Since it knew that the Owners objected to the conditions, it should have and could have required them to specifically and knowingly waive their right to challenge these specific conditions prior to issuing the CDP. The Commission did none of these things.

The Commission also has not demonstrated any prejudice to it. It argued below that it would not have issued the permit, but for the Owners' agreeing to the deed restrictions, because their seawall project would be inconsistent with the Coastal Act absent those conditions. JA at 97. But that is only true if the Commission's interpretation of the Coastal Act is correct. And that is what the merits of this lawsuit will determine: whether the Coastal Act requires the Owners to remove their stairway and to reapply for a new seawall permit in 20 years. Without doubt, the Coastal Act does not outlaw

private beach stairways, and it does not provide for arbitrary expiration dates on seawall permits. The Commission cannot ground a claim of prejudice on an unlawful interpretation of a statute. Where, as here, a lawsuit seeks only prospective, equitable relief, the Commission will not suffer any harm if the permit conditions are struck down as inconsistent with the Coastal Act. *Cf. Pfeiffer*, 69 Cal. App. 3d at 78 (noting the "complete chaos" that would result if permittees could force municipalities to reimburse them for the cost of complying with permit conditions via inverse condemnation actions).

Finally, the Commission argues that the Owners waived their right to challenge the permit conditions because they accepted the permit and executed the deed restrictions without noting they were doing so "under protest." AOB at 14. But as the Commission acknowledges, there is no provision of the Coastal Act setting forth a procedure for accepting a permit "under protest." *Id.* at 15. Instead, the Commission seeks to insert such a requirement after the fact as an additional hurdle to judicial review. The only prerequisite to challenging permit conditions in court under the Coastal Act is to object to those conditions during the administrative process and to timely file a writ petition challenging those conditions after they are adopted—all of which the Owners did. Pub. Res. Code § 30801; JA at 74; AR 1658-61, 1671-73. The Commission cannot fault them for failing to comply with an additional procedural rule that does not exist—and that was raised only in the course of

litigation. Courts are, furthermore, reluctant to find waiver based on a party's failure to explicitly invoke a right. *Waller*, 11 Cal. 4th at 33. And they will not do so where a party, by its actions, instead makes patently clear its intent to pursue that right. *Reisman*, 153 Cal. App. 3d at 1088.

2. The Mitigation Fee Act Is Irrelevant

The Commission argues that the Owners' challenge is doomed because of the Mitigation Fee Act. Gov't Code § 66020, *et seq.*; AOB at 15-16. The Commission errs.

Unhappy with the result in *Pfeiffer*, the Legislature enacted the Mitigation Fee Act in order to correct a particular problem facing developers. Developers could only challenge fees imposed on them as a condition of development, if they refused to pay the fees. *See Shapell Industries, Inc. v. Governing Bd. of the Milpitas Unified School Dist.*, 1 Cal. App. 4th 218, 241 (1991). And refusing to pay the fees meant they could not obtain a building permit, requiring abandonment of the project. *Id.* The Legislature enacted the Mitigation Fee Act to "provide[] 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.* The fact that the Legislature applied the Act only to local governments makes sense, since it enacted the law specifically to overturn *Pfeiffer*—a challenge to a local permit

decision. *See Sterling Park, L.P. v. City of Palo Alto*, 57 Cal. 4th 1193, 1200 (2013).

The fact that the Legislature did not extend the Act to encompass state agencies is irrelevant, because the Owners do not challenge any fees and do not seek money damages against the Commission. For the same reason, the *Pfeiffer* rule does not apply to this case because the Owners have not brought an inverse condemnation action. *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.*, 172 Cal. App. 3d 914, 941 (1985) ("[T]he rule [that] a landowner seek to invalidate the condition by writ of mandate rather than seek compensation by inverse condemnation is designed to avoid forcing an unwanted taking property by the public entity and concomitant burden of compensation when the landowner has previously accepted conditions and benefits of development.").

The Owners brought the correct cause of action and did everything the Coastal Act required of them to challenge the CDP conditions. None of the Commission's evidence satisfies the waiver standard. And the Commission has not identified a single case where the court found a property owner had waived the right to seek equitable relief from permit conditions when that owner timely filing a writ action. The Court should affirm the trial court's finding of "no waiver".

II

THE SEAWALL AND STAIRWAY CONDITIONS ARE UNLAWFUL

A. The Seawall Condition Is Unlawful

1. The Seawall Condition Violates the Coastal Act

The Coastal Act provides that a seawall "***shall be permitted*** when required . . . to protect existing structures . . . in danger from erosion and when designed to eliminate or mitigate adverse impacts on the local shoreline sand supply." Pub. Res. Code § 30235 (emphasis added). Crucially, section 30235 makes the permitting of a seawall *mandatory* when two criteria are met: (1) an existing structure is in danger from erosion, and (2) the seawall is designed to eliminate or mitigate adverse impacts on the local shoreline sand supply. With respect to the second criterion, it authorizes the Commission to address, via design conditions, adverse impacts that the *seawall* causes to sand supply. Nothing in section 30235 or in any other provision of the Coastal Act authorizes the Commission to burden the statutory right to a mandatory seawall with concessions or conditions of any other kind or for any other purpose.

Here, the permit-expiration condition is not designed to address the seawall's adverse impacts. In considering the Owners' application, the Commission had the opportunity to require full mitigation for the seawall's

impact on sand supply,[2] and in fact required the Owners to pay a substantial mitigation fee. In the Commission's words, the 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.

Instead, the expiration date is designed to give the Commission maximum flexibility to *deny* the Owners continued use of their seawall after 2030, when they are forced to file a new permit application to remove the seawall or request that it be kept. The Commission makes no bones about the intent behind the expiration date—namely, "to allow for potential removal of the approved seawall." AR 1710. As the Commission's staff report explains:

> 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. . . . 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, but it is perhaps more likely that the baseline context for considering armoring will be different. . . .

AR 1709-10 (also cited in AOB at 20).

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[2] The Commission uses a sophisticated mathematical formula for determining an appropriate mitigation fee given the natural life of a seawall—in this case, 75 years (AR 212). *See* AR at 1703-06.

In other words, the Commission premises permit expiration on mere speculation about future environmental and political changes—and on its fervent hope that such changes will give it expanded power to wipe out the Owners' right to continued protection of their homes with a seawall. But the Coastal Act does not authorize the Commission to impose conditions on mandatory seawalls simply to accommodate a hoped-for regulatory agenda. Again, a seawall must be permitted—without arbitrary expiration dates—so long as it is needed and the seawall's design mitigates for impacts on local shoreline sand supply. Nothing more is required of the Owners.

The only legal authority the Commission cites for its "future shoreline planning" rationale is *Ocean Harbor House Homeowners Ass'n v. California Coastal Commission*, 163 Cal. App. 4th 215 (2008). In particular, the Commission relies on the decision's observation that the agency "has broad discretion to adopt measures designed to mitigate all significant impacts that the construction of a seawall may have." AOB at 19 (quoting *Ocean Harbor House*, 163 Cal. App. 4th at 242 (internal quotation marks omitted)). But the Commission's reliance on that case is misplaced.

In *Ocean Harbor House*, the Sixth District Court of Appeal upheld an in-lieu fee on homeowners who sought a seawall permit, on the grounds that

the fee mitigated for identified impacts caused by the seawall.[3] *Ocean Harbor House*, 163 Cal. App. 4th at 240-42. Unlike the mitigation fee in *Ocean Harbor House*, the permit-expiration requirement in this case is not a mitigation condition at all. Permit expiration mitigates for nothing, let alone for impacts that the seawall may or may not cause in the future. Instead, by imposing an expiration date on the Owners' right to protect their homes, the Commission simply seeks to exploit the impact of possible future environmental and legislative changes on the scope of its powers—***i.e., impacts not attributable to the seawall itself.*** For instance, the Commission might be envisioning a future Legislature that amends the Coastal Act to delete section 30235, thereby eliminating altogether the right of bluff-top homeowners to protect their homes with seawalls. In the past, some legislators have tried—but failed—to achieve this very end. JA at 128-40 (Exhibits C-E). By requiring the Owners to come back to it in 2030 for an application to remove or keep the seawall, the Commission ensures that it will enjoy whatever new power the Legislature *might* grant it to deny such an application. *Ocean Harbor House* may authorize the Commission to require mitigation for seawall impacts to public resources; but the decision does not authorize

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[3] The plaintiff's section 30235 challenge to the mitigation fee focused on *how* the moneys would be spent (local sand supply replenishment versus providing public recreational opportunities elsewhere). The parties did not raise, and the court did not address, the issue of whether section 30235 allows non-design conditions—like a mitigation fee—for mandatory seawalls.

conditions whose goal is, not to ensure mitigation, but to preserve flexibility based on some hypothetical change in the law.

Besides *Ocean Harbor House*, the Commission cites to a couple of additional reasons for its permit-expiration requirement. These reasons are pretexts for the Commission's real purpose of preserving its planning options—i.e., requiring the seawall's removal—in 2030. Moreover, none of them actually are served by the expiration of the Owners' seawall permit.

First, the Commission claims the conditions are necessary to "ensure [the seawall's] consistency with the City's local coastal program." AOB at 17. The Commission quotes at length from the City's local coastal program, but its citations are inapposite. *Id.* at 17-18. The quoted policies all address the importance of seawall ***design***. *Id.*; *see, e.g.*, Encinitas Municipal Code § 30.34.020(C)(2)(b) (referring to seawall "design"). None of the local program provisions that the Commission cites speak to non-design requirements, like the Commission's permit-expiration condition. *Id.*

Second, the Commission says that requiring the Owners to apply for a new seawall permit in 2030 allows them to assess the seawall's condition to determine whether the Owners still need the seawall and whether possible alternatives exist. AOB at 20. The Commission makes no findings—and the record contains no evidence—to substantiate its doubts about the continued need for the Owners' seawall, its hypothesis that alternatives may exist in the

future, or even the seawall's impacts on sand supply. The Commission's contentions are based on pure speculation or, at most, generalized evidence that have no demonstrated application to the Owners' state-of-the-art seawall. *Surfside Colony, Ltd. v. California Coastal Comm'n*, 226 Cal. App. 3d 1260, 1270 (1991) ("[E]vidence which may not necessarily even apply to the case at hand hardly meets" the definition of substantial evidence.).

Indeed, the evidence that the Owners *will* have a continued need for their seawall in 2030—and long thereafter—is clear. The Commission concedes that "[b]luffs in this area are subject to a variety of erosive forces and conditions," so that "bluffs and blufftop lots in the Encinitas area are considered a hazard area." AR 1695. As far back as 1986, the Division of Mines and Geology mapped "the entire Encinitas shoreline as an area susceptible to landslides"—a fact that became evident in the following decades. *Id.* at 1695-96 (citing the need for shoreline property owners to obtain emergency permits to protect their homes, including the Owners in this case, after a 2010 storm caused "substantial bluff collapse"). The consensus is that the threat to the Owners' bluff-top homes will only worsen. *Id.* at 1695 (recognizing the inevitable fact that erosion of shoreline properties will continue); AOB at 21 ("[T]here is scientific consensus that sea level rise will accelerate in the coming decades . . . ."). Again, the Commission's "need to assess" rationale has nothing to do with the possibility that the Owners will no

longer require a seawall; it has everything to do with the Commission's "intent . . . to allow for potential removal of the approved seawall." AR 1710.

Furthermore, the Commission cannot rely on the possibility of alternative protection to cut short the life of an otherwise well-functioning seawall. Section 30235 does not say that a homeowner in need of bluff protection is entitled to a seawall *"only as long as there is no alternative."* The Commission's "alternatives" rationale simply adds language to section 30235.

In any event, with or without permit expiration, both the City and the Commission have the power to evaluate the seawall's condition at any time, and to address any actual or imminent threat to life or property that the seawall may pose in the coming decades. *See, e.g.*, Pub. Res. Code § 30005 (affirming local and state authorities' broad discretion to address nuisances in the coastal zone). In rejecting the permit-expiration requirement as a "power grab designed to obtain further concessions in 20 years, or force the removal of the seawall[] at a later time," the trial court aptly observed:

> [T]he government always has the power to force repair or change should the seawall become unsafe. It may proceed by code enforcement, inverse condemnation, or many other legal practices to protect against a dangerous condition.

JA at 204.

Moreover, the alleged need to reassess mitigation in 2030 is justification, not for a seawall expiration date, but for a much more modest

condition. The Commission could have conditioned the seawall on the Owners' agreement to submit to a reassessment of mitigation needs in 20 or 30 years—without imposing an *expiration* on their seawall permit. In fact, the Commission's staff recommended this very approach in the first two staff reports that it issued for the Commission's consideration. AR 24 (Staff Report No. 1), 735 (Staff Report No. 2).

Specifically, the Commission staff proposed a re-evaluation of mitigation needs after 30 years (Staff Report No. 1), and then after 20 years (Staff Report No. 2)—without needlessly forcing expiration of the seawall permit. These facts alone belie the Commission's claim that "[w]ithout the requirement that Respondents seek reauthorization [in 20 years], the Commission will be unable to re-evaluate conditions and determine if further mitigation is warranted . . . ." AOB at 21. The Commission knew it could do a mitigation review in 20 or 30 years without requiring the permit's expiration.

The staff's *third* report—the one the Commission ultimately adopted—inexplicably changed course and proposed the expiration and re-authorization requirement at issue in this case. Requiring the Owners' seawall (with a life-span of 75 years) to expire in just *20* years from the date of approval goes far beyond any condition simply requiring a re-evaluation of mitigation needs. But, again, it does reveal the Commission's real intent: It wants to leave the door open to forcing the Owners to remove the seawall.

Third, the Commission wants the power to remove the seawall in 20 years, should the Owners (or their successors) redevelop the bluff tops in a way that no longer justifies the need for one—for example, if the new structures are set far enough back from the bluff edge. AOB at 22. The Commission complains that, unless the seawall permit expires in 20 years, the Commission will not be able to exercise that power. *Id.* Its claimed need for removal power in the event of bluff-top redevelopment is as illegitimate as its claimed need to evaluate seawall alternatives.

As with its "alternatives" rationale, the Commission seeks to add limiting language to section 30235 where none exists. Section 30235 does not say that a homeowner in need of bluff protection is entitled to a seawall *"until such time as redevelopment of the bluff-top makes one unnecessary."* To the contrary, the statute unqualifiedly entitles him to a seawall, as long as he has a need for it and mitigates for impacts on sand supply. Period. Moreover, requiring a seawall permit's expiration does nothing to advance the Commission's purported justification. There is no guarantee—and, in fact, the likelihood is exceedingly remote—that the Owners (or their successors) will seek to redevelop their properties around the time that the seawall permit is set to expire. What bluff-top homeowner would time an application for redevelopment with the expiration of his seawall permit, knowing full well that

the Commission would require the seawall's removal? Permit expiration does nothing to further the Commission's stated goal.

2. The Seawall Condition Is Unconstitutional

a. The Owners Have Constitutionally Protected Rights and Interests in Their Property

Even if the permit-expiration requirement passed statutory muster (which it does not), it would constitute an unconstitutional condition.[4] 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 right to use, enjoy, and protect property is *not* a government privilege, but a fundamental, constitutional right. *See, e.g., Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987) ("The right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'"). A person's property rights exist regardless of the regulatory restrictions that subsequently burden those rights. *Nectow v. City of Cambridge*, 277 U.S. 183,

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[4] If the Court affirms, on statutory grounds, the trial court's ruling on the seawall condition, it will not need to reach the question of whether the condition also is unconstitutional. "Under well-established precedent, of course, a statute must be construed, if reasonably possible, in a manner that avoids a serious constitutional question." *People v. Engram*, 50 Cal. 4th 1131, 1161 (2010).

187 (1928); *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926).

When permitted by existing law, the right to continued use of the property in accordance with the permit survives in perpetuity. *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 516 (1975). No zoning change or governmental dictate can interfere with such continued use, without raising serious constitutional questions. *See, e.g., Hansen Brothers Enterprises, Inc. v. Bd. of Supervisors of Nevada City*, 12 Cal. 4th 533, 552 (1996) ("'The rights of users of property as those rights existed at the time of the adoption of a zoning ordinance, are well recognized and have always been protected.'" (internal citation omitted)); *see also* 66A Cal. Jur. 3d Zoning and Other Land Controls § 399 ("Where a retroactive ordinance causes substantial injury and the prohibited business is not a nuisance, the ordinance is to that extent an unreasonable and unjustifiable exercise of the police power." (citing *E.B. Jones v. City of Los Angeles*, 211 Cal. 304 (1930)).

The right to continue a particular use of land is a "property right"; the permitting agency cannot, except under narrow circumstances, revoke its approval once it is granted. *Korean American Legal Advocacy Foundation v. City of Los Angeles*, 23 Cal. App 4th 376, 391 n.5 (1994) (emphasis added). A lawfully issued permit may not be revoked unless, after notice and a fair hearing on revocation, the agency has determined that the permittee's use has

created a nuisance, or the permittee has otherwise violated the law or failed to comply with the permit's conditions. *See* Gov't Code § 65905 (requiring notice and "a public hearing" on "a proposed revocation or modification" of a permit); *Cmty. Dev. Comm'n of Mendocino Cnty. v. City of Fort Bragg*, 204 Cal. App. 3d 1124, 1131-32 (1988) ("A municipality's power to revoke a permit is limited" and "may not be revoked arbitrarily without cause," and "notice and hearing must be afforded a permittee prior to revocation of a use permit."); *see also* 66A Cal. Jur. 3d Zoning And Other Land Controls § 462 (same); *City of Oakland v. Superior Court*, 45 Cal. App. 4th 740, 755-56 (1996) (discussing power of government to abate and eliminate nuisances caused by nonconforming uses); Pub. Res. Code § 30005 (local and state governments have power to abate and eliminate nuisances).

These constitutional rights and property interests are fully protected in the permitting context, where individuals are especially vulnerable to government pressure to give them up. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2586, 2594-95 (2013) ("[L]and-use permit applicants are especially vulnerable to . . . coercion . . . [and] [e]xtortionate demands."). The unconstitutional conditions doctrine provides that "the government may not deny a benefit to a person because he exercises a constitutional right." *Koontz*, 133 S.Ct. at 2594; *Dolan v. City of Tigard*, 512 U.S. 374, 395 (1994) (characterizing the doctrine as "well-settled"). The doctrine recognizes that

what a constitutional provision "precludes the government from commanding directly, it also precludes the government from accomplishing indirectly" through the withholding of a government benefit or permit. *See, e.g., Rutan v. Republican Party*, 497 U.S. 62, 77-78 (1990).

The United States Supreme Court applied the unconstitutional conditions doctrine in the land-use context in *Nollan*, 483 U.S. 825, and *Dolan*, 512 U.S. 374. Together, these cases hold that the Takings Clause allows the government to take a property interest as a condition of permit approval, but only if the condition bears an essential nexus and rough proportionality to adverse impacts caused by the proposed project. *Nollan*, 483 U.S. at 837 (requiring an "essential nexus" between a permit condition and the adverse impacts caused by the proposed project); *Dolan*, 512 U.S. at 391 (requiring "rough proportionality"); *see also Koontz*, 133 S.Ct. at 2600 (holding that any required "transfer of an interest in property from the landowner to the government"—whether it be money or an interest in land—is subject to *Nollan* and *Dolan*). Otherwise, the condition is unconstitutional. *See, e.g., Dolan*, 512 U.S. at 385 (describing unconstitutional conditions in land-use context).

b. The Seawall Condition Unconstitutionally Forces the Owners to Waive Their Rights and Property Interests

The Commission's permit-expiration requirement forces the Owners to relinquish certain constitutional rights and property interests as the condition of obtaining a seawall permit. First, the condition forces Owners to waive their present and future rights to protect their homes in perpetuity, 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. That the Owners may apply to the Commission "to either remove the seawall in its entirety, change or reduce its size or configuration, or extend the length of time the seawall is authorized" (AR 1683) guarantees *nothing*—let alone the restoration of the Owners' rights. Indeed, the Commission has made it all too clear that its top priority is to forever rid the Owners' bluffs of the new seawall in 2031. *Id.* 1710 ("The intent [behind the expiration condition]. . . is . . . to allow for potential removal of the approved seawall.").

Second, the expiration condition takes the Owners' property right in the continued, lawful use of their fortified bluffs as protection against erosion. And it requires the Owners to waive all constitutional protections against unjustified revocation of their seawall permit and retroactive application of any

future changes in the law. Again, there is no dispute that the Owners are entitled to their seawall under current law; indeed, section 30235, along with the inalienable constitutional right to protect one's property, *mandate* authorization of the seawall. Unless the seawall—a modern, state-of-the-art structure with a 75-year life—became a nuisance in 2031, the Commission would have no basis for revoking the seawall permit, and would at the very least have to provide the Owners with notice, a fair hearing, and adequate findings to justify seawall removal. Similarly, if in the unlikely event seawalls were categorically prohibited by 2031, the Owners would be constitutionally protected against retroactive application of that law and from the forced removal of their seawall. Yet the expiration condition purports to do an end-run around those constitutional protections, by forcing the Owners to agree to dispense with their due process and vested property rights.

Third, the expiration condition effectively requires the Owners to convey to the Commission a negative easement—or conservation easement—across their bluffs. A negative easement imposes "specific restrictions on the use of the property" it covers. *Wooster v. Department of Fish & Game*, 211 Cal. App. 4th 1020, 1026 (2012) (explaining that a conservation easement is a kind of negative easement). It "prevent[s] acts from being performed on the property" and "may be created by grant, express or implied." *Wolford v. Thomas*, 190 Cal. App. 3d 347, 354 (1987); *see also*

Johnston v. Sonoma County Agricultural Preservation & Open Space Dist., 100 Cal. App. 3th 973, 976 (2002) (discussing conservation easement acquired by a government entity).[5] A negative easement is "property" with the meaning of the Takings Clause, and when the government impresses land with a negative easement in its favor, it must pay for it. *Southern Cal. Edison Co. v. Bourgerie*, 9 Cal. 3d 169, 172-73 (1973).

Here, expiration of the Owners' permit in 2031 extinguishes the Owners' right to their seawall, and gives the Commission the discretion to require the seawall's removal and the bluff's restoration to its natural state. *Id.* 1710. ("The intent [behind the expiration condition]. . . is . . . to allow for potential removal of the approved seawall."). That the Commission *might* allow the seawall to remain, *if* the Owners expend the resources to apply for and justify a new permit, is beyond speculative. Again, the Commission has made clear its opposition to seawalls generally and to the Owners' seawall, in particular; and it has made clear its preference for returning bluffs to their natural state (to preserve "scenic visual resources") and requiring "relocation of all or portions of the principal structure[s] that are threatened" (*i.e.*, the

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[5] *See also* Civ. Code § 784 ("'Restriction' . . . means a limitation on, or provision effecting, the use of real property in a deed, declaration, or other instrument, whether in the form of a covenant, equitable servitude, condition subsequent, negative easement, or other form of restriction."); *id.* § 815.1 (describing a conservation easement); *id.* § 815.3(b) (A state or city governmental entity may hold a conservation easement.).

Owners' homes). AR 1684; *see also id.* 1709-10 (stating goal of preserving future planning options). When the Owners' permit expires, the Commission will have a negative easement across the Owners' bluff, the use of which will be severely restricted.

Fourth, the condition obliges the Owners to pay *another* CDP application fee to the Commission, along with additional engineering and consultant fees, when the permit expires—simply to re-prove their right to protect their homes. AR 1685-86 (describing requirements for new permit application). These are monetary obligations imposed on the Owners that are unrelated to any adverse impacts that the seawall might have on sand supply loss. *Koontz*, 133 S.Ct. at 2603 (Money is property under the Takings Clause, and, in the permitting context, monetary exactions must be shown to have an essential nexus and rough proportionality to a project's impact.)

The Commission demands relinquishment of these rights and interests, without making the constitutionally required connection to the impact of the Owners' seawall. What adverse impacts attributable to the seawall justify waiver of their constitutional and statutory right to protect their homes? What adverse impacts attributable to the seawall justify the present dedication of a negative easement across their bluffs to the State, to take effect in 2031? What adverse impacts attributable to the seawall justify waiver of all the constitutional protections that are accorded to individuals with respect to

permit revocation and retroactive application of new laws? And what adverse impacts attributable to the seawall justify imposition of extra monetary costs on the Owners? The Commission never says—precisely because it has no answer to any of these questions. For these reasons, the permit-expiration requirement is an unconstitutional condition.

B. The Commission's Stairway Prohibition Is Unlawful

1. Because a "Disaster" Destroyed a Portion of the Owners' Stairway, Its Reconstruction Does Not Require a CDP

Both the City's LCP and the Coastal Act provide that "any structure . . . destroyed by a disaster" may be replaced and is exempt from the requirement for a CDP. Encinitas Municipal Code (EMC) § 30.80.050(E); Pub. Res. Code § 30610(g). The term "disaster" is statutorily defined as "any situation in which the force or forces which destroyed the structure to be replaced were beyond the control of its owner." Pub. Res. Code § 30610(g)(2)(A) (incorporated by reference in section 30.80.050(E) of the EMC). These provisions are plain and unambiguous. When a structure, like a beach stairway, is destroyed by a force that is beyond the owner's control—*e.g.*, a winter storm or bluff collapse—then the owner may replace it without a CDP.

Here, the record is unambiguous. Severe winter storms in December 2010 caused the bluff collapse that took down the Owners' stairway. The

forces that caused the stairway's partial destruction was undisputedly beyond the Owners' control. AR 2315, 2332, 2340. Therefore, the reconstruction is exempt from the CDP requirement, and the Commission had no power to deny it via a condition on the Owners' seawall permit—a permit that, as explained above, it *had* to grant under section 30235.

2. The Stairway Reconstruction Is a "Repair" That Does Not Require a CDP

Even if the Owners' stairway reconstruction did not benefit from the "disaster" exemption (which it clearly does), it would still constitute "repair" activity that is clearly exempt from the CDP requirement. "Repair and maintenance activities to existing structures or facilities that do not result in an addition to, or enlargement or expansion of, the structures or facilities" are "exempt from the requirement for a coastal development permit." Encinitas Municipal Code § 30.80.050(C); *see also* Pub. Res. Code § 30610(d) (same). Moreover, the *replacement* of less than 50% of a structure is considered a "repair" of that structure entitled to CDP exemption. 14 Cal. Code of Regs. § 13252(b).

As the trial court found, the Owners' reconstruction qualifies for the "repair" exemption under the City Code and Coastal Act regulations. JA at 203-04. The record establishes that the Owners seek to reconstruct less than 50% of the original stairway, and none of the repair work adds to, enlarges, or

expands that structure.[6] AR 1579 (photo), 1677 ("The upper portions and landing of the existing stairway . . . remain[] and will be retained. The lower portion of the destroyed/removed private access stairway is proposed to be reconstructed in its same location and design, and tied into the new seawall."). Given the stairway reconstruction's exemption from the CDP requirement as a "repair," the Commission had no power to deny it.

3. None of the Commission's Arguments in Support of Its Stairway Denial Have Merit

The Commission asks the Court to ignore the CDP-exemptions provided under the City's LCP and the Coastal Act. Instead, the Commission argues, the Court must apply the City's "Coastal Bluff Overlay Zone" (CBOZ) regulations, which purportedly exclude the Owners' stairway from enjoying the benefits from those exemptions. AOB at 28-31. The Commission also cites to future goals discussed in the City's general plan elements about discouraging and phasing out private access to the beach, and prohibiting ***new***

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[6] The Commission contends that the Owners propose "much more than replacement of half of the stairway," when the stairway reconstruction is considered as just one component of a much larger project that includes the seawall. AOB at 33-34. The Commission's analysis is confused and contrary to law. First, the relevant Commission regulation requires analysis of how much of the "structure"—not the total project—requires replacement. 14 Cal. Code of Regs. § 13252(b). Second, as the trial court correctly found, the evidence in the record demonstrates that less than half needs to be reconstructed. The Commission offers no findings and no evidence to the contrary; indeed, it concedes it does not know whether more or less than half of the stairway requires reconstruction. AOB at 34.

private accessways. AOB at 31-32. It also cites, with no reasoned argument, the City's Code provision applying to "nonconforming structures." AOB at 35. None of the Commission's "authorities" support ignoring the LCP's and the Coastal Act's express exemptions for the Owners' stairway.

First, the CBOZ does not exclude the Owners' stairway from the "disaster" or "repair" exemptions that other structures are entitled to. Indeed, the CBOZ specifically allows "public beach access facilities." Encinitas Municipal Code § 30.34.020(B)(2). The Owners' stairway undisputedly provides access to a public beach. Moreover, the CBOZ states that "existing legal structures . . . on the face of a bluff may remain unchanged" and may be maintained. *Id.* § 30.34.020(B)(4). Again, the Owners' stairway is an existing structure that may be maintained.[7] JA at 203-04. Importantly, the CBOZ does

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[7]The Commission argues that the stairway is *not* an "existing" structure, and that the Owners are proposing a "new" structure. AOB at 34. This is untrue factually. The disaster spared over half of the Owners' stairway, so at least a partial stairway *does* exist. AR 1579 (photo), 1677. In any event, if the Commission's argument were sound, then the LCP and Coastal Act exemptions for replacement of disaster-stricken structures would be nullified. After all, a law that authorizes *replacement* of a structure destroyed by a disaster presupposes that, after the disaster, some or all of the structure no longer exists—and that is precisely why it needs to be replaced. For purposes of the CDP-exemptions at issue here, the Owners' stairway is an "existing" structure. The case the Commission cites—*Barrie v. California Coastal Commission*, 196 Cal. App. 3d 8 (1987)—is inapposite. That case was concerned with whether the granting of an emergency permit for an unlawfully erected seawall exempted the seawall from "new" development requirements under sections 30235 and 30253 of the Coastal Act. *Id.* at 20. There is no question that, here, the Owners' stairway was and is a lawful and permitted

(continued...)

not implement any general policy statement regarding the phase-out of existing private stairways or otherwise address the reconstruction of existing legal structures destroyed by disasters. Neither the CBOZ nor the City's general policy statements prohibit the Owners' stairway reconstruction.

Second, the Public-Safety and Circulation policies that the Commission cites are generalized and unimplemented policy statements that are not "applicable zoning and development requirements," as that term is used in section 30.80.050(E) of the Encinitas Municipal Code. The policies merely state future goals that someday may be implemented within specific ordinances. Today, however, they are not zoning or development requirements that apply to the disaster-replacement or repair analyses. Most importantly, they do not—and cannot—nullify Coastal Act and City Code provisions that expressly allow disaster-stricken stairways to remain, to be replaced, and to be repaired. Pub. Res. Code § 30610; Encinitas Municipal Code §§ 30.34.020(B)(4), 30.80.050(E).

Third, the Commission cites the City's "structural nonconformity" provision, presumably for the proposition that the stairway meets this definition. AOB at 35. The Commission goes on to say that structural nonconformities can only be repaired or maintained, but not replaced. *Id.* The

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[7](...continued)
structure; the only question is whether its replacement or repair is CDP-exempt.

Commission does not explain how or why the stairway meets the definition of a "structural nonconformity," or why such a designation would trump the disaster-replacement and repair provisions found elsewhere in the City's LCP and in the Coastal Act.

Assuming *arguendo* that the Owners' stairway is a structural nonconformity, its reconstruction still is entitled to CDP-exemption. It is true that section 30.76.050 of the Encinitas Municipal Code places limitations on nonconforming structures and uses. But nowhere does it state that a structural nonconformity cannot be replaced when it is destroyed by a disaster or otherwise. Section 30.76.050(A) makes it unlawful to enlarge, extend, expand, or change a structural nonconformity "so as to increase its inconsistency with the zoning regulations of this Chapter," but it does not prohibit replacement with the same or similar structure that maintains the status quo. Section 30.76.050(C) further states that repair and maintenance may be performed on a structural nonconformity "so long as the nonconformity is not enlarged, relocated or increased in intensity, unless permitted by this Chapter." Once again, this subsection does not prohibit the replacement of a nonconforming structure. Moreover, given that Coastal Act regulation 13252(b) classifies the replacement of less than 50% of a structure as a "repair," section 30.76.050(C) is properly interpreted as allowing the reconstruction of the bottom portion of the Owners' stairway.

Finally, if the City's CBOZ and general policy statements could be interpreted to prohibit the stairway reconstruction (which they cannot), they would be invalid under the Coastal Act. Pub. Res. Code § 30005, subd. (a) (allowing localities to impose stricter requirements, as long as they are "not in conflict with this Act"); *Yost v. Thomas*, 36 Cal. 3d 561, 572-73 (1984) (LCPs must conform to the Coastal Act.). Section 30610(g)(1) of the Coastal Act specifically *mandates*—in no uncertain terms—that the replacement of structures destroyed by a disaster are to be exempted from the CDP requirement. *See also* Encinitas Municipal Code § 30.80.050(E) (same). The Commission claims that this exemption is limited by the next sentence in the statute, which—*in the Commission's words*—provides that "the replacement of a structure destroyed by a disaster also must conform to applicable existing zoning requirements." AOB at 29. The Commission's paraphrasing of section 30610(g)(1) might mislead one to conclude that some disaster-stricken structures (*e.g.*, private stairways) are not entitled to CDP-exemption, if a local regulation says so. But the Commission misrepresents what the provision actually says. It is the "structure"—not its *replacement*—that must conform to applicable zoning requirements. Pub. Res. Code § 30610(g)(1) ("The replacement ***structure*** shall conform to applicable existing zoning requirements." (emphasis added)). In other words, the structure's design, aesthetics, and dimensions must comply with local zoning regulations; but no

zoning regulation can decide the question of whether a particular *replacement* project is entitled to CDP-exemption)—that question is answered by section 30610(g)(1). Thus, section 30610(g)(1) does not countenance any legislative attempt, by the Commission or a local government, to re-write the disaster-based exemption in a way that excludes certain disfavored structures.

C. The Trial Court Did Not Abuse Its Discretion in Striking Down the Seawall and Stairway Conditions

The Commission argues that the trial court erred by requiring the Commission to remove the offending conditions from the Owners' permits. AOB at 36. The Commission complains it had no chance to "revise or to consider revisions to the conditions." AOB at 37. The Commission errs.

Section 1094.5(f) defines the scope of the trial court's writ power. It provides that the court's judgment may not "limit or control in any way the discretion legally vested in the respondent." Importantly, section 1094.5(f) does not require a remand to the agency for reconsideration. *See, e.g., Levingston v. Retirement Bd.*, 38 Cal. App. 4th 996, 1001 (1995) (remand to agency not required). The trial court's judgment did not violate this provision. It simply required the Commission to delete the unlawful seawall and stairway conditions. JA at 227. The judgment did not purport to alter or strike any other term or condition of the Commission's permit decision.

Importantly, the Commission has no discretion to revise the challenged conditions, because there is no way to revise them to make them lawful. No

expiration date of the seawall, and no stairway denial, could ever be lawful. The trial court properly struck down the conditions, and it was not required to remand the matter to the Commission for additional review.

CONCLUSION

For the foregoing reasons, the trial court judgment granting the Owners' petition for writ of administrative mandate should be affirmed.

DATED: April 11, 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing RESPONDENTS' BRIEF is proportionately spaced, has a typeface of 13 points or more, and contains 12,591 words.

DATED: April 11, 2014.

PAUL J. BEARD II

DECLARATION OF SERVICE

I, Pamela Spring, 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 April 11, 2014, true copies of RESPONDENTS' BRIEF were placed in envelopes addressed to:

Hayley Elizabeth Peterson
Office of the Attorney General
110 West A Street, Suite 1100
San Diego, CA 92101

The Honorable Earl Maas III
San Diego County Superior Court
North County Division
325 South Melrose Drive
Vista, CA 92081

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 further certify that a single electronic copy was served on the California Supreme Court through the Court of Appeal's Electronic Document Submission system.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 11th day of April, 2014, at Sacramento, California.

PAMELA SPRING