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**SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

MARK I. GREENE and BELLA GREENE,

Petitioners,

vs.

CALIFORNIA COASTAL COMMISSION,

Respondent.

Case No.: BS165764

PETITIONERS' BRIEF ON REMEDY

Dept: 85
Judge: The Honorable James. C.
Chalfant
Trial Date: July 26, 2018
Time: 9:30 a.m.
Action Filed: May 5, 2017

Hearing on Order to Show Cause re: Judgment
scheduled for September 13, 2018 at 9:30 a.m.

1 **INTRODUCTION**

2 Pursuant to this Court’s request for further briefing at the July 26 hearing on the Petition
3 for Writ of Administrative Mandate, Petitioners Mark and Bella Greene (the Greenes) submit this
4 brief on the proper remedy following this Court’s findings. At issue is how the Court should
5 proceed based on the fact that Respondent California Coastal Commission (the Commission) was
6 not clear as to which justifications it relied on to impose Special Condition 1 on the Greenes’
7 coastal development permit.

8 Special Condition 1 requires the Greenes to submit new development plans for their home
9 with a smaller footprint. In its tentative order on the Petition, this Court held that the Commission’s
10 concerns about sea level rise and flooding did not justify that condition. On the other hand, the
11 Court held that substantial evidence could justify the Commission’s concerns about privatization
12 of the public beach, maintenance, and avoiding privacy conflicts among the Greenes and the
13 public. Because it is not clear from the record which justifications were relied on by the
14 Commission, and whether the final decision to impose Special Condition 1 rested on substantial
15 evidence, this Court should remand the case to the Commission for further proceedings consistent
16 with this Court’s ruling.

17 **ARGUMENT**

18 This Court should remand the case back to the Commission because the Commission failed
19 to clearly articulate its reasons for imposing Special Condition 1. California Code of Civil
20 Procedure § 1094.5 requires “that the agency which renders the challenged decision must set forth
21 findings to bridge the analytic gap between the raw evidence and ultimate decision or order.”
22 *Topanga Ass’n for a Scenic Cmty. v. Cty. of Los Angeles*, 11 Cal. 3d 506, 515, 522 P.2d 12, 17
23 (1974); *see also* Petitioners’ Reply Brief in Support of Petition at 10. If a court is unable to “discern
24 the analytic route” an agency “traveled from evidence to action,” then the proper course of action
25 is to set aside the decision and remand to the agency. *W. Chandler Boulevard Neighborhood Ass’n*
26 *v. City of Los Angeles*, 198 Cal. App. 4th 1506, 1522, 130 Cal. Rptr. 3d 360, 373 (2011).

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1 Requiring agencies to issue clear findings in support of their decisions is crucial to the rule
2 of law. While administrative agencies may be vested with broad authority, agency decisions must
3 be clear, able to be understood, and include findings that allow for effective judicial review. In
4 short, a “findings requirement serves to conduce the administrative body to draw legally relevant
5 sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly
6 analysis and minimize the likelihood that the agency will randomly leap from evidence to
7 conclusions.” *Topanga Ass’n for a Scenic Cmty.*, 11 Cal. 3d at 516. In turn, this enables “the
8 reviewing court to trace and examine the agency’s mode of analysis.” *Id.*

9 Although an agency is not required to issue formal findings of fact analogous to those
10 issued by a court, an agency is still required to issue discernable findings in support of its decision.
11 *Hadley v. City of Ontario*, 43 Cal. App. 3d 121, 128, 117 Cal. Rptr. 513, 518 (1974). And “*where*
12 *the action of the administrative agency may be on any one of several bases, failure to make findings*
13 *is prejudicial* and a writ of mandate will issue to require the agency to *hold a new hearing with*
14 *appropriate findings.*” *Id.* at 128–29 (all emphasis added).

15 Here, this Court determined that there are several justifications that the Commission could
16 have relied on to impose Special Condition 1. It also determined that some of those justifications,
17 based on sea level rise, are not supported by substantial evidence. Unfortunately, the Commission
18 failed in its deliberations to provide adequate findings in support of its decision to impose the
19 Special Condition. Without clear findings, it is impossible for this Court or the Greenes to discern
20 whether the Commission acted in accordance with law when it imposed Special Condition 1.

21 The Commission’s March 9, 2017, decision contains no findings as to the reasoning for
22 imposing Special Condition 1. The only record of the Commissioners’ thinking is the discussion
23 on this issue at the hearing. But that discussion does not provide any clarity, as multiple
24 Commissioners cited various reasons for supporting Special Condition 1, while four other
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1 Commissioners voted in favor of Commissioner Howell’s motion to remove Special Condition 1.
2 See AR000727–755.¹

3 At best, the Commissioners’ statements at the hearing support the conclusion that the
4 imposition of Special Condition 1 was based primarily on concerns over sea level rise. Several
5 Commissioners specifically stated that they were concerned about sea level rise, and indicated that
6 their votes were based on that concern. For example, Commissioner Vargas stated that “when I
7 first kind of started contemplating this project I thought about this in terms of sea level rise and
8 how you know, we’re going to have to make tough decisions” AR000747. Similarly,
9 Commissioner Brownsey stated that “we must pay attention to sea level rise” when the
10 Commission makes decisions. AR000743.

11 Commissioner Turnball-Sanders was the most clear about her motivations. She stated that
12 “we’ve got to think more strategically about sea level rise and policies for the future and for that
13 reason I’m going to be supporting the motion” of the staff to approve the permit with Special
14 Condition 1. AR000748. In an attempt to understand the evidence about sea level rise, she asked
15 the Commission staff about the projected rise in sea level. *Id.* In response, the Commission staff
16 member incorrectly stated that “we didn’t receive from the applicant enough information to say
17 how close to the house the wave up rush would get.” *Id.* In fact, the Greenes submitted an expert
18 study that provides that the shoreline is estimated to move between 75 feet to 150 feet over the life
19 of the development and, because the house is more than 550 feet from current mean high-tide line,
20 it is unlikely that wave runup will reach the site.

21 All three Commissioners voted to impose Special Condition 1. AR000751–52. It is
22 possible these Commissioners would have still voted to impose Special Condition 1 even if they
23 knew that the sea level rise justification was not supported by substantial evidence. But this Court
24 should not speculate about what the Commission might have done under different circumstances.
25 California Code of Civil Procedure Section 1094.5 “leaves no room for the conclusion that the
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27 ¹ Because the court returned the administrative record, the transcript of the Commission hearing is
28 attached hereto as exhibit 1.

1 Legislature would have been content to have a reviewing court speculate as to the administrative
2 agency’s basis for decision.” *Topanga Ass’n for a Scenic Cmty.*, 11 Cal. 3d at 515.

3 Moreover, it is irrelevant that some other Commissioners might have had different
4 justifications for imposing Special Condition 1. While an agency’s decision will be upheld if one
5 of several clearly stated findings is supported by substantial evidence, that is not the case here. *See*
6 *Sinaiko v. Superior Court*, 122 Cal. App. 4th 1133, 1145–46, 19 Cal. Rptr. 3d 371 (2004)
7 (comparing and contrasting situations when an agency decision with multiple justifications should
8 be remanded). This is not a situation where the Commission has clearly made several different
9 findings in support of its decision, and one superfluous finding is not supported by substantial
10 evidence. *See, e.g., Desmond v. County of Contra Costa*, 21 Cal. App. 4th 330, 25 Cal. Rptr. 2d
11 842 (1993).² Instead, it is unclear whether the Commission would have altered its decision had it
12 known that sea level rise does not justify the imposition of Special Condition 1. *See W. Chandler*
13 *Boulevard Neighborhood Ass’n*, 198 Cal. App. 4th at 1522 (“On this record, however, we cannot
14 discern the analytic route the city council traveled from evidence to action.”). In fact, it appears
15 that the issue of sea level rise was the crucial justification for imposing Special Condition 1. *See*
16 AR000743 (Commissioner Brownsey’s statements in support of Special Condition 1); AR000747
17 (Commissioner Vargas); AR000748 (Commissioner Turnball-Sanders).

18 As a result, this is not a case where the Court can presume the Commission’s findings.
19 Although a finding may be implied from an agency’s decision where it is the only finding that
20 could have been made, “[t]his rule of presumed findings will obviously not apply where the
21 decision might be based on one or more of several theories, each relating to different factual
22 considerations.” *Mahoney v. San Francisco City etc. Employees’ Ret. Bd.*, 30 Cal. App. 3d 1, 5,
23 106 Cal. Rptr. 94, 96 (1973). When, like here, there are several different justifications but no
24 clearly stated findings, “a reviewing court is unable to ‘determine whether there is sufficient
25 evidence to support’ the presumed findings, or if the decision is ‘based upon a proper principle.’”

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27 ² In *Desmond* the Board of Supervisors issued written findings to support its decision, which
28 allowed the court to effectively review the Board’s decision. *Desmond v. Cty. of Contra Costa*, 21
Cal. App. 4th 330, 333, 25 Cal. Rptr. 2d 842, 844 (1993).

1 *Id.* (quoting *Swars v. Council of City of Vallejo*, 33 Cal. 2d 867, 871, 206 P.2d 355 (1949)).
2 Therefore, this Court should not speculate as to the motivations of the Commissioners, and should
3 instead remand to the Commission to make a decision based on the appropriate considerations.
4 *Topanga Ass'n for a Scenic Cmty.*, 11 Cal. 3d at 515.

5 **CONCLUSION**


6 The Commission's failure to issue clear findings in support of imposing Special Condition
7 1 undermines this Court's effective review of that condition. To guarantee that the Greenes receive
8 fair consideration of their coastal development permit application, and to ensure that the
9 Commission's decisions are in accordance with law, this Court should set aside the Commission's
10 permitting decision and remand the matter to the Commission for further proceedings consistent
11 with the Court's ruling on the Petition for Writ of Administrative Mandate.

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13 Dated: September 2, 2018.

Respectfully submitted,

14 Lawrence G. Salzman
15 Jeffrey W. McCoy
16 Joshua P. Thompson
17 David R. Greene

18 By:


19 Jeffrey W. McCoy
20 Attorneys for Petitioners
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1 **DECLARATION OF SERVICE**

2 I, Iza A. Rodriguez, declare as follows:

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

6 On September 5, 2018, a true and correct copy of **PETITIONERS' BRIEF ON**
7 **REMEDY** was placed in an envelope addressed to:

8
9 Erica B. Lee
10 Deputy Attorney General
11 Andrew M. Vogel
12 Deputy Attorney General
13 Land Law Section
14 California Department of Justice
15 300 S. Spring Street
16 Los Angeles, CA 90013

17 which envelope, with postage thereon fully prepaid, was then sealed and delivered via FedEx in
18 Sacramento, California.

19 I declare under penalty of perjury that the foregoing is true and correct and that this
20 declaration was executed this 5th day of September, 2018, at Sacramento, California.

21 
22 IZA A. RODRIGUEZ