IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

BEACH & BLUFF CONSERVANCY, Plaintiff-Appellant and Cross-Respondent, v. CITY OF SOLANA BEACH, Defendant-Respondent and Cross-Appellant, CALIFORNIA COASTAL COMMISSION, Intervenor-Respondent and Cross-Appellant, SURFRIDER FOUNDATION, Intervenor-Respondent and Cross-Appellant,	Court of Appeal No. D072304 (Super. Ct. No. 37-2013-00046561-CU-WM-NC)

Appeal From A Judgment After An Order
The Superior Court of San Diego County
No. 37-2013-00046561-CU-WM-NC
The Hon. Timothy Casserly, 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: D072304
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 155057 NAME: Lawrence G. Salzman FIRM NAME: Pacific Legal Foundation STREET ADDRESS: 930 G Street CITY: Sacramento STATE: CA ZIP CODE: 95814 TELEPHONE NO.: 916-419-7111 FAX NO.: E-MAIL ADDRESS: lsalzman@pacificlegal.org ATTORNEY FOR (*name*): Beach and Bluff Conservancy	SUPERIOR COURT CASE NUMBER: 37-2013-00046561-CU-WM-NC
APPELLANT/ PETITIONER: BEACH AND BLUFF CONSERVANCY RESPONDENT/ REAL PARTY IN INTEREST: CITY OF SOLANA BEACH, ET AL.	
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INTRODUCTION

More than 1,000 residences sit on roughly two miles of coastal bluffs in Solana Beach. Storms and erosion have caused bluffs to collapse in recent years, endangering people walking along the beach below and damaging bluff-top property. This case is about a series of land use policies adopted by the City of Solana Beach ("City") in 2014 that unlawfully prohibit or restrict bluff-top homeowners from securing, repairing, or replacing structures built along the bluffs. These prohibitions and restrictions put bluff-top property and the public at risk of serious harm.

Plaintiff-Appellant Beach & Bluff Conservancy ("BBC") is a nonprofit organization whose membership represents nearly every residential homeowner on Solana Beach's bluffs. It is dedicated to protecting public and private assets against natural hazards. The BBC and City were not always opponents. For nearly a decade, BBC's members worked closely with the City to prepare a land use plan for submission to the Coastal Commission ("Commission") in furtherance of a "local coastal program" mandated by the California Coastal Act of 1976 ("Coastal Act"). *See* 1 JA 259–61 (Pl.'s Second Amended Compl. and Petition for Mandate). That plan aimed at harmonizing the rights of private property owners with the Coastal Act's goals of preservation and public beach access.

BBC sued when the City scuttled that plan on the recommendation of the Commission and instead adopted a different plan amenable to the

Commission. *Id.* BBC challenged seven individual policies (out of more than 150 policies adopted in the new plan) as violating the Coastal Act or imposing unconstitutional conditions on coastal development permits. 1 JA 261–62. BBC filed a motion for judgment on its writ petition to set aside the policies as facially invalid, which the trial court granted-in-part and denied-in-part. ("Judgment"). 4 JA 948–49.

The trial court ruled in favor of BBC with respect to two policies (Policies 4.22 and 2.60); it ruled for the City with respect to the remaining five, three of which BBC appeals here (Policies 4.53, 4.19, and 2.60.5). *Id.* Those three contested policies are facially invalid because they cannot be lawfully applied in the generality or great majority of cases. BBC therefore respectfully requests that this Court reverse the judgment below as to the City's Land Use Policies 4.53, 4.19, and 2.60.5.

FACTUAL AND PROCEDURAL BACKGROUND

I. Introduction to Local Costal Program Process

The Coastal Act requires each local government having jurisdiction over land in the "coastal zone" to adopt a Local Coastal Program (LCP). Local governments prepare the plan, which requires certification by the Coastal Commission to become final. *See* Pub. Res. Code § 30500. An LCP has two parts: a Land Use Plan (LUP) and a Local Implementation Plan (LIP). *See McAllister v. California Coastal Comm'n*, 87 Cal. Rptr. 3d 365, 372–373 (Cal. Ct. App. 2008). The LUP is a general policy document with

the force of law that sets forth policies for coastal land development. LUP policies are the subject of the instant appeal. An LIP is made up of implementing ordinances carrying out the LUP's policies. *See* Pub. Res. Code §§ 30108.5, 30108.6. Both the LUP and LIP must accord with the California Coastal Act, as well as the state and federal constitutions. *See* 1 JA 260–261, ¶¶ 12–15.

II. Previous Litigation between BBC and the Commission

After years of negotiations with the Coastal Commission and in concert with members of BBC, the City of Solana Beach submitted its proposed Coastal Land Use Plan to the Commission for certification in October 2011. 1 JA 261, ¶ 16. The Commission rejected this plan, recommending and then approving a substantially modified LUP. 1 JA 261, ¶ 17. Plaintiff-Appellants filed suit against the Commission to challenge its approval of the plan. The action was dismissed for failure to name the City as a necessary party, without reaching the merits of the action. *See* 2 JA 327–331 (Minute Order, Nov. 27, 2013, sustaining demurrer for failure to name the City as a necessary party).

III. The City's Adoption of the LUP and the Present Action

While the above-mentioned suit against the Commission was pending, the City adopted the Commission's recommended version of the LUP pursuant to Solana Beach City Council Resolution 2013-018, and made subsequent amendments, in February and May of 2013, respectively. 4 JA

929 (Minute Order, Dec. 6, 2016, granting-in-part & denying-in-part BBC's petition for writ of mandate). The instant case began when BBC filed a timely complaint and petition for mandate against the City challenging its adoption of the LUP. BBC filed a complaint and petition for mandate in April, 2013, and the Commission and Surfrider Foundation intervened. *Id.* On June 11, 2014, the City accepted the Commission's final modifications to its LUP pursuant to Resolution 2014-60, making the LUP final. *Id*. BBC's second amended complaint, which underlies the judgment at issue in this appeal, was filed in October, 2014. 1 JA 257 (BBC's Second Amended Complaint for Declaratory Relief and Petition for Writ of Mandate). In March 2015, the trial court denied the City and Commission's demurrer to the second amended complaint. *See* 2 JA 495–499. In March 2016, BBC filed a motion for judgment on its writ petition. A hearing was held on November 18, 2016, and on December 6, 2016, the trial court issued an order granting the motion with respect to two of the challenged policies and denying it with respect to the remainder. 4 JA 929. A final judgment and writ of mandate were issued on April 5, 2017. 4 JA 948–951.

IV. LUP Policies at Issue on Appeal and Trial Court Ruling

A. Policy 4.53

The City LUP defines "Bluff Retention Device" to include any structure "designed to retain the bluff and protect a bluff home or other principal structure . . . from the effects of wave action, erosion and other

natural forces." *See* City of Solana Beach Local Coastal Plan (amended June 11, 2014) (City's LCP), at 181.[1]

LUP Policy 4.53 provides that permits for bluff retention devices automatically expire when (1) a currently existing bluff-top structure requiring protection is redeveloped, (2) the current structure is no longer present, or (3) a current structure no longer requires a seawall. *Id.* at 130. The policy also requires new permits for expansion or alteration of existing bluff retention devices (*i.e.*, existing seawalls), subject to these conditions. *Id*. BBC challenged Policy 4.53 on its face as violating Coastal Act Section 30235. *See* 1 JA 264–65. The trial court rejected that claim on grounds that Policy 4.53 "specifically ties the life of the seawall or bluff protection device to the existing structure requiring protection." 4 JA 932.

B. Policy 4.19

Policy 4.19 prohibits seawalls for new bluff-top development. City's LCP at 117. As a condition of a permit for new development, the policy also requires the property owner record a deed restriction waiving any future right to protect the property pursuant to Section 30235 of the Coastal Act with new or additional bluff retention devices. *Id.*

BBC challenged this policy as a facially unconstitutional exaction, in violation of the unconstitutional conditions doctrine. 1 JA 266–67. The trial

[1] *Available at* http://solana-beach.hdso.net/LCPLUP/LCPLUP-COMPLETE.pdf.

court held, however, that the required deed restriction did not constitute an exaction subject to the unconstitutional conditions doctrine because it did not require the homeowner "to dedicate any portion of their property to the public or pay any money to the public." 4 JA 933.

C. Policy 2.60.5

Policy 2.60.5 requires private stairways located on bluffs to be converted to public accessways whenever the stairway owner applies for a coastal development permit to replace or repair more than 50% of the stairway, and where a portion of the private stairway utilizes "public land, private land subject to a public access deed restriction or private land subject to a public access easement." *See* City's LCP at 43. In the court below, BBC challenged this policy as both a violation of the Coastal Act, which exempts repairs and maintenance (or replacement of existing structures destroyed by natural disaster) from any permit requirements, and as an unconstitutional condition. *See* 1 JA 268–69.

The trial court rejected this claim because, it held, BBC did not meet the burden of showing that Policy 2.60.5 violated the statute in all or virtually all situations. 4 JA 934–35. The court further held that while the permit condition transforms private stairways into public accessways, it is not an unconstitutional condition because there is a nexus between conversion of accessways and the Commission's goal of public beach access. Relatedly, the court held that BBC did not show that "there is no proportionality

between the requirement" an adverse public impact of stairways replacements and repairs. 4 JA 935.

STATEMENT OF APPEALABILITY

This is an appeal from a final judgment resolving all issues between the parties, brought pursuant to Code of Civil Procedure section 904.1(a)(2).

STANDARD OF REVIEW

The judgment below granted-in-part and denied-in-part the BBC's petition for writ of mandate raising a facial challenge to various provisions of the City's Land Use Plan on constitutional and statutory grounds. The facial constitutionality of legislation is subject to *de novo* review on appeal. *McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 842 (1986). The construction of an ordinance provision is a pure question of law that is also reviewed *de novo*. S*ee People ex rel. Lockyer v. Shamrock Foods Co.*, 24 Cal. 4th 415, 432 (2000).

In a facial challenge, the petitioner must demonstrate that the contested policy cannot be lawfully applied in "the generality or great majority of cases." *See San Remo Hotel L.P. v. City & Cnty. of San Francisco*, 27 Cal. 4th 643, 673 (2002).

SUMMARY OF ARGUMENT

This appeal seeks the reversal of the judgment below denying BBC's motion for a writ of mandate to set aside the City's Land Use Policies (LUP) 4.53, 4.19, and 2.60.5. These policies unlawfully restrict or condition the

rights of bluff-top property owners to construct or maintain seawalls and to repair or replace private stairways providing bluff-top homeowners with access to the beach.

LUP 4.53 and 2.60.5 are both facially invalid because they violate the Coastal Act and cannot be lawfully applied in any case. Municipalities do not have discretion to implement a local coastal program that is in conflict with the Coastal Act. *See Yost v. Thomas*, 36 Cal. 3d 561, 573 (1984). Policy 2.60.5 is also invalid because it unconstitutionally conditions permits to repair or replace private stairways on the owner's relinquishment of the right to exclude the public from using them; similarly, Policy 4.19 is facially invalid because it unconstitutionally conditions all new development permits on the waiver of the property owner's right to build a shoreline protective device in the future. Municipalities may not condition the approval of a land use permit on an exaction of a property interest from the applicant except where there is an "essential nexus" and "rough proportionality" between the exaction and the public impact of the property owner's proposed use. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). Policies 2.60.5 and 4.19 fail this test.

I. The City's Land Use Policies 4.53 and 2.60.5 Violate the Coastal Act

A. Policy 4.53 Violates Coastal Act Section 30235 by Imposing an Expiration Date and a 20-Year Reauthorization Requirement on Seawall Permits

Property owners have bought homes and invested in land along the coast since the enactment of the Coastal Act with the guarantee that their property can be protected with seawalls when necessary to combat erosion. *See* Cal. Pub. Res. Code § 30235(b). The City's Land Use Policy 4.53 is inconsistent with the Coastal Act and upends the security of coastal property.

Policy 4.53 states in relevant part:

> All permits for bluff retention devices shall expire when the currently existing bluff-top structure requiring protection is redeveloped [], is no longer present, or no longer requires a protective device, whichever occurs first.

City's LCP at 130.

In addition, property owners are required under the policy to apply for a coastal development permit to retain, modify, or remove an existing seawall prior to the expiration of the permit, which requires that the device be reassessed every 20 years. *Id.*

This policy violates Coastal Act Section 30235's guarantee that "seawalls, cliff retaining walls, and other such construction . . . shall be permitted when required to . . . protect existing structures." Cal. Pub. Res. Code § 30235. Nothing in Section 30235 or any other provision of the

Coastal Act authorizes municipalities to impose an expiration on a permitted seawall, or to burden a permit with conditions that do not mitigate adverse public impacts caused by the seawall.

Most strikingly, Policy 4.53 eliminates the ability of property owners to protect existing structures whenever their property is redeveloped. In effect, the policy holds that the redevelopment of an existing structure causes that structure to no longer exist for purposes of the Coastal Act.

Section 30235 does not say, however, that a homeowner in need of a seawall is entitled to it only until such time as the property is redeveloped. The statute entitles a property owner to install shoreline protection to protect structures that exist and are in danger from erosion at the time a seawall permit is sought. Section 30235 only conditions that right on a requirement that the protective device "will minimize further alternation of the natural landform of the bluff, and that adequate mitigation for coastal resource impacts, including but not limited to impacts to the public beach, has been provided." *Id*.

The City's Policy 4.53 adds surplus words to the statute, permitting seawalls only until redevelopment of the property occurs. The policy thereby exceeds the City's authority under the Coastal Act. The harm to property owners resulting from this overreach is substantial.

Consider a typical circumstance of a property owner who wishes to expand an existing home landward or in height, where the home is presently

protected by an existing seawall. Due to the seawall, the bluff is stable and will remain stable for as long as it remains in place. Redevelopment would comply with the Coastal Act Section because the redevelopment does not "create nor contribute significantly to erosion, geologic instability . . . or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs." Cal. Pub. Res. Code § 30253(b). However, Policy 4.53 strips the property owner of the right to maintain the existing seawall that protects the redeveloped property or any part of it that existed prior to redevelopment. This policy is therefore inconsistent with the Coastal Act because it eliminates rights to shoreline protection guaranteed by Section 30235.

The interpretation of statutes must "begin with the plain, commonsense meaning of the language used by the Legislature. If the language is unambiguous, the plain meaning controls." *Voices of Wetlands v. State Water Resources Control Bd*., 52 Cal. 4th 499, 519 (2011) (citation omitted). A court cannot insert words to make a statute conform to an agency's contrary interpretation. *See* Code Civ. Proc. § 1858. Further, "courts will not interpret away clear language in favor of an ambiguity that does not exist." *Hartford Fire Ins. Co. v. Macri*, 4 Cal. 4th 318, 326 (1992) (citation and quotation omitted). The plain reading of Section 30235 precludes the waiver imposed by Policy 4.53.

Further, Policy 4.53 transforms permitted seawalls into temporary structures whereas Section 30235 has previously been recognized to authorize permanent seawalls. In *Barrie v. Coastal Commission*, for instance, a coastal property owner faced severe storms and applied for an emergency permit for a temporary shoreline protective structure under Pub. Res. Code § 30264. *See* 196 Cal. App. 3d 8 (1987). The permit was issued for only 150 days, after which the homeowner was required to apply for a permanent seawall under Section 30235. *Id.* at 15. The court acknowledged that Section 30235 contemplates approval of a permanent seawall structure. "The approval the Homeowners are seeking here is for a new development, i.e., a permanent seawall . . . not a temporary seawall." *Id*. at 20. *Barrie* thus underscores that the seawall intended and authorized under Public Resources Code § 30235 to protect existing structures is a permanent seawall. LUP 4.53 therefore violates Section 30235 by converting existing, permanent seawalls into temporary seawalls.

Local governments have discretion in fashioning land use policies, but only insofar as "such restrictions do not conflict with the [Coastal Act]." *Yost v. Thomas*, 36 Cal. 3d at 573; *McAllister v. California Coastal Comm'n*, 169 Cal. App. 4th 912, 930, fn.9 (2008). Every application of Policy 4.53 conflicts with the Coastal Act, making it facially invalid.

B. Policy 2.60.5 Violates Coastal Act Section 30610(d) by Requiring Permits for the Repair and Maintenance of Stairways or Their Replacement when Destroyed by Natural Disaster

Policy 2.60.5 states that "private beach access ways shall be converted to public access ways where feasible and where public access can be reasonably provided," as a condition of a "permit for the replacement of a private beach stairway or replacement of greater than 50% thereof." The condition applies without exception in circumstances where "all or a portion of the stairway utilizes public land, private land subject to a public access deed restriction or private land subject to a public access easement." City's LCP at 43.

The purpose of the policy is obvious: to eliminate the right of stairway owners to exclude others from their private stairways in service of greater public access to the beach. Instead of using its power of eminent domain to take private stairways for public use, the City is leveraging its permitting power to achieve the same objective. However, *any* permit requirement on the repair of existing stairways or their replacement after a disaster exceeds the City's authority under the Coastal Act.

Coastal Act Section 30610, titled "Development authorized without permit," instructs that no permit at all is required for "[r]epair and maintenance activities that do not result in an addition to, or enlargement or expansion of" a stairway and for the replacement of stairways "destroyed by

a disaster." Cal. Pub. Res. Code § 30610(d) & (g). The repair of a private stairway does not "result in an addition to, or enlargement or expansion of," that stairway. Such repairs are therefore exempt from any requirement to obtain a coastal development permit. Likewise, stairways damaged or destroyed by disasters are exempt. *Id.* at § 30610(g). Yet, the City's Policy 2.60.5 requires a coastal development permit for the very activities that the Coastal Act expressly exempts. The policy is facially invalid because every application of it violates the Coastal Act.

The leading case adjudicating the meaning of Section 30610 is consistent with this understanding. In *Union Oil Co. v. South Coast Regional Comm'n*, the court considered the government's demand for a permit before the company could "replace seventy five percent of [its] existing wharf structure" that had been destroyed when a ship exploded nearby in the harbor. 92 Cal. App. 3d 327, 331 (1979). The court ruled that rebuilding the wharf was exempt from any permit requirement pursuant to Section 30610 because the new wharf would be "functionally the same as the original" and would not "result in the addition to, or enlargement or expansion of" the structure. *Id.*

The trial court in the instant case rejected BBC's analogy to *Union Oil* on the grounds that Section 30610 was amended subsequent to the *Union Oil* decision to give the Commission authority to regulate and require permits where "extraordinary methods of repair and maintenance involve a risk of

substantial adverse environmental impact." 4 JA 935. Because the Commission has since issued regulations deeming "repair or maintenance to . . . structures . . . located in an environmentally sensitive habitat area, any sand area, within 50 feet of the edge of a coastal bluff" to constitute an "extraordinary method of repair," the trial court ruled that Policy 2.60.5 "does not violate the Coastal Act in all or virtually all situations." *Id*. Respectfully, that judgment is in error.

The amendment to Section 30610(d) addressed and gave the Commission permitting power over activities that involve "extraordinary methods of repair." For that class of activities, the Commission (or municipalities operating under a Commission-certified local coastal program) may require permits. Existing structures requiring repair, or replacement due to disaster, remain wholly exempt from permit requirements, however, if they involve standard methods of repair.

The Commission has sought to extend its authority and regulate exempt projects through regulation purporting to interpret and apply Section 30610(d). It defines "extraordinary methods of repair" as any repair by any method that occurs within various physical locations (*i.e.*, "Any repair or maintenance to facilities or structures or work located in an environmentally sensitive habitat area, any sand area, within 50 feet of the edge of a coastal bluff . . . ." Cal. Code Regs. Tit. 14 § 13252(a). This definition of "extraordinary methods" is unreasonable and an overreach of the permitting

authority provided by the Coastal Act. It conflates the concept of "method" with the concept of "location" and thereby improperly sweeps many projects exempt from permit requirements into the permitting process.

Courts owe no deference to the Commission's (or City's) interpretation of the Coastal Act when determining consistency between a regulation and the Coastal Act. *See Schneider v. Cal. Coastal Comm'n*, 140 Cal. App. 4th 1339, 1344 (2006) ("A court does not . . . 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). Read according to its plain meaning, Section 30610 does not provide authority to require permits for repair and maintenance of structures in *locations* disfavored by the Commission; it only allows for permits for activities involving extraordinary *methods* of repair, wherever the repaired or maintained facilities or structures are located. For instance, a typical stairway repair might involve a simple drill and screws to remove and replace stair risers or banisters. Such repairs are hardly extraordinary methods in any plain sense of those terms, yet they are subject to permit requirements pursuant to the Commission's regulation.

"Administrative regulations which are contrary to legislative acts are null and void." *Ciani v. San Diego Trust & Savings Bank*, 233 Cal. App. 3d. 1604, 1616 (1991). Policy 2.60.5 is in conflict with the Coastal Act because it requires a permit for repair and maintenance activities on stairways that are

exempt from permit requirements under Section 30610. The Policy cannot be saved by the Commission's overreaching and invalid regulation purporting to require permits for exempt projects. For these reasons, Policy 2.60.5 is invalid on its face.

II. The City's Land Use Policies 4.19 and 2.60.5 Are Unconstitutional

Policy 4.19 requires bluff-top homeowners to waive their future right to seawall protection as a condition of receiving a permit to develop or redevelop their property. As discussed above, Policy 2.60.5 demands that private stairways on bluffs be converted to public access ways as a condition of repairing them or replacing them with identical structures. Both of these provisions are unconstitutional because they require a coastal development permit applicant to accede to an uncompensated taking of private property without compensation as a condition of a permit.

A. Coastal Property Owners Have Constitutionally Protected Rights to Use and Protect Their Property

The California Constitution establishes inalienable rights of "acquiring, possessing, and *protecting property*, and pursuing and *obtaining safety*, happiness, and privacy." Cal. Const. art I, §1 (italics added). The takings clause of the U.S. Constitution also protects a basic right to use, enjoy, and protect property, which the Supreme Court has said "cannot remotely be described as a 'governmental benefit.'" *See Nollan*, 483 U.S. at 833–34, 833 fn.2.

Constitutionally protected property rights include the right to exclude others from the use of one's property. *See, e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) ("we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, . . . cannot be taken without compensation"). Property interests created by state law are also constitutionally protected. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992) ("existing rules or understandings that stem from an independent source such as state law . . . define the range of interests that quality for protection as property" under the Constitution) (internal quotations omitted). Coastal Act Section 30235 recognizes the right of coastal property owners to construct a seawall within statutorily-defined parameters when needed to protect "existing structures" from erosion. *See* Cal. Pub. Res. Code § 30235. "Existing structures" are simply structures that exist on the property at the time a property owner applies for a seawall permit.

The unconstitutional conditions doctrine protects these property interests in the context of the permitting process because property owners in need of a permit are particularly vulnerable to government pressure to give them up. *See 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 Supreme Court explained and applied the unconstitutional conditions doctrine in land-use permitting in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Those cases establish that government may only take an interest in property as a condition of a land-use permit when the exaction bears an "essential nexus" and "rough proportionality" to an adverse public impact 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" between the exaction and the impact); *see also Koontz*, 133 S. Ct. at 2600 (holding that governmental demands for "transfer of an interest in property from the landowner to the government" in exchange for a permit are subject to the standards of *Nollan* and *Dolan*). The only legitimate purpose of an exaction is the mitigation of negative impacts created by the proposed development. Otherwise, the condition is unconstitutional. *See Dolan*, 512 U.S. at 385 (describing unconstitutional conditions in the context of land use); *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 547 (2005) ("[T]he government may not require a person to give up a" constitutionally protected property right "in exchange for a discretionary benefit" such as a land-use permit.) (internal quotation and citation omitted).

B. The City's LUP 4.19 Violates the Unconstitutional Conditions Doctrine by Requiring Property Owners to Waive Their Future Right to Shoreline Protection in Exchange for a Building Permit

Policy 4.19 states, in relevant part:

> A condition of the permit for all new development and bluff-top redevelopment on bluff property shall require the property owner [to] record the deed restriction against the property that expressly waives any future right that may exist pursuant to Section 30235 of the Coastal Act to new or additional bluff retention devices.

City's LCP at 117.

The right to protect one's home from erosion or other hazards is guaranteed to property owners by Coastal Act Section 30235. Policy 4.19, however, forces property owners to give up any future right they have under Section 30235 to protect their homes as a condition of a development permit. The waiver takes a discrete property interest and leaves homeowners in jeopardy if in the future some natural disaster or other unanticipated event occurs to threaten an existing structure with erosion or outright destruction. Nothing in the Coastal Act requires such a waiver.

The waiver condition effectively demands that coastal property owners convey to the City a negative easement along their bluffs. A negative easement imposes "specific restrictions on the use of property." *Wooster v. Department of Fish & Game*, 211 Cal. Appl. 4th 1020, 1026 (2012). 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). A negative easement is property within the meaning of the Takings Clause, and when the government subjects land to a negative easement the government must pay for it. *Southern Cal. Edison Co. v. Bourgerie*, 9 Cal. 3d 169, 172–73 (1973).

The waiver constitutes an exaction of a discrete property interest from coastal homeowners in exchange for a land-use permit. It is an *unconstitutional* exaction because there is no logical connection—or nexus—between the waiver demand and any identified adverse public impact of new development. When government demands property in exchange for a land-use permit, but that demand does not bear an "essential nexus" to an adverse public impact of the proposed project, the condition "is not a valid regulation of land use but an out-and-out plan of extortion." *Nollan*, 483 U.S. at 837 (internal quotation omitted); *see also Surfside Colony, Ltd. v. Cal. Coastal Comm'n*, 226 Cal. App. 3d 1260, 1269–71 (1991). Policy 4.19 effectively leverages the City's permitting process to circumvent the Takings Clause. That is precisely what the Supreme Court in *Nollan* said government may not do.

Nollan involved a project to redevelop a home on an oceanfront parcel in Ventura County. 483 U.S. at 827. The land was within the jurisdiction of the Coastal Commission, which demanded that the Nollan family dedicate a

lateral easement along the seaward side of their property as a condition of a development permit. *Id.* at 828.

The Commission justified the demand on the grounds that the proposed home would block views from the street to the ocean, creating an alleged psychological barrier burdening the public's ability to access and enjoy the beach. *Id.* at 829. The Court noted that "[h]ad California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking." *Id.* at 831. It pointed out that "one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them." *Id.* Calling the easement over the land "a mere restriction on its use is to use words in a manner that deprives them of all their ordinary meaning." *Id.* (citations omitted).

The Court then explained how the unconstitutional conditions doctrine applied to land-use permitting, distinguishing legitimate exactions from unconstitutional ones. A permit condition that exacts a property interest without compensation is constitutional if the permit condition "serves the same legitimate police-power purpose as a refusal to issue the permit" where such refusal would not be a taking. *Id*. at 837. The Court indicated, for instance, that the Commission could have imposed a condition requiring

"that the Nollans provide a viewing spot on their property for passersby" to mitigate the alleged view interference of the new home. *Id*. "The evident constitutional propriety disappears, however, if the condition . . . utterly fails to further the end advanced as the justification for the prohibition." *Id.* The Court then observed that "[i]t is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollan's property reduces any obstacles to viewing the beach created by the new house." *Id*. at 838. The Court invalidated the condition imposing the lateral easement because it did not mitigate any public impact caused by the Nollan's project. *Id.*

The Court acknowledged "the Commission's belief that the public interest will be served by a continuous strip of publicly accessible beach along the coast." *Id*. at 841. Nonetheless, it held that if the state "wants an easement across the Nollans' property, it must pay for it." *Id.* at 842.

Policy 4.19 imposes the same kind of unconstitutional exaction on all applicants for new development in Solana Beach. Pursuant to that policy, every permit for development or redevelopment of bluff-top property is conditioned on the homeowner giving up a negative easement to the City. That demand does not mitigate any adverse public impact of bluff-top development because only development that complies with the Coastal Act is entitled to a permit. Such development does not cause any adverse public impact that could justify the waiver of the homeowner's future right to

shoreline protection. The negative easement imposed by Policy 4.19 is, therefore, "something extra" taken from every homeowner through the permitting process without compensation.

The California Constitution and Section 30235 permit coastal property owners to protect structures that exist and are threatened by erosion at the time an owner makes an application to construct a seawall. The City prefers a policy of "managed retreat," by which coastal property owners must retreat from bluffs, moving or tearing their homes and other structures down in the face of erosion, rather than protecting the property. As with the Commission's views in *Nollan*, the City's preference here may benefit the public, "but that does not establish that" Solana Beach homeowners "can be compelled to contribute to its realization" without compensation. *See Nollan*, 483 U.S. at 841. Policy 4.19 violates the essential nexus requirement of the unconstitutional conditions doctrine and is therefore invalid.

Moreover, even if there were a logical connection between the waiver and some negative impact of bluff-top development, Policy 4.19 violates the Supreme Court's direction in *Dolan* that a "city must make some sort of individualized determination that the [exaction] is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. This requirement assures that even a legitimate exaction bears a "rough proportionality" to the alleged public impact. *Id.* Policy 4.19, however, is a categorical demand for a negative easement across the private bluffs in all

cases. It neither contemplates nor requires any individualized determination of impacts or proportionality. Policy 4.19 therefore also fails the unconstitutional conditions doctrine under *Dolan*.

C. The City's LUP 2.60.5, Conditioning the Replacement of Private Stairways on a Conversion of the Private Stairway to a Public Access Way, Unconstitutionally Exacts Private Property for Public Use

Policy 2.60.5 states in relevant part that "private beach access ways shall be converted to public access ways where feasible and where public access can be reasonably provided," as a condition of a "permit for the replacement of a private beach stairway or replacement of greater than 50% thereof." This applies in all cases where "all or a portion of the stairway utilizes public land, private land subject to a public access deed restriction or private land subject to a public access easement." City's LCP at 43. This policy violates Coastal Act Section 30610. *See supra* pp. 16-20. But even assuming *arguendo* that it does not violate the Coastal Act, the permit condition is unconstitutional because it exacts private property for public use without compensation.

As discussed in Part II (B) of this brief, above, government may exact a property interest in exchange for a permit only when and to the extent necessary to mitigate an adverse public impact created by the proposed development. The right to exclude the public from one's property is among the most basic property rights possessed by a property owner. *Kaiser Aetna*,

444 U.S. at 180. Repairing or replacing an *existing* stairway creates no *new* burden on public access or any other coastal resource. The repairs or replacement cannot, therefore, justify a demand that property owners convert their private stairways into public access ways without compensation.

The Supreme Court's concern in *Nollan* is nearly identical to BBC's objection to Policy 2.60.5. The City's desire for additional public beach access may be a good idea, but that does not mean that the City can convert private stairways into public access at no cost—or condition development permits on such conversion. *See Nollan*, 483 U.S. at 841–42. The proper way for the City to create new public beach access in the instant case—just as it was the proper way for the Commission to achieve it in the *Nollan* case—is by eminent domain and the payment of just compensation. That would ensure that individual property owners are not forced "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," which is the purpose of the Takings Clause. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

CONCLUSION

For the reasons discussed above, this Court should reverse the trial court's denial of its motion for judgment on its petition for writ of mandate with respect to Policies 4.19, 4.53, and 2.60.5.

DATED: October 31, 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this Appellant's Opening Brief contains 6,123 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

DATED: October 31, 2017.

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