

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

1 PAUL J. BEARD II, No. 210563
E-mail: pjb@pacifical.org
2 JENNIFER M. FRY, No. 280885
E-mail: jmf@pacifical.org
3 LANA HARFOUSH, No. 287843
E-mail: lh@pacifical.org
4 Pacific Legal Foundation
930 G Street
5 Sacramento, California 95814
Telephone: (916) 419-7111
6 Facsimile: (916) 419-7747

7 JONATHAN C. CORN, No. 156983
E-mail: joncorn@axelsoncorn.com
8 VINCENT J. AXELSON, No. 159549
E-mail: vaxelson@axelsoncorn.com
9 Axelson & Corn, P.C.
160 Chesterfield Drive, Suite 201
10 Encinitas, California 92007
Telephone: (760) 944-9006
11 Facsimile: (760) 454-1886

12 Attorneys for Plaintiff and Petitioner

13 SUPERIOR COURT OF CALIFORNIA

14 COUNTY OF SAN DIEGO

15 NORTH COUNTY DIVISION

17 BEACH & BLUFF CONSERVANCY,)
)
18 Plaintiff and Petitioner,)
)
19 v.)
)
20 CITY OF SOLANA BEACH; CITY COUNCIL)
OF THE CITY OF SOLANA BEACH;)
21 COUNCIL MEMBERS MIKE NICHOLS,)
THOMAS M. CAMPBELL, LESA HEEBNER,)
22 DAVID A. ZITO, and PETER ZAHN, in their)
official capacities; CITY MANAGER DAVID)
23 OTT, in his official capacity; and DOES 1)
through 50, inclusive,)
)
24 Defendants and Respondents.)
25 _____)

No. _____

**VERIFIED COMPLAINT
FOR DECLARATORY RELIEF
AND PETITION FOR
WRIT OF MANDATE
(C.C.P. §§ 1060, 1085)**

26
27
28

1 Plaintiff and Petitioner Beach & Bluff Conservancy (Conservancy) brings this action for
2 declaratory relief and a petition for writ of mandate (hereinafter, Complaint), and alleges as
3 follows:

4 **THE PARTIES**

5 1. Plaintiff and Petitioner Beach & Bluff Conservancy is a California mutual benefit
6 corporation that represents the interests of coastal property owners who are citizens and taxpayers
7 of the City of Solana Beach, California. Formed in 1998, its broad mission is to “restore, rebuild,
8 maintain and preserve the safety, beauty, joy and access of . . . beaches and bluffs for the benefit
9 of everyone.” The Conservancy challenges certain policies contained the Land Use Plan adopted
10 by Defendants and Respondents (collectively, City) that will adversely affect the property rights
11 of the Conservancy’s Solana Beach members, some of whom own bluff-top properties and private
12 stairways that are the subject of said policies. The Conservancy is authorized by its members to
13 bring this litigation.

14 2. Defendant and Respondent City of Solana Beach is a general law city in the County
15 of San Diego, incorporated in 1986, and organized and existing under the laws and Constitution
16 of the State of California. The City is responsible for enforcing and defending its laws, including
17 the policies of the Land Use Plan challenged herein.

18 3. Defendant and Respondent City Council of the City of Solana Beach is the City’s
19 legislative body and is responsible for adopting resolutions, ordinances, and other laws, including
20 the policies described herein.

21 4. Defendants and Respondents Mike Nichols, Thomas M. Campbell, Lesa Heebner,
22 David A. Zito, and Peter Zahn are members of the City Council and are sued in their official
23 capacities.

24 5. Defendant and Respondent David Ott is the City Manager of the City of Solana
25 Beach, is charged with enforcing all applicable Federal, State, and City laws, and is sued in his
26 official capacity.

27 6. The true names and capacities of Defendants and Respondents identified as Does 1
28 through 50, inclusive, are unknown to the Conservancy. The Conservancy is informed and

1 believes, and thereon alleges, that Does 1 through 50, inclusive, are individuals, public entities, or
2 both, with jurisdictional authority over the subject matter of this action and have authority to carry
3 out the judicial relief requested in this action. The Conservancy shall seek leave to add the true
4 names and capacities of said Doe Defendants and Respondents when they become known to it.

5 7. Defendants and Respondents have the duty to adopt and enforce laws, including the
6 City’s Land Use Plan and the policies contained therein, consistently with the Federal and State
7 statutory and constitutional requirements.

8 **JURISDICTION AND VENUE**

9 8. Jurisdiction and venue lie in the Superior Court for the County of San Diego
10 pursuant to Code of Civil Procedure sections 393 through 395, in that the City is located within the
11 County of San Diego, and the public offices, duties, and trusts arising therefrom are to be
12 performed within the County of San Diego.

13 **APPLICABLE LAW**

14 9. The Coastal Act requires local governments with jurisdiction over “coastal zone”
15 lands to adopt a Local Coastal Program (LCP) that has been certified by the California Coastal
16 Commission (CCC). Pub. Res. Code § 30500. An LCP has two parts: a Land Use Plan (LUP) and
17 a Local Implementation Plan (LIP). The LUP is a general policy document that sets forth policies
18 for coastal development and has the force of law. The LIP is the collection of implementing
19 ordinances that carry out LUP policies. Both the LUP and LIP—together, the Local Coastal
20 Program—must be consistent with the Coastal Act.

21 10. The Act provides that each local government shall prepare and determine the
22 “precise content” of its own LUP. Pub. Res. Code § 30500(a), (c). By contrast, the CCC’s review
23 of a local government’s proposed LUP is strictly limited to its determination that the plan does, or
24 does not, conform with the requirements of Chapter 3 of the Coastal Act. Once the Commission
25 certifies an LUP, the City has the power formally to adopt it.

26 11. LUP policies must be consistent with the Coastal Act’s unqualified mandate that
27 “[r]evetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such
28 construction that alters natural shoreline processes shall be permitted when required . . . to protect

1 existing structures . . . in danger from erosion.” Pub. Res. Code § 30235 (emphasis added).
2 (Hereinafter, revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and
3 other such construction for the protection of property against erosion shall be referred to as “Bluff
4 Retention Devices.”)

5 12. LUP policies must be consistent with the Coastal Act’s mandate that “no coastal
6 development permit shall be required” for “[i]mprovements to any structure,” for “[r]epair or
7 maintenance activities that do not result in an addition to, or enlargement or expansion of, the
8 object of those repair or maintenance activities,” or for “[t]he replacement of any structure . . .
9 destroyed by a disaster.” Pub. Res. Code § 30610.

10 13. LUP policies must respect the constitutional right of property owners to “protect
11 property.” Cal. Const. art. I, § 1.

12 14. LUP policies must satisfy the constitutional requirement that the permitting
13 authority make an individualized determination that permit conditions bear an “essential nexus”
14 and “rough proportionality” to the alleged impacts of the specific project before it. U.S. Const.
15 amend. V (Takings Clause); *id.* amend. XIV (incorporating Takings Clause as against state and
16 local governments); *see also Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987) (applying
17 the unconstitutional conditions in the context of the Takings Clause of the Fifth Amendment to the
18 U.S. Constitution to require an “essential nexus”); *Dolan v. City of Tigard*, 512 U.S. 374, 391
19 (1994) (requiring “rough proportionality” between permit conditions and a project’s alleged
20 impacts, and establishing the procedural rule that the burden is on the permitting authority to make
21 the individualized determination that a nexus and rough proportionality exist).

22 **FACTUAL ALLEGATIONS**

23 15. After years of negotiation with CCC staff, the City submitted its seventh draft of the
24 LUP for CCC certification in October 2011.

25 16. At its hearing on March 7, 2012, the Commission denied certification of the City’s
26 LUP and instead certified a different LUP that contained substantial modifications demanded by
27 CCC staff.

28 ///

1 17. Despite having twice acknowledged that the CCC-modified LUP was defective, at
2 a public hearing on February 27, 2013, the City Council adopted the LUP pursuant to Solana Beach
3 City Council Resolution 2013-018. That LUP contains the policies challenged in this action, a true
4 nd correct copy of which is attached as Exhibit 1 and incorporated herein by reference.

5 18. The LUP contains Policy 4.22, which provides that “[n]o bluff retention device shall
6 be allowed for the sole purpose of protecting an accessory structure.”

7 19. The LUP contains Policy 4.55, which imposes an expiration date on new Coastal
8 Development Permits (CDPs) approved for Bluff Retention Devices: “All permits for bluff
9 retention devices shall expire 20 years after approval of the [Coastal Development Permit (CDP)].”

10 20. The same Policy 4.55 requires the owner to apply for a new CDP, after the old
11 permit expires, to determine the continued necessity for the device based on a variety of factors,
12 including “changed geologic site conditions relative to sea level rise and the age, condition, and
13 economic life of [the] principal structure including whether it was an existing structure on
14 January 1, 1977 (prior to implementation of the Coastal Act).”

15 21. The LUP contains Policy 4.54, which requires an owner applying for a permit to
16 install an “upper bluff system” to establish, as a condition of permit approval, that “[r]emoval and
17 relocation of all, or portions, of the affected bluff home” are infeasible.

18 22. The LUP contains Policy 4.40, which requires an owner to pay fees as “mitigation
19 for the impacts of all bluff retention devices which consists of the payment of Sand Mitigation Fees
20 and Public Recreation Fees to the City or other assessing agency.” Policy 4.52 incorporates the
21 mandate that Sand Mitigation and Public Recreation Fees required by Policy 4.40 be collected for
22 Bluff Retention Devices.

23 23. The LUP contains Policy 4.19, which provides, in relevant part:

24 A condition of the permit for all new development and blufftop redevelopment on
25 bluff property shall require the property owner record a deed restriction against the
26 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.

27 ///

28 ///

1 24. The LUP contains Policy 2.60, which provides, in relevant part:
2 Existing permitted or private beach stairways constructed prior to the Coastal Act
3 may be maintained in good condition with a [Coastal Development Permit], but
4 shall not be expanded in size or function. Routine repair and maintenance shall not
5 include the replacement of the stairway or any significant portion of the stairway.
6 As feasible, private beach accessways shall be phased out or converted to public
7 accessways.

8 25. On behalf of itself and its members, many of whom are directly affected by the
9 aforementioned policies, the Conservancy lodged a written protest, and appeared before the City
10 Council at its February 27, 2013, hearing in order to object to said policies. There are no further
11 administrative remedies available to the Conservancy.

12 **FIRST CAUSE OF ACTION FOR**
13 **VIOLATION OF PUBLIC RESOURCES CODE § 30235**
14 **(POLICY 4.22)**

15 26. The Conservancy incorporates by reference and realleges each and every allegation
16 in this Complaint as if fully set forth herein.

17 27. Policy 4.22 provides that “[n]o bluff retention device shall be allowed for the sole
18 purpose of protecting an accessory structure.” However, Section 30235 unqualifiedly mandates
19 that a permit for a Bluff Retention Device “shall be permitted when required to . . . to protect
20 existing structures from erosion” (emphasis added). Policy 4.22 violates Section 30235,
21 which countenances no distinctions among the kinds of structures that may be protected from
22 erosion.

23 28. In adopting Policy 4.22, the City took legislative action in violation of the law
24 and/or in excess of its authority.

25 29. An actual and justiciable controversy exists between the parties concerning the
26 legality of Policy 4.22. The Conservancy contends that the policy violates the law, as specified
27 above. The Conservancy is informed and believes, and on that basis alleges, that the City disputes
28 the Conservancy’s contention. A judicial determination of rights and responsibilities arising from
this actual controversy is necessary and appropriate at this time.

30. The Conservancy has no plain, speedy, or adequate remedy at law. Pecuniary
compensation to the Conservancy or its members would not afford adequate relief.

1 c. Section 30235 mandates the issuance of Bluff Retention Device permits for
2 existing structures regardless of “changed geologic site conditions relative to sea level rise and the
3 age, condition, and economic life of the principal structure.” Policy 4.55 requires the consideration
4 of factors not identified in Section 30235 and, if implemented, would violate the statute’s mandate
5 that a Bluff Retention Device permit shall issue to protect existing structures against the threat of
6 erosion.

7 35. In adopting Policy 4.55, the City took legislative action in violation of the law
8 and/or in excess of its authority.

9 36. An actual and justiciable controversy exists between the parties concerning the
10 legality of Policy 4.55. The Conservancy contends that the policy violates the law, as specified
11 above. The Conservancy is informed and believes, and on that basis alleges, that the City disputes
12 the Conservancy’s contention. A judicial determination of rights and responsibilities arising from
13 this actual controversy is necessary and appropriate at this time.

14 37. The Conservancy has no plain, speedy, or adequate remedy at law. Pecuniary
15 compensation to the Conservancy or its members would not afford adequate relief, or it would be
16 extremely difficult to ascertain the amount of compensation that would afford adequate relief.

17 **THIRD CAUSE OF ACTION FOR**
18 **VIOLATION OF PUBLIC RESOURCES CODE § 30235**
19 **(POLICY 4.54)**

20 38. The Conservancy incorporates by reference and realleges each and every allegation
21 in this Complaint as if fully set forth herein.

22 39. Policy 4.54 requires an owner applying for a permit to install an “upper bluff
23 system” to establish, as a condition of permit approval, that “[r]emoval and relocation of all, or
24 portions, of the affected bluff home” are infeasible.

25 40. Policy 4.54 violates Section 30235 of the Coastal Act, which unqualifiedly mandates
26 the issuance of a permit for a Bluff Retention Device in order to protect existing structures in
27 danger from erosion. Neither Section 30235 nor any other Coastal Act provision makes the
28 feasibility of alternatives, like a structure’s removal and relocation, a permissible factor.

///

1 41. In adopting Policy 4.54, the City took legislative action in violation of the law
2 and/or in excess of its authority.

3 42. An actual and justiciable controversy exists between the parties concerning the
4 legality of Policy 4.54. The Conservancy contends that the policy violates the law, as specified
5 above. The Conservancy is informed and believes, and on that basis alleges, that the City disputes
6 the Conservancy's contention. A judicial determination of rights and responsibilities arising from
7 this actual controversy is necessary and appropriate at this time.

8 43. The Conservancy has no plain, speedy, or adequate remedy at law. Pecuniary
9 compensation to the Conservancy or its members would not afford adequate relief, or it would be
10 extremely difficult to ascertain the amount of compensation that would afford adequate relief.

11 **FOURTH CAUSE OF ACTION FOR**
12 **VIOLATION OF PUBLIC RESOURCES CODE § 30235**
13 **(POLICIES 4.40 & 4.52)**

14 44. The Conservancy incorporates by reference and realleges each and every allegation
15 in this Complaint as if fully set forth herein.

16 45. Policies 4.40 and 4.52 impose Sand Mitigation and Public Recreation Fees as a
17 condition of a permit to construct a Bluff Retention Device.

18 46. These policies violate Section 30235 of the Coastal Act, which unqualifiedly
19 mandates the issuance of a permit for a Bluff Retention Device in order to protect existing
20 structures in danger from erosion. Neither Section 30235 nor any other Coastal Act provision
21 authorizes the imposition of fees as a condition of obtaining a Bluff Retention Device permit.

22 47. In adopting Policies 4.40 and 4.52, the City took legislative action in violation of
23 the law and/or in excess of its authority.

24 48. An actual and justiciable controversy exists between the parties concerning the
25 legality of Policies 4.40 and 4.52. The Conservancy contends that the policies violate the law, as
26 specified above. The Conservancy is informed and believes, and on that basis alleges, that the City
27 disputes the Conservancy's contention. A judicial determination of rights and responsibilities
28 arising from this actual controversy is necessary and appropriate at this time.

///

1 49. The Conservancy has no plain, speedy, or adequate remedy at law. Pecuniary
2 compensation to the Conservancy or its members would not afford adequate relief, or it would be
3 extremely difficult to ascertain the amount of compensation that would afford adequate relief.

4 **FIFTH CAUSE OF ACTION FOR VIOLATION OF**
5 **THE UNCONSTITUTIONAL CONDITIONS DOCTRINE AS**
6 **APPLIED TO THE U.S. CONSTITUTION, AMENDS. V & XIV**
7 **(POLICY 4.19)**

8 50. The Conservancy incorporates by reference and realleges each and every allegation
9 in this Complaint as if fully set forth herein.

10 51. Policy 4.19 forces bluff-top owners applying for a permit for new development to
11 forever waive their constitutional right to protect their property in the future, should the property
12 become endangered by erosion. Cal. Const. art. I, § 1.

13 52. Policy 4.19 violates the unconstitutional conditions doctrine under *Nollan* and
14 *Dolan* for at least two reasons:

15 a. The policy categorically dispenses with the constitutional requirement, under
16 *Dolan*, that the permitting authority make an individualized determination of nexus and rough
17 proportionality between permit conditions and the impact of the proposed project.

18 b. The policy imposes a condition—*i.e.*, waiver of the right to protect property
19 (Section 30235, Cal. Const. art. I, § 1)—that bears no essential nexus or proportionality to the
20 present impact of permissible development. An otherwise permissible development generates no
21 public harms that possibly could be mitigated by the owner’s agreement not to construct a Bluff
22 Retention Device in the future.

23 53. In adopting Policy 4.19, the City took legislative action in violation of the law
24 and/or in excess of its authority.

25 54. An actual and justiciable controversy exists between the parties concerning the
26 legality of Policy 4.19. The Conservancy contends that the policy violates the law, as specified
27 above. The Conservancy is informed and believes, and on that basis alleges, that the City disputes
28 the Conservancy’s contention. A judicial determination of rights and responsibilities arising from
this actual controversy is necessary and appropriate at this time.

1 55. The Conservancy has no plain, speedy, or adequate remedy at law. Pecuniary
2 compensation to the Conservancy or its members would not afford adequate relief, or it would be
3 extremely difficult to ascertain the amount of compensation that would afford adequate relief.

4 **SIXTH CAUSE OF ACTION FOR**
5 **VIOLATION OF PUBLIC RESOURCES CODE § 30610**
6 **(POLICY 2.60)**

7 56. The Conservancy incorporates by reference and realleges each and every allegation
8 in this Complaint as if fully set forth herein.

9 57. Policy 2.60 provides that “[e]xisting permitted or private beach stairways
10 constructed prior to the Coastal Act may be maintained in good condition with a CDP, but shall
11 not be expanded in size or function” (emphasis added). It also requires the phasing out, or
12 conversion to public use, of private accessways.

13 58. Policy 2.60 violates Section 30610, which mandates that “no coastal development
14 permit shall be required” for “[i]mprovements to any structure,” for “[r]epair or maintenance
15 activities that do not result in an addition to, or enlargement or expansion of, the object of those
16 repair or maintenance activities,” and for “[t]he replacement of any structure . . . destroyed by a
17 disaster.” Moreover, the Coastal Act does not require or authorize the phasing out or conversion
18 to public use of private accessways.

19 59. In adopting Policy 2.60, the City took legislative action in violation of the law
20 and/or in excess of its authority.

21 60. An actual and justiciable controversy exists between the parties concerning the
22 legality of Policy 2.60. The Conservancy contends that the policy violates the law, as specified
23 above. The Conservancy is informed and believes, and on that basis alleges, that the City disputes
24 the Conservancy’s contention. A judicial determination of rights and responsibilities arising from
25 this actual controversy is necessary and appropriate at this time.

26 61. The Conservancy has no plain, speedy, or adequate remedy at law. Pecuniary
27 compensation to the Conservancy or its members would not afford adequate relief, or it would be
28 extremely difficult to ascertain the amount of compensation that would afford adequate relief.

///

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

PRAYER FOR RELIEF

WHEREFORE, the Conservancy requests relief as follows:

1. A declaration pursuant to Code of Civil Procedure section 1060 that:
 - a. Policy 4.22 violates Public Resources Code section 30235;
 - b. Policy 4.55 violates Public Resources Code section 30235;
 - c. Policy 4.54 violates Public Resources Code section 30235;
 - d. Policies 4.40 and 4.52 violate Public Resources Code section 30235;
 - e. Policy 4.19 violates the Unconstitutional Conditions Doctrine; and
 - f. Policy 2.60 violates Public Resources Code section 30610;
2. A peremptory writ of mandate commanding Defendants and Respondents to invalidate, set aside, and not enforce Policies 4.22, 4.55, 4.54, 4.40, 4.52, 4.19, and 2.60, in whole or in part, as described above;
3. For costs of suit, including reasonable attorneys' fees; and
4. For such other and further relief as the Court may deem proper.

DATED: April 26, 2013.

Respectfully submitted,

PAUL J. BEARD II
JENNIFER M. FRY
LANA HARFOUSH
Pacific Legal Foundation

JONATHAN C. CORN
VINCENT J. AXELSON
Axelson & Corn, P.C.

By _____
JONATHAN C. CORN

Attorneys for Plaintiff and Petitioner

1 **VERIFICATION**

2 I, Chris Hamilton, declare as follows:

3 I am an authorized representative of Plaintiff and Petitioner Beach & Bluff Conservancy.

4 I have the authority to act on the Conservancy’s behalf to make this verification for, and on behalf
5 of, the Conservancy. I have read the foregoing VERIFIED COMPLAINT FOR DECLARATORY
6 RELIEF AND PETITION FOR WRIT OF MANDATE and know the contents thereof; that the
7 same is true to my knowledge, except as to matters which are therein stated on information or belief
8 and as to those matter I believe them to be true.

9 I declare under penalty of perjury under the laws of the State of California that the foregoing
10 is true and correct and that this verification was executed this ____ day of April, 2013, at Solana
11 Beach, California.

12
13
14 _____
15 CHRIS HAMILTON
16
17
18
19
20
21
22
23
24
25
26
27
28

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747