SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
NORTH COUNTY

MINUTE ORDER

DATE: 12/06/2016 TIME: 09:18:00 AM DEPT: N-31

JUDICIAL OFFICER PRESIDING: Timothy M. Casserly
CLERK: Trish Dietrich
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2013-00046561-CU-WM-NC** CASE INIT.DATE: 04/26/2013
CASE TITLE: **Beach & Bluff Conservancy vs. City of Solana Beach [IMAGED]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

APPEARANCES

The Court, having taken the above-entitled matter under submission on 11/18/16 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

On November 18, 2016, this Court heard oral argument on the petition and complaint filed by Beach and Bluff Conservancy. The Court took the matter under submission. After careful review of the authorities and arguments presented by all parties, the Court issues the following ruling:

Plaintiff/Petitioner Beach and Bluff Conservancy's motion for judgment on the verified petition for writ of mandate is granted in part and denied in part.

On February 27, 2013, City of Solana Beach City Council (City) adopted the Land Use Plan (LUP) (Resolution No. 2013-018). On May 22, 2013, City adopted amendments to the LUP. On June 11, 2014, City accepted the California Coastal Commission's (Commission) proposed modifications to the LUP.

On April 26, 2013, plaintiff filed a verified complaint and petition for writ of mandate challenging City's amendments to the LUP. On August 20, 2013, plaintiff filed a first amended complaint for declaratory relief and petition for writ of mandate and on October 3, 2014, plaintiff filed a second amended complaint for declaratory relief and petition for writ of mandate.

The second amended complaint seeks declaratory relief pertaining to seven causes of action challenging seven land use policies (4.22, 4.53, 4.39, 4.50, 4.19, 2.60, and 2.60.5). Plaintiff also seeks a peremptory writ of mandate commanding defendants to invalidate, set aside, and not enforce the policies. These policies relate to bluff-retention devices, including permitting issues, fees, and future development of these devices and private beach stairways. Plaintiff alleges that these provisions violate the Public Resources Code §§ 30235 and 30610, and the Unconstitutional Conditions Doctrine. Respondent City and Intervenor Surfrider Foundation oppose the complaint and the petition for writ of mandate.

On August 15, 2016, the parties stipulated that the Court could hear both the petition and the complaint in one proceeding and based on the papers submitted by the parties.

City and Commission's joint request for judicial notice dated September 30, 2016 is granted.

Turning first to the procedural issues presented by the parties, the Court has carefully considered the arguments and authorities presented by the parties and finds that: (1) petitioner's claims are not barred by res judicata (Minute Order dated March 5, 2015, p. 2, ¶ 3); (2) declaratory relief and traditional mandamus are available to challenge the LUP (*DeVita v. County of Napa* (1995) 9 Cal.4th 763); (3) facial challenges are available under the unconstitutional conditions doctrine (*Nollan v. California Coastal Commission* (1987) 483 U.S. 825; *San Remo Hotel L.P. v. City and County of San Francisco* (2002) 27 Cal.4th 643); and (4) an administrative record is not necessary to decide the case (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069).

Applicable Standard for Facial Unconstitutionality

There are two tests to determine facial unconscionability: (1) the act's provisions inevitably pose a present and fatal conflict (the strict test); and (2) a party must establish the statute conflicts with constitutional principles in the generality or great majority of cases (the lenient test.) *Coffman Specialties, Inc. v. Dep't of Transp.* (2009) 176 Cal.App.4th 1135, 1145. The *Coffman* court held that the burden is heavy in either test that the plaintiff must show unconstitutionality in all or most cases, and plaintiff can't prevail by suggesting possible future hypothetical constitutional problems. *Id.* Further, the only material that is necessary for the Court to consider is the language of the ordinance itself. "Such a challenge [facial unconstitutionality] is directed solely to the language of the enactment and not to its application in the particular case." *Dillon v. Mun. Court* (1971) 4 Cal. 3d 860, 865.

"[T]he well-established principle [is] that under the California Constitution a municipality has broad authority, under its general police power, to regulate the development and use of real property within its jurisdiction to promote the public welfare. Cal. Const., art. XI, § 7; *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151–1152. The variety and range of permissible land use regulations are extensive and familiar, including, for example, restrictions on the types of activities for which such property may be used (commercial or residential, or specific types of commercial ventures or specific types of residential developments-single family, multiunit), limitations on the density and size of permissible residential development (permissible lot size, number of units per lot, minimum or maximum square footage of units, number of bedrooms), required set-backs, aesthetic restrictions and requirements, and price controls (for example, rent control). As a general matter, so long as a land use restriction or regulation bears a reasonable relationship to the public welfare, the restriction or regulation is constitutionally permissible. (Citations omitted)." *California Bldg. Indus. Assn. v. City of San Jose* (2015) 61 Cal. 4th 435, 455–56 cert. denied sub nom. *California Bldg. Indus. Assn v. City of San Jose, Calif.* (2016) 136 S. Ct. 928.

Challenges to the exercise of such power are reviewed deferentially. "In deciding whether a challenged [land use] ordinance reasonably relates to the public welfare, the courts recognize that such ordinances are presumed to be constitutional, and come before the court with every intendment in their favor. (Citation omitted) Accordingly, a party challenging the facial validity of a legislative land use measure ordinarily bears the burden of demonstrating that the measure lacks a reasonable relationship to the public welfare." *Id.*

Although land use regulations are generally entitled to deference, "judicial deference is not judicial

abdication. The ordinance must have a *real and substantial* relation to the public welfare. [Italics in original; Citation omitted.] There must be a reasonable basis in fact, not in fancy, to support the legislative determination. [Citation.] Although in many cases it will be 'fairly debatable' [citation] that the ordinance reasonably relates to the regional welfare, it cannot be assumed that a land use ordinance can *never* be invalidated as an enactment in excess of the police power." *Id.* [Italics in original]

Therefore, the Court turns to each contested provision of the LUP to determine whether, as a matter of law, any of the challenged provisions are facially invalid applying these standards.

First Cause of Action (violation of Public Resources Code § 30235-Policy 4.22)

Policy 4.22 provides, in pertinent part: No bluff retention device shall be allowed for the sole purpose of protecting an accessory structure. See City/Commission RJN, Exhibit 3.

Plaintiff argues that § 30235 provides that "seawalls...shall be permitted when required...to protect existing structures...and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply" and that accessory structures are a subset of structures that are provided for in the Coastal Act.

Defendants argues that *Ocean Harbor* mandates that § 30235 be read as permissive, rather than exclusive and other Coastal Act sections support the prohibition on bluff protection devices solely to protect accessory structures ("The scenic and visual qualities of coastal areas 'shall' be considered and protected as a resource of public importance" § 30251, and "assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding are or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs" § 30253(b)).

The Court has carefully reviewed the authorities and arguments presented by both parties and is persuaded that the plaintiff has met its burden of demonstrating that Policy 4.22 is unconstitutional in virtually all cases because while § 30235 requires seawalls to be permitted to protect existing structures, Policy 4.22 prohibits bluff retention devises to protect accessory structures. Thus, it appears to the Court that Policy 4.22 is inconsistent with § 30235.

Therefore, the motion for judgment and peremptory writ of mandate as to the first cause of action are both granted.

Second Cause of Action (violation of Public Resources Code § 30235-Policy 4.53)

Policy 4.53 provides, in pertinent part: All permits for bluff retention devices shall expire when the currently existing blufftop structure requiring protection is redeveloped (per definition of Bluff Top Redevelopment in the LUP), is no longer present, or no longer requires a protective device, whichever occurs first and a new CDP must be obtained. Prior to expiration of the permit, the bluff top property owner shall apply for a coastal development permit to remove, modify or retain the protective device. In addition, expansion and/or alteration of a legally permitted existing bluff retention device shall require a new CDP and be subject to the requirements of this policy. The CDP application shall include a re-assessment of need for the device, the need for any repair or maintenance of the device, and the potential for removal based on changed conditions. The CDP application shall include an evaluation of: - The age, condition and economic life of the existing principal structure; - Changed geologic site conditions including but not limited to, changes relative to sea level rise, implementation of a long-term,

large scale sand replenishment or shoreline restoration program; and - Any impact to coastal resources, including but not limited to public access and recreation. The CDP shall include a condition requiring reassessment of the impacts of the device in 20 year mitigation periods pursuant to Policies 4.49 and 4.53. No permit shall be issued for retention of a bluff retention device unless the City finds that the bluff retention device is still required to protect an existing principal structure in danger from erosion, that it will minimize avoid further alteration 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. See City/Commission RJN, Exhibit 3.

Coastal Act § 30235 provides in relevant part that "seawalls...shall be permitted when required...to protect existing structures...and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply." Provision 4.53 requires that permits for bluff retention devices automatically expire when: (a) the existing structure requiring protection is redeveloped, (b) is no longer present, or (c) no longer requires a protective device. The provision further requires that prior to the expiration of the permit, the owner must apply for a CDP to remove, modify, or retain the device. Also, expansion or alteration of an existing device requires a new CDP.

The Court has carefully reviewed the arguments presented by both parties and finds that the expiration criteria in this policy is consistent with § 30235 because it specifically ties the life of the seawall or bluff protection device to the existing structure requiring protection.

Plaintiff has failed to meet its burden of showing that Policy 4.53 lacks a reasonable relationship to the public welfare and is facially unconstitutional; therefore, the motion for judgment and peremptory writ of mandate as to the second cause of action are both denied.

Third Cause of Action (violation of Public Resources Code § 30235-Policy 4.39 and 4.50)

Plaintiff initially challenged these policies relating to sand mitigation fees and reasonable and feasible mitigation measures relating to bluff retention devices; however, plaintiff essentially conceded that per *Ocean Harbor House* (2008) 163 Cal. App. 4th 215, the Appellate Court held that the Coastal Act does not preempt attempts to impose additional conditions that do not mitigate impacts on local shoreline sand supply. Plaintiff disagrees with the appellate court's holding and preserves its argument for appeal. See previously filed JOP, 14:22-28. Plaintiff's most recently filed papers do not include an argument relating to these provisions.

In an abundance of caution, the Court will rule on this cause of action. The Court finds that there is proportionality between the fee and the impact of the seawall. The fees would go to replace sand lost due to the seawall, and to provide for recreational areas that would be lost by the seawall. Additionally, there is, in the provision, a method for determining the fee on a case by case method. Plaintiff has failed to meet its burden of demonstrating that the statute is unconstitutional in almost all cases. As such, based on *Ocean Harbor*, the Court denies plaintiff's motion and peremptory writ with respect to the third cause of action.

Fourth Cause of Action (Unconstitutional Conditions Doctrine-Policy 4.19)

Policy 4.19 provides, in pertinent part: New shoreline or bluff protective devices that alter natural landforms along the bluffs or shoreline processes shall not be permitted to protect new development. A condition of the permit for all new development and blufftop redevelopment on bluff property shall require the property owner record a 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. See City/Commission RJN, Exhibit 3.

Plaintiff argues that: (1) this Policy is an exaction because it requires property owners to mitigate anticipated negative impacts of his or her development; (2) "The property owners' waiver of their right to build a seawall will not solve any anticipated problems caused by permitted development" and "the waiver of a constitutional right bears no relationship to whatever impacts may be attributable to development;" and (3) this provision is applied indiscriminately without individualized findings as required by *Dolan v. City of Tigard*, (1994) 512 U.S. 374, 388.

Defendants counter with the arguments that: (1) this land use restriction is not an exaction but a limit on use of property. *California Bldg. Indus. Assn. v. City of San Jose* (2015) 61 Cal. 4th 435, 457; and (2) case law and the nexus test applies in "as-applied" decisions of individual adjudicative land use decisions, but not to general legislative zoning decisions. *Action Apartment Ass'n v. City of Santa Monica* (2008) 166 Cal. App. 4th 456, 469;

An exaction exists where an ordinance requires "a [party] to give up a property interest for which the government would have been required to pay just compensation under the takings clause outside of the permit process." *California Bldg. Indus. Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 461. "[T]he government may impose such a condition only when the government demonstrates that there is an 'essential nexus' and 'rough proportionality' between the required dedication and the projected impact of the proposed land use." *Id.* at 458. The steps then, to determine the constitutionality are: (a) determine if this provision is actually an exaction; (b) determine if there is a nexus between the requirement and the impact on the land; and (c) determine if there is rough proportionality between the requirement and the impact on the land.

The Court has carefully considered the arguments and authorities presented by both parties and is not persuaded that this provision constitutes an exaction because the Solana Beach homeowners are not required to dedicate any portion of their property to the public or pay any money to the public. Instead, the condition set forth in Policy 4.19 simply places a restriction on the way the homeowner may use its property. Regulations on how a homeowner can use his/her property does not constitute an exaction. See *California Bldg. Indus. Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 460 ["Nothing in *Koontz* suggests that the unconstitutional conditions doctrine under *Nollan* and *Dolan* would apply where the government simply restricts the use of property without demanding the conveyance of some identifiable protected property interest (a dedication of property or the payment of money) as a condition of approval. It is the governmental requirement that the property owner convey some identifiable property interest that constitutes a so-called 'exaction' under the takings clause and that brings the unconstitutional conditions doctrine into play."] This Court finds that the Policy "falls within what [courts] have already described as municipalities' general broad discretion to regulate the use of real property to serve the legitimate interests of the general public and the community at large." *Id.*

Therefore, the Court is not persuaded that plaintiff has met its burden of demonstrating an exaction with respect to Policy 4.19. The motion for judgment and peremptory writ of mandate as to the fourth cause of action are both denied.

Fifth Cause of Action (violation of Public Resources Code § 30610-Policy 2.60)

Policy 2.60 provides, in pertinent part: No new private beach stairways shall be constructed, and private beach stairways shall be phased out at the end of the economic life of the stairways. Existing permitted or private beach stairways constructed prior to the Coastal Act may be maintained in good condition with a CDP where required, but shall not be expanded in size or function. Routine repair and maintenance shall not include the replacement of the stairway or any significant portion of greater than 50% of the stairway cumulatively over time from the date of LUP certification. See City/Commission RJN, Exhibit 3.

Plaintiff argues that this Policy runs afoul of the Coastal Act which provides that no permit is required for "[r]epair or maintenance activities that do not result in an addition to, or enlargement or expansion of, the object of those repair or maintenance activities" or "[t]he replacement of any structure...destroyed by a disaster." Pub. Res. Code § 30610(d), (g). Plaintiff argues that repair of a private bluff stairway with no change in footprint or new impacts should not be excluded from the exemption.

However, defendants argue that § 30610(d) authorizes the Commission to require a permit "if the commission determines that certain extraordinary methods of repair and maintenance involve a risk of substantial adverse environmental impact..." Two regulations have been adopted by the Commission relating to substantial adverse environmental impacts: § 13252(b) relating to routine repair or maintenance of the stairway greater than 50% of the stairway and § 13252(a)(3) relating to the placement of solid material and mechanized equipment or construction materials on the City's coastal bluffs.

The Court has carefully reviewed the authorities and arguments presented by both parties and is persuaded that the plaintiff has met its burden of demonstrating that Policy 2.60 is unconstitutional because while § 30610 allows for repair and maintenance activities of structures, Policy 2.60 includes a condition that the repair or maintenance of stairways must not be greater than 50% cumulatively over time. The Court is persuaded that this condition is inconsistent with § 30610.

The motion for judgment and peremptory writ of mandate as to the fifth cause of action are both granted.

Sixth and Seventh Causes of Action (violation of Public Resources Code § 30610/ Unconstitutional Conditions Doctrine-Policy 2.60.5)

Policy 2.60.5 provides, in pertinent part: Upon application for a coastal development permit for the replacement of a private beach stairway or replacement of greater than 50% thereof, private beach accessways shall be converted to public accessways where feasible and where public access can reasonably be provided. The condition to convert the private stairway to a public stairway shall only be applied 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. See City/Commission RJN, Exhibit 3.

Plaintiff argues that: (1) Coastal Act § 30610(d) allows stair repair without a permit except in certain instances; (2) where the new construction is functionally the same as the original, the Coastal Act does not necessarily require a permit. *Union Oil Co. v. S. Coast Reg'l Com.* (1979) 92 Cal. App. 3d 327, 331; and (3) this is an exaction, and there is no connection between the repair or replacement of existing private stairways and a need for more public access.

Defendants counter with the arguments that: (1) Coastal Act § 13252(a)(3) and (b) classify the repair of facilities or structures within 50 feet of the edge of a coastal bluff as an extraordinary method of repair,

and therefore requiring a permit; (2) converting a private staircase to a public staircase will only occur if the staircase is already on public land or on land subject to a restriction allowing public access; and (3) case law (Nollan/Dolan/Koontz) and the nexus test applies in "as-applied" decisions of individual adjudicative land use decisions, but not to general legislative zoning decisions. *Action Apartment Ass'n v. City of Santa Monica* (2008) 166 Cal. App. 4th 456, 469.

Turning first to the argument that this violates the Coastal Act, defendants cite to California code that shows this clearly does not violate the Coastal Act. "For purposes of Public Resources Code Section 30610(d), the following extraordinary methods of repair and maintenance shall require a coastal development permit because they involve a risk of substantial adverse environmental impact: (a)(3) 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 or environmentally sensitive habitat area..." Cal. Code Regs. tit. 14, § 13252.

On this record, plaintiffs have failed to show that this provision is in violation of the Coastal Act in all or virtually all situations. There may be times where stairs are to be repaired that are further than 50 feet from the edge of a coastal bluff. But that is not the test. Plaintiff provides no evidence that in virtually every instance, private stairs will be more than 50 feet from the bluff edge. The Court is not persuaded by the holding set forth in *Union Oil* for two reasons: *Union Oil* did not deal with "extraordinary methods of repair" and the Coastal Act relating to these extraordinary methods of repair was not law when *Union Oil* was decided in 1979.

Assuming arguendo that the Policy does constitute an exaction (because private accessways are to be converted to public accessways), the Court is persuaded that, on the face of the Policy, there is a nexus between the conversion of the accessways and public access unlike the *Nollan* case. See *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, 837 [The permit sought by the Nollans was to build a house. The condition placed on the permit was provide an easement across the property for public beach access. The Supreme Court held "the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was."].

Finally, the plaintiff has failed to demonstrate that there is no proportionality between the requirement and the impact on the land under *Dolan v. City of Tigard* (1994) 512 U.S. 374, 396. There is no evidence before the Court, and there can be none on this facial challenge, to determine if the findings by the City show a proportionality between the requirement to make the stairs public and the impact on the land.

Therefore, the Court is not persuaded that plaintiff has met its burden. The motion for judgment and peremptory writ of mandate as to the sixth and seventh causes of action are both denied.

Timothy M. Casserly

Judge Timothy M. Casserly