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22 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
23 **FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT**
24

25 MARK I. GREENE and BELLA GREENE,
26
27 Petitioners and Plaintiffs,
28
29 vs.

30 CALIFORNIA COASTAL COMMISSION,
31
32 Respondent and Defendant.

Case No.: BS165764

Opposition to Respondent's Demurrer

**[Filed Concurrently with Request for
Judicial Notice]**

Date: February 22, 2018
Time: 9:30 a.m.
Dept: 85
Judge: The Honorable James. C.
Chalfant
Trial Date: July 24, 2017
Time: 1:30 p.m.
Action Filed: May 5, 2017

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INTRODUCTION

Plaintiffs Mark and Bella Greene (the “Greenes”) submit this Opposition to the Demurrer of Defendant California Coastal Commission (Commission). The Commission has demurred to the Second Cause of Action in the Greenses’ Petition for Writ of Mandate, which challenges the Commission’s imposition of Special Condition 3 on a coastal development permit. For the reasons set forth below, the Commission’s demurrer should be overruled.

STATEMENT OF FACTS

In 2006, Dr. Mark Greene and Bella Greene bought their future retirement home in Playa del Rey. Petition ¶ 9. In 2015, in anticipation of Dr. Greene’s upcoming retirement, the Greenses began the process of securing the necessary permits to remodel the home. *Id.* ¶ 10. The Greenses’ plans for the home include reinforcing the existing structure to meet more modern standards concerning earthquakes, increasing the interior square footage and exterior deck space, and adding a short staircase and chair glide to allow Bella Greene to avoid the use of stairs and the potential exacerbation of knee problems. *Id.* ¶ 11.

To help in the process of securing the development permit, the Greenses hired architect Mark Appel. Petition ¶ 13. Mr. Appel developed plans that fit with the Greenses’ vision for the home and ensured that those plans complied with applicable laws and regulations. *Id.* In March of 2016, the Greenses submitted their plans to the City of Los Angeles Planning Department. *Id.* ¶ 14. The Greenses did not request any zoning variances and, on June 28, 2016, the City approved a permit for the Greenses’ proposed remodel. *Id.* ¶¶ 14, 15.

The Greenses then began the process of securing a coastal development permit from the California Coastal Commission, which asserted authority under its dual permit jurisdiction. *See* Petition ¶ 18. As part of the review, the Commission demanded that the Greenses pay for and present to the Commission “a wave uprush study” that analyzed whether the house and proposed renovations “could be subject to erosion, wave attack or wave run-up, the frequency of occurrence, consequences and options for siting or designing the project to avoid or minimize impacts over the life of the structure.” *Id.* ¶ 19. The Greenses complied with this request and hired an experienced

1 engineering firm to complete the study. *Id.* ¶ 20. The study concluded, among other findings, that
2 “[t]he proposed development will neither create nor contribute significantly to erosion, geologic
3 instability, or destruction of the site or adjacent area.” *Id.* The Greenes submitted the study to the
4 Commission on or around January 10, 2017. *Id.*

5 On February 23, 2017 the Commission published a staff report on the Greene’s Coastal
6 Development Permit application. Petition ¶ 21. The report recommended approval with several
7 special conditions, including Special Conditions 1 and 3 which are the subject of this litigation.
8 *Id.* Special Condition 1 requires the Greenes to modify their plans to increase the setback of their
9 property to no less than five feet from their rear property line, contrary to the one-foot setback
10 permitted by local ordinances and sought by the Greenes. *Id.* ¶ 22. Special Condition 3, challenged
11 in the Greenes’ Second Cause of Action, requires the Greenes to waive any future right they may
12 have to protect their property from erosion or other natural hazards with a shoreline protective
13 device. *Id.* ¶ 23. The staff report purports that Special Condition 3 is required by Section 30253 of
14 the Coastal Act, justifying the condition. Respondents Request for Judicial Notice (Respondent’s
15 RJN), Exhibit 1, p. 19, AR000020.

16 On March 9, 2017, the Commission held a hearing on the Greenes’ coastal development
17 permit application. Petition ¶ 27. At the hearing, the Greenes were represented by Don Schmitz, a
18 coastal development consultant. *Id.* ¶ 28. Mr. Schmitz focused his presentation on why the
19 Commission should not impose Special Condition 1. *Id.* After a vote to remove Special Condition
20 1 failed seven to four, the Commission unanimously approved the coastal development permit
21 with the conditions recommended by the Staff Report. *Id.* ¶¶ 31, 32.

22 The Greenes filed this action on May 1, 2017, seeking a writ of administrative mandate to
23 invalidate the Commission’s imposition of Special Conditions 1 and 3.¹ Petition. On January 10,
24 2017, the Commission filed a demurrer against the Greenes’ Second Cause of Action, arguing that
25

26
27 ¹ The Greenes also original sought declaratory and injunctive relief regarding the Commission’s
28 interpretation and application of two sections of the Coastal Act. The Greenes have since
voluntarily dismissed that cause of action. *See* Stipulation and [Proposed] Order Dismissing Third
Cause of Action.

1 the Greenes failed to exhaust administrative remedies with respect to Special Condition 3. See
2 Memorandum of Points and Authorities in Support of Demurrer to Petition (Respondents P&A).

4 STANDARD OF REVIEW

5 A demurrer lies only where a defect appears on the face of the challenged pleadings. Code
6 of Civ. Proc. § 430.30. This Court must “deem to be true all material facts that were properly pled,”
7 along with “those facts that may be implied or inferred from those expressly alleged.” *City of*
8 *Morgan Hill v. Bay Area Quality Mgmt. Dist.*, 118 Cal. App. 4th 861, 869 (2009). This Court may
9 also “consider matters that may be judicially noticed” but not “contentions, deductions or
10 conclusions of fact or law.” *Id.* at 870. On demurrer, the Petition “must be liberally construed, with
11 a view to substantial justice between the parties.” Code of Civ. Proc. § 452.

13 ARGUMENT

14 Although normally a party must exhaust administrative remedies before coming to court,
15 “the doctrine of exhaustion of administrative remedies has not hardened into inflexible dogma.”
16 *Ogo Assocs. v. City of Torrance*, 37 Cal. App. 3d 830, 834 (1974); see also *Green v. City of*
17 *Oceanside*, 194 Cal. App. 3d 212, 222 (1987). There are several exceptions to the doctrine,
18 including when resorting “to the administrative process would be futile because it is clear what the
19 agency's decision would be,” *Green*, 194 Cal. App. at 222, and when a case involves “important
20 questions of public policy.” *Lindeleaf v. Agric. Labor Relations Bd.*, 41 Cal. 3d 861, 871 (1986).
21 Both of these exceptions apply here.

22 At the core of the Greenes’ Second Cause of Action is a dispute over the proper
23 interpretation of Section 30253 of the Coastal Act. See Petition ¶¶ 66, 67. The Commission’s
24 imposition of Special Condition 3 is based on its belief that the Coastal Act requires a waiver of
25 shoreline protection rights when it issues a coastal development permit. Respondent’s RJN,
26 Exhibit 1, p. 19, AR000020. Due to this belief, the Commission unrelentingly requires coastal
27 property owners to waive their rights to shoreline protection when applying for permits to develop
28 beachfront property, regardless of whether individualized findings support that demand. Because

1 the Commission has made its position on the meaning of the statute clear, both to the Greenes and
2 to other property owners, this Court should hear the Greenes' challenge to Special Condition 3.

3
4 **I**
5 **Objecting to Special Condition 3 at**
6 **the Commission Hearing Would Have Been Futile**

7 The Greenes did not need to object to Special Condition 3 because making such an
8 objection would not have changed the outcome of the March 9, 2017, Commission hearing.
9 Litigants are not required to engage in futile administrative processes in order to get relief. *Doster*
10 *v. Cty. of San Diego*, 203 Cal. App. 3d 257, 262 (1988) ("The law does not require a party to
11 participate in futile acts."). The Commission's actions, both in this case and in other cases, clearly
12 demonstrate how it would have responded to any objection to Special Condition 3.

13 The Commission's imposition of Special Condition 3 was not based on any unique facts
14 related to the Greene's property. Rather, it was based on the Commission's legal interpretation of
15 the Coastal Act. The Staff Report states that the Special Condition 3 is required in order to put the
16 Greenes and future owners "on notice that Section 30253 [of the Coastal Act] limits their ability
17 to ever construct a protective device to protect the new development" Respondent's RJN,
18 Exhibit 1, p. 19, AR000020. Conversely, the Greenes allege that "no waiver of shoreline
19 protection rights is required by the terms of Public Resources Code § 30253(b)" and that the
20 Commission's determination to the contrary is a "misapplication of the law." Petition ¶¶ 66, 67.

21 This is not a case where the Greenes could have presented evidence to persuade the
22 Commission to remove Special Condition 3. If the Greenes had objected to Special Condition 3,
23 it would not have resolved the underlying dispute about the proper interpretation of Section 30253.
24 Courts often recognize that objecting to an agency's legal interpretation is futile because only the
25 judiciary can resolve a disagreement over the correct interpretation of the law. *See Union of Am.*
26 *Physicians & Dentists v. Kizer*, 223 Cal. App. 3d 490, 503 (1990) ("We concluded that because
27 the Department at all times had maintained it had statutory authority to utilize sampling and
28 extrapolation, such challenge by Grier at the administrative level would have been futile.");
Doster, 203 Cal. App. 3d at 262 (Recognizing that an administrative hearing would have been

1 futile because “this is not a case where the review hearing officer would have been called upon to
2 decide controverted facts or furnish expertise essential for later judicial review.”). As a result, this
3 Court should recognize that objecting to Special Condition 3 would have been futile, and decide
4 the proper meaning of Section 30253 of the Coastal Act.

5 The Commission’s actions in similar cases further confirms that objecting to Special
6 Condition 3 would have been futile. The Commission has consistently imposed substantially
7 similar conditions on coastal property owners applying for development permits. *See, e.g.,*
8 Petitioners’ Request for Judicial Notice (Petitioners’ RJN), Exhibit A, p.4. And since at least 2015,
9 the Commission has made clear that it interprets Section 30253 as requiring a waiver of shoreline
10 protection rights when it issues a coastal development permit. *See, e.g.,* Petitioners’ RJN, Exhibit
11 B, p. 17. The Commission even imposed the same condition on a nearby Playa del Rey property
12 owner at around the same time the Greenes were applying for their coastal development permit.
13 Petitioners’ RJN, Exhibit C, p. 2.

14 When a coastal property owner objects to the required waiver of shoreline protection rights,
15 the Commission still imposes the condition. *See* Petitioners’ RJN Exhibit D, Applicant response
16 p. 2, Staff Report p. 19; Petitioners RJN Exhibit E, p. 3. In fact, even when courts have held that
17 it is unlawful to impose this type of condition, the Commission has continued to impose the
18 condition on subsequent applicants for development permits. Petitioners’ RJN Exhibit G., p. 8;
19 Petitioners RJN Exhibit H, p. 4. In *Capistrano Shores*, the Orange County Superior Court held in
20 August of 2016 that Section 30253 does not require the Commission to condition a development
21 permit on the waiver of shoreline protection rights. Petitioners’ RJN Exhibit G, p. 8. A few months
22 later, the Commission reiterated its opposing viewpoint by imposing Special Condition 3 on the
23 Greenes. Petition ¶ 32.²

24 The Commission’s repeated imposition of shoreline protection right waivers is not based
25 on facts or circumstances of the applicant. Instead, the Commission believes Section 20353
26 requires property owners who develop their land to give up any right they have to protect that
27

28 ² The Commission is so confident in its interpretation of the Coastal Act that it recently reaffirmed
its position in its Draft Residential Adaptation Policy Guidance. Petitioners’ RJN Exhibit F, p. 16.

1 development in the future. *See, e.g.*, Respondent's RJN, Exhibit 1, p. 19, AR000020; Petitioners'
2 RJN Exhibit B, p. 17; Petitioners' RJN Exhibit G, p. 8. That view results in the Commission
3 imposing the waiver regardless of the position of the applicant or whether the applicant objects.
4 Petitioners' RJN Exhibit E, p. 3.

5 Accordingly, it is clear that it would have been futile for the Greenes to object to Special
6 Condition 3. When an agency consistently maintains it has the statutory authority to take some
7 action, courts have recognized that it is futile to object to that action before that very agency.
8 (*Grier v. Kizer*, 219 Cal. App. 3d 422, 431 (1990), *modified* (May 2, 1990), and *disapproved of on*
9 *other grounds by Tidewater Marine W., Inc. v. Bradshaw*, 14 Cal. 4th 557 (1996); *see also Union*
10 *of Am. Physicians & Dentists*, 223 Cal. App. 3d at 503. In *Grier*, the Department of Health Services
11 repeatedly claimed that it had the statutory authority to use a specific statistical method to audit
12 physicians. 219 Cal. App. 3d at 427. Even after the Office of Administrative Law stated that the
13 method was unenforceable, the Department continued to use it. *Id.* at 431. When a physician
14 challenged the method in court, the court excused the failure to exhaust administrative remedies
15 under the futility exception because the Department "consistently" and "unyielding[ly]" took the
16 position that it had the statutory authority to use the challenged statistical method. *Id.*

17 This case is no different. The Commission has consistently and unyieldingly justified its
18 imposition of shoreline protective device waiver conditions on its interpretation of Section 30253,
19 even when the Commission has been informed that its interpretation is incorrect. These facts
20 distinguish this case from the futility analysis in *Lindeleaf*. *See* Respondents P&A at 10-11. There,
21 "the issue had never been presented" to the agency and, thus "its probable decision could not be
22 forecast." (*Lindeleaf*, 41 Cal. 3d at 870.) In contrast, several property owners have raised the
23 shoreline protection waiver issue with the Commission previously and this Court can easily
24 forecast what the Commission's decision would have been if the Greenes had objected to Special
25 Condition 3. Based on the Commission's past actions and confident interpretation of Section
26 30253, it would have certainly ignored any objection made by the Greenes. Accordingly, such an
27 objection would have been futile and this Court should hear the Greene's Second Cause of Action.

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II

The Interpretation of Section 30253 of the Coastal Act Is a Public Policy Question of Statewide Concern

Additionally, this Court should hear the Greenses' Second Cause of Action because the meaning of Section 30253 is an important public policy question of statewide concern. Administrative remedies need not be exhausted when the case raises an important question of public policy. *Lindeleaf*, 41 Cal. 3d at 870-71. That is the case here because the proper interpretation of Section 30253 is not an issue that exclusively affects the Greenses.

As demonstrated above, the Commission has repeatedly used its interpretation of the Coastal Act to impose waivers of shoreline protection rights on coastal property owners across the state. The Commission does not change its position based on the unique aspects of a specific coastal property. Instead, the Commission applies its legal interpretation of the Coastal Act and imposes a condition similar to the Greene's Special Condition 3 on every new coastal development permit.

The Greenses directly challenge that interpretation in their Second Cause of Action. If they are correct that the Commission's interpretation is a "misapplication of the law," then that misapplication has not only impacted the Greenses, but nearly every coastal property owner that has recently applied for a coastal development permit. Petition ¶ 67. As a result, deciding the Greene's Second Cause of Action would "affect not only the present parties," but would guide the Commission in its treatment of any property owner who seeks a coastal development permit. *Lindeleaf*, 41 Cal. 3d at 870.

Another factor weighing in favor of deciding the Greenses' Second Cause of Action is that this Court can resolve the dispute over the meaning of Section 30253 without the need for any further fact-finding.³ One of the underlying rationales for requiring exhaustion of administrative

³ In its memorandum of points and authorities, the Commission focuses solely on the Greenses' allegation that Special Condition 3 imposes an unconstitutional condition and ignores the allegations that the Commission misapplied the law. Respondents P&A p. 10. While the nexus and rough proportionality test for unconstitutional conditions is a mixed question of law and fact, the relevant facts, including the wave uprush study that was requested by the Commission, are

1 remedies is to ensure that the deciding court has a fully developed factual record. *Action*
2 *Apartment Ass'n v. Santa Monica Rent Control Bd.*, 94 Cal. App. 4th 587, 611 (2001), *as modified*
3 (Jan. 3, 2002). On the other hand, when a case presents "a straightforward legal issue that needs
4 little in the way of factual development," the need for administrative exhaustion is lessened. *Id.* at
5 615. Exhausting administrative remedies in order to get an agency's position on a legal matter
6 provides no assistance to the court because "[a] court does not ... defer to an agency's view when
7 deciding whether a regulation lies within the scope of the authority delegated by the Legislature
8" *Schneider v. California Coastal Com.*, 140 Cal. App. 4th 1339, 1344 (2006) (quoting
9 *Yamaha Corp. of America, v. State Bd. of Equalization*, 19 Cal. 4th 1, 11 n.4 (1998)). Instead,
10 questions of law are "within judicial, not administrative competence." *Action Apartment Ass'n.*,
11 94 Cal. App. 4th at 611; *see also Hale v. Morgan*, 22 Cal. 3d 388, 394 (1978) ("We have held that
12 a litigant may raise for the first time on appeal a pure question of law which is presented by
13 undisputed facts.").

14 Here, this Court is in the best position to decide the dispute about the proper interpretation
15 of Section 30253 of the Coastal Act. Whether that Section requires applicants to waive their rights
16 to build shoreline protective devices is a pure question of law. Until there is a definitive answer
17 to that legal question, the Commission will dogmatically require the Greenes' and other coastal
18 owners to waive their shoreline protection rights as a condition of a coastal development permit.
19 This Court should therefore review the Commission's interpretation of the Coastal Act as
20 requested by the Greenes' Second Cause of Action.

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27 included in the record. Regardless, the underlying dispute in the Greenes' Second Cause of Action
28 is about the proper interpretation of Section 30253, a question of law that this Court can and should
decide.

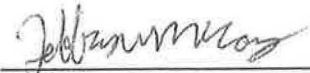
1 **CONCLUSION**

2 This Court should overrule the Commission's demurrer to the Greenes' Second Cause of
3 Action.

4
5 Dated: February 6, 2018.

PACIFIC LEGAL FOUNDATION

6
7 By:


Jeffrey Wilson McCoy
Attorney for Petitioners

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13 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
14 **FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT**
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Case No.: BS165764

**Request for Judicial Notice in Support of
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Chalfant
Trial Date: July 24, 2017
Time: 1:30 p.m.
Action Filed: May 5, 2017

1 Pursuant to Evidence Code section 452, Petitioners Mark and Bella Greene (The Greens')
2 request that this Court take judicial notice of the following documents, for the reasons set forth
3 below:

4 A. California Coastal Commission, Staff Report: Consent Calendar for Application
5 No. 5-14-0582 (October 23, 2014) (excerpts), available at
6 <https://documents.coastal.ca.gov/reports/2014/11/F8b-11-2014.pdf>

7 B. California Coastal Commission, Staff Report: Regular Calendar for Application 5-
8 15-0936 (July 31, 2015) (excluding appendix and exhibits), available at
9 <https://documents.coastal.ca.gov/reports/2015/8/th19c-8-2015.pdf>

10 C. California Coastal Commission, Staff Report: Regular Calendar for Application 5-
11 16-0100 (November 17, 2016) (excerpts), available at
12 <https://documents.coastal.ca.gov/reports/2016/12/th15b-12-2016.pdf>

13 D. California Coastal Commission, Staff Report and Recommendation on Appeal
14 Substantial Issue & De Novo for Application A-6-ENC-13-0210 (June 30, 2016) (excerpts);
15 Addendum to Coastal Commission Permit Application #A-6-ENC-13-0210 (July 12, 2016)
16 (excerpts). Available at <https://documents.coastal.ca.gov/reports/2016/7/w10a-7-2016.pdf>

17 E. California Coastal Commission, Draft Minutes of Meeting of July 13-15, 2016
18 (July 29, 2016) (excerpts), available at [https://documents.coastal.ca.gov/reports/2016/8/w18-8-
19 2016.pdf](https://documents.coastal.ca.gov/reports/2016/8/w18-8-2016.pdf)

20 F. California Coastal Commission, Draft Residential Adaptation Policy Guidance
21 (July 2017) (excerpts), available at [https://documents.coastal.ca.gov/reports/2017/8/w6h/w6h-8-
22 2017-exhibits.pdf#page=2](https://documents.coastal.ca.gov/reports/2017/8/w6h/w6h-8-2017-exhibits.pdf#page=2)

23 G. Minute Order finalizing Under Submission Ruling, *Capistrano Shores Property*
24 *LLC vs. California Coastal Commission*, 30-2015-00785032-CU-WM-CJC (Superior Court of
25 California, County of Orange August 22, 2016).

26 H. Tentative Ruling, *Lindstrom vs. California Coastal Commission*, 37-2016-
27 00026574-CU-WM-NC (Superior Court of California, County of San Diego December 21, 2017).
28

1 This Court may take judicial notice of “Official acts of the legislative, executive, and
2 judicial departments of the United States and of any state of the United States,” “Records of (1)
3 any court of this state,” and “Facts and propositions that are not reasonably subject to dispute and
4 are capable of immediate and accurate determination by resort to sources of reasonably
5 indisputable accuracy.” Evid. Code §§ 452(c), (d), (h).

6 Exhibits A through F are documents issued by Respondent California Coastal Commission,
7 including staff reports, meeting minutes, and guidance documents. Besides being “[o]fficial acts”
8 of the California Coastal Commission, the documents “are not reasonably subject to dispute and
9 are capable of immediate and accurate determination by resort to sources of reasonably
10 indisputable accuracy” because they appear on the Commission’s own website. Thus, this Court
11 should take judicial notice of Exhibits A through F. *See Banning Ranch Conservancy v. City of*
12 *Newport Beach*, 211 Cal. App. 4th 1209, 1225 n.6 (2012) (“We grant the City’s request to take
13 judicial notice of a staff report, hearing transcript, draft minutes, and notice of determination from
14 the California Coastal Commission.”).

15 Exhibits G and H are decisions from two California Superior Courts, one final order
16 (Exhibit G) and one tentative ruling (Exhibit H). This Court “may take judicial notice of the
17 existence of judicial opinions and court documents, along with the truth of the results reached”
18 *Williams v. Wraxall*, 33 Cal. App. 4th 120, 130 n.7 (1995), *as modified on denial of reh'g* (Apr.
19 12, 1995). The two decisions are being offered to support the proposition that these courts ruled
20 against the Commission on similar legal issues before this Court, in order to demonstrate the
21 Commission’s consistent position on the interpretation of Section 30253 of the Coastal Act, and
22 are not meant to imply that this Court is bound by the decisions. Thus, this Court should take
23 judicial notice of Exhibits G and H.

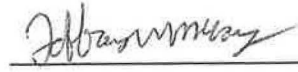
24 Finally, the requested evidence is relevant to this Court’s determination of whether or not
25 the futility exception to the doctrine of administrative exhaustion applies in this case. The
26 documents demonstrate that the Commission has consistently and unyieldingly justified its
27 imposition of shoreline protective device waiver conditions—the same type of permit condition
28

1 challenged by the Greenes in this case—on its interpretation of Section 30253. Accordingly,
2 Petitioners respectfully request that this Court take judicial notice of the above-listed documents.
3

4 Dated: February 6, 2018.

PACIFIC LEGAL FOUNDATION

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6 By:



7 Jeffrey Wilson McCoy
8 Attorney for Petitioners and Plaintiffs
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I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

Erica B. Lee
Deputy Attorney General
Andrew M. Vogel
Deputy Attorney General
Land Law Section
California Department of Justice
300 S. Spring Street
Los Angeles, CA 90013

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

IZA A. RODRIGUEZ