IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

No. B243015

SDS FAMILY TRUST,
Appellant,

v.

CALIFORNIA COASTAL COMMISSION,
Respondent.

On Appeal from the Judgment of the Superior Court of California
County of San Luis Obispo
Department 3
Case No. CV100611, Honorable Dodie Harman, Judge
(805) 781-5677

APPELLANT SDS FAMILY TRUST'S ANSWER TO RESPONDENT CALIFORNIA COASTAL COMMISSION'S PETITION FOR REHEARING

PAUL J. BEARD II, No. 210563
DAMIEN M. SCHIFF, No. 235101
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Attorneys for Appellant
SDS Family Trust

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Miscellaneous

INTRODUCTION

The California Coastal Commission's petition raises three issues, none of which merit rehearing.

First, the Commission objects to just one fact included in the Court's Opinion: The CDP-1 application, as originally filed in March 2002, was only to connect a well to the house, and it was expanded in December 2002, to include reconstruction and interior alterations and septic-system installation. The Commission makes much ado about nothing. The precise timing of when the CDP-1 application sought authorization to undertake certain categories of work—whether *seriatim* or all at once—has no bearing on whether SDS Family Trust (Family) actually performed any of that work.

Moreover, the fact, as presented by the Family and adopted by the Court in its Opinion, is the correct, record-based fact. It is based on direct and contemporaneous County records establishing that the CDP-1 application initially sought only to connect a well; all those records were before the Commission, which considered and included them in the administrative record that it created. There is simply no substantial evidence to support the Commission's alternative (and false) view of CDP-1's history.

Second, the Commission takes issue with the Court's adjudication of the merits of the easement exaction, which it complains is based on the Family's "unrebutted argument" (Pet. for Reh'g at 7) on an issue that was not

before it and for which there is no record. Of course, the Commission deliberately chose *not* to rebut the Family's repeated argument that the easement exaction is unconstitutional—an argument the Family presented to the Commission before and at the hearing, and throughout this litigation. Moreover, there *is* a record from which the Court can adjudicate the merits of the exaction: The record contains ample evidence establishing the nature and scope of the Family's proposed project and the Commission's exaction. Based on those *undisputed* facts, the Court could only conclude that "[t]here is no rational nexus, no less rough proportionality, between the work on a private residence a mile from the coast and a lateral public access easement." Opinion at 5.

Finally, the Commission argues that the Court applied the "independent judgment" test in finding that the CDP-1 application initially asked only to connect a well and in adjudicating the merits of the exaction. Not so. The Opinion identifies and applies the correct "substantial evidence" test. Importantly, it recognizes that the reviewing court is obligated to review "the whole record" to determine if an agency finding is supported by "substantial evidence"—a task that requires the court to assess the credibility and weight of conflicting evidence in the record. Opinion at 4-5 (citing, *inter alia*, Code of Civ. Proc. § 1094.5(c)). To adopt the Commission's finding regarding CDP-1's history, the Court would have to look *only* at the alleged "evidence"

supporting that finding—to the exclusion of the direct and contemporaneous County records that incontrovertibly establish the correct chronology. And to take a pass on adjudicating the merits of the exaction, the Court would have to ignore a record that supplies all the facts necessary to make a "nexus" and "rough proportionality" determination. The Court should resist the Commission's call to ignore section 1094.5(c) and the litany of precedents that plainly reject the Commission's confused understanding of the "substantial evidence" test.

The Opinion is correct in its factual recitation, in the standard of review it describes and applies, and in its conclusions. The petition raises no material issues of fact or law that justify rehearing or modification of the Opinion. The petition should be denied.

STANDARD OF REVIEW

In challenges to agency findings, section 1094.5(c) requires that the reviewing court determine whether "the findings are . . . supported by substantial evidence in the light of the whole record." Code of Civ. Proc. § 1094.5(c). As the Court's Opinion correctly states, this requires the reviewing court to assess the credibility and weight of the evidence in the entire record—for the limited purpose of evaluating the sufficiency of evidence supporting agency findings. Opinion at 4-5.

"Substantial evidence" is not just any evidence. As the California Supreme Court and this District have recognized, "substantial evidence" is "relevant evidence that a reasonable mind might accept as adequate to support a conclusion," and must be "reasonable in nature, ***credible***, and of solid value." *Ofsevit v. Trustees of Cal. State University & Colleges*, 21 Cal. 3d 763, 773 n.9 (1978) (emphasis added); *Young v. Gannon*, 97 Cal. App. 4th 209, 225 (2002) (same). Every other District is in accord. *Ogundare v. Dep't of Industrial Relations*, 214 Cal. App. 4th 822, 830 (5th Dist. 2013); *TG Oceanside, L.P. v. City of Oceanside*, 156 Cal. App. 4th 1355, 1371 (4th Dist. 2007); *JKH Enterprises, Inc. v. Dep't of Industrial Relations*, 142 Cal. App. 4th 1046, 1057 (6th Dist. 2006); *Cal. Youth Authority v. State Pers. Bd.*, 104 Cal. App. 4th 575, 584-85 (3d Dist. 2002); *Desmond v. Cnty. of Contra Costa*, 21 Cal. App. 4th 330, 335 (1st Dist. 1993).

If a court must assess whether evidence is "substantial" enough to support an agency finding (Code of Civ. Proc. § 1094.5(c)), it necessarily must determine whether such evidence is, among other things, "credible." There is one narrow exception to this rule, applicable just to witness testimony and from which the Commission does not benefit in this case. Under the Administrative Adjudication Bill of Rights, courts will give "great weight" to an agency's determination that a witness is not credible, but only if the agency "identif[ies] any specific evidence of the observed demeanor, manner, or

attitude of the witness that supports the determination." Gov't Code § 11425.50(b); *id.* §§ 11410.20, 11425.10(b). At the hearing, the Commission made no credibility determinations, let alone findings about witness demeanor, manner, or attitude. Consequently, there is nothing for the Court to give "great weight" to.

In addition to assessing the credibility of evidence, the reviewing court must engage in some weighing of the evidence in order to carry out its duty under section 1094.5(c). Weighing the evidence is inherent in the requirement that the court review "the whole record," including evidence that detracts from the agency's finding. Code of Civ. Proc. § 1094.5(c). As this District held in *La Costa Beach Homeowners' Ass'n v. Cal. Coastal Comm'n*, 101 Cal. App. 4th 804 (2002), "[t]he court must consider all relevant evidence, including evidence detracting from the decision, ***a task that involves some weighing to fairly estimate the worth of the evidence***." *Id.* at 814 (emphasis added) (internal citation and quotation marks omitted); *see also Sierra Club v. Cal. Coastal Comm'n*, 19 Cal. App. 4th 547, 557 (1993) (same); *Lucas Valley Homeowners Ass'n v. Cnty. of Marin*, 233 Cal. App. 3d 130, 142 (1991) (same). Again, it is section 1094.5(c)'s mandate that the reviewing court look at *all* the evidence in the record—both for and against an agency finding—that requires the court to weigh any conflicting evidence and determine whether there is substantial evidence to support the finding.

Against the backdrop of section 1094.5's clear mandate and the litany of precedents applying it, the Commission counters with three authorities. But on close analysis, none of them actually refutes the well-established principle that the reviewing court in a section 1094.5 case must assess the credibility and weight of the evidence in the entire record.

First, the Commission cites *Pescosolido v. Smithe*, 142 Cal. App. 3d 964 (1983), for the proposition that the agency is "the sole judge of the credibility of the witnesses," and "may draw or may refuse to draw inferences reasonably deducible from the evidence." Pet. for Reh'g at 9 (quoting *Pescosolido*, 142 Cal. App. at 970-71). *Pescosolido* perfunctorily draws this language from *Johnson v. Pac. Indemn. Co.*, 242 Cal. App. 2d 878 (1966)—a 1966 decision of the Fourth District that discusses the standard of review on appeal from a trial court judgment in an insurance case, not the standard of review in section 1094.5 actions. The *Pescosolido* court failed to consider binding precedent at the time, including the California Supreme Court's discussion in *Ofsevit*, 21 Cal. 3d at 773 n.9, defining "substantial evidence" as evidence that, *inter alia*, must be "credible." Moreover, *Pescosolido* pre-dates the Legislature's enactment of the Administrative Adjudication Bill of Rights, which makes clear that a court should give weight to an agency's credibility determinations only if the agency "identif[ies] any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the

determination." Gov't Code § 11425.50(b); *id.* §§ 11410.20, 11425.10(b). Here, the Commission made no such credibility determinations, so there is nothing for the Court to give weight to.

Second, the Commission cites *West Chandler Boulevard Neighborhood Ass'n v. City of Los Angeles*, 198 Cal. App. 4th 1506 (2011), for the proposition that the discretion to determine facts is vested in the Commission. The Family agrees: The agency is the fact-finder, and it is not the task of the reviewing court to duplicate that fact-finding mission. But that does not mean the court has *no* role. The court can—and must—ensure that agency findings are supported by substantial evidence, in light of the whole record. C.C.P. § 1094.5(c). And the only way for the court to carry out that duty is to assess the relative credibility and weight of conflicting evidence pertaining to those findings. Nothing in *West Chandler* contradicts this basic principle of administrative law.

Finally, the Commission cites *Bedoe v. Cnty. of San Diego*, 215 Cal. App. 4th 56 (2013), for the proposition that the court does "not 'reweigh the evidence but indulge[s] in all presumptions and resolve[s] all conflicts in favor of the agency's decision.'" Pet. for Reh'g at 9 (quoting *Bedoe*, 215 Cal. App. 4th at 61)). *Bedoe* is not a section 1094.5 case and is therefore of limited relevance. Moreover, the quoted language from *Bedoe* purports to be based on another case—*McAllister v. Cal. Coastal Comm'n*, 169 Cal. App. 4th 912

(2008), which *is* a section 1094.5 decision. Nothing in *McAllister* supports the language from *Bedoe*. *McAllister* simply restates the well-settled principles that, in section 1094.5 cases, the reviewing court must "examine[] the whole record and consider[] all relevant evidence, including evidence that detracts from the decision," and must engage in "some weighing to fairly estimate the worth of the evidence." *Id.* at 921 (internal citation and quotation marks omitted). Unfortunately, though it cites *McAllister*, *Bedoe* fails to capture the important distinction between weighing conflicting evidence to arrive at a finding (the agency's prerogative) and weighing conflicting evidence to assess whether a finding is sufficiently supported (the reviewing court's prerogative). *Bedoe* glosses over that key distinction and suggests that courts may not reweigh the evidence *for any purpose*—an interpretation that would do violence to section 1094.5(c)'s mandate that the court review the *whole* record for *substantial* evidence. *Bedoe* should not be used to obliterate the distinction, mandated by section 1094.5(c) and recognized by a long line of precedents from various Districts of the Court of Appeal.

The Court's Opinion identifies the correct standard for reviewing the Commission's findings, and the Commission's petition for rehearing identifies no reason to revisit those parts of the Opinion that reference and apply it.

ARGUMENT

I

THE COURT SHOULD NOT REVISIT OR MODIFY THE OPINION'S FACTUAL DESCRIPTION OF CDP-1'S HISTORY

A. The Date of the Family's CDP-1 Application To Reconstruct and Remodel Its Home Is Not Dispositive of Any Issue in This Appeal

For much of the administrative and litigation proceedings, the parties described the Family's CDP-1 application as if it initially sought authorization to perform three categories of work: (1) connect an existing well to the house, (2) reconstruct the outside of the house to accommodate a new bathroom and perform interior alterations, and (3) install a septic-system. These descriptions—made many years after the application was filed—mischaracterize the direct and contemporaneous evidence of the CDP-1 application's actual history, as reflected in the administrative record that the Commission considered and compiled. The CDP-1 application, filed in March 2002, initially sought only to connect the existing well to the house. 1 AR 92, 100; 4 AR 514. Several months later, in December of that year, the Family expanded the application to include the reconstruction and remodel work, and the septic-system installation. 4 AR 514.

Based on this conclusive evidence in the record, the Family clarified in its Reply Brief that its CDP-1 application as filed in March 2002 was only for

the well connection, with the other activities being added to the application in December.[1] *See* Reply Brief at 3. And the Court's Opinion reflects that fact. Opinion at 2. The Commission does not dispute the fact's veracity, but nevertheless wants the Court to rehear the case and introduce into its Opinion the obvious misstatement that the CDP-1 application as originally filed sought authorization for all activities.

The Commission's rehearing request should be denied because a different chronology for the CDP-1 application would not alter the Court's decision anyway. Simply put, the fact about *when* the Family asked to reconstruct and remodel the house is not dispositive of the question of *whether* it performed any of that work. As the Opinion correctly concludes, the Family undertook none of the work for which it applied in its CDP-1 application. Opinion at 2, 6-7. Significantly, the record contains no evidence that the Family reconstructed the exterior of the house to accommodate a new

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[1] Contrary to the Commission's claim (Pet. for Reh'g at 6), the Family's point that the CDP-1 application as originally filed was only for a well connection is not a new "issue" or "argument" that the Family was precluded from including in its Reply Brief; it is merely a factual clarification established by evidence before the Commission, in the record that *it* created and considered. The issue of whether the Family undertook CDP-1 work remains the same, and so does the Family's argument—it did not undertake that work. Even if the clarification *were* a new issue or argument, the Commission forfeited its right to complain, when it failed to timely move to strike it from the Family's Reply Brief—as the respondent (unsuccessfully) did in the only case that the Commission cites. *Am. Indian Model Schools v. Oakland Unified Sch. Dist.*, 227 Cal. App. 4th 258, 275-76 (2014).

bathroom, performed interior alterations, connected the well, or installed the septic system. Instead, the Family undertook *only* roof-and-deck repairs pursuant to County-issued, over-the-counter permits whose legality and propriety have never been doubted or contested. Opinion at 6-7. And these repairs did not require a CDP. San Luis Obispo County Code § 23.03.040-(4). It is *these* facts—not the fact that the CDP-1 application initially asked only to connect a well—that more than adequately support the conclusion that the Family took none of CDP-1's benefits.

In sum, the Court's Opinion does not turn on whether the Family applied for the reconstruction and remodel work in March, December, or any other time in between. The point is that the *repairs*—the only work the Family ever undertook—were not factually or legally a part of the then-pending CDP-1 application. The repairs constituted a discrete activity that was lawfully exempt from the CDP application process—as established, not just by the nature and scope of the repairs, but by the County's issuance of over-the-counter permits that were never revoked, modified, or otherwise challenged.

The Commission claims that the Family's repairs were part and parcel of its CDP-1 application (even if the application originally sought only to connect a well). Pet. for Reh'g at 6-7. The Commission gives two reasons: (1) a County inspector allegedly determined that a CDP was necessary for the

entirety of the work on the house, including the repairs,[2] and (2) "it is a bit obvious," since the purpose of the roof-and-deck repairs, and the reconstruction and remodel work, is the same: to make the house habitable. *Id.* at 6. The Commission's argument is flawed.

The question that the Commission's argument raises is whether the record as a whole contains substantial evidence to support the finding that the repairs were part and parcel of the CDP-1 application. The answer unequivocally is "no": As a factual matter, the CDP-1 application *never* included a request for authorization to undertake roof-and-deck repairs and dry-rot removal. Instead, the repairs were included in the Family's application for over-the-counter permits. The Commission does not—and cannot—contest this fact.

Second, the County ratified the Family's view of the repairs and treated them as work that was independent of the CDP-1 application. That is why the County issued over-the-counter permits that specifically authorized the repairs, while the CDP-1 application was pending before it. 5 AR 802-05. How could the repairs have been authorized by over-the-counter permits, if they were part and parcel of the Family's CDP-1 application? They could not have. All the

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[2] The Commission makes the bizarre claim that the Family never challenged this determination when it appeared before the Commission." Pet. for Reh'g at 7. Not so. The Family repeatedly objected to any suggestion that the only work they had performed on the property—the repairs—required a CDP. 5 AR 767, 877-85.

evidence in the record points to the repairs being—as a *factual matter*—over-the-counter permit work, not CDP-1 work.

Third, the repairs and the work applied for in the CDP-1 application were distinct kinds of activities. They certainly shared a common purpose—*i.e.*, to allow the Family to use its home—but the similarities begin and end there. Making repairs to a roof and deck, and removing dry rot, constitute preventative measures necessary to avert deterioration of the house. Repairs of this kind cannot await the years it takes for an agency to consider and approve the more closely scrutinized CDP needed for major development activities, like reconstruction of a house and major utility work.[3] It is for this reason that repairs to existing structures within their existing footprints do not require a CDP, but only an over-the-counter permit. By contrast, reconstructing a house to accommodate a new bathroom, making interior alterations, connecting a domestic well, and installing a septic system are more significant development activities designed to enhance the functionality of the structure—not to address a pressing need to salvage it. Thus, there are important factual distinctions, both in purpose and in urgency, between the Family's repairs and the CDP-1 work.

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[3] The County took two years to approve the Family's CDP-1 application. 1 AR 154.

The record is unequivocal: There is no evidence (let alone no *substantial* evidence) to support the finding that the repairs were part and parcel of the CDP-1 application. Perhaps the Commission's argument is that the over-the-counter permits were not sufficient to authorize the repairs, and that the Family also needed a CDP—the very suggestion allegedly made by the County inspector who asked the Family, as it was wrapping up the repairs, to refrain from further work until the County approved CDP-1. This is a purely legal contention about what the law required of the Family—not a factual assertion about the nature and scope of the repairs and the CDP-1 work (and whether they were inextricably related). And it is a contention that is contrary to the law. The County Code explicitly exempted the Family from having to obtain a CDP for repairs, whatever the ultimate purpose of those repairs. County Code § 23.03.040-(4). And no law obligated the Family to pursue *two separate kinds of permit* for the repairs (*i.e.*, over-the-counter permits *and* a CDP) when the whole legal basis for over-the-counter permitting is that the activity is exempt from the CDP requirement.

In conclusion, the Family applied for over-the-counter permits to perform minor repairs on the house. The County issued those permits in June 2002. 5 AR 802-05. In reliance on those permits, and without any indication that additional permits were necessary or that an unlawful easement exaction might be imposed two years later, the Family immediately set out to do the

repairs and completed them in January 2003. The Commission would bind the Family to an easement exaction imposed in one permit (CDP-1), on the basis of work performed nearly two years earlier in an entirely different set of permits (the over-the-counter permits). Neither substantial evidence in the record nor the law countenances such a grave injustice.

B. The Court's Accurate Description of CDP-1's History Should Not Be Replaced with the Commission's False Account, Which Lacks Substantial Evidence in the Record As a Whole

The Court's account of CDP-1's history constitutes the correct, record-based statement of the facts. The administrative record contains direct and contemporaneous evidence of the chronology of events surrounding the Family's CDP-1 application and the discrete repair work performed under over-the-counter permits. There is no reason to modify it.

First, the Court will find in the record the Family's CDP-1 application as initially filed with the County in March 2002.[4] 1 AR 92, 100; 4 AR 514. The application requests authorization only to connect a domestic well to the house (*id.*)—a fact corroborated (as if it were necessary) by a number of contemporaneous records of the County. 1 AR 102-07.

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[4] The Commission states the CDP-1 application was filed in May 2002. But the application was actually filed in March of that year, as the County's official records amply demonstrate. 1 AR 92 (application signed on March 1, 2002); 1 AR 101 (March 8, 2002 County record stating that CDP-1 application for well connection was "recently filed"). The discrepancy is not dispositive of any issue in this appeal.

Second, the record contains direct and contemporaneous evidence of the precise timing, nature and scope of the over-the-counter permits that authorized the Family's roof-and-deck repairs and dry-rot removal. The Court will find in the record the County's official documents establishing the facts that it authorized the repairs and dry-rot removal "over the counter" in June 2002, and that the work was completed in January 2003, while the CDP-1 application was pending. 5 AR 802-05.

Finally, the record contains direct and contemporaneous evidence of the precise timing, nature and scope of additional work that the Family added to its then-pending CDP-1 application in December 2002. The Court will find in the record the Family's December 20, 2002, request to the County to add items to its CDP-1 application:

> We are submitting information in regards to obtaining an additional building permit to rehabilitate existing residence on property. We want to replace existing waste disposal system (septic tank with leach lines), rebuild original structure on back side of residence (supported by photos including on building plans) to house a bathroom, and rehabilitate the interior of the residence. We want to add these items to an existing application of a minor use permit for a domestic well dated May 7, 2002 [sic].

4 AR 514.

This letter—which conclusively establishes the chronology of events surrounding the Family's CDP-1 application—is stamped "RECEIVED August 04 2006 CALIFORNIA COASTAL COMMISSION." *Id.* In other

words, as early as 2006—four years before it rendered its permit decision—the Commission had before it direct evidence that the Family applied for all of the major bathroom-construction and interior-remodel work in December 2002.

The Commission does not try to contest the existence or veracity of all this evidence in the record, or the conclusion that necessarily follows from it. Instead, the Commission urges the Court to deliberately adopt a false account of CDP-1's history. In support of its argument, it offers two record citations. First, the Commission cites to a print-out from the County's permit database for CDP-1. The "Description" line of the print-out describes CDP-1 as a permit to "RESTORE SFR AND CONNECT TO AG WELL." 5 AR 799. But the print-out is silent about when the significant house reconstruction and remodel work was added to the Family's CDP-1 application; at most, it simply establishes that the final CDP-1 application sought authorization for that work (and the well connection and septic-system installation). The Commission conveniently omits reference to a revealing print-out from the County's permit database just a few pages later that contains a December 20, 2002, entry entitled "Rev[ised] Proj. Description." 5 AR 801. The entry states: "Letter from contractor. Project includes SFR restoration and hook-up to ag well." *Id.* In other words, as the County's contemporaneous record shows, the project was revised on December 20, 2002, to include the reconstruction and remodel work.

Second, the Commission cites the "Project History" section of the County's CDP-1 decision rendered in March 2004. The section at most describes the final CDP-1 application as amended, while observing (not disapprovingly) that some of the work within the footprint of the house (*i.e.*, the roof-and-deck repairs and dry-rot removal) "already occurred under separately issued building permits." 1 AR 155. The section says nothing about the application history for CDP-1, let alone contradict the fact that the Family applied for the reconstruction and remodel work in December 2002.

Finally, the Commission cites to prior statements of the Family's representatives, who unintentionally omitted this chronological detail. The Commission seizes on those statements and declares them "substantial evidence" that the CDP-1 application, as initially filed in March 2002, included the reconstruction and remodel work. But the inadvertent omission of the fact that CDP-1 was amended—particularly where the omission was made so many years after the fact—does not rise to the level of substantial evidence, when considered alongside the contemporaneous evidence in the record conclusively establishing the correct chronology. Put differently, no reasonable person reviewing the entire record could possibly find, as the Commission did, that the CDP-1 application as initially filed in March 2002 was in its final form. *California Youth*, 104 Cal. App. 4th at 584-85 ("Substantial evidence" is not just any evidence; it must "be reasonable,

credible, and of solid value."); *La Costa*, 101 Cal. App. 4th at 814 (The Court "must consider all relevant evidence, including evidence detracting from the decision, a task which involves some weighing to fairly estimate the worth of the evidence.").

The Commission's finding that the CDP-1 application as initially filed included the request to reconstruct and remodel the home is not supported by substantial evidence in the record. Even worse, the finding is incontrovertibly wrong. The Court should resist the Commission's call to deliberately incorporate the Commission's finding and instead preserve the Opinion as written.

C. The Court's Description of CDP-1's History Is Drawn from Evidence That Was Before the Commission and That the Commission Included When Compiling the Administrative Record

The Commission contends that the Court relies on "new facts" that were "not before the Commission" at the hearing on the Family's permit appeal. Pet. for Reh'g at 1, 4. By "facts," the Commission really means just one fact—namely, that the CDP-1 application as originally filed sought only to connect a well (and only later included a request to reconstruct and remodel the house). *Id.* at 4-5. That fact was squarely before the Commission.

First, all the evidence establishing CDP-1's chronology is in the administrative record that the Commission itself compiled and certified as the "official record" of the "proceedings before [it]." 5 AR 1178. Evidence in the

administrative record is, by definition, evidence that was before the agency when it rendered its decision. Code of Civ. Proc. § 1094.6(c) (requiring the agency to supply "[t]he complete record of the proceedings"). This is why section 1094.5 mandates that the Court assess agency findings "in the light of the whole record"—not just those snippets of the record favored by the agency. *Id.* § 1094.5(c); *California Youth*, 104 Cal. App. 4th at 579 (Section 1094.5 requires courts to consider "evidence that fairly detracts from the evidence supporting the agency's decision.").

Second, the Commission's allegation that the correct CDP-1 history was not before it flies in the face of its own permit decision. That decision identifies the "San Luis Obispo County CDP files for CDPs DRC2004-00125 and D010354P" as the "File Documents" that the Commission specifically relied upon in making its permit decision. 4 AR 623. The file for CDP D010354P comprises those County records pertaining to CDP-1, including the Family's December 2002 request to expand its CDP-1 application to include the reconstruction and remodel work. *See, e.g.*, Vols. I-IV of AR (County Records); 1 AR 92 (original CDP-1 application). The County's records related to CDP-1, the over-the-counter permits for the roof and deck repairs, and other permits, are all relied upon and cited throughout the Commission's permit decision. *See, e.g.*, 4 AR at 629-32 nn. 4, 7, 9, 12. It is disingenuous at best for the Commission to claim that it was ignorant of this evidence.

II

THE RECORD IS MORE THAN ADEQUATE TO ADJUDICATE THE MERITS OF THE EASEMENT EXACTION

The Commission takes the Court to task for adjudicating the merits of the easement exaction "based . . . solely on SDS's unrebutted argument." Pet. for Reh'g at 7. According to a new argument presented for the first time in its petition for rehearing, "there is nothing in the record before the Commission . . . that would allow [the Court] to consider whether the easement was a taking." Pet. for Reh'g at 8. Remarkably, the Commission proclaims that the "issue [of the exaction's constitutionality] was not before [it]," and readily admits that it "never addressed this issue when the CDP-2 matter was before it" or "on judicial review." *Id.* at 7. The Commission's argument is without merit.

First, the issue of the exaction's constitutionality was squarely before the Commission. The Family brought the issue to the Commission's attention both in a letter prior to the hearing and in testimony at the hearing itself. 5 AR 883-84 (Family's letter to Commission prior to hearing raising unconstitutionality of exaction); 5 AR 985 (Family's testimony at hearing raising unconstitutionality of exaction.). The Commission and its staff were fully aware of the issue, but simply opted to ignore it.

Second, the record created and compiled by the Commission itself contains all the information necessary to adjudicate the exaction's constitutionality. The question is whether "there is a 'nexus' and 'rough proportionality' between the government's demand [for an easement] and the effects of the proposed land use." *Koontz v. St. Johns River Mgmt. Dist.*, 133 S. Ct. 2586, 2591 (2013) (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)). The facts necessary to decide this question concern the nature and impact of the Family's project, and the nature and scope of the easement demanded. The record provides ample evidence of what the Family's project entails, and establishes that all the work will be performed on existing footprints and will not interfere with public resources in any way. 4 AR 514, 799; 1 AR 408-09. Thus, the only possible conclusion is that the exaction has no nexus or proportionality to the project's impacts. This is precisely why the County walked back its planner's initial decision to impose the easement exaction—it simply could not be constitutionally justified. 1 AR 408-09 ("[T]here will be no nexus between the proposed improvements and the requirement for coastal access.").

Third, as the Commission concedes, it chose never to address the question of the exaction's constitutionality. Its permit decision does not address it, and it never once attempted to defend it on the merits in this litigation, instead relying exclusively on the idea that it was merely enforcing

an existing exaction. Indeed, even in its petition for rehearing, the Commission makes no attempt at all to justify the exaction *on the merits*. The reason is there is no way to defend the constitutionality of the exaction, and the Commission knows it.

In a desperate struggle to salvage the exaction, the Commission offers the new argument that there is an "inadequate record" for resolving the issue. But as explained above, the record has all the facts and evidence the Court needs to adjudicate the exaction's legality. And, in any event, the Commission's new argument is too little, too late. New arguments cannot be asserted for the first time in a petition for rehearing. *Reynolds v. Bement*, 36 Cal. 4th 1075, 1092 (2005); *Alameda Cnty. Mgmt. Employees Ass'n v. Superior Ct.*, 195 Cal. App. 4th 325, 338 n.10 (2011) ("[A]rguments first raised on rehearing are usually forfeited."); *Midland Pac. Bldg. Corp. v. King*, 157 Cal. App. 4th 264, 276 (2007) ("It is much too late to raise an issue for the first time in a petition for rehearing.").

III

THE COURT CORRECTLY APPLIED THE STANDARD OF REVIEW

In passing, and without much development, the Commission argues the Court misapplied the standard of review. Pet. for Reh'g at 9. It claims that the Court substituted its judgment for the Commission's by (1) finding that the initial CPD-1 application was only for a well connection, and (2) concluding

that the easement exaction, if enforced, would be unconstitutional. The Commission is wrong on both counts.

First, the fact that the CDP-1 application was initially only for a well connection (and was only later amended to include the reconstruction and remodel work) was before the Commission and is in the record it compiled. Under the "substantial evidence" standard, that evidence—comprising direct and contemporaneous official documents of the County—must be weighed against the imprecise testimony of the Family's representatives made years after the Family filed its application. In light of the record as a whole, no reasonable person considering all the evidence could conclude that the application initially sought only a well connection, and was not later amended to include the reconstruction and remodel work. After all, the record that the Commission compiled includes ***both*** the March 2002 CDP-1 application ***and*** the December 2002 request to the County to add reconstruction and remodel of the home. The only possible conclusion is the one made in the Opinion: The CDP-1 application as originally filed was only for a well connection.

Second, the Court did not adjudicate the merits of the easement exaction based on evidence outside the record or based on no evidence at all. Quite the country, the Court's holding rests entirely on facts in the record about the nature and scope of the Family's project, and the location and scope of the easement demanded by the Commission. Opinion at 5. The fact that the

Commission deliberately refused to make findings about the exaction's constitutionality does not mean that there was no record on which such findings could be made, and that the Court therefore substituted its judgment for the Commission's; indeed, it makes no sense to speak of the Court substituting its judgment for the Commission's, when the Commission deliberately took a pass on making any judgment about the constitutional merits of the easement exaction. But even if the Commission had made findings in an attempt to justify the exaction, no evidence exists in the record that could have supported those findings: All the facts about the project and the easement demanded by the Commission establish, beyond any dispute, that no nexus or rough proportionality exists between the two.

CONCLUSION

For these reasons, the Commission's petition should be denied.

DATED: November 19, 2014.

Respectfully submitted,

PAUL J. BEARD II
DAMIEN M. SCHIFF

By 
PAUL J. BEARD II

Attorneys for Appellant
SDS Family Trust

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPELLANT SDS FAMILY TRUST'S ANSWER TO CALIFORNIA COASTAL COMMISSION'S PETITION FOR REHEARING is proportionately spaced, has a typeface of 13 points or more, and contains 5,874 words.

DATED: November 19, 2012.

PAUL J. BEARD II

DECLARATION OF SERVICE BY MAIL

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.

On November 19, 2014, true copies of APPELLANT SDS FAMILY TRUST'S ANSWER TO CALIFORNIA COASTAL COMMISSION'S PETITION FOR REHEARING were placed in envelopes addressed to:

Christina Arndt
Office of the Attorney General
300 South Spring Street, Suite 1702
Los Angeles, California 90013

Honorable Dodie A. Harman
Superior Court of California
San Luis Obispo County
1035 Palm Street, Room 385
San Luis Obispo, California 93408

which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I further certify that a electronic copy was efiled on the California Court of Appeal, Second Appellate District for service on the California Supreme Court.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 19th day of November, 2014, at Sacramento, California.

PAMELA SPRING