IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S221980

BARBARA LYNCH and THOMAS FRICK,
Petitioners,

v.

CALIFORNIA COASTAL COMMISSION,
Respondent.

After an Opinion by the Court of Appeal,
Fourth Appellate District, Division One
(Case No. D064120)

On Appeal from the Superior Court of San Diego County
(Case No. 37-2011-00058666-CU-WM-NC,
Honorable Earl Maas III, Judge)

PETITIONERS' OPENING BRIEF

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ISSUES PRESENTED IN PETITION

1. If a property owner has satisfied all the statutory requirements for challenging an unlawful permit condition, including exhausting administrative remedies and filing a timely and valid challenge to the condition in court, has the owner thereby preserved her right to judicial review of that challenge?

2. The Coastal Act, as interpreted by the Sixth District Court of Appeal in *Ocean Harbor House Homeowners Association v. California Coastal Commission*, 163 Cal. App. 4th 215, 242 (2008), mandates issuance of a permit for a protective device necessary to safeguard one's property against erosion, subject only to conditions that mitigate identified impacts on public resources that the structure causes. *See* Pub. Res. Code § 30235. In addition, the Federal unconstitutional-conditions doctrine requires that permit conditions burdening a property right or interest bear an "essential nexus" to—*i.e.*, mitigate—identified impacts on public resources caused by the proposed use of the property (*e.g.*, proposed protection of the property via installation of a protective device). *See Koontz v. St. Johns River Water Management Dist.*, 133 S. Ct. 2586 (2013); *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987).

Do the Coastal Act and the Federal unconstitutional-conditions doctrine therefore prohibit a permitting agency from imposing conditions that are designed, not to mitigate identified impacts of a protective device, but to expand regulatory authority for its own sake?

3. Does a property owner's statutory right to replace a structure destroyed by a disaster without a permit (Pub. Res. Code § 30610(g)) preempt local policies that purport to strip her of that right?

INTRODUCTION

At the outset, this case concerns the right to judicial review of permitting decisions of the California Coastal Commission. The Petitioners, Barbara Lynch and Thomas Frick (the "Homeowners"), sought approval for a Coastal Development Permit (CDP) to replace an aging seawall that is necessary to protect their homes. The permit was ultimately granted, but with two conditions. One of the conditions provided that the seawall permit would expire in 20 years, and at that future time the Homeowners would need to apply for another approval, *or remove the protective seawall.* The second condition required that the Homeowners delete from the plans any re-construction of a shared stairway (the only route down the bluff from the homes to the beach), even though the stairway was partially destroyed by heavy rains that caused collapse of an upper portion of the bluff.

The Homeowners formally objected to the conditions in writing and orally at the hearing on their permit application. Having met the requirements of an aggrieved party under Public Resources Code § 30801, the Homeowners pursued their right to judicial review by timely filing a petition for writ of mandate in accordance with Section 1094.5 of the Code of Civil Procedure.

Despite following all legal requirements, and exhausting all administrative remedies, the Court of Appeal ruled that the Homeowners waived their right to judicial review by complying with the Commission's additional requirement that the Homeowners record an irrevocable "deed restriction." By recording the deed restriction, potential future purchasers of property are informed of the Commission's decision and its conditions.

The trial court found there was no waiver of the right to challenge the conditions because the Homeowners "neither specifically agreed to the conditions nor failed to challenge their validity." Joint Appendix (JA) 101 (minute order, 12/21/2012). The Court of Appeal reversed, over a dissent, holding that unless the Homeowners refuse to comply with the conditions, including refusing to sign the deed restriction, they cannot proceed to seek judicial review. However the facts and the case law do not support the Court of Appeal's conclusion. For reasons set forth below, and as ruled by the trial court and supported by the dissent below, this Court should conclude there has been no waiver of the right to judicial review. Accordingly, the Court should then proceed to the merits of the lawfulness of the two conditions, as presented in Issues 2 and 3 set forth above.

STATEMENT OF THE CASE

A. General Factual Background

The Homeowners are neighbors, each owning an adjacent residential parcel located atop an 80-foot oceanfront bluff in Encinitas, California. Administrative Record (AR) 61. The properties consist of three distinct areas, specifically, (1) the blufftop area which is developed with their respective homes, (2) the steep coastal bluff that for over 40 years has been improved with a shared stairway down to the beach, and (3) the sandy beach area from the toe of the bluff to the mean high-tide line. AR 1660. The shared stairway connects the homes to the beach area below.

The stairs were built prior to enactment of the Coastal Zone Conservation Act of 1972. AR 380, 2328. In 1973, the stairway partially collapsed and was reconstructed under a permit issued by County of San Diego. AR 380-84. The stairs have been regularly used and maintained and provide the only direct access to the beach portion of the property. JA 201. Homeowner Barbara Lynch is now over 80 years old and cannot physically go to the nearest public access stairway half mile away and walk to her own property. AR 2275. Without the stairs, beach access to the Homeowners is effectively denied. AR 2329.

Since 1986, the properties have been protected by a 100-foot wide beach-level seawall, consisting of wood poles embedded in the sand and

cabled to the bluff. The properties were further protected by a mid-bluff wall consisting of railroad ties and supporting timber poles and secured to the bluff to retain the earth material from sloughing off. In an after-the-fact permitting application, the Commission in 1989 determined that the seawall system and stairway were consistent with the Coastal Act and issued a CDP authorizing their continued use. That permit had no expiration date. AR 2-22, 1690.

B. The City Approves the New Seawall and Repair of the Stairway

In 2003, the Homeowners applied to the City of Encinitas to replace the aging wooden seawall with a state-of-the-art, textured concrete seawall system that included structural tiebacks and mid-bluff geogrid protection. AR 38-39, 870. In order to build the seawall, the lower portion of the stairway would have to be temporarily removed.

After considerable delays, the City in 2009 ultimately voted unanimously to approve the application. The City found the project was consistent with its Local Coastal Program (LCP) as well as the policies of its General Plan and Municipal Code. AR 1844. As to the stairway, the City's Resolution states:

> A stairway currently exists on the bluff face and will **remain**. However, portions of the stairwell most adjacent to the existing mid-bluff retaining wall and lower seawall will be removed as necessary to allow for the installation of the proposed improvements and will be replaced to its original configuration

> with the same materials, dimensions, and colors once the construction of the shotcrete walls are completed.

AR 1849 (emphasis added).

C. The Commission Reviews the Permit Application

After securing approval from the City of Encinitas, the Homeowners' project still could not be built. The application was technically an amendment to the 1989 seawall permit issued by the Commission, and therefore the Homeowners also needed Commission approval.[1] Unfortunately, while the application was pending before the Commission, a series of strong winter storms hit Southern California, depositing significant rainfall and causing major property damage along the coast. AR 2347-48. President Obama declared San Diego County an emergency disaster relief area. JA at 130-32. On December 24, 2010, in the immediate aftermath of heavy rainfall, the Homeowners' bluff suffered a significant collapse in the area above and through the mid-bluff protection system. AR 1579, 2255 (photos). The result was to destroy much of the existing mid-bluff protection and the lower portion of the stairway. AR 408-09, 421-31, 1690.

[1] The City of Encinitas has a certified LCP and the project is within the City's permit jurisdiction. However, because the project is an amendment to a previously approved CDP issued by the Commission, the Commission also has jurisdiction over the project and in its review applies the certified Encinitas LCP and the public access and recreation policies of Chapter 3 of the Coastal Act. AR 1680.

After several delays and two prior staff reports, the Commission staff published its third and final staff report on July 11, 2011. Staff Report No. 3 discussed the adverse impacts of seawalls as generally being (1) physical occupation of beach area, (2) long-term beach loss, and (3) entrapment of bluff sand. AR 1702. With regard to the specific adverse impacts of the Homeowners' project, the Commission found that general impacts (1) and (2) were not present because the new seawall "expos[es] approximately 425 sq. ft. of additional beach area." AR 1715. Additional beach area would open up because the existing seawall was located **inland** of the mean high-tide line (on the Homeowners' private property) and the new seawall would be located even **further inland**. The Commission explained the importance of this fact as follows:

> In cases where the seawall is located on the public beach, appropriate mitigation could be installation of public access/recreational improvements and/or creation of additional public beach area in close proximity to the impacted beach area.
>
> . . . .
>
> However, in this particular case, the proposed seawall will not be located directly on public beach, but rather will be located upland of the mean high tide. In fact, the proposed project places the seawall as far as approximately eight ft. landward of the originally approved seawall, which creates the potential for additional beach to become available to the public and is a significant reason for approving the proposed 100 ft. wall that includes protecting 1520 Neptune Avenue, rather than

> only approving the smaller 50 linear ft. portion below 1500 Neptune Avenue.

AR 1715.

This is in contrast with most seawall applications in that area. As acknowledged by the Commission, "Unlike the subject application request, most if not all of the seawall applications approved by the Commission in Encinitas and nearby Solana Beach have been located on the public beach, **seaward** of the mean high tide line." AR 1714 (emphasis added). Accordingly, there is no identified adverse impact on public access or recreational uses resulting from the Homeowners' project.

> According to the Commission's Technical Services Division, the seawall will not directly impede the public access or recreational uses typically considered by the Commission over its 20 year authorization period because there will be no direct encroachment of the proposed development onto public beach area.

AR 1715-16.

The general impact of sand loss resulting from seawalls is addressed through a sand loss mitigation fee which the Homeowners do not challenge. Similarly, any adverse visual impacts of the seawall are also mitigated, especially as compared to the old seawall. As explained by the Commission:

> One of the principal reasons for approving the entire 100 ft. seawall is the improved visual character of the wall . . . . To mitigate the visual impacts of the proposed seawall, the applicants propose to color and texture the seawall. The visual treatment proposed is similar to visual treatment approved by the Commission in recent years . . . . Today, seawalls typically

> involve sculpted and colored concrete that upon completion more closely mimic the natural surface of the lower bluff face.

AR 1721.

As the Commission admits, the state-of-the-art seawall "has been designed and conditioned to mitigate its impact on coastal resources such as scenic quality, geologic concerns, and shoreline sand supply." AR 1679 (see also Dissenting slip op. at 15).

D. The Commission Imposes the Unlawful Conditions

Despite these findings and mitigation measures, the Commission approved the seawall project with Special Conditions 2 and 3 which require that the permit **expire in 20 years**. AR 1682-83. The basis for the condition was explained in the staff report:

> To ensure that this project does not prejudice **future shoreline planning options**, including with respect to **changing and uncertain circumstances that may ultimately change policy** and other coastal development decisions (including not only climate change and sea level rise, but also due to **legislative change, judicial determinations, etc.**), staff recommends that this approval be conditioned for a twenty-year period.

AR 1709-10 (emphasis added).

In short, the Commission is asserting broad power to apply **future** policy changes that are unknown and uncertain. The trial court rejected the expiration condition, insightfully acknowledging that "the 20 year limit is simply a power grab designed to obtain further concessions in 20 years, or force the removal of seawalls at a later time. " JA 204.

The Homeowners contend that this condition does not mitigate an identified adverse impact and therefore is unlawful under the Coastal Act, specifically Public Resource Code § 30235, as well as the Federal unconstitutional-conditions doctrine. While the Commission admittedly has significant power to impose conditions to mitigate actual and identified adverse impacts, requiring the expiration of permits so that it can start the process anew, and apply unknown and different policies to a then-existing seawall is a startling—and unlawful—extension of power.

The Commission also adopted Special Condition 1.a., which required the Homeowners to delete from the final plans any repair of the lower portion of the stairway. AR 1681. Despite approval of the stairway by the City of Encinitas, the Commission applied the Encinitas policies and regulations differently, thereby rejecting the proposal to repair the stairway. This left the Homeowners with a partial stairway down the bluff, dangling at the midpoint. AR 1579 (photo).

E. Procedural Background

The Homeowners timely filed a petition for writ of mandate on October 7, 2011. JA 2. The petition challenges the lawfulness of the 20-year permit expiration (Special Conditions 2 and 3) and the denial of the stairway repair (Special Condition 1.a.). No other challenges to the Commission's decision were alleged. JA 4-5.

As required by Special Condition 17, the Homeowners recorded their respective identical deed restrictions on September 30, 2011 (JA 45), and November 23, 2011 (JA 24). Shortly thereafter, on December 6, 2011, the Commission confirmed that the requirements for issuance of the permit had been completed and provided its Notice of Acceptance so that the final permit could issue and the seawall could be constructed. JA 65.

The Commission filed its Answer approximately six months later, June 6, 2012, and asserted typical affirmative defenses, but did not allege that the deed restrictions were a waiver of the right to judicial review. JA 8-9. Eventually, on October 20, 2012, the Commission filed its motion contending that the deed restriction and construction of the seawall by the Homeowners resulted in a waiver of the right to judicial review of the two challenged permit conditions.

The trial court rejected the Commission's motion and found that the Homeowners had not waived their right to review. On the merits, the trial court ruled in favor of the Homeowners and invalidated both conditions. In a split decision, the Court of Appeal reversed and this Court subsequently granted the Petition for Review.

STANDARD OF REVIEW

The first question presented is whether the Homeowners waived their right to judicial review. This Court reviews "the trial court's finding of waiver under the deferential 'substantial evidence' standard." *Bickel v. City of*

Piedmont, 16 Cal. 4th 1040, 1053 (1997). As stated by this Court: "We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court." *Id.* (quoting *Jessup Farms v. Baldwin*, 33 Cal. 3d 639, 660 (1983)).

With respect to the lawfulness of the conditions themselves, there are no disputed facts. Accordingly, the legality of the conditions present questions of law that are reviewed *de novo.* "[T]he application of . . . statutory provisions to undisputed facts" triggers de novo review; deference to the Commission is inappropriate. *Silvers v. Board of Equalization*, 188 Cal. App. 4th 1215, 1219 (2010). "A court does not, in other words, defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature." *Schneider v. California Coastal Commission*, 140 Cal. App. 4th 1339, 1344 (2006).

ARGUMENT

I

SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING THAT THERE WAS NO WAIVER OF THE RIGHT OF JUDICIAL REVIEW

A. There Was No Intent To Relinquish the Right to Judicial Review

It is well established that waiver is the intentional relinquishment of a known right. *Bickel*, 16 Cal. 4th at 1048. "To constitute a waiver, there must be an existing right, knowledge of the right, and an actual intention to relinquish the right." *Id.* at 1053. "Waiver always rests upon intent." *City of Ukiah v. Fones*, 64 Cal. 2d 104, 107 (1966).

Because waiver rests upon intent, it is necessarily a factual question for determination by the trial court. *Bickel*, 16 Cal. 4th at 1052. Here, the trial court correctly found there was no waiver of the right to judicial review of the permit conditions. As ruled by the trial court, the Homeowners "neither specifically agreed to the conditions nor failed to challenge their validity." JA 101 (minute order, 12/21/2012).

Substantial evidence supports the trial court's finding. In sharp contrast to the cases relied upon by the Commission in the lower court, the Homeowners here properly and timely filed their petition for writ of mandate. Rather than ignoring or waiving their right to judicial review, the Homeowners

affirmatively exercised that right! This is not a situation where the Homeowners are seeking to collaterally challenge the conditions because they failed to properly file a petition for writ of mandate. Rather, the Homeowners have opposed these two specific conditions from the outset, objected at the hearing and in writing, and pursued their legal remedy in the manner required by the law. These actions provide ample basis for the trial court to conclude there was no intent by the Homeowners to relinquish their right to judicial review.

B. The Deed Restriction Does Not Support the Commission's Waiver Argument

1. The Severability Clause Expressly Provides for Invalidation of the Special Conditions

The Commission relies on the deed restriction to contend that the Homeowners waived their right to challenge the conditions. A careful reading of the deed restriction reveals no such intent. The deed restriction is located in the record at JA 24-26. Significantly, Paragraph V expressly incorporates the Special Conditions as part of the deed restriction. The language states:

> WHEREAS . . . the Commission conditionally approved coastal development permit number 6-88-464-A2 . . . subject to, among other conditions, the conditions listed under the heading **"Special Conditions"** in the Notice of Intent To Issue Permit dated August 31, 2011, **attached hereto** as EXHIBIT B and **incorporated herein by reference** (hereafter referred to as the "Special Conditions) . . . .

JA 24-25 (emphasis added). Having incorporated the Special Conditions as part of the deed restriction, the document then expressly acknowledges that "any provision" may be held to be invalid. The concluding paragraph of the deed restriction states:

> If **any provision** of these restrictions **is held to be invalid**, or for any reason **becomes unenforceable**, no other provision shall be affected or impaired.

JA 26 (emphasis added). This language can only mean one thing. A provision is "held to be invalid" *by a court*. This language is an express acknowledgment that "any provision" included in the Special Conditions may be "held to be invalid." Of course, the only way that a court may hold any of the Special Conditions invalid is through a *timely filed petition for writ of mandate*. That is exactly what the Homeowners filed and were pursuing. Contrary to the argument advanced below by the Commission, the express language of the deed restriction does not support waiver by the Homeowners of the right to judicial review; rather, the terms of the deed restriction **confirm** that the petition for writ of mandate may result in a judicial ruling that Special Conditions 1.a., and 2 and 3 are invalid and unenforceable. Because of the severability clause, the other unchallenged conditions will remain intact.

In short, the recording of the deed restriction is fully consistent with the Homeowners' exercise of their right of judicial review. The express language

acknowledges and provides for the very remedy that the Homeowners seek in their lawsuit, namely, invalidation of Special Conditions 1.a. and 2 and 3.

2. Other Terms in the Deed Restriction Do Not Establish Waiver

a. The "Comply" Term Does Not Establish That These Homeowners Have Waived Their Legal Challenge

In considering the deed restriction, the Commission has focused on Paragraph VII. That paragraph includes the following: "WHEREAS, Owner(s) has/ve elected to comply with the Special Conditions . . . . " JA 25.

But this language does not overcome the express language of the severability clause. Certainly, the Homeowners "complied" with various conditions that needed to be satisfied in order to get their final permit and complete the seawall. *But complying with the conditions is not the same thing as agreeing with the conditions.* The term "comply" simply means to obey. As defined in Webster's American Family Dictionary (1998), comply means to "act or be in accordance with wishes, requests, demands, requirements or conditions." For example, a person might comply with a court order, but not agree with it.

The Commission's argument not only is contrary to the ordinary dictionary definition, but it creates a direct conflict with the express language of the severability clause. If the term "comply" is interpreted to mean that the Homeowners agree with the lawfulness of the conditions, and thereby waive

the right to challenge the conditions, there is no point in even having a severability clause because any judicial review would already be waived. Of course, rather than render the severability clause as surplusage, the trial court was correct to find that the deed restriction did not support a finding of intent to waive judicial review. Rather, the Homeowners simply obeyed, satisfied or acted in accordance with the Commission's requirements while also maintaining their legal challenge, *just as the severability clause expressly contemplates*.

Homeowners recognize that there may be other factual situations where the nature of the conditions renders it impractical to both "comply" and legally challenge the condition at the same time. But that is not the case here. Indeed, the condition calling for the expiration of the permit in 20 years is not something that at the present time the Homeowners can even "comply" with. If there is to be any compliance by the Homeowners, it is in 20 years when they would be required to apply for another Commission approval. But now, there is nothing for the Homeowners to do. The type of condition being challenged here presents a legal issue that does not involve any difficulty with respect to the judicial remedy, especially in light of the severability clause.

Although within the context of the Mitigation Fee Act, this Court recognized that the nature of the condition can be relevant to the efficiency of a judicial remedy.

> By the nature of things, some conditions a local entity might impose on a developer, like a limitation on the number of units, cannot be challenged while the project is being built. Obviously, one cannot build a project now and litigate later how many units the project can contain—or how large each unit can be, or the validity of other use restrictions a local entity might impose. But the validity of monetary exactions, or requirements that the developer later set aside a certain number of units to be sold below market value, can be litigated while the project is being built.

Sterling Park, L.P. v. City of Palo Alto, 57 Cal. 4th 1193,1206-07 (2013).

Unlike factual situations acknowledged in *Sterling Park* where satisfying the condition might render a court remedy problematic, or even moot, there is no such problem here. This is a condition that can be "held to be invalid" as expressly provided for by the severability clause. If this Court rules that the 20-year expiration is unlawful, that condition is simply invalidated. It is then a ministerial task to record a document against the property and thereby inform potential purchasers of the results of the litigation. Such a document for recording would also likely reference the severability clause and attach the final decision as an exhibit. Future buyers will have a complete notification of the proceedings and the legal status of the conditions.

Nor does the stairway present a problem for a remedy. The Commission denied the proposal to repair the lower portion of the stairway. As will be discussed further below, this presents a legal dispute that once resolved by the Court, is easy to implement. If this Court rules in favor of the Homeowners, the stairway can be lawfully repaired. If this Court rules against

the Homeowners, there simply will have to be no stairway to the beach. Instead, the existing stairway will need to be left dangling.[2]

In short, the language in the deed restriction stating that the Homeowners would comply with the conditions does not mean they agreed to the conditions, or waived their right to challenge the conditions. Neither does the deed restriction in any way create a remedy problem, or otherwise impinge on the ability of the Court to rule on the merits. The trial court's finding that the Homeowners did not intend to waive their legal challenge is not contradicted by the deed restriction.

b. The "Irrevocably Covenant" Terminology Does Not Preclude a Court from Finding the Conditions Are Invalid

The Commission also suggests that because the deed restriction is an "irrevocable covenant" (JA 25, line 14), the recording of the document must be a waiver by the Homeowners. Again, the Commission seeks to read much more into the language than is warranted.

Admittedly, this language precludes the Homeowners from unilaterally revoking the deed restriction. Of course, that is not what the Homeowners are doing. Rather, they seek to have the Court declare that certain conditions are unlawful. The fact that the covenant is not revocable by the Homeowners does

[2] Although not of record, after the trial court issued the writ striking the three special conditions, and the Commission did not seek a stay, the Homeowners repaired the stairway.

not, and cannot, bind a court from finding that the Special Conditions are unlawful.

To accept the Commission's argument would mean that unlawful covenants, conditions, and restrictions (*i.e.*, "CC&Rs") could not be struck down by a court. Of course, it is well established that unlawful CC&Rs can be held to be invalid by the courts. Perhaps the most well known case is *Shelly v. Kraemer*, 334 U.S. 1 (1948), where the Supreme Court struck down CC&Rs that included racial restrictions on who could buy property within the neighborhood. California courts have likewise struck down unlawful CC&Rs. *See, e.g.*, *Barrett v. Dawson*, 61 Cal. App. 4th 1048, 1051-52 (1998). While the Homeowners cannot revoke the covenant themselves, this Court is not thereby deprived of power to invalidate unlawful conditions. Likewise, nothing about the "irrevocable covenant" language amounts to a waiver by the Homeowners from seeking their judicial remedy. Again, that is precisely what the severability clause anticipates.

In summary, the deed restriction falls far short of meeting the Commission's burden to show by clear and convincing evidence that the Homeowners waived their right to judicial review. Rather, the most persuasive and direct language is the severability clause which confirms that the deed restriction is not intended to cause a waiver of the right of review.

C. The Case Law Fully Supports the Homeowners

Several California cases have addressed the waiver issue in the land use context. However, not a single case finds waiver of the right to judicial review when a timely petition for writ of mandate was filed.

A leading decision is *Pfeiffer v. City of La Mesa*, 69 Cal. App. 3d 74 (1977). The property owner obtained a building permit conditioned on granting the city an easement across the property and building a storm drain. The property owner **did not challenge** the conditions through a petition for writ of mandate. Instead the property owner granted the easement, constructed the storm drain, and completed the project, and then afterward sued the city in inverse condemnation seeking to recover damages for the costs of the conditions. Not surprisingly, the court held that the property owner had waived the right to challenge the conditions by failing to timely file a petition for writ of mandate. The Court of Appeal concluded:

> If the conditions imposed by the city in their permit were invalid, Code of Civil Procedure section 1094.5 provided plaintiffs with the right and procedures to eliminate them. By declining to avail themselves of those procedures, plaintiffs cannot convert that right into a cause of action in inverse condemnation.

Id. at 78.

Of course, the Homeowners here did not make that mistake. They timely challenged the validity of the conditions by filing their petition for writ of mandate. Nor do they seek damages through inverse condemnation or any

other cause of action. Rather, they seek only invalidation of the conditions as provided by section 1094.5 and contemplated by the severability clause of the deed restriction. Accordingly, *Pfeiffer* strongly supports the Homeowners by confirming they followed the correct procedure to avoid waiver of the right to challenge the conditions.

Further support is found in *County of Imperial v. McDougal*, 19 Cal. 3d 505 (1977). There, this Court considered a challenge to a conditional use permit authorizing sales of well-water within the geographical boundaries of the county. *Id.* at 507. The original owner, Simpson, did not challenge the condition and he limited sales of the well-water to small quantities for local use within the county. *Id.* Five years later, the property was sold to McDougal and the new owner began selling water for use outside the county. *Id.* This Court ruled as follows:

> It is equally clear, however, that McDougal is subject to the limitations in the permit under which he claims, and that he can assert no greater rights therein than Simpson enjoyed. Simpson, **by failing to challenge** the limitations imposed upon him by the permit, waived his right to object to the condition prohibiting the sale of water for use outside the county.

Id. at 510 (emphasis added).

> A number of cases have held that a landowner or his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein **by either specifically agreeing** to the condition **or failing to challenge its validity**, and accepted the benefits afforded the permit.

Id. at 510-11 (emphasis added). Again, as ruled by the trial court, the Homeowners here did not "specifically agree" to the conditions, nor did they fail to challenge the conditions. Under *McDougal*, there has been no waiver of rights by the Homeowners.

The same defect was again present in *California Coastal Commission v. Superior Court of San Diego County (Ham)*, 210 Cal. App. 3d 1488 (1989). The Commission approved the rebuilding of a beach front residence on the condition that the owner, Ham, dedicate an easement for public access. The owner dedicated the easement and completed the project. *Id*. at 1492. However, "Ham never sought mandate relief." *Id*. at 1499. Three years later, Ham sought damages through inverse condemnation, but the failure to previously challenge the condition through a timely petition for writ of mandate was again fatal. The Court ruled that an "administrative mandate proceeding provides the proper vehicle for such a challenge." *Id*. at 1496. *See also Rossco Holdings Incorporated v. State*, 212 Cal. App. 3d 642, 654, 656 (1989) (following *Pfeiffer* and *McDougal* and noting that the owner "never petitioned for an administrative writ of mandate as required by section 30801 and Code of Civil Procedure section 1094.5").

The stark contrast between these cases and the procedure followed here by the Homeowners again supports the trial court's finding that there has been no waiver of the right to challenge the conditions. The Homeowners' timely

filing of their petition for writ of mandate places them squarely within California law.

D. The Commission Has Always Known That the Homeowners Never Intended To Waive Their Right to Judicial Review

The decision below by the Court of Appeal attempts to cast the Homeowners in bad light, three times asserting that they engaged in "deliberate subterfuge." Slip op. at 9. But the facts do not support such characterizations.

The Commission cannot seriously argue that it was unaware of the Homeowners' challenge to the conditions when it issued the final permit and allowed the seawall to be constructed. The timing of the events reveals there was no subterfuge at all. The petition for writ of mandate was filed on October 7, 2011. Significantly, Barbara Lynch's deed restriction was recorded **after** the lawsuit was initiated. JA 24 (deed restriction recorded November 23, 2011). The Commission then confirmed that the requirements for issuance of the permit had been completed and provided its Notice of Acceptance on December 6, 2011, so that the final permit could issue and the seawall could be constructed. JA 65. The Commission allowed the permit to go forward with full knowledge of the pre-existing legal challenge to the conditions.

In summary, the trial court finding that the Homeowners "neither specifically agreed to the conditions nor failed to challenge their validity" (JA

101) is fully supported by the factual record and the case law. Moreover, the severability clause of the deed restriction confirms that its recording does not demonstrate intent to waive judicial review, but rather, demonstrates that judicial review was contemplated and provided for in the event that a court finds any condition to be invalid. This Court is therefore urged to conclude there has been no waiver of the right to judicial review and proceed to the merits of the challenge to the conditions.

II

THE CONDITION IMPOSING A 20-YEAR PERMIT EXPIRATION IS UNLAWFUL

A. The Permit Expiration Does Not Mitigate an Identified Adverse Impact and Therefore Violates the Coastal Act

The Coastal Act recognizes the importance of being able to protect existing structures from erosion. Accordingly, seawalls to protect structures are required to be permitted. This command is balanced by the further requirement that such seawalls be designed to mitigate adverse impacts. Accordingly, the Act provides that a seawall "**shall be permitted** when required . . . to protect existing structures . . . in danger from erosion and when designed to eliminate or mitigate adverse impacts on the local shoreline sand supply." Pub. Res. Code § 30235 (emphasis added).

Homeowners acknowledge that the Commission has broad discretion to attach conditions to seawall permits, however, even that broad discretion is

limited by the statute. Specifically, conditions must mitigate identified adverse impacts of the proposed seawall. As stated in *Ocean Harbor House Homeowners Association*, 163 Cal. App. 4th at 242, "the Commission has broad discretion to adopt measures designed to mitigate all significant impacts that the construction of a seawall may have."

The legal problem with the 20-year expiration is that it is not imposed to mitigate any adverse impact *caused by* the Homeowners' proposed seawall. Indeed, the adverse impacts have all been addressed by other conditions. As conceded by the Commission, the seawall "has been designed and conditioned to mitigate its impact on coastal resources such as scenic quality, geologic concerns, and shoreline sand supply." AR 1679.

In contrast, the 20-ear expiration is not because of the design of the seawall, or due to any impacts attributable to the seawall itself. Rather, the expiration is to allow the Commission in the future to respond to unknown circumstances and changes in legislative policy.

> To ensure that this project does not prejudice **future shoreline planning options**, including with respect to **changing and uncertain circumstances that may ultimately change policy** and other coastal development decisions (including not only climate change and sea level rise, but also due to **legislative change, judicial determinations, etc.**), staff recommends that this approval be conditioned for a twenty-year period.

AR 1709-10 (emphasis added). Of course, such unknown circumstances or policy changes are not attributable to the Homeowners or the design of their seawall. As stated by the dissent below:

> Unlike the mitigation fee in *Ocean Harbor House*, the permit-expiration condition in this case is not a mitigation condition. The permit expiration does not mitigate any impacts the seawall may cause in the future. Rather, it merely gives the Commission the option to deny the permit outright in 20 years.

Dissenting slip op. at 14.

The Commission will respond that there may be unknown impacts of the seawall in the future, and that the permit-expiration gives the opportunity to respond to those impacts. The Commission will surely cite to places in the record discussing potential future concerns, and that the science in understanding the impacts of seawalls may advance, or similar rationalizations. However, such speculation about unknown future impacts does not justify a **present requirement** that the permit will terminate. The expiration of the permit does not address any impact, present or future. If there are future impacts, those will be addressed by some different condition. But expiration of the permit itself *does nothing*.

By terminating the permit in 20 years, the mandatory language of section 30235 is directly violated. Under the statute, seawalls to protect existing homes "shall be permitted." But for these Homeowners, their project is actually not permitted. Rather, their project is being allowed temporarily,

and the Commission is holding power to deny the seawall in the future. While it would take a legislative change to section 30235 to outright deny the seawall in the future, it is such potential legislative change that the permit-expiration seeks to take advantage of. But meanwhile, the seawall is not permitted as that term is normally understood, it is merely authorized for 20 years. Such a condition is directly contrary to the mandatory language of section 30235.

The Homeowners are expected to expend up to a million dollars building a seawall (AR 730) that has only temporary approval. They have no assurance that the seawall will be able to remain. By analogy, if California local governments started placing expiration dates on building permits for houses, the uproar would be deafening. Indeed, introducing a temporary nature to permitting would destroy the housing industry because no lender will loan money on a 30-year mortgage for a house that has a permit for only 10 or 20 years.

If the Commission has legitimate concerns about unknown future impacts of seawalls, it may address those concerns in the future. But conditioning the seawall today on the expiration of the permit is reaching too far and is contrary to the mandatory language of the statute. As explained by the dissent below:

> This does not mean the City or Commission cannot review the effects of the seawall in the future. The 20-year seawall expiration is unnecessary because, with or without a permit expiration, both the City and the Commission have power to evaluate the seawall's condition at any time, and to address any

> actual or potential threat to life or property that the seawall may pose in the future. As the trial court observed, the City and the Commission have the power to force repair or change should the seawall become unsafe, or in need of repair or change. There are many other avenues by which the government may proceed, such as code enforcement or inverse condemnation. The Commission always has the power to implement reasonable regulations related to the seawall so long as they do not conflict with the Act.

Dissenting slip op. at 15-16.

In short, the 20-year approval is not a mitigation of any present, identified adverse impact of the seawall. Rather, it is imposed to accommodate unknown and uncertain future policy changes. Moreover, the expiration condition is contrary to the mandatory language of the Act that seawalls "shall be permitted" to protect existing homes. The permit expiration is contrary to Public Resources Code § 30235 and should be invalidated as a matter of law.

B. The 20-year Expiration Is Unconstitutional

Even if the condition terminating the permit is not barred by Public Resources Code § 30235, the condition violates the Federal unconstitutional-conditions doctrine.

1. The Permit-expiration Must Be Roughly Proportional to the Adverse Impacts of the Seawall

In the land use context, the protection afforded by the unconstitutional-conditions doctrine has been significantly clarified by the United States Supreme Court. The doctrine was applied in the seminal cases *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of*

Tigard, 512 U.S. 374 (1994). More recently, substantial clarification was provided in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), and *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013). The Supreme Court has recognized that these decisions "provide important protection against the misuse of the power of land-use regulation." *Id*. at 2591. The Court recognized the reality that "land-use applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits." *Id*. at 2594.

Under this doctrine, government may not use the permitting authority to coerce applicants to give up constitutional rights in order to secure a permit.

> [T]he government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by government.

Lingle, 544 U.S. at 547 (quoting *Dolan*, 512 U.S. at 385). Accordingly, when government conditions its permit-approval on an exaction of some form of protected property interest, the exaction must bear an "essential nexus" to mitigating an adverse impact of the proposed project. *Nollan*, 483 U.S. at 837. In addition, the mitigating exaction must be "roughly proportional . . . both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at. 391. *See generally Lingle*, 544 U.S. at 546-47, and *Koontz*, 133 S. Ct. at 2595 (setting forth analysis under the unconstitutional-conditions doctrine).

Here, the Homeowners' clearly have a right to protect their property. The California Constitution guarantees—as "inalienable"—the rights of "acquiring, possessing, and **protecting** property, and pursuing and **obtaining safety**, happiness, and privacy." Cal. Const. art. I, § 1 (emphasis added). The right to protect private property is recognized in the Coastal Act and is why applications for seawalls to protect property from erosion "shall be permitted." Pub. Res. Code § 30235.

Consistent with this fundamental right, California law also recognizes that when a use of property is established and permitted under existing law, future changes in the law cannot render the existing use illegal. Changes in the zoning, for example, may cause an existing use to become nonconforming, but the use remains legal and protected. *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 516 (1975) (right to continued use despite downzoning). As this Court recognized in *Hansen Brothers Enterprises, Inc. v. Board of Supervisors of Nevada City*, 12 Cal. 4th 533, 552 (1996), "The rights of users of property, as those rights existed at the time of the adoption of a zoning ordinance, are well recognized and have always been protected." (Internal citation omitted.)

Here, the Homeowners' continued property interest in protecting their residences is forced to be given up in 20 years. Indeed, the seawall itself is part of the property and is automatically rendered illegal at the expiration deadline. Absent satisfying the *Nollan* and *Dolan* tests, such a condition

amounts to an outright confiscation by the Commission of the right to protect private property. Such confiscation can only be constitutional if the condition is roughly proportional to the adverse impacts caused by the seawall.

2. Because Future Impacts Are Unknown, and May Not Even Exist, Permit Termination Cannot Be Shown To Be Roughly Proportional

The forced expiration of the permit cannot be shown to be roughly proportional to any adverse impacts caused by the seawall. Indeed, the Commission does not know what the future impacts will be, if any. Nevertheless, despite not identifying with any particularity the nature and extent of future impacts, the Commission takes the most aggressive and severe form of condition—that is, complete termination of the legality of the seawall. The lack of any rough proportionality between this extreme condition and any unknown adverse impacts is revealed by the true purpose of the permit-expiration condition. As discussed above, the expiration is not due to any actual impacts of the seawall, but is to allow the Commission discretion to apply new regulations and changes in policy to the existing and permitted seawall.

It is no answer for the Commission to argue that there are unknown impacts that may occur. Indeed, the fact that these impacts are unknown, speculative, and uncertain proves the point that there is no rough proportionality between such unknown impacts and the termination of the

seawall permit. The outright expiration of the permit simply reaches too far and cannot be shown to be proportional to as yet unknown future impacts. The Commission is simply assuming the worst case scenario, that future impacts warrant expiration of the permit. But such a conclusion is a guess, completely speculative, and inherently cannot be shown to be roughly proportional to the impact of the seawall.

It is also no answer for the Commission to contend that the Homeowners can avoid losing the right to protect their property by simply re-applying for another approval. A new application does not render the expiration condition any less unconstitutional. Rather, a future new application would simply be the effort by the Homeowners to **re-establish** the right that they have **already lost** by the expiration of the existing permit.

The dissenting opinion below correctly understood as follows:

> Here, the Commission's condition that the seawall permit expires in 20 years unconstitutionally forces the homeowners to waive their rights and property interests without any nexus or "rough proportionality" to potential adverse impacts caused by the seawall.

Dissenting slip op. at 19. Judge Nares continued:

> The condition forces the homeowners to waive their present and future rights to protect their homes, as guaranteed to them by section 30235 of the Coastal Act and the California Constitution. Despite substantial evidence establishing that the homes will continue to be threatened, the condition effectively

> extinguishes their right to protect their properties, beginning in 2031.

Id.

In summary, the permit-expiration is an unconstitutional condition that has not been shown to be roughly proportional to adverse impacts of the seawall. Indeed, the very fact that future impacts are unknown, unquantified, and may not even exist, can only mean that the most extreme condition of terminating the permit goes too far. Under the United States Supreme Court precedents, this Court is urged to hold that the condition invalid as an unconstitutional condition.

III

THE COMMISSION'S STAIRWAY PROHIBITION IS UNLAWFUL

A. Because a "Disaster" Destroyed a Portion of the Homeowners' Stairway, Its Reconstruction Does Not Require a CDP

The repair of the stairway is authorized by the Coastal Act without any need to secure a CDP from the Commission. The Act specifies that "no coastal development permit shall be required . . . for the following types of development . . . (g)(1) The replacement of any structure . . . destroyed by a disaster." Pub. Res. Code § 30610(g)(1).

First, there is no question that a disaster destroyed the lower portion of the stairway. Although the Commission initially contended that the

destruction of the lower portion was not caused by the heavy rains of December 2010, the trial court ruled that the Commission used the wrong definition of the term "disaster" and was in error. JA 203 ("the Commission failed to proceed in the manner required by law in applying an erroneous definition of 'disaster' "). On appeal, the Commission did not assign error to this ruling, nor argue in its brief that the trial court ruling was incorrect. Accordingly, for purposes here, it is now a verity on appeal that the stairway was destroyed by a disaster. Of course, that conclusion is also well supported by the record. AR 2347-48; JA 130-32 (President Obama declared San Diego County an emergency disaster relief area).

In short, the Coastal Act recognizes the arbitrary nature of natural disasters. Rather than penalizing the unfortunate few who suffer destruction beyond their control, the Act provides this exception to the CDP requirement so that coastal owners can quickly re-establish their existing structures to the status they enjoyed before the disaster. The Homeowners here are entitled to this relief with respect to their long-established stairway.

B. Repair of the Stairway Is Not Precluded by Local Policies

1. To the Extent Any Local Policy or Regulation Prohibits Repair of the Stairway, Such Policy or Regulation Is Invalid

Local regulations and policies may not operate in a manner that is in conflict with the Coastal Act. Pub. Res. Code § 30005(a) (allowing localities

to impose stricter requirements, as long as they are "not in conflict with this act"); *Yost v. Thomas*, 36 Cal. 3d 561, 572-73 (1984) (LCPs must conform to the Coastal Act); *McAllister v. California Coastal Commission*, 169 Cal. App. 4th 912, 930 n.9 (2008) (same).

As discussed above, the Coastal Act clearly exempts from the CDP requirement the replacement of structures destroyed by a disaster. Pub. Res. Code § 30610(g)(1). However, the Commission contended below that this exemption is narrowed by the next sentence of the statute which states that the "replacement structure shall conform to applicable zoning requirements." *Id*.

Under this language, the *structure itself* must conform to the zoning requirements. This language does mean that the "use" must conform to the zoning requirements, rather it is the physical structure that must conform. This distinction is important. It allows for local regulations that govern the structure's design, aesthetics, dimensions, and similar structural considerations. Such concerns are more naturally within the purview of local regulations and typically would not be in conflict with the Act. However, to the extent any such local regulations conflict with the right of replacement under section 30610(g)(1), such conflicting regulations must be invalid as applied.

2. Repair of the Stairway Is Consistent with All Applicable Local Policies and Regulations

The Commission argues that the City's policies and regulations preclude repair of the stairway. The Commission first points to Public Safety Policy 1.6, which states, in part: "The City shall provide for the reduction of unnatural causes of bluff erosion, as detailed in the Zoning Code, by: a. Only permitting public access stairways and no private stairways." Similarly, the Commission points to Policy 6.7 of the City's Circulation Element, which provides in part "New private accessways shall be prohibited."

The trial court correctly rejected the applicability of either policy because they only applied to proposals for **new** stairways, not the repair of stairways that have been in existence for over 40 years. As stated by the trial court:

> Both policies refer to "new" structures and private accessways. Such is not the case here. If the Petitioners were attempting to install a new stairway or completely replace a stairway, such policies would bar their application. However, here, petitioners simply seek to repair a portion of a stairway.

JA 204.

The Court of Appeal below ignored this factual distinction. The plain language, however, cannot be ignored. The policies clearly apply only to proposals for new access, but not to the repair of the portion of the existing stairway that was destroyed by the December 2010 disaster. Accordingly, these local policies do not provide a basis for avoiding the authority under

section 30610(g)(1) allowing replacement of the destroyed portion of the stairway structure.

The Commission further argues that the "Coastal Bluff Overlay Zone" (CBOZ) prohibits repair of the stairway. Homeowners recognize that the CBOZ does prohibit **new** development on the face of a coastal bluff. Encinitas Municipal Code § 30.34.020 B.2. However, once again, the prohibition does not apply to existing structures. The same code provision goes on to provide that "**Existing legal structures and facilities** within 40 feet of a bluff edge or on the face of a bluff **may remain unchanged** . . . . Routine maintenance of existing facilities is allowed." Encinitas Municipal Code § 30.34.020 B.4 (emphasis added).

There can be no dispute that even in its damaged state, the stairway is an existing legal structure. First, the stairway was approved by the County of San Diego in 1973, and then approved with a CDP from the Commission in 1989. It is a legal structure. Second, the stairway also is still existing. Yes, it was damaged by the disaster, but as the photos in the record reveal, the upper portion of the stairway and the landing area remained. AR 1579, 2255 (photos).

All that the Homeowners seek is to have their legally approved stairway remain unchanged. They want no more than the right to repair the stairway to its identical configuration and materials, unchanged from the way it has been for over 40 years. This is precisely the kind of situation that the exception in B.4 was intended to allow.

Moreover, allowing existing legal structures to remain unchanged is consistent with the authority under section 30610(g)(1) for the replacement of structures destroyed by disaster. The whole point of allowing a replacement structure is so that the development status of a parcel remains unchanged, despite the arbitrary consequences of a disaster.

While unnecessary to the analysis, the provision allowing for maintenance of existing structures is also consistent with section 30610(g)(1). To "maintain" something means "to keep in existence or continuance; to preserve" or to "keep in due condition, operation, or force." Webster's American Family Dictionary (1998). Of course, this is precisely what the Homeowners want to do. They simply want to keep the stairway in operation, in existence, and preserve it for continued use. While the maintenance is substantial, the work itself is still maintenance.

The B.4 exception provides its clear intent by stating that existing legal structures "may remain unchanged." While the Coastal Bluff Overlay Zone undoubtedly precludes new development on the bluff, it is equally clear that whatever structures are already developed and legally approved may remain

unchanged. In effect, the intent is to freeze the status quo. Existing legal structures will not be penalized and may remain unchanged, but no new structures will be allowed on the face of the bluff. The Homeowners seek to realize that intent.

Finally, it is worth noting that the failure to permit the repair of the stairway *would change* the status of the bluff. That is, there will be a very unusual, eyecatching, and dangerous stairway proceeding down the bluff and left dangling at the mid-point.[3] This is a result that no one should want. Indeed, it is a result that is contrary to the intent of preserving the status quo. In short, under the Coastal Act, section 30610(g)(1) authorizes repair of the lower portion of the stairway. The applicable zoning requirements are consistent with that authorization.

In summary, the Homeowners have enjoyed a shared stairway connecting their homes to the beach for over 40 years. A disaster destroyed the lower portion of that stairway and the Homeowners seek to repair it under the authority of the Coastal Act, section 30610(g)(1). That authority is clearly applicable.

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[3] *See supra* note 2.

CONCLUSION

The Homeowners have affirmatively exercised their right to judicial review by timely filing a petition for writ of mandate as required by the Coastal Act procedures and case law. At no point was there ever any intent to waive that right. Moreover, the deed restriction upon which the Commission relies expressly incorporates the Special Conditions and, through the severability clause, expressly acknowledges that those conditions can be held to be invalid. Accordingly, the deed restriction confirms that there has been no intent by the Homeowners to waive their right to judicial review of the legality of the conditions. The Court is urged to so rule and proceed to the merits of the challenges to the Special Conditions.

On the merits, for the reasons set forth above, the Court is urged to rule that the 20-year permit-expiration condition does not mitigate any identified adverse impacts caused by the Homeowners' seawall. Accordingly, the condition reaches too far and violates both the Coastal Act section 30235 and the Federal unconstitutional-conditions doctrine, and should therefore be found to be invalid as a matter of law. Finally, the condition prohibiting replacement

of the stairway is contrary to the authority under the Coastal Act section 30610(g)(1) and is unlawful.

DATED: March 10, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing PETITIONERS' OPENING BRIEF is proportionately spaced, has a typeface of 13 points or more, and contains 9,402 words.

DATED: March 10, 2015.

/s/ JOHN M. GROEN
JOHN M. GROEN

DECLARATION OF SERVICE BY MAIL

I, Tawnda A. Elling, declare as follows:

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 March 10, 2015, true copies of PETITIONERS' OPENING BRIEF were placed in envelopes addressed to:

Hayley Elizabeth Peterson
Office of the Attorney General
110 West A Street, Suite 1100
San Diego, CA 92101

Clerk of the Court
Fourth District Court of Appeal, Division One
Symphony Towers
750 B Street, Suite 300
San Diego, CA 92101

Clerk of the Court
San Diego County Superior Court
North County Division
325 South Melrose Drive
Vista, CA 92081

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 declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 10th day of March, 2015, at Sacramento, California.

/s/ TAWNDA A. ELLING
TAWNDA A. ELLING