IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

No. D066072

DIANNE KRETOWICZ and URE KRETOWICZ,
Plaintiffs and Appellants,

v.

CALIFORNIA COASTAL COMMISSION,
Defendant and Respondent.

On Appeal from the Superior Court of San Diego County
(Case No. 37-2011-00097607-CU-MC-CTL,
Honorable Eric Helgesen, Judge)

APPLICATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

JAMES S. BURLING, No. 113013
CHRISTOPHER M. KIESER,
No. 298486
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: jsb@pacificlegal.org
E-mail: cmk@pacificlegal.org

Attorneys for Amicus Curiae Pacific Legal Foundation

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Fourth **APPELLATE DISTRICT, DIVISION** One	Court of Appeal Case Number: D066072
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* James S. Burling, No. 113013; Christopher M. Kieser, No. 298486 Pacific Legal Foundation 930 G Street Sacramento, California 95814 TELEPHONE NO.: (916) 419-7111 FAX NO. *(Optional):* (916) 419-7747 E-MAIL ADDRESS *(Optional):* jsb@pacificlegal.org; cmk@pacificlegal.org ATTORNEY FOR *(Name):* Amicis Curiae Pacific Legal Foundation	Superior Court Case Number: 37-2011-00097607-CU-MC-CTL ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: Dianne Kretowicz and Ure Kretowicz RESPONDENT/REAL PARTY IN INTEREST: California Coastal Commission	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Amicus Curiae Pacific Legal Foundation

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	**Nature of interest *(Explain):***
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: June 26, 2015

Christopher M. Kieser ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
www.courtinfo.ca.gov

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Rule

Page

Statutes

Miscellaneous

APPLICATION OF PACIFIC LEGAL FOUNDATION TO APPEAR AS AMICUS CURIAE IN SUPPORT OF APPELLANTS AND IN SUPPORT OF REVERSAL

Pursuant to California Rule of Court 8.200(c), and for the reasons set forth in this application, Pacific Legal Foundation respectfully requests permission to file the accompanying brief in support of Appellants Ure and Dianne Kretowicz, for reversal of the lower court decision.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under California law for the purpose of litigating matters affecting the public interest. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. Thousands of individuals nationwide support PLF, as do many organizations and associations. PLF is headquartered in Sacramento, California, and has offices in Bellevue, Washington; Washington, D.C.; and Palm Beach Gardens, Florida.

The Foundation has litigated many cases defending private property rights in the Supreme Court of the United States. *See*, *e.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). PLF has also

created the Coastal Land Rights Project in order to defend the property rights of coastal landowners from the actions of agencies like the Coastal Commission. To this end, the Foundation has litigated and participated in many cases against the Commission, including cases relating to public access easements. *See, e.g.*, *Lynch v. Cal. Coastal Comm'n*, 229 Cal. App. 4th 658 (2014), *review granted*, 339 P.3d 328 (Cal. 2014) (direct representation); *Bowman v. Cal. Coastal Comm'n*, 230 Cal. App. 4th 1146 (2014) (direct representation); *Nollan*, 483 U.S. 825 (direct representation); *Feduniak v. Cal. Coastal Comm'n*, 148 Cal. App. 4th 1346 (2007) (amicus).

PLF and its supporters believe this case is important to anyone seeking to buy property in the coastal zone in California. The enforcement of unrecorded public access easements creates uncertainty for property owners, who should be able to rely on the record to determine the quality of their title. PLF believes that its public policy perspective and litigation experience will provide an additional and useful viewpoint in this case.

For the above reasons, Pacific Legal Foundation respectfully requests this Court to grant its application to file the accompanying brief amicus curiae.

INTRODUCTION AND SUMMARY OF ARGUMENT

Ure and Dianne Kretowicz purchased blufftop property in La Jolla in a foreclosure sale in 1994. (*See* Excerpts, Vol. 1, p. 1538.)[1] As is customary, the Kretowiczs performed a title search and found no encumbrances. But when they sought a permit from the City of San Diego to install a swimming pool in their backyard, the Kretowiczs unwittingly instigated a long battle with the California Coastal Commission. (*See* Excerpts, Vol. 1, pp. 1699-1701, 2665-76, 2710-39.) The Commission claims that the property has been subject to public access easements since they were imposed on the parcel's prior owners (the Bakers) as a condition of expanding a home in 1979. *See* Statement of Decision at 3.

The current dispute began when two Coastal Commissioners appealed the San Diego City Council's decision to uphold the Kretowiczs' permit—subject only to emergency lifeguard access (to which the Kretowiczs do not object)—to the Commission. (*See* Excerpts, Vol. 1, pp. 1701, 1742, 2665-76; Appellant's Opening Brief at 10 n.11.) The Commission eventually determined that it could enforce public access easements that it had demanded from the Bakers in 1979, even though those easements had never been recorded or enforced and the Kretowiczs bought the property without any

[1] *Amicus* adopts the citation format used in the Appellant's briefing. *See* Appellant's Opening Brief at 2-3.

notice that they existed. (Excerpts, Vol. 1, pp. 3484-85; Vol. 3, pp. 5469-79.) In the process, the Commission reneged on two settlement agreements that would have eventually provided the public beach access it desired. (Excerpts, Vol. 3, pp. 5469-79.)

Throughout this controversy, the Commission has never argued that it has an independent basis to require the Kretowiczs to grant public access in return for their permit. On the contrary, had the Commission attempted to insert these easements as conditions to the Kretowiczs' permit application in the first instance, they would be invalid under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013). Just like in *Nollan*, the public access easements the Commission demands in this case are unrelated to any of the improvements the Kretowiczs want to make on their property. And even if they were related, the Commission has not attempted to make a showing that the easements are proportional to any harm caused by the proposed improvements. Therefore, if the easements are valid, it must be because the 1979 permit conditions are enforceable against the Kretowiczs.

But the Commission runs into a significant problem in its attempt to enforce the easements in the current dispute: the Kretowiczs had no notice that they existed. (Excerpts, Vol. 2, p. 4967; Vol. 3, p. 5460.) When it considered an appeal of the now-defunct San Diego Regional Coastal Commission's

permit grant in 1979, the Commission issued a "Notice of Intent to Issue Permit" including conditions requiring the Bakers to grant public access easements. (Excerpts, Vol. 1, pp. 941-43.) But nobody ever recorded the easements, nor was there any notice from the record that the Commission might be able to enforce them in the future. Statement of Decision at 4. Nor did the Commission ever enforce or attempt to enforce the easements, even after receiving two letters from the private citizen who had appealed the Bakers' permit to the Commission in the first place. (Excerpts, Vol. 1, pp. 804-05, 809-11.) Because the Kretowiczs are bona fide good-faith purchasers for value without notice of the unrecorded easements, the Commission cannot now enforce the easements against them. *See Triple A Mgmt. Co. v. Frisone*, 69 Cal. App. 4th 520, 530 (1999) (citing 3 Miller & Starr, *Cal. Real Estate* (2d ed. 1989) Recording and Priorities, §§ 8:2, 8:3, pp. 270, 273)). The Kretowiczs had a duty to perform a title search, but they had no duty to peruse the Commission's records to find possible encumbrances on the property.

This Court should reverse the superior court's denial of the writ of mandate and remand with instructions to grant the writ.

I

NOTHING IN THE KRETOWICZS' PERMIT APPLICATIONS CAN JUSTIFY THE EXACTION OF A PUBLIC ACCESS EASEMENT

Even if this Court accepts the superior court's conclusion that the permit conditions were valid in 1979 and free from collateral attack because the Bakers did not then file a timely writ petition, the public access easements are still unenforceable against the Kretowiczs. Whatever happened then, it is undisputed that the Commission failed to enforce the easements for over two decades after it issued the Notice of Intent to Issue Permit on September 25, 1979. (Excerpts, Vol. 1, pp. 941-43; Statement of Decision at 4.) The Commission knew that the Bakers were not complying with the conditions, because the appellant in the Bakers' case sent two letters to the Commission asking it to enforce the easements. (Excerpts, Vol. 1, pp. 804-05, 809-11); *cf. Feduniak v. Cal. Coastal Comm'n*, 148 Cal. App. 4th 1346, 1361-65 (2007) (because the Commission has no general duty to inspect properties for permitting violations, it cannot be estopped from enforcing permit conditions unless it actually knew about violations). But the Commission never responded and instead allowed the easements to lay dormant and unrecorded until the Kretowiczs sought a permit. The Commission cannot opportunistically enforce these public access easements against bona fide purchasers of the property.

The right to exclude strangers from private property is "perhaps the most fundamental of all property interests." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). Therefore, "even if the Government physically invades only an easement in property, it must nonetheless pay just compensation." *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979). Because land-use permits are often worth far more than the government's desired easements, permit applicants are especially vulnerable to government coercion. *Koontz*, 133 S. Ct. at 2594-95. As a result, the U.S. Constitution constrains the ability of state agencies like the Commission to require landowners to give up their right to receive just compensation for a taking in return for a permit. *Id*. at 2594. To justify an exaction, the Commission must demonstrate that there is an "essential nexus" and "rough proportionality" "between the property that the government demands and the social costs of the applicant's proposal." *Id*. at 2595 (citing *Nollan*, 483 U.S. at 837, and *Dolan*, 512 U.S. at 391).

Like this case, *Nollan* involved the Commission's attempt to acquire a public access easement in exchange for a land-use permit. *Nollan*, 483 U.S. at 827. The Nollans wanted a permit to knock down a beach house on their property and build a single-family home. *Id*. at 828. But the Commission found the new house would contribute to blocking the view of the ocean, so it demanded that the Nollans dedicate an easement across their property in return for the permit. *Id*. at 828-29. In reversing this Court, the Supreme Court found that there was no connection between the Commission's demand

of the easement and the fact that the new house would obstruct public view of the ocean. *Id*. at 838-39. Particularly, the Court observed that "[i]t is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house." *Id*. at 838.

Likewise here, the Commission has not argued—and it could not argue—that the public access easements it demands militate any effect of the Kretowiczs' planned improvements. Neither the swimming pool nor the minor improvements the Kretowiczs want to make could have any effect on existing public access to the beach. Indeed, public access across the Kretowiczs' property has been nonexistent since 1979, when the Bakers built their expansion and the Commission decided not to enforce the easements it had demanded. Thus, it is not possible for the Kretowiczs' planned projects to have any impact on public access. Much like the easement in *Nollan*, there is no connection between anything the Kretowiczs plan to do and the supposed need for more coastal access.

Even if the exaction satisfied *Nollan*'s essential nexus standard, the Commission made no "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. Without that finding, the Commission cannot satisfy its burden that exacting the public access easements is constitutional. Therefore, if the Commission were proceeding against the

Kretowiczs in the first instance and attempting to obtain these easements based upon the effects of their proposed projects, the exaction would be unconstitutional.

In *Feduniak*, this Court expressly rejected PLF's argument that the easements in that case "would be constitutionally suspect if they were imposed on a project today" under *Nollan*. *Feduniak*, 148 Cal. App. 4th at 1379 n.11. The Court deemed the argument "irrelevant" because PLF conceded that "the restrictions are valid and 'it is far too late to make a collateral attack on the permit conditions.'" *Id*. (quoting Brief of Pacific Legal Foundation as *Amicus Curiae* at 6). The superior court in this case likewise concluded that the 1979 permit conditions are immune from collateral attack. But even conceding that, the Commission could not have imposed the contested easements on the Kretowiczs today, so it must rely on the continuing vitality of the 1979 conditions if it is to prevail. This is distinct from the argument the Court rejected in *Feduniak*.

II

BECAUSE THE KRETOWICZS WERE BONA FIDE GOOD-FAITH PURCHASERS OF THE PROPERTY FOR VALUE, THE COMMISSION CANNOT ENFORCE THE EASEMENTS AGAINST THEM

In California, "a bona fide purchaser who first duly records his deed is granted preference over all unrecorded and unknown interests." *Lewis v. Superior Court*, 30 Cal. App. 4th 1850, 1873 (1994). A bona fide purchaser is one who purchases the property for value, in good faith, and without actual or constructive notice of another's claim. *See Melendrez v. D & I Investment, Inc.*, 127 Cal. App. 4th 1238, 1251 (2005). "The objective of the [recording statutes protecting bona fide purchasers and encumbrancers] is to protect persons who have invested substantial sums of money or property . . . in reliance on an honest belief that they are acquiring a good title or lien." *Id*. (quoting 5 Miller & Starr, *Cal. Real Estate* (3d ed. 2000) Recording and Priorities, § 11:52, p. 140). Like any other property interest, public easements dedicated at the Commission's behest must be recorded. *See* Phillip J. Hess, *A Line in the Sand: Oceanfront Landowners and the California Coastal Commission Have Been Battling Over Easements Allowing Public Access to Beaches*, L.A. Lawyer, Jan. 2005, at 26 (describing the way that so-called "offers to dedicate" public easements are recorded)[2]; *cf. Feduniak*, 148 Cal.

[2] *Available at* http://www.lacba.org/Files/LAL/Vol27No10/2100.pdf (last visited June 16, 2015).

App. 4th at 1353 ("[The owners] recorded an irrevocable offer to dedicate an open space easement . . . ."). If they are not, future purchasers can never be certain whether a property is encumbered by a public access easement.[3]

A. The Kretowiczs Lacked Actual or Record Notice of the Permit Conditions

It is undisputed that the Kretowiczs purchased the property for value and with a good-faith belief it was unencumbered. (Excerpts, Vol. 2, p. 4967; Vol. 3, p. 5460.) The record also demonstrates that the Kretowiczs purchased the property without actual or constructive notice of the contested easements. *Id*. The Commission does not argue—and there is no evidence to suggest—that the Kretowiczs had actual notice of the permit restrictions. Indeed, it is hard to imagine that they did, since the easements had never been enforced. And even though the Bakers did not formally challenge the permit conditions, their attorney told the Commission on September 20, 1979, that the Commission would have to resort to eminent domain if it wanted public access easements. (Excerpts, Vol. 1, p. 1231.) The only time the conditions were even acknowledged after the Commission imposed them was when the Bakers sold the property to Chris McKellar in 1989. *See* Statement of Decision at 4.[4]

---

[3] Moreover, the Court should not defer to the Commission's factual determination of the priority of interests. That is a legal question to be resolved by the courts, particularly when the Commission's own interest is at stake.

[4] Appellants consider the document purporting to show disclosure to McKellar in 1989 to be a forgery. (*See* McKellar Decl. ¶ 5.) However, even assuming

There is no indication that anyone other than the Bakers and McKellar knew about this, nor that the Kretowiczs could have known about it when they purchased the property at the foreclosure sale.

Nor did the Kretowiczs have constructive notice of the conditions. It is undisputed that the public access easements were never recorded. *Id*. This Court has long recognized that "[t]he purpose of the recording statutes is to give notice to prospective purchasers or mortgagees of land of all existing and outstanding estates, titles or interest, whether valid or invalid, that may affect their rights as bona fide purchasers." *Domarad v. Fisher & Burke, Inc.*, 270 Cal. App. 2d 543, 554 (1969). When an interest in land such as an easement is unrecorded, prospective purchasers can have no constructive notice from the record. *See Gates Rubber Co. v. Ulman*, 214 Cal. App. 3d 356, 365 (1989).

1. No Facts in This Case Give Rise to a Duty To Investigate the Commission's Records

Even when a prospective purchaser does not have constructive notice from the record, he may be deemed to have constructive notice of a competing interest if he is aware of facts that would place the quality of title in doubt. As the California Supreme Court put it: "He cannot be regarded a purchaser in good faith who negligently or willfully closes his eyes to visible pertinent facts, indicating adverse interest in or incumbrances [sic] upon the estate he

---

its legitimacy, the document is irrelevant as far as the Kretowiczs' notice is concerned.

seeks to acquire, and indulges in possibilities or probabilities, and acts upon doubtful presumptions, when by the exercise of prudent, reasonable diligence he could fully inform himself of the real facts of the case." *J.R. Garrett Co. v. States*, 3 Cal. 2d 379, 382 (1935) (emphasis deleted) (quoting *Pell v. McElroy*, 36 Cal. 268, 274 (1868)).

This Court has occasionally applied that principle to the detriment of those claiming to be bona fide purchasers. For example, in *Rabbit v. Atkinson*, 44 Cal. App. 2d 752 (1941), this Court held that a plaintiff who purchased property worth $35,000 in satisfaction of a $184.74 judgment was not a bona fide purchaser. The Court reasoned that "an offer by a vendor to sell for a grossly inadequate price is a circumstance which should place the purchaser on his guard and may be such as to require that he make a reasonable inquiry as to the title of the vendor not disclosed by the record." *Id*. at 757. And in *Asisten v. Underwood*, 183 Cal. App. 2d 304 (1960), the defendant purchased property from two individuals who had fraudulently induced the plaintiff to sign a quitclaim deed conveying the property to them. Although the defendant had no record notice of the fraud, this Court held that the plaintiff's continued possession of the property should have put the defendant on notice, disqualifying him from being a bona fide purchaser. *Id*. at 309. Additionally, the transaction was completed with "unusual haste" and the defendant paid $6,000 for a property worth about $14,000. *Id*. at 310.

No like circumstances exist here. There is no evidence the Kretowiczs paid less than fair value for the property.[5] Nor were there any other indications to a reasonable purchaser that the property was encumbered by public easements. The superior court did not say otherwise. Instead, the court incorrectly extended the precedents of the California Supreme Court and this Court, holding the Kretowiczs to a higher standard than that of the reasonable purchaser. The superior court said that because Mr. Kretowicz is a "prominent real estate developer" he was "required to investigate any conditions of the sale" and could have "simply gone to the Commission's office," where he would have discovered the Notice of Intent to Issue Permit that contains the conditions. Statement of Decision at 4. But there is no authority for the proposition that Mr. Kretowicz has a greater duty to investigate than any other purchaser.

The California Supreme Court and this Court have consistently held that a subsequent purchaser need only make a "reasonable" inquiry into facts

---

[5] The fact that the Kretowiczs paid less than the $5 million paid by the previous purchaser does not help the Commission. Foreclosure sales "generally realize far less than the actual value of properties sold, even under normal market conditions." Richard A. Mendales, *Collateralized Explosive Devices: Why Securities Regulation Failed to Prevent the DCO Meltdown, and How to Fix It*, 2009 U. Ill. L. Rev. 1359, 1394 n.266 (citing Bernard Condon, *Fire Sale*, Forbes, Mar. 28, 2008, *available at* http://www.forbes.com/global/2008/ 0407/020.html). This reality does not make the Kretowiczs' purchase price "grossly inadequate." In fact, it would be more surprising had the Kretowiczs paid $5 million to obtain the property from the bank after it had been through foreclosure.

that may leave the quality of title in doubt. *See, e.g., J.R. Garrett*, 3 Cal. 2d at 382 ("reasonable diligence" required if there are "visible pertinent facts" indicating defect in title); *March v. Pantaleo*, 4 Cal. 2d 242, 244 (1935) (describing constructive notice "by reason of facts sufficient to put [the purchaser] on inquiry, before he gave value," of the competing interest); *Rabbit*, 44 Cal. App. 2d at 757 (purchaser may be obligated to make a "reasonable inquiry" into circumstances leading to offer to sell property for grossly inadequate price); *First Fidelity Thrift & Loan Ass'n v. Alliance Bank*, 60 Cal. App. 4th 1433, 1443 (1998) ("A person generally has 'notice' of a particular fact if that person has knowledge of circumstances which, upon reasonable inquiry, would lead to that particular fact."). If no such facts exist, the purchaser has no duty to search for them. This Court said as much in *First Fidelity*. There, two deeds of trust encumbered the same commercial property, but the first had been mistakenly reconveyed such that the second became the first deed of record. *First Fidelity*, 60 Cal. App. 4th at 1435. The Court stated that "there is no authority for the proposition that a prospective lender, learning that a prior deed of trust had been reconveyed, has a duty to investigate further to determine whether that reconveyance was in error." *Id*. at 1444-45. The unanimous panel opined that a contrary rule "would seriously complicate the lending process far beyond anything which seems contemplated by the statutes by creating a duty to investigate beyond the state of record title in virtually all cases." *Id*. at 1445.

The Kretowiczs had even less reason to doubt the adequacy of the title they acquired at the bank. At least the lender in *First Fidelity* knew that the prior deed of trust had been reconveyed.[6] One could have argued in that case that knowledge of the reconveyance triggered a duty to investigate its circumstances. But this Court rejected that precise argument, holding that it would inject significant uncertainty into the lending process by creating an expanded and imprecise duty. Likewise here, the Kretowiczs knew of no facts suggesting that there might be a public access easement. Nothing they knew when they purchased the property even triggered the duty to make the "reasonable inquiry" required. The recording acts are meant to protect bona fide purchasers who take title to property without knowledge of title defects. *Melendrez*, 127 Cal. App. 4th at 1251. The duty the superior court imposed on the Kretowiczs entirely defeats that objective and creates needless uncertainty for all real estate purchasers. Nothing in any California case establishes that the Kretowiczs had any duty—absent knowledge of predicate facts, like a grossly inadequate price or the obvious existence of public access—to check the Commission's records for unrecorded public easements. Because nothing in the record indicates such knowledge, they had no duty to investigate.

---

[6] Of course, the recording acts apply equally to titles and liens. *Melendrez*, 127 Cal. App. 4th at 1251.

2. The Lack of a Recorded Instrument Is Not Only Relevant, but Critically Important

The superior court erroneously held that the fact the easements were unrecorded was "irrelevant." Statement of Decision at 4. The court cited *Feduniak*, but the contested easements in that case *were* recorded. Indeed, *Feduniak* stated that "once the period to challenge the restrictions had expired *and they were recorded*, they became immune from collateral attack . . . ." *Feduniak*, 148 Cal. App. 4th at 1379 (emphasis added). The Feduniaks' principal problem was that they were not truly bona fide purchasers, since their "title company had failed to discover the restrictions before the purchase." *Id.*[7] Thus, the superior court's reliance on *Feduniak* to show that recording is irrelevant is misplaced. If anything, *Feduniak* confirms that failure to record the restrictions may render them unenforceable against a true bona fide purchaser without constructive notice.

B. Adopting a Heightened Duty Would Be Contrary to the Public Policy of the Recording Acts and Create Needless Uncertainty for Purchasers of Property

Should this Court adopt the superior court's heightened duty to investigate potential easements, it is unclear where the obligations would end. The "reasonable inquiry" standard makes it clear that no duty arises unless the

[7] The Feduniaks may have had a claim for indemnification against their title insurance company, *see, e.g., First Am. Title Ins. Co. v. XWarehouse, Lending Corp.*, 177 Cal. App. 4th 106, 113 (2010), but not against the Commission.

purchaser becomes aware of a suspicious fact. But the superior court's standard would make it impossible for any real estate purchaser to know what to do to protect himself against unforeseen adverse claims. Recording acts exist precisely to prevent this type of uncertainty and to render a bona fide purchaser's title secure if he makes the required good faith inquiry. *See, e.g.*, *Melendrez*, 127 Cal. App. 4th at 1251; Cal. Civ. Code § 880.020(a)(4) ("The status and security of recorded real property titles should be determinable to the extent practicable from an examination of recent records only."); *id*. § 880.020(b) ("It is the purpose of the Legislature in enacting this title to simplify and facilitate real property title transactions in furtherance of public policy by enabling persons to rely on record title to the extent provided in this title, with respect to the property interests specified in this title, subject only to the limitations expressly provided in this title and notwithstanding any provision or implication to the contrary in any other statute or in the common law. This title shall be liberally construed to effect the legislative purpose."). Unaware of any fact to the contrary, the Kretowiczs should have been secure in their property after performing the required title search.

Finally, whatever benefit the public would receive from additional public beach access is outweighed by the strong public policy furthered by the recording statutes. Should the Commission prevail, the public would get only an easement across one piece of property that the Commission did not deem

important enough to enforce for decades. On the other hand, as demonstrated above, the California legislature and courts have emphasized that recording provides important stability for property owners and allows potential purchasers to easily determine the quality of title. Courts in several other states have also recognized the importance of recording statutes to the security of property interests. *See, e.g.*, *Franklin Bank, N.A. v. Bowling*, 74 P.3d 308, 312 (Colo. 2003) (the purpose of recording acts "is to provide notice to prospective purchasers of encumbrances on title, and to protect certainty and marketability of title to real property"); *Monsanto Employees Fed. Credit Union v. Harbison*, 508 A.2d 262, 264 (N.J. Super. Ct. App. Div. 1986) ("[T]he fundamental purpose of our recording legislation is clearly to provide stability and certainty in land ownership by permitting subsequent takers in a chain to rely on what the record shows.") (internal quotation marks omitted). This Court should not cast aside the strong policy in favor of recording by allowing the Commission to enforce these dormant easements against the Kretowiczs.

CONCLUSION

Because the Kretowiczs were bona fide purchasers of the property at issue, the Commission cannot demand that they honor unrecorded public access easements in exchange for a land-use permit. This Court should reverse the superior court and remand with instructions to grant the writ of mandate.

DATED: June 26, 2015.

Respectfully submitted,

JAMES S. BURLING
CHRISTOPHER M. KIESER

By _____
CHRISTOPHER M. KIESER

Attorneys for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS is proportionately spaced, has a typeface of 13 points or more, and contains 4,488 words.

DATED: June 26, 2015.

_____
CHRISTOPHER M. KIESER

DECLARATION OF SERVICE BY MAIL

I, Suzanne M. MacDonald, 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 June 26, 2015, a true copies of MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANT were placed in envelopes addressed to:

Sherman Louis Stacey
Gaines & Stacey LLP
1111 Bayside Drive, Suite 280
Corona Del Mar, CA 92625

Jamee Jordan Patterson
Office of the Attorney General
600 West Broadway, Suite 1800
San Diego, CA 92101

Superior Court of San Diego County
220 West Broadway
San Diego, CA 92101

Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, CA 94102

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 26th day of June, 2015, at Sacramento, California.

_____

SUZANNE M. MACDONALD