

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

No. S221980

BARBARA LYNCH
and THOMAS FRICK,

Plaintiffs and Respondents,

v.

CALIFORNIA COASTAL COMMISSION,

Defendant and Appellant.

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 H. Maas III, Judge)

**PETITION
FOR REHEARING**

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INTRODUCTION

Petitioners Thomas Frick and the Heirs of Barbara Lynch (Owners) respectfully request that this Court grant rehearing in this matter, under California Rule of Court 8.268. The Court's Opinion in this case, dated July 6, 2017, failed to address important merits issues decided in the trial court and reversed in the Court of Appeal. Specifically, the Owners' right to re-build the previously existing stairway (which was substantially damaged by natural disaster) was not addressed by the Court. In addition, the Court resolved the case on grounds that neither party proposed or had an opportunity to brief, contrary to Government Code section 68081. For these reasons, the Owners respectfully urge this Court to grant this petition.

FACTUAL AND PROCEDURAL BACKGROUND

The Owners argued in its brief that under Public Resources Code section 30510(g), no coastal development permit was necessary to rebuild the damaged stairway. And indeed, no permit was issued. This is a sharp and critical distinction from the seawall which was granted a permit. With regard to the seawall, the Court ruled: "By accepting the benefits of the permit and building the seawall, plaintiffs effectively forfeited the right to maintain their otherwise timely objections." Slip op. at 7.

But there was no such acceptance of a permit with respect to the stairway. This is because no permit was issued for the stairway. It appears that the Court misunderstood this critical fact with respect to the stairway.

The California Coastal Commission approved a permit to rebuild the seawall, but denied a permit for the stairway and instead required that stairway reconstruction be “deleted from the plans.” Staff Report at 5. The Owners filed a timely petition for administrative mandate in the Superior Court of San Diego County. After the lawsuit was filed, the Commission issued its permit to construct the seawall to the Owners.

More than one year later, the Commission moved for judgment in the Trial Court, alleging the Owners had waived their right to judicial review by constructing the seawall as allowed by the permit. This Court issued its Opinion on July 6, 2017, affirming the Court of Appeal and finding that the Owners had forfeited their right to seek judicial review of the seawall conditions, but failing to reach the merits of the stairway issue. The Owners now request rehearing to consider the merits of the stairway issue and to allow supplemental briefing on the issue of forfeiture.

ARGUMENT

I

THE OPINION DID NOT ADDRESS RECONSTRUCTION OF THE DESTROYED STAIRWAY AFTER THE SEAWALL CONDITIONS HAD BEEN INVALIDATED

In the Opinion, this Court concluded that the Owners’ right to object to the seawall conditions were subject to “equitable forfeiture.” Slip op. at 5. The Opinion stated that, although the Owners had “timely filed for a writ of mandate,” the Owners had “acquiesced to” the terms of the seawall permit

because they had satisfied all remaining conditions of the permit, obtained a construction permit, and built the seawall. *Id.* The Court failed to rule with regard to the reconstruction of the lawful stairway.

The stairway cannot be subject to this Court's holding of equitable forfeiture because there are important factual and legal distinctions between the construction of the seawall and the stairway. The Owners sought and obtained a coastal development permit for the seawall. However, the Owners did not accept a permit for the stairway, instead alleging that no permit was required in the Trial Court.

The Trial Court issued its Peremptory Writ of Mandate on April 24, 2013, holding that the Owners were entitled to rebuild their beach stairway under the Encinitas Municipal Code and the state Coastal Act. The Trial Court found that the permitted stairway had been destroyed by a "disaster" within the meaning of Public Resources Code section 30610(g). The Trial Court held that no coastal permit was required to repair the stairway. The Owners rebuilt the stairway under this statement of authority by the Trial Court, and construction was completed before the Commission filed its Notice of Appeal.

Moreover, the acceptance of the seawall conditions did not constitute a forfeiture of the Owners' right to repair their lawfully existing stairway. Importantly, Special Condition 1(a) attached to the seawall permit only required the stairway be "deleted from the plans" for seawall construction.

Staff Report at 5. Because no permit was issued by the Commission as to the stairway's reconstruction, there were no conditions placed on the Owners, and therefore no "accept[ance] [of] the benefits afforded by the permit," as in the case of the seawall. Slip op. at 5.

Because the Court did not address the merits of the Owners' contention that no permit was required to repair the previously existing stairway, and because this Court's theory of equitable forfeiture does not apply to the repair of the stairway, we respectfully request the Court grant this petition for rehearing.

II

THIS COURT'S OPINION RELIED ON A CONCEPT OF EQUITABLE FORFEITURE, AND THE PARTIES SHOULD HAVE BEEN GIVEN AN OPPORTUNITY TO FILE SUPPLEMENTAL BRIEFING ON THIS ISSUE

In the Opinion, this Court relied on a concept of equitable forfeiture. Slip op. at 5. However, this Court noted that "[t]he parties and courts below have analyzed the issue here in terms of *waiver*." *Id.* at 4-5 (emphasis in original). Under Government Code section 68081, before the Supreme Court renders a decision based upon an issue which was not proposed or briefed by any party to the proceeding, the Court "shall afford the parties an opportunity to present their views on the matter through supplemental briefing." Further, if the court fails to afford that opportunity, "a rehearing shall be ordered upon timely petition of any party." Because neither party proposed nor briefed the

issue of forfeiture central to the Opinion, the Owners are entitled to rehearing before this Court.

The distinction between waiver and forfeiture is not a small one. As noted by this Court, waiver is a factual question, for which a trial court's determination is reviewed for substantial evidence. *Bickel v. City of Piedmont*, 16 Cal. 4th 1040, 1052 (1997). Forfeiture, on the other hand, is "essentially legal in nature, and thus subject to independent review." Slip op. at 5 (citing to *Evans v. City of San Jose*, 128 Cal. App. 4th 1123, 1136 (2005)).

Further, unlike forfeiture, waiver "is not effective unless it is voluntary." *Bickel v. City of Piedmont*, 16 Cal. 4th at 1052. Here, however, the Owners challenged the permit conditions, and sought to invalidate them through an administrative mandate proceeding. Slip op. at 7. Indeed, the Court conceded that "on these facts, they cannot be fairly said to have waived their objection." *Id.* (emphasis removed).

Because neither of the courts below addressed forfeiture, and because the parties had no opportunity to address the forfeiture issue in their briefs, Government Code section 68081 requires that this Court grant the Owners' petition for rehearing, and order the parties to file supplemental briefing on the issue of forfeiture.

CONCLUSION

In its Opinion, this Court neglected to address the distinct factual and legal issues surrounding the reconstruction of the destroyed stairway. Further, the Opinion resolved the case on grounds that neither party briefed or argued, contrary to the requirements of Government Code section 68081. In addition to the inequity to the Owners of leaving important merits issues unresolved, the scope of this Court's Opinion—on an issue raised by neither party—will have unintended and harmful consequences on permit applicants across the State. For these reasons, the Owners respectfully urge this Court to grant this petition.

DATED: July 21, 2017.

Respectfully submitted,

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DECLARATION OF SERVICE

I, Barbara A. Siebert, 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 July 21, 2017, true copies of MOTION FOR RECONSIDERATION were placed in envelopes addressed to:

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Counsel for Defendant and Appellant

COURT CLERK
Fourth District Court of Appeal, Division One
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San Diego County Superior Court
North County Division
325 South Melrose Drive
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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 21st day of July, 2017, at Sacramento, California.

BARBARA A. SIEBERT