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

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

APPLICATION TO FILE AMICUS BRIEF AND BRIEF OF CALIFORNIA ASSOCIATION OF REALTORS® AND NATIONAL ASSOCIATION OF REALTORS® AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND IN SUPPORT OF REVERSAL

Paul J. Beard II, No. 210563
ALSTON & BIRD LLP
1115 11th Street
Sacramento, California 95814
Telephone: (916) 498-3354
Facsimile: (213) 576-2864
E-mail: paul.beard@alston.com

Counsel for Amici Curiae
California Association of Realtors®
and National Association of Realtors®

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APPLICATION

Pursuant to California Rule of Court 8.520(f), and for the reasons set forth in this application, California Association of Realtors® and National Association of Realtors® respectfully request permission to file the accompanying brief in support of Petitioners Barbara Lynch and Thomas Frick and in support of reversal of the appellate court decision.

IDENTITY AND INTEREST OF AMICI CURIAE

The California Association of Realtors® (CAR) is a voluntary trade association whose membership consists of approximately 170,000 persons licensed by the State of California as real estate brokers and salespersons, and the local associations of REALTORS® to which those members belong. Members of CAR assist the public in buying, selling, leasing, financing, and managing residential and commercial real estate. CAR is actively engaged in promoting and establishing reasonable standards to govern the transfer of real property and the protection of private property rights. CAR pursues its objectives through a variety of methods, including education of its members, creation of standard form agreements for use in real estate transactions, lobbying, providing legal advice to its members, and participation as amicus curiae in relevant court cases. In order to support the preservation of landowners' constitutional rights, CAR has participated in several land-use and takings cases, including as amicus curiae in the

seminal case of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), which is discussed in the parties' briefs.

The National Association of Realtors® (NAR) is a nationwide, nonprofit professional association, incorporated in Illinois, that represents persons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. Founded in 1908, NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote the interests of its members and their professional competence. The membership of NAR includes 54 state and territorial Associations of REALTORS®, approximately 1,200 local Associations of REALTORS®, and more than 1 million REALTOR® and REALTOR-ASSOCIATE® members.

The court of appeal's decision in this case helps to insulate the unlawful permit decisions of state agencies in general and grants the California Coastal Commission in particular new permit powers that infringe upon the private property rights of homeowners. If upheld, the decision will negatively affect the marketability and values of thousands of properties in California and also serve to increase the length, complexity, and expense of real estate sale and lease transactions in this State. Thus, the ultimate disposition of this case is of paramount concern to CAR and NAR members, and the consumer clients whom they serve. The

associations' unique perspective, particularly as to the real-word effects of the outcome of this case on the industry and the homeowners it serves, will help the Court weigh all relevant considerations—including significant public policy concerns—as it analyzes the issues.

For the reasons above, California Association of Realtors® and National Association of Realtors® respectfully request that this Court grant their application to file the accompanying amicus brief.

Amici curiae California Association of Realtors® and National Association of Realtors® respectfully submit the following brief in support of Petitioners Barbara Lynch and Thomas Frick ("Homeowners").

INTRODUCTION AND SUMMARY OF ARGUMENTS

Amici urge the Court to reverse the Court of Appeal's decision on all three issues presented in this case, and hold as follows:

> (1) the Commission has no power to impose an arbitrary expiration date on the right to protect one's home;
>
> (2) the Commission has no power to deny a homeowner the right to repair a private structure; and
>
> (3) the correct standard for reviewing a "waiver" finding requires the reviewing court, *inter alia*, to disregard evidence detracting from the superior court's finding.

For purposes of this brief, Amici offer the Court their insights and concerns about only the **first** and **third** issues.[1]

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[1] Amici fully support the Homeowners with respect to the second issue, but they see no special need to brief it.

The relevant facts are undisputed. When the Homeowners sought to protect their storm-battered, bluff-top residences with a state-of-the-art seawall, Respondent California Coastal Commission ("Commission") approved a permit authorizing them to build it. Administrative Record ("AR") 1682-83. Under existing law, the Commission had no choice but to recognize the Homeowners' right to protect their homes. Pub. Res. Code § 30235 (requiring issuance of a seawall permit for existing homes in danger from erosion). But the Commission found a creative way to make that right temporary and dependent entirely upon the Commission's future discretion: The Commission would impose a 20-year expiration date on the seawall permit. AR 1682-83.

There should be no doubt about the real effect of the Commission's expiration date on the Homeowner's rights. After twenty years, the Homeowners or their successors-in-interest will lose the *permanent* and *guaranteed* right to protect their homes from collapse to the beach. AR 1682. Of course, they will be free to apply again to the Commission for (what the agency views as) the "privilege" of protecting their homes; but there will be no guarantee that the seawall will be re-authorized. *Id.* at 1683. The Commission asks this Court to endorse this unprecedented "power grab." Joint Appendix ("JA") 204 (trial court describing the Commission's 20-year expiration-date condition as a "power grab").

As described in detail below, Amici strongly urge the Court to reject the Commission's invitation. Important public-policy considerations militate in favor of a permanent and guaranteed right to protect one's home. Among other things, legal certainty and predictability about the nature and scope of that right are necessary to preserving a robust, orderly, and efficient real-estate market; by contrast, subjecting that right to the political whims of an administrative agency, serves to devalue affected properties, damage their marketability, and render the buying and selling of those properties costly, time-consuming, and difficult. None of the Commission's alleged "reasons" for imposing expiration dates on seawall permits addresses these significant concerns or justifies that power. Nor does the plain meaning of section 30235, which guarantees a homeowner the permanent and guaranteed right to protect his home, allow it. Pub. Res. Code § 30235.

Moreover, the Homeowners preserved their right to challenge in Court the Commission's expiration date (along with denial of the right to repair their staircase). The Commission asks the Court to depart from well-established precedents on "waiver," and institute a new and unworkable rule that would make reviewing courts the arbiters of fact-intensive inquiries about a claimant's intent, the actions he pursued to preserve or waive his claim, and what the opposing party did or did not know. The Court need simply reaffirm the sensible framework whereby the superior

court weighs the facts in a case and makes a "waiver" finding, which the reviewing court reviews only for substantial evidence. Importantly, under the "substantial evidence" standard, the reviewing court determines only whether sufficient evidence in the record supports the finding ***and disregards evidence to the contrary***. Under this standard, which promotes judicial economy and reduces the potential for unnecessary appeals, the Homeowners easily can be found to have preserved their claims against the Commission.

For these reasons, and those stated in the Homeowners' briefs, the Court should reverse the Court of Appeal decision.

ARGUMENT

I. THE COMMISSION SHOULD HAVE NO POWER TO IMPOSE AN EXPIRATION DATE ON AN OWNER'S RIGHT TO PROTECT HIS HOME

A. Important Policy Considerations Militate in Favor of Recognizing One's Right to Protect His Home

It is difficult to overstate the public-policy ramifications of a Court decision legitimizing the Commission's power to impose an expiration date on an owner's right to protect his home. Most obviously, such power would adversely affect homeowners' and prospective buyers' need for certainty about the future integrity of the residences they own or seek to buy. It would negatively impact the marketability and values of thousands of properties in California. And it would erect possibly insurmountable

barriers for prospective homebuyers who need to finance their purchases and obtain reasonably priced (if available) home-insurance policies. It would also increase the duration, complexity, and expense of real-estate sale and lease transactions in this State.

Take Barbara Lynch, one of the Homeowners in this case. If she decides to put her home up for sale, a prospective buyer will learn that the home enjoys seawall protection only temporarily—until 2031.[2] At that point, he will be told, the Commission will be free to order the seawall's removal. In other words, the risk is significantly high that, after 2031, the house will have no protection whatsoever against erosion and possible collapse to the beach. What prospective buyer would entertain the possibility of purchasing a home that he knows could collapse to the beach after 2031? Even if a buyer with an unusual penchant for risk-taking were interested, and financing and insurance were otherwise available to him under those precarious circumstances, Ms. Lynch's home would be so devalued as a result of the lack of guaranteed bluff protection that the transaction would be difficult—if not entirely impossible—for her to close from a financial standpoint.

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[2] The Commission approved the seawall permit in 2011, and the relevant condition of approval requires its expiration in 2031. *See* Petitioners' Opening Brief at 9.

Despite the chaos that legitimization of the Commission's new-fangled expiration-date policy would visit upon the real-estate and related industries, the Commission tries to justify it on economic and policy grounds. For example, the Commission explains that "[t]he $500,000 that Plaintiffs estimated each would pay for the seawall will be amortized over at least 20 years," Respondent's Brief ("Resp. Brief") at 41, making it reasonable for the permit to expire within that time. The Commission obviously has not thought through the illogic of this purported justification. If a property owner obtained a permit for a new roof, the cost of which was amortized over five years, no reasonable person could expect the owner to be at risk of being required by law to *remove* the new roof at the end of those five years—and thereby lose forever the permanent and guaranteed right to have a roof over his head. Fundamental rights, including the right to protect one's home,[3] are not a function of amortization tables.

Next, the Commission claims that the Homeowners will likely need to repair, replace or augment the seawall in 20 years' time anyway. Resp. Brief at 41. But this is not a reason for imposing an arbitrary expiration date on the seawall permit. The law *already* requires the Homeowners to

[3] The right to protect one's property is one of the few "inalienable" rights that the California Constitution guarantees. Cal. Const. art. I, § 1 ("All people are by nature free and independent and have ***inalienable rights***. Among these are enjoying and defending life and liberty, acquiring, possessing, and ***protecting property***, and pursuing and obtaining safety, happiness, and privacy." (emphasis added)).

obtain a permit to make *any* such modifications to their seawall—with or without the expiration date. The Commission does not need the expiration date to protect its or the City's permitting jurisdiction over repairs, replacement or augmentation of a structure like a seawall.

The Commission also argues that the Homeowners must be forced onto a level playing field with other property owners, or they could apply to demolish their homes and replace them with more intense development "in reliance on the seawall." Resp. Brief at 34. It's true: The Homeowners might ***apply*** for permission to remodel or even replace their homes. But application is not approval. In the end, the City and Commission retain the discretion to approve only a project whose scope and aesthetics they believe is consistent with the law. Certainly, the existence of a state-of-the-art seawall—with several decades of life left[4]—will help alleviate concerns about the bluff's ability to support replacement homes. But in terms of protecting life, limb and property, this is a result to be encouraged as a matter of good public policy—and, in any event, a result not of the Homeowners' making, but of the Legislature's considered policy decision to guarantee in the Coastal Act an owner's right to protect his home. Pub. Res. Code § 30235. By imposing an expiration date, the Commission seeks to act as a Legislature and water down the protections in the Coastal Act, in

[4] The seawall has a life expectancy of 75 years. AR 212.

a misguided effort to enact as law its own policy preferences concerning whether and how individuals can protect their homes.

Next, the Commission argues that "[n]either the Commission nor Plaintiffs know what facts and circumstances will be present in 20 years or how the Commission will analyze the issues at that time." Resp. Brief at 33. It cites to a variety of future hypotheticals that will allegedly make the present seawall either unnecessary or undesirable (from its perspective). Resp. Brief at 33. Specifically, it cites to (1) the possible redevelopment of the Homeowners' lots, (2) the possible need to implement future policies to address shoreline sand supply (that the City may or may not adopt), and (3) new technologies that improve upon the seawall. *Id.* & n.5. Again, the Commission conveniently omits the fact that *any* redevelopment by the Homeowners will require a new permit from the City and/or the Commission, at which time they will have the power to take into account any changed circumstances that legally can inform their approval; the expiration date adds no additional permit obligations on the Homeowners. As for the possible need to implement policies addressing shoreline sand supply, such policies (if ever enacted) would address a quintessentially *public* need requiring a *public* response financed by the *public* as a whole (*e.g.*, a publicly financed sand replenishment program to shore up public beaches). After all, <u>any future sand supply issue would not be attributable to the Homeowners or their seawall</u>: As the Commission concedes, their

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 (emphasis added). Consequently, the Homeowners' continued use of their seawall for its entire 75-year life would not interfere with or undermine the City's future policies to address shoreline sand supply. Finally, the possibility of new technologies that improve upon seawalls is no reason to force the removal of such a massive investment, let alone expose homeowners to the inherent dangers of an unprotected bluff. The Commission cites to no authority for the proposition that an agency can hold a permitted—and legally required—structure hostage in the name of speculative technological advances.

All of the Commission's "reasons" for imposing an expiration date on the Homeowners' seawall permit are pre-textual. Unable to predict the future, but keen on retaining regulatory flexibility, the Commission simply wants the opportunity to exact land, funds, or other concessions from the Homeowners under the threat of removing their $1 million seawall. This approach to permitting causes uncertainty and unpredictability, not just to the Homeowners in this case, but to *all* property owners. Indeed, as more and more bluff-top homes lose section 30235's guaranteed protections, property owners who require Commission permitting to protect their properties, as well as the real-estate industry writ large, increasingly will suffer the consequences, as described above.

On the other hand, interpreting section 30235 to guarantee a permanent right to protect vulnerable bluff-top homes makes practical sense. It not only preserves the values of those homes, but it also eliminates much of the recent uncertainty surrounding coastal homeowners' rights and the continued viability of their residences—particularly given the Commission's ever-stringent, anti-development policies. The Court should hold that section 30235 does not authorize the Commission to include expiration dates on seawall permits, and that all property owners, including bluff-top homeowners, have the right to protect their homes.

B. Section 30235 Recognizes No Expiration of an Owner's Right to Protect His Home

The many public-policy considerations favoring an owner's right to protect his home are reflected in the plain language of section 30235—which the Commission, an administrative agency, is constitutionally bound to respect. Like all administrative agencies, "the Commission . . . has no inherent powers; it possesses only those powers that have been granted to it by the Constitution or by statute." *Carmel Valley Fire Protection Dist. v. State of California*, 25 Cal. 4th 287, 299–300 (2001). As the Court of Appeal in *Security Nat'l Guaranty, Inc. v. California Coastal Comm'n*, 159 Cal. App. 4th 402 (2008), aptly explained:

> [A]n agency literally has no power to act . . . unless and until [the Legislature] confers power upon it. That an agency has been granted some authority to act within a given area does not mean that it enjoys plenary authority to act in that area.

> As a consequence, if the Commission takes action that is inconsistent with, or that simply is not authorized by, the Coastal Act, then its action is void.

Id. at 419 (internal citations and quotation marks omitted).

In assessing whether an agency has acted beyond the bounds of its legislative grant of power, the Court "begin[s] by examining the statutory language, giving the words their usual and ordinary meaning." *Day v. City of Fontana*, 25 Cal. 4th 268, 272 (2001). Importantly, "[i]f there is no ambiguity, then [the Court] presume[s] the lawmakers meant what they said, and ***the plain meaning of the language governs***." *Id.* (emphasis added). But even if the statute at issue is ambiguous, the Court must "select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." *Id.* Moreover, the Court "should avoid a construction that makes some words surplusage." *Agnew v. State Bd. Of Equalization*, 21 Cal. 4th 310, 330 (1999).

Section 30235 is unambiguous about a property owner's fundamental right to protect his home in danger from erosion and the kinds of conditions that the Commission is authorized to impose on that right. Pub. Res. Code § 30235; *see also* Cal. Const. art. I, § 1 (guaranteeing the fundamental and "inalienable" right of "protecting property," among other rights). Significantly, after mandating that the Commission "shall"

authorize protection for a home in danger from erosion (*e.g.*, a seawall), the statute identifies only one relevant qualification to that right—namely, the seawall must be "designed to eliminate or mitigate adverse impacts on the local shoreline sand supply." Pub. Res. Code § 30235. Thus, the plain meaning of the statute authorizes only ***design***-related conditions that ***eliminate or mitigate*** for impacts to local shoreline sand supply caused by the seawall. Because the Commission's expiration date on the Homeowners' seawall is not a design-related condition, let alone a condition that eliminates or mitigates for impacts on local shoreline supply attributable to the seawall, it is categorically outside the Commission's power to impose.

Nevertheless, the Commission wants authority, not only to dictate a seawall's design, but also to redefine the nature and scope of ***the right*** to that seawall by arrogating to itself the power to make uncertain and temporary what otherwise is a guaranteed and permanent right. This attempt to read into section 30235 an implied power to impose expiration dates on seawall permits fails for a number of reasons.[5]

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[5] The Commission claims that local policies authorize expiration dates on seawall permits and that those policies trump section 30235. But tellingly, the Commission fails to cite a single local policy that speaks to, let alone authorizes, any kind of temporal limitation on bluff-top owners' right to protect their homes in danger from erosion.

First, "[t]he courts are loath to construe a statute which has the effect of 'adding' language to a statute." *Schneider v. California Coastal Comm'n*, 140 Cal. App. 4th 1339, 1345 (2006); *see also Wells Fargo Bank v. Superior Court*, 53 Cal. 3d 1082, 1097 (1991) ("[C]ourts are no more at liberty to add provisions to what is therein declared in definite language than they are to disregard any of its express provisions." (internal citation and quotation marks omitted)). Like the Commission, some may argue that, as a policy matter, section 30235 should have included other, non-design restrictions on the right to protect one's home—perhaps even the power to impose expiration dates on seawall permits. But it is not the function of the Court, much less an administrative agency like the Commission, to inquire into the wisdom of the Legislature's underlying policy choices in enacting 30235. *See, e.g., Bonnell v. Medical Bd. of California*, 31 Cal. 4th 1255, 1263 (2003) ("It is not our function to inquir[e] into the 'wisdom' of underlying policy choices." (internal citation and quotation marks omitted)); *Drouet v. Superior Court*, 31 Cal. 4th 583, 593 (2003) ("The judicial branch has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." (internal citation and quotation marks omitted)).

Schneider is particularly illustrative. The case involved interpretation of section 30251 of the Coastal Act, which provides in relevant part that "[p]ermitted development shall be sited and designed to

protect views ***to and along*** the ocean and scenic coastal areas." Pub. Res. Code § 30251 (emphasis added). Relying on this provision, the Commission imposed burdensome conditions on a property owner's permit to build a residence on his oceanfront lot. Among other things, the Commission required the residence and associated development to be significantly confined within an area of no more than 5,000 square feet and be re-sited to the far northwest corner of the lot—away from the coastline—in order to protect views "from the sea to the coast" under section 30251. The question for the Court of Appeal was whether section 30251 authorized the Commission to protect, not just *ocean-ward* views from the land, but *landward* views from the ocean as well (for example, those views of a boater or kayaker). The Court of Appeal answered with a resounding "no," rejecting the Commission's invitation to add words to the statute:

> The Coastal Commission and the Attorney General's construction of the section adds the words "and from" between the italicized words "along," and "the." The statute would thus read, "protect views to and along, and from, the ocean . . . ." This expansive reading of the statute stretches the fabric too thin. The courts are loath to construe a statute which has the effect of "adding" language to a statute. Courts may add language to a statute in extreme cases where they are convinced the Legislature inadvertently failed to utilize the words which would give purpose to its pronouncements. In our view, this is not such a case.

Id. at 1345 (internal citations and quotation marks omitted).

Like in *Schneider*, the Commission in this case asks the Court to add words to a statute in an effort to expand its power. If accepted, the Commission's construction of section 30235 would add the following words at the end of the first sentence: "and only for as long as the Commission deems appropriate for responding to future environmental factors, and to legislative or judicial changes in the law that would eliminate the right protected herein." In its entirety, the Commission's edited version of Section 30235 would read, in relevant part:

> A seawall "shall be permitted when required . . . to protect existing structures . . . in danger from erosion, when designed to eliminate or mitigate adverse impacts on local shoreline sand supply **and only for as long as the Commission deems appropriate for responding to future environmental factors, and to legislative or judicial changes in the law that would eliminate the right protected herein."**

The Commission's proposed addition would dramatically change section 30235 into something far different from what the Legislature intended, and it should therefore be rejected out-of-hand.

Second and relatedly, the Commission's interpretation leads to an absurd result—namely, vitiation of the very right that section 30235 was originally designed to protect. If, as the Commission argues, section 30235 confers an implied power to issue only *temporary* seawall permits, there would be nothing to stop the Commission from imposing an expiration date of five years, one year, six months, or even less on a seawall permit. The Commission could justify a short-term seawall permit on the same grounds

that it relies upon in this case—namely, speculation about future environmental factors, and hoped-for legislative or judicial abolition of the right to protect one's home.

From a purely economic standpoint, what homeowner would invest the hundreds of thousands of dollars required to install a new seawall with a 75-year life, knowing full well that he could be forced to remove it, at significant cost, in just a matter of months or a few years? What buyer would purchase a home that—*by law*—faced the prospect of destruction from erosion? Would an insurer issue a policy on such a home; if so, at what exorbitant price?

By making it economically infeasible for property owners to exercise the right to protect their homes, the Commission could pay lip service to section 30235 by issuing a short-term, but largely worthless, permit while advancing its very public and well-documented goal of banishing seawalls from the coast by any means necessary. *See, e.g.*, Meg Caldwell & Craig Holt Segall, *No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access Along the California Coast*, 34 Ecology L.Q. 533, 564-65 (2007) (discussing the Commission strategy of skirting the statutory right to protect one's home by requiring applicants for new residences to expressly "waive, on behalf of themselves and all successors and assigns, any rights to construct such devices that may exist under Public Resources Code Section 30235 or under Local Coastal Plans"). The

potential for that kind of sharp practice in the context of an issue as significant as the right to protect one's home cannot possibly be what the Legislature had in mind when it enacted section 30235.

Third, the Commission's proposed modification of section 30235 would render meaningless and mere surplusage another key provision of the Coastal Act. Section 30624 authorizes the Commission to grant emergency permits on most any term or condition it wants, including *temporarily*. Pub. Res. Code § 30624. The Commission has relied on this expansive power to grant temporary seawalls. For example, in *Barrie v. California Coastal Comm'n*, 196 Cal. App. 3d 8 (1987), the Commission granted homeowners an emergency permit to build a seawall in front of their residences in response to reports of imminent storms and high tides. *Id.* at 12. As a condition of the emergency permit, the Commission required the homeowners to "'apply for a regular Coastal Permit to have the emergency work be considered permanent' within 60 days"; otherwise, "'the emergency work [was to] be removed in its entirety within 150 days of the above date unless waived by the [Executive] Director.'" *Id.* (quoting the Commission's permit approval). By the terms of its permit approval, the Commission recognized that a "regular" (*i.e.*, non-emergency) permit provided for a "permanent" seawall (presumably, under section 30235) to replace the temporary one. If the Legislature had intended for section 30235 to give the Commission power to issue only temporary seawall

permits, there would be no need for section 30624. *Agnew*, 21 Cal. 4th at 330 (The Court "should avoid a construction that makes some words surplusage.").

Amici, who represent the interests of countless coastal property owners, have a keen interest in seeing that the Commission exercises its power within the limits and letter of the law, and in a fair and predictable manner. All too often in its 40-year history, the Commission has acted in ways that the Coastal Act does not allow, with the practical effect being that both property owners and prospective buyers in the coastal zone have had no clear idea of the Commission's regulatory reach with respect to the development, use, and protection of coastal property. The *Schneider* case discussed above is a good illustration of the problem, but there are many others.

For example, in *Security National Guaranty,* 159 Cal. App. 4th 402, the Commission accepted an appeal of Sand City's permit to develop a parcel, after the City had concluded that the parcel contained no undevelopable "Environmentally Sensitive Habitat Area" ("ESHA"); the City's conclusion was based on its Local Coastal Program ("LCP"), which comprised its local zoning laws and maps that the Commission certified. The certified LCP *should* have provided the applicant with some level of certainty about what could be done on the parcel. But on appeal, the Commission ignored the LCP and unilaterally sought to designate the

parcel as undevelopable ESHA. The Court found the Commission's action to be unlawful, concluding that "the Commission exceeded its statutory authority, improperly assumed powers reserved to the local government, and contradicted the terms of the certified LCP." *Id.* at 422 (heading to part (c)(3) of its "Discussion"); *see also Landgate, Inc. v. California Coastal Comm'n*, 17 Cal. 4th 1006, 1014-15 (1998) (describing earlier litigation in the same case, in which the Court of Appeal held that the Coastal Act "did not authorize the Commission to invalidate a legally recorded lot line adjustment to which the Commission, by its actions and inaction, had given tacit approval, when an innocent purchaser would stand to lose all value from its lot from such invalidation").

But the Commission's excesses have not been limited to Coastal Act violations. The Commission also has tested the constitutional limits of its authority. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the United States Supreme Court struck down the Commission's demand that an applicant give up a public-access easement across his beachfront property as the "price" of exercising his right to build a home[6] there. The demand was made pursuant to the Commission's policy—not authorized anywhere in the Coastal Act—of seizing public-access

[6] "[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'" *Nollan*, 483 U.S. 825, 833 n.2.

easements from vulnerable coastal landowners in need of a permit to build. The Supreme Court held that the easement exaction effected an unconstitutional taking of private property without just compensation, because the exaction bore no relationship whatsoever to the proposed home's impact on existing public access; in the Court's view, the Commission's demand was just "an out-and-out plan of extortion." *Id.* at 837 (internal citation and quotation marks omitted).

The United States Supreme Court's stern language did little to deter the Commission, which continued—and continues—in its efforts to seize public easements from homeowners in the permitting process by any means necessary.[7] *See, e.g., Surfside Colony, Ltd. v. California Coastal Comm'n*, 226 Cal. App. 3d 1260, 1269 (1991) (striking down Commission's requirement that homeowners give up a public-access easement across their beach, as a condition of obtaining a permit for a revetment necessary to protect their homes from erosion). Most recently, the Commission tried to

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[7] As one commentator who surveyed the history of the Commission's permit practices observed, "[t] he Commission has treated the Supreme Court's decision [in *Nollan*] more like a temporary irritant, rather than a binding command to respect property rights. The Commission has made no attempt to secure compensation for those pre-*Nollan* land use applicants on whom it imposed access conditions now recognizable as unconstitutional under that decision. Instead, the Commission has acted vigorously and successfully to keep all pre-*Nollan* exactions in place." J. David Breemer, *What Property Rights: The California Coastal Commission's History of Abusing Land Rights and Some Thoughts on the Underlying Causes*, 22 U.C.L.A. Envt'l L. & Pol'y 247, 267 (2004).

force a family to dedicate a public-access easement across its coastal property, in exchange for a permit simply to *remodel* an existing home. The attempt failed, with the Court of Appeal striking down the exaction and remarking:

> Here the Commission does not argue [the *Nollan*] test is met. How could it when it is not? There is no rational nexus, no less rough proportionality, between the work on a private residence a mile from the coast and a lateral public access easement.

Bowman v. California Coastal Comm'n, 230 Cal. App. 4th 1146, 1151 (2014).

These examples of Commission overreach are offered as illustrations of the Commission's penchant for creativity. That same creativity is at play here, as the Commission seeks to interpret section 30235 beyond all recognition and in a way that undermines the provision's very deliberate protections for homeowners. The Court should reject that interpretation and remain faithful to the plain meaning of section 30235.

II. "SUBSTANTIAL EVIDENCE" EASILY SUPPORTS THE SUPERIOR COURT'S "NO WAIVER" FINDING

The Court of Appeal incorrectly held that the Homeowners waived their right to challenge the permit conditions imposed by the Commission. "To constitute a waiver, there must be an existing right, knowledge of the right, and an actual intention to relinquish the right." *Bickel v. City of Piedmont*, 16 Cal. 4th 1040, 1053 (1977). Whether a party has waived a

right is "a question of fact." *Id.* at 1052. As a consequence, a superior court's determination of the "waiver" issue is reviewed "under the deferential 'substantial evidence' standard," pursuant to which the reviewing court views "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.* at 1053. "Substantial evidence" is not just any evidence. It is "relevant evidence that a reasonable mind might accept as adequate to support a conclusion," and "must be reasonable, credible, and of solid value." *California Youth Authority v. State Personnel Bd.*, 104 Cal. App. 4th 575, 584-85 (2002); *see also Ofsevit v. Trustees of Cal. State University & Colleges*, 21 Cal. 3d 763, 773 n.9 (same).

Importantly, under the "substantial evidence" test, a reviewing court does not reweigh the evidence in the record. To the contrary, "the appellate court will look only at the evidence supporting the prevailing party and will disregard the contrary showing." *GHK Associates v. Mayer Group, Inc.*, 224 Cal. App. 3d 856, 872 (1990). As the *GHK Associates* court explained:

> "All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity, to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed."

Id. (quoting *Estate of Teel*, 25 Cal.2d 520, 527 (1944)).

One policy reason for the "rule of conflicting evidence" is that "the appellate courts have the primary function of reviewing errors of law, and lack the time and resources to assume the added burden of studying records for the purpose of re-determining the facts." 9 Witkin, Cal. Proc. 5th (2008) Appeal, § 367, p. 425. The rule also has the benefit of reducing appellate litigation. Because a superior court's findings are reviewed for "substantial evidence"—where the losing party's contrary evidence is disregarded—that party is less likely to appeal on those grounds.

The Commission concedes that "[t]his Court reviews the trial court's finding of no waiver under the substantial evidence standard." Respondent's Brief at 16. Nevertheless, the Commission goes on to misapply the standard by demanding that *its* alleged evidence for waiver be weighed against the Homeowners' evidence to the contrary. "Substantial evidence" review plainly prohibits the reweighing of conflicting evidence.

The evidence supporting the superior court's "no waiver" finding is more than substantial. The record shows that the Homeowners objected to the expiration date and staircase removal, both in writing and orally, throughout the administrative process. They filed a timely writ of mandate action challenging those conditions under Code of Civil Procedure section 1094.5. They diligently prosecuted their challenge in the superior court, with no evidence in the record to suggest any intention of abandoning their lawsuit. *See* Petitioners' Opening Brief at 10-11.

Together, these undisputed facts easily constitute substantial evidence in support of the superior court's finding that the Homeowners did not waive their right to challenge the permit conditions. Under the "substantial evidence" test, the inquiry begins and ends there. The superior court's finding must stand.

In their briefs, the Homeowners quite effectively show why the two facts the Commission points to in its brief—namely, the recorded deed restrictions and the seawall construction[8]—are not evidence of an intent to waive. But given the "substantial evidence" test, the Court should go further and altogether "disregard the [Commission's] contrary showing" and "discard[]" any allegedly "unfavorable" evidence. *GHK Associates*, 224 Cal. App. 3d at 872.

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[8] Neither fact establishes the Homeowners' intent to waive. This is particularly evident with respect to their seawall construction. Exercising one aspect of a permit (the so-called permit "benefits") says absolutely nothing about the applicant's intent with respect to *other* aspects of the same permit, like an unfavorable condition. There is no sensible reason why, in order to preserve a challenge, a permit applicant should have to sacrifice for an indeterminate period of time his right to use or (as in this case) protect his property until his challenge is fully litigated—something that can take many years to finally resolve. The only reason why the Commission would want to force applicants to make the impossible choice between exercising their property rights and challenging unlawful conditions is obvious: It knows that, given one or the other choice, many applicants will choose to swallow unlawful or even unconstitutional conditions just so that they can proceed with their projects without delay. *See, e.g.*, Respondent's Brief at 25 (Commission bemoaning any weakening of the rule that "permit applicants are required to submit to conditions they view to be unfavorable in order to obtain a permit").

In sum, the Court should reaffirm the well-established framework for analyzing "waiver" claims, including the nature and application of the "substantial evidence" standard. That framework allows intensely factual questions about a particular mental state—the intent to waive—to be determined by the superior court, which is best-positioned to weigh all the evidence for and against waiver. It preserves the resources of the appellate courts. And, on balance, it discourages unnecessary appeals over factual findings. By contrast, the Commission offers no reason whatsoever for deviating from the traditional "substantial evidence" standard of review.

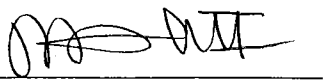
CONCLUSION

For all the reasons stated above, and the reasons stated in the Homeowners' briefs, the decision of the Court of Appeal should be reversed.

DATED: July 29, 2015.

Respectfully submitted,

Paul J. Beard II
ALSTON & BIRD LLP



PAUL J. BEARD II

Counsel for Amici Curiae California Association of Realtors® and National Association of Realtors®

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPLICATION TO FILE AMICUS BRIEF AND BRIEF OF CALIFORNIA ASSOCIATION OF REALTORS® AND NATIONAL ASSOCIATION OF REALTORS® is proportionally spaced, has a typeface of 13 points or more, and contains 6,352 words.

DATED: July 29, 2015.

PAUL J. BEARD II

PROOF OF SERVICE

I, Annie Yu, declare:

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action. My business address is Alston & Bird LLP, 1115 11th Street, Sacramento, California 95814. I am over the age of eighteen years and not a party to the action in which this service is made.

On July 29, 2015, I served the document described as BRIEF AMICUS CURIAE OF CALIFORNIA ASSOCIATION OF REALTORS® AND NATIONAL ASSOCIATION OF REALTORS® on the interested parties in this action by enclosing the document in a sealed envelope addressed as follows: See Attached Service List.

☒ BY MAIL: I am "readily familiar" with this firm's practice for the collection and the processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, the correspondence would be deposited with the United States Postal Service in Sacramento, California, with postage thereon fully prepaid the same day on which the correspondence was placed for collection and mailing at the firm.

☐ BY FEDERAL EXPRESS ☐ UPS NEXT DAY AIR ☐ OVERNIGHT DELIVERY: I deposited such envelope in a facility regularly maintained by ☐ FEDERAL EXPRESS ☐ UPS ☐ Overnight Delivery with delivery fees fully provided for or delivered the envelope to a courier or driver of ☐ FEDERAL EXPRESS ☐ UPS ☐ OVERNIGHT DELIVERY authorized to receive documents at Alston & Bird LLP, 1115 11th Street, Sacramento, California 95814 with delivery fees fully provided for.

☐ BY FACSIMILE: I telecopied a copy of said document(s) to the following addressee(s) at the following number(s) in accordance with the written confirmation of counsel in this action.

☒ [State]I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 29, 2015, at Sacramento, California.

ANNIE YU

SERVICE LIST

James S. Burling
John M. Groen
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Counsel for Petitioners

Jonathan C. Corn
Axelson & Corn, P.C.
160 Chesterfield Drive, Suite 201
Cardiff by the Sea, CA 92007
Counsel for Petitioners

Hayley E. Peterson
Office of the Attorney General
600 West Broadway, Suite 1800
San Diego, CA 92101
Counsel for Respondent

Court Clerk
Fourth District Court of Appeal, Div. 1
Symphony Towers
750 B Street, Suite 300
San Diego, CA 92101

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