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' REPLY TO BRIEFS OF AMICI

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INTRODUCTION

There were six briefs filed by amici. Three of those briefs were filed in support of Petitioners Barbara Lynch and Thomas Frick (the "Homeowners"). The amici supporting the Homeowners include trade associations representing broad statewide interests that are impacted by the California Coastal Commission's regulatory actions. Those organizations are the California Association of Realtors, the National Association of Realtors, the California Building Industry Association, the California Cattlemen's Association, and the California Farm Bureau Federation. In addition, an amicus brief in support of the Homeowners was filed by a coalition of groups representing individuals and coastal property owners. These amici are the Beach and Bluff Conservancy, Protect The Beach.Org, Seacoast Preservation Association, and the Coastal Property Owners Association of Santa Cruz County.

Homeowners appreciate and agree with the arguments advanced by the amici in support of their claims against the California Coastal Commission. Accordingly, there is no need to respond to these supporting briefs. These briefs raise salient points and authorities that are consistent with and enhance the position of Homeowners.

There were also three briefs filed by amici in support of the California Coastal Commission. Much of what is contained in those briefs is already answered by the Homeowners' briefs on the merits. Accordingly, in the

interest of brevity and clarity, this response will focus on specific points that warrant correction.

ARGUMENT

I

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

The amici opposing the Homeowners cannot dispute the controlling California authorities holding that waiver rests upon intent. *See, e.g.*, *City of Ukiah v. Fones*, 64 Cal. 2d 104, 107 (1966) (" 'Waiver always rests upon intent.' " (quoting *Roesch v. DeMota*, 24 Cal. 2d 563, 572 (1944))); *Bickel v. City of Piedmont*, 16 Cal. 4th 1040, 1053 (1997) ("To constitute a waiver, there must be an existing right, knowledge of the right, and an **actual intention to relinquish** the right.") (emphasis added). Rather than presenting any contrary authority, or acknowledging *Bickel v. City of Piedmont*, the American Planning Association (APA) at page 5 of its amicus brief characterizes the Homeowners as needing to "fashion a novel theory" with respect to waiver. But there is nothing novel about Homeowners' argument that waiver rests upon intent. That is long-established California law.

Of course, the undisputed facts show that the Homeowners never intended to waive their right to judicial review. The key fact that the California Coastal Commission and its supporting amici never come to grips with is that the Homeowners filed a timely petition for writ of administrative mandate under Code of Civil Procedure section 1094.5. There was nothing secret about that filing. There was no subterfuge. The Commission knew that the Homeowners opposed the challenged Special Conditions, and that a timely lawsuit had been filed. Given these facts, it should be no surprise that the trial court found the Homeowners "neither specifically agreed to the conditions nor failed to challenge their validity." Joint Appendix (JA) at 101 (minute order, 12/21/2012). Substantial evidence supports that finding, and the amici have no persuasive response.

The APA repeats the argument made by the Commission that the deed restriction shows that the Homeowners "specifically agreed" to the conditions. But that is simply not true. The language in the deed restriction is that the Homeowners "complied" with the imposition of the conditions, not that they agreed with them, or would not challenge the conditions. The APA ignores this distinction which is discussed in Petitioners' Opening Brief at 16 - 19.

The APA also argues that preserving the Homeowners' right to judicial review will undermine the need for finality and certainty in land use planning. If that is the case, we might as well repeal the authority for filing writs for administrative mandamus under Code of Civil Procedure section 1094.5, and

thereby avoid any legal challenges to land use decisions, and thus maximize certainty and finality. Remarkably, the APA at page 8 of its brief quotes *Hensler v. City of Glendale*, 8 Cal. 4th 1, 27 (1994), that the "purpose of statutes and rules which require that attacks on land-use decisions be brought by petitions for administrative mandamus, and create relatively short limitation periods for those actions, . . . is to permit and promote sound fiscal planning by state and local government entities." Of course, the glaring defect in the APA's argument is that filing a timely administrative mandamus action is *precisely what the Homeowners did*! They exercised their right to judicial review in exactly the manner called for by the law. The notion that this case undermines certainty in land use planning, and will lead to chaos, is unpersuasive and should be rejected.

The Homeowners are not seeking to create a new "under protest" procedure. They simply exercised their right to judicial review through the timely filing of a writ of administrative mandamus, and they never waived such right. Rather, they exercised that right.

The APA also argues that the severability clause of the deed restriction should not be enforced. APA brief at 11. In support, the APA cites *City of Bell v. Superior Court*, 220 Cal. App. 4th 236, 252 n.17 (2013). But that decision is taken totally out of context. The party there was trying to use a severability clause to remove an indemnity clause where the indemnity clause was recognized by the court as being fully valid. Not surprisingly, the court

rejected using the severability clause to remove a valid indemnity clause from the contract. The decision has no bearing on the severability clause here. The severability clause as part of the deed restriction reveals the intent that there was no waiver of the right to judicial review. The severability clause contemplates and provides for severability if certain conditions are declared invalid by a court. The APA never addresses this central point.

In short, the amici supporting the Commission have added nothing to undermine the trial court's finding that there has not been a waiver of the Homeowners' right to judicial review. The Homeowners did exactly what they were supposed to do, they filed a timely writ under section 1094.5 and they should now not be barred from proceeding on the merits of that challenge.

II

THE CONDITION IMPOSING A 20 YEAR PERMIT EXPIRATION IS UNLAWFUL

Under Public Resources Code 30235 the Homeowners have a right to a permanent seawall to protect their property. Of course, that seawall is subject to review and mitigating conditions. But it is not a temporary seawall. Temporary seawalls are permitted in emergency situations under expedited procedures as provided for in Public Resources Code section 30624. In contrast, permanent seawalls are permitted under the authority of Public Resources Code section 30235.

The amicus brief filed by the California Association of Realtors very effectively supports this argument at pages 12 - 20 of its brief. Indeed, a very salient point is made at page 17. Specifically, if a seawall permit under section 30235 is rendered temporary, the result is vitiation of the very right that section 30235 was designed to protect. If a 20-year expiration is allowed for "permanent" seawalls, so also would a 12-year expiration, or a 7-year expiration. In effect, the right to a seawall permit under section 30235 would be meaningless, as any seawall would really only be permitted as a temporary structure.

The Coastal Act provides for temporary seawalls in emergency situations under section 30624. Permanent seawalls are authorized under section 30235. *See* Petitioners' Reply Brief at 21, discussing *Barrie v. California Coastal Commission*, 196 Cal. App. 3d 8 (1987). Here, the Homeowners went through the full review and extensive procedures for a permanent seawall. The Commission's 20-year expiration is simply unlawful as a violation of section 30235.

The APA does make one argument that was not advanced by the Commission. However, that position appears to be a deliberate attempt to mislead the Court. Specifically, at page 3 of the APA amicus brief, it is written that the "Commission expressly concluded" that "*but for the imposition of the Special Conditions*, the proposed development could not be found consistent with the provisions of the [Coastal] Act." APA brief at 3 (italics by

APA). The problem is that this quote is from the recitals in the deed restriction; it is not from the actual findings of the Commission. Nowhere in the Commission's actual findings is there any language providing the "but for" finding that the APA refers to. Indeed, if there was any such actual finding in the Commission's decision, the APA would surely have cited to it. But there is not. Your undersigned has carefully reviewed the Commission's findings, which are found at Administrative Record (AR) at 1690-1725, and the repeated phrasing is that "as conditioned, the Commission finds the project consistent with . . . [the policies of the Act]." *See, e.g.*, AR at 1716 (referring to the public access and recreation policies).

At no place is there a Commission finding that "but for" the 20-year expiration condition, the permit would not have been approved. Indeed, the Commission conceded in its Answer Brief that in **recent decisions** it has **dropped the 20 year permit expiration** requirement. By dropping the 20-year expiration requirement in recent decisions, the Commission has acknowledged that such a condition is not necessary to achieve consistency with the Act. Indeed, for many decades, such a condition limiting seawall permits for 20 years did not exist. As conceded by the Commission:

> In some recent permit decisions, instead of limiting the permit to 20 years, the Commission has permitted seawalls **for so long as the existing structure they protect remains**, consistent with

> the language of **section 30235** and applicable local coastal programs.

Answer Brief of Commission at 10, note 3 (emphasis added). This is reasonable. It is also consistent with Public Resources Code 30235 which authorizes seawalls to protect existing structures. The Commission continued:

> In those decisions, the Commission has imposed conditions requiring adaptive management, including future permit amendments to address changed circumstances and longer term mitigation.

Answer Br. at 10, note 3.

In short, there was no "but for" finding made by the Commission. Moreover, the candid admission by the Commission shows that there is a less drastic, more reasonable approach to long-term mitigation and changed circumstances than an automatic expiration and forced re-application for a new permit in 20 years. This is a case where reasonableness should prevail. While seawall permits are subject to reasonable mitigating conditions, a 20-year expiration date for a million dollar seawall with a 75-year expected life span (AR at 212) is an overreach, and violates the rights secured by section 30235. The recent decisions by the Commission where it has dropped the 20-year expiration, demonstrate the ability of the Commission to take less drastic measures to address any potential future adverse impacts from a seawall. Indeed, the other conditions already attached to the permit provide ample opportunity to require modifications if such a need actually arises. This is

discussed fully in Petitioners' Reply Brief at 17 - 20 (discussing Special Conditions 6 and 7, which were not challenged by Homeowners).

As a final note, the amicus brief submitted by Surfrider Foundation has no bearing on the legal arguments presented here. That brief provides lengthy discussion of the general impacts of seawalls. While Surfrider opposes any seawall, and would prefer that all of the California coast be left in its natural state, such arguments must be taken to the Legislature. There are very strong economic realities and policy decisions supporting the right to protect property from erosion. That is why section 30235 was included as part of the Coastal Act. Until the power of eminent domain is exercised, owners of coastal properties have a right to protect their properties from erosion. Of course, mitigation is appropriate, but as the Commission here found, the Homeowners' 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 at 1679. They should not have to re-apply for another permit in 20 years.

CONCLUSION

The Homeowners have never waived their right to judicial review. The Court should proceed to address the merits of the case and rule in favor of the Homeowners for the reasons set forth in the briefing.

DATED: September 30, 2015.

Respectfully submitted,

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By /s/ John M. Groen
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing PETITIONERS' REPLY TO BRIEFS OF AMICI is proportionately spaced, has a typeface of 13 points or more, and contains 2,080 words.

DATED: September 30, 2015.

/s/ John M. Groen
JOHN M. GROEN

DECLARATION OF SERVICE BY MAIL

I, Tawnda 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 September 30, 2015, true copies of PETITIONERS' REPLY TO BRIEFS OF AMICI were placed in envelopes addressed to:

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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 30th day of September, 2015, at Sacramento, California.

TAWNDA ELLING