SUPREME COURT COPY

In the Supreme Court of the State of California

BARBARA LYNCH and THOMAS FRICK, **Plaintiffs and Respondents,** **v.** **CALIFORNIA COASTAL COMMISSION,** **Defendant and Appellant.**	Case No. S221980

SUPREME COURT
FILED

OCT 01 2015

Frank A. McGuire Clerk

Deputy

Appellate District, Case No. D064120
San Diego Superior Court, Case No. 37-2011-00058666-CU-WM-NC
Earl H. Maas III, Judge

CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS OF CALIFORNIA BUILDING INDUSTRY ASSOCIATION ET AL., CALIFORNIA ASSOCIATION OF REALTORS ET AL., AND THE BEACH AND BLUFF CONSERVANCY ET AL.

KAMALA D. HARRIS
Attorney General of California
MARK J. BRECKLER
Chief Assistant Attorney General
JOHN A. SAURENMAN
Senior Assistant Attorney General
JAMEE JORDAN PATTERSON
Supervising Deputy Attorney General
HAYLEY PETERSON
Deputy Attorney General
State Bar No. 179660
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2540
Fax: (619) 645-2271
Email: Hayley.Peterson@doj.ca.gov
Attorneys for Defendant and Appellant California Coastal Commission

TABLE OF CONTENTS

Page

Introduction 1

Argument 3

I. Property Owners Who Accept the Benefits of a Permit Forego Their Right to Challenge the Permit's Conditions 3

A. This Court has consistently recognized and reaffirmed the general waiver rule 3

B. Speculation regarding hypothetical dire outcomes does not justify abolishing the waiver rule 6

C. There are no broad common law duress or under protest exceptions to the waiver rule 8

II. Amici's Argument That Requiring Property Owners to Seek Reauthorization of Their Seawalls After 20 Years Renders Their Properties Valueless Rests Solely on Speculation 10

A. Amici's argument that a 20-year seawall permit renders the associated property unmarketable is unsupported in the record and contrary to experience 10

B. Durational limits are consistent with the city's local coastal program and Coastal Act Section 30235 12

C. Durational limits are not subject to heightened scrutiny under this Court's recent decision in *California Building Industry Association v. City of San José* 14

Conclusion 16

TABLE OF AUTHORITIES

Page

CASES

Barrie v. California Coastal Commission
(1987) 196 Cal.App.3d 8 6

California Building Industry Association v. City of San Jose
(2015) 61 Cal.4th 435 .... 14, 15

County of Imperial v. McDougal
(1977) 9 Cal.3d 505 .... 3, 5

Dolan v. City of Tigard
(1994) 512 U.S. 374 14

Gyerman v. United States Lines Co.
(1972) 7 Cal.3d 488 9

Koontz v. St. Johns River Water Management
(2013) 133 S.Ct. 2586 14

Laguna Village Inc. v. County of Orange
(1985) 166 Cal.App.3d 125 9

McClain Western #1 v. County of San Diego
(1983) 146 Cal.App.3d 772 9

Pfeiffer v. City of La Mesa
(1977) 69 Cal.App.3d 74 .... 5, 8

Rental Housing Owners Assn. of Southern Alameda County, Inc. v. City of Hayward
(2011) 200 Cal.App.4th 81 .... 7, 10, 13

Sports Arenas Properties, Inc. v. City of San Diego
(1985) 40 Cal.3d 808 .... 3, 5

State of California v. Superior Ct.
(1974) 12 Cal.3d 237 6

Sterling Park L.P. v. City of Palo Alto
(2013) 57 Cal.4th 1193 .... 2, 4, 5

United States v. Riverside Bayview Homes
(1985) 474 U.S. 121 15

STATUTES

Cal. Code Regs., Title 14
§ 13142 14

Coastal Act .... *passim*
§ 30235 .... 12, 13
§ 30624 14

Curtin's Land Use and Planning Law (2014) 4

Gov. Code
§ 66020, subd. (a) 5

Mitigation Fee Act .... *passim*

Pub. Resources Code
§ 30253, subd. (b) 13

INTRODUCTION

The Coastal Commission approved a permit to allow Plaintiffs to build a massive seawall to protect their existing homes, which are built on top of a highly erosive bluff. The Commission conditioned the permit to mitigate the seawall's adverse impacts on coastal resources and to ensure its consistency with the City of Encinitas local coastal program. Plaintiffs chose to comply with all of the prerequisites for the permit's issuance (including signing and recording a deed restriction irrevocably covenanting to the conditions), accepted the permit, and proceeded to construct their seawall. As explained in the Commission's answer brief on the merits, Plaintiffs waived their right to challenge the conditions of approval by expressly agreeing to comply with the conditions and by proceeding with their project.

Amici the Beach and Bluff Conservancy et al. (Beach and Bluff Conservancy), the California Building Industry Association (CBIA), and the California Association of Realtors et al. (Realtors) ask this Court to overturn the well established case law regarding the waiver of rights to challenge permit conditions. In addition, despite the mandate of the Coastal Act and numerous court decisions to construe the Coastal Act liberally to accomplish its purposes and objectives, Amici argue for a pinched interpretation of the Act and novel interpretations of the takings doctrine that would constrain the Commission's ability to provide flexible responses to the challenges that accelerating sea level rise poses.

Amici argue that there is no rule that a permittee who accepts the benefits of a permit by proceeding with its project waives the right to challenge the conditions of approval and that, if such a rule does exist, then case law has created broad exceptions for property owners who accept a permit under protest or duress. Amici are wrong on the law. If the rule did not exist or the claimed exceptions did exist, then the Legislature need not

have adopted the Mitigation Fee Act to partially negate the rule's effects to allow a property owner to proceed with its project while simultaneously challenging certain types of conditions. Amici also do not account for this Court's recent decision in *Sterling Park L.P. v. City of Palo Alto* (2013) 57 Cal.4th 1193, in which the Court restated the general waiver rule in describing the state of the law prior to the Mitigation Fee Act. The cases Amici do cite in support of the alleged exceptions are inapposite. The cases either address a limited exception that the Court of Appeal below addressed in its opinion or waiver was not raised as a defense. The cases do not create a general exception for complying with conditions under protest or duress.

Amici also argue that the general waiver rule is inequitable, contending it risks life and property and creates traps for the unwary. These arguments fail because options are available to property owners. Plaintiffs could have applied for an emergency permit to allow them to address any immediate dangers and which would have maintained the status quo while Plaintiffs applied for a regular permit and during any challenge to the regular permit's conditions of approval, but they did not. Plaintiffs could have requested the Commission agree to allow them to simultaneously proceed with the project and with their challenge to the conditions, but they did not. Plaintiffs chose not to avail themselves of these procedures. Instead, they chose to accept the special conditions and unilaterally proceed with their project.

Amici's arguments regarding the 20-year authorization period are also meritless. They contend that the requirement that Plaintiffs apply in 20 years to reauthorize their seawall so devalues their properties as to make them unmarketable. The Court need not consider this argument because Plaintiffs did not raise it. Regardless, the argument fails. The argument relies on bare assertions about the effect of the 20-year duration on property values, which have no support in the record, and speculation about the state

of the property, the seawall, and the Commission's actions in 20 years. Amici's theory that the requirement to apply for a permit serves to devalue property would mean that every property that will require a permit for a new seawall or seawall repair in the next 20 years is unmarketable. Amici do not and cannot support this claim.

ARGUMENT

I. PROPERTY OWNERS WHO ACCEPT THE BENEFITS OF A PERMIT FOREGO THEIR RIGHT TO CHALLENGE THE PERMIT'S CONDITIONS

A. This Court Has Consistently Recognized and Reaffirmed the General Waiver Rule

Contrary to Amici's assertions that there is no general waiver rule and the Commission has misread precedent to create such rule (CBIA Brief at pp. 1, 9-19, see also Beach and Bluff Conservancy Brief at p. 4), this Court has consistently recognized the general waiver rule that property owners who accept a permit's conditions or a permit's benefits, forgo the right to challenge the conditions of approval.

In *County of Imperial v. McDougal* (1977) 19 Cal.3d 505, this Court stated: "A number of cases have held that a landowner or his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by either specifically agreeing to the condition *or* failing to challenge its validity, and accepted the benefits afforded by the permit." (*Id.* at pp. 510-511, italics added and citations omitted.) Based on those cases, this Court held that a permittee's successor in interest was estopped to assert that a permit condition was invalid. Likewise, in *Sports Arenas Properties, Inc. v. City of San Diego* (1985) 40 Cal.3d 808, 815, this Court, relying on *County of Imperial*, stated that "if the permittee exercises its authority to use the property in accordance with

the permit, it must accept the burdens along with the benefits of the permit."

This Court recently confirmed the Commission's view of the law in *Sterling Park, L.P. v. City of Palo Alto, supra,* 57 Cal.4th 1193. In *Sterling Park, L.P.,* this Court explained that prior to the Legislature's adoption of the Mitigation Fee Act, property owners and developers had to choose between either complying with a condition imposing a fee, dedication, reservation, or other exaction with no recourse or delaying the project and challenging the fee. (57 Cal.4th at p. 1205.)

> Prior to the enactment of [the Mitigation Fee Act], a developer could not challenge the validity of fees imposed on a residential development without refusing to pay them. (*Pfeiffer v. City of La Mesa* (1977) 69 Cal.App.3d 74, 78.) Since payment is a condition of obtaining the building permit, a challenge meant that the developer would be forced to abandon the project. The bill was drafted to correct this situation. It provided a procedure whereby a developer could pay the fees under protest, obtain the building permit, and proceed with the project while pursuing an action to challenge the fees. If the action were successful, the fees would be refunded with interest.

(*Id.* at p. 1200, quoting *Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 241.)

The Legislature adopted the Mitigation Fee Act to partially negate the common law rule under which a property owner was forced to choose between accepting a permit in order to pursue development and giving up the ability to develop while suing to invalidate conditions. (Curtin's Land Use and Planning Law (2014) at pp. 556-557.) But the Mitigation Fee Act does not apply to conditions that restrict the manner in which a developer may use its property. (*Sterling Park, L.P. v. City of Palo Alto, supra,* 57 Cal.4th at p. 1207.) It also does not apply any type of condition a state agency imposes because the Act applies only to local agency exactions.

(Gov. Code, § 66020, subd. (a).) The general waiver rule remains intact with respect to these conditions.

CBIA argues that this Court should disapprove *Pfeiffer v. City of La Mesa, supra,* 69 Cal.App.3d 74, a case this Court cited with approval in *Sterling, L.P.* CBIA argues that *Pfeiffer* does not support the general waiver rule, but rather it established the rule that a party's failure to seek judicial review of an administrative agency determination bars the party from seeking damages. This argument fails because the *Pfeiffer* court recognized that the plaintiffs could not proceed with their project while seeking to invalidate the conditions before holding that they were also barred from seeking damages: "If plaintiffs in this instance were 'compelled' to accept the conditions of the permit and proceed with the construction rather than challenge the conditions in a mandamus proceeding, the compulsion was of their own making. They signed the lease agreement and unilaterally decided it was to their economic advantage to proceed with the construction to meet its requirements rather than make use of the orderly procedure which has been provided to resolve such controversies." (69 Cal.App.3d at p. 78.) In any event, even if *Pfeiffer* could be limited as CBIA contends, *County of Imperial v. McDougal, supra,* and *Sports Arenas Properties, Inc. v. City of San Diego, supra*; and *Sterling Park, L.P. v. City of Palo Alto, supra,* were brought to determine the validity of conditions, not to seek damages.

Amici's arguments cannot be reconciled with the Legislature's adoption of the Mitigation Fee Act and with this Court's decisions. If, as Amici and Plaintiffs contend, property owners have always been able to proceed with a project and simultaneously seek to invalidate the conditions of approval, then the Legislature would not have needed to adopt the Mitigation Fee Act.

Plaintiffs chose to accept the permit, comply with the permit conditions—including signing and recording a deed restriction irrevocably

covenanting to comply with all of the conditions—and proceeded to build their project. By doing so, they waived their right to challenge the conditions of approval.

B. Speculation Regarding Hypothetical Dire Outcomes Does Not Justify Abolishing the Waiver Rule

The Beach and Bluff Conservancy raises three arguments why it believes the general waiver rule is inequitable and should be overturned by this Court. It first argues that the waiver rule violates public policy because property owners must choose between their right to protect their property and to challenge permit conditions. (Beach and Bluff Conservancy Brief at pp. 5-7.) But the rule does not require property owners to waive their right to challenge permit conditions. It simply requires that property owners challenge the permit conditions *before* they undertake the project.

The Beach and Bluff Conservancy next argues that the waiver rule would put life and property at risk. (Beach and Bluff Conservancy Brief at pp. 7-8.) But, as Amici recognize, the Coastal Act contains an expedited method to address emergency conditions. Amici suggest that, because an emergency permit is discretionary, it is a "roll of the dice." (*Id.* at p. 7.) But all coastal development permits are discretionary. (*State of California v. Superior Ct.* (1974) 12 Cal.3d 237, 247-248.) Amici suggest that the Executive Director will deny an emergency permit on "a whim," but they do not cite any examples where this has occurred. The Commission's Executive Director has in appropriate circumstances issued emergency permits for seawalls. (E.g., *Barrie v. California Coastal Commission* (1987) 196 Cal.App.3d 8.) Denial of an emergency permit would, of course, be subject to judicial review.

Third, the Beach and Bluff Conservancy argues that the rule creates traps for the unwary and that the requirements to satisfy conditions within 120 days renders permit challenges impracticable if not impossible. But

Plaintiffs, who were represented by counsel throughout the administrative proceedings, never raised this objection. (See, e.g., AR 1658-1664, 2298-2303.) The Court should decline to expand the issues at this late date, particularly where there is no record support. (*Rental Housing Owners Assn. of Southern Alameda County, Inc. v. City of Hayward* (2011) 200 Cal.App.4th 81, 95, fn. 13.) Moreover, as a practical mater, the rule has not prevented litigation. The waiver rule was in place before the Legislature adopted the Coastal Act, and it has not prevented innumerable permit challenges over the years. In addition, some property owners may be able to resolve issues within 120 days, and those who cannot may seek additional time. The Beach and Bluff Conservancy omits mention of permit language allowing permittees "such additional time as the Executive Director may grant for good cause" to satisfy prior-to-issuance conditions. (AR 1795.) Here, Plaintiffs did not request any additional time to satisfy the conditions.

Plaintiffs had other options as well to preserve or pursue their complaints about the permit conditions other than unilaterally proceeding to build and sue. They could have applied to the Commission's Executive Director for an emergency permit to allow them to address the immediate danger and then pursue a regular permit. They did not. Plaintiffs could have asked the Commission to agree they could comply with the conditions under protest and proceed with the litigation. They did not. Plaintiffs could have sued to void the conditions and asked the court to allow them to proceed with the project. Again, Plaintiffs did not do so. There is simply no evidence that such efforts would have been futile.

While the Beach and Bluff Conservancy asserts that the Commission would oppose any approach that would temper the effect of the general waiver rule (Beach and Bluff Conservancy Brief at p. 9, fn. 2), the argument is unsupported. The Commission supports the waiver rule because it provides that disputes over a project's conditions will be

resolved before the project is built. The granting of an extension of time to satisfy conditions or, when appropriate, agreeing that a project and a challenge may proceed simultaneously, can be consistent with this goal depending on the circumstances of a particular case. For example, the Commission recently stipulated with a permittee to allow him to proceed with his project while his challenge to a permit condition is pending. (See *Capistrano Shores Property LLC v. California Coastal Commission* (Super. Ct. Orange County, 2015, No. 30-2015-00785032-CU-WM-CJC).)

The Plaintiffs, however, did not request an emergency permit, an extension, or any sort of agreement that could have allowed them to pursue their legal challenges while undertaking temporary or permanent measures that might be necessary to protect their houses from danger. Instead, they chose to sign and record deed restrictions making the terms and conditions of the permit irrevocable. Having built their project, they should be held to the conditions of the permit.

C. There Are No Broad Common Law Duress or Under Protest Exceptions to the Waiver Rule

CBIA contends that case law has created "under duress" and "under protest" exemptions from the waiver rule. The cases CBIA cites do not support its claims.

CBIA contends that performance of conditions under duress or under economic compulsion do not constitute waiver. (CBIA Brief at p. 21.) In *Pfeiffer v. City of La Mesa, supra,* 69 Cal.App.3d at p. 78, superseded by statute, the court rejected the argument that the general waiver rule does not apply where the property has an economic "compulsion" to proceed with the project: "If plaintiffs . . . were 'compelled' to accept the conditions of the permit and proceed with the construction rather than challenge the conditions in a mandamus proceeding, the compulsion was of their own

making. . . . As the trial court judge pointed out . . ., economic detriment frequently results when a delay is incurred in obtaining a building permit."

CBIA cites *McClain Western #1 v. County of San Diego* (1983) 146 Cal.App.3d 772, 777 and *Laguna Village Inc. v. County of Orange* (1985) 166 Cal.App.3d 125, in support of its argument. The Court of Appeal below explained that these cases create only a limited exception from the waiver rule for conditions an agency imposes on a later phase of a project that is already underway. (Opinion at p. 7.) As the Court of Appeal also noted, at least one appellate court has since limited this exception to actions seeking a refund of fees, making it largely indistinguishable from the Mitigation Fee Act exception. (Opinion at p. 7, citing *Rezai v. City of Tustin* (1994) 26 Cal.App.4th 443, 451.)

Indeed, in *McClain Western #1, supra,* the court restated the general waiver rule before applying the narrow exception for challenges to fees imposed on a second phase of a project: "Ordinarily, the developer will not be permitted to obtain the benefit of going ahead with construction and subsequently litigating the validity of one of the conditions of the permit." (146 Cal.App.3d at p. 776.)

CBIA next argues that a series of cases dating back to 1861 established a common law under protest exception to the general waiver rule. (CBIA Brief at pp. 22-23.) CBIA contends that the California courts have long recognized that "performance under protest" does not waive the right to seek judicial invalidation of conditions. (*Id.* at p. 22.) But the cited cases do not support their argument because waiver was not raised as a defense or bar to the litigation in any of the cited cases. "It is fundamental that the point relied on as law of the case must have been necessarily involved in the case." (*Gyerman v. United States Lines Co.* (1972) 7 Cal.3d 488, 498, quoting 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 647, p. 4564.)

As the Court of Appeal below recognized, what Plaintiffs really seek is a new "under protest" exception. (Opinion at pp. 7-8.) Not only would such an exception essentially swallow the rule, it would undermine finality and certainty in land use decisions for property owners and government. (See Commission's Answer Brief on the Merits at pp. 25-27; Amicus Brief of the California State Association of Counties et al. at pp. 5-6, 8-10; and Amicus Brief of the American Planning Association et al. at pp. 8-11.) This Court should decline to create such an exception.

II. Amici's Argument That Requiring Property Owners to Seek Reauthorization of Their Seawalls After 20 Years Renders Their Properties Valueless Rests Solely on Speculation

A. Amici's Argument That a 20-Year Seawall Permit Renders the Associated Property Unmarketable Is Unsupported in the Record and Contrary to Experience

Without citing to any evidence, Amici claim that the condition requiring Plaintiffs to apply in 20 years to reauthorize their seawall renders Plaintiffs' properties unmarketable. (Realtors Brief at p. 6; Beach and Bluff Conservancy Brief at p. 10.) The Court need not consider this claim because Plaintiffs did not raise. (*Rental Housing Owners Assn. of Southern Alameda County, Inc. v. City of Hayward, supra,* 200 Cal.App.4th at p. 95, fn. 13.) In any event, the claim fails for two reasons. First, Amici provide no evidence to support their argument. It is based on speculation and on the assumption that the Commission will improperly deny an extension in 20 years. Second, the argument is counter to common experience. Many coastal California properties will need to build or repair a seawall in the next 20 years, and the owners will need to go through the same permit process as Plaintiffs. Under Amici's theory, all such properties would be unmarketable.

Realtors contend that it will be difficult if not impossible for Lynch to sell her home when a prospective buyer learns of the conditions. (Realtors Brief at pp. 7-8.) But they do not provide a market analysis or any other evidence to support this assertion. (*Ibid.*)[1] Similarly, the Beach and Bluff Conservancy suggests that no insurance company would offer a homeowners' policy for Plaintiffs' homes, but provides no evidence that Plaintiffs have been unable to obtain insurance or that their homes are currently uninsured. (Beach and Bluff Conservancy Brief at p. 10.)

At the crux of Amici's argument is the assumption that the Commission will improperly deny an application to reauthorize the seawall and the houses will collapse to the beach after 2031. (See Realtors Brief at p. 7.) As the Court of Appeal noted, until the Commission reaches a final decision on the application, the outcome is purely speculative. (Opinion at pp. 15-16.)

The flaw in Amici's argument is apparent when one considers the market for oceanfront property in California. Many properties along the coastal will need a new seawall or modifications to an existing seawall in the next twenty years. Amici acknowledge that the Coastal Act requires property owners to obtain a permit to make any modifications to their seawall. (Realtors Brief at pp. 8-9.) Amici offer no explanation why a requirement to reevaluate a permit at the 20-year mark would "erect . . . insurmountable barriers" and "so devalue" oceanfront property as make sales impossible (Realtors Brief at p. 7), while other properties that will

---

[1] Plaintiffs' properties are located at 1500 and 1520 Neptune Avenue in Encinitas, California. A recent search for properties on Neptune Avenue at www.zillow.com listed four properties for sale with prices ranging from $4.25 million to $7.29 million. (http://www.zillow.com/homes/for_sale/2101111657_zpid/33.065161,-117.2966,33.059712,-117.307865_rect/16_zm/1_fr/, last visited 9/18/15.)

need seawalls in the future or with aging seawalls that are in essentially the same situation continue to sell.

The conditions do not require Plaintiffs to automatically remove their seawall in 20 years. It simply requires them to apply for a permit in 20 years to reauthorize the seawall if it remains necessary and structurally able to protect the development for which it was approved. And, even in this case, the Commission approved Plaintiffs' application for a seawall, and Plaintiffs have built that seawall. Against this history, the logical presumption is that the Commission will act properly in the future when Plaintiffs reapply.

B. Durational Limits Are Consistent with the City's Local Coastal Program and Coastal Act Section 30235

As discussed in the Commission's Answer Brief on the Merits (at pages 34-38) and in the Brief of Amici Curiae American Planning Association and American Planning Association California Chapter (at pages 18-20), the Commission has broad discretion to adopt measures to mitigate all significant impacts that construction of a seawall may have. Nothing in the City's local coastal program or section 30235 prevents the Commission from limiting the duration of seawall permits. (Commission's Answer Brief at pp. 34-38.) Amici argue that the Commission does not like seawalls, but the Commission *approved* Plaintiffs' application for a seawall and had approved Plaintiffs' after-the-fact permit for their previous seawall. The Commission simply conditioned their project to protect public trust resources and public access to the coast as the Coastal Act requires.

Realtors make three arguments why they believe section 30235 provides property owners a right to a seawall indefinitely. These arguments lack merit. First, they contend that the Commission is asking this Court to add words to section 30235 to support durational limits. However, it is Amici who seek to add words to the statute. Amici suggest that Plaintiffs

are entitled to rely upon the seawall to protect future development, including future new homes. (Realtors Brief at p. 9.) But the City's local coastal program and Coastal Act section 30235 only allow seawalls to protect an *existing* principal structure; new development must be designed and located far enough from the bluff edge so that it will not require shore or bluff stabilization. (See Commission's Answer Brief on the Merits at pp. 32-34; Pub. Resources Code, § 30253, subd. (b).) Even Plaintiffs acknowledge that they are not entitled to rely on the seawall to protect future redevelopment. (Petitioners' Reply Brief at pp. 23-24.)

Amici also argue that section 30235 only authorizes design-related conditions that eliminate or mitigate for impacts to shoreline sand supply caused by the seawall. (Realtors Brief at p. 14.) Plaintiffs made this argument in the Court of Appeal (Respondents Brief at pp. 29-30), but they chose not to pursue it to this Court. For this reason, the Court need not consider it. (*Rental Housing Owners Assn. of Southern Alameda County, Inc. v. City of Hayward, supra,* 200 Cal.App.4th at p. 95, fn. 13.) Regardless, the argument lacks merit. As the Court of Appeal below noted, section 30235 does not purport to preempt other sections of the Act that require the Commission to consider other factors in granting coastal development permits, including public access and recreation, visual impacts, etc. (Opinion at p. 14, citing *Ocean Harbor House Homeowners Assn. v. California Coastal Com.* (2008) 163 Cal.App.4th 215, 241.)

Second, Amici contend that the Commission just as easily could impose a 6-month duration or even shorter. Those are not the facts of this case. The Commission determined that the 20-year duration was appropriate based on its staff's experience that shoreline armoring generally needs augmentation, replacement, or substantial change within 20 years. (AR 1710.) In fact, Plaintiffs made substantial (albeit unpermitted) repairs

to their previous seawall less than 20 years of its construction, and it largely collapsed within 25 years. (AR 38, 735.)

Finally, Amici argue that allowing the Commission to limit the duration of seawalls renders emergency permits meaningless. (Realtors Brief at pp. 19-20.) Amici contend that section 30624 of the Coastal Act authorizes the Commission to grant emergency permits on most any term or condition it wants, including temporarily. Section 30624 does not refer to durational limits. Rather the Commission's regulations provide for "reasonable terms and conditions, including an expiration date" for emergency permits. (Cal. Code Regs., tit. 14, § 13142.) The significance of the emergency permit is not that it may be limited in duration; it is that the Executive Director, rather than the Commission, may issue an emergency permit on an expedited basis without notice and a public hearing.

Amici seek to limit the Commission's ability to mitigate the impacts of seawalls on the public and on neighboring private property. But, as the Supreme Court has noted, requiring that landowners internalize the negative externalities of their conduct "is a hallmark of responsible land-use policy." (*Koontz v. St. Johns River Water Management* (2013) 133 S.Ct. 2586, 2595.) Unless owners of houses built on top of highly erodible bluffs are required to internalize the risks, the public will be subsidizing and encouraging risky development with a wide range of significant adverse impacts on public resources.

C. Durational Limits Are Not Subject to Heightened Scrutiny Under This Court's Recent Decision in *California Building Industry Association v. City of San Jose*

CBIA contends that the 20-year authorization period is unconstitutional, citing *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374. The Commission's Answer Brief on the Merits explains why the durational time

limit does not constitute a takings. (Commission's Answer Brief on the Merits at pp. 38-41.) After the Commission filed its Answer Brief, this Court decided *California Building Industry Association v. City of San Jose* (2015) 61 Cal.4th 435, confirming the Commission's arguments.

In *California Building Industry Association v. City of San Jose, supra,* this Court held that the unconstitutional conditions doctrine applies only when the government requires a property owner to give up a property interest for which the government would have had to pay just compensation if it took the property outside the permit process. (61 Cal.4th at p. 461.) Here, the 20-year authorization period condition requires Plaintiffs to apply for a permit. (AR 1682-1683.) It does not require Plaintiffs to convey to the Commission or the public any interest in their properties. Like the inclusionary housing requirement at issue in *California Building Industry Association*, the durational conditions here fall within the Commission's "broad discretion to regulate the use of real property to serve the legitimate interests of the general public and the community at large." (61 Cal.4th at p. 461; see Commission's Answer Brief on the Merits at pp. 30-34, American Planning Association Brief at pp. 21-26, and Surfrider Foundation Brief at pp. 31-39.) Moreover, requiring a permit for a use of property is not a taking. (*United States v. Riverside Bayview Homes* (1985) 474 U.S. 121, 127.)

The Commission properly limited the duration of Plaintiffs' seawall to 20 years subject to reauthorization. The conditions allow the Commission to revisit the need for the seawall or to require further mitigation for its impacts based on, but not exceeding, the remaining anticipated lifespan of Plaintiffs' existing homes. This is what the City's local coastal program and the Coastal Act require. The durational limits do not "take" anything from Plaintiffs.

CONCLUSION

For the reasons set forth in the Commission's Answer Brief on the Merits and as further discussed in this answer, the Commission respectfully requests that this Court affirm the judgment of the Court of Appeal.

Dated: September 30, 2015

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
MARK J. BRECKLER
Chief Assistant Attorney General
JOHN A. SAURENMAN
Senior Assistant Attorney General
JAMEE JORDAN PATTERSON
Supervising Deputy Attorney General

Hayley Peterson

HAYLEY PETERSON
Deputy Attorney General
Attorneys for Defendant and Appellant California Coastal Commission

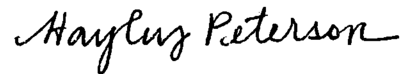
SD2014118806
71128775.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached Consolidated Answer to Amicus Curiae Briefs of California Building Industry Association et al., California Association of Realtors et al., and the Beach and Bluff Conservancy et al. uses a 13 point Times New Roman font and contains 4,708 words.

Dated: September 30, 2015

KAMALA D. HARRIS
Attorney General of California



HAYLEY PETERSON
Deputy Attorney General
Attorneys for Defendant and Appellant California Coastal Commission

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Lynch et al. v. California Coastal Commission**
Court: **California Supreme Court, Case No. S221980**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On **September 30, 2015**, I served the attached:

CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS OF CALIFORNIA BUILDING INDUSTRY ASSOCIATION ET AL., CALIFORNIA ASSOCIATION OF REALTORS ET AL., AND THE BEACH AND BLUFF CONSERVANCY ET AL.

by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

SEE ATTACHMENT

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **September 30, 2015**, at San Diego, California.

Roberta L. Matson
Declarant

Signature

SD2014118806
71128911.doc

ATTACHMENT

Jonathan C. Corn
Axelson & Corn, P.C.
160 Chesterfield Drive, Suite 201
Cardiff by the Sea, CA 92007
Attorney for Petitioners
Barbara Lynch and Thomas Frick

Paul J. Beard II
Alston & Bird LLP
1115 11th Street
Sacramento, CA 95814
Counsel for California Association of Realtors
And National Association of Realtors

James S. Burling
John M. Groen
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Attorneys for Petitioners
Barbara Lynch and Thomas Frick

Janis Lynn Herbstman
Attorney at Law
1100 K Street, Suite 101
Sacramento, CA 95814
Counsel for California State Association of
Counties, League of California Cities, and
International Municipal Lawyers Association

Peter Stanley Prows
Briscoe Ivester & Bazel, LLP
155 Sansome Street, 7th Floor
San Francisco, CA 94104
Counsel for Beach and Bluff Conservancy,
Protect the Beach.org.,
Seacoast Preservation Association, and
Costal Property Owners Association of Santa
Cruz County

Fran M. Layton
Catherine H. Malina
Shute, Mihaly & Weinberger, LLP
396 Hayes Street
San Francisco, CA 94102
Counsel for American Planning
Association and American Planning
Association California Chapter

David P. Lanferman
Rutan & Tucker, LLP
Five Palo Alto Square
3000 El Camino Real, Suite 200
Palo Alto, CA 943306-9814
Counsel for California Building Industry
Association, California
Cattlemen's Association, and California Farm
Bureau Federation

Deborah Ann Sivas
Alicia Ellen Thesing
Matthew Jeffrey Sanders
Mills Legal Clinic at Stanford Law School
Environmental Law Clinic
559 Nathan Abbott Way
Stanford, CA 94305-8610
Counsel for Surfrider Foundation

Clerk of Superior Court
San Diego Superior Court
325 South Melrose Drive
Vista, CA 92081

Clerk of Court of Appeal
California Court of Appeal
4th District, Division I
750 B Street, Suite 300
San Diego, CA 92101