In the Supreme Court of the State of California

BARBARA LYNCH and THOMAS FRICK, **Petitioners,** **v.** **CALIFORNIA COASTAL COMMISSION,** **Respondent.**	Case No. S221980

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

ANSWER TO PETITION FOR REVIEW

KAMALA D. HARRIS
Attorney General of California
JOHN A. SAURENMAN
Senior Assistant Attorney General
JAMEE JORDAN PATTERSON
Supervising Deputy Attorney General
HAYLEY PETERSON
Deputy Attorney General
State Bar No. 179660
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2540
Fax: (619) 645-2012
Email: Hayley.Peterson@doj.ca.gov
Attorneys for Respondent California Coastal Commission

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

This case arises from Petitioners' attempt to challenge certain coastal development permit conditions they find objectionable, even though they signed, notarized, and recorded deed restrictions, expressly and irrevocably covenanting to comply with the permit conditions; accepted the coastal development permit; and proceeded to construct their seawall project. The majority of the Court of Appeal properly rejected their challenge, applying well established case law that a property owner "is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by specifically agreeing to the condition or failing to challenge its validity, and accepted the benefits afforded by the permit." (*County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510-511.)

The Court of Appeal further held that, even if Petitioners had not waived their right to challenge the permit conditions, the Commission lawfully limited the duration of Petitioners' permit to mitigate the seawall's long-term impacts and prohibited rebuilding a portion of their bluff-face stairway in order comply with the Encinitas local coastal program. The majority's decision as to these specific conditions presents a case-specific application of settled law and does not warrant review.

For these reasons, the Commission respectfully requests the Court deny the petition for review.

STATEMENT OF THE CASE

Petitioners own adjacent bluff-top homes in Encinitas, California. (Administrative Record (AR) 735.) Each property has a relatively flat, developed blufftop area and a steep bluff face that cascades down to the Pacific Ocean. (AR 735.)

Petitioners applied to amend an earlier, Commission-issued coastal development permit to remove their then-existing shoreline protection and

build a new 100-foot long, 29-foot high shotcrete seawall and new mid-bluff geogrid protection. (AR 1677.) They also sought to rebuild the lower portion of a private access stairway tied into the seawall. (AR 1677.)

Petitioners built the previous seawall and a bluff face stairway in 1986 without coastal development permits. (AR 1909.) The Commission approved a coastal development permit after-the-fact, determining that removal of the seawall and the stairs could "render the bluff unstable and increase the danger to the existing residence resulting from bluff failure." (AR 9, 1695, 1767.) By building the seawall and stairway first and requesting permission later, Petitioners prevented the Commission from evaluating the project's compliance with Coastal Act requirements. (AR 8, 9.) In 2005, Petitioners, again without permits, installed concrete footings around the base of the seawall's supporting timbers. (AR 38.) Petitioners applied for a permit amendment only after the Commission's enforcement division issued a stop work notice. (AR 38.) While Petitioners' permit amendment application was pending, much of the seawall and stairway collapsed during a storm. (AR 735.)

The Commission approved a permit amendment to allow the demolition and reconstruction of the seawall and installation of mid-bluff geogrid protection subject to various special conditions. (AR 1677-1725.) Among the conditions, special condition 1.a. precluded reconstruction of the lower section of the stairway (AR 1679, 1681), and special conditions 2 and 3 limited the permit's duration to 20 years (1682-1683, 1711).

The Commission included special conditions 2 and 3 to allow the Commission to respond to long-term potential changes and uncertainties. The special conditions require Petitioners to apply for an amendment to the seawall permit before the 20-year authorization period expires. Petitioners may apply to retain the seawall and provide mitigation for the ongoing impacts of the seawall based on the proposed remaining life of the seawall,

to change its size or configuration, or to remove the seawall. (AR 1682-1683, 1711.) These conditions allow the Commission to reassess the need for continued armoring and its effects in twenty years when circumstances may differ greatly from today and to assess the physical condition of the seawall after twenty years of existence. (AR 1710.) For example, uncertainty about how rapidly sea level will rise greatly complicates assessment of the long-term impacts of the seawall on the adjacent beach and public tidelands. (AR 1710.)

Special condition 1.a. requires Petitioners to submit revised plans deleting reconstruction of the private bluff stairway. (AR 1679, 1681 [Special Condition 1.a].) The Commission found reconstruction of the stairway was inconsistent with the City's local coastal program, which prohibits the construction of new private access stairways over the bluff and requires phasing out of existing private bluff face stairways. (AR 1679.)

The permit also includes a special condition requiring Petitioners to record deed restrictions. (AR 1689.) The deed restrictions state the Commission approved the permit subject to the special conditions and, but for the imposition of the special conditions, the project would not be consistent with the California Coastal Act and the Commission would not have approved the permit. The deed restrictions also state Petitioners elected to comply with the special conditions in order to undertake the development authorized by the permit and, in consideration for the permit's issuance, they irrevocably covenanted with the Commission that the special conditions constituted covenants, conditions, and restrictions on use of the land.[1]

---

[1] The Deed Restriction reads in part:

(continued...)

On August 31, 2001, the Commission sent a Notice of Intent to Issue Permit to Petitioners. (AR 1784-1795.) The Notice incorporated the permit's special conditions. (*Ibid.*) The Notice includes an Acknowledgment for the applicant to sign, which reads, "The undersigned permittee acknowledges receipt of this Notice and fully understands its contents, including all conditions imposed." (Joint Appendix (JA) 32-43, 52-62.)

Petitioners accepted the conditions and recorded the deed restrictions. Frick signed and dated the Acknowledgment recorded the deed restriction before Petitioners filed their writ petition. (JA 45-62.) Lynch signed the

---

(...continued)

V. WHEREAS, on August 10, 2011, the Commission conditionally approved coastal development permit number 6-88-464-A2 . . . subject to, among other conditions, the conditions listed under the heading "Special Conditions" . . . .

VI. WHEREAS, the Commission found that, but for the imposition of the Special Conditions, the proposed development could not be found consistent with the provisions of the Act and that a permit could therefore not have been granted; and

VII. WHEREAS, *Owner(s) has/ve elected to comply with the Special Conditions, which require, among other things, execution and recordation of this Deed Restriction, so as to enable Owner(s) to undertake the development authorized by the Permit* . . . .

NOW, THEREFORE, in consideration of the issuance of the Permit to Owner(s) by the Commission, the undersigned Owner(s), for himself/herself/themselves and for his/her/their heirs, assigns, and successors-in-interest, *hereby irrevocably covenant(s) with the Commission that the Special Conditions (shown in Exhibit B hereto) shall at all times on and after the date on which this Deed Restriction is recorded constitute for all purposes covenants, conditions and restrictions on the use and enjoyment of the Property* that are hereby attached to the deed to the Property as fully effective components thereof.

(JA 45-46, italics added.)

Acknowledgment and recorded the deed restriction after they filed their writ petition. (JA 24-43.)

After confirming Petitioners complied with all of the prior-to-issuance permit conditions, including recording the deed restrictions irrevocably covenanting to comply with all of the conditions, the Commission issued Petitioners' permit. (JA 65.) Petitioners proceeded to construct the seawall. (Petition for Review, at p. 5.)

Petitioners filed their writ petition on October 7, 2011. (JA 1-7.) Petitioners moved for judgment on their writ of administrative mandamus. (JA 102-103.) The trial court granted their motion for judgment. (JA 201-205.)

The Commission timely appealed. (JA 239-240.) The Court of Appeal reversed. The appellate court found that Petitioners waived their right to challenge the permit conditions when they signed and recorded deed restrictions agreeing to the permit conditions and then accepted the permit's benefit by constructing their project. (Opinion, at p. 5.) The court also held that, even if Petitioners had not waived their right to challenge the permit conditions, substantial evidence supported the conditions. (Opinion, at pp. 10, 16.)

The Court held that the Commission has broad discretion to impose conditions to mitigate a seawall's impacts based on existing case law and the Coastal Act. (Opinion, at pp. 13-14.) The Court rejected Petitioners' claims that limiting the permit's duration did not mitigate any adverse impacts. The Court held that substantial evidence in the record supported the Commission's findings that the conditions mitigate the project's likely long-term impacts to adjacent, unprotected properties from accelerated erosion by ensuring there is an opportunity to revisit the need for the seawall or require further mitigation for the seawall's impacts at the point

in time it will likely require augmentation, replacement, or substantial change anyway. (Opinion, at p. 15.)

The Court also agreed with the Commission that the stairway required a permit. The Court held that the City's permit requirements are consistent with the Coastal Act's disaster exemption provision. The Coastal Act exemption is expressly subject to conformance with local zoning requirements, which include the City's Coastal Bluff Overlay regulations. (Opinion, at pp. 16-17.)

REASONS TO DENY THE PETITION

I. THE COURT OF APPEAL CORRECTLY APPLIED EXISTING PRECEDENT ON WAIVER

This Court should deny review because this case involves a straightforward application of well established case law that a property owner "is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by specifically agreeing to the condition or failing to challenge its validity, and accepted the benefits afforded by the permit." (*County of Imperial v. McDougal, supra,* 19 Cal.3d 505, 510-511; see also *Edmonds v. County of Los Angeles* (1953) 40 Cal.2d 642, 653; *Rossco Holdings Inc. v. State of California* (1989) 212 Cal.App.3d 642, 654-655; *Pfeiffer v. City of La Mesa* (1977) 69 Cal.App.3d 74, 78, modified by statute as stated in *Sterling Park, L.P. v. City of Palo Alto* (2013) 57 Cal.4th 1193, 1200.) The Court of Appeal simply applied this law when it held that Petitioners waived their right to challenge the conditions because they signed, notarized, and recorded deed restrictions, expressly and irrevocably covenanting to comply with the permit conditions; they complied with the conditions; they accepted their coastal development permit; and they proceeded to construct their project. Even the dissent acknowledges that Petitioners "satisfied the myriad . . . conditions precedent required to obtain the Commission's [permit],

including recording deed restrictions recognizing the objected-to seawall and stairway conditions . . . and . . . proceeded with their Project." (Dissenting Opinion, at p. 7.) Petitioners never applied for an emergency permit or permit amendment; nor did they seek judicial relief from the requirement to record deed restrictions before proceeding with their project.

Petitioners argue that the Court of Appeal created the rule that property owners are deemed to waive their challenge if they accept any of a permit's benefits. But this is not a new rule. Citing to numerous decisions of this Court and various appellate districts, the Court of Appeal explained, "Generally, a property owner may challenge an allegedly unreasonable permit condition by refusing to comply with the condition and bringing a mandate action to have the condition declared invalid." (Opinion, at p. 5, citation omitted.) "If the property owner complies with the condition, the property owner waives the right to legally challenge it." '(*Ibid.*, citations omitted.) "The rule stems from the maxim, 'He who takes the benefit must bear the burden.'" (*Ibid.*, citations omitted.)

Pfeiffer v. City of La Mesa, supra, 69 Cal.App.3d 74 is instructive. Precisely because they could not simultaneously challenge the conditions of approval while proceeding with the project, the property owners there sought to accept the conditions under protest without waiving their right to demand compensation. (*Id.* at p. 77 ["Plaintiffs point out their case is different from *Selby [Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110] in that plaintiff in that action sought judicial relief before complying with the city's demand and hence mandamus under Code of Civil Procedure section 1094.5 was an appropriate method to test the validity of the conditions the City was attempting to impose."]) The *Pfeiffer* property owners argued that their lease with the State required them to construct the improvements without delay or suffer the possibility of cancellation of their lease, and thus they could not pursue a writ of mandate.

In rejecting the attempt to accept conditions under protest, proceed with a project, and then seek damages, the court in *Pfeiffer* held:

> 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. . . .* If every owner who disagrees with the conditions of a permit could unilaterally decide to comply with them under protest, do the work, and file an action in inverse condemnation on the theory of economic coercion, complete chaos would result in the administration of this important aspect of municipal affairs.

(*Id.* at p. 78, italics added.) The orderly procedure is to file a petition for writ of mandate to challenge the conditions before proceeding with the project.

This Court has held that even a reluctant oral acceptance of conditions is sufficient to waive a challenge. In *Edmonds v. County of Los Angeles, supra,* 40 Cal.2d 642, 653, this Court held that a property owner's reluctant oral acceptance of permit condition constituted waiver, and his failure to comply with conditions of approval did not alter the binding effect of his acceptance. Here, Petitioners signed, notarized, and recorded deed restrictions expressly acknowledging and irrevocably accepting the conditions they challenged. There is no question, and Petitioners do not deny, that they complied in order to receive their permit.

Petitioners contend, incorrectly, that waiver occurs only if a property owner both accepts the conditions *and* fails to timely challenge them. But the test is disjunctive: "[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." (*County of Imperial v. McDougal, supra,* 19 Cal.3d 505, 510-511, italics added.)

Petitioners cite no cases holding that a property owner may proceed with a project while simultaneously challenging the conditions of approval, and, on the People's review, there are none.[2] Petitioners claim that "[t]he plaintiff's problem in *Rossco* [*Holdings, Inc. v. State of California, supra,* 212 Cal.App.3d 642] was not simply acceptance of the permit's benefits, but acceptance without a timely challenge under section 1094.5." (Petition for Review, at p. 17.) To the contrary, the court held that plaintiff "waived its right to attack the allegedly improper conditions of the . . . permit by complying with them." (212 Cal.App.3d at p. 654.) The court separately held that its failure to timely pursue a mandamus action precluded a suit for inverse condemnation. (*Id.* at p. 656.)

Petitioners argue that because they faced the possibility of losing their homes, not just cancellation of a lease, the rule should be different. But as the Court of Appeal pointed out, the evidence in the record indicates Frick's home was not in immediate danger at the time the Commission approved the permit. (Opinion, at p. 6, fn. 2.) To the extent Lynch's home was in immediate danger, she could have applied for an emergency permit, but she did not. (*Ibid.*, citing Pub. Resources Code, § 30624; Cal. Code Regs., tit. 14, § 13136 et seq.) The emergency permit process allows for

---

[2] Petitioners mention that the petitioner in *Nollan v. California Coastal Com.* (1987) 483 U.S. 825 never accepted the public easement condition and went ahead with construction of his project (without the Commission's knowledge) while challenging the condition. (Petition for Review, at pp. 16-17.) But as Petitioners acknowledge, the courts have rejected the argument that *Nollan* abrogated California's waiver rule. (*Rossco Holdings, Inc. v. State of California, supra,* 212 Cal.App.3d at p. 655 ["Because the *Nollan* case does not present the issue of waiver, we disagree [the Supreme Court overruled the *County of Imperial-Pfeiffer* rule."]; Petition for Review at p. 17.)

expedited action and is not subject to review and approval by the Commission itself. (Cal. Code Regs., tit. 14, §§ 13142, 13143, subd. (c).) An emergency permit would have maintained the status quo pending the outcome of this litigation by allowing her to address the immediate danger without giving her any vested rights. (Opinion, at p. 6, fn. 2, citing *Barrie v. California Coastal Com.* (1987) 196 Cal.App.3d 8, 17-18.) Petitioners also chose not to seek a court order relieving them from the requirement to record the deed restriction before proceeding with the project. This case does not present a Hobson's choice because the Coastal Act provided Lynch with an option.

Petitioners also argue that the delay applicants suffer outweighs the policy concerns favoring waiver (Opinion, at p. 7) and argue for a rule allowing them to accept the conditions under protest. As this Court has noted, such delay "is an incident of property ownership." (See *Landgate v. California Coastal Com.* (1998) 17 Cal.4th 1006, 1032.) And neither statutory nor case law supports such an exception.

The Coastal Act does not contain a provision that allows a permittee to accept the benefits of a permit and still challenge the permit conditions. In contrast, the Legislature enacted the Mitigation Fee Act to provide a procedure whereby a developer can pay fees or comply with conditions under protest under certain circumstances. In *Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 241, the court explained:

> Prior to the enactment of this statute, 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[, supra,]* 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.

But, as the Court of Appeal explained, the Mitigation Fee Act applies only to exactions imposed by local agencies that "divest the developer of money or a possessory interest in property." It does not apply to conditions imposed by state agencies or to conditions that restrict "the manner in which a developer may use its property." (Opinion, at p. 6, citing *Sterling Park, L.P. v. City of Palo Alto, supra,* 57 Cal.4th 1193, 1207.)

The cases Petitioners cite, *Kadrmas v. Dickinson Public Schools* (1988) 487 U.S. 450, 456-457 and *40 Retail Corp. v. City of Clarksville* (Ark. 2012) 424 S.W.3d 823, 829, have no application here. *Kadrmas* involved a challenge to a North Dakota statute permitting some school districts to charge a user fee for bus transportation. The Court allowed the case to proceed even though the family had signed a bus contract and paid some of the fees. The Court found the fee was a burden, not a benefit, and in addition the suit was prospective as appellants were seeking relief from paying the balance still owing and to invalidate the requirement for their younger children not yet in school. (*Id.* at pp. 456-457.) *Kadrmas* is simply not relevant.

40 Retail Corp. v. City of Clarksville (Ark. 2012) 424 S.W.3d 823, 829 is consistent with the Court of Appeal's decision here. The City of Clarksville filed an action to enjoin continued operation of a nonconforming sexually oriented business. The City argued the store should be estopped from challenging a statute that phased out nonconforming uses after three years. The Arkansas court held the store was not estopped from pursuing its suit because the plaintiff was "not seeking to retain the benefits of legislation while at the same time seeking to rid itself of its burdens."

The Court of Appeal properly determined Petitioners waived their right to challenge the conditions because they accepted and complied with the conditions and proceeded with their project. Because the Court of

Appeal decision is consistent with long-standing precedent and raises no novel or important questions of law, the Commission urges this Court to deny the petition for review.

II. THE COURT OF APPEAL'S DECISION REGARDING THE 20-YEAR AUTHORIZATION PERIOD IS CASE-SPECIFIC AND CONSISTENT WITH EXISTING PRECEDENT

Although the Court of Appeal's decision on waiver was sufficient to resolve this case, the majority went on to find the Commission acted within its statutory discretion in imposing certain conditions, including a 20-year durational limit on the seawall permit. Petitioners contend that, contrary to the Court of Appeal's decision, the Coastal Act only allows the Commission to impose conditions on seawalls that eliminate or mitigate adverse impacts on local shoreline sand supply. (Petition for Review, at p. 21.) They also argue that the Court of Appeal opinion gives permit agencies "near-limitless power to impose whatever conditions they wish" and therefore conflicts with the United States Supreme Court's unconstitutional-conditions jurisprudence. (Petition for Review, at pp. 22-23.) In fact, the majority's analysis of the Commission's jurisdiction is consistent with the statute and precedent, while its fact based conclusion the Commission acted within its discretion in this matter does not warrant review.

As the majority correctly recognized, "[t]he court's role in reviewing Commission decisions is to determine ' "whether (1) the [Commission] proceeded without, or in excess of, jurisdiction; (2) there was a fair hearing; and (3) the Commission abused its discretion."'" (Opinion, at p. 10, quoting *Ross v. California Coastal Com.* (2011) 199 Cal.App.4th 900, 921.) On the first issue, the court looked to the governing statute, specifically Public Resources Code section 30235, addressing issuance of coastal development permits.

The very case on which Petitioners rely, *Ocean Harbor House Homeowners Assn. v. California Coastal Com.* (2008) 163 Cal.App.4th 215, 241 (Petition for Review, at p. 21), specifically rejected the statutory arguments Petitioners raise here. The Court of Appeal quoted at length from *Ocean Harbor House* and adopted that court's analysis:

> As the [*Ocean Harbor House*] court explained, "The language of section 30235 is permissive, not exclusive. . . . The statute does not purport to preempt other sections of the Act that require the Commission to consider other factors in granting coastal development permits. . . . Nor does the statutory language purport to limit the Commission's duty to consider other impacts and discretion to impose conditions to mitigate them. Homeowners [offer] no legislative history to support [their] view of the statute. Moreover, had it been the Legislature's intent to limit permit conditions, one would reasonably have expected direct or express limiting language – e.g., seawalls shall be permitted, and the Commission may *only* impose conditions that mitigate sand loss; or seawalls shall be permitted, and the Commission may not impose any conditions other than those that mitigate sand loss.

(Opinion, at p. 14.) "In short, we conclude that section 30235 does not limit the type of conditions that the Commission may impose in granting a permit to construct a seawall. Rather the Commission has broad discretion to adopt measures designed to mitigate all significant impacts that the construction of the seawall may have." (Opinion, at p. 15, quoting *Ocean Harbor, supra,* 163 Cal.App.4th at pp. 241-242.)

The Commission further notes that Petitioners' current argument that the Court of Appeal decision is inconsistent with *Ocean Harbor House* conflicts with their earlier arguments. In the superior court, Petitioners argued *Ocean Harbor House* "was wrongly decided because it conflicts with the principle, clearly annunciated by the U.S. Supreme Court in *Nollan*, that the right to impose permit conditions derives from the right to deny the permit altogether." (JA at p. 190, lines 1-3.) In their petition for review,

Petitioners again take issue with *Ocean Harbor House*, arguing that "[i]f section 30235 permits only design-related conditions that eliminate or mitigate impacts caused by protective devices, then the *Ocean Harbor House* fee and the 20-year expiration condition here would be invalid under that provision." (Petition for Review, at p. 22, fn. 7.)

Petitioners' argument that the Court of Appeal's decision is a "groundbreaking opinion" that gives "permit agencies near-limitless power to impose whatever conditions they wish" is premised on their contention that the condition is unrelated to the seawall's impacts. (Petition for Review, at pp. 22, 23.) This argument fails because, as the Court of Appeal found, "the conditions are aimed at addressing the project's likely long-term impacts to adjacent, unprotected properties from accelerated erosion by ensuring that there is an opportunity to revisit the need for the seawall or require further mitigation for its impacts at the point in time it will likely require augmentation, replacement, or substantial change anyway." (Opinion, at p. 15.)

"[T]he Commission imposed the condition limiting the permit's duration because it found: (1) the seawall is only required to protect [Petitioners'] existing homes and is not intended to be a permanent structure accommodating any future redevelopment of the homes; (2) the seawall will have long-term impacts on adjacent properties to the north and may have long-term impacts on other adjacent properties which are not yet fully addressable; [footnote omitted] (3) shoreline protection strategies are evolving, particularly in light of climate change and sea level rise; and (4) notwithstanding its theoretical lifespan, the seawall will likely need augmentation, replacement, or substantial changes within 20 years because of sea level rise and the seawall's location in a high hazard area." (Opinion, at p. 12.)

With respect to Petitioners' constitutional challenges, the Court of Appeal properly noted these arguments "presuppose[] a particular outcome when [Petitioners] apply to renew their seawall in the future." (Opinion, at p. 15.) "However, the outcome of any subsequent application is purely speculative and until the Commission reaches a final decision on the application any related takings claim is not ripe for adjudication." (Opinion, at pp. 15-16, citation omitted.)

Petitioners argue that the Commission imposed the condition in hopes that due to legislative or judicial changes, the Commission will be able to require removal of the seawall. (Petition for Review, at p. 3.) They and the dissent rely upon a single sentence in the Commission's findings, which states that the condition will ensure the project does not prejudice future shoreline planning options in light of changing and uncertain circumstances, including not only climate changes and sea level rise, but also due to legislative change, judicial determinations, etc. (AR 1709.) The condition itself does not mention legislative or judicial changes. It requires the Commission to consider "the opportunities to remove or modify the existing seawall in a manner that would eliminate or reduce the identified impacts, taking into consideration the requirements of the [local coastal program] and the protection required for the adjoining property that is also subject to this coastal development permit." (AR 1683.)

In addition, the Commission's decision is not subject to the heightened scrutiny under the *Nollan/Dolan* test. That test and line of cases only apply when a government entity requires the dedication of land or an interest in land and to ad hoc monetary exactions. (*Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528, 546; *Koontz v. St. Johns River Water Management Dist.* (2013) 133 S.Ct. 2586; *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 881.) The 20-year authorization period does not take an interest in Petitioners' property or constitute an ad hoc monetary

exaction. Therefore, heightened scrutiny under *Nollan/Dolan* does not apply to the Commission's decision.

Even assuming the *Nollan/Dolan* test applied, the conditions easily satisfy the requirements. "It is beyond dispute that California has a legitimate interest in protecting and maintaining its beaches as recreational resources." (*Ocean Harbor House Homeowners Assn. v. California Coastal Com., supra,* 163 Cal.App.4th at p. 231.) "[T]he Commission has broad discretion to adopt measures designed to mitigate all significant impacts that the construction of a seawall may have." (*Id.* at p. 242.) Given unavoidable uncertainty regarding the long-term need for the seawall and its long-term impacts, the 20-year condition helps to ensure that the Commission's required mitigation measures are proportionate responses to the project's actual impacts.

Because the Court of Appeal decision is consistent with existing precedent, review is not needed to secure uniformity of decision. Nor does this case raise an important question of law. The Court of Appeal applied the proper standard of review and determined substantial evidence in the record supported the Commission's decision to impose the 20-year authorization period. As the Court of Appeal noted, there may be other means of satisfactorily addressing the project's long-term impacts, but the court may not substitute its judgment from the Commission's. (Opinion, at p. 13.)

III. THE COURT OF APPEAL'S DECISION REGARDING THE STAIRWAY IS CONSISTENT WITH EXISTING PRECEDENT

The Court of Appeal held that Petitioners' proposed stairway reconstruction required a permit under the Coastal Act and the City's local coastal program. The Court's decision is consistent with the general principle to avoid preemption. (See, e.g., *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729,

737-738 ["The California Constitution recognizes the authority of cities and counties to make and enforce, within their borders, 'all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.' (Cal. Const., art. XI, § 7.) This inherent local police power includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land within a local jurisdiction's borders, and preemption by state law is not lightly presumed."])

Petitioners contend that the Court of Appeal's decision conflicts with the decisions of this Court and other Courts of Appeal regarding preemption. But their contention is based on their flawed argument that the City's local coastal program disaster exemption conflicts with the Coastal Act's disaster exemption. In fact, the City's local coastal program, as Petitioners themselves admit (and the Court of Appeal found), "contains substantially the same language protecting the right of Encinitas residents to replace disaster-stricken structures without a permit" as the Coastal Act. (Petition for Review, at p. 25; Opinion, at p. 16.)

Coastal Act section 30610, subdivision (g)(1) does not contain a blanket exemption from permits for any structure destroyed by a disaster. The permit exception applies only if the replacement structure "shall conform to applicable existing zoning requirements" among other things. (Pub. Resources Code, § 30610, subd. (g)(1).) The equivalent provision in the Encinitas local coastal program provides that the permit exemption for structures destroyed by a disaster applies only if the proposed structure is "in conformance with all other provisions of the Municipal Code (i.e.[,] . . . not governed by the Coastal Bluff Overlay regulations of Chapter 30.34 of the Municipal Code)." (AR 868, Encinitas Municipal Code, § 30.80.050.)

The Encinitas local coastal program does not conflict with the Coastal Act; it simply inserts a reference to the specific applicable existing zoning

requirements by name, that is, the Coastal Bluff Overlay Zone regulations, rather than referring generally to applicable existing zoning requirements.

The Coastal Bluff Overlay regulations are part of the City's zoning code, and they prohibit private stairways down coastal bluffs. (AR 849 [Encinitas Municipal Code, § 30.34.020, subd. (B)(2)(a)-(c)].) Because replacement of the private stairway would be inconsistent with the City's applicable existing zoning requirements, they do not qualify for the disaster replacement exemption under the plain terms of the Coastal Act or the local coastal program.

The Coastal Bluff Overlay regulations are "existing zoning requirements." Petitioners describe zoning requirements as requirements governing "the structure's location and physical dimensions." (Petition for Review, at p. 25, fin. 10.) That is precisely what the Coastal Bluff Overlay regulations do. The Coastal Bluff Overlay regulations specify where development can be located and where it cannot, including private stairways on the City's bluffs. (AR 847-848, Encinitas Municipal Code, § 30.34.020.)

Because both the Encinitas' local coastal program and the Coastal Act required a permit for Petitioners' proposed reconstruction of the stairway, this case does not raise any preemption issues, and the Court of Appeal decision is consistent with the cases Petitioners cite.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests the Court deny the petition for review.

Dated: November 7, 2014

Respectfully submitted,

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

Hayley Peterson

HAYLEY PETERSON
Deputy Attorney General
Attorneys for California Coastal Commission

SD2014118806
70970749.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER TO PETITION FOR REVIEW uses a 13-point Times New Roman font and contains 5,054 words.

Dated: November 7, 2014

KAMALA D. HARRIS
Attorney General of California

Hayley Peterson

HAYLEY PETERSON
Deputy Attorney General
Attorneys for California Coastal Commission

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Lynch et al. v. California Coastal Commission**
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; my business address is: 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266.

On **November 7, 2014**, I served the attached:

ANSWER TO PETITION FOR REVIEW

by placing a true copy thereof enclosed in a sealed envelope with the **FEDEX**, addressed as follows:

Jonathan C. Corn, Esq.
AXELSON & CORN, P.C.
160 Chesterfield Drive, Ste. 201
Cardiff by the Sea, CA 92007
Attorney for Petitioners

Clerk of the Court
Fourth District Court of Appeal-
Division One
750 B Street, Suite 300
San Diego, CA 92101

Paul J. Beard II, Esq.
Jennifer F. Thompson
PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
Attorney for Petitioners

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

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 **November 7, 2014**, at San Diego, California.

K. Gutierrez
Declarant

K Gutierrez
Signature

SD2014118806
70978761.doc