IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S221980

BARBARA LYNCH and THOMAS FRICK,
Plaintiffs and Respondents,

v.

CALIFORNIA COASTAL COMMISSION,
Defendant and Appellant.

After an Opinion by the Court of Appeal,
Fourth Appellate District, Division One
(Case No. D064120)

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

PLAINTIFFS' AND RESPONDENTS' REPLY TO ANSWER TO PETITION FOR REVIEW

JONATHAN C. CORN,
No. 156983
Axelson & Corn, P.C.
160 Chesterfield Drive
Suite 201
Cardiff by the Sea, CA 92007
Telephone: (760) 944-9006
Facsimile: (760) 454-1886
E-Mail: joncorn@axelsoncorn.com

PAUL J. BEARD II,
No. 210563
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: pjb@pacificlegal.org
E-mail: jft@pacificlegal.org

Attorneys for Plaintiffs and Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Petitioners Barbara Lynch and Thomas Frick ("Homeowners") hereby reply to the Answer of Respondent California Coastal Commission ("Commission").

ARGUMENT[1]

I

THE DIVIDED OPINION OF THE COURT OF APPEAL RADICALLY DEPARTS FROM EXISTING PRECEDENTS ON THE IMPORTANT ISSUE OF PROPERTY OWNERS' ACCESS TO THE COURTS TO CHALLENGE UNLAWFUL PERMIT CONDITIONS

A. The Divided Opinion Breaks with the Precedents on "Waiver" in the Permitting Context

The Court of Appeal's divided opinion is unprecedented. Prior thereto, no court had ever held that an applicant who exhausted all administrative remedies in the face of unlawful permit conditions, then filed a timely and valid action challenging those conditions, nevertheless could be barred from having her day in court. The majority opinion does just that, creating out of whole cloth a new barrier to property owners' access to the courts: Even if an

---

[1] The Commission's petition presents a lengthy factual background concerning issues that are irrelevant to the present petition in an attempt to paint the Homeowners in an unfavorable light. The only relevant background is: The Homeowners applied for a coastal development permit to build a new seawall to protect their homes, and the Commission conditioned their right to do so on (1) requiring the seawall to expire in 20 years and (2) the Homeowners' forfeiture of the right to rebuild the lower portion of their staircase destroyed by storms.

applicant follows every statutory requirement necessary to preserve her challenge, she nevertheless waives her right to have her challenge adjudicated, if she does not also abandon her right to use (or, in this case, protect) her property pending the outcome of the litigation.

Respondent California Coastal Commission attempts to reconcile the divided opinion with the long line of precedents on "waiver" in the permitting context. According to the Commission, the majority opinion was just a "straightforward application" of those precedents, based on findings that the Homeowners had "recorded deed restrictions, . . . complied with the conditions[,] . . . accepted their coastal development permit[,] and . . . proceeded to construct their project." Answer at 6. But it is precisely because the court based its "waiver" holding on those findings that the majority opinion breaks new ground.

The precedents hold that an applicant waives the right to challenge a permit condition by (1) "specifically agreeing to the condition or failing to challenge its validity," and (2) "accept[ing] the benefits afforded by the permit." *County of Imperial v. McDougal*, 19 Cal. 3d 505, 510-11 (1977); *Rossco Holdings, Inc. v. State*, 212 Cal. App. 3d 642, 644-45 (1989) (same). It is important to underscore that the precedents require that waiver be predicated on the satisfaction of *two* independent criteria—the first of which, in turn, identifies two ways for the applicant to demonstrate acquiescence to

offending conditions. Here, there is no dispute that that the Homeowners timely challenged the validity of the seawall-expiration condition and the stairway-reconstruction ban. And there is no dispute that the Homeowners repeatedly objected to the conditions before and at the administrative hearing, and via their timely and valid lawsuit filed shortly after the Commission imposed those conditions. As the superior court and the dissent both found, there is no way, based on these undisputed facts, to accuse the Homeowners of having "specifically agree[d]" to the challenged conditions. This ends the analysis: Without meeting either prong of the first criterion, the Homeowners could not be deemed to have waived their right to challenge the conditions.

But the Opinion in this case dispenses entirely with the first criterion—and, in particular, the "specific agreement" prong of that criterion. The Opinion instead relies exclusively on the Homeowners' actions surrounding their construction of the permitted seawall—the *second* criterion for waiver that no one disputes has been met (*i.e.*, acceptance of a permit's benefits). In that regard, the Opinion makes much of the fact that the Homeowners recorded deeds that provide public notice that the Commission approved the seawall permit with conditions and, importantly, recognize that any of those conditions could ultimately be invalidated by a court of law.

Having to record the deeds was part and parcel of the construction of the permitted seawall. The Commission forced the Homeowners to record the

deeds before receiving a building permit allowing them to proceed with the project. Compliance with the Commission's condition that they record deeds was not compliance (let alone specific agreement) with the challenged seawall-expiration and staircase-ban conditions. Thus, the majority found waiver on the basis only one of the second of two criteria necessary to make such a finding: The Homeowners took the benefits of the permit. Again, there is no precedent that supports finding waiver based only on the performance of the work authorized by the permit.

Significantly, the United States Supreme Court—in a case against the Commission that was very similar to this one—specifically rejected the notion that an applicant had to choose between vindicating his rights in court and proceeding with the permitted project. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), a homeowner challenged the Commission's condition on his remodel permit, which would have required him to dedicate a public-access easement across his property. During litigation, the homeowner accepted the permit's benefits and remodeled his house. *Id.* at 829-30. When the case landed in the United States Supreme Court, the Commission moved to dismiss the case on the ground that the homeowner had waived his right to challenge the easement condition, because he had taken the permit's benefits. See Response of Appellants to Motion of Appellee California Coastal Commission To Dismiss (filed Dec. 9, 1986), U.S. Supreme

Court Case No. 86-133, at 7-12.[2] The Supreme Court denied that motion.[3] *Nollan v. California Coastal Comm'n*, 479 U.S. 913 (1986) (denying the Commission's motion to dismiss).

The Commission also hypothesizes that, if they needed to build their seawall, the Homeowners could have applied for an emergency permit or permit amendment, or they could have sought judicial relief from having to record the deeds. Answer at 7, 9. But the Commission's hypotheticals do not answer the legal problem created by the majority opinion: There is now a split in the courts of appeal as to whether following the legal requirements for preserving a challenge to permit conditions will actually guarantee the applicant's right to judicial review of those conditions. Moreover, on the merits of the Commission's hypotheticals, they make little sense. Particularly with respect to the "emergency permit" argument, no statute or precedent

---

[2] A relevant excerpt of the brief is attached to the Amici Curiae Letter of Beach and Bluff Conservancy, et al., in support of the Petition for Review (filed Oct. 31, 2014).

[3] In response, the Commission cites *Rossco Holdings, Inc. v. State of California*, 21 Cal. App. 3d 642 (1989). There, the court of appeal concluded that *Nollan* did not abrogate the *County of Imperial* rule, in part on the grounds that "waiver was neither discussed nor in issue in Nollan." *Id.* at 656. First, while not discussed in *Nollan* itself, the United States Supreme Court certainly did address the waiver issue when it specifically rejected the Commission's argument that merely proceeding with a permitted project constitutes waiver. Second, the High Court's ruling on the "waiver" issue is consistent with *County of Imperial* and other state precedents, none of which hold that proceeding with a project—without more—waives a challenge to permit conditions.

requires a permit applicant to initiate a new permit proceeding in order to preserve the right to proceed with an already-permitted project while litigating the permit's conditions. And the futility of such a course of action is evident: There is no reason to believe that the agency that imposed unlawful conditions in one permit will, in an entirely new and different permit proceeding, authorize the same activity *without* the offending conditions.

Next, the Commission cites *Pfeiffer v. City of Mesa*, 69 Cal. App. 3d 74 (1977), and *Edmonds v. County of Los Angeles*, 40 Cal. 2d 642 (1953), as supporting the majority opinion's "waiver" finding. Answer at 7-9. Not so. The actual *holding* in *Pfeiffer* is not that the acceptance of a permit's benefits constitutes waiver, but that any challenge to a permit condition must be brought pursuant to Code of Civil Procedure section 1094.5 (either before or concomitantly with an inverse condemnation claim). Of course, the Homeowners here complied with the *Pfeiffer* holding, and filed a timely section 1094.5 writ action challenging the Commission's unlawful conditions.

In *Edmonds*, this Court emphasized that "never once during the entire proceedings" leading up to the permit decision at issue there did the plaintiffs object the conditions. *Edmonds*, 40 Cal. 2d at 650. The Court explained that if the plaintiffs had believed that the conditions were unlawful, "they would have relied on the courts for vindication," but instead the plaintiffs had proceeded "as if they claimed no right" against the conditions. *Id.* The finding

of "waiver" was based both on (1) the plaintiffs' failure to object to the conditions during the permit proceedings, and (2) the plaintiffs' failure to file suit to challenge them. By contrast, the Homeowners both objected and filed a timely suit; nor did the Homeowners ever comply with the challenged conditions.

Drawing a contrast with the Mitigation Fee Act, the Commission points out that the Coastal Act does not contain a provision that allows an applicant to proceed with a permitted project while challenging the permit's conditions. Answer at 10. But neither point is relevant. The question is not whether there is specific statutory authority that recognizes the right of an applicant to an adjudication of her challenge to a permit condition, while proceeding with her project. The question is whether this State's well-established jurisprudence has ever—before the divided opinion this case—*extinguished* a timely and valid claim challenging an unlawful permit condition, solely on the basis that the claimant proceeded with her project. The answer is a resounding "no." The majority opinion is the first to so hold, and deviates significantly from established precedents that have required, in addition to proceeding with a project, a finding of specific agreement with or failure to challenge the permit conditions at issue.[4] That latter finding could not be made in this case.

---

[4] The fact that the Mitigation Fee Act applies only to challenges to permit conditions imposed by local agencies is irrelevant. Answer at 11. Almost all (continued...)

Finally, the Commission fails to distinguish a United States Supreme Court precedent on waiver that is on all fours with this case. In *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 456-57 (1988)—and as the Commission recognizes (Answer at 11)—the United States Supreme Court refused to bar a challenge to a statute permitting some school districts to charge a user fee for transportation, even though the plaintiff had signed a bus contract and paid some of the fees—i.e., accepted the benefits of the statute. The Court "doubt[ed] that plaintiffs are generally forbidden to challenge a statute simply because they are deriving some benefit from it." The Commission notes that the Court found the fee to be a burden, not a benefit, and that the suit sought equitable relief. Answer at 11. But that is true of this case as well: The conditions that the Homeowners challenge are a burden on the permit, not a benefit, and the Homeowners simply seek equitable relief—*i.e.*, invalidation of the conditions.

---

[4] (...continued)
agencies that issue land-use permits are local, not state, agencies; therefore, it made sense for the Legislature to legislate on local agency exactions. Moreover, the public policy considerations that the Legislature relied upon in enacting the Mitigation Fee Act apply equally to conditions imposed by state agencies: Applicants should not have to choose between forfeiting their right of judicial review of unlawful conditions and forfeiting their right to use and protect their properties. The Commission does not explain why—as a public policy matter— it should be free to force that kind of a choice onto applicants, while every local agency in the State is not.

B. The "Waiver" Issue in the Land-Use Permit Context Is Important

The Commission does not address, let alone contest, the importance of the "waiver" issue raised in the Homeowners' petition. The majority opinion in this case conflicts with a long line of precedents on the issue, and only serves to confuse an already complex area of the law: Beyond following all the statutory requirements necessary to preserve a challenge to unlawful permit conditions, what else must an applicant do? In light of the divided court of appeal's published decision, that question is difficult to answer. And, until it is, millions of Californians—inside and outside the coastal zone—will have little guidance from this State's fractured jurisprudence.

The issue's statewide importance is buttressed by the fact that a number of prominent organizations and experienced land-use attorneys from across the State have filed amicus curiae letters in support of this petition. Amici include homeowners associations from up and down California, the California Building Industry Association, the California Farm Bureau Federation, the California Cattlemen's Association and the California Association of Realtors. As against the vast and varied voices in support of the petition, the Commission offers no reason why the "waiver" issue is of limited importance.

II

THE DIVIDED OPINION OF THE COURT OF APPEAL CONFLICTS WITH EXISTING PRECEDENTS ON THE IMPORTANT QUESTION OF WHAT LIMITATIONS EXIST ON GOVERNMENT'S POWER TO CONDITION THE RIGHT TO PROTECT PROPERTY

The Homeowners and amici explain at great length the reasons why the majority opinion conflicts with existing precedents concerning the limitations on government power to condition the right to protect property. *See, e.g.*, Petition for Review at 21-23; *see also* Amici Curiae Letter of Beach and Bluff Conservancy, et al., at 3-6. In short, both the United States Supreme Court and at least one court of appeal have made clear that only conditions that actually *mitigate* for *identified* impacts *caused* by a project are lawful. *Nollan*, 483 U.S. at 837 (condition must bear an "essential nexus" to identified impacts of the proposed use); *Ocean Harbor House Homeowners Ass'n v. California Coastal Comm'n*, 163 Cal. App. 4th 215, 240-42 (2008) (upholding in-lieu fee that mitigated for identified impacts caused by project). The reason for requiring that a permit condition actually be mitigation is to avoid government agencies from exploiting the permit process to simply exact property interests pursuant to an "out-and-out plan of extortion." *Nollan*, 483 U.S. at837. Nevertheless, in spite of these precedents and the plain language of the Coastal Act, the majority opinion upholds the Commission's imposition of a 20-year expiration date on a state-of-the-art seawall expected to last 75 years—a

condition meant "'to allow the potential removal of the approved seawall'" at that time. Dissenting Opinion at 15 (quoting Commission). This, despite the Commission's admission that the seawall "'has been designed and conditioned to mitigate its impact on coastal resources . . . .'" *Id.* (quoting Commission). In other words, requiring the seawall to expire in 20 years does not actually *mitigate* any identified impacts from the seawall (all of which had already been mitigated), but is merely an insurance policy that protects the Commission's freedom in the future should legislative or judicial changes allow it to ban all seawalls up and down the coast.

The Commission does not dispute that both *Nollan* and *Ocen Harbor House* endorse only actual mitigation for identified impacts of a proposed use of property. Instead, it argues that the majority opinion is consistent with those requirements, because the 20-year expiration condition *is* mitigation. But, as the superior court and the dissent recognized, it is not. *See, e.g.*, Dissenting Opinion at 14-15 (The 20-year expiration condition "does not mitigate any impacts the seawall may cause in the future[,]" but "merely gives the Commission the option to deny the permit outright in 20 years."). Importantly, the Commission does not explain the difficulty that the majority opinion raises. If a 20-year expiration condition can be labeled "mitigation," then *any* condition can be characterized as such—and the mandate in *Nollan* that all

conditions bear an essential nexus to identified impacts caused by the proposed use of property is a dead letter.

Review is necessary to determine just how far a government agency like the Commission can go in imposing permit conditions, without running afoul of *Nollan* and *Ocean Harbor House*. It is especially significant here, where the right being conditioned is the constitutional and "inalienable" right of "protecting property." Cal. Const. art. I, § 1. Can the government impose a 20-year expiration date on that inalienable right? The court of appeal answered in the affirmative, not only conflicting with precedents that set forth the standards for "mitigation," but risking the lives and properties of landowners all along the coast.

III

THE DIVIDED OPINION OF THE COURT OF APPEAL RAISES AN IMPORTANT QUESTION ABOUT WHETHER LOCAL POLICIES CAN TRUMP STATE-LAW PROTECTIONS FOR COASTAL PROPERTY OWNERS

The majority opinion holds that the Homeowners' replacement of their lower staircase requires a permit, even though the stairway was destroyed by a disaster. Majority Opinion at 16-17. That holding is based on a failed attempt to reconcile a state mandate specifically exempting disaster-stricken structures from a permit and a conflicting local provision. Section 30610(g) of the Coastal Act makes clear that the right to replace a disaster-stricken

structure, including a private staircase, is a state-statutory right that cannot be trumped by local policy.

The Commission does not contest the well-established principle that local policies cannot trump state law. But it defends the majority opinion on the basis that the Coastal Act exemption at issue here somehow *permits* a local end-run around its protections. That implausible reading of the statute would allow endless local exceptions to swallow the state rule.

The Commission asserts that the Costal Act exemption is limited by the following sentence in section 30610, subdivision (g): "[t]he replacement structure shall conform to applicable existing zoning requirements." Pub. Res. Code § 30610(g)(1). The Commission interprets this sentence to mean "the replacement of a structure destroyed by a disaster also must conform to applicable zoning requirements." However, as that sentence makes clear, it is the "structure," not its replacement, that must conform to applicable zoning requirements. Thus, as Justice Nares aptly put it:

[I]t is the *structure*'s design, aesthetics and dimensions that must comply with local zoning regulations. However, no zoning regulation can be contradictory to the law governing the question of whether a particular replacement project is entitled to exemption. As is made clear in section 30610, subdivision (g)(1), the stairway repair project is exempt.

The plain meaning of the Coastal Act's exemption conflicts irreconcilably with any local policy to the contrary. And the majority's decision to allow the local policy to prevail raises important state-preemption questions that this Court should resolve. If the decision stands, the Commission will undoubtedly use it to encourage localities to adopt "exceptions" to the few protections that the Coastal Act actually affords property owners, on the grounds that local policy can trump state law.

CONCLUSION

For all these reasons, the petition should be granted.

DATED: November 20, 2014.

Respectfully submitted,

PAUL J. BEARD II
Pacific Legal Foundation

JONATHAN C. CORN
Axelson & Corn, P.C.

By _____
PAUL J. BEARD II

Attorneys for
Plaintiffs and Respondents

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing PETITION FOR REVIEW is proportionately spaced, has a typeface of 13 points or more, and contains 3,163 words.

DATED: November 20, 2014.

PAUL J. BEARD II

DECLARATION OF SERVICE

I, Pamela Spring, 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 November 20, 2014, true copies of PLAINTIFFS' AND RESPONDENTS' REPLY TO ANSWER TO PETITION FOR REVIEW were placed in envelopes addressed to:

Hayley Elizabeth Peterson
Office of the Attorney General
110 West A Street, Suite 1100
San Diego, CA 92101

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

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

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 20th day of November, 2014, at Sacramento, California.

PAMELA SPRING