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

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

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Plaintiffs and Respondents Barbara Lynch and Thomas Frick appeal from a court of appeal decision upholding the California Coastal Commission's decision to include certain conditions in a coastal development permit. The permit allows Plaintiffs to construct a massive concrete seawall to protect their existing blufftop homes. The challenged conditions limit the permit's duration to 20 years subject to reauthorization and prohibit reconstruction of a private beach access stairway across the bluff face. The Commission determined these conditions were necessary to address the seawall's impacts on coastal resources and to ensure consistency with the City of Encinitas local coastal program.

Plaintiffs complied with all of the prerequisites for the permit's issuance (including signing and recording deed restrictions irrevocably covenanting to the conditions), accepted the permit, and built the seawall. Under long-standing precedent, because they specifically agreed to the permit conditions, accepted the permit's benefits, and proceeded with their project, the court of appeal correctly held that Plaintiffs waived their right to challenge the conditions.

Plaintiffs contend they did not waive because they timely challenged the permit conditions. There are two recognized exceptions to the general waiver rule (the first exception, codified in Government Code section 66020, applies to conditions a local agency imposes that divest the owner of money or a possessory interest in property; the second exception applies when an agency imposes new conditions on a permit for a later phase of a project already underway), but neither applies here. Plaintiffs essentially ask this Court to create a third exception that would effectively abolish the common law waiver rule. In light of established law and policy considerations, this Court should decline to do so.

If the Court reaches the merits of Plaintiffs' claims, it should reject them. The Commission has broad authority to impose reasonable terms and conditions to ensure development complies with a certified local coastal program. Compliance is important because the local coastal program establishes the allowable types, locations, and intensities of development in the coastal zone to achieve the Coastal Act's statewide resource management goals. The Commission ensured the seawall's consistency with the local coastal program by authorizing it for 20 years subject to renewal. The renewal process ensures the Commission may evaluate the seawall's consistency with the local coastal program and consider mitigation for its as-yet unmitigated long-term impacts and its continued utility when the seawall will likely require augmentation, replacement, or substantial change.

There is no merit to Plaintiffs' argument that Public Resources Code section 30235, which provides that seawalls shall be permitted when necessary to protect existing structures in danger from erosion and when designed to mitigate their adverse impacts, requires the Commission to issue a seawall permit in perpetuity. As an initial matter, the City's local coastal program, not section 30235, is the standard. Even assuming section 30235 applied, nothing in section 30235 prevents the Commission from limiting the duration of a seawall permit. Nor does limiting the duration of a permit, subject to reauthorization, violate the takings clause. Speculation that the Commission may deny a renewal application in 20 years does not establish a taking today.

The Commission properly denied Plaintiffs' request to rebuild the lower portion of their private stairway down the bluff because it did not conform to the City's zoning requirements. The Coastal Act exempts replacement of a structure destroyed by a disaster from permit requirements only if, among other requirements, the structure conforms to existing

zoning requirements. The City's zoning requirements prohibit new bluff-face development, allow only "routine maintenance" of existing bluff-face development, and require phasing out of existing private stairways.

The conditions balance Plaintiffs' right to protect their existing homes with the public's right and interest in lands below the toe of the bluff, and substantial evidence in the record supports the Commission's decision to impose them.

STATEMENT OF THE CASE

A. Statutory Background

The California Coastal Act of 1976 (Pub. Resources Code, §§ 30000-30900)[1] provides a "comprehensive scheme to govern land use planning for the entire coastal zone of California." (*Pacific Palisades Bowl Mobile Estates v. City of Los Angeles* (2012) 55 Cal.4th 783, 793, quoting *Yost v. Thomas* (1984) 36 Cal.3d 561, 565.) The Legislature found that "the California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people"; that "the permanent protection of the state's natural and scenic resources is a paramount concern"; that "to protect public and private property . . . it is necessary to protect the ecological balance of the coastal zone and prevent its deterioration and destruction"; and that "existing developed uses, and future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state . . . ." (§ 30001, subds. (a)-(d); *Yost v. Thomas, supra,* 36 Cal.3d at 565.)

The Legislature adopted the Coastal Act to "protect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone

[1] All further statutory references are to the Public Resources Code unless otherwise indicated.

environment and its natural and artificial resources" and to "[m]aximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners." (§ 30001.5, subds. (a), (c).) The Coastal Act must be liberally construed to accomplish its purposes and objectives. (*Pacific Palisades Bowl Mobile Estates v. City of Los Angeles, supra,* 55 Cal.4th at 793-794, 796; § 30009.)

To achieve these goals, Chapter 3 of the Coastal Act contains policies which are the standards by which the Commission judges the adequacy of local coastal programs and the permissibility of proposed development. (§§ 30200-30265.5.) Under the Coastal Act, the Commission and local governments share coastal development planning responsibility. Local governments develop local coastal programs that contain policies and plans for coastal development within their jurisdictions. (§ 30500.) Local coastal programs establish the allowable types, locations, and intensities of development in the coastal zone to achieve statewide resource management goals and provide for local community planning and development objectives. Local coastal programs must conform to the Coastal Act. (§§ 30512, 30513.)

After the Commission certifies that a local coastal program conforms to the Coastal Act, the local jurisdiction assumes most permitting authority. (*Pacific Palisades Bowl Mobile Estates v. City of Los Angeles, supra,* 55 Cal.4th at 794; § 30519.) The Commission retains jurisdiction over amendments to permits the Commission issued prior to certification of the local coastal program. (Administrative Record (AR) 868.) When the Commission considers such permit amendments, it reviews the amendment for consistency with the local coastal program and, where the development is located between the nearest public road and the sea, with the Coastal

Act's Chapter 3 recreation and public access policies. (§ 30604, subds. (b), (c).)

The Legislature gave the Commission the final word on the interpretation of local coastal programs. (*Charles A. Pratt Constr. Co. v. California Coastal Com.* (2008) 162 Cal.App.4th 1068, 1072; see § 30625, subd. (c).) "The Commission has the ultimate authority to ensure that coastal development conforms to the policies embodied in the Coastal Act." (*Id.* at p. 1075; see also *Reddell v. California Coastal Com.* (2009) 180 Cal.App.4th 956, 966-967.)

Plaintiffs' properties are located in the City of Encinitas, which has a certified local coastal program. The City's local coastal program includes policies to reduce and eliminate activities and structures that could adversely affect bluff stability. (AR 1720.) It also includes provisions to protect the natural scenic qualities of the City's coastal bluffs. (AR 1721.)

B. Procedural and Factual Background

1. Development and Permit History

Plaintiffs own adjacent blufftop homes in the City of Encinitas. (AR 735.) Each property has a developed area at the top of the bluff and a steep bluff face that cascades down to the beach and ocean. (AR 735.) Plaintiffs' properties, along with the rest of the Encinitas coastline, are "Generally Susceptible" or "Most Susceptible" to landslides. (AR 1695 [Division of Mines and Geology, Landslide Hazards in Encinitas Quadrangle, San Diego County, 1986].)

Lynch purchased what was then a single property in 1970. (AR 2275.) A bluff face stairway existed when she purchased the property, but it was destroyed shortly thereafter. (AR 6 [no stairway visible in 1973 photo].) Lynch rebuilt the stairway sometime after 1973. (AR 2150-2154.)

In 1986, this second bluff face stairway collapsed along with part of the bluff. (AR 1909.) Without applying for permits, Lynch constructed a wooden seawall and new stairway. (AR 1909.) The following year, Plaintiffs applied to split the property into two lots and to construct a home on the newly created lot. (AR 2-22.) Plaintiffs requested after-the-fact approval of the seawall and stairway. (*Ibid.*)

The Commission approved an after-the-fact coastal development permit because it determined that the stairway and seawall could not be removed without destabilizing the bluff. (AR 9.) As the permit conditions required, Plaintiffs recorded open space deed restrictions prohibiting "any alteration of landforms, removal of vegetation or the erection of structures of any type" on the bluff without the Commission's written approval. (AR 4, 500-504, 603-607.) The permit also required Plaintiffs to contact the Commission before undertaking any repair or maintenance work to determine if a permit was required. (AR 5.)

In 2001, again without permits and without notifying the Commission, Plaintiffs installed concrete footings around the seawall's timbers. (AR 38.) Plaintiffs applied for a permit amendment to authorize the footings only after the Commission's enforcement division issued a stop work notice. (AR 38.) Plaintiffs decided to build a new seawall instead and withdrew their application for the footings. (AR 39.)

2. The Commission's Conditional Approval of Plaintiffs' Seawall

Plaintiffs first applied to the City for a major use permit to replace the wooden seawall. (AR 870.) The City noted that in order to install the seawall Plaintiffs needed to remove the lower portion of the stairway and replace it after construction of the wall. (AR 1849.) The City's approval contains no further discussion of the stairway or analysis of whether replacing it would comply with the City's local coastal program. (See AR

1843-1860.) The City's approval required Plaintiffs to obtain a coastal development permit amendment from the Commission (AR 1854).

Plaintiffs then applied to the Commission to amend their existing Commission-issued permit to remove the existing wooden seawall and replace it with a new 100-foot long, 29-foot high concrete seawall with a lower wooden stairway attached to the proposed wall. (AR 1826-1827.) Commission staff initially recommended the Commission approve a seawall only on the Lynch property because the Frick home was not currently threatened. (AR 39-40.) Commission staff recommended the Commission deny the stairway because it was inconsistent with the local coastal program, which prohibits private stairways because of their adverse impacts. (AR 24.) Plaintiffs withdrew their application in order to provide additional information. (AR 2280.)

After Plaintiffs withdrew their application, portions of the wooden seawall and stairway collapsed during a storm. (AR 402, 735.) Plaintiffs submitted a new application after the collapse. (AR 711-732.)

This time, Commission staff recommended approval of a seawall across both properties even though only the Lynch house was currently threatened because it found the seawall would need to encroach some distance onto the Frick property to protect the Lynch home and erosion was likely to threaten the Frick home in the near future. (AR 1697-1698.) Approval of a single seawall would reduce adverse visual impacts and allow the seawall to be placed further landward. (AR 1698.) Staff again recommended denial of the stairway as inconsistent with the local coastal program. (AR 1679.)

At the public hearing on their application, Plaintiffs claimed that the Commission had previously authorized a stairway in perpetuity and submitted a stack of documents allegedly supporting this claim. (AR 2298-2300.) The Commission continued the hearing to allow staff time to review

the newly submitted documents. (AR 2305-2306.) The additional documents were copies of the recorded deed restrictions that the Commission had required in connection with the original permit, which in fact prohibited erection of structures of any type on the bluff face without Commission approval. At the second hearing on Plaintiffs' application, staff explained that "[t]he documents did not include any information suggesting the private access stairway was approved in perpetuity or even an allowable structure in the open space deed restricted area." (AR 1767-1768.) Commission staff also noted that since the Commission's after-the-fact approval of the stairway, the City's local coastal program, which requires phasing out of stairways, took effect. (AR 1768.)

At the conclusion of the public hearing, the Commission conditionally approved a permit amendment to allow Plaintiffs to remove the remainder of the wooden seawall and replace it with a concrete seawall across both properties. (AR 1681-1689.) Special condition 1.a. requires Plaintiffs to delete reconstruction of the stairway below the existing landing from the plans. (AR 1681.) The Commission found that reconstruction of the stairway was inconsistent with the City's local coastal program, which permits only public access stairways and provides for phasing out of private stairways. (AR 1716-1717.)

The Commission documented the various adverse impacts that seawalls in general and Plaintiffs' seawall specifically may have on public resources and adjacent private lands. It found that:

- Seawalls can impact public beaches through (1) loss of the beach area that the seawall physically occupies, (2) narrowing of the beach in front of a seawall by preventing bluff retreat while the beach continues to erode; and (3) loss of sand which would have resulted from the bluff's natural erosion. (AR 1702.)

- Seawalls can impact public access and recreational use by inhibiting the natural landward migration of lands subject to the public trust and compromise public access and recreation along the shoreline.
- Seawalls can impact adjacent unprotected properties. (AR 1709.) Studies show that unprotected adjacent properties experience a greater retreat rate than they would if a seawall were not present. (AR 1709.) The Commission found that, at best, optimal design of Plaintiffs' seawall could reduce but not eliminate the wall's impacts on adjacent unprotected properties to the north. (AR 1709.)
- Seawalls substantially alter the natural appearance of bluffs, negatively impacting a shoreline's character and visual quality. (AR 1721-1722.)

The Commission included conditions to mitigate the seawall's impacts. Special condition 1 requires that the seawall be designed to blend visually and structurally into the adjacent natural bluff as much as possible to minimize the seawall's impacts on visual resources and the adjacent bluffs. (AR 1682.) The design must also minimize the seawall's erosive effects on the adjacent bluffs. (AR 1682.)

Special condition 5 requires a sand mitigation fee in lieu of providing sand to replace the sand and beach area that will be lost as a result of the seawall over a twenty year period.[2]

Special condition 17 requires Plaintiffs to record deed restrictions irrevocably agreeing that the permit special conditions constitute conditions, covenants, and restrictions on the use and enjoyment of their properties. (AR 1689.)

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[2] Plaintiffs proposed a sand supply mitigation fee based on an expected 30-year lifespan for the seawall. (AR 1706.) The Commission pro-rated the amount to reflect the 20-year authorization period. (AR 1685.)

Special condition 2 authorizes the seawall for twenty years from the date of approval and provides that future redevelopment of the blufftop residential parcels shall not rely on the permitted seawall to establish geologic stability or protection from hazards. (AR 1682.)

Special condition 3 requires that, prior to expiration of the 20-year authorization period, Plaintiffs apply for a permit amendment to extend the seawall's authorization period, change its size or configuration, or remove it. (AR 1683.)

The Commission limited the seawall's duration to 20 years subject to renewal to ensure its consistency with the City's local coastal program. It is difficult for the Commission to determine now the impacts that the seawall will have 20 years from now as there is significant uncertainty about how quickly sea level rise will accelerate in coming decades, about potential future alternative responses to shoreline erosion, and about future development patterns. (AR 1709-1710.) For example, in 20 years, the seawall could be located on public trust lands, significantly increasing the seawall's adverse impacts and potentially requiring different mitigation than what is required today. (AR 1716.) In 20 years, the Commission will be in a better position to determine what mitigation is needed to address the seawall's impacts at that time or whether the seawall is even still necessary to protect the structures it was approved to protect. (AR 1710.)[3]

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[3] In some recent permit decisions, instead of limiting the permit term to 20 years, the Commission has permitted seawalls for so long as the existing structure they protect remains, consistent with the language of section 30235 and applicable local coastal programs. In those decisions, the Commission has imposed conditions requiring adaptive management, including future permit amendments to address changed circumstances and longer-term mitigation. (See Presnell/Graves LLC, coastal development permit application number 6-13-0437, p. 9, <http://documents.coastal.ca.gov/reports/2014/5/W16a-5-2014.pdf>

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3. Plaintiffs' Acceptance of Conditions and Construction of Project

After the Commission approved the permit amendment, Commission staff sent Plaintiffs a notice of intent to issue the permit amendment. (AR 1784-1795.) The notice states that development cannot start until the amendment is effective. In order to take effect, Commission staff must issue the amendment to the applicant, and the applicant must sign and return the amendment. (AR 1785.)

Plaintiffs signed and returned the acknowledgement on the notice of intent and also signed, notarized, and recorded deed restrictions as special condition 17 required. Frick signed these documents before Plaintiffs filed suit (JA 45-62); Lynch signed them shortly after Plaintiffs filed suit (JA 24-43).

After confirming that Plaintiffs complied with all of the prior-to-issuance conditions, Commission staff issued the permit to Plaintiffs. (JA 65.) Plaintiffs accepted the permit and proceeded to construct their seawall. Plaintiffs admit that they have now also constructed the stairway in violation of the permit conditions. (Opening Brief (OB) at 9, fn. 2.)[4]

(...continued)
[Commission authorized seawall until the currently existing structure is redeveloped, is no longer present, or no longer requires protection, required mitigation for 20 years of impacts, and required submittal of permit amendment for additional mitigation if the seawall remains in place longer than 20 years.].) Because seawall applications can address a wide range of different circumstances, the Commission's approach for any given application will necessarily be tailored to address the concerns a specific project raises and the requirements of any applicable local coastal program.

[4] Plaintiffs state they rebuilt the stairway because the Commission did not seek a stay "after the trial court issued the writ striking the three conditions." The Commission's appeal automatically stayed the trial court's judgment. (Code Civ. Proc., § 916.) Moreover, the trial court did not strike the conditions from their permit. The writ ordered the Commission to
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4. Plaintiffs' Lawsuit and the Trial and Appellate Court Decisions

Plaintiffs filed their lawsuit in October 2011. (JA 1-7.) When the Commission learned that Plaintiffs had proceeded with and completed construction of the seawall, the Commission moved for judgment under Code of Civil Procedure section 1094 on the ground that Plaintiffs waived their right to challenge the special conditions by electing to accept the special conditions and proceeding with their project. (JA 13-23.) The Commission requested the trial court take judicial notice of the deed restrictions, containing Plaintiffs' written agreement to the conditions:

> [I]n consideration of the issuance of the Permit to Owner(s) by the Commission, the undersigned Owner(s) . . . hereby irrevocably covenant(s) with the Commission that the Special Conditions . . . 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 25, 46.)

Despite the above, the trial court determined that: "[Plaintiffs] have neither specifically agreed to the conditions nor failed to challenge their validity." (JA 101.) It also found that, by proceeding with the project, Plaintiffs did not necessarily accept the conditions in question. (JA 101.)

Plaintiffs then moved for judgment. (JA 102-127.) The trial court granted Plaintiffs' motion. The court held Plaintiffs were entitled to reconstruct their beach stairway because it was destroyed by a disaster. (JA 229.) The court also held that Plaintiffs were entitled to a perpetual permit,

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remove the conditions from the permit. (JA 227.) In lieu of complying with the writ, the Commission filed a return to the writ stating that it was appealing the judgment.

determining that the 20-year authorization period was a regulatory taking. (JA 229.) The trial court issued a writ commanding the Commission "immediately upon receipt of this writ to remove . . . Special Conditions 1(a), 2 and 3" from the coastal development permit. (JA 227.) The Commission filed a return to the writ stating it was appealing the judgment.

The Commission appealed (JA 239-240), and the Court of Appeal reversed the judgment. Citing a long line of cases, the court held that Plaintiffs waived their right to challenge the permit conditions by signing and recording deed restrictions agreeing to the conditions and by accepting the permit's benefits and constructing their project. (Opinion at 5-6.) The court refused "to condone deliberate subterfuge in recorded documents as doing so would subvert the documents' noticing function." (Opinion at 9.) The court also declined to adopt an "under protest" exception to the general waiver rule for several reasons, including that such exception would effectively swallow the general rule and that such request was more appropriately directed to the Legislature than the courts. (Opinion at 7-8.)

The Court of Appeal further held that, even if Plaintiffs had not waived their right to challenge the permit conditions, the Commission lawfully limited the duration of the permit and lawfully conditioned the permit on removal of the lower stairway from the project plans.

"[Plaintiffs] have not identified nor have we located any authority categorically precluding the Commission from imposing a condition limiting the duration of a permit." (Opinion at 13.) "Since the Commission imposed the conditions limiting the permit's duration to ensure the seawall's long-term impacts do not extend beyond the time period for which the seawall's existence can be reasonably justified to protect [plaintiffs'] existing homes, we conclude the conditions fell within the Commission's discretion and were valid." (Opinion at 13.)

With respect to the stairway, the Court of Appeal determined the Coastal Act allows the replacement of a structure destroyed by a disaster without a permit only if, among other requirements, the structure conforms to applicable zoning requirements. (Opinion at 16.) The court determined that the stairway did not conform to the City's applicable zoning requirements, which prohibit new private stairways on the bluff and require phasing out of existing stairways. (Opinion at 18.) The court rejected the dissent's conclusion that the City's zoning requirements conflict with the Coastal Act because the Coastal Act disaster replacement provision is expressly subject to conformance with local zoning requirements. (Opinion at 16, fn. 6.)

STANDARD OF REVIEW

In reviewing an agency's decision under Code of Civil Procedure section 1094.5, the trial court determines whether (1) the agency proceeded without, or in excess of, jurisdiction; (2) there was a fair hearing; or (3) the agency abused its discretion. (*McAllister v. California Coastal Com.* (2009) 169 Cal.App.4th 912, 921.) It is established that the substantial evidence standard of review governs review of the Commission's findings in support of its decision to issue a coastal development permit. (*Ross v. California Coastal Com.* (2011) 199 Cal.App.4th 900, 921; *Charles A. Pratt Constr. Co. v. California Coastal Com., supra,* 162 Cal.App.4th at 1076; *LT-WR, LLC v. California Coastal Com.* (2007) 152 Cal.App.4th 770, 795.)

Under the substantial evidence standard of review, "the trial court presumes the agency's decision is supported by substantial evidence, and the party challenging that decision bears the burden of demonstrating the contrary." (*Ocean Harbor House v. California Coastal Com.* (2008) 163 Cal.App.4th 215, 227.) The reviewing court's role is "precisely the same" as that of the trial court. (*Sierra Club v. California Coastal Com.* (1993) 19 Cal.App.4th 547, 557.) Thus, this Court does not review the lower court's

decision for error; it reviews the Commission's decision to determine whether it is supported by the evidence and whether the Commission proceeded properly. (*Ibid.*)

In determining whether the Commission's findings are supported by substantial evidence, courts examine the whole record and consider all relevant evidence, including evidence detracting from the Commission's decision. While this task involves some weighing to fairly estimate the worth of the evidence, courts do not conduct an independent review or substitute their findings and inferences for those of the Commission. It is the Commission's role to weigh the preponderance of conflicting evidence; a court may reverse the Commission's decision only if no reasonable person could have reached the same conclusion based on the same evidence. (*Ross v. California Coastal Com., supra,* 199 Cal.App.4th at 922; *Ocean Harbor House v. California Coastal Com., supra,* 163 Cal.App.4th at 227.)

Plaintiffs cite *Schneider v. California Coastal Commission* (2006) 140 Cal.App.4th 1339, 1344 for the proposition that a court does not defer to an agency when deciding whether a regulation lies within the scope of the authority delegated by the Legislature. (OB at 12.) The Commission agrees this Court reviews de novo pure questions of law, including interpretations of the Coastal Act and a city's local coastal program. But, due to the Commission's special familiarity with the regulatory and legal issues, courts defer to the Commission's interpretation of the statutes under which it operates. (*Ross v. California Coastal Com., supra,* 199 Cal.App.4th at 938, *Coronado Yacht Club v. California Coastal Com.* (1993) 13 Cal.App.4th 860, 868.) Courts give "broad deference" and "great weight" to the Commission's interpretation of a local coastal program, which the Commission will construe to conform to the Coastal Act, even if such interpretation differs from the local government's view of its local coastal program. (*Hines v. California Coastal Com.* (2010) 186 Cal.App.4th 830,

849; *Charles A. Pratt Constr. Co. v. California Coastal Com., supra,* 162 Cal.App.4th at 1072.)

Contrary to Plaintiffs' claim (OB at 12), the Commission resolved disputed questions of fact. For example, Plaintiffs alternatively asserted that the seawall will last 30 years (when calculating the sand mitigation fee [AR 1679, 1735-1738]) and 75 years (when arguing it will last indefinitely). The Commission found that seawalls in general, and this seawall in particular given its location in an area highly susceptible to erosion, will likely require augmentation, replacement, or substantial change within about 20 years. (AR 1710.) The Commission also made factual findings regarding the effect of anticipated sea level rise on the project and the likelihood of changed circumstances that could affect whether the seawall will have different impacts requiring mitigation in 20 years than it has today. (AR 1715-1716.)

If this Court determines that substantial evidence does not support the Commission's decision, the proper remedy is to remand the matter to the Commission for further consideration consistent with the Court's ruling. (Code Civ. Proc., § 1094.5.) The trial court erred when it ordered the Commission "immediately upon receipt of this writ to remove . . . Special Conditions 1(a), 2 and 3" from the permit. (JA 227.)

This Court reviews the trial court's finding of no waiver under the substantial evidence standard. But where there is no evidence to support the trial court's finding, this Court must reverse. (*See Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 598.)

ARGUMENT

I. PLAINTIFFS WAIVED THEIR RIGHT TO CHALLENGE THE CONDITIONS BY IRREVOCABLY COVENANTING TO COMPLY WITH THE CONDITIONS, ACCEPTING THE PERMIT, AND PROCEEDING WITH THE PROJECT

A. Plaintiffs Waived Their Right to Challenge the Conditions by Expressly Agreeing to the Conditions

"[A] landowner is barred from challenging a permit condition imposed upon the granting of a special permit if he has acquiesced therein by specifically agreeing to the conditions . . . ." (*County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510-511; see also *Edmonds v. City of Los Angeles* (1953) 40 Cal.2d 642, 650.) Plaintiffs specifically agreed to the conditions when they signed, notarized, and recorded deed restrictions irrevocably agreeing that the conditions are covenants, conditions, and restrictions on their properties.

Plaintiffs raise two arguments to attempt to circumvent the deed restrictions. First, they argue the deed restrictions' severability clause authorizes them to sue to invalidate the conditions. Second, while they admit they complied with the conditions, they argue compliance is not the same as agreeing to the conditions.

1. Plaintiffs expressly agreed to the conditions when they signed, notarized, and recorded the deed restrictions

Plaintiffs signed, notarized, and recorded deed restrictions irrevocably covenanting to comply with the special conditions:

> V. WHEREAS, on August 10, 2011, the Commission conditionally approved coastal development permit number 6-88-464-A2 . . . subject to . . . [the] "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 24-25, 45-46, italics added.) Plaintiffs were represented by counsel throughout the administrative process, including when they signed the deed restrictions. (AR 1769.)

"[W]here the terms of an agreement are set forth in writing, and the words are not equivocal or ambiguous, the writing or writings will constitute the contract of the parties, and one party is not permitted to escape from its obligations by showing that he did not intend to do what his words bound him to do." (*Brant v. California Dairies* (1935) 4 Cal.2d 128, 134; see also Opinion at 9.)

This Court has found waiver based on a far less formal agreement. In *Edmonds v. Los Angeles County, supra,* 40 Cal.2d 642, the plaintiff reluctantly agreed to accept a durational limit on his nonconforming trailer court in exchange for a short-term increase in the allowable number of trailers. At various points during the hearing on his application, the plaintiff said the time was not sufficient and he could not agree. But at the end of the hearing, he said simply: "I would reconsider on my attorney's advice." This

Court affirmed that plaintiff was bound by this verbal acceptance even though he did not execute a written agreement or file a faithful performance bond. (*Id.* at 649-650.) If a single sentence at a public hearing is sufficient to establish waiver, then a signed, notarized, and recorded deed restriction must be as well.

The Court of Appeal determined that the language of the deed restrictions is unambiguous regarding Plaintiffs' intent to establish covenants running with the land in favor of the Commission. The language of the documents "provides ample evidence of [Plaintiffs'] waiver." (Opinion at 9.) The Court also refused to condone "deliberate subterfuge in recorded documents as doing so would subvert the documents' noticing function." (Opinion at 9.)

Plaintiffs waived their right to challenge the permit conditions when they signed and recorded the deed restrictions expressly agreeing that the permit conditions constitute covenants, conditions, and restrictions on the use of their properties.

2. The deed restriction severability clause does not supersede or invalidate their express agreement to the conditions

The deed restrictions contain a severability clause, which provides: "If any provision of these restrictions is held to be invalid, or for any reason becomes unenforceable, no other provision shall be affected or impaired." (JA 26.) Plaintiffs contend this clause allows them to challenge the conditions. Plaintiffs provide no support for their claim, and neither the plain language of the severability clause nor case law supports such claim.

The severability clause's purpose is to address unforeseen actions that may impact the parties' agreement (e.g. future legislation retroactively invalidating a condition). Its purpose is not to allow Plaintiffs to promise to comply with the conditions to induce the Commission to issue their permit

and then, after the Commission upholds its end of the bargain, allow them to break their promise and challenge the permit's conditions. The severability clause says nothing about the procedure or availability of judicial review.

Despite the prevalence of severability clauses in contracts and other legal documents, Plaintiffs provide no support for their novel claim that the presence of such a clause supersedes the usual rules of waiver and benefit of the bargain. The cases Plaintiffs cite, *Shelley v. Kraemer* (1948) 334 U.S. 1 and *Barrett v. Dawson* (1998) 61 Cal.App.4th 1048, are inapposite. In *Shelley*, the Court held that a state court's enforcement of a racially restrictive covenant constituted state action, denying black purchasers equal protection of the laws. *Barrett* involved retroactive state legislation that voided restrictive covenants prohibiting family daycares. Neither case involves permit conditions that a government entity imposed or a severability clause; they address solely the judicial enforceability of private covenants.

Moreover, in each cited case, the person challenging the covenant was not the person who had signed the covenant. Here, Plaintiffs signed the deed restrictions, and nothing prevented Plaintiffs from litigating the validity of the conditions before accepting the permit and proceeding with their project. While Plaintiffs claimed in the Court of Appeal that they had no choice but to sign the deed restrictions or the Commission would not have issued their permit and they "could have lost their family homes," the record establishes otherwise. (Respondents' Brief, D064120, at 2.) The Frick home was not in immediate danger at the time the Commission approved the permit. (AR 1698.) For Lynch, the Coastal Act provides a specific procedure to address emergencies. Lynch could have applied for an emergency permit from the executive director, but did not. (§ 30624; Cal. Code Regs., tit. 14, § 13136 et seq.) The emergency permit would have

essentially maintained the status quo pending the outcome of this litigation by allowing her to address the immediate dangers without giving her any vested rights. (*Barrie v. California Coastal Com.* (1987) 196 Cal.App.3d 8, 17-18.) Plaintiffs also could have requested the Commission agree to escrow the conditions and allow them to proceed with their project and the challenge, but did not.

Like Plaintiffs here, the plaintiff in *County of Imperial v. McDougal, supra,* sought to rely on *Shelley*. This Court found such reliance misplaced. (19 Cal.3d 505, 511, fn. 3.) "*Shelley* did not involve the waiver of rights or the challenge to the validity of a condition relating to the economic value of a permit whose benefits the permittee sought and accepted. Nor can [plaintiff's] right to export water from the county be analogized to the constitutional rights which the petitioners in *Shelley* sought to vindicate." (*Ibid.*)

The conditions at issue here are analogous to those at issue in *California Coastal Commission v. Superior Court (Ham)* (1989) 210 Cal.App.3d 1488. In *Ham*, a property owner sought to challenge a public access easement after the Supreme Court held in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 that such easements could be unconstitutional in certain circumstances. The court held that the Commission did not act in excess of its fundamental jurisdiction in imposing the conditions, and plaintiff had waived his right to challenge the conditions by not filing a timely challenge. *Ham* establishes that a petitioner may waive a permit challenge, even one based on the alleged taking of property without just compensation.

Barrett v. Dawson, supra, 61 Cal.App.4th 1048 supports the Commission and the Court of Appeal's interpretation of the severability clause, not Plaintiffs' claims. In *Barrett,* the court held that a family daycare could remain in operation despite a restrictive covenant prohibiting

such use. The court found that a state statute invalidating such covenants applied retroactively, so the restrictive covenant could be severed from the remaining property restrictions. If the Legislature adopts legislation that retroactively invalidates one of the special conditions of Plaintiffs' permit, the severability clause provides that the remainder of the deed restrictions and the parties' agreement will remain in effect.

3. Plaintiffs agreed to comply and did comply with the conditions

There is no merit to Plaintiffs' second argument that complying with conditions is distinct from agreeing to the conditions and therefore does not constitute waiver. Initially, the argument fails because Plaintiffs agreed to the conditions. A covenant is an agreement; to covenant is to agree. (Black's Law Dictionary Free Online Legal Dictionary, 2d ed.) Plaintiffs signed, notarized, and recorded deed restrictions stating: they "irrevocably covenant[] . . . that the Special Conditions . . . shall at all times . . . constitute for all purposes covenants, conditions and restrictions on the use and enjoyment of the Property." (JA 24-25, 45-46.)

Regardless, compliance with the conditions is equivalent to agreeing to the conditions. For example, in the law of contracts, compliance with the conditions of a proposal constitutes acceptance of the proposal. (Civ. Code, § 1584.) The same rules that govern the interpretation of contracts apply to the interpretation of covenants, codes, and restrictions. (*Costa Serena Owners Coalition v. Costa Serena Architectural Committee* (2009) 175 Cal.App.4th 1175, 1199.) Because Plaintiffs candidly admit that they "complied" with the various conditions in order to get their final permit (OB at 16), they are bound by the terms of the deed restriction and permit conditions.

B. Plaintiffs Also Waived Their Right to Challenge the Conditions by Building the Seawall

"[I]f the permittee exercises its authority to use the property in accordance with the permit, it must accept the burdens with the benefits of the permit." (*Sports Arenas Properties, Inc. v. City of San Diego* (1985) 40 Cal.3d 808, 815; see also Civ. Code, § 3521 ["He who takes the benefit must bear the burden."])

In *County of Imperial v. McDougal, supra,* the county issued a permit that allowed commercial water sales from a residential well subject to a restriction that the water could be sold or used only within the county. The property owner's successor-in-interest asserted that he did not need a conditional use permit to sell water outside the county because the geographic restriction was invalid. Because his predecessor accepted the benefits afforded by the permit and conducted himself in accordance therewith, this Court held that the current property owner was estopped from challenging the prohibition and was bound by the limitation. (19 Cal.3d at 510-511.)

In *Pfeiffer v. City of La Mesa* (1977) 69 Cal.App.3d 74, 78, landowners complied with certain permit conditions under protest and thereafter brought an action for inverse condemnation, recognizing that they were barred from proceeding with their project while challenging the conditions of approval in mandamus. The landowners argued that a petition for writ of mandate would have been inadequate because they needed to proceed with the project or risk cancellation of their lease. (*Id.* at 77-78.) The court rejected this claim, finding that the compulsion was of their own making and economic detriment frequently results when a delay is incurred in obtaining a building permit. (*Id.* at 78.) A landowner who accepts a building permit and complies with the conditions waives the right to assert the invalidity of the conditions and sue for damages. (*Ibid.*)

Plaintiffs contend these cases do not apply to them because they objected to the conditions during the Commission's proceedings and then timely filed a petition challenging them. (OB at 21-24.)

There are, however, only two recognized exceptions to the general waiver rule, and neither applies here. The Legislature created the first exception when it adopted the Fee Mitigation Act to allow a property owner to proceed with development while simultaneously challenging conditions imposed by local agencies that divest the owner of money or a possessory interest in property. (Gov. Code, § 66020 et seq.) This exception applies only to local government conditions, not conditions a state agency imposes. It also 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,* (2013) 57 Cal.4th 1193, 1207; *Trend Homes, Inc. v. Central Unified School Dist.* (1990) 220 Cal.App.3d 102, 111.)

The second exception is when an agency imposes new conditions on a permit for a later phase of a project already under way. (*Building Industry Assn. v. City of Oxnard* (1985) 40 Cal.3d 1, 3, fn. 1.) At least one appellate court has since limited this exception to fee condition challenges, making it largely indistinguishable from the first exception. (*Rezai v. City of Tustin* (1994) 26 Cal.App.4th 443, 451.) Regardless, the exception does not apply in this case, which does not involve new conditions imposed on a later phase of a project already underway. (See Opinion at 7.)

If Plaintiffs' interpretation of the waiver cases were correct, there would have been no need for the Legislature to adopt the Fee Mitigation Act. As this Court has explained, the Legislature adopted the Fee Mitigation Act precisely because case law required property owners, like Plaintiffs, to choose between either complying with conditions and proceeding with their project or delaying a project while challenging the conditions. (*Sterling Park, L.P. v. City of Palo Alto, supra,* 57 Cal.4th at

1205.) In *Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 241, the court explained:

> Prior to the enactment of th[e Fee Mitigation 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[, supra,]* 69 Cal.App.3d [at] 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.

Plaintiffs' interpretation of the cases runs counter to precedent and would render the Legislature's actions superfluous.

C. The Court Should Decline to Create an "Under Protest" Exception

As the Court of Appeal recognized, what Plaintiffs really seek is a new "under protest" exception for permit applicants who oppose nonfee conditions like those at issue in this case and wish to realize the private benefits of their permit while simultaneously challenging the permits' conditions designed to protect public and environmental interests. The Commission urges this Court to reaffirm the common law waiver rule and decline to create a new exception for the multiple reasons set forth in the Court of Appeal's decision.

First, the exception would effectively swallow the general rule as many permit applicants are required to submit to conditions they view to be unfavorable in order to obtain a permit.

Second, allowing permit applicants to accept the benefits of a permit while challenging its burdens would foster litigation and create uncertainty in land use planning decisions. One purpose of the statutes and rules which require that attacks on land use decisions be brought by petitions for administrative mandamus, and create relatively short limitation periods for

those actions, is to permit and promote sound fiscal planning by governmental entities. (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 27.)

Finally, unlike an invalid fee condition, an invalid nonfee condition is not readily quantified and remedied. If an agency learns a nonfee condition is invalid before a project is built, the agency may be able to address the impacts underlying the condition in an alternate manner. But if an agency learns a nonfee condition is invalid after a project is built, the agency may have no practical means of addressing the underlying impacts. (Opinion at 7-8.) In light of these policy considerations, the Court of Appeal correctly concluded the need for or desirability of such an exception is a matter best left for legislative resolution. (Opinion at 8.)

Plaintiffs contend that the land use waiver rules should not apply because of the type of conditions they are challenging. (OB at 17-18.) But invalidation of the conditions after Plaintiffs have already built the seawall would limit the Commission's discretion to mitigate the seawall's impacts and consider alternatives. The Commission approved a seawall across both properties (even though the Commission found only the Lynch home was currently threatened), but with the conditions allowing assessment of the seawall's continued local coastal program consistency in 20 years. If the authorization period is invalidated, the Commission will have no ability to review the seawall to assess its impacts after 20 years in existence, when circumstances may differ greatly from today, and determine the need for mitigation to address such impacts. Without this ability, the Commission might have approved a smaller seawall or another alternative. Because the seawall is complete, the Commission has no ability to consider such alternatives. Likewise, if the Court were to overturn the condition eliminating reconstruction of the stairway, the Commission would have limited ability to require integration of the stairs and seawall because the seawall is already built.

Finally, even if this Court created an "under protest" exception, it would not apply to Plaintiffs. Plaintiffs did not proceed under protest. They recorded deed restrictions agreeing to the conditions. Allowing Plaintiffs to proceed with their challenge prejudices not only the Commission, but the general public, adjacent property owners, and others who have an interest in coastal development who relied on Plaintiffs' signed and recorded agreement to the conditions. The Court of Appeal refused to condone deliberate subterfuge in recorded documents as doing so would subvert the documents' noticing functions. (Opinion. at 9.)

Plaintiffs accepted the permit and built their project. By accepting the permit's benefits, Plaintiffs waived their right to challenge the permit conditions.

II. THE COMMISSION PROPERLY AUTHORIZED THE SEAWALL FOR 20 YEARS SUBJECT TO REAUTHORIZATION

The Commission conditionally approved Plaintiffs' application to amend their existing coastal development permit to allow them to replace their deteriorating seawall with a new 100-foot long, 29-foot high concrete seawall. (AR 1681-1689.) Special conditions 2 and 3 authorize the seawall for 20 years subject to an amendment to reauthorize, modify, or remove the seawall. (AR 1682-1683.) Special condition 2 also provides that future redevelopment of the blufftop parcels may not rely on the seawall to establish geologic stability or protection from hazards. (AR 1682.)

The Commission properly found that these conditions were needed to ensure the seawall conforms to the City's local coastal program and the Coastal Act's public access and recreation policies. The 20-year authorization period ensures that the seawall's impacts are fully mitigated and that the seawall may be removed if no longer needed to protect the existing structures.

Plaintiffs contend that section 30235, which provides that seawalls shall be permitted when necessary to protect existing structures in danger from erosion and when designed to mitigate their adverse impacts, requires the Commission to issue a seawall permit in perpetuity. Plaintiffs' argument initially fails because the City's local coastal program, not section 30235, is the standard. Plaintiffs have waived any claims that the 20-year authorization period violates the local coastal program. Even assuming section 30235 applied, nothing in section 30235 requires the Commission to approve development in perpetuity.

Nor does the durational limit constitute a taking. Mere speculation that the Commission may deny their reauthorization request in 20 years, and that this future denial would be a taking, does not constitute a taking today.

A. Substantial Evidence Supports the Commission's Finding that the 20-Year Authorization Period Is Necessary for the Seawall to Conform to the City's Local Coastal Program

The City's local coastal program has policies to protect and maintain its coastal bluffs. (AR 843.) The local coastal program provides:

> The City will encourage the retention of the coastal bluffs in their natural state to minimize the geologic hazard and as a scenic resource. Construction of structures for bluff protection shall only be permitted when an existing principal structure is endangered and no other means of protection of that structure is possible. Only shoreline/bluff structures that will not further endanger adjacent properties shall be permitted as further defined by City coastal bluff regulations. Shoreline protective works, when approved, shall be aligned to minimize encroachment onto sandy beaches.

(AR 844.) The City also encourages measures to replenish sandy beaches in order to protect coastal bluffs from wave action and maintain beach recreational resources. (AR 844.) "The City will establish, as primary

objectives, the preservation of natural beaches and visual quality as guides to the establishment of shoreline structures. . . ." (AR 845.)

Seawalls must be designed to protect the natural scenic qualities of the bluffs and not significantly alter the bluff face. The design and appearance of any structures visible from public vantage points must be compatible with the scale and character of surrounding development and protect the bluff's natural scenic qualities. (AR 850.)

In order to approve a seawall, the authorizing agency must find the seawall:

1) will meet its intended purpose of bluff erosion/failure protection;

2) is necessary for the protection of a principal structure on the blufftop to which there is a demonstrated threat;

3) will not directly or indirectly cause, promote, or encourage bluff erosion or failure, either on site or for an adjacent property, and will not cause additional erosion at the ends of the seawall;

4) in design and appearance is visually compatible with the character of the surrounding area and will not significantly alter the bluff face's natural character; and

5) will not serve to unnecessarily restrict or reduce the existing beach width for use or access. (AR 853.)

The Coastal Act's public access and recreation policies require that "[i]n carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access . . . and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse." (§ 30210.)

The Commission found that the seawall was needed to protect the existing principal structure on the Lynch property, but not to protect the Frick structure. (AR 1697.) The Commission nonetheless approved a

seawall across both properties because the seawall would need to encroach some distance onto the Frick property to protect the Lynch home and erosion would likely threaten the Frick home in the near future. (AR 1698.) A single seawall would have fewer adverse visual impacts and could be located further landward. (AR 1698.)

After determining the seawall was necessary, the Commission evaluated the seawall's adverse impacts on shoreline sand supply, public access, recreation, and the visual quality of the shoreline. The Commission imposed various conditions to address the seawall's impacts (e.g., requiring final project plans that demonstrate the seawall will blend into the adjacent natural bluff and minimize the erosive effects of the seawall on adjacent bluffs and an in-lieu sand supply fee to replace the sand and beach area that will be lost over the 20-year authorization period). (AR 1681-1689.) The Commission also limited the seawall to 20 years subject to renewal. (AR 1682-1683.)

1. The Commission properly limited the seawall's duration to ensure that its impacts will be fully mitigated

The Commission required Plaintiffs to apply to reauthorize the permit in 20 years, in part, to allow the Commission to evaluate the seawall's adverse impacts after 20 years in existence when circumstances may vary greatly from today and to assess the need for mitigation for any such impacts. (AR 1679-1680, 1683-1684, 1710.) Although there is scientific consensus that sea level rise will accelerate in coming years, there is substantial uncertainty about exactly how quickly it will rise. This uncertainty makes long-term projections about the impacts and stability of shoreline structures extraordinarily difficult to make. (AR 1710.)

The Commission limited the permit's duration to 20 years based on its staff's experience that shoreline armoring, particularly in high-hazard

areas such as Plaintiffs' properties, generally needs augmentation, replacement, or substantial change within 20 years. (AR 1710; *Coastal Southwest Dev. Corp. v. California Coastal Com.* (1976) 55 Cal.App.3d 525, 535-536 [staff opinions constitute substantial evidence].) "Rising sea levels and attendant consequences will tend to further delimit such a time period in the future, potentially dramatically, depending on how far sea level actually rises." (AR 1710.) Indeed, Plaintiffs' prior seawall required significant repair work less than 20 years after its construction and largely collapsed less than 25 years after construction despite those repairs. (AR 38, 402, 735, 1909.)

Through the renewal process, the Commission will be able to evaluate the seawall's impacts if and when Plaintiffs apply for reauthorization. This is necessary because the very nature of the seawall's impacts may be different in 20 years. Unlike most seawall applications approved by the Commission in Encinitas and Solana Beach which are located on the public beach, Plaintiffs' seawall would be located on their private property at least at the time of the Commission's approval. (AR 1715.) The Commission determined, however, that due to sea level rise the mean high tide line – the ambulatory line between private upland property and public trust lands – will move inland over time, and repeated wave attack will wear down the beach. The seawall will prevent the mean high tide line from moving further inland, and eventually the public beach, along with its public access and recreational opportunities, will disappear. (AR 716; see *United States v. Milner* (9th Cir. 2009) 583 F.3d 1174, 1188-1190.)

As the mean high tide line moves inland, the lands subject to the public trust also move inland. The State is required to hold these lands in perpetual trust for the benefit of the people of the State of California and is charged with protecting these resources for the benefit of all citizens. (§ 6301; *City of Berkeley v. Superior Ct.* (1980) 26 Cal.3d 515, 521.) The

permit condition ensures that the State, through the Commission, is able to meet this obligation.

As conditioned, the Commission will evaluate the beach conditions and the mean high tide elevation in 20 years to determine if the seawall is then located on public trust lands. (AR 1716.) If the seawall is located on public trust lands in 20 years and the permit is renewed, appropriate mitigation could include installation of public access/recreational improvements or creation of additional public beach area in proximity to the impacted beach area. (AR 1715.) The Commission must be able to condition seawalls to protect public trust lands.

The conditions are also necessary because the current conditions limit mitigation to 20 years. For example, special condition 5 requires Plaintiffs to pay a sand mitigation fee to mitigate the seawall's impacts on regional sand supply calculated over only 20 years. (AR 1679.) The intent was not that mitigation should stop abruptly in 20 years, but rather that the Commission would analyze the seawall's impacts on public access and recreation, scenic views, sand supplies, and other coastal resources in 20 years and consider the need for mitigation for such impacts over any renewal period.

2. The Commission also properly limited the seawall's duration to ensure that the seawall remains only as needed to protect the existing structures

The City's local coastal program authorizes seawalls only when an existing principal structure is endangered and no other means of protection of that structure is possible. (AR 844, 853.) New development must be designed and located a safe distance from the bluff edge so that it will not require any shore or bluff stabilization over its lifetime. (AR 848, 855.)

The 20-year authorization period allows the Commission to assess the need for and local coastal program consistency of continued armoring in

twenty years. Neither the Commission nor Plaintiffs know what facts and circumstances will be present in 20 years or how the Commission will analyze the issues at that time. Circumstances could be unchanged, and the Commission could reauthorize the seawall. Alternatively, circumstances may differ greatly from today due to redevelopment of the blufftop portions of Plaintiffs' lots or implementation of a regional beach replenishment or other comprehensive shoreline management strategy.[5]

If Plaintiffs redevelop the blufftops with new homes that are set further back or with deepened caissons or other construction techniques that protect the homes without the need for the seawall or if regional approaches to erosion such as sand replenishment or other techniques are developed in the next 20 years, Plaintiffs may no longer need the seawall.

Without the conditions, the Commission could not have found the seawall consistent with the local coastal program as it would not have been able to ensure that the seawall would remain necessary to protect the existing structures for which it was approved. (AR 1710-1711.) "As the blufftop lots redevelop and structures are potentially moved inland, this could reduce or eliminate the need for the seawall." (AR 1711.) In the absence of the conditions, the Commission would have no ready mechanism to require removal of the seawall even if Plaintiffs or their successors-in-interest redevelop the blufftops in a manner that eliminates the need for the seawall, making the seawall a nonconforming use and perpetuating its inconsistencies with the local coastal program.

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[5] At the time of the Commission's decision, the City was in the process of developing a comprehensive program to address the City's shoreline erosion problem and establish goals, policies, and strategies to comprehensively address the issues. The City has conducted several public workshops and meetings on a comprehensive plan, but it was uncertain when the plan would be finalized. (AR 1724.)

The special conditions place Plaintiffs on a level playing field with other property owners. Without the conditions, Plaintiffs could apply for a seawall permit ostensibly to protect their existing homes. Then, after the seawall is constructed, they could apply to demolish their existing homes and replace them with more intense development in reliance on the seawall inconsistent with the local coastal program.

The Coastal Act and local coastal program permit seawalls to protect existing development; new development must be safe without the need for a seawall. The conditions ensure consistency with these requirements.

3. Nothing in the City's local coastal program or the Coastal Act prevents the Commission from limiting the duration of a seawall permit

Plaintiffs argue that the 20-year authorization period does not mitigate an identified adverse impact and therefore violates section 30235 of the Coastal Act. This argument fails for three reasons. First, the City's local coastal program, not section 30235, is the applicable law. Second, even if section 30235 applied, nothing in section 30235 prevents the Commission from limiting a seawall permit's duration. Third, Plaintiffs' argument fails because it is based on unfounded speculation about legislative or judicial changes.

First, Plaintiffs address the wrong standard. They argue the condition violates section 30235. But the standard is the City's local coastal program, not section 30235. After certification of a local coastal program, the Commission must find that the proposed development conforms to the certified local coastal program and, for projects located between the nearest public road and the shoreline, to the Coastal Act's public access and public recreation policies (§§ 30210-30224, 30252) in order to issue a permit. (§ 30604, subds. (b), (c).) The City's local coastal program, not section 30235, is the standard for seawalls within the City's limits. As discussed

above, the Commission properly found the 20-year authorization period was necessary to conform to the local coastal program.

Plaintiffs do not address the local coastal program policies, much less meet their burden of demonstrating that these policies prevent the Commission from limiting duration of a seawall. By failing to address the local coastal program policies, Plaintiffs have waived any argument that substantial evidence does not support the Commission's decision that the conditions were required to conform to the local coastal program. (*Tisher v. California Horse Racing Bd.* (1991) 231 Cal.App.3d 349, 361.)

Second, even if section 30235 were the standard, nothing in section 30235 prevents the Commission from limiting the duration of a seawall permit. Section 30235 provides in relevant part that "seawalls . . . and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply."

Plaintiffs in essence contend that section 30235 requires the Commission to issue a seawall permit in perpetuity any time there is an existing structure that is currently in danger of erosion – regardless of that structure's expected remaining lifespan and regardless of the seawall's future impacts to the natural shoreline and changes to the seawall's location in relationship to the natural shoreline due to sea level rise. This is not a reasonable construction of section 30235.

"[T]he Commission has broad discretion to adopt measures to mitigate all significant impacts that the construction of the seawall may have." (*Ocean Harbor House Homeowners Assn. v. California Coastal Com., supra,* 163 Cal.App.4th at 242.) The Commission has the authority to impose "reasonable terms and conditions in order to ensure that the development or action will be in accordance with the provisions of [the

Coastal Act]." (§ 30607.) Plaintiffs admit the Commission has broad discretion to impose conditions to address the full range of impacts that seawalls have on coastal resources. (OB at 25).

Plaintiffs contend that introducing durational limits to permits will destroy the housing industry, but point to no evidence in the record or elsewhere to support this claim. (OB at 28.) In fact, the industry accepts that projects and structures are not permanent; financing based on long-term leases is not uncommon.[6] And, the Commission's authority to impose time restrictions on seawalls has been upheld. In *Barrie v. California Coastal Commission, supra,* 196 Cal.App.3d 8, the court upheld the Commission's requirement that a group of homeowners remove a seawall authorized by an emergency permit within a specified time period. The homeowners spent more than $300,000 to build a seawall in front of their homes due to forecasted severe storm and high tide predictions. The Commission issued an emergency permit conditioned on the homeowners applying for a regular permit and, if the regular permit was not approved, removal of the seawall within 150 days. (*Id.* at 15.) When the homeowners applied for a regular permit, the Commission required them to move the seawall ten feet inland. The court upheld the Commission's decision, holding that the homeowners did not have a vested right to continue the seawall at its current location.

Barrie involved an emergency permit, but it nonetheless supports the Commission's authority to balance important and potentially competing private and public interests in imposing conditions. "The Commission . . .

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[6] See Neil S. Hecht, Variable Rental Provisions in Long Term Ground Leases, 72 Columbia L. Rev. 625, 629 (Apr. 1972) ["Rockefeller Plaza, Madison Square Garden, . . . and numerous cooperative residential, and office buildings are modern monuments to the vitality, flexibility, and utility of the long-term ground lease."]

was faced with balancing probabilities – the probability of beach erosion caused or contributed to by the seawall and the probability there will be future storms which will threaten beachfront residences. [The Commission] weighed the need to protect the public beach against the Homeowners' need to protect their homes. The condition requiring relocation of the seawall was a reasonable accommodation of these two needs since it mitigated the negative impact on the beach while still affording the Homeowners the opportunity to protect their homes. Moreover, this accommodation must be viewed in light of another purpose of the Coastal Act, that of insuring public access." (196 Cal.App.3d at 21-22.)

Here, the Commission balanced Plaintiffs' interests and the public's interests. While the Commission approved the seawall to protect Plaintiffs' existing homes, it included a mechanism to protect the public. The condition allows the Commission to require mitigation if sea level rises and the seawall intrudes onto public trust lands or consider removal if Plaintiffs redevelop their properties and no longer need a seawall.

Plaintiffs do not dispute that the seawall will have long-term impacts. Nor do they dispute that the Commission can impose mitigation to address such impacts. In the court of appeal, they conceded that "[t]he Commission could have conditioned the seawall on the owners' agreement to submit a reassessment of mitigation in 20 or 30 years." (Respondents' Brief, Case No. D064120, at 36.) In their opening brief to this Court, they contend such impacts "will be addressed by some different condition." (OB at 27.)

While Plaintiffs might have chosen different conditions to ensure their permit's consistency with the local coastal program and applicable Coastal Act policies, the Legislature delegated implementation of the Coastal Act to the Commission, not private homeowners or the trial courts. (*Charles A. Pratt Constr. Co. v. California Coastal Com., supra,* 162 Cal.App.4th at 1072; *Reddell v. California Coastal Com., supra,* 180 Cal.App.4th at 966-

967.) The Commission properly conditioned the seawall to ensure that the Commission can adequately assess the nature and extent of the seawall's impacts in 20 years, given the uncertainties inherent in predicting the seawall's future impacts.

Finally, Plaintiffs argue that the conditions are a pretext to allow the Commission to deny renewal of the seawall if the Legislature or courts change seawall policy. (OB at 26-27.) Plaintiffs' speculation about future legislative or judicial changes is not a valid basis to overturn the Commission's decision. Even assuming the Legislature or courts do change seawall policies, the time to challenge such policies is when they occur, not now. Plaintiffs and all similarly situated property owners will be able to challenge such changes as applied to their property. But the possibility that the Legislature or courts may outlaw seawalls in the future does not justify invalidating the Commission's decision now. (See Section II.B. below.)

Plaintiffs' speculation that the Commission will simply deny the seawall in the future also is belied by the Commission's past permit decisions. The Commission provided after-the-fact approval of Plaintiffs' earlier seawall. (AR 9.) And, here, the Commission approved a seawall spanning both properties even though the record establishes that the Frick home is not currently threatened. (AR 1678.)

B. Limiting the Duration of a Permit Does Not Violate the Takings Clause

Plaintiffs contend that special conditions 2 and 3, addressing the permit's duration and renewal process, are regulatory takings. (OB at 29-34.) They argue that under the *Nollan/Dolan* line of cases (*Nollan v. California Coastal Com., supra,* 483 U.S. 825; *Dolan v. City of Tigard* (1994) 512 U.S. 374), the 20-year authorization period must be roughly proportional to the seawall's impacts. (OB at 29-32.) They further argue that, because the Commission cannot currently identify and quantify the

seawall's future impacts, this proves there is no rough proportionality. These arguments fail for three reasons.

First, the Commission's decision merely requires Plaintiffs to apply for an amendment to reauthorize the seawall. Requiring a permit for a use of property is not a taking. (*United States v. Riverside Bayview Homes* (1985) 474 U.S. 121, 127.)

Second, the *Nollan/Dolan* line of cases does not apply to a temporal permit condition. This line of cases applies only when a government entity requires the dedication of an interest in land or imposes an ad hoc monetary exaction. (*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 Commission did not require Plaintiffs to dedicate a portion of their property to public use; the Commission did impose an ad hoc fee to offset the seawall's impacts, but Plaintiffs do not argue the fee violates the *Nollan/Dolan* test. The *Nollan/Dolan* test and heightened scrutiny do not apply to the Commission's 20-year authorization period.

Third, 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 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 242.)

The Commission found that the 20-year authorization period was needed to ensure that the seawall was consistent with the local coastal program and applicable Coastal Act provisions and to ensure that its impacts would be fully mitigated if the seawall remains beyond 20 years. As the Commission explained in its findings, the Commission mitigated the

seawall's current impacts, but the seawall's impacts may be far different in 20 years than they are now, particularly given the uncertainties related to sea level rise. Plaintiffs themselves recognize that the seawall will have ongoing impacts and suggested that the Commission include a condition requiring them to revisit mitigation at intervals rather than having a set authorization period. (RT at 5-6.)

Ignoring the long-term impacts the seawall will have on the public beach and neighboring properties, Plaintiffs focus on the Commission's alleged agenda to deny the seawall in 20 years. (OB at 32.) Plaintiffs speculate regarding what the Legislature, the courts, or the Commission may do in the future. (JA 204.) Allegations that the Commission has violated their constitutional rights must rest on more than speculation that the Legislature or courts will adopt policies outlawing seawalls and speculation that the Commission will deny renewal of the seawall based on such future speculative policy changes. Moreover, such claims are not ripe. (*Williamson County Reg. Planning Com. v. Hamilton Bank* (1985) 473 U.S. 172, 186 ["[A] claim that the application of governmental regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."])

Even assuming that the Legislature or the courts might change the law regarding seawalls at some point in the next 20 years and, based on such speculative change, the Commission might deny their reauthorization request in 20 years, that bare possibility does not establish a taking today. Plaintiffs would be in the same position as other similarly situated property owners. Plaintiffs and those similarly situated property owners would have an opportunity to challenge Commission permit denials based on those policy changes.

The Commission approved Plaintiffs' seawall for at least 20 years. The $500,000 that Plaintiffs estimated each would pay for the seawall will be amortized over at least 20 years. The 20-year authorization period is reasonable as Plaintiffs will likely need to repair, replace, or augment the seawall in 20 years. (AR 1710, 1706.)

Contrary to Plaintiffs' contention, government is allowed to change zoning, update allowable land uses, and phase out nonconforming uses. (*Metromedia, Inc. v. City of San Diego* (1981) 26 Cal.3d 848, judgment reversed on other grounds *Metromedia, Inc. v. City of San Diego* (1981) 453 U.S. 490 [upholding an ordinance providing for the eventual elimination of commercial billboards but reversing and remanding because ordinance extended to noncommercial protected speech]; *National Advertising Co. v. County of Monterey* (1970) 1 Cal.3d 875; *Livingston Rock etc. Co. v. County of Los Angeles* (1954) 43 Cal.2d 121,127. In *Livingston Rock etc. Co,* the county allowed plaintiffs to continue their nonconforming use of the property for 20 years, subject to revocation where it could be done without the impairment of "constitutional rights." This Court held: "Manifestly, care has been taken in such rezoning regulations to refrain from the interference with constitutional guarantees, and in the light of such express language it would be a contradiction in terms to hold that the regulations are nevertheless unconstitutional." (43 Cal.2d at 127, citations omitted.)

III. THE COMMISSION PROPERLY DENIED RECONSTRUCTION OF THE STAIRWAY

A. Neither the Coastal Act nor the City's Local Coastal Program Exempts the Stairway from Permit Requirements

Plaintiffs contend that the Coastal Act contains a blanket exemption from permit requirements for any structure destroyed by disaster, and the

Commission, therefore, was required to allow them to reconstruct the lower portion of their private beach access stairway. (OB at 34-35, citing § 30610, subd. (g)(1).) Plaintiffs ignore a key provision in section 30610, subdivision (g), which provides in relevant part, with emphasis added:

> Notwithstanding any other provision of this division, no coastal development permit shall be required pursuant to this chapter for the following types of development and in the following areas: . . .
>
> (g)(1) The replacement of any structure, other than a public works facility, destroyed by a disaster. *The replacement structure shall conform to applicable existing zoning requirements*, shall be for the same use as the destroyed structure, shall not exceed either the floor area, height, or bulk of the destroyed structure by more than 10 percent, and shall be sited in the same location on the affected property as the destroyed structure.

Because Plaintiffs' proposed stairway did not conform to applicable existing zoning requirements, the Commission found that it fell outside the exemption and required a permit. The Commission also found that it could not approve a permit for the stairway because it did not conform to the City's zoning requirements.

Plaintiffs argue that to the extent the City's local coastal program prohibits the stairway, it is invalid because it conflicts with the Coastal Act. (OB at 35-36.) The argument fails because the City's code does not conflict with the Coastal Act; it mirrors the Coastal Act.

Coastal Act section 30610, subdivision (g)(2) and local coastal program section 30.80.050.E exempt from permit requirements the replacement of a structure other than a public works facility destroyed by disaster. Each contains an exception to the permit exemption. The Coastal Act requires that the replacement structure "conform to applicable existing zoning requirements." (§ 30610, subd. (g)(1).) The City provision requires

that the replacement structure "conform to applicable zoning and development requirements of the City . . . ." (AR 869.)

Plaintiffs do not argue that the minor semantic differences are substantive. Instead, they argue that "the *structure itself* must conform to the zoning requirements. This language does not mean that the 'use' must conform to the zoning requirements, rather it is the physical structure that must conform." (OB at 36, italics in original.) But it is the structure that fails to conform to the City's zoning requirements. The City's local zoning requirements prohibit new private stairways on the bluff face. (See Section III.B below.)

Even if the City's local coastal program were stricter than the Coastal Act, it would not be invalid. The Coastal Act does not limit "the power of a city . . . to adopt and enforce additional regulations, not in conflict with this act, imposing further conditions, restrictions, or limitations with respect to any land or water use or other activity which might adversely affect the resources of the coastal zone." (§ 30005.)

Plaintiffs' arguments are counter to the purpose of local coastal programs, which are intended to address local issues and concerns while still considering the important statewide interest in protecting coastal resources. Under the Coastal Act, local governments "have the discretion to be more restrictive than the act." (*Yost v. Thomas, supra,* 36 Cal.3d at p. 572.) "The Coastal Act sets minimum standards and policies with which local governments within the coastal zone must comply; it does not mandate the action to be taken by a local government in implementing local land use controls." (*Ibid.*)

The City adopted specific requirements to address bluff-related hazards, which projects on and near the bluff exacerbate, and the Commission certified these requirements as consistent with the Coastal Act. The Encinitas shoreline is "Generally Susceptible" or "Most Susceptible"

to landslides. (AR 873-875.) Plaintiffs pointed out the unique dangers the bluffs pose, noting that "[s]ince 1995, 5 beachgoers have been killed by sudden and unexpected bluff collapses in North San Diego County." (JA 110.) They attribute the collapses of the bluff on their properties to the "relentless shoreline erosion and severe winter storms." (JA 108.)

The City adopted its zoning requirement to "prevent future development or redevelopment that will represent a hazard to its owners or occupants" and "to preserve [the City's] significant natural and cultural resources." (AR 836, 829.) The City "encourage[s] the retention of the coastal bluffs in their natural state to minimize the geologic hazard and as a significant scenic resource." (AR 844.)

Plaintiffs argue that the disaster replacement provisions in section 30610, subdivision (g)(1) are intended to protect the unfortunate few who suffer destruction beyond their control. But an absolute exemption would prevent the Commission and local jurisdictions from phasing out development located in unsafe locations and from requiring that new or replacement development meet current building provisions. Many existing structures fail to meet current setbacks and other requirements. This may be a result of the local jurisdiction changing the setback, or it may be a result of the bluff edge eroding to a position closer to an existing structure. Either way, the Commission and local entities must be able to require that new structures, even structures replacing a structure destroyed by disaster, meet current zoning requirements, including setbacks.

Plaintiffs' stairway is prime example of why the Legislature required that disaster replacement structures conform to current building requirements. Plaintiffs contend that they simply seek to repair a stairway that they have had for over 40 years. (OB at 37, 38, 39, 40.) But they are not replacing a 40-year old stairway. They have repeatedly had to rebuild the stairway over the last 40 years because of its bluff-face location. When

Lynch purchased the properties in 1970, there was a bluff face stairway. (AR 2275.) But it was destroyed shortly thereafter. (AR 6.) Lynch rebuilt the stairway sometime after 1973. (AR 2150-2154.) In 1986, that stairway collapsed along with part of the bluff. (AR 1909.) Lynch again rebuilt the stairway. (AR 6.) In 2010, the stairway collapsed again. (AR 735.)

Since the Commission last approved an after-the-fact permit for the stairway, the City adopted its local coastal program to address and prohibit development on the unstable coastal bluffs. The repeated collapse of Plaintiffs' stairway is a prime example of why the coastal bluff overlay zone was needed.

B. Substantial Evidence Supports the Commission's Finding that the Stairway Does Not Conform to Applicable Existing Zoning Requirements

The City's local coastal program not only prohibits the construction of private stairways on the bluff, it also requires phasing out of existing private stairs. To reduce unnatural causes of bluff erosion the City will "[o]nly permit[] public access stairways and no private stairways" (AR 829) and will "[d]iscourage and phase out private access to the beach over the bluffs" (AR 822.) "New private accessways shall be prohibited." (AR 822.)

The City's Coastal Bluff Overlay regulations apply in addition to any other development and zoning requirements and, in the case of a conflict, the more restrictive regulations apply. (AR 847.) The Coastal Bluff Overlay regulations prohibit any "structure, facility, improvement or activity on the face or at the base of a coastal bluff" with three exceptions: (1) public beach access facilities, (2) protective devices (e.g., seawalls) when necessary to protect a principal structure on the blufftop, and (3) landscape maintenance. (AR 849.) Plaintiffs' private stairway does not fall within any of the exceptions.

Plaintiffs argue that these provisions apply only to "new" stairways and not to repairs of existing stairways. Plaintiffs' argument fails because the City's policies require existing development to remain "unchanged." (AR 849.) Here, the entire lower portion of the stairway collapsed, and only the upper portion and landing remain. (AR 418 [photo], 1556, 1579.)[7] Plaintiffs recognize that, under the Coastal Bluff Overlay Zone, only "[r]outine maintenance of existing facilities is allowed." (OB at 38, citing Encinitas Municipal Code § 30.34.020 B.4.) They admit that the needed repairs for the stairway, in contrast, are "substantial." (OB at 39.) Replacement of the entire lower portion of the stairway is not "routine maintenance" by any definition.

In *Barrie v. California Coastal Commission, supra,* 196 Cal.App.3d 8, a group of homeowners made a similar argument when they applied for permanent status of a seawall they had built under an emergency permit. They argued that because it was already built, the seawall was not "new" development. The court rejected this argument, noting that the approval that the homeowners were seeking was for a new development, i.e., a permanent seawall, not an emergency temporary seawall. (*Id.* at p. 20.)

Similarly, in this case, substantial evidence supports the Commission's finding that the proposed new private bluff-face stairway does not conform to the City's local coastal program. Therefore the Commission properly removed reconstruction of the stairway from the proposed project.

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[7] The Commission's decision does not require Plaintiffs to remove the upper portion of the stairway and landing, which can remain as a view platform. (See Opening Brief at 40.) Plaintiffs may apply to remove the remainder of the stairway. If they do not, and, over time natural processes continue to threaten the remaining portions of the stairway, Plaintiffs will be responsible for removing the debris from the bluff and beach. (AR 1720.)

CONCLUSION

For the reasons set forth above, the Commission respectfully requests that this Court hold that Plaintiffs waived their right to challenge the conditions by specifically agreeing to them, accepting the permit, and completing their project. If this Court reaches the merits of the Commission's decision, then the Commission urges the Court to rule that substantial evidence supports the Commission's conditional approval of the seawall and its condition prohibiting rebuilding of a private bluff-face stairway.

Dated: June 5, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the ANSWER BRIEF ON THE MERITS uses a 13-point Times New Roman font and contains 13,674 words.

Dated: June 5, 2015

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DECLARATION OF SERVICE BY U.S. MAIL

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. 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 June 5, 2015, I served the attached **ANSWER BRIEF ON THE MERITS** 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:

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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 June 5, 2015, at San Diego, California.

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Declarant

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