S221980

IN THE
SUPREME COURT OF CALIFORNIA

BARBARA LYNCH and THOMAS FRICK,
Petitioners,

v.

CALIFORNIA COASTAL COMMISSION
Respondent.

After A Decision By The Court of Appeal,
Fourth Appellate District, Division One
Case No. D064120

APPLICATION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS, BY BEACH AND BLUFF CONSERVANCY, PROTECT THE BEACH.ORG, SEACOAST PRESERVATION ASSOCIATION, and COASTAL PROPERTY OWNERS ASSOCIATION OF SANTA CRUZ COUNTY; [PROPOSED] AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS

*Peter Prows (SBN 257819)
BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104
Telephone: (415) 402-2700
Fax: (415) 398-5630
Email: pprows@briscoelaw.net

Attorneys for Applicants
BEACH AND BLUFF CONSERVANCY,
PROTECT THE BEACH.ORG
SEACOAST PRESERVATION ASSOCIATION, and
COASTAL PROPERTY OWNERS ASSOCIATION OF SANTA CRUZ COUNTY

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BRISCOE IVESTER & BAZEL LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104
Telephone: (415) 402-2700
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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Beach and Bluff Conservancy, Protect the Beach.org, Seacoast Preservation Association, and Coastal Property Owners of Santa Cruz County apply for leave to file an amici curiae brief in support of petitioners.

Interests of the Amici

Beach and Bluff Conservancy is an organization that represents about 1,500 people in San Diego County. It is devoted to promoting public safety and the protection of public infrastructure and private homes put in danger by eroding and unstable bluffs. It is interested in this case because of the public and private importance of seawalls.

Protect the Beach.org is a 501(c)(3) nonprofit whose mission includes supporting the preservation of the property rights guaranteed by the Coastal Act and helping to educate the public about the value of maintaining safe beaches in California. The organization is interested in this case because the right to have a seawall for protection is guaranteed by the Coastal Act, and seawalls can help maintain safe beaches. (Five beach-goers have been killed by collapsing natural bluffs in northern San Diego County since 1990.)

Seacoast Preservation Association is a California non-profit corporation, founded in 1971, that is now the largest organized oceanfront-homeowners group in Southern California, with approximately 1,200

members. The organization is interested in safe beaches, which seawalls can promote.

Coastal Property Owners of Santa Cruz County is a 501(c)(4) civic league that represents the interests of the approximately 2,200 coastal property owners in Santa Cruz County. It has 464 paid members. It is dedicated to promoting a legislative and regulatory environment where coastal property owners can protect their homes and businesses from coastal erosion. It is interested in this case because permanent seawalls can be an important part of protecting those properties.

How Amici Will Assist The Court In Deciding This Matter

The Coastal Commission relies on an equitable maxim ("He who takes the benefit must bear the burden") as the primary basis for the argument that undertaking the development authorized by a permit waives the permittee's right to pursue a timely-filed petition for writ of mandate challenging illegal conditions in the permit. Amici's proposed brief addresses whether the practical application of that maxim here would be equitable, and concludes that it is not.

The Coastal Commission also disputes that the 20-year time limit in the permit at issue would harm coastal property values. Amici's proposed brief addresses the harm caused by that 20-year time limit, and concludes that the harm caused is quite real.

No party or counsel for any party authored the brief in whole or part, or made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the amici curiae, their members, or their counsel in the pending appeal, has made a monetary contribution intended to fund the preparation or submission of the brief.

DATED: July 27, 2015

BRISCOE IVESTER & BAZEL LLP

By: _____

Peter S. Prows
Attorneys for Applicants
BEACH AND BLUFF CONSERVANCY,
PROTECT THE BEACH.ORG
SEACOAST PRESERVATION ASSOCIATION, and
COASTAL PROPERTY OWNERS ASSOCIATION OF SANTA CRUZ COUNTY

AMICI CURIAE BRIEF

I. INTRODUCTION

The Coastal Commission does not like seawalls or the law that mandates their approval. Here, the Commission issued only a temporary seawall permit, and is taking the position that even this temporary seawall cannot be built while litigation challenging the permit is pending. The Commission claims that its position is supported by rules of equity, and is not likely to harm coastal property owners.

Amici are groups of coastal property owners and of people concerned about maintaining safe coastal beaches, which seawalls can promote. This brief demonstrates that the Commission's position is inequitable and will destroy much of the value of coastal property.

II. NO EQUITABLE REASON SUPPORTS THE COMMISSION'S PROPOSED EQUITABLE-WAIVER RULE

In support of the argument that a person waives the constitutional right to litigate unlawful permit conditions by proceeding with the development authorized by a permit, the Commission, like the Court of Appeal below, relies on the equitable maxim, found in Civil Code § 3521, that "He who takes the benefit must bear the burden." (Answer Br. at 23; 229 Cal.App.4th 658, 664 (depublished by grant of review).) Petitioners have thoroughly demonstrated that this argument: (i) finds no support in the case law (all the cases are distinguishable because they were collateral

attacks to conditions that went unchallenged by the type of timely petition for writ of mandate here) (Reply Br. at 6-10); (ii) is undermined by the severability clause in the deed restriction (providing that, if any condition is "held to be invalid", then "no other provision shall be affected or impaired") (Reply Br. at 2-5);[1] and (iii) is not necessitated by practical considerations (since construction of the seawall does not prejudice the disposition of this case) (Opening Br. at 17-19).

Just as importantly, the equitable maxims should only be applied to do equity. (Civil Code § 3509 (maxims of jurisprudence intended "to aid in [the code's] just application").) Here, the Commission's proposed equitable-waiver rule would work only inequity.

First, the proposed equitable-waiver rule would impose an unconscionable legal price on permit recipients generally, and seawall permittees in particular. Permits are entitlements from the government. (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1100.) Seawall permits are also a constitutional and statutory right in certain circumstances. The California Constitution guarantees the right to

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[1] The Coastal Act contains a parallel severability provision, Pub. Res. Code § 30900. This provides that, if "any ... application" of that Act (such as the conditioning of a coastal development permit) "is held invalid", that holding "shall not affect other ... applications" of the Act (such as the remaining valid conditions or authorizations) "which can be given effect without the invalid ... application". This severability provision of the Coastal Act further undermines the Commission's argument.

build seawalls necessary to protect life and property, by covenanting, in article 1 section 1, that Californians have the "inalienable" rights of "defending life", "pursuing and obtaining safety" and "protecting property". The Coastal Act likewise mandates that the Commission permit seawalls when they "protect existing structures" and are "designed to eliminate or mitigate adverse impacts". (Pub. Res. Code § 30235.)

But the proposed equitable-waiver rule would require permittees to forego these entitlements and rights as the price for exercising their constitutional right to litigate unlawful permit conditions. (*See City of Long Beach v. Bozek*, (1982) 31 Cal.3d 527, 534 ("the act of filing suit against a governmental entity represents an exercise of the right of petition").) Indeed, the Commission touts the chill its proposed rule would have on the right of petition as the key policy reason supporting its position. (Answer Br. at 25 ("allowing permit applicants to accept the benefits of a permit while challenging its burdens would foster litigation").) But both this Court, and the U.S. Supreme Court, have prohibited the conditioning of even governmental entitlements—much less constitutional and statutory rights—on the waiver of other constitutional rights:

> [Government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms

> would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' [Citation]. Such interference with constitutional rights is impermissible.

(*Perry v. Sindermann* (1972) 408 U.S. 593, 597; *see also Bagley v. Wash. Township Hosp. Dist.* (1966) 65 Cal.2d 499, 502 (applying strict scrutiny to hold that public employment may not be conditioned on agreement to refrain from political activities).) Permittees—especially seawall permittees—should likewise not be forced to give up their constitutional right of petition as the price for using the development rights granted by their permits, and recognized by the California Constitution and Coastal Act.

Second, the proposed equitable-waiver rule would recklessly put life and property at risk. It would require coastal residents whose seawalls have been destroyed to go without the protection of a new seawall—potentially for years—until any litigation over the seawall permit is final. The Commission tries to reassure that "the Coastal Act provides a specific procedure"—an emergency permit—"to address emergencies." (Answer Br. at 20.) What the Commission neglects to mention is that applying for an emergency permit is a roll of the dice, for "the decision to issue an emergency permit is solely at the discretion of the executive director of the commission". (14 Cal. Code Regs. § 13143(c).) No Californian should be forced to put the security of their family and home at the whim of another

person just to challenge a permit condition (imposed by that person's employer) in court.

Third, the proposed equitable-waiver rule would create serious traps for the unwary. This is because the Commission does not actually issue the permit at the time it approves the project. Rather, it issues a "notice of intent to issue permit", as it did here. (AR 1784.) Only once the applicant satisfies all the "prior to issuance" conditions in the yet-to-be-issued permit does the Commission actually issue the permit. (*Id.*; 14 Cal. Code Regs. § 13158(e).) Here, the Commission required that the prior-to-issuance conditions, including recordation of the deed restriction, be satisfied within 120 days. (AR 1795.) Other coastal permit approvals require the applicant, within a specified period of time, to: (i) satisfy prior-to-issuance conditions to the Commission's satisfaction, (ii) satisfy prior-to-construction conditions to the Commission's satisfaction, and (iii) actually commence construction of the project. (14 Cal. Code Regs. § 13156(g).) If any of those deadlines are missed, the Commission's approval of the project expires and the project cannot be built without going through the entire permitting process again.

Application of the Commission's proposed equitable-waiver rule, together with the 120-day deadline to satisfy the prior-to-issuance conditions, likely would have prevented petitioners *both* from challenging the permit conditions *and* from legalizing their seawall. The Commission

approved the permit on August 10, 2011. (AR 1782.) Suit was timely filed on October 7, 2011. But the Commission did not even certify the initial administrative record in this case until April 30, 2012—more than *260 days* after the permit was approved. (AR 1808.) If, as the Commission now argues, petitioners should have held off on recording the deed restriction and complying with the other prior-to-issuance conditions while they litigated this case, then their permit would have lapsed, and this suit would have become moot, more than four months *before* the initial administrative record was even certified. In other cases, permit applicants would likewise be put under the gun to litigate their cases to finality, satisfy all pre-issuance and pre-construction conditions, and actually commence construction, within the time provided by their permit approval, or else forfeit that approval.[2]

Faced with the Hobson's choice of either accepting the Commission-approved permit as-is, or facing the very real risk of losing both that approval and the constitutional right to litigate a permit that may expire during the litigation, most permit applicants would be apt to accede to the permit, even if its conditions are unlawful or unconstitutional. Justice

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[2] The Commission may argue that a stay from the court, or an extension of time from the Commission, could be sought. But there is no guarantee that either would be granted. The Commission's distaste for "litigation and ... uncertainty in land use planning decisions" (Answer Br. at 25) suggests that the Commission may be tempted to oppose such stays or extensions of time.

would be better served by allowing permittees to proceed with the permitted development while at the same time litigating unlawful or unconstitutional permit conditions. The Commission's proposed equitable-waiver rule would work only inequity, and so it should be rejected.

III. THE COMMISSION'S ILLEGAL 20-YEAR TIME LIMIT WOULD DESTROY COASTAL PROPERTY VALUES

Petitioners argued (Opening Br. at 28) that the 20-year time limit on their seawall permit would have devastating consequences for property values all along the coast. After all, what bank would issue a 30-year mortgage for the purchase of property that is now protected by a seawall permitted for only 20 years? What insurance company would offer a homeowners' policy for petitioners' homes without the security of a permanent seawall?[3] And what young family would *want* to purchase such a house? The 20-year term of this permit destroys much of the value of petitioners' homes, and potentially renders them unmarketable.

The Commission responds by citing the fact that places like "Rockefeller Plaza, [and] Madison Square Garden" have secured a "long-term ground lease." (Answer Br. at 36 n.6.) Rockefeller Plaza and Madison Square Garden are hardly helpful comparisons to petitioners'

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[3] A coastal home without the protection of a seawall is like a home in a floodplain. Insuring homes in floodplains proved impossible, until Congress stepped in with the National Flood Insurance Act of 1968. (*See* 42 U.S.C. § 4001(b)(1) ("uneconomic for the private insurance industry alone to make flood insurance available to those in need of such protection on reasonable terms and conditions").)

personal homes, starting with the fact that they are located on solid Manhattan granite, rather than a sandy California coastal bluff.

The Commission also tries to mitigate these concerns by pointing to the fact that, in more recent seawall permits, the Commission has dropped the 20-year time limit in favor of a provision that requires seawall-permit applicants to return to the Commission in 20 years for an assessment of whether circumstances have changed from what was predicted at the time of the permit's issuance. (Answer Br. at 10 n.3.) Petitioners have conceded that this type of "adaptive management" condition would have been legal here. (Answer Br. at 37.) But by dropping the 20-year time limit from more recent seawall permits, the Commission has implicitly conceded that the 20-year time limit at issue here is illegal, for all the reasons given in petitioners' briefs.

IV. CONCLUSION

The judgment of the Court of Appeal should be reversed.

DATED: July 27, 2015

BRISCOE IVESTER & BAZEL LLP

By: _____
Peter S. Prows
Attorneys for Amici
BEACH AND BLUFF
CONSERVANCY,
PROTECT THE BEACH.ORG
SEACOAST PRESERVATION
ASSOCIATION, and
COASTAL PROPERTY OWNERS
ASSOCIATION OF SANTA CRUZ
COUNTY

CERTIFICATE OF WORD COUNT

The text of the application and proposed brief, not including the tables or signature blocks, according to the word count feature of Microsoft Word, consists of 2,298 words.

DATED: July 27, 2015

BRISCOE IVESTER & BAZEL LLP

By: _____
Peter S. Prows
Attorneys for Amici
BEACH AND BLUFF CONSERVANCY,
PROTECT THE BEACH.ORG
SEACOAST PRESERVATION ASSOCIATION, and
COASTAL PROPERTY OWNERS ASSOCIATION OF SANTA CRUZ COUNTY

PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to this action. I am employed in the City and County of San Francisco, and my business address is 155 Sansome Street, Suite 700, San Francisco, California 94104.

On July 27, 2015, at San Francisco, California, I served the following document(s):

APPLICATION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS, BY BEACH AND BLUFF CONSERVANCY, PROTECT THE BEACH.ORG, SEACOAST PRESERVATION ASSOCIATION, and COASTAL PROPERTY OWNERS ASSOCIATION OF SANTA CRUZ COUNTY; [PROPOSED] AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS

on the following parties:

James S. Burling
John M. Groen
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814

Attorneys for Petitioners
Barbara Lynch and Thomas Frick

Jonathan C. Corn
Axelson & Corn, P.C.
160 Chesterfield Drive, Suite 201
Cardiff by the Sea, CA 92007

Attorneys for Petitioners
Barbara Lynch and Thomas Frick

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

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

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

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on July 27, 2015, at San Francisco, California.

Arlene Won