Case No. S221980

In the Supreme Court of the State of California

BARBARA LYNCH and THOMAS FRICK,

Petitioners,

vs.

CALIFORNIA COASTAL COMMISSION,

Respondent.

BRIEF OF AMICI CURIAE CALIFORNIA BUILDING INDUSTRY ASSOCIATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, and CALIFORNIA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

After a Decision by the Fourth Appellate District, Division One
Case No. D064120

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

Page(s)

STATE CASES (CONT.)

Page(s)

STATE CASES (CONT.)

Page(s)

STATE CASES (CONT.)

STATE STATUTES

I. INTRODUCTION

On behalf of the proposed *amici curiae,* CALIFORNIA BUILDING INDUSTRY ASSOCIATION, the CALIFORNIA FARM BUREAU FEDERATION, and the CALIFORNIA CATTLEMEN'S ASSOCIATION, it is respectfully submitted that this Court should reverse the decision issued by Division One of the Fourth Appellate District.

This brief first addresses the respondent Coastal Commission's implicit but unfounded efforts to change the law governing the affirmative defense of waiver. The Commission's defense of the majority opinion by the Court of Appeal, and its assertions of "waiver," mischaracterizes the established law that has limited the circumstances in which a court may be justified in finding that citizens have actually and voluntarily "waived" their fundamental rights to seek judicial review of unreasonable or unlawful governmental action. In effect, the Commission's arguments invite this Court to re-write, rather than to apply, the existing law. California courts have required, at least until this case, that respondent agencies show more than the permittee's mere (purported) "compliance" with a condition of approval in order to justify a court in finding a voluntary waiver of the permittee's constitutional rights to challenge the condition, especially in cases like this where the permittees seek invalidation of unlawful conditions rather than damages in inverse condemnation.

The *amici* also address, briefly, the invalidity of the permit conditions demanded by respondent Commission, and point out the inconsistencies between what the Commission demanded from the petitioners in order to allow them to save their homes and what our constitutions allow.

Accordingly, these *amici* respectfully request that the Court reverse the decision of the appellate court and instead direct affirmance of the trial court's finding that there had been no "waiver" of the petitioners' rights to pursue judicial review and invalidation of unreasonable permit conditions imposed by the respondent Coastal Commission, and further direct affirmance of the trial court's determination that the challenged conditions were invalid.

II. INTERESTS OF AMICI CURIAE

The **California Building Industry Association** ("CBIA") is a statewide nonprofit association with approximately 3,000 members active in all aspects of the housing and home-building industry throughout California. Members of the Association are routinely subjected to a multitude of legally-questionable conditions of approval in the course of seeking permission to build homes for the residents of California. CBIA, its members and affiliates, and people seeking housing in all ranges of affordability are directly affected by deviations from the constitutional standards on such conditions as declared by this Court and the United States

Supreme Court, as well as by appellate court decisions changing the laws and precedents protecting the rights of permit applicants to obtain effective judicial review of unlawful conditions of approval.

The **California Cattlemen's Association** ("CCA") is the predominant organization of cattle grazers in California, with more than 1,700 producer members throughout California. The Association is a mutual benefit corporation organized under California law as an "agricultural and horticultural, non-profit, cooperative association" to promote the interests of the industry. Members of the Association own or lease property and graze cattle on land subject to the jurisdiction of the California Coastal Commission throughout many of California's coastal counties. CCA members have also instituted Association policy establishing a Coastal Subcommittee with the stated purpose "to help members located in this state's coastal zone with land use issues."

The **California Farm Bureau Federation** ("Farm Bureau") is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home and the rural community. Farm Bureau is California's largest farm organization, comprised of county Farm Bureaus currently representing more than 57,000 agricultural, associate and collegiate members in 56 counties. Farm Bureau strives to protect and

improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

The laws governing "conditions of approval" that may be demanded by state and local governmental agencies, for a wide variety of activities subject to governmental regulation, are of vital concern to the *amici* CBIA, the CCA, and the Farm Bureau, and their respective members. These *amici* and their members are directly affected by decisions of state and local agencies that establish such requirements, often involving demands for the dedication of land or easements, payment of fees, or the exaction of other property rights and interests, as conditions of granting permits or governmental approvals essential to their livelihoods or businesses, such as the Coastal Commission's extreme conditions of approval that are the subject of this case. The *amici* associations and their members are also directly affected, and placed at serious jeopardy, by judicial decisions that threaten to curtail or severely limit the right of access to the courts for judicial review of such conditions of governmental approval, or that threaten to create involuntary forfeitures of fundamental rights to judicial review of governmental action.

III. STATEMENT OF THE CASE

These *amici* adopt the statement of the factual background and procedural history as set forth in the Petitioners' Opening Brief.

The trial court properly rejected the Coastal Commission's argument that the petitioners had "waived" their rights to challenge the validity of the onerous conditions demanded by the Commission. The trial court then addressed the merits of the petitioners' challenges to the permit conditions, concluding that both of the disputed conditions, i.e., the Commission's demand that the permit allowing a seawall automatically expire after the 20-years, and its condition prohibiting reconstruction of a stairway that had been destroyed by natural forces, were unreasonable and invalid.

The decision by the majority of the Court of Appeal erroneously reversed both parts of the trial court's findings and conclusions. In doing so, the appellate decision misconstrued the holdings of this Court, and many appellate courts, describing the limited circumstances in which an alleged "waiver" may be found as to the rights of permit applicants to seek invalidation of conditions imposed by governmental agencies such as the Commission. It also apparently disregarded its own earlier decision in *Salton Bay Marina v. Imperial Irrigation District* (4th Dist. Div. One, 1985) 172 Cal.App.3d 914, rejecting a claim of waiver in similar circumstances, and soundly distinguishing the cases now relied upon by the Commission. Substantial evidence supported the trial court's determination that those limited circumstances that might warrant a finding of "waiver" were not shown by the Commission below, and the record does not support the

attempt to contrive a "waiver" of rights to pursue invalidation of the Commission's conditions of approval under existing law.

IV. ARGUMENT

First, the Commission's reliance on the defense of waiver to cut off judicial review of its actions is misplaced, and mischaracterizes the rationale of the distinct case law in which a waiver of rights to seek damages has been found. The rationale of those cases – protecting government agencies against unintended liability for damages in inverse condemnation – does not apply in cases like this, where petitioners properly seek invalidation of the disputed conditions.

Second, the trial court properly addressed the merits of the petitioners' challenge to the Commission's conditions of permit approval and properly determined the invalidity of the two disputed conditions.

A. This Court, Like The Trial Court, Should Reject The Commission's Claims That The Petitioners Intended To Waive Their Rights To Pursue Judicial Review.

The Commission, like the appellate court majority opinion, fails to recognize the significance of the timely and active writ of mandate challenge to the permit conditions by petitioners, as well as the other, substantial, evidence in the record supporting the trial court's finding that petitioners did not intentionally and voluntarily waive their rights to pursue invalidation of the Commission's conditions.

1. A Defense Based on Claims That Citizens Have "Waived" Their Fundamental Rights to Judicial Review Is NOT Favored.

"Generally, 'waiver' denotes the voluntary relinquishment of a known right." (*Platt Pacific Inc. v. Andelson* (1993) 6 Cal.4th 307, 315 [emph. added].) The trial court found that the facts in the record did not support the Commission's claim of a voluntary waiver of rights to contest the validity of the permit conditions.[1] California law generally abhors forfeitures or waivers of important rights, including rights to pursue judicial review of governmental actions, and it is deemed to be error to imply a waiver. (E.g., *Nasir v. Sacramento County* (1992) 11 Cal.App.4th 976, 986, n. 5 ["This forfeiture of the right to a determination on the merits is precisely the type of forfeiture which the law abhors."]; see also, *Cuevas v. Superior Court* (2013) 221 Cal.App.4th 1312, 1323.)

> The Supreme Court has held, in a number of varying contexts, that **a waiver of constitutional rights must be based upon clear and convincing evidence** to demonstrate that the waiver is knowing, voluntary, and intelligent. *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (right to counsel); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967) (First

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[1] This Court has encouraged practitioners and lower courts to use the terms "waiver" and "forfeiture" in a more technical and precise manner. (E.g., *In re Sheena K.* (2007) 40 Cal.4th 875, 880, fn. 1; *People v. Simon* (2001) 25 Cal.4th 1082, 1097. fn. 9; *People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6.) Under this approach, the term "waiver" refers to a party's intentional relinquishment or abandonment of a known right or privilege, while "forfeiture" is used to refer to the loss of a right resulting from the failure to assert it in a timely fashion. (*People v. Simon, supra* at p. 1097, fn.9.) Neither forfeitures nor waivers are favored under the law.

> Amendment rights); *see also Doe v. Marsh*, 105 F.3d 106, 111 (2d Cir. 1997) (noting that Supreme Court and Second Circuit jurisprudence "suggests that the **waiver of a fundamental right** in the context of civil cases **must be made voluntarily, knowingly and intelligently**") (*citing United States v. Local 1804-1*, 44 F.3d 1091, 1098 n.4 (2d Cir. 1995)). (*Murray v. Town of N. Hempstead* (E.D.N.Y. 2012) 853 F.Supp.2d 247, 259 [emph. added].)

2. Judicial Review of the Defense of "Waiver."

The Commission's arguments, and the appellate court opinion that they strive to defend, are inconsistent with existing authorities as to the standard of judicial review applicable where, as here, a defendant invokes the defense of waiver. The Commission admits that the trial court's factual finding of "no waiver" should have been reviewed under the substantial evidence standard, but then argues that there was "no evidence" to support that finding – ignoring the ample evidence in the record cited by the trial court and by the dissenting justice on appeal.

It was not petitioners' burden to anticipate and refute the Commission's assertion of its waiver defense. To the contrary, "waiver" is an affirmative defense, and therefore, the burden is generally on the defendant to produce substantial evidence to show every necessary element of the defense. (*People v. Tehama County* (2007) 149 Cal.App.4th 422, 431.) As stated in *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, "the party seeking to establish a waiver bears a heavy burden of proof."

The trial court found, as a matter of fact, that the petitioners had not waived their rights. Nevertheless, the Commission defends the unusual appellate re-weighing of the evidence reflected in the appellate court majority opinion, and its new finding of a "voluntary, knowing, and intelligent" waiver of fundamental rights, apparently as a matter of law. This too is inconsistent with prevailing authority as to the applicable standards of review. (*See, e.g., Bickel v City of Piedmont* (1997) 16 Cal.4th 1040, 1052: "Whether there has been a waiver is a question of fact." *Cf., St. Agnes Medical Center, supra*, 31 Cal.4th at 1195, confirming that the determination of a waiver is "generally a question of fact.")

3. The Commission Misstates "the General Waiver Rule" and Omits Key Factors Necessary to Support a Finding of Waiver of Rights to Judicial Review.

The Commission, and the appellate majority, invoke a purported "general waiver rule." However, the Commission's brief does not detail what that new "general rule" requires, and the cases cited do not purport to define such a rule. It appears that the Commission relies instead on an improperly-truncated version of statements extracted from some of this Court's opinions and erroneously focuses on one element -- purported "compliance" – in disregard of other required evidence, or the absence of other evidence, bearing on the Commission's heavy burden to prove petitioners' voluntary and intentional waiver of specific rights.

When this Court has described the circumstances that may support finding a waiver of rights to challenge a permit condition, its holdings have made clear that mere "compliance" with the permit condition by itself is not enough to support a waiver of rights to seek invalidation. (Cf., *County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510-511.) The Commission omits the requirements this Court has prescribed for additional evidence of a knowing and voluntary waiver, e.g., the absence of protests, execution of a "specific agreement" to waive rights, or the failure to timely file a writ petition. The Commission's invention of a supposed general rule of waiver, focusing exclusively on superficial evidence of "compliance" with governmental demands -- without regard to other evidence bearing on the permittee's intent -- would omit the key elements of knowing and voluntary action, and would unjustifiably moot out decades of case law involving relief from involuntary actions, e.g. "duress," "adhesion," "mistake," etc.

To the contrary, this Court's decisions (discussed below) have required that the party claiming the defense of "waiver" must show more than mere ostensible "compliance with" permit conditions in order to support a finding of a waiver of the right to seek review of the permit conditions.[2]

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[2] Moreover, it is not clear that petitioners' actions in signing and recording a deed restriction document, without any explicit waiver language, may be deemed to be "compliance with" the distinct conditions (requiring expiration of the permit in 20 years and prohibiting

4. The Commission's Brief Mischaracterizes This Court's Holdings on Waiver of Challenges to Conditions of Permit Approval.

The Commission's Brief (p. 17) invokes *Edmonds v. County of Los Angeles* (1953) 40 Cal.2d 642, 650, and *County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510, as the purported source of its narrow "compliance-only" conception of waiver. The Commission, however, mischaracterizes, and misses the point of, both decisions.

In *Edmonds*, this Court explained that plaintiffs could not belatedly challenge conditions of zoning approval, based on "promissory estoppel:"

> For a period of three years plaintiffs made a use of their property to which they were not entitled under the law in the absence of the granting of the conditional exception. By their conduct they led everyone to believe that the exception had been accepted. Plaintiffs made an oral promise on which defendants relied to their detriment, and justice can be done only by the enforcement of the promise. (*Id.* at p. 653.)

The Court also carefully described the factors that would be needed to find a waiver, including both (1) the verbal acceptance of the County's

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reconstruction of the stairway) that petitioners were challenging in the pending mandamus action, nor is it clear whether the Commission sought or received any specific agreement that the petitioners would dismiss or waive the invalidation claims in their petition for writ of mandate. (Cf., *Farahani v. San Diego Comm. College Dist.* (2009) 175 Cal.App.4th 1486, 1496 [rejecting government's claim that petitioner had waived rights by signing an 'agreement' because the government had presented petitioner "with a Hobson's choice between two 'bad,' indeed illegal, options" and the petitioner had merely "followed the Union attorney's advice to take the pragmatic course and sign the agreement."]

conditions, and (2) the absence of timely legal action to challenge the validity of the conditions. The Court pointed out that if plaintiffs had thought the conditions objectionable, "they would have relied on the courts for vindication," but instead the plaintiffs had proceeded "as if they claimed no right" contrary to the conditions. The Court also noted that "never once during the entire proceedings" leading up to the conditional granting of the permit did plaintiff object or assert a claim to be free of the conditions (40 Cal.2d at p. 650.) The finding of "waiver" (or "promissory estoppel") in *Edmonds* was thus justified by facts far different from the record here, including: (1) the absence of any protest during the permit process, and (2) the absence of a timely legal challenge to the permit conditions.

The new purported "general waiver rule" as asserted by the Commission is thus not consistent with *Edmonds*. In contrast with *Edmonds*, here the petitioners objected verbally and in writing during the administrative process and did timely seek relief from the conditions in court, filing a petition for writ of mandate.

Similarly, the Commission's reliance on *County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510-511, is misplaced. In *McDougal*, the Court first summarized the evidence showing that the property owner/defendant's predecessor in title had (1) affirmatively accepted the County's conditions on a use permit without protest or objection, and (2) "accepted the benefits" of the permit, and (3) had not sought to challenge

the conditions in a timely action in court. In *McDougal*, rather than announcing an ostensible "general rule of waiver" the Court spoke in terms of "estoppel," cited *Edmonds* (and five non-California cases) and observed: "A number of cases have held that a landowner of his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by either specifically agreeing to the condition or failing to challenge its validity, and accepted the benefits afforded by the permit." (19 Cal.3d at 511, emphasis added.)

The Court concluded that the successor-permittee "is estopped to assert" that the conditions in the permit were invalid when the County sought to enforce them, because his predecessor had both (1) failed to timely challenge their validity, and (2) had accepted the benefits afforded by the permit. (*Id.* at p. 510, emphasis added.)

McDougal thus required more than just an "acceptance of benefits" or "compliance" by the permittee in order to justify a possible finding of waiver – or estoppel – to litigate the permit conditions; rather it also depended on the permittee's failure to take timely action to challenge the validity of the permit conditions.

In this case, the Commission, like the appellate decision, fails to acknowledge the significance of petitioners' timely pursuit of writ relief (in addition to administrative objections) as evidence precluding implication of a voluntary and intentional waiver of rights to judicial review.

5. *Pfeiffer v. City of La Mesa* Does NOT Support the Finding of Waiver And the Commission Erroneously Relies On Distinct and Inapposite Cases Requiring "Exhaustion of Judicial Remedies" (Pursuit of Mandamus Relief) Prior to Seeking Damages in Inverse Condemnation.

The Commission also erroneously invokes *Pfeiffer v. City of La Mesa* (1977) 69 Cal.App.3d 74, in support of its "waiver" arguments. However, *Pfeiffer* merely held that a permittee must challenge offending governmental action by way of mandamus in order to pursue a claim for damages or compensation for inverse condemnation.[3]

Neither *Pfeiffer v. City of La Mesa*, nor other equally distinguishable decisions citing *Pfeiffer,* support a finding of waiver in this case: (1) Petitioners here do not seek inverse condemnation damages; and (2) Petitioners timely filed a writ petition to challenge the validity of the permit conditions. *Pfeiffer* does not apply.

In *Pfeiffer*, a building permit condition required the permittee to build storm drain improvements on the developer's property, allegedly in excess of needs caused by the developer. The permittee did not file a writ to challenge the permit conditions. Instead, the permittee built the

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[3] This was nothing new. It has been noted that *State of California v. Superior Court* (*Veta*) (1974) 12 Cal.3d 237, "must be read as establishing as early as 1974 that an administrative mandate action was a necessary procedural predicate to seeking inverse condemnation damages based upon a regulatory taking accomplished by an administrative agency." (*California Coastal Com. v. Superior Court* (*Ham*) (1989) 210 Cal.App.3d 1488, 1494 [emph. added].)

improvements, and then filed suit for inverse condemnation damages for the costs of the improvements, contending that there had been no feasible opportunity to suspend work on the project to seek a writ challenging the permit condition, without incurring economic ruin.

The appellate court in *Pfeiffer* referred to plaintiff's failure to first file for a writ as akin to a "waiver" of the plaintiff's rights -- but only in reference to the plaintiff's right to seek compensation or inverse condemnation damages as a result of the permit condition.

Pfeiffer, rightly, said nothing about distinct rights to seek judicial review and invalidation of disputed permit conditions somehow being waived by mere "compliance" under protest. The *Pfeiffer* court explained that the permittee should not be able to convert an allegedly invalid permit condition into a compensable "taking" without first challenging the condition's validity in a mandamus action, and thereby allowing the government to retract its condition if found to be invalid, rather than to pay compensation in inverse condemnation. That rationale would not justify finding a waiver in an action like this, for invalidation of the conditions.

However, the misleading *dictum* in *Pfeiffer* is often misunderstood, and mis-cited as in this case, as if it had held that all rights, including rights to seek invalidation of unlawful permit conditions or to seek refunds of fees paid under protest, may be deemed to be waived by mere compliance (even if "under protest"). *Pfeiffer*, of course, did not so hold. It is thus error to

cite *Pfeiffer* to support an over-broad theory of waiver of rights to seek invalidation of permit conditions.[4] The actual holding of *Pfeiffer* does not support the overbroad "waiver-by compliance" rule the Commission (and others) would try to derive from it.

The Court should take this opportunity to disapprove *Pfeiffer* to the extent that it may be perceived as implying a waiver of all rights to judicial review of conditions of permit approval based on mere "compliance."

Pfeiffer is best understood as an early illustration of the distinct California rule that mandamus must ordinarily be sought to review governmental action before pursuing a claim of damages in inverse condemnation based on that action. (*See, e.g., California Coastal Commission v. Ham* (1989) 210 Cal.App.3d 1488 [see fn. 3, above, citing *State of California v. Superior Court (Veta), supra*]; *Rossco Holdings v. State of California* (1989) 212 Cal App.3d 642, 654.) In that context, i.e., where damages are sought based on allegedly unlawful governmental decisions, such a defense is more commonly viewed as a "failure to exhaust judicial remedies" rather than as a "waiver" of rights. (E.g., *Johnson v. City*

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[4] Indeed, prior to the unfortunate *dicta* in *Pfeiffer*, many California cases had involved actions brought by developers or contractors seeking to challenge fees, or for refunds of fees, paid "under protest." (See cases in Section III (B) (3), below.) Since Gov. Code §§ 66020-66021 expressly providing for protests of development fees and exactions were not enacted until 1984-85, these earlier actions were presumably brought under common law or equitable restitution.

of Loma Linda (2000) 24 Cal.4th 61, 69 [state FEHA action].) And, in such cases where damages or inverse condemnation is claimed, the courts have advanced a distinct rationale for applying the defense. That rationale – protecting the public fisc against unintended claims for compensation – has no application to cases – like this – where petitioner seeks review and invalidation of unlawful conditions.

For example, in *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, this Court noted that the rationale for requiring "exhaustion of remedies" as discussed in *Pfeiffer* distinctly applies in actions alleging a "regulatory taking" and seeking inverse condemnation damages. (*Hensler*, 8 Cal.4th at 18-19.) It does not apply in a case where the permittee has properly and timely filed and is pursuing a writ of mandate action to invalidate the offending conditions.

Indeed, this critical distinction was previously recognized by the same Court of Appeal as in this case, in *Salton Bay Marina, Inc. v. Imperial Irrigation Dist., supra*, 172 Cal.App.3d 914, which accurately interpreted and distinguished *Pfeiffer* as just such a limited holding. The court explained *Pfeiffer* as simply holding that a landowner who accepts and "complies with" the conditions of a building permit generally could not later sue the agency for inverse condemnation for the cost of compliance.

As *Salton Bay Marina* explained, even in such inverse condemnation settings, there would be no finding of waiver from compliance alone, but

there must also be evidence of voluntary acceptance of the permit conditions. (172 Cal.App.3d at 94 [emphasis added]):

> Generally, a landowner who accepts and complies with the condition of a building permit cannot later sue the issuing public entity for inverse condemnation for the cost of compliance." (*County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510; *Pfeiffer v. City of La Mesa* (1977) 69 Cal.App.3d 74, 76.) Instead, the property owner is generally limited to having the condition invalidated by a proceeding for writ of mandate. (*See Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110,128.)
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> The reasoning behind this rule was stated by the California Supreme Court in *Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 276: "But it seems a usurpation of legislative power for a court to force compensation. Invalidation, rather than forced compensation, would seem to be the more expedient means of remedying legislative excesses.' [Citations.]

Similarly, *Rezai v. City of Tustin* (1994) 26 Cal.App.4th 443, does not support the Commission's otherwise unsupported effort to broaden the existing "waiver rule." *Rezai,* like *Salton Bay Marina,* recognized that *Pfeiffer* only implied a waiver where (1) the permittee sought inverse condemnation damages, and (2) the permittee had failed to first bring a timely petition for mandamus to challenge the condition of approval. (*Rezai v. City of Tustin, supra*, 26 Cal.App.4th at 449 ["Rezai did the same thing here [as in *Pfeiffer*]. He complied with the second conditional use

permit... and then sought damages. He never pursued administrative mandamus to challenge the conditions.")

Neither *Rezai* nor *Pfeiffer* support the Commission's attempted expansion of the "waiver rule" to preclude review of the validity of permit conditions, as distinct from precluding inverse or damages claims.

The reason for limiting this rule of "exhaustion of remedies" to the context of inverse condemnation cases was again explained in *Hurwitz v. City of Orange* (2004) 122 Cal.App.4th 835 (emphasis added):

> "The point is simple. Before the taxpayers should have to pay good money for some kind of "taking" action by an administrative agency (or local government entity), the government agency (or entity) should have the chance to mend its ways and stop short of the costly undertaking. In essence there should be one last chance for a court to yell 'halt' and save the taxpayers from the burden of incurring a debt that might still be prevented. That is the basis of the doctrine of exhaustion of administrative remedies in this context – give the government a chance to remedy its land use determination without paying money . . . . Invalidation, rather than forced compensation, would seem to be the more expedient means of remedying legislative excesses."

That preferred remedy – "invalidation" – is precisely the course of action that petitioners timely and properly pursued here – without waiver.

B. The Commission Not Only Misstates "The General Waiver Rule" But Also Erroneously Contends That There Are "Only Two Recognized Exceptions" To The Purported Rule Imposing A Waiver.

Even if there were a "general waiver rule" as imagined by the Commission, California courts have recognized more than two "exceptions" in refusing to find a waiver of rights to challenge the validity of governmental conditions based on mere alleged compliance. For example, in addition to the two "exceptions" acknowledged in the Commission's brief, permittees are allowed to challenge the validity of conditions without waiver, in other situations where the permittee's compliance was not voluntary.

1. "Compliance" Coerced Under Duress Does NOT Operate as a Waiver of Rights to Seek Judicial Review of Governmental Demands or Exactions of Property Interests.

"A waiver ... is not effective unless it is voluntary." (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1052.) Therefore, when the circumstances indicate that the permittee's "compliance" with permit conditions was other than voluntary, claims of waiver are rejected.

The risks of involuntary compliance under coercion or duress are "realities" particularly inherent in the land use permitting context, as the courts have frequently recognized. (See, e.g., *Koontz v. St. John's River Water Management District* (2013) __ U.S. ___, 133 S.Ct. 2586, 2594 ["land-use permit applicants are especially vulnerable to the type of

coercion that the unconstitutional conditions doctrine prohibits ...."]; *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, 837 ["an out-and-out plan of extortion...."; see also; *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 867-870 [discussing the prevalence of agencies improperly "'leveraging' the permit power"].)

Because of the heightened risks of undue leverage or coercion inherent in the land use permitting process, courts must be especially vigilant to reject assertions that permit applicants have surrendered constitutional rights unless there is clear and convincing evidence to support finding a voluntary waiver. Mere compliance is not enough, and courts consider the totality of the circumstances and evidence bearing on the "voluntariness" of the purported acts of compliance.

For example, performance of conditions under "duress" or circumstances reflecting economic compulsion is recognized as not constituting a waiver – even in cases where the permittee claimed it was not feasible to timely file or pursue a writ petition to challenge the permit conditions. (See, e.g., *McLain Western # 1 v. County of San Diego* (1983) 146 Cal.App.3d 772, 777 [developer did not waive rights to challenge permit requirements (fees) where economic forces made it impracticable or unduly burdensome for developer to have filed timely mandamus action]; *Laguna Village Inc. v County of Orange* (1985) 166 Cal.App.3d 125, 128 [same].)

The facts in this record provided a vivid illustration of duress, and the absence of any voluntary waiver of rights to continue to pursue a timely-filed and pending petition for writ relief, as the trial court found.

2. Performance "Under Protest" Does NOT Imply a Voluntary Waiver of Rights to Judicial Review.

Performance "under protest" indicates it is not voluntary. Therefore, such payment or performance under protest is commonly recognized, at common law as well as by statute, as not waiving the right to seek judicial invalidation of the conditions or demands. (*See, e.g., Brumagin v. Tillinghast* (1861) 18 Cal. 265, 271; *Pimental v. City of San Francisco* (1863) 21 Cal. 351, 362; *Simms v. Los Angeles County* (1950) 35 Cal.2d 303, 316 [no statutory authority is necessary in order to require government to restore charges paid under protest].)

California courts have long recognized even non-statutory "performance under protest" as indicating the absence of "voluntary" compliance with unlawful conditions, and not operating as a waiver. (*See, e.g., Kelber v. City of Upland* (1957) 155 Cal.App.2d 631 [disapproved, on other grounds, by *The Pines v. Santa Monica* (1981) 29 Cal.3d 656, and affirmed refund of subdivision fees paid under protest]; *City of Belmont v. Union Paving Company* (1957) 156 Cal.App.2d 214, 217; *see also, Longridge Estates v. City of Los Angeles* (1960) 183 Cal.App.2d 533 [sewer charges paid under protest]; *Newport Building Corp. v. City of Santa Ana*

(1962) 210 Cal.App.2d 771, 778 [disapproved, on other grounds, in *The Pines v. Santa Monica* (1981) 29 Cal.3d 656]; *Codding Enterprises v. City of Merced* (1974) 42 Cal.App.3d 375 [park in-lieu fees paid under protest as condition of lot-split approval]; *Wright Development v. City of Mountain View* (1975) 53 Cal.App.3d 374 [overruled demurrer to developer's complaint seeking refund of park in-lieu fees paid under protest]; *Regents of the Univ. of California v. City of Santa Monica* (1978) 77 Cal.App.3d 130 [affirmed refund of permit fees paid under protest].)

These cases pre-dated the Legislature's enactment of statutory protest remedies in the context of development exactions in the 1980s, and are thus distinct from the Commission's acknowledgement of an exception from the rule of waiver for "statutory" protests of fees.

3. The Right to Invalidation of Permit Conditions Is NOT Limited to Cases Involving Monetary Fees.

Equitable relief against invalid conditions of approval – even after "compliance" – has not been limited to "fees" but courts have also granted relief where permit applicants have been compelled by economic circumstances to "comply" with other types of conditions under duress or protest. (*See, e.g., Short Line Associates v. City & County of San Francisco* (1978) 78 Cal.App.3d 50 [relief granted where city unlawfully compelled applicant to purchase easement rights for the city, easement deed rescinded]; *Uniwill, L.P. v. City of Los Angeles* (2004) 124 Cal.App.4th

537, 542-44 [developer entitled to relief from easement conveyed under duress in compliance with city demands].)

C. The Trial Court Properly Determined That The Disputed Conditions Of Approval Were Unreasonable And Invalid.

The federal Constitution, as well as the California Constitution, preclude governmental agencies from demanding unreasonable and unconstitutional conditions of permit approval. (*Cf., Koontz v. St. John's River Water Management District* (2013) __ U.S. ___, 133 S.Ct. 2586; *Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528; *Dolan v. City of Tigard* (1994) 512 U.S. 374 [prohibition of unconstitutional conditions].)

These constitutional constraints are applicable to conditions such as those here, purporting to extinguish vested property rights, and demanding exactions of property interests without showing any reasonable relationship to deleterious public impacts caused by the applicant or showing any reasonable mitigation of impacts caused by the applicant violate such constitutional constraints. (*Nollan v. California Coastal Commission* (1987) 483 U.S. 825; *San Remo Hotel L.P. v. City & County of San Francisco* (2002) 27 Cal.4th 643; *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854.)

The trial court's determination that the disputed conditions are inconsistent with these constitutional and statutory limits on the Coastal Commission's power to impose conditions of permit approval was well

founded under California law, and supported by the record. (Cf., Pub. Res. Code 30235; *Bowman v. California Coastal Commission* (2014) 230 Cal.App.4th 1136; *Security National Guaranty Inc. v. California Coastal Commission* (2008) 159 Cal.App.4th 402; *Ocean Harbor House Homeowners Association v. California Coastal Commission* (2008) 163 Cal.App.4th 215; *Liberty* v. *California Coastal Commission* (1980) 113 Cal.App.3d 491.)

A permit subject to an arbitrary "expiration date," imposed despite the expectation that the permittee must act in reliance on the permit by expending substantial money, effort, and resources in making physical improvements to maintain and preserve their existing homes and property rights, may be found to be unlawful. (*E.g., Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519.) The trial court's determination of invalidity was not unfounded.

V. CONCLUSION

California courts have not previously declared any "general waiver rule" as suggested by the Commission, pursuant to which any form of alleged "compliance" with the conditions of a permit – without regard to other evidence indicating the absence of a voluntary and intentional waiver – automatically constitutes a waiver of all legal rights, including the right

to pursue a pending and timely-filed writ action for invalidation of the permit conditions.

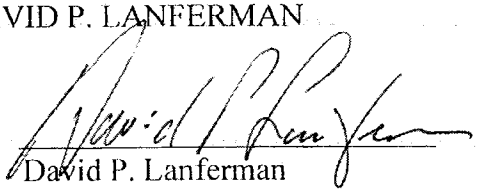
This Court and the Courts of Appeal have not previously allowed the government to infer a "waiver" of fundamental rights to timely judicial review so easily or so broadly. To the contrary, alleged waivers and forfeitures of such rights are, for good reason, judicially disfavored and narrowly construed.

To the limited extent that acquiescence has been considered as some evidence of waiver, the Courts have required more than mere compliance or acceptance of benefits of a permit. The Commission has cited no case in which a waiver of the right to seek invalidation of a permit condition was found notwithstanding the timely filing of a writ petition as in this case.

For each of the foregoing reasons, these *amici* respectfully request that the Court reverse the decision of the Court of Appeal, and grant relief as sought by the petitioners.

Dated: July 28, 2015

RUTAN & TUCKER, LLP
DAVID P. LANFERMAN

By: 
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA CLARA

I am employed by the law office of Rutan & Tucker, LLP in the County of Santa Clara, State of California. I am over the age of 18 and not a party to the within action. My business address is Five Palo Alto Square, 3000 El Camino Real, Suite 200, Palo Alto, CA 94306-9814.

On July 28, 2015, I served on the interested parties in said action the within: **BRIEF OF AMICI CURIAE CALIFORNIA BUILDING INDUSTRY ASSOCIATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, and CALIFORNIA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS** as stated below:

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Executed on July 28, 2015, at Palo Alto, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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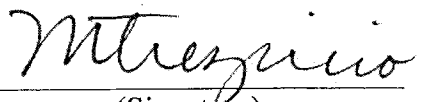
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Lynch v. California Coastal Commission

Supreme Court of the State of California Case No. S221980

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