Case No. S221980
IN THE SUPREME COURT OF CALIFORNIA

BARBARA LYNCH and THOMAS FRICK,
Plaintiffs and Respondents,
v.
CALIFORNIA COASTAL COMMISSION,
Defendant and Appellant.

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

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

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT AND APPELLANT CALIFORNIA COASTAL COMMISSION AND [PROPOSED] BRIEF OF AMICI CURIAE AMERICAN PLANNING ASSOCIATION AND AMERICAN PLANNING ASSOCIATION CALIFORNIA CHAPTER

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Pursuant to Rule 8.520(f) of the California Rules of Court, the American Planning Association and the American Planning Association California Chapter respectfully request leave to file the accompanying *amici curiae* brief in support of Defendant and Appellant California Coastal Commission ("Commission").

IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Planning Association ("APA") is a nonprofit public interest and research organization founded in 1909 to advance the art and science of land use, economic, and social planning at the local, regional, state, and national levels. The APA represents approximately 40,000 professional planners, planning commissioners, and citizens involved with urban and rural planning issues. The APA regularly files amicus briefs in federal and state appellate courts in cases of importance to the planning profession and the public interest.

The American Planning Association California Chapter ("APA California"), the largest of the 47 chapters of the American Planning Association, is an organization of more than 5,000 professional planners, planning commissioners, and elected officials in California whose mission is to foster better planning by providing vision and leadership in addressing important planning issues. To that end, the Chapter's Amicus Curiae Committee, made up of experienced planners and land use attorneys, monitors litigation of concern to California planners and participates in cases of statewide or nationwide significance that raise issues affecting land use planning in California.

Amici are familiar with the issues before the Court and have a critical interest in the outcome of this case. *Amici* believe that additional briefing is necessary to

demonstrate that Lynch and Frick (hereafter "Plaintiffs") have waived their right to challenge the validity of the special conditions imposed on their coastal development permit. Specifically, this *amici curiae* brief emphasizes the importance of finality and certainty in the land use decision process and highlights the policy reasons that mitigate against Plaintiffs' attempt to have this Court adopt a new "under protest" exception to the general waiver rule.

Amici's brief demonstrates the importance of the Commission's inherent authority, and indeed the authority of public agencies in general, to impose conditions that enable the agency to address changing circumstances. At issue here is the critical need to ensure that government can respond effectively to the uncertainty associated with the effects of climate change and sea level rise.

Additional briefing is also necessary to more fully address and dispose of Plaintiffs' takings argument. Finally, additional briefing will demonstrate that, contrary to Plaintiffs' assertions, their stairway reconstruction is barred under the City of Encinitas's Local Coastal Program and Zoning Code.

Pursuant to California Rule of Court 8.520(f)(4), Amici certify that no party or counsel for a party in the pending case authored the proposed *Amici Curiae* brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief.

DATED: August 7, 2015

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SUMMARY OF ARGUMENT

The Coastal Commission determined that it could not approve Plaintiffs' coastal development application to construct a seawall unless Plaintiffs agreed to conditions limiting the term of their permit. Plaintiffs agreed and recorded deed restrictions irrevocably covenanting with the Commission that the special conditions apply to their properties. The Commission then issued the permit, relying on Plaintiffs' commitment, and Plaintiffs proceeded to construct the seawall. Despite this undisputed history, Plaintiffs contend that they have not waived the right to challenge the validity of their permit's special conditions. They ask this Court to ignore the unambiguous terms of their recorded deed restrictions and, instead, to give effect to their subjective intent.

Allowing Plaintiffs to challenge the permit's special conditions after accepting its benefits would impair the critical goals of finality and certainty in governmental decision making, throwing orderly and balanced land use planning into chaos. It would also undermine the confidence with which property owners and local governments proceed with development projects, interfering as well with agencies' ability to fashion effective mitigation measures to address the impacts of the projects that come before them.

Having waived their right to judicial review, Plaintiffs may not pursue this challenge to the terms of their seawall permit. Notwithstanding their waiver, Plaintiffs' challenge is meritless. The Commission's action approving their permit subject to a twenty-year authorization and renewal process is entirely consistent with the overall purpose of the Coastal Act as evidenced by the Commission's findings. Moreover, the Commission's decision protects coastal resources while respecting the property interests

of Plaintiffs and their coastal neighbors. Substantial evidence plainly supports the agency's chosen course of action, and this Court should thus affirm the conditions' validity.

Like all public agencies, the Commission must exercise its broad and flexible powers so as to promote the public welfare, adopting policies that address the difficult and novel challenges that they confront. This power expands to deal with new problems, including the significant and uncertain effects of climate change and sea level rise. The durational permit term allows the Commission to reassess the seawall's impacts on coastal resources and adjacent properties and determine, consistent with its mandate, if changes to Plaintiffs' permit are required.

Plaintiffs' claim that the durational permit conditions constitute a regulatory takings of their property is not ripe for judicial review. Consistent with the permit's special conditions, Plaintiffs must apply to amend their permit prior to the end of its term. Plaintiffs' takings claim would have the Court opine as to how the Commission will respond to the future amendment application. The ripeness doctrine precludes such speculation. Plaintiffs also err in asserting that the Commission's action runs afoul of the unconstitutional conditions doctrine. Not only does the doctrine not encompass the durational permit condition, Plaintiffs have no constitutional right to construct a seawall. Nor were they entitled to reconstruct their beach access stairway. The Encinitas local coastal program and its general plan prohibited the private stairway. Moreover, the stairway was a legal non-conforming use; the City's zoning code barred Plaintiffs from reconstructing the stairway after it had been damaged by a storm.

This Court should find that Plaintiffs have waived their right to challenge the Commission's special conditions. If the Court proceeds to address their claims, it should uphold the validity of the twenty-year term on Plaintiffs' seawall permit and the prohibition on reconstructing their beach access stairway.

I. The Court of Appeal Properly Concluded that Plaintiffs Waived Their Right to Challenge the Conditions of their Coastal Development Permit.

A. Plaintiffs Specifically Agreed to the Conditions and Accepted the Permit's Benefits By Constructing the Project.

There is no dispute that the Coastal Commission approved Plaintiffs' application to construct a seawall on their properties subject to special conditions that: prohibited reconstruction of a private access stairway from Plaintiffs' property to the beach below; authorized the project for a twenty-year period; and required Plaintiffs to apply for a permit amendment to extend the seawall's authorization beyond the twenty year period, or to remove, modify or expand the seawall. (Administrative Record ("AR") 1681-83.) If Plaintiffs submit a complete application to amend their permit before the twenty-year period expires, the Commission must automatically extend and maintain the seawall's authorization until the time that it acts on the application. (*Id.* at 1683)

The Commission expressly concluded, before approving Plaintiffs' permit, that "*but for the imposition of the Special Conditions*, the proposed development could not be found consistent with the provisions of the [Coastal] Act and that *a permit could therefore not have been granted.*" (Joint Appendix ("JA") 24-25, 45-46, italics added.) Plaintiffs explicitly acknowledged the Commission's "but for" finding when they signed, notarized, and recorded deed restrictions on their properties, as required by Special

Condition 17. (See *ibid.*) The deed restrictions state that Plaintiffs "elected to comply with the Special Conditions, which require, among other things, execution and recordation of this Deed Restriction, so as to enable [Plaintiffs] to undertake the development authorized by the Permit. . . ." (*Ibid.*) The deed restrictions further state that Plaintiffs, "in consideration of the issuance of the Permit . . . hereby *irrevocably covenant[s]* with the Commission that the Special Conditions . . . shall at all times . . . constitute for all purposes covenants, conditions and restrictions on the use and enjoyment of the Property." (*Ibid.,* italics added.) After Plaintiffs satisfied all of the permit's conditions precedent, the Commission issued the development permit, and Plaintiffs constructed their seawall.

Plaintiffs now contend that they did not waive their right to challenge the validity of their permit's special conditions because they filed a "timely petition for writ of mandate under Section 1094.5." (Reply Br. at p. 6.) It is well-established, however, that "a landowner who accepts a building permit and complies with its conditions waives the right to assert the invalidity of the conditions and sue the issuing public entity for the costs of complying with them." (*Pfeiffer v. City of La Mesa* (1977) 69 Cal.App.3d 74, 78; see also Civ. Code, § 3521 ["He who takes the benefit must bear the burden."].) The filing of their writ petition does not negate Plaintiffs' unmistakable waiver here.

Plaintiffs' reliance on this Court's decision in *County of Imperial v. McDougal* (1977) 19 Cal.3d 505 to support their argument is to no avail. (Opening Br. at pp. 22-23; Reply Br. pp. 7-8.) *McDougal* explicitly states that a property owner is barred from challenging a condition imposed on his permit if he has acquiesced to the condition "by

either specifically agreeing to the condition *or* failing to challenge its validity, *and* accept[ed] the benefits afforded by the permit." (*McDougal*, *supra,* 19 Cal.3d at 510-11, italics added.) There is no question that Plaintiffs "specifically agreed" to the permit's special conditions by signing, notarizing, and recording deed restrictions that "irrevocably covenant" to the conditions, "in consideration of the issuance of the Permit." (JA 24-25, 45-46.) Their agreement, coupled with their acceptance of the permit's benefits by constructing the seawall, satisfies *McDougal*'s "either-or" test for waiver. Plaintiffs are therefore barred from challenging the invalidity of the permit's special conditions.

Recognizing that they need to fashion a novel theory to avoid dismissal of their lawsuit, Plaintiffs claim that they did not have any "actual intention to relinquish" their right to challenge the permit's special conditions when they executed and recorded the deed restrictions. (Reply Br. at p. 3.) Plaintiffs cannot avoid the consequences of their actions by invoking their subjective intent. Although a development approval is not a contract, courts apply the same rules of interpretation to deed restrictions and contracts. (*Costa Serena Owners Coalition v. Costa Serena Architectural Committee* (2009) 175 Cal.App.4th 1175, 1199.) The "principal rule of contract interpretation is to give effect to the parties' intent as expressed in the terms of the contract." (*Regional Steel Corp. v. Liberty Surplus Ins. Corp.* (2014) 226 Cal.App.4th 1377, 1389 .)

The deed restrictions that Plaintiffs signed of their own volition expressly state that Plaintiffs "elected to comply with the Special Conditions, which require, among other things, execution and recordation of this Deed Restriction, so as to enable [them] to

undertake the development authorized by the Permit. . . ." (JA 24-25, 45-46.) Leaving no room for ambiguity, the deed restrictions also expressly state that Plaintiffs, "in consideration of the issuance of the Permit . . . irrevocably covenant with the Commission" that the special conditions would run with the land for the duration of the permit. (*Ibid.*)

It is beyond question that "where 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, Inc.* (1935) 4 Cal.2d 128, 134, italics omitted.) The fact that Plaintiffs "exercised their right of judicial review, while contemporaneously recording the deed restrictions" does not alter the outcome. (Reply Br. at p. 3.) It is Plaintiffs' "expressed objective intent" in the recorded deed restrictions that governs, not any "unexpressed subjective intent" that they claim now in the course of litigation. (See *Roldan v. Callahan & Blaine* (2013) 219 Cal.App.4th 87, 93.)

Furthermore, Plaintiffs' "actual intent" argument cannot be sanctioned. The Court of Appeal correctly admonished Plaintiffs for signing and recording legal documents "purporting to establish covenants running with the land when [they] did not actually intend to establish such covenants." (Opinion at p. 8.) In every contract, there is an implied covenant of good faith and fair dealing that neither party will act in a way to compromise the rights of the other to receive the contract's benefits. (*Lincoln General Ins. Co. v. Access Claims Administrators, Inc.* (E.D.Cal. 2009) 596 F.Supp.2d 1351,

1368.) "The covenant imposes on each party not only the duty to avoid acting in a way that compromises the performance of the contract, but also the duty to do everything that the contract assumes they will do to bring about its purpose." *Ibid.* If Plaintiffs did not intend to restrict their properties in accordance with the special conditions of the permit, they acted in bad faith by executing and recording the deed restrictions, and specifically sought to frustrate the "purpose" of the deed restrictions. Plaintiffs' apparent "subterfuge" cannot be condoned. (Opinion at p. 8.)

Plaintiffs reaffirmed their waiver of the right to challenge their permit's special conditions by proceeding to construct the seawall. As this Court has instructed, "if 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 *Sterling Park, L.P. v. City of Palo Alto* (2013) 57 Cal.4th 1193, 1207 ["Obviously, one cannot build a project now and litigate later how many units the project can contain—or how large each unit can be, or the validity of *other use restrictions a local entity might impose*."], italics added.)

Plaintiffs could have refused to sign the deed restrictions and delayed construction of the seawall while they challenged the validity of the permit's special conditions. But they chose a different course of action, "electing" to build the seawall after the Commission issued the permit in reliance on Plaintiffs' promise to comply with the special conditions. (See *McLain Western #1 v. County of San Diego* (1983) 146 Cal.App.3d 772, 776 [distinguishing between a party who has "no further ability to make an election" as to his course of action, and applicants who have "the ability to elect to

decline the benefits of the permit"].) Plaintiffs cannot have their permit and challenge it, too. Having accepted the permit's benefits, they are foreclosed from asserting the invalidity of its conditions.

B. Creating an "Under Protest" Exception to the General Waiver Rule Would Impair the Important Goals of Finality and Certainty in Governmental Decisionmaking.

The Court of Appeal wisely, and correctly, refused to create a new "under protest" exception to the general waiver rule, which would allow property owners to construct projects while simultaneously challenging their permit's non-fee conditions. Such an exception would swallow the general waiver rule. As the Court of Appeal observed, developers routinely elect to accept conditions they disfavor in order to obtain a permit. (Opinion at pp. 7-8.) The waiver exception that Plaintiffs seek would also impair the critical need for finality and certainty in land use planning. To this end, the legislature has carefully balanced property owners' rights and government's need for a smoothly functioning development approval process. Plaintiffs here want the benefits without the balance.

This Court has emphasized the importance of finality and certainty in government's land use decisions. For example, in *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, the Court concluded that the statutes of limitations for challenging the validity of local land use regulations barred plaintiff's claims that a city ordinance effected an unconstitutional taking of his property. (*Id.* at 21-22.) The Court observed that the "purpose of 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, and actions which challenge the validity of land use statute, regulations, and/or decisions, is to permit and promote sound fiscal planning by state and local governmental entities." (*Id.* at 27.)

More recently, in *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, this Court affirmed that the purpose of a relatively short statute of limitations to challenge local land use decisions is to "provide certainty for property owners and local governments regarding decisions . . . and thus to alleviate the chilling effect on the confidence with which property owners and local governments can proceed with projects. . . . " (*Id.* at 765, citations and internal quotation marks omitted.)[1] The Coastal Act's 60-day statute of limitations to challenge an action of the Commission (Pub. Resources Code section 30801) serves the same purpose as the relatively short statute of limitations at issue in *Hensler* and *Travis*. (See also *Ojavan Investors, Inc. v. California Coastal Commission* (1994) 26 Cal.App.4th 516, 525 ["Once the 60-day statute of limitations has run, the permit issued must be deemed good as against the world."].) To exempt Plaintiffs' actions—specifically agreeing to the special conditions and accepting the benefits of the permit—from the general waiver rule would unquestionably undermine the confidence with which property owners and local governments proceed with development projects.

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[1] See also *Urban Habitat Program v. City of Pleasanton* (2008) 164 Cal.App.4th 1561, 1571 [statutes of limitations are "specifically designed to ensure finality with regard to land use planning decisions."]; *Ching v. San Francisco Board of Permit Appeals* (1998) 60 Cal.App.4th 888, 893 ["any delay in the resolution of local land-use disputes is ultimately reflected in increased costs to the public."]; *McLain Western #1, supra,* 146 Cal.App.3d at 776-77 [local government "requires and is entitled to certainty in its fiscal affairs and budget procedures"].

Additional policy reasons mitigate against the creation of a new "under protest" exception to the general waiver rule. First, such an exception would lead to absurd results, because property owners would be free to accept the benefits of a land use approval, begin construction, and then file an action challenging numerous conditions of their permit. Such uncertainty would throw orderly land use planning into chaos. (See *Pfeiffer, supra,* 69 Cal.App.3rd at 78 [if property owners "could unilaterally decide to comply with [permit conditions] under protest, do the work, and file an action in inverse condemnation . . . complete chaos would result in the administration of this important aspect of municipal affairs"].)

Second, if the special conditions of Plaintiffs' permit are found invalid after the project is built, the Commission may not be able to fashion effective mitigation measures to address the identified impacts on coastal resources and adjacent properties. (See AR 1685 [confirming that the project's "developed mitigation plan covers impacts only through the approved 20-year design life of the seawall"].) Plaintiffs' exception would allow them to retain the benefits of the Commission's approval while limiting or eliminating the essential burdens that the Commission determined were required for consistency with the Coastal Act. (See JA 24-25, 45-46.)

Moreover, as the Court of Appeal correctly concluded, "the need for or desirability of" a new exception to the general waiver rule is "a matter best left for legislative resolution." (Opinion at p. 8.) Indeed, it was the Legislature that decided to create a limited exception to the general waiver rule with the enactment of Senate Bill 2136 in 1984. (See *Sterling Park, supra,* 57 Cal.4th at 1201 [citing *Shapell Industries, Inc. v.*

Governing Board (1991) 1 Cal.App.4th 218, 241].) That exception, now codified in Government Code section 66020, allows a property owner to challenge the validity of conditions imposed on a building permit that divest him of "money or a possessory interest in property, but not restrictions on the manner in which [he] may use [his] property." (*Id.* at 1207.) Notably, that exception is limited to conditions imposed by *local* agencies; it does not apply to conditions imposed by *state* agencies, such as the Commission. (*Ibid.*) It is for the Legislature, rather than the judiciary, to determine if the general waiver rule should be expanded to include challenges to *non-fee* permit conditions. (See *Friends of Shingle Springs Interchange, Inc. v. County of El Dorado* (2011) 200 Cal.App.4th 1470, 1492 [recognizing the "legislative policy underlying the short land use limitations periods" and confirming that "[c]ourts defer to the legislative branch in matters of public policy."].)

C. Plaintiffs Cannot Avoid the Effect of Their Waiver By Invoking the Deed Restriction's Severability Clause.

Plaintiffs contend that they did not waive their right to challenge the permit's special conditions because the deed restrictions that they signed and recorded contained a severability clause that "allows for, and contemplates, a judicial challenge." (Reply Br. at pp. 4-5.) However, a "party to an agreement cannot use the severability clause to remove from the agreement legally valid enforceable language which has [an] effect" that the party does not prefer. (*City of Bell v. Superior Court* (2013) 220 Cal.App.4th 236, 252 fn.17.) The severability clause affords Plaintiffs no escape from the consequences of their waiver.

As noted above, courts apply the same rules in interpreting deed restrictions, contracts, and statutes. (*Costa Serena Owners Coalition, supra,* 175 Cal.App.4th at 1199.) A contract is "not severable, when by its terms, nature, and purpose, it contemplates and intends that each and all of its parts, material provisions, and the consideration, are common each to the other and interdependent." (*Sterling v. Gregory* (1906) 149 Cal. 117, 120; see also *World Savings and Loan Association v. Kurtz Co., Inc.* (1960) 183 Cal.App.2d 319, 327-28 [finding no severability where "the parties intended the entire matter to be single and indivisible"].)

The special conditions and the other requirements and authorizations in Plaintiffs' permit are clearly "interdependent." The Commission specifically concluded 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." (JA 24-25, 45-46.) Accordingly, the deed restrictions and the permit "contemplate[] and intend[] that each and all of its parts," including the conditions, are indivisible and cannot be severed. (*Sterling*, *supra,* 149 Cal. at 120.)

Likewise, a severability clause in a statute will only sustain the valid portion of the enactment if there is also an ability to mechanically sever the invalid portion, and the remainder "is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidity of the statute." (*Palmer/Sixth Street Properties, L.P. v. City of Los Angeles* (2009) 175 Cal.App.4th 1396, 1412 [finding no severability where an ordinance's in lieu fee provision and affordable housing requirements were "inextricably intertwined" and severance would "serve no useful purpose"].) If the Court

were to find that the special conditions of Plaintiffs' permit are invalid, the remainder plainly would not be "complete in itself" nor would the Commission have approved the permit if it had foreseen the invalidity of the special conditions. The special conditions are so "inextricably intertwined" with the permit's approval that severing them would "serve no useful purpose." Accordingly, Plaintiffs' reliance on the deed restrictions' severability clause to avoid the effect of their waiver is unavailing.

II. The Court of Appeal Properly Upheld the Commission's Decision to Approve Plaintiffs' Permit Subject to a Twenty-Year Authorization and Renewal Period.

A. Limiting the Duration of the Permit is Consistent with the Overall Purpose of the Coastal Act and Supported by Substantial Evidence.

The Coastal Act is predicated on the legislative finding that the California coastal zone is "a distinct and valuable natural resource of vital and enduring interest to all the people and exists as a delicately balanced ecosystem." (Pub. Resources Code, § 30001, subd. (a).)[2] Accordingly, "the permanent protection of the state's natural and scenic resources is a paramount concern to present and future residents of the state and nation." (§ 30001, subd. (b).) The Act declares that "it is necessary to protect the ecological balance of the coastal zone and prevent its deterioration and destruction" in order to promote public safety, health, and welfare, and to protect public and private property, wildlife, marine fisheries, other ocean resources, and the natural environment. (§ 30001, subd. (c).)

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[2] Further statutory references in this brief are to the Public Resources Code unless otherwise stated.

Consistent with these legislative findings and coastal zone values, the Act outlines five fundamental goals and objectives:

> (a) Protect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources;
> (b) Assure orderly, balanced utilization and conservation of coastal zone resources taking into account the social and economic needs of the people of the state;
> (c) Maximize 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;
> (d) Assure priority for coastal-dependent and coastal-related development over other development on the coast;
> (e) Encourage state and local initiatives and cooperation in preparing procedures to implement coordinated planning and development for mutually beneficial uses, including educational uses, in the coastal zone.

(§ 30001.5.)

Recognizing that these objectives may on occasion be at odds with one another, the Act requires that any conflicts between its cited goals and policies "be resolved in a manner which on balance is the *most protective of significant coastal resources*." (§ 30007.5, italics added.) Courts "construe the statute liberally in light of its beneficent purposes," acknowledging that the "highest priority must be given to environmental consideration in interpreting the statute." (*Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493, 506.) And the Commission, in its review of permit applications, strives to achieve "a delicate balancing of the effect of each proposed development upon the environment of the coast." (*City of San Diego v. California Coastal Commission* (1981) 119 Cal.App.3d 228, 234.)

In *City of San Diego*, the Commission denied a permit to realign and widen a road adjacent to a lagoon that constituted one of the "highest priority wetlands" in the state.

(*Id.* at 231-32, 234.) The agency had determined that the proposed project was not in conformity with the Act, as it would have significant adverse impacts on one of the last natural coastal wetlands, which was "unique and especially sensitive," and feasible alternatives existed that would improve coastal access without negatively affecting coastal wetlands or endangered species. (*Id.* at 231-34.) Affirming the Commission's denial of the permit, the court of appeal acknowledged that the agency had selected a course of action in keeping with section 30007.5's directive, since it had "delicately balanced the competing interests of the protection of a significant natural resource and the resolution of a road safety problem," which could be mitigated without harming the lagoon. (*Id.* at 234.) The Commission had also "succeeded in balancing the conflicting goals of preserving natural resources while maximizing access to the coast consistent with the needs of the public." (*Id.* at 235.)

Here, the Commission's decision to approve Plaintiffs' permit subject to a twenty-year authorization and renewal process similarly reflects a balancing of the Act's goals in a manner that is "most protective of significant coastal resources." (§ 30007.5.) According to the Commission's findings, a seawall is necessary to protect Lynch's home, but natural shoreline processes, "such as the formation and retention of sandy beaches, can be significantly altered by construction of a seawall, since bluff retreat is one of several ways that beach area and beach quality sand is added to the shoreline." (AR 1702.) To balance these competing interests, the proposed development was specifically "designed and conditioned to mitigate its impact on coastal resources such as scenic quality, geologic concerns, and shoreline sand supply." (AR 1679.) The Commission

selected a course of action that prioritizes coastal resource concerns, seeking, for example, to prevent "long-term loss of beach," as well as losses in recreational use and value that result from the loss of available shoreline area. (AR 1702, 1708.)

The Commission also strove to balance the competing interests of Plaintiffs and neighboring property owners. According to its findings, the proposed seawall, which is located in a "significantly high-hazard area," could have "adverse impacts on adjacent unprotected properties caused by wave reflection, which leads to accelerated erosion." (AR 1709-10.) The Commission noted that "[n]umerous studies have indicated that when continuous protection is not provided, unprotected adjacent properties experience a greater retreat rate than would occur if the protective device were not present." (AR 1709.) The twenty-year authorization and renewal process respects the property interests of Plaintiffs as well as their neighbors, because it allows the Commission to revisit its approval of the permit in twenty years, to see if adjacent properties have been affected by "likely" bluff erosion and collapses that could "spill over." (*Ibid.*)

The Commission's decision is also consistent with the Act's directive that the "permanent protection of the state's natural and scenic resources" is a "paramount concern." (§ 30001, subd. (b).) The Commission noted that seawalls "directly impede[]" the natural processes of beach formation, and the quantifiable effects include the "long-term loss of beach." (AR 1702.) It also acknowledged the uncertainty inherent in current projections of sea level rise. (AR 1710 ["Of course it is possible that physical circumstances [in twenty years] . . . are significantly unchanged from today, but it is perhaps more likely that the baseline context for considering armoring will be different—

much as the Commission's direction on armoring has changed over the past twenty years as more information and better understanding has been gained regarding such projects, including their effect on the California coastline."].)

Authorizing Plaintiffs' project for a twenty-year period, subject to renewal, "ensure[s] that this project does not prejudice future shoreline planning options, including with respect to changing and uncertain circumstances that may ultimately change policy and other coastal development decisions." (AR 1709.) The permit's special conditions allow the Commission to reassess the seawall and its effects with the passage of time, as understanding about climate change and sea level rise "should improve in the future," and such an "improved understanding will almost certainly affect [coastal development permit] armoring decisions, including at this location." (AR 1710; see also AR 1716 [predicting that the seawall would have no effects on beach access for twenty years, but that "at the end of the authorized 20 year period, the beach conditions and mean high tide elevation should be re-evaluated to determine if this condition has changed."].) The conditions afford the Commission the flexibility necessary to ensure "permanent protection" of the shoreline and coastal zone environment's resources.

The administrative record thus amply demonstrates that substantial evidence supports the Commission's decision to impose a durational limit on Plaintiff's permit. The Commission considered the relevant factors—the need for the seawall, the necessary mitigation, effects on public access, and possible changes in coastal conditions—based on the available evidence. It also considered the purposes of the enabling statute and demonstrated that its chosen course of action was rationally related to those factors and

purposes. Accordingly, Plaintiffs' challenge to the Commission's decision must fail. (See *Kirkorowicz v. California Coastal Commission* (2000) 83 Cal.App.4th 980, 986 [confirming that "it is for the Commission to weigh the preponderance of conflicting evidence," and courts "may reverse its decision only if, based on the evidence before it, a reasonable person could not have reached the conclusion reached by it"].)

B. The Commission Has Authority to Impose Durational Permit Conditions.

Contrary to Plaintiffs' assertions, the Commission acted well within its authority when it approved the permit subject to a twenty-year authorization and renewal period. As the Court of Appeal affirmed in *Ocean Harbor House Homeowners Association v. California Coastal Commission* (2008) 163 Cal.App.4th 215, the Act grants the Commission broad discretion to impose permit conditions to mitigate the impacts of proposed development, and there is no statutory language that purports to limit that discretion. (*Id.* at 241.) Section 30607 of the Act, for example, broadly states that any coastal development permit issued "shall be subject to reasonable terms and conditions . . . to ensure that [the permitted action] will be in accordance with the provisions of this division." (§ 30607.) And section 30009 provides that the Act "shall be liberally construed to accomplish its purposes and objectives." (§ 30009.) "[H]ad it been the Legislature's intent to limit permit conditions, one would reasonably have expected direct or express limiting language—e.g., seawalls shall be permitted and the Commission may only impose conditions that mitigate sand loss; or seawalls shall be permitted, and the

Commission may not impose any conditions other than those that mitigate sand loss." (*Ocean Harbor*, *supra,* 163 Cal.App.4th at 241, italics omitted.)

Moreover, courts consistently recognize that "the Commission has a general mandate to implement the Coastal Act to preserve and protect the California coast and thus has broad administrative responsibility to regulate coastal development by enforcing applicable laws and regulations and imposing conditions on development permits." (*Feduniak v. California Coastal Commission* (2007) 148 Cal.App.4th 1346, 1363.) There is "nothing in the Coastal Act or in any other statute, regulation, or legal opinion" that would limit or prohibit the Commission from conditionally approving Plaintiffs' seawall subject to a twenty-year authorization and renewal process. (See *La Costa Beach Homeowners' Association v. California Coastal Commission* (2002) 101 Cal.App.4th 804, 816-817 [rejecting challenge to mitigation condition imposed on development permit].)

The Commission's durational permit condition is not novel. The Court of Appeal in *Barrie v. California Coastal Commission* (1987) 196 Cal.App.3d 8 affirmed the Commission's authority to condition the permit for a permanent seawall to require that homeowners reconstruct and relocate the temporary seawall they had built on a public beach. The temporary seawall was constructed pursuant to a 150-day emergency permit that acknowledged the likelihood of relocation. (*Id.* at 12-13.) In finding for the Commission, the court cited the Act's requirement that the Commission resolve any conflict between the statute's different policies "in a manner which on balance is the most protective of significant coastal resources." (*Id.* at 17 [citing § 30007.5].) The court

concluded that the Commission had the authority to "weigh[] the need to protect the public beach against the Homeowners' need to protect their homes." (*Id.* at 21.) And 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." (*Id.* at 21-22.) The Commission exercised the same broad discretion when it approved Plaintiffs' permit subject to a twenty-year authorization and renewal process, accommodating both Plaintiffs' and adjacent property owners' need to protect their homes and the Act's "paramount concern"—the protection of significant coastal resources.

The court in *Barrie* also affirmed that there is "nothing improper about the Commission basing its findings on probabilities," as that is "inherent in decision-making involving protective structures." (*Id.* at 21.) The opinion recognized that the Commission's findings—i.e., seawalls "cause beach erosion and sand loss"—were "not based merely on speculation but on numerous well-documented reports," and they were "not based on a mere possibility of beach erosion, but on a strong probability as documented in numerous studies." (*Ibid.*) Likewise, the Commission's findings here—i.e. a "twenty-year period better responds to [] potential changes and uncertainties," particularly with respect to climate change and sea level rise—are based on real science and strong probabilities, documented in numerous studies. (AR 1710; see *infra* Part II.C.) The Coastal Act not only authorized, but required the Commission to respond to these concerns in approving Plaintiffs' coastal development application.

C. The Durational Authorization Condition Is an Appropriate Response to the Uncertainty Associated with Sea Level Rise.

Climate change presents public agencies with complex challenges made more difficult by uncertainty surrounding when and how its impacts will arise. To address this uncertainty, agencies have adopted flexible policies that allow them to adjust to changing conditions. The durational permit condition and reauthorization process at issue here is one such policy. Like other flexible responses, the condition prevents the Coastal Commission from irreversibly committing to a course of action that may ultimately fail to implement the Commission's statutorily mandated goals. Instead, the condition allows the Commission to respond to inevitable changes in coastal circumstances. The condition is not only legally permissible, it is good policy.

1. Public Agencies Must Exercise Their Broad Authority to Address the Effects of Climate Change.

Policymakers' ability to craft solutions to difficult and novel challenges is supported by government's "broad and flexible power to promote the public welfare." (*Richeson v. Helal* (2007) 158 Cal.App.4th 268, 277.) This power expands to deal with new problems and does not fade in the face of uncertainty. (See *ibid.* ["A city's police power 'is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life, and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race.'" (quoting *Miller v. Board of Public Works* (1925) 195 Cal. 477, 485)].)

Faced with uncertain circumstances, public agencies are not required to predict the future with exact precision, but may instead act based on currently available information. See, e.g., *Alliance of Small Emitters v. South Coast Air Quality Management Dist.* (1997) 60 Cal.App.4th 55, 63-65 [analysis of proposed cap-and-trade system may rely on incomplete available data: "It would be impossible to devise a long-range air pollution control program if [its] legality . . . depended upon the ability to make precise assessments of . . . data . . . which are not yet available."].) The substantial evidence standard of review reinforces this ability by deferring to agencies' rational decisions based on adequate consideration of available evidence. (See *Sonoma County Water Coalition v. Sonoma County Water Agency* (2010) 189 Cal.App.4th 33, 40-41 [the court's role is not to second-guess agency decisions, but to "ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." (quoting *Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559, 577, internal quotation marks omitted)].)

Climate change is one of the most serious threats facing California. Its potential impacts include increased air quality problems, reduced water supply, damage to sensitive ecosystems, increases in infectious diseases and heat-related mortality, and sea level rise that threatens to displace coastal communities and permanently alter the shoreline. (See Cal. Health & Saf. Code, § 38501.) California's economy is uniquely vulnerable due to the state's many climate-dependent sectors, including agriculture, viniculture, tourism, fishing, and forestry. *Ibid.*

California is already feeling the effects of climate change, and matters are only expected to get worse. (Cal. Air Resources Bd., *First Update to the Climate Change Scoping Plan* (2014) at ES5.) Results of the changing climate are visible on the state's beaches, where seas have swelled six inches or more since 1900. (*Id.* at p. 11.) And due to warming temperatures, ice sheets and glaciers have been melting at alarming rates, hastening the ocean's advance along our Pacific coast. (*Id.* at p. 9.) These trends are expected to continue. (*Id.* ["[c]urrent glacier extents are out of balance with current climatic conditions, indicating that glaciers, ice sheets, and sea ice will continue to shrink in the future even without further temperature increases"].)

Despite scientific consensus that sea levels will continue to rise, the timing and magnitude of climate change impacts is subject to vast uncertainty. Not only are complex natural systems challenging to model, but the human factors that affect those systems are difficult to predict. For example, the Intergovernmental Panel on Climate Change (IPCC) uses four different scenarios to develop its projections of future greenhouse gas emissions and resulting climatic changes. (Pachauri et al., IPCC, *Climate Change 2014 Synthesis Report: Summary for Policymakers* (2015) at p. 8.) These scenarios range from one in which the international community robustly mitigates greenhouse gas emissions to one in which emissions continue unabated. (*Ibid.*) Though scientists can estimate how each scenario will affect sea level rise with varying degrees of confidence, the IPCC does not predict which scenario is most likely. As a result, policymakers are left with a wide range of possible outcomes. For example, by 2100, global sea level could increase as little as

.26 meters or as much as .82 meters, and global glacial coverage could decrease as little as 15 percent or as much as 85 percent. (*Id.* at pp.12, 13.)

In the United States, sea level rise estimates differ widely from state to state. The only consistent trends across states are that sea level rise will accelerate and that even the best estimates are uncertain. For example, Rhode Island estimates that the sea level at Newport will increase 36-60 inches by 2100.[3] In contrast, North Carolina predicts slower change, with increases of 1.9-2.8 inches at Southport and 4.4-6.4 inches at Duck by 2045.[4]

As with its sister states, California is facing certain sea level rise at uncertain rates. Recent estimates of sea level rise along the California coast predict an increase of 4-56 inches for areas north of Cape Mendocino and 17-66 inches for areas south of Cape Mendocino by 2100. (California Coastal Commission, California Coastal Commission Sea Level Rise Policy Guidance: Recommended Final Draft (July 31, 2015) p. 12.) Over forty inches separate the high and low estimates. To put this gap in context, 54 inches of sea level rise could result in the disappearance of 41 square miles of coastal land from Oregon to Santa Barbara. (*Id.* at p. 50.)

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[3] James Boyd, R.I. Coastal Resources Management Council, CRMC Climate Change Adaptation Actions http://www.crmc.ri.gov/news/2013_0201_climate.html [as of April 27, 2015].

[4] N.C. Coastal Resources Commission, North Carolina Sea Level Rise Assessment Report (draft) (Mar. 31, 2015) http://www.nccoastalmanagement.net/web/cm/sea-level-rise-study-update [as of July 1, 2015] p. iv.

2. The Uncertainty Associated With Sea Level Rise Demands a Dynamic, Flexible Response By Agency Decisionmakers.

A problem like climate change, fraught with a high degree of uncertainty, calls for a flexible response. Considering the severe consequences that could result from maintaining the status quo, inaction is not an option. At the same time, the action chosen may not achieve the desired result.

Policymakers can manage these risks by adopting flexible, short-term responses that allow them to adapt to changing circumstances. Such solutions minimize the chances of decision-makers committing to a path that will ultimately work against their goals. (Miller, *Grappling With Uncertainty: Water Planning and Policy in a Changing Climate* (2010) 5 Envtl. & Energy L. & Pol'y J. 395, 411.) By employing near- or mid-term solutions, policies can evolve as conditions change. (See, e.g., *Alliance of Small Emitters*, *supra,* 60 Cal.App.4th at 65 [describing a program allowing for "mid-course corrections" as "a more sensible way of devising and managing a long-range plan than requiring impossibly precise predictions of the future at the outset"].)

In the face of the coast's uncertain fate, the Coastal Commission has shifted toward a more flexible set of coastal protection strategies that will allow it to adapt to changing circumstances. The Commission's draft sea level rise policy guidance makes this shift explicit, stating that, for certain projects, "strategies will need to be implemented incrementally as conditions change, and planners . . . will need to think creatively and adaptively to ensure that coastal resources and development are protected

over time." (California Coastal Commission, California Coastal Commission Sea Level Rise Policy Guidance: Recommended Final Draft (July 31, 2015) p. 20.)

The twenty-year condition and renewal process is part of this shift. It enables the Coastal Commission to adapt to changing circumstances and new information. Rather than committing a section of the coast to one strategy—in perpetuity—that may ultimately frustrate the Commission's attempts to implement its goals, the permit condition and renewal process allow the Coastal Commission to tailor its policies to future realities, so that the agency's response more accurately addresses the conditions that ultimately arise. For example, increased erosion flanking the seawall and the gradual disappearance of the beach in front of it—changes directly attributable to the seawall itself—may require new mitigation in twenty years. The Commission acknowledged this possibility when issuing the twenty-year condition. (See AR 1711, 1716 [explaining that new mitigation for public access and recreational use impacts may be necessary if conditions change in twenty years].)

The durational permit condition gives the Commission the flexibility to address future conditions. If conditions do not change, the Commission does not need to order any additional mitigation and can even choose to extend the seawall's authorization period. (Cf. *Richeson*, *supra,* 158 Cal.App.4th at 278 [describing a City's ability to extend a permit despite the permit's termination date].) However, if erosion rates accelerate, the Commission may order new mitigation or a change in the seawall's size or configuration. The durational permit condition allows the Commission the flexibility to address changed physical circumstances, whatever they may be.

3. Coastal States Are Adopting Flexible Shoreline Protection Strategies to Address Sea Level Rise.

California is not alone in responding to the threat of sea level rise by adopting flexible responses to protect its coastline. Though shoreline protection strategies vary, there has been a general movement toward more flexible solutions.

States have acknowledged that their decisions must evolve as conditions and the state of current science change. Hawai'i, for example, recognized that beach renourishment is not a permanent solution, and that planning for the failure of its renourished beaches must occur in parallel with restoration projects.[5] South Carolina adjusts its beach setback line every eight to ten years to account for changes in the coastline.[6] And New York City has decided to implement its comprehensive coastal protection plan gradually, to allow for course corrections based on changing circumstances: "[I]n many cases, it may make sense to monitor the actual rising sea levels before making some of the aforementioned investments where associated risks may not be felt for several decades." N.Y.C. Special Initiative for Rebuilding & Resiliency, PlaNYC: A Stronger, More Resilient New York (2013) at 57.

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[5] Hawai'i Department of Land & Natural Resources, Hawai'i Coastal Erosion Management Plan http://www.dlnr.hawaii.gov/occl/coastal-lands/ [as of July 1, 2015] p. 8.

[6] S.C. Department of Health & Environmental Control, Shoreline Change Advisory Comm., Adapting to Shoreline Change: A Foundation for Improved Management and Planning in South Carolina (Apr. 2010) http://www.scdhec.gov/homeandenvironment/water/coastalmanagement/beachmanagement/beachfrontmanagement/ [as of July 1, 2015] p. 36.

The Hawaii Supreme Court's decision in *Morgan v. Planning Dept., County of Kauai* (2004) 86 P.3d 982 recognizes that public agencies cannot fulfill their mandate if they do not have the ability to respond to the unexpected impacts of climate change. In that case, the Planning Commission permitted construction of a revetment in the early 1980s, but only learned of the environmental damage it caused to neighboring beaches years later. (*Id.* at 985.) Responding to this new information, the Planning Commission ordered modifications to the revetment. (*Id.* at 986.) The circuit court ruled for the property owner, finding that the Planning Commission lacked authority to re-open the permit. (*Ibid.*) The Hawai'i Supreme Court reversed, holding that since the Planning Commission "could not [at the time it issued the permit] . . . make proper provisions for conditions which might arise in the future," it "must possess the inherent power to reconsider a validly issued [coastal] permit" to fulfill its statutory responsibility to protect the coast. (*Id.* at 992-93; see also *Meridian Ocean Sys., Inc. v. California State Lands Commission* (1990) 222 Cal.App.3d 153, 165 ["Inherent in the Commission's power to issue permits is the ability to re-evaluate the conditions surrounding their issuance as warranted by changing circumstances."].)

The Coastal Commission's durational permit condition is a responsible and rational response to the significant threat that climate change poses to California's coast and to Plaintiffs' neighboring properties. Climate change is a reality. There is no question that sea level will rise; the only question is how high. Considering the vast differences in potential outcomes projected by scientists, states have chosen flexible strategies that will

allow them to re-assess and adapt once conditions have changed. These policies will help to avoid the mistakes that have led to the disappearance of too many sandy beaches.

III. The Durational Permit Condition Does Not Violate the Takings Clause.

A. Plaintiffs' Takings Claim is Not Ripe.

Plaintiffs contend that the durational permit condition constitutes a regulatory taking of their property (Opening Br. at pp. 29-34; Reply Br. at pp. 24-27), but all of their arguments fail because their claim is not ripe for judicial review. In *Williamson County Regional Planning Commission v. Hamilton Bank* (1985) 473 U.S. 172, the U.S. Supreme Court established a two-part ripeness requirement for regulatory takings. First, a claim that the application of government regulations constitutes a taking is not ripe until the agency has reached a final decision as to how those regulations will be applied to the property at issue. (*Id.* at 186-94.) Second, if the government has provided an adequate process for obtaining just compensation, an aggrieved property owner cannot bring a takings claim until it has used that procedure and been denied just compensation. (*Id.* 184-197.)

The Ninth Circuit has interpreted the final decision requirement to preclude a takings claim unless the government agency has denied at least one meaningful application for development and one application for a variance. (See *Kinzli v. City of Santa Cruz* (9th Cir. 1987) 818 F.2d 1449, opn. mod., 830 F.2d 968, cert. den., (1988) 484 U.S. 1043; see also *Carson Harbor Village Ltd. v. City of Carson* (9th Cir. 1994) 37 F.3d 468, 474-75, overruled on other grounds in *WMX Technologies, Inc. v. Miller* (9th Cir. 1997) 104 F.3d 1133, 1136.) As the Ninth Circuit has explained, to adjudicate an as-

applied takings claim in the absence of a rejected development application would require courts "to guess" what possible proposals a landowner might have filed and how the government entity "might have responded to those imaginary applications." (*Southern Pacific Transportation Co. v. City of Los Angeles* (9th Cir. 1990) 922 F.2d 498, 504, cert. den. (1991), 502 U.S. 943.)

Plaintiffs here are doing just that: asking the Court *to guess* how the Commission might respond to their future application to amend their coastal development permit. Plaintiffs' seawall is currently approved for a twenty-year period (i.e. until August 10, 2031). Special Condition 3 provides that prior to the end of that twenty-year period, Plaintiff shall submit an application for a permit amendment "to either remove the seawall in its entirety, change or reduce its size or configuration, or extend the length of time the seawall is authorized." (AR 1682-83; see also AR 1711.) "Provided a complete application is received before the 20-year permit expiration, the expiration date shall be automatically extended until the time the Commission acts on the application." (AR 1683.) The Commission's durational permit condition "allow[s] for an appropriate reassessment of continued armoring and its effects at that time in light of what may be differing circumstances than are present today," but it simultaneously acknowledges the possibility that "physical circumstances as well as local and/or statewide policies and priorities regarding shorelines armoring [will be] significantly unchanged from today." (AR 1710.)

Any consideration of Plaintiffs' takings claim before they have submitted and the Commission has responded to a permit amendment would be based on pure speculation,

and it is "precisely this type of speculation that the ripeness doctrine is intended to avoid." (*Southern Pacific Transportation Co., supra,* 922 F.2d at 504, citing *Kinzli, supra,* 818 F.2d at 1454.) If, in twenty years, the Commission does improperly reject Plaintiffs' application for a permit amendment, Plaintiffs may challenge the Commission's decision. Until that time, Plaintiffs' takings claim is not ripe.

B. The Unconstitutional Conditions Doctrine Does Not Apply to the Durational Permit Condition.

Plaintiffs argue that the twenty-year authorization period is an unconstitutional condition because it requires them to surrender their constitutional right to protect their property. (Reply Br. at p. 24.) This argument is incorrect for two reasons: (1) the Commission's action does not require Plaintiffs to surrender a Constitutional right; and (2) the unconstitutional conditions doctrine does not encompass Plaintiffs' claims.

First, the right to the protection of property in the California Constitution, which does not exist in the United States Constitution, "is not the equivalent of a vested right to protect property in a particular manner where the method chosen is one that is regulated by government . . . ." (*Whaler's Village Club v. California Coastal Commission* (1985) 173 Cal.App.3d 240, 252-53, abrogated on other grounds by *Nollan v. California Coastal Commission* (1987) 483 U.S. 825.)[7] Indeed, "[t]here is no constitutional right to own property free from regulation." (*Id.* at 253 [holding that homeowner did not have a fundamental right to protect her property by building a revetment].)

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[7] Though *Whaler's Village Club* goes on to explain that a vested right can result from prior governmental approval, the present case is distinguishable in that the authorization period here was expressly limited.

Plaintiffs have no Constitutional right to construct a seawall to protect their property. The Coastal Commission regulates the construction of seawalls, conditioning permits as necessary to mitigate their impacts. Moreover, the durational condition does not require Plaintiffs to stop protecting their property. The seawall is permitted for twenty years; thereafter the permit does not automatically disappear. (AR 1683.) Plaintiffs must apply to amend their permit, whether it is to extend the permit term, to remove the seawall, or to change or reduce the seawall's size or configuration. (*Ibid.*) If Plaintiffs submit a complete application to amend before the twenty-year period concludes, the Commission will *automatically* extend and maintain the seawall's authorization until the time that it acts on the application. (*Ibid.*) Any assumptions about the Commission's action on that *future* application are purely speculative and any related claims are not ripe.

Second, this Court issued an opinion earlier this summer that left no question that the unconstitutional conditions doctrine does not apply to the Commission's twenty-year permit condition. *California Building Industry Association v. City of San Jose* (2015) 61 Cal.4th 435, 494 reaffirms that the unconstitutional conditions doctrine applies only where the government demands "the conveyance of some identifiable property interest (a dedication of property or the payment of money) as a condition of approval." This Court held that San Jose's inclusionary zoning ordinance was only a restriction on the use of property, not an exaction of a property interest. (*Id.* at 491-92.) As such, it was distinguishable from the permit conditions in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, *Dolan v. City of Tigard* (1994) 512 U.S. 374, and *Koontz v. St.*

John's River Water Management District (2013) 133 S.Ct. 2586, where the government conditioned permits on dedications of land to the public or payment of a monetary fee.

Here too, the durational permit condition does not constitute an exaction. Rather than requiring Plaintiffs to "convey some identifiable property interest," the condition merely restricts their use of their properties by stating that, in twenty years, they must re-apply for a coastal development permit for the seawall.[8]

Plaintiffs further contend that the permit condition here must satisfy the nexus and "rough proportionality" standard. (Reply Br. at p. 26.) But the *California Building Industry Association* decision also foreclosed this argument: "[W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use." *California Building Industry Association*, *supra*, 61 Cal.4th at 495, quoting *Monterey v. Del Monte Dunes at Monterey, Ltd.* (1999) 526 U.S. 687, 702.) The condition here is a restriction on the use of property, not an exaction of a property interest or monetary payment. The rough proportionality standard does not apply.

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[8] The Commission's special condition, though recorded as a deed restriction, is not an exaction akin to the purchase option at issue in *Sterling Park v. City of Palo Alto*. It is not "a sufficiently strong interest in the property to require compensation if the government takes it in eminent domain." (See *California Building Industry Association*, *supra*, 61 Cal.4th at 513, quoting *Sterling Park, supra,* 57 Cal.4th at 1207.) Rather, the condition is a classic land use restriction.

IV. Encinitas' Local Coastal Program and Zoning Code Bar Reconstruction of Plaintiffs' Stairway.

Severe winter storms in 2010 caused the lower portion of Plaintiffs' beach access stairway to collapse, after the City of Encinitas ("City") had already issued a major use permit for a new seawall system. As a result of the storm damage, Plaintiffs modified their application for a coastal development permit to strengthen and expand the seawall, without reapplying for City approval. The modified application also proposed reconstruction of the stairway, to replace the storm-damaged lower portion.

The court below upheld the Commission's refusal to grant a permit for the stairway reconstruction, finding that it was inconsistent with the City's local coastal program, including general plan policies to prohibit new private beach access over the bluffs and to "phase out private access to the beach over the bluffs." (Encinitas General Plan, Circulation Element, Policy 6.7.) The City's general plan also prohibited the permitting of private stairways. (Encinitas General Plan, Public Safety Element, Policy 1.6.) Plaintiffs argue these provisions do not apply to replacement structures or storm damage. (Opening Br. at pp. 37-38; Reply Br. at pp. 27-28.)

Amici agree that reconstruction of a private beach access stairway on the bluff adjoining plaintiffs' property is inconsistent with the City's local coastal program, including its general plan policies. An alternative basis for upholding the permit condition requiring Plaintiffs to remove the lower stairway is that the stairway was a legal non-conforming use under the City's Zoning Code. Once it was destroyed, both public policy and the plain language of the City's non-conforming use ordinance prohibit

reconstruction to provide continued private beach access. The purpose of the ordinance is to accomplish the "eventual elimination of nonconforming uses and structural nonconformities," including those made nonconforming by the general plan and zoning. (Encinitas Mun. Code, § 30.76.010, subd. A.)

As this Court has recognized, "[t]he policy of the law is for elimination of nonconforming uses, and generally there can be no resumption of a nonconforming use which has been relinquished." (*City of Los Angeles v. Wolfe* (1971) 6 Cal.3d 326, 337.) "'The object of such provision is the gradual elimination of the nonconforming use by obsolescence or destruction by fire or the elements, and it has been frequently upheld by the courts.'" (*San Diego County v. McClurken* (1951) 37 Cal.2d 683, 686, quoting *Rehfeld v. City & County of San Francisco* (1933) 218 Cal. 83, 84.) "Given the objective of zoning to eliminate nonconforming uses, courts throughout the country generally follow a strict policy against their extension or enlargement." (*Id.* at 687, fn. omitted.)

The City's coastal bluff overlay zone sets forth "development standards" prohibiting all improvements within forty (sometimes twenty-five) feet of a bluff edge and any new private beach access facilities on the face of a coastal bluff. (Encinitas Mun. Code, §§ 30.34.020, subd. B.1. and 2.) As an exception to the general prohibition, existing legal structures on the face of a bluff "may remain unchanged," and routine maintenance is allowed. (*Id.* at § 30.34.020, subd. B.4.) Private beach access facilities violate both the use and structural provisions of the development standards in the coastal bluff overlay zone; they are not permitted uses anywhere in the zone, and they violate setback requirements from the bluff face.

Once the beach access stairway was substantially destroyed, the City's nonconformities ordinance prevented issuance of a building permit for a replacement structure, regardless of whether a coastal development permit was required. (*Id.* at § 30.76.070, subd. B.) In fact, the exemptions from coastal development permits cited by plaintiffs do not apply to uses or structures that are inconsistent with the City's zoning ordinance. Specifically, exemptions granted to disaster reconstruction do not apply to any projects subject to the coastal bluff ordinance or projects that do not conform with the City's zoning and development standards. (*Id.* at § 30.80.050.)

The City's nonconformities provisions are not in conflict with the disaster reconstruction provisions of the Coastal Act; they implement it. Nonconforming use ordinances are the primary method by which cities phase out development that was legal when built, but no longer complies with current plans and policies. (See *Consolidated Rock Products Co. v. City of Los Angeles* (1962) 57 Cal.2d 515, 535 ["The adoption of a comprehensive plan of community development looking toward the containment and eventual elimination of non-conforming uses . . . accords with recognized zoning objectives under settled legal principles."].) By requiring that disaster-destroyed replacement structures comply with existing zoning requirements, the Coastal Act recognizes that coastal development standards cannot be frozen in time, any more than the natural processes they address.

CONCLUSION

For the foregoing reasons, the American Planning Association and the American Planning Association California Chapter respectfully request that this Court find that Plaintiffs waived their right to challenge the validity of the special conditions that the Commission imposed on their permit to construct a seawall in front of their coastal properties. In addition, amici urge the Court to hold that the Commission acted within its authority in limiting the duration of Plaintiffs' permit and in prohibiting them from reconstructing their private beach access stairway. Finally, this Court should reject Plaintiffs' claim that their permit's twenty-year authorization effected a taking of their properties.

DATED: August 7, 2015

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CERTIFICATE OF WORD COUNT
(California Rules of Court 8.504(d)(1))

I hereby certify that the text of this [Proposed] Brief of Amici Curiae consists of 9,799 words, not including tables of contents and authorities, signature block, and this certificate of word count as counted by Microsoft Word, the computer program used to prepare this brief.

DATED: August 7, 2015

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PROOF OF SERVICE

Barbara Lynch and Thomas Frick v. California Coastal Commission
Case No. S221980
California Supreme Court

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the City and County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, CA 94102.

On August 7, 2015, I served true copies of the following document(s) described as:

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT AND APPELLANT CALIFORNIA COASTAL COMMISSION AND [PROPOSED] BRIEF OF AMICI CURIAE AMERICAN PLANNING ASSOCIATION AND AMERICAN PLANNING ASSOCIATION CALIFORNIA CHAPTER

on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Shute, Mihaly & Weinberger LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on August 7, 2015, at San Francisco, California.

_____
Sean P. Mulligan

SERVICE LIST
Barbara Lynch and Thomas Frick v. California Coastal Commission
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