

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE Central Justice Center 700 W. Civic Center Drive Santa Ana, CA 92702	
SHORT TITLE: Capistrano Shores Property LLC vs. California Coastal Commission	
CLERK'S CERTIFICATE OF MAILING/ELECTRONIC SERVICE	CASE NUMBER: 30-2015-00785032-CU-WM-CJC

I certify that I am not a party to this cause. I certify that a true copy of the above Minutes finalized for Under Submission Ruling 08/22/2016 dated 08/23/16 has been placed for collection and mailing so as to cause it to be mailed in a sealed envelope with postage fully prepaid pursuant to standard court practice and addressed as indicated below. This certification occurred at Santa Ana, California on 8/24/16. Following standard court practice the mailing will occur at Santa Ana, California on 8/24/16.

LAWRENCE G. SALZMAN
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Clerk of the Court, by: KathuPenza, Deputy

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CLERK'S CERTIFICATE OF MAILING/ELECTRONIC SERVICE

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER**

MINUTE ORDER

DATE: 08/22/2016

TIME: 09:33:00 AM

DEPT: C18

JUDICIAL OFFICER PRESIDING: Theodore Howard

CLERK: Kathy Peraza

REPORTER/ERM: None

BAILIFF/COURT ATTENDANT:

CASE NO: **30-2015-00785032-CU-WM-CJC** CASE INIT.DATE: 04/29/2015

CASE TITLE: **Capistrano Shores Property LLC vs. California Coastal Commission**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

EVENT ID/DOCUMENT ID: 72431722

EVENT TYPE: Under Submission Ruling

APPEARANCES

There are no appearances by any party.

The Court, having taken Petitioner's Petition for Writ of Mandate and Petitioner's Motion for Judgment on Verified Petition for Writ of Mandate under submission on 8/18/2016 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

**Capistrano Shores Property, LLC vs. California Coastal Commission
Memorandum of Intended Decision**

A. BACKGROUND

Capistrano Shores Property, LLC (hereinafter "CSP") on 4/29/15 filed its Petition for Writ of Mandate and other relief. CSP is a member of Capistrano Shores, Inc. (hereinafter "CSI" and not to be confused with CSP) which owns the mobile home park at 1880 N. El Camino Real, San Clemente. CSP is a member of the CSI and this entitles it to lease one space, Space #12, at the property under an Occupancy Agreement. Petitioner does not own the space, the CSI does. CSP's lease is dated 2007, with a 99-year term and renewals thereafter.

This park was built about 1960 and consists of some 90 spaces located between the former Southern Pacific rail line and the beach. Separating the coach spaces and the beach is a rocky seawall (also referred to in the record as "revetment"), apparently built the same time as the park and belonging to CSI which is responsible for its maintenance (rather than the space lessee, here CSP).

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As noted, CSI owns the entire park. The seawall creates protection of the park homes, from the beach/ocean below, and protects the property somewhat from the waves and water. [See Photo in the Administrative Record (hereinafter, "A/R") p. 53 and p. 429]. The seawall has been in place since, before the Coastal Act was enacted (according to the A/R p. 460). Also, the beach that is in front of the revetment, is partly owned by the community and partly public beach (the boundary is at the mean high tide line). Public access to the beach is about a half mile south. This is a fairly narrow beach area. At high tide, the water comes all the way up to the seawall and can overflow from time to time but homes are built on foundations and water can go under. (A/R pp. 110, and 460.)

CSP sought replace its old mobile home at its leased space in the park in 2014, with a new mobile home that it bought (and a smaller one, at that). But placing a structure on the California Coast constitutes "development", so CSP applied to the Coastal Commission for a waiver of a coastal permit, under *Pub Res. Code* § 30624.7 (based on a *de minimis* project that will not have potential adverse impact on coastal resources). In the past, the Commission had apparently approved two similar waivers of permits, for two lessees, who were replacing their mobile homes inside the park, in 2008. But when Petitioner sought the waiver (things change, sea levels have risen), the Commission denied the waiver. It appears that CSP is not at this point challenging the denial of a waiver of a permit.

This means that Petitioner needed to apply for a coastal "development" permit per *Pub Res. Code* sec. 30106 (hereinafter referred to as "PRC") Petitioner did this in 2015. The Commission's staff issued a Report and later an Addendum, indicating that the Commission would *conditionally* approve a permit for changing out the mobile homes, subject to certain "Special Conditions." There were a number of Special Conditions, but we are here involved only in a consideration of Special Condition 3. There is one particular portion of it that Petitioner disputes (not the entirety of it) which is the following:

By acceptance of this Permit, the applicant waives, on behalf of himself and all successors and assigns of Unit Space #12, any rights to shoreline protection that may exist under Public Resources Code Section 30235 to protect the proposed new mobile home on Unit Space #12.[A/R p.457]

It appears the Coastal Commission is concerned that the seawall that protects the entire park is going to require expansion in the future, based on rising sea levels, and that such an expansion could diminish the small beach there if the expansion is seaward, and diminish the sand available for the public beach. So in anticipation of this future event, the Commission is essentially trying to have the individual mobile home owners and space lessees give up any rights to shoreline protection when they are updating their mobile homes entirely inside the park. This may be a recurring issue as the mobile homes are replaced inside the park as has been occurring in the recent past.

B. PROCEDURAL HISTORY

After the Petition was filed in or about April 2015, the parties reached a Stipulation about certain matters. These were placed into a formal Order by Judge Claster:

- (1) Petitioner can go ahead with removing the old mobile home and installing the new one during the pendency of the case, but subject to the special conditions;
- (2) Petitioner's Occupancy Agreement with the nonprofit corp. will be amended to say that the Commission has approved the project, subject to the special conditions;

(3) The Commission will issue Petitioner a coastal permit to Petitioner, and Petitioner will then dismiss the 2nd cause of action in the lawsuit, and

(4) The parties will abide by the Court's decision on Special Condition 3. (Order dated 8/3/15 and Stip. filed 7/28/15).

Petitioner has dismissed its 2nd cause of action, as stipulated (for declaratory and injunctive relief). (8/11/15 Dismissal). This leaves the 1st cause of action for a writ of mandate.

This is the hearing on the Petition, via a Motion for Judgment, filed by petitioner.

C. THE MOTION FOR JUDGMENT

Petitioner filed as the opening brief a Motion for Judgment on the petition. Basically, that motion seeks a final decision on the petition. It does not seem to be two matters, but only one-deciding the writ. Specifically, "If no return be made [NB --that seems to be the case here, there is no return on a writ issued], the case may be heard on the papers of the applicant. . ."

If a petition for a writ of mandate filed pursuant to Section 1088.5 presents no triable issue of fact or is based solely on an administrative record, the matter may be determined by the court by noticed motion of any party for a judgment on the peremptory writ." CCP § 1094. That seems to be what we have here.

Also, under the California Coastal Act, the decisions of the Coastal Commission are reviewed by a petition for writ of mandate in accordance with CCP §1094.5. (PRC sec.30801, sec. 30105).

CCP § 1094.5 provides: "Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, ... board, or officer, the case shall be heard by the court sitting without a jury."

"The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." CCP § 1094.5(b).

"Where it is claimed that **the findings are not supported by the evidence**, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, **abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.** [emphasis added] CCP § 1094.5(c).

Published cases on reviewing a decision on a coastal development permit, utilize the test of *substantial evidence* for the agency's findings. E.g., *McAllister v. California Coastal Commission* (2008) 169 Cal.App.4th 912, 921; *Ross v. California Coastal Com.* (2011) 199 Cal.App.4th 900, 921. Under that test, "[t]he trial court presumes that the agency's decision is supported by substantial evidence, and the

petitioner bears the burden of demonstrating the contrary. [citations omitted]. In reviewing the agency's decision, the trial court examines the whole record and considers all relevant evidence, including evidence that detracts from the decision. [citations omitted]. 'Although this task involves some weighing to fairly estimate the worth of the evidence, that limited weighing does not constitute independent review where the court substitutes its own findings and inferences for that of the Commission. Rather, it is for the [agency] to weigh the preponderance of conflicting evidence, as [the court] may reverse its decision only if, based on the evidence before it, a reasonable person could not have reached the conclusion reached by it.' [citations omitted] "

On the other hand, the trial court exercises independent judgment on pure questions of law, including the interpretation of statutes and judicial precedent. *McAllister v. California Coastal Com'n* (2008) 169 Cal.App.4th 912, 921-22; *Schneider v. California Coastal Com'n*. (2006) 140 Cal.App.4th 1339, 1344.

Courts have final responsibility for interpreting a statute but nevertheless, an agency's interpretation of its governing statutes is entitled to great weight. *McAllister*, 169 Cal.App.4th 921-22; *Schneider v. California Coastal Com.* (2006) 140 Cal.App.4th 1339, 1344. But "[b]ecause an interpretation is an agency's legal opinion, however 'expert,' rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree of judicial deference." (*Schneider*, 140 Cal.App.4th at 1349)

D. THE CALIFORNIA COASTAL ACT

The California Coastal Act was created in 1976 and is found in *PRC secs. 30000 – 30900*. It has myriad purposes and goals and is a comprehensive scheme to govern coastal land use planning for the entire state. *Ross v. California Coastal Com.* (2011) 199 Cal.App.4th 900, 923. Its broad goals are protection of the coastline and its resources, and maximization of public access. *Ocean Harbor House Homeowners Ass'n v. California Coastal Com'n* (2008) 163 Cal.App.4th 215, 242.

In general, the Coastal Act "shall be liberally construed to accomplish its purposes and objectives." *PRC sec. 30009*. The California Coastal Commission considers many factors in granting coastal development permits, e.g., *PRC §§ 30604*, subd. (c) [the Commission "shall" make findings that the permit complies with public access and recreational policies]; *PRC sec. 30251* [scenic and visual qualities of coastal areas "shall" be considered and protected as a resource of public importance]; *PRC sec. 30240* [environmentally sensitive habitats "shall" be protected].) The Commission has a duty to consider impacts and has discretion to impose conditions to mitigate them. *Ocean Harbor House Homeowners Ass'n*, 163 Cal.App.4th 215, 241. See also *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 793.

To this end, *PRC sec. 30600(a)* generally provides that except for certain emergency work, any person wishing to "perform or undertake any development in the coastal zone" shall obtain a coastal development permit. *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 794, 796.

Under *PRC sec. 30106*, "'Development' means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land,; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for

agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 As used in this section, "structure" includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line." (PRC sec. 30106).

The Commission has the right to impose conditions on permits. "Any permit that is issued or any development or action approved on appeal, pursuant to this chapter, shall be subject to reasonable terms and conditions in order to ensure that such development or action will be in accordance with the provisions of this division." (PRC sec. 30607; see also *Liberty v. California Coastal Com.* (1980) 113 Cal.App.3d 491, 498).

PRC sec. 30235 provides in part: "Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Existing marine structures causing water stagnation contributing to pollution problems and fishkills should be phased out or upgraded where feasible." Note that "existing structures" used in this section, is NOT defined.

A court has said the language of the above sec. 30235 is permissive, not exclusive. It allows seawalls under certain conditions: (1) when necessary to protect existing structures and (2) when they can be designed to minimize sand loss. The Commission can consider the above statute in deciding on a matter but the above statute does not purport to preempt other sections of the Coastal Act that require the Commission to consider other factors in granting coastal development permits. *Ocean Harbor House Homeowners Ass'n v. California Coastal Com'n* (2008) 163 Cal.App.4th 215, 241.

Another section of the Act that addresses shorelines protection is PRC sec.30253. This section provides:

"New development shall do all of the following:

- (a) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.
- (b) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.
- (c) Be consistent with requirements imposed by an air pollution control district or the State Air Resources Board as to each particular development.
- (d) Minimize energy consumption and vehicle miles traveled."
- (e) Where appropriate, protect special communities and neighborhoods that, because of their unique characteristics, are popular visitor destination points for recreational uses. (Pub. Resources Code § 30253).

E. DISCUSSION

This case is basically a conflict between the interests of the private person vs. the public interest sought to be discharged by the Coastal Commission. However, it appears to the Court that the Petitioner has the better arguments under the facts here.

The Commission actually required Petitioner to submit a geological study of the hazards of the site, i.e. erosion, wave attacks, flooding etc. based on expected rising sea level, in order to consider this application. (See Commission's Letter in the A/R p. 406). In response, Petitioner had "Geo Soils" do a study (See A/R p. 61, Study). The engineer found that the expected life of this new mobile home is 37 years; that the revetment is in good condition, and does not need maintenance at this time, and it will protect the mobile home from structural wave damage ahead. But the long-term stability of the revetment depends on continued maintenance including replacing some stones. (See A/R p. 60).

The Commission is concerned that the seawall/revetment is going to need to be expanded out in the future. The Commission wants the park owner (CSI), the nonprofit corporation, to undertake a comprehensive plan to address this. The Commission absolutely does not want the revetment to expand seawards towards the beach, because this will diminish the public beach, public land and sand. It wants any expansion to go inwards in the private property.

The Staff Report mentions that the nonprofit had a pending application for work regarding the revetment. It was from 2012 and it is said to be stalled /incomplete at this time, as the applicant is submitting more information about "project alternatives". (See A/R p. 466) The Commission wants that matter resolved.

Meanwhile, the Commission is taking action by requiring individual lessees of the Park (including CSP and members of the nonprofit corporation), who are trying to change out mobile homes, to WAIVE any right to shoreline protection that they may have to protect their new homes. (*It is unclear what specific rights Petitioner has, since Petitioner doesn't own the seawall/revetment at issue; the nonprofit corporation does*). But the Commission is seeking this waiver "just in case" and "for good measure" as the Court sees it. The Commission justifies this on the ground that replacing a mobile home, extends its life by 37 years, therefore, the life of the revetment has to be considered in conjunction with that.

The Commission argues that the engineering study found that the revetment is good-enough to protect CPS's unit, so Petitioner loses nothing by waiving any rights to shoreline protection under PRC sec. 30235 for the new unit. In other words, Petitioner is being asked only to accept the findings of its own study. However, as the Court sees it, the study is not a guarantee of what will happen in the future. Nature is unpredictable. What if there is a major disaster? The applicant will have in hindsight lost any rights to advocate for repair or maintenance of the seawall/revetment by accepting the present condition. And if the Commission **will always have the right to reject any future requests** to expand the revetment itself, why proactively require people to waive any rights ahead of time?

The Commission argues: "Without the [special] condition, mobile home owners may replace and upgrade their mobile homes relying on the false assumption that they will be entitled to build whatever is necessary to protect the new structures." (Opp. p. 1). As to this point, if the Commission is concerned about an estoppel, it is not a simple task to successfully argue an estoppel against a public agency which is charged with looking after public interest and policy. See *Schafer v. City of Los Angeles* (2015) 237 Cal.App.4th 1250, 1262 ("[t]he doctrine of equitable estoppel may be applied against the government where justice and right require it" ... [but] an estoppel will not be applied against the government if to do so would effectively nullify 'a strong rule of policy, adopted for the benefit of the public..."); *Barrie v. California Coastal Com.* (1987) 196 Cal.App.3d 8, 17.

In *Barrie*, homeowners got a temporary emergency permit to build a seawall. They were not entitled to keep that wall permanently where the Coastal Commission had always advised them it was a temporary wall, and advised them not spend a lot of money on it, as they had to apply for a permanent permit. The Commission acted reasonably in ordering them to tear down the temporary wall which had been built on the public beach area, and to move the wall to their private property where it would not impact coastal resources as much. Seawalls are known to take up space on public beaches and erode the sand.

In the present case, the Commission relies on *Barrie* primarily in its brief. The fundamental difference is that in *Barrie*, the very object of the permit that was sought was to maintain a seawall. As noted, there is no seawall that is being built by Petitioner, or being expanded. It is simply a mobile home owner seeking to replace his old model home with a newer model.

Rather than compelling what appears to be a preemptive waiver of any rights, the Commission could consider a different type of condition, perhaps one that engages an applicant and successors to acknowledge that the revetment and bulkhead that currently protect the entire park, may require serious attention in the future, as to which the Coastal Act's policies and the State of California's goals may preclude expansions or alterations thereof, thus acknowledging the risk of the proposed development. *Barrie* may present just the kind of guidance to assist the balancing of the private vs. public interests in this matter, in the finding there was no estoppel where the evidence showed that "The Commission staff warned the Homeowners that the location of the temporary seawall was very controversial and that there was a strong likelihood the staff would recommend relocation of the seawall if the Homeowners applied for approval for a permanent seawall. The Commission staff "urged [the Homeowners] to keep this in mind and not to invest excessive amounts of money in the proposed development." (*Barrie, supra*, at p. 15-16)

Further, the concern which the Commission seeks to address - any expansion of the revetment - is not in a direct subject of this particular application. The Commission seems to acknowledge, "the applicant does not propose any changes or improvements to the existing bulkhead/revetment along the portion that protects Unit Space #12 under this ... application" (A/R p 463 and see also A/R p. 410). It acknowledges that the "applicant is only responsible for the repair/maintenance to the mobile home ... on Unit #12" (A/R p. 463). The Commission further acknowledges that any development of the revetment would have to be applied for separately by the park owner, not by this applicant. (*Id.*) In relation to any such (future) application and decision, the Commission seems to fully retain the power to prevent any seaward expansion of the revetment, considering the Coastal Act's policies and goals. The record does not defeat a scenario where the revetment could be expanded inward, in a way that may not endanger the public coastal resources, for example. [See Opp. Brief at 9:3 "Because the Commission does not have such an application in front of it for the seawall, the Commission does not know what specific impacts it could have or what alternatives may exist"). Therefore, it appears unreasonable to require a waiver from this applicant, of this magnitude ("any rights"). The special condition does not seem reasonably, closely, substantially tied to the specific project at hand (replacing one mobile home inside the park). *Surfside Colony, Ltd. v. California Coastal Com.* (1991) 226 Cal.App.3d 1260, 1267-1268 noted there should be a "substantial connection" or "nexus" or "substantial relationship" between the public burden created by the proposed new construction and the condition required by the Commission under federal constitutional and standards enunciated in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, 107 S. Ct. 3141.

In *Whaler's Village Club v. California Coastal Com.* (1985) 173 Cal.App.3d 240, another revetment case, at p. 262, where the Court is discussing approval of the Trial Court's finding of an abuse of discretion in

the imposition of a condition that the property owners that they acknowledge they may not be eligible for public disaster funds if the revetment is built. The Court said: "This condition was overbroad. The Commission could extract a more narrowly drawn assumption of liability from erosion hazard and waiver of claims against the Commission or any agency involved in the issuance of the permit for damage caused by erosion or storms."

The Commission points out, *PRC sec. 30235* only protects "existing structures" and that putting a new mobile home on coastal property is "new development" under *PRC sec.30253* so that the new home is not entitled to "existing structure" status or protection under the former section. However, the former section does not actually define "existing structures" nor was a definition found in the definitions within the Coastal Act or in regulations. If the Legislature had meant for section *sec.30235's* protection not to apply to any "new development" then it seems it could have created an exception or exclusion for any "new development" within that section. It is not clear that the Commission's reading of "existing structures" in *PRC sec.30235* is proper as excluding anything that is "new development". Are the two terms synonymous necessarily?

The Commission argues that Special Condition 3 is justified by the language in *PRC sec. 30253* that states, "new development shall [m]inimize risks to life and property in areas of high geologic, flood and fire hazard." (*PRC sec. 30253(a)*). It appears that by putting in place the condition of requiring applicants to waive any shoreline protection rights for new mobile homes, that the stated risk is not lessened. The Commission also cites subdivision (*b*) which says, new development shall not "in any way require the construction of protection devices that would substantially alter natural landforms along bluffs and cliffs." (*PRC sec. 30253(b)*). However, evidence was not found in the record, that this mobile home Park is along a bluff or cliff or that replacing the unit in Space #12 will substantially alter any such bluffs and cliffs. Nor is evidence cited, that the indirect concern of the Commission-the need to expand the revetment-is going to substantially alter natural landforms, along bluffs and cliffs. So the reliance on *PRC sec. 30253* is not persuasive.

The Park's revetment/bulkhead structure is a pre-Coastal Act structure, according to the record. (See A/R, p. 460). If so, this would suggest it is an existing structure, and not a new development (at this moment). See also *Cal. Code Regs., tit. 14, § 13252*, Repair and Maintenance Activities Requiring a Permit. If so, then it appears to be overreaching to have the Petitioner give up any rights to possible repair or maintenance of the device, under *PRC sec. 30235*, which Petitioner's membership in the Capistrano Shores Inc. association may yield. The waiver seems unreasonably broad and contrary to the above guidance from *Nollan* and *Whaler's Village*.

The Commission argues that the "waiver condition ... keeps all options open for appropriate adaptation measures in the future to address sea level rise and protect the public beaches." (Opp. Brief p. 10). It appears, to the contrary, to extract a preemptive waiver from Petitioner on a matter that is not presently directly before the Commission as to this applicant. It appears to be less closely related to the project at hand and instead related to a broader project which the Commission anticipates will become necessary in the future. As one Commission staff person apparently wrote, "A lot of this is beyond the issues related to the individual site. . . since this is work on a new house [sic] that will not initiate any work on the existing shore protection, I do not think there is any connection between what's being done and any seawall mitigation." (A/R p. 410).

F. RULING

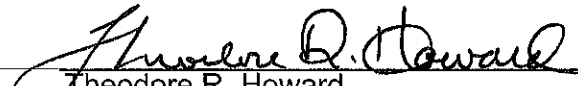
The Court **GRANTS** the Petition for Writ of Mandate to overturn the waiver condition in Special Condition

in the future. As one Commission staff person apparently wrote, "A lot of this is beyond the issues related to the individual site. . . since this is work on a new house [sic] that will not initiate any work on the existing shore protection, I do not think there is any connection between what's being done and any seawall mitigation." (A/R p. 410).

F. RULING

The Court **GRANTS** the Petition for Writ of Mandate to overturn the waiver condition in Special Condition 3 and remand to the Commission to consider in the light of this ruling.

DATED: AUG 22 2016


Theodore R. Howard
JUDGE OF THE SUPERIOR COURT