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NO FEE PURSUANT TO
GOVERNMENT CODE SECTION
6103

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ORANGE
12 CENTRAL JUSTICE CENTER

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14 **CAPISTRANO SHORES PROPERTY,
LLC, a California limited liability company,**

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Petitioner,

v.

**CALIFORNIA COASTAL COMMISSION,
and DOES 1 through 30, inclusive,**

Respondent.

Case No. 30-2015-00785032-CU-WM-CJC

**OPPOSITION TO PETITION FOR WRIT
OF MANDATE**

Revised Hearing Date: July 14, 2016

Time: 1:30 p.m.

Dept: C18

Judge: Honorable Theodore R. Howard

Action Filed: April 29, 2015

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1 **INTRODUCTION**

2 Petitioner Capistrano Shores Property, LLC leases Space #12 at the Capistrano Shores
3 Mobile Home Park in San Clemente. The Park is located directly on the beach and exists solely
4 due to the presence of a bulkhead and rock revetment which was built at the same time as the
5 Park came into existence in the 1960's. Petitioner applied for a coastal development permit to
6 remove his existing no longer habitable mobile home at the end of its useful life and replace it
7 with a new mobile home unit. The primary issue raised by replacement of existing mobile homes
8 in the Park is the introduction of new structures in an inherently risky location with the
9 expectation that the existing revetment will be retained indefinitely or even augmented in the
10 future to protect the new structures. The revetment is currently located on the sandy beach and
11 impacts public access; any seaward expansion would further impact lateral public access along
12 the shoreline and encroach onto State tidelands and public trust lands. The revetment also impacts
13 sand supply and scenic qualities.

14 In order to approve the project, the Coastal Commission required Petitioner to show that his
15 new mobile home would be safe over its expected life time without any changes to the revetment.
16 Petitioner submitted a study to this effect. Based on Petitioner's assurances that no future
17 expansion of the seawall was needed to protect the new mobile home, the Commission found the
18 project was consistent with the Coastal Act and conditionally approved the project. At the same
19 time, the Commission recognized that the study's conclusions may be subject to error. Since the
20 study's prediction that the home would not require expansion of the seawall was critical to the
21 Commission's approval, it was necessary to make that prediction a meaningful assurance. Thus,
22 the Commission imposed Special Condition 3, requiring Petitioner to formally waive any rights to
23 further shoreline protection.

24 Special Condition 3 puts Petitioner, his successors-in-interest, and the Park owner on notice
25 that the Commission will not consider the new mobile home to be entitled to protection if and
26 when the Park or a successor entity seeks improvements to the revetment. Without the condition,
27 mobile home owners may replace and upgrade their mobile homes relying on the false
28 assumption that they will be entitled to build whatever is necessary to protect the new structures.

1 Similarly, the Park owner may seek to replace, improve, or expand the revetment to protect the
2 new structures. Because the Coastal Act requires that the Commission approve shoreline
3 protection for certain types of structures in certain circumstances, this could provide an end run
4 around the Commission’s ability to regulate such development. It could also lead to the perpetual
5 approval and increased bulkheading without providing the Commission an opportunity to review
6 a comprehensive shoreline protection permit.

7 Special Condition 3 is reasonable and necessary to conform to the Coastal Act’s
8 requirements and simply allocates the risk of adding a new structure in an inherently dangerous
9 location to Petitioner from the general public. Petitioner assured the Commission that he would
10 not need future shoreline protection to protect his mobile home. The condition simply holds him
11 to his assurances. The condition is reasonable and necessary to ensure that future shoreline
12 protection applications do not avoid review and will conform to the Coastal Act.

13 SUMMARY OF THE COASTAL ACT

14 The Coastal Act of 1976 (Pub. Resources Code, §§ 30000-30900)¹ is the legislative
15 continuation of the coastal protection afforded by Proposition 20, the 1972 initiative that created
16 the California Coastal Zone Conservation Commission. As our Supreme Court explained in
17 *Pacific Palisades Bowl v. City of Los Angeles* (2012) 55 Cal.4th 783, 793-794:

18 The Coastal Act “was enacted by the Legislature as a comprehensive scheme to
19 govern land use planning for the entire coastal zone of California. The Legislature
20 found that ‘the California coastal zone is a distinct and valuable natural resource of
21 vital and enduring interest to all the people’; that ‘the permanent protection of the
22 state’s natural and scenic resources is a paramount concern’; that ‘it is necessary to
23 protect the ecological balance of the coastal zone’ and that ‘existing developed uses,
24 and future developments that are carefully planned and developed consistent with the
25 policies of this division, are essential to the economic and social well-being of the
26 people of this state....’ (§ 30001, subs. (a) and (d).)” (*Yost v. Thomas* (1984) 36
27 Cal.3d 561, 565, 205 Cal.Rptr. 801, 685 P.2d 1152.) The Coastal Act is to be
28 “liberally construed to accomplish its purposes and objectives.” (Pub. Resources
Code, § 30009.) Under it, with exceptions not applicable here, any person wishing to
perform or undertake any development in the coastal zone must obtain a coastal
development permit “in addition to obtaining any other permit required by law from
any local government or from any state, regional or local agency. (*Id.*, § 30600, subd.
(a).)

¹ Hereafter statutory references are to the Public Resources Code unless otherwise indicated.

1 One of the primary reasons for both of the coastal acts was the avoidance of the deleterious
2 consequences of development on coastal resources. (*Pacific Legal Foundation v. California*
3 *Coastal Com.* (1982) 33 Cal.3d 158, 163; *CEED v. California Coastal Zone Conserv. Com.*
4 (1974) 43 Cal.App.3d 315, 321.) The Coastal Act, like its predecessor the Coastal Initiative, is a
5 form of nuisance regulation derived from the police power. (*CEED, supra*, 43 Cal.App.3d at pp.
6 318-319 [contemporary environmental legislation represents an exercise by government of the
7 traditional police power to regulate activities in the nature of nuisance].)

8 The Legislature declared that a basic goal of the Coastal Act is to “[m]aximize public
9 access to and along the coast and maximize public recreational opportunities in the coastal zone
10 consistent with sound resources conservation principles and constitutionally protected rights of
11 private property owners.” (§ 30001.5, subd. (c).) Another goal is to “[p]rotect, maintain, and,
12 where feasible, enhance and restore the overall quality of the coastal zone environment and its
13 natural and manmade resources.” (§ 30001.5, subd. (a).) To achieve these goals, the Act sets forth
14 specific policies governing public access, recreation, the marine environment, land resources, and
15 development along the coast. (§§ 30210-30265.5.) (*McAllister v. California Coastal Commission*
16 (2008) 169 Cal.App.4th 912, 922; see also, *Landgate v. California Coastal Commission* (1998)
17 17 Cal. 4th 1006, 1011; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553,
18 571; §§ 30001.5, 30512, 30513.) These policies are the standards by which the permissibility of
19 proposed development are determined. (§ 30200, subd. (a).)

20 The Act’s enforceable policies are intended to protect natural landforms, maximize public
21 access and recreation, and minimize the need for revetments, seawalls, and other shoreline
22 protection devices. “[M]aximum access . . . and recreational opportunities shall be provided for
23 all the people consistent with public safety needs and the need to protect public rights, rights of
24 private property owners, and natural resources from overuse.” (§ 30210.) “Permitted development
25 shall be sited and designed to . . . minimize the alteration of natural landforms” (§ 30251.)
26 The Act requires approval of retaining walls and other shoreline protection devices only when
27 they are “required to serve coastal-dependent uses or to protect *existing* structures or public
28 beaches in danger of erosion, and when designed to eliminate or mitigate adverse impacts on

1 local shoreline sand supply.” (§ 30235, italics added.) In contrast, *new* development must
2 “[a]ssure stability and structural integrity, and neither create nor contribute significantly to
3 erosion, geologic instability, or destruction of the site or surrounding area *or in any way require*
4 *the construction of protective devices that would substantially alter natural landforms along*
5 *bluffs and cliffs.*” (§ 30253, subd. (b), italics added.)

6 It is within this statutory framework that this case arose.

7 **STATEMENT OF FACTS**

8 Petitioner leases space #12 at the Capistrano Shores Mobile Home Park. (Administrative
9 Record (AR) 453.) The Park is located between the first public road and the sea and is seaward of
10 the coastal bluff and the Orange County Transportation Authority railroad tracks in San
11 Clemente. (AR 453.) The Park is a legal non-conforming use on a stretch of beach developed
12 with a single row of 90 mobile homes parallel to the shoreline on a lot designated privately owned
13 open space in the City of San Clemente land use plan. (AR 453-454.) A rock revetment protects
14 the 90 mobile homes units from direct wave attacks. (AR 460.)

15 Petitioner submitted an application for a coastal development permit to remove an existing
16 mobile home and replace it with a new mobile home, storage shed, slab, glass fence, and minor
17 landscaping at Space #12 in the Park. (AR 3-11.) The old mobile home was at the end of its
18 useful life and uninhabitable due to mold, electrical, and other problems. (Petitioner’s
19 Memorandum of Points and Authorities in Support of Motion for Judgment (Opening Brief) at p.
20 1.) He proposed to replace it with a new mobile home unit with a conservative design life of 37
21 years. (AR 49.)

22 The primary issue raised by significant improvements to or replacement of the existing
23 mobile homes within the Park is the potential expectation that the existing revetment will be
24 retained and perhaps even augmented in the future to protect such development. Prolonging the
25 life of the seawall would prolong its impacts on sand supply and scenic qualities. Coastal
26 shoreline experts generally agree that where the shoreline is eroding and armoring is installed, the
27 armoring will eventually define the boundary between the sea and the upland. (AR 468.) On the
28 California coast the effect of a rise in sea level will be the landward migration of the intersection

1 of the ocean with the shore, leading to a faster loss of the beach as the beach is squeezed between
2 the landward migrating ocean and the fixed backshore. (AR 468.) Any seaward encroachment of
3 the revetment would directly impact existing lateral public access along the shoreline and
4 encroach onto State tidelands and lands subject to the public trust. (AR 454.)

5 To address these concerns, Petitioner submitted a Wave Runup & Coastal Hazard Study to
6 establish that the proposed project and site were safe from erosion, flooding, wave attack, and
7 runup without any changes to the shoreline protection taking into consideration sea level rise.
8 (AR 52-61.) The Study concluded that the existing revetment is in good condition and not in need
9 of maintenance at this time. (AR 60.) It further concluded that the existing shore protection
10 system (revetment, bulkhead, and perched beach), if maintained, is adequate to protect the
11 proposed replacement mobile home. (AR 60.) In reliance on Petitioner's Study, the Commission
12 approved the application with a condition requiring acknowledgement and agreement that Space
13 #12 may be subject to hazards from flooding, wave uprush, sea level rise, and erosion and with
14 Special Condition 3, requiring Petitioner to waive any rights to shoreline protection for the
15 proposed new mobile home. (AR 454, 457.)

16 Given the shoreline protection's impacts on public access, recreation, shoreline sand
17 supply, and more, the Commission included Special Condition 3 that Petitioner waive his right to
18 shoreline protection to assure that the proposed development remains consistent with the access
19 and recreation policies of the Coastal Act throughout its anticipated life. (AR 468.) But for
20 Petitioners' assurances, the Commission could not have approved the project.

21 **STANDARD OF REVIEW**

22 The Court's scope of review extends to the questions of whether the Commission
23 proceeded without or in excess of its jurisdiction; whether there was a fair administrative hearing
24 and whether there was any prejudicial abuse of discretion. (Code of Civ. Proc., § 1094.5, subd.
25 (b).) An abuse of discretion is established if the Commission failed to proceed in the manner
26 required by law, its order or decision is not supported by the findings, or its findings are not
27 supported by substantial evidence. (*Ibid*; *Ocean Harbor House Homeowners Assn. v. California*
28 *Coastal Com.* (2008) 163 Cal.App.4th 215, 227.)

1 The Commission’s decision comes before the Court with a presumption that it is supported
2 by substantial evidence, and the party challenging the decision bears the burden of demonstrating
3 to the contrary. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817; *Ocean Harbor House*
4 *Homeowners Assn. v California Coastal Com.*, *supra*, 163 Cal.App.4th at p. 227.) The court may
5 not overturn a Commission finding because a contrary finding would have been equally or more
6 reasonable. (*La Costa Beach Homeowners’ Assn. v. California Coastal Com.* (2002) 101
7 Cal.App.4th 804, 814.) The substantial evidence standard of review requires the Court to indulge
8 in all reasonable inferences in favor of the Commission’s findings, and the Court may reverse the
9 Commission’s decision only if, based on the evidence before it, a reasonable person could not
10 have reached the conclusion reached by the Commission. (*Kirkorowicz v. California Coastal*
11 *Com.* (2000) 83 Cal.App.4th 980, 986; *Sierra Club v. California Coastal Com.* (1993) 12
12 Cal.App.4th 602, 610.)

13 Plaintiffs cite *Schneider v. California Coastal Com.* (2006) 140 Cal.App.4th 1339, 1344 for
14 the proposition that a court does not defer to an agency when deciding whether a regulation lies
15 within the scope of the authority delegated by the Legislature. (Opening Br. at p. 7.) The
16 Commission agrees this Court reviews de novo pure questions of law, including interpretations of
17 the Coastal Act. But due to the Commission’s special familiarity with the regulatory and legal
18 issues, the Commission’s interpretation of the Coastal Act and the Act’s implementing
19 regulations is entitled to deference based on the well-established rule that great weight must be
20 given to the administrative construction of those charged with the enforcement and interpretation
21 of a statute. (*Ross v. California Coastal Com.* (2011) 199 Cal.App.4th 900, 938, *Alberstone v.*
22 *California Coastal Com.* (2008) 169 Cal.App.4th 859, 864; *Hines v. California Coastal Com.*
23 (2010) 186 Cal.App.4th 830, 849.)

24 Petitioner also cites *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19
25 Cal.4th 1. The case is inapplicable here as it dealt with the proper level of deference due to an
26 agency’s quasi-legislative actions. Even so, the case recognizes that deference is owed to an
27 administrative agency’s interpretations of its governing statutes.
28

1 Substantial evidence in the record before this Court supports the Commission's decision to
2 condition approval of Petitioner's new mobile home on waiver of future shoreline protection.

3 ARGUMENT

4 I. THE COMMISSION IMPOSED THE WAIVER CONDITION TO ENSURE THAT 5 PETITIONER'S NEW DEVELOPMENT WOULD NOT BE USED TO JUSTIFY EXTENSION 6 OR EXPANSION OF THE SHORELINE PROTECTION IN THE FUTURE

7 The Coastal Act requires approval of seawalls and other shoreline protective devices when
8 they meet certain criteria, including that they are necessary to protect existing development.
9 (§ 30235.) New development must assure stability and structural integrity without the need for a
10 seawall. (§ 30253; *Barrie v. California Coastal Com.* (1987) 196 Cal.App.3d 8, 20.) Here, the
11 Park and Petitioner's mobile home space are already protected by a shoreline revetment.
12 Petitioner and his consultant assured the Commission that Petitioner's proposed mobile home
13 would be safe over its predicted design life without changes to the existing shoreline protection.
14 Based on these assurances, the Commission found Petitioner's project was consistent with the
15 Coastal Act and conditionally approved Petitioner's application. Special condition 3 confirms and
16 provides notice to subsequent purchasers of Petitioner's assurances that no additional shoreline
17 protection would be needed in the future.

18 Special condition 3 provides:

19 **Future Response to Erosion/No Future Shoreline Protective Device.** No repair or
20 maintenance, enhancement, reinforcement, or any other activity affecting the existing
21 shoreline protective device, is authorized by this coastal development permit. *By
22 acceptance of this Permit, the applicant waives, on behalf of himself and all
23 successors and assigns of Unit Space #12, any rights to shoreline protection that may
24 exist under Public Resources Code section 30235 to protect the proposed new mobile
25 home on Unit Space #12.*

26 By acceptance of this permit, the applicant further agrees, on behalf of himself and all
27 successors and assigns to Unit Space #12, that the applicant and all successors and
28 assigns shall remove the development authorized by this permit, including the
residence, foundations, patio covers, if any government agency has issued a
permanent order that the structure not be occupied due to the threat of or actual
damage or destruction to the premises resulting from waves, erosion, storm
conditions, sea level rise, or other natural hazards in the future. In the event that
portions of the development fall to the beach before they are removed, the applicant
or successor shall remove all recoverable debris associated with the development
from the beach and ocean and lawfully dispose of the material in an approved
disposal site. Such removal shall require a coastal development permit.

1 (AR 457, italics added.) Petitioner challenges the italicized portion of this condition. (Opening Br.
2 at p. 4; see also AR 412, 414.)

3 Petitioner provided a Coastal Hazard and Wave Runup Study to establish the project's
4 geologic stability and safety from waves, erosion, and other coastal processes. (AR 52-62.) The
5 site's shore protection primarily consists of a quarry stone revetment and timber bulkhead, which
6 is then back-filled with an approximately 6'-wide perched beach. (AR 462.) The revetment is in
7 good condition and not in need of maintenance at this time. (AR 462.)

8 The Study identified a design life of 37 years for a mobile home. (AR 56, 462.) This is
9 shorter than a standard single-family home because mobile homes are generally constructed of
10 lighter material. Based on predicted sea level rise and the project's design, the Study concluded
11 the new mobile home would be safe from coastal hazards over the next 40+ years. (AR 462.) It
12 also noted that a mobile home is unique in that the structure is "mobile" and can be moved if
13 threatened by coastal hazards. (AR 56.)

14 The Commission's geologist reviewed the Study and concurred with its conclusions:
15 "Bottom line for the proposed project is that it is fairly safe from flood risk due to the 18' [mean
16 sea level] finished floor elevation, the revetment, the bulkhead, the perched beach and the
17 proposed flood shield. It is also fairly safe from erosion due to the revetment and the bulkhead."
18 (AR 410.) Even if the bulkhead or revetment were removed, individual homes could be placed on
19 piles to protect from erosion. (AR 410.)

20 Based on Petitioner's assurances that the new mobile home would be reasonably safe and
21 not require expansion of the shoreline protection, the Commission conditionally approved his
22 application. Special condition 3 ensures that Petitioner is not entitled to future shoreline
23 protection to protect the new mobile home.

24 **II. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S CONDITIONAL APPROVAL.**

25 Substantial evidence supports the Commission's conditional approval. The Commission
26 explained the need for this condition. Replacement or expansion of the shoreline protection
27 conflicts with the Coastal Act requirements regarding public access and recreation, shoreline sand
28 supply, and protection of views to and along the shoreline. Because the proposed development

1 involves the placement of a new mobile home and ancillary structures on the beach, those new
2 structures are not entitled to shoreline protection under section 30235 of the Coastal Act. Because
3 the Commission does not have an application in front of it for the seawall, the Commission does
4 not know what specific impacts it could have or what alternatives may exist. The Commission
5 included special condition 3 to ensure that the Commission may fully consider a future
6 application to expand or modify the shoreline protection and mitigate its impacts.

7 Consideration of the shoreline protection device should occur as part of a comprehensive
8 plan for the entire Park. Any repairs or enhancements should occur within in the Park's private
9 property and not further encroach on the public beach. In addition, alternatives to the shoreline
10 protection must be considered that would eliminate impacts to scenic visual resources, recreation,
11 and shoreline processes. (AR 466.) Alternatives could include relocation and/or removal of all or
12 portions of the mobile homes and ancillary improvements that may be threatened as well as other
13 remedial measures capable of protecting the mobile homes without shoreline stabilization
14 devices. (AR 466.)

15 Special condition 3 requires that Petitioner waive any rights that may exist. If, as argued by
16 Petitioner and the Park owner, Petitioner has no such rights, that is not a reason to remove the
17 permit condition. Only applicable rights would be affected by the condition language. However,
18 as the mobile homes are upgraded without a comprehensive shoreline protection permit in place,
19 it is through the permit conditions and findings that Petitioner, his successors and assigns, the
20 Park owner, and others are made aware of the potential risks of building in this location and the
21 limitations on their ability to secure future protective devices to protect the new structures they
22 choose to introduce into this environment.

23 At the public hearing, staff explained: "As the lots in the park redevelop with newer, more
24 modern structures, it's important that . . . they are not relying on the expectation that there will be
25 unlimited protection from wave run up, erosion and sea level rise. By their nature these structures
26 are capable of being removed if the impacts to public resources become so great in the future that
27 actions such as removal of the revetment become warranted. In this case, the wave run up
28 analysis indicates [the new mobile home] will be safe for its expected life" (AR 439.)

1 “Although the proposed mobile home would be relying on the existing revetment for protection at
2 this time, with the waiver condition the permit approval keeps all options open for appropriate
3 adaptation measures in the future to address sea level rise and protect the public beaches.” (AR
4 439.) At the time of the Commission's hearing, there were 12 pending after-the-fact permit
5 applications for two-story mobile homes. (AR 439.)

6 The beach in front of the Park is narrow varying from a few feet to 70 feet, depending on
7 the season. High tide extends to the existing rock revetment which prevents or makes difficult
8 public access during high tide. Because of the narrow beach in this location, allowing a future
9 shoreline protective device to protect a new residential structure could adversely impact public
10 access by occupying existing sandy beach and deprive the beach of sand replenishment. (AR
11 467.)

12 When a shoreline protection device is placed on a sandy beach, it often results in
13 privatization of the public beach and a loss of space in the public domain as the public can no
14 longer access the occupied area. (AR 467-468.) The encroachment also results in a loss of sand
15 and areas from which sand generating materials can be derived. Coastal shoreline experts
16 generally agree that where the shoreline is eroding and armoring is installed, the armoring will
17 eventually define the boundary between the sea and the upland. (AR 468.)

18 In addition, sea level has been rising for many years. There is a growing body of evidence
19 that there has been an increase in global temperature and sea level rise will accelerate. On the
20 California coast, the effect of sea level rise will be the landward migration of the intersection of
21 the ocean with the shore, leading to a faster loss of the beach as the beach is squeezed between
22 the landward migrating ocean and the fixed backshore. (AR 468.)

23 Petitioner's project introduces new development in the Park and likely extends the life of
24 the mobile home by 37+ years. Staff explained at the public hearing that there is a connection
25 between the installation of these homes and the need for future protection. The expansion seaward
26 in any way as well as continuation of the revetment could have significant and direct impacts on
27 the public beach and conflict with Coastal Act requirements regarding public access and
28 recreation, shoreline sand supply, and protection of views to and along the shoreline. (AR 464.)

1 Because of these possible conflicts, the Commission included the waiver condition to put
2 Petitioner’s successors and assigns on notice that the new mobile home cannot be considered
3 existing so as to justify reinforcement of the revetment. (AR 464.)

4 Petitioner argues that the Commission has no authority to impose the condition. He first
5 argues that because he is not currently seeking to modify the seawall, there is no justification for
6 imposing the condition. (Opening Br. at pp. 9-10.) But the condition is designed to allow the
7 Commission to avoid potential future impacts. Section 30253 prohibits development “that in any”
8 requires shoreline protection, including requiring it in the future. The Commission approved
9 Petitioner’s project based on his assurances that the new mobile home would be safe from erosion
10 and other hazards without the need for further shoreline protection in the future. The condition
11 represents a recognition that those assurances could prove wrong, and future shoreline protection
12 *would* have adverse impacts. The condition simply holds Petitioner to his assurances and allocates
13 any risks to Petitioner rather than the general public.

14 Petitioner next argues that the Commission must make specific findings that replacement of
15 a single mobile home will cause or contribute to erosion in order to impose the condition.
16 (Opening Br. at p. 10.) The purpose of the condition, however, is not to mitigate for erosional
17 impacts of the home, but to ensure that the Commission is not forced to approve shoreline
18 protection in the future without regard to the erosional and other adverse impacts of that shoreline
19 protection. And it is designed to ensure that at some point the Commission will be able to
20 consider the revetment as a whole and not be blocked by piecemeal permits. Because of the
21 separate ownership interests in the mobile homes and the underlying Park property and
22 revetment, Petitioner’s argument would create a never-ending cycle which would prevent the
23 Commission from fully considering a future application related to the revetment and alternatives.
24 As mobile homes reach their natural end, the owners seek permits to replace them, arguing as
25 Petitioner did that the current revetment provides sufficient safety. After the new mobile homes
26 are in place, the Park owner would then argue that the Commission must allow further shoreline
27 enforcement to protect these “now-existing” mobile homes. (See Opening Br. at p. 12, lines 13-
28 15.) After expansion of the revetment, the mobile home owners would return and argue a right to

1 replace their mobile homes in reliance on the newly approved barrier, and the cycle and non-
2 conforming use would continue without end.

3 The Commission acknowledges that to some extent this is the current reality. “[T]he
4 proposed mobile home is not anticipated to need additional shoreline protection beyond what
5 would be necessary to protect other existing structures in the park.” (AR 464.) However, at some
6 point as the existing mobile homes reach their natural life ends, owners will seek to replace them.
7 With the conditional approvals in place, the Commission will have an opportunity to review the
8 entire revetment and alternatives at some point.

9 A better alternative to piecemeal applications and individual waivers would be for the Park
10 owner to submit a comprehensive shoreline plan that accounts for sea level rise and establishes a
11 footprint for the revetment, including future maintenance requirements, and criteria that if met
12 could result in a streamlined permit process for replacing individual mobile homes. The Park
13 owner submitted an application in 2012, but it remains incomplete. (AR 466.) The effort stalled
14 over issues related to height limitations to protect ocean views from inland public trails. (AR
15 440.) The purpose of the waiver condition is to ensure that at some point when the Park does
16 submit an application the Commission will not be prejudiced in addressing impacts to coastal
17 resources in a comprehensive manner and the Park will not utilize Petitioner’s and other
18 individual development projects to force the Commission to approve seaward expansion of
19 shoreline protection. (AR 447.)

20 Finally, Petitioner argues that even if he had applied for a shoreline protective device, it
21 would not substantially alter natural landforms along bluffs and cliffs and therefore the condition
22 is improper. (Opening Brief at p. 10.) The purpose of the condition is to ensure that the
23 Commission will be able to review a future application related to the shoreline protective device.
24 A primary concern with respect to the existing revetment is its impacts on the public beach and
25 public trust lands. In this case, the existing revetment is located on the sandy beach. (AR 437.) If
26 the revetment is retained indefinitely or expanded seaward, there would be increased impacts to
27 public trust lands and access, which is already limited due to the presence of the revetment on the
28 beach. (AR 437, 427-429 [photos].)

1 Staff explained that the waiver condition is very similar to those that would be required for
2 any new structure in a hazardous location and is in keeping with the Commission's practice and
3 policy to tie shoreline protection to the structure that requires the protection. (AR 437.) New
4 construction should be built in a location that does not require a protective device. Continuation
5 as well as expansion of the seawall would not only be inconsistent with section 30253 because of
6 its impacts on natural shoreline processes and the natural land forms, but also with Coastal Act
7 policies that protect public beaches for recreational purposes. (AR 438; see §§ 30210-30211,
8 30220-30224.)

9 Petitioner's mobile home is sufficiently set back to be consistent with the pattern of
10 development of surrounding homes within the Park. The setback area provides an area that may
11 accommodate any necessary future bulkhead/revetment repairs or expansion efforts within the
12 mobile home unit's private property thereby protecting intertidal habitat and avoiding any
13 possible future public access impacts that may arise due to encroachment of the rock revetment
14 into public beach areas (both individually and cumulatively). (AR 467.) A perched beach area
15 exists behind the existing revetment could accommodate additional protection in the future should
16 it become necessary and warranted to protect existing structures in the Park. (AR 438.)

17 Because of the potential impacts to access and shoreline sand supply that a shoreline
18 protective device would cause, the Commission included Special Condition 3, requiring Petitioner
19 to waive his right to shoreline protection, to assure that Petitioner's mobile home remains
20 consistent with the access and recreation policies of the Coastal Act by avoiding any of the
21 aforementioned impacts. (AR 468.)

22 **III. THE WAIVER CONDITION DOES NOT VIOLATE THE TAKINGS CLAUSE**

23 Petitioner contends that Special Condition 3 is a regulatory takings. Citing *Nollan v.*
24 *California Coastal Com.* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374,
25 he argues that the condition must be roughly proportional to the mobile home's impacts. This
26 argument fails. The *Nollan/Dolan* line of cases does not apply to the condition in question. Even
27 if it did, the condition takes nothing from Petitioner.
28

1 The *Nollan/Dolan* line of cases does not apply to the waiver condition. This line of cases
2 applies when a government entity requires the dedication of an interest in land or imposes an ad
3 hoc monetary exaction. (*Koontz v. St. Johns River Water Management Dist.* (2013) __ U.S. __
4 [133 S.Ct. 2586]; *Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528, 546; *Ehrlich v. City of*
5 *Culver City* (1996) 12 Cal.4th 854, 881.) The Commission did not require Petitioner (or the Park)
6 to dedicate a portion of the property to public use; the Commission did not impose an ad hoc fee
7 to offset the project’s impacts. The *Nollan/Dolan* line of cases does not apply to the
8 Commission’s waiver of future shoreline protection.

9 Even assuming the *Nollan/Dolan* test applied, the condition easily satisfies the requirements.
10 “It is beyond dispute that California has a legitimate interest in protecting and maintaining its
11 beaches as recreational resources.” (*Ocean Harbor House Homeowners Assn. v. California*
12 *Coastal Com., supra*, 163 Cal.App.4th at p. 231.) The Commission documented the various
13 adverse impacts westward expansion of the seawall would have. (AR 461-469.) In order to
14 receive his permit, Petitioner assured the Commission that his new mobile home did not and
15 would not require changes to the existing shoreline protection for its predicted design life. The
16 condition simply holds Petitioner to his word and allocates the risk of increasing development
17 directly on a sandy beach to Petitioner from the general public.

18 But for Petitioner’s assertions that he would not need improvements or expansion of the
19 seawall to protect the new mobile home, the Commission could not have approved his project.
20 Because the Commission would have been justified in denying his permit application if he had
21 sought changes to the revetment, the Commission’s conditional approval, enforcing his
22 assurances of the lack of need for additional shoreline protection upon which approval was based,
23 does not violate the unconstitutional conditions doctrine.

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CONCLUSION

For the reasons set forth above, the Commission requests the Court deny the petition for writ of mandate.

Dated: May 31, 2016

Respectfully Submitted,

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SD2015300459

DECLARATION OF SERVICE BY E-MAIL and U.S. Mail

Case Name: **Capistrano Shores Property, LLC v. CA Coastal Commission**
No.: **30-2015-00785032-CU-WM-CJC**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On **May 31, 2016**, I served the attached:

OPPOSITION TO PETITION FOR WRIT OF MANDATE

by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

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CAPISTRANO SHORES PROPERTY, LLC

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **May 31, 2016**, at San Diego, California.

Roberta L. Matson
Declarant



Signature