Case No. S221980

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BARBARA LYNCH AND THOMAS FRICK
Plaintiffs and Respondents,

v.

CALIFORNIA COASTAL COMMISSION
Defendant and Appellant.

On Appeal from a Decision of the Court of Appeal
Fourth Appellate District, Division One, Case No. D064120

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

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, THE LEAGUE OF CALIFORNIA CITIES, AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF THE CALIFORNIA COASTAL COMMISSION

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The California State Association of Counties (CSAC), the League of California Cities (League) and the International Municipal Lawyers Association (IMLA) seek leave to file the attached amicus brief.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The League is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective

viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

The issue before this Court is critical for effective land use planning at the local level. Permit conditions are an integral part of a project's approval, representing the local agency's delicate balancing of local interests, environmental considerations and community needs. Modification to the design elements of a project is difficult, if not impossible, after a project is built. For this reason, the long-standing general waiver rule bars a permit applicant from proceeding with portions of a permit that "benefit" the applicant while challenging the "burdens" of the permit that mitigate the impacts of the project or address public interests or concerns.

Application of the waiver rule to the present case does not raise any novel issues that warrant creation of an "under protest" exception for non-fee conditions. Further, the Legislature has not adopted and relevant policy considerations do not support an under protest exception for non-fee conditions. In addition to making subsequent project review by a local agency difficult or impossible, such an exception would create uncertainty, increase litigation, undermine public participation and diminish public reliance on agency land use decisions. An under protest exception for non-fee conditions would disrupt long-standing local land use practices and

hinder local government's ability to protect the public interest. Thus, Petitioners' proposed exception should be rejected.

CSAC, the League and the IMLA have reviewed the briefing of the parties, and do not repeat those arguments here. Rather, the proposed amicus brief provides a local government perspective on the waiver issue that is before the Court.

For the foregoing reasons, CSAC, the League and the IMLA respectfully request that this Court accept the accompanying amicus curiae brief.

Dated: Respectfully submitted,

By: _____

JANIS L. HERBSTMAN

Attorney for Amici Curiae

California State Association of Counties,
League of California Cities and
International Municipal Lawyers
Association

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[PROPOSED] AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, THE LEAGUE OF CALIFORNIA CITIES, AND THE INTERATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF THE CALIFORNIA COASTAL COMMISSION

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I. INTRODUCTION

If a land owner accepts a permit and constructs the project, she cannot at the same time challenge the permit in court. The facts of the present case provide a classic example of the general waiver rule. By constructing the permitted seawall, Petitioners received all of the benefits provided by the permit. Petitioners are now barred from challenging the permit's burdens.

An "under protest" exception for non-fee conditions does not exist under current law and such an exception should not exist. Conditions imposed on a project often reflect a delicate balancing of interests. If a condition is removed after a project is built, the permitting agency cannot modify the project's design to address the interests, concerns or impacts addressed by that particular condition. Thus, the creation of an "under protest" exception would significantly hinder local governments' ability to protect the public interest.

The California State Association of Counties (CSAC), the League of California Cities (League) and the International Municipal Lawyers Association (IMLA) believe the waiver issue presented in this case is of critical importance to effective land use planning. We urge the Court to affirm the Fourth Appellate District's holding that Petitioners' challenge to non-fee permit conditions is barred by the general waiver rule.

II. INTEREST OF AMICI CURIAE

Amici Curiae represent local government agencies and lawyers that are responsible for land use regulation at the local level. Specifically, each organization is concerned that if permit applicants are permitted to proceed in the manner suggested by Petitioners, it would disrupt the administration of local planning and enforcement activities.[1]

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

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[1] Amici Curiae do not take a position on the merits of this case, including whether the Coastal Commission exceeded its authority in imposing the challenged conditions or any other issues raised in this matter that are not specifically addressed in this brief.

those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

III. ARGUMENT

A. Local Government Land Use Decisions Protect the Public Interest.

Authority for local zoning regulations is derived from the police power conferred by article XI, section 11, of the California Constitution. (*Scrutton v. County of Sacramento* (1969) 275 Cal.App.2d 412, 417.) Local governments have "broad discretion to regulate the use of real property to serve the legitimate interests of the general public and the community at large." (*California Building Industry Association v. City of San Jose* (2015) 61 Cal.4th 435, 461.) This includes the imposition of reasonable conditions on land use. (*Scrutton, supra* (1969) 275 Cal.App.2d at 418; *IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 89.)

There are a wide range of land use regulations at the local level and any number of conditions that may be imposed. This Court recently noted various types of land uses subject to regulation by municipalities. (*California Building Industry Association, supra*, 61 Cal.4th at p. 461-462.) The very nature of land use decisions can create conflict between a project applicant and the public agency. (*See Euclid v. Ambler Realty Co.* (1927) 272 U.S. 365, 386-387.) However, "[i]nsisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy…." (*Koontz v. St. Johns River Water Management District* (2013) 133 S.Ct. 2586, 2595.)

Local land use decisions balance many competing interests including, but not limited to, the needs of the community, environmental considerations, property rights, public health and safety, and nuisance concerns. Protecting the public interest through effective land use planning is an important function of local agencies. (*Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 969-970; *Rutherford v. California* (1987) 188 Cal.App.3d 1267, 1286 [concluding that government power to regulate land use is so important that no vested right to a particular use arises until the government has approved that specific use].)

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B. Local Governmental Entities Rely on the General Waiver Rule for Effective Administration of Land Use Decisions.

If a land owner agrees to a condition or fails to challenge its validity and accepts the benefits afforded by the permit, the land owner is estopped from challenging the validity of the condition. (*County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510-511; Civil Code, § 3521 ["He who takes the benefit must bear the burden."].) Thus, land owners are prohibited from obtaining a valid permit, constructing the project and later challenging unfavorable conditions (*See Sterling Park, L.P. v. City of Palo Alto* (2013) 57 Cal.4th 1193, 1206-1207 [explaining the difference between monetary exactions and use restrictions]; *See also Shapell Industries, Inc. v. Governing Board (*1991) 1 Cal.App.4th 218, 241 [describing the process for challenging conditions prior to the Mitigation Fee Act].)[2] Instead, any challenge to non-fee permit conditions must be made through a writ petition proceeding, pursuant to Code of Civil Procedure section 1094.5, before constructing the project. (*See Pfeiffer v. City of La Mesa* (1977) 69 Cal.App.3d 74, 78.)[3]

This process provides certainty for the applicant, the general public and the local public agency by adjudicating disputes before changes

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[2] As discussed in Section (C) of this brief below, the law has not changed for challenges to non-fee conditions.

[3] Petitioners argue that the mere act of filing the writ petition prevents a finding of waiver based on construction of the seawall (Reply Brief, pp. 10-11.) However, as also discussed in Section (C), an under protest exception does not exist for non-fee conditions.

become much more difficult, or in some cases impossible, to make due to construction. It is also consistent with local government's broad discretion to make land use decisions, not by default with permits moving forward in a piece-meal fashion, but in a deliberate manner.

C. The Legislature Did Not Create an "Under Protest" Exception for Non-Fee Conditions.

The Legislature has made a specific policy decision that, as a general rule, an applicant cannot both build its project and protest the project's conditions. Rather, the ability to move forward with a project "under protest" has been limited by the Legislature to when payment of fees or other exactions is required. The Mitigation Fee Act[4] applies to local governments and governs conditions that divest a developer of money or a possessory interest in property, but do not restrict the manner in which a developer may use its property. This Court recently recognized the

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[4] Under the Mitigation Fee Act (Gov. Code, § 66000 et seq.), an applicant's protest must include "[t]endering any required payment in full or providing satisfactory evidence of arrangements to pay the fee when due or ensure performance of the conditions necessary to meet the requirements of the imposition." (Gov. Code, § 66020, subd. (a)(1).) The Act includes the administrative process for protests including requiring notice of the protest period and written notice of a protest specifically stating that the fees are being paid under protest and including a statement of the facts and legal theory forming the basis of the protest. (Gov. Code, § 66020, subds. (a)(2) & (d)(1).) The Act prohibits local agencies from denying a permit based on a protest and it suspends protests for fees related to public health and safety facilities. (Gov. Code, § 66020, subds. (b) & (c).) If the fees are successfully challenged, the court shall direct the local agency to refund the unlawful portion of the payment with interest. (Gov. Code, § 66020, subd. (e)).

distinction between fee conditions and non-fee conditions. In *Sterling Park, supra,* this Court noted the policy rationale behind the special exception for fees, stating, "[t]he Legislature did not want developers to have to choose between either paying the fee with no recourse or delaying the project while challenging the fee, as previous law had required." (57 Cal.4th at p.1205.)

But the Court went on to explain why fees are different from other non-fee conditions:

> By the nature of things, some conditions a local entity might impose on a developer, like a limit on the number of units (citation omitted), cannot be challenged while the project is being built. 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. But the validity of monetary exactions, or requirements that the developer later set aside a certain number of units to be sold below market value, can be litigated while the project is being built. In the former situation—where the nature of the project must be decided before construction—it makes sense to have tight time limits to minimize the delay. In the latter situation—where the project can be built while litigating the validity of fees or other exactions—it makes sense to allow payment under protest followed by a challenge and somewhat less stringent time limits.

(*Id*., at pp. 1206-1207.)

Where only the amount of fees is at stake, the amount can easily be adjusted after the litigation without disrupting the project.

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D. Local Land Use Policy Considerations Do Not Support the Creation of a New Under Protest Exception for Non-Fee Conditions.

An "under protest" exception for non-fee conditions should not exist because it would undermine local governments' ability to balance competing interests and effectively regulate land use. Further, Amici Curiae agree with the Court of Appeal's conclusion that "the [proposed] exception would swallow up the general rule" (Opinion, pp. 7-8), and all of the equitable principles it embodies.

1. *Subsequent Review by a Permitting Agency Would Be Difficult or Impossible.*

The issue before this Court is critical for effective land use planning because once a project is built, meaningful modification to the design elements of the project is generally not possible. Conditions are typically an integral part of the decision to approve a project, representing a delicate balancing of interests. Land use decisions are undermined if a permit applicant may proceed with portions of the permit that "benefit" the applicant while challenging the "burdens" of the permit that support public interests.

An example of this from the present case is the Commission's decision to require Petitioners to make a mitigation payment for sand loss that coincided with the 20-year period attached to the seawall approval. (Answer Brief, p. 32.) Specifically, a permit with a longer duration could

have required different mitigation measures that affected the design or construction of the project.

Courts and government agencies may hesitate to order demolition of structures that were either built to conform to conditions that are ultimately found unlawful, or that were built disregarding the conditions under challenge. For example, Petitioners constructed a seawall in 1986 without a permit. In 1989, the Commission granted a permit for those structures, since by that time, the structures could not be removed without destabilizing the bluff. (Answer Brief, p. 6.)

Environmental damage or a change in the character of a neighborhood, as examples, may be irreversible once a project is built, even if a court order or an agency decision requires removal of the structure(s). Thus, Petitioners' request to create a rule here that allows a project to go forward while it is also being challenged would turn rational land use planning on its head and should be rejected.

2. *Uncertainty and Increased Litigation Would Follow.*

The Court of Appeal concluded that "allowing permit applicants to accept the benefits of a permit while challenging its burdens would foster litigation and create uncertainty in land use planning decisions." (Opinion, p. 8.) Amici Curiae agree. In addition to questions regarding the process for filing a protest and the practical effects on the administration of permits, factual questions regarding the permit applicant's state of mind (such as

whether the conditions were accepted or the applicant was acting under protest) would need to be considered on a case-by-case basis, increasing the need for judicial review.

In addition, a ruling by this Court that finds covenants in executed deeds are not binding on land owners would create significant uncertainty and disrupt long-standing practices at the local level. For example, local public agencies rely on legal instruments, such as deeds, to establish a land owner's agreement to the stated terms of a permit. Government agencies and courts should not have to decipher the actions of permit applicants in the face of an executed, legally binding document that was voluntarily signed.[5] (*See Costa Serena Owners Coalition v. Costa Serena Architectural Committee* (2009) 175 Cal.App.4th 1175, 1199 [applying rules that govern contract interpretation to uphold the validity of deed restrictions].)

3. *Public Participation and Reliance on Decisions Would Be Diminished*.

Concerned neighbors, environmental groups and other public interest groups may oppose a project or offer comments and suggestions for approval of the project. Those concerns are part of the interest balancing that local governments engage in when approving a development project.

[5] The Court of Appeal found that the deed was voluntarily signed and rejected Petitioners' duress argument, noting in a footnote that Petitioners could have applied for an emergency permit. (Opinion, p. 6)

However, if an under protest exception existed, the impact of public participation may be lessened. For example, in a scenario where conditions are successfully challenged, if the permit was issued and the project was built, removal of any conditions specifically tailored to particular concerns (such as a height restriction to protect neighborhood views) would leave those concerns unaddressed.

Further, agreed-upon conditions provide notice and may influence the actions of interested parties. For example, in this case, neighbors of the project applicants concerned about the effects of the subject seawall on their own property may be relying on further mitigation by the Commission in the future instead of taking other action, such as applying for a seawall permit or incurring the expense of anchoring their own homes. Similarly, if the condition prohibiting the staircase, is enforced, it may deter others from incurring the expense associated with attempting to obtain a permit for a staircase of their own. If it is not enforced, neighboring homeowners may follow suit and construct staircases of their own without a permit.

E. The Present Case is a Classic Example of Waiver.

It is the acceptance of the permit benefits that waives the right to challenge its conditions. (*Sports Arenas Properties, Inc. v. City of San Diego* (1985) 40 Cal.3d 808, 815; Civil Code, § 3521.) The facts of the present case provide a classic example. By constructing the seawall, Petitioners received all of the benefits under the permit and, thus, the Court

should affirm the portion of the Court of Appeal's opinion holding that Petitioners are barred from challenging the permit conditions. This is consistent with the Legislature's policy determinations, current law and practical considerations at the local level.

Petitioners argue that the conditions were challenged and never accepted (Opening Brief, p.14.), but such an assertion is inconsistent with the law: "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." (Civ. Code, § 1589.)

F. The Facts of This Case Do Not Warrant Creation of a Judicially- Created Exception to the Waiver Rule.

In analyzing this issue, the Court of Appeal concluded:

> If an agency learns a nonfee condition is invalid before a project is built, the agency may be able to address the impacts underlying the condition in an alternate manner. However, if an agency learns a nonfee condition is invalid after a project is built, the agency may have no practical means of addressing the underlying impacts. Given these policy considerations, we conclude the need for or desirability of an under protest exception of the type advocated by respondents is a matter best left for legislative resolution.

(Opinion, p. 8.)

Amici Curiae agree. The Legislature created such an exception for fee conditions when it enacted the Mitigation Fee Act. If there is a need for a non-fee condition exception, one can be created through the legislative process. The facts of this case do not raise issues of unspeakable injustice

or a social problem that has long been ignored. The waiver rule is a long-standing principle in local land use regulation and its application to the present case does not raise any novel issues.

IV. CONCLUSION

Amici Curiae urge the Court to uphold the long-standing rule that if a land owner accepts a permit and constructs the project, she cannot at the same time challenge the permit in court. The rule provides stability and consistency that local officials and the public at large rely on. The exception suggested by Petitioners would disrupt local government land use decisions, including significantly hindering the ability of local governments to protect the public interest.

Dated: _____ By: _____

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Association

CERTIFICATION OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the word count feature in my Microsoft Word software, this brief contains 2,672 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this ___ day of July, 2015 in Sacramento, California.

Respectfully submitted,

By: _____
Janis L. Herbstman
Attorney for Amicus Curiae

Proof of Service by Mail

Lynch v. California Coastal Commission
Case No. S221980

I, Mary Penney, declare:

That I am, and was at the time of the service of the papers herein referred to, over the age of eighteen years, and not a party to the within action; and I am employed in the County of Sacramento, California, within which county the subject mailing occurred. My business address is 1100 K Street, Suite 101, Sacramento, California, 95814. I served the within **APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF BY THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, LEAGUE OF CALIFORNIA CITIES AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF THE CALIFORNIA COASTAL COMMISSION** by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Proof of Service List

Party	
Barbara Lynch, et al.: Plaintiffs and Respondents	Jonathan C. Corn Axelson & Corn, P.C. 160 Chesterfield Drive, Suite 201 Cardiff By The Sea, CA 92007 John M. Groen Pacific Legal Foundation 930 G Street Sacramento, CA 95814
California Coastal Commission: Defendant and Appellant	Hayley Elizabeth Peterson Office of the Attorney General 600 West Broadway, Suite 1800 San Diego, CA 92101

Court of Appeal	Clerk of the Court Fourth District Court of Appeal, Division 1 Symphony Towers 750 B Street, Suite 300 San Diego, CA 92101
Trial Court	Honorable Earl H. Maas, III San Diego Superior Court of California North County Division 325 South Melrose Drive Vista, CA 92081

and by placing the envelopes for collection and mailing following our ordinary business practice for collecting and processing correspondence for mailing. On the same day that 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 prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on _____, at Sacramento, California.

_____

MARY PENNEY