

SEAWALLS IN CALIFORNIA:

THE SUPREME COURT SPEAKS TO THE POWER OF THE COASTAL COMMISSION

by PAUL J. WEINBERG

On July 7, 2017, the California Supreme Court ruled on a pivotal lawsuit between two private landowners and the California Coastal Commission regarding the right to reconstruct an existing seawall and beach stairway to protect the two landowners' homes sitting atop an eighty-foot bluff overlooking Neptune Beach in the City of Encinitas, California. The ruling has been long-awaited and stands to profoundly affect landowners with beachfront or bluff-top property in California.

The case, *Lynch v. California Coastal Comm'n.*, No. S221980, 2017 Cal. Lexis 5054 (Cal. July 6, 2017), sent out a very strong signal to the land use legal community and landowners seeking relief

before the California Coastal Commission. In essence, orders by the Commission that constituted a quasi-"taking" of property rights wouldn't be disturbed on appeal if the landowners acquiesced by obtaining permits and doing the work, even if protests, legal challenges, and court action were taken to try to preserve their rights.

The case threw into relief a long-simmering problem for coastline landowners in California. As erosion continues

to destabilize and cause the collapse of seawalls, some of which date back to the turn of the prior century, California coastal landowners are seeking the right to rebuild them. The California Coastal Commission, with the support of environmental groups, is finding that these seawall repairs are "armoring" the coastline, and now is attempting to flex its muscles and assert its power by limiting both the amount of time that the permits can be issued and, also, outright preventing reconstruction of previously existing improvements. The *Lynch* case discussed in some depth the issues of

atop an eighty-foot oceanfront bluff. The properties consisted of the bluff-top areas improved with the homeowners' homes, the steep coastal bluffs improved with a shared staircase that went to the beach, a seawall designed to protect the bluffs from erosion while mitigating impacts to unprotected adjacent bluffs, and a sandy beach area from the toe of the bluff to the mean high tide line. Similar to many properties along this stretch of coast, the shared staircase connected the homes to the beach area below. See *Lynch v. California Coastal Comm'n.*, 229 Cal. App. 4th 654, 662 (2014).

The appellate opinion giving rise to the Supreme Court case also noted that one of the plaintiffs, Lynch, was close to eighty years old at the time of her application and suffered from very high blood pressure and the attendant health limitations. See *Lynch*, 229 Cal. App. 4th at 674.

The two families applying for the permits, as the plaintiffs in the underlying case, based their legal arguments on the "Takings Clause" in the United States Constitution, arguing from the state supreme court case:

"[T]he government may not require a person to give up a constitutional right—here the right to receive just

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waiver and estoppel in resolving the question of whether: "In the land use context, a landowner may not challenge a permit condition if he has acquiesced to it either by specific agreement, or by failure to challenge the condition while accepting the benefits afforded by the permit." See *Lynch*, No. S221980 at 5, lines 26 through 28.

The landowners in the *Lynch* case were two homeowners who owned adjacent residential properties located



compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by government.” See *Lingle v. Chevron USA, Inc.*, 544 US 528, 547 (2005).

The existing improvements protecting the two residences constituted a wooden seawall and a mid-bluff structure with an integrated concrete wall as well as a stairway down to the beach. In 2009, the City of Encinitas approved the project, finding it consistent with the general plan and the municipal code. In 2010, while the plaintiffs’ application for the permit before the Coastal Commission was pending, unusually heavy winter storms caused the bluff below the Lynch’s home to collapse, destroying part of the seawall, most of the mid-bluff structure, and the lower portion of the stairway.

At that point, both landowners sought a new permit to demolish the old structure, construct a new tied-back seawall across both properties, and rebuild the lower stairway. The Commission staff apparently initially recommended approving the proposed seawall, even though the existing support under the Frick property was adequate, because the new wall would provide greater stability and visual appeal. It would be located eight feet inland from its current location, providing additional beach area for recreation. But the staff recommended disapproving the stairway repair and replacement, finding it inconsistent with local coastal plan requirements discouraging private access stairways on the bluff.

What caused the controversy, though, were the three conditions that the Coastal Commission imposed on the granting of the permit to rebuild the seawall. Special condition number 1-A prohibited reconstruction of the lower stairway. Special condition number 2 provided that the seawall permit would expire in twenty years and prohibited future bluff-top redevelopment from relying on the seawall as a source of geologic stability or protection. Spe-

cial condition number 3 required that, before expiration of the twenty-year period, plaintiffs would have to apply for a new permit to remove the seawall, change the size or configuration, or extend the authorization.

The Fricks objected to the three conditions. Faced with the prospect of potentially losing their homes with another massive storm, they elected to record deed restrictions stating that the special conditions of the permit were covenants, conditions, and restrictions on the use and enjoyment of their properties. They then filed a petition for a writ of administrative mandate challenging the twenty-year expiration conditions and the conditions prohibiting reconstruction of the lower stairway. While that litigation proceeded, the plaintiffs satisfied all of the permit conditions, obtained the permit and built the seawall.

The Coastal Commission moved for judgment on the mandamus petition, stating that, by accepting the permit conditions, recording the deed restriction and satisfying the other conditions, they had waived their objections. The trial court denied the motion.

Interestingly, the plaintiffs then applied for judgment, arguing that the permit’s twenty-year expiration date was unconstitutional and beyond the Commission’s authority because it did not mitigate impacts of this particular project and, in addition, that the Commission couldn’t prohibit reconstruction of the lower stairway because that activity did not require a permit.

The trial court agreed with the landowners and issued the writ, directing the Commission to remove the three challenged conditions. The court of appeals reversed in a split decision with a vigorous dissent:

“The majority determined that plaintiffs had waived their claims and, in any event, both conditions were valid. The dissenting justice disagreed with all of these conclusions.” See *Lynch*, 2017 Cal. Lexis 5054, at *6.

The California Supreme Court determined that, in fact, the waiver argument was valid, concluding:

Plaintiffs may be correct that, on these facts, they cannot be fairly said to have *waived* their objection, in the sense of having intentionally relinquished it. That conclusion, however, does not save their case. The crucial point is that they *went forward with construction before obtaining a judicial determination on their objections*. By accepting the benefits of the permit and building the seawall, plaintiffs effectively forfeited the right to maintain their otherwise timely objections.

See *Lynch*, 2017 Cal. Lexis 5054, at *11 (citations omitted).

The plaintiffs had raised the point in their briefs that the California legislature had enacted the Mitigation Fee Act (Government Code section 66000 *et seq.*) which, as the court pointed out: establishes a procedure by which developers may proceed with a project and still protest the imposition of fees or a possessory interest in property. In general, if a developer has tendered payment of the disputed fee and given written notice of the grounds for protest, local agencies cannot withhold project approval during litigation of the dispute.

See *Lynch*, 2017 Cal. Lexis 5054, at *13 (citation omitted).

Plaintiffs were clearly trying to invoke the Mitigation Fee Act, showing that timely protests relieve them of the burden of having waived objections to the current situation. In essence, the California Supreme Court disagreed, finding that a non-fee objection doesn’t constitute sufficient grounds to avoid a waiver. If a landowner takes advantage of the permit, the landowner loses the right to object later. The court found a public policy ground to support its conclusion: “An exception allowing applicants to challenge a permit’s restrictions after taking all of its benefits would change the dynamics of permit negotiations and would foster litigation.” See *id.* at *15.

The court also found little value in

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plaintiffs' urgency argument:

Plaintiffs protest that imposing a forfeiture under these circumstances could put homeowners in a serious bind. The Commission approved the seawall because Lynch's blufftop home was in danger of collapsing into the sea. Postponing construction until mandate proceedings had concluded would have left plaintiffs' homes at significant risk. If proceeding with a project constitutes a forfeiture, plaintiffs argue property owners under similar duress could be coerced to accept unlawful permit conditions, simply because they cannot wait months or years for litigation to conclude.

See *Lynch*, 2017 Cal. Lexis 5054, at *18.

The court avoided this objection by stating that certain emergency permit procedures were in place under the Public Resources Code section 30624.

The opinion, however, was silent on the question of the cost to go through an emergency repair and then have to incur the same cost again after a long-term permit was issued. Additionally, the court avoided discussing the very real likelihood that the Commission would be unlikely to allow any significant repairs because of its very public statements that it dislikes the "armoring" of the coastline. Finally, the court avoided discussing the fact that, even if the landowners applied for a writ of mandamus under Code of Civil Procedure section 1094.5 (the court's "streamlined" method of obtaining a resolution before obtaining permits and doing any work) and won, they would still be subject to appeal, further delaying the process. Slashed court budgets and the attendant hearing delays because of lack of funding under the current economy also were not mentioned in the opinion. The "streamlined" process the court was referring to is, therefore, quite lengthy and cumbersome, not to mention expensive.

The dissent at the appellate level found that, since the Coastal Commission had granted previous seawall permits on the very same properties without an expiration date at the very same location, the

appellate court should have prohibited the Commission from exacting new conditions or a time limit:

The right to continue a particular use of land is a "property right." A permitting agency cannot, except under narrow circumstances, revoke its approval once it is granted. A lawfully issued permit may only be revoked where, after notice and a fair hearing on revocation, the agency has determined that the permittee's use has created a nuisance, or the permittee has otherwise violated the law or failed to comply with the permit's conditions.

See *Lynch*, 229 Cal. App. 4th at 684.

The California State Legislature, in parallel, has also taken up the underlying issues being litigated in the *Lynch* case. Assemblyman Mark Stone of Monterey has proposed AB 1129, an Assembly bill that, in essence, strengthens the ability of the Coastal Commission to prevent the construction and repair of seawalls in the future. A California Assembly analyst has summarized that the bill: "[c]larifies [for] which shoreline protection structures the California Coastal Commission . . . must provide a coastal development permit (CDP)." See Assembly Third Reading, AB1129 (Mark Stone) as amended April 26, 2017, at 1.

Once the shoreline protection device is installed it is difficult, costly, and environmentally damaging to remove. Generally, the erosion issues that led to the emergency have been known for some time and could have undergone review prior to seeking the emergency permit. This bill limits future emergency permits to the minimum amount of temporary development necessary to address the identified emergency and requires the structure to be removed at the end of the term of the emergency permit.

See Assembly Third Reading, AB1129 (Mark Stone), as amended April 26, 2017, at 3.

Where does this ruling leave landowners and land use attorneys? Landowners now will go through a process

at the local level with the very real likelihood that whatever relief they are granted to support and preserve their homes and property will be temporary in nature and there will, most likely, be little that they can do about it. The cost, time, and burden of obtaining an emergency permit and performing temporary repairs will, for the most part, obviate the likelihood that landowners will pursue this dual track process: get an emergency repair permit and then bring mandamus litigation to try to get permit conditions removed. See, e.g., Stanford Law School Environment and Natural Resources Law and Policy Program, 2015 California Coastal Armoring Report: Managing Coastal Armoring and Climate Change Adaptation in the Twenty-First Century (June 18, 2015), <https://law.stanford.edu/publications/california-coastal-armoring-report-managing-coastal-armoring-and-climate-change-adaptation-in-the-21st-century/>.

With the very real concern of global warming, sea level rise, and climate change, the public policy issues that have been raised in the environmental community clearly found a sympathetic audience with the California Supreme Court. Whether the property rights of the Lynches and the Fricks were compromised by this decision is a debate most likely for the legislature in the future.



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