

Case No. D072304
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN THE FOURTH APPELLATE DISTRICT
DIVISION ONE

BEACH & BLUFF CONSERVANCY,
Plaintiff-Appellant and Cross-Respondent,

v.

CITY OF SOLANA BEACH,
Defendant-Respondent and Cross-Appellant,
CALIFORNIA COASTAL COMMISSION,
Intervenor-Respondent and Cross-Appellant,
SURFRIDER FOUNDATION,
Intervenor-Respondent and Cross-Appellant.

**SURFRIDER FOUNDATION’S COMBINED RESPONDENT AND
CROSS-APPELLANT OPENING BRIEF**

On Appeal from the Superior Court of the state of California
County of San Diego, Case No. 37-2013-00046561-CU-WM-NC

The Hon. Timothy Casserly, Judge

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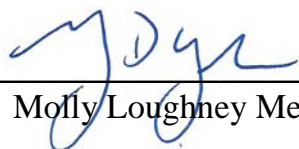
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no entities or persons that must be listed in this certificate under Rule 8.208, California Rules of Court.

Dated: December 8, 2017

Respectfully submitted,

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TABLE OF CONTENTS

INTRODUCTION 10

FACTUAL AND PROCEDURAL BACKGROUND 12

 I. Coastal Armoring Harms California’s Famous Coastline 12

 II. The Solana Beach Land Use Plan is a Prudent Compromise between Private and Public Interests..... 18

 III. Trial Court Decision..... 20

LEGAL BACKGROUND..... 21

 I. The Public Trust Doctrine Provides Robust Protections for Coastal Access and Coastal Resources. 21

 II. The California Constitution Preserves the Public’s Right to Access the Coast..... 22

 III. The California Coastal Act Gives Priority to both Coastal Access and Coastal Resource Protections. 23

STANDARD OF REVIEW..... 25

STATEMENT OF APPEALABILITY 26

ARGUMENT 27

SURFRIDER’S CROSS-APPEAL 28

 I. The City’s Prohibition on Seawalls to Protect Accessory Structures is Consistent with the Coastal Act, the California Constitution, and the Public Trust Doctrine..... 28

 A. The Coastal Act Supports Policy 4.22’s Prohibition on Seawalls for Accessory Structures..... 28

 B. Policy 4.22 Comports with the Public Trust Doctrine and the State Constitution’s Robust Protection of Coastal Access and Coastal Resources. 31

 II. Policy 2.60 Requiring a Permit for Stairway Repair and Maintenance Is Consistent With the Coastal Act..... 33

III. The Administrative Record Is Necessary for the Public’s Voice to be Heard.....	34
SURFRIDER’S ANSWERING BRIEF	36
I. LUP Policy 4.53 Is Consistent with the Letter and Intent of the Coastal Act.....	36
A. The City May Tie a Seawall Permit to the Life of the Existing Development the Seawall is Intended to Protect.	36
B. Under the Coastal Act, the City May Reassess the Impacts of Seawalls For Mitigation Purposes Every 20 Years.	38
II. Policies 4.19 and 2.60.5 Are Constitutional and Consistent With the Coastal Act.....	40
A. Coastal Property Owners Have No Right To Protect Their Property Free From Land Use Regulation.....	40
B. BBC’s Facial Challenge to Policies 4.19 and 2.60.5 Based on an Unconstitutional Conditions Claim is Not Ripe.	42
C. Requiring an Explicit Waiver on Future Seawalls for New Development in LUP Policy 4.19 Is Constitutional and Complies with the Letter and Intent of the Coastal Act.....	44
D. Policy 2.60.5 Is Consistent with the Coastal Act and Satisfies the Nexus And Rough Proportionality Tests in the Unconstitutional Conditions Doctrine.	49
CONCLUSION	51
CERTIFICATE OF COMPLIANCE	53
PROOF OF SERVICE	54

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Action Apartment Ass'n v. City of Santa Monica</i> , 166 Cal. App. 4th 456 (2008)	43
<i>Associated Home Builders, Inc. v. City of Livermore</i> , 18 Cal. 3d 582 (1976)	40
<i>Barrie v. California Coastal Comm'n</i> , 196 Cal. App. 3d 8 (1987)	35, 46
<i>Cal. Building Industry Ass'n v. City of San Jose</i> , 61 Cal. 4th 435 (2015)	41, 45
<i>Center for Biological Diversity v. FPL Group, Inc.</i> , 166 Cal. App. 4th 1349 (2008)	22
<i>City of Berkeley v. Superior Court</i> , 26 Cal. 3d 515 (1980)	22, 32
<i>Dolan v. City of Tigard</i> , 512 U.S. 374 (1994)	passim
<i>Gualala Festivals Committee v. California Coastal Comm'n</i> , 183 Cal.App.4th 60 (2010)	33
<i>Illinois Central Railroad v. Illinois</i> , 146 U.S. 452 (1892)	20
<i>Koontz v. St. Johns River Water Management Dist.</i> , 133 S. Ct. 2586 (2013)	42, 43, 44
<i>People ex rel. Lockyer v. Shamrock Foods Co.</i> , 24 Cal. 4th 415 (2000)	25
<i>Lynch v. California Coastal Comm'n</i> , 229 Cal. App. 4th 658, <i>aff'd on procedural grounds</i> , 3 Cal. 5th 470 (2017)	37, 40, 46
<i>Marks v. Whitney</i> , 6 Cal. 3d 251 (1971)	21

<i>McAllister v. California Coastal Comm’n</i> , 169 Cal. App. 4th 912 (2008)	50, 51
<i>Mercury Cas. Co. v. Scottsdale Indem. Co.</i> , 156 Cal. App. 4th 1212 (2007)	25
<i>Nat’l Audubon Soc’y v. Superior Court</i> , 33 Cal. 3d 419 (1983)	22, 32
<i>Nollan v. California Coastal Comm’n</i> , 483 U.S. 825 (1987).....	<i>passim</i>
<i>Ocean Harbor House Homeowners Ass’n v. California Coastal Comm’n</i> , 163 Cal. App. 4th 215 (2008)	29, 37, 46
<i>Pac. Legal Found. v. Brown</i> , 29 Cal. 3d 168 (1981)	26
<i>Rental Housing Owners Ass’n of Southern Alameda County, Inc. v. City of Hayward</i> , 200 Cal. App. 81 (2011)	26
<i>Ross v. California Coastal Comm’n</i> , 199 Cal. App. 4th 900 (2011)	34
<i>San Mateo County Coastal Landowners’ Assn. v. County of San Mateo</i> , 38 Cal. App. 4th 523 (1995)	26, 43, 7, 50
<i>Sierra Club v. Cal. Coastal Comm’n</i> , 19 Cal. App. 4th 547 (1993)	30, 37, 43
<i>Tobe v. City of Santa Ana</i> , 9 Cal. 4th 1069 (1995)	47, 50
<i>Union Oil Co. v. South Coast Regional</i> , 92 Cal. App. 3d 327 (1979)	34
<i>Webb v. California Fish Co.</i> , 166 Cal. 576 (1913)	21
<i>Whaler’s Village Club v. Cal. Coastal Comm’n</i> , 173 Cal. App. 3d 240 (1985)	41

<i>Zubarau v. City of Palmdale</i> (2011) 192 Cal. App. 4th 289	25, 26
--	--------

California Constitution

Cal. Const. art. X, § 4	23, 32, 50
Cal. Const. art. XI, § 7	40

Regulation

Cal. Code Regs., tit. 14, § 13000 et seq.	33
--	----

Statutes

Cal. Civ. Code § 670	21
Cal. Pub. Res. Code § 30001.5(a)	24
Cal. Pub. Res. Code § 30001.5(c)	24, 49
Cal. Pub. Res. Code § 30005(a)	50
Cal. Pub. Res. Code § 30006	35
Cal. Pub. Res. Code § 30007.5	24, 31, 37
Cal. Pub. Res. Code § 30009	25, 50
Cal. Pub. Res. Code § 30210	22
Cal. Pub. Res. Code § 30211	23, 31
Cal. Pub. Res. Code § 30005	50
Cal. Pub. Res. Code § 30010	43, 44
Cal. Pub. Res. Code § 30235	<i>passim</i>
Cal. Pub. Res. Code § 30253	38, 47, 48
Cal. Pub. Res. Code § 30503	19, 34
Cal. Pub. Res. Code § 30610	28, 33

Local Ordinance

City of Solana Beach Local Coastal Program Land Use Plan
(as amended June 11, 2014).....*passim*

Journals, Articles Books, and Agency Publications

Bradley E. Scarfe et al., *Sustainable Management of Surfing
Breaks: Case Studies and Recommendations*, 25 Coastal
Research 684 (May 2009)..... 15

Cal. Climate Action Team, Coastal & Ocean Working Group,
State of California Sea-Level Rise Guidance Document
(Ocean Protection Council, Mar. 2013)..... 17

Cal. Dep’t of Boating and Waterways & State Coastal
Conservancy, *California Beach Restoration Study* (2002)..... 13

Charles F. Lester, *An Overview Of California’s Coastal
Hazards Policy*, in *Living with the Changing California
Coast* (2005). 38

Dan Cayan et al., Cal. Climate Change Ctr., *Projecting
Future Sea Level* (2006)..... 17

Dan Cayan et al., Cal. Climate Change Ctr., *Scenarios of
Climate Change In California: An Overview* (2006) 17

Gary B. Griggs, *The Impacts of Coastal Armoring*, 73 Shore
Beach 13 (2005)..... 13, 14

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California Experience* (2010) 13, 14, 15, 16

Gary Griggs et al., *Living with the Changing California Coast*
(2005)..... 13, 38

J. Peter Byrne & Jessica Grannis, *Coastal Retreat Measures*
(2012)..... 14

Jenifer E. Dugan et al., *Ecological Effects of Coastal
Armoring on Sandy Beaches*, 29 Marine Ecology 160
(2008)..... 14

L. Benedet et al., <i>Impacts of Coastal Engineering Projects on the Surfability of Sandy Beaches</i> , 75 <i>Shore & Beach</i> 3 (2007)	15
Linwood Pendleton et al., <i>Estimating the Potential Economic Impacts of Climate Change on Southern California Beaches</i> , 109 <i>Climatic Change</i> 277 (2011)	16
Meg Caldwell & Craig Holt Segall, <i>No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access Along the California Coast</i> , 34 <i>Ecology L.Q.</i> 533, 541 (2007)	15
National Research Council, <i>Sea-Level Rise for the Coasts of California, Oregon, and Washington: Past, Present, and Future</i> (2012)	17
Nicholas C. Kraus, <i>The Effects of Seawalls on the Beach: An Extended Literature Review</i> , <i>Journal of Coastal Research</i> (1988)	13
Omar Defeo et al., <i>Threats to Sandy Beach Ecosystems: A Review</i> , 81 <i>Estuarine, Coastal, and Shelf Science</i> (2009)	13
Warren Kriesel & Robert Friedman, <i>Coping With Coastal Erosion: Evidence For Community-Wide Impacts</i> , 71 <i>Shore & Beach</i> (2003)	16

INTRODUCTION

Coastal armoring structures, including bluff retention devices, seriously threaten the coastline in Solana Beach by impeding public access and harming coastal resources. While armoring structures are designed to protect individual properties in the short-term, it is the public that bears the long-term consequences of such structures – consequences as dire as the loss of entire portions of the beach. The issue of whether beaches will remain accessible and usable by the general public lies at the heart of this case.

To address the direct harms that bluff retention devices impose on the shoreline and to ensure the public’s ability to access the coast, the City of Solana Beach (“City”) developed the Land Use Plan (“LUP”) portion of the City’s Local Coastal Program to regulate coastal development. The policies in the LUP – including suggested modifications carefully crafted by the Coastal Commission (“Commission”) and then accepted by the City after two decades of public process – comport with coastal protection and public trust principles enshrined in the California Constitution and the California Coastal Act.

Surfrider Foundation (“Surfrider”), a California-based nonprofit organization dedicated to the protection and enjoyment of oceans, waves, and beaches, submits this combined brief as both respondent and cross-appellant. In this action, Surfrider intervened in support of the City’s LUP

policies regulating bluff retention devices and coastal access, after appellant/cross-respondent Beach & Bluff Conservancy (“BBC”) challenged seven LUP policies as facially invalid. The trial court upheld five of the policies, three of which BBC has appealed, and invalidated two. Surfrider demonstrates below that the trial court correctly found the three appealed policies to be consistent with the Coastal Act and the Constitution. Further, Surfrider will show that the trial court erred in invalidating the two policies regarding protection of existing accessory structures and repair and maintenance of stairways. As such, Surfrider requests that the Court grant Surfrider’s cross-appeal and deny BBC’s appeal.

In addition, BBC’s election to proceed without an Administrative Record is procedurally flawed.¹ Surfrider participated extensively, both in writing and orally, through the process of formulating and certifying the LUP and amendments to it. Without a record, however, the Court is deprived of the public and expert opinion that informed the policies, along with the written findings that the Commission adopted to explain the rationale for its decision. BBC’s appeal should be denied for the additional reason that BBC failed to provide the Administrative Record to the Court.

¹ The Commission and City will address additional procedural flaws that compel granting Surfrider’s, the City’s, and the Commission’s cross-appeals and denying BBC’s appeal.

FACTUAL AND PROCEDURAL BACKGROUND

I. Coastal Armoring Harms California's Famous Coastline

Coastal armoring, which includes the bluff retention devices being regulated by the LUP and other types of seawalls, are large man-made structures built into a shoreline or bluff to harden the coast. Seawalls² are designed as a stopgap measure to protect individual properties from coastal erosion. While coastal armoring may temporarily protect individual properties from damage, it ultimately transfers the harm to the shoreline and to the public, impeding access to the beach and water and destroying coastal resources.

Seawalls create or contribute to many negative and potentially long-lasting impacts, including: reducing sand supply and beach width, increasing erosion, destroying habitat, diminishing the quality of recreational activities at the beach, and limiting public access to the beach. These physical impacts directly affect millions of people who come to California's famous coastline each year to swim, surf, walk, jog, play, and otherwise relax and enjoy the ocean and beach. The impact of armoring on these activities – and on the economic benefits these activities provide to the City, the region, and the State of California – is highly concerning.

It is well established that seawalls cause a net loss of sand to the

² While bluff retention devices are the particular type of coastal armoring at issue in this case, we use the terms “seawall” or “coastal armoring” interchangeably with bluff retention devices throughout the brief.

beach.³ California beaches are largely fed by sand transported down rivers and streams and by sand eroding from coastal bluffs.⁴ Cal. Dep't of Boating and Waterways & State Coastal Conservancy, *California Beach Restoration Study* 2-2 to 2-3 (Jan. 2002). Because beach sand is constantly lost to the ocean by the action of waves and wind, regular sand replenishment from bluffs is critical for maintaining beach area. Gary Griggs et al., *Living with the Changing California Coast* 76, 480 (2005). Without replenishment from eroding bluffs, there is a net loss in beach area over time as sand is transported out to sea. Cal. Dep't of Boating and Waterways, *supra*, at 8-3. Coastal armoring undermines this natural process of sand replenishment through bluff erosion by placing a hardened artificial barrier between the bluff and the beach, resulting in a decrease in sand and, ultimately, narrowing of the beach. Griggs, *The Effects of Armoring Shorelines*, *supra*, at 81-82.

³ For a full analysis of armoring impacts, see Omar Defeo et al., *Threats to Sandy Beach Ecosystems: A Review*, 81 *Estuarine, Coastal, and Shelf Science* 1-12 (2009); Nicholas C. Kraus, *The Effects of Seawalls on the Beach: An Extended Literature Review*, *Journal of Coastal Research* 1-28 (1988); Gary B. Griggs, *The Impacts of Coastal Armoring*, 73 *Shore & Beach* 13, 13-22 (2005).

⁴ Rivers and streams contribute 70 percent or more of the sand on California's beaches, with most of the remaining sand coming from eroding bluffs and cliffs. Gary Griggs, *The Effects of Armoring Shorelines—The California Experience*, in *Puget Sound Shorelines and the Impacts of Armoring—Proceedings of a State of the Science Workshop*, 81 (Shipman, et al. eds., 2010). With a significant percentage of the riverine sediment supply blocked by dams and other infrastructure, the cumulative impact of any additional sand supply loss from armoring is particularly alarming. *Id.*

While coastal armoring is designed to halt the impacts of erosion in a localized area by anchoring the shoreline, seawalls actually exacerbate erosion – causing the very impact they are designed to prevent. *Id.* Wave energy deflecting off the front of a seawall exacerbates erosion on the sides of the seawall, thereby increasing the vulnerability of neighboring properties to increased erosion impacts and necessitating yet more armoring in the long run. J. Peter Byrne & Jessica Grannis, *Coastal Retreat Measures*, in *The Law of Adaptation to Climate Change: U.S. and International Aspects*, 269 (Michael B. Gerrard & Katrina Fischer Kuh, eds., 2012). With increased erosion and reduced sand supply, the beach in front of the seawall will retreat to the face of the seawall until no beach remains, cutting off the public’s access to that section of the beach and to surrounding areas. Griggs, *The Impacts of Coastal Armoring*, *supra*, at 15-20. Put simply, when placed on California’s retreating beaches, seawalls will cause that beach to narrow and eventually disappear.

By reducing the size of the beach and disrupting natural processes, coastal armoring also decreases the ecological and recreational value of California’s beaches, impairing the public’s ability to access and enjoy coastal areas. Seawalls greatly diminish habitat for species that rely on sandy beaches, marshes, bluffs, and dune ecosystems. *See* Jenifer E. Dugan et al., *Ecological Effects of Coastal Armoring on Sandy Beaches*, 29 *Marine Ecology* 160, 167 (2008). Shorebirds and coastal flora and fauna require

these ecosystems for spawning, nesting, and feeding and have few alternatives when great swaths of the coastline are armored. *Id.* at 167-169. A smaller beach area also limits the activities for which the beach can be used. Meg Caldwell & Craig Holt Segall, *No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access Along the California Coast*, 34 *Ecology L.Q.* 533, 541 (2007). When the whole beach is covered at high tide, there is no longer room for runners to jog or children to play. Surfers are doubly harmed: treasured surf breaks are inaccessible at high tide because of beach loss and the quality of surf breaks declines as waves rebound off seawalls and change wave patterns. *See* L. Benedet et al., *Impacts of Coastal Engineering Projects on the Surfability of Sandy Beaches*, 75 *Shore & Beach* 3, 13-15 (2007).⁵

In some areas, seawalls can also provide a vertical barrier to the beach; unable to access the beach by climbing down dunes or bluffs, the public must travel around each seawall before finding an access point. Griggs, *The Effects of Armoring Shorelines*, *supra*, at 81; Caldwell & Segall, *supra*, at 540, 555. When vertical access points are limited to areas on private property inaccessible to the public, attempting to reach the beach becomes even more challenging. Having to search for a public beach

⁵ For more on how armoring impacts surf breaks and flow conditions, see Bradley E. Scarfe et al., *Sustainable Management of Surfing Breaks: Case Studies and Recommendations*, 25 *Coastal Research* 684, 684, 699 (May 2009).

access point along a busy coastal highway can deter beachgoers and families. In Solana Beach, where the length of shoreline is only 1.7 miles and the beach is below bluffs reaching 75 feet high, the City's efforts to ensure the continued provision of public access points through the LUP policies is especially important.⁶

In spite of attempts by the Coastal Commission to have armoring blend in with the local environment, seawalls stick out in the landscape and can mar the beauty of the coast. With a third of California's southern coastline armored by seawalls, such negative impacts on the scenic and visual qualities of the coast do not go unnoticed to the millions of visitors each year. Griggs, *The Effects of Armoring Shorelines*, *supra*, at 78. Both residents and out-of-state travelers flock to California's coast, spending money in beachside communities. As the beach is lost and the shoreline hardened, the subsequent reduction in recreational and visual quality has the potential to cause substantial economic loss as visitors instead seek pristine beaches elsewhere.⁷

Moreover, the impacts from coastal armoring will become amplified

⁶ There are currently eight vertical access points, four of which are private. LUP ch.1, at 2.

⁷ For an analysis of the recreational and economic effects of reduced beach width, see Linwood Pendleton et al., *Estimating the Potential Economic Impacts of Climate Change on Southern California Beaches*, 109 *Climatic Change* 277, 277-298 (2011); *see also* Warren Kriesel & Robert Friedman, *Coping With Coastal Erosion: Evidence For Community-Wide Impacts*, 71 *Shore & Beach* 19, 19-23 (2003).

by climate change. Dan Cayan et al., Cal. Climate Change Ctr., *Scenarios of Climate Change In California: An Overview*, 11 (2006). Sea level rise is predicted to increase at accelerating rates, exacerbating already prevalent erosion.⁸ Climate change may increase the frequency of storms, which, when coupled with escalations in storm intensity and wave energy due to increased sea level rise, imperil California's beaches. See National Research Council, *supra* note 8, at 7. These storms are more likely to overwhelm existing seawalls. Dan Cayan et al., Cal. Climate Change Ctr., *Projecting Future Sea Level*, 30 (2006). Along many parts of the armored coastline in Solana Beach and elsewhere, the beach is already often impassable at high tide. LUP ch.2, at 3. This impediment to public access worsens during the winter storm season and will likely be exacerbated by sea level rise. Rising sea levels will cover up existing beach area and, as an armored coastline results in a narrower beach area, the public's right to access and enjoy the coast will be further curtailed.

In order to combat erosion and maintain beaches for public use, the City of Solana Beach has already dedicated millions of dollars in taxpayer money towards temporary sand nourishment projects. But without sound

⁸ Sea level in California is expected to rise by at least one foot in the next forty years and by at least four to five feet over the next century. Cal. Climate Action Team, Coastal & Ocean Working Group, *State of California Sea-Level Rise Guidance Document* (Ocean Protection Council, Mar. 2013); National Research Council, *Sea-Level Rise for the Coasts of California, Oregon, and Washington: Past, Present, and Future* 117, table 5.3 (2012).

regulation of armoring structures, including mitigation fees, the City will be forced to continue spending taxpayer funds to counter the negative impacts from these structures, forcing the general public to subsidize harmful structures that only benefit a small number of private property owners. The LUP policies help avoid this inequitable outcome.

II. The Solana Beach Land Use Plan is a Prudent Compromise between Private and Public Interests

For the past two decades, the City has been working on its LUP to achieve a balance between public interests, including public trust and environmental interests, and private interests, including property and economic interests. The Coastal Commission approved and certified the LUP in March 2012 with modifications to certain policies and subsequently approved further amendments by the City to a handful of LUP policies in January 2014.⁹ 1 Joint Appendix (JA) 261. The LUP, as certified, provides reasonable policies regulating “development and redevelopment in a manner that minimizes impacts to coastal resources, including public access and recreation.” LUP ch. 4, at 10.

The certified LUP strikes a balance between private interests and constitutional and statutory mandates to protect the rights of the public. As required by the Coastal Act, certification of the LUP and LUP amendments

⁹ Surfrider adopts and joins in the City’s and Coastal Commission’s briefs and their thorough discussion of the procedural and factual background of this case.

were the product of extensive public participation processes. Cal. Pub. Res. Code §§ 30006, 30503. This extensive public participation, including Surfrider's participation, is explicitly noted in the adopted LUP:

The LCP/LUP is intended to provide a long-term comprehensive land use planning and policy blueprint for the utilization, management and preservation of coastal resources within the City. The planning and development of the City's LCP/LUP involved an Ad-Hoc Council Committee, City Staff as well as a citizen's committee whose members included a representative of CalBeach Advocates, consultants, a former California Coastal Commissioner, the Surfrider Foundation, local policymakers, attorneys, and other local residents. This [sic] stakeholders met over the course of five years (from 2004-2009) and provided recommendations and input to the City for its consideration in the drafting of the LCP/LUP. The stakeholders were actively involved in assisting the City with responding to the California Coastal Commission's (CCC's) comments on earlier drafts of the LCP/LUP (including the 2006, 2007, 2008 and 2009 LUPs). The City incorporated a substantial number of their comments and suggestions and much of their work is embodied in this LUP. Moreover, a number of public hearings were held by the City to review drafts of this LCP/LUP and to solicit and receive public input.

LUP ch. 1, at 4. And, while throughout years of public meetings Surfrider consistently advocated for coastal protections and public access policies that were more stringent than the regulatory policies ultimately adopted in the LUP, Surfrider accepts that the existing LUP is a compromise between competing interests and thus has not challenged the Plan. By contrast, BBC, not agreeing with the results of the public process (and depriving the

Court of the record which reflects it), has challenged the LUP and urges an extreme interpretation of essentially unconstrained individual property rights. Surfrider supports the existing LUP and urges judicial deference to the decisions reached by the Commission and City after over two decades of public process.

III. Trial Court Decision

BBC challenged seven land use plan and amended land use plan policies and amendments as being facially invalid. 1 JA 257. The trial court issued its intended decision on December 6, 2016, and entered a final judgment and writ of mandate on April 5, 2017. 4 JA 929, 948–951. The trial court upheld five of the challenged policies, three of which BBC has appealed here (Policies 4.53, 4.19, and 2.60.5) and invalidated two policies (Policies 4.22 and 2.60). 4 JA 931–935; AOB at 8. Surfrider demonstrates below that the trial court correctly found Policies 4.53, 4.19, and 2.60.5 regulating seawalls and stairways consistent with the Coastal Act and the Constitution. Further, Surfrider will show that the trial court erred in invalidating Policies 4.22 (limiting seawalls whose sole purpose is to protect existing accessory structures) and 2.60 (requiring a coastal development permit for repair and maintenance of stairways).¹⁰ Surfrider requests that this Court uphold the judgment below as to the City’s Land

¹⁰ This brief does not address the other procedural issues that bar this lawsuit, as those are addressed by the Commission and the City.

Use Policies 4.53, 4.19, and 2.60.5 and reverse the judgment below with respect to Policies 4.22 and 2.60.

LEGAL BACKGROUND

I. The Public Trust Doctrine Provides Robust Protections for Coastal Access and Coastal Resources.

California law requires strong protections for public access to the coast and for the preservation of coastal lands and waters. It is well-established that the State owns all lands below the ordinary high tide line and holds those lands, including the beach and submerged waters, in trust and for the benefit of the public. Cal. Civ. Code § 670; *People ex inf. Webb v. California Fish Co.*, 166 Cal. 576, 584 (1913); *Marks v. Whitney*, 6 Cal. 3d 251, 259 (1971). As the United States Supreme Court announced over a century ago, the state holds public trust property “in trust for the people of the state that they may enjoy . . . freed from the obstruction or interference of private parties.” *Illinois Central Railroad v. Illinois*, 146 U.S. 452, 460 (1892).

The public trust not only encompasses traditional public uses such as navigation and commerce, but also extends to the preservation and enjoyment of tidelands “. . . in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.” *Marks v. Whitney*, 6

Cal. 3d at 259-60; *see also City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 521 (1980) (holding that public trust uses to include the right to “hunt, bathe or swim, and the right to preserve the tidelands in their natural state as ecological units”); *Nat’l Audubon Soc’y v. Superior Court*, 33 Cal. 3d 419, 435 (1983) (concluding that protecting recreational and ecological values and uses, scenic views of a waterbody and its shores, and wildlife, are among the purposes of the public trust doctrine). The Commission implements the public trust doctrine through the policies of the Coastal Act.

Both the Commission and City, which is delegated the coastal development permitting responsibility once the full Local Coastal Program (LUP and Implementation Plan) is certified, bear responsibility to protect the public trust. *Center for Biological Diversity v. FPL Grp., Inc.*, 166 Cal. App. 4th 1349, 1369 (2008) (holding that a county and other “subdivisions and agencies” of the state must protect public trust resources). The public trust must be protected “whenever feasible” and cannot be abandoned to appease private interests. *Nat’l Audubon Soc’y*, 33 Cal. 3d at 446; *City of Berkeley*, 26 Cal. 3d at 521 (holding that the “administrator of the trust in tidelands on behalf of the public, does not have the power to abdicate its role as trustee in favor of private parties”).

II. The California Constitution Preserves the Public’s Right to Access the Coast.

The right of the public to access and use the coast is enshrined in the

California Constitution:

No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands . . . shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.

Cal. Const. art. X, § 4. In accordance with these constitutional protections, the California Legislature passed the California Coastal Act to regulate coastal development to protect coastal resources and ensure public access to these resources. *See* Cal. Pub. Res. Code § 30210.¹¹ The Commission and City, in turn, carried out these coastal protection and public access obligations under the California Constitution and state law by including policies in the LUP that regulate the redevelopment of existing bluff retention devices and stairways and limit new bluff retention devices.

III. The California Coastal Act Gives Priority to both Coastal Access and Coastal Resource Protections.

Surfrider adopts and joins in the City’s and Coastal Commission’s briefs and their thorough discussion of the framework, purpose, and

¹¹ Section 30210 provides that: “In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.” *Id.*

provisions of the Coastal Act, with the following additions concerning the Coastal Act.

The California Coastal Act was enacted to “Protect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources.” Cal. Pub. Res. Code § 30001.5(a). Protecting the overall quality of the coastal zone includes preserving both the visual beauty of the coastline and the integrity of marine resources. *Id.* §§ 30251, 30230. The Legislature specified that the protection of coastal resources is paramount in coastal management decisions: When conflicts arise between provisions within the Coastal Act, they must “be resolved in a manner which on balance is the most protective of significant coastal resources.” *Id.* § 30007.5; *see also id.* § 30200(b). This includes conflicts between policies regarding development and redevelopment and policies on public access and preservation of coastal resources.

The Coastal Act was also enacted to “maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners.” Cal. Pub. Res. Code § 30001.5(c); *see also id.* § 30210. This emphasis on public access derives from the California state constitution and takes precedence over the right of private property development. *Id.* § 30211 (mandating that

“[d]evelopment shall not interfere with the public’s right of access to the sea . . . including, but not limited to, the use of dry sand and rocky coastal beaches”). Finally, Coastal Act provisions must be “liberally construed to accomplish its purposes and objectives.” Cal. Pub. Res. Code § 30009. It was with these goals in mind – coastal resource protection, public access, and public recreation – that the City and Commission carefully crafted the LUP policies at issue in this case.

STANDARD OF REVIEW

Where the facial validity or constitutionality of legislation is challenged, the appellate court reviews the trial court decision *de novo*. *Zubarau v. City of Palmdale*, 192 Cal. App. 4th 289, 307-308 (2011); *People ex rel. Lockyer v. Shamrock Foods Co.*, 24 Cal. 4th 415, 432 (2000). Because BBC chose to forego the normal administrative mandate process and challenged the facial validity of the City’s LUP, this appeal involves a facial challenge to the language of LUP and amended LUP policies. Thus, the issues before this Court are questions of law and are subject to independent appellate review. *Id.*

In general, “statutes are presumed to be valid and a court will not strike down a legislative enactment unless its invalidity is clearly established.” *Mercury Cas. Co. v. Scottsdale Indem. Co.*, 156 Cal. App. 4th 1212, 1218 (2007) (internal quotes and brackets omitted). And, where the constitutionality of a local ordinance is at issue, “[a]ll presumptions and

intendments favor the validity of a statute . . . Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears.” *Zubarau v. City of Palmdale* at 307-308 (internal quotes omitted); *Rental Housing Owners Ass’n of Southern Alameda County, Inc. v. City of Hayward*, 200 Cal. App. 81, 90 (2011).

Indeed, to prevail, a challenger must show that the unconstitutional application of a local ordinance policy is unavoidable. *San Mateo County Coastal Landowners’ Assn. v. County of San Mateo*, 38 Cal. App. 4th 523, 547 (1995) (petitioner’s facial challenge to a fully certified Local Coastal Program’s policies as unconstitutional was denied because petitioner failed to show that unconstitutional application of the Local Coastal Program’s policies was unavoidable); *see also Pac. Legal Found. v. Brown*, 29 Cal. 3d 168, 181 (1981) (holding that “petitioners must demonstrate that the act’s provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions”). In this case, it is not possible for BBC to show that an unconstitutional application of the LUP policies is unavoidable because the City has not even completed the Implementation Plan, which consists of the ordinances in a Local Coastal Program that lay out specifically how the LUP policies would be applied.

STATEMENT OF APPEALABILITY

This is an appeal from a final judgment resolving all of the issues between the parties, 4 JA 948–951, brought pursuant to Code of Civil

Procedure section 904.1(a)(2).

ARGUMENT

The state's common law public trust doctrine, the California Constitution and the Coastal Act each emphasize the importance of preserving California's renowned coastal resources and ensuring the public's ability to access those resources. In developing the LUP, the City and Commission recognized the interests of private property owners while also following constitutional and statutory directives to protect the public's interests. The LUP policies provide reasonable restrictions on seawalls and stairways in order to minimize long-lasting harms to public resources and maximize public access.

Surfrider's cross-appeal addresses issues relating to seawalls for accessory structures (Policy 4.22) and coastal development permits for stairway repairs (Policy 2.60). It also shows that the lack of an administrative record in this case prevents the public's voice, including Surfrider's written and oral testimony to the Commission and City, from being heard and undermines the public participation principles in the Coastal Act. Finally, Surfrider's response addresses additional regulations on seawalls and stairways upheld by the trial court and appealed by BBC. Surfrider requests that the Court grant the Surfrider's, the City's, and the Commission's cross-appeals and deny BBC's appeal.

SURFRIDER’S CROSS-APPEAL

BBC’s challenge to certain policies in the LUP must be evaluated in light of the Coastal Act’s overarching intent and goals. The fundamental flaw in BBC’s contention regarding bluff retention devices is that it isolates but one policy of the Act – section 30235 – which it contends provides an unqualified “mandate” to allow seawalls. 2 JA 514. This claim, however, is contrary to established precedent and fails to consider other equally applicable policies in the Coastal Act. Similarly, BBC’s argument that section 30610 of the Act requires the City to allow stairway repairs without a coastal development permit ignores other Coastal Act provisions and Coastal Commission regulations implementing the coastal development permit exemption provisions in section 30610.

I. The City’s Prohibition on Seawalls to Protect Accessory Structures is Consistent with the Coastal Act, the California Constitution, and the Public Trust Doctrine.

A. The Coastal Act Supports Policy 4.22’s Prohibition on Seawalls for Accessory Structures.

Policy 4.22 provides that “[n]o bluff retention device shall be allowed for the sole purpose of protecting an accessory structure.”¹² While BBC argues that Coastal Act 30235 provides an unqualified right to protect

¹² Accessory structures are defined as playhouses, pools, cabanas, walkways, tennis courts, gazebos, and patios. LUP ch. 8, p. 1. Note that armoring is allowed to protect existing principal structures which include accessory structures; it merely prohibits protecting accessory structures alone. *Id.* (Policy 4.22).

any existing structure with a seawall, the Coastal Act provides otherwise.

Coastal Act section 30235 allows seawalls if necessary to protect existing coastal development at risk from erosion and only if certain conditions are met, limiting the ability of individual homeowners to use seawalls to protect existing structures. *Id.* § 30235. The courts have specifically rejected claims that section 30235 confers an unqualified right to having a seawall to protect existing structures. *Ocean Harbor House Homeowners Ass’n v. California Coastal Comm’n*, 163 Cal. App. 4th 215, 242 (2008). In *Ocean Harbor House*, the Court held “that section 30235 does not limit the type of conditions that the Commission may impose in granting a permit to construct a seawall. Rather, the Commission has broad discretion to adopt measures designed to mitigate all significant impacts that the construction of a seawall may have.” *Id.*

Importantly, the Court emphasized, contrary to BBC’s argument here, that “[t]he language of section 30235 is permissive, not exclusive,” and that “the statute does not purport to preempt other sections of the Act that require the Commission to consider other factors in granting coastal development permits.” 163 Cal. App. 4th at 241. The other applicable provisions of the Coastal Act that the Commission must consider include: section 30604(c) (permits must comply with the Act’s public access and recreation policies); section 30251 (scenic and visual qualities of coastal areas “shall” be considered and protected); and section 30240

(environmentally sensitive habitats “shall” be protected). *Id.* at 242. Policy 4.22 is clearly consistent with these Coastal Act provisions and is a reasonable regulation to mitigate the adverse impacts directly caused by armoring structures.

Other courts have also underscored that individual provisions within the Coastal Act “cannot be considered in isolation” and instead should be interpreted “in light of other provisions of the Act.” *Sierra Club v. Cal. Coastal Comm’n*, 19 Cal. App. 4th 547, 561 (1993). In *Sierra Club*, the Court held that section 30233, which provides that dredging “shall be planned and carried out to avoid significant disruption to marine and wildlife habitats and water circulation,” did not require the Coastal Commission to deny any dredging that causes significant habitat disruptions. *Id.* at 561 (emphasis added). Instead of reading section 30233 in isolation as an absolute and mandatory provision, the Court held that the provision should be considered within the greater context of the Coastal Act:

The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.

Id. The Court further clarified that should conflicts arise between

individual provisions, the “plain meaning of section 30007.5 authorized the Commission to resolve the conflict in favor of long term protection of the [marine environment].” *Id.* at 562.

In reasoning analogous to the failed arguments in *Sierra Club*, BBC argues that section 30235 is a mandatory provision, preventing regulation of seawalls for existing development. This tunnel-visioned reading of section 30235 fails to consider the broader intent of the Coastal Act to protect California’s coastal resources. Specifically, BBC’s argument fails to acknowledge that conflicts between policies on short-term coastal armoring and long-term environmental protection should be resolved in favor of protecting coastal resources – even where, as in *Sierra Club*, a provision at issue contains the word “shall.” Cal. Pub. Res. Code § 30007.5; *id.* § 30200; *Sierra Club*, 19 Cal. App. at 362. For this reason, the City’s efforts to protect coastal resources by prohibiting seawalls solely to protect a playhouse or cabana should be upheld, and the trial court’s invalidation of Policy 4.22 should be reversed.

B. Policy 4.22 Comports with the Public Trust Doctrine and the State Constitution’s Robust Protection of Coastal Access and Coastal Resources.

Coastal armoring impairs the public trust by placing a physical barrier that harms coastal ecosystems and inhibits the public’s ability to access the beach. Coastal armoring can also reduce the physical area of public trust land; when the beach erodes to such an extent that the waves

crash directly into an armoring structure, the wet sand beach and tidelands disappear. Caldwell & Segall, *supra*, at 539-41.

The Commission and the City must ensure that the development located *near* tidelands (public trust lands) does not impair trust resources by, for example, impeding public access to the tidelands. *See* Pub. Res. Code § 30211; *Nat'l Audubon Soc'y*, 33 Cal. 3d at 435-37 (agencies have a duty to consider how the use of non-trust resources will affect public trust resources). Bluff retention devices, even if not built directly on the tidelands, affect public trust resources by eventually making the beach impassable at high tide and shrinking the physical footprint of the tidelands and tidal habitat. This curtailment of access to the tidelands and ocean also violates the state Constitution, which prohibits the obstruction of public access to tidelands. Cal. Const. art. X, § 4.

The loss of public access and public trust resources to ensure that wealthy homeowners can protect their pools and gazebos is hardly sound public policy and is inconsistent with the public trust doctrine and the state Constitution. The public trust must be protected “whenever feasible” and cannot be abandoned to appease private interests. *Nat'l Audubon Soc'y*, 33 Cal. 3d at 446; *City of Berkeley*, 26 Cal. 3d at 521. As such, the City cannot simply subordinate the public trust protections in the current LUP to pacify individual property owners. For these additional reasons, the trial court’s invalidation of Policy 4.22 on accessory structures should be

reversed.

II. Policy 2.60 Requiring a Permit for Stairway Repair and Maintenance Is Consistent With the Coastal Act.

Coastal Act section 30610 sets forth the types of activities for which coastal development permits typically are not required.¹³ Cal. Pub. Res. Code § 30610. Typically, repair and maintenance activities that do not enlarge or expand the development at issue do not require a permit. *Id.* § 30610(d). The Act gives the Coastal Commission wide latitude, however, to require coastal development permit, particularly where such activities will potentially cause adverse impacts. *Id.* The Coastal Commission, through its regulations (Cal. Code Regs., tit. 14, § 13000 et seq.), has done just that. The regulations implementing section 30610 require that any repair and maintenance on any sand area or within 50 feet of the edge of the coastal bluff, and which use mechanized equipment or construction materials, involve a risk of substantial adverse environmental harm and require a permit. *Id.* § 13252(a)(3). Because stairway repairs along the coastal bluff use construction materials within 50 feet of the edge of the bluff, Policy 2.60 requiring a permit for repairs is consistent with Coastal Act section 30610 and its implementing regulations. The trial court’s

¹³ Notably, the Coastal Act generally requires a permit for all “development,” which is defined broadly and goes well beyond “what is commonly regarded as development of real property.” *Gualala Festivals Committee v. California Coastal Comm’n*, 183 Cal.App.4th 60, 67 (2010).

invalidation of Policy 2.60, therefore, should be reversed.¹⁴

III. The Administrative Record Is Necessary for the Public's Voice to be Heard.

BBC also contends that its challenge does not require preparing a certified Administrative Record for submission to the Court. 3 JA 695–696. Importantly, however, the consequence of BBC's argument is that Surfrider and the members of the public who participated extensively for two decades in the proceedings before the Commission and City regarding the LUP policies will be harmed as their views and the evidence before the Commission are excluded from review.

The Coastal Act requires that the public “shall be provided maximum opportunities to participate,” including through public hearings. Cal. Pub. Res. Code §§ 30006, 30503; *Ross v. Cal. Coastal Comm'n*, 199 Cal. App. 4th 900, 935 (2011). The Coastal Act further states that:

the public has a right to fully participate in decisions affecting coastal planning, conservation and development; that achievement of sound coastal conservation and development is dependent upon public understanding and support; and that the continuing planning and implementation of programs for coastal conservation and development should include the widest opportunity for public participation.

¹⁴ In arguing that LUP Policies 2.60 and 2.60.5 are inconsistent with the Coastal Act and that no permit should be required for repairs or for replacement of a 50 percent or more of a stairway, BBC relies on *Union Oil Co. v. South Coast Regional*, 92 Cal. App. 3d 327, 331 (1979), a case that predated amendments to section 30610(d) and its above-referenced implementing regulations. For these reasons, this Court should find this case inapposite, as did the trial court.

Cal. Pub. Res. Code § 30006.

In *Barrie v. California Coastal Comm'n*, 196 Cal. App. 3d 8 (1987), the court acknowledged that this public process must not be undermined. There, the Coastal Commission declined to grant a permanent emergency permit for an existing seawall because such a permit “circumvents the Act’s procedures which are designed to ensure protection of the coastline and input by the public.” *Id.* at 17. The Court held that such action “would undermine the Coastal Act’s policies of informed decision-making and public participation and would encourage individuals to circumvent the Coastal Act’s procedures as a matter of course.” *Id.* at 17-18. Deciding this case in the absence of a record would similarly undermine the public participation requirements in the Coastal Act.

Consistent with statutory obligations for public participation, the Coastal Commission and City both conducted a lengthy public process that ultimately led to the certified LUP. Surfrider, representing over 7000 members and activists in San Diego County, was involved throughout this process for over two decades. Indeed, Surfrider staff and members testified numerous times at City Council and Coastal Commission hearings, testimony that is part of the record that BBC is insisting is unnecessary. Allowing BBC to challenge policies in the LUP without a record not only is inconsistent with the basic tenets of administrative law, but also would

undermine the democratic process enshrined in the Coastal Act and render an expensive and time-consuming public process meaningless.

For all of the foregoing reasons, the Court should reverse the trial court ruling with respect to the City's LUP Policies 4.22 and 2.60.

SURFRIDER'S ANSWERING BRIEF

BBC erroneously contends that the current LUP does not comply with statutory and constitutional provisions. First, BBC argues that the Coastal Act provides an unqualified mandate to allow seawalls for existing development and that the City cannot require homeowners to waive any future right to a seawall. Second, BBC argues that the City went too far by requiring public access easements for reconstructed stairways and that the City lacks authority to require a coastal development permit for stairway repairs. These claims, in essence, seek to place unfettered interests of individual homeowners over the interests of the public, directly contravening California law regarding public access and coastal resources.

I. LUP Policy 4.53 Is Consistent with the Letter and Intent of the Coastal Act.

A. The City May Tie a Seawall Permit to the Life of the Existing Development the Seawall is Intended to Protect.

Policy 4.53 ensures that seawalls are only used to protect existing development, as the Coastal Act requires.¹⁵ BBC incorrectly argues that

¹⁵ Policy 4.53 provides in part: "All permits for bluff retention devices shall expire when the currently existing blufftop structure requiring protection is

4.53 is inconsistent with the Coastal Act because, in BBC’s view, section 30235 provides a “guarantee” that homeowners have a perpetual right to a bluff retention device.¹⁶ Section 30235 provides that armoring “shall” be permitted under certain conditions to protect existing structures. As discussed above, however, the courts have specifically rejected claims that section 30235 confers an unqualified right to having a seawall to protect existing structures. *Ocean Harbor House*, 163 Cal. App. 4th at 242; *see also Lynch v. California Coastal Comm’n*, 229 Cal. App. 4th 658, 177 Cal. Rptr. 3d 654, 662, *aff’d on procedural grounds*, 3 Cal. 5th 470 (2017) (holding that the Commission has broad discretion to impose conditions to mitigate the seawalls impacts.) In particular, 30235 must be read in conjunction with all other provisions of the Coastal Act, and coastal resource protection must be prioritized over coastal development when conflicts arise. *Id.* §§ 30007.5; 30200; *Sierra Club*, 19 Cal. App. at 561-562.

Finally, allowing a structure the continued benefit of a seawall, even after that structure is essentially replaced with a new structure through

redeveloped (per definition of Bluff Top Redevelopment in the LUP), is no longer present, or no longer requires a protective device, whichever occurs first and a new CDP must be obtained. . . In addition, expansion and/or alteration of a legally permitted existing bluff retention device shall require a new CDP and be subject to the requirements of this policy.”

¹⁶ “Property owners have bought homes and invested in land along the coast since the enactment of the Coastal Act with the guarantee that their property can be protected with seawalls when necessary to combat erosion.” AOB p. 15.

redevelopment, would undermine the purpose of the Coastal Act and would render Coastal Act section 30253 meaningless. Section 30253 prohibits seawalls and other armoring devices to protect *new* development. Cal. Pub. Res. Code § 30253 (“New development shall . . . 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.”) As the former Executive Director of the Coastal Commission has observed, without sound policies limiting armoring for redeveloped structures like those outlined in the LUP, “structures do not really die so much as metamorphose into ‘new and improved’ structures in the same place.” Charles F. Lester, *An Overview Of California’s Coastal Hazards Policy*, 148 in *Living with the Changing California Coast* (Gary Griggs, ed., Berkeley, University of California Press, 2005).

Without conditions limiting protection for redeveloped structures and explicitly tying seawalls to the life of the existing structure the seawall is intended to protect, private property homeowners could attempt an end run around the Coastal Act’s clear restriction on armoring for new structures. Policy 4.53 effectively and lawfully prevents this outcome and helps effectuate a logical and application of the Coastal Act. For these reasons, Policy 4.53 should be upheld.

B. Under the Coastal Act, the City May Reassess the Impacts of Seawalls For Mitigation Purposes Every 20 Years.

BBC also takes issue with the fact that Policy 4.53 requires, as a permit condition on seawalls, that the impacts of the seawall be reassessed for mitigation purposes every 20 years. The text of Policy 4.53 provides in part that: “The CDP shall include a condition requiring reassessment of the impacts of the device in 20 year mitigation periods” Contrary to BBC’s assertions, it is clear from the plain language of the policy that it does not contain a 20-year permit “reauthorization” requirement. Rather, it merely requires a reassessment of impacts for purposes of determining the appropriate mitigation measures and mitigation fees given potentially changed circumstances.

Consistent with case law, the LUP implements a sand mitigation fee, to mitigate loss of sand that would have been deposited on the beach but for the seawall, and a public recreation fee, to improve public access and public recreation, on individuals owning seawalls in order to combat negative effects from seawalls. LUP Policies 4.39 and 4.50.¹⁷ Without sound regulation of seawalls, including mitigation fees, the City would have to use taxpayer dollars to negate the impacts from armoring. Policy 4.53’s requirement that impacts are reassessed every 20 years to determine appropriate mitigation and fees will allow the City to adapt to any increased impacts from climate change and sea level rise.

¹⁷ The trial court upheld the imposition of mitigation fees, and BBC did not appeal this issue. 4 JA 948-951; AOB at 8.

Even if Policy 4.53 provided that the permit would totally expire after 20 years, the policy would still be valid. In a recent California appellate decision, the court upheld a coastal development permit condition that limited the duration of an armoring permit to protect an existing structure to 20 years. *Lynch*, 229 Cal. App. 4th 658, 177 Cal. Rptr. 3d at 660-663. In *Lynch*, the appellate court noted that there is no authority “categorically precluding the Commission from imposing a condition limiting the duration of a permit.” *Id.* at 662. The court further held that “[s]ince the Commission imposed the conditions limiting the permit’s duration to ensure the seawall’s long-term impacts do not extend beyond the time period for which the seawall’s existence can be reasonably justified to protect respondents’ existing homes, we conclude the conditions fell within the Commission’s discretion and were valid.” *Id.* The City and Commission applied the same rationale to LUP Policy 4.53. For all of these reasons, the trial court’s ruling upholding Policy 4.53 should be affirmed.

II. Policies 4.19 and 2.60.5 Are Constitutional and Consistent With the Coastal Act.

A. Coastal Property Owners Have No Right To Protect Their Property Free From Land Use Regulation.

Under its police power, the City has broad authority to regulate land use to protect the public health, safety, and welfare of its residents. Cal. Const. art. XI, § 7; *Associated Home Builders, Inc. v. City of Livermore*, 18

Cal. 3d 582, 600-01 (1976); *Cal. Building Industry Ass'n v. City of San Jose*, 61 Cal. 4th 435, 455-457 (2015). Pursuant to this clearly established power, coastal property owners have no right to protect their property free from land use regulation. *Whaler's Village Club v. Cal. Coastal Comm'n*, 173 Cal. App. 3d 240, 253 (1985) (*abrogated on other grounds*); *Cal. Building Industry Ass'n*, 61 Cal. 4th at 455-457. While constitutional rights attaching to private ownership and use of real property are vital, more than 80 years ago,

it was clearly established that property ownership rights, reserved to the individual by constitutional provision, must be subordinated to the rights of society. It is now a fundamental axiom in the law that one may not do with his property as he pleases; his use is subject to reasonable restraints to avoid societal detriment.

Whaler's Village Club, 173 Cal.App.3d at 253 (citations omitted). Thus, a “homeowner did not have a fundamental right to build a new revetment to protect his home from coastal hazards; rather, any right to build such a structure was subject to legitimate regulation under the Coastal Act.” *Id.* at 253-54. BBC property owners’ constitutionally protected rights are similarly subject to legitimate regulation under the Coastal Act and “reasonable restraints to avoid social detriment.” *Id.*

The government may even take a property interest as a condition of permit approval without providing compensation, so long as there is an “essential nexus” and “rough proportionality” between the permit exaction

and the negative public impact of the property owner's development. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (requiring an "essential nexus" between the permit exaction and the legitimate state interest the government is trying to further); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (requiring that the exaction be roughly proportional to the impact the exaction is intended to mitigate); *see also Koontz v. St. Johns River Water Management Dist.*, 133 S. Ct. 2586 (2013). As outlined below, if the permit condition satisfies the nexus/proportionality test from *Nollan* and *Dolan*, then the condition is constitutional. *Dolan*, 512 U.S. at 385.

B. BBC's Facial Challenge to Policies 4.19 and 2.60.5 Based on an Unconstitutional Conditions Claim is Not Ripe.

BBC argues that LUP Policy 4.19 (requiring an explicit waiver of armoring as a condition for new development) and LUP Policy 2.60.5 (addressing the conversion of private stairways into public accessways under certain narrow circumstances) constitute a taking under the "unconstitutional conditions" doctrine. This challenge is premature, however. Because the policies in the LUP have not been applied to anyone seeking a development permit, no conditions, let alone unconstitutional conditions, have been imposed.

Challenges under the unconstitutional conditions doctrine are only appropriate in response to a permit application and cannot be made to a

land use plan. *Sierra Club*, 12 Cal. App. 3d at 618; *see also San Mateo County*, 38 Cal. App. 4th at 547 (denying a facial takings challenge to an LCP because the local government would have flexibility to avoid potentially unconstitutional application of the policies whenever making individual permit decisions). The Court of Appeal has explicitly held that the unconstitutional conditions doctrine “applies only in the context of judicial review of individual adjudicative land use decisions.” *Action Apartment Ass'n v. City of Santa Monica*, 166 Cal. App. 4th 456, 471 (2008). Indeed, *Nollan*, *Dolan*, and *Koontz* – the cases that BBC cites to support its unconstitutional conditions argument – were all as-applied takings claims arising out of individual permit decisions.

In rejecting a facial takings challenge to the County of Mendocino’s coastal land use plan, the court in *Sierra Club* held that that “takings decisions must await as-applied challenges and are usually not ripe until the permit stage.” *Sierra Club*, 12 Cal. App. 3d at 618. In so holding, the court cited section 30010 of the Coastal Act, which makes clear that, on its face, neither the Commission nor the City may implement the Coastal Act in a way that would constitute a taking under the U.S. Constitution.

Specifically, section 30010 provides that:

[the Coastal Act] is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage

private property for public use, without the payment of just compensation therefor.

Cal. Pub. Res. Code § 30010. The City's LUP provides a similar provision to ensure that the policies are not implemented in a way that would effectuate a taking under the U.S. Constitution. LUP Policy 5.9.5. Both 30010 and Policy 5.9.5 allow the City flexibility to avoid unconstitutional applications of its land use policies when considering individual permit applications. For these reasons, the constitutional challenges to Policies 4.19 and 2.60.5 are not ripe.

C. Requiring an Explicit Waiver on Future Seawalls for New Development in LUP Policy 4.19 Is Constitutional and Complies with the Letter and Intent of the Coastal Act.

Not only is BBC's takings claim misplaced because it is premature, BBC's claim also misses the mark because Policy 4.19 does not implicate the unconstitutional conditions doctrine at all. The United States Supreme Court has declined to extend the unconstitutional conditions doctrine beyond the special context of exactions, which only includes permit conditions requiring dedication of private property for public use or permit conditions requiring monetary payments for mitigation. *Nollan*, 483 U.S. 825; *Dolan*, 512 U.S. 374; *Koontz*, 133 S. Ct. 2586. Thus, legislatively imposed, generally applicable development standards that do not require dedication of private property for public use or payment of money to the public should not be considered "exactions" that are subject to the

heightened scrutiny of *Nollan* and *Dolan*. See *Cal. Building Industry Ass'n*, 61 Cal. 4th at 444, 468.

For example, in *Cal. Building Industry Ass'n*, the court held that a city ordinance requiring developers to sell a certain percent of their units as affordable housing was not considered an exaction and thus could not be considered a taking under the unconstitutional conditions doctrine. 61 Cal. 4th at 468. Just like the ordinance at issue in *Cal. Building Industry Ass'n*, Policy 4.19 is not an exaction because it does not require dedication of private property for public use or payment of money.¹⁸ Thus, Policy 4.19 does not implicate the unconstitutional conditions doctrine and the heightened scrutiny regarding the constitutionality of exactions articulated in *Nollan* and *Dolan* does not apply.

Even if Policy 4.19 did implicate the unconstitutional conditions doctrine, it clearly meets the nexus and rough proportionality tests laid out in *Nollan* and *Dolan*. Surfrider, in its numerous submissions to the City and Commission during the LUP planning process and in the background section of this brief, provided a snapshot of some of the many studies showing the impacts of coastal armoring on California's beaches. The

¹⁸ Policy 4.19 prohibits armoring for new development and provides: "A condition of the permit for all new development and blufftop redevelopment on bluff property shall require the property owner record a deed restriction against the property that expressly waives any future right that may exist pursuant to Section 30235 of the Coastal Act to new or additional bluff retention devices."

detrimental impacts from coastal armoring have been recognized by the California courts and support a finding of nexus and proportionality for the development restrictions outlined in Policy 4.19. For example, in *Barrie* the court upheld the Commission's decision to deny a permanent permit for an armoring structure was reasonable because

[t]he Commission's findings that seawalls generally and vertical seawalls such as the Homeowners' seawall specifically cause beach erosion and sand loss were not based merely on speculation but on numerous well-documented reports. . . . The Commission's findings were not based on a mere possibility of beach erosion, but on a strong probability as documented in numerous studies. The studies also suggested that the further a seawall is from the breaking waves, the less adverse the probable impact.

196 Cal. App. 3d at 21. Similarly, the Court of Appeal in *Lynch* deferred to the Commission's findings on the negative impacts from seawalls and the exacerbating affect sea level rise will have on beach erosion in upholding a 20-year expiration condition on seawall permit. *Lynch*, 229 Cal. App. 4th at 658.

Just as *Nollan* requires, Policy 4.19's restriction on seawalls for new development serves to further the same government interest validated by *Ocean Harbor House*, *Lynch*, and *Barrie* – avoiding armoring's negative impacts on coastal resources and coastal access. The City's LUP specifically spells out its goals of minimizing the placement of seawalls to help maintain public lateral access along the beach. *See, e.g.* LUP Policies

2.61-2.63. The LUP also lays out the public safety and coastal resource protection rationales for restricting seawalls. *See, e.g.* LUP ch. 2, at 8-9; ch. 4, at 10-11.

Policy 4.19 is also proportional to the impact from armoring that it is intended to mitigate, as required by *Dolan*. Because armoring contributes to coastal erosion, decreased public access, and visual blight, the City reasonably wants to ensure that new development will not contribute to additional armoring along the coast. As such, the City's condition restricting armoring for new development is a logical condition proportionate to the impact the condition is designed to mitigate.

Moreover, in order to prevail on a facial constitutional challenge, BBC would need to do more than suggest some future hypothetical situations in which constitutional problems may possibly arise. *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1084 (1995). Rather, BBC carries the burden to show that the LUP policies at issue inevitably pose a total and unavoidable conflict with applicable constitutional prohibitions. *Id.* at 1084; *see also San Mateo County*, 38 Cal. App. 4th at 547. Because the Coastal Act does not guarantee – and indeed prohibits – armoring structures to protect new development, BBC cannot show that Policy 4.19's waiver of a hypothetical right to build a future seawall would “inevitably pose a total and fatal conflict” with the takings clause. *See* Cal. Pub. Res. Code §

30253. Accordingly, BBC's claim that Policy 4.19 is unconstitutional should be rejected.

Finally, while BBC makes much of Policy 4.19's "waiver" of a future right to build a seawall to protect new development, coastal homeowners have no such right under the Coastal Act to begin with. Policy 4.19 merely reflects well-settled Coastal Act prohibitions on armoring for new development outlined in Coastal Act section 30253. Cal. Pub. Res. Code § 30253. When read together, Coastal Act sections 30253 (prohibiting armoring for new development) and 30235 (allowing armoring for some existing development if conditions are met) evince a broad legislative intent to allow some armoring for development that existed when the Coastal Act was passed, but avoid armoring for new development.

The waiver of any future right the homeowner "may" have to build a seawall merely avoids a situation where property owners seek to evade the requirements of section 30253 by, for example, building a house and then a few years later applying for a seawall for their no longer "new" house – a result that would be inconsistent with the letter and intent of the Coastal Act. Policy 4.19 ensures that coastal homeowners internalize the risks of building in an inherently hazardous location in a way that protects public access and the recreational, ecological, and scenic value of the coastline, as

required by the Coastal Act. For all of the foregoing reasons, the trial court's ruling upholding Policy 4.19 should be affirmed.

D. Policy 2.60.5 Is Consistent with the Coastal Act and Satisfies the Nexus And Rough Proportionality Tests in the Unconstitutional Conditions Doctrine.

Policy 2.60.5 provides for private stairways to be converted to public accessways if 50 percent or more of the stairway is being replaced.¹⁹ LUP Policy 2.60.5. Notably, this conversion requirement *only* applies where the private stairway is *already* using public land or is subject to a public access easement. *Id.* The policy further provides that conversion will only be required where feasible and where public access can be reasonably provided. *Id.*

Conversion of private stairways into public accessways under certain narrow circumstances meets the nexus and proportionality requirements laid out in *Nollan* and *Dolan*. Here again, the condition furthers the critical public access and recreation provisions in the Coastal Act and the California Constitution, which are clearly legitimate state purposes as required by *Nolan*. *See, e.g.*, Cal. Pub. Res. Code § 30001.5(c) (enshrining Coastal Act goals of maximizing public access to and along the coast and

¹⁹ Policy 2.60.5 provides: “Upon application for a coastal development permit for the replacement of a private beach stairway or replacement of greater than 50% thereof, private beach accessways shall be converted to public accessways where feasible and where public access can reasonably be provided. The condition to convert the private stairway to a public stairway shall only be applied where all or a portion of the stairway utilizes public land, private land subject to.”

maximizing public recreational opportunities in the coastal zone); *see also id.* § 30211-12 (preferencing coastal access in the face of private development); Cal. Const. art. X, § 4 (preventing private property owners from excluding the public from public lands).

The condition that would be imposed by Policy 2.60.5 is also roughly proportional to the impact it is designed to mitigate because it only applies to stairways which basically already use public land. Finally, as noted above, this challenge is premature because it is unclear how the city will implement it; BBC cannot prevail on a facial constitutional challenge to a land-use policy relying on hypothetical unconstitutional applications of that policy. *Tobe*, 9 Cal.4th at 1084; *San Mateo County*, 38 Cal.App.4th at 547.

Finally, a land use plan can be more restrictive in protecting coastal resources than the Coastal Act. Cal. Pub. Res. Code §§ 30009, 30005(a); *McAllister v. California Coastal Commission*, 169 Cal. App. 4th 912 (2008). In *McAllister*, an individual homeowner challenged restrictions in the Big Sur Land Use Plan on development in sensitive habitat areas. *Id.* at 912. In upholding Big Sur’s Land Use Plan, the Court concluded that “[w]hen a provision of the Coastal Act is at issue, we are enjoined to construe it liberally to accomplish its purposes and objectives, giving the highest priority to environmental considerations.” *Id.* at 928. Moreover, the Court held that “[a] local coastal program need not be identical to the

Coastal Act. As long as a local coastal program is not inconsistent with the Coastal Act, *it can be more restrictive.*” *Id.* at 929, fn. 9 (emphasis added).

As in *McAllister*, the City here has the authority to adopt LUP policies that are more restrictive than the minimum requirements of the Coastal Act. Consistent with its statutory authority, the City took action in the LUP to address public access issues. The LUP policy requiring conversion of private stairways to public stairways only apply in very limited circumstances when the stairways are on public land or subject to a public access deed or easement. This is consistent with *McAllister*, as an LUP can have development policies that are “more restrictive” than the Coastal Act. Cal. Pub. Res. Code § 30005. The Solana Beach LUP policies meet the minimum requirements of the Coastal Act and are a proper and reasonable exercise of the City’s authority to preserve coastal resources.

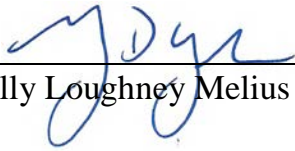
CONCLUSION

For the foregoing reasons and the reasons set forth in the City’s and Commission’s briefs, Surfrider respectfully requests the Court affirm the

judgment upholding LUP Policies 2.60.5, 4.19 and 4.53 and reverse the judgment as to Policies 2.60 and 4.22.

Dated: December 8, 2017

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

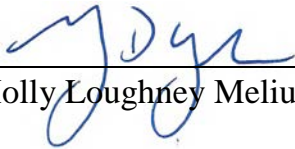
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CERTIFICATE OF COMPLIANCE

I certify that the attached SURFRIDER FOUNDATION’S COMBINED
RESPONDENT’S BRIEF AND CROSS-APPELLANT’S OPENING
BRIEF uses a 13 point Times New Roman font and contains 10,119 words.

Dated: December 8, 2017 ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA CLARA

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Santa Clara, State of California. My business address is Crown Quadrangle, 559 Nathan Abbott Way, Stanford, CA 94305-8610.

On December 8, 2017, I served true copies of the following document(s) described as **SURFRIDER FOUNDATION'S COMBINED RESPONDENT AND CROSS-APPELLANT OPENING BRIEF** on the interested parties in this action as follows:

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BY ELECTRONIC SERVICE: I served the document(s) on the person listed in the Service List by submitting an electronic version of the document(s) to One Legal, LLC, through the user interface at www.onelegal.com.

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

Executed on December 8, 2017, at Stanford, California.



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