No. A168645

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

CASA MIRA HOMEOWNERS ASSOCIATION, ET AL,

Respondents - Plaintiff,

v.

CALIFORNIA COASTAL COMMISSION,

Appellant - Respondent.

San Mateo County Superior Court, Case Nos. 19-CIV-04677
The Honorable Marie S. Weiner, Judge

APPLICATION OF CALIFORNIA BUILDING INDUSTRY ASSOCIATION AND CALIFORNIA BUSINESS PROPERTIES ASSOCIATION TO FILE AN AMICI CURIAE BRIEF IN SUPPORT RESPONDENT CASA MIRA HOMEOWNERS' ASSOCIATION; [PROPOSED] BRIEF OF AMICI CURIAE

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Pursuant to Rule 8.200(c) of the California Rules of Court, the California Building Industry Association ("CBIA") and California Business Properties Association ("CBPA") respectfully request leave to file an Amici Curiae Brief ("Brief") in this proceeding in support of Respondent Casa Mira Homeowners' Association ("Casa Mira").

A. AUTHORSHIP AND FUNDING

This Brief was drafted by Stanley W. Lamport and Morgan L. Gallagher of Cox, Castle & Nicholson, LLP on behalf of Amici CBIA and CBPA. No party or counsel for a party in the pending case authored the proposed Brief in whole or in part, directly or indirectly, or made any monetary or other contribution to fund its preparation. No person or entity made a monetary contribution intended to fund the preparation or submission of the proposed Brief, other than the amici curiae, their members, or their counsel in the pending appeal.

B. STATEMENT OF INTEREST

CBIA is a statewide non-profit trade association comprising approximately 3,000 members involved in the California residential real estate industry. CBIA and member companies directly employ over one hundred thousand people. CBIA is a recognized voice of all aspects of the residential real estate industry in California. CBIA acts to improve the conditions for this state's residential development community and frequently

advocates before the courts in amicus curiae briefs in cases involving issues of concern to its members.

Founded in 1972, CBPA is a statewide non-profit organization with over 10,000 members that represents the largest commercial-retail-industrial real estate consortium in California. CBPA serves as the advocate for property owners, tenants, developers, retailers, contractors, land use attorneys, brokers, and other professionals in the commercial real estate industry. Its members range from some of America's largest retailers and commercial property owners and tenants to individual and family-run commercial real estate interests. CBPA acts to improve the conditions for this state's commercial real estate industry and frequently advocates before the courts in amicus curiae briefs in cases involving issues of concern to its members.

Together CBIA and CBPA represent the leading voices for California residential and commercial real estate. They are united here because the outcome of this case has ramifications that extend far beyond the fate of Casa Mira. California's 1,100-mile coastline is a dynamic environment. Shoreline protection is commonly a necessary response to the demands of that environment. The Commission's current construction of Section 30235 to limit the mandate for approval of shoreline protection represents the greatest single threat to the future of California's residential and commercial real estate along California's coastline.

C. ISSUES ON WHICH AMICI CURIAE SEEK TO ASSIST THE COURT OF APPEAL

This case turns on the meaning of "existing structures" in Public Resources Code §30235, which requires the Appellant California Coastal Commission ("Commission") to permit shoreline protection (consisting of revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes) when necessary to protect existing structures. The question before the Court is whether the statutory mandate to approve shoreline protection applies to every structure existing when the protection is necessary, or only to those structures that existed prior to January 1, 1977.

The implications of the Commission's construction are currently playing out throughout the coastline. Amici have been dealing with the ramifications of the Commission's construction on a statewide basis. They bring a perspective that is informed by that broad experience that will assist the Court in deciding this appeal.

Amici agree with the Commission that resolving the meaning of "existing structures" requires consideration of the phrase in the context of the Coastal Act as a whole. However, the briefing by the parties thus far has not fully addressed a key point – that the Commission's construction of Section 30235 conflicts with private property rights in Article 1, Sections 1 and 19 of the California Constitution and two sections in the Coastal Act (Sections 30001.5(c) and 30010) in which the Legislature

declared that the Coastal Act is not to be applied to abridge those rights.

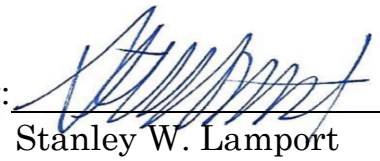
Allowing Amici to address this issue in their proposed Brief will assist the Court in deciding the meaning of Section 30235 in the context of the Coastal Act as a whole. The conflict between the Commission's construction of "existing structures" and Sections 30001.5(c) and 30010 and the corresponding property owner protections in the California Constitution has a direct bearing on the meaning of Section 30235 in the context of the Coastal Act as a whole. The issue has not been fully addressed in the parties' briefs.

Amici have drafted the accompanying Brief to complement, but not duplicate, the detailed arguments that have already been submitted to this Court by the parties to this case. Amici therefore, respectfully request that the Court grant this application and order the accompanying Brief of Amici Curiae to be filed.

Respectfully submitted,

Dated: September 5, 2024

COX, CASTLE & NICHOLSON LLP

By: 

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BRIEF OF AMICI CURIAE

INTRODUCTION

Amici Curiae ("Amici") California Building Industry Association ("CBIA") and California Business Properties Association ("CBPA") submit this brief in support of the trial court's construction of Public Resources Code §30235, which Respondent Casa Mira Homeowners' Association ("Casa Mira") ably defends. However, there is an additional point to be made – that Appellant California Coastal Commission's ("Commission") construction of Public Resources Code §30235 conflicts with property owners' rights under the California Constitution and Public Resources Code Sections 30001.5(c) and §30010 that affirm the applicability of those constitutional rights in the Coastal Act.

The Commission cites Section 30001.5(c) in its Opening Brief. The Commission's brief states, "Another key goal of the Act is 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***.' (§ 30001.5, subd. (c).)" (AOB 13, emphasis added.) California's constitutionally protected rights of private property owners are found in Article 1, Section 1 of the California Constitution, which states "**All people** are by nature free and independent and **have inalienable rights. Among these are**…acquiring, possessing and **protecting property**…" (Emphasis added.)

The Legislature's intent in Section 30001.5(c) is manifest - the Coastal Act does not override property owners' inalienable rights to acquire, possess and protect their properties.

Not only do private property owners have an inalienable right to protect their properties, but damaging private property for public use is a compensable taking under Article 1, Section 19 of the California Constitution, which states that "**Private property may be** taken or **damaged for a public use and only when just compensation**, ascertained by a jury unless waived, **has first been paid to**, or into court for, **the owner**." (Emphasis added.)

The Legislature codified the application of Article 1, Section 19 to the Coastal Act in Public Resources Code §30010, which states:

> The Legislature hereby finds and declares that ***this division is not intended, and shall not be construed as authorizing the commission***…or local government…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***. (Emphasis added.)

Here again, the Legislature's intent is manifest - the Coastal Act cannot be applied to approve or deny a coastal development permit in a manner that would damage private property for public use (such as compelling a property to be damaged by erosion to provide for public beaches and public recreation) without compensating the property owner.

The only reasonable construction of "existing structure" in Section 30235 that is consistent with the California Constitution

and Sections 30001.5(c) and 30010 is the one the trial court adopted – an existing structure is a structure for which shoreline protection is required when the application is made. This is the only reasonable construction of "existing structure" because (i) the owners of all such structures have an inalienable right to protect them, (ii) the Legislature intended public access and recreation to be carried out in a manner that was consistent with the exercise of that constitutionally protected inalienable right, and (iii) the Legislature intended to prevent the Commission from denying coastal development permits that would damage private property for public use without paying just compensation.

The Commission's construction of Section 30235 conflicts with the California Constitution and the Legislature's codified intent. It is obvious on the face of the Commission's Opening Brief that its construction is intended to justify denying coastal development permits so that private property is left unprotected and inevitably damaged for public use of beaches and public recreation. That outcome directly conflicts with Section 30010 and deprives owners of post-1976 structures of their inalienable right to protect their properties when shoreline protection is required.

The Legislature resolved the balance between (i) protecting public access and public resources and (ii) addressing shoreline protection impacts in Section 30235, by requiring mitigation of sand supply impacts resulting from the approval of shoreline protection. Section 30235 demonstrates that it is not necessary to ban shoreline protection to achieve the Coastal Act's objectives.

ARGUMENT

A. The Commission Advocates for a Construction of Section 30235 to Justify Denying Permits for the Purpose of Damaging Private Property for Public Use

The Court need look no further than the parties' briefs to see that this case concerns whether the Coastal Act allows the Commission to deny coastal development permits so that private property can be damaged or destroyed for public use.

There is no question that the Casa Mira property will be damaged and destroyed if the protection in question is not permitted. In the Commission's words, "In 2015 and 2016, heavy wave action caused roughly 20 feet of bluff failure nearby. (AR 3.) In 2016 and 2017, the Commission issued emergency CDPs to Casa Mira and several 2 Mirada apartment owners for temporary placement of 4,000 tons of rock (described as "rip-rap") to prevent further erosion." (AOB 15.)[1] Casa Mira's brief adds, "The bluff collapse threatened the foundations of the Casa Mira homes as well as the 2 Mirada Road apartment building…" (RB 15.)[2]

In issuing the emergency CDPs, the Commission necessarily found that the Casa Mira property would be damaged without the temporary protection. Under the Commission's regulations, an "emergency" is a sudden unexpected occurrence demanding immediate action to prevent or mitigate loss or

[1] All references to "AOB" are to the Appellant's Opening Brief in this appeal.
[2] All references to "RB" are to the Respondents' Brief in this appeal.

damage to life, health, property or essential public services. (14 CCR § 13009.) To issue the two emergency permits, the Commission had to find that the rip rap was an immediate action necessary to mitigate loss or damage to the Casa Mira property.

The conditions at Casa Mira that required the emergency protection have not changed. If the emergency rip rap is removed, the property and the structures on it will continue to erode and fail. According to Casa Mira, "If the CCC wins this lawsuit, it will demand that the emergency rip rap be removed, which would place the Casa Mira homes in immediate danger again. (1405-1410; 1550 ¶9 [City's likely red-tag].)" (RB 16.)

While it is clear in the briefing that the protection in question is necessary to protect the Casa Mira property from inevitable damage, the Commission nonetheless claims that Casa Mira cannot obtain a regular coastal development permit to protect the structure from that inevitable damage.

The Commission's principal contention is that the Coastal Act mandates this outcome, not just for Casa Mira, but for every property on California's 1,100-mile-long coast that does not fit within the Commission's newly concocted and unreasonably narrow construction of "existing structure" in Coastal Act section 30235.

The Commission's rationale is that the Casa Mira property (as well as all structures developed after the Coastal Act took effect) must be damaged and destroyed for public use. The Commission's contention is that there is a public interest in the

ongoing erosion and failure of coastal properties that is codified in the Coastal Act.

The Commission's Opening Brief repeatedly makes this point. The opening paragraph posits that (i) two of the primary purposes of the Coastal Act are to protect the coastal environment and to maximize public access along the coast, and (ii) coastal armoring to protect property undermines both purposes. (AOB 12.) According to the Commission, "Erosion is a common natural process on the coast and is in fact how beaches are formed. (See AR 29.) Storms, waves, tides, and wind, often exacerbated by sea level rise, gradually cause shores and bluffs along the coast to erode and recede." (AOB 13.) Thus, Casa Mira is not alone in facing the need for protection to prevent the damage that results from unprotected exposure to ocean forces.

The Commission maintains that seawalls, revetments and other forms of "hard" armoring "can have a variety of negative impacts on coastal resources including adverse effects on sand supply, public access, coastal views, natural landforms, and overall shoreline and beach dynamics on and off site, including ultimately resulting in the loss of sandy beach." (AOB 13.) According to the Commission, allowing shoreline armoring to protect property contributes to "'coastal squeeze'"—beach erosion continues at the seaward side, but the armoring blocks the corresponding natural bluff erosion at the landward side and thus prevents new beach from being created, until there is no beach left. (AOB 14.)

In other words, the Commission maintains that private property must be damaged for public use. According to the Commission, the Coastal Act mandates that private properties must suffer the preventable damage and destruction that results from tidal erosion and coastal recession because the State needs the sand retained by the protection and the area that is vacated as a result of unrestrained erosion for public beaches and public recreation. To this end, the Commission maintains that Section 30235 should be narrowly construed because private property must be left unprotected and inevitably damaged for public use.

The Commission's Opening Brief clearly demonstrates that it is interpreting Section 30235 to justify denying coastal development permits in a manner that will damage private property for public use (by denying permits to allow protection required to prevent damage that will occur without it) without compensating the owner. The Commission's construction would result in permit denials that violate Article 1, Section 19 and Section 30010.

The Commission's construction is not only clearly contrary to the Legislature's expressed intent in Section 30010, but it conflicts with Section 30001.5(c) by advancing public access and public recreation at the expense of property owners' inalienable right to protect their properties in Article 1, Section 1.[3]

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[3] Even if Section 30001.5(c) did not mandate that the Commission apply the Coastal Act's public access and recreation policies consistent with constitutionally protected rights of private property owners, the Commission's construction would unconstitutionally abridge an inalienable right. A constitutional

B. Section 30235 Requires the Commission to Allow Property Owners to Exercise Their Inalienable Right to Protect Their Properties.

Section 30235 states:

> Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes **shall be permitted when required** to serve coastal-dependent uses or **to protect existing structures** or public beaches in danger from erosion **and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply**. Existing marine structures causing water stagnation contributing to pollution problems and fishkills should be phased out or upgraded where feasible." (Emphasis added.)

Viewed in light of Article 1, Sections 1 and 19 and Sections 30001.5(c) and 30010, Section 30235 requires the Commission to approve shoreline protection when necessary to (i) protect private property and (ii) avoid exposing the State (and local government) to liability for the inevitable damage that would result from denying the coastal development permit.

A state agency is strictly liable for inverse condemnation under the California Constitution when the agency's intentional acts ensure that private property will be permanently damaged or subject to frequent and inevitable damage. (*Pacific Shores*

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right may be subject to reasonable rules and regulations for the enforcement or protection thereof but may not be abridged. (*Rose v. State* (1942) 19 Cal.2d 713, 725 ["That a constitutional right may be subject to reasonable rules and regulations for the enforcement or protection thereof is elementary… it is likewise elementary that the legislature by statutory enactment may not abrogate or deny a right granted by the Constitution."].)

Property Owners Association v. Department of Fish & Wildlife (2016) 244 Cal.App.4th 12, 46-47 [Department of Fish and Wildlife was strictly liable for flooding plaintiff's lands intentionally to protect environmental resources].) By stating that shoreline protection shall be permitted when required to protect a structure, Section 30235 prevents the Coastal Act from being applied to create an outcome that would expose the State (and local government) to strict liability.

There is no constitutional basis to distinguish between damaging structures in existence prior to January 1, 1977, and damaging structures that were developed after that date. Under Article 1, Section 19, the State cannot damage either category of property for public use without first paying compensation to the owner. Nor does Section 30010 distinguish between property interests in existence before and after the effective date of the Coastal Act.

There is equally no basis to import such a distinction in Section 30235 by narrowly construing the concept of an existing structure. Under the Commission's rationale, government would be required to deny a coastal development permit for required shoreline protection that ensures a post-1976 structure will be damaged, but government would be required to approve a coastal development permit that ensures a pre-1977 structure is not damaged even though Section 30010 would prohibit the Commission from denying either permit without first compensating the owner.

The Commission justifies limiting the meaning of "existing structure" based on an exaggerated construction of Coastal Act Section 30253, which states:

> New development shall . . . (b) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area **or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs**.[4]

Section 30253 relates to the construction of "new development," meaning development that is not yet in existence. Section 30253 simply means that new development shall not require construction of protection devices affecting bluffs and cliffs when the new development is approved.

To justify an unnatural and new construction of "existing structure" in Section 30235, the Commission reads more into Section 30253 than it says. Section 30253 does not say that new development can never be protected in the future if it becomes necessary to do so. It says that new development cannot require bluff and cliff retention "in any way" when it is built. The phrase "in any way" does not mean at any time thereafter.

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[4] Notably, Section 30253 only refers to devices that substantially alter natural landforms along bluffs and cliffs, which is only a subset of the devices mentioned in Section 30235 that alter natural shoreline processes. Section 30253 does not state that new development cannot construct shoreline protection on beaches or other locations where bluffs and cliffs are not present. Section 30253 provides no support for the proposition that shoreline protection must be limited to pre-1977 structures in locations that do not involve bluffs or cliffs.

Once new development is built, it becomes an existing structure that is subject to Constitutional rights and protections. If the then existing structure requires shoreline protection, Section 30235 states that the protection shall be approved, subject to eliminating or mitigating for sand loss.

This is a plain meaning construction of the Coastal Act that not only harmonizes Section 30235 with Section 30253 but also harmonizes Section 30235 with the Legislature's stated intent in Sections 30001.5(c) and 30010 and does not violate the California Constitution.

Amici agree with the Commission that "One of the most fundamental rules of statutory interpretation is that courts should strive to construe one provision of a statute in a way that harmonizes it with the rest of the statute." (ARB 9.)[5] However, the Commission's construction does not produce that harmony. The Commission's newly minted construction not only twists the meaning of the term "existing structure" and the scope of Section 30253, but it puts the Coastal Act at odds with the California Constitution and conflicts with the Legislature's stated intent in Sections 30001.5(c) and 30010.

C. The Legislature Resolved the Sand Supply Issues in Section 30235

The Commission's central theory is that (i) shoreline protection impacts sand supply and beach dynamics that result in the loss of sandy beaches (AOB 13-14), (ii) the fundamental

[5] All references to "ARB" are to the Appellant's Reply Brief in this appeal.

purpose of the Coastal Act is to protect coastal resources such as beaches and natural shorelines (AOB 25), and (iii) limiting Section 30235 is necessary to protect public beaches and recreation. (AOB 26.)

However, the Legislature was aware of the impact that shoreline protection could have on sand supply and resolved the issue in Section 30235 by requiring shoreline protection to be "designed to eliminate or mitigate adverse impacts on local shoreline sand supply." In so doing, the Legislature directed that potential loss of sandy beaches was to be addressed in the design of the protection, such that the sand supply impacts are either eliminated or mitigated.

The trial court's construction of Section 30235 represents the balance expressed in Section 30001.5(c) of maximizing public access and public recreation consistent with constitutionally protected property rights. It allows property owners to exercise their inalienable property protection rights and avoids damaging private property for public use while protecting the coastline by requiring the elimination or mitigation of sand supply impacts.

While the Commission believes it would have been more protective of beaches and natural resources to ban shoreline protection, it is not the policy the Legislature enacted. Even if the Commission claims to have a compelling interest to override property owners' inalienable rights, the Legislature made clear in Section 30001.5(c) that the Commission cannot do so. The Legislature was equally clear in Section 30010 that the Commission cannot apply the Coastal Act to deny a coastal

development permit in a manner that would result in private property being damaged to advance public access, public recreation, and other public uses without compensating the property owner.

The Commission's theory advances resource protection at the expense of the Constitution. Ironically, the Commission quotes Section 30001.5(c) twice in its Opening Brief. (AOB 13 & 26.) Both times the Commission focuses on protecting public resources without acknowledging that public access and recreation is to be accomplished "consistent with…constitutionally protected rights of private property owners."

This blind spot is a key flaw in the Commission's construction of Section 30235 and a key reason why the trial court's construction of "existing structures" is correct.

CONCLUSION

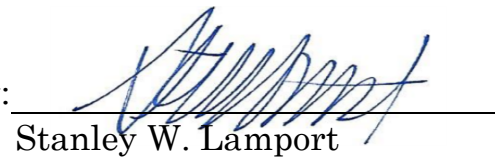
For the foregoing reasons, Amici CBIA and CBPA respectfully submit that the trial court correctly found that "existing structures" in Section 30235 are structures for which

shoreline protection is required when the application is made. Amici request that the Court affirm the trial court's judgment.

Respectfully submitted,

Dated: September 5, 2024

COX, CASTLE & NICHOLSON LLP

By: 

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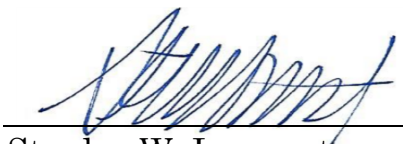
CERTIFICATE OF WORD COUNT

The text of this brief consists of 3,031 words according to the word count feature of the computer program used to prepare this brief.

Dated: September 5, 2024

By: 

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PROOF OF SERVICE AND CERTIFICATION

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On September 5, 2024, I electronically filed the foregoing **APPLICATION OF CALIFORNIA BUILDING INDUSTRY ASSOCIATION AND CALIFORNIA BUSINESS PROPERTIES ASSOCIATION TO FILE AN AMICI CURIAE BRIEF IN SUPPORT RESPONDENT CASA MIRA HOMEOWNERS' ASSOCIATION; [PROPOSED] BRIEF OF AMICI CURIAE**

On September 5, 2024, I caused the above-referenced document(s) to be electronically served pursuant to California Rules of Court, Rule 8.71, (all filings in Civil, Criminal, Juvenile and Original proceedings must be made through the Court's electronic filing system (TrueFiling). This service complies with CCP §1010.6. The file transmission was reported as complete and a copy of the "TrueFiling Receipt" page will be maintained with the original document(s) in our office.

SEE ATTACHED SERVICE LIST

I certify under penalty of perjury that the foregoing is true and correct. Executed on September 5, 2024, in Los Angeles, California

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