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a California non-profit mutual benefit corporation,
on its behalf and on behalf of the Association members, et al.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

CASA MIRA HOMEOWNERS ASSOCIATION, a California non-profit mutual benefit corporation, on its behalf and on behalf of the Association members, et al.,

Petitioners and Plaintiffs,

vs.

CALIFORNIA COASTAL COMMISSION, a department of the State of California, and DOES 1-50, inclusive,

Respondent

CITY OF HALF MOON BAY, a city within the State of California, and DOES 1-50, inclusive,

Real Party-in-Interest.

Case No.: 19-CIV-04677
Related to Case No. 21-CIV-03202

PETITIONER CASA MIRA HOMEOWNERS ASSOCIATION'S OPENING BRIEF

(Filed Concurrently with Declaration of Thomas D. Roth, and Request for Judicial Notice)

Assigned to: Hon. Marie S. Weiner
Dept. 2

Petition/Complaint Filed: June 9, 2019
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I. INTRODUCTION

Petitioner Casa Mira Homeowners Association, and its members (collectively, "Casa Mira") challenge the effective denial by the California Coastal Commission ("CCC" or "Commission") of an application for a coastal development permit to construct a 257-foot seawall to protect a collapsing bluff that fronts Casa Mira townhomes built in 1984. Casa Mira worked tirelessly with CCC staff for three years to develop a proposal that met every one of staff's seemingly endless objections. Finally, staff recommended approval. (AR 1193:4-9.) While staff refused to recommend approval specifically to protect the townhomes, staff did agree that the Coastal Act mandated protection of an existing segment of the public Coastal Trail that immediately fronts the homes. Thus, staff's recommendation would have protected the townhomes because the seawall that protected the public trail would also protect the townhomes.

Despite the enormous work by staff and Casa Mira to reach a consensus on the seawall design, at the July 11, 2019 public hearing, the commissioners washed that all away in a matter of 20 minutes. Casa Mira had spent hundreds of thousands of dollars designing and re-designing the seawall in a good faith effort to try to meet staff's rigorous demands. All for nothing. The full Commission denied all but 50 feet of the wall, rendering it completely useless since the ocean would simply spill around its sides.

The Coastal Act mandates the issuance of a seawall permit if certain conditions are met. The Act authorizes a seawall for different types of structures/development needing protection. First, Pub. Res. Code ["PRC"] § 30235 provides that a seawall "shall be permitted" "when required to serve **coastal-dependent uses**" "when designed to eliminate or mitigate adverse impacts on local shoreline sand supply." Here, the CCC staff determined that the Coastal Trail is a coastal dependent use, and that Casa Mira's seawall design, combined with a comprehensive mitigation package, mitigated all impacts, met the requirements of § 30235, and fully complied with the Coastal Act. The full Commission, with almost no legally relevant discussion at the public hearing, reversed its staff's determination and ordered staff to reject any part of the seawall that protected the

Coastal Trail. That was practically the entire seawall. That reversal was critical because staff's recommended approval would have protected the Casa Mira homes located immediately inland of the trail.

Second, PRC § 30235 also authorizes a seawall to protect "existing structures," so long as the seawall mitigates adverse impacts on local shoreline sand supply. Here, the full Commission (and staff) denied Casa Mira's seawall application, claiming the Casa Mira homes were not "existing structures." How can homes built 38 years ago not be "existing structures"? According to the CCC, "existing structures" means only structures built before the adoption of the Coastal Act in 1977. Does PRC § 30235 say that? Nope. In fact, for most of the 38 years that the Casa Mira homes have existed, the CCC routinely interpreted that statutory phrase to mean existing *at the time of the seawall application, not merely pre-1977*. But here (and shortly before Casa Mira needed a seawall), the CCC began interpreting the phrase "existing structures" to mean only pre-1977 structures. Nothing in § 30235 changed between 1977 and now. The CCC just decided that the same words in the same statute mean something completely different.

The full Commission's refusal to protect the coastal-dependent Coastal Trail as required by § 30235, and the CCC's newly minted interpretation of the same words that have existed in a statute for 45 years – if allowed to stand – will result in the immediate destruction of ten homes and a long-standing section of the Coastal Trail. When uncertainty exists in interpreting a statute, courts should consider "consequences that will flow from a particular interpretation." *Big Sur Properties v. Mott* (1976) 62 Cal.App.3d 99, 105. Since this is an issue of first impression not previously decided by the courts, interpreting "existing structures" to mean only pre-1977 structures would authorize the CCC and local jurisdictions to deny seawalls needed to protect *tens of billions of dollars of long-existing coastal homes*. They, like the Casa Mira homes, will fall into the sea in the name of so-called "managed retreat." If that's what the California Legislature wants, it should go through the legislative process of amending the Coastal Act to re-define "existing structure" to mean pre-1977. But such a tragic, horrific and

costly outcome should not result simply from an administrative agency's "re-interpretation" of statutory language that has existed without amendment for 45 years.

The CCC also exceeded its authority in adopting revised findings, violated the Coastal Act and violated the California Environmental Quality Act ("CEQA").

II. FACTS

A. The Casa Mira Townhomes.

Casa Mira consists of ten townhomes on the coast in Half Moon Bay (along with some common area). (Administrative Record ["AR"] 167; AR 132 [aerial showing individual townhome lots 10-28].) The ten townhomes were constructed in 1984 after receiving a coastal development permit. (AR 503-508; AR 2; AR 296.) The coastal development permit contained **no waiver** of the protection afforded existing structures set forth in PRC § 30235, i.e., the right to build a revetment or seawall to protect the townhomes. (AR 506-507; AR 1579 [CCC explaining its policy *in later years* to require the applicant to waive the statutory protection of § 30235].) Indeed, the 1984 permit required additional work related to then-existing rip rap to protect an existing apartment building known as 2 Mirada (built prior to the Coastal Act), and expressly required that work to be "consistent with" PRC § 30235. (AR 511, AR 508.) The 2 Mirada apartment still exists, but it's on a separate parcel (the original parcel was subdivided). (AR 511.)

B. The Bluff Collapse and the 2016/2017 Emergency Permits.

After severe storms (and an El Nino) in the winter of 2016, a large area (20 feet inland) on a bluff in front of the Casa Mira homes collapsed. (AR 116-121; AR 430; AR 419; AR 432; AR 434; AR 104; AR 150-151; AR 156; AR 152-153; AR 639; AR 1188-89.) The bluff collapse threatened the foundations of the Casa Mira homes, the foundation of the 2 Mirada Road apartment building, a sewerline servicing the area, and a renowned section of the Coastal Trail. (Id., and AR 167.) In March 2016, Casa Mira applied for an emergency permit to place a rip rap revetment in an area fronting the homes. (AR 97-103, AR 110-112, AR 176 [showing rip rap placement]; AR 462.) The 2 Mirada apartment owners were added to the application because the rip rap needed to be placed on property

that they owned between the ocean and Casa Mira. (AR 97-98 [listing 2 Mirada property owners]; AR 106; AR 145; AR 379.) In May 2016, the CCC granted that permit for about 200 feet of rip rap to protect the bluff from further erosion. (AR 133-139; AR 669 [emergency rip rap within red square]; AR 176.) The emergency permit required that Casa Mira apply for a regular coastal development permit for a permanent protective structure. (AR 137, ¶ 7.) The sewer district supported protecting the bluff because one of its sewer lines was being threatened. (AR 145; AR 608 [sewer easement location], AR 462, AR 663; Roth Dec., Ex. 2 [CCC Answer], ¶ 17.) In 2017, Casa Mira applied for a second emergency permit to repair slumping rip rap, (AR 183-191, AR 453), which the CCC granted in 2017. (AR 193-199.)

The emergency rip rap remains in place and is protecting the bluff from further collapse, and is protecting the homes and the Coastal Trail. (AR 427; AR 1426, ¶ 9; AR 1427.) If the CCC wins this lawsuit, it will require the emergency rip rap to be removed, which would place the Casa Mira homes in immediate danger again. (AR 1405-1410; AR 1550, ¶ 9 [City's likely red-tag].)

C. The Regular Coastal Development Permit Process.

Casa Mira applied for a regular CDP for a shoreline protective device to prevent further bluff collapse. (AR 387-390; AR 394-418, AR 419-435.) The CCC rejected Casa Mira's initial application for a rip rap revetment "out of hand," (AR 392, AR 419, AR 1426, ¶ 11, AR 1541), and demanded more than $2.3 million in mitigation fees. (AR 392.) Casa Mira was surprised because the CCC had repeatedly approved rip rap for large sections of Half Moon Bay previously. (AR 1409-10, ¶ 13.) To placate the CCC, Casa Mira retained experts to design a "tied-back, shotcrete seawall," instead of the much less expensive rip rap revetment. (AR 460-464; AR 487-502 [detailed plans and maps]; AR 1426.) Casa Mira proposed to remove the emergency rip rap and replace it with a seawall. (AR 275, 279.) Casa Mira spent three years and more than $300,000 working with CCC staff, design professionals, engineers and experts to design a seawall that would meet CCC approval. (AR 1426-27, ¶ 12.) The estimated cost of the new, state-of-the-art seawall was

nearly $4.7 million (AR 1426, AR 1543), not including the additional expensive coastal mitigation package. (AR 311-12; AR 670.)

Other government agencies supported Casa Mira's application for shoreline protection. Real Party-in-Interest City of Half Moon Bay filed written support for the seawall application to protect not only the homes, but also the "critical" public infrastructure of the sewerline and the coastal trail. (AR 385.) Real Party-in-Interest Granada Community Services District filed a letter supporting the proposed seawall to protect the existing and threatened sewerline (which it owned), the Coastal Trail and the homes that were served by the sewerline "in the interest of public health and safety." (AR 455.) Finally, State Parks and Casa Mira had reached an agreement to move the existing coastal trail inland (while preserving trail views of the ocean and coastline) as part of the seawall application.[1] (AR 380-381; AR 473-474; AR 1302-1304; AR 1298-99, ¶ 6; AR 1302 [". . . Coastal Commission staff agreed with Parks on the trail realignment."].)

D. The CCC's Effective Denial of the Seawall Application.

On July 11, 2019, the CCC effectively denied Casa Mira's application for a coastal development permit ("CDP") for a 257-foot seawall to protect the homes. (AR 1210; AR 1184-85.) The CCC misleadingly describes its action as an "approval." (AR 1.) But the agency approved only about a 50-foot section of the proposed 257-foot wall, which of course would allow the ocean waves to simply flow around the "baby" wall. (AR 1221, Item 8 [approval *excluded* protection of the Coastal Trail which fronted the Casa Mira homes, i.e., the CCC denied a seawall to protect the homes, the public Coastal Trail or the critical infrastructure sewerline]; AR 7 [reducing approval to 50 feet].) Casa Mira's expert

[1] Casa Mira and Parks agreed to realign the Coastal Trail inland minimally to preserve ocean and coast views. That realignment depended on the 257-foot seawall being approved. (AR 381.) That re-alignment is different than the CCC's revised finding alignment that placed the trail *behind* the Casa Mira townhomes (thus completely blocking the ocean view). (AR 32.) For that reason, the CCC staff initially found that the deep inland trail failed to comply with the Coastal Act, but the full Commission reversed staff without any study or analysis supporting the new alignment. (AR 303-305; AR 32-34.)

concluded that the "baby" wall would exacerbate erosion problems, and would fail to address any of the issues the seawall was intended to fix. (AR 1314-1317 [expert drawings showing that removal of emergency rip rap and installation of a 50-foot wall would result in immediate erosion threatening Casa Mira homes]; AR 1320-21.) The approval of an ineffective "baby" wall was simply an ill-conceived whim of the commissioners.

III. STANDARD OF REVIEW

In an administrative writ petition, the court evaluates whether the agency acted in excess of jurisdiction or abused its discretion by not proceeding in a manner required by law. CCP § 1094.5(b); *Schneider v. Coastal Com.* (2006) 140 Cal.App.4th 1339, 1343.

The CCC, "like all administrative agencies, has no inherent powers; it possesses only those powers that have been granted to it by the state Constitution or by statute." *Security National Guaranty, Inc. v. California Coastal Com.* (2008) 159 Cal.App.4th 402, 419. When the determination of an administrative agency's jurisdiction involves a question of statutory interpretation, "the issue of whether the agency . . . [exceeded] . . . its jurisdiction is a question of law." Id. at 414. "[C]ourts do not defer to an agency's determination when deciding whether the agency's action lies within the scope of authority delegated to it by the Legislature." *Citizens for a Better Eureka v. California Coastal Com.* (2011) 196 Cal.App.4th 1577, 1583, quoting *Burke v. California Coastal Com.* (2008) 168 Cal.App.4th 1098, 1106. When determining the "question of how [a] . . . statute is to be construed and applied," the court exercises its independent judgment. *State Building & Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 304. Here, the Court must first decide whether the CCC exceeded its jurisdiction by mis-construing PRC § 30235 to forbid seawall protection for "existing structures" that post-date the Coastal Act's adoption in 1977.

In addition to the statutory interpretation question, the court must review the agency's findings to ascertain whether they are supported by substantial evidence. As stated in *La Costa Beach Homeowners Assn. v. California Coastal Comm.* (2002) 101 Cal.App.4th 804, 814, a court applying the substantial evidence standard "must consider

all relevant evidence, *including evidence detracting from the decision*, a task which involves some weighing to fairly estimate the worth of the evidence." *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 585 [courts may not uphold agencies' decisions by isolating evidence supporting the agency's findings and disregarding conflicting relevant evidence in the record.] The court also evaluates whether the agency has set forth "findings to bridge the analytic gap between the raw evidence and ultimate decision or order." *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515. A court will not imply agency findings. *Woodland Hills Residents Ass'n v. City Council* (1975) 44 Cal.App.3d 825, 837.

"[I]f the manner in which an agency failed to follow the law is shown to be prejudicial, or is presumptively prejudicial, as when the [agency] . . . fails to comply with mandatory procedures, ... the decision [must] be set aside ... ." *Friends, Artists & Neighbors of Elkhorn Slough v. California Coastal Com.* (2021) 72 Cal.App.5th 666, 692.

IV. ARGUMENT

A. The CCC's Denial on the Erroneous Basis That the Casa Mira Townhomes Are Not "Existing Structures" Under Pub. Res. Code § 30235 Is a Clear Error of Law.

Under the Coastal Act, "existing structures" are entitled to a seawall for protection if certain statutory conditions are met. PRC § 30235 provides, in relevant part, ". . . seawalls . . . **shall be permitted** when required . . . to protect existing structures . . . in danger from erosion and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply." Here, the CCC rejected a seawall to protect the Casa Mira homes on the basis that they are not "existing structures." (AR 300 ["The sewer line and Casa Mira condominiums were constructed in 1984 and both post-date the Coastal Act, and thus do not constitute 'existing structures' . . . ."]; AR 29.) The CCC asserted that "existing structures" are only those structures "existing prior to the effective date of the Coastal Act on January 1, 1977." (AR 299; AR 28.) On that basis, the full Commission refused to consider approving a seawall designed to protect the Casa Mira homes. The CCC mis-interprets § 30235. "An administrative agency must act within the powers

conferred upon it by law and may not act in excess of those powers. … Actions exceeding those powers are void." *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1042. Denying Casa Mira's seawall on the basis that the homes were built after 1977 exceeds the CCC's authority under § 30235, and is thus void.

1. The Ordinary Meaning of "Existing Structures" Is Existing Now.

In the absence of a legislative definition or established precedent, courts give the words of a statute their usual and ordinary meaning. *Cleveland v. Taft Union High School Dist.* (2022) 76 Cal.App.5th 776, 806. The ordinary meaning rule is the most fundamental semantic rule of statutory interpretation. *Feder v. Frank*, 716 F.3d 1173, 1181 (9th Cir. 2013). Neither the Coastal Act, nor its implementing regulations, define "existing" or "existing structure." The ordinary meaning of the word "existing" is "already or previously in place." (Dictionary.com.) Hence, an "existing structure" would be one that is already in place. In ordinary usage, the term does *not* mean existing prior to 1977. CCP § 1858 ["In the construction of a statute . . ., the . . . Judge . . . simply . . . ascertain[s] and declare[s] what is in terms or in substance contained therein, not to insert what has been omitted, ..."]

In its denial, the CCC interpreted "existing structures" to mean only pre-1977 structures even though nothing in the statute indicates that such a limited definition was intended. But assuming, *arguendo*, that the term is ambiguous, numerous factors indicate that the Legislature used the phrase in its ordinary sense. *People v. Flores* (2003) 30 Cal.4th 1059, 1063 [When evaluating competing interpretations of statutory text, courts "look to a variety of extrinsic aids . . . ."] These factors are discussed below.

2. Historically, the CCC Has Interpreted the Term "Existing Structure" to Mean "Existing" at the Time of the Seawall Application.

Courts examine whether "the agency has adhered consistently to the interpretation at issue." *Simi Corp. v. Garamendi* (2003) 109 Cal.App.4th 1496, 1504-05; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 13 [an agency's "vacillating position . . . is entitled to no deference."]; *Kaanaana v. Barrett Bus. Servs.*

(2021) 11 Cal.5th 158, 179 [when agency repeatedly changes its stance on statute's meaning, "its position does not warrant . . . deference."] The CCC has not consistently interpreted "existing structure" in § 30235 to mean pre-1977. For most of the statute's history, the CCC interpreted the phrase to mean existing at the time of a seawall application, not merely pre-1977. *Article: No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access Along the California Coast*, 34 Ecology L.Q. 533, 557-558 (2007) ["does 'existing' mean existing as of 1976, when the Act was passed, or existing at the time of the application to build a seawall ? . . . "the second [interpretation] would still bar applications for seawalls for unbuilt structures but leave all built structures with at least the possibility of obtaining a permit to armor. **The Coastal Commission has historically adopted . . . the second view**."]; *Whose Coast Is It Anyway? Climate Change, Shoreline Armoring, and the Public's Right to Access the California Coast*, 46 ELR 10971, 10980 (Nov. 2016)[". . . 'existing structure,' . . . **has so far been interpreted to mean existing at the time of application** . . . . [T]here has been no indication that judges, legislators, or state permitting agencies intend to change the way in which the term has traditionally been interpreted: as applying to structures existing at the time of application."].

Prior to the CCC hearing in this case, Casa Mira alerted the CCC to the agency's historical inconsistency in interpreting "existing structures." (AR 1294-95; AR 480-81.) In 2003, in approving a seawall project in Santa Cruz, the CCC acknowledged that it "**has generally interpreted 'existing' to mean structures existing at the time the armoring proposal is being considered**, whether these structures were originally constructed before or after the Coastal Act, and has not limited consideration of armoring only to those structures constructed prior to the Coastal Act." (AR 1636-37.) Similarly, in reviewing a Pismo Beach project in 2010, the CCC admitted that it "has, in some cases, interpreted 'existing' to mean structures existing at the time the armoring proposal is being considered, whether these structures were originally constructed before or after the Coastal Act . . . ." (AR 1579, 4th ¶.) So, contrary to the CCC's interpretation now, the CCC

previously has interpreted "existing structure" to mean "existing" at the time of the seawall application.

3. The Coastal Act Routinely Uses the Word "Existing" to Mean "Existing" Presently, Not Merely Pre-1977.

"[O]ne of the most basic rules of statutory interpretation" is that "identical words used in different parts of the same act are intended to have the same meaning." *Denan v. TransUnion LLC*, 959 F.3d 290, 296 (7th Cir. 2020); *People v. Gray* (2014) 58 Cal.4th 901, 906 ["when the same word appears in different places within a statutory scheme, courts generally presume the Legislature intended the word to have the same meaning each time it is used"]; *United States v. Castleman*, 572 U.S. 157, 174 (2014) (Scalia, J., concurring) ["[A] term generally means the same thing each time it is used."].) The presumption of consistent use serves the vital purpose of ensuring that a statutory scheme is coherent and consistent. *Ross v. R.A. North Dev., Inc. (In re Total Realty Mgmt., LLC*), 706 F.3d 245, 251 (4th Cir. 2013).

The Coastal Act employs the word "existing" and the phrase "existing structure(s)" frequently. For example, immediately following § 30235, § 30236 limits channelization, dams and river alterations to, *inter alia*, "flood control projects where no other method for protecting *existing structures* in the flood plain is feasible and where such protection is necessary for public safety or to protect *existing development*." Since a flood plain is ambulatory, it would make little sense to interpret "existing structures" to mean pre-1977 structures – the applicable flood plain may well have shifted compared to 1977 and, as a result, may affect post-1977 structures. See, e.g., *Houston's High Water Problems*, 46 Houston Lawyer 18, 19 (Dec. 2008)[noting flood plain changes over time].

PRC § 30600(e)(2) exempts certain emergency projects from a permit requirement including projects to repair an "existing highway" or within an "existing right-of-way." Certainly, the Legislature didn't mean only highways existing before 1977.

PRC § 30624(a) empowers the CCC's Executive Director to issue a permit under expedited and abbreviated procedures for "improvements to any *existing structure*." The

CCC has never opined that such procedures may be used only for improvements to pre-1977 structures.

PRC § 30610 creates certain categorical exclusions from a coastal development permit requirement. *Surfrider Foundation v. Martins Beach 1, LLC* (2017) 14 Cal.App.5th 238, 251. Section 30610(a) exempts certain improvements to "*existing* single-family residences." No one, including the CCC, argues that the word "existing" in that provision means only "existing prior to 1977." PRC § 30610(c) exempts maintenance dredging of "*existing*" navigation channels. The CCC doesn't contend that the word "existing" there means only pre-1977. See *Venice Coalition to Preserve Unique Community Character v. City of Los Angeles* (2019) 31 Cal.App.5th 42, 48 and 53 [analyzing provision without discussing any requirement that the structures pre-date the Coastal Act].) PRC § 30610(f) exempts certain utility connections between an "*existing*" service facility and a development. The CCC has never argued that the word "existing" in that provision means only pre-1977. PRC § 30610(h) exempts the conversion of any "*existing*" multiple–unit residential structure to a time-share project. That same subsection also declares that improvements to exempt "*existing structures*" – referring to multiple-unit residential structures (*not* just pre-1977) – don't require a permit.

Nothing in § 30235 remotely suggests that the Legislature intended the word "existing" or the phrase "existing structure" to mean something entirely different than it does in numerous other Coastal Act provisions governing existing structures. If the Legislature intended to do so, it could have easily qualified the phrase in § 30235. In fact, as discussed below, the Legislature considered limiting the term "existing structures" in § 30235 to pre-1977 structures, but rejected that proposed legislation.

4. The Legislature Refused to Define "Existing Structures" As Pre-1977.

In 2002, the Legislature considered amending § 30235 to expressly narrow the definition of "existing structure." *Article: She Sells Seawalls Down by the Seashore*, 5 San Diego J. Climate & Energy L. 209, 219 (2014), citing A.B. 2943, 2001-2002 Reg. Sess.

(Cal.) (amended by Senate, Aug. 26, 2002).[2] The bill proposed to define "existing structure" to mean "a structure that . . . obtained a vested right as of January 1, 1977, the effective date of the . . . [Coastal Act]." Id. at 220. The proposed legislation **died on the senate floor**. Id. at 221. Since the legislation was specifically intended to limit the meaning of "existing structure" in § 30235 to pre-1977, and the Legislature failed to pass the measure, it is reasonable to infer that the Legislature did not think it was important to change the way that the CCC was interpreting "existing structure." See, e.g., *Pollitzer v. Gebhardt*, 860 F.3d 1334, 1340 (11th Cir. 2017) (Legislative body is "presumed to be aware of an administrative or judicial interpretation of a statute . . . ."); *Sun Home Health Visiting Nurses v. Workers' Comp. Appeal Bd.* (Pa.Commw.Ct. 2003) 815 A.2d 1156, 1161. As noted above, during this time, the CCC was consistently interpreting the phrase to mean existing at the time of a seawall application. The Legislature is presumed to have been aware of this interpretation and declined to change it.

5. The Legislature Qualified the Word "Existing" by Specific Date Elsewhere in the Coastal Act, But Not in § 30235.

Courts note when the Legislature knows how to limit the definition of a word or phrase, but doesn't. *Kaanaana v. Barrett Business Services, Inc.* (2018) 29 Cal.App.5th 778, 792, fn. 13 [court noted that the Legislature knew how to limit definition of "public works," but didn't]. Elsewhere in the Coastal Act, the Legislature has qualified the word "existing" by specifying a date certain. For instance, in § 30614(a) the Legislature qualified the word "existing" by adding "as of January 1, 2002." Thus, the Legislature knew how to qualify the word "existing" by date, and, yet, didn't do so in § 30235.

6. The 2015 CCC Guidance Purporting to Interpret § 30235 Is Entitled to No Deference.

The CCC relies on its 2015 Sea Level Rise Policy Guidance to support its re-interpretation of "existing structures" to mean only pre-1977 structures. (AR 28, fn 5.)

[2] A.B. 2943, 2001-2002 Reg. Sess. attached as Ex. 1 to Declaration of Thomas D. Roth.

However, the part of the Guidance that re-interprets § 30235 is not a quasi-legislative rule, but rather an "interpretive rule." It simply sets forth the agency's interpretation of the statutory language. (AR 998.)[3] As such, an interpretive rule is merely the agency's legal opinion. It ". . . commands a commensurably lesser degree of judicial deference," and is "not binding or … authoritative." *Yamaha, supra,* 19 Cal.4th at 8, 11. "Courts must, in short, independently judge the text of [a] statute … ." Id., at 7. A court is measurably less inclined to defer to an agency's interpretation of a statute than a regulation. Id. at 12.

The degree of deference accorded a guidance is dependent upon whether the agency has a "comparative interpretative advantage over the courts" and on whether it has probably arrived at the correct interpretation. *Yamaha, supra,* 19 Cal.4th at 12. The CCC has no "comparative interpretative advantage over the court" in deciding whether "existing structure" should mean what it ordinarily means, or whether it should mean "pre-1977." Plain statutory language is not something "where the materials are technical and engage an agency's expertise." *State Building, supra,* 162 Cal.App.4th 289, 304. "To the contrary, it is the judiciary which has the ultimate authority for determining the meaning of a statute." Id.; *Stolman v. City of Los Angeles* (2003) 114 Cal.App.4th 916, 928 ["court has the duty to state the true meaning of the statute . . . conclusively, notwithstanding the agency construction."]. Courts are skeptical of an agency's effort to expand its authority by changing the usual definition of a word. *See People ex rel. Dep't of Alcoholic Beverage Control v. Miller Brewing Co.* (2002) 104 Cal.App.4th 1189, 1198 [rejecting agency effort to adopt a rule changing the meaning of a word used in statute].

The fact that the CCC didn't adopt the guidance until 2015 highlights that the agency frequently interpreted "existing structure" to mean existing at the time of the seawall application for the first 38 years of the statute's existence. To the extent that the CCC is claiming it has a relevant comparative advantage or expertise, was the CCC using

[3] Notably, the CCC Guidance itself cautions it is "advisory and not a regulatory document or legal standard of review for the actions of the Commission." (AR 838.)

that expertise during the first 38 years of the statute's existence, or only since 2015?

7. Sections 30235 and 30253 Are Harmonized When "Existing Structures" Is Interpreted in Its Ordinary Sense.

The CCC argues that interpreting "existing structures" to mean pre-1977 "harmonizes" § 30235 and § 30253 "which together evince a broad legislative intent to allow armoring [only] for development that existed when the Coastal Act was passed . . . ." (AR 28, fn 5.) Yet, the CCC provides no explanation or details on how it gleaned such legislative intent from the statutory text. (Id.) No court has ever gleaned such intent. For the first 38 years that the statute existed, the CCC never gleaned such an intent.

The CCC argues that § 30**253** (as compared to § 30**235**) sets standards for "new development." Ok, but so what? A reasonable reading of § 30253 is that when a project applicant wants to build something (a house), he or she can't insist as part of that application that the CCC approve a seawall to go along with it. PRC § 30253(b) [new development cannot "require the construction of protective devices"]. That reading doesn't conflict with interpreting § 30235 to protect existing structures even if built after 1977. In other words, if an applicant applies to build a house after 1977, he or she can't also *compel* the CCC to approve a seawall as part of the house application. However, if the CCC does approve a post-1977 house, and decades down the road, the house needs a seawall to survive, it is entitled to § 30235 protection. Of course, the CCC can always condition the approval of a post-1977 house on the requirement that the homeowner waive protections under § 30235. Indeed, the CCC routinely does that now, although it neglected to do that in the early days of the Coastal Act. (AR 999.) The CCC **did not** condition the construction of the Casa Mira townhomes in 1984 on the waiver of § 30235. (AR 507.) Accordingly, Casa Mira should be entitled to § 30235's protection.

8. Casa Mira's Seawall Otherwise Meets § 30235 Requirements.

Because the CCC committed clear and prejudicial legal error by mis-reading § 30235, the Court should void the denial and remand the case to the agency for re-hearing. However, it should be noted that Casa Mira's seawall otherwise met § 30235

requirements. (See AR 298 [CCC listing requirements].)

First, the Casa Mira homes are "in danger from erosion." (AR 295, AR 24 [coastal bluff at project site subject to erosion]; AR 296 [20 feet of bluff eroded away]; AR 301, AR 30 [". . . the southern extent of the bluff at this site retreated over 20 feet in the winter of 2015-16, demonstrating that the bluffs in question are vulnerable to sudden and substantial episodic erosion and bluff loss."]; AR 1190 [bluff subject to ongoing erosion]; AR 301, AR 30 ["The property line for the Casa Mira condominiums is located . . . 2 feet inland of the trail" which is 3 to 4 feet from bluff edge]; AR 398; AR 302, AR 30 ["Erosion continues to affect this area, and such impacts stand to get worse due to ongoing sea level rise and the predicted increase in extreme weather events."]; AR 133 [CCC found that "high tides and wave action due to increased storms" required emergency rip rap revetment to protect homes]; AR 1399 [bluff has significantly retreated]; AR 1405-1417 [expert fears another 25- to 35-foot bluff collapse without seawall (¶¶ 5-8)]; AR 1428, ¶ 4 [cross-reference AR 1503-1512]; AR 430; AR 432; AR 434; AR 104; AR 116-121; AR 150-151; AR 156; AR 639; AR 152-153; AR 404; and AR 419.)

Second, the highly-engineered seawall was "designed to eliminate or mitigate adverse impacts on local shoreline sand supply." The CCC staff evaluated whether the seawall met this criteria, and concluded that it did. (AR 305-313; AR 313 [finding the seawall consistent with § 30235].) Staff found that impacts from the seawall could be adequately and fully mitigated through a mitigation package. (AR 311 [finding that rather than imposing an "in lieu fee" ". . . a series of immediate public access improvements nearby the project site . . . can most effectively offset . . . impacts," and that the CCC "has historically offset identified impacts via in-kind public access improvement projects."].) Staff worked with Casa Mira and State Parks to develop a mitigation package whereby Casa Mira had agreed to (1) construct a new vertical beach access stairway, incorporated into the seawall design; (2) dedicate 7,430 square feet of bluff area for public use and enjoyment, including connecting the area to the Coastal Trail and the new beach stairway; (3) construct a newly realigned blufftop Coastal Trail (8 feet wide, approximately 300

lateral feet) above the proposed seawall, on State Parks' property directly south of the project site to provide a more inland route and minimize erosion risk; (4) pay for the removal of the old Coastal Trail and restoration of the area to natural bluff; (5) pay $10,000 towards additional public access improvements in the area, such as a second beach access stairway north of the 2 Mirada apartments; (6) install landscape improvements and access amenities, including public benches, picnic tables, bicycle racks, and signage; and (7) remove old timber pines on beach to open up additional public beach area. (AR 311-12; AR 1191 [staff "worked closely with applicant" on mitigation package]; AR 281 [removal of timber pines].) Staff found that it was "reasonable" to mitigate for the seawall impacts, as well as to enhance and maximize public access and recreational opportunities in the project area by approving the mitigation package. (AR 313.) Staff concluded that "this approach will allow public access improvements to be realized in the very near term, providing fairly immediate and tangible public benefits as opposed to an overall single fee approach that may not be used or applied for some time, reducing its effectiveness." (Id.) "[T]he . . . access improvement [proposal] . . . constitutes an appropriate and adequate compensatory mitigation package . . . ." (Id.) CCC staff then found the seawall consistent with § 30235. (Id.)

Third, there were no feasible alternatives. Allowing the townhomes to be threatened by the collapsing bluff – what the CCC euphemistically calls "managed retreat" – would in short order result in the homes falling into the ocean, destroying more than $12 million of structures that had existed for 38 years with CCC approval. (AR 1301.) Because Casa Mira owns limited property, the townhomes could only be moved 10 feet inland at a cost exceeding $2.6 million. (AR 303, fn 14; AR 408-09, AR 411.) Further, State Parks owns the property inland to the east, and Parks generally is not allowed to convey the property to a private landowner like Casa Mira to build homes on it. PRC § 30609.5(a) and (c) prohibit any coastal state property like the Parks' property from being transferred to private ownership "unless the state retains a permanent property interest *in the land* adequate to provide public access to or along the sea." Since the homes would

occupy the Parks' land entirely, the State would not be able to provide public access over that land. Likewise, the remaining conditions in § 30609.5(c) could not be met. Thus, there are no feasible alternatives to a revetment or seawall.

For these reasons, the CCC prejudicially exceeded its authority under the Coastal Act by denying the seawall on the basis that the Casa Mira homes were built after 1977.

B. The CCC's Revised Findings Exceed its Authority under the Coastal Act and Its Regulations.

As noted above, the CCC erred in denying Casa Mira's application for a seawall on the basis that the townhomes were not "existing structures." However, the CCC staff recommended approval of the seawall on an alternative basis that still would have protected the homes. (AR 276.) The townhomes are fronted by the Coastal Trail. (AR 274 [Casa Mira homes "just inland" of trail]; AR 300; CCC Answer, ¶ 12.) PRC § 30235 compels approval of a seawall to protect "coastal-dependent uses," and CCC staff determined that the coastal trail qualified as such a use. (AR 276, AR 300 ["The trail is coastal-dependent . . . ."], AR 303.) Thus, staff recommended approval. (AR 276.) Without any forewarning, at the July 11, 2019 CCC hearing, the full Commission rejected staff's recommendation to approve the seawall to protect the Coastal Trail. More than four months later, the CCC purported to adopt "revised findings" to support that reversal. But the CCC exceeded its authority when it adopted the revised findings.

While the CCC may adopt "revised findings" after the original hearing, such authority is not unlimited. 14 CCR § 13096(b) provides, in relevant part, "if the [CCC] action is substantially different than that recommended in the staff report, the prevailing commissioners **shall state the basis for their action in sufficient detail** to allow staff to prepare a revised staff report with proposed **revised findings that reflect the action** of the [CCC]." A public hearing must be held regarding the revised findings. Id., § 13096(c). "The public hearing shall solely address whether the proposed revised findings reflect the action of the [CCC]." Id. After the public hearing, a majority vote of the members from the prevailing side present at the original CCC meeting must approve the

revised findings. PRC § 30315.1; 14 CCR § 13096(b),(c).

"[R]evised findings are meant to capture actions, not change them." *Friends, supra.,* 72 Cal.App.5th 666, 698, citing *San Diego Navy Broadway Complex Coalition v. California Coastal Com.* (2019) 40 Cal.App.5th 563, 577, fn. 8. "[T]he requirement that commissioners state the basis for their action in enough detail that staff can later prepare revised findings reflective of their decision is essentially a requirement that the commissioners layout the analytic route for their decision **before** the approval occurs." *Friends, supra,* 72 Cal.App.5th at 704-705.

In *Friends,* 72 Cal.App.5th 666, the CCC staff prepared a report recommending denial of a coastal development permit application. Id. at 678, 681, 682. At the public hearing, the full Commission disagreed with staff's recommendation and approved the permit application. Id. at 678, 684. Subsequent to the hearing, CCC staff prepared written revised findings that were adopted. Id. The court of appeal **reversed** the trial court's determination that the revised findings were consistent with the oral statements made by commissioners at the original hearing approving the permit. The court of appeal found that "none of the prevailing commissioners . . . expressed a view regarding mitigation measures or project alternatives, or regarding any conditions that might be necessary for project approval." Id. at 703. The court therefore held that the revised findings went beyond the limited oral statements by the commissioners. Id. 704-705. Like in *Friends,* the revised findings here exceed the commissioners' limited oral comments as to why they were reversing the staff's recommendation.

The CCC's action was "substantially different" than the CCC staff recommendation to approve the 257-foot seawall. (AR 275-76; AR 297.) The full Commission **reversed staff completely** by rejecting any part of the seawall that protected the Coastal Trail (which was the vast majority of the proposed seawall). (AR 1208:4-12; AR 1200:13-15 [motion that approval forbid Coastal Trail protection].)

At the hearing, certain individual commissioners stated four reasons for reversing the staff: (1) they didn't want to be "inconsistent," (2) they wanted to "lead by example,"

(3) they wanted to implement "managed retreat," and (4) they thought the seawall was "anti-access." (["inconsistent"] - AR 1199:22-25, AR 1206:15-20, AR 1207:14-17; [Alminzadeh - "lead by example" and demonstrate "managed retreat"] AR 1204:1-7; [Chair Bochco -protecting the trail was "anti-access"] AR 1206:5-14.) CCC's Chief Counsel then stated the amending motion, which was to require the applicant to "submit revised final plans that would show the seawall protecting only the area needed to protect the apartment building and not to protect the Coastal Trail because they're a viable alternative to the -- to the Coastal Trail." [sic](AR 1208:7-12.) As will be discussed below, the revised findings were not limited to these articulated reasons for the reversal.

As a preface to Casa Mira's argument on the proper scope of the revised findings, the Court should rule that commissioners' denied the seawall for reasons that exceeded the CCC's authority. First, the commissioners' assertion that staff's recommendation to *protect* the Coastal Trail was "inconsistent" with *not protecting* the homes is not a lawful basis for refusing to protect the Coastal Trail. Section 30235 expressly authorizes a seawall to protect the Coastal Trail as a coastal-dependent use. Whether that is "inconsistent" with a denial of a seawall for private homes is not a lawful basis for denial under § 30235 or the Coastal Act. It also wholly ignores that approving the seawall for the trail would protect the homes since the homes are located immediately east of the trail.

Second, Chair Bochco's assertion that protecting the trail was "anti-access" is flatly contradicted by the record which shows that the seawall proposal included a $500,000 stairway built into the seawall in order to allow direct public access to the beach. (AR 312 [listing elements of mitigation package including stairway], AR 276, AR 279, AR 282, AR 283, AR 297 ["The seawall would include an integral *beach access* stairway with a connection to the inland [Coastal Trail]."], AR 306, fn 16; AR 312, fn 29 ["stairway proposed here . . . is a . . . stable and robust stairway" expected to be long-lasting]; AR 319, AR 1306, AR 1308, AR 1161, AR 1191 [staff opining that project would remedy public access deficiencies in area]; AR 1195.) The Chair didn't understand the project, and she misled her fellow commissioners.

Third, 14 CCR § 13096(b) requires that the commissioners "state the basis for their action **in sufficient detail** to allow staff to prepare a revised staff report with proposed revised findings that reflect the action of the [CCC]." Here, the commissioners failed to state the basis for their action *in any detail*. The few commissioners that spoke at all made vague, legally impermissible and erroneous assertions such "inconsistency," and "anti-access." That's no detail at all. Thus, the commissioners' statements at the hearing fail the regulation's basic prerequisite to articulate in "sufficient detail" to allow staff to prepare revised findings, and the Court should set aside the CCC's November 2019 revised findings on that basis alone. This last failure led the CCC staff astray. Because the CCC staff didn't have any detail to work with, it improperly tried to fill in the gaps in its revised findings. Under 14 CCR § 13096(c), staff only has authority to prepare revised findings that "reflect the action" of the commissioners. So the operative question under this claim is whether the revised findings "reflect the action" of the CCC? No, they don't.

Like the facts in *Friends, supra*, 72 Cal.App.5th at 703, "none of the prevailing commissioners . . . expressed a view regarding mitigation measures or project alternatives, or regarding any conditions that might be necessary for project approval." Indeed, commission staff did not provide a substantive analysis of any "components" of the project, mitigation measures, and/or necessary conditions until the [revised findings] . . ., which was after the project had been approved by the commission." Id. Here, none of the prevailing commissioners expressed a view regarding mitigation measures, alternatives or project conditions. Indeed, not a single commissioner uttered the words "mitigation," "exaction," or "project conditions" at the July 11, 2019 hearing. (AR 1186-1218.) Yet, the revised findings purported to include a *drastically modified* mitigation and exaction package that was never discussed with the commissioners or even the project applicant. Specifically, CCC staff deleted the mitigation package that Casa Mira and staff had negotiated during the previous three years, AR 40-43, and substituted an "in lieu" fee. (AR 13, AR 42.) The commissioners never directed staff to substitute a new "in lieu" fee for the existing mitigation package, and never gave staff any direction on

changing the project conditions or mitigation. Staff's post hoc conversion of the mitigation package to an in lieu fee exceeds its authority for a revised finding under 14 CCR § 13096.

In addition to the new "in lieu" fee, CCC staff still required a stairway, (AR 13), but didn't give any direction on how that was supposed to be achieved since the original proposal (that staff had recommended) included a 70-foot stairway built into the 257-foot seawall. (AR 312, fn 29.) A 70-foot stairway can't be built in to a 50-foot long wall. (AR 1322, ¶ 9; AR 1316-17 [expert drawings showing that installing stairway on a 50-foot seawall was not feasible].) Yet, that's what staff ordered in the revised findings. (AR 1226 [stairs to be built "within the shortened seawall"].) Alternatively, if staff expected the new stairway to be built in an area unprotected by a seawall, that stairway would soon be crushed by ocean waves. (AR 3; AR 1291; AR 473.) Indeed, that's why staff previously supported the stairway encased in the seawall. (AR 312, fn 29.)

Staff deleted and reworked the mitigation and exaction package in excess of its authority since the commissioners did not consider, debate, discuss, evaluate, authorize or even mention any change to the mitigation and exaction package previously negotiated between staff and Casa Mira. The CCC cannot adopt revised findings if those findings do not accurately reflect the commissioners *stated* reasons for the decision. For these reasons, the CCC's attempted substitution of a new mitigation and exaction conditions after-the-fact exceeded its authority and must be set aside.

C. The CCC's Denial and Revised Findings Violated the Coastal Act, the CCC's Regulations and CEQA.

1. The Commissioners Denied the Seawall Without Waiting for the Required CEQA Analysis.

The purpose of the CEQA is to ensure that the agencies regulating activities "that may" affect the environment give primary consideration to preventing environmental damages. *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 117. CEQA applies to "discretionary projects proposed to be carried out or approved by public agencies." PRC § 21080(a). A project may be exempted from

CEQA, or part of CEQA, by statute. Here, the CCC evaluated the Casa Mira project under the "certified regulatory program" exemption to CEQA, allowing the CCC to sidestep a few procedural aspects of CEQA such as preparing an EIR. *POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 709. But PRC § 21080.5(c) exempts certified regulatory programs only from a **limited number** of CEQA provisions, namely – §§ 21100–21108, 21150–21154, and 21167. *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1231; *EPIC v. Johnson* (1985) 170 Cal.App.3d 604 [not a "blanket exemption."]. Thus, the CCC is still "**subject to the broad policy goals and substantive standards of CEQA**." *Pesticide Action Network North America v. Dep't of Pesticide Reg.* (2017) 16 Cal.App.5th 224, 242; 14 CCR § 15250; 13096(a); 13057(c).

CEQA's broad policy goals that apply here include a written analysis of "(A) Alternatives to the activity and mitigation measures to avoid or reduce any significant or potentially significant effects that the project might have on the environment . . . ." *Friends, supra*, 72 Cal.App.5th 666, 694, quoting 14 CCR § 15252(a)(2)(A), (B); PRC § 21080.5(d)(3)(A)). "Requiring specific findings about alternatives and mitigation measures 'ensures there is evidence of the public agency's actual consideration of alternatives and mitigation measures, and reveals to citizens the **analytical process by which the public agency arrived at its decision**. . . . Under CEQA, the **public agency bears the burden** of affirmatively demonstrating that, notwithstanding a project's impact on the environment, the agency's approval . . . followed meaningful consideration of alternatives and mitigation measures. . . .' " *Friends,* 72 Cal.App.5th at 694-695, quoting *Mountain Lion Found. v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134.

Here, the CCC's Chief Counsel stated the amending motion to require the applicant to "submit revised final plans that would . . . not . . . protect the Coastal Trail **because they're a viable alternative to the -- to the Coastal Trail**." [sic] (AR 1208:7-12.) While not clearly articulated, the CCC's counsel asserted – on behalf of the commissioners – that the CCC denied any part of the seawall that would protect the Coastal Trail because there is an alternative to armoring the collapsing bluff. That puts

the cart before the horse. The commissioners made that "finding" before any study concluded that such an alternative existed after a careful CEQA analysis analyzing the environmental impacts. In other words, at the moment at the July 11, 2019 hearing that the commissioners rejected staff's recommendation, the only analysis before the commissioners was the CCC's staff report, (AR 274-371), and that report concluded that there were **no feasible alternatives** to the seawall. (AR 303 ["there is no viable location for the Coastal Trail to be rerouted in this location while maintaining its aesthetic and recreational value adjacent to the ocean and beach . . . ."; AR 305].) The commissioners can't *ipse dixit* declare that *there is a feasible alternative* without studying the issue, when its own staff's analysis concluded exactly the opposite. The revised findings attempt to add this analysis but the problem is that they do so **after** the commissioners denied the seawall on the basis that a feasible alternative existed. That CEQA violation is similar to the facts in *Friends, supra*, 72 Cal.App.5th at 699 ["We determine that the [CCC]'s environmental review was incomplete at the time it approved [the] . . . coastal development permit application . . ., and that **this failure to complete the required environmental review before approving the permit application requires that the approval be vacated**." See also id., at 701 ["**After** the project was approved at the . . . hearing, Coastal Commission staff . . . analyzed for the first time various "components" of the project, mitigation measures, and/or conditions for the project."]; *Vedanta Society of So. California v. California Quartet, Ltd.* (2000) 84 Cal.App.4th 517, 530 ["Projects which significantly affect the environment can go forward, but only after the elected decisionmakers have their noses rubbed in those environmental effects, and vote to go forward anyway."] Similarly, the CCC's denial here was based on the commissioners' directive that a viable alternative existed when there was no CEQA analysis supporting that pre-mature conclusion. The commissioners can't direct the outcome of a CEQA study that has not been performed and base its denial on that premature finding. The CCC violated CEQA.

2. The Commissioners' Unstudied Inland Route Is Not a Feasible Alternative Under CEQA, and Furthermore, It Violates the Coastal Act.

In its original staff report, CCC staff concluded there was no feasible alternative to protecting the existing Coastal Trail with a seawall because "there is no viable location for the Coastal Trail to be rerouted . . . while maintaining its aesthetic and recreational value adjacent to the ocean and beach," and trying to move it inland would "sacrific[e] coastal views and a consistent path along the shoreline for pedestrians." (AR 303-304.) Casa Mira echoed that finding and presented evidence that moving the trail inland would violate the Coastal Act's provisions protecting scenic views and coastal visual resources. (AR 1159-1184; AR 1194-96; AR 477-482.) PRC § 30001(b) identifies as a "paramount concern" "the permanent protection of the state's . . . scenic resources . . . ." Section 30251 mandates that the CCC consider and protect "the scenic and visual qualities of coastal areas" because they are deemed "a resource of public importance." Thus, the Coastal Act mandates that the CCC protect views and scenic resources. The Coastal Trail at this location provides iconic ocean views that are not available elsewhere in Half Moon Bay or along the California coast. Staff was directed, without a CEQA study, to create deep inland trail route. But that alternative doesn't comply with the Act's directive to protect scenic resources because the views would be blocked by trees, bushes and homes. It also doesn't maximize public access as required by PRC § 30210, as the deep inland route provides no long-term beach access like Casa Mira's seawall proposal. (AR 48.)

Contradicting its own staff report, the CCC staff – as ordered by the commissioners – adopted a revised staff report that concluded that there *is a viable alternative* to the proposed seawall because the Coastal Trail could be re-routed deep inland. The revised findings flatly contradict staff's original findings that concluded the inland route was inconsistent with the Coastal Act and CEQA because: (1) any re-routing the Coastal Trail inland could not occur for a significant period of time given permitting requirements (AR 303); (2) lack of armoring would result in immediate threats to, and likely destruction of, the existing Coastal Trail (id.); (3) the re-routed Coastal Trail would not have the

requisite coastal views that must be protected under the Coastal Act (AR 303-304); and (4) the re-routed Coastal Trail would fail to provide "a consistent path along the shoreline for pedestrians." (Id.) Neither the November 2019 revised findings nor the record **provided any new analysis or evidence to support the reversal of the CCC's position**. In a **conclusory** fashion, staff simply changed the wording without citing any evidence or analysis supporting the changes. (AR 31-35.) *City of Duarte v. State Water Resources Control Bd.* (2021) 60 Cal.App.5th 258, 273 ["conclusory findings do not reveal the route from evidence to action and are inadequate to support compliance" with a statutory requirement]; *POET, LLC v. State Air Resources Bd.* (2017) 12 Cal.App.5th 52, 81 [agency's conclusory statement that further analysis would not yield meaningful information unpersuasive]. Hence, staff originally found that moving the trail far inland would block iconic views, violate Coastal Act policies, and would take a substantial period of time that would deny trail benefits to the public. But in its revised findings the CCC failed to explain why those things were no longer important – it just deemed an alternative inland route feasible. (AR 32-33.) Clearly, staff was just following the commissioners' directive without undertaking any meaningful analysis.

The CCC must comply with CEQA's broad policy goals and substantive provisions. Under CEQA, project alternatives must be "feasible." See *Friends, supra*, 72 Cal.App.5th 666, 693. PRC § 21061.1 defines "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." The CEQA Guidelines add "legal" to the list of factors that must be considered. 14 CCR § 15364.

PRC § 21081.5 requires the CCC to " base its findings on substantial evidence in the record." *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 737 [no evidence in record supported agency's assertions regarding alternatives].) The revised findings and the record here fail to establish that the deep inland trail alternative is feasible or that it complies with the Coastal Act.

Alternatives must meet and implement key, fundamental project objectives.

Golden Door Properties, LLC v. County of San Diego (2020) 50 Cal.App.5th 467, 546 ["Examining alternatives begins with project objectives because it is these objectives that a proposed alternative must be designed to meet."] PRC § 30235 sets a key objective of protecting a coastal dependent resource like the Coastal Trail. The commissioners asserted (without a CEQA study) that there is a feasible alternative to the seawall by moving the trail deep inland. But staff determined that moving the trail inland without a seawall means moving the trail *behind* the Casa Mira homes. (AR 32 ["loop inland of existing residential structures"].) That would block the iconic views of the coast and ocean that compelled the trail's location in the first place. It would no longer be a "coastal trail." The trail's present location is extremely popular because of the unique views it provides of the ocean and the coast. (AR 1196; AR 1190:12-18; AR 2; AR 24.) Moving the trail behind buildings and trees destroy the coastal views and thus defeat the trail's purpose. Under CEQA, that renders the alternative infeasible. 14 CCR § 15126.6 (f)(1)[alternative may be infeasible if inconsistent with governing agency's policies or regulations]; id., § 15126.6(f)(2)(B) [location is critical for some projects]; id., § 15126.6(f)(1) [site suitability should be considered].

The deep inland trail also is infeasible because Casa Mira has no ability to compel State Parks to move the existing trail to a new location on State Parks' land, or to compel Parks' to re-build the trail at that location. (AR 473 [Parks had no interest in de-commissioning trail in front of homes because that's not Parks' property; Parks didn't want to be responsible for permitting or cost of deep inland trail]; see also Roth Dec., Ex. 3 [City Answer], ¶ 170 [City, not Parks, holds trail easement].) *Save Our Residential Env't v. City of W. Hollywood* (1992) 9 Cal.App.4th 1745, 1753, fn 1. Finally, the deep inland alternative is infeasible because it ignores the permanent economic loss of $12 million in long-standing homes that will be destroyed as a result of rejecting the seawall, as well as the substantial cost of removing the existing emergency rip rap. (AR 1298, 1301.) It also ignores the loss in $125,000 in yearly real estate tax revenue to the County and the City. (Id.) These costs are severe, prohibitive and imprudent, but the CCC didn't

consider them in violation of CEQA. 14 CCR § 15364 [economic considerations are an important component of feasibility.] Under CEQA, the analysis of alternatives must be specific enough to allow informed decision-making. *City of Rancho Palos Verdes v. City Council* (1976) 59 Cal.App.3d 869, 892. Here, the CCC's findings failed to acknowledge or analyze the many reasons that the deep inland trail alternative is infeasible under CEQA and inconsistent with the Coastal Act. 14 CCR § 15126.6(a)[CEQA Guidelines require that agency provide a meaningful evaluation and comparison of alternatives]. That violates CEQA.

V. CONCLUSION

The CCC mis-interpreted § 30235 and improperly denied Casa Mira's seawall on the erroneous basis that the long-standing homes are not "existing structures," with great prejudice to Casa Mira and its members. The CCC also exceeded its authority by adopting revised findings that did not reflect fairly the stated action of the commissioners on July 11, 2019. The CCC violated CEQA by determining that a feasible alternative to the seawall existed before the agency conducted any study, and violated both CEQA and the Coastal Act by finding that the deep inland Coastal Trail was feasible even though it eliminated all ocean and coastal views. The CCC's effective denial of the seawall application must be vacated.

Dated: June 29, 2022

LAW OFFICES OF THOMAS D. ROTH

By: 

Thomas D. Roth

Law Offices of Thomas D. Roth
Attorneys for Petitioners/ Plaintiffs Casa Mira Homeowners' Association and its members

PROOF OF SERVICE

Casa Mira Homeowners' Association et al. v. California Coastal Commission, et al., San Mateo County Superior Court, Case No. 19CIV-04677

I am over 18 years old, not a party to this lawsuit and am employed by the Law Offices of Thomas D. Roth, 1900 S. Norfolk Street, Suite 350, San Mateo, CA 94403.

On June 29, 2022, I served the foregoing **PETITIONER CASA MIRA HOMEOWNERS ASSOCIATION'S OPENING BRIEF** on the following persons by email:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 29, 2022, at San Mateo, California.

Thomas D. Roth