Filed Apr. 5, 2021

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

WARREN M. LENT et al., Plaintiffs, Appellants, and Cross-respondents, v. CALIFORNIA COASTAL COMMISSION, Defendant, Respondent, and Cross-appellant, CALIFORNIA STATE COASTAL CONSERVANCY et al., Real Parties in Interest.	B292091 (Los Angeles County Super. Ct. No. BS167531)

APPEAL from a judgment of the Superior Court of Los Angeles County. James C. Chalfant, Judge. Reversed with directions.

Pacific Legal Foundation, Damien M. Schiff, Joshua P. Thompson, and Jeremy Talcott; FisherBroyles and Paul J. Beard II for Plaintiffs, Appellants, and Cross-respondents.

Law Offices of Thomas D. Roth and Thomas D. Roth for Center for Balanced Land Use, Inc. as Amicus Curiae on behalf of Plaintiffs, Appellants, and Cross-respondents.

Knipe Law Firm and V. Nicholas Knipe for Malibu Association of Realtors as Amicus Curiae on behalf of Plaintiffs, Appellants, and Cross-respondents.

Berding Weil and Fredrick A. Hagen; Kara M. Rollins and Harriet H. Hageman for New Civil Liberties Alliance as Amicus Curiae on behalf of Plaintiffs, Appellants, and Cross-respondents.

Kara M. Rollins and Harriet H. Hageman for National Federation of Independent Business Small Business Legal Center as Amicus Curiae on behalf of Plaintiffs, Appellants, and Cross-respondents.

Chris Scheuring for California Farm Bureau Federation as Amicus Curiae on behalf of Plaintiffs, Appellants, and Cross-respondents.

Xavier Becerra, Attorney General, Daniel A. Olivas, Senior Assistant Attorney General, Christina Bull Arndt and David Edsall Jr., Deputy Attorneys General, for Defendant, Respondent, and Cross-appellant.

Environmental Law Clinic, Mills Legal Clinic at Stanford Law School, Deborah A. Sivas, and Molly L. Melius for Surfrider Foundation and Azul as Amici Curiae on behalf of Defendant, Respondent, and Cross-appellant.

INTRODUCTION

A house sits on beachfront property in Malibu. A five-foot-wide vertical easement, owned by the California Coastal Conservancy for public access to the coast, encumbers one side of the property. By 1983 the property owner had built on the easement area a deck providing private access to the beach, a staircase from the deck leading to the house, and a gate blocking public access to the easement area. The California Coastal Commission, which enforces the California Coastal Act (Pub. Resources Code, § 30000 et seq.)[1] and remedies violations of permit conditions, did not approve these structures.

Warren and Henny Lent purchased the property in 2002. In 2007 the Commission began asking the Lents to remove the structures so the Conservancy could build a public accessway over the easement area. The Lents refused. In 2014 the Commission served the Lents with a notice of intent to issue a cease and desist order. The notice advised the Lents the Commission could impose administrative penalties under section 30821, a statute enacted that year authorizing the Commission to impose penalties

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[1] Undesignated statutory references are to the Public Resources Code.

on property owners who violate the public access provisions of the Coastal Act. Still, the Lents refused to remove the structures.

Two weeks before the scheduled hearing on the cease and desist order, the Commission staff issued a report detailing the Lents' alleged violations of the Coastal Act. In the report the Commission staff recommended that the Commission impose a penalty of between $800,000 and $1,500,000 (and specifically recommended a penalty of $950,000), but stated that the Commission was justified under the circumstances in imposing a penalty of up to $8,370,000. At the hearing the Commission issued the cease and desist order and imposed a penalty of $4,185,000.

The Lents filed a petition for writ of mandate asking the trial court to set aside the Commission's order and penalty. In addition to contending substantial evidence did not support the Commission's determination that the Lents violated the Coastal Act, the Lents argued section 30821 is unconstitutional on its face because it allows the Commission to impose substantial penalties at an informal hearing where the alleged violator does not have the procedural protections traditionally afforded defendants in criminal proceedings. The Lents also argued that section 30821 is unconstitutional as applied to them and that the penalty violated the constitutional prohibition on excessive fines. The trial court granted the petition in part and denied it in part, ruling substantial evidence supported the Commission's decision to issue the cease and desist order and to impose a penalty. The court ruled,

however, the Commission violated the Lents' due process rights by not giving them adequate notice of the amount of the penalty the Commission intended to impose. Therefore, the court set aside the penalty and directed the Commission to allow the Lents to submit additional evidence. Both the Lents and the Commission appealed.

We conclude substantial evidence supported the Commission's decision to issue the cease and desist order. We also conclude the Commission did not violate the Lents' due process rights by imposing a $4,185,000 penalty, even though its staff recommended a smaller penalty, because the Commission had previously advised the Lents it could impose a penalty of up to $11,250 per day and the Commission staff specifically advised the Lents that the Commission could impose a penalty of up to $8,370,000. Therefore, we reverse the trial court's judgment remanding the matter to the Commission.

On the Lents' appeal of the penalty, we conclude the Lents failed to show section 30821 is unconstitutional, either on its face or as applied to them. We also conclude the penalty does not violate the constitutional prohibition on excessive fines. Therefore, we reverse the superior court's judgment and affirm the Commission's order.

FACTUAL AND PROCEDURAL BACKGROUND

A. *A Prior Owner Builds the House*

The Lents own property in Malibu. South of the property is the ocean; north of the property is the Pacific Coast Highway. In 1978 a prior owner of the property applied to the Commission for a coastal development permit to build a house. As a condition of approving the permit, the Commission required the prior owner to dedicate a vertical public-access easement on the eastern side of the property. In 1980 the prior owner recorded an offer to dedicate a five-foot-wide easement, and in 1982 the Conservancy recorded a certificate of acceptance. A storm drainpipe, owned by the County of Los Angeles, runs across the easement area.

Notwithstanding the permit condition and the easement, the prior owner built in the easement area a wooden deck that sits above the drainpipe and a staircase that provides access from the deck to the house. The staircase occupies 27 inches of the five-foot-wide easement. The deck provides access to the sand through a (different) staircase. The owner also constructed a fence and gate adjacent to the sidewalk that blocks access to the easement area from the highway. The Commission did not issue a permit or otherwise approve any of these structures. This is a view of the easement area from the north (i.e., PCH):

B. *The Commission Attempts To Obtain the Lents' Consent To Remove the Unpermitted Structures*

In 1993 the Conservancy sent a letter to the owners of the property informing them of the easement and stating the Conservancy had "the right to open for public use a five-foot-wide corridor for pedestrian access to and from the shoreline." The Conservancy also stated, however, the easement would "remain closed until the Conservancy locate[d]

a management agency and open[ed] this easement to public use." Observing that the gate blocked access to the easement area, the Commission asked the owners to "either remove the gate" or "seek the Conservancy's permission to keep the gate in place during the period that the accessway is officially closed" and remove the gate once the Conservancy decided to open the easement.

The Lents purchased the property in 2002 (with the gate intact). In April 2007 the Commission sent a letter to the Lents stating the structures in the easement area, including the deck and the gate, were inconsistent with the easement and violated the Coastal Act and asking the Lents to remove all structures in the easement area. The Commission also attached a copy of the house's original permit conditions. The next month the Commission served the Lents with a "notice of intent to commence cease and desist order proceedings." The Lents did not agree to remove the structures.

Because the topography of the easement area includes several steep elevation drops, the Conservancy determined it had to build an accessway with stairs to make the easement usable for the public. In 2008 the Conservancy hired a contractor to conduct a survey of the easement area to assess the feasibility of building an accessway, and in 2010 an architectural firm completed conceptual plans for the accessway. Later that year, representatives from the Commission, the Conservancy, and the architectural firm met at the property with the Lents and their attorneys to discuss development of the accessway.

During the next several years the Commission and the Lents' attorneys exchanged correspondence in which the Commission asked the Lents to remove the structures in the easement area and the Lents objected for various reasons. Having failed to resolve the issue, the Commission sent a letter to counsel for the Lents in June 2014 stating that, "under the newly enacted Section 30821, . . . in cases involving violations of the public access provisions of the Coastal Act, the Commission is authorized to impose administrative civil penalties in an amount up to $11,250 per day per violation."

C. *The Commission Issues a Cease and Desist Order and Imposes a Monetary Penalty*

In September 2015 the Commission served the Lents with a new notice of intent to issue a cease and desist order and to impose penalties under section 30821. In February 2016 the Lents served the Commission with a statement of defense. Among other arguments, the Lents contended the Commission had approved the structures in the easement area, the doctrine of laches barred the Commission from requiring the Lents to remove the stairway, and the Commission could not impose penalties on the Lents because the Lents had not built the allegedly unpermitted structures.

On November 18, 2016, two weeks before the scheduled hearing on the cease and desist order, the Commission staff submitted a report with proposed findings and recommendations. The report stated that under section 30821 "[t]he potential penalty that the Commission could impose" was $8,370,000—$11,250 per day for 744 days, beginning November 24, 2014,

the date the Commission advised the Lents that their violations of the Coastal Act could expose them to administrative penalties. The staff report stated that a penalty of up to $8,370,000 was warranted because the violations caused "significant blockage of public access" to the coast, there was limited coastal access in the area, the Lents refused to undertake any "voluntary restoration efforts" despite the Commission's efforts over many years to obtain the Lents' consent, and the Lents used the property as a vacation rental and marketed the property's private beach access on at least one vacation rental website. The Commission staff, however, "taking the most conservative possible approach in weighing the relevant statutory factors," recommended the Commission impose a penalty between $800,000 and $1,500,000, and specifically $950,000.

At the public hearing the Commission staff presented its findings and conclusions, again recommending the Commission impose a $950,000 penalty. Counsel for the Lents presented a defense, and Warren Lent spoke at the hearing. After the Lents' presentation, several individuals spoke, including the executive officer of the Conservancy. The executive officer stated that the only impediment to opening the easement for public access was the Lents' refusal to remove the structures, and both the executive officer and another member of the Conservancy stated that the Conservancy's engineers had determined it was feasible to build an accessway in the easement area.

After the presentations, the commissioners deliberated. Several commissioners stated the Lents'

conduct was particularly egregious and warranted a penalty higher than the staff's recommendation. Ultimately, the Commission voted unanimously to issue the cease and desist order requiring the Lents to remove the structures in the easement area and to impose a penalty of $4,185,000.

D. *The Lents File a Petition for Writ of Mandate, Which the Trial Court Grants in Part*

In February 2017 the Lents filed a petition for a writ of mandate. In addition to making the arguments they made during the administrative proceedings, the Lents argued section 30821 is unconstitutional on its face because it allows the Commission to impose substantial penalties without providing property owners sufficient procedural protections. The Lents also argued the penalty was an excessive fine under the federal and state constitutions.

The trial court found that there was "overwhelming evidence" the Lents violated the Coastal Act by "interfering with the public's right of access to the ocean via the easement" and that the "Conservancy has made clear that the stairway/gate has substantially impaired its ability to move forward with a public accessway." The court ruled that substantial evidence supported the Commission's cease and desist order, that laches did not bar the Commission from issuing the order, and that the Commission was authorized to impose penalties. Although the court ruled the penalty was not constitutionally excessive, the court also ruled the Commission violated the Lents' due process rights by "deviat[ing] upward from the staff-recommended $950,000" penalty without providing the Lents an

"opportunity to argue against the Commission's . . . reasoning for imposition of a considerably larger fine." The court stated: "The amount of the fine in this case is substantial and the hearing procedure did not give [the Lents] an opportunity to present all available evidence and argue against the $4.1 million penalty imposed. An additional opportunity to present evidence would have enhanced the reliability of the quasi-criminal proceeding and the fine actually imposed, and a safeguard permitting [the Lents] to present additional penalty evidence would not adversely impact the Commission's procedure."

The trial court entered judgment ordering the Commission to set aside the penalty, inform the Lents of a specific proposed penalty, and give the Lents an opportunity to present additional evidence. The trial court otherwise denied the Lents' petition. The Lents timely appealed, and the Commission timely cross-appealed.

DISCUSSION

A. *The Commission Did Not Abuse Its Discretion in Issuing the Cease and Desist Order*

1. *Standard of Review*

Under the Coastal Act "[a]ny aggrieved person" has the "right to judicial review of any decision or action of the commission by filing a petition for writ of mandate in accordance with [Code of Civil Procedure] Section 1094.5 . . . ." (§ 30801; see *SLPR, L.L.C. v. San Diego Unified Port Dist.* (2020) 49 Cal.App.5th 284, 321 ["'administrative mandamus is the "proper and sole remedy" for challenging or seeking review of' a

[Commission] decision"].) "[T]he trial court reviews the commission's decision to determine whether the commission 'proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the [Commission] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.'" (*Mountainlands Conservancy, LLC v. California Coastal Com.* (2020) 47 Cal.App.5th 214, 230; see Code Civ. Proc., § 1094.5, subd. (b); *San Diego Navy Broadway Complex Coalition v. California Coastal Com.* (2019) 40 Cal.App.5th 563, 572.) "'Our scope of review is identical to that of the trial court. [Citations.] We, like the trial court, examine all relevant materials in the entire administrative record to determine whether the agency's decision is supported by substantial evidence.'" (*San Diego Navy*, at p. 572; see *Ross v. California Coastal Com.* (2011) 199 Cal.App.4th 900, 922.)

2. *The Commission Proceeded in the Manner Required by Law in Issuing the Cease and Desist Order*

Section 30600 requires "any person . . . wishing to perform or undertake any development in the coastal zone" to "obtain a coastal development permit." Under section 30810 the Commission may issue a cease and desist order after a public hearing if the Commission "determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing a permit or (2) is

inconsistent with any permit previously issued by the commission . . . ." The Lents argue an owner who merely purchases property containing unpermitted structures, but who did not build the structures, does not undertake activity that requires a permit under the Coastal Act. Therefore, according to the Lents, regardless of whether the structures in the easement area required a permit or violated the terms of the easement, the Commission erred in issuing the cease and desist order.

The law does not support the Lents' interpretation of section 30600. Although the statute refers to the person "wishing to perform or undertake" development, the requirement to obtain a permit for any development in the Coastal Zone necessarily extends to subsequent owners of the property. "It is well settled that the burdens of permits run with the land once the benefits have been accepted." (*Ojavan Investors, Inc. v. California Coastal Com.* (1994) 26 Cal.App.4th 516, 526.) A successor obtains property "with the same limitations and restrictions which bound" the prior owner. (*Id.* at p. 527; see, e.g., *City of Berkeley v. 1080 Delaware, LLC* (2015) 234 Cal.App.4th 1144, 1151 [purchaser of property waives, "by [its] purchase of deed-restricted lots, any right to a property interest greater than that conveyed by [the] predecessors in interest," and the "conditions of the permit remain enforceable against a subsequent owner of the property"]; *Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1379 ["once the period to challenge the [coastal development permit] restrictions had expired and they were recorded, they became immune from collateral attack by the original property owner *and*

successor owners"]; *Serra Canyon Co. v. California Coastal Com.* (2004) 120 Cal.App.4th 663, 668 [although the property owner "was not a party to the original permits, it was bound by the inaction of its predecessor in interest"]; *Ojavan*, at p. 525 [deadline for successors to challenge coastal development permits ran from the date the Commission issued the permits, not the date the successors purportedly violated the permit restrictions, because the successors were "bound by what their grantee had to convey"].) Therefore, an owner who maintains a development on his or her property "undertakes activity" that requires a permit for purposes of section 30810, as does an owner who maintains a development inconsistent with a previously issued permit, regardless of whether he or she constructed the development. (See *Ojavan Investors, Inc. v. California Coastal Com.* (1997) 54 Cal.App.4th 373, 386 (*Ojavan II*) [former provision of the Coastal Act, which provided that "[a]ny person who violates any provision of this division shall be subject to a civil fine of not to exceed ten thousand dollars," applied to coastal permit violations and "extended to . . . the successors-in-interest in the real property subject to the permits"].)

Under the Lents' theory, a property owner who develops coastal property has an obligation to obtain permits under section 30600, but a subsequent purchaser does not. Developers could avoid complying with the Coastal Act by simply selling the property before the Commission discovers the development, a result inconsistent with the purposes and directives of the Coastal Act. (See § 30001, subd. (d) ["[t]he Legislature hereby finds and declares" that "future

developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state"]; § 30607 ["[a]ny permit that is issued or any development or action approved . . . shall be subject to reasonable terms and conditions in order to ensure that such development or action will be in accordance with the provisions of [the Act]"]; see also § 30009 [the Coastal Act "shall be liberally construed to accomplish its purposes and objectives"].)

The court in *Leslie Salt Co. v. San Francisco Bay Conservation & Development Com.* (1984) 153 Cal.App.3d 605 reached a similar conclusion for nearly identical statutory language. *Leslie Salt* involved a challenge to the McAteer-Petris Act (Gov. Code, § 66600 et seq.), which authorizes the San Francisco Bay Conservation and Development Commission (SFBCDC) to issue permits to any person or government agency seeking to place fill in the San Francisco Bay. (See *id.*, §§ 66604, 66610, 66632.) The McAteer-Petris Act has a provision nearly identical to the cease and desist provision of the Coastal Act: The SFBCDC may issue a cease and desist order if it "determines that a person or governmental agency has undertaken, or is threatening to undertake, an activity that (1) requires a permit from the commission without securing a permit, or (2) is inconsistent with a permit previously issued by the commission . . . ." (*Id.*, § 66638, subd. (a).) In *Leslie Salt* the SFBCDC issued a cease and desist order requiring a property owner to remove fill that had been placed on the owner's property, even though the SFBCDC did not prove the current owner placed or authorized the placement of the fill. (*Leslie Salt Co.*,

at pp. 609-610.) The court in *Leslie Salt* reversed the trial court's order issuing a writ of mandate to set aside the order, holding it was reasonable and necessary to construe the cease and desist provision so that its reference to "one who 'has undertaken, or is threatening to undertake' the proscribed activities refers not simply to one responsible for the actual placement of unauthorized fill but also to one whose property is misused by others for that purpose . . . ." (*Id.* at pp. 618, 622.)

The Lents attempt to distinguish *Leslie Salt* on the ground that, unlike the McAteer-Petris Act, the Coastal Act gives the Commission an additional mechanism to remedy unlawful activity. Under section 30811 the commission may "order restoration of a site if it finds that the development has occurred without a coastal development permit . . . , the development is inconsistent with [the Coastal Act], and the development is causing continuing resource damage." According to the Lents, the Commission may issue a restoration order against a property owner who did not build an unpermitted development, but not a cease and desist order. Section 30811, however, does not say this. Section 30811 does not specify against whom the Commission may issue a restoration order, nor does it distinguish between developers and "mere" property owners. Contrary to the Lents' assertion, nothing in the statutory scheme suggests that section 30810 applies only to persons who build an unpermitted development and that section 30811 applies more broadly to persons who build the development and to subsequent property owners.

Moreover, although the Commission characterized its order requiring the Lents to remove the structures in the easement area as a cease and desist order, the Commission's findings satisfied the requirements for issuing a restoration order under section 30811.[2] The Commission determined that the Lents' property contained unpermitted developments (an issue we will address), that the developments were inconsistent with the easement and violated the public access provisions of the Coastal Act, and that "the presence of the unpermitted development in a public easement is causing continuing resource damage" by obstructing public access to the coast. The Lents concede that, under the regulations implementing section 30811, public access qualifies as a resource and that a Commission restoration order may require an owner to remove an unpermitted development. (See Cal. Code Regs., tit. 14, § 13190, subd. (a) ["as such term is used in section 30811 . . . '[r]esource' means any resource which is afforded protection under the policies of Chapter 3 of the Coastal Act, including but not limited to public access"].)

3. *Substantial Evidence Supported the Commission's Cease and Desist Order*

In its cease and desist order, the Commission concluded that the Lents, by retaining "solid material and structures" on the property, including "the separate placement of a gate, a staircase, decks, and supporting structures," undertook activity that

[2] The Commission's 2007 notice to the Lents stated the Commission intended to issue both a cease and desist order under section 30810 and a restoration order under section 30811.

required a permit and that was inconsistent with a previously issued permit. The Lents contend there was no substantial evidence to support the Commission's decision. There was.[3]

As stated, with certain exceptions not applicable here, any person who wants to perform or undertake development in the coastal zone must obtain a coastal development permit. (§ 30600.)[4] "'[T]he Coastal Act's definition of "development" goes beyond "what is commonly regarded as a development of real property."'" (*Surfrider Foundation v. Martins Beach 1, LLC* (2017) 14 Cal.App.5th 238, 252; see *11 Lagunita, LLC v. California Coastal Com.* (2020) 58 Cal.App.5th 904, 919 ["The word 'development' as used in the Coastal Act is expansive."].) Not only does "development" include "the placement or erection of any solid material or structure" on land and "construction . . . or alteration of the size of any structure," it includes any "change in . . . access" to water. (§ 30106.) As the Commission found, the deck, staircase, and gate were developments that required a coastal development permit because they were solid materials or structures built on land. (See *LT-WR, L.L.C. v. California Coastal Com.* (2007) 152 Cal.App.4th 770, 805 ["gates and signs are 'development' within the meaning" of section 30106].) The deck, stairway, and gate were also developments because they altered access to water—namely, by

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[3] Although the Lents apparently removed the unpermitted structures after the trial court entered judgment, they state they plan to rebuild them if they are successful in this litigation.

[4] Exceptions include, for example, "[i]mmediate emergency work necessary to protect life or property." (§ 30600, subd. (e)(1).) The Lents do not contend an exception applies.

providing beach access to the occupants of the Lents' property and restricting beach access to all others. (See *Surfrider Foundation*, at p. 247 [landowners engaged in unpermitted development under section 30106 by closing a gate on a road to the beach, putting up a sign stating the beach was closed, covering a sign that advertised public access, and stationing security guards to deny public access]; see also *San Diego Unified Port Dist. v. California Coastal Com.*, *supra*, 27 Cal.App.5th at p. 1129 ["a core principle of the [Coastal] Act is to maximize public access to and along the coast as well as recreational opportunities in the coastal zone"].)

Substantial evidence supported the Commission's finding the structures were not permitted. The plans the prior owner submitted in support of the original permit application do not depict any structures in the easement area (except the drainpipe). On the other hand, the plans do depict a deck on the south side of the house facing the beach and an exterior stairwell on the western side of the house—the side that does not include the easement area—providing access from the house to the beach. In 1980 the owner of the property also applied for, and the Commission approved, an amended permit to extend the size of the house toward the coast. Again, the prior owner submitted plans in support of the amendment that did not depict structures in the easement area, but that did depict the deck on the south side of the house. The plans also depicted a proposed new staircase leading from the deck to the beach (which the Commission did not approve).

Substantial evidence also supported the Commission's finding the structures in the easement were inconsistent with both the original permit and the amended permit. The original permit included a condition requiring all construction to "occur in accord with the proposal as set forth in the application," with "[a]ny deviations from the approved plans" requiring review by the Commission. The amended permit included the same condition, plus an additional condition requiring "[c]onstruction of the house and deck" to "occur in accord with the revised plans submitted by the applicant." It also provided that "[a]ll conditions of the original permit not expressly altered by this amendment shall remain in effect." The structures in the easement area were inconsistent with these conditions.

Notwithstanding this evidence, the Lents rely on two sets of conceptual floorplans to argue the Commission impliedly approved the deck and staircase in the easement area. The Lents contend the first set, which the prior owners submitted to the County of Los Angeles in 1980, depicts both the staircase in the easement area and an exterior door on the east side of the house adjacent to the stairway. However, the Commission stated that this set of plans, while it may have been submitted to the county, was not in the Commission's permit file for the property, and it is a reasonable inference (if not a self-evident certainty) the Commission would not have approved a stairway that encroached two feet three inches into a five-foot-wide easement—nearly half the width of the easement. And even if the Commission had approved these plans, the plans are largely illegible, and the Lents provided no evidence the

staircase and deck, as constructed, comply with these plans.

The second set of plans, which the prior owner did submit to the Commission, shows an exterior door on the northeast corner of the building adjacent to the easement area. According to the Lents, the existence of the door in the conceptual plan implies the Commission approved the stairway and deck. However, the plans do not depict the stairway or the deck in the easement area. Moreover, the prior owner submitted the plans in support of a 1981 amendment to the permit that had nothing to do with the purported exterior door. This third amendment "permit[ted] the applicant to extend the western corner of the . . . house"—a corner not adjacent to the easement area—an additional "18 inches beyond the stringline" between the corners of the adjacent buildings and stated that "[a]ll conditions of the original permit not expressly altered by this amendment shall remain in effect."

Finally, the Lents submitted the virtually identical declarations of two architects, both of whom stated that in the 1970s and 1980s they did not always depict "walkways, steps, planters and other landscape/ancillary features outside of the footprint of the residence" on initial concept drawings submitted to the Commission. This testimony, however, was not consistent with either the original plans or the plans submitted in support of the 1980 amendment, each of which depicted a deck and stairway—just not the ones eventually built in the easement area. The Commission did not have to find the architects' declaration(s) credible or persuasive. (See *Ross v.*

California Coastal Com., *supra*, 199 Cal.App.4th at p. 922 ["'it is for the Commission to weigh the preponderance of conflicting evidence, as [the court] may reverse its decision only if, based on the evidence before it, a reasonable person could not have reached the conclusion reached by it"].) And even if the Commission occasionally permitted stairways and decks that were not depicted on conceptual plans, such action would have little bearing on whether the Commission approved the stairway and deck here. The owners constructed the stairway and deck in a public-access easement area, and the architects did not state they generally omitted depictions of stairways and decks in public-access easement areas. In light of the numerous conceptual plans submitted to the Commission that did not depict these structures (but depicted similar structures elsewhere on the property), the permit condition requiring the owner to dedicate an easement for public access, and the fact the structures encroached on the easement, there was substantial evidence the Commission never issued permits for the structures.

B. *Laches Did Not Bar the Commission from Issuing the Cease and Desist Order*

The Lents argue laches barred the Commission's enforcement action because "the Commission was guilty of unreasonable delay in seeking the [s]tructures' removal, thereby unduly prejudicing the Lents and acquiescing as a matter of law in their maintenance." The trial court did not err in ruling the Lents had not met their burden of showing laches barred the Commission from issuing the order.

"Under appropriate circumstances, the defense of laches may operate as a bar to a claim by a public administrative agency . . . if the requirements of unreasonable delay and resulting prejudice are met." (*Robert F. Kennedy Medical Center v. Belshe* (1996) 13 Cal.4th 748, 760, fn. 9; accord, *Krolikowski v. San Diego City Employees' Retirement System* (2018) 24 Cal.App.5th 537, 568; *Cedars-Sinai Medical Center v. Shewry* (2006) 137 Cal.App.4th 964, 985-986.)[5] The standard of review for an order applying the doctrine of laches is generally substantial evidence. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 67.) But because laches is an affirmative defense, on which the defendant has the burden of proof (*Highland Springs Conference & Training Center v. City of Banning* (2016) 244 Cal.App.4th 267, 282), the standard of review for an order refusing to apply laches is different. "'In the case where the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment . . . .'" (*Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 838.) Instead, "'the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law'" because "'the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it

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[5] Laches, however, ""'is not available where it would nullify an important policy adopted for the benefit of the public.'"" (*Krolikowski v. San Diego Employees' Retirement System*, *supra*, 24 Cal.App.5th at p. 568; see *Feduniak v. California Coastal Com.*, *supra*, 148 Cal.App.4th at p. 1381.)

was insufficient to support a finding.'" (*Ibid.*; see *Eisen v. Tavangarian* (2019) 36 Cal.App.5th 626, 647 [applying this standard to the defenses of waiver and estoppel]; *Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 734 [applying this standard to an employer's defense of undue hardship in an action under the Fair Employment and Housing Act].)

For purposes of laches, "'"[a] defendant has been prejudiced by a delay when the . . . defendant has changed his position in a way that would not have occurred if the plaintiff had not delayed.'" (*George v. Shams-Shirazi* (2020) 45 Cal.App.5th 134, 142; see *Magic Kitchen LLC v. Good Things Internat., Ltd.* (2007) 153 Cal.App.4th 1144, 1161.) The party asserting laches may either "'affirmatively demonstrate[ ]'" prejudice (*Highland Springs Conference & Training Center v. City of Banning*, *supra*, 244 Cal.App.4th at p. 282), or "the element of prejudice may be 'presumed' if there exists a statute of limitations which is sufficiently analogous to the facts of the case, and the period of such statute of limitations has been exceeded by the public administrative agency in making its claim" (*Fountain Valley Regional Hospital & Medical Center v. Bonta* (1999) 75 Cal.App.4th 316, 323-324; see *Malaga County Water Dist. v. State Water Resources Control Bd.* (2020) 58 Cal.App.5th 447, 463 [discussing the two ways to show prejudice]). The Lents do not contend in their opening brief that an analogous statute of limitations creates a presumption of prejudice (nor did they in the trial court).[6] They

[6] In their reply brief the Lents cite the statutes of limitations applicable to an action alleging a patent or latent deficiency in construction of real property (Code Civ. Proc., §§ 337.1, subd. (a),

instead assert "the Commission's enforcement delay has resulted in the loss of significant evidence concerning the [s]tructures' legality."

A defendant may show prejudice for purposes of laches where delay causes "important evidence . . . to become unavailable." (*City and County of San Francisco v. Pacello* (1978) 85 Cal.App.3d 637, 645; see *Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1420 ["Death of important witnesses may constitute prejudice."].) But the Lents have not shown there was such a loss of important evidence here. The Lents rely on a declaration Warren Lent submitted to the Commission in January 2016 claiming that he had "recently attempted to communicate with the architect that developed the Property as well as the

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337.15, subd. (a)) and an "action upon a statute for a . . . penalty to the people of this state" (*id.*, § 340, subd. (b)). To the extent the Lents argue these statutes of limitations create a presumption of prejudice, the Lents forfeited the argument by not making it in their opening brief. (See *Dumas v. Los Angeles County Bd. of Supervisors* (2020) 45 Cal.App.5th 348, 356, fn. 5.) In any event, none of these statutes would create such a presumption here. A cause of action for construction defect is not analogous to a Commission cease and desist order, which is more akin to an action to enjoin activity inconsistent with easement rights. And even if an action to impose a penalty under Code of Civil Procedure section 340 were analogous, the Commission moved promptly to impose penalties here. The Legislature did not enact section 30821 until June 2014—seven years after the Commission filed its first notice of intent to issue a cease and desist order and began trying to negotiate a resolution with the Lents. The Commission informed the Lents their conduct might expose them to penalties only a few months after the Legislature enacted section 30821 (see Stats. 2014, ch. 35, § 147), and shortly thereafter the Commission served the Lents with a new notice of intent to issue a cease and desist order and impose penalties.

prior Property owner that oversaw the development," but that his "attempts . . . confirmed both these persons died within the past few years." The Lents' argument, however, ignores that the Commission first asked the Lents to remove the structures from the easement area in April 2007—nearly nine years before Warren Lent stated he "recently" tried contacting the prior owner and the architect.[7] There is no evidence the prior owner and the architect were not alive and willing to discuss the history of the property with the Lents in April 2007 when the Commission sought the Lents' consent to remove the structures, nor is there evidence showing how long the Lents waited before attempting to contact the prior owner and the architect. The Lents' evidence did not compel the trial court to find the Commission's purported delay in seeking to enforce the terms of the easement caused the Lents' claimed prejudice.

The Lents also suggest the Commission acquiesced in the Lents' maintenance of the unpermitted structures because it knew of the structures by 1993 or, at the latest, 2002. In contexts other than administrative enforcement actions, a defendant can establish laches by showing either that the plaintiff's unreasonable delay caused him or her prejudice or that "the plaintiff has acquiesced in the act about which the plaintiff complains." (*Johnson v. City of Loma Linda*, *supra*, 24 Cal.4th at p. 77.) Even

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[7] In their opening brief the Lents assert the Commission did not notify them until 2010 that the stairway was not permitted. This assertion is contradicted by the Commission's April 2007 letter stating that all "development obstructing the accessway" was unpermitted and should be removed, including the "deck area" (on which the stairway sits).

assuming laches can bar an administrative enforcement action where the agency acquiesces to a defendant's conduct (and there is no showing of prejudice), the Lents' evidence did not compel the trial court to find the Conservancy and Commission acquiesced here. The Conservancy notified the prior owner in 1993 that the easement was closed temporarily because the Conservancy had not retained a management agency to open the easement for public use, but that the gate violated the terms of the easement and the owners would need to remove the gate either immediately or, at the latest, when the Conservancy was ready to develop the easement. The Lents submitted no evidence the Commission or the Conservancy agreed that any of the structures could remain permanently. (See *Pacific Hills Homeowners Assn. v. Prun* (2008) 160 Cal.App.4th 1557, 1565 [despite delays by a homeowners' association in seeking to enforce setback requirements governing a homeowner's gate, the homeowner could not show the association acquiesced where the association "made its opposition to the gate known from the moment it was built, and it never changed its position or communicated to defendants it had changed its position"]; *Wells Fargo Bank v. Goldzband* (1997) 53 Cal.App.4th 596, 632 [the California Division of Oil and Gas did not acquiesce by failing for 16 years to require a mineral rights owner to plug and abandon oil wells, where there was no evidence the agency agreed the owner was not responsible for plugging and abandoning the wells]; *Tustin Community Hospital, Inc. v. Santa Ana Community Hospital Assn.* (1979) 89 Cal.App.3d 889, 899 ["[m]ere delay on the part of the plaintiff does not necessarily indicate an actual willingness that the defendant may continue his

invasion of the plaintiff's rights" sufficient to show acquiescence].)

C. *The Lents Received Adequate Notice of the Penalty*

"[P]rocedural due process 'does not require any particular form of notice . . . .'" (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 990; accord, *Pacific Gas & Electric Co. v. Public Utilities Com.* (2015) 237 Cal.App.4th 812, 860 (*Pacific Gas*).) ""'If the [administrative remedy] provides for reasonable notice and a reasonable opportunity to be heard, that is all that is required.'"" (*Jonathan Neil & Assoc., Inc. v. Jones* (2004) 33 Cal.4th 917, 936, fn. 7, brackets in original; see *Pacific Gas*, at p. 860 ["All that is required is that the notice be reasonable."].)

The Lents had reasonable and sufficient notice. As the Commission correctly argues, due process does not require an administrative agency to notify an alleged violator of an exact penalty the agency intends to impose, so long as the agency provides adequate notice of the substance of the charge. For example, in *Pacific Gas*, *supra*, 237 Cal.App.4th 812 a gas pipeline operator challenged a $14,350,000 penalty imposed by the Public Utilities Commission (PUC), which the PUC based in part on a provision authorizing daily penalties of $50,000 for a continuing violation. (*Id.* at pp. 832-833.) The court held the PUC provided adequate notice by sending the operator an order to show cause informing it of the rule it violated, of the conduct constituting the violation, and that the violation could expose the operator to penalties under an applicable section of the Public Utilities Code, even though the PUC did not cite the section of the code

permitting it to impose daily penalties for a continuing violation. (*Id.* at p. 861.)

Here, the Commission in its 2015 notice of intent informed the Lents how their conduct violated the Coastal Act and provided them with citations to all applicable statutes. And although the Commission did not indicate the specific penalty amount it would impose, it cited section 30821 and stated the Lents' conduct could warrant penalties of up to $11,250 "for each day the violation has persisted or is persisting, for up to five (5) years." The rest was a matter of multiplication; the Lents at that point knew all they needed to know about the potential penalty they faced, how the Commission would calculate it, and why.

But there was more: Two weeks before the hearing the Commission staff issued its recommended findings and order and sent a copy to counsel for the Lents. Not only did the staff describe in further detail how the Lents violated the Coastal Act and why their conduct warranted penalties under section 30821, but the staff attached all of the evidence it relied on to reach its conclusions. While the Commission staff recommended a penalty of between $800,000 and $1,500,000 "in an effort to be extraordinarily conservative in th[e] first unilateral imposition of administrative penalties," it also specifically advised the Lents that the Commission could impose a penalty of "up to $8,370,000" and that "application of [the statutory] factors would support the imposition of a higher end penalty in the matter close to the $8 million" or "a penalty in the middle range . . . near $4 million . . . ."

Of course, under some circumstances an agency may violate due process by indicating it intends to impose a certain penalty, but subsequently deciding to impose a greater penalty, without giving the person an additional opportunity to respond. For example, in *Tafti v. County of Tulare* (2011) 198 Cal.App.4th 891 the county served a notice ordering the owner of a gasoline station to pay a $138,824 penalty, but informed him he could request a hearing to challenge the order. (*Id.* at pp. 894-895.) The court in *Tafti* vacated the $1,148,200 penalty an administrative law judge subsequently imposed during the hearing, holding the county did not adequately inform the owner it might increase the penalty at the hearing. (*Id.* at pp. 898-900.) But the circumstances here are different. The Commission staff informed the Lents that its recommended penalty range of $800,000 to $1,500,000 was just that—a recommendation—and that the Commission could impose a penalty of up to $8,370,000. Moreover, by the time the Commission staff sent its notice of intent to issue a cease and desist order and impose penalties, the Lents, through counsel, had exchanged correspondence with the Commission about the unpermitted developments. The Lents and their attorneys received adequate notice of the potential penalty.

The Lents argue they "could not present" evidence of whether the penalty imposed by the Commission "might be" constitutionally excessive, and could not have "fully appreciated" "the importance" of other evidence, until the commissioners began deliberating a potential penalty higher than the penalty recommended by the Commission staff. Therefore, according to the Lents, due process required the

Commission to give them an opportunity to submit additional evidence after the Commission decided to impose the penalty. Not true. The Lents knew in September 2015, long before the Commission staff made a recommendation on the amount of a penalty, that the Commission might impose daily penalties of up to $11,250. The Lents filed a statement of defense and a supplemental statement of defense, but never raised a constitutional objection to the potential size of the penalty. At the hearing, neither the Lents' attorneys nor Warren Lent argued that the potential size of the penalty was constitutionally excessive or that the Lents needed additional time to submit evidence relevant to the statutory penalty factors under section 30820, subdivision (c), even though the Commission had specifically informed the Lents two weeks before the hearing that the Commission could impose a penalty of up to $8,170,000. In addition, even if the Commission somehow reduced the Lents' motivation or incentive to submit relevant evidence by recommending a penalty of "only" up to $1,500,000, the Lents have not identified what additional evidence they would have submitted had the Commission staff recommended a larger penalty.[8]

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[8] In its cross-appeal, the Commission asserts the trial court "erred by remanding based on finding that the Commission focused overly on deterrence" and "by finding that the second penalty factor, on susceptibility to remediation, did not support imposition of a penalty." Because the trial court did not make either finding, and the Lents do not mention either finding in their opening brief, we do not address the Commission's assertion.

D. *The Lents Have Not Shown They Received Inadequate Procedural Protections*

The Lents contend that, even if they received sufficient notice of the potential penalty, section 30821 is unconstitutional on its face because it allows the Commission to impose substantial penalties without giving alleged violators sufficient procedural protections. In the alternative, the Lents contend section 30821 is unconstitutional as applied to them. Neither contention has merit.

1. *Applicable Law*

"Both the federal and state Constitutions compel the government to afford persons due process before depriving them of any property interest." (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 212 (*Today's Fresh Start*).) "'The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it."' [Citations.] The opportunity to be heard must be afforded 'at a meaningful time and in a meaningful manner.'" (*Ibid.*) In determining '"'"the quantum and quality of the process due in a particular situation"' . . . the United States Supreme Court [in *Mathews v. Eldridge* (1976) 424 U.S. 319, 335 [96 S.Ct. 893, 47 L.Ed.2d 18] (*Mathews*)] has rejected absolute rules in favor of balancing three considerations: 'First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the

function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'" (*Today's Fresh Start*, at pp. 212-213.) California courts "also consider a fourth factor, the "'dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official.'"" (*Id.* at p. 213.) "In other words, what would the proposed additional procedures add to the fairness and accuracy of the proceedings actually held, and is any such additional benefit constitutionally necessary in light of the respective interests at stake?" (*Id.* at pp. 228-229.)

2. *The Lents Have Not Shown Section 30821 Is Unconstitutional on Its Face*

As the California Supreme Court stated in *Today's Fresh Start*, *supra*, 57 Cal.4th 197, the "standard for a facial constitutional challenge to a statute is exacting. It is also the subject of some uncertainty." (*Id.* at p. 218.) Under one standard, courts "will not invalidate a statute unless it 'pose[s] a present total and fatal conflict with applicable constitutional prohibitions.'" (*California School Boards Assn. v. State of California* (2019) 8 Cal.5th 713, 723-724; see *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 338.) Under "'a more lenient standard,'" courts ask "'whether the statute is unconstitutional "in the generality or great majority of cases."'" (*California School Boards Assn.*, at p. 724; see *Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (2017) 3 Cal.5th 1118, 1138.) "Either way, we consider only the text and purpose of the

statute, and 'petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute.'" (*California School Boards Assn.*, at p. 724.) The Lents' facial constitutional challenge, even under the more lenient standard, fails.

"[P]rocedural due process does not require a trial-type hearing in every instance." (*Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, 392.) "To the contrary, '[i]n general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action.'" (*Today's Fresh Start*, *supra*, 57 Cal.4th at p. 228.) Courts have rejected challenges to administrative proceedings that did not provide the kind of procedural protections the Lents complain section 30821 does not provide, including the right to call witnesses and examine adverse witnesses (see, e.g., *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1122; *James v. City of Coronado* (2003) 106 Cal.App.4th 905, 912; *Stardust Mobile Estates, LLC v. City of San Buenaventura* (2007) 147 Cal.App.4th 1170, 1189); the right to exclude unsworn testimony (see *E.W.A.P., Inc. v. City of Los Angeles* (1997) 56 Cal.App.4th 310, 324; *Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 298); and the right to subpoena witnesses (*Mohilef*, at p. 303; cf. *Cimarusti v. Superior Court* (2000) 79 Cal.App.4th 799, 808-809 ["[g]enerally, there is no due process right to prehearing discovery in administrative hearing cases"]).

In support of their due process argument, the Lents discuss primarily the first *Mathews* factor, asserting that section 30821 allows the Commission to impose substantial penalties of up to $20,000,000 against property owners, "akin to the deprivation of one's means of livelihood." It is true that due process may require a proceeding that more closely resembles a trial when, for example, "action by the state significantly impairs an individual's freedom to pursue a private occupation." (*Oberholzer v. Commission on Judicial Performance*, *supra*, 20 Cal.4th at p. 392.) While the Commission certainly has the potential to impose significant penalties, this potential has less relevance to the Lents' facial challenge because section 30821 does not require the Commission to impose a minimum penalty if it determines a property owner has violated the Coastal Act. (*See People ex rel. Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508, 522-523 [statutory penalty is less likely to violate due process where the statute gives the adjudicator discretion in determining the amount of the penalty].) To prevail on their facial challenge, the Lents must show not only that the Commission has the potential to impose penalties large enough to violate due process under the informal hearing procedures of section 30821, but (under the standard more lenient to them) that in the generality or the great majority of cases the Commission's imposition of a fine would violate due process. They did not make such a showing here. The Commission has discretion to impose a daily penalty of up to $11,250 for a violation of the Coastal Act, but it does not have to do so, even where it determines a property owner has violated the Coastal Act. Moreover, under section 30821, subdivision (h), the

Commission may not impose a penalty if the alleged violator can correct the violation within 30 days of receiving notification of the violation without undertaking additional development that requires a permit.

Turning to the second *Mathews* factor, neither the Lents nor the Commission discusses the procedures available to alleged violators in proceedings under section 30821. But several provisions of the Coastal Act and the regulations adopted by the Commission are designed to ensure alleged violators have a meaningful opportunity to be heard. The Commission may only impose penalties after "a duly noticed public hearing" on a cease and desist or restoration order or after a hearing on a notice of intent to record a violation of the Coastal Act. (See §§ 30810-30812, 30821, subd. (b).) Prior to the hearing, the executive director of the Commission must give the alleged violator notice of the Commission's intent to issue the order. (§ 30812, subd. (a); Cal. Code Regs., tit. 14, §§ 13181, subd. (a), 13191, subd. (a).) In the case of a notice of intent to issue a cease and desist order (the procedure used here) or a restoration order, the executive director must attach a statement of defense form and give the alleged violator at least 20 days to respond, with the executive director having discretion to grant additional time. (Cal. Code Regs., tit. 14, §§ 13181, subds. (a) & (b), 13191, subds. (a) & (b).) Prior to the hearing the director must prepare and distribute to the alleged violator a written recommendation on the proposed order that includes "a brief summary of (A) any background to the alleged violation, (B) the allegations made by staff in its violation investigation, (C) a list of all allegations

either admitted or not contested by the alleged violator(s), (D) all defenses and mitigating factors raised by the alleged violator(s), and (E) any rebuttal evidence raised by the staff to matters raised in the alleged violator's assertion of any defense or mitigating factor with references to supporting documents." (*Id.*, § 13183, subd. (b)(2); see *id.*, § 13193, subd. (b)(2).) At the hearing the Commission staff must summarize its investigation and proposed findings, and the alleged violator may present his or her position. (*Id.*, §§ 13185, subds. (c) & (d), 13195.) The alleged violator may also ask to submit "evidence that could not have been set forth in a statement of defense form," in which case the Commission may postpone the matter until later in the meeting or continue the matter to a subsequent meeting. (*Id.*, §§ 13185, subd. (d), 13195.) Any speaker, including the alleged violator, may submit questions to the Commission to ask other speakers. (*Id.*, §§ 13185, subd. (g), 13195.)[9]

Although not as robust as trial-like proceedings, these procedures guarantee that a property owner has notice of the alleged violations, an opportunity to present evidence, notice of the recommendation by the Commission staff and supporting evidence prior to the hearing, and an opportunity to present a defense prior to and at the hearing. The Lents do not explain why these protections are insufficient in the generality or in the great majority of cases. (See *Today's Fresh*

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[9] Title 14 of the California Code of Regulations does not include specific procedural requirements for hearings on a notice of intent to record a violation, but section 30812, subdivision (d), of the Public Resources Code requires that the owner have an opportunity to present evidence at the public hearing.

Start, *supra*, 57 Cal.4th at pp. 229-230 [charter school had a meaningful opportunity to be heard where it had "notice of the alleged deficiencies in its operations and numerous chances to respond, in writing and orally, with evidence and arguments for why its charter should not be revoked"].)

Moreover, to prove the existence of an unpermitted development, the Commission, as it did here, will generally rely on documentary evidence. "Unlike cases that turn upon the testimony of live witnesses, cases involving documentary evidence do not carry a critical need to inquire into credibility via cross-examination." (*Stardust Mobile Estates, LLC v. City of San Buenaventura*, *supra*, 147 Cal.App.4th at p. 1189; see *Oberholzer v. Commission on Judicial Performance*, *supra*, 20 Cal.4th at p. 393 [superior court judge was not entitled to a trial-like evidentiary hearing to contest an advisory letter from the Commission on Judicial Performance because that commission's "inquiry lent itself well to proof through documentary forms of evidence"]; cf. *Manufactured Home Communities, Inc. v. County of San Luis Obispo* (2008) 167 Cal.App.4th 705, 711 [cross-examination "is especially important where findings against a party are based on an adverse witness's testimony"].) And even in cases where the Commission's findings may depend on the testimony of a percipient witness, the proceedings, as discussed, allow the alleged violator to submit questions to the commissioners to ask witnesses. (See *Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055, 1084 [due process did not guarantee a student accused of sexual assault the right to cross-examine the complainant where the student could submit written questions to

the university's disciplinary review panel, even though the panel's findings were "likely to turn on the credibility of the complainant, and respondent face[d] very severe consequences"].)

Nor have the Lents shown that additional, trial-like procedures would significantly reduce the risk that the Commission would impose a fine that is not justified under the statutory penalty factors. As the California Supreme Court explained in *People v. Ramirez* (1979) 25 Cal.3d 260, when a decision "is evaluative in nature" and "depends on consideration of a host of intangible factors rather than on the existence of particular and contestable facts," formal hearing procedures aimed at "promoting accuracy and reliability," like cross-examination, are less important "because of the difficulties inherent in challenging the subjective aspects of an evaluative-type decision." (*Id.* at pp. 275-276.) Section 30820, subdivision (c), lists five factors the Commission must consider before imposing the penalty. At least three of them are or include intangible factors that do not necessarily depend on contestable facts: the "nature, circumstance, extent, and gravity of the violation"; the "sensitivity of the resource affected by the violation"; and "[w]ith respect to the violator, . . . the degree of culpability . . . and such other matters as justice may require." (§ 30820, subd. (c)(1)-(5).)[10]

[10] Arguably, the other factors the Commission must consider depend more on contestable facts, such as whether the violation is susceptible to restoration or remediation efforts, the cost to the state of bringing the action, and whether the violator has undertaken any remediation efforts.

Regarding the final *Mathews* factor, the Commission argues it has an important interest in imposing penalties using informal procedures to efficiently resolve violations of the Coastal Act and deter future violations. Certainly the Commission has an interest in efficiently remedying violations of the Coastal Act. And although the Commission could implement additional procedural protections for alleged violators in proceedings under section 30821, courts give some deference to the procedures an agency has adopted in enforcement proceedings, even if those proceedings do not include a full, trial-like evidentiary hearing. As the California Supreme Court stated in *Today's Fresh Start*, *supra*, 57 Cal.4th 197, ""legislatures and agencies have significant comparative advantages over courts in identifying and measuring the many costs and benefits of alternative decisionmaking procedures. Thus, while it is imperative that courts retain the power to compel agencies to use decisionmaking procedures that provide a constitutionally adequate level of protection . . . , judges should be cautious in exercising that power. In the vast bulk of circumstances, the procedures chosen by the legislature or by the agency are likely to be based on application of a *Mathews*-type cost-benefit test by an institution positioned better than a court to identify and quantify social costs and benefits."" (*Id.* at p. 230; see *Marvin Lieblein, Inc. v. Shewry* (2006) 137 Cal.App.4th 700, 723 [acknowledging "the administrative and fiscal burden of requiring a full evidentiary hearing with live testimony"]; *Mohilef v. Janovici*, *supra*, 51 Cal.App.4th at p. 301 ["'Courts should be particularly cautious in deciding whether to require an agency to provide a procedure that has the potential to impose

significant costs, such as a right to cross-examine.'"].)[11]

One of the Lents' primary arguments is not based on any of the three *Mathews* factors. They argue section 30821 is unconstitutional on its face because it permits the Commission to impose a "quasi-criminal" penalty, but does not guarantee property owners and other alleged violators the "formalities usually afforded the accused in the quasi-criminal context." The Lents contend that, by enacting the provision that allows the Commission to impose an administrative penalty, the Legislature intended, in part, to punish those who violate the Coastal Act. Citing *Austin v. United States* (1993) 509 U.S. 602 [113 S.Ct. 2801, 125 L.Ed.2d 488], the Lents argue that section 30821 therefore creates a quasi-criminal proceeding.[12]

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[11] The Lents do not make any specific arguments regarding the fourth factor California courts consider, the dignitary interests of the individual. The California Supreme Court has emphasized that this factor largely concerns ensuring individuals have the opportunity to meaningfully participate in proceedings. (See *People v. Allen* (2008) 44 Cal.4th 843, 869 [defendants have a "dignitary interest in being heard," and the "government has no interest in assuming a paternal role to prevent a defendant from pursuing a strategically misguided path"]; *People v. Ramirez*, *supra*, 25 Cal.3d at p. 275 ["'Only through [oral] participation can the individual gain a meaningful understanding of what is happening to her, and why it is happening. Moreover, providing the opportunity to react . . . promote[s] the feeling that, notwithstanding the substantive result, one has been treated humanely and with dignity by one's government.'"].) As discussed, the Commission's procedures adequately account for the dignitary interests of the individual.

[12] The Lents also cite *People v. Ruiz* (2018) 4 Cal.5th 1100, where the California Supreme Court considered whether a criminal

The problem with the Lents' argument is that it conflates different constitutional protections. In *Austin v. United States*, *supra*, 509 U.S. 602 the United States Supreme Court considered the Excessive Fines Clause of the Eighth Amendment to the United States Constitution—not the due process balancing test described in *Mathews*. (See *Austin*, at p. 604.) The Supreme Court held that a "'civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment' . . . and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause." (*Austin*, at pp. 621-622.) But even assuming a penalty imposed under section 30821 is a "fine" subject to the limitations of the Excessive Fines Clause (an issue we will discuss), that does not guarantee alleged violators all the "formalities usually afforded the accused" in criminal proceedings. For example, it is the Sixth Amendment, not the Eighth Amendment, that guarantees the accused in criminal prosecutions the right to confront witnesses (one of the protections the Lents complain section 30821 does not afford them), and courts do not use the Excessive Fines analysis of *Austin* to determine the proceedings to which the protections of the Sixth Amendment apply. (See, e.g., *Lewis v. United States* (1996) 518 U.S. 322, 325 [116 S.Ct. 2163, 135 L.Ed.2d

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laboratory analysis fee and drug program were "punishment" for purposes of "Penal Code section 182, subdivision (a)—which provides that persons convicted of conspiring to commit a felony 'shall be punishable in the same manner and to the same extent as is provided for the *punishment* of that felony.'" (*Ruiz*, at p. 1106.) Neither *Ruiz* nor Penal Code section 182 has anything to do with this case.

590]; *Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998, 1003.)

The California Supreme Court in *People v. Superior Court (Kaufman)* (1974) 12 Cal.3d 421 similarly explained that the punitive nature of a penalty does not guarantee an accused the Fifth Amendment privilege against self-incrimination. In that case the government sought to impose civil penalties on an individual for deceptive advertising, and the individual invoked his Fifth Amendment privilege against self-incrimination to avoid answering questions at a deposition, arguing the proceeding was criminal in nature because of the substantial penalties the individual faced. (See *id.* at pp. 424-425, 429.) In rejecting the individual's privilege assertion, the Supreme Court explained that a civil penalty for deceptive advertising "is unquestionably intended as a deterrent against future misconduct and does constitute a severe punitive exaction by the state, but neither it nor the process by which it is imposed is deemed criminal in nature for such reasons. The penalty does not include, for instance, the stigma of a criminal conviction nor does it permit such alternative punishment as the loss of personal freedom with which a defendant in a criminal action is threatened." (*Id.* at p. 431, fn. omitted.)

In their reply brief the Lents assert that, "[b]y definition, a quasi-criminal penalty is more serious than a purely civil remedy, and that point is appropriately considered in the balancing-factor analysis under procedural due process." But the Legislature has characterized the penalty imposed

under section 30821 as an "administrative civil penalty" (§ 30821, subd. (a)), not a "criminal" penalty or fine. Like the civil penalty the Supreme Court considered in *Kaufman*, a penalty imposed under section 30821 does not expose the defendant to the stigma of a criminal conviction. The Lents do not explain why an individual has a greater interest in avoiding an administrative civil penalty simply because the Legislature intends the penalty (in part) to deter future unlawful conduct.

3. *The Lents Have Not Shown Section 30821 Is Unconstitutional as Applied to Them*

The party challenging a statute that is facially valid has "the burden of evincing facts to show that it was unconstitutional as applied." (*Associated Homebuilders of Greater East Bay, Inc. v. City of Livermore* (1961) 56 Cal.2d 847, 854; accord, *Coffman Specialties, Inc. v. Department of Transportation* (2009) 176 Cal.App.4th 1135, 1145.) The Lents' opening brief (but not their petition) includes a one-paragraph argument that section 30821, even if not unconstitutional on its face, it is unconstitutional as applied to them because the Commission imposed a large penalty. There may be instances where an agency, by imposing a substantial penalty without giving the alleged violator a fair opportunity to present a defense, infringes on the alleged violator's due process rights. For example, in *Manufactured Home Communities, Inc. v. County of San Luis Obispo*, *supra*, 167 Cal.App.4th 705 a county rent control board determined, based primarily on the testimony of tenants, that a mobilehome park operator violated a rent control ordinance. (*Id.* at

p. 708.) The court held the county violated the operator's due process rights because the county "found the tenants' testimony to be credible and 'never rebutted,'" but "did not allow [the operator] to test the tenants' veracity or rebut the testimony through cross-examination." (*Id.* at p. 712.)

The Lents, however, have not identified any specific procedural protection they contend was necessary to avoid an erroneous deprivation of their interests. They do not contend, for example, that they needed to cross-examine or otherwise question a particular witness the Commission relied on or that they needed to subpoena a particular witness who was unwilling to testify. The Lents simply reiterate that they were entitled to all of the "traditional checks against arbitrary and unfair adjudication" afforded in trial-like proceedings, without explaining how these additional protections, as applied to them, could have made any difference. Accordingly, the Lents' as-applied challenge fails.

E. *The Lents Have Not Shown the Commissioners Are Biased Adjudicators*

The Lents next contend the commissioners are biased adjudicators in proceedings to impose penalties under section 30821. Where "'an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal.'" (*Today's Fresh Start*, *supra*, 57 Cal.4th at p. 215; see *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737.) Unlike California's statutory scheme, in which "an explicit ground for judicial disqualification . . . is a public perception of partiality,

that is, the appearance of bias," the constitutional due process guarantee of a fair tribunal "focuses on actual bias." (*People v. Freeman* (2010) 47 Cal.4th 993, 1001.) "A fair tribunal is one in which the judge or other decision maker is free of bias for or against a party." (*Morongo*, at p. 737.) "Violation of this due process guarantee can be demonstrated not only by proof of actual bias, but also by showing a situation 'in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" (*Ibid.*; see *Freeman*, at p. 1001.) "Claims that an adjudicator is biased are not subject to balancing under the federal Mathews or state *Mathews*-plus test." (*Today's Fresh Start*, at p. 216.) "'[T]he burden of establishing a disqualifying interest rests on the party making the assertion.'" (*Id.* at p. 221.)

Quoting (part of) section 30001.5, subdivision (c), the Lents argue the commissioners are biased adjudicators because the Coastal Act directs them to "[m]aximize public access to and along the coast." The Lents' quotation, however, is misleadingly selective. The complete text of section 30001.5, subdivision (c), states that the "basic goals of the state for the coastal zone" include maximizing "public access to and along the coast and maximiz[ing] public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners." Section 30210, which the Lents also cite, states that access "shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse."

The Lents' argument is also based on a false premise. Section 30001.5 does not direct or require the commissioners to do anything; it is a statement of the Legislature's declarations and findings in adopting the Coastal Act. That commissioners "may be sympathetic towards the objectives of the Act is not a valid criticism. . . . 'Administrators who are unsympathetic toward the legislative program are very likely to thwart the democratic will; the way to translate legislative policies into action is to secure administrators whose honest opinions—biases—are favorable to those policies.'" (*CEEED v. California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306, 328-329; see *Today's Fresh Start*, *supra*, 57 Cal.4th at p. 222 [we "presum[e] that agency adjudicators are people of '"conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances"'"].)

The Lents also argue the commissioners are biased because they can raise revenue for the Commission by imposing penalties under section 30821. "[I]nstitutional financial interests alone, even without any corresponding personal benefit, may compromise due process." (*Today's Fresh Start*, *supra*, 57 Cal.4th at p. 217.) Here, the revenue derived from penalties imposed under section 30821 is not collected by the Commission; it is deposited into the Violation Remediation Account of the Coastal Conservancy Fund. (See § 30821, subd. (j).) But section 30823 requires the Conservancy to expend funds "for carrying out the provisions" of the Coastal Act "when appropriated by the Legislature." The Commission has "primary responsibility for the implementation of the provisions" of the Coastal Act (§ 30330), which

includes "manag[ing] and budget[ing] any funds that may be appropriated, allocated, granted, or in any other way made available to the commission for expenditure." (§ 30340.) Therefore, the commissioners know the revenue from penalties imposed under section 30821 will be used (if at all) to carry out the provisions of the Coastal Act, which by statute they are required to implement (although it is not clear from the record how the Commission exercises, and whether it delegates any of, its executive authority). That individuals with both executive and adjudicative functions can raise revenue by imposing penalties in adjudicative proceedings may, but does not necessarily, show the individuals have a sufficient institutional financial interest to violate due process.

The United States Supreme Court has held that an official is not an impartial adjudicator where the official has executive responsibilities, the official can impose fines in adjudicative proceedings to fulfill his or her executive responsibilities, and the fines constitute a "substantial" or "major" part of the revenue of the organization the official oversees. For example, in *Tumey v. State of Ohio* (1927) 273 U.S. 510 [47 S.Ct. 437, 71 L.Ed. 749] (*Tumey*) the Supreme Court held that the mayor of a village was not an impartial adjudicator for a defendant who was charged with unlawfully possessing liquor because the mayor was the "chief executive of the village . . . charged with the business of looking after the finances of the village" and "substantial sums were expended out of the village treasury, from the fund made up of the fines" imposed on defendants convicted under the

applicable prohibition statutes. (*Id.* at pp. 521, 532.)[13] The Supreme Court observed, however, that "the mere union of the executive power and the judicial power in [a person] cannot be said to violate due process of law" and that the "minor penalties usually attaching to the ordinances of a village council, or to the misdemeanors in which the mayor may pronounce final judgment . . . , do not involve any such addition to the revenue of the village as to justify the fear that the mayor would be influenced in his judicial judgment by that fact." (*Ibid.*) Similarly, in *Ward v. Village of Monroeville* (1972) 409 U.S. 57 [93 S.Ct. 80, 34 L.Ed.2d 267] (*Ward*) the United States Supreme Court held that the mayor of a village who convicted and fined a defendant for traffic offenses was not impartial where the mayor had "wide executive powers," "account[ed] annually to the [village] council respecting village finances," and had "general overall supervision of village affairs," and where a "major part of village income [was] derived from the fines, forfeitures, costs, and fees imposed by him in his mayor's court." (*Id.* at pp. 58, 60.)

In contrast, the court in *Alpha Epsilon Phi Tau Chapter Housing Assn. v. City of Berkeley* (9th Cir. 1997) 114 F.3d 840 (*Alpha Epsilon*) held a city's rent stabilization board that decided appeals over whether units were subject to the city's rent control ordinance was an impartial adjudicator, even though the board could impose fees and penalties to raise revenue. "In its executive capacity, the Board control[led] the rents

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[13] The Supreme Court separately held the mayor was not impartial because he personally received compensation if he convicted the defendant, but not if he acquitted the defendant. (*Tumey*, *supra*, 273 U.S. at pp. 523, 531-532.)

that landlords may charge for properties subject to the ordinance," administered "its own budget," and was "responsible for its own funding." (*Id.* at p. 842.) If the board ruled a unit was subject to rent control, the owner had to pay an annual registration fee and penalties for late payments, which went to the board's budget. Distinguishing *Tumey* and *Ward*, the court in *Alpha Epsilon* held the arrangement did not violate due process because the board did not have a strong enough interest in adjudicating proceedings against landlords to "'reasonably warrant [a] fear of partisan influence on [the] judgment.'" (*Alpha Epsilon*, at pp. 846-847; see *Commonwealth of the Northern Mariana Islands v. Kaipat* (1996) 94 F.3d 574, 575.) The court explained that, although the board's role as both "adjudicator of coverage and executor of its finances may be a less than optimal design for due process purposes," the "amount of the budget at stake" from the registration fees and penalties "in any year—at a maximum of five percent—is rather small." (*Alpha Epsilon*, at p. 847.) The court also concluded that the board's "ability to recoup losses" and "seek funding from the City and other sources . . . further attenuate[d its] financial motivations" and that the board "regularly waive[d] penalties" and recently had a surplus. (*Ibid.*)

The Coastal Act places some check on the Commission's ability to use revenue derived from penalties imposed under section 30821 by requiring that the Legislature appropriate and the Conservancy expend the funds. (See § 30823; see also § 30821, subd. (i)(3) [requiring the Commission to submit to the Legislature a report of administrative penalties imposed under section 30821].) More importantly, the

Lents submitted no evidence in the trial court of how much money the Legislature generally appropriates or the Conservancy spends from the Violation Remediation Account to carry out the provisions of the Coastal Act. Nor did the Lents submit evidence of the Commission's annual budget or of how much of its budget (if any) the Commission generally receives from expenditures from the Violation Remediation Account. The Coastal Act may give the commissioners at least some incentive to impose substantial fines under section 30821, just as the budgetary system in *Alpha Epsilon* gave the board some incentive to recover registration fees and impose late payment penalties on landlords. (See *Alpha Epsilon*, *supra*, 114 F.3d at p. 847.) But absent some additional evidence showing how much the commissioners rely on the penalties to carry out their executive duty to implement the Coastal Act, we cannot determine whether the commissioners' motives are strong enough to reasonably warrant a "fear of partisan influence" on the Commission's judgment or to cause the commissioners "'not to hold the balance nice, clear, and true between the state and the accused.'" (*Ibid.*; see *Ward*, *supra*, 409 U.S. at p. 60.) The Lents did not meet their burden of showing the commissioners have a strong enough institutional financial interest in the penalties they impose to create a constitutionally impermissible risk of bias.

In connection with their opening brief, the Lents ask us to take judicial notice of a memorandum of understanding (MOU) between the Commission and the Conservancy, titled Use and Expenditure of Violation Remediation Account Funds. According to the Lents, the MOU shows the executive director of

the Commission has "final say" on how penalties deposited into the Violation Remediation Account are used. In their reply brief, the Lents ask us to take judicial notice of even more documents prepared by the Commission and the Conservancy. According to the Lents, these documents show that the Conservancy has made expenditures from the Violation Remediation Account that directly fund the Commission's operations and that the penalty imposed on the Lents would have accounted for approximately 14 percent of the Commission's annual budget for the 2017-2018 fiscal year.

We deny the requests for judicial notice of these documents. The Lents did not ask the trial court to take judicial notice of any of these documents, nor do the Lents explain why they did not submit this evidence in the trial court. (See *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325-326 ["An appellate court may properly decline to take judicial notice under Evidence Code sections 452 and 459 of a matter which should have been presented to the trial court for its consideration in the first instance."]; *County of Los Angeles Department of Public Health v. Superior Court* (2021) 61 Cal.App.5th 478, 486, fn. 3 [same].)

With respect to the MOU, even assuming we could take judicial notice of it as an official act of an agency (see Evid. Code, §§ 452, subd. (c), 459), the Lents ask us to interpret the MOU in a manner that is not obvious from the face of the document. While the MOU states the Conservancy must ask the Legislature to appropriate certain funds in the Violation Remediation Account for specific projects designated by the executive director of the Commission, it also

states that, "[i]f the Executive Officer of the Conservancy finds the designation of the Executive Director infeasible, then the Conservancy and the Commission shall consider and agree upon an alternative proposal(s)." It is not clear that, as the Lents assert, the executive director has "final say" on the Conservancy's expenditures, and the extent of the executive director's control over expenditures is a factual question a trial court would have been in a better position to resolve had the Commission had an opportunity to respond.

In addition, several of the documents the Lents ask us in their reply brief to judicially notice, including the document purporting to describe the Commission's annual budget, are memoranda authored by members of the Conservancy and the Commission. "While we may take judicial notice of . . . official acts of state agencies [citation], the truth of matters asserted in such documents is not subject to judicial notice." (*Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 482; see *Guarantee Forklift, Inc. v. Capacity of Texas, Inc.* (2017) 11 Cal.App.5th 1066, 1075.) The Lents seek to use the memoranda to prove the purported facts in those documents—namely, that the Conservancy in fact made various expenditures from the Violation Remediation Account to the Commission and that the budget described in the memoranda is in fact the budget the Legislature approved. And even if we could take judicial notice of these documents, the Lents, by waiting until their reply brief on appeal to request judicial notice, prevented the Commission from having an adequate opportunity to respond. (See *Newhall County Water Dist. v. Castaic Lake Water*

Agency (2016) 243 Cal.App.4th 1430, 1450 ["[d]enial is particularly appropriate where judicial notice has been requested in support of a reply brief to which the opposing party has no opportunity to respond"].)[14]

The Lents also contend that statements by the individual commissioners at the hearing show the commissioners were biased against them. "A party must allege concrete facts that demonstrate the challenged judicial officer is contaminated with bias or prejudice. 'Bias and prejudice are never implied and must be established by clear averments.'" (*Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 792.) The Lents take issue with the fact that several commissioners recommended fines greater than $4,150,000. Such statements, however, do not show the commissioners had a "personal bias" (*Hauser v. Ventura County Bd. of Supervisors* (2018) 20 Cal.App.5th 572, 580) against the Lents or advocated against them prior to hearing the evidence (*Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 484).

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[14] Having declined to take judicial notice of these documents, we do not reach the issue of whether the documents show, as argued by the Lents, that the executive director of the Commission—a person appointed by the commissioners who "serve[s] at the pleasure of his or her appointing power" (§ 30335)—has significant input into the Conservancy's expenditures and that those expenditures have occasionally provided funding for the Commission's operations. If penalties imposed by the Commission directly fund the Commission's operations without sufficient oversight and comprise a significant portion of the Commission's budget, there could be a concern the commissioners may have an impermissible institutional interest when deciding whether to impose significant penalties under section 30821 like the penalty the Commission imposed on the Lents.

In fact, the commissioners who suggested imposing higher fines justified their positions by discussing permissible penalty factors under section 30821, including the public's loss of access to the beach, the many years Commission staff spent trying to remedy the violation, and the Lents' unwillingness to cooperate. (See §§ 30820, subd. (c)(1), (4) & (5), 30821, subd. (c).)

Finally, the Lents argue the "the Commissioners and staff delighted in how they could put the money they raised to use" during the hearing. This is not an accurate description of what occurred at the hearing. There was a brief mention of how revenue is derived from penalties. Commissioner Mark Vargas asked Lisa Haage, the Commission staff's Chief of Enforcement, to clarify how the revenue collected from penalties is allocated. She correctly responded, "It goes to the Violation Remediation Account." She also stated, "If you had creative ideas of what to do with $200,000, certainly there would be more that's possible to do with whatever amount you impose today," and she suggested that "one option might be to fund the construction of this access way."[15] While Commissioner Vargas later repeated Haage's suggestion, he emphasized that the Lents' violation was "egregious" and that they were unwilling to remedy the violation. None of the other commissioners discussed how the Commission could potentially use revenue derived from the penalty or justified imposing higher penalties on the Lents based on the potential

[15] It is not clear what $200,000 Haage was referring to. The Commission staff did not recommend, and none of the commissioners discussed, imposing a $200,000 fine on the Lents.

revenue for the Commission. Nor did the Commission discuss the potential revenue from the penalty in its adopted findings and order.

F. *The Lents Have Not Shown the Penalty Violated the Constitutional Prohibition on Excessive Fines*

The Lents' final argument is that the $4,150,000 penalty violates the federal and state constitutional prohibition on excessive fines. It does not.

Both the Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution prohibit excessive fines. (See *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 727-728.)[16] "'[T]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality,'" which courts assess by considering "(1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay." (*Ibid.*; see *United States v. Bajakajian* (1998) 524 U.S. 321, 334 [118 S.Ct. 2028, 141 L.Ed.2d 314].) A fine is constitutionally excessive only if it is "grossly disproportionate to the offense[ ] . . . ." (*People v. Braum* (2020) 49 Cal.App.5th 342, 359; see *Bajakajian*, at p. 334 ["a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's

[16] The Excessive Fines Clause of the Eighth Amendment is applicable to the states through the Fourteenth Amendment. (*Timbs v. Indiana* (2019) ___ U.S. ___, ___ [139 S.Ct. 682, 686-687, 203 L.Ed.2d 11].)

offense"]; *City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1322 [same].) Because the Commission does not dispute that the penalty imposed on the Lents is a fine for purposes of the Excessive Fines Clause, we consider whether the penalty is grossly disproportionate to the Lents' violation under the factors in *Lockyer* and *Bajakajian*.

"'We review de novo whether a fine is constitutionally excessive and therefore violates the Eighth Amendment's Excessive Fines Clause.' [Citations.] '[F]actual findings made by the [trial court] in conducting the excessiveness inquiry, of course, must be accepted unless clearly erroneous.'" (*Sweeney v. California Regional Water Quality Control Bd.* (Feb. 18, 2021, A153583) ___ Cal.App.5th ___, ___ [2021 Cal.App.Lexis 243, p. 81], as modified Mar. 18, 2021.) We review the "underlying factual findings . . . for substantial evidence, viewing the record in the light most favorable to the ruling." (*People v. Braum*, *supra*, 49 Cal.App.5th at p. 360.)

1. *The Lents' Culpability*

Relying on a declaration Warren Lent filed in the Commission proceeding, the Lents contend they had "minimal culpability" because they believed in "good-faith . . . that they were not violating any public access provisions." The trial court found the Lents had a high degree of culpability because they willfully retained unpermitted structures and deliberately refused to remove those structures for over nine years after the Commission notified them the structures violated the Coastal Act. The court's finding was not clearly erroneous. Although Warren Lent stated he did not realize the structures were unpermitted, the trial

court was not required to find that statement credible, particularly given that the Conservancy recorded its acceptance of the public easement and the Commission notified the Lents in 2007 that the structures were not permitted and that they encroached on the public access easement. The Commission sent multiple letters to the Lents or counsel for the Lents over the next several years asking them to remove the structures and explaining the Conservancy could not develop the accessway until they did so. Still, the Lents refused to remove the structures.

Citing *United States v. Goodwin* (1982) 457 U.S. 368 [102 S.Ct. 2485, 73 L.Ed.2d 74], where the United States Supreme Court held that "to punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort'" (*id.* at p. 372), the Lents argue the Commission impermissibly punished them for exercising their right to defend themselves in the enforcement proceeding.[17] But the trial court did not find the Lents culpable because they attempted to defend themselves. The court found the Lents culpable because they continued to violate the law by refusing to remove the unpermitted structures. And courts routinely consider a person's unwillingness to comply with the law when considering whether a fine is excessive under the Eighth Amendment. (See *People v. Braum*, *supra*, 49 Cal.App.5th at p. 361 [landlord's

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[17] The defendant in *United States v. Goodwin*, *supra*, 457 U.S. 368 moved to set aside a verdict on the ground of prosecutorial vindictiveness, contending the prosecutor indicted him on a felony charge in retaliation for not pleading guilty to a misdemeanor charge. (See *id.* at pp. 371-372.)

flagrant disobedience of city ordinances and court orders demonstrated his culpability]; *City and County of San Francisco v. Sainez*, *supra*, 77 Cal.App.4th at p. 1322 [landlord's "numerous instances of ignoring or disobeying orders to abate or rectify substandard housing conditions affecting the public health and safety" demonstrated his culpability]; *Ojavan II*, *supra*, 54 Cal.App.4th at p. 398 [$9.5 million penalty imposed by the Commission was not excessive, in part because of the investor's "flagrant disregard of the . . . restrictions" on development].)

2. *The Relationship Between the Harm and the Penalty*

The trial court found the Conservancy could have built a public accessway if the Lents had removed the structures in the easement area, although the court stated it was not clear "how long it would have taken" for the Conservancy to complete the accessway. Again, the trial court's finding was not clearly erroneous. The Conservancy hired contractors in 2008 to complete a survey of the property and in 2010 to design conceptual plans. The executive officer of the Conservancy submitted a letter to the Commission stating the Conservancy's draft feasibility study showed no serious physical impediments, other than the Lents' refusal to remove the structures, to the development of public access improvements. And both the executive officer and another member of the Conservancy confirmed this during the hearing. Even if it was uncertain how long it would take the Conservancy to build the accessway, there was substantial evidence the Lents delayed the Conservancy's efforts, which in turn delayed the

public's ability to use the easement to access the beach.[18]

And there was other evidence showing the harm the Lents caused was proportional to the penalty. It was undisputed that there is no public access to the beach near the Lents' property; the beach is part of a three-mile stretch of the coast with no public access, with the closest public access point a mile away from the Lents' property. There is no question the state places significant value on the public's right to access the coast. "[T]idelands—lands between the lines of mean high tide and mean low tide—are owned by the public," which the state holds "in trust for the people for their use . . . ." (*State of California v. Superior Court (Lyon)* (1981) 29 Cal.3d 210, 214.) Both the California Constitution and Coastal Act protect the public's right to access the coast (see Cal. Const., art. X, §§ 3, 4; § 30210), and the Coastal Act specifically recognizes the importance of the public's ability to use oceanfront land for recreation (see §§ 30220 ["Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses."]; 30221 ["Oceanfront land suitable for recreational use shall be protected for recreational use

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[18] Citing a letter written by an engineer and submitted by the Lents in support of their defense during the Commission proceeding, the Lents contend that "the harm from any delay is uncertain." The trial court was not required to find the statements by the Lents' engineer credible, particularly because they conflicted with the Conservancy's evidence. And even if it is not "certain" the Conservancy can eventually build an accessway in the easement area, there is substantial evidence the Lents at least delayed when the Conservancy can finally determine whether building an accessway is feasible.

and development unless . . . already adequately provided for in the area."]).

That the harm caused by the Lents' obstructing public access to the coast may be difficult to quantify does not show the penalty is not proportional to the Lents' violation. For example, in *Ojavan II*, *supra*, 54 Cal.App.4th 373 the Commission issued a permit requiring an owner of 77 lots to recombine them into two lots. (See *id.* at p. 378.) Despite the permit, an investor purchased 54 of the 77 lots and attempted to resell them as individual lots. (*Id.* at p. 379.) The court in *Ojavan II* held that the trial court's $9.5 million penalty against the investor was not disproportionate to the harm, even though the investor caused "'very little or no physical damage to the properties involved,'" because the investor "engaged in activities contrary to the Coastal Act's goal of limiting development." (*Ojavan II*, at pp. 387, 397-398.) Similarly, even if the Lents caused no physical damage to the property by maintaining the structures, the Lents' conduct was inconsistent with the Coastal Act's goal of ensuring public access to the coast and for many years impeded the Conservancy's efforts to provide that access.

3. *Penalties Imposed in Similar Statutes*

Citing various provisions of the Penal Code and the Fish and Game Code (see Pen. Code, §§ 374.7, subd. (b) [$250 to $3,000 fine for dumping waste matter into a body of water], 374.8, subd. (b) [$50 to $10,000 fine for knowingly causing a hazardous substance to be deposited into or on a road, another person's land, or waters of the state]; Fish & G. Code, §§ 12007 [$5,000 maximum fine for violating a

streambed alteration agreement], 12008 [$5,000 maximum fine for violating certain provisions regarding endangered or protected species]), the Lents contend that the penalty the Commission imposed under section 30821 is disproportionate to the penalty the state may impose for other violations that cause environmental harm. But the statutes the Lents cite impose fines for individual acts, not for ongoing violations like maintaining an unpermitted development that violates the Coastal Act's public access provisions. Moreover, there are plenty of statutes that impose daily penalties for activity that can cause environmental harm—including undertaking activity without obtaining a required permit—some of which impose maximum penalties higher than the maximum penalty the Commission can impose under section 30821. (See, e.g., Fish & G. Code, §§ 5901, 12025.1 [daily penalty of up to $8,000 for constructing or maintaining a device in a stream that impedes passing of fish]; Gov. Code, §§ 66632, 66641.5, subd. (b) [$100 to $10,000 daily penalty for knowingly placing fill, extracting materials, or making any substantial change in use of any water, land, or structure in the San Francisco Bay without obtaining a permit]; Health & Saf. Code, § 25191 [daily penalty of up to $25,000 for the first violation, and $50,000 for the second violation, of provisions relating to the handling of hazardous waste]; Pub. Resources Code, §§ 29610 [$50 to $5000 daily penalty for "intentionally and knowingly commenc[ing] any development in violation of" the Suisun Marsh Preservation Act, § 29000 et seq.], 45023 [$10,000 daily penalty for violating provisions of the Integrated Waste Management Act, § 40050 et seq.]; Wat. Code, §§ 13265, subd. (d) [regional water board may impose

a daily penalty of up to $5,000, and the superior court may impose a daily penalty of up to $25,000, for discharging hazardous waste], 13385, subd. (b)(1) [daily civil liability of up to $25,000 for violations of the federal Clean Water Act, 33 U.S.C. § 1251 et seq.].) And courts have rejected excessive fine challenges to civil penalties of several million dollars imposed under statutes authorizing daily penalties like the daily penalty the Commission imposed here. (See *Pacific Gas*, *supra*, 237 Cal.App.4th at pp. 866-867 [$14.35 million penalty against a gas pipeline operator for failing to report information]; *People v. Braum*, *supra*, 49 Cal.App.5th at p. 359 [$5,967,500 penalty against a landlord who leased property to marijuana dispensary operator in violation of local ordinance]; *Ojavan II*, *supra*, 54 Cal.App.4th at p. 398 [$9.5 million penalty against an investor for violations of Coastal Act].)

4. *Ability To Pay*

Although the defendant's ability to pay is a proper factor for the court to consider when analyzing whether a penalty violates the federal and state constitutional prohibitions on excessive fines, the defendant has the burden of proving his or her inability to pay. (See *People v. Cowan* (2020) 47 Cal.App.5th 32, 49-50, review granted June 17, 2020, S261952; *People v. Kopp* (2019) 38 Cal.App.5th 47, 96, review granted Nov. 13, 2019, S257844; cf. *People v. First Federal Credit Corp.* (2002) 104 Cal.App.4th 721, 728-729 [to obtain penalties for violations of the unfair competition law and false advertising law, the government was "not required to present evidence of defendants' wealth" where the relevant statutes did

not state that the defendant's ability to pay was "essential for determining the penalty"].) During the Commission proceedings, the Lents never argued or submitted any evidence they could not pay a fine of up to $8,400,000, even though Commission staff notified them prior to the hearing the Commission could impose such a fine. The trial court stated in its order on the Lents' petition that the Lents (again) did not contest their ability to pay the penalty, and the Lents make no showing on appeal they submitted any such evidence in the trial court. The Lents simply state, without explanation, they "are prepared" to present evidence on "their inability to pay a substantial fine" if the matter is remanded. The Lents failed to meet their burden.

DISPOSITION

The judgment is reversed. The superior court is directed to vacate its order granting the petition in part and to enter a new order denying the petition. The parties' motions for judicial notice are denied. The Commission is to recover its costs on appeal.

/s/ Segal
SEGAL, J.

We concur:

/s/ Perluss
PERLUSS, P. J.

/s/ Feuer
FEUER, J.

Filed May 24, 2018

Los Angeles County Superior Court
Case No. BS167531

Warren M. Lent and Henny S. Lent v. California Coastal Commission, et al., BS 167531	~~Tentative~~ decision on petition for writ of mandate: granted in part

Petitioners Warren M. Lent ("Warren Lent") and Henny S. Lent, individually and as trustees of the Lent Family Living Trust, seek a writ of mandate directing Respondent California Coastal Commission ("Commission") to vacate a cease and desist order and administrative penalty imposed against Petitioners. Petitioners also seek a declaration of the parties' rights and obligations pursuant to Public Resources Code ("Pub. Res. Code") section 30821.

The court has read and considered the moving papers, opposition,[1] and reply, and renders the following tentative decision.

[1] Both parties' opening briefs are 15 pages plus a signature page, and Petitioners' reply is 10 pages plus a signature page. Counsel are reminded that the page limits of CRC 3.1113(d) include the signature line. Petitioners' reply footnotes violate the 12-point type requirements of CRC 2.104 and have not been read or considered.

A. Statement of the Case

1. Petition

Petitioners commenced this proceeding on February 6, 2017. The operative pleading is the First Amended Petitioner ("FAP") filed on April 30, 2018. The FAP alleges in pertinent part as follows.

The subject of this action is beachfront real property located at 20802 Pacific Coast Highway, Malibu, CA 90265 ("Property"). In 1978, the original permit applicant, the Olympian Hotel Partnership submitted a Coastal Development Permit ("CDP") application to the South Coast Regional Commission ("Regional Commission") for the construction of an 1,830 square foot, two-story, single family dwelling with an attached two-car garage.

A few months later, the regional commission approved the application with, *inter alia*, a permit condition (1) requiring a deed restriction granting the public access from Pacific Coast Highway to the beach over a six-foot wide area along the eastern border of the Property and (2) requiring the applicant to provide an area for stairs down the access way to the beach, if necessary. Due to the topography of the Property, there are multiple steep drops in elevation in the public access easement such that it would be necessary to construct stairs and walkways to make it usable as a public access easement.

Following an appeal, the Commission approved the CDP with the permit condition but failed to specify the location for the easement condition. The staff report providing the findings in support of the

permit's approval state that the easement would be located along the Property's western border.

In 1980, Olympian Hotel Partnership assigned the CDP to Frank and Lynne Erpelding ("Erpeldings"), who recorded in the office of the Los Angeles County ("County") Recorder an offer to dedicate the public access easement. The easement was specifically described as abutting the eastern property line. In 1982, the California State Coastal Conservancy ("Conservancy") accepted the offer to dedicate.

In 1983, construction of a residence on the Property was completed. As constructed, the residence included improvements within the recorded public access easement area. These improvements include decking, an external stairway, and a removable fence/gate.

In 2002, Petitioners purchased the Property. They had constructive knowledge of the offer to dedicate the vertical accessway, but no notice that the residence's improvements violated the Conservancy's easement rights and/or the Coastal Act.

In 2007, the Commission mailed Petitioners a Notice of Intent for Cease and Desist Order Proceedings ("Order") and to Record a Notice of Violation of the Coastal Act. This notice of intent alleged that the Property possessed unpermitted developments inconsistent with the CDP.

The Conservancy had a survey of the easement prepared. In 2009, the Conservancy entered into a contract with a design firm, Bionic, for the

preparation of conceptual plans for public accessways on several public access easements in Malibu.

In 2010, Petitioners' attorney met with the Commission, Conservatory, and Bionic representatives to discuss conceptual plans for the public accessway on the Property. The Commission and Conservancy representatives informed Petitioners that the gate, stairs, and related improvements could remain within the vertical accessway, due to liability issues, until such time as the accessway was ready to be developed and opened for public use.

In 2012, the Conservancy authorized a grant to the Mountains Recreation and Conservation Authority ("MRCA") to develop plans for the improvement of public accessways throughout Malibu. In 2013, the Conservancy informed Petitioners that MRCA was preparing a feasibility study to determine the suitability of the Property's accessway for public use. No plans, beyond Bionic's conceptual ones, were developed for improvement of the Property's public accessway because this feasibility study was not yet completed.

In December 2016, a hearing was held on the proposed Order and civil penalties. The Commission's staff submitted a report for the hearing. The Commission staff recommended that the Commission issue the Order to remove all improvements within the easement area and imposing an administrative penalty in the sum of $950,000. Petitioners asserted that they were not opposed to removal of improvements within the easement area, but asked

that the removal not occur until May 31, 2017 when a long-term lease for the Property was set to expire.

The Commission voted unanimously to adopt the Order requiring Petitioners to remove all improvements in the public access easement and an administrative penalty requiring Petitioners to pay an administrative fine in the sum of $4,185,000.

Petitioners seek a writ of administrative mandate on the basis that (1) the Commission committed a prejudicial abuse of discretion by issuing the Order, (2) the Commission committed a prejudicial abuse of discretion by imposing the administrative penalties, and (3) Pub. Res. Code section 30821 is unconstitutional on its face and as-applied.

2. Course of Proceedings

On October 19, 2017, the court granted Petitioners' *ex parte* application for a stay of the Order. On March 16, 2018, the court denied the Commission's and Real Parties' *ex parte* application to lift the stay.

B. Standard of Review

CCP section 1094.5 is the administrative mandamus provision which structures the procedure for judicial review of adjudicatory decisions rendered by administrative agencies. Topanga Ass'n for a Scenic Community v. County of Los Angeles, ("Topanga") (1974) 11 Cal.3d 506, 514-15.

CCP section 1094.5 does not on its face specify which cases are subject to independent review,

leaving that issue to the courts. Fukuda v. City of Angels, (1999) 20 Cal.4th 805, 811. In cases reviewing decisions which affect a vested, fundamental right the trial court exercises independent judgment on the evidence. Bixby v. Pierno, (1971) 4 Cal.3d 130, 143. See CCP §1094.5(c).

The administrative decision in this case is the Order for Petitioners to remove improvements in the easement area and to pay an administrative penalty of $4,185,000. The Commission performs a quasi-judicial function with it issues cease and desist orders with regard to unauthorized development. *See* Marine Forests Society v. California Coastal Commission, (2005) 36 Cal.4th 1, 25-26.

In determining whether Petitioners have a fundamental vested right subject to independent review, the court must weigh together the importance of the right involved and the degree to which it is possessed. Hardesty v. Sacramento Metropolitan Air Quality Management District, ("Hardesty") 202 Cal.App.4th 404, 414 (citing Frink v. Prod, (1982) 31 Cal.3d 166, 177) (abatement of mining operation until appellant obtained permit upheld under substantial evidence standard). The search for "vestedness" and the search for "fundamentalness" are one and the same. Id. The ultimate question is whether the affected right is sufficiently significant that its abridgement by a body lacking judicial power should be reviewed independently. Id.

A right is fundamental on either of two bases: (1) the character and quality of its economic aspect and (2) the character and quality of its human aspect. Benetatos v. City of Los Angeles, ("Bentatos") (2015)

235 Cal.App.4th 1270, 1280 (citations omitted) (substantial evidence applied to city's imposition of conditions on continued operation of burger stand to abate a nuisance). In weighing the fundamental issue, the courts do not weigh the economic aspect alone, and also consider its effect in human terms and its importance to the individual in the life situation. Id. (citing Bixby v. Pierno, (1971) 4 Cal.3d 130, 144). This task is done on a case-by-case basis. Id.

The substantial evidence standard of review has been applied to administrative decisions that restrict a property owner's return, increase the cost of doing business, or reduce profits because such decisions impact mere economic interests. Id. at 1281 (citations omitted). On the other hand, the independent judgment standard of review is applied to decisions that will drive a property owner out of business or significantly injure the owner's ability to function. Ibid. Courts are far less likely to find a fundamental vested right where a case involves pure economic interests. Ibid. (citation omitted). The ultimate question in each case is whether the affected right is deemed to be of sufficient significance to preclude its extinction or abridgement by a body lacking judicial power. Interstate Brands v. Unemployment Ins. Appeals Bd., (1980) 26 Cal.3d 770, 779, n.5. In analyzing the fundamental nature of a right, less sensitivity is provided to the preservation of purely economic privileges. Id. at 779, n.6.

Petitioners have neither a vested right to develop their property in a particular fashion, nor a vested right to a CDP free of conditions. Paoli v. California Coastal Com., (1986) 178 Cal.App.3d 544, 550-51

(reviewing Commission's decision imposing an open space easement condition on CDP). The portion of the Commission's Order requiring Petitioners to remove improvements in the easement area is reviewed under the substantial evidence standard. Id.

As for the $4,185,000 administrative penalty, no fundamental vested right generally is involved where the penalty is a fine, and the trial court generally reviews such a penalty for substantial evidence. Handyman Connection of Sacramento, Inc. v. Sands, ("Handyman") (2004) 123 Cal.App.4th 867, 880. Petitioners contend that the independent judgment standard should apply to the $4,185,000 penalty because it violates Petitioners' fundamental vested right against deprivation of property without due process of law. Pet. Op. Br. at 12.

Petitioners cite Gikas v. Zolin, ("Gikas") (1993) 6 Cal.4th 841, 870, for the proposition the administrative penalty was imposed in a quasi-criminal proceeding. Id. Gikas held that a DMV license suspension proceeding could relitigate the lawfulness of an arrest. 6 Cal.4th at 859. A dissenter noted that a proceeding is quasi-criminal if it is closely identified with the aims and objectives of criminal law enforcement, and a DUI administrative license suspension proceeding meets that definition. Id. at 870.

Petitioners focus on the wrong issue. The question for judicial review is not whether the Commission's civil penalty is quasi-criminal – it is – but whether imposition of the penalty invokes Petitioners' fundamental vested rights. This requires consideration of the fine's effect on Petitioners in

human terms and its importance to the individual in the life situation. Benetatos, *supra*, 235 Cal.App.4th at 1280. Petitioners present no evidence of the economic impact on themselves of the $4,185,000 fine and its importance to their life situation. Therefore, the general rule of a substantial evidence standard of review applies. *See* Handyman, *supra*, 123 Cal.App.4th at 880.

"Substantial evidence" is relevant evidence that a reasonable mind might accept as adequate to support a conclusion (California Youth Authority v. State Personnel Board, ("California Youth Authority") (2002) 104 Cal.App.4th 575, 585) or evidence of ponderable legal significance, which is reasonable in nature, credible and of solid value. Mohilef v. Janovici, (1996) 51 Cal.App.4th 267, 305, n.28. The petitioner has the burden of demonstrating that the agency's findings are not supported by substantial evidence in light of the whole record. Young v. Gannon, (2002) 97 Cal.App.4th 209, 225. The trial court considers all evidence in the administrative record, including evidence that detracts from evidence supporting the agency's decision. California Youth Authority, *supra*, 104 Cal.App.4th at 585.

The agency's decision must be based on the evidence presented at the hearing. Board of Medical Quality Assurance v. Superior Court, (1977) 73 Cal.App.3d 860, 862. The hearing officer is only required to issue findings that give enough explanation so that parties may determine whether, and upon what basis, to review the decision. Topanga, *supra*, 11 Cal.3d at 514-15. Implicit in section 1094.5 is a requirement that the agency set forth findings to

bridge the analytic gap between the raw evidence and ultimate decision or order. Id. at 515.

An agency is presumed to have regularly performed its official duties (Ev. Code §664), and the petitioner therefore has the burden of proof. Steele v. Los Angeles County Civil Service Commission, (1958) 166 Cal.App.2d 129, 137. "[T]he burden of proof falls upon the party attacking the administrative decision to demonstrate wherein the proceedings were unfair, in excess of jurisdiction or showed prejudicial abuse of discretion." Afford v. Pierno, (1972) 27 Cal.App.3d 682,691.

The propriety of a penalty imposed by an administrative agency is a matter in the discretion of the agency, and its decision may not be disturbed unless there has been a manifest abuse of discretion. Lake v. Civil Service Commission, (1975) 47 Cal.App.3d 224, 228. Neither an appellate court nor a trial court is free to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed. Nightingale v. State Personnel Board, (1972) 7 Cal.3d 507, 515. The policy consideration underlying such allocation of authority is the expertise of the administrative agency in determining penalty questions. Cadilla v. Board of Medical Examiners, (1972) 26 Cal.App.3d 961.

The court reviews questions of law *de novo*. The Commission's interpretation of the statutes and regulations under which it operates is entitled to deference. Ross v. California Coastal Commission, (2011) 199 Cal.App.4th 900, 921. This deference does not apply to Petitioners' constitutional claims, however.

C. Coastal Act

The Coastal Act of 1976 (Pub. Res. Code[2] §30000 *et seq*.) ("Coastal Act" or "Act") is the legislative continuation of the coastal protection efforts commenced when the People passed Proposition 20, the 1972 initiative that created the Coastal Commission. *See* Ibarra v. California Coastal Comm., ("Ibarra") (1986) 182 Cal.App.3d 687, 693. One of the primary purposes of the Coastal Act is the avoidance of deleterious consequences of development on coastal resources. Pacific Legal Foundation v. California Coastal Comm., (1982) 33 Cal.3d 158, 163. The Supreme Court described the Coastal Act as a comprehensive scheme to govern land use planning for the entire coastal zone of California. Yost v. Thomas, (1984) 36 Cal.3d 561, 565. The Act must be liberally construed to accomplish its purposes and objectives. §30009.

The Coastal Act's goals are binding on both the Commission and local government and include: (1) maximizing, expanding and maintaining public access to the coast and coastal zone (§§ 30210-14); (2) expanding and protecting public recreation opportunities (§§ 30220-24); (3) protecting and enhancing marine resources including biotic life (§§ 30230-37); and (4) protecting and enhancing land resources (§§ 30240-44). The supremacy of these statewide policies over local, parochial concerns is a primary purpose of the Coastal Act, and the Commission is therefore given the ultimate authority under the Act and its interpretation. Pratt

[2] All further statutory references are to the Pub. Res. Code unless otherwise stated.

Construction Co. v. California Coastal Comm., (2008) 162 Cal.App.4th 1068, 1075-76.

After public hearing, if the Commission determines any person has undertaken or is threatening to undertake any activity that (1) requires a permit from the Commission without securing said permit or (2) is inconsistent with any permit previously issued by the Commission, the Commission may issue an order directing that person to cease and desist. §30810(a). The cease and desist order may be subject to such terms and conditions as the Commission may determine are necessary to ensure compliance with the Act, including immediate removal of any development or the setting of a schedule within which steps shall be taken to obtain a permit. §30810(b).

In 2014, the California Legislature enacted section 30821, which enables the Commission to impose an administrative civil penalty on persons who violate public access provisions of the Act. §30821(a). The penalty may be assessed for each day that the violation persists, but for no more than five years. Id. The amount of the penalty per violation may not exceed 75 percent of $15,000 per day. Id.

In determining the amount of civil liability the Commission must consider the following factors: (1) the nature, circumstance, extent, and gravity of the violation; (2) whether the violation is susceptible to restoration or other remedial measures; (3) the sensitivity of the resource affected by the violation; (4) the cost to the state of bringing the action; and (5) with respect to the violator, any voluntary restoration or remedial measures undertaken, any

prior history of violations, the degree of culpability, economic profits, if any, resulting from, or expected to result as a consequence of, the violation, and such other matters as justice may require. §30821(c) (incorporating §30820(c)).

D. Statement of Facts[3]

1. The Easement

The Property is an oceanfront parcel of land in Malibu.[4] On August 7, 1978, the original permit applicant, the Olympian Hotel Partnership, submitted a CDP application to the Regional Commission for the construction of a 1,830 square foot, two-story, single-family dwelling with an attached two-car garage on the Property. AR 479.

On October 23, 1978, the Regional Commission approved a CDP for the project, subject to several conditions. AR 479, 596-97. One of the conditions was a deed restriction (1) granting the public the right to

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[3] Petitioners ask the court to judicially notice the Commission's staff report for another matter in 2016. Respondents ask the court to judicially notice the Conservancy's staff report regarding MRCA's preparation of the Malibu Coastal Access Public Works Plan. A staff report is the equivalent of legislative history for agency action, but the court has no evidence that either the Commission or the Conservancy adopted the respective reports. Without it, neither document is an official act of an agency. Nonetheless, since both sides admit that the Commission did adopt the two staff reports, the requests are granted. *See* Evid. Code §452(c).

[4] Some of the following facts are unsupported by citation because the parties failed to include the cited page in the Joint Appendix. There is no dispute that the facts are true.

public access to and egress from the beach over a six-foot wide area along the eastern property border and (2) the right to construct stairs down to the beach seaward of the proposed new residence. AR 479, 2634. The easement would be located above a five-foot-wide, concrete-encased storm drain outfall pipe serving Pacific Coast Highway ("PCH") and adjacent northerly areas. AR 2634. The rationale for requiring a public easement was that there was "a need for a vertical access in this area." AR 479. The existence of the storm drain was part of the rationale (presumably because nothing else could be built upon it). AR 479.

On October 31, 1978, Olympian Hotel Partnership appealed one of the CDP's conditions to the Commission. AR 479. On January 17, 1979, the Commission affirmed the condition and approved the CDP. AR 480, 602. Special Condition No. 5 of the CDP is the vertical easement condition: "The applicant shall execute and record a document ... irrevocably offering to dedicate to a public agency ... an easement for public access to the shoreline.... The easement shall allow for pedestrian access to and from the shoreline.... Applicant shall provide an area for stairs down from the vertical accessway, if necessary, in the beach seaward of the structure." AR 604. The Commission found that the proposed project as conditioned conformed to the Coastal Act. AR 602.

The CDP does not authorize any development along the eastern side of the Property where the public access easement was located, except to replace the existing storm drainpipe. AR 480. To this end, Standard Condition No. 4 states: "All construction must occur in accord with the proposal as set forth in

the application for permit .... Any deviations from the approved plans must be reviewed by the Commission...." AR 481. Consistent with this requirement, the plans submitted to and reviewed by the Commission for the CDP show the eastern Property edge unencumbered by any private external development. AR 481, 623. The plans show a beach access stair on the western property edge, opposite of the public easement side. AR 481.

After the CDP was approved and before commencement of the residence's construction, the owner applied for a permit amendment to construct a larger house because an adjacent residence was approved expanding the residence's stringline (imaginary line from adjacent houses limiting seaward encroachment of residence). AR 481. On February 20, 1980, the Commission approved the amendment. AR 481. The amendment states in relevant part: "All conditions of the original permit not expressly altered by this amendment shall remain in effect." AR 481. The amendment, like the permit, did not approve any development along the eastern side of the Property. AR 481. The plans for the new residence again showed the eastern Property edge devoid of any external development. AR 481.

2. The Residence

On July 7, 1980, the Olympian Hotel Partnership assigned the CDP to the Erpeldings. AR 482. A few days later, the Erpeldings recorded an offer to dedicate the vertical easement pursuant to the CDP condition. AR 482. The vertical easement was described as a five-foot wide public access easement over the eastern property line. Id. The Conservancy

accepted the offer to dedicate on November 17, 1982. AR 2307.

Construction of the residence began in 1981 and was completed in 1983. AR 482-83, 3027. As constructed, the residence possesses an external access ten-foot stairway constructed from the second story down to the eastern edge of the Property for private beach access. AR 483, 2331. The stairway connects the house to a deck approximately ten feet below, a point where the beach can be accessed. AR 2331. The stairway's landing sits atop a large concrete storm drain. AR 2553, 2677. The stairway lies directly in the recorded public access easement, infringing on it by 27 inches. AR 483, 698, 4215. This stairway was not depicted in the designs approved in the CDP. AR 483. Additionally, an unpermitted gate/metal fence was constructed blocking access to the easement. AR 483, 699.[5]

3. Communications with the Property Owner

In August 1993, the Conservancy sent a letter to the then-owner of the Property notifying him that the Conservancy staff would be conducting a site visit later that month to view the easement. Following the visit, the Conservancy created an Easement Monitoring Form. AR 2428-30. The form mentioned the stairway, but did not state it was non-compliant. Id.

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[5] According to Petitioner Warren Lent, the gate protects the public from a 6 to 7 foot drop from PCH onto the easement. AR 2331-32.

On September 15, 1993, the Conservancy sent a letter to owner's attorney stating that there is a gate across the easement that "violates the Conservancy's vertical access easement by blocking it." AR 700. The Conservancy noted that the easement will remain closed until the Conservancy locates a management agency to open the easement to public use. Id. The Conservancy told the owner's attorney to "either remove the gate or seek the Conservancy's permission to keep the gate in place during the period that the accessway is officially closed." Id. The Conservancy did not mention removal of the stairway. *See* id.

There is no record of any response to the Conservancy's letter, and the development blocking the public access easement remained. AR 484.

In 1996, the owner of the Property submitted to the Commission an application for a CDP to add approximately 35 feet of five-foot tall tubular steel fencing to the street side of the existing residence. AR 448-49. The Commission waived the requirement for a CDP for this work. AR 456.

4. Petitioners' Purchase of the Property

On November 7, 2002, twenty years after the stairway and gate were built, Petitioners purchased the Property. AR 484, 2331. The easement had been appended to the Property's title by this point. AR 484. When Petitioners purchased the Property, it contained the gate, outdoor stairway, vegetation, planters, a mailbox, and a deck area on the easement. AR 2331. Petitioners did not know that these fixtures violated any laws. AR 2331. Since purchasing the property in 2002, Petitioners have primarily used the

Property as a vacation rental. AR 479. In 2016, its average nightly rate was $1092, the weekly rate was from $8,500 up to $9,200 in peak months, and the monthly rate was from $19,950 to $32,000 in peak months. AR 479.

5. <u>The Notice of Violation</u>

In May 2002, Commission staff became aware of and began investigating the easement violation. AR 484.

On April 27, 2007, the Commission mailed Petitioners a "Notice of Violation" letter pursuant to section 30812.[6] AR 484, 703. The letter explained that the white metal fence and gate, vegetation, planters, mailbox, and deck area (for convenience, "stairway/gate") obstructed the vertical easement and thereby violated the CDP's express conditions and the Coastal Act. AR 703-04. The letter explained that before the Conservancy could properly administer public access, Petitioners need to remove the encroachments and comply with the CDP conditions. AR 704. The letter notified Petitioners that they, as current owners, were liable for resolving any outstanding violations of the Coastal Act that exist on the Property. AR 704. Pursuant to section 30812(b) and (g), the Commission's Notice of Violation requested that Petitioners contact a Commission representative to resolve the matter informally. AR 704.

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[6] Pursuant to section 30812, the Commission may, after hearing if there is an objection, record the notice of violation which shall be considered notice to all successors-in-interest of the property.

Soon thereafter, Petitioners' attorney had a telephone conversation with Commission representatives. AR 2331. Petitioners explained that portions of the unpermitted development protected the public from a six to seven foot drop. Id. Commission staff agreed that these portions of the unpermitted development needed to remain in place due to liability issues until the Conservancy developed and managed the easement. AR 2331-32.

6. The Notice of Intent

On May 23, 2007, following a number of telephone conversations between Commission staff and Petitioners and their attorney, the Commission mailed Petitioners a "Notice of Intent to Commence Cease and Desist Order Proceedings and to Record a Notice of Violation of the Coastal Act" ("Notice of Intent") pursuant to section 30810(a). AR 484, 719. The Notice of Intent informed Petitioners that the stairway/gate is inconsistent with the terms of the easement held by the Conservancy for the purpose of public access to the beach. AR 719. The proposed cease and desist order would require Petitioners to "remove the portion of fence and gate that is blocking the vertical easement" and "require [them] to keep the easements open and free from impediments to pedestrian use at all times in the future." AR 721.

7. The Conservancy's Development Effort

In anticipation of a possible settlement with Petitioners, the Conservancy began to take steps to develop the easement. AR 485.

On March 3, 2008, the Conservancy prepared a survey of the easement following a full site visit. AR 485. This survey revealed to the Conservancy for the first time that the fence, stairway, landings, and deck were all blocking the easement area. AR 485. The Conservancy had been unable to make this determination previously because the view from the street was partially-obstructed view. Id. The survey was the Conservancy's first opportunity to document the extent of the blockage. Id.

In July 2010, Commission staff, Conservancy staff, representatives of Bionic (the Conservancy's design firm) and Petitioners' attorney met at the easement site to discuss the potential accessway designs and the need to remove any development that was blocking the easement. AR 485. Also in 2010, the Commission staff notified Petitioners that the stairway as well as the gate were unpermitted. AR 926.

The Conservancy consistently conveyed to Petitioners its intent to improve the easement for public access to the Las Flores Beach. AR 1189. In 2009, the Conservancy initiated a planning process for public access improvements in the easement. AR 1189. In June 2010, Bionic, completed a series of conceptual design for an accessway in the easement. AR 485. The design, which was shown to Petitioners, demonstrated the feasibility of constructing said public accessway. AR 485, 1189-90. Even the rough cost for improvements to the easement were in the range of expectations for similar beach projects. AR 1189.

On August 2, 2011, Petitioners' attorney outlined in a letter to Commission staff a series of arguments against removing the stairway/gate and opening the easement to public access. AR 484. The letter argued that (a) removing the stairway/gate would unduly burden the Property in violation of Petitioners' property rights, (b) the Commission was barred by judicial estoppel from seeking its removal, (c) local building codes prevented removing the stairway/gate, (d) the easement should not be developed for public access because it is infeasible to do so, and (e) there are nearby easements that should be developed for public access instead. AR 484. The Commission staff found no merit to these arguments, but continued to work with Petitioners over the next several years to address them. AR 484-85.

8. The Malibu PWP

In December 2012, the Conservancy authorized a grant to MRCA of up to $470,000 to develop the Malibu Coastal Access Public Works Plan ("Malibu PWP"). AR 485. The Malibu PWP included planning and designing improvements for Conservancy and MRCA-owned public access easements in Malibu, including the Property. Id.

In March 2013, Petitioners' counsel sent the Conservancy a letter arguing against inclusion of the Property's easement in the Malibu PWP. AR 485, 792-96. Petitioners argued that there were existing nearby public accessways to the beach and that public access through the easement would be inconsistent with the goals and policies of the Coastal Act. AR 792, 795.

The PWP apparently was adopted by the Commission.[7] The Plan is an effort by the Conservancy and MRCA to explore the feasibility of developing undeveloped or impeded public accessways in Malibu as expeditiously as possible in compliance with the Coastal Act and the Conservancy's statutory mandate for maximum public access to the beach. AR 2094. As a first step, MRCA will develop or refine conceptual site plans sufficient to analyze site feasibility and potential environmental impacts. AR 2095. The Property is one of the public access points to be analyzed. AR 2096. The Conservancy shall give property owners ten days' notice for any proposed action. AR 2100.

9. The Conservancy's Continued Efforts

After the approval of the Malibu PWP grant, the Conservancy and MRCA continued to attempt to complete the public access improvements on the Property's easement. AR 485, 959-62, 1187-92. In a June 6, 2016 letter to the Commission, the Conservancy concluded that it has intended to open a public access to Las Flores Beach through the easement for almost 34 years, but has been thwarted by the Property owners' long-term private encroachments into the easement and refusal to agree to the removal of the encroachments. AR 961-62. The result has substantially impaired the ability of the Conservancy and MRCA to proceed with finalizing and implementing a public accessway. AR 962.

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[7] The Commission staff report for the Malibu PWP is in the record (AR 2092-103), but not the Commission's action adopting it.

Subsequent correspondence was exchanged between the parties regarding removal of the encroachments and Petitioners' legal challenges thereto. In February 2014, Commission staff sent a letter responding to Petitioners' counsel's March 2013 letter rebutting the legal challenges raised. AR 486, 797-805.

In March 2014, Petitioners' attorney sent an email again asserting that MRCA should complete its feasibility study before Petitioners remove the encroachments. AR 487, 806.

Commission staff sent an April 2014 letter responding that the unpermitted development violated the Coastal Act and is inconsistent with the CDP conditions, and its prompt removal is imperative to going forward with the long-delayed public access. AR 807-08. Staff indicated that if Petitioners wish to have input into the public access, the first step is to negotiate a Consent Order. AR 807. Such a Consent Order would have to happen soon because public access easement has been blocked for far too long. AR 808.

At the end of April 2014, Petitioners' attorney wrote a letter expanding on their legal arguments against removal of the encroachments. AR 487, 809-17.

In June 2014, Commission staff responded in a letter that focused on settlement through a Consent Order. AR 487, 818-19. In October 2014, Commission staff mailed an outline of a potential Consent Order to Petitioners' counsel. AR 488, 821-22.

On November 24, 2014, Commission staff informed Petitioners' counsel that the newly enacted section 30821 authorized the Commission "to impose administrative penalties in an amount up to $11,250 per day per violation" for violation of the Coastal Act's public access provisions, including section 30210 and 30211, and that this new penalty statute applies to the Lents' property. AR 488, 823.

In December 2014, Petitioners' counsel responded that that the Commission's offer was "profoundly disappointing" and amounted to a demand for "absolute capitulation" by his client. AR 488, 824.

At the end of December 2014, Commission staff responded to the arguments of Petitioners' counsel and repeated an interest in mutual settlement. AR 488, 826-28.

In January 2015, Petitioners' counsel sent another letter to Commission staff making new or newly expanded arguments. AR 489. Petitioners' counsel also sent a letter to the Conservancy raising legal arguments against the removing the stairway/gate. AR 489, 835-40.

In July 2015, Commission staff sent a rebuttal to these arguments. AR 489, 841-49.

10. <u>The Second Notice of Intent</u>

In September 2015, the Commission sent Petitioners a second "Notice of Intent to Commence Cease and Desist Order and Administrative Civil Penalties Proceedings" ("Second Notice of Intent") pursuant to section 30810(a). AR 490, 850-62. The

Second Notice of Intent stated that Commission staff had been trying to resolve the violations of the Coastal Act and CDP on the Property since 2007. AR 850. Yet, the easement remains blocked by a private stairway, fence, decks, and other unpermitted development. AR 851. The Second Notice of Intent warned Petitioners that, if a Cease and Desist Order is imposed, section 30821 of the Coastal Act authorizes the Commission to impose administrative penalties in the amount up to $11,250 per day for each day a violation has persisted, for up to five years. AR 856. If a person fails to pay the administrative penalty, the equivalent of a judgment lien may be recorded on that person's property. AR 856. The Second Notice of Intent closed with a statement that the Commission was willing to resolve the matter without a contested hearing if Petitioners signed a Consent Order. AR 857.

11. <u>Subsequent Correspondence</u>

Petitioners' counsel responded in a September 25, 2015 letter stating that Petitioners "are moving forward in their efforts to try to reach a mutually acceptable resolution of the current situation, based upon a singular but critically important predicate: they must have a viable second means of egress." AR 863.

Subsequent emails stated Petitioners' willingness to resolve the matter through removal of the stairway/gate if they could have some other private beach stairs for the Property, an 18 month delay after the Conservancy submitted an application for a CDP for a public accessway, and other conditions. AR 490.

In January 2016, Petitioners changed attorneys, which led to an exchange of letters raising old and new legal challenges. AR 490. Later in the month, Commission staff sent a January 19, 2016 letter that described the Commission's statutory authority under section 30821 to impose administrative penalties. AR 491, 865-66. The letter stated that (1) Petitioners have known about illegal development obstructing the easement through Commission staff letters dated April 27 and May 23, 2007, and (2) Petitioners have known since at least 2010 that the stairway is inconsistent with the public easement and the Conservancy's need to develop a public accessway. AR 866. Yet, Petitioners have consistently refused to remove the illegal development. AR 866. The letter concluded that even a generous weighing of factors in section 30821 would result in substantial administrative penalties. AR 866.

In February 2016, Petitioners' new counsel sent Commission staff a letter contending that the permitting of the stairway is at least ambiguous, and that an administrative fine of "several hundred thousand dollars" would be unwarranted. AR 867-71. The letter discussed the factors required to be considered in section 30281 and concluded that no fine would be warranted. AR 490, 867-71. Commission staff responded to the permitting argument and warned that an administrative fine could be substantial. AR 491, 872-76. Correspondence between the parties continued throughout early 2016. AR 491.

In May 2016, Commission staff informed Petitioners that they intended to bring the matter before the Commission in June. AR 492, 920. The

matter was postponed to December 2016 because Petitioners changed lawyers again. AR 492. Further negotiations and telephone conferences with Petitioners' counsel failed to resolve the matter. AR 492. The parties could not agree, *inter alia*, on an appropriate civil penalty; Petitioners found Commission staff's demand of $600,000 to be an unreasonable figure. *See* AR 928.

12. <u>The Hearing</u>

At a December 8, 2016 hearing, the Commission adopted the Commission staff's recommendation to issue the portion of the Order directing Petitioners to remove the stairway/gate from the public access easement. AR 475, 2804.

The Order also imposes an administrative penalty. The Commission staff report noted that Petitioners had been in violation since at least November 24, 2014, when Commission staff sent a letter informing Petitioners that section 30821 penalties would apply to their Coastal Act violations. AR 500. There was a period of 744 days between November 24, 2014 and the hearing date. AR 500. Commission staff noted that section 30821 authorizes a penalty for up to five years for each day the violation persists. AR 500. The Commission was authorized to impose up to $8,370,000 ($11,250 per day for 744 days) for each of Petitioners' several violations. AR 500. After evaluating a number of factors, the staff recommended a conservative penalty of $950,000. AR 501.

The Commission evaluated the section 30821 factors, expressly noting that Petitioners had

remained in violation of the Coastal Act for 15 years (AR 503) and Petitioners remained unwilling to allow public access. AR 504. The Commission exercised its discretion to impose a penalty in the amount of $4,185,000 and not the $950,000 recommended by staff. AR 501-05, 2804.

E. Analysis

Petitioners seek a writ of mandate directing Respondent Commission to vacate the entire Order, including removal of the stairway/easement and the $4,185,000 administrative civil penalty imposed against Petitioners. Petitioners also seek a declaration of the parties' rights and obligations pursuant to section 30821.

1. The Removal Requirement

a. Violation of Permit Requirement and Inconsistency with CDP Conditions

Any person wishing to perform or undertake any development in the coastal zone shall obtain a CDP. §30600. A "development" means "... the placement or erection of any solid material or structure...." §30106. "If the commission, after public hearing, determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing a permit or (2) is inconsistent with any permit previously issued by the commission, the commission may issue an order directing that person or governmental agency to cease and desist." §30810.

Petitioners contend that they have not undertaken or threatened to undertake any development of the stairway/gate. Pet. Op. Br. at 9. According to Petitioners, the Commission has conceded this fact. Id.[8] Even if Petitioners' mere use of the stairway/gate is an "undertaking of development", this activity is not inconsistent with the Coastal Act. The CDP's Condition 5 required only an offer to dedicate an easement, and Petitioners' predecessor owners performed that condition. The subsequent easement is not exclusive, and Petitioners have a right to use it so long as it does not unreasonably interfere with the Conservancy's usage. *See* Main Street Plaza v. Cartwright & Main, LLC, (2011) 194 Cal.App.4th 1044, 1054 (easement for particular purpose does not include any other uses by property owner). Petitioners contend that the Order should be set aside for this reason. Id.

Petitioners need not have constructed the stairway/gate to be in violation of section 30810. As Respondents point out (Opp. at 7), Leslie Salt Co. v. San Francisco Bay Conservation etc. Com. ("Leslie Salt") (1984) 153 Cal.App.3d 605, is analogous. In Leslie Salt, unpermitted land fill had been placed on marshy shoreline property between 1971 and 1976. Id. at 609. The San Francisco Bay Conservation and Development Commission ("BCDC") discovered the landfill in 1979. Ibid. Appellant property owner was

[8] Petitioners overstate the Commission's concession. The Commission staff only admitted that Petitioners are not the original Property owners and did not place the stairway/gate on the Property. AR 3048. This statement is not a concession that Petitioners have not undertaken any activity in violation of section 30810(a).

not involved in, and had no knowledge of, the fill. The court examined the McAteer-Petris Act, the purpose of which is to comprehensively regulate development of the San Francisco Bay and shoreline. Id. at 616-17. The McAteer-Petris Act provides that BCDC may issue an order requiring a person to cease and desist when the commission determines that the person has "undertaken, or is threatening to undertake, an activity that (1) requires a permit from the commission without securing a permit, or (2) is inconsistent with a permit previously issued by the commission." Govt. Code §66638. The commission so determined and ordered appellant to remove the fill. Id. at 610. On appeal, the appellant contended that Government Code section 66638 could not be applied to any person other than the one who actually placed the fill — viz., the one who "undertook" the landfill. Leslie Salt, *supra*, 153 Cal.App.3d at 612. The court disagreed. Id. at 618. In order to effectuate the important purpose of the McAteer-Petris Act, the court found it "necessary to construe section 66638 broadly so that one who 'has undertaken, or is threatening to undertake' the proscribed activities refers not simply to one responsible for the actual placement of unauthorized fill but also to one whose property is misused by others for the purpose and who even passively countenances the continued presence of such fill on his land." Id. at 616-18.

Leslie Salt is analogous to the instant case. Petitioners did not perform or undertake the proscribed activity of installing the unpermitted stairway/gate, but nevertheless continued to permit its presence on the Property. The McAteer-Petris Act and the Coastal Act are similar in that they possess

cease-and-desist statutes that must be interpreted broadly. *See* §§ 30810, 30009 (Coastal Act shall be liberally construed). Applying the Leslie Salt rationale, section 30810 must be construed broadly to proscribe not only the actual placement of unpermitted structures, but also Petitioners' countenance of the continued presence of the unpermitted stairway/gate. Given the frequent transfer of real properties, only in this way can the Coastal Act purpose of obtaining and maintaining beach access be enforceable.

Apart from a Leslie Salt statutory construction, section 30810 is violated when the retention of unpermitted structures is inconsistent with a previously issued CDP. Special Condition 5 of the CDP not only requires recordation of an offer for a public access easement, it requires that the Property allow public access to the beach: "The easement shall allow for pedestrian access to and from the shoreline." AR 480. Special Condition No. 4 requires all construction must occur by permit, and no development along the eastern side of the Property been through a permit. AR 481. Therefore, Petitioners' retention of the stairway/gate without a permit violates the CDP and section 20810.

Petitioners contend that they are in compliance with the CDP because their predecessor Property owner recorded the offer for access easement. They are not. The stairway/gate is inconsistent with the CDP's Special Condition No. 5 because it made public pedestrian access to and from the shoreline virtually impossible. The gate blocks pedestrian access entirely, and the stairway encroaches 27 inches onto a 60-inch

(five-foot) wide accessway. The stairway/gate also is inconsistent with Special Condition No. 4 because it is unpermitted.

Petitioners suggest that the stairway/gate in fact was permitted, which would satisfy Special Condition No. 4 (but not Condition No. 5). They rely on approved 1980 plans for the residence from County files which they contend show stairs along the eastern side of the residence. AR 2633-37, 2661. Petitioners contend that a diagram was submitted to the Commission in 1981 as part of the request for approval of the CDP amendment which shows a door on the second floor of the eastern side of the residence. AR 2659.

In reply, Petitioners also present evidence from Ron Goldman ("Goldman"), an architect since the late 1970's, who avers that it was a general custom and practice at the time not to always depict walkways, steps, planters and other landscape features outside of the footprint of the residence. AR 2561. Reply at 9. Petitioners further contend that the gate, while unpermitted, was installed out of necessity to protect passersby because of a steep 6 -to -7 -foot drop from PCH onto the wood landing covering the storm water pipe. AR 2331-32. As long as the easement remains undeveloped, members of the public could fall onto the landing and seriously injury themselves. That is why the Commission and the Conservancy allowed Petitioners to keep the removable gate until such time as construction of the accessway actually commenced. AR 2331-32, 2485.

Petitioners have not carried their burden. The plan page approved by the County is virtually illegible. AR 2661. The diagram submitted to the

Commission as part of the CDP amendment does not "clearly depict" anything either. *See* AR 2634, 2659. More important, the CDP amendment states: "All conditions of the original permit not expressly altered by this amendment shall remain in effect." AR 627 (emphasis added). Whatever the plans may show, the CDP amendment did not expressly alter the public access easement to permit a stairway to be built.

The Commission's staff also rebutted the plan sheet submitted by Petitioners by showing that it is contradicted by all other County-approved plans for the residence that show no development in the public easement. AR 509, 516-17. The plan sheet presented by Petitioners was not in the Commission's permit file, and there is no evidence that the Commission reviewed or approved the stairway or other development. AR 511-14. In fact, the Coastal Act and the Commission's regulations prohibit it from approving development in a public access easement that lessens public usage; the Commission would have had to expressly address a development that fundamentally contradicts the CDP's public access purpose. AR 515-17.

There is substantial evidence that the Commission never saw or approved any plans for a stairway, and that a stairway in the public right of way would deviate from Coastal Act policies and the CDP. The stairway was unpermitted, and it is undisputed that the gate was also. As such, this unpermitted development violated CDP Special Condition No. 4. The stairway/gate also are inconsistent with Special Condition No. 5's requirement for public access to the beach. For this

reason, Petitioners violated section 30810 because the stairway/gate are inconsistent with the CDP. Additionally, Petitioners violated section 30810 by passively countenancing the encroaching stairway/gate.

b. Laches

Petitioners contend that laches precludes the Commission's enforcement action. Pet. Op. Br. at 10. They argue that the Commission unreasonably delayed in bringing its action, and this worked to Petitioners detriment because witnesses have been lost – the original applicant and his architect have passed away. AR 4197. Additionally, it has been difficult to reconstruct the CDP events for construction of the residence. Pet. Op. Br. at 11.

Laches is an equitable safeguard operating independently of the statute of limitations and exists to assure defendants are not confronted with stale claims. Transwestern Pipeline Co. v. Monsanto Co., (1996) 46 Cal.App.4th 502, 520. A claims based on the public duty of a local or state agency may be barred by the doctrine of laches. People v. Dept. of Housing & Community Development, (1975) 45 Cal.App.3d 185, 195. The claim is barred by the laches where the plaintiff is guilty of unreasonable delay in commencing litigation plus either the plaintiff acquiesces to the defendant's alleged wrongful act or the defendant is prejudiced by the delay. Johnson v. City of Loma Linda, (2000) 24 Cal.4th 61, 68; Conti v. Board of Civil Service Commissioners, (1969) 1 Cal.3d 351, 359-360. The laches defense applies fully to mandamus claims as well as other claims. Schellinger Brothers v. City of Sebastopol, (2009) 179 Cal.App.4th

1245, 1267-68. Laches is not available where it would nullify an important policy adopted for the benefit of the public. Feduniak v. California Coastal Com'n, ("Feduniak") (2007) 148 Cal.App.4th 1346, 1381.

The Property's stairway/gate has been inconsistent with the CDP since the residence was completed in 1983. AR 3027. The stairway/gate is visible from PCH. AR 699. The Conservancy acquired actual knowledge of the stairway/gate in 1993 when it sent a letter that the owner must either remove the gate or seek the Conservancy's permission to keep it in place until the accessway was opened for public use. AR 700. In 1996, the Property's former owner submitted a CDP application to the Commission that sought to add five-foot tall tubular steel fencing to the street side of the existing residence. AR 448-49. The Property's former owner filled out an undated "Easement Monitoring Form" stating that "the vertical easement is altered in the way of a gate placed at the entrance point" and that the gate "could constitute a lack of compliance". AR 4078.

From this evidence, Petitioners conclude that the Conservancy and Commission knew about the stairway/gate no later than 1993 and 1996, respectively. Pet. Op. Br. at 11. The timing of the Commission's knowledge of the stairway/gate existence is a factual question which need only be supported by substantial evidence. Substantial evidence exists for the Commission's conclusion that it did not learn of the unpermitted stairway/gate until May 2002 when Commission staff became aware of, and began investigating, the easement violation. AR 484. Petitioners' evidence of the Commission's

knowledge does not contradict this conclusion because it concerns only fencing on the PCH side of the residence and the former Property owner's Easement Monitoring Form was given to the Conservancy, not the Commission.

In any event, the Commission delayed from 2002 until 2007, when Commission staff mailed Petitioners the April 27, 2007 Notice of Violation and then the May 23, 2007 Notice of Intent. AR 484, 703, 719. The court will assume *arguendo* that this delay was unreasonable. Nonetheless, laches cannot be applied to the Commission's failure to act. One of the core principles of the Coastal Act is to maximize public access to the coast to the extent feasible. City of Dana Point v. California Coastal Commission, (2013) 217 Cal.App.4th 170, 185. The public has a strong interest in "eliminating an ongoing unpermitted development" and in "protecting the Commission's ability to enforce existing and future easement and permit conditions." Feduniak, *supra*, 148 Cal.App.4th at 1380 (cease and desist order enforced to compel restoration of 3-hole golf course per easement requiring native vegetation despite 20 year delay). Use of the laches doctrine to prevent enforcement of the easement's public accessway to the beach would nullify an important Coastal Act public policy.

Petitioners assert that application of laches would negate the cease and desist order, but would not prevent removal of the stairway/gate because Petitioners are committed to removing them if and when construction commences for the public accessway. Pet. Op. Br. at 11-12. As the Commission staff pointed out (AR 536), Petitioners' decade of

"avowed resistance" to the Commission's removal of the stairway/gate undermines this purported commitment.[9]

Substantial evidence supports the Commission's Order directing Petitioners to remove the stairway/gate pursuant to the Commission's authority under section 30810(b) because (1) the stairway/gate are inconsistent with the CDP and (2) Petitioners violated section 30810(a) statute by passively countenancing the stairway/gate encroaching on the public access easement. This conclusion would apply even under an independent judgment standard of review.

2. The Administrative Penalty

In 2014, the California Legislature enacted section 30821, enabling the Commission to impose an administrative civil penalty on "a person, including a landowner, who is in violation of the public access provisions" of the Coastal Act. §30821(a). The penalty may be assessed for each day that the violation persists, but for no more than five years. Id. The amount of the penalty per violation may not exceed 75 percent of $15,000 per day (*i.e.*, $11,250 per day). Id.[10]

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[9] Petitioners contend that they were told by the Commission that they could keep the gate until construction of a public walkway began. AR 2331-32. Pet. Op. Br. at 9, 10. This promise has no bearing on their violation of section 30810, and would at most support only an agency estoppel claim, which has not been made.

[10] Section 30820 permits a superior court to award a civil penalty of not less than $1,000 and not more than $15,000 per day for each day of violation under similar circumstances of a

In determining the amount of civil liability, the Commission must consider the following factors: (1) the nature, circumstance, extent, and gravity of the violation; (2) whether the violation is susceptible to restoration or other remedial measures; (3) the sensitivity of the resource affected by the violation; (4) the cost to the state of bringing the action; and (5) with respect to the violator, any voluntary restoration or remedial measures undertaken, any prior history of violations, the degree of culpability, economic profits, if any, resulting from, or expected to result as a consequence of, the violation, and such other matters as justice may require. §30821(c) (incorporating §30820(c)).

The Commission performs a quasi-judicial function when it issues a cease and desist order and an accompanying fine for unauthorized development. *See* Marine Forests Society v. California Coastal Commission, *supra*, 36 Cal.4th at 25-26. The limitations on the Commission's power to issue a fine are that it must be authorized by legislation and must be "reasonably necessary to effectuate the administrative agency's primary, legitimate regulatory purpose." McHugh v. Santa Monica Rent Control Board, (1989) 49 Cal.3d 348, 374. Petitioners do not dispute the Commission's statutory authority to impose a fine where it is reasonably necessary to rectify a violation of the Coastal Act's public access provisions.

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development that is in violation of the Coastal Act or inconsistent with a CDP, local coastal program, or certified port master plan.

1. Violation of Public Access Provisions

Petitioners contend that the Commission mistakenly relies on section 30210 through 30212, which are Coastal Act public access provisions, to justify application of an administrative penalty for Petitioners. Pet. Op. Br. at 13.

a. Section 30210

Section 30210 states in relevant part: "In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access ... shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse."[11] (Emphasis added).

Petitioners contend that section 30210 sets forth public duties imposed on the Commission and the Conservancy, not on property owners like Petitioners. Pet. Op. Br. at 12. Petitioners contend that only the Conservancy violated section 30210 by "sitting on" the easement for decades without taking action. Pet. Op. Br. at 12-13.

Petitioners are partly correct. As stated *ante*, section 30821 authorizes the Commission to impose administrative penalties on anyone "in violation of the public access provisions" of the Coastal Act. §3082l(a).

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[11] Section 4 of Article X of the California Constitution states in relevant part: "No individual ... claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose."

Section 30210 is a public access provision, and sets forth a public access policy which the Commission is obligated to implement. *See* §30214. It is not a policy directed to Petitioners or obligating them to act. §30330. Nevertheless, the Commission did implement this policy through the CDP issued to Petitioners' predecessor owner. The CDP's Special Conditions are enforced by the Commission through a cease and desist order under section 30810. Petitioners are in violation of the public access provisions of the Coastal Act, including section 30210, by undertaking/passively countenancing activities that violate the CDP's Special Conditions. The Commission has both jurisdiction under section 30810 and a duty under section 30210 to abate this violation. AR 2809.

Petitioners argue that section 30821 authorizes an administrative penalty only for violation of the Coastal Act's access policies, and the Commission could file a civil action under section 30820 if it wanted to allege a violation of the CDP. Pet. Op. Br. at 15. Not so. The Coastal Act's access policies are implemented through the CDP. The Commission has the authority under section 30821 to impose an administrative penalty for a violation of coastal policies required by a CDP.

Petitioners contend that their maintenance of the gate is consistent with public safety needs and that their maintenance of a stairway only partly encroaches in the easement area and is consistent with their non-exclusive right to the easement. Pet. Op. Br. at 13. Petitioners miss the point. The policy in section 30210 is maximum access to the coast

consistent with public safety needs. Public safety needs are not the focus, but rather a limitation on public access. As noted *post*, Petitioners stairway/gate violates the CDP's Special Conditions and impairs maximum public access to the beach.

b. Section 30211

Also a public access provision, Section 30211 states in relevant part that "[d]evelopment shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization."

Petitioners contend that they are not interfering with the public's right of access because there is no public access at their property; there is only a neglected publicly-owned easement which is physically inaccessible because of the inherent dangers in the easement's topography. Petitioners rely on the Commission hearing testimony of Alex Nathan Helperin ("Helperin"), a Commission staff member. AR 4273. Helperin testified that a grade separation exists between the sidewalk and the surface of the easement area such that something must be in place in order for the public to descend to the storm drain or whatever is on it as a pathway. The Conservancy and MRCA are finalizing their plans regarding removal of the gate and this topography issue. Id. Pet. Op. Br. at 13.

Petitioners also contend that insufficient evidence supports the Commission's claim that that the unpermitted stairway/gate impedes further planning and design of the public accessway. Petitioner Warren Lent testified that he intends to remove the gate at a

moment's notice and send keys to Commission and Conservancy staff so that they can build on or evaluate the Property. AR 4216-17. He also testified that he was not trying to block the easement and just wanted to figure out a way to have a secondary means of egress out of his home. Id. Petitioners further cite to a 2011 letter written by David C. Weiss ("Weiss"), a structural engineer, who examined Bionic's conceptual designs and questioned their practicality. AR 2396. Pet. Op. Br. at 13.

These arguments are spurious. The immediate availability of public access following removal of unpermitted development is not the test for whether the development denies public access. There is overwhelming evidence that Petitioners are interfering with the public's right of access to the ocean via the easement. The Conservancy has made clear that the stairway/gate has substantially impaired its ability to move forward with a public accessway. AR 959-62. Since 2012, the Conservancy has been working with MRCA to design and improve the Property's public access easement. AR 959. The Conservancy has spent tens of thousands of dollars to address the various problems raised by the encroachments which otherwise could have gone to design and planning efforts. Id. The Conservancy cannot move beyond a very rough draft of its feasibility studies until it learns when and how the stairway/gate will be removed. AR 960. Petitioners' resistance to removal of the stairway/gate has harmed the efforts to develop the easement as it has rendered potential costs, timeframes, and liability issues uncertain. AR 962. The Conservancy concludes: "Removal of these encroachments will enable [it] to

move forward with increasing needed public access in this area." Id. At the Commission hearing, Helperin testified that the Conservancy and MRCA have been "holding off' on finalizing plans for the public accessway because "they weren't sure how things were going to play out and whether there was going to be resistance." AR 4273.

This evidence compellingly shows that removal of the stairway/gate is required for the easement to be available to the public for access to the beach, and that Petitioners have interfered with the public's right of access in violation of section 30211.

c. Section 30212

Section 30212 is a public access provision, and provides in relevant part that "[p]ublic access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects."

Petitioners contend that this statute requires that new development be conditioned on the provision of public access, which imposes an obligation on the Commission, not Petitioners. Pet. Op. Br. at 13. As noted *ante*, this logic is unsound. Section 30212 is a policy enforced by the Commission upon developers through a CDP. A breach of a CDP condition is a violation of this public access policy.

d. Conclusion

Overwhelming evidence exists to support the Commission's decision to impose an administrative civil penalty on Petitioners for their violation of the

public access provisions of the Coastal Act as implemented through the CDP. §30821(a).

2. The Administrative Penalty

The Commission found that every one of the five factors in section 30821(c), borrowed from section 30820, supports imposition of a significant penalty. AR 501.

a. Nature, Circumstance, Extent, and Gravity of the Violation

The Commission found Petitioners' violation of the public access provisions to be significant in nature, circumstance, extent, and gravity. AR 501. The Commission described the public accessway as "highly needed" and desired. Id. The stairway/gate unpermitted by a CDP blocked the easement belonging to the public for access to and from the ocean. Id. The Commission characterized the public access as a "significant and central resource protected by the Coastal Act" and Petitioners' blockage significant. Id. The Commission noted that the violation had impacted the easement's improvement for multiple years. Id. Finally, the Commission concluded that the gravity of Petitioners' violation is significant because it limits public access to the coast for an almost three-mile distance and there is a complete lack of other available public access. Id.

The Commission acknowledged that Petitioners are not the original owners who built the stairway/gate, but stated that they have a legal duty to comply with the CDP's conditions and the Coastal

Act. AR 505. The easement also was on title when Petitioners purchased the Property. Id.

Petitioners wrongly argue that the Commission cites the Coastal Act, CDP, and violation of Coastal Act policies, yet should only have evaluated Petitioners' violation of the Coastal Act's public-access policies pursuant section 30821(c). Pet. Op. Br. at 14. The CDP implements the Coastal Act's public access policies, and it was appropriate for the Commission to evaluate it as part of the violation.

Petitioners argue that they did nothing more than buy the Property upon which the unpermitted developments were already present. Pet. Op. Br. at 14. Petitioners did more than that. When they bought the Property, the unpermitted stairway/gate had prevented public access for 20 years. Petitioners continued that blockage by fighting the Conservancy and the Commission to prevent its removal. By the time of the hearing, Petitioners had continued to prevent public access by retaining the stairway/gate for another 14 years. Petitioners cannot be saddled with the initial 20 year delay, but its existence underscores the significance of the violation.[12]

Petitioners argue that the stairway/gate does not "significantly" block the easement because the

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[12] Petitioners contend that the Commission's decision mistakenly assumed that the stairway/gate interferes with public access as opposed to blocking a closed easement that only recently became a candidate for Conservancy/MRCA development. Pet. Op. Br. at 14. This argument ignores the Conservancy's initial tentative effort in 1993, as well as the Conservancy's and the Commission's more concerted effort beginning in 2007 and continuing thereafter.

stairway lies only partly in the easement area. Pet. Op. Br. at 14-15. This conclusion is not true. The gate blocks access to the easement entirely, and the stairway encroaches nearly halfway (27 inches) onto the six foot easement. There is no evidence that a public accessway could be built on a three and a half foot easement, and common sense suggests otherwise.

Petitioners argue that the gate and landing protect the public against a six to seven foot fall onto the concrete landing in the easement area. Pet. Op. Br. at 14. This is true with respect to the gate. The gate or some other blockage well may be necessary to prevent falls by the public until the Conservancy builds the accessway. But that fact does not undermine the seriousness of Petitioners' refusal to remove the stairway.

Petitioners contend that the Commission exaggerates the lack of actual and potential beach access in the vicinity of Petitioners' property. Pet. Op. Br. at 15. They argue that other publicly-owned accessways remain closed only because of the Conservancy's failure to develop them. Id. Petitioners informed the Commission of three locations in close proximity to the Property that have public access easements to the beach: (a) two that are one-half mile west at Duke's restaurant; (b) a second at Moonshadows restaurant one-half mile east, and (c) a third at 19900 PCH, approximately 1.1 miles east. AR 2633-34, 3012. Reply at 4.

Since Petitioners concede that these public accessways currently are closed (Reply at 4), the Commission's conclusion that there are no other operative accessways for a three-mile stretch is

correct. Moreover, it is not for Petitioners to say which public accessways should be opened; that is the Conservancy's job. The Commission and the Conservancy have been trying for years to gain public access to the beach through dedicated easements, only to battle various homeowners for lawful public access. *See, e.g.*, AR 2097-99 (noting three lawsuits in which the Conservancy and/or Commission have been obligated to litigate public beach access). According to the Commission, there have been 34 public accessway easements recorded in the County, and yet only 13 have been opened for public use. AR 502. In Malibu, only 8 of the 24 vertical access easements have been opened for public access. AR 502. Indeed, frustration over private property owner resistance to opening previously granted public access easements to the beach appears to be the reason why the Legislature passed section 30821. The Malibu LUP establishes a goal of a public accessway every 1000 feet for Las Flores Beach, where the Property is located, and for Las Costa Beach. AR 502. Yet, there are only two public accessways near the Property, one 1.7 miles west at Carbon Beach and another one mile east at Big Rock Beach. AR 502. Petitioners cannot rely on the resistance of other private property homeowners to permit beach access to undermine the significance of their own violation. The Conservancy is guilty of acquiescing in some of the delay, but there is no doubt that homeowners have been a major obstacle to beach access.

The first factor weighs in favor of a penalty.

b. Whether the Violation is Susceptible to Restoration or Other Remedial Measures

The Commission acknowledged that Petitioners' violation could be viewed as susceptible to restoration because the stairway/gate can be removed and demolished. AR 505. The Commission nevertheless found that removal of unpermitted development would not undo years of lost public access to the beach. Id. The Conservancy stated that the public accessway would have been opened to the public long ago but for Petitioners' encroachments. Id.

Petitioners contend that this factor merely asks whether the violation is susceptible to restoration. Pet. Op. Br. at 15. They argue that the answer is plainly yes; the stairway/gate can be removed quickly and simply. Id. The Commission's Chair acknowledged that "the ability to restore is quite simple." AR 4276. Petitioners contend that the Commission improperly focused on the harm from the violation, and not the violation itself. Id.

The Commission's opposition does not address this argument. Section 30821(c) incorporates the factors of section 30820 in determining the amount of civil liability for violating Coastal Act public access provisions. The factor in section 30820(c)(2) is "whether the violation is susceptible to restoration or other remedial measures." The plain meaning of this provision is remediation of the violation, not remediation of the harm from the violation. The Commission's discussion runs adrift from the second factor's scope.

The second factor does not weigh in favor of a penalty and the Commission erred in so finding.

c. Sensitivity of the Resource Affected by the Violation

The Commission noted that the resource affected — coastal access — is a sensitive resource which is extremely limited in the County, and in Malibu in particular. AR 502. Vertical easements in developed coastal areas are rare and valuable and there are virtually no new vertical easements being required presently. Id. Further, California's population continues to grow and there is a concordant increasing desire to access the coast. Id.

Petitioners contend that the Commission engaged another "bait-and-switch" on this factor because the easement is the resource affected by Petitioners' violation, not public access. They note that there are 24 vertical public easements in Malibu, with eight open for public use. Petitioners contend that this is a sufficient number. Pet. Op. Br. at 15.

Petitioners are wrong. For purposes of a Coastal Act violation, the resource affected is public access. The purpose of the easement is to provide public access to the beach. There are eight open public accessways in Malibu, but there should be more. The Malibu LUP establishes a goal of a public accessway every 1000 feet for Las Flores Beach where the Property is located. AR 502. There are only two public accessways near the Property, one 1.7 miles west at Carbon Beach and another one mile east at Big Rock Beach. AR 502. Public access to Las Flores beach has been significantly impacted by Petitioner's violation.

In reply, Petitioners blame the Conservancy and MRCA for the lack of public access. Reply at 4-5. This repetitive argument may be given short shrift. The Conservancy is complicit in the multi-decade failure to develop public accessways, but that fact in no way exonerates Petitioners.

The third factor weighs in favor of a penalty.

d. Cost to the State of Bringing the Action

The Commission found that the costs to the state in bringing this action have been "very significant" and that Petitioners' violation has been "particularly egregious". AR 502. The Commission's staff has spent nine years working on this matter, including a tremendous amount of time in letter writing, researching, phone conversations, attempted negotiations, coordination with other agencies, and meetings. Id. Much of this time has been spent in responding to Petitioners' numerous challenges. Id. Since December 2013, the Commission's staff has written approximately 20 letters to Petitioners, many with long, detailed legal analysis. Id. Many of the responses involved rearguing the same issues raised by Petitioners. Id. Each time staff rebutted an argument, Petitioners proffered new variations of the argument, or else new arguments. Id.

Additionally, the Conservancy has spent considerable time investigating the encroachments, and time and money attempting to plan the accessway while confronting opposition from Petitioners. AR 503. These public funds could have been spent developing public access at other locations. Id. When MRCA is included, three state agencies have invested

significant time and effort on this violation. Id. The public policies in favor of resolving violations quickly and reducing transactions costs support higher penalties in Petitioners' case. Id.

Petitioners contend that this factor has "no sensible application" because the state — through the Attorney General — did not bring an action to recover penalties against Petitioners under section 30820. Pursuant to section 30820, the state brings an action for civil penalties in superior court and, in such a lawsuit, the court may consider the State's costs in bringing the suit under section 30820(c)(4). According to Petitioners, this factor has no bearing on a Commission-imposed administrative civil fine under section 30821, which by definition cannot include the cost of a superior lawsuit. Pet. Op. Br. at 16.

Petitioners are incorrect. Section 30821(c) only requires consideration of section 30820's factors, not the portions of section 30820(a) and (b) concerning a superior court lawsuit. As incorporated into section 30821(c), section 30820(c)(4)'s language of "bringing the action" must be construed to mean bringing the Commission's cease and desist enforcement proceeding.

Petitioners further argue that the Commission made no effort to quantify the administrative cost even of bringing the administrative proceeding. AR 3046, 4276. Petitioners add that the costs to the Conservancy of research, settlement talk, and conferring with third parties are not part of the costs of "bringing the action", which only should be the costs of preparing for and conducting the cease and desist proceeding. Reply at 5.

The court disagrees. Section 30820(c)(4)'s language must be interpreted to include the state's costs — through the Commission, Conservancy, and MRCA — of dealing with Petitioners in an attempt to open the public accessway. The Commission's cost for conducting the actual enforcement hearing is relatively small, and the factor should not be construed in a way that unduly crimps consideration of the state's efforts.

Petitioners contend that the Commission asserts that it incurred "very significant" costs in enforcing this matter but made no effort to quantify said costs. Pet. Op. Br. at 16. This is true. The Commission's failure to quantify the state's costs undermines, but does not negate, this factor. The number and detail of the letters between the parties shows a substantial, albeit unquantified, effort by state agencies.

The fourth factor weighs in favor of a penalty, but less heavily than a quantified number would have.

e. With Respect to the Violator, Any Voluntary Restoration or Remedial Measures Undertaken, Any Prior History of Violations, the Degree of Culpability, Economic Profits, if Any, Resulting from, or Expected to Result as a Consequence of, the Violation, and Such Other Matters as Justice May Require

The Commission noted that the Petitioners exhibited a high degree of culpability and a lack of voluntary restoration efforts. AR 503. Since 2007, Petitioners have refused to remove Coastal Act

violations that blocked the public access easement or enter into a cease and desist order despite many staff letters over the years requesting a resolution. Id. Petitioners' pattern of behavior over the years reflects an attitude of unwillingness to allow public access to the beach and an intention of keeping the beach private. AR 504.

This unwillingness was distinctive as the Commission has amicably resolved many past disputes without resort to section 30821 penalties. Id. The Commission settled a similar public access violation in Malibu in 2013 for over $1million (Ackerberg). Id. Other recent settlements include $700,000 in 2016, $400,000 in 2015, and $2.5 million, $600,000, and $575,000 in 2013. Id. Immediately preceding this matter, the Commission settled the first section 30821 case for public access in Malibu just upcoast of the Property. Id. The respondent was cooperative and settled within several months of purchasing the property for an amount similar to $950,000 recommended by staff in this case. Id.

The Commission also noted that Petitioners have maintained the residence primarily for temporary vacation rental listed on "VRBO" and other websites. AR 504. Properties in Malibu typically enjoy substantial profits. AR 504. On November 17, 2016, the average nightly rate of the residence was listed as $1,092, and the weekly rate ranged from $6,500 in winter to $32,000 per month in the peak summer months. Id. *See* AR 769-85. Commission staff did not have access to specific records of occupancy, but the residence appears to be booked typically based on the VRBO website. Id. The private access to the beach

through the stairway/gate is highlighted as a benefit for potential renters in the VRBO advertisement. Id. Therefore, Petitioners' Coastal Act violations indirectly helped market the Property and generated higher revenues. Id.

Petitioners contend that they have engaged in some voluntary restoration and remedial measures. Pet. Op. Br. at 16. Petitioners cite an unsigned draft letter from their counsel to the Commission with supporting pictures to contend that they removed a mailbox and planters in the easement area. AR 2475. Petitioner Warren Lent declares that they have never blocked the Conservancy's access to the easement and always provided access when requested to do so. AR 2333 (¶7). At the hearing, Petitioner Warren Lent testified that he gave gate keys to the Commission. AR 4217.

Assuming all of this evidence is correct — the citation does not actually support removal of the planter — Petitioners' voluntary effort has had only a minor impact. Petitioners did not voluntarily remove the two important unpermitted structures — the gate and stairway — and did not adopt reasonable remedial measures as evidenced by the nine years of Conservancy and Commission effort and the cease and desist proceeding. *See* Opp. at 11. In no way have Petitioners given "full cooperation" as they claim. *See* Reply at 5.

Petitioners contend that they have not committed prior violations, are innocent purchasers of the Property with no knowledge of any alleged violation, and are not responsible for the present lack of public access. Pet. Op. Br. at 16. Petitioners have not

committed prior violations and they were innocent purchasers. But they have known of the violations for over nine years and have resisted the requirement for public access. As the Commission pointed out, Petitioners were never justified in their non-compliance with the CDP conditions and the Coastal Act. AR 505.

Petitioners attack the Commission's conclusion that they derive economic profits from the violation. They contend that the Commission merely speculated that Petitioners have made significant revenues from renting the house without actual evidence of the same. In fact, the "undisputed evidence" is that the rental income does not cover the Property's mortgage and property tax. AR 4212. Pet. Op. Br. at 16.

The Commission had no quantifiable evidence of economic profits from the violation. It did have some evidence. The Commission may reasonably infer that the unpermitted development aided Petitioners' effort to generate rental income because Petitioners' VRBO listing provides a picture of the stairway, landing, and beach beyond with the caption: "Direct Beach Access." AR 785. The stairway/gate to the beach has been a selling point for Petitioners' rentals.

Moreover, Petitioners need not derive a profit from renting the Property for this factor to apply. The factor involves examination of "economic profits, if any, resulting from, or expected to result as a consequence of, the violation." This means profit from the violation, not profit from a property rental business. Further, Petitioners purported evidence that the vacation rentals of their Property does not pay the mortgage and property tax is merely the

advocacy of their lawyer, who reported what his clients told him. AR 4212. That argument is not evidence.

Petitioners contend that the Commission punished them for "fighting hard" to preserve a staircase, landing, and gate that they believed legal and vital to the safety and security of themselves and the public. Reply at 6. They did not spend nine years defying the Commission; Commission staff is at fault for delaying months and sometimes years without following up. AR 2331-32, 2485. Id.

The court agrees that Commission staff sometimes waited months before responding to a letter from Petitioners' counsel. Nonetheless, Petitioners are the principal cause of the nine year delay. It is plain that Petitioners' motive was to stall. If given the chance, Petitioners would have continued their letter writing indefinitely, purporting to cooperate but making the same legal arguments, sometimes embellished in a new way. This factor works in favor of a penalty not because Petitioners fought hard for their legal rights, but because they deliberately stalled public access.

The fifth factor weighs in favor of a penalty.

3. The Penalty

Based on these factors, as well as an attempt to be conservative in its first imposition of penalties under section 30821 by using the November 24, 2014 date on which Commission staff first notified Petitioners of the potential for section 30821 penalties and by reducing the number of violations to one, the

Commission imposed a penalty of half the maximum: $4,185,000. AR 505. This penalty was more than four times greater than the $950,000 penalty recommended by staff. *See* id.

Petitioners do not challenge the Commission's calculation of the fine. The court has some concern about the calculation because, at least from the cited pages in the Joint Appendix, the Commission did not draw a nexus between its findings on the pertinent factors and the actual penalty of $4.1 million. Instead, the Commission was concerned with the deterrence of other homeowners who fail to cooperate and resist opening lawful public access easements. For this reason, the Commission considered a penalty six times that imposed on the cooperating homeowner who settled for a $925,000 penalty that day, and ultimately settled on a penalty four times that amount. AR 4286, 4307. Civil penalties may have a punitive or deterrent aspect, but their primary purpose is to secure obedience to statutes and regulations serving an important public policy. City and County of San Francisco v. Sainez, ("Sainez") (2000) 77 Cal.App.4th 1302, 1315 (citation omitted).

4. Constitutionality of Penalty

Petitioners contend that the penalty is grossly disproportional to the gravity of Petitioners' offense and should be set aside as unconstitutional under the excessive fine clauses in the United States and California Constitutions. Pet. Op. Br. at 17.

a. Excessive Fine

Both the United States and California Constitutions possess excessive fines clauses. U.S. Const., 8th Amend; Cal. Const., art. I, § 17. A civil penalty, by virtue of its partially punitive purpose, is a fine for purposes of the constitutional protection. Sainez, *supra*, 77 Cal.App.4th at 1321. The constitutional question is whether the penalty is excessive. Id. The touchstone of this inquiry is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the defendant's offense. Id. at 1321-22. The fine is unconstitutional if the amount of the forfeiture is grossly disproportional to the gravity of the violator's offense. Id. at 1322. Proportionality factors include the nature of the violation, its punishment, the harm caused by the violator, other penalties for like offenses, and the ability to pay. *See* id. Judgments about the appropriate punishment for an offense belong in the first instance to the legislature. Balice v. U.S. Dept. of Agriculture, (9th Cir. 2000) 203 F.3d 684, 699.

i. Nature of Violation

Petitioners contend that the nature of their violation is that (1) a removable gate restricts access to a topographically dangerous easement and (2) a stairway and wood landing encroach partly within the easement area but do so to provide emergency secondary egress for Petitioners. Pet. Op. Br. at 17.

This is not a fair characterization. The nature of Petitioners' violation is the willful retention of unpermitted structures blocking public access in

violation of the Coastal Act and CDP, and nine years of deliberate refusal to remove them after the Commission notified them on April 27, 2007 that they were in violation. AR 703-04.

ii. Harm Caused

Petitioners contend that the Commission proved no harm because the Conservancy has failed to develop a path for public access. There is insufficient evidence to support a conclusion that stairway/gate are impeding the opening of this easement into a public accessway. Pet. Op. Br.at 17.

Substantial evidence demonstrates that a public accessway could have been built long ago if Petitioners had removed their gate/stairway. In June 2010, Bionic, the Conservancy's design firm, completed a series of conceptual design for a public accessway in the easement. AR 485. The design, which was shown to Petitioners, demonstrated the feasibility of constructing said public accessway. AR 485, 1189-90. Even the rough cost for improvements to the easement were in the range of expectations for similar beach projects. AR 1189. There is substantial evidence that Petitioners' resistance was the only hurdle preventing further development of the easement as a public accessway. The only unclear issue is how long it would have taken for the Conservancy to fund, design, and build the public accessway.

iii. Other Penalties for Like Offenses

Petitioners contend that the penalty is grossly disproportional to other penalties assessed for like offenses. Petitioners attempt to cite to a matter before

the Commission on the same hearing date in which Commission staff recommended a section 30821 penalty in the amount of $925,000 against Malibu Beach Inn. Pet. RJN Ex. A, p.24.

The Commission settled a section 30821 case on the same day as Petitioners' hearing for $925,000. AR 504. The critical distinction between the two matters is that, unlike Petitioners, the other proceeding was a settlement in which the Malibu Beach owners were "very recent purchasers [circa 2015] of the property" who "worked with staff to very quickly rectify the violation after having the violation brought to their attention." Pet. RJN Ex. A, p.24.

On the other hand, the Commission indicated that it settled a similar public access violation in Malibu in 2013 for over $1 million (Ackerberg). AR 504. This is not a fair characterization of Ackerberg. This department handled the Ackerberg enforcement lawsuit and, to the court's best recollection, Ackerberg had blocked public access to the ocean through an easement on her property for over 30 years, more than three times as long as Petitioners. The Commission did not explain why it settled that case for $1 million in contrast to the more than $4 million penalty imposed in this case. According to the Commission, other settlements for public access violations have been $700,000 in 2016, $400,000 in 2015, and $2.5 million, $600,000, and $575,000 in 2013. AR 504.

The $4.1 million penalty is disproportionate to other penalties in similar matters, but not grossly so on the existing record. The other penalties were all obtained by settlement and only one was obtained pursuant to section 30821. A penalty is not excessive

where it is "'both proportioned to the…misconduct and necessary to achieve the penalty's deterrent purposes.'" Kinney v. Vaccari, (1980) 27 Cal.3d 348, 356 (quoting Hale v. Morgan, (1978) 22 Cal.3d 388, 404).

iv. Ability to Pay

Petitioners do not raise arguments for this factor. *See* Sainez, *supra*, 77 Cal.App.4th at 1319-20 (evidence of a defendant's net worth, not just the value of a particular property, may be received in a civil penalty case).

v. Punishment

The punishment is a civil penalty in the amount of $4,185,000. As Respondents point out (Opp. at 12), section 30821 authorized the Commission to impose a penalty up to $8,370,000 for each violation. AR 500. The Commission elected to impose a penalty for one violation and cut the maximum sum in half. Id.

A consideration of all of the pertinent factors does not justify Petitioners' conclusion that the penalty is grossly disproportionate to their offense. Petitioners' fine is within the maximum that the Commission could have imposed, and a civil penalty less than the statutory maximum generally does not run afoul of the federal excessive fines clause. United States v. Mackby, (N.D. Cal. 2002) 221 F.Supp. 1106, 1110-11. A fine greater than that imposed for parties who settle is not grossly disproportionate. *See* United States v. Goodwin, ("Goodwin") (1982) 457 U.S. 368, 378-80. The $4.1 million fine is not grossly disproportionate to the fines imposed on settling homeowners. *See* Ojavan

Investors, Inc. v. Coastal Commission, (1997) 54 Cal.App.4th 373, 397-98 ($9.5 million civil penalty imposed by trial court under Coastal Act for deed restriction violations was not grossly disproportionate, in part because of owners' blatant disregard and need for deterrence).

b. Vindictive Prosecution

Petitioners contend that "vindictive prosecution" played a significant role in the Commission's determination of the penalty. Petitioners cite the Commission Staff Report which reads: "In summary, [Petitioners] have declined repeatedly over many years to remove the unpermitted development and to provide public access consistent with the permit and Coastal Act. They, therefore, have a high degree of culpability in the violation." AR 3047. Petitioners also cite to the Commission testimony discussing the voluntary remediation factor of section 30820(c). The Commission representative stated: "[L]ooking at the prior history of violations ... staff went into great detail in looking at how many letters, how many points of contact, how many times there were meetings with the respondent that were to no avail." AR 4258. Another Commission representative stated: "[W]e don't want to be in a position where rewarding ... applicants that have been fighting us and resisting these types of opportunities." AR 4263. Petitioners contend that they were severely punished for their exercise of their right to petition under the First Amendment. *See* MHC Fin. Ltd. Pship Two v. City of Santee (2010) 182 Cal.App.4th 1169, 1187, n.16 (right to petition is accorded preferred place in our democratic system). Pet. Op. Br. at 18; Reply at 7.

To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort. Goodwin, *supra*, 457 U.S. at 372. Where the defendant shows that the prosecution has increased the charge in apparent response to the defendant's exercise of a procedural right, the defendant has made an initial showing of an appearance of vindictiveness. Twiggs v. Superior Court (1983) 34 Cal.3d 360, 371.

The Commission has not punished Petitioners for exercising their constitutional right to petition. Instead, it has punished them for their steadfast refusal to remove the stairway/gate after being informed of the violation. Due process does not allow Petitioners unlawfully to refuse to remove these unpermitted structures, even if they concomitantly exercised their right to petition by wrongly claiming that their refusal was justified.

Moreover, Petitioners have taken the Commissioners' and staff's statements out of context. The Commission staff noted that Petitioners possess a high degree of culpability because they were informed about the violations nine years earlier and still refused to remove the gate/stairway. Individual Commissioners commented that Petitioners should not be rewarded for "fighting and resisting" public access with a penalty in a similar amount as the homeowner who cooperatively settled on the same day for $925,000. AR 4263. *See also* AR 4278("we have these two different instances of similar problems dealt with in absolutely the opposite — 180 degrees"), or in similar amount to a case where they settled amicably for $725,000 with a homeowner "who acted as quickly

as they could once they realized that they were in violation" (AR 4267). Thus, the Commission ensured that Petitioners were punished for their deliberate refusal to remove the stairway/gate. The individual Commissioners who spoke at the hearing wanted to ensure that the penalty was greater than that imposed for cooperative homeowners who settled; they were not retaliating against Petitioners for exercising their First Amendment rights. Reply at 7. *See* Goodwin, *supra*, 457 U.S. at 378-80.

4. Due Process

Petitioners contend that section 30821 is unconstitutional facially and as-applied under the due process clauses of the United States and California Constitutions. Pet. Op. Br. at 19. Petitioners proceed with this theory in two ways: (1) Petitioners contend that the Commission is inherently biased because it has a financial interest in the fines it imposes and (2) section 30821 provides insufficient due process guarantees. Pet. Op. Br. at 19-20. Petitioners also contend that section 30821 is unconstitutional facially and as-applied under the excessive fines clauses of the United States and California Constitutions. Pet. Op. Br. at 20.

The federal and state constitutions impose similar procedural limitations on adjudicating state and local agencies. At minimum, an agency must provide private parties with adequate notice, an opportunity for a fair hearing at a meaningful time and manner, and an impartial decision-maker. Today's Fresh Start, Inc. v. Los Angeles County Office of Education, ("Today's Fresh Start") (2013) 57 Cal.4th 197, 212.

To succeed in a facial challenge to the validity of a statute, the plaintiff must establish that the statute's provisions inevitably pose a total and fatal conflict with applicable constitutional provisions. Tobe v. City of Santa Ana, ("Tobe") (1995) 9 Cal.4th 1069, 1102. All presumptions favor the validity of a statute, and the court may not declare a statute invalid unless it is clearly so. Id. Under a facial challenge, the fact that the statute or ordinance "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid...." Sanchez v. City of Modesto, (2006) 145 Cal.App.4th 660, 679.

A timely as-applied challenge where the petitioner's injury does not arise solely from the law's enactment may include a facial attack on the measure. Travis v. County of Santa Cruz, (2004) 33 Cal.4th 757, 769. This is because the action challenges the enforcement of the measure and not just its enactment. Id. In this circumstance, the facial challenge to the text of a measure may be made only insofar as it affects enforcement of the measure against the petitioner. Id. at 767.

In assessing due process constitutionality, "[a]ll presumptions favor the validity of a statute", and a court "may not declare it invalid unless it is clearly so." Tobe, *supra*, 9 Cal.4th at 1102. In the exercise of its police power, a legislature does not violated due process so long as the enactment is procedurally fair and reasonably related to a proper legislative goal. Ojavan, *supra*, 54 Cal.App.4th at 397. It is well accepted that a state may impose reasonable penalties

as a means of securing obedience to statutes validly enacted under the police power. *Ibid*.

a. Impartiality

The right to a fair procedure includes the right to impartial adjudicators. Rosenblit v. Superior Court, (1991) 231 Cal.App.3d 1434, 1448. Unless they have a financial interest in the outcome, adjudicators are presumed to be impartial. Morongo Band of Mission Indians v. State Water Resources Control Bd., ("Morongo") (2009) 45 Cal.4th 731, 73 7. Bias and prejudice on the part of an administrative decision maker must be proven with concrete facts. Breakzone Billiards v. City of Torrance, (2000) 81 Cal.App.4th 1205, 1237. Bias and prejudice are never implied. Id.

Petitioners contend that the Commission is an inherently biased tribunal because section 30821 penalties enable the Commission to finance Coastal Act policies, including public access. Pet. Op. Br. at 19. Section 30821 civil penalties are deposited in the Conservancy's Violation Remediation Account ("VRA") until appropriated by the Legislature. §30821(j); §30823. When appropriated by the Legislature, the funds must be expended for Coastal Act purposes. §30823. Petitioners conclude that section 30821 guarantees that the Commission will be influenced by the prospect of filling the coffers of its sister agency, the Conservancy. Pet. Op. Br. at 19.

In their facial challenge, Petitioners contrast section 30821's procedures with those of section 30820. Pet. Op. Br. at 19-20. In a section 30820 action, the Commission must go to the superior court, a disinterested decision-maker, to obtain a civil fine.

There is no risk of bias because the court has no financial interest in the fine. Yet, section 30821 places the power to financially destroy individuals in the hands of those who institutionally benefit from the most aggressive exercise of that power. Pet. Op. Br. at 20.

Petitioners' facial challenge is unpersuasive. As Respondents point out (Opp. at 14), the VRA is managed by the Conservancy, not the Commission. The entities might have similar purposes, but they are distinct. The use of monies collected in an enforcement action to remediate the harm caused by the violation also is not improper. People ex. rel Younger v. Superior Court, (1976) 16 Cal.3d 30, 38-39. The deposit into the VRA of civil penalty funds imposed by the Commission under section 30821 does not fatally conflict with the due process requirement of impartiality.

For their as-applied challenge, Petitioners contend that the Commission was "blinded" by their purported statutory financial interest in exacting a multi-million dollar penalty. Pet. Op. Br. at 19. Petitioners point out that the Commission imposed a penalty over four times greater than recommended by its staff and even entertained a penalty over six times greater. AR 4286. During the hearing, a Commission staff member asked if the Commission had "creative ideas of what to do with [the penalties]" and suggested "that one option might be to fund the construction of this accessway." AR 4261-62.

Petitioners' contentions are still unpersuasive. Bias is not implied under Morongo, and Petitioners present no concrete facts of bias. Section 30821

expressly empowers the Commission to authorize a fine within the statutory maximum. The Commission's discussion of "creative ideas" for use of the civil fine is consistent with the statute's dictates about the use of the fine for Coastal Act purposes. The Commission's financial interest is constrained by the nexus between the fine and the section 30820 factors, the Conservancy's management of the VRA, and the Legislature's appropriation.

Section 30821 is not facially unconstitutional or as-applied based on the lack of impartial decision-maker.

b. Adequacy of the Procedure

The extent to which due process protections will be available depends on a careful and clearly articulated balancing of the interests at stake in each context. Mohilef v. Janovici, ("Mohilef") (1996) 51 Cal.App.4th 267, 286. In some instances, this balancing may counsel formal hearing procedures that include rights of confrontation and cross-examination; in others, due process may require only that that the administrative agency comply with the statutory limitations on its authority. Id. The factors considered in this balancing include (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; (3) the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible governmental official; and (4) the governmental

interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Id. at 287 (noting balancing test's similarity to one adopted in Mathews v. Eldridge, (1976) 424 U.S. 319, 341).

Petitioners contend that evaluation of the Mohilef factors demonstrates that section 30821 provides insufficient due process guarantees. Pet. Op. Br. at 20.

(i) Private Interest

Petitioners point out that section 30821's penalty provision is a quasi-criminal proceeding which enables the Commission to divest the accused of property, including either payment of the fine or recording of a lien, for the purpose of punishment. Pet. Op. Br. at 20.

Whether a statute is civil or criminal is a question of statutory construction. Smith v. Doe, ("Smith") (2003) 538 U.S. 84, 92). The legislature's stated intent normally warrants deference, unless the clearest proof overrides the intent. Id. at 93. The court agrees that the Commission's imposition of a section 30821 fine is a quasi-criminal matter. There is no question that the purpose of a section 30821 fine is to punish. As one Commissioner stated: "[A] penalty is meant to penalize...It's supposed to hurt." AR 4278. The fine serves the objective of abating an unlawful public access blockage, and is similar to a nuisance prosecution. While there should be a nexus between the harm and the fine, the Commission may also consider deterrence, which is normally a quasi-criminal issue. *See* Ojavan, *supra*, 54 Cal.App.4th at 397 (Commission staff indicating in section 30820

proceeding that deterrent is necessary to prevent reoccurrence). A section 30821 fine may not always impact a significant private interest, but it certainly does in Petitioners' circumstance.

The $4,185,000 fine concerns a significant private interest.

(ii) Risk of Erroneous Deprivation/Probable Value of Additional Safeguards

Petitioners point out that section 30821 imports the same informal procedures applicable in civil enforcement matters that do not threaten seizure of property. 14 CCR §§ 13065, 13066, 13185-86, 13195. This informal procedure resulted in no opportunity to respond to all adverse testimony, no right to cross-examine adverse witnesses, and no chance to exclude evidence that normally would be inadmissible under standard evidentiary rules. Id. Pet. Op. Br. at 20.

The Commission's opposition point out (Opp. at 15) that due process is often satisfied if the accused received adequate notice of the nature of the violation and is provided a meaningful opportunity to respond to the charges against him. Mohilef, *supra*, 51 Cal.App.4th at 276; *see also* Gai v. City of Selma, (1998) 68 Cal.App.4th 213, 219 ("[P]rocedural due process in an administrative setting requires notice of the proposed action; the reasons therefor; a copy of the charges and materials on which the action is based; and the right to respond to the authority initially imposing the discipline 'before a reasonably impartial, noninvolved reviewer.'"). It is not necessary to provide the full panoply of procedural protections accorded in a judicial trial of the right to cross-examine witnesses

or not observe the formal rules of evidence. Mohilef, *supra*, 51 Cal.App.4th at 288-89.

The court must defer to the Commission's hearing procedure if it is constitutionally adequate. "Legislatures and agencies have significant comparative advantages over courts in identifying and measure the many costs and benefits of alternative decisionmaking procedures. Thus, while it is imperative that courts retain the power to compel agencies to use decisionmaking procedures that provide a constitutionally adequate level of protection, judges should be cautious in exercising that power." Today's Fresh Start, *supra*, 57 Cal.4th at 230.

The Commission's opposition notes that Petitioners had the benefit of years of communications with the Conservancy and Commission, a Commission staff report received weeks before the hearing, submitted a substantial Statement of Defense, and received 50 minutes to present their case with an opportunity to propose questions for any other speaker. Opp. at 15.

The court agrees that Petitioners received ample notice of the proposed cease and desist order for the stairway/gate and of the Commission's staff report for the hearing. While Petitioners did not receive specific notice of the $4.1 million fine actually imposed, the Staff Report informed them that the Commission could impose a maximum fine of $8,370,000 based on one violation, and explained the daily maximum fine, the number of days of violation, and the section 20831 factors. The notice was sufficient. *See* Pacific Gas & Electric Co. v. Public Utilities Commission, (2015) 237 Cal.App.4th 812, 858-63 (OSC amply warned

petitioner that its violation was serious and did not need to specifically warn of a continuing violation to impose a $14 million fine).

The hearing provided by the Commission also was sufficient. In a land-use public hearing context, the safeguards of sworn testimony and cross-examination are unnecessary. Mohilef, *supra*, 51 Cal.App.4th at 288-302. Land use hearings are traditionally informal and lack the elements of formal trial-type proceedings such as cross-examination and sworn testimony. Id. The Commission was not obligated to abide by the rules of evidence, and could consider any evidence that reasonably could be relied upon as accurate, including hearsay. Petitioners also received sufficient opportunity to present evidence on all issues. The mere fact that other speakers addressed the Commission after Petitioners does not undermine this informal process. *See* AR 44187-217 (Petitioners), 4217 (MCRA), 4222 (Conservancy), 4248 (staff).

Nonetheless, the $4.1 million fine was substantial and more than four times greater than the $950,000 recommended by staff. The Commission deviated upward from the staff-recommended $950,000 fine primarily because it felt that Petitioners' fine should be substantially greater than the $925,000 paid that same day by a settling public access violator who had been cooperative. AR 504, 4263, 4267, 4278. Petitioners had no opportunity to argue against the Commission's assessment of the other matter or its reasoning for imposition of a considerably larger fine. The risk of erroneous deprivation is increased when an agency deviates upward from the staff-

recommended fine without the offender having an opportunity to argue against it.

The Commission also (a) wrongly concluded that Petitioners' violation was not susceptible to remedial measures under section 30820(c)(2), (b) did not give Petitioners the chance to rebut the Commission's conclusion that their vacation rentals were aided by their blockage of the stairway/gate (their lawyer merely argued that the rentals do not cover the mortgage and property taxes), and (c) did not give Petitioners the chance to show that the $4.1 million fine was disproportionate to other similar public easement matters, most particularly Ackerberg.

These factors bear only on the amount of fine. If given the opportunity to address a proposed $4.1 million fine, Petitioners may have been able to present evidence and at least argue against each of those matters. They also could have addressed their ability to pay a $4.1 million fine and the value of the Property in relation to the fine. Substantive due process in a civil penalty matter allows consideration of evidence of a defendant's net worth, not just the value of a particular property at issue. Sainez, *supra*, 77 Cal.App.4th at 1319. These failures were aggravated by the Commission's apparent focus on deterrence without also considering the nexus between the section 30820 factors they found and the ultimately fine. Civil penalties may have a punitive or deterrent aspect, but their primary purpose is to secure obedience to statutes and regulations serving an important public policy. Id. at 1315. The Commission's focus at the hearing on deterrence in deciding whether the fine should be $6.2 or

$4.1 million seems arbitrary and not tied to the section 30820 factors.

The risk of erroneous deprivation and probable value of additional safeguards is not supported facially, but it is as applied to Petitioners. The amount of the fine in this case is substantial and the hearing procedure did not give Petitioners an opportunity to present all available evidence and argue against the $4.1 million penalty imposed. An additional opportunity to present evidence would have enhanced the reliability of the quasi-criminal proceeding and the fine actually imposed, and a safeguard permitting Petitioners to present additional penalty evidence would not adversely impact the Commission's procedure.

(iii) Dignitary Interest

Petitioners contend that application of judicial rules of procedure and evidence to a section 30821 proceeding would provide necessary safeguards to protect Petitioners from arbitrary deprivation and thereby would protect their dignitary interest. Pet. Op. Br. at 20.

Petitioners' dignitary interest supports a procedure in which they may present evidence on a proposed $4.1 million penalty. It does not support a formal proceeding with evidentiary rules and witness cross-examination.

(iv) Governmental Interest

Petitioners contend that enacting more stringent procedures and evidentiary requirements could save

the government time and resources currently expended on allowing the presentation of deficient evidence and testimony. Pet. Op. Br. at 20.

The Commission's governmental interest in conducting the public hearing weighs against burdening the section 30821 fine process with witness cross-examination, *in limine* hearings, and formal evidentiary rules. On the other hand, the governmental interest is not burdened by permitting Petitioners to provide additional evidence on the $4.1 million fine.

(v) Conclusion

Petitioners' due process guarantees argument mostly lacks merit. While not constitutionally compelled by due process, the better practice would be for the Commission to notify an offender of the specific amount that it intended to impose, as recommended by staff or greater, and then give the offender an opportunity to present evidence and argue against it. In this particular case, due process requires that the Commission comply with this practice and give Petitioners an additional opportunity to present evidence and argue against the $4.1 million fine.[13]

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[13] Petitioners contend that section 30821 is unconstitutional facially and as-applied under the excessive fines clauses of the United States and California Constitutions. Pet. Op. Br. at 20. Petitioners contend that section 30821 dispenses with the explicit mandate in case law to consider proportionality in levying fines. Id. Instead, section 30821 promotes excessive fines by permitting consideration of the state's costs and the violator's economic profits. Id. Petitioners' argument is unavailing. The section 30820 factors permit consideration of proportionality,

F. Conclusion

The Petition for writ of mandate is granted in part. A writ shall issue directing the Commission to set aside the fine, give notice to Petitioners of a specific proposed section 20831 fine, and give them an opportunity to present additional evidence and argue against it or for a lower fine. In all other respects, the Petition is denied.

Petitioners' counsel is ordered to prepare a proposed writ and judgment, serve it on the Commission's counsel for approval as to form, wait ten days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for June 19, 2018 at 1:30 p.m.

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and the governing statute need not expressly mandate constitutional conformity.

Dated Dec. 8, 2016

CEASE AND DESIST ORDER CCC-16-CD-03
AND ADMINISTRATIVE CIVIL PENALTY
CCC-16-AP-01
(Lent)

1.0 CEASE AND DESIST ORDER CCC-16-CD-03

Pursuant to its authority under California Public Resource Code ("PRC") Section 30810, the California Coastal Commission ("the Commission") hereby orders and authorizes Dr. Warren M. and Henny Lent, in their individual capacities and as Trustees of any Trust in which title to the property at 20802 Pacific Coast Highway in Malibu is vested, and all their successors in interest, assigns, future owners of the Property, employees, agents, contractors, and anyone acting in concert with any of the foregoing (hereinafter referred to as "Respondents") to take all actions required by this Cease and Desist Order including by complying with the following:

1.1 Cease and desist from engaging in any further development, as that term is defined in the Coastal Act (PRC Section 30106), on the property identified in Section 4.2 below (the "Property"), unless authorized pursuant to the Coastal Act (PRC Sections 30000 to 30900), which includes pursuant to this Cease and Desist Order, or confirmed by Commission staff to be exempt.

1.2 Remove, pursuant to and consistent with the terms of an approved Removal Plan as set

forth in Section 6.0, below and to the terms and conditions set forth herein, all of the physical items of development that were placed or have come to rest as a result of Unpermitted Development, as that phrase is defined in Section 4.4 below.

1.3 Refrain from any attempt to limit or interfere (a) with the public's use of the public access easements on the Property that were offered by the prior owners as required by the special conditions of Coastal Development Permit A-421-78, as amended, and accepted by the State Coastal Conservancy in acceptance documents recorded with the Office of the County Recorder for Los Angeles County as Instruments No.s 82-1303557 and 82-1303558; or (b) with the use of those easements by any holder(s) thereof to develop access improvements or to maintain the easements as available for public use; including refraining from any attempt or activity to physically or indirectly discourage or prevent use of the public easements on the Property.

1.4 Comply with all terms and conditions of CDP A-421-78, approved by the Commission on January 17, 1979, as amended by the Commission on February 20, 1980 and on June 16, 1981.

2.0 ADMINISTRATIVE CIVIL PENALTY CCC-16-AP-0l

Pursuant to its authority under PRC Section 30821, the Commission hereby imposes on Respondents an administrative civil penalty of $4,185,000. Within sixty (60) days of the effective date of this Cease and Desist Order and Administrative Penalty, Respondents shall submit a plan for the review and approval of the Commission's Chief of Enforcement or the Deputy Chief of Enforcement for the payment of this penalty that shall result in the full payment of this penalty within one year of the effective date of this Cease and Desist Order and Administrative Penalty. Extensions for payments under this plan may be requested under Section 14.0 below. The funds for this penalty shall be made out to the California Coastal Conservancy for deposit into its Violation Remediation Account (see PRC Section 30821(j) and 30823). The Commission also authorizes the Executive Director to record a lien on the Property if the penalty is unpaid within this specified timeframe.

3.0 PERSONS SUBJECT TO THIS CEASE AND DESIST ORDER AND ADMINISTRATIVE PENALTY

The persons subject to this Cease and Desist Order and Administrative Penalty are Dr. Warren M. and Henny S. Lent, in their individual capacities and as Trustees of any Trust in which title to the Property is vested, all of their successors, assigns, employees, agents, and

contractors, and anyone acting in concert with the foregoing.

4.0 DEFINITIONS

4.1 This Cease and Desist Order and Administrative Penalty

Cease and Desist Order No. CCC-16-CD-03 and Administrative Penalty No. CCC-16-AP-01 are referred to collectively herein as this Cease and Desist Order and Administrative Penalty. This Cease and Desist Order refers specifically to the requirement of Cease and Desist Order No. CCC-16-CD-03.

4.2 The Property

The property that is the subject of this Cease and Desist Order and Administrative Penalty is as follows: 20802 Pacific Coast Highway in Malibu, Los Angeles County, which is identified by the Los Angeles County Assessor's Office as APN 4450-007-027. This Cease and Desist Order and Administrative Penalty refer to that property as the "Property."

4.3 Vertical Public Access Easement

Vertical Public Access Easement refers to the easement or the easement interest on the Property that was offered by the prior owners as required by the special conditions of Coastal Development Permit A-421-78, as amended, and accepted by the State Coastal

Conservancy in an acceptance document recorded with the Office of the County Recorder for Los Angeles County as Instrument No. 82-1303557, and which provided an easement "in perpetuity for the purposes of ... public access from Pacific Coast Highway to the mean high tide line, including the privilege and right to pass and repass over a five (5) ft. wide strip of land located on the subject property ... along the eastern edge of the parcel, extending from the edge of the public right-of-way of Pacific Coast Highway to the mean high tide line of the Pacific Ocean. . . ."

4.4 Unpermitted Development

Unpermitted Development refers to development as that term is defined by the Coastal Act (PRC Section 30106) that occurred on the Property without the authorization required under the Coastal Act and/or that did not comply with the terms and conditions of Coastal Development Permit No. A-421-78, including its amendments, as well as any materials or structures existing on the Property as a result of such development, specifically including a staircase, stair landings or decks, a fence, a gate, supporting structures, and any other structures placed in the area covered by the Vertical Public Access Easement.

4.5 Vertical Easement Holder

Vertical Easement Holder refers to the State Coastal Conservancy or any successor in interest as the holder of the Vertical Public Access Easement.

5.0 SUBMITTAL OF DOCUMENTS

All documents and funds submitted to the Commission pursuant to this Cease and Desist Order and Administrative Penalty shall be sent to:

California Coastal Commission
Attn: Peter Allen
45 Fremont St, Suite 2000
San Francisco, CA 94105

With a copy sent to:
California Coastal Commission
Attn: Molly Troup
89 S. California Street, Suite 200
Ventura, CA 93001

6.0 REMOVAL PLAN

6.1 Within 30 days of issuance of this Cease and Desist Order, Respondents shall submit a Removal Plan for the review and approval of the Commission's Chief of Enforcement or the Deputy Chief of Enforcement. The Removal Plan shall describe, in detail, all measures to be used for the removal and off-site disposal of all physical items that were placed or have come to rest on the Property as a result of Unpermitted Development, including but not necessarily limited to all

items of Unpermitted Development specifically identified in Section 4.4 above, and shall be consistent with the conditions set forth m this Section 6.0, below.

6.2 The Removal Plan shall be prepared by a licensed, certified civil engineer or other qualified professional licensed by the State of California ("Specialist") approved by the Commission's Chief of Enforcement or the Deputy Chief of Enforcement and shall include the following components:

A. A timetable for removal activities that will provide for removal of all items of Unpermitted Development, including, but not necessarily limited to, the fence, gate, stairs, decks, and other supporting structures in the Vertical Public Access Easement, within 30 days from approval of the Removal Plan;

B. A site plan, prepared by a licensed surveyor, depicting the boundary lines of the Property, the area of the Vertical Public Access Easement, and the area of the lateral public access easement on the Property, all physical items of Unpermitted Development to be removed and the location where photographs will be taken pursuant to Section 6.4, below;

C. A detailed description of the proposed removal activities, which shall indicate the use of removal techniques that will minimize impacts to the natural habitat

of the beach and public use of that beach and Pacific Coast Highway;

D. An identification of the disposal or recycling site to which removed development materials will be transported, which must be a licensed disposal facility. If the proposed destination for the removed materials is located in the Coastal Zone and is not an existing, legal sanitary landfill or recycling center, a CDP is required for such disposal. All hazardous materials must be transported to and properly disposed of at a licensed hazardous waste disposal facility;

E. The Removal Plan shall describe all equipment to be used. All tools utilized shall be hand tools unless the Specialist demonstrates to the satisfaction of the Chief of Enforcement or the Deputy Chief of Enforcement that mechanized equipment is needed and will not impact resources protected under the Coastal Act. If mechanized equipment is proposed, the Removal Plan shall provide, for the review and approval of the Chief of Enforcement or the Deputy Chief of Enforcement, a description of:

    1) Type of mechanized equipment that will be used for removal activities;

    2) Length of time equipment will be used;

3) Routes that will be utilized to bring equipment to and from the Property, including to and from the sandy beach area if such activity is approved in the Removal Plan;

4) Storage locations for equipment when not in use during removal process. Mechanized equipment cannot be stored on the sandy beach;

5) Hours of operation of mechanized equipment;

6) Contingency plan that addresses clean-up and disposal of released materials and water quality concerns in case of a spill of fuel or other release of hazardous materials from use of mechanized equipment;

7) Designated areas for staging of any construction equipment and materials, including receptacles and temporary stockpiles of materials. All stock piles and construction materials shall be covered, enclosed on all sides, located as far away as possible from drain inlets and the beach and ocean, and shall not be stored in contact with the soil. No demolition or construction materials. debris, or waste shall be placed or stored where it may enter receiving waters or a storm drain, or be subject to wind or runoff erosion and dispersion.

8) Designated and confined areas for maintaining and washing machinery and equipment, specifically designed to control runoff. Thinners or solvents shall not be discharged anywhere on the Property or adjacent areas, including into sanitary or storm sewer systems. The discharge of hazardous materials into any receiving waters is prohibited.

6.3 Within 10 days of completion of removal activities pursuant to this Section, Respondents shall submit evidence of the completion to the Commission's Chief of Enforcement or the Deputy Chief of Enforcement for his or her review and approval, including photographic documentation from the locations depicted on the site plan required by Section 6.2.B, evidencing the removal of all physical items and structures required to be removed pursuant to this Cease and Desist Order and Administrative Penalty. After review of the evidence, if the Commission's Chief of Enforcement or the Deputy Chief of Enforcement determines that the removal activities have in part, or in whole, been unsuccessful, based on the requirements of the approved Removal Plan and this Cease and Desist Order, Respondents shall submit a Revised Removal Plan for the review and approval of the Commission's Chief of Enforcement or the Deputy Chief of Enforcement. The Revised Removal Plan

shall specify any measures necessary to ensure that the removal activities comply with the approved Removal Plan, this Cease and Desist Order and Administrative Penalty, and the Coastal Act. Respondents shall implement any specified measures, within the timeframe specified by the Commission's Chief of Enforcement or the Deputy Chief of Enforcement.

7.0 REVISION OF DELIVERABLES

The Commission's Chief of Enforcement or the Deputy Chief of Enforcement may require revisions to deliverables under this Cease and Desist Order and Administrative Penalty, whenever necessary to satisfy the criteria established in this Cease and Desist Order and Administrative Penalty, and Respondents shall revise any such deliverable consistent with the requested specifications and resubmit it for review and approval by the Commission's Chief of Enforcement or the Deputy Chief of Enforcement, by the deadline established by the modification request.

8.0 COMMISSION JURISDICTION

The Commission has jurisdiction over resolution of these Coastal Act violations pursuant to PRC Section 30810 and jurisdiction to issue administrative civil penalties under PRC Section 30821.

9.0 EFFECTIVE DATE AND TERMS OF THIS CEASE AND DESIST ORDER AND ADMINISTRATIVE PENALTY

The effective date of this Cease and Desist Order and Administrative Penalty is the date the Commission votes to issue this Cease and Desist Order and Administrative Penalty. This Cease and Desist Order and Administrative Penalty shall remain in effect permanently unless and until either is modified by the Commission.

10.0 FINDINGS

This Cease and Desist Order and Administrative Penalty are issued on the basis of the findings adopted by the Commission, as set forth in the document entitled "STAFF REPORT: RECOMMENDATIONS AND FINDINGS FOR CEASE AND DESIST ORDER AND ADMINISTRATIVE CIVIL PENALTY." The Commission has authorized the activities required in this Cease and Desist Order and Administrative Penalty and has determined them to be consistent with the resource protection policies set forth in Chapter 3 of the Coastal Act, if carried out in compliance with the terms of this Cease and Desist Order and Administrative Penalty.

11.0 COMPLIANCE OBLIGATION

Strict compliance with this Cease and Desist Order and Administrative Penalty by all parties subject hereto is required.

11.1 Failure to comply with the requirement to pay the Administrative Penalty required by this Cease and Desist Order and Administrative Penalty may result in the Commission recording a lien on the Property in the amount of the Administrative Penalty, which shall have the force, effect, and priority of a judgment lien.

11.2 Failure to comply with any term or condition of this Cease and Desist Order and Administrative Penalty, including any deadline contained herein, will constitute a violation of this Cease and Desist Order and Administrative Penalty and may result in the imposition of civil penalties under PRC Section 30821.6 of up to SIX THOUSAND DOLLARS ($6,000) per day for each day in which each violation persists. In addition, failure to comply with any terms or conditions of this Cease and Desist Order and Administrative Penalty may result in the Commission seeking judicial relief and additional penalties as authorized under Chapter 9 of the Coastal Act, including PRC Sections 30820, 30821, and 30822.

12.0 SITE ACCESS

Respondents shall provide Commission staff and staff of any agency having jurisdiction over the work being performed under this Cease and Desist Order with access to the areas of the Property described below. Nothing in this Cease and Desist Order is intended to limit in any way the right of entry or inspection that any agency

may otherwise have by operation of any law. The Commission and other relevant agency staff may enter and move freely about the following areas: (1) the portions of the Property on which the violations are located, (2) any areas where work is to be performed pursuant to this Cease and Desist Order or pursuant to any plans adopted pursuant to this Cease and Desist Order, (3) adjacent areas of the Property and any other area in order to view the areas where work is being performed pursuant to the requirements of this Cease and Desist Order, (4) any other area where evidence of compliance with this Cease and Desist Order may lie for purposes including, but not limited to, inspecting records, logs and contracts relating to the Property; and overseeing, inspecting, documenting, and reviewing the progress of Respondents in carrying out the terms of this Cease and Desist Order.

13.0 GOVERNMENT LIABILITY

Neither the State of California, nor the Commission, nor its employees shall be liable for injuries or damages to persons or property resulting from acts or omissions by Respondents in carrying out activities required and authorized under this Cease and Desist Order and Administrative Penalty; nor shall the State of California, the Commission, or its employees be held as a party to any contract entered into by Respondents or their agents in carrying out activities pursuant to this Cease and Desist Order and Administrative Penalty.

14.0 DEADLINES

The Commission's Chief of Enforcement or the Deputy Chief of Enforcement may extend any deadlines specified herein, Any extension request must be made in writing and received by Commission staff ten (10) days prior to expiration of the subject deadline. Any such request shall be sent to the address listed in Section 5.0, above.

15.0 SEVERABILITY

Should any provision of this Cease and Desist Order and Administrative Penalty be found invalid, void, or unenforceable, such illegality or unenforceability shall not invalidate the whole, but this Cease and Desist Order and Administrative Penalty shall be construed as if the provision(s) containing the illegal or unenforceable part were not a part hereof.

16.0 SUCCESSORS AND ASSIGNS

This Cease and Desist Order shall run with the land, binding Respondents and all successors in interest, heirs and assigns of Respondents, and future owners of the Property. Respondents shall provide notice to all successors, heirs, assigns, and potential purchasers of the Property of any remaining obligations under this Cease and Desist Order.

17.0 MODIFICATIONS AND AMENDMENTS TO THIS CEASE AND DESIST ORDER AND ADMINISTRATIVE PENALTY

Except as provided in Section 14.0 of this Cease and Desist Order and Administrative Penalty, or for ministerial corrections, this Cease and Desist Order and Administrative Penalty may be amended or modified only in accordance with the standards and procedures set forth in Section 13188(b) of Title 14 of the California Code of Regulations.

18.0 APPEAL

Pursuant to PRC Section 30803(b), any person or entity against whom this Cease and Desist Order under Section 1.0 is issued may file a petition with the Superior Court for a stay of this Cease and Desist Order.

19.0 GOVERNMENT JURISDICTION

This Cease and Desist Order and Administrative Penalty shall be interpreted, construed, governed, and enforced under and pursuant to the laws of the State of California.

20.0 NO LIMITATION ON AUTHORITY

Except as expressly provided herein, nothing herein shall limit or restrict the exercise of the Commission's enforcement authority pursuant to Chapter 9 of the Coastal Act (PRC Sections 30800 to 30824), including the authority to require and

enforce compliance with this Cease and Desist Order and Administrative Penalty.

Executed in Ventura, CA on behalf of the California Coastal Commission.

By: /s/ John Ainsworth 12/8/2016
John Ainsworth
California Coastal Commission
Acting Executive Director

Filed 4/16/21

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

WARREN M. LENT et al., Plaintiffs, Appellants, and Cross-respondents, v. CALIFORNIA COASTAL COMMISSION, Defendant, Respondent, and Cross-appellant, CALIFORNIA STATE COASTAL CONSERVANCY et al., Real Parties in Interest.	B292091 (Los Angeles County Super. Ct. No. BS167531) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN APPELLATE JUDGMENT]

THE COURT:

The opinion filed on April 5, 2021 and certified for publication, is modified as follows:

1. On page 43, in the second sentence of the last paragraph, add the phrase "in their as-applied

challenge" after the word "contend," so that the sentence reads:

> They do not contend in their as-applied challenge, for example, that they needed to cross-examine or otherwise question a particular witness the Commission relied on or that they needed to subpoena a particular witness who was unwilling to testify.

2. In footnote 8 on pages 30 to 31, replace the second sentence in the footnote, which begins with the word "Because," with:

> But the trial court did not remand based on either purported finding, instead determining the Lents did "not challenge the Commission's calculation of the fine" in their petition. Therefore, we do not address the parties' arguments on these issues.

Appellant's petition for rehearing is denied.

This order does not change the appellate judgment.

PERLUSS, P. J. SEGAL, J. FEUER, J.

Filed July 21, 2021

Court of Appeal, Second Appellate District,
Division Seven – No. B292091

S268762

IN THE SUPREME COURT OF CALIFORNIA

En Banc

WARREN M. LENT et al., Plaintiffs, Cross-respondents and Appellants,

v.

CALIFORNIA COASTAL COMMISSION,
Defendant, Cross-appellant and Respondent;

CALIFORNIA STATE COASTAL CONSERVANCY et al., Real Parties in Interest.

The petition for review is denied.

CANTI L-SAKAUYE
Chief Justice

U.S. Const. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV, § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Cal. Pub. Res. Code § 30810.

Cease and desist orders issued after public hearing; terms and conditions; notice of hearing; finality and effectiveness of order

(a) If the commission, after public hearing, determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing a permit or (2) is inconsistent with any permit previously issued by the commission, the commission may issue an order directing that person or governmental agency to cease and desist. The order may also be issued to enforce any requirements of a certified local coastal program or port master plan, or any requirements of this division which are subject to the jurisdiction of the certified program or plan, under any of the following circumstances:

(1) The local government or port governing body requests the commission to assist with, or assume primary responsibility for, issuing a cease and desist order.

(2) The commission requests and the local government or port governing body declines to act, or does not take action in a timely manner, regarding an alleged violation which could cause significant damage to coastal resources.

(3) The local government or port governing body is a party to the violation.

(b) The cease and desist order may be subject to such terms and conditions as the commission may determine are necessary to ensure compliance with this division, including immediate removal of any development or material or the setting of a schedule within which steps shall be taken to obtain a permit pursuant to this division.

(c) Notice of the public hearing on a proposed cease and desist order shall be given to all affected persons and agencies and the order shall be final and effective upon the issuance of the order. Copies shall be served immediately by certified mail upon the person or governmental agency subject to the order and upon other affected persons and agencies who appeared at the hearing or requested a copy. The notice shall include a description of the civil remedy to a cease and desist order, authorized by Section 30803.

Cal. Pub. Res. Code § 30811.

Restoration order; violations

In addition to any other authority to order restoration, the commission, a local government that is implementing a certified local coastal program, or a port governing body that is implementing a certified port master plan may, after a public hearing, order restoration of a site if it finds that the development has occurred without a coastal development permit from the commission, local government, or port governing body, the development is inconsistent with this division, and the development is causing continuing resource damage.

Cal. Pub. Res. Code § 30812.

Notification of intention to record property violation; contents; public hearings; review

(a) Whenever the executive director of the commission has determined, based on substantial evidence, that real property has been developed in violation of this division, the executive director may cause a notification of intention to record a notice of violation to be mailed by regular and certified mail to the owner of the real property at issue, describing the real property, identifying the nature of the violation, naming the owners thereof, and stating that if the owner objects to the filing of a notice of violation, an opportunity will be given to the owner to present evidence on the issue of whether a violation has occurred.

(b) The notification specified in subdivision (a) shall indicate that the owner is required to respond in writing, within 20 days of the postmarked mailing of the notification, to object to recording the notice of violation. The notification shall also state that if, within 20 days of mailing of the notification, the owner of the real property at issue fails to inform the executive director of the owner's objection to recording the notice of violation, the executive director shall record the notice of violation in the office of each county recorder where all or part of the property is located.

(c) If the owner submits a timely objection to the proposed filing of the notice of violation, a public hearing shall be held at the next regularly scheduled commission meeting for which adequate public notice

can be provided, at which the owner may present evidence to the commission why the notice of violation should not be recorded. The hearing may be postponed for cause for not more than 90 days after the date of the receipt of the objection to recordation of the notice of violation.

(d) If, after the commission has completed its hearing and the owner has been given the opportunity to present evidence, the commission finds that, based on substantial evidence, a violation has occurred, the executive director shall record the notice of violation in the office of each county recorder where all or part of the real property is located. If the commission finds that no violation has occurred, the executive director shall mail a clearance letter to the owner of the real property.

(e)(1) The notice of violation shall be contained in a separate document prominently entitled "Notice of Violation of the Coastal Act." The notice of violation shall contain all of the following information:

(A) The names of the owners of record.

(B) A legal description of the real property affected by the notice.

(C) A statement specifically identifying the nature of the alleged violation.

(D) A commission file number relating to the notice.

(2) The notice of violation, when properly recorded and indexed, shall be considered notice of the

violation to all successors in interest in that property. This notice is for informational purposes only and is not a defect, lien, or encumbrance on the property.

(f) Within 30 days after the final resolution of a violation that is the subject of a recorded notice of violation, the executive director shall mail a clearance letter to the owner of the real property and shall record a notice of recision in the office of each county recorder in which the notice of violation was filed, indicating that the notice of violation is no longer valid. The notice of recision shall have the same effect of a withdrawal or expungement under Section 405.61 of the Code of Civil Procedure.

(g) The executive director may not invoke the procedures of this section until all existing administrative methods for resolving the violation have been utilized and the property owner has been made aware of the potential for the recordation of a notice of violation. For purposes of this subdivision, existing methods for resolving the violation do not include the commencement of an administrative or judicial proceeding.

(h) This section only applies in circumstances where the commission is the legally responsible coastal development permitting authority or where a local government or port governing body requests the commission to assist in the resolution of an unresolved violation if the local government is the legally responsible coastal development permitting authority.

(i) The commission, 24 months from the date of recordation, shall review each notice of violation that

has been recorded to determine why the violation has not been resolved and whether the notice of violation should be expunged.

(j) The commission, at any time and for cause, on its own initiative or at the request of the property owner, may cause a notice of recision to be recorded invalidating the notice of violation recorded pursuant to this section. The notice of recision shall have the same effect of a withdrawal or expungement under Section 405.61 of the Code of Civil Procedure.

Cal. Pub. Res. Code § 30820.

Civil liability; violations; amount; factors

(a) Any person who violates any provision of this division may be civilly liable in accordance with this subdivision as follows:

(1) Civil liability may be imposed by the superior court in accordance with this article on any person who performs or undertakes development that is in violation of this division or that is inconsistent with any coastal development permit previously issued by the commission, a local government that is implementing a certified local coastal program, or a port governing body that is implementing a certified port master plan, in an amount that shall not exceed thirty thousand dollars ($30,000) and shall not be less than five hundred dollars ($500).

(2) Civil liability may be imposed for any violation of this division other than that specified in paragraph (1) in an amount that shall not exceed thirty thousand dollars ($30,000).

(b) Any person who performs or undertakes development that is in violation of this division or that is inconsistent with any coastal development permit previously issued by the commission, a local government that is implementing a certified local coastal program, or a port governing body that is implementing a certified port master plan, when the person intentionally and knowingly performs or undertakes the development in violation of this division or inconsistent with any previously issued coastal development permit, may, in addition to any

other penalties, be civilly liable in accordance with this subdivision. Civil liability may be imposed by the superior court in accordance with this article for a violation as specified in this subdivision in an amount which shall not be less than one thousand dollars ($1,000), nor more than fifteen thousand dollars ($15,000), per day for each day in which the violation persists.

(c) In determining the amount of civil liability, the following factors shall be considered:

(1) The nature, circumstance, extent, and gravity of the violation.

(2) Whether the violation is susceptible to restoration or other remedial measures.

(3) The sensitivity of the resource affected by the violation.

(4) The cost to the state of bringing the action.

(5) With respect to the violator, any voluntary restoration or remedial measures undertaken, any prior history of violations, the degree of culpability, economic profits, if any, resulting from, or expected to result as a consequence of, the violation, and such other matters as justice may require.

Cal. Pub. Res. Code § 30821.

Additional civil penalties; determination of amount; time to correct violation

(a) In addition to any other penalties imposed pursuant to this division, a person, including a landowner, who is in violation of the public access provisions of this division is subject to an administrative civil penalty that may be imposed by the commission in an amount not to exceed 75 percent of the amount of the maximum penalty authorized pursuant to subdivision (b) of Section 30820 for each violation. The administrative civil penalty may be assessed for each day the violation persists, but for no more than five years.

(b) All penalties imposed pursuant to subdivision (a) shall be imposed by majority vote of the commissioners present in a duly noticed public hearing in compliance with the requirements of Section 30810, 30811, or 30812.

(c) In determining the amount of civil liability, the commission shall take into account the factors set forth in subdivision (c) of Section 30820.

(d) A person shall not be subject to both monetary civil liability imposed under this section and monetary civil liability imposed by the superior court for the same act or failure to act. If a person who is assessed a penalty under this section fails to pay the administrative penalty, otherwise fails to comply with a restoration or cease and desist order issued by the commission in connection with the penalty action, or challenges any of these actions by the commission in

a court of law, the commission may maintain an action or otherwise engage in judicial proceedings to enforce those requirements and the court may grant any relief as provided under this chapter.

(e) If a person fails to pay a penalty imposed by the commission pursuant to this section, the commission may record a lien on the property in the amount of the penalty assessed by the commission. This lien shall have the force, effect, and priority of a judgment lien.

(f) In enacting this section, it is the intent of the Legislature to ensure that unintentional, minor violations of this division that only cause de minimis harm will not lead to the imposition of administrative penalties if the violator has acted expeditiously to correct the violation.

(g) "Person," for the purpose of this section, does not include a local government, a special district, or an agency thereof, when acting in a legislative or adjudicative capacity.

(h) Administrative penalties pursuant to subdivision (a) shall not be assessed if the property owner corrects the violation consistent with this division within 30 days of receiving written notification from the commission regarding the violation, and if the alleged violator can correct the violation without undertaking additional development that requires a permit under this division. This 30-day timeframe for corrective action does not apply to previous violations of permit conditions incurred by a property owner.

(i) The commission shall prepare and submit, pursuant to Section 9795 of the Government Code, a report to the Legislature by January 15, 2019, that includes all of the following:

(1) The number of new violations reported annually to the commission from January 1, 2015, to December 31, 2018, inclusive.

(2) The number of violations resolved from January 1, 2015, to December 31, 2018, inclusive.

(3) The number of administrative penalties issued pursuant to this section, the dollar amount of the penalties, and a description of the violations from January 1, 2015, to December 31, 2018, inclusive.

(j) Revenues derived pursuant to this section shall be deposited into the Violation Remediation Account of the Coastal Conservancy Fund and expended pursuant to Section 30823.

Cal. Code Regs. tit. 14, § 13181.

Commencement of Cease and Desist Order Proceeding Before the Commission.

(a) If the executive director believes that the results of an enforcement investigation so warrant, he or she may commence a cease and desist order proceeding before the commission. The executive director shall formally commence such a proceeding by providing any person whom he or she believes to have acted or failed to act in such a manner as to trigger the application of section 30810(a) of the Public Resources Code, or who is threatening to so act, with notice of his or her intent to do so, unless the person waives the right to such notice. Such notice of intent may be given either as a provision of a cease and desist order issued pursuant to section 30809 of the Public Resources Code or by separate written communication delivered either (1) by certified mail, (2) by regular mail or electronic mail, receipt of which is confirmed by subsequent oral or written communication, or (3) by hand, and shall include, at minimum, the information specified in sections 13187(a)(4), (5), and (6) together with an explanation of the basis of the executive director's belief that the specified activity, threat, or failure to act meets the criteria of section 30810(a). The notice of intent shall be accompanied by a "statement of defense form" that conforms to the format attached to these regulations as Appendix A with an indication of when the completed form is due back to the Commission. The person(s) to whom such notice is given shall complete and return the statement of defense form to the Commission by the date specified therein, which date

shall be no earlier than 20 days from transmittal of the notice of intent.

(b) The executive director may at his or her discretion extend the time limit for submittal of the statement of defense form imposed by any notice of intent issued pursuant to subsection (a) of this section, upon receipt, within the time limit, of a written request for such extension and a written demonstration of good cause. The extension shall be valid only to those specific items or matters that the executive director identifies to the party that requested the extension as being exempt from the deadline for the Statement of Defense form, and shall be valid only for such additional time as the executive director allows.

Once the applicable deadline for the submittal of (i) the Statement of Defense form or (ii) any specific items or matters for which the executive director has provided an extended deadline has passed, no additional defenses, factual claims, or supporting evidence may be submitted unless the responding party demonstrates to the satisfaction of the Executive Director that the late response could not have been submitted earlier, in which case the late response may nevertheless trigger a delay in the proceedings pursuant to section 13185(d) or otherwise.

Cal. Code Regs. tit. 14, § 13183.

Contents of an Executive Director's Recommendation on Proposed Cease and Desist Order.

(a) The executive director shall prepare a recommendation on a proposed commission cease and desist order.

(b) The executive director's recommendation shall be in writing and shall include, at minimum:

(1) a copy of any statement of defense form completed and returned to the Commission by the alleged violator(s) pursuant to section 13181;

(2) a brief summary of (A) any background to the alleged violation, (B) the allegations made by staff in its violation investigation, (C) a list of all allegations either admitted or not contested by the alleged violator(s), (D) all defenses and mitigating factors raised by the alleged violator(s), and (E) any rebuttal evidence raised by the staff to matters raised in the alleged violator's assertion of any defense or mitigating factor with references to supporting documents;

(3) a summary and analysis of all unresolved issues;

(4) a statement of (A) whether the executive director has issued a cease and desist order relating to the same activity, and if so (B) its expiration date; and (C) the extent of the alleged violator(s)' compliance therewith;

(5) the proposed text of any cease and desist order that the executive director recommends that the commission issue.

Cal. Code Regs. tit. 14, § 13185.

Procedure for Hearing on Proposed Cease and Desist Order.

A hearing on a proposed cease and desist order shall proceed in the following manner:

(a) the Chair shall announce the matter, ask all alleged violators or their representatives present to identify themselves for the record, indicate what matters are already part of the record, and announce the rules of the proceeding including (1) any imposition pursuant to subsection (b) of time limits for presentations to be made by the staff, the alleged violator(s), and the public at the hearing and (2) the right of any speaker to propose to the Commission before the close of the hearing any question(s) for any Commissioner, in his or her discretion, to ask of any other speaker;

(b) the Chair may impose time limits based on the circumstances of the alleged violation(s), the number of other items contained on the meeting agenda, the number of persons who intend to speak, and such other factors as the Chair believes relevant;

(c) the staff shall summarize its violation investigation and proposed findings with particular attention to issues which remain in controversy;

(d) each alleged violator may present its position(s) on the matter(s) relevant to the alleged violation or proposed order with particular attention to those issue(s) where an actual controversy exists between the staff and the party(ies). Presentation of

evidence that could not have been set forth in a statement of defense form pursuant to section 13181 at the time of submittal may be grounds for a determination by the commission, in its discretion, (1) to trail the matter to later in the same day; (2) to postpone the matter to a later day of the same meeting; or (3) to continue the matter to a subsequent meeting;

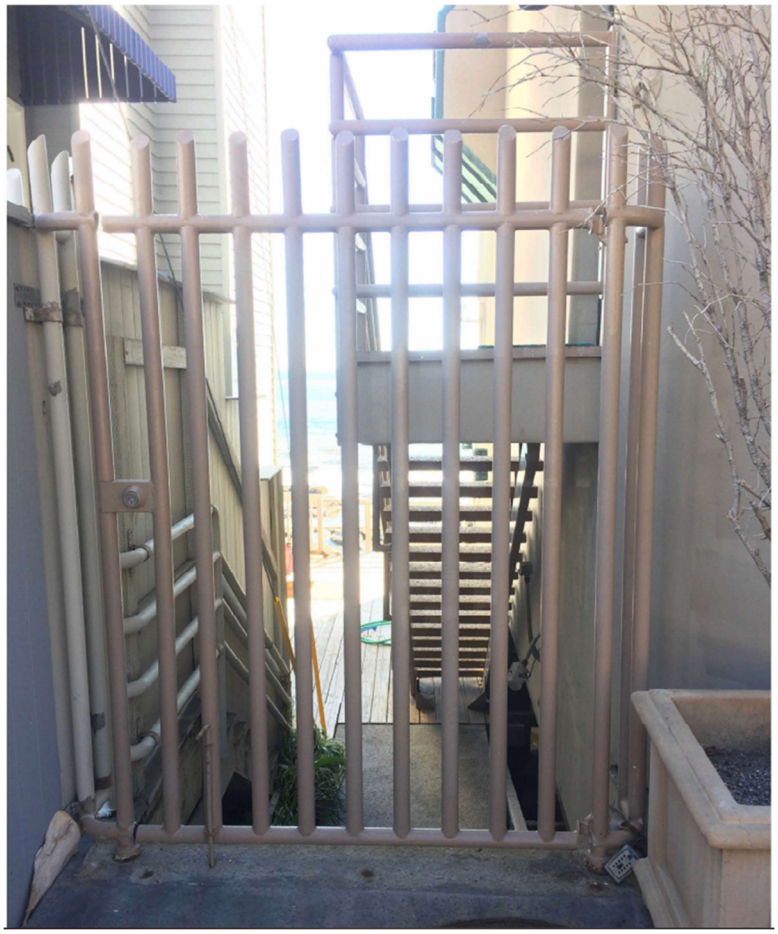
(e) other speakers may speak concerning the matter;

(f) the chair shall close the public hearing after the staff, all alleged violators, and the public have completed their presentations, except that the chair may allow staff to respond to particular points raised by other speakers;

(g) commissioners may ask questions, including any question(s) proposed by any speaker under authority granted pursuant to subsection (a), of any speaker at any time during the hearing or deliberations;

(h) the commission shall deliberate and determine, by majority vote of those present and voting, whether to issue a cease and desist order either in the form recommended by the executive director or as amended by the commission.

Appendix P-1



View of the easement area looking seaward.

001655

View of the easement area looking landward.