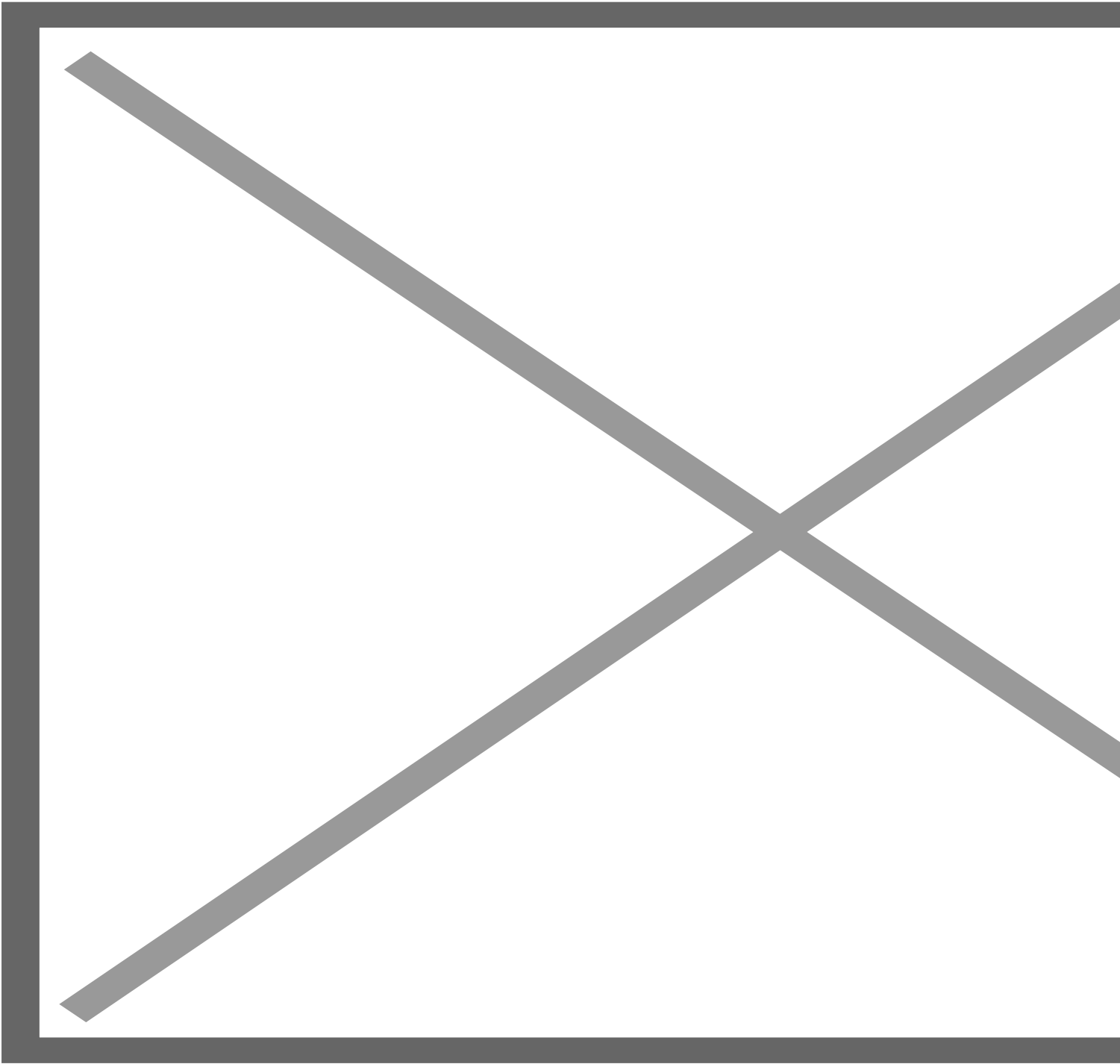


## **Property Owner Who Proceeds With Development Under a Permit Cannot Challenge Land-Use Conditions Attached to the Permit**

The California Supreme Court has ruled that a landowner who accepts the benefits of a permit by constructing the project forfeits the right to challenge land-use conditions imposed on the project. *Lynch v. California Coastal Commission* (Calif. Supreme Court, No. S221980, July 6, 2017). **Factual Background** After storms damaged a seawall and stairway structure beneath their bluff-top homes, plaintiffs sought a permit from the California Coastal Commission to demolish and reconstruct the seawall. The Commission granted the permit subject to conditions that included a prohibition against reconstruction of the stairway and a 20-year limit on the authorization for the seawall, after which plaintiffs would need to apply for a new permit to extend the authorization period.



Plaintiffs filed a petition for writ of administrative mandamus challenging the 20-year expiration condition and the condition prohibiting reconstruction of the stairway. They argued that the 20-year expiration date was unconstitutional because it did not mitigate impacts of the project, and that the Commission could not prohibit reconstruction of the stairway because that activity did not require a permit. While the litigation was pending, plaintiffs satisfied other permit conditions, secured the coastal development permit, and built the seawall. The Court of Appeal held that plaintiffs' challenge could not proceed because they had waived their claims by constructing the project. **California Supreme Court Decision** Under the *Pfeiffer/McDougal* line of cases, a landowner may not challenge a permit condition if he or she has acquiesced to it either by specific agreement or by failing to challenge the condition while accepting the benefits of the permit. Instead, the landowner must file a timely challenge to the conditions and await the outcome before proceeding with the project. An exception to this rule exists under the Mitigation Fee Act, which allows a property owner to challenge fees, dedications,

reservations or exactions imposed on a permit by paying or otherwise complying with the exaction under protest and filing suit within 180 days after issuance of the permit. However, the Act covers only requirements that divest the property owner of money or a possessory interest in property; it does not include land-use restrictions, such as setbacks or height limits. In *Lynch*, plaintiffs maintained that the *Pfeiffer/McDougal* rule was inapplicable because, unlike the landowners in those cases, plaintiffs *had* filed a timely mandamus challenge to the permit conditions. Moreover, they had not acquiesced to the conditions by fulfilling them and thus could not fairly be said to have waived their objections to them. The California Supreme Court disagreed. While plaintiffs may not have waived their objections – in that they never intentionally relinquished the right to challenge them – that conclusion did not save their case. The crucial point, according to the court, was that plaintiffs proceeded with the construction before obtaining a judicial ruling on the validity their objections. By accepting the benefits of the permit, the court said, plaintiffs effectively forfeited the right to maintain their otherwise timely objections, citing the equitable maxim "He who takes the benefit must bear the burden." (Civil Code § 3521). Plaintiffs also argued that because the objectionable permit conditions did not affect the design or construction of the seawall, they should have been allowed to challenge them while the project was being built. The court declined to create what it characterized as an "exception that would potentially swallow the general rule that landowners must take the burdens along with the benefits of a permit." Permit applicants, it observed, frequently accept permit conditions they dislike in order to secure the permit. Creating an exception based on whether the conditions did or did not affect the construction itself, the court said, "would change the dynamics of permit negotiations and foster litigation." It would also be difficult in practice, the court reasoned, to determine whether a particular condition attached to a permit was truly severable from the construction. Further, requiring a timely challenge and adjudication before construction commenced would allow the agency to revise the conditions to address the identified issue. If the condition were invalidated after construction, alternative mitigation measures might be rendered impracticable. **Conclusion** Under *Lynch*, barring an express agreement with the agency providing otherwise, landowners who object to permit conditions not covered by the Mitigation Fee Act must litigate their objections in a mandamus proceeding before constructing the project. Proceeding with the project before conclusion of the mandamus case results in forfeiture of the challenge.

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