2d Civil No. B142315

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

TRANCAS PROPERTY OWNERS ASSN.,

Plaintiff and Appellant,

vs.

THE COASTAL COMMISSION OF THE STATE OF CALIFORNIA,

Defendant and Respondent.

Appeal from the Superior Court of Los Angeles County
Honorable Robert M. Latteau, Judge
(Los Angeles County Superior Court Case No. SC054684)

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Plaintiff, a homeowner's association, sues to stop defendant Trancas-PCH, LLC from pursuing a subdivision development in the City of Malibu absent a valid, unexpired coastal development permit. Since Trancas-PCH's permit had a March 1996 expiration date, it is invalid unless it was "exercised" before that date. Was it exercised? The answer to that question depends on which of two sources of authority the court must follow. Here are the contenders:

- In one corner—the decision in *Trancas Property Owners Assn. v. City of Malibu* (*Trancas I*) (1998) 61 Cal.App.4th 1058. There, Division One of this Court fashioned a simple test that provides a certain and decisive answer: A permit is timely exercised if the city engineer approves a developer's final tract map before the permit's expiration date. There is no dispute here that *Trancas I* and the present case involve similar issues, similar parties and what defendant California Coastal Commission calls "similarly situated project[s]." (AA 34, 71.) If *Trancas I* governs this case, Trancas-PCH's permit expired before it was exercised, and plaintiff is entitled to summary judgment.

- In the other corner—a private advice letter to Trancas-PCH from the Commission's chief counsel, Ralph Faust. (AA 1004.) In his letter, Faust promised Trancas-PCH's attorney that he would recommend (presumably to the Commission for its vote and adoption) that the developer's otherwise expired permit be treated as valid. Faust indicated that he believed that Trancas-PCH had exercised its permit before the permit's expiration date simply by submitting an incomplete final map to the City of Malibu, provided the City at some future date approved the developer's final map.

The call is not even close. Developers in the coastal zone are kept on a short leash; before the deadline date of their permits, they must either apply for a permit extension or actually exercise the permit. And extensions cannot be granted without an inquiry as to the status of the project and an opportunity for interested parties and Commission members to object. *Trancas I* furthers this regulatory scheme by choosing a fixed, non-contingent event—the city engineer's approval of a developer's final map—as the standard for determining whether a permit has been exercised before it expired. And by subsequently amending its applicable regulation without adopting a different rule, the Commission has endorsed *Trancas I*.

In contrast, Faust's contingent, open-ended test—map submittal within the deadline, city approval at any time thereafter—completely undermines this scheme. Why should any developer apply to extend its permit and thereby subject its project to regulatory scrutiny and public comment, or persevere to complete its map conditions before the permit expires, when its failure to do either can be retroactively cured by approval of his final map?

The trial court chose Faust's advice letter over *Trancas I*, according it nothing short of blind deference—even though the Commission denied that the letter represented Commission action or that it bound either the Commission or the court. On that basis, the court denied plaintiff's motion for summary judgment.

The court was wrong.

Our Supreme Court has recently ruled out exactly this kind of automatic deference, even when the subject is an agency's official interpretations of its own regulations or enabling statute. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1.) We have far less than that here. Faust's advice letter is not an agency interpretation. Faust himself admitted that his job was only to "advise the Commission when it has to interpret its regulations." (AA 940.) The Commission never adopted Faust's advice; at most, its attorneys have advocated his views in this litigation. But courts may not defer to private opinion letters or an agency's mere litigating position.

Trancas I therefore governs this case. That means there is only one question to answer: Did Malibu's city engineer approve Trancas-PCH's final map before its permit expired? There is no dispute about the answer: He didn't, and he still hasn't. Nor could he have done so, because Trancas-PCH had not satisfied the conditions of its tentative tract maps by the permit's deadline date, and it still had not done so at the time of the judgment. That too is undisputed. Thus, the trial court erred in denying plaintiff's summary judgment motion.

The trial court compounded its error by granting summary judgment to Trancas-PCH. It held that Trancas-PCH *has already* timely exercised its coastal permit merely by submitting an incomplete final map to the City before the permit's expiration date. (RT 18; AA 1122.) But not even Faust advocated that interpretation of Commission regulations. Under his test, it is not sufficient for a developer merely to submit its final map before its permit expires; the permit is deemed to have been timely exercised only if and when the city approves it. Only

then does the original submittal of the map constitute an exercise of the permit before its deadline date.

But if that is the test here, once again Trancas-PCH didn't satisfy it, because the City of Malibu has yet to approve its final map. Indeed, Trancas-PCH did not even seek summary judgment on that ground. The trial court's decision to dismiss plaintiff's complaint therefore lacks any basis in law or fact, and it must be reversed.

STATEMENT OF FACTS

A. Trancas-PCH's Coastal Permit And Its March 1996 Expiration Date.

1. Trancas-PCH's development plan and initial permit.

Trancas-PCH's predecessor, Trancas Town, Ltd., owned approximately 35 undeveloped acres in what is today the City of Malibu that it proposed to subdivide into 15 single family lots and four lots that would hold a total of 52 town houses. (AA 25, 97, 534.)[1] At the time, the land was in an unincorporated part of Los Angeles County. In May 1985, the County of Los Angeles approved tentative tract maps for the subdivision and development of the 35-acre Trancas property. (AA 535, 646.) On March 28, 1991, the City of Malibu was incorporated, and Trancas-PCH's proposed development fell within the City's jurisdiction.

Before Trancas-PCH could subdivide or develop the property, it was also required to obtain a coastal development permit, since the Trancas property is also within the jurisdiction of the California Coastal Commission. (AA 89, 97.) Trancas-PCH obtained a permit in May 1989, but it expired before it was exercised, and the Commission denied Trancas-PCH's application to extend it. (AA 97-98, 116, 815-817.)

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[1] "Trancas-PCH" refers to both Trancas-PCH, LLC and to its predecessor Trancas Town, Ltd., the original developer. (See Appellant's Appendix ("AA") 813-814.)

2. The Commission issues Trancas-PCH a second permit.

On March 12, 1992, the Commission granted Trancas-PCH a second coastal development permit, No. 5-91-754R. (AA 240.) By its terms, the permit was to expire on March 12, 1994 "[i]f development has not commenced." (AA 241.) However, by operation of Government Code section 66452.11, the expiration date was automatically extended to March 12, 1996.

The issuance of the new permit was not without controversy. The Commission was particularly concerned with the geologic stability of the proposed development and the ability of the terrace sand to absorb septic system disposal from the systems serving the development. The Commission noted that "[t]he proposed development is located in the Santa Monica Mountains, an area which is subject to an unusually high amount of natural hazards, including flooding, erosion, and slope instability." (AA 140.) It cited the fears of project opponents "that effluent from the septic systems might be forced upward into the terrace deposit . . . resulting to [*sic*] damage to houses located on terrace materials." (AA 144.) And the Commission staff geologist warned

> "that elevated marine terraces have a limited ability to absorb septic effluent. At some point, should continued development occur at this location in Malibu, the terrace sand will become saturated and will no longer accept effluent as per Los Angeles County standards." (AA 147.)

Nonetheless, the Commission issued the development permit, while worrying that these "question[s] of cumulative impacts of septic system disposal and the ability of the marine terrace deposits to handle it" were "not satisfactorily answered." (AA 147.) Indeed, because the "risk of harm" from "the unforseen possibility of flooding, erosion, and slope instability" "cannot be completely eliminated," the Commission required Trancas-PCH "to waive any claim of liability on the part of the Commission for damage to life or property which may occur as a result of the permitted development." (AA 143.)

3. Trancas-PCH allows the permit's expiration date to pass without seeking an extension.

Permits are not open-ended, but must be exercised within a set time, usually two years, or they expire. (Cal. Code Regs., tit. 14, § 13156, subd. (g) ("section 13156(g)").) A developer may apply for a permit extension, but "any request for an extension of time of commencement *must* be applied for prior to expiration of the permit" and the request *must* be accompanied by "evidence of an approved, unexpired permit." (§§ 13156(g), 13169, subd. (a)(1), emphasis added.)[2] Trancas-PCH's coastal development permit also provided that any "[a]pplication for extension of the permit *must* be made prior to the expiration date." (AA 241, emphasis added.)

Trancas-PCH did not apply to extend its coastal permit prior to March 12, 1996. In fact, it never sought an extension at any time. Its counsel Alan Block confirmed this in a letter to the Commission:

> "Trancas Town did not file an application for an extension of the above-referenced permit prior to March 12, 1996 in light of its strenuous belief that its coastal development permit had been activated prior to that time." (AA 905.)

Trancas-PCH made the decision not to apply for a permit extension on its own. It did not rely on the Commission, the City or plaintiff. In a letter to Commission legal staff, for example, Block admitted that "the issue regarding the possible 'expiration' of the permit was first brought up [by Commission staff] in or about September 1996." (AA 905, 911.) But that was six months *after* the permit's expiration date.

Commission staff always counseled Trancas-PCH to act prudently by applying for extensions before any applicable expiration dates. For example, in early 1994, Block inquired of Commission legal staff whether Trancas-PCH's coastal permit would be automatically extended for two years under Government Code section 66452.11. (AA 884.) Because there was some uncertainty, Block was told that Trancas-PCH "may wish to apply for the normal extension of the

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[2] Unless otherwise stated, all regulatory citations are to Title 14 of the Administrative Code.

Coastal Permits as provided in our regulations prior to the March expiration date of the permits." (AA 884.)[3] Even Faust, in his June 5, 1997 advice letter, chided Block for not applying for a permit extension on behalf of his client:

> "In the future, in order to avoid uncertainty over whether a coastal permit for a subdivision has been exercised, we strongly recommend that your client file a timely extension request." (AA 1005.)

Because Trancas-PCH chose not to file a timely extension request, its coastal development permit expired on March 12, 1996, unless it was exercised on or before that date. Whether that happened is the core issue in this case.

4. The factual basis for determining whether Trancas-PCH exercised the permit before it expired.

a. What the permit provides.

Trancas-PCH's coastal development permit stated that "[i]f development has not commenced, the permit will expire two years from [its] date." (AA 241.) Under the automatic extension of Government Code section 66452.11, the expiration date was extended to March 12, 1996.

b. The applicable Commission regulations.

Former section 13156(g) provided that a permit must include "[t]he time for commencement of the project" or, if the Commission "ha[d] not imposed any specific time for commencement of construction," then the time for "commencement" was two years from the permit approval date. Former section 13169, subdivision (a) provided that a permittee could, "[p]rior to the time that commencement of construction . . . must occur under the terms of the permit or Section 13156," "apply to the executive director of the commission for an

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[3] The uncertainty arose not from any question as to whether the developer's permit had been exercised—no one claimed it had—but because there was doubt about whether its tentative tract maps were valid on the effective date of Government Code section 66452.11. Under that section, a valid map was a necessary condition for obtaining the statutory two year permit extension.

extension of time not to exceed an additional one year period. The application shall be accompanied by evidence of a valid, unexpired permit . . . ."[4]

c. *Trancas I* gives a binding construction to the Commission's regulations.

Former section 13156(g) did not define "commencement." Called upon to construe the term in *Trancas I*, the court held that section 13156(g) had "no plain meaning" and "we have no crystal ball to shed light on any legislative intent." (61 Cal.App.4th at 1061.) The court therefore deferred to the Commission's "interpretation of a regulation within its purview." (*Id.* at 1061-1062.) According to the Commission, under section 13156(g), where a permit does not state "a specific time for commencement of 'construction,'" a permit is exercised upon the "commencement of the project," which is a broader term than "construction." (*Id.* at 1061.) And, "[a]ccording to the Commission, the City engineer's approval of [the developer's] final subdivision map is the date on which the project commenced." (*Ibid.*) If that approval occurred before the permit expired, which it so happened was the case in *Trancas I*, then the permit was "'effectuated' before it expired." (*Ibid.*)[5]

The Commission's interpretation of its regulation was not newly minted for *Trancas I*, but, as this Court noted, had been its view "in other cases" as well. (*Ibid.*)

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[4] In 1999, these sections were amended to remove the word "construction" so as to codify the court's decision in *Trancas I*. (See discussion, p. 23, *post.*) Copies of both the former (AA 325) and current (AA 196) regulations are in the record.

[5] In *Trancas I*, the developer's "final subdivision map was accepted by the City of Malibu's engineer in July 1996 and filed with the City's clerk on August 12 (seven months before the permit's expiration date)." (61 Cal.App.4th at 1060.) The City Council, however, only approved the map after the permit expired. (*Ibid.*) The developer argued, and the court agreed, that the City Council "should have promptly rubber-stamped [the city engineer's] approval"; therefore, "the project was commenced about seven months before the permit expired." (*Id.* at 1061-1062.)

d. Malibu's city engineer did not approve Trancas-PCH's final map before its permit expired.

It is undisputed that the Malibu city engineer did not approve Trancas-PCH's final subdivision map before its permit expired. (AA 231, 531, 772.) Indeed, almost four years later, the City Engineer still was unable to approve the developer's final tract map because as of January 5, 2000, he had still "not received any evidence that all of the conditions of the Tract Maps have been satisfied." (AA 231-232.)

e. The city engineer could not have approved Trancas-PCH's final map because Trancas-PCH had not satisfied the conditions of its tentative tract maps before its permit expired.

(1) How the system works.

A final tract map may be filed with a city after it "conform[s] to the approved or conditionally approved tentative map" and "after all required certificates or statements on the map have been signed and, where necessary, acknowledged." (Gov. Code, § 66457, subd. (a).) However, it is the practice of the City of Malibu to accept and begin processing final tract map applications before that time. (AA 231.) In those cases, the City customarily maintains a check list of the conditions and keeps the final map application on file until all the tract-map conditions have been satisfied. (AA 231.) Only when all the conditions of the tentative maps have been satisfied is an application considered complete. (AA 231.) When this is confirmed by the city engineer's office, then the city engineer reports to the City Council for its approval of the final tract map. (AA 231-232.)

The city engineer is barred by statute from certifying an incomplete final map. (Gov. Code, § 66442.)

(2) Trancas-PCH submits an incomplete final tract map application.

Trancas-PCH submitted an application for final tract map approval to the City of Malibu on January 25, 1993. (AA 648.) But when the application was submitted, Trancas-PCH had not completed all the conditions of its tentative tract maps. (AA 231-232, 648, 650-653, 748-772; RT 15, 20-21, 26.) As its own attorney admitted:

> "At the time that the maps were filed, the developer, Trancas Town, was *continuing to satisfy* the conditions of its tentative tract map approvals, as well as conditions imposed by its newly acquired CDP No. 5-91-754." (AA 391, emphasis added.)

For example, Trancas-PCH's engineer admits that Trancas-PCH had not obtained "final approval of its grading and drainage plan" at the time it submitted its final tract map (AA 648)—one of the most environmentally critical aspects of the proposed development.

As noted, the City accepted Trancas-PCH's incomplete final tract map application for processing subject to the requirement that it satisfy all tentative tract map conditions. (AA 231-232.)

(3) The final tract map is still incomplete as of the expiration date of Trancas-PCH's permit.

The expiration date of Trancas-PCH's permit was March 12, 1996. As of that date, much remained to be done. For example, Trancas-PCH had still not submitted "the Hydrology and Hydraulics Drainage Reports to the City of Malibu as requested for approval of Tract Map Nos. 32415 and 29273"—that would not be done until June 27, 1996. (AA 650-651.) Once it received the report, the City acted. On August 2, 1996, the City Engineering Department finished its first plan check of Trancas-PCH's grading and street plans and its first review of its hydrology report, sent Trancas-PCH marked-up versions of the same and asked it to "return the redline markups with the next submittal." (AA 757.) In early 1997, the City Engineer required further information, which was furnished to it by Trancas-PCH "in mid-to-late 1997." (AA 652.)

Over a year later, in June 1997—reviewing the situation based solely on Trancas-PCH's own version of the facts—Faust concluded that it is "not entirely clear whether [the developer] has satisfied the conditions of the tentative map." (AA 1005.) In fact, it had not. One of the conditions of the tentative map, for example, was: "Approval of the method of sewage disposal is contingent upon the approval of the California Regional Water Quality Control Board, Los Angeles Region." (AA 926.) But by September 1998, the project still had not yet been cleared by the RWQCB for waste water disposal. (AA 926.) Trancas-PCH applied to the RWQCB in late November 1998, though its application apparently did not "contain[] all of the data required" for agency review. (AA 930.) At that time, Trancas-PCH admitted that once its application was finalized, the RWQCB procedure could take "from 3 to 4 months to complete" (AA 930). On January 15, 1999, Trancas-PCH warned that "[t]here may be a bit of a delay" before it finished "revising the application to meet RWQCB requirements." (AA 770.)

In February 1999, the city engineer informed Trancas-PCH that there were numerous "outstanding items needed prior to approval of [a] final map"—specifically, (1) "RWQCB approval of method of waste discharge"; (2) "Geology 'concept' approval"; (3) "Environmental Health 'concept approval'"; (4) "Improvement bonds"; (4) "Park and in-lieu fee"; (5) "Fire Department approval"; (6) "Covenant and Agreement (Condition 25-Enviro. Mitigation)"; (7) "A variance from Planning prior to issuance of a Grading Permit for site grading in excess of 1,000 cubic yards per lot"; and (8) "percolation testing." (AA 772.)

On April 5, 2000, the developer's counsel admitted that Trancas-PCH "still ha[d] conditions to satisfy" because it had not paid its bonds or obtained clearance from "the water quality control board." (RT 15.)

B. The Commission's Chief Counsel, Ralph Faust, Devises An Ad Hoc Interpretation Of Commission Regulations To Relieve Trancas-PCH From The Consequences Of Its Failure To Extend Its Permit.

1. The Commission questions whether Trancas-PCH's permit has expired.

In September 1996, the Commission inquired whether Trancas-PCH's permit had expired on March 12, 1996. (AA 905.) The developer "set forth the legitimate contentions of Trancas Town as to why its permit had been activated" prior to its deadline date, but the Commission was still investigating the matter in May 1997 and requested further information. (AA 905.)

2. Faust writes a private advice letter promising to recommend that Trancas-PCH's permit be treated as valid.

On June 5, 1997, the Commission's chief counsel, Ralph Faust, wrote to the developer's attorney offering an exemption from the rules. (AA 1004.)

Faust identified three ways to prevent a permit from expiring, each of which required action before the permit's expiration date: The applicant could (1) apply for an extension; (2) begin construction; or (3) satisfy "all the conditions of the tentative map" and secure the approval of the final map, which "could be considered tantamount to the commencement of development for purposes of effectuating the permit." (AA 1004-1005.) The last method is essentially the approach adopted in *Trancas I*.[6]

But Faust pointed out that none of those applied to Trancas-PCH:

> "As we understand the factual history of your client's subdivision proposal, no construction has commenced and there is an ongoing

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[6] Although at that time *Trancas I* was still in the future, Faust's letter shows that the test adopted by the court in that case—a permit is exercised by final map approval within the permit's time deadline—was the Commission's test at the time.

> dispute between the City and your client that has prevented the City from approving the final map. It is therefore not entirely clear whether your client has satisfied the conditions of the tentative map, as you assert. Moreover, the time for commencing construction under the terms of the coastal permit issued for this project has elapsed." (AA 1005.)

Faust also stressed "that the City Engineer has not yet given his approval of the map and has required additional testing, including geologic testing." (AA 1004.) Thus, Faust concluded, "the validity of your client's coastal permit is not free from doubt." (AA 1005.) He based that assessment on "the materials [Trancas-PCH] sent us concerning the factual history of the permittee's efforts to secure from the City of Malibu final approval of the tract maps for both of the above-referenced permits." (AA 1004.)

Nonetheless, Faust promised that "[i]f your client does obtain final map approval from the City," then:

> "we believe this would support the contention that a good faith final map submittal was made to the City before the expiration of the coastal permit. In such a case, we would be prepared to recommend that the permit for the project was properly exercised." (AA 1005.)

Presumably, Faust's promise was to recommend to the Commission that the permit be treated as valid. (See AA 940 ["I and my staff advise the Commission when it has to interpret its regulations"], 943.) There is no evidence in the record, either from Faust or anyone else, that any recommendation was made; in any event, the Commission never adopted such a position. (See pp. 13, 14-15, *post.*)

3. Faust attempts to enforce his advice letter against the City of Malibu.

On February 27, 1998, this Court decided *Trancas I.* Shortly thereafter, Malibu's city engineer informed the Commission that "[t]he City is in the process of finalizing its review of the subject subdivision" and asked whether Trancas-PCH's permit was "presently valid and not expired for the purpose of approving the final map." (AA 918.) Faust responded. He told the city engineer "that we consider this permit to be valid and unexpired if the applicant obtains final map

approval from the City." (AA 1008.) Faust did not mention *Trancas I* directly; rather, he stated that he would "continue to confirm" that the permit was valid because "we believe it would be inequitable to take a different position at this time." (AA 1008.)[7]

Malibu's city attorney wasn't satisfied. On July 31, 1998, she wrote to Faust, reminding him that "a currently valid coastal development permit is a condition of final map approval" and asking how to apply that rule if city approval is a condition a valid coastal permit. (AA 1010.) On August 20, 1998, Faust instructed her that the City "should treat the coastal permit as valid" for the "purpose of determining whether to approve the final map." (AA 1012.)

There is no evidence that the Commission ever considered, voted on or approved Faust's advice letter to the developer or his instructions to the City of Malibu to follow his views and thereby treat Trancas-PCH's permit as valid.

C. Plaintiff Files The Present Action.

On October 22, 1998, plaintiff filed this action against defendants Trancas-PCH, the Commission and the City of Malibu for a declaration that the Trancas-PCH permit had expired and for an injunction to stop the development. (AA 1.)[8]

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[7] Plaintiff's attorney also wrote to the Commission calling its attention to *Trancas I* and urging that, under the decision, "the coastal permit has not been exercised and thus expired long ago." (AA 285-286.) In response, Faust argued that *Trancas I* supported his interpretation. (AA 288.)

[8] As used in the remainder of this brief, the term "defendants" refers only to Trancas-PCH and the Commission, since the City of Malibu neither sought summary judgment nor opposed any other party's summary judgment motion.

D. The Commission Belatedly And Reluctantly Advocates Faust's Views As Its Litigating Position In This Case.

1. In its motion for judgment on the pleadings, the Commission initially distances itself from Faust's advice letters and insists that his opinion is not binding on it or on the court.

The Commission filed a motion for judgment on the pleadings. (AA 31.) In its supporting memorandum, the Commission argued that Faust is not a member of the Commission, that his "opinion" is "not an action of the Commission" and that his advice letters were not Commission actions or decisions. (AA 32, 38-39, 40, 42.) Moreover, the Commission insisted that neither plaintiff nor Trancas-PCH was entitled to rely on Faust's opinion because it was not a "legally binding action of the Commission." (AA 39.)

Most importantly, the Commission refused to endorse Faust's advice letters as an interpretation of its regulations. Instead, it equivocated, stating that Faust's "opinion *may* express the position of the Commission" (AA 34, emphasis added), and that "the Commission *does not believe* that its staff gave any erroneous advice" (AA 40, emphasis added).

At oral argument on the motion for judgment on the pleadings, the Commission again refused to adopt Faust's position that Trancas-PCH's expired permit could be revived if its final tract map were approved. Rather, it argued that

> "it is really up to the court to determine the regulation, and the reading of that regulation, and to interpret it in light of Trancas, which was a case where [the Commission] did stay in that case, and we did argue about the meaning of our regulation, and we feel at this point the regulation has been interpreted, but this case is different because this deals with *the court interpreting Trancas I, and applying it to the facts of this case.*" (RT 4, emphasis added.)

In short, the Commission kept its distance from Faust's opinion letter and instead pointed the court to *Trancas I* as stating the applicable law.

2. In its summary judgment motion, the Commission contradicts itself, arguing that the trial court must defer to Faust's advice letter.

After losing its motion for judgment on the pleadings, the Commission's attorneys partially reversed direction. On the one hand, the Commission continued to insist that Faust's advice letter was merely a staff opinion: "[I]t is crystal clear that the Commission neither discussed nor voted on the issue of whether the Trancas Town permit had been activated." (AA 1086.) Yet, at the same time, the Commission argued, for the first time, that the trial court was required to defer to Faust's advice letter under the rule that "the Commission's interpretation of its own regulations is entitled to great weight unless clearly erroneous." (AA 71, 78-79, 83-84.)

Why the change? The Commission did not attempt to explain it.

But the answer may lie in Trancas-PCH's opposition to the Commission's motion for judgment on the pleadings. There, Trancas-PCH asserted that the Commission should remain in the lawsuit because (1) the developer had relied on Faust's advice to its detriment and the Commission "must therefore be held accountable for its regulations and the interpretations it gives them"; and (2) if plaintiffs prevail, and are entitled to recover attorneys fees, the Commission "should be held liable for a portion, if not all, of plaintiff's attorneys' fees." (AA 53.)

E. The Summary Judgment Motions.

1. Plaintiff's motion for summary judgment.

Plaintiff moved for summary judgment on the ground that this Court's decision in *Trancas I* is "dispositive of the present case" and requires a finding that Trancas-PCH's "permit has expired without having been exercised." (AA 209, 212, 213-214.)

Trancas-PCH opposed the motion on the grounds that (1) plaintiff already litigated the identical causes of action in *Trancas I*, so its complaint is barred by res judicata; (2) plaintiff is barred by the doctrine of collateral estoppel from

relitigating whether "the Coastal Commission is best situated to make the determination of when a CDP is activated"; and (3) the court should defer to the Commission's interpretation of its own regulations. (AA 504, 520.)

The Commission opposed the motion on the ground that the doctrine that "a court must defer to the Commission when interpreting its regulations" required the trial court to defer to Faust's advice letter. (AA 633-636.)

2. Trancas PCH's motion for summary judgment.

Trancas-PCH moved for summary judgment on the ground that plaintiff's complaint was time-barred under Public Resources Code section 30801, which requires that a challenge to "any decision or action of the Commission" must be brought by a petition for writ of mandate pursuant to Code of Civil Procedure section 1094.5 "within 60 days after the decision or action has become final." (AA 376.)

Plaintiff opposed the motion on the ground that Faust's letters were not a "decision or action of the Commission" under section 30801 or a "final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given [and] evidence is required to be taken" under section 1094.5. (AA 774-775.)

3. The Commission's motion for summary judgment.

The Commission moved for summary judgment on the ground that Faust's advice letter was correct and the trial court had to defer to his interpretation of Commission regulations. (AA 69.) The Commission also argued that it was not a proper party to the case. (AA 84-86.) Trancas-PCH joined the Commission's motion. (AA 501.)

Plaintiff opposed the motion on the grounds that (1) the *Trancas I* decision controls the case, not the views expressed by Faust in his advice letter (AA 790) and (2) the trial court had already held that the Commission was a proper party to the action when it denied the Commission's motion for judgment on the pleadings (AA 792).

4. The court denies plaintiff's motion and grants the motions of Trancas-PCH and the Commission.

a. The hearing on the motions.

The trial court denied plaintiff's motion and granted the motions of Trancas-PCH and the Commission on the ground that "this thing has gone on too long, and it does parallel *Trancas I*." (RT 33.) The court's actual discussion of *Trancas I*, however, came and went with two cryptic comments. First, the trial judge noted that his rulings in *Trancas I* "were affirmed, and then basically elaborated on." (RT 12.) Second, he insisted that "I know what I intended in *Trancas I*." (RT 12.) But the court did not explicitly follow *Trancas I*. Instead, at one point, it appeared to hold that Faust's advice letter was controlling, asking, "Who better to interpret the Coastal Commission's rules and regulations then [*sic*] the chief counsel?" (RT 17.)

In the end, the court applied a test that was consistent with neither *Trancas I* nor Faust's advice letter, holding that Trancas-PCH had done everything necessary to exercise its permit simply by submitting its incomplete final tract map to the city engineer. (RT 18.) That is a position that no party had urged and that was contrary *both* to Faust's advice letter *and* to *Trancas I*.

The court abandoned any pretense of impartiality. It accused plaintiff homeowners of "acting like outlaws and renegades" and dismissed them as "people with more money than sense living in Malibu that are just going to have their way regardless of common sense, the law or anything else." (RT 10, 12.) It accused the City of Malibu of "actually working behind the scenes to see that [the tract map] conditions are not and cannot be met [by the developer]." (RT 27.) And it charged that the city engineer "wouldn't dare get up before the City Council and say that this developer has done what they were required to do and did do, and now we have to recommend the approval of this project and move it forward" —"he would be run out of town." (RT 20-21.)

These accusations are not supported by the record. (See discussion at pp. 43-44, post.)

b. Judgment and appeal; statement of appealability.

On June 2, 2000, the trial court entered judgment against plaintiff and in favor of the Commission and Trancas PCH, finding:

1. The Commission is not a proper party to the action;
2. Plaintiff's action is barred by the statute of limitations;
3. Trancas-PCH exercised its coastal permit prior to the permit's expiration on March 12, 1996. (AA 1121-1122.)

Plaintiff filed a timely notice of appeal on June 15, 2000. (AA 1127.) The appeal is from a final judgment that resolves all issues among the parties.

STANDARD OF REVIEW

Courts review orders granting or denying summary judgment motions de novo. (*American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 35.) This Court may direct the trial court to enter judgment in favor of plaintiff, if it finds that plaintiff is entitled to it. (Code Civ. Proc., §§ 43, 906; *Conley v. Matthes* (1997) 56 Cal.App.4th 1453, 1459, fn. 7.)

LEGAL ARGUMENT

I.

TRANCAS I REQUIRES JUDGMENT FOR PLAINTIFF AS A MATTER OF LAW.

Trancas-PCH's permit is invalid unless it exercised the permit before the permit's expiration date. We show below that as a matter of law, Trancas-PCH did not timely exercise its permit and that plaintiff is thus entitled to summary judgment.

A. Trancas-PCH May Not Proceed With Its Subdivision Development Without A Valid, Unexpired Coastal Permit.

No development may occur in the "coastal zone" unless the developer has a valid coastal development permit. (See Pub. Resources Code, §§ 30103, 30106, 30600.) Permits are not open-ended. They are issued for a finite time period, and must either be exercised or renewed before they expire. (See pp. 5-6, *ante*.) Extensions are not automatically granted; they may be denied on the basis of changed circumstances, and may not be granted for more than a year at a time. (§ 13169, subds. (a), (b), (d)(1), (d)(2).)

By its terms, Trancas-PCH's permit expired on March 12, 1994, unless "development" had "commenced." (AA 241.) Before that date arrived, a new law automatically extended unexpired coastal permits for two years. (Gov. Code, § 66452.11.) Accordingly, the expiration date of Trancas-PCH's coastal permit was automatically extended to March 12, 1996.

It is undisputed that Trancas-PCH never applied for an extension of its permit, either before March 12, 1996, or at any time thereafter. Therefore, the permit is invalid unless it was exercised before March 12, 1996.

B. *Trancas I* Established The Conclusive And Exclusive Test For Determining When A Coastal Permit For A Subdivision Project Is Exercised: Exercise Occurs When The City Engineer Approves A Final Map.

1. The law as it stood when *Trancas I* was decided.

Before *Trancas I*, the Commission's regulations were ambiguous on the question of how a permit is exercised. Former section 13156(g) provided that all permits "shall include":

> (g) "*The time for commencement of the project* except that where the commission on original hearing or on appeal has not imposed any specific time for *commencement of construction* pursuant to a permit, *the time for commencement shall be two years from the date of the commission vote upon the application.* Each permit shall

contain a statement that any request for an extension of *the time of commencement* must be applied for prior to the expiration of the permit." (Emphasis added.)

The regulation raised as many questions as it answered. Was a permit exercised upon "commencement of the project" or upon "commencement of construction"? Were those intended to be different events? If so, what constituted "commencement of the project"? The matter was further confused by the fact that actual coastal permits did not, as section 13156 contemplated, "include" the language specified in section 13156(g), but rather referred to the commencement of "development." For example, the permit at issue in *Trancas I* recited that it would expire in two years "[i]f development has not commenced." (61 Cal.App.4th at 1060.) The same language was used in the permit at issue in the present case. (AA 241.) Was the commencement of "development" different from the commencement of "the project"? If so, what acts constituted the "commencement of development"?

These issues were all aired and resolved in *Trancas I.*

2. The facts of *Trancas I.*

In March 1992, the Commission granted a developer, Lunita Pacific, LLC ("Lunita"), a coastal development permit to construct a condominium project in the City of Malibu. "[T]he permit provided that '[i]f development has not commenced, the permit will expire' on a date subsequently extended to March 12, 1997." (61 Cal.App.4th at 1060.)

It appeared Lunita was in good shape. Seven months prior to its permit's expiration date, "Lunita's final subdivision map was accepted by the City of Malibu's engineer." (*Ibid.*) A month later the map was filed with the City of Malibu. However, the City Council refused to approve the map. Lunita sued the City and won. The case was settled, and in September 1997 the City Council finally approved the map, six months after the permit's expiration date. (*Ibid.*)

The plaintiff—the same homeowners' association as here—sued Lunita and the Commission, seeking a declaration that the developer's coastal development permit had expired and an injunction to stop construction.

3. The issue in *Trancas I*: Did Lunita exercise its permit before it expired?

The parties differed as to when a permit is exercised and whether Lunita had in fact exercised its permit. Plaintiff argued that under Commission regulations, "a coastal permit is not 'exercised' or 'activated' until the developer has 'commenced construction.'" (61 Cal.App.4th at 1060, emphasis omitted.) Citing section 13156(g), plaintiff argued that the terms "commencement of the project" and "commencement of construction" had the same meaning, and that "'construction' is the dispositive word." (*Id.* at 1060-1061.) The court observed that plaintiff's conclusion "finds some support" in the Commission regulations, specifically in section 13169, "which authorizes a permittee to apply for an extension prior to the 'commencement of construction under a permit.'" (*Id.* at 1061.)

The Commission argued that "construction" and "project" in section 13156 have different meanings. And, contrary to plaintiff's position, the Commission argued that "project," the broader word, is the dispositive word. (*Ibid.*) Thus, according to the Commission, Lunita was not required to commence "construction" in order to exercise its permit. So long as Lunita commenced the "project" before the expiration date of its coastal permit, the Commission considered the permit properly exercised.

What constituted "commencing" the "project"? The court summed up the Commission's position:

> "Here, as in other cases, it is the Commission's view that 'where the applicant has diligently performed all the acts necessary to carry out the conditions of the permit, it would be unfair to require the applicant to obtain a permit extension [as permitted by the permit and also by section 13169].' According to the Commission, the City engineer's approval of Lunita's final subdivision map is the date on which the project commenced, and the permit was therefore 'effectuated' before it expired." (*Ibid.*)

Taking a somewhat more convoluted route, Lunita arrived at the same place as the Commission: Both fastened on the city engineer's approval of the final tract map as the date on which a coastal permit is exercised.[9]

4. The decision in *Trancas I*: A permit is exercised when the city engineer approves the final map.

The court held that there was "no plain meaning" to section 13156(g) and no ascertainable legislative intent. (61 Cal.App.4th at 1061.) Although requiring that "[a]ll three parties offer facially sound arguments for acceptance of their interpretations and rejection of all others" (*ibid.*), the court chose to adopt the Commission's interpretation of its regulation. The court gave two reasons: The court's interpretation was less complex than the versions offered by the other parties, and "this is an appropriate case for deference to the Coastal Commission's interpretation of a regulation within its purview." (*Id.* at 1061-1062.)

In the present case, defendants argued below that *Trancas I* merely affirmed that courts must defer to the Commission's interpretation of its own regulations. (AA 520, 633.) But *Trancas I*'s holding was more specific than that. It had to be. Courts may not simply rubber-stamp agency interpretations, but must exercise independent judgment. (See *Yamaha Corp. of America v. State Bd. of Equalization*, *supra*, 19 Cal.4th 1, discussed at pp. 28-29, *post.*) Thus, *Trancas I*'s holding depended on the particular facts and circumstances before it.

As one leading treatise describes the decision, the court concluded that section 13156(g) "was ambiguous, and it deferred to [the] Commission's position

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[9] Specifically, Lunita argued that "project" and "construction" meant different things, but "development" and "project" were interchangeable; therefore, by designating a date for "commencement of development" in the permit, the Commission effectively specified a date for "commencement of the project," bringing Lunita's permit within the "general rule" that the permit "shall" include "[t]he time for commencement of the project." Since no date for "construction" was specified, "commencement of the project" was the operative concept; and, Lunita concluded, the project was commenced on the date that Malibu's City Council "should have promptly rubber-stamped [the city engineer's] approval" of Lunita's final tract map. (61 Cal.App.4th at 1061.) If City approval was a "rubberstamp[]," then City engineer approval was, as the Commission urged, the key event.

that [the] condominium project was commenced when [the] city engineer approved [the] final subdivision map." (4 Manaster & Selmi, California Environmental Law and Land Use Practice (2000) § 66.55[2], p. 66-83, fn. 14.)

5. The Commission amends its regulations after *Trancas I* to buttress the court's holding.

The court in *Trancas I* cautioned that if it had misunderstood the Commission's position, "[i]f they who must be obeyed intended a different result, the regulation can be amended." (61 Cal.App.4th at 1062.) The Commission did not amend its regulations to show it intended a different result. Just the opposite: It reinforced the decision by removing the word "construction" from section 13169(a) and the words "construction" and "project" from section 13156(g), in each case replacing those words with the word "development." (AA 196-197.) That change removed the basis for plaintiff's argument in *Trancas I* that a coastal permit was exercised only upon the commencement of "construction."

Otherwise, the Commission left the court's holding in place. It did not amend its regulations to nullify or limit the application of the decision. Thus, after *Trancas I* and the amendment, there was no doubt what the regulations meant: A developer had to apply for an extension before the permit's deadline date, unless by that date the city engineer had approved the developer's final tract map.

It is a fundamental principle of statutory interpretation that "'[w]hen a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction of that statute.'" (*People v. Massie* (1998) 19 Cal.4th 550, 568.) That principle applies here because "the language of administrative regulations" are interpreted "by the same rules used to interpret statutes." (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 995.)

6. Why the rule established in *Trancas I* makes sense.

a. The test adopted by *Trancas I* fortifies the rule that an application to extend a coastal permit must be submitted prior to its expiration date.

The requirement that no development may occur in the coastal zone without a coastal development permit is at the heart of the legislative and regulatory scheme for protecting the coastal environment. (See p. 19, *ante*.) To further that scheme, the Commission keeps a tight rein on permit holders. They typically have four years to exercise their permits, counting the automatic two-year extension of Government Code section 66452.11; they may apply for an extension, but it is not automatic and is "not to exceed an additional one year period." (§ 13169, subd. (a).) And, as shown below (pp. 25-26, *post*), the extension process triggers important public-input protections.

Central to this scheme is the requirement that an application to extend a coastal permit must be made before the permit's expiration date. For example, under section 13169, subdivision (a)(1), the Commission "shall not" accept an application for a permit extension "unless it is accompanied by . . . evidence of an approved, *unexpired* permit." (Emphasis added.) An applicant may apply for a permit extension only "*[p]rior* to the time that commencement of development [formerly, "commencement of construction"] . . . must occur." (§ 13169, subd. (a), emphasis added.) And section 13156(g) mandates that "[e]ach permit shall contain a statement that any request for an extension of the time of commencement *must* be applied for *prior* to the expiration of the permit." (Emphasis added.)

The more indulgent the test for determining whether a permit has been exercised, the less effective the rules for requiring applicants to apply for extensions. In *Trancas I*, the plaintiff argued that a permit is exercised only if the developer commences construction before its expiration. The Commission urged and the court adopted a different test, but one that allows compliance to be definitively judged as of the permit's expiration date. At that point, the city engineer either has or has not approved the final tract map. That is immediately knowable. Nothing depends on future, post-expiration-date events.

b. The test adopted by *Trancas I* ingeniously taps the central role of the city engineer in the approval process.

Trancas I's holding meshes with the leading role assigned the city engineer in the statutory scheme governing the approval of tract maps. The city engineer "is required" to certify that he has examined the final tract map; that it comports with the tentative tract map; that it complies with all relevant statutory provisions and applicable local ordinances; and, in certain circumstances, that the map is technically correct. (Gov. Code, § 66442.) After receipt of a favorable report by the city engineer, the City Council usually must approve the final tract map at or before its next regularly scheduled meeting. (Gov. Code, § 66458; see *Trancas I*, *supra*, 61 Cal.App.4th at 1061-1062.)

The city engineer is thus the final decision-maker on whom the whole statutory permit scheme depends. His approval of the final tract map is dispositive certification that the developer has satisfied every condition of its permit. After that, the city's approval will ordinarily be pro forma—a matter, as the developer argued in *Trancas I*, of "promptly rubber-stamp[ing] that approval." (61 Cal.App.4th at 1061.) Approval by the city engineer therefore constitutes a sound basis on which to find that a permit was exercised.

c. The test adopted by *Trancas I* preserves the right of the Commission, its executive director and the public to object to a permit extension on the ground of changed circumstances.

The Commission's executive director has front-line responsibility for dealing with extension applications. This is consistent with the Coastal Act, which itself sets the executive director apart from other staff, including "house staff counsel." (Pub. Resources Code, § 30335.) Thus, a developer must apply to the executive director for a permit extension, and he may grant the application only if he finds that there are no "changed circumstances that may affect consistency of the development." (§ 13169, subds. (a), (b).)

But not even the executive director has the final word. His decision is subject to public comment and Commission review. To that end, he must give

notice to all parties he "has reason to know may be interested in the application," post the notice at the project site, and "report the determination to the commission to provide the commission with an opportunity to object." (§ 13169, subd. (b).) The Commission's chief counsel has no defined role in this procedure.

Trancas-PCH circumvented this regulatory procedure and its mandatory "changed circumstances" inquiry by deliberately choosing not to seek an extension of its permit. Chief counsel Faust's advice letter gave cover for that end-run around section 13169.

As we've shown, by the expiration date of its permit, Trancas-PCH had not completed the conditions of its tentative tract maps or obtained any kind of city approval for its final map; rather, it had merely submitted an incomplete final map to Malibu's city engineer. Given its situation, Trancas-PCH should have applied for a permit extension; even Faust said so. (AA 1005.) Nonetheless, Faust agreed to recommend that the permit for the project had been "properly exercised" merely by the developer submitting an incomplete map before the permit deadline, provided the City approved the map sometime in the future. (AA 1005.)

Faust's advice letter effectively granted Trancas-PCH a permit extension without regard to the requirements of section 13169. Under section 13169, there would have been an annual opportunity for executive director review and public comment. There has been neither here. Nor will there be review or comment in the future. Rather, the effective extension Faust concocted—now at well over four years and still counting—has no limits. Faust's test for determining when a permit is exercised thus removes any incentive for a developer to seek a permit extension and renders section 13169's elaborate procedures superfluous.

In contrast, the test adopted in *Trancas I* preserves section 13169's regulatory scheme. Under the court's test, the permit's deadline date continues to mean something and developers cannot avoid the regulation's "changed circumstances" inquiry by negotiating separate deals with agency staff in which the exercise of a permit depends on open-ended, post-expiration events.

C. *Trancas I* Governs This Case And Compels The Entry Of Summary Judgment For Plaintiff.

All these facts are undisputed:

- The expiration date of Trancas-PCH's coastal development permit (as extended by Government Code section 66452.11) was March 12, 1996. (AA 240-241, 530, 905, 991.)
- As of that date, Trancas-PCH had not applied for an extension of its permit. (AA 530, 905.)
- As of that date, Trancas-PCH had not completed all of the conditions of its permit or of its tentative tract maps. (See pp. 9-10, *ante*.)
- As of that date, Malibu's city engineer had not approved Trancas-PCH's final tract map. (AA 231, 391, 772.)

Under the test advocated by the Commission and adopted by the court in *Trancas I*, these undisputed facts compel the conclusion that Trancas-PCH failed to exercise its permit prior to its expiration date and the permit therefore expired on March 12, 1996.

Plaintiff is entitled to sue to seek a declaratory judgment to that effect and to stop Trancas-PCH from proceeding with a project for which it does not have a valid coastal permit. The legislative scheme for enforcing the rules governing coastal zone development expressly provides for enforcement efforts by private citizens like plaintiff. (Pub. Resources Code, §§ 30111, 30803, 30805, 30820.) And the courts reject efforts to discredit such parties because they have a "so-called 'nimby' ('not in my backyard') personal interest" in the matter. (*Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (2000) 79 Cal.App.4th 505, 516.) "The fact is that 'nimby' plaintiffs are often at the forefront of private environmental enforcement in the public interest." (*Id.* at 517.)

Under these circumstances, there was only one proper outcome of the proceedings in the trial court: judgment for plaintiff.

We now demonstrate that none of the grounds that defendants urged in the trial court permits a different result.

D. The Trial Court Erred In Denying Plaintiff Summary Judgment.

1. Neither Faust's private advice letter nor the Commission's litigating position is entitled to judicial deference.

Defendants argued below that the trial court was compelled to defer to Faust's advice letter and to the Commission's belated advocacy in this litigation of his informal interpretation of section 13156(g). (AA 520, 629.) The trial court gave binding weight to Faust's application of section 13156(g) to Trancas-PCH: "Who better," the court asked, "to interpret the coastal commission's rules and regulations then [*sic*] the chief counsel?" (RT 17.) The trial judge declined to discuss the holding in *Trancas I*, dismissing plaintiff's reliance on it with the cryptic remark that, having been the trial judge in that case, "I know what I intended in *Trancas I*." (RT 12.) But "a trial court does not have the luxury of refusing to follow decisions it disagrees with." (*Lewis v. Superior Court* (1994) 30 Cal.App.4th 1850, 1867.)

a. A court may not automatically defer to an agency's interpretation of a regulation, but must determine the weight to give the interpretation through an independent review of its merits.

Courts are not bound to follow an "agency's *interpretation* of a statute or regulation." (*Yamaha Corp. of America v. State Bd. of Equalization, supra,* 19 Cal.4th at 7, emphasis in original ("*Yamaha*").) On the contrary, "[c]onsidered alone and apart from the context and circumstances that produce them, agency interpretations are not binding or necessarily even authoritative." (*Id.* at 8.) Rather, "'[t]he standard for judicial review of agency interpretation of law is the *independent judgment* of the court, giving *deference* to the determination of the agency *appropriate* to the circumstances of the agency action.'" (*Ibid.*, quoting Judicial Review of Agency Action (Feb. 1997) 27 Cal. Law Revision Com. Rep. (1997) p. 81, emphasis in the original.)

In *Yamaha*, the Supreme Court held that the court of appeal had given "greater weight" to a published staff opinion by the Board of Equalization's

counsel "than it warranted." (19 Cal.4th at 6, 15.) The Board had been publishing such staff opinions for more than 40 years, but the Supreme Court held that they had no binding force on the courts; indeed, they were entitled to no more than "some consideration." (*Id.* at 15.)

The court stressed the critical distinction between quasi-legislative rules and interpretive rules. In the former case—where an agency adopts a regulation pursuant to a delegation of legislative power—the judicial function in determining the regulation's validity is highly limited. The court does not exercise independent judgment. It asks only whether the regulation is within the scope of the authority conferred by the Legislature and reasonably necessary to effectuate the statute's purpose, and both issues come to court "'freighted with [a] strong presumption of regularity.'" (*Id.* at 10-11.)

No such decisive presumption attaches to an agency's interpretation of its own regulations. Agency interpretations are entitled to consideration only because the agency "may possess special familiarity with satellite legal and regulatory issues. It is this 'expertise,' expressed as an interpretation (whether in a regulation or less formally, as in the case of the Board's tax annotations), that is the source of the presumptive value of the agency's views." (*Id.* at 11.) But the Supreme Court emphasized that these "agency interpretations" have a "diminished power to bind" and "command[] a commensurably lesser degree of judicial deference." (*Ibid.*)

Given the holding in *Trancas I*, defendants could prevail below only if the trial court disregarded that decision and instead blindly deferred to Faust's advice letters. Unfortunately, that is precisely what the trial court did. It had no right to do so.

b. Deference is not appropriate in this case.

In assessing "the weight due an agency's interpretation," a court must consider whether "'the agency has a comparative interpretive advantage over the court,'" and whether "'the interpretation in question is probably correct.'" (*Yamaha*, *supra*, 19 Cal.4th at 12.) The weight to be assigned to an interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those

factors which give it power to persuade, if lacking power to control." (*Id.* at 14-15, emphasis and internal quotation marks omitted.)

Here, there is no agency interpretation at all, just a staff advice letter. The Commission never took any formal action to adopt Faust's interpretation as its own. (AA 1085-1086.) Rather, it did just the opposite. It insisted that Faust's advice letter was *not* Commission action. (See AA 34, 38-40, 1085-1086.) At most, and only belatedly, the Commission asserted Faust's views as its litigating position in this case.

The Commission has authority to "adopt or amend, by vote of a majority of the appointed membership thereof, rules and regulations to carry out" the Coastal Act. (Pub. Resources Code, § 30333.) It also has authority to adopt "[i]nterpretive guidelines designed to assist local governments, the commission, and persons subject to" the Coastal Act in determining how Commission policies will be applied prior to the certification of local coastal programs. (Pub. Resources Code, § 30620, subd. (a)(3).) The Commission did neither.

Even if Faust's views could be seen as an agency interpretation, they would warrant no consideration because they undermine the statutory scheme for ensuring agency supervision over coastal zone development. (See *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493, 513 [refusing to follow Commission interpretative guideline, though formally reviewed and adopted, because inconsistent with statutory scheme].)

Under these circumstances, Faust's ad hoc views were entitled to no consideration or weight in the trial court and are entitled to none here. There are many reasons.

No deference is due to a staff advice letter. Courts do not defer to private advice letters even when written by the agency itself, let alone when written by a staff member. Thus, "'an interpretation of a statute contained in a regulation adopted after public notice and comment is more deserving of deference than [one] contained in an advice letter prepared by a single staff member.'" (*Yamaha, supra*, 19 Cal.4th at 13.) "A staff letter is not the equivalent of an administrative agency's contemporaneous interpretation and application of the law." (*Zapara v. County of Orange* (1994) 26 Cal.App.4th 464, 470, fn. 4.)

For one thing, an informal interpretation of an agency regulation expressed in a private letter is less "likely to be correct." (*Yamaha, supra*, 19 Cal.4th at 13-

14.) For another, a private letter is "the product of a nonadversarial, ex parte process," rather than "an adversary proceeding in which the administrative agency was either a party" or "had acted as an adjudicator in the proceedings under review." (*Hudgins v. Neiman Marcus Group, Inc.* (1995) 34 Cal.App.4th 1109, 1125.) Moreover, opinion letters often take sides in a dispute, and they do so without the due process protections afforded by public hearings or an adversary procedure. In *Hudgins*, for example, the court refused to defer to a private opinion letter by the Labor Commissioner, noting that it had been written "at the request of an organization that exclusively represents the interests of employers in the retail industry." (*Id.* at 1125.)

Here, Faust wrote an opinion letter in response to letters from Trancas-PCH's counsel asking for confirmation that the developer's permit had been exercised. (AA 1004.) Faust did not remotely have all the facts to decide that issue. On the contrary, he admitted that his letter was based entirely on the materials sent him by the developer's attorney. (AA 1004.) And after reviewing even that one-sided presentation, Faust was forced to conclude that it is "not entirely clear whether your client has satisfied the conditions of the tentative map" and that "the validity of your client's coastal permit is not free from doubt." (AA 1005.) Yet, Faust created a special standard for the developer: Submit your final map to the city before your permit expires, and if at some later point you satisfy all conditions and the city approves, we'll "recommend that the permit for the project was properly exercised." (AA 1005.)

Faust was not purporting to craft a general interpretation of a Commission regulation. He was throwing a lifeline to a developer who could easily have applied to extend its permit but chose not to do so. No case supports giving such high-handed staff action any weight at all, much less deference. (Cf. *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 310-311 [citing *Hudgins* with approval, court refused to give deference to "a private, unpublished letter" by an agency staffer because it was ex parte, partisan and "declined to take a definitive position on the question posed"].)

No deference is due to an agency's litigating position. Courts likewise don't defer to mere litigating positions. An agency's "legal arguments as a party in the lawsuit are not evidence of [its] interpretation" of its rules. (*McPherson v. City of Manhattan Beach* (2000) 78 Cal.App.4th 1252, 1266, fn. 6.) For example, in

Culligan Water Conditioning v. State Bd. of Equalization (1976) 17 Cal.3d 86, the court refused to defer to "the Board auditor's interpretation of two existing regulations." (*Id.* at 92.) The court stressed that the Board had "adopted no formal regulation of a general nature," but "the Board and its staff" merely considered "the particular facts of the transactions involved in the audit of plaintiff taxpayer and interpreting the statutes and regulations deemed applicable," "the Board 'took the position' that certain sections of the law and the regulations applied and made its assessment in conformity with its view of the law." (*Id.* at 92-93.) But "the 'position' taken by the Board . . . was merely its litigating position in this particular matter." (*Id.* at 93.)[10]

More recently, an appellate court, citing the Supreme Court decisions in *Culligan* and *Yamaha*, refused to defer to an agency's "litigating position," holding that "[w]e give the [Insurance] Commissioner's interpretation substantial weight, but limited deference, in our construction of the regulations." (*State Farm Mutual Automobile Ins. Co. v. Quackenbush* (1999) 77 Cal.App.4th 65, 76.) The court was particularly influenced by the fact that "the theory advanced by the Commissioner . . . has not been formally adopted in a process including public participation." (*Id.* at 75.)

The *State Farm* court rejected agency interpretations *even though the head of the agency was directly involved in developing them.* Here, there is no evidence either the executive director or any member of the Commission knew what interpretations Faust was advancing or promises he was making. And when the Commission did find out, it distanced itself from Faust's advice letters. Only when it lost its motion for judgment on the pleadings, and faced the threat of liability for damages and attorneys fees, did it see the need to circle the wagons.

This chronology makes the Commission's position here particularly suspect. (See *Jones v. Tracy School Dist.* (1980) 27 Cal.3d 99, 107 [where agency memorandum was "composed and circulated after [agency] had become an amicus

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[10] Although the Board's position was entitled to "appropriate weight" (*id.* at 93), in reviewing "such litigating positions of the Board," the court was required to exercise its own judgment "to determine whether the Board in making the assessment in controversy has properly interpreted" the governing statute and its own regulations. (*Id.* at 93 & fn. 4.)

curiae in this case," that "chronology, in our view, substantially dilutes the authoritative force of the memorandum"].)

There is already a definitive interpretation of the relevant regulations to which this Court is required to defer—Trancas I. The Commission's interpretation of section 13156(g) had already been considered and adopted by the court in *Trancas I.* The Commission admitted as much in both its motion for judgment on the pleadings and its summary judgment motion:

> "Prior litigation on a similarly situated project resulted in an appellate court decision, *Trancas Property Owners Assn. v. City of Malibu* (1998) 61 Cal.App.4th 1058, where the court upheld the Commission's interpretation of its regulation section 13156(g)." (AA 34, 71.)

The Commission acknowledged that it was now up to the courts—not the Commission—to apply *Trancas I* to these facts. (AA 34-35, 60 & fn. 4, 61.) Indeed, in its motion for judgment on the pleadings, the Commission did not even argue that the trial court had to defer to the Commission's interpretation of its regulations—after all, the court in *Trancas I* had already done that, construing a regulation that applies equally to the present case and the "similarly situated project" at issue in *Trancas I*, and the Commission had no more to say on the matter. That's why it sought to be dismissed from the lawsuit.

Given the Commission's conduct, no court could reasonably defer to Faust's advice letters or even accord them substantial weight. To command deference from a court, an agency interpretation of a regulation must be consistent. As our Supreme Court observed, "'[a] vacillating position . . . is entitled to no deference.'" (*Yamaha, supra*, 19 Cal.4th at 13.) In *Hudgins*, the court, in refusing to defer to the agency's "private ruling," noted that "it mark[ed] a significant change of direction" by the agency. (34 Cal.App.4th at 1125.) The private ruling, the court held, "'can hardly be described as a contemporaneous interpretation long acquiesced in by all persons who could possibly have an interest in the matter.'" (*Ibid.*)

Here, the Commission's interpretation of section 13156(g) was adopted in *Trancas I* with the court noting that the Commission had applied that interpretation in other cases as well. (61 Cal.App.4th at 1061.) Faust's newly-minted interpretation cannot overcome previously existing Commission policy that was

hardened into judicial precedent by *Trancas I.* (See *Brewer v. Patel* (1993) 20 Cal.App.4th 1017, 1022 [court refused to give "any deference" to interpretation that was "inconsistent with [the agency's] own prior interpretation of the rule"].) This is particularly true where the Commission has since amended its regulation without even slightly retreating from the court's interpretation.

Faust's advice letters do not rise to the dignity of even an informal interpretation of section 13156 (g). Faust did not purport to propound a general standard for determining when a coastal permit has been exercised under section 13156(g). Indeed, his letters never mention that or any other administrative provision. Rather, he offered an ad hoc solution to the peculiar problem facing Trancas-PCH: It was "due to the particular circumstances" involving Trancas-PCH that "it was our position that this permit for the project would be properly exercised if the applicant obtained final map approval from the City." (AA 1008.)

Faust's interpretation of section 13156(g) undermines the purposes of the Coastal Act. "Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations." (*Morris v. Williams* (1967) 67 Cal.2d 733, 748, quoted by this Court in *Grimes v. State Dept. of Social Services* (1999) 70 Cal.App.4th 1065, 1073.) That must be doubly true for informal staff advice.

We have seen that a developer's obligation to have a valid permit before commencing development or construction is at the heart of the regulatory scheme to protect the coastal zone. (See Pub. Resources Code, §§ 30103, 30106, 30600; Cal. Code Regs., tit. 14, §§ 13156, subd. (g), 13169.) We have also seen that the Commission takes the permit deadline date seriously, so as to preserve its right to stop a project on the basis of changed conditions. (See § 13169.) Thus, if a developer wants an extension, he *must* apply before the deadline date. If he claims the permit has been exercised, he *must* show acts that occurred before the permit expired. (See p. 24, *ante*.)

In *Trancas I*, the Commission advocated and the court adopted a test for determining when a permit was exercised that reinforced the statutory and regulatory scheme: A developer's permit expires unless two finite events occur before its expiration date—(a) the developer performed "all the acts necessary to carry out the conditions of the permit" and (b) it secures the city engineer's approval of its final tract map. (61 Cal.App.4th at 1061.) Under this test, a court

can, by consulting objective facts, determine whether the permit has been exercised as of its expiration date.

Not so with the subjective, open-ended test that Faust concocted to help Trancas-PCH. In Faust's view, a developer exercises his permit when he submits an incomplete final map application to the city in "good faith" before the permit's expiration date, so long as the city *subsequently*—even long after the expiration date—determines that the conditions of the developer's tentative tract map have been satisfied and approves its final map. That is a far cry from *Trancas I.* It is also inconsistent with the recent decision in *McPherson v. City of Manhattan Beach, supra,* where the court refused to construe a statute so as to secure a developer "rights in perpetuity." (78 Cal.App.4th at 1263.)

Under Faust's interpretation, a permit's expiration date would be meaningless. All a developer would need to do by that date would be to submit a final map application to the city. The map would not need to be complete or ready for approval by the city; indeed, the test assumes it will *not* be complete. Its enough that it was submitted in good faith—which, according to Faust, will be shown by the fact that the city ultimately approves the map.

But here's the rub. Under Faust's test, good faith is determined after the permit's expiration date and then, by some extra-statutory alchemy, relates back to the time that the developer submitted the incomplete map. As Faust wrote:

> "If your client does obtain final map approval from the City . . . we believe this would support the contention that a good faith final map submittal was made to the City *before the expiration of the coastal permit.*" (AA 1005, emphasis added.)

Faust placed no time limit on the City's ability to approve the final map. The Commission, in ultimately advocating Faust's advice-letter interpretation of its regulation, did not try to supply one. Diamonds may be forever, but not a coastal development permit. Yet, that *will* be the result if the Commission ever formally adopts the Faust test.

Which is undoubtedly why the Commission has not done so.

This lawsuit has not been the Commission's finest hour. The Commission should never have allowed itself to be dragged along in support of an advice letter that was bad law and bad policy. No deference is due this misguided effort to aid Trancas-PCH. On the contrary, the "standard of review is one of respectful

*non*deference." (*Environmental Protection Information Center v. Department of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1011, 1022, emphasis added.).

2. Contrary to defendants' contentions below, *Trancas I* did not involve Trancas-PCH, its permit or Faust's private advice letters to Trancas-PCH's counsel.

Unable to distinguish *Trancas I*, defendants rewrote it. Trancas-PCH argued below that the *Trancas I* court had literally decided the status of Trancas-PCH's permit and that plaintiff "now seeks to re-litigate the identical issue in order to further delay completion of the subdivision." (AA 504, 508, 514.) Similarly, the Commission argued that the court in *Trancas I* had relied on and discussed Faust's advice letter. (AA 1086.)

Nonsense. Trancas-PCH was not even a party to *Trancas I*, and the court never so much as mentioned its permit or project. (AA 508, 514-516.) As we've seen, the case involved a different developer, Lunita Pacific, and a different coastal permit, and it was decided specifically on the unique facts involving Lunita Pacific.

Trancas-PCH's "proof" for the proposition that plaintiff "already unsuccessfully challenged the same Coastal Commission action" and "now seeks to re-litigate the identical issue" begins and ends with the coincidental fact that Faust's advice letter addressed the status of both the Lunita development and the Trancas-PCH development. (AA 508, 514-515.) But that proves nothing.

Faust's letter dealt with both projects only because it was addressed to a lawyer, Alan Block, who happened to represent both developers. (AA 1004 ["This letter is written in response to your dual requests for 'confirmation of activation' of the above-referenced permits"].) The letter treated each project and the status of its permit separately. (AA 1004-1006.) At any rate, neither Faust nor his advice letter was ever mentioned in *Trancas I*. No surprise there—the decision turned on the objective fact of the city engineer's approval.

Having created a kind of anti-matter *Trancas I*, defendants then carried the fiction to its absurd conclusion, insisting that plaintiff's action was barred by res judicata (i.e., claim preclusion) because "the identical causes of action alleged herein were already litigated in" *Trancas I*, and that plaintiff was "further barred

by the doctrine of collateral estoppel from relitigating the issues raised in *Trancas I*." (AA 514, 520.) But the doctrine of res judicata has no place in this case; plaintiff is not suing on the same cause of action as it sued on in *Trancas I*. Even the trial court rejected that argument. (RT 25.)

The doctrine that governs this case is not res judicata, but stare decisis. And the application of that doctrine compels the court to reverse the judgment with directions to the trial court to enter summary judgment for the plaintiff.

No claim preclusion. *Trancas I* and the present case are in fact strikingly similar, and must be governed by the same legal principles, as even the trial court acknowledged. (RT 25.) But they do not involve the same parties or causes of action—the sine qua non of claim preclusion. (*Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App.4th 1234, 1245.) Trancas-PCH was not a party to *Trancas I*, and the parties to that case did not litigate the legal status of *its* project or the legal effect of *its* failure to complete the conditions of its permit and tentative tract maps before the expiration date of its permit.

Under those circumstances, there can be no claim preclusion:

> "If a stranger to the former suit seeks to invoke the doctrine of res judicata in a new action, he is first met with the objection that the cause of action (involving neither the original parties nor privies) is not the same. This eliminates the use of the former judgment as a bar." (7 Witkin, Cal. Procedure (4th ed. 1996) Judgment, § 408, p. 983.)[11]

No issue preclusion. Trancas-PCH's issue preclusion argument—that plaintiff is collaterally estopped from relitigating issues raised in *Trancas I* (AA 520)—is equally misconceived.

The issue litigated in *Trancas I* was: When is a coastal development permit exercised? Plaintiff is not trying to relitigate that issue—on the contrary, it is strenuously seeking to have the *Trancas I* court's holding applied in the present case. That is what this appeal is about.

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[11] Although the Commission was a party to *Trancas I*, that does not trigger res judicata, because plaintiff wants to *apply* the decision, not relitigate it.

Stare decisis applies. If neither res judicata nor collateral estoppel applies here, a different doctrine does—stare decisis. As Witkin describes it:

> "The doctrine of stare decisis expresses a fundamental policy of common law jurisdictions, that a rule once declared in an appellate decision constitutes a precedent that should normally be followed by certain other courts in cases involving the same problem."
> (9 Witkin, Cal. Procedure (4th ed. 1996) Appeal, § 917, pp. 953-954.)

This case involves, to use Witkin's language, "the same problem" that was involved in *Trancas I*: What is the date of commencement of a subdivision development for purposes of determining whether a coastal permit was exercised before its expiration date? The answer the court gave in *Trancas I*—the permit is exercised when the city engineer approves the final map—must apply here as well.

Neither Lunita nor Trancas-PCH applied for an extension of its coastal permit nor commenced construction prior to the permit's expiration date. But Lunita *did* secure the city engineer's approval of its final map before its permit expired, while Trancas-PCH did *not*. Thus, Lunita satisfied the *Trancas I* test, while Trancas-PCH did not. By any notion of stare decisis, that fact compels summary judgment for plaintiff.

II.

EVEN IF PLAINTIFF IS NOT ENTITLED TO SUMMARY JUDGMENT, THE COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS.

The trial court granted Trancas-PCH summary judgment on the ground that plaintiff's complaint was not timely filed. The court granted the Commission's summary judgment motion (in which Trancas-PCH joined) on the ground that the Commission was not a proper party to the action and that Trancas-PCH had exercised its coastal permit prior to its expiration on March 12, 1996. (AA 1122.)

The court was wrong on all counts. Plaintiff's action is *not* time-barred. The Commission *is* a proper party to this action—as it was, uncontroversially, to *Trancas I*. And regardless of whether the court applies *Trancas I* or defers to

Faust's advice letter, it doesn't matter: Trancas-PCH did not exercise its permit prior to its expiration date *under either test.* If the court should decide to apply Faust's advice letter instead of *Trancas I*, that just means the question of timely exercise is still open—and while plaintiff may not yet be entitled to summary judgment, neither is Trancas-PCH.

A. Plaintiff's Complaint Was Timely Filed.

1. Background.

Trancas-PCH moved for summary judgment against plaintiff on the ground that (1) its "remedy was limited to an action for administrative mandate pursuant to Code of Civil Procedure § 1094.5" and (2) it had failed to bring such an action within the 60-day statute of limitations of Public Resources Code section 30801. (AA 383-388.) That was the sole ground stated in Trancas-PCH's notice of motion and argued in its points and authorities. (AA 376.)

In its motion for judgment on the pleadings, the Commission had made a similar argument. The Commission's chief argument had been that Faust's opinion "is not Commission action." (AA 34.) But the Commission also argued, in the alternative, that "[i]f this court decides that Faust's advice letter constitutes Commission action," then a petition for a writ of mandate would have been plaintiff's exclusive remedy. (AA 42.)

Significantly, after losing that motion, the Commission totally abandoned the argument that plaintiff's exclusive remedy was a petition for writ of mandate. Moreover, though both defendants joined each other's motions and opposition briefs, the Commission conspicuously did *not* join Trancas-PCH's argument that the 60-day statute of limitations applied to plaintiff's claims. (AA 629.) In fact, on that issue, the Commission stood with plaintiff: If plaintiff "wishes to bring an enforcement action against Trancas, it can. A private party can bring such an action for declaratory and equitable relief to restrain a violation of the Coastal Act and to bring an action for recovery of civil penalties." (AA 85.)

2. Public Resources Code section 30801 does not govern this case, and therefore its 60-day statute of limitations does not apply.

Public Resources Code section 30801 provides that a person who challenges "any decision or action of the Commission" must file a petition for a writ of mandate pursuant to Code of Civil Procedure section 1094.5 "within 60 days after the decision or action has become final." Section 1094.5, in turn, applies only to "any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken" and an officer or board is vested with "discretion in the determination of facts."

Could the statutes possibly be clearer? Section 30801 applies *only* to a "decision or action of the commission"; section 1094.5 applies *only* to an "order or decision" made after a hearing at which evidence is taken by someone with discretion to determine facts.

We know that Faust's advice letters are not "a decision or action of the commission." First, the Commission says so. (AA 34-35, 38-39, 42.) Second, the Coastal Act says so. Under section 30315 of the Public Resources Code, the Commission can take no action other than at a public meeting where a majority of the total appointed members is present. There is no evidence that any such meeting ever occurred with respect to Faust's advice. (AA 1086 & fn. 1.)

We also know that Faust's advice letters are not within the compass of section 1094.5. That section is meant for "cases in which review of *a final adjudicatory order* is sought by mandate and the *three* indicated elements are present [a hearing was held; evidence was taken; someone had discretion to determine facts]." (*Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 814, emphasis added.) In all cases, "[t]he decisive question is whether the agency exercises *an adjudicatory function* in considering facts presented in an administrative hearing." (*Temescal Water Co. v. Dept. Public Works* (1955) 44 Cal.2d 90, 101, emphasis added.) And "[t]hose three elements codify the essence of 'adjudicatory function.'" (*Harris v. Civil Service Com.* (1998) 65 Cal.App.4th 1356, 1363.) It is undisputed that Faust's advice letters did not involve a hearing or the taking of evidence and that he did not exercise an adjudicatory function.

And, finally, we know that an action brought under section 1094.5 is not the only way to sue under the Coastal Act. Rather, the Act explicitly provides that it may be enforced by ordinary civil actions seeking declaratory and injunctive relief. (See p. 27, *ante*.) *Trancas I* demonstrates that. So do other cases. (See *Sanders v. Pacific Gas & Elec. Co.* (1975) 53 Cal.App.3d 661, 665 [property owners sued because company "failed to obtain permit before construction"]; *No Oil, Inc. v. Occidental Petroleum Corp.* (1975) 50 Cal.App.3d 8.) And the Commission itself says so. (AA 85.)

If section 30801 does not apply—as we've shown it does not—plaintiff was not required to file its complaint within the 60-day deadline. Accordingly, there was no basis for summary judgment on this ground.

B. Whether The Court Follows *Trancas I* Or Applies Faust's Test, The Undisputed Evidence Shows That Trancas-PCH Did Not Exercise Its Permit As Of The Date Of The Judgment.

The trial court granted something that neither defendant had sought in its summary judgment motion—a declaration that as a matter of law Trancas-PCH had exercised its permit before the permit's expiration date. (AA 1122.)

The court was dead wrong.

1. Neither defendant sought summary judgment on the ground that the developer had exercised its permit before its expiration date.

Trancas-PCH moved for summary judgment on one ground only—that the complaint was barred by the 60-day statute of limitations of Public Resources Code 30801. The Commission moved for summary judgment on two grounds: (1) Faust's interpretation of section 13156(g) is entitled to "great weight unless clearly erroneous" and "is correct"; and (2) the Commission is not a proper or necessary party to the action. (AA 71-72, 78, 83-86.) Trancas-PCH joined in that motion. (AA 501.)

Neither party argued that Trancas-PCH had in fact exercised its permit. No wonder—Trancas-PCH *admitted* it had not. (See pp. 9-10, 26-27, *ante*.)

2. As a matter of law, Trancas-PCH is not entitled to summary judgment under either of the two contending interpretations of section 13156(g).

The parties advanced two possible interpretations of section 13156(g). If *Trancas I* is followed—as plaintiff argued—Trancas-PCH's permit has expired and is thus invalid. Therefore, the judgment for defendants must be reversed, and judgment awarded to plaintiff.

But even if Faust's advice letters are followed—as Trancas-PCH and the Commission argued—the judgment still must be reversed. That is because the evidence is undisputed that *Trancas-PCH still has not satisfied Faust's test*: As of the date of the summary judgment motions, the City of Malibu had not approved Trancas-PCH's final tract map. (See pp. 9-10, 26-27, *ante*.)

Trancas-PCH submitted an incomplete final map application to Malibu's city engineer in 1993, before its permit expired. (AA 231-232.) The City of Malibu accepts incomplete map applications and keeps them on file until all the tract map conditions have been satisfied. (AA 231.)

Under *Trancas I*, of course, a developer does not exercise his permit merely by submitting a final tract map application prior to the permit's expiration date. What matters is whether the city engineer approves the final tract map before the permit's expiration date.

Under Faust's test, a developer also does not exercise its permit merely by submitting a final tract map application before the permit expires. On the contrary, the permit is not deemed to have been timely exercised unless the developer "obtain[s] final map approval from the city." (AA 1005.) According to Faust, that after-the-fact approval is evidence—indeed, the only acceptable evidence—that Trancas-PCH submitted its incomplete final map application in good faith. As the Commission itself argued:

> "Commission staff recognized that it is not in a position to judge whether a final map submittal has been made in good faith, and that *this is a determination more appropriately made by local government*. . . . [T]he Commission staff's [June 5, 1997] letter indicated that *Malibu's approval of the map* would evidence that the map had been submitted in good faith and that under the

circumstances, the Commission would not challenge the validity of the permit." (AA 82, emphasis added.)

Malibu's city engineer has not approved Trancas-PCH's final map. (AA 231-232.) Therefore, the evidence required under Faust's test to establish that the developer submitted its map in good faith is missing, and the trial court had no basis to "find[] and declare[]" that Trancas-PCH "exercised its Coastal Permit . . . prior to its expiration on March 12, 1996." (AA 1122.)

3. The trial court usurped the authority of both the Commission and the City of Malibu in an improper effort to aid Trancas-PCH.

Our Supreme Court has recently reaffirmed that judges "cannot be advocates for the interests of any parties; they must be, and be perceived to be, neutral arbiters of both fact and law (see Preamble, Cal. Code Jud. Ethics) who apply the law uniformly and consistently." *(Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1100; *see also Katheryn S. v. Superior Court* (2000) 82 Cal.App.4th 958, 973 ["the tone of the [trial] court's comments demonstrates a personal involvement in the case which one might expect from an advocate, not a neutral observer charged with the duty of ascertaining the best interests of the child involved"].)

Here, the trial court became an advocate for Trancas-PCH. For example:

- It accused plaintiff and the City of Malibu of "acting like outlaws and renegades," who "are just bound and determined never to let this development go forth, no matter what the developer does, no matter what the Coastal Commission has agreed to." (RT 10.)
- It characterized plaintiff's counsel as its "hired gun" and stated that plaintiff's "directions [to him] are we're not ever going to allow this development to proceed forward. We'll do anything we can to obstruct it." (RT 11-12.)
- It characterized plaintiff's homeowner members as "people with more money than sense living in Malibu that are just going to have their way regardless of common sense, the law or anything else." (RT 12.)

- It defamed Malibu's city engineer by insisting that he "wouldn't dare get up before the City Council and say that this developer has done what they were required to do and did do, and now we have to recommend the approval of this project and move it forward"—"he would be run out of town." (RT 20-21.)

No evidence supports these ad hominem attacks. In *Trancas I*, the Malibu city engineer *did* report to the City Council that the developer had satisfied the conditions of its tract map; he wasn't afraid to do so, and he wasn't "run out of town." (See 61 Cal.App. 4th at 1060.) The plaintiff in the present case was also the plaintiff in *Trancas I*. Just as it does here, it opposed a developer whose permit had expired. The court ultimately rejected plaintiff's interpretation of section 13156(g), but, far from dismissing plaintiff as "people with more money than sense," it held that "[a]ll three parties"—plaintiff, the developer and the Commission—"offer[ed] facially sound arguments for the acceptance of their interpretations and the rejection of all others." (*Id.* at 1061.)

Here, the trial court came close to admitting that it had abandoned any pretense of acting in a judicial capacity. After characterizing the conduct of plaintiffs and the City as "patently wrong," the court stated that "I'm certainly not part of the political process, but at some point in time . . . ." (RT 10.) The sentence trails off, but the court's intention is clear: For the court, that "point in time" had come in this lawsuit and it was prepared to make political decisions that the law relegates to the city engineer and the city counsel. (*Ibid.*)

Having chosen sides and decided, without any evidence, that neither the City nor its engineer could be trusted, the trial court then made an essentially political decision: "I think" Trancas-PCH has "done everything necessary to be deemed to have exercised the permits." (RT 18.).

But that conclusion is plainly wrong under *Trancas I* and plainly wrong under Faust's advice letters.

III.
THE COMMISSION IS A PROPER PARTY TO THIS LAWSUIT.

A. *Trancas I* Is Itself Precedent For Joining The Commission.

The Commission was joined as a party here in the same capacity as in *Trancas I*, where it played a significant role in advocating an interpretation of its regulations. In its motion for summary judgment in this case, the Commission argued that "[t]he only interest [it] had in the prior case and in this case is its interpretation of it regulation." (AA 71.) That's enough here, as it was in *Trancas I*, to join the Commission as a party defendant.

B. Plaintiff May Join The Commission As A Defendant To Seek Declaratory Relief As To The Meaning Of Its Regulation And To Avoid A Multiplicity Of Lawsuits.

Plaintiff is entitled to join the Commission as a defendant here so that all interested parties can be heard on the question of whether Trancas-PCH's permit had expired. (Code Civ. Proc., §§ 379, 1060.) After all, "[t]he purpose of a declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation" and "to liquidate doubts with respect to uncertainties or controversies which might otherwise result in subsequent litigation." (*Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1566, internal quotes omitted.)

In addition, "[d]eclaratory relief has been held to be the proper remedy when it is alleged an agency has a policy of ignoring or violating applicable laws." (*Ibid.*) In *Venice Town Council*, the court allowed plaintiff to maintain a declaratory relief action against a city for misinterpreting a statute, noting that the "complaint properly alleges a present and actual controversy whether the City's interpretation of [a statute] and the duties that statute imposes on local governments is erroneous, and whether it has an informal policy of nonenforcement of the [statute]." (*Ibid.*)

Here, plaintiff seeks a declaration that the validity of Trancas-PCH's permit is governed by *Trancas I* and not the renegade advice of a Commission staff

member. Faust brought the Commission into the case when he tried to enforce his advice letter by telling the City of Malibu that the City "should treat [Trancas-PCH's] coastal permit as valid" for the "purpose of determining whether to approve the final map." (AA 1012.)

The best place to sort all of this out is in a single lawsuit in which all interested parties—the Commission, the developer, the plaintiff homeowners and the City of Malibu—are before the court. As the court held in *Venice Town Council*, "judicial economy strongly favors the use of declaratory relief to avoid a multiplicity of actions to challenge the City's statutory interpretation or alleged policies." (47 Cal.App.4th at 1566.)

CONCLUSION

It is a commonplace of our constitutional system that we are a government of laws and not of men. That "historic phrase" is "the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power. Every act of government may be challenged by an appeal to law, as finally pronounced by this Court." (*U.S. v. United Mine Workers of America* (1947) 330 U.S. 258, 308 [67 S.Ct. 677, 703, 91 L.Ed. 884] (Conc. opn. of Frankfurter, J.).)

Plaintiff is faced with "rule by fiat." Without public hearings or an investigation of the facts, Faust promised Trancas-PCH to recommend that its expired permit be treated as valid. He then instructed the City of Malibu to accede to his views on the matter. There is no evidence that Faust brought this matter before the Commission, and the Commission never adopted his ad hoc interpretation of its regulations. But, as a litigating position here, it belatedly advocated Faust's views and abandoned the test adopted *at its urging* in *Trancas I*.

That won't do. Plaintiff has a right to be governed by law, and not by an informal staff letter to a developer's attorney or a cynical maneuver by an agency seeking to cover itself from the consequences of careless staff advice.

The facts are not in dispute: Malibu's city engineer did not approve Trancas-PCH's final map before it expired. The law is not in dispute: Under *Trancas I*, Trancas-PCH's permit has expired. Accordingly, plaintiff was entitled

to summary judgment. This Court should reverse the judgment and direct the trial court to enter judgment in plaintiff's favor.

Dated: December 12, 2000.

Respectfully submitted,

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