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, et al.,

Defendants and Respondents.

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

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Should this Court follow on-point precedent that correctly implements the Coastal Act, or instead follow a recommendation by the Coastal Commission's chief counsel that the Commission never adopted and is at odds with the Act? Nothing in either of defendants' briefs changes the obvious answer: The court must apply the existing judicial interpretation of Commission regulations, not an ad hoc rule adopted by Commission staff for no apparent reason than as a favor to a developer's attorney.

The Commission continues, as it has throughout the litigation, to talk out of both sides of its mouth:

- The Commission admits that *Trancas Property Owners Assn. v. City of Malibu* (1998) 61 Cal.App.4th 1058 *("Trancas I")* "settled most issues concerning the interpretation of" its regulations, and that the present case only "deals with the court interpreting *Trancas I*, and applying it to the facts of this case." (Commission Respondent's Brief ("CRB") 4; RT 4.) But it also insists, conveniently, that *Trancas I* merely reiterated "that the Coastal Commission's interpretation of its regulations ultimately controls." (CRB 18-21.)

- In the trial court, it argued that "[w]hile the chief counsel's opinion *may* express the position of the Commission, *it is not binding* on this court." (AA 34, emphasis added.) Yet here, the Commission insists that the Court *must* defer to its chief counsel's advice letter (CRB 30-31)—even though the Commission itself has still never even discussed, much less voted on, his recommendation (AA 1086).

Trancas-PCH goes even further. It contends that Commission counsel Faust is literally empowered to extend permits and interpret Commission rules, and that his actions are Commission actions. (Trancas-PCH Respondent's Brief ("TRB") 31-32, 47.) And as for *Trancas I*, it claims that the case has *no* discernable or fixed meaning. The reason—the Court of Appeal summarily denied a petition for rehearing.

Both defendants are wrong.

First, there is no legal basis on which a court can defer to Faust's advice letter in lieu of applying the Commission regulations as construed by *Trancas I*. Faust has no power to interpret Commission regulations or extend the life of a coastal permit. His opinion letter and "promise to recommend" is not Commission action of any sort. It's nothing more than advice from its lawyer that the Commission has—over the course of four years—studiously chosen not to adopt. It is not and cannot be binding on this Court; indeed, it lacks any legal authority.

- *So says the Commission.* Despite waffling on whether the Court should defer to Faust's letters, the Commission has consistently maintained that they are not Commission decisions or actions. (AA 34-35, 38-39, 42; CRB 31-32.)

- *So says Faust.* His own position is explicit: He "advise[s] the Commission when *it* has to interpret its regulations." (AA 940, emphasis added.) He never purported to make a decision; all he said was that he would "*recommend* that the permit for the project was properly exercised." (AA 1005, emphasis added.)

- *So says the Coastal Act.* By statute, 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." (Pub. Resources Code, § 30620, subd. (a)(3).) Here, *the Commission did neither.* The Commission's executive director has explicit power to issue coastal permits and to grant permit extensions. (Pub. Resources Code, § 30624; Cal. Code Regs., tit. 14, § 13169.) But Faust has no such authority. His job is to "make recommendations to the Commission on any proposed rulemaking." (Cal. Code Regs., tit. 14, § 13034.) No surprise there—a lawyer's job is not to make policy, but to advise his client when *it* does so.

- *So says the decisional law.* The Commission concedes that this case does not involve any interpretation *it* made. It is *Faust's* interpretation that is at issue, and the Commission is "here today defending such an interpretation." (CRB 22; AOB 14-15.) But an interpretation advanced as

a mere "litigating position" is entitled to no weight, especially where it conflicts with Commission rules and an on-point appellate decision.

Second, defendants' efforts to emasculate *Trancas I* must fail. *Trancas I* didn't just state some general principle of deference to agency action; it adopted a specific and *necessarily exclusive* interpretation of the Commission's permit-extension regulations. The clarity of that holding cannot be obscured by the fact that the Court of Appeal summarily denied a rehearing petition. Indeed, the denial did not deter Faust himself from stating, in a leading treatise, that the court "deferred to [the] Commission's position that [the] condominium project was commenced when [the] city engineer approved [the] final subdivision map." (See CRB 5, fn. 2.)

And there is this dispositive fact. *Five years* after the expiration date of its permit and *nearly a year* after the trial court ruled that it had "done everything necessary to be deemed to have exercised the permits" (RT 18), Trancas-PCH now admits that it *still* has not done enough to enable the city engineer to approve its final map (see TRB 16-17 & fn. 8). It is hard to imagine a more compelling demonstration of why the Court should reject defendants' position.

Trancas-PCH's permit has expired. Plaintiff is entitled to judgment.

ARGUMENT

I.

TRANCAS-PCH'S COASTAL PERMIT IS EXPIRED AND INVALID AS A MATTER OF LAW.

A. The Court Must Apply The Law Established In *Trancas I* To The Strikingly Similar Facts In The Present Case.

We showed in the opening brief that *Trancas I* directly controls the present case. (AOB 19-23, 38.) It addressed and decided the question of when a subdivision permit is exercised within the meaning of the two pertinent Commission regulations, section 13156, subd. (g) ("section 13156(g)") and section 13169.[1] How "exercise" is defined is critical to the enforcement of the Coastal Act: A developer that has timely exercised its permit has complied with the time deadlines of section 13156 and need not apply to extend the permit under section 13169. *Trancas I*'s holding—the ratio decidendi of the opinion—is inescapable: A permit for a subdivision is timely exercised if the city engineer approves the final tract map before the permit expires.

Here, it is undisputed that Trancas-PCH neither extended its permit nor completed its map conditions so as to secure city engineer approval of its final map.[2] Thus, if *Trancas I*'s holding controls, Trancas-PCH's permit expired, and the judgment must be reversed with directions to enter judgment for plaintiff. That is why defendants are desperate to discredit *Trancas I* and render it useless as precedent.

Trancas-PCH argues that *Trancas I*'s city engineer approval language is based on a factual inaccuracy, is dictum, is incapable of

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

[2] As in the opening brief, "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.)

producing a fixed principle of law—"like a fine piece of abstract art work, [it] provides different meanings to different persons" (TRB 44)—and must be construed in light of Trancas-PCH's speculation about the court's motives in denying the plaintiff's petition for rehearing (TRB 42-46).

The Commission takes a different tack. It concedes that the holding in *Trancas I* is discernible. It admits that the case presents "one example of where a permit is exercised, when the city engineer approves the final tract map." (AA 1085; CRB 20.) But, the Commission insists, the case does not present the "only" example of how to exercise a permit. (CRB 20.) "The more general holding is that the Coastal Commission's interpretation of its regulations ultimately controls." (CRB 20.) In other words, the Commission reads *Trancas I* not as adopting a specific Commission interpretation, but as giving the agency free rein to interpret its regulations as it sees fit. (CRB 18-21.)

Trancas I is not so easily marginalized. The Commission's effort to replace *Trancas I*'s ratio decidendi with a "more general holding" that disregards the facts before the court offends the elemental rules of case law interpretation. So too does Trancas-PCH's argument that the decision can fairly be read to support all "the litigants' differing viewpoints on this issue." (TRB 45, 46.)

It is a simple matter to determine *Trancas I*'s holding. Faust himself did it, as co-author of a chapter in a leading land use treatise, where he said that the court in *Trancas I* "deferred to Commission's position that condominium project was commenced when city engineer approved final subdivision map." (4 Manaster & Selmi, California Environmental Law and Land Use Practice (2000) § 66.55[2], p. 66-83, fn. 14.)

Trancas I, then, is *not* all things to all people. It does *not* license the Commission to construe its regulations at will, nor could it properly have done so. It deferred to a specific interpretation of a regulation.

That interpretation governs this case. It cannot be displaced by informal actions by Commission attorneys. That would substitute chaos for certainty. That's not what the rule of law is all about.

1. The rules for determining what *Trancas I* held and its precedential effect.

The holding or ratio decidendi of a case "is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them." (*Achen v. Pepsi-Cola Bottling Co.* (1951) 105 Cal.App.2d 113, 124, internal quotes omitted.) "[T]he language of an opinion must be construed with reference to the facts presented by the case; the positive authority of a decision is coextensive only with such facts." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1097.) Further, a prior decision applies even when the facts are not identical to the case before the court, since "stare decisis would be unworkable if we required factual clones before applying the principles of an earlier case." (*Stewart v. Telex Communications, Inc.* (1991) 1 Cal.App.4th 190, 197.)

A decision that fashions a test to determine compliance with a legal requirement must, therefore, apply consistently both to the party who satisfies the test and to the party who does not. The facts necessarily differ, but the problem and the legal principle remain the same. (*Krupnick v. Hartford Accident & Indemnity Co.* (1994) 28 Cal.App.4th 185, 205-206 [decision that *permitted* a plaintiff to sue for negligent infliction of emotional distress because, though a nonbystander, he was a direct victim of the negligence, applied to *deny* a plaintiff recovery where he did *not* qualify as a direct victim].)

2. What *Trancas I* holds.

Trancas I prescribes a simple test for determining whether a subdivision permit has expired: Before the permit's expiration date, did the developer secure the city engineer's approval of its final map? If not, the permit is expired and invalid. The facts that the *Trancas I* court treated as material and on which it based its holding were these:

- The developer Lunita's permit expired on March 12, 1997 (61 Cal.App.4th at p. 1060);
- Lunita had not commenced construction by that date (*ibid.*);

- The city engineer approved Lunita's final map on August 12, 1996, seven months before the permit's expiration date (*id.* at pp. 1060, 1061, 1062);
- The city council did not approve the final map until after the permit's expiration date (*id.* at pp. 1060, 1061).

The issue the court had to resolve in order to decide the case was whether the trial court had properly denied the plaintiff homeowners association's motion for a preliminary injunction. (*Id.* at pp. 1060, 1062.) That issue, in turn, depended on whether the permit was still valid. (*Id.* at p. 1062.) And that issue, in its turn, depended on whether the developer had exercised the permit before it expired. (*Id.* at pp. 1060-1061.)

The court therefore had to identify the point at which a subdivision permit is exercised, and it concluded that the appropriate point is the date on which the city engineer approves the final map. (*Id.* at p. 1061.) Lunita satisfied that test, and that is why the court was able to resolve the litigation in its favor:

> "Accordingly, we hold that Lunita's project commenced on August 12, 1996 [when the city engineer approved the developer's final map], about seven months before the permit's expiration date. It follows that the Association's motion for a preliminary injunction was properly denied." (*Id.* at p. 1062.)

3. *Trancas I* positively precludes Faust's advice-letter interpretation of Commission regulations.

The Commission concedes that the court decided *Trancas I* on the basis of a finding that the city engineer approved the developer's map before its permit expired. (CRB 17-20; AA 1085.) But it nevertheless says that *Trancas I* does not bar this Court from applying a different test that is based on Faust's opinion letter. Indeed, according to the Commission, the decision supports that outcome. It claims that Faust's "letter of advice was, indeed, pervasive in the decision." (CRB 4.) It also argues that "the decision presents only one example of when a permit may be exercised"

and that its "more general holding is that the Coastal Commission's interpretation of its regulations ultimately controls." (CRB 20.)

Not so. Not only was Faust's test not involved in *Trancas I*, but there is no way to reconcile it with any plausible reading of the decision.

First, the court never mentions Faust, his advice letter, or his ad hoc test for determining the exercise of a permit. Since the Commission concedes this much (CRB 4), its claim that Faust's letter is nonetheless "pervasive in the decision" asks the Court to read the minds of the justices who decided *Trancas I*.

And if the *Trancas I* court really did consider Faust's letter without saying so, which aspect of the letter did it consider? For the letter did two distinct things: (1) It described *existing Commission practice*, which treated "*approval* of a final map" before the permit expired as "tantamount to the commencement of construction" (AA 1005, emphasis added; see p. 12, *post*); and (2) it *promised to recommend* that Lunita could exercise its permit without *either* commencing construction *or* securing map approval if it simply submitted an incomplete final map before the permit's expiration date and obtained City approval at any time thereafter (AA 1005, 1006).[3]

The answer is obvious: If the court relied on Faust's letter at all, it relied on his summary of *existing Commission practice*, not his unilateral effort to craft new policy. Why? Because *Trancas I* effectively adopts what Faust described as the Commission's existing rules. Nowhere does the opinion discuss, let alone adopt, Faust's notion that a developer may exercise its permit simply by submitting an incomplete map.

Second, there is no reasonable way to read *Trancas I* as licensing the Commission to interpret its regulations in any way it sees fit. For one thing, courts cannot automatically defer to an agency's interpretation of a statute or regulations. (See AOB 28-30.) "A court assessing the value of an interpretation must consider a complex of factors material to the substantive legal issue before it, the particular agency offering the

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[3] As discussed in the opening brief, Faust's letter addressed two unrelated projects, Lunita's and Trancas-PCH's, because both developers were represented by the same attorney, Alan Block. (AOB 36.)

interpretation, and the comparative weight the factors ought in reason to command." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12.) For another, the *Trancas I* court explicitly deferred to a *particular* agency interpretation of a regulation. That deference did not even remotely imply that any future agency interpretation would automatically pass muster.

Third, far from "present[ing] only one example of when a permit may be exercised" (CRB 20), *Trancas I* necessarily excluded any method of exercising a subdivision permit by anything less than final map approval within the permit's deadline date. Any other construction renders the opinion meaningless. Here is why. If Lunita did not need engineer approval of its final map before its permit expired, it wouldn't matter what the city engineer did with the final map or when he did it. After all, the City of Malibu ultimately did approve Lunita's final map long after the expiration date of its permit. But the court didn't rely on that late approval. Instead, it repeatedly noted that the city engineer approved Lunita's map *before* the expiration date. (*Trancas I*, 61 Cal.App.4th at pp. 1060, 1061, 1062.)

More importantly, the court explicitly based its holding that Lunita's permit was valid on the fact that the engineer's approval happened *before the permit expiration date*. (*Id.* at pp. 1061, 1062.) Indeed, the reason the court discussed the city engineer's role at all was precisely because the city council's approval had come too late. Why else did Lunita have to argue that "the Malibu City Council should have promptly rubber-stamped [the city engineer's] approval" of its final tract map—i.e., that the city council's approval was merely ministerial, while the engineer's approval was not? (*Id.* at p. 1061.) If Faust's test were available, both the city council's and the engineer's approval could have come at any time.

Thus, by necessity, *Trancas I* positively excludes the test that Faust recommended and that the Commission's attorneys urge here. The Commission can of course change the regulations or adopt a different construction. (*Id.* at p. 1062.) It has not done so. Indeed, it clarified its regulations to conform to *Trancas I*. (See AOB 23.)

The Commission has no answer to any of this. It argues that the court simply "weighed the equities and reiterated the Coastal Commission's statement 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].'" (CRB 20-21, quoting *Trancas I*, 61 Cal.App.4th at p. 1061.)

Again, not so. *Trancas I* construed a regulation; it didn't weigh equities. And, the quoted language was simply a prelude to the court's holding, not an alternative to the approval-by-city-engineer test the court adopted. If it were an alternative, the court would not have had to discuss the city engineer or the dates of final map approval at all. Besides, as we showed in the opening brief and show again below (Section II), Trancas-PCH had *not* "diligently performed all the acts necessary to carry out the conditions of the permit" by the permit's expiration date, and still has not done so.

4. The summary denial of a rehearing petition provides no basis for disregarding *Trancas I*.

Was there a factual error in *Trancas I*? In a petition for rehearing, the plaintiff claimed there was. The opinion stated that the city engineer approved Lunita's final map on August 12, 1996, seven months before the expiration date of its permit. (*Trancas I*, 61Cal.App.4th at pp. 1060, 1061, 1062.) But the plaintiff argued that after approving the map, the city engineer discovered that Lunita had not satisfied one tentative map condition, and he "withdrew his favorable recommendation." (TRB 43, quoting AA 603-604.) The court of appeal summarily denied the petition.

Trancas-PCH argues that *Trancas I*'s true meaning must be teased from the summary denial of a rehearing petition that no ordinary reader of the opinion can possibly know anything about. From the denial, Trancas-PCH deduces that the opinion can't possibly mean what it says, because "if plaintiff were correct that City Engineer approval of a final map was the 'conclusive and exclusive' test for coastal development permit activation,

one would certainly expect the *Trancas I* court to immediately reverse its decision." (TRB 45; see CRB 18, fn. 7 [Commission's similar argument].)[4]

Trancas-PCH cites no authority, and we are aware of none, that permits any inference to be drawn from the denial of a rehearing petition. "Petitions for rehearing are rarely granted," and, when they are, the court "seldom changes the result and issues a new opinion." (2 California Civil Appellate Practice (Cont.Ed.Bar 3d ed. 2000) § 19.3.) And "there are almost no cases in which courts have found misstatements of material fact sufficient to justify granting a petition for rehearing." (*Id.*, § 19.7.)

For stare decisis purposes, opinions must be interpreted and applied on the basis of their explicit reasoning, not through speculative inferences about why the court denied rehearing. Any other approach would conflict with the California Constitution. (Cal. Const., art. VI, § 14 [decisions "that determine causes shall be in writing with reasons stated"].)

That Trancas-PCH's approach would rob *Trancas I* of all meaning is best shown in Trancas-PCH's own words:

> "Either the Coastal Commission was correct, and City Engineer approval of the final map is just one example of 'commencement of development' or, perhaps, the *Trancas I* court was referring to Ralph Faust's test, which was a good faith submittal subsequently approved by the City, or, perhaps the statement was simply irrelevant to the *Trancas I* court's holding and did not merit rehearing." (TRB 46.)[5]

In other words: *Trancas I* may mean "perhaps" one thing, or "perhaps" another, or "perhaps" nothing at all—except, not surprisingly, "[n]o matter what the *Trancas I* court intended, plaintiff's position is wrong." (TRB 46.)

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[4] If a subdivision developer has neither applied to extend its permit nor commenced construction, it may exercise its permit only by obtaining final map approval before its permit expires. In that sense, the test adopted in *Trancas I* is indeed "conclusive and exclusive." (See p. 12, *post.*)

[5] There is in fact no evidence in the record that Lunita Pacific did not secure city engineer approval after August 12, 1996 and before March 12, 1997, i.e. within the permit period.

How convenient—and how hopelessly artificial. The belittling suggestion that the *Trancas I* court didn't know what it was doing is dead wrong, and it provides no basis for disregarding the on-point precedent that naturally governs this case.

B. Even Without *Trancas I*, Trancas-PCH's Permit Is Invalid Under Commission Regulations.

The Commission traditionally recognized three ways to prevent a permit from expiring, each of which required action before the permit's expiration date. Faust identifies these three approaches in his June 5, 1997 advice letter: 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 that the Court adopted in *Trancas I*.

Each of those methods comported with the Coastal Act and its regulations. As we showed in the opening brief (AOB 19, 24-26), a developer's obligation to have a valid permit before commencing construction is at the heart of the regulatory scheme to protect the coastal zone. (See Pub. Resources Code, §§ 30103, 30106, 30600; §§ 13156(g), 13169.) Permit durations are intentionally short so as to ensure continued oversight by the Commission and input by the public. (AOB 19, 24-26, 34-35.) A developer must either exercise the permit in accordance with section 13156(g) or seek an extension in accordance with section 13169. (AOB 5.) Extensions must be sought before a permit expires, and they are subject to public inquiry and Commission review. (AOB 24-26, 34-35.)

Trancas-PCH does not fall within any of those three categories. It is undisputed that (1) the expiration date of its permit was March 12, 1996; (2) Trancas-PCH did not apply to extend its permit; (3) it did not begin construction; and (4) it did not satisfy the conditions of its tentative map or

secure approval of its final map. Therefore, under the regulations as written, the permit is expired and invalid.

Defendants argue that a developer has a fourth method for preventing the expiration of its permit—it may submit an incomplete final map to a city engineer before the permit expires. That, defendants urge, constitutes an exercise of the permit sufficient to prevent its expiration, so long as sometime in the future—five years and still counting in this case—the developer completes the map conditions and the city approves the final map. (See CRB 22-24; TRB 23-25, 38.)

But the solitary source of authority for this method is Faust's letter, in which he promised to recommend this approach to the Commission. (AA 1004-1005.) And, as we demonstrated in the opening brief (AOB 28-36) and further demonstrate below, Faust's interpretation has no legal force and cannot displace the court's obligation to independently construe and apply the Coastal Act and the Commission regulations.

C. Faust Is Not Authorized to Interpret, Alter Or Enforce The Coastal Act Or Commission Regulations Or To Extend Permit Expiration Dates.

1. Faust's role is limited to advising the Commission. Only Commission actions undertaken pursuant to the Coastal Act have binding legal force.

Faust is an agency lawyer. His job is to make recommendations, not policy. He admitted that below, testifying that "I and my staff advise the Commission when *it* has to interpret its regulations." (AA 940, emphasis added.) The Commission ceaselessly stresses that Faust is not just any lawyer, but is the Commission's chief counsel—it refers to him throughout its brief as "Chief Counsel Faust." (CRB 3.) But that doesn't change things. His job is still to advise policy makers, not to make policy himself. (E.g., § 13034 [chief counsel "shall make recommendations to the Commission on any proposed rulemaking"].) And he recognized that this was his role when he wrote his advice letter. He promised Trancas-PCH's

counsel only that he "would be prepared *to recommend* that the permit for the project was properly exercised." (AA 1005, emphasis added.)

The Commission doesn't try to show otherwise. The most it can say about Faust is that he "has overseen many amendments to its regulations over the years, and he is well placed to explain how the Commission's regulations work." (CRB 5.) That may be true, but it's a far cry from saying that he has the power unilaterally to interpret Commission regulations or to act on permits. Indeed, the Commission argued below *that he had no such authority*: "Generally, only the Commission has the authority to act on coastal development permits" unless "exceptions are specifically denoted in the Public Resources Code." (AA 39.) The Commission has never suggested there is such an exception for Faust (see AA 39), and it continues to deny that his advice letter is Commission action at all (CRB 32).

Trancas-PCH tries to endow Faust with far greater power than does the Act, the regulations, or the Commission. It insists that Faust is permitted "to make a determination regarding the activation of Trancas Town's coastal development permit on an ad hoc basis" and is authorized to "determine on behalf of the Coastal Commission whether the permit had been activated." (TRB 31, 33, 47.) It argues that Faust's advice letter *is* Commission action. (TRB 47.) And it purports to find provisions in the Coastal Act (Pub. Resources Code, § 30000 et seq.) and regulations that empower the Commission's chief counsel to make policy determinations and ad hoc interpretations of the rules. (TRB 31.) The effort fails. The provisions that Trancas-PCH cites only emphasize the limits on Faust's power. For example:

- Public Resources Code section 30333 gives the Commission authority to "adopt or amend, by vote of a majority of the appointed membership thereof, rules and regulations to carry out" the Coastal Act. Section 30620 empowers the Commission to adopt "[i]nterpretive guidelines." (Pub. Resources Code, § 30620, subd. (a)(3).) It did neither in this case. Faust has no power to do so for the Commission.

- Public Resources Code section 30301 identifies the Commission's members; the chief counsel is not among them. (See AA 38-39.)

- Public Resources Code section 30321 defines matters within the Commission's jurisdiction, which include "any permit action" and any "categorical or other exclusions from coastal development permit requirements." Nothing in that section permits the Commission to delegate these matters to an agency lawyer, and nothing allows permit actions to be taken by way of private advice letter. On the contrary, the immediately preceding section requires that "the commission conduct its affairs in an open, objective, and impartial manner free of undue influence and the abuse of power and authority" and that "all members of the public are given adequate opportunities to present their views and opinions to the commission." (Pub. Resources Code, § 30320, subds. (a), (b).)

"Open, objective and impartial"? That hardly describes what has happened here. An agency attorney sends a private advice letter that purports to grant a developer an "exclusion[] from coastal development permit requirements"; the Commission holds no public hearings (indeed, it never discusses the matter, AA 1086); and its lawyers then ask this Court to defer to the advice letter, as if there *had* been the very kind of agency action that the lawyers have consistently disclaimed.

- Public Resources Code section 30335 provides that the Commission shall appoint an executive director and, "as it deems necessary to carry out the provisions of this division," shall appoint and discharge "any officer, house staff counsel or employee of the commission." Section 30335.1 allows Commission staff employees to assist applicants on *procedural* matters in connection with matters before the Commission. Neither section authorizes the chief counsel or his staff to extend permits, interpret or alter regulations, or exempt developers from their operation.

- Commission regulation section 13034 makes the chief counsel the Commission's "regulatory ombudsperson." As Trancas-PCH's own definition shows, an ombudsperson investigates and sometimes may "attempt to resolve informal disputes"; he doesn't determine them or render binding interpretations of the law. (TRB 32-33, fn. 23; cf. *Costa v.*

Workers' Comp. Appeals Bd. (1998) 65 Cal.App.4th 1177, 1182 ["If the ombudsman cannot satisfactorily resolve the matter, the complainant may apply for mediation"].) That's confirmed by section 13034 itself: "In his or her capacity as the regulatory ombudsperson, the Chief Counsel shall review all petitions for rulemaking and *shall make recommendations* to the Commission on any proposed rulemaking." (Emphasis added.)

In contrast to the chief counsel's limited role, the Coastal Act provides that the Commission's executive director can issue coastal permits in certain cases, subject to public notice and to Commission review and retraction. (Pub. Resources Code, § 30624.) The regulations empower him to grant permit extensions, again subject to public comment and Commission review. (§ 13169, subds. (a), (b).) Neither statute nor regulations give any such power to the chief counsel.[6]

2. Faust's advice letter does not constitute action of the Commission in the nature of interpreting or amending its regulations.

The Commission has consistently maintained that neither advice letters nor opinions by its chief counsel constitute Commission actions or decisions. (AA 34-35, 38-39, 42; CRB 32 [Faust's "letter is not Commission action or decision"].) It also tacitly admits that it has not issued any official interpretation of its regulations as part of this litigation; at most, it has declined to disavow what Faust did: "If the Coastal Commission disagreed with Chief Counsel Faust's interpretation of the

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[6] The Act sets the executive director apart from other staff, including "house staff counsel." (Pub. Resources Code, § 30335.) Trancas-PCH cites section 13032, which provides that "the executive director shall administer the affairs of the commission," such as appointing other employees, and may delegate "the performance of any of his or her functions." (§ 13032, subds. (a) and (b).) But even if this regulation allowed the executive director to delegate policy-making functions (as opposed to strictly managerial ones), there is no evidence that he ever delegated his permit functions to the chief counsel, and the Commission makes no such claim.

regulations, the Coastal Commission would not be here today defending such an interpretation." (CRB 22.)

Trancas-PCH also admits that the interpretation being argued here is Faust's alone. (See TRB 31-34.) How could it be otherwise? The Commission emphatically states that it "neither discussed nor voted on the issue of whether the Trancas Town permit had been activated." (AA 1086.)

But that doesn't faze Trancas-PCH. It simply morphs Faust into the Commission—as, for example, when it argues that "the trial court gave proper deference to the *Coastal Commission's* determination regarding the activation of Trancas Town's permit." (TRB 35, emphasis added; see also TRB 42 [Commission "not asserting a litigation position when *it* determined that Trancas Town's coastal development permit had been activated prior to its expiration," emphasis added].) It doesn't wash. The *Commission* has never made such a determination, and saying that it did doesn't make it so.

Nor does it help Trancas-PCH to cite what it claims is "a substantial body of law which wisely holds that deference to an administrative agency is particularly appropriate where the agency is interpreting a regulation which it authored." (TRB 36.) Yes, there is such a body of law. But it's irrelevant because, as the Commission has repeatedly confirmed, there has been no "agency" action here—just Faust's private advice-letter recommendation, *which the Commission has never adopted.*

Finally, Trancas-PCH claims that under *Bam, Inc. v. Board of Police Comrs.* (1992) 7 Cal.App.4th 1343, the Commission didn't have to take any formal action to adopt Faust's determination—it "would have been required to adopt findings only if Ralph Faust's determination was appealed and rejected by the Commission." (TRB 34, fn. 24.) But *Bam* bears no resemblance to this case. There, the Court of Appeal reversed the suspension of a merchant's license by the Board of Police Commissioners after the Board "perfunctorily rejected" its hearing examiner's contrary recommendations. (*Id.* at p. 1345.) Trancas-PCH apparently relies on the court's statement that if the Board had adopted the examiner's recommendation instead of rejecting it, "we would have no problem deeming the examiner's findings to be those of the Board." (*Id.* at p. 1346.)

So what? Faust isn't a hearing examiner; he didn't hold evidentiary hearings; there is no evidence that he ever actually made a recommendation; and the Commission never considered the issue. Faust does not make fact or policy determinations, and the Commission does not hear appeals from his acts. *Bam* doesn't come close to overturning the Coastal Act's requirement that the Commission, not its counsel, must interpret its regulations and rule on the validity of permits, and that it must do so in public hearings.

The Commission's protean position in all of this is that while it admits there has never been any official agency action (CRB 31-33), the fact that it "is here today defending [Faust's] interpretation" means that his "letter has been adopted by the Coastal Commission as a correct interpretation of its regulations." (CRB 22-23.)

No way.

For the Commission to adopt or amend "rules and regulations to carry out the purposes and provisions of" the Coastal Act, there must be a "vote of a majority of the appointed membership thereof." (Pub. Resources Code, §§ 30333, 30620, subd. (a)(3).) That hasn't happened. (AA 1086.) The Act requires "that the commission conduct its affairs in an open, objective, and impartial manner free of undue influence and the abuse of power and authority" (§ 30320, subd. (a)), in which members of the public have the opportunity "to present their views and opinions to the commission" (§ 30320, subd. (b)). That hasn't happened. To suggest that the Commission has adopted Faust's interpretation by the expedient of asserting it as a litigating position in this lawsuit makes a mockery of the statutory scheme.

3. No deference is due or permitted to Faust's advice letter or to the litigating position taken here by the Commission attorneys.

The Commission began this litigation arguing that no one had to defer to Faust's advice letter—which it characterized as merely "an opinion of Commission staff." (AA 38.) It argued that "[w]hile the chief counsel's

opinion may express the opinion of the Commission, it is not binding on this Court." (AA 34.) Indeed, his "opinion would not even be binding on the Commission if he had misstated the Commission's position." (AA 34.)

The Commission was right. As we have shown, Faust cannot act for the Commission, and the Commission is not deemed to have adopted his opinions just because its lawyers are asserting them in litigation. Since official Commission action is out of the picture, the only question left is whether this Court should defer to Faust's advice letter, which the Commission's lawyers urge here as their litigating position. The answer is—no.

The rules that govern the inquiry are settled, and we laid them out in the opening brief. (AOB 28-35.) To reiterate the key points:

- "'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 Corp. of America v. State Bd. of Equalization, supra,* 19 Cal.4th at p. 13.)
- "A staff letter is not the equivalent of an administrative agency's contemporaneous interpretation and application of the law. The regulations promulgated by an agency to implement the statutes are, however." (*Zapara v. County of Orange* (1994) 26 Cal.App.4th 464, 470, fn. 4.)
- An agency's litigating position is also not entitled to deference. (AOB 28-33; see *Aktar v. Anderson* (1997) 58 Cal.App.4th 1166, 1181 [courts must distinguish between agency action that has "'the benefit of careful crafting and comment, and those more informal statements that do not necessarily reflect the deliberate focus of the entire agency . . .'"].)

Here, the Commission's "litigating position" flatly contradicts the statutory and regulatory scheme. The Commission may alter its regulations, but only as provided by statute. "It may not do so by interpreting the regulation in a manner inconsistent with its plain language." (*Motion*

Picture Studio Teachers & Welfare Workers v. Millan (1996) 51 Cal.App.4th 1190, 1195; see AOB 31-33, 34-36.)

a. The rules restricting judicial deference apply here.

Defendants argue that these rules don't apply where an agency is construing its own regulations. (CRB 25-26; TRB 36.) Wrong. Our Supreme Court has held that 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 p. 7, first emphasis in original; accord, *State Farm Mutual Automobile Ins. Co. v. Quackenbush* (1999) 77 Cal.App.4th 65, 71, fn. 2; see also *U.S. v. Trident Seafoods Corp.* (9th Cir. 1995) 60 F.3d 556, 559 ["No deference is owed when an agency has not formulated an official interpretation of its regulation, but is merely advancing a litigation position."].)

b. Faust's letter deviates from existing Commission application of its regulations.

Defendants argue that Faust's advice letter represents consistent Commission policy. (CRB 22-26, 28-29.) Also wrong. The advice letter is *inconsistent* with Commission policy, and the Commission's own brief proves it.

The Commission quotes Faust's description of Commission policy as of the date of his June 1997 advice letter (CRB 22-23), in which he described the three ways in which a developer could prevent its permit from expiring—seeking an extension, commencing construction, or securing approval of the final map. (CRB 23, quoting AA 1004-1005.) He did not even suggest that existing Commission policy allowed a developer to exercise a permit by submitting an *incomplete* final map to a city engineer within the permit deadline.

But, defendants argue, look at what the Commission did with respect to two other developers, Lunita (whose permit was at issue in *Trancas I*) and Winograd. (CRB 23-24, 28-29; TRB 8, 17-20.) The Court can look,

but it will find no consistent Commission policy that supports Faust's opinion that map approval prior to permit expiration is not necessary to prevent a permit from expiring.

Lunita. If Trancas-PCH had done what Lunita did, this case would not have been filed. Before the permit's expiration date, Lunita both applied to extend its permit and secured the city engineer's approval of its final tract map. (AA 1005; *Trancas I*, 61 Cal.App.4th at pp. 1060, 1061.) It had therefore, in the words of Faust's description of *existing* Commission policy, satisfied "all the conditions of the tentative map" before its permit's expiration. No need there to apply Faust's proposed test, because the developer had secured pre-expiration map approval.

Winograd. Faust and another Commission staff attorney told Winograd's attorneys that because of Winograd's "delivery for filing to the City of Malibu of the *tentative* tract map before the date of expiration of the permit, the permit vested once the map was considered filed by the operation of Government Code section 66452.6(b)." (AA 903, emphasis added.) If this is supposed to show consistent Commission application of its regulations, it fails. For one thing, there is no evidence that Faust's act of grace was done with either the Commission's knowledge or its blessing. On the contrary, the Commission itself states that "[t]he Winograd project is another of the projects where *Chief Counsel Faust found* that the permit had been exercised"; the Commission offers no evidence of official *agency* action. (CRB 28.) For another, the issue in Winograd was whether the *tentative* map had expired when *it* was submitted; that's why the letter cites section 66452.6, which establishes the time period during which a tentative map remains valid, and extends the period if a development moratorium is in place. Here, the issue is whether a coastal permit has expired because Trancas-PCH has not completed its *final* map conditions.[7]

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[7] Trancas-PCH now argues, without a hint of record support, that the letter contains a "misstatement" and that when the Commission staff wrote "tentative tract map," they really meant "final map." (TRB 18, fn. 9.) True or not, the statement hardly instills confidence in the accuracy of defendants' description of historical agency practices.

Moreover, Faust's Winograd letter suggests not continuity but uniqueness: The letter explicitly states that the staff attorneys' "conclusion is based upon the unique factual circumstances presented by this matter." (AA 903.) And whereas here Faust's interpretation—final map submission before expiration, city approval after expiration—is focused on the final map, the interpretation he concocted for Winograd concerns the *tentative* map, and does not require city approval at any time. (AA 903.) Finally, as far as the record reveals, the result in Winograd was "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, 1125-1126.)

Indeed, the only common denominator among the three projects and their corresponding pro-developer advice letters is that Alan Block, who in a prior life represented the Commission (e.g., *South Coast Regional Com. v. Gordon* (1978) 84 Cal.App.3d 612, 614) represented the three developers. It should not require argument that legal rules on which people's property interests depend cannot be based on an agency lawyer's ad hoc responses to a single attorney and his clients.

c. Faust's interpretation undermines the Coastal Act.

We showed in the opening brief that Faust's developer-friendly construction of the regulations would defeat the purposes of the Coastal Act, end-run Commission regulations and undermine protection of the coastal zone. (AOB 34-36.) It would relieve a developer of ever having to seek a permit extension, as long as it submitted a final map, however incomplete, before its permit expired. When the city finally approved its final map—months or maybe even years after its permit expired—then, according to Faust, "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.) Under a regime like this, there would be little to motivate a developer to apply to extend its permit—and thus expose its project to the open regulatory review required

by section 13169—or to persevere in completing its map conditions, when its failure to do either could be retroactively cured whenever it got its act together, fulfilled its map conditions, and secured final map approval.

Incredibly, neither defendant addresses these points at all. From their perspective, why should they bother? The Commission reads *Trancas I* as giving it (and its staff) a kind of carte blanche to interpret its own regulations, arguing that the decision's "more general holding is that the Coastal Commission's interpretation of its regulations ultimately controls." (CRB 20.) Indeed, both defendants seem to view the Commission's chief counsel as a kind of medieval Chancellor, dispensing equity and exempting developers from the ordinary rules. (E.g., TRB 30 [given the city's resistance to approving the project, to "allow it to deny final map approval on the basis that Trancas Town's coastal development permit expired before the City Engineer approved the final maps would indeed be inequitable"]; AA 1008, quoted at TRB 29 [given his promises to the developer's attorney, Faust "believe[s] it would be inequitable to take a different position at this time"].)

As we show below, Trancas-PCH is the author of its own predicament, and that alone should bar such "equitable" relief here. In addition, there are three fatal objections to this "equity" approach.

First, the Coastal Act permits only the Commission to alter or grant an exemption from its regulations. (See Pub. Resources Code, §§ 30321, 30333.) Neither the chief counsel nor his staff have any such power. (See Pub. Resources Code, §§ 30335, 30335.1.)

Second, Faust's "equity" is not bounded by rules or definition; he is "simply dispensing justice by the length of the chancellor's foot." (*People v. Gale* (1973) 9 Cal.3d 788, 806, fn. 6 (dis. opn. of Mosk, J.).) In the words of one historic writer:

> "For law we have a measure, know what to trust to; equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a chancellor's foot; what an uncertain measure would this be? One chancellor has a long foot, another a short foot, a third an

> indifferent foot: 'tis the same thing in the chancellor's conscience." (John Selden (1584-1654) Table Talk, Selden Society (1927) at page 43, London, Quaritch, quoted in *Sweatt v. Foreclosure Co.* (1985) 166 Cal.App.3d 273, 278, fn. 6.)

The "uncertain measure" of the chief counsel's foot is particularly pernicious where property rights and regulatory policies converge. Unfettered "equitable" power is contrary to Commission regulations and statutory purposes. (Cf. *Escamilla v. Superior Court* (1969) 271 Cal.App.2d 730, 734 [court cannot "substitute immunity according to the chancellor's foot, for standards established by the Legislature"].)

Third, even if it were the job of the chief counsel to provide "equitable" exemptions from the rules, he could not do so to the prejudice of third parties. Here, plaintiff has a right—indeed, the statute encourages it—to enforce the Coastal Act. (See AOB 27, 41.) Faust had no right to prejudice plaintiff's rights under the Act in order to extricate Trancas-PCH from the consequences of its failure to seek an extension of its permit.

d. Defendants' cases provide no basis for judicial deference to Faust's interpretation; rather, they require the Court to reject it.

Defendants cite cases for two general propositions—that (1) "deference to an administrative agency is particularly appropriate where the agency is interpreting a regulation which it authored" (TRB 36; see also CRB 20) and (2) "[a] court will not will not depart from such construction unless it is clearly erroneous" (CRB 20; see also TRB 36-37). But defendants' cases all involve interpretations that were unequivocally and officially adopted by the administrative body. For example, in *Harris v. Alcoholic Bev. etc. Appeals Bd.* (1965) 238 Cal.App.2d 24, the rule the court deferred to was adopted by an appeals board. Similarly, in *REA Enterprises v. California Coastal Zone Conservation Com.* (1975) 52 Cal.App.3d 596, 611, the "administrative construction" to which the court was required to give "great weight" had been made by the agency itself. Thus, *REA*'s holding was dictated by "[a]dministrative regulations which

have been adopted by the *Commissions*." (*Id.* at p. 609, emphasis added.) None involves, as this case does, an agency that over the course of four years never adopted its lawyer's interpretation of its regulation.

Trancas-PCH repeatedly cites and relies on an *unpublished* Court of Appeal decision, *Trancas Town, Ltd. v. City of Malibu*, Court of Appeal No. B083587 (AA 886). (TRB 14, fn. 5, 34, 47, fn. 27.) Compounding its violation of rule 977 of the California Rules of Court, Trancas-PCH fails to note that the court never reached any question relevant to this case, because it based its decision on estoppel principles. (AA 893 ["we need not and do not resolve as a matter of law the question of whether the County follows an acceptable procedure for making development moratorium determinations"].) Moreover, the unpublished opinion does not even discuss the doctrine of deference to agency action.

A court cannot defer even to an interpretation that is unequivocally promulgated by an agency if the interpretation is "clearly erroneous or unauthorized." All of defendants' cases state that proposition. (See CRB 20; TRB 36-37; *Central Delta Water Agency v. State Water Resources Control Board* (1993) 17 Cal.App.4th 621, 631.) Without more, that's fatal to the judgment here, which is based on an interpretation that is both unauthorized and erroneous—it completely undermines the regulatory scheme, since it allows a developer to disregard the deadline for commencing development under the permit and the requirements for extending the permit past the deadline date. (Pp. 22-23, *ante*.) The interpretation requires not deference, but unequivocal rejection.

D. There Is No Merit To The Commission's Miscellaneous Arguments Concerning Faust's Interpretation.

The Commission argues that Faust's test became part of the regulatory scheme in 1999 when the Commission amended the regulations that were construed in *Trancas I* the previous year. (CRB 19, 27-28.) Even if that were so, it could not affect this case, because this case is governed by the pre-1999 regulations as construed in *Trancas I*. (See AA 79, fn. 4.)

But in fact it is not true. The amendment, which substitutes the word "development" for the words "project" and "construction," was intended to codify *Trancas I* and remove the basis for plaintiff's argument there that a coastal permit could be exercised only by construction. (See CRB 16; AA 81 & fn. 6; AOB 23.) The amendment did not codify Faust's advice letter, which was not even discussed in *Trancas I*. Indeed, as we have shown, the decision is flatly contrary to it.

The Commission argues that the term "development" in the amended regulations must be defined as it is in Public Resources Code section 30106, and broadly construed. Not so. Section 30106 is broadly construed because the Commission's jurisdiction to require coastal permits depends on the scope of the term "development." (§ 30600; *La Fe, Inc. v. County of Los Angeles* (1999) 73 Cal.App.4th 231, 240 ["The Legislature's stated intent [in enacting section 30106] was to *grant the commission permit jurisdiction*," emphasis added].) Only a broad definition of "development" can preserve that purpose. (See *Stanson v. San Diego Coast Regional Com.* (1980) 101 Cal.App.3d 38, 47-48.) But the use of the same definition of "development" in the permit-expiration regulations would *defeat* the purposes of the Coastal Act. By relaxing the test for determining whether a permit has been exercised, it would render the rules for ensuring compliance with permit deadlines less effective.

Even if the definition were the same in both contexts, it still could not apply to Trancas-PCH's situation: Section 30106 expressly defines what acts constitute "development," and submitting an incomplete map to a city isn't among them, or even analogous to any of them. Moreover, Trancas-PCH never took any of the actions that are identified in that section as constituting development. (See Section II.)

The Commission argues that it is entitled to summary judgment because its separate statement of undisputed facts "established facts which negated" plaintiff's assertion that Faust's letter should be given no deference or weight, and plaintiff disputed none of those facts. (CRB 29-30.) Nonsense. Plaintiff's only obligation is to file a separate statement that responds to the Commission's separate statement. (Code Civ. Proc., § 437c, subd. (b).) Plaintiff did that. (AA 795.) It is not required to

dispute facts with which it agrees; indeed, the Commission cited plaintiff's complaint as supporting evidence for many of its undisputed facts. (AA 88-89, 91-92.) Moreover, the facts in the Commission's separate statement do not "establish" any legal issue concerning Faust's letter. They simply show that Faust wrote letters. Significantly, the Commission did not include any undisputed facts that would show that it had ever adopted any of Faust's recommendations.

II.

BECAUSE TRANCAS-PCH STILL HAS NOT SATISFIED THE CONDITIONS OF ITS TENTATIVE TRACT MAPS, IT CANNOT CLAIM ITS PERMIT WAS TIMELY EXERCISED UNDER ANY THEORY.

We showed in the opening brief that five key facts are undisputed, and defendants do not suggest otherwise. These are: (1) The expiration date of Trancas-PCH's permit was March 12, 1996; (2) Trancas-PCH never applied to extend its permit; (3) it submitted an incomplete final map to the City of Malibu in January 1993; (4) as of its permit's expiration date, Trancas-PCH had not completed all the conditions of its permit or maps; and (5) as of that date, Malibu's city engineer had not, and could not have, approved Trancas-PCH's final tract map. (AOB 9, 26-27; AA 531.)

We also showed that as of April 5, 2000, the date of the hearing on the summary judgment motions, Trancas-PCH still had not completed its tentative map conditions. (AOB 10.)[8]

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[8] Trancas-PCH argues that in this lawsuit, it "was ordered not to seek final map approval pending the outcome of this action." (TRB 9.) Not true. Of its three supporting record citations, two do not even address the assertion (AA 1, 107) and the third *disproves it* (AA 813). In this last, Trancas-PCH's counsel, Alan Block, states in a declaration that in April 1999, the bankruptcy court barred Trancas Town, Ltd. (Trancas-PCH's predecessor, then in bankruptcy) "from undertaking any action whatsoever for the purpose of obtaining or advancing any permit or governmental approval for the development or subdivision of the property until further

(continued...)

A year later, nothing's changed.

A. Trancas-PCH Admits That It Had Not Satisfied Its Tentative Map Conditions Before Its Permit Expired And That It Is Still Nowhere Near Satisfying Them.

We showed in the opening brief that as of March 12, 1996, the expiration date of its permit, Trancas-PCH still had not satisfied its tentative map conditions (AOB 9-10), and Trancas-PCH does not dispute the fact (TRB 13-15). A month after the permit's expiration date, the City required revisions to meet map and permit conditions that Trancas-PCH admits involved "health and safety issues" and non-technical matters like "the submission of a 'plan to limit post-development storm water run-off to pre-development quantities, which was required by City Ordinance 51U.'" (TRB 15-16 & fn. 6.)

None of this could have come as a surprise—that's what city engineer review is all about. That's why developers are encouraged to apply for extensions. (See AA 1005, 1006.)

And long before its permit was set to expire, Trancas-PCH knew, or certainly should have known, that it had not met one of the most critical conditions for final map approval: It had not obtained updated waste discharge requirements from the California Regional Water Quality Control Board ("RWQCB"). (See AA 926 ["For final approval of these final maps the City requires that the applicant fulfill the following condition of the tentative map: 'Approval of the method of sewage disposal is contingent upon the approval by the'" RWQCB].)

As we showed in the opening brief, issues of waste discharge, an important consideration for any development, are of surpassing significance for a development in the coastal zone. (AOB 4.) Although Trancas-PCH

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[8] (...continued)
order of the court." (AA 823.) But, as he further declares, six months later "Trancas-PCH purchased the subdivision project from Trancas Town and resumed the processing of the final maps." (AA 823.)

originally received RWQCB approval and waste discharge requirements for its proposed development in 1979 (TRB 5), those requirements "were no longer adequate based upon a condition imposed in 1983 on Trancas Town's tentative tract map approval" (TRB 16). This was brought to the city engineer's attention by a homeowner's group (not plaintiff) in 1998, and "[t]hereafter, the RWQCB indicated to the City Engineer that new waste discharge requirements would need to be obtained." (TRB 16.) As Trancas-PCH admits, the need for new waste requirements was "confirmed in the City Engineer's letter" that he sent to the RWQCB in September of 1998. (TRB 16.) In that letter, the city engineer stated:

> "I understand from your transmittal that the Regional Board no longer considers these 'old' WDRs to be 'adequate' for the current development. I have informed the applicant that they must submit a new Report of Waste Discharge to Regional Board per your request." (AA 926.)

Thus, Trancas-PCH had not met the 1983 condition of its tentative map to upgrade its water discharge requirements, either in 1993 when it first submitted an incomplete map (see AOB 9), or by March 12, 1996, the expiration date of its permit, or by September 4, 1998, the date of the city engineer's letter. And Trancas-PCH admits in its respondent's brief that *it has still not satisfied that condition.* (TRB 17 [its "application for new waste discharge requirements is still pending before the RWQCB"].)

The story is the same as to most of the other map and permit conditions identified by the city engineer in his February 1999 letter. (AOB 10.) Trancas-PCH admits that it has not obtained geology concept and environmental health concept approvals because those "cannot be given until the new waste discharge requirements are obtained." (TRB 17, fn. 8.) It also admits that it still has not obtained City approval of its improvement bonds and parkland in-lieu fee. (TRB 17, fn. 8.)[9] Trancas-PCH claims

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[9] Trancas-PCH claims that the County approved these matters (apparently in 1984 and 1987, TRB 5, 6), and it requested the City to approve those amounts in 1993, but the City has not done so (TRB 13, fn. 4, 17, fn. 8). However, Trancas-PCH does not claim or show that the City was obligated (continued...)

that one item, fire department approval, "was in fact given" (TRB 17, fn. 8), but the fire department letter it cites as proof shows otherwise: "The final concept map which has been submitted to this Department for review *has fulfilled* the conditions of approval recommended by this Department for *access only*." (AA 709, emphases in original.) Trancas-PCH provides no response to the remaining items identified by the city engineer. (See AOB 10.)

B. Trancas-PCH's Failure To Satisfy Its Map Conditions Means That It Has Not Exercised Its Permit Under Either *Trancas I* Or Faust's Advice Letter.

These undisputed facts require reversal regardless of whether the court applies *Trancas I* or Faust's advice letter interpretation. (See AOB 28-29, 41-44.) Under *Trancas I*, the fact that Malibu's city engineer did not approve Trancas-PCH's final map before its permit expiration date means that the permit is expired and invalid, and plaintiff is entitled to judgment as a matter of law. But Trancas-PCH hasn't satisfied Faust's test, either. Under that test, even though the submission of an incomplete final map may support an ultimate finding that the permit was timely exercised, that still doesn't happen until the engineer or city council *actually approves* the map. (AOB 29; TRB 37-38.) Accordingly, there was no basis of any kind for the trial court's ruling that Trancas-PCH exercised its permit before its expiration date. (AOB 17-18, 42-44.) So even on that basis the judgment must be reversed.

Faced with the undeniable fact that it has not satisfied any known test for exercising a coastal permit, Trancas-PCH invents a new one: A permit is exercised by "any development activity performed in good faith reliance upon the issuance of a coastal development permit." (TRB 37.)

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[9] (...continued)
to rubber-stamp those amounts. If it were, Trancas-PCH's remedy would be to bring a lawsuit for a writ of mandate to compel the city to accept amounts established by the County 15 years ago. As far as we are aware, it has not done so.

Suffice it to say that the Commission has never adopted such a test; not even Faust has advocated it; and in its breadth, the test would completely swallow both *Trancas I* and Faust's advice letter—and, even more than the latter, nullify sections 13156 and 13169. And the judgment would *still* have to be reversed. The question of whether Trancas-PCH met this new test—whether it in fact undertook development activity "in good faith reliance" on the permit—raises its own triable issues.[10]

Is it any wonder that Trancas-PCH is ultimately reduced to arguing that "[i]t is not necessary in this case to determine with absolute precision when a coastal development permit is activated or vested?" (TRB 30.) Even Faust never went that far.

C. Trancas-PCH Cannot Be And Should Not Be Excused From Complying With The Coastal Act.

This matter would not be in court if Trancas-PCH had, in accord with section 13169, requested an extension, made its case to the executive director and the Commission, and given the public a chance to be heard. All of the "equities" that Trancas-PCH relies on could have been considered as part of the determination of the request.

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[10] On the face of the record, Trancas-PCH has not complied with its own new test. It claims that it has shown sufficient "development activity" to meet this test because it purchased development credits ("TDCs") and submitted its final maps at a time when it had satisfied all its tentative map conditions "except those which required the City's input and cooperation." (TRB 37-38.) But there is no evidence showing that Trancas-PCH actually purchased TDCs; the sole relevant record citation (at TRB 7) is to an unsigned installment contract to make that purchase. And Trancas-PCH fails to identify the tentative map items that required no City input (whatever that means in this context) and that it supposedly completed when it submitted its incomplete map. We *do* know, however, that Trancas-PCH had not secured approvals from the County fire department or the RWQCB—items plainly outside the control of the City of Malibu. (See AA 781-782, 1052-1053; pp. 28-30, *ante*.)

Trancas-PCH never explains why it failed to take that simple step. Instead, its brief overflows with excuses about why it should not be subject to the ordinary rules:

• *It relied on statements by the Commission and its chief counsel in choosing not to extend its permit.* Not so. The expiration date of Trancas-PCH's permit was March 12, 1996; the record shows that all Trancas-PCH's contacts with Commission staff occurred after that time. Its attorney Alan 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.)[11]

• *It spent money in pursuit of the project in reliance on Commission actions.* Trancas-PCH claims that in "the next six months" following September 1996, "the Coastal Commission appeared to agree with Trancas Town that its permit had been activated by its development activities." (TRB 17-22.) Again, not so. The record is contrary, which is undoubtedly why Trancas-PCH cites nothing in the record to support its contention. The Commission states that it "neither discussed nor voted on the issue of whether the Trancas Town permit had been activated." (AA 1086.) And Faust himself, in his June 5, 1997 advice letter, after reviewing Trancas-PCH's version of the facts (AA 1004), concluded that it was "not entirely clear whether [Trancas-PCH] has satisfied the conditions of the tentative map" (AA 1005).

• *Its failure to complete its tentative map conditions either by the expiration date of its permit, or even now, is all the fault of the City of Malibu.* Trancas-PCH argues that the City refused to process its final maps because the City contended that they were filed "after its tentative tract map approvals expired," and Trancas-PCH then was forced to spend two years litigating the matter. (TRB 7.) But that delay doesn't account for Trancas-PCH's failure to complete its map conditions, and it doesn't excuse its

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[11] We have previously discussed the staff advice letter written to Alan Block, when he was counsel for an unrelated developer, Winograd. (See pp. 21-22, *ante*.) Although Trancas-PCH seems to argue that it could have relied on that letter (TRB 17-21), the letter was written over a month *after* Trancas-PCH chose to let its permit expire without seeking an extension.

failure to seek an extension of its permit. Besides, as Trancas-PCH admits, by late summer or early Fall of 1995, the litigation was over, Trancas-PCH again submitted its final maps to the City, and "the City began to process Trancas Town's submittal in earnest." (TRB 14.) Moreover, nothing the City did precluded Trancas-PCH from obtaining approvals from other agencies like the County fire department and the RWQCB—which it did not do and still has not done.

And regardless of these fictitious "equities," the validity of Trancas-PCH's permit is not only a matter between the City, the Commission and Trancas-PCH. The public, including neighboring homeowners, has rights too. As we showed in the opening brief (AOB 27), the Legislature provided for private citizens to enforce the Coastal Act, and courts have recognized that enforcement efforts by parties who have a "so-called 'nimby' ('not in my backyard') personal interest" in the matter "are often at the forefront of private environmental enforcement in the public interest." (*Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (2000) 79 Cal.App.4th 505, 516, 517.) Plaintiff's right to have the Coastal Act enforced cannot be prejudiced by the actions of the City, the Commission or Trancas-PCH.

III.

THIS ACTION IS NOT BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL OR BY ANY STATUTE OF LIMITATIONS.

A. The Commission Has Not Met The Requirements For Raising A Collateral Estoppel Defense.

The trial court rejected Trancas-PCH's collateral estoppel arguments (RT 25), and Trancas-PCH has not pursued them on appeal. But the Commission, picking up the fallen standard, puts the doctrine to a particularly absurd use. It doesn't apply, as we now demonstrate.

Collateral estoppel "'precludes a party to an action from relitigating in a second proceeding matters litigated and determined in a prior proceeding.'" (*Kelly v. Vons Companies, Inc.* (1998) 67 Cal.App.4th 1329, 1335.). To raise a collateral estoppel defense, a party must meet at least three core requirements: "'First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding.'" (*Townsel v. San Diego Metropolitan Transit Development Bd.* (1998) 65 Cal.App.4th 940, 951.) "The party asserting collateral estoppel bears the burden of establishing these requirements." (*Ibid.*)

The Commission cannot meet this burden.

1. No issue is being relitigated.

The reason the Commission's use of collateral estoppel seems weird is that plaintiff seeks not to relitigate *Trancas I*, but to *rely* on it. From the first, plaintiff has argued that *Trancas I*'s holding controls this case. It would be different if plaintiff were re-arguing the position the court rejected in *Trancas I*. But plaintiff accepts that a subdivision developer may exercise a permit by securing city engineer approval. It simply wants that test applied to Trancas-PCH.

The Commission does not claim otherwise. Instead, it argues plaintiff is trying to relitigate "the impact of Chief Counsel Faust's letter in interpreting the Coastal Commission's regulations to determine whether a permit has been exercised." (CRB 31.) What impact? The Commission itself admits (CRB 4) that the opinion doesn't refer to Faust or his views or to the supposed power of a chief counsel's interpretation to bind the court.

The Commission requests judicial notice of four briefs filed in *Trancas I*, citing pages where the plaintiff argued against deference to Faust's advice letter. (CRB 30.) But collateral estoppel is not triggered simply because a party argues a point. On the contrary, "the party asserting a collateral estoppel *must prove* that the issue was raised, actually submitted for determination *and determined*. . . . Denial of a motion does not establish an estoppel if the basis for the denial cannot be determined." (*Barker v. Hull* (1987) 191 Cal.App.3d 221, 226, emphasis added.)

The Commission fails to explain how an opinion that never mentions Faust or his letter could possibly have decided anything about the letter's supposed impact. Its argument is pure speculation. That's fatal. "No aspect of what was decided in the previous proceeding can be left to conjecture. [Citation]. 'If, on the face of the record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel.'" (*Silver v. Los Angeles County Metropolitan Transportation Authority* (2000) 79 Cal.App.4th 338, 357.)

2. There is no identity of issues.

The issue in *Trancas I* was whether the regulations required a subdivision developer to commence construction in order to exercise or activate its coastal permit. The plaintiff argued that the regulations did impose that requirement; the Commission argued that final map approval was enough. The court deferred to the Commission. The developer accordingly prevailed, because its map had in fact been approved by the city engineer before its permit's expiration date.

The issue raised by the present case is whether, as Faust urged, *something less than* final map approval is sufficient to exercise a permit. The Court in *Trancas I* had no occasion to consider that question.

3. No issue regarding Faust's advice letter was directly or necessarily decided in *Trancas I.*

California law provides: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." (Code Civ. Proc., § 1911.)

What the Commission calls "the impact of Chief Counsel Faust's letter in interpreting the Coastal Commission's regulations to determine whether a permit has been exercised" (CRB 31) does not appear "upon [the] face" of the *Trancas I* opinion. In fact, the Commission admits that the opinion never mentions Faust. (CRB 4.) Nor was Faust's ad hoc test "necessarily included" in the judgment. Quite the contrary—Faust advocated a test that flatly contradicted the test that the court adopted. For Faust, it was enough for a developer to submit an incomplete map before its permit expired, so long as the map was later approved. For the *Trancas I* court, the final map had to be complete and approved by the permit's expiration date.

Obviously, Lunita's final map submission—whether complete or incomplete—occurred before the expiration date of its permit, since city engineer approval also occurred before that date. If the court had been disposed to adopt Faust's opinion, its inquiry could and would have stopped with map submission; if that submission were enough, why bother to ascertain the approval date?

But that is precisely what the court did ascertain and what it based its decision on: "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." (*Trancas I*, 61 Cal.App.4th at p. 1061, emphasis added.) Thus, the court

did not have to decide the legal effect of Faust's interpretation to arrive at its decision. If it considered Faust's opinion at all, it rejected it.

The result is that if collateral estoppel applies here at all, it bars *the Commission* from relitigating that rejection.

B. This Action Is Not Governed By Public Resources Code Section 30801 Or Its 60-Day Statute Of Limitations.

This is a civil action for declaratory and injunctive relief to stop Trancas-PCH from commencing construction under an expired permit. (AA 1.) The Coastal Act expressly provides for exactly this kind of civil action to enforce its provisions. (See AOB 27.) The Commission itself states that plaintiff may bring this action "as an enforcement action against Trancas" because "[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." (CRB 35.)

Nonetheless, Trancas-PCH persuaded the trial court that plaintiff's complaint was subject to the 60-day limitations provision of section 30801, and therefore time-barred. (AOB 16, 18.)[12]

Trancas-PCH renews that argument here, if only half-heartedly in the final few pages of its brief. (TRB 46-49.) But the present case is not an action for writ of mandate pursuant to Public Resources Code section 30801, and it is therefore not subject to a 60-day statute of limitations.

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[12] Section 30801 provides: "Any aggrieved person shall have a right to judicial review of any decision or action of the commission by filing a petition for a writ of mandate in accordance with Section 1094.5 of the Code of Civil Procedure, within 60 days after the decision or action has become final."

1. Section 30801 is inapplicable on its face.

This case does not and cannot come within Section 30801.

First, the statute applies to "[a]ny aggrieved person" who is seeking "judicial review of any decision or action of the commission." But plaintiff is not an "aggrieved person" as that term is explicitly defined in the statute, and there has not been "any decision or action of the commission" for which plaintiff could seek "judicial review." Section 30801 defines an "aggrieved person" as "any person who, in person or through a representative, appeared at a public hearing of the commission . . . in connection with the decision or action appealed, or who, by other appropriate means prior to a hearing, informed the commission . . . of the nature of his concerns or who for good cause was unable to do either."

But plaintiff is not and cannot be an "aggrieved person" within the meaning of the statute because there has been no "public hearing of the commission" and no "decision or action" taken by the Commission at any such "public hearing" from which plaintiff could appeal. There is only Faust's advice letter. But, as the Commission admits, a chief counsel's advice letter "is not Commission action or decision." (CRB 32; AA 34-35, 38-39, 42.) And there has never been a "public hearing" on Faust's recommendation regarding Trancas-PCH's permit because, as the Commission concedes, it "neither discussed nor voted on the issue of whether the Trancas Town permit had been activated." (AA 1086.)

Second, section 30801 provides that the "aggrieved person" obtains judicial review of the Commission's "decision or action" by "filing a petition for a writ of mandate in accordance with Section 1094.5 of the Code of Civil Procedure." That too doesn't compute. As we showed in the opening brief (AOB 40-41), that section 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." That's not this case.

Third, in a further improper use of the unpublished decision in *Trancas Town, Ltd. v. City of Malibu*, *supra*, Court of Appeal No. B083587, Trancas-PCH invents a ruling out of thin air. It argues that the

statute of limitations issue here "is virtually identical to the statute of limitations issue decided" in the unpublished decision (TRB 46-47 & fn. 27), where, according to Trancas-PCH, the "court held that the City's challenge to the County Counsel's determination in a private letter to Trancas Town's counsel violated the 90-day statute of limitation found in . . . Government Code § 66499.37." (TRB 14, fn. 5.) That is pure fiction. Not only did the Court of Appeal make no such ruling, but it explicitly *declined* to decide *any* statute of limitations question.[13]

2. No case treats a lawyer's advice letter as a final agency decision.

Trancas-PCH's cases (TRB 46-49) are not remotely relevant to the issue of whether this lawsuit is governed by section 30801's 60-day statute of limitations. Every single case involves unambiguous agency action. Not one involves an opinion letter or other staff action.[14]

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[13] The entirety of the court's statute of limitations discussion is this: "In view of our conclusion that Malibu is asserting its procedural challenge against the wrong party, we need not consider whether its claim is time-barred. Timely or not, Malibu's claim of a procedural defect by the County cannot be maintained against Trancas." (AA 893-894.)

[14] *Briggs v. State of California ex rel. Dept. Parks & Recreation* (1979) 98 Cal.App.3d 190, 194-195 (California Coastal Zone Conservation Commission denied application for coastal permit); *Stockton v. Department of Employment* (1944) 25 Cal.2d 264 (State Personnel Board decided appeal from decision ordering layoff); *DeCelle v. City of Alameda* (1963) 221 Cal.App.2d 528, 532 (Pension Board "conducted a hearing" and held pension application barred); *Walter H. Leimert Co. v. California Coastal Com.* (1983) 149 Cal.App.3d 222, 230 (regional coastal commission made permit decisions after public hearings); *Sierra Club, Inc. v. California Coastal Com.* (1979) 95 Cal.App.3d 495, 498 (regional commission granted permit; state commission voted to refuse appeal); *Ojavan Investors, Inc. v. California Coastal Com.* (1994) 26 Cal.App.4th 516, 521 (coastal commission issued permits).

CONCLUSION

One thing is beyond any possible debate: The judgment must be reversed. The only question is whether the Court directs entry of judgment for plaintiff.

If *Trancas I* applies, then Trancas-PCH's permit has expired, and plaintiff is entitled to a judgment enjoining Trancas-PCH from commencing any development activity that requires a valid coastal permit

If Faust's advice letter governs, reversal is still required, since by its own admission, Trancas-PCH has not satisfied Faust's test. It has not completed the conditions of its tentative map, thus barring any such approval in the foreseeable future.

And even if the court were disposed to create some third test based on the extent of Trancas-PCH's development activity, reversal would still be required, for there are numerous triable issues as to what Trancas-PCH has done and why it did not do more sooner.

Plaintiff has played by the rules. Reversal will require that everyone else do so too.

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Respectfully submitted,

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