ROB BONTA
Attorney General of California
JAMEE JORDAN PATTERSON
Supervising Deputy Attorney General
ANDREW R. CONTREIRAS
Deputy Attorney General
State Bar No. 307596
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 738-9000
Fax: (619) 645-2271
E-mail: Andrew.Contreiras@doj.ca.gov
Attorneys for Respondent
California Coastal Commission

No Fee Pursuant to Government Code § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

CENTRAL JUSTICE CENTER

GRAHAM PROPERTY MANAGEMENT, LLC, a California limited liability company,, Petitioner, **v.** **CALIFORNIA COASTAL COMMISSION, a State Agency and DOES 1 through 10, inclusive,,** Respondents.	Case No. 30-2019-01086776-CU-WM-CJC **RESPONDENT CALIFORNIA COASTAL COMMISSION'S OPPOSITION TO PETITION FOR WRIT OF MANDATE** Dept: C14 Judge: The Honorable Robert J. Moss Trial Date: May 23, 2022 Action Filed: July 30, 2019

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

INTRODUCTION

The Coastal Commission denied Graham Property Management, LLC's (GPM) application for a coastal development permit (CDP) to construct a new 5,165 square foot residence, along with a 1,239 square foot garage and 1,931 square foot terrace area, sited within a coastal canyon containing extensive environmentally sensitive habitat areas (ESHA). The Commission denied the project based on substantial evidence, finding that the project was inconsistent with the Coastal Act's Chapter 3 policies governing geology, visual resources, and ESHA. It was also inconsistent with various implementing policies in the Coastal Land Use Plan (LUP), including provisions that specifically prohibit new development within 15 feet of a canyon edge and 100 feet of ESHA. The Coastal Act instructs the Commission to deny projects inconsistent with the Coastal Act's Chapter 3 policies. Here, the Commission's Coastal Act inconsistency findings are undisputed.

Approval of GPM's project would require two exceptional government actions. First, the City of San Clemente (City) would need to approve a local variance from applicable City land use regulations. GPM has not obtained this City variance. Second, the Commission would need to approve the CDP on a "takings" exception from applicable Coastal Act policies, upon a determination that approval is necessary to avoid a taking of private property. The Commission could not reach this determination, in part because the City had not granted a local variance.

GPM raises no challenge to the Commission's actual denial findings. Instead, it imagines various ancillary errors. First, GPM alleges technical deficiencies in three Commissioners' ex parte communication disclosures. Second, it alleges that the Revised Findings do not reflect the Commission's reasoning. Third, it alleges that two statements at the public hearing or in the findings, which identified past ESHA violations and the need for City review, were somehow improper and formed the sole, true basis for the Commission's decision. Finally, based on these allegations, GPM alleges a taking without any supporting argument.

But GPM's ex parte disclosure claims are barred by the issue exhaustion doctrine and the statute of limitations. Even in substance, GPM's allegations do not amount to violations of the disclosure statute. GPM complains that Commissioner Howell did not identify the name of the

specific City official when he disclosed a communication with the City. But this is not a meaningful omission and, regardless, his communication with a local agency was not an ex parte communication requiring disclosure. GPM then complains that after Commissioners Brownsey and Uranga filed ex parte disclosure forms for the official public record, which is all that is required, the Commission did not post those forms on its website, which is not required. These two Commissioners also identified these ex parte disclosures at the hearing.

GPM's claims against the Revised Findings are misguided. The Commission denied GPM's proposed development based on extensive findings of inconsistencies with the Coastal Act's Chapter 3 policies. These were the recommended findings presented in Commission staff's first staff report, the Commission accepted them at the hearing, and they were unchanged in the Revised Findings. Those findings are undisputed here. Commissioner Brownsey's statement expressing additional reservations because of unresolved ESHA violations on the property was neither improper nor determinative. The explanation in the Revised Findings that GPM's project required City review for a variance accurately reflected the facts.

With certain exceptions not relevant here, the Commission requires applicants to first obtain all required local approvals. The lack of prior local review for a variance was one reason the Commission determined that approval solely on a takings exception was premature. The Commission could not find that project approval was necessary at this stage before it went through the City's local review process below. Nothing requires the Commission to prematurely approve a CDP ahead of the local agency—or allows an applicant to sidestep this step-by-step process.

The Commission respectfully requests that the Court deny the petition.

STATEMENT OF FACTS

GPM is the owner of the vacant parcel located at 217 Vista Marina, San Clemente, California. (AR 1495, 1535.) The parcel is situated within Trafalgar Canyon, near its seaward mouth, and is largely undisturbed in its natural state with extensive ESHA vegetation. (AR 1507.)

In 2018, GPM applied to the Commission for a CDP to construct a new three-story, 5,165 square-foot residence, 1,239 square-foot garage, and 1,931 square-foot terrace/deck.

Development would also involve geotechnical stabilization of the building pad, retaining and heat barrier walls into the canyon around the residence, and a cul-de-sac with a driveway. (AR 1495.)

In its application submittal, GPM provided documentation that the Project would require no local discretionary approvals. (AR 12, 151.) This included a form statement that the Project "needs no local permits other than building permits" and an In-Concept Review Approval letter from the City. (AR 151–154.) The letter stated, "current plans show the structure to meet the 15-foot setback from the lower canyon edge and that [it] conforms to site development standards, including height." (AR 151.) Based on this representation, Commission staff accepted the application for filing. (AR 1.)

On May 31, 2019, after reviewing the project and working with GPM on possible modifications to lessen its impacts on coastal resources, Commission staff issued a Staff Report for a Commission hearing on June 12–14, 2019. (AR 162–207.) It concluded that the proposed residence is entirely within a coastal canyon on extensive ESHA, is inconsistent with several Chapter 3 policies in the Coastal Act, and would cause significant impacts to the coastal canyon and ESHA. (AR 162–207.) Specifically, Commission staff concluded:

- "the project does not minimize risk to life and property in areas of high geologic hazards but for the construction of a protective device (deepened caisson foundation) that would substantially alter natural landforms along bluffs and cliffs, contrary to the requirements of Coastal Act section 30253(b)." (AR 164, 176–183.)
- "the proposed development footprint would provide a zero buffer area from the majority of existing surrounding ESHA . . . . inconsistent with Coastal Act section 30240(b)" and "poses potential significant impacts to ESHA vegetation which would significantly degrade habitat and would not be compatible with the continuance of those habitat areas[.]" (AR 164, 183–189.)
- "Because of its location near the mouth of the Trafalgar Canyon within the canyon slope, the project would be highly visible from public vantage points, including the public trail," which is "not compatible with the character of the surrounding area in relation to lack of development on the canyon face/slope, inconsistent with Section 30251 of the Coastal Act and LUP Policy VIS-1." (AR 192–194.)
- "the project is inconsistent with certified Land Use Plan policies that prohibit residential development on a coastal canyon slope, that require a development setback from the canyon edge or from native vegetation, and that require development to be safely sited." (AR 164, 176–187.)

Accordingly, "the Coastal Act directs that the project should be denied." (AR 197–198.) Commission staff nevertheless recommended approval, solely on a takings exception. (AR 198–

202.) Staff concluded that denial could be deemed a "final and authoritative decision about the use of the subject property" and constitute a taking, which would allow approval despite the project's impacts and Coastal Act inconsistencies. (AR 198–202.)

On June 7, 2019, after reviewing this Staff Report and accompanying project materials, the City notified the Commission by email that any Commission approval of the CDP "would result in new development that encroaches into the coastal canyon and therefore requires City of San Clemente variance approval to permit encroachment into the coastal canyon prior to issuance of City permits." (AR 563.) As the City explained: "[t]he Approval-in-Concept letter issued to the applicant includes a condition in Attachment 1 that new development shall not encroach into coastal canyons and shall be set back in compliance with San Clemente Municipal Code section 17.56.050(D)(2)." (AR 563.) The proposed residence did not satisfy this condition.

On June 14, 2019, the Commission held a hearing on the project.[1] Following presentations and public comment, the Commission concurred with staff that the project was inconsistent with the Coastal Act's geologic hazards, visual resources, and ESHA policies. (AR 1479–1482.) But the Commission disagreed with staff's approval recommendation on a takings exception—instead affirmatively concluding that approval at this stage would be premature. (*Ibid*.)

As Commissioner Brownsey explained: "[T]his project did not align with respect to Chapter 3 on visual, on geological stability, certainly on hazard. And the fact for me was that the City of San Clemente, in their LCP has a ban on development in coastal canyons. . . [B]efore I feel that I can consider this permit, I believe that this permit has to go through the full process[, w]ith full notification, through the local entity in order to examine all these issues." (AR 1479.)

Likewise, Commissioner Howell explained: "If we're going to be partnering with local government, we should give them an opportunity to have input from their citizens, and make their own approvals before things end up in front of us." (AR 1479.)

[1] Before the hearing, Commissioners Uranga, Brownsey, and Howell filed ex parte disclosure forms detailing their communications with members of a community group. (AR 1379–1384.) At the hearing, these Commissioners again disclosed that they had communications, and that their disclosure forms were on file. (AR 1468–1469, 1478–1479.) Commissioner Howell also disclosed that he had a recent communication with the City. (AR 1468–1469.)

Commissioners Escalante, Faustinos, and Padilla all agreed, respectively stating: "I completely echo [Commissioner Brownsey] and Commissioner Howell's frustration with this even being here before us," "I think this is something really needs to go through a step process," and "this is highly problematic from a standard of review standpoint." (AR 1480–1482.)

Unanimously, the Commission voted to deny the CDP—concurring with staff's determinations that the Project would significantly impact geology, visual resources, and ESHA, but disagreeing with the recommendation to nevertheless approve the CDP solely on a takings exception. (AR 1479–1482.) Commission staff then drafted proposed Revised Findings reflecting this decision. (AR 1495–1544.)

At its December 2019 hearing, the Commission held a public hearing and unanimously adopted the Revised Findings as reflecting its decision. (AR 1495.) The Revised Findings retained the original findings on the project's inconsistencies with the Coastal Act's geology, visual resources, and ESHA policies, and various implementing LUP policies. (AR 1509–1522.) The Revised Findings then reflected the Commission's determination that approval is premature on a takings exception when it had not undergone the prerequisite City review process below. (AR 1495–1544.) Therefore, the CDP was denied, without prejudice, on undisputed findings that the project would be inconsistent with the Chapter 3 policies of the Coastal Act.

COASTAL ACT BACKGROUND

The California Coastal Act of 1976 (Pub. Resources Code, § 30000 et seq.)[2] is the legislative continuation of Proposition 20, the 1972 Coastal Initiative, which created the California Coastal Zone Conservation Commission. The Legislature declared that "the California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people"; "the permanent protection of the state's natural and scenic resources is a paramount concern"; "it is necessary to protect the ecological balance of the coastal zone and prevent its deterioration and destruction; and "existing developed uses, and future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state." (§ 30001.)

[2] Further statutory references are to the Public Resources Code unless otherwise indicated.

As our Supreme Court explained: The Coastal Act "was enacted by the Legislature as a comprehensive scheme to govern land use planning for the entire coastal zone of California. The Legislature found that 'the California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people'." (*Pacific Palisades Bowl v. City of Los Angeles* (2012) 55 Cal.4th 783, 793-794, citing *Yost v. Thomas* (1984) 36 Cal.3d 561, 565, § 30001, subd. (a).] The Coastal Act is to be "liberally construed to accomplish its purposes and objectives." (*Ibid.*; § 30009.) Any conflicts among policies must be resolved "in a manner which on balance is the most protective of significant coastal resources." (§ 30007.5.)

One of the Act's primary goals is to avoid development's deleterious consequences on coastal resources and to "[p]rotect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources." (*Pacific Legal Foundation v. Cal. Coastal Com.* (1982) 33 Cal.3d 158, 163; *CEEED v. Cal. Coastal Zone Conserv. Com.* (1974) 43 Cal.App.3d 306, 321; § 30001.5, subds. (a).)

To achieve these goals, the Act contains specific policies governing public access, recreation, land resources, and development along the coast. (*McAllister v. Cal. Coastal Com*. (2008) 169 Cal.App.4th 912, 922; §§ 30210-30265.5.) New development must "[a]ssure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or *in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs*." (§ 30253, italics added.) New development must also "be sited and designed to prevent impacts which would significant [ESHA], and shall be compatible with the continuance of those habitat . . . areas." (§ 30240.)

The Coastal Act represents a partnership between state and local governments. As the Legislature declared: "To achieve maximum responsiveness to local conditions, accountability, and public accessibility, it is necessary to rely heavily on local government and local land use planning procedures and enforcement." (§ 30004, subd. (a).) Under the Act, local agencies that lie within the coastal zone must develop a Local Coastal Program (LCP), which is comprised of a land use plan (LUP) and implementing ordinances, that implements the Coastal Act. (*Pacific*

Palisades Bowl v. City of Los Angeles (2012) 55 Cal.4th 783, 794; §§ 30001.5, 30500–30526.) A local agency may submit an LCP for Commission certification in two phases, with the LUP processed first and then the implementing ordinances. (§ 30511, subd. (b).)

Before certification of an LCP, the Commission issues CDPs. (§ 30600, subd. (c); Cal. Code Regs, [C.C.R.] tit. 14, §§ 13050, 13052.) Unless the Executive Director grants a waiver, applicants must first obtain all local discretionary approvals, such as a variance, through the local agency's public land use process. (14 C.C.R., §§ 13052, 15053; see Gov. Code § 65906.) The standard for issuance of a CDP is conformity with the Coastal Act's Chapter 3 policies and, if certified as here, guided by the City LUP. (§ 30604, subds. (a),(b).)

STANDARD OF REVIEW

Section 30801 provides for judicial review of Commission decisions by way of a petition for writ of administrative mandamus pursuant to Code of Civil Procedure section 1094.5. In reviewing a Commission decision, the trial court determines whether the Commission (1) proceeded without or in excess of its jurisdiction, (2) held a fair hearing, or (3) abused its discretion. (*Ross v. California Coastal Commission* (2011) 199 Cal.App.4th 900, 921.)

Abuse of discretion occurs if the Commission has not proceeded in the manner required by law, the findings do not support the decision, or substantial evidence does not support the findings. (Code Civ. Proc., § 1094.5, subd. (b).) The Commission's decision is presumed to be supported by substantial evidence, and GPM bears the burden to establish abuse of discretion. (*Taylor Bus Service, Inc. v. San Diego Bd. of Education* (1987) 195 Cal.App.3d 1331, 1341.)

The Commission weighs conflicting evidence, and the Court may reverse its decision only if, based on the evidence before it, a reasonable person could not have reached the conclusion the Commission reached. *(Ross v. California Coastal Commission* (2011) 199 Cal.App.4th 900, 922.) While the Court reviews questions of law de novo, the Commission's interpretation of an LCP is entitled to deference. (*Charles A. Pratt Construction Co. v. California Coastal Com*. (2008) 162 Cal.App.4th 1068, 1075-1076; *Alberstone v. California Coastal Com*. (2008) 169 Cal.App.4th 859, 866 ["We . . . grant broad deference to the Commission's interpretation of the LCP"].)

In reviewing compliance with notice and disclosure requirements, such as of an ex parte communication, the trial court determines whether the disclosure substantially complied with the statute. (*City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 928-929; *North Pacifica LLC v. California Coastal Com.* (2008) 166 Cal.App.4th 1416, 1435.) Substantial compliance means satisfying the essential purpose and objective of a statute. (See *id*. at p. 925.)

ARGUMENT

The Coastal Act and LUP provide that new development encroaching into or substantially altering a coastal canyon is not permitted. (§ 30253, subd. (b); AR 1509–1516.) New development encroaching into or substantially degrading ESHA is not permitted. (§ 30240; AR 1516–1523.) New development that substantially alters natural landforms is also not permitted. (§§ 30251; AR 1526–1528.) GPM's proposed project was not permitted under the Coastal Act and LUP. The Commission denied it based on findings of these Coastal Act inconsistencies.

Nor was the project permitted under the City's local land use ordinances. (AR 563.) If GPM's project, or a modified version of it, is to be developed, it will require two exceptional approvals. First, it will require City approval of a variance from applicable local land use regulations. (AR 563, 1508–1509, 1532.) Variance approvals are strictly limited because, when granted, they allow for development that is otherwise prohibited by law.[3]

Second, a CDP for this project can only be approved on a takings exception. The Commission would need to determine that, despite its many inconsistencies with Coastal Act policies, the project must be approved to avoid an unconstitutional taking of private property. (§ 30010; AR 1497, 1531–1533.) This is an approval action of last resort—it can occur only after the project is vetted by the local agency and Commission for any and all feasible modifications

[3] A city may approve a variance "only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification." (Gov. Code § 65906.) If granted, the city must impose conditions of approval that assure it does not "constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone[.]" (*Ibid*.) The City's ordinances require the Planning Commission, after environmental review, public review, and a hearing, to make specified findings—including that the variance will not be detrimental to public safety, is necessary for the preservation of a substantial property right, and is consistent with the City's General Plan. (See City of San Clemente Municipal Code, § 17.16.080.)

that could lessen its impacts on coastal resources and when the Commission's action represents the "final and authoritative" decision about the development allowable on the property. (See AR 1531–1533.) This project has not undergone the prerequisite City variance review, a process which could result in project modifications. (AR 1479, 1532.)

GPM asks this court to overturn the Commission's denial decision based on allegations of technical deficiencies in its documentation and factual findings. But these allegations lack merit in law and fact. GPM asserts that three Commissioners' ex parte disclosures violated procedural requirements, but this claim is barred and the posited statutory requirements do not exist. (OB, 12–16). Commissioner Howell had no duty to disclose his agency-to-agency communication (§§ 30322–30323), but did so voluntarily at the hearing, and Commissioners Brownsey and Uranga filed their ex parte disclosure forms as required (§ 30324, subd. (a)). GPM recasts two fact statements, the past ESHA violations and the City's variance requirement, as representing the sole rationales for the Commission's denial decision. (OB, pp. 16–21.) But these were not the substantive, much less the sole, rationales for the Commission's decision. They were factual considerations relevant to deciding whether to approve a project with significant ESHA impacts solely on a takings exception. (AR 1523–1524, AR 1479.)

I. GPM'S EX PARTE CLAIM IS BARRED AND ALLEGES VIOLATIONS OF INAPPLICABLE OR NONEXISTENT STATUTORY REQUIREMENTS

A. GPM is Barred from Asserting Ex Parte Violations Because It Failed to Exhaust Administrative Remedies

GPM alleges that Commissioners Howell, Brownsey, and Uranga omitted information in their ex parte disclosures. But GPM cannot raise this claim in litigation after failing to raise it to the Commission at the administrative hearing, which would have given Commissioners the opportunity to provide any allegedly missing information or otherwise address GPM's concerns.

The issue exhaustion doctrine bars a reviewing court from considering an issue unless the challenger raised the issue to the agency in the administrative proceedings. (*Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 510 ["Administrative agencies must be given the opportunity to reach a reasoned and final conclusion on each and every issue upon which they have jurisdiction to act before those issues are raised in a judicial forum"]; *City*

of Walnut Creek v. County of Contra Costa (1980) 101 Cal.App.3d 1012, 1021; Asimow et al., CAL. PRACTICE GUIDE: ADMINISTRATIVE LAW, The Rutter Group 2020, ¶ 15:485.])

Each Commissioner disclosed their ex parte communications at the hearing, and two of the Commissioners had also filed publicly available disclosure forms. (AR 1468–1469, 1478–1479, 1379–1384.) Yet, GPM never questioned the Commissioners' disclosures at the hearing, nor requested to see the disclosure forms. (AR 1468–1469, 1478–1479 [Commissioner ex parte statements]; 1469–1472, 1478 [GPM not raising an ex parte disclosure issue].) If GPM had done so, the Commissioners would have had the opportunity to supplement their disclosures.

For example, GPM now alleges that Commissioner Howell's disclosure of a communication with the City omitted the name and title of the specific City official. (OB, p. 14:23–24.) But GPM never raised this omission to the Commission. Nor did GPM ever request the disclosure forms of Commissioners Brownsey and Uranga, which were filed for public review. (AR 1379–1384.)[4] Even after the two Commissioners again publicly announced their ex parte disclosures at the hearing, GPM raised no issue. (AR 1468–1469, 1478–1479.)

Therefore, GPM cannot seek to have the Commission's decision reversed for alleged informational omissions after GPM failed to raise any issue before the Commission took action.

B. GPM is Time Barred from Asserting Ex Parte Disclosure Violations

Nor did GPM identify or raise this claim within the 60-day statute of limitations. (§ 30328; 30801.) Its original petition, filed July 30, 2019, asserted no claims related to ex parte communications. (Petition for Writ of Mandate [Original Petition], pp. 1–8.) GPM waited until December 2021—over two years after the statute of limitations lapsed—to assert this claim in an amended petition. (First Amended Petition for Writ of Mandate [Amended Petition], pp. 15–16.)

Here, application of the statute of limitations is clear. The Commission action occurred on June 14, 2019. (AR 1480–1481.) The statute of limitations for claims against the Commission is 60 days, which lapsed on August 13, 2019. (§ 30801.) More than two years later, GPM asserted this claim in an amended petition filed on December 2, 2021. (Amended Petition, p. 28.)

[4] Commissioners are required to file ex parte disclosure forms to the Executive Director for any ex parte communication more than seven days before the hearing, and these forms are kept in the public record for public review. (§ 30324, subds. (a), (b)(2).)

There is no applicable exception to the statute of limitations, nor has GPM argued for one. While GPM may argue on reply that its claims "relate back" to its original petition filing, the relation-back doctrine only applies where the new claim rests on the same set of facts, alleges the same injury, and refers to the same instrumentality. (*Coronet Manufacturing Co. v. Superior Court* (1979) 90 Cal.App.3d 342, 345; see *Norgart v. Upjohn* (1999) 21 Cal.4th 383, 408–409.)

The ex parte disclosure claims do not satisfy this doctrine. The original petition alleged two causes of action: (1) an abuse of discretion claim alleging that the Commission's findings were not supported by substantial evidence and (2) a takings claim. (Original Petition, pp. 6–7.) These claims rest on a different set of facts: the adequacy of the Commission's findings of denial, not the adequacy of communication disclosures. They also involve a different injury: to development rights, not to public transparency. And they refer to different instrumentalities: the Commission's findings, not individual Commissioners' disclosure forms.

Therefore, GPM's ex parte disclosure claims are time-barred.

C. The Commissioners' Ex Parte Disclosures Complied with the Coastal Act, and No Alleged Omission Affected the Decision.

GPM's ex parte disclosure claims also lack substantive merit. GPM argues that Commissioner Howell's disclosure of a communication with the City omitted the specific City official's name. (OB, p. 14:15–24.) But this communication with the local agency is not an ex parte communication requiring disclosure at all. GPM then argues that Commissioners Browney and Uranga filed disclosure forms that were not posted on its website. (OB, p. 14:15–24.) But no law mandates the Commission to post the forms on-line. (§ 30323, 30324, subd. (b)(2).)

The purpose of the Coastal Act's ex parte provisions are to "ensure open decisionmaking in a system allowing private communications about pending matters[.]" (*Spotlight on Coastal Corruption v. Kinsey* (2020) 57 Cal.App.5th 874, 878.) It permits Commissioners to engage in ex parte communications about open matters, and requires each communication to be disclosed. (§30324, subd. (a).) There are two methods of disclosure. If the communication occurs seven or more days before the hearing, the Commissioner "fully discloses and makes public the ex parte communication by providing a full report of the communication to the [Commission's] Executive

Director[.]" (*Ibid*.)[5] The report must be "placed in the Commission's official record." (§ 30324, subds. (b)(2), (c).) If the communication occurs within seven days of the hearing, the Commissioner reports it "to the Commission on the record of proceedings at the hearing." (*Ibid*.)

Once a Commissioner's report is "placed in the official record," or the disclosure is made at the public hearing, the communication "cease[s] to be [an] ex parte communication." (§ 30324, subd. (c).) Only if a Commissioner "has knowingly had an ex parte communication that has not been reported" is the Commissioner barred from participating in a matter. (§ 30327, subd (a).) If a violation occurs *and* that violation "may have affected" the decision, a petitioner may seek a writ of mandate requiring the Commission to "revoke its action and rehear the matter." (§ 30328.)

Here, Commissioners Howell, Brownsey, and Uranga complied with the above disclosure requirements. And, even if GPM's allegations amounted to violation, it had no effect on the decision. The Commission denied GPM's CDP on a 9-0 vote. (AR 1495, 1496.)

Commissioner Howell's Communication with a City Official. Commissioner Howell disclosed that he had "an ever so brief conversation with the City of San Clemente" in which the City expressed "extreme reservations" and explained that the project "needs an awful lot of variances to even be allowed to go forward." (AR 1468–1469.)

The Coastal Act does not require disclosure of these inter-agency communications. It excludes local-agency communications from the definition of an "ex parte communication." (§§ 30322, 30323.) An "ex parte communication" is a communication between a Commissioner and "an interested person," which is defined as: (a) the applicant or participant in the proceeding, (b) a person with a financial interest in the matter, or (c) a representative of a civic, environmental, or similar organization. (§ 30322, subd. (a).) 30323.) It does not include local agencies.

This exclusion is important. The Coastal Act creates an ongoing cooperative partnership between the state Commission and local agencies, and encourages mutual communication and

[5] The Coastal Act requires the Commission to have a standard disclosure form that includes the following information about the communication: (a) the date, time, and location, (b) the people initiating, receiving, or present, and (c) a complete description of the content. (§ 30324, subd. (b).)

assistance on local permitting and land use matters. (§ 30336.) Commissioner Howell's voluntary disclosure only increased transparency beyond statutory requirements.

Even if disclosure were required, GPM only complains that Commissioner Howell omitted the specific City official's name. (OB, p. 14:22–24.) This is a mere technicality. By identifying the communication with the City and describing its content, Commissioner Howell fulfilled the purpose of disclosure. Omitting the specific public official who spoke on behalf of the City does not undermine the transparency purposes of disclosure.

Even more, the City (via Gabriel Perez, City Planner) emailed the Commission to notify it that the City's Approval-in-Concept was contingent on an unsatisfied condition, and that the project would require a City variance if it could be approved. (AR 563 [City email published in staff report addendum].) Since a specific City official was on record expressing the same City position, Commissioner Howell's omission could have no effect on the outcome. (§ 30328.)

Therefore, Commissioner Howell's disclosure was not required by statute. But, even so, it provided all the relevant information, and any omission did not affect the outcome.

Commissioners Brownsey and Uranga Fully Disclosed Their Communications. Commissioners Brownsey and Uranga had ex parte communications with community members, which did require disclosure. Accordingly, both Commissioners filed "full report[s] of the communication[s] to the Executive Director" within seven days, and the Executive Director placed those reports in the official record. (AR 1379–1382; § 30324, subds. (a), (b)(2), (c).)

Citing no legal authority, GPM asserts that the disclosure reports were insufficient because they were not posted on the Commission's website. (OB, p. 13:4–6.) According to GPM, on-line posting is the Commission's "standard practice and procedure," but this is not a legal requirement.[6] Disclosure reports must be placed in the official public record, available to the public upon request. (§ 30324, subds. (a), (b)(2), (c).) To be sure, the Commissioners also announced their disclosure reports at the hearing. (AR 1468, 1478–1479; § 30324, subd. (a).)

[6] The Commission often, but not always, posts them on-line for ease of public access—not to fulfill a legal duty.

Citing only to a Commission memorandum, GPM contends that Commissioner Brownsey violated the Coastal Act by discussing a pending enforcement action against the property. (OB, p. 13:8–11, citing Petitioner's Request for Judicial Notice, Exhibit A, "Commission Staff Procedures for Handling Ex Parte Communication Disclosures" [Ex Parte Memo].) But the cited internal memorandum is only a recommendation against ex parte communications for purposes of the enforcement hearing against a violator. (Ex Parte Memo, p. 1.)

Finally, even if it were a violation, it had no effect on the outcome. (§ 30328.) The ESHA violations are discussed in both the original and revised staff report as relevant to assessing the baseline conditions for the permitting decision. (AR 189–190, 1523–1524.)

Therefore, nothing prohibited Commissioners Howell, Brownsey, and Uranga from participating in the hearing.

II. THE COMMISSION'S REVISED FINDINGS REFLECT AND FULLY SUPPORT THE COMMISSION'S DENIAL.

The Commission hearing included presentations from Commission staff (AR 1465–1468), GPM's representative (AR 1469–1472, 1478), and the public (AR 1472–1477). The Staff Report contained detailed findings that the project was inconsistent with Coastal Act policies governing geologic hazards, visual coastal resources, and ESHA. (AR 176–183.) Located on a coastal bluff of "high geologic hazards," the proposed residence "could not assure stability or structural integrity without . . . substantially alter[ing] natural landforms along bluffs and cliffs[.]" (§ 30253; AR 197, 1496, 1509–1516.) It would violate the required 15-foot setback from a canyon edge, and its extensive retaining walls would cause significant alterations to natural landforms. (*Ibid*; § 30251; AR 1526–1528.) It would be sited almost entirely within the required 100-foot buffer[7] from, and significantly degrade, ESHA. (§ 30240; AR 203, 1496, 1516–1523.)

The Commission properly denied GPM's project due to its direct inconsistencies with Coastal Act and LUP policies on geologic hazards, visual resources, and ESHA. (§§ 30253, 30240, 30251; AR 1509–1528–1531.) It concurred with staff's inconsistency findings. (AR 1479

[7] In an accommodation to GPM's project, the Commission's staff biologist concluded that a 50-foot buffer could be sufficient; but the proposed residence did not even comply with this reduced 50-foot buffer. (AR 1522.)

["when I read this analysis it was a list of reasons to not approve this. . . . this project d[oes] not align with respect to Chapter 3 on visual, on geological stability, certainly on hazard"], 1480 [concurrences].) But it disagreed with staff's recommended action to approve the project solely on a takings exception as "premature" because the City did not have "the opportunity to have input from their citizens and make their own approvals[.]" (AR 1479–1480.) The project had not undergone—nor had GPM sought—the prerequisite City review for a discretionary variance. (14 C.C.R. § 15032; AR 1497, 1532–1533.)

The Revised Findings reflect precisely this decision. Commission staff prepared a Revised Staff Report that retained the findings on the project's inconsistencies with Coastal Act policies, and replaced staff's takings discussion with the Commission's determination that approval at this stage would be premature. (AR 1495–1544 [revisions in strikeout].) The Commission voted unanimously that the Revised Findings reflect the reasons for its denial decision. (AR 1633.)

A. The Commission's Revised Findings Reflect the Commission's Reasons for Denial.

For each permit application, Commission staff must prepare a staff report that includes "a staff recommendation for the Commission to approve, conditionally approve, or deny the application, supported by specific findings with analysis of whether the proposed development conforms to the application standard of review." (14 C.C.R § 13057, subd. (a), (a)(3).) If the Commission takes an action consistent with that staff recommendation, its action is "deemed to have been taken on the basis of, and to have adopted, the reasons, findings and conclusions set forth in the staff report[.]" (14 C.C.R. § 13096, subd. (b).)

If the Commission takes a substantially different action, the Commissioners must state the basis for doing so and staff must prepare a revised staff report with revised findings that reflect the Commission's action. (14 C.C.R. § 13096, subd. (b).) Then, the Commission must hold a second hearing and a vote only on "whether the proposed revised findings reflect the action of the Commission." (14 C.C.R. § 13096, subd. (c).) "Revised findings are meant to capture actions, not change them." (*Friends, Artists & Neighbors of Elkhorn Slough v. Cal. Coastal Com.* (2021) 72 Cal. App. 5th 666, 698.) The revisions may be "relatively minor" and reflect only portions of the

recommended findings to reflect where the Commission's action or rationale differed. (*Ocean Harbor House Homeowners Assn. v. Cal. Coastal Com.* (2018) 163 Cal. App. 4th 215, 245.)

GPM contends that the Revised Findings contain two deviations from the Commission's reasoning. (OB, pp. 16–18.) First, the Revised Findings do not repeat Commissioner Brownsey's statement that the "[ESHA] violations should be resolved before I can bring my full attention to this permit." (OB, pp. 16:22–17:8; AR 1479.) But this one statement was not integral to her decision and not reflective of the Commission's decision as a whole. (AR 1479–1480.) Commissioner Brownsey identified two reasons she thought approval would be premature: (1) the City must first have an opportunity to review it for discretionary variance approval and (2) Commission enforcement should first sort out the unresolved ESHA violations. (AR 1479.) The other Commissioners specifically reiterated the need for prior local review. (AR 1479–1480 [Commissioners Howell, Escalante, Faustinos, and Padilla].) None reiterated the unresolved ESHA violations. (AR 1479–1480.)[8] Accordingly, the Revised Findings did not include it as the Commission's rationale for concluding approval would be premature. (AR 1523–1524.) The Commission unanimously voted that the Revised Findings reflected its reasoning. (AR 1633.)

Second, GPM asserts that the Revised Findings add an "extensive discussion" of project modifications that might lessen the project's inconsistencies with the Coastal Act. (OB, p. 17:9–19, citing AR 1532.) But this one-paragraph discussion mirrors the Commissioners' decision that it would be "premature at this time to approve the proposed residence" before the City's review process below that may result in project modifications. (AR 1532 [Revised Findings]; 1479–1480 [Commissioner statements].) The Revised Findings only expand into the obvious: that the residence's total footprint (14,457 square feet for a residence of 5,165 square feet, plus a 1,239 square-foot garage and 1,931 square-foot terrace) could be scaled down to reduce impacts and encroachments into the coastal canyon and ESHA. (AR 1532.) Any number of possible modifications might be required of the City under its local land use ordinances. (*Ibid*.)

Nothing in the Commission's Revised Findings represents a post-hoc rationalize.

[8] GPM inexplicably asserts that three Commissioners (Escalante, Luevano, and Howell) reiterated it. (OB, p. 16:25–26.) But Commissioner Escalante asked a question and made no comment, and Commissioners Luevano and Howell did not mention it. (AR 1479–1480.)

B. The Revised Findings Fully Support Denial of the Project.

GPM asserts that the Revised Findings, as "drafted and adopted," do not support denial of the project. (OB, 18–21.) This is wholly without merit. GPM does not even contest the Commission's operative denial findings of Coastal Act inconsistencies. Instead, GPM continues to recast the Commission's findings in its own terms. It first claims that the local variance requirement is not valid as its own sufficient basis for denial. (OB, pp. 18–20; AR 1497, 1532; 14 C.C.R § 13052.) But the fact that the project still needs local variance review is fully supported in the record—and was a valid basis to preclude a finding that project approval was necessary at this stage despite not being permitted under the Coastal Act. GPM then claims that Commissioner Brownsey's statement about ESHA violations, discussed above, was an improper basis for denial. (OB, 20–21.) But this was not the Commission's basis for denial. (See Section II.A, ante.)

1. Local Approvals are Generally Required Before CDP Approval.

The Commission's regulations require applicants to first obtain all local discretionary permits, and specifically "all required variances," before applying for a CDP from the Commission. (14 C.C.R., § 13052, subd. (e).) The Executive Director may issue a waiver from this requirement, but no waiver was granted here. (14 C.C.R., § 13053, subd. (a).)

GPM's contention that the Executive Director implicitly granted a waiver is factually and legally false. (OB, pp. 18–20.) The Executive Director explicitly accepted the application as complying with, not on a waiver from, the requirement of prior local-approval requirement. (AR 1.) GPM's permit application had represented that the "[p]roposed development . . . needs no local permits other than building permits." (AR 12.) In support, it included an In-Concept Approval letter from the City that no local discretionary approvals were required. (AR 151–154.)

However, this in-concept approval was invalid or inapplicable to this project. As the City explained: "[t]he Approval-in-Concept letter issued to the applicant includes a condition . . . that new development shall not encroach into coastal canyons and shall be set back in compliance with [City codes]." (AR 563.) Because the proposed project failed to satisfy this condition and would violate City codes, it "therefore requires City of San Clemente variance approval to permit encroachment of the proposed residence into the canyon prior to issuance of City permits." (AR

563.) Thus, the in-concept approval was invalid as to the project presented to the Commission. Applicants cannot circumvent prior local review, and demand premature Commission approval of a project with coastal impacts, by submitting misleading, false, or ineffective documentation.

Even so, contrary to GPM's arguments, the lack of prior local review was not the Commission's basis for denial here. It only supported the Commission's conclusion that project approval, inconsistent with the Coastal Act, would be premature at this stage. (AR 1531–1533.) The City's review for a variance, under local land uses ordinances after local public review, "could alter the nature and scope of the project from the version presented to the Commission" and "clarify the scope of the project that would be undertaken[.]" (AR 1497.) Accordingly, the Commission expressly found that GPM could later return to the Commission for CDP approval. (AR 1533.) GPM's next step was its first step: the local review and approval process.

2. The Commission Did Not Deny the CDP Due to the Pending Enforcement Action.

GPM contends that the Commission's adopted Revised Findings fail to support denial on the basis of past ESHA violations. But this is a strawman without merit. As GPM itself argues and as discussed in Section III.A, the past ESHA violations are not even cited as a basis for the Commission's denial decision. The Revised Findings do not purport to make this finding.

GPM does not challenge the Commission's extensive Revised Findings supporting project denial due to its impacts to coastal resources and inconsistencies with the Coastal Act.

C. The Revised Findings Satisfy All Required Statutory Findings.

According to GPM, the Revised Findings failed to make findings on whether the project is consistent with the Coastal Act's Chapter 3 policies. (OB, p. 21, citing § 30604.) Not so. The Revised Findings are replete with extensive findings detailing the project's inconsistencies with the Coastal Act's Chapter 3 policies. (AR 1509–1533.) GPM inexplicably ignores the bulk of the Revised Findings that it contends are missing.[9]

[9] Without argument, GPM also suggests that the Revised Findings failed to satisfy the findings in section 30010 of the Coastal Act and section 21080.5 of the California Environmental Quality Act (CEQA). (OB, p. 21:10–13.) Section 30010 is the takings exception, which is addressed in AR 1531–1533. The CEQA provision has no application here; CEQA does not apply

III. THE COMMISSION'S DENIAL WAS PROPER UNDER THE COASTAL ACT AND DID NOT CONSTITUTE A TAKING OF PRIVATE PROPERTY

GPM argues that there was no substantial evidence to support a finding that project modifications would lessen its impacts on coastal resources and inconsistencies with Coastal Act policies. (OB, pp. 21–23.) This is incorrect in law and fact. No finding of project modifications is required. (See also Section II.C, fn. 9, ante.) But the Revised Findings still support the conclusion that the project could be modified to lessen its coastal impacts. (AR 1431–1433.)

Courts have repeatedly held that "the Commission is not required to redesign an applicant's project to make it acceptable." (*Reddell v. Cal. Coastal Com.* (2009) 180 Cal.App.4th 956, 971; *Bel Mar Estates v. Cal. Coastal Com.* (1981) 115 Cal.App.3d 936, 942; LT-WR, L.L.C. v. Cal. Coastal Com. (2007) 152 Cal.App.4th 770, 801.) A denial "does not bar [the applicant] from submitting a new and different proposal." (*Ibid*.)

The Commission has no obligation to make an affirmative finding identifying project modifications or redesigns. Nevertheless, the Commission did address whether modifications could make the project less impactful and less inconsistent with Coastal Act policies. (AR 1531–1533.) "A smaller project could reduce impacts to coastal resources and inconsistency with Chapter 3 of the Coastal Act, while still providing an economically viable use of the site." (AR 1531.) This goes without saying: the project as proposed—with a 14,547 square-foot footprint to support a residential use totaling 8,335 square feet—could less significantly encroach into ESHA and the coastal canyon *if it were smaller*. Scaling down the project could degrade less ESHA vegetation, reduce its encroachment area into the coastal canyon, and reduce natural landform alterations.[10]

GPM asserts that Commission staff had reached the contrary conclusion that no project modifications could not lessen the project's inconsistencies. (OB, p. 22:18–20, citing AR 539–

---

to project denials in the first instance, and section 21080(c)(2)(A) expressly acts only to *prohibit* certain project approvals. (§ 21080, subd. (b)(5); AR 1543.)

[10] GPM hones in on a statement in the Revised Findings that Friends of Trafalgar Canyon, a community group, suggested other "alternatives to the proposed project . . . that would lessen impacts on coastal resources." (OB, p. 22:8–13 citing AR 1508.) But this statement in the "Project History" merely summarizes the sequence of events and correspondence.

552.) But this is incorrect and, even it if were true, would be inconsequential. Commission staff's earlier conclusion was only that no "residential use could be found *consistent* with the Coastal Act" and that additional conditions on *this* project proposal would not lessen its inconsistencies. (AR 540, italics added.) A redesigned, scaled down residence could still lessen the *degree* to which it significantly impacts coastal resources.

Still, staff's previous conclusion is inconsequential. The Commission concluded that it was premature to dismiss the potential of lessening the project's coastal impacts. The City's "full and complete review . . . at the local level would provide a clearer factual record" and could identify other feasible modifications or residential alternatives "to minimize impacts to the coastal canyon." (AR 1532.)

Thus, "submitting a subsequent application to the Commission for some form of residential development *after further review of the project by the City* would not be a futile endeavor." (AR 1533.) But rather than seeking City approval first, GPM filed this lawsuit seeking to short circuit this coordinated review process at the local and state levels.

CONCLUSION

For the reasons set forth above, the Commission respectfully requests that the Court deny the petition for writ of mandate.

Dated: April 25, 2022

Respectfully submitted,

ROB BONTA
Attorney General of California
JAMEE JORDAN PATTERSON
Supervising Deputy Attorney General

ANDREW R. CONTREIRAS
Deputy Attorney General
Attorneys for Respondent
California Coastal Commission

SD2019104357
83374883.docx

DECLARATION OF SERVICE BY E-MAIL

Case Name: **Graham Property Management LLC v Coastal Commission**
No.: **30-2019-01086776-CU-WM-CJC**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266.

On **April 22, 2022**, I served the attached:

RESPONDENT CALIFORNIA COASTAL COMMISSION'S OPPOSITION TO PETITION FOR WRIT OF MANDATE

On all interested parties in this actions as follows:

[X] BY EMAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from email address celia.valdivia@doj.ca.gov to the email addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Sherman L. Stacey, Esq.
Rebecca A. Thompson, Esq.
Kimberly A. Rible, Esq.
GAINES & STACEY LLP
3197-A Airport Loop Drive
Costa Mesa, CA 92626
TEL: (949) 640-8999
E-mail: sstacey@gaineslaw.com
E-mail: rthompson@gaineslaw.com
E-Mail: krible@gaineslaw.com
Attorney for Petitioner
GRAHAM PROPERTY MANAGEMENT, LLC

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on **April 22, 2022**, at San Diego, California.

Celia Valdivia
Declarant

Celia Valdivia
Signature

SD2019104357
83374457.docx