

Property Owners Forfeit Right to Challenge Permit Conditions by Accepting Permit and Constructing

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Property owners seeking to invalidate conditions of approval imposed on a land use permit give up the right to challenge the conditions when they accept the permit, comply with conditions necessary to obtain a building permit, and construct the permitted improvements.

In the California Supreme Court's unanimous *Lynch v. California Coastal Commission* decision, property owners filed a legal challenge to certain conditions of approval the California Coastal Commission imposed on a permit to demolish and reconstruct a seawall. While the legal challenge was pending, the property owners constructed the seawall in compliance with the permit. In keeping with a line of precedent, the Court held that permit holders must accept both the benefits and burdens of the permit, and cannot expect to invalidate conditions after constructing the permitted improvement.

A permit holder must decide whether to accept the benefits of the permit or to resolve challenges to the permit before construction. Invalidation of conditions of approval after construction could prevent the permitting agency from considering alternate conditions to address project impacts. Ultimately, the permit holder must decide between the delays involved with challenging the conditions versus building pursuant to the approval. The Court noted a narrow exception to the forfeiture rule in the Mitigation Fee Act (Cal. Govt. Code Sec. 66000 et seq.), which expressly allows a developer to pay a contested fee or exaction, proceed with development, challenge the fee or exaction in court, and get reimbursed if the challenge is successful. That exception, however, does not apply to land use restrictions like those challenged in Lynch.

Because property owners gave up their claims, the Court declined to decide the legality of the challenged conditions prohibiting reconstruction of a stairway to access the beach below the properties, setting a 20 year expiration of the permit, and requiring the property owners to apply for a new permit to extend the 20 year period or to demolish or reconfigure the seawall. The conditions had been upheld by the Court of Appeal in a split decision.

For further information about this decision or any other concerns regarding land use and entitlement issues, please contact **David M. Snow**. For further information about Coastal Act issues, please contact **Ginetta L. Giovinco**.