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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ORANGE, CENTRAL JUSTICE CENTER
11

12 **HORIZONTAL DEVELOPMENT LLC, A**
CALIFORNIA LIMITED LIABILITY COMPANY;
13 **ARMSTRONG PETROLEUM**
CORPORATION, A CALIFORNIA
14 **CORPORATION; WEST NEWPORT OIL**
COMPANY, A CALIFORNIA CORPORATION,

15 **Plaintiff,**

16 **v.**

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18 **CALIFORNIA COASTAL COMMISSION,**
A CALIFORNIA PUBLIC AGENCY, AND DOES
19 **1-25, INCLUSIVE,**

20 **Defendant.**
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Case No. 30-2014-00739490-CU-MC-CJC

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEMURRER TO COMPLAINT

[Filed concurrently with Notice of Demurrer
and Demurrer; Request for Judicial Notice]

Date: December 19, 2014
Time: 1:30 p.m.
Dept.: C-11
Reserv. no. 72036412
Judge: The Hon. Andrew P. Banks

Action Filed: August 12, 2014

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INTRODUCTION

The Court should dismiss plaintiffs' action because it suffers from a fatal defect. Plaintiffs sue for a judicial declaration resolving a dispute with the Commission, but that same dispute is subject to a pending administrative enforcement proceeding that Commission staff have initiated under the Coastal Act.¹ The doctrine of exhaustion of administrative remedies bars plaintiffs' action as a matter of law.

Beginning in 2012, Commission staff notified plaintiff West Newport Oil that it was investigating potential violations of the Coastal Act by West Newport Oil for conducting unpermitted oil-related development. The Coastal Act empowers the Commission to remedy such violations through cease and desist and restoration orders. Plaintiffs have contended that a 1973 Resolution of Exemption that the Commission's predecessor issued to a former mineral lessee exempts its development from the Coastal Act's permit requirement. In an apparent attempt to beat the Commission to the punch, plaintiffs filed this action before Commission staff initiated formal enforcement proceedings. Plaintiffs' complaint asks the Court to interpret the 1973 Resolution of Exemption and determine whether the allegedly unpermitted development may continue. However, just a week after plaintiffs filed suit, Commission staff initiated the formal portion of its enforcement proceeding for cease and desist and restoration orders against West Newport Oil. Whether the 1973 Resolution of Exemption exempts West Newport Oil's development from the Coastal Act's permit requirement will be one of the issues the Commission must consider in a contested enforcement proceeding when evaluating whether West Newport Oil violated the Coastal Act.

The Commission's pending administrative proceeding divests this Court of jurisdiction to entertain plaintiffs' action, let alone grant the relief plaintiffs seek. Plaintiffs must exhaust the Coastal Act's administrative remedies. They must wait until the Commission issues a final

¹ Commission staff initiated an enforcement proceeding against both plaintiffs and the owner of surface rights at Newport Banning Ranch. Should Commission staff reach a negotiated resolution with the surface rights owner or plaintiffs, the negotiated resolution may potentially obviate the need for the Commission to interpret the 1973 Resolution of Exemption in the context of the enforcement proceeding and the need for plaintiffs' requested relief. To date, however, the enforcement proceeding remains open and pending.

1 decision in its administrative proceeding concerning plaintiffs’ alleged Coastal Act violations. If
2 plaintiffs disagree with that decision, only then may they challenge it judicially by a petition for
3 writ of administrative mandamus. Plaintiffs cannot circumvent the pending administrative
4 proceeding by asking this Court to step in and decide questions that California law requires the
5 Commission to determine in the first instance. No amendment of plaintiffs’ complaint can remedy
6 this defect. The Court should sustain the Commission’s demurrer without leave to amend.

7 **STATEMENT OF FACTS**

8 This factual summary derives from the allegations in plaintiffs’ complaint and judicially
9 noticeable matters. The former are treated as true for the purposes of demurrer, though the
10 Commission does not concede or admit them. (*Berg & Berg Enterprises, LLC v. Boyle* (2009)
11 178 Cal.App.4th 1020, 1034.) The latter “may be treated as having been pled” in the complaint.
12 (*Friends of Shingle Springs Interchange, Inc. v. County of El Dorado* (2011) 200
13 Cal.App.4th 1470, 1484, citation omitted.)

14 This action concerns oil-producing operations at the West Newport Oil Field, which is
15 located partly in Newport Beach and partly in unincorporated Orange County. (Complaint, ¶ 1.)
16 The Oil Field is located within the Coastal Zone and is subject to the California Coastal Act.
17 (*Ibid.*) Plaintiffs allege that oil drilling and related operations have taken place at the Oil Field
18 continuously since 1943. (*Id.*, ¶ 2.)

19 In 1972, the Legislature enacted the California Coastal Zone Conservation Act, the
20 predecessor to the current Coastal Act. In July 1973, previous lessees of oil and gas rights at the
21 Oil Field submitted a vested rights claim to the South Coast Regional Commission of the then-
22 California Coastal Zone Conservation Commission. (*Id.*, ¶ 5.) By their vested rights claim, the
23 then-lessees sought to establish a vested right – and thus an exemption from the Act’s permit
24 requirement – for their oil operations at the Oil Field. (*Ibid.*) The South Coast Regional
25 Commission adopted a Resolution of Exemption on October 30, 1973. (*Id.*, ¶ 6.)

26 Plaintiffs allege that oil operations have continued since the adoption of the 1973
27 Resolution of Exemption. (Complaint, ¶ 10.) Plaintiff Horizontal Development LLC has been the
28 owner of the mineral interest in the West Newport Oil Field since 1997. (*Id.*, ¶ 12.) Plaintiffs

1 Armstrong Petroleum Corporation and West Newport Oil Company (Armstrong's subsidiary)
2 have conducted oil operations at the Oil Field since 1983. (*Id.*, ¶¶ 13, 14.)

3 In May 2012, Commission staff notified West Newport Oil and the owner of surface rights
4 at Newport Banning Ranch that unpermitted development, specifically the removal of major
5 vegetation related to West Newport Oil's operations, had been occurring at the Oil Field in
6 violation of the Coastal Act. (*Id.*, ¶¶ 18, 19; RFJN, Exh. 1.) In January 2014, Commission staff
7 further notified these parties of additional unpermitted development, including unpermitted oil
8 well drilling and related construction, grading, placement and discharge of solid material, mining,
9 and placement of structures in or near wetlands, along with the major vegetation removal that
10 Commission staff previously identified. (Complaint, ¶ 26; RFJN, Exh. 2, pp. 1, 7-12.)
11 Commission staff explained that this unpermitted development did not fall within the scope of the
12 1973 Resolution of Exemption and was subject to the Coastal Act's permit requirement.
13 (Complaint, ¶¶ 26, 28; RFJN, Exh. 2, pp. 3-6.) In response to each of these Commission notices,
14 West Newport Oil disputed Commission staff's position, contending that all of its oil-related
15 development fell within the scope of the 1973 Resolution of Exemption. (Complaint, ¶¶ 20, 27,
16 28.)

17 Plaintiffs therefore allege that as of the date they filed their complaint (August 12, 2014), a
18 justiciable controversy existed between West Newport Oil and the Commission concerning
19 whether the 1973 Resolution of Exemption encompasses West Newport Oil's operations and
20 whether the Coastal Act requires a permit for the development in question. (Complaint, ¶ 30,
21 Request for Relief, ¶ 1.) Plaintiffs allege, however, that as of the date of their complaint, they
22 lacked a way to resolve this dispute short of litigation because they had not yet "received either a
23 Cease and Desist Order or a Notice of Violation pursuant to the Coastal Act." (*Id.*, ¶ 25.)

24 However, this allegation ignores that Commission staff had sent West Newport Oil a Notice
25 of Violation in May 2012. (RFJN, Exh. 1.) And just a week after plaintiffs filed their complaint,
26 Commission staff issued to West Newport Oil a formal "Notification of Intent to Commence
27 Cease and Desist Order and Restoration Order Proceedings and Notification of Intent to Record a
28

1 Notice of Violation.” (RFJN, Exh. 3.) The Notification specifically identified the unpermitted oil-
2 related activities that were the subjects of the Commission’s previous communications with West
3 Newport Oil. (RFJN, Exh. 3, pp. 1-5.) The Notification reiterated Commission staff’s position
4 and its analysis of why none of this unpermitted development falls within the scope of the 1973
5 Resolution of Exemption. (RFJN, Exh. 3, pp. 5-7.)

6 As a result of this Notification, cease and desist and restoration order proceedings before
7 the Commission against West Newport Oil have been initiated. (Cal. Code Regs., tit. 14,
8 §§ 13181, 13191; RFJN, Exh. 3.) The scope and interpretation of the 1973 Resolution of
9 Exemption, and the question of whether West Newport Oil’s unpermitted development at the Oil
10 Field falls within its scope, are among the issues that will be presented to the Commission in that
11 proceeding. (RFJN, Exh. 3.)

12 THE COASTAL ACT ENFORCEMENT PROVISIONS

13 The Coastal Act (Pub. Resources Code § 30000 et seq.) requires anyone who wishes to
14 undertake development in the coastal zone to obtain a coastal development permit. (Pub.
15 Resources Code § 30600.) Anyone who performs development without a permit violates the
16 Coastal Act and may be subject to civil liability for fines and penalties, exemplary damages, and
17 injunctive relief. (Pub. Resources Code, §§ 30803, 30805, 30820, 30822; Cal. Code Regs., tit. 14,
18 § 13172.) The Coastal Act authorizes the Commission to pursue violations administratively and
19 to issue cease and desist orders and restoration orders. (Pub. Resources Code, §§ 30810, 30811.)
20 A party against whom the Commission issues a cease and desist order may challenge the order by
21 a petition for writ of administrative mandate. (Pub. Resources Code, § 30801.)

22 The former Coastal Zone Conservation Act contained, and the current Coastal Act contains,
23 a vested right exemption to the Act’s permit requirement. Former Public Resources Code section
24 27204 was effective at the time of the 1973 Resolution of Exemption. That section provided: “If,
25 prior to November 8, 1972, any city or county has issued a building permit, no person who has
26 obtained a vested right thereunder shall be required to secure a permit from the regional
27 commission; . . . Any such person shall be deemed to have such rights if, prior to November 8,
28 1972, he has in good faith and in reliance upon the building permit diligently commenced

1 construction and performed substantial work on the development and incurred substantial
2 liabilities for work and materials necessary therefor..." (*Aries Dev. Co. v. Cal. Coastal Zone*
3 *Conservation Com.* (1975) 48 Cal.App.3d 534, 543, n. 6, quoting former section 27204; *San*
4 *Diego Coast Regional Com. v. See the Sea, Ltd.* (1973) 9 Cal.3d 888, 891, n. 3 [noting April 1973
5 amendment to section 27204].) Because a vested right determination exempts development from
6 the Coastal Act's permit requirement, the Commission construes vested rights narrowly to avoid
7 "serious impairment of the government's right to control land use policy." (*South Central Coast*
8 *Regional Com. v. Charles A. Pratt Constr. Co.* (1982) 128 Cal.App.3d 830, 844, citing *Avco*
9 *Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 797.)

10 ARGUMENT

11 I. THE EXHAUSTION OF ADMINISTRATIVE REMEDIES DOCTRINE PRECLUDES THIS 12 COURT FROM DECIDING WHETHER THE 1973 RESOLUTION OF EXEMPTION 13 ENCOMPASSES THE UNPERMITTED DEVELOPMENT WHILE THAT QUESTION IS 14 PART OF A PENDING COMMISSION ENFORCEMENT PROCEEDING.

15 Plaintiffs allege that "only a court, not the Commission, has jurisdiction to decide the scope
16 and intent of the 1973 Resolution of Exemption." (Complaint, ¶ 11.) Plaintiffs are wrong as a
17 matter of law. The Coastal Act authorizes the Commission to determine in the first instance
18 whether any person has undertaken an activity that requires a permit from the Commission
19 without securing such a permit. (Pub. Resources Code, § 30810, subd. (a).) This authority
20 necessarily includes the ability to determine whether the alleged violation was exempt from
21 permitting requirements. In this case, the Commission has acted on that authority and has initiated
22 and is conducting an enforcement proceeding against plaintiff West Newport Oil. (See RFJN,
23 Exh. 3.) At issue in that proceeding, among other things, is whether the 1973 Resolution of
24 Exemption encompasses West Newport Oil's current unpermitted development such that a permit
25 from the Commission was not required. Plaintiffs cannot interfere with that pending
26 administrative proceeding by asking the Court to usurp the Commission's authority to determine
27 this question in the first instance.

28 Where a statute provides an administrative remedy, the courts lack jurisdiction to consider
the issues to be determined in the administrative proceeding until that process is exhausted.
(*Styne v. Stevens* (2001) 26 Cal.4th 42, 56.) Failure to exhaust available administrative remedies

1 deprives a court of jurisdiction to act until those remedies are exhausted. (*Abelleira v. District*
2 *Court of Appeal* (1941) 17 Cal.2d 280, 291-93.)

3 Exhaustion of administrative remedies is “not a matter of judicial discretion, but is a
4 fundamental rule of procedure.” (*Id.* at p. 293.) Among other purposes, the doctrine serves to
5 (1) preserve the administrative agency’s role and the dignity of its decision-making processes;
6 (2) permit the agency to exercise its expertise in areas of law the Legislature delegated to it;
7 (3) avoid burdening courts with direct decision of all disputes; (4) provide for a full
8 administrative record and findings to assist the courts if judicial review later becomes necessary;
9 and (5) give the administrative agency the opportunity to correct any errors. (*Tejon Real Estate,*
10 *LLC v. City of Los Angeles* (2014) 223 Cal.App.4th 149, 156; *Board of Police Commissioners v.*
11 *Superior Court* (1985) 168 Cal.App.3d 420, 432; *McAllister v. County of Monterey* (2007) 147
12 Cal.App.4th 253, 287.)

13 The exhaustion requirement applies even where threshold “questions concerning the
14 agency’s jurisdiction are presented” because the agency has the power “to determine in the first
15 instance, and before judicial relief may be obtained, whether a given controversy falls within [its]
16 statutory grant of jurisdiction.” (*McAllister v. County of Monterey, supra*, 147 Cal.App.4th at
17 p. 276, citing *United States v. Superior Court* (1941) 19 Cal.2d 189, 195; accord, *Walker v.*
18 *Munro* (1960) 178 Cal.App.2d 67, 71-72 [affirming summary judgment for Department of
19 Alcoholic Beverage Control on liquor dealers’ action to enjoin enforcement of Alcoholic
20 Beverage Control Act on Constitutional grounds, where Department’s enforcement action against
21 plaintiffs was pending].) The requirement also applies whether the party seeking judicial relief is
22 in the position of “plaintiff” or “defendant” in the administrative proceeding. (*Walker v. Munro,*
23 *supra*, 178 Cal.App.2d at p. 72.) It likewise applies even if the administrative proceeding will not
24 necessarily address every issue that the party seeks to resolve or provide the party with the exact
25 relief it seeks. (*Tejon Real Estate v. City of Los Angeles, supra*, 223 Cal.App.4th at p. 156;
26 *McAllister v. County of Monterey, supra*, 147 Cal.App.4th at p. 275.)

27 Courts have applied the doctrine of exhaustion of administrative remedies specifically to
28 actions against the Commission where the plaintiff, as here, has not exhausted the Commission’s

1 administrative procedures. (*Walter H. Leimert Co. v. California Coastal Com.* (1983)
2 149 Cal.App.3d 222, 232-33 [affirming judgment for Commission on property owner’s
3 declaratory relief claim that challenged conditions imposed on water services district’s permit;
4 property owner failed to first appeal decision to Commission under Coastal Act]; accord,
5 *McAllister v. County of Monterey, supra*, 147 Cal.App.4th at pp. 266, 285-88 [affirming orders
6 sustaining demurrers to plaintiff’s claims against Commission and County; plaintiff failed to
7 exhaust administrative remedies under Coastal Act].)

8 The California Supreme Court has addressed the very issue raised here and held that alleged
9 Coastal Act violators must raise their claim of exemption before the Commission before seeking
10 relief in the courts. (*South Coast Regional Com. v. Gordon* (1977) 18 Cal.3d 832.) In *Gordon*, the
11 South Coast Regional Commission filed a court action against a property owner, Gordon, alleging
12 that he was building a house in its permit area without having obtained the necessary permit. The
13 action sought an injunction and penalties against Gordon. Gordon raised as a defense that he did
14 not need to obtain a coastal permit and attempted to litigate the defense in the superior court. The
15 Supreme Court determined that Gordon was not entitled to raise the defense because he had not
16 exhausted his available administrative remedy. The Court ruled that even though Gordon did not
17 apply for a permit because of his view that one was not required, and did not initiate the superior
18 court litigation, he was still required to apply for a permit, raise his exemption claim to the
19 administrative agency, and obtain a final agency decision as a predicate to seeking judicial review
20 of his exemption claim. (*Id.* at pp. 870-71.)

21 An administrative agency may assert the exhaustion requirement on demurrer. (*Tejon Real*
22 *Estate, LLC v. City of Los Angeles, supra*, 223 Cal.App.4th at p. 156; *Tri-County Special Educ.*
23 *Local Plan Area v. County of Tuolumne* (2004) 123 Cal.App.4th 563, 574-75.) Accordingly, in a
24 variety of administrative contexts, courts have applied this requirement at the pleading stage to
25 dismiss actions – like plaintiffs’ – that seek a judicial determination of matters that the
26 administrative agency must determine in the first instance.

27 For example, in *Tejon Real Estate, supra*, the City of Los Angeles advised a landowner that
28 City utility rules prohibited the landowner from receiving water service without a nearby fire

1 hydrant. The landowner challenged the City's application of this rule by suing for a judicial
2 declaration of whether the City's rules would permit the water infrastructure the landowner
3 proposed. The Court of Appeal affirmed the trial court's order sustaining the City's demurrer
4 without leave to amend. The Court held that by not applying to the City for a permit or receiving
5 a final administrative decision from the City, the landowner failed to exhaust available
6 administrative remedies and could not prosecute its civil action. (*Id.* at pp. 156-57.)

7 Similarly, in *Tri-County Special Education Local Plan Area, supra*, a local agency that
8 oversaw special education services sued the County and its representatives for declaratory relief,
9 alleging defendants improperly terminated mental health services in response to a reduction in
10 state funding. The Court of Appeal affirmed the trial court's order sustaining the defendants'
11 demurrer without leave to amend, because the agency failed to first exhaust available
12 administrative procedures for resolving inter-governmental disputes over the provision of special
13 educational services. (*Id.* at pp. 574-75.) The Court explained that the exhaustion requirement
14 applies with particular force to declaratory relief actions: "The declaratory relief provisions do
15 not independently empower the courts to stop or interfere with administrative proceedings by
16 declaratory decree." (*Id.* at p. 576, citing *Walker v. Munro, supra*, 178 Cal.App.2d at p. 72.)

17 In addition to dismissing actions at the pleading stage for violation of the exhaustion
18 requirement, courts have also reversed lower court orders that would interfere with a pending
19 administrative proceeding. In *Abelleira, supra*, the California Employment Commission
20 determined that individual longshoremen were entitled to unemployment benefits. Their
21 employers first obtained a writ from the Court of Appeal that enjoined the Commission from
22 paying benefits. The employers then filed an administrative appeal of the Commission's
23 determination. The California Supreme Court issued a writ prohibiting enforcement of the Court
24 of Appeal's writ based on the pending administrative appeal. The Court ruled that the
25 Commission "ha[d] not yet determined the facts upon which the right to benefits depends, and
26 until it does so, it [was] improper for a reviewing court to consider the claims on their merits."
27 (*Id.* at p. 286.) The Court explained: "The importance of [this] issue can hardly be over-estimated,
28 since a curtailment of administrative jurisdiction usually means an enlargement of the duties of

1 courts in a field in which the courts traditionally are reluctant to enter.” (*Ibid.*; accord, *Board of*
2 *Police Commissioners v. Superior Court, supra*, 168 Cal.App.3d at pp. 432, 434 [trial court
3 exceeded its jurisdiction in enjoining Board’s pending administrative action against a business
4 owner for Municipal Code violations, holding owner failed to exhaust administrative remedies].)

5 These authorities preclude plaintiffs from prosecuting this declaratory relief action against
6 the Commission. Plaintiffs’ action asks this Court to engage in the very type of interference in a
7 pending administrative proceeding that the exhaustion requirement serves to prevent. In its
8 enforcement proceeding against plaintiff West Newport Oil, the Commission will determine,
9 among other things, the exact issue that plaintiffs ask this Court to judicially declare: whether the
10 1973 Resolution of Exemption exempts from the Coastal Act’s permit requirement the oil-related
11 development that is the subject of the Commission’s action, or whether West Newport Oil must
12 instead secure a coastal development permit for these activities. (RFJN, Exh. 3.)

13 California law requires the Commission, not the courts, to determine the merits of this
14 dispute in the first instance. Under the case law cited above, judicial interference with the
15 Commission’s pending proceeding would constitute reversible error. That plaintiffs purport to
16 challenge the Commission’s threshold jurisdiction to decide the issues in its enforcement
17 proceeding does not change this result. (*McAllister, Walker, supra.*) Plaintiffs’ unfounded
18 invective accusing the Commission of engaging in “bias,” “recklessness,” and “duress” against
19 them does not change this result either. (Complaint, ¶¶ 17, 29, 38.) Nor does the fact that West
20 Newport Oil is the party against which the Commission initiated the proceeding, rather than the
21 party that initiated it. (*Walker, supra.*)

22 If plaintiffs wish to involve the courts in their disagreement with Commission staff over
23 whether the 1973 Resolution of Exemption renders their unpermitted oil-related development
24 permissible, they must wait until the Commission acts, by a final decision, to interpret it. Then,
25 they may challenge the Commission’s decision by a petition for writ of administrative mandamus
26 if they disagree with it. (Pub. Resources Code, § 30801.) Until then, California law bars plaintiffs
27 from prosecuting this action. No amendment or change to plaintiffs’ complaint will remedy this
28 defect.

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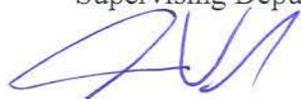
CONCLUSION

For the reasons discussed above, the Commission requests that the Court sustain its demurrer to plaintiffs' complaint without leave to amend.

Dated: October 3, 2014

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
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Supervising Deputy Attorney General



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*Attorneys for Defendant
California Coastal Commission*

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Horizontal Development LLC, et al. v. California Coastal Commission**

No.: **30-2014-00739490-CU-MC-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 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On **October 3, 2014**, I served the attached [**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO COMPLAINT**] by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, addressed as follows: 300 South Spring Street.

Tim Poane, Esq.
COX, CASTLE & NICHOLSON, LLP
19800 MacArthur Boulevard, Suite 500
Irvine, CA 92612-2435

*Attorneys for Plaintiff, Horizontal
Development LLC, et al.*

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **October 3, 2014**, at Los Angeles, California.

Teresa De Paz
Declarant



Signature