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23 UNITED STATES DISTRICT COURT  
24 CENTRAL DISTRICT OF CALIFORNIA

25 DENNIS SEIDER and LEAH SEIDER,  
26 as Trustees of the Seider Family Trust,

27 Plaintiffs,

28 v.

CITY OF MALIBU,

Defendant.

No. 2:20-cv-8781

**COMPLAINT**

**INTRODUCTION**

1. “The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.” *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 392 (1992). That is what we have

1 here: a City of Malibu ordinance designed to enforce majority preferences for open  
2 and public beach for all, regardless of private ownership of the beach. Plaintiffs  
3 Dennis and Leah Seider thus challenge the ordinance because their proposed speech,  
4 as described more fully below, does nothing more than lawfully and properly  
5 demarcate the line between where the plaintiffs' property line on the beach ends and  
6 the public's right of access to the beach begins. Because Malibu's ordinance is a  
7 content-based impermissible restriction on speech, the Court must declare the  
8 ordinance unconstitutional and unenforceable. Hanging a sign on one's property to  
9 declare it private property is a tradition likely as old as the country itself, and  
10 prohibiting such a trifling amount of speech amounts to nothing short of  
11 unconstitutional conduct that the Court cannot countenance.

12 2. The Seiders have an oceanfront home in Malibu, California. Their  
13 property extends seaward to the mean high-tide line. The last 25 feet of the beach  
14 before the mean high-tide line is burdened by a lateral access easement for the benefit  
15 of the public, but much of the dry sand beach is unencumbered, private beach. To put  
16 trespassers on notice and protect their property against future claims of prescriptive  
17 rights, the Seiders want to put up a simple, truthful sign on their property demarcating  
18 the boundary between unencumbered private property and the easement. In the  
19 absence of a sign, members of the public have asserted the right to remain on the  
20 Seiders' private property—specifically citing the lack of signage.

21 3. In the Coastal Zone, California law requires a Coastal Development  
22 Permit for most signs. The City of Malibu has jurisdiction and authority for  
23 permitting. When Dennis inquired about obtaining a permit for the proposed sign,  
24 Malibu's planning director explained in no uncertain terms that Malibu could not  
25 issue a permit for such a sign because the sign would violate a provision of the city's  
26 Local Implementation Plan (LIP) for coastal development that prohibit signs  
27 "purport[ing] to identify the boundary between State tidelands and private property."

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1 4. The Seiders sought to apply for a permit anyway, but found that Malibu  
2 requires them, as a condition of applying, to agree to indemnify the City “from and  
3 against all liability and costs relating to the City’s actions concerning [the] project,  
4 including (without limitation) any award of litigation expenses in favor of any person  
5 or entity who seeks to challenge the validity of any of the City’s actions or decisions  
6 in connection with [the] project.” Since the enforcement of this provision could cause  
7 Dennis and Leah significant liability even if the permit were granted, they chose not  
8 to apply and instead seek injunctive and declaratory relief.

9 5. In order to protect their property rights and vindicate their freedom of  
10 speech, the Seiders today bring this action seeking an injunction and a declaration  
11 that portions of Malibu’s LIP are inconsistent with the First Amendment, either as a  
12 prior restraint on speech or a content-based speech restriction. This action also seeks  
13 a declaration that the indemnification clause unconstitutionally conditions Dennis  
14 and Leah’s free speech rights on the agreement to pay Malibu’s legal bills.

15 6. This case lies at the intersection between free speech and property rights.  
16 Americans should not—and do not—need government permission to mark the  
17 boundaries of their private property in order to enforce their fundamental right to  
18 exclude trespassers. Yet, Malibu’s LIP demands that coastal property owners like the  
19 Seiders forfeit both their First Amendment and property rights. That much is  
20 unconstitutional.

## 21 **JURISDICTION AND VENUE**

22 7. This action arises under the First Amendment to the United States  
23 Constitution, incorporated against the States by the Fourteenth Amendment and  
24 enforced through 42 U.S.C. § 1983. The Court has jurisdiction under 28 U.S.C.  
25 §§ 1331 (federal question), 1343(a) (redress for deprivation of civil rights), and 1367  
26 (supplemental jurisdiction). Declaratory relief is authorized by the Declaratory  
27 Judgment Act, 28 U.S.C. §§ 2201-2202.

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1 8. Venue is proper in this district under 28 U.S.C. § 1391(b)(1)-(2).  
2 Defendant, the City of Malibu, is located within this district, and a substantial part of  
3 the events giving rise to this claim have occurred in the Central District of California.

4 9. A live controversy exists between the parties because the City of Malibu  
5 continues to prohibit the Seiders from posting a truthful sign describing the limits of  
6 the parcel they own.

7 10. A live controversy also exists with respect to the indemnification  
8 requirement because the City of Malibu continues to require permit applicants to  
9 agree to indemnify the City in order to apply for a sign permit.

#### 10 **PARTIES**

11 11. Plaintiff Dennis Seider is a retired attorney who practiced law in  
12 California for over 40 years. He is an inactive member of the California bar. He and  
13 his wife, Plaintiff Leah Seider, are Trustees and Trustors of the Seider Family Trust,  
14 which owns the property located at 26642 Latigo Shore Drive in Malibu, California  
15 (“the Property”).

16 12. Defendant City of Malibu is a municipality in Los Angeles County,  
17 California. Pursuant to the Coastal Act, Defendant has had primary permitting  
18 authority for all Coastal Development Permits, including the sign permit at issue in  
19 this case, since the California Coastal Commission (“Coastal Commission”)  
20 certified its Local Coastal Program in 2002.

#### 21 **FACTUAL ALLEGATIONS**

##### 22 ***Coastal Act and Malibu’s Local Coastal Plan***

23 13. In 1976, California enacted the Coastal Act, Cal. Pub. Res. Code  
24 § 30000, *et seq.*, in order to—among other things—“[m]aximize public access to and  
25 along the coast and maximize public recreational opportunities in the coastal zone  
26 consistent with sound resources conservation principles and constitutionally  
27 protected rights of private property owners.” *Id.* § 30001.5(c).

28 ///

1           14. The Coastal Act requires municipalities such as Malibu to create “Local  
2 Coastal Programs” (“LCPs”) for certification by the Coastal Commission. *See id.* §  
3 30500(a) (“Each local government lying, in whole or in part, within the coastal zone  
4 shall prepare a local coastal program for that portion of the coastal zone within its  
5 jurisdiction.”); *id.* § 30512 (describing certification procedure). When the Coastal  
6 Commission certifies an LCP, it vests the authority to grant or deny coastal  
7 development permits (CDPs) to the local government, although it retains appellate  
8 jurisdiction over permitting. *Id.* § 30519(a).

9           15. Malibu’s LCP was certified in 2002 and it has had permitting authority  
10 along its shoreline, including authority over sign permits, ever since. Once certified,  
11 no part of an LCP can be amended without the Commission’s certification.

12           16. One portion of an LCP is a Local Implementation Plan (“LIP”),  
13 which consists of ordinances enacted to implement the LCP. Malibu’s LIP,  
14 current as of February 2019, is available here:  
15 [https://www.malibucity.org/DocumentCenter/View/4421/Malibu-Local-](https://www.malibucity.org/DocumentCenter/View/4421/Malibu-Local-Implementation-Plan-LIP-?bidId=)  
16 [Implementation-Plan-LIP-?bidId=](https://www.malibucity.org/DocumentCenter/View/4421/Malibu-Local-Implementation-Plan-LIP-?bidId=) (last visited Sept. 14, 2020).

17 ***Malibu LIP’s Sign Permitting Scheme***

18           17. Malibu’s LIP subjects most signs to a permitting requirement.  
19 Exempted signs are listed in Section 3.15.4(D) of the LIP.

20           18. For those signs requiring a permit, a permit applicant must seek a CDP  
21 on a form provided by Malibu’s Planning Department. Permit applicants must pay a  
22 fee and provide certain information, including current development on the property;  
23 the proposed location of the sign; the proposed design, size, and colors of the sign;  
24 how the sign will be attached; the sizes and dimensions of all other signs on the  
25 property; photographs of the sides of all buildings on the property; and “[s]uch other  
26 information as the Planning Department may require to secure compliance with this  
27 Chapter.” LIP § 3.15.4(A)(9).

28 ///

1           19. The Planning Manager then reviews all permit applications in light of  
2 eleven criteria specified in the LIP. *Id.* § 3.15.4(B). Many of these criteria are  
3 objective, but some are not. The Planning Manager must determine, for example, that  
4 the proposed sign “is not detrimental to the public health, safety, or welfare,” that  
5 “the size, shape, color, and placement of the sign is compatible with the  
6 neighborhood,” and that “a proposed sign in close proximity to any residential district  
7 does not adversely affect the quality or character of such residential area.” *Id.*  
8 § 3.15.4(C).

9           20. Certain signs are prohibited altogether, such that no permit will issue for  
10 them. LIP § 3.15.3. While most of these are content-neutral—such as the bans on  
11 “[p]rojecting signs,” “[r]evolving signs,” and [d]evices dispensing bubbles and free  
12 floating particles of matter”—Section 3.15.3(X) explicitly refers to the content of the  
13 sign, prohibiting “[s]igns which restrict public access to State tidelands, public  
14 vertical or lateral access easement areas, or which purport to identify the boundary  
15 between State tidelands, and private property[.]” Although arguably this portion of  
16 the LIP does not apply to the Seiders’ sign, since their sign identifies a boundary  
17 between an easement over the private property and the unencumbered private  
18 property, Malibu takes the position that this portion applies to the Seiders’ proposed  
19 sign.

20 ***Malibu CDP Application—Indemnification Clause***

21           21. Malibu requires property owners to fill out a form to begin the process  
22 of applying for a CDP. The current form is available here:  
23 [https://www.malibucity.org/DocumentCenter/View/13101/Application\\_Uniform?bi  
24 dId=](https://www.malibucity.org/DocumentCenter/View/13101/Application_Uniform?bidId=) (last visited Sept. 14, 2020).

25           22. The permit application form includes an “indemnification clause,” to  
26 which each applicant must agree before he or she may submit an application for a  
27 CDP. The indemnification clause reads:  
28

1 The property owners, and their successors in interest, shall indemnify  
2 and defend the City of Malibu and its officers, employees and agents  
3 from and against all liability and costs relating to the City's actions  
4 concerning this project, including (without limitation) any award of  
5 litigation expenses in favor of any person or entity who seeks to  
6 challenge the validity of any of the City's actions or decisions in  
7 connection with this project. The City shall have the sole right to choose  
8 its counsel and property owners shall reimburse the City's expenses  
9 incurred in its defense of any lawsuit challenging the City's actions  
10 concerning this project.

11 ***Background on the Property***

12 23. In 1976, the Seiders' predecessor-in-interest, Alexander Keith, sought a  
13 permit from the then-existing South Coast Regional Commission (a predecessor  
14 agency to the Coastal Commission) to build a single-family home on the Property.  
15 The South Coast Regional Commission granted the permit on the condition that Keith  
16 record a deed restriction granting lateral public access up to 25 feet inland of the  
17 mean high tide line (except not where 25 feet inland would be within 5 feet of the  
18 permitted structure). Upon information and belief, Keith recorded the deed  
19 restriction. The permit grant is attached as Exhibit 1.

20 24. When the Seiders came into possession of the Property, they were  
21 initially unaware of the deed restriction due to a mistake on the part of the title  
22 insurance company. At one point, Dennis contested the validity of the lateral access  
23 easement, but he now recognizes its validity.

24 25. In 2018, a sign reading "PRIVATE BEACH" was positioned on the  
25 crossbeams below the Seiders' house, facing the beach, in order to establish their  
26 property ownership. A photograph of this location is attached as Exhibit 2.

27 26. On April 29, 2020, the Coastal Commission sent Dennis and Leah a  
28 Notice of Violation of the California Coastal Act related to the "PRIVATE BEACH"  
sign. The Coastal Commission stated that the sign was unpermitted, that its content  
was contrary to the 1976 deed restriction, and that it violated Section 3.15.3(X) of  
the Malibu LIP. The Coastal Commission gave Dennis and Leah until May 13, 2020,

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1 to remove the sign. The Seiders removed the sign. This letter is attached as Exhibit  
2 3.

3 ***Dennis' Attempt to Apply for a Sign CDP***

4 27. Although Dennis took down the "PRIVATE BEACH" sign, the Seiders  
5 sought to put up a replacement sign that would explain the existence of the lateral  
6 access easement so as to not run afoul of the Coastal Commission's objection.

7 28. Dennis and Leah needed the sign because, in the absence of signage,  
8 they have dealt with an influx of trespassers who assume the beach behind the house  
9 is entirely public. When Dennis politely informs these trespassers that much of the  
10 dry sand is private property—and that the public only has an easement over the  
11 remainder—beachgoers often appeal to the lack of signage in asserting that the beach  
12 is public. A true and accurate sign is the only practical way for Dennis and Leah to  
13 protect their property rights and avoid potential confrontations with beachgoers.  
14 Although Dennis often welcomes beachgoers to stay for a particular day, he also  
15 asserts his family's property rights and informs the beachgoers of public beaches a  
16 short distance away.

17 29. The current COVID-19 pandemic has exacerbated the problem. Since  
18 many public beaches are closed, more beachgoers have come onto the Property. The  
19 lack of signage has significantly hindered the Seiders' ability to enforce their property  
20 rights, including their right to exclude trespassers.

21 30. For these reasons, Dennis sought to apply for a CDP from Malibu. On  
22 June 1, 2020, he emailed Malibu Planning Director Bonnie Blue asking about the  
23 permit process. He inquired:

24 I would like to apply for a permit to put up a sign on our house saying  
25 something like "PRIVATE PROPERTY FROM THIS SIGN \_\_\_ FEET  
26 SEAWARD AFTER WHICH THE PUBLIC HAS A LATERAL  
27 ACCESS ALONG THE SHORE" or something similar that is  
unambiguous and is still useful to the beach going public. I will have  
the property surveyed so the sign is accurate. How is getting the permit  
best done?

28 This email is included as part of Exhibit 4.



1           31. On June 9, 2020, Blue responded that “[a]ccording to the LCP, a sign  
2 like this is not allowed. I’ve included the code section below. If you wanted to apply  
3 anyway, a CDP would be needed.” The cited code section was LIP § 3.15.3(X), the  
4 prohibition on “[s]igns which restrict public access to State tidelands, public vertical  
5 or lateral access easement areas, or which purport to identify the boundary between  
6 State tidelands, and private property[.]” This email is included as part of Exhibit 4.

7           32. On June 10, 2020, Dennis again emailed Blue, noting that he

8           thought the sign was worded so as to not offend the language of the LIP  
9 prohibition as it does not restrict access to tidelands or lateral access  
10 nor does it identify a boundary between our property and the tidelands  
11 but does indicate instead delineate the boundary between our  
unburdened property and that part of our property burdened by a public  
lateral access . . . .

12 Dennis expressed concern that “we have quite a few folks that have come to sit under  
13 our house or on the beach immediately in front of our house and when we come down  
14 to use the beach they sometimes abusive in their refusal to move, asking ‘. . .Where  
15 does it say this is private property; this is the Republic of California—I know my  
16 rights—I can sit wherever I want . . . etc.’” This email is also included in Exhibit 4.

17           33. Despite the denial, Dennis sought to apply for a CDP anyway. On  
18 June 12, 2020, he downloaded the CDP application form described above (paragraph  
19 21) and filled out most of it. However, he stopped at the indemnification clause and  
20 refused to agree, believing that it could subject he and Leah to significant liability  
21 whether or not the permit was ultimately granted.

22           34. On June 15, 2020, Dennis emailed Blue and the members of the Malibu  
23 City Council to describe his problem with beachgoers trespassing on the private  
24 portion of his beach. He noted that:

25           My neighbors and I have had an unusually large number of folks  
26 coming to the beach at Latigo by walking down our private street and  
27 using Tivoli Condominiums private stairs to access the sand, a series of  
28 private beaches with some deeded lateral access, because the nearest  
public access is blocked by the MRCA who states that it is being  
blocked at the order of the Los Angeles County Board of Supervisors.

1 He urged that the City Council repeal the prohibition on his proposed sign. This email  
2 is included in Exhibit 5. Blue wrote back on June 26 noting that any changes to the  
3 LIP would have to be approved by the Coastal Commission. That response is  
4 included in Exhibit 6.

5 35. On June 17 Dennis emailed Blue again, asking whether “an agreement  
6 to indemnify the city” was a “necessary part of the application for a CDP regarding  
7 a beach property sign.” This email is also included in Exhibit 4. Dennis noted: “I  
8 certainly don’t have the money to engage in that kind of Litigation.” Blue indicated  
9 in response on June 26 that Dennis could not apply for a permit without agreeing to  
10 the indemnification provision. That response is included in Exhibit 6.

11 36. Due to the indemnification clause, Dennis decided not to formally apply  
12 for a permit.

13 37. On June 29, 2020, Dennis and Leah had the Property surveyed by Chris  
14 Nelson & Associates. The survey, which is attached as Exhibit 7, demarcates the  
15 mean high-tide line as well as the location of the lateral access easement. It shows a  
16 significant portion of dry sand beach not within the easement.

17 38. On September 10, 2020, Dennis emailed Blue again and proposed an  
18 alternative sign that would simply state the boundaries of the Property by reference  
19 to the mean high-tide line, rather than attempt to ascertain the location of the line.  
20 The proposed sign would have read:

21 PRIVATE PROPERTY EXTENDS TO HOUSE FROM 25 FEET  
22 LANDWARD OF MEAN HIGH TIDE LINE  
23 TO INCLUDE 25 FOOT LATERAL PUBLIC ACCESS

24 Blue indicated that this sign, too, would run afoul of the LIP. A further email from  
25 Blue emphasized that any sign on the beach describing the boundary of Dennis’s  
26 private property would violate Section 3.15.3(X) of the LIP. These emails are  
27 attached as Exhibit 8.

28 ///

1 39. Blue’s September 10 response did invite Dennis to apply for a permit  
2 with the new language, but Dennis was still unwilling to agree to the indemnification  
3 clause. He also did not want to go through a futile permit application process.

4 40. Although the mean high-tide line is not a static location, it establishes  
5 by reference the true boundary of the Property. The prohibition in Section 3.15.3(X)  
6 of Malibu’s LIP prohibits Dennis and Leah from informing the public as to the true  
7 and accurate boundaries of their property. They are unable to use the surveyed  
8 location of the mean high-tide line or even reference the mean high-tide line itself on  
9 a sign. As such, they have no practical way to enforce their property rights.

10 41. The prohibition in Section 3.15.3(X) also leaves Dennis and Leah at risk  
11 of future claims of a prescriptive easement for the benefit of the public if they are not  
12 permitted to post adequate signage demarcating their property. The Coastal  
13 Commission openly solicits from the public evidence of public use over private  
14 property as part of its ongoing efforts to obtain prescriptive rights against private  
15 landowners. *See Public Access Prescriptive Rights, California Coastal Commission,*  
16 <https://www.coastal.ca.gov/access/prescriptive->  
17 [rights/#:~:text=This%20is%20called%20a%20public,for%20significant%20public](https://www.coastal.ca.gov/access/prescriptive-rights/#:~:text=This%20is%20called%20a%20public,for%20significant%20public%20access%20benefits.)  
18 [%20access%20benefits.](https://www.coastal.ca.gov/access/prescriptive-rights/#:~:text=This%20is%20called%20a%20public,for%20significant%20public%20access%20benefits.)

19 **FIRST CAUSE OF ACTION**

20 **(Violation of the First Amendment — Content Based Speech Restriction)**

21 42. Plaintiffs hereby re-allege each and every allegation contained in  
22 Paragraphs 1 through 41 as though fully set forth herein.

23 43. The First Amendment to the United States Constitution provides in  
24 relevant part that “Congress shall make no law . . . abridging the freedom of speech  
25 . . . .” U.S. Const. amend. I. The Fourteenth Amendment incorporates the First  
26 Amendment’s protections against the States. *Gitlow v. New York*, 268 U.S. 652, 666  
27 (1925).

28 ///

1           44. Defendant City of Malibu is a “person” within the meaning of 42 U.S.C.  
2 § 1983. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978). In denying  
3 Plaintiffs’ request for a CDP and enforcing the indemnification clause against  
4 Plaintiffs, Defendant acted under color of state law. Defendant retains policies, as  
5 part of the LIP certified by the Coastal Commission, which effectively prohibit them  
6 from obtaining the necessary CDP.

7           45. The Supreme Court has held that content-based speech restrictions must  
8 satisfy strict scrutiny, “which requires the Government to prove that the restriction  
9 furthers a compelling interest and is narrowly tailored to achieve that interest.” *Reed*  
10 *v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (quoting *Ariz. Free Enterprise Club’s*  
11 *Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011)). A restriction on signs is  
12 content-based when “[t]he only way to determine” whether a sign is prohibited is “to  
13 evaluate the content and substantive message of the sign.” *G.K. Ltd. Travel v. City of*  
14 *Lake Oswego*, 436 F.3d 1064, 1078 (9th Cir. 2006).

15           46. Because Malibu officials must read the content of Plaintiffs’ sign to  
16 determine whether it is prohibited, Section 3.15.3(X) of Malibu’s LIP is a content-  
17 based speech restriction. If Plaintiffs’ proposed sign read “PUBLIC WELCOME ON  
18 BEACH,” it would not run afoul of any prohibition, even if it were the same size,  
19 location, and color. It is the message of Plaintiffs’ sign—that their unencumbered  
20 private property extends to a particular point, where a public easement begins—that  
21 makes it illegal.

22           47. Malibu lacks a compelling interest in preventing Plaintiffs from posting  
23 a true and accurate sign demarcating their private property lines in order to deter  
24 trespassers.

25           48. Malibu’s total prohibition of signs describing oceanfront property is not  
26 narrowly tailored to any interest Malibu might have, such as promoting public access  
27 to the beach.

28 ///

1 49. Because Section 3.15.3(X) of the Malibu LIP is a content-based  
2 restriction on speech that is not narrowly tailored to further a compelling government  
3 interest, Plaintiffs are entitled to relief in the form of a declaration that the Section is  
4 unconstitutional as applied to Plaintiffs' proposed sign demarcating the true and  
5 accurate boundaries of his property. Plaintiffs are also entitled to injunctive relief  
6 prohibiting Malibu from enforcing Section 3.15.3(X) against Plaintiffs.

## 7 SECOND CAUSE OF ACTION

### 8 (Violation of the First Amendment — Prior Restraint)

9 50. Plaintiffs hereby re-allege each and every allegation contained in  
10 Paragraphs 1 through 41 as though fully set forth herein.

11 51. The First Amendment to the United States Constitution provides in  
12 relevant part that "Congress shall make no law . . . abridging the freedom of speech  
13 . . . ." U.S. Const. amend. I. The Fourteenth Amendment incorporates the First  
14 Amendment's protections against the States. *Gitlow*, 268 U.S. at 666.

15 52. Defendant City of Malibu is a "person" within the meaning of 42 U.S.C.  
16 § 1983. *Monell*, 436 U.S. at 690. In denying Plaintiffs' request for a CDP and  
17 enforcing the indemnification clause against Plaintiffs, Defendant acted under color  
18 of state law.

19 53. Defendant retains policies, as part of the LIP certified by the Coastal  
20 Commission, which grant Malibu officials nearly unbridled discretion to deny a sign  
21 CDP even if Plaintiffs' sign did not run afoul of Section 3.15.3(X) of the LIP.

22 54. "Prior restraints on speech present some of the 'most serious and the  
23 least tolerable infringement' on free speech rights." *Cuviello v. City of Vallejo*, 944  
24 F.3d 816, 831 (9th Cir. 2019) (quoting *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559  
25 (1976)). A sign permitting scheme is a prior restraint on speech. *Desert Outdoor*  
26 *Advert., Inc. v. City of Moreno Valley*, 103 F.3d 814, 818-19 (9th Cir. 1996).

27 55. Sign permitting criteria is an unconstitutional prior restraint on speech  
28 when such criteria is not "sufficiently specific and objective so as to effectively place

1 some ‘limits on the authority of City officials to deny a permit.’” *Epona, LLC v.*  
2 *County of Ventura*, 876 F.3d 1214, 1222 (9th Cir. 2017) (quoting *Moreno Valley*, 103  
3 F.3d at 819).

4 56. Several criteria listed in the Malibu LIP require “broadly subjective  
5 determinations” on the part of City officials, which renders them invalid prior  
6 restraints. *Desert Outdoor Advert., Inc. v. City of Oakland*, 506 F.3d 798, 807 (9th  
7 Cir. 2007). These criteria are: the sign is “is not detrimental to the public health,  
8 safety, or welfare,” “the size, shape, color, and placement of the sign is compatible  
9 with the neighborhood,” and that “a proposed sign in close proximity to any  
10 residential district does not adversely affect the quality or character of such  
11 residential area.” LIP § 3.15.4(C).

12 57. Because these three criteria essentially grant City officials “unbridled  
13 discretion” to deny a permit based on subjective criteria, a permit requirement subject  
14 to such requirements is an unconstitutional prior restraint on speech. *Epona*, 876 F.3d  
15 at 1222.

16 58. In order to justify a prior restraint, Malibu must demonstrate that the  
17 restraint is justified without reference to the content of the speech, and is narrowly  
18 tailored to serve a compelling governmental interest. Such amorphous criteria have  
19 little meaning if not to regulate content—objective criteria suffice to limit the place  
20 and manner of signage—and Malibu has no compelling interest in such regulation.

21 59. Because Malibu may maintain a sign permitting scheme so long as the  
22 criteria for obtaining a permit are specific and objective, Plaintiffs seek only a  
23 declaration that the three criteria described in Paragraph 56 are unconstitutional both  
24 on their face and as applied to Plaintiffs’ proposed sign. Plaintiffs are entitled to  
25 injunctive and declaratory relief.

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**THIRD CAUSE OF ACTION**

**(Indemnification Clause — Unconstitutional Condition)**

60. Plaintiffs hereby re-allege each and every allegation contained in Paragraphs 1 through 41 as though fully set forth herein.

61. Defendant City of Malibu is a “person” within the meaning of 42 U.S.C. § 1983. *Monell*, 436 U.S. at 690. In requiring Plaintiff to agree to the indemnification clause, Defendant acted under color of state law.

62. The Supreme Court has “held that the Government ‘may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.’” *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214 (2013) (quoting *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006)).

63. The indemnification clause substantially burdens Plaintiffs’ free speech rights—it effectively prohibits them from even applying for a sign CDP unless they agree to pay a potentially substantial, and certainly unknown, amount of money to defend Malibu against any challenges, even frivolous challenges, that may arise as to its actions regarding the permit. On its face, the indemnification clause applies both to permits grants and denials, meaning that Plaintiffs would be forced to pay for Malibu’s defense of his own suit challenging a permit denial. And even if Malibu granted a permit, Plaintiffs may have to pay a significant sum should any third-party challenge Malibu’s decision to grant the permit.

64. The potential for substantial liability chills Plaintiffs’ free speech rights to the point of dissuading him from applying for a CDP.

65. Because the indemnification clause unconstitutionally conditions Plaintiffs’ receipt of—and even application for—a permit to speak on such uncertain and potentially substantial future liability, it is an unconstitutional condition as applied to them. Plaintiffs are therefore entitled to injunctive and declaratory relief.

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1 **FOURTH CAUSE OF ACTION**

2 **(Indemnification Clause — Infringement on First Amendment Rights)**

3 66. Plaintiffs hereby re-allege each and every allegation contained in  
4 Paragraphs 1 through 41 as though fully set forth herein.

5 67. Defendant City of Malibu is a “person” within the meaning of 42 U.S.C.  
6 § 1983. *Monell*, 436 U.S. at 690. In requiring Plaintiff to agree to the indemnification  
7 clause, Defendant acted under color of state law.

8 68. Aside from being an unconstitutional condition on the ability to apply  
9 for a CDP, the indemnification clause is also an unconstitutional infringement on  
10 Plaintiffs’ free speech rights. Even content-neutral infringements like the  
11 indemnification clause may pose First Amendment problems. Such “time, place, and  
12 manner” restrictions must be narrowly tailored to further a significant government  
13 interest. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Long*  
14 *Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1039-40 (9th Cir.  
15 2009).

16 69. The City of Malibu may have a significant interest in protecting itself  
17 from financial liability in the form of lawsuits, but the indemnification clause is not  
18 narrowly tailored to protect that interest. Instead, it burdens far more speech than  
19 necessary and chills expression by exposing Plaintiffs to an “unknown amount of  
20 liability” *iMatter Utah v. Njord*, 980 F. Supp. 2d 1356, 1381 (D. Utah. 2013). Such  
21 liability could result merely from organizations opposed to private ownership of the  
22 beach deciding to sue Malibu should it grant the permit. *Cf. id.* (“The organization is  
23 required to defend the State against all third-party claims alleging some action by a  
24 member of the organization, even if those claims are frivolous. Third parties who  
25 disagree with the content of the organization’s speech could use this tactic to punish  
26 an organization after the event.”).

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1           70. The indemnification clause is also overbroad because it would require  
2 Plaintiffs to pay for the City’s defense of *their own suit* challenging Malibu’s decision  
3 to deny a sign CDP.

4           71. Because the indemnification clause limits Plaintiffs’ free speech and is  
5 not narrowly tailored to further a significant government interest, it is  
6 unconstitutional. Plaintiffs are thus entitled to injunctive and declaratory relief.

7                                   **FIFTH CAUSE OF ACTION**

8   **(Ultra Vires)**

9           72. Plaintiffs hereby incorporate and re-allege each and every allegation  
10 contained in Paragraphs 1 through 41 as though fully set forth herein.

11           73. California law recognizes a cause of action where a municipality takes  
12 action contrary to its own governing laws. *See, e.g., City and County of San*  
13 *Francisco v. Board of Permit Appeals*, 207 Cal. App. 3d 1099, 1105 (1989).

14           74. Section 3.15.3(X) of the LIP explicitly refers to the content of the sign,  
15 prohibiting “[s]igns which restrict public access to State tidelands, public vertical or  
16 lateral access easement areas, or which purport to identify the boundary between  
17 State tidelands, and private property[.]”

18           75. Should the Court conclude that the text of the LIP does not prohibit the  
19 proposed signs, then Malibu’s denials constitute ultra vires action which is void under  
20 California law. In this circumstance, it is not the LIP that restricts Plaintiffs’ speech,  
21 but Malibu’s actions that contradict the LIP.

22           76. The Seiders’ proposed signs do not restrict public access to State  
23 tidelands, public vertical or lateral access easement areas, or purport to identify the  
24 boundary between State tidelands and private property. The proposed signs identify  
25 the boundary between the Seiders’ unencumbered property and the lateral easement  
26 area on their own private property.

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1 77. This Court has jurisdiction over this state law claim under 28 U.S.C.  
2 § 1367 because it is so closely related to Plaintiffs’ federal claims that it forms part  
3 of the same case or controversy.

4 78. Because the City of Malibu’s actions in prohibiting the Seiders’ sign are  
5 ultra vires, Plaintiffs are entitled to injunctive and declaratory relief.

6 **PRAYER FOR RELIEF**

7 1. An entry of judgment declaring that Section 3.15.3(X) of the Malibu  
8 LIP, which restricts signs that “purport to identify the boundary between State  
9 tidelands and private property,” is an unconstitutional content-based speech  
10 restriction, or alternatively an entry of judgment declaring that this section does not  
11 prohibit the Seiders’ sign and thus any reliance upon that section by Malibu to  
12 prohibit the sign is ultra vires and unenforceable.

13 2. An entry of a permanent injunction prohibiting Defendant from  
14 enforcing LIP Section 3.15.3(X) against Plaintiffs.

15 3. An entry of judgment declaring that the provisions of Section 3.15.4(B)  
16 requiring the Malibu Planning Director to determine whether a sign “is not  
17 detrimental to the public health, safety, or welfare,” that “the size, shape, color, and  
18 placement of the sign is compatible with the neighborhood,” and that “a proposed  
19 sign in close proximity to any residential district does not adversely affect the quality  
20 or character of such residential area,” transform Malibu’s sign permitting process into  
21 an unconstitutional prior restraint and therefore are facially unconstitutional.

22 4. An entry of judgment declaring that the provisions of Section 3.15.4(B)  
23 referenced in the previous paragraph are unconstitutional as applied to Plaintiffs.

24 5. An entry of a permanent injunction prohibiting Defendant from  
25 enforcing the challenged provisions of LIP Section 3.15.4(B) against Plaintiffs.

26 6. An entry of judgment declaring that the indemnification clause  
27 contained in the City of Malibu’s CDP application form imposes an unconstitutional  
28 condition on Plaintiffs’ free speech rights.

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7. An entry of judgment declaring that the indemnification clause unconstitutionally infringes Plaintiffs’ First Amendment rights.

8. An entry of a permanent injunction prohibiting Defendant from requiring Plaintiffs to agree to the indemnification clause as a condition of applying for a CDP.

9. An award of attorneys’ fees and costs in this action pursuant to 42 U.S.C. § 1988.

10. An award of any further legal or equitable relief this Court may deem just and proper.

DATED: September 24, 2020.

Respectfully submitted,  
CHRISTOPHER M. KIESER  
JEREMY TALCOTT  
MARK MILLER\* (*Pro Hac Vice Pending*)

By s/ Jeremy Talcott  
JEREMY TALCOTT

*Attorneys for Plaintiffs*