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Coastal panel's power in high court's hands

By Claire Cooper -- Bee Legal Affairs Writer
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Rodolphe Streichenberger didn't set out to sink the California Coastal Commission. His goal was more ambitious.

"Planting the sea," the French economics researcher called it.

He would line the ocean floor with "decommissioned material" - chiefly old tires. Seaweed would attach itself and then various invertebrates. Increasingly complex life forms would follow, attracted to what would become a "marine forest." The idea was to feed the world.

While that goal remains distant, Streichenberger now has a more immediate one ending the "ecoterrorism," as he calls it, that deep-sixed his marine forest outside Newport harbor.

"There is no science to it," Coastal Commission executive director Peter Douglas said of Streichenberger's dream.

Streichenberger said there's "plenty of science." The problem, he said, is the tyranny of the commission, which voted unanimously to deny him a permit.

On Wednesday, the California Supreme Court will take up the dispute.

It's no longer about old tires, though, and Streichenberger no longer is on the defensive. It's the commission that's on the line after two losses in the lower courts.

The stakes could be enormous.

The justices are considering the legal status of every act the commission has ever taken. As they've defined the case, it calls into question about 100,000 permits, dozens of offshore oil and gas leases, and myriad conditions placed on all kinds of construction in the past 27 years.

"Chaos on the coast," predicts Douglas, if the worst-case scenario comes to pass. And it may.

The lower courts - Sacramento Superior Court Judge Charles Kobayashi and then the 3rd District Court of Appeal - said the commission since its inception has violated the constitutional doctrine of separation of powers.

Although the commission is "subservient to the Legislature," which appoints eight of the 12 commissioners, it performs an executive function, interpreting and implementing the California Coastal Act, said the Court of Appeal in 2002.

The chief problem, wrote Presiding Justice Arthur Scotland, was the commissioners' "at will" terms, meaning they could be removed at any time by the Senate Rules Committee or the Assembly speaker.

In 2003, the Legislature changed the law in an effort to salvage the commission. Commissioners now are appointed to fixed four-year terms.

The Supreme Court will hear arguments this week on whether the amendment was sufficient.

It wasn't, contends Streichenberger's lawyer, well-known property rights champion Ronald Zumbrun.

And even if it were adequate for the future, says Zumbrun's brief, "past decisions made by the formerly unconstitutional agency remain null and void."

In an interview, Zumbrun said he would be happy with a less-sweeping victory than that statement suggests. He says his targets aren't so much the commission's permit approvals and denials.

What he's really after are the open-space set-asides and beach access paths often required by the commission as its price for permitting development. Those are uncompensated land grabs, forbidden by the U.S. Constitution, Zumbrun says.

Not surprisingly, the Pacific Legal Foundation co-founder has drawn support from many who have long opposed the Coastal Commission on any of a broad range of issues.

Briefs have been filed by the California Building Industry Association, as well as large and small developers and Realtors, many of whom have their own suits against various commission decisions.

One couple chafe at the commission's 10,000-square-foot limit on development of their Santa Monica Mountains property. Another commission foe, a San Mateo County physician, says the commission demanded \$200,000 because he failed to obtain permits before rebuilding his, oceanfront property after El Nino damage.

The city of Malibu is in the case, too, arguing against the commission and in favor of local control of coastal development.

On the other side, a coalition of 120 conservation-minded organizations has filed a brief that reads at times like an infomercial. It extolls the commission's successes in preserving coastal vistas and public access, protecting habitat and wetlands, and allowing development that's sensitive to coastal resources.

Deputy Attorney General Joseph Barbieri will represent the commission at the oral arguments. His brief says the separation-of-powers principle isn't violated because the California Constitution, unlike the federal Constitution, gives the Legislature broad appointment powers.

Even if the Supreme Court decides the commission is unconstitutional, argues Barbieri, there's ample precedent for leaving in force prior commission decisions made with "apparent authority of office."

In the alternative, his brief spells out this scenario: Jeopardize coastal protection. Impair regulation of offshore oil and gas activity. Grant no new permits to property owners. Undermine property values by throwing 100,000 old permits into doubt.

The court will have 90 days to decide.

Streichenberger, meanwhile, has turned his attention to Senegal and Mauritania, where he's trying to organize new projects to plant the sea.

"We just wanted to live, to go on with our project," he said in looking back.

Looking forward, he conceded, "We need regulation and we need eventually the Coastal Commission to regulate." But he said the current commission is "the very, very wrong regulator" and it's "not good for society."