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Court to Decide Fate of Coastal Commission

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FROM THE DAILY JOURNAL

The California Coastal Commission, which for more than 30 years has controlled development along the state's Pacific shoreline, still isn't properly constituted, a conservative Sacramento attorney argues. Ronald Zumbrun, a Sacramento lawyer (and Daily Recorder columnist) who represents a group founded by an outspoken inventor of experimental marine habitats, said efforts to change the Legislature's involvement in the powerful body haven't cured its defects.

An attorney for the state, meanwhile, insisted there's nothing legally wrong with the structure of the commission, either now or before the Legislature enacted changes in 2003.

Whoever wins this argument before the California Supreme Court may help determine the fate of tens of thousands of decisions made by the commission over the years.

Oral arguments are scheduled for today, in the case, *Marine Forests Society v. California Coastal Commission*, S113466.

The high court in April 2003 granted the state's petition to review the previous year's decision by the 3rd District Court of Appeal that threatened the commission's future.

In December 2002, the appeal court ruled that the body's makeup violates the separation-of-powers doctrine because eight of its 12 members were appointed by the

Legislature and could be fired at will. It was an impermissible intrusion into executive branch authority, the court held.

In February 2003, the Legislature, reacting to the commission, approved a law imposing a four-year fixed term on commission Members appointed by the lawmakers.

But that did not mollify critics such as Zumbrun.

"Nothing has been accomplished in removing the control of the Legislature," Zumbrun said.

Zumbrun represents the Marine Forests Society, the brainchild of a French researcher, Rodolphe Streichenberger. The nonprofit society had been experimenting with the construction of an artificial reef system and kelp bed, using old tires, plastic pipes and nylon mesh.

Although Streichenberger – whom Zumbrun said was honored by Gov. Schwarzenegger for his environmental and economic Leadership – had permits from the local and state officials, the Commission issued an order to stop.

He sued in 1998.

Zumbrun described his objections as philosophical and practical. Philosophically, the American notion of freedom has long

relied on the notion of separation of powers, he contended.

"What we have is a modern-day battle cloaked in historical terms," Zumbrun said.

Additionally, because of the influence of the politicians, the commission's decisions are erratic and commissioners play favorites, he charged.

The state has rejected those assertions.

"We've continued to argue that both the old appointment scheme and the new one are valid under California law," said J. Matthew Rodriguez, a senior assistant attorney general working on the case.

He noted that as many as a half-dozen other state boards also have majorities appointed by the Legislature, while 70 have some members appointed by the lawmakers, Rodriguez said.

There is no separation of powers violation because, "since the first day of statehood, the Legislature has possessed the constitutional power to determine the appointment of executive branch officers and their term of office, and to exercise this power in its own behalf," Deputy Attorney General Joseph Barbieri wrote in a brief to the Supreme Court.

Hanging over the deliberations is the question of what if the court sides with the critics of the commission's composition. Would that threaten what by some estimates are more than 100,000 decisions made by the panel since its formation?

The Supreme Court has asked those arguing the case to address the issue of the potential retroactivity of its decision.

In December, the justices also asked for briefing on whether it needed to address the retroactivity question in light of the legislative amendments and the fact that Marine Forests was asking only an injunction against the commission interfering in its project, Rodriguez said.

The question is being closely watched. More than 20 cases have been filed by

property owners hoping to use the case to undo Coastal Commission decisions, according to Rodriguez's estimate.

State attorneys argue against any retroactive application of an adverse ruling, saying past decisions should be left intact. Once of the main arguments is that previous decisions should have been appealed in a timely manner.

Zumbrun said the issue really doesn't have anything to do with Marine Forests, because the group appealed the commission's decision in a timely manner.

Nevertheless, he said the high court could find a way to extend its decisions to other property owners who have come before the agency in the past.

He acknowledged the court will probably be reluctant "about opening things wide open."

But he said there might be a way the high court could let trial judges review the commission's past decisions and weight the competing interests of property owners, the state and the public.

"There's no question this whole subject of retroactivity is up in the air and the court will want to do something that is well grounded and reasonable," he said.

The commission, which in some ways acts as a super zoning board along a relatively narrow strip of California's more than 1,000 miles of shoreline, dates back to a 1972 ballot measure approved by the state's voters. It was further codified by a law approved by the Legislature in 1976.

Since then, the commission was marred by a major scandal, when one of its members pleaded guilty in the early 1990s to using his office to solicit bribes from people with business before the body.

The courts have also previously clipped the commission's powers when property owners objected to what they viewed as extreme limitations on coastal development.

But it has won generally high praise from environmentalists as well as condemnation from some property owners for its control of coastal construction.

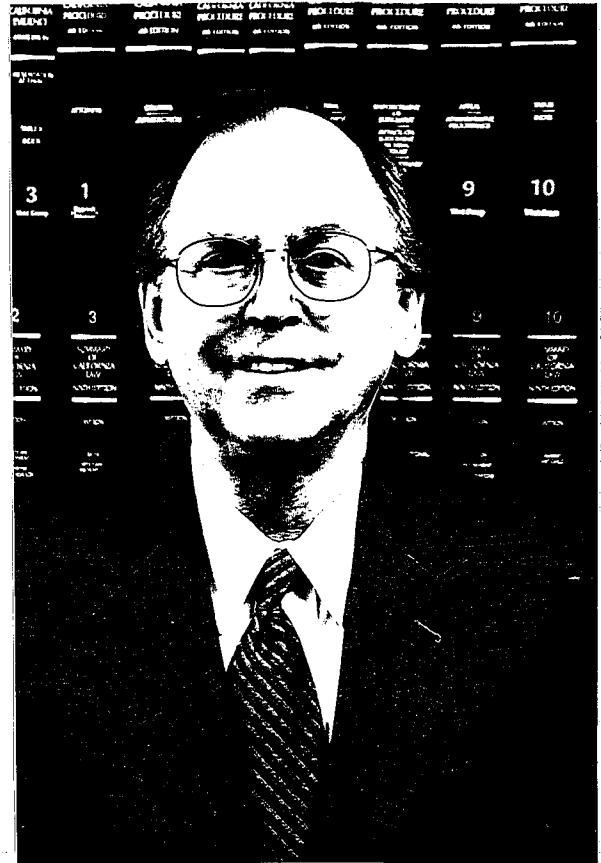
It blocked plans to build a seaside resort proposed by the Hearst Corp. in San Luis Obispo County and a major residential development in Orange County's Bolsa Chica wetlands. Currently, it is at the forefront of state efforts to block offshore oil drilling, arguing that it has the power to review federal decisions to extend the life of underwater leases.

Streichenberger himself has lashed out at the commission, calling it a "totalitarian tribunal" and similarly denouncing its long-time executive director, Peter Douglas.

James Burling, an attorney for the Pacific Legal Foundation, which has sided with Streichenberger, said the commission has "displayed an unbridled arrogance against the people living on the coast."

Douglas, however, has argued that without the commission the California coast wouldn't be the same.

"People forget that the commission's greatest achievements are the things you don't see, he said.



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