

# San Francisco Chronicle

## Coastal panel's fate hangs in balance

### State's top court to hear challenge to appointments

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The California Coastal Commission, a powerful body created by voters and lawmakers 29 years ago to preserve a 1,100-mile coastline from unlimited development, will be fighting for its own preservation Wednesday before the state Supreme Court.

The issue before the justices, meeting in Los Angeles, will not be the incessant complaints of property owners that the commission has trampled their rights in its zeal to provide public access to Pacific beaches and bluffs. Instead, the point of contention will be the commission's makeup, an issue that arose abruptly in 2001 when a Sacramento judge ruled that the appointment system violated constitutional separation of powers.

Simply put, the question is whether an agency that wields executive power -- the power to enforce the state's Coastal Act, by granting and denying development permits -- can operate with eight appointees from the legislative branch -- four from the state Senate and four from the Assembly -- among its 12 members. The governor appoints the other four members.

If the answer is no -- as two lower courts determined, before the state's high court agreed to review the case in 2003 -- the question becomes, what happens to the commission and the 100,000-plus rulings it has issued since 1976?

Ronald Zumbrun, a property-rights lawyer arguing the case on behalf of a builder of an artificial reef on an Orange County shoreline, has a simple set of answers: abolish the commission as a permit-granting agency, return to the old system of letting city and county governments approve coastal development and allow a court appeal by anyone who was ever denied a permit by the commission.

That wouldn't invite chaos or a development free-for-all, Zumbrun said in an interview. He said the courts could easily arrange an orderly transition by establishing rules for different circumstances, taking into account the passage of time since a permit was sought.

"It is possible to protect our coast while adhering to the checks and balances and accountability applicable to all other government agencies," he said.

Attorney General Bill Lockyer's office, representing the Coastal Commission, warned in court papers that "all the commission's work in protecting California's coastline would be jeopardized" if old permit decisions were reopened.

A broad ruling against legislative appointments to any executive agency could threaten dozens of state agencies that have members appointed by one or both houses, said Deputy

Attorney General Joseph Barbieri. One agency that appears to fit that description, created by a voter initiative last November, is the committee overseeing California's \$3 billion stem cell research program.

Barbieri also argued that the commission's mix of legislative and gubernatorial appointees, outlined in a 1972 ballot measure, is both legal and a necessary safeguard against domination by the governor or either legislative house.

#### Environmentalists' fears

Environmentalists are horrified by the idea of a return to pre-commission regulation and said the commission was established because local governments had failed to protect the coast from being locked up and despoiled by wealthy interests.

"The Coastal Act of 1976 was the result of popular recognition that uncontrolled development of the California coastline could not continue," a collection of environmental groups, including the Sierra Club, the Planning and Conservation League and the Natural Resources Defense Council, said in a court filing. Also signing the brief was the Mexican American Legal Defense and Educational Fund, in recognition of the commission's role in gaining coastal access for poor and minority residents.

The commission was created by a 1972 ballot measure and 1976 legislation to set rules, approve local land use plans and rule on permits for construction in a narrow strip of land along the coast. Its powers also extend to offshore development -- including oil drilling in federal waters -- that affects the coast.

It has been the target of landowner lawsuits that have twice reached the U.S. Supreme Court and resulted in rulings somewhat restricting the commission's authority to require conditions - like paths through private land -- in exchange for development permits.

Questions have also been raised about political influence and fund raising. Commission member Mark Nathanson confessed in 1992 to taking bribes from developers and was sentenced to prison. A Chronicle investigation revealed in 2002 that political donors to then-Gov. Gray Davis were winning commission approval for controversial developments.

#### Reef project rejected

The case before the court on Wednesday. involves a project by the nonprofit Marine Forests Society to use auto tires to build an artificial reef off Newport Beach to create a habitat for sea life. The reef was approved by Orange County authorities, but after construction had begun, the Coastal Commission said it needed a permit, declared the project worthless and ordered it removed.

The society sued, arguing, among other things, that the commission's membership violated state constitutional standards for an executive agency. A Sacramento judge and a state appeals court agreed, saying legislators exercised too much control over the commission -noting, for example,

that legislative leaders had the power to remove any of their eight appointees at any time. In a few instances, legislative appointees have been fired before key votes.

After the appeals court ruling in 2003, Davis called the Legislature into special session for a bill that gave legislative appointees fixed four-year terms, rather than allowing them to be fired at will. But opponents of the commission argue that the change didn't go nearly far enough. "The Legislature retained for itself control over an agency that should have been ... an executive agency under the governor's control," Zumbrun, the Marine Forest Society's lawyer, said in court papers.

"The Legislature applied a small Band-Aid when what was needed was a tourniquet," argued lawyers for AC Signal Landmark and Hearthside Homes, would-be developers of the 208-acre Bolsa Chica project in Orange County, who filed a friend of the court brief in this case.

Lockyer's office countered that -- unlike the strict separation-of-powers barriers in the U.S. Constitution -- the California Constitution has always given the Legislature the power to appoint members of agencies. Legislators appointed the first state Supreme Court and currently appoint members to about 60 executive agencies, said Barbieri, the state's lawyer.

If the court finds the current structure invalid, Barbieri said, it should ratify past commission rulings -- on which all parties have relied --

and suspend its own ruling for 120 days so that the Legislature can rewrite the law..

The case is Marine Forests Society vs. California Coastal Commission, S113466.