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Coast panel's right to wield power weighed

Constitutionality debated before state's high court

By Terry Rodgers, Staff Writer

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The state Supreme Court today will begin deciding the fate of the Coastal Commission, which has controlled growth and preserved natural features along California's 1,100-mile coastline for more than three decades.

Meeting in Los Angeles, the seven justices will listen to attorneys' final arguments on why the commission should or should not be ruled unconstitutional.

The court will also decide if more than 100,000 of the commission's land-use and regulatory decisions since 1976 need re-evaluation. A ruling is required in 90 days.

Under the most extreme scenario, the commission could be stripped of its authority and become an advisory body.

"The impact could be absolutely enormous," said Jonathan Zasloff, a UCLA law professor who has studied the case. "Probably the most interesting thing about this case is that it calls into question the existence of the single most powerful land-use agency in the country."

A toothless commission would be a shadow of what voters anticipated when they approved the Coastal Initiative in 1972, from which the commission was created.

The agency issues permits for coastal development and has authority over federal projects ranging from offshore oil and gas leases to the dredging of San Diego Bay. It also tries to preserve prime agricultural land, expand the public's access to beaches and protect lagoons and other environmental treasures.

"The real estate over which the commission has jurisdiction is among the most sensitive environmentally and valuable in California," Zasloff said. "The commission is the planning commission for the rich, the famous and the powerful. Just about everything it does is controversial."

The legal challenge is the agency's most serious crisis since the Legislature made the commission permanent in 1976.

Every governor since Jerry Brown has battled the commission, which has few friends among builders, the agricultural industry or local governments.

But it has taken an offbeat, underfunded environmental group, the Orange County-based Marine Forests Society, to push the commission to the brink. The confrontation began when the nonprofit entity sued in 1999.

The case stems from the commission's order to dismantle an artificial reef built by the society. The experimental reef near the Newport Beach pier is made of rope, used tires, plastic jugs and concrete blocks.

"Good Lord, what kind of environmental group would dump junk like that into the ocean?" Peter Douglas, the commission's executive director for the past 20 years, said Monday. "You can't call them environmentalists, not after what they did."

The disgust is mutual.

"The commission is brutal and arrogant because of its excessive use of power," said Rudolphe Streichenberger, a French researcher who founded the society in 1986. His group began construction of the reef after securing permission from the city of Newport Beach and the state Fish and Game Department, he said.

Streichenberger's idea is to use low-cost materials to grow kelp, mussels and other shellfish in the reef. "We want to plant the sea," he said.

Initially, more than 1,000 volunteer divers contributed to the construction of the reef. But the project has been put on hold and the lawsuit has drained away what little in donations Streichenberger has raised.

"We are prisoners of the Coastal Commission," Streichenberger said.

When the commission issued a cease-and-desist order against Marine Forests Society, the conservative property-rights lawyer Ronald Zumbrun of Sacramento came to the group's rescue.

Zumbrun successfully argued before a Superior Court judge that the commission has usurped powers reserved for the executive branch. The 3rd District Court of Appeal also ruled for his client. In 2003, it concluded that the commission violates the state constitution's separation-of-powers doctrine.

The problem, the justices said, is that the commission is beholden to the Legislature, which appoints eight of the commission's 12 voting members. An agency subject to the political influence of the Legislature cannot perform regulatory functions, including enforcement powers, that are reserved for the executive branch, the courts concluded.

The Legislature tried to fix the flaw last year. It changed the appointment process and established fixed terms for the eight members chosen by the Assembly and Senate. The governor still can remove his or her four appointees at any time without cause.

Zumbrun contends the Legislature's action falls short of solving the commission's legality

problem.

"The Legislature still appoints two-thirds of the commissioners and there are no safeguards to protect against (it) interfering with the executive branch," he said. "The simple way to correct this is to get the Legislature out of the appointment process entirely."

Zumbrun's confidence is buoyed by his 1987 victory against the commission before the U.S. Supreme Court. The court ruled that the commission's policy requiring property owners to forfeit easements for beach access in exchange for building permits was unconstitutional.

Despite that rebuke, the commission has continued to act capriciously toward property owners, Zumbrun said.

"We'd like to see a restructuring of the commission by the governor and the Legislature to create a new commission that will be responsible and fair to all the public and honor due process," he said.

"If we prevail, the commission is not wiped out," he added. He envisions the agency reborn as an advisory board on coastal policy.

That would be a disaster and a betrayal of what voters put into place, Douglas said.

"The public and the Legislature recognized that the best protection of the coast comes from an independent, state-level commission" that is less susceptible to the pressures from development industry, he said.

The commission's chairwoman, Stanford Law School instructor Meg Caldwell, said Zumbrun and the Marine Forests Society are fronts for advocates of property rights.

"(This) case is nothing more than an anti-public-interest attack on the state's ability to protect the coast and beaches for the benefit of all," Caldwell said.

Joseph Barbieri of the state Attorney General's Office, who is defending the commission before the state Supreme Court, said the state's position is that the commission doesn't violate the separation-of-powers doctrine. He contends that historically, the Legislature has exercised its right to appoint officers to executive agencies.

"We're saying there was never was a problem in the first place, but also that, if there were a problem, it was resolved by the actions of the Legislature" last year, Barbieri said.

If the commission's opponents prevail, regulating coastal development would be thrown into chaos, Douglas said.

"Either there would be a free-for-all in terms of development along the coast or there

would be a moratorium that would halt processing of the many pending coastal permit applications and appeals," he said.

Norbert Dall, a Sacramento consultant and lobbyist who has written a history of the Coastal Commission, said such dire predictions are exaggerated.

"Humpty Dumpty could be put together again," he said. "The Legislature can move quickly when it needs to move quickly. Rational people will put their heads together and this will be resolved."