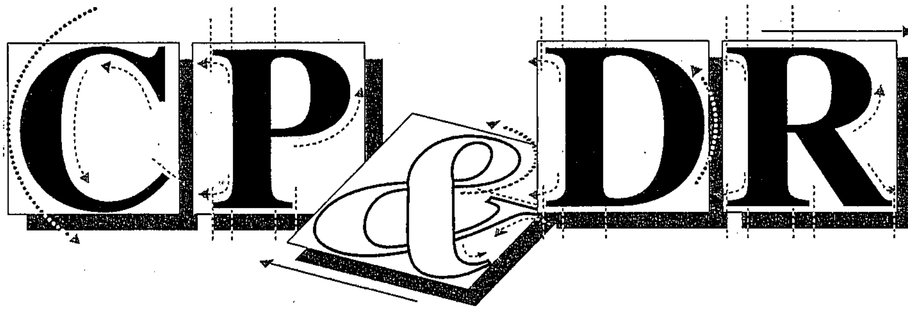

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Coastal Commission Survives

State Supreme Court Says New Appointment Process is Constitutional

BY PAUL SHIGLEY

The California Coastal Commission has survived one of most direct assaults on its existence since the Commission's establishment in 1976. Property owners, who have chafed for years at the Coastal Commission's land use restrictions, had hoped to have the Commission's makeup declared unconstitutional, but the California Supreme Court unanimously upheld the current system in a ruling issued June 23.

The decision relieved environmentalists and coastal access advocates, many of whom were stunned 2 1/2 years ago when an appellate court ruled that the system for appointing Commission members was unconstitutional. That ruling, added to the state Supreme Court's decision to review the case, suggested that every land use decision the Commission has ever made might be on shaky legal ground.

However, it appears that the Coastal Commission was saved in part by an urgency bill passed by the Legislature and signed by Gov. Gray Davis shortly after the appellate court ruling came down. The bill established fixed, four-year terms for the eight coastal commissioners appointed by the Assembly speaker and Senate Rules Committee. The 2003 legislation (AB X2 1, Jackson) eliminated the at-will provision for the Legislature's appointees to the commission, a provision that the appellate court said was a legislative intrusion into the executive branch of government that violated the separation of powers doctrine.

In his 67-page opinion, state Supreme Court Chief Justice Ronald George said the pre-2003 appointment scheme posed "a much more serious separation of powers question than the current provisions." And in a concurring opinion, Justices Marvin Baxter and Janice Rogers Brown (who was recently appointed to the federal appellate court bench in Washington D.C.) called the earlier scheme "constitutionally flawed." However, the court based its decision in favor of the Commission on the appointment process adopted in 2003, which the court held was entirely proper under the state constitution. Because the lower court issued an injunction – which prohibits future action - what matters is the current law, the Supreme Court ruled.

Environmentalists up and down the 1,100-mile coast praised the state high court's ruling.

"It's a very significant decision for the coastal program, and for the ability to create these independent commission's and agencies," said Sacramento attorney Bill Yeates, who had filed a friend-of-the-court brief for environmental organizations. The court recognized that voters set up the basic structure of the Coastal Commission when they approved Proposition 20 in 1972, he

said. That initiative was the precursor to the Coastal Act adopted by the Legislature in 1976.

"This was set up by the voters for a particular reason," said Yeates. Voters did not want to place all power regarding coastal development in one branch of government, so they divided the appointments equally among the governor, the Senate and the Assembly. That approach ensures that neither the governor nor individual lawmakers can dominate the Coastal Commission, he said.

Attorney General Bill Lockyer, who defended the Commission in the case, said the decision "affirms that the Coastal Commission's appointment structure reflects the will of the voters, who long ago declared that our coastal resources will best be preserved for future generations if planning decisions affecting the coast are made by an independent body comprised of members representing a variety of philosophical backgrounds."

That independence, however, gripes property rights advocates.

"What you have," said Pacific Legal Foundation attorney James Burling, "is a commission without any control. And I think that runs smack dab into conflict with a representative democracy and the separation of powers." Burling, who filed a friend-of-the-court brief in favor of upholding the appellate court decision, said the appointment system causes "the endemic problems that the Coastal Commission has, such as its arrogance, its abrogation of property rights, it's lack of accountability to voters."

Burling said the move to fixed terms for the Legislature's appointees did not solve the problem because voters cannot choose the Assembly speaker or members of the Senate Rules Committee. Thus, voters have no ability to effect change at the Commission, he argued.

Attorney Ronald Zumbrun, who represented the project proponent in the litigation, agreed that the 2003 legislature was not a cure-all. But Zumbrun added, "I felt that our client came out well in that he changed the law."

Environmental attorney Yeates said the change was significant because it provided a unanimous vote at the Supreme Court. "I think the Third District Court of Appeal did us a favor," he said, because the ruling led to legislation that "eliminated any cloud of doubt."

Although regulation of coastal land uses was at stake in the case, the court based its decision on an interpretation of state constitutional law. The litigation at hand was filed in 1999 by a nonprofit group called Marine Forests Society and its leader Rodolphe Streichenberger. During the early 1990s, Marine Forests Society built an artificial reef from old tires, plastic jugs, PVC pipe and concrete blocks on the ocean floor off Newport Beach to aid marine life. The group built the experimental reef without a coastal development permit. The Commission refused to grant an after-the-fact permit, and then issued a cease and desist order demanding removal of the reef.

In its lawsuit, Marine Forests Society argued that the Commission did not have the authority to issue such an order because of the way the majority of commissioners was appointed. Sacramento County Superior Court Judge Charles Kobayashi agreed and ordered the Commission to stop taking action on permits or issuing cease and desist orders. The Third District Court of Appeal upheld Kobayashi's injunction (see *CP&DR Legal Digest,* February 2003).

Neither Kobayashi nor the Third District showed any desire to reopen previous Coastal Commission decisions. But, at the attorney general's urging, the state Supreme Court agreed to review not only the lower court ruling but also the question of what

affect it would have on past and pending Coastal Commission decisions (see *CP&DR Legal Digest,* May 2003). Advocates on either side began to wonder if the Supreme Court was willing to throw out nearly three decades of Coastal Commission decisions.

The answer was no. In his opinion, Chief Justice George addresses at length the evolution of the California constitution and its differences with the federal constitution. Zumbrun and supporting attorneys based much of their argument on federal court decisions regarding the United States constitution. Those precedents did them little good here because the court found that the state's separation of powers doctrine is weaker than the federal constitution's.

"In contrast to the federal constitution, there is nothing in the California constitution that grants the governor (or any other executive official) the exclusive or paramount authority to appoint all executive officials or that prohibits the Legislature from exercising such authority," George wrote.

"Moreover," George continued, "the history of the California constitution and past judicial decisions make it abundantly clear that under the state's constitution, the Legislature posses authority not only to determine whether to create new executive offices, agencies, or commissions, but also to decide who is to appoint such executive officers and commissioners, including, at least as a general matter, the authority to provide for such appointment by the Legislature itself."

George also reviewed the history of Proposition 20 and the Coastal Act of 1976, finding that the current appointment structure is similar to what voters backed when they approved a Coastal Zone Conservation Commission and six regional commissions in 1972.

There are safeguards to the prevent lawmakers from meddling in the system, as opponents had contended could happen, George noted. He pointed out that the fixed four-year terms are the same length that the, president and governor receive. The fact that three different entities make appointments is a safeguard, as are the provisions of the Coastal Act requiring fairness and transparency, and decisions that are based on substantial evidence in the record, George wrote.

Although the pre-2003 appointment system was questionable because of lawmakers' ability to remove commissioners at any time, the court upheld all past *Commission decisions* based *on the "de facto* officer doctrine. That principle holds that even if the Commission were not legally seated, the decisions stand because they were made by a lawfully established entity whose members followed guidelines, and whose decisions were relied upon by the public.

Zumbrun and Burling entirely rejected the court's application of the *de facto officer* doctrine *to this case.* Zumbrun said *the* argument *for* overturning past decisions made by an illegally constituted Coastal Commission was strong.

"I think our case was too much," Zumbrun said. "I think the court saw the world collapsing and chaos. And from a public policy standpoint, they had to shut us down."

Burling said he had no desire to reopen tens of thousands of permits. But the court should have allowed property owners who filed timely lawsuits over the makeup of the Commission to press their claims, he said.

Neither the Marine Forests Society litigation nor the larger battle over the Coastal Commission are over. The Marine Forests Society case now returns to Superior Court, where Zumbrun plans to argue that the Commission treated his client differently than it treated another entity that built marine habitat. ■