The Coastal Commission is Re-Legislating the Coastal Act – Coastal City by Coastal City

By Jon Corn

In 1976, the California Coastal Act (the "Act") ushered in a tectonic power shift, transferring coastal land use control from local government to the State, in the form of the newly minted California Coastal Commission. Unfortunately, the breadth of this unprecedented power shift did not stop with the Act's passage; it continues to expand in favor of the Coastal Commission at the expense of local government and private property rights.

This ever-creeping expansion of state power occurs in numerous ways, but one of the more egregious is the Coastal Commission's misuse of its Local Coastal Program (LCP) certification power. The Coastal Commission will not certify a city or county's LCP unless its policies are more restrictive, and sometimes in conflict with, the Act's already robust requirements. This violates the Coastal Act and is effectively re-legislating an expansion of the Coastal Act on a city-by-city, county-by-county basis.

While environmental protection is, or should be, high on everyone's agenda, so should the rights guaranteed to local government by the Act, not to mention respect for the separation of powers doctrine and private property rights guaranteed by the California Constitution.

The Act's LCP requirement was supposed to restore local control over coastal land use decisions. Instead, it is being used by the Coastal Commission to force our coastal cities and counties to adopt policies that exceed the Coastal Act. This agency force majeure, in effect, operates to incrementally amend the Coastal Act without the Legislature's consent or knowledge, defying democratic process.

Prior to the Act, locally elected officials of California's coastal cities and counties decided land use matters based on the physical, environmental, and economic conditions unique to their towns and communities. Under the Act, no development may take place anywhere in California's behemoth "coastal zone" unless the San Francisco-based Coastal Commission, a body of 12 politically appointed persons from around the state, grants a coastal development permit for the project. Without the Commission's permit and the applicant's acceptance of "special conditions," the project cannot be built.

To compensate for the sweeping loss of local power, the Act includes a mechanism for the apparent restoration of local control. The Act requires each coastal city and county to draft an LCP to carry out the "basic goals" of the Act. Once the Commission "certifies" the LCP, the local jurisdiction is authorized to itself issue coastal development permits, subject to the Coastal Commission's de novo review for development on the oceanfront and other sensitive areas.

The Act provides that the Commission's certification review of an LCP "shall be limited to its administrative determination that the [LCP] does, or does not, conform with the requirements of Chapter 3" of the Act. Neither the Commission, nor its staff is authorized to re-write a LCP. In fact, the Act expressly states that the "precise content" of the LCP "shall be determined by local government." The Act also states that "the Commission is not authorized … to diminish or abridge the authority of a local government to adopt and establish, by ordinance, the precise content" of its LCP. While the Act allows the Commission, after a public hearing, to deny certification and submit to the city or county those "suggested modifications" needed to bring the LCP into conformance

with the requirements of Chapter 3, the suggested modifications should be limited to just that: the changes needed to bring the LCP into simple conformity with Act's basic goals. The suggested modifications should not go beyond the Act's requirements, let alone conflict with the Act, for the purpose of advancing the Commission's or its staff's extra-legislative goals.

Nevertheless, this is precisely what happens.

Because case law allows local jurisdictions to adopt LCP policies that are more restrictive than the Act, Coastal staff typically withholds its recommendation in favor of certification unless the LCP's policies further the Commission's agenda (e.g., managed retreat) and go far beyond or conflict with the Act's requirements. In the citizen lawsuits that inevitably follow, the Coastal Commission has a free law firm in the form of the California Attorney General's Office, paid for by the state's taxpayers. But, local government and private parties are left to defend themselves in court at great expense.

This is exactly what recently happened in Solana Beach, a small coastal town in North San Diego County with limited resources to take on the Coastal Commission. The town's former mayor astutely established a bipartisan citizen's committee to draft a proposed LCP for the City's consideration. The committee, which included two blufftop homeowners, including the author of this article, a former Coastal Commissioner/land use attorney, and a Surfrider Foundation representative, wrote an innovative plan that actually led to the elimination of seawalls over time and would have created new coastal open space for future generations to enjoy. The City wholeheartedly adopted this plan and sent it to Coastal Commission staff for an informal review.

Over the next ten years and seven separate draft LCPs, Coastal staff responded to the City with several hundred "suggested modifications" that would be "needed" in order for this innovative LCP to gain a positive staff recommendation. The City submissively adopted the suggested modifications, obliterating the citizen committee's plan, and then officially submitted the LCP, now largely re-written by Coastal staff, to the Commission for formal certification.

And, despite having written large swaths of the LCP, the Coastal staff report to Commission recommended its rejection *unless* the City accepted yet another 153 additional "suggested modifications." Not surprisingly, the Coastal Commission followed its staff's recommendation. It rejected the City's LCP as written (even though it was already mostly written by Coastal staff), but offered to certify it if the City accepted the additional 153 modifications.

Some of the "suggested modifications" included: (i) a requirement that disallowed protection for any blufftop accessory structure; (ii) a 20-year permit expiration date on all new seawall permits; (iii) a requirement that homeowners permanently waive their right to seawall protection in exchange for any blufftop building permit; (iv) a new methodology for calculating bluff edge setbacks that eliminated the possibility for new homes, or even additions, on more than half the City's coastal properties; (v) a requirement that private beach stairs be "phased out" over time, along with an outright prohibition on cumulative repairs to more than 50% of the stairs; and, (vi) a mechanism forcing owners of private beach stairs to allow public access to the stairs over private property.

The common denominator for each of these objectionable policies is that they were (a) written by Coastal staff, not the City, and (b) the new requirements were nowhere to be found in, or required by, the Coastal Act. Certainly, none of these requirements were *necessary* to comply with the Act, as

evidenced by the fact that the Commission previously certified many LCPs throughout the State without such requirements. Yet, Coastal staff informed the Commission that the LCP could not be found consistent with the Act without the 153 "suggested modifications." The Commission accepted its staff's recommendation hook, line and sinker.

The City then unwisely adopted the 153 changes and quickly found itself embroiled in litigation with nearly all the small City's 1,100 coastal property owners. These suits challenged the objectionable LCP policies on a facial basis, which requires the plaintiff to prove that the policies will be unconstitutional in all or almost all cases – a very high standard. The author of this article, the Pacific Legal Foundation, and another private attorney represented the plaintiffs. Meanwhile, the Coastal Commission was represented at taxpayer expense by the Attorney General's Office. The small City was forced to hire private counsel at the City's expense.

While acknowledging that these issues will ultimately be resolved by the Court of Appeals, the trial court recently decided that 2 of the Commission's policies were unconstitutional and facially violated the Coastal Act. And although the Court found that certain other policies were not *facially* invalid, its decision left open the possibility that such policies could be found invalid in future "as applied" challenges by the City's coastal property owners. Moreover, during the litigation, the City abandoned its 20-year seawall permit expiration date policies in favor of a much more liberal standard, which the Court found acceptable.

None of this litigation would have been necessary *but for* the Coastal Commission's manipulation of the City's LCP process. Just because local jurisdictions *may* adopt LCP policies that are more restrictive than the Coastal Act, the Coastal Commission should not withhold certification of an LCP simply because they don't. The Coastal Act is very clear that it is the *local* government who gets to write its *local* coastal program. It is also very clear that the Coastal Commission is duty bound to certify an LCP as long it conforms to Chapter 3 to achieve the "basic state goals" set forth in the Act.

Using the LCP certification process to incrementally re-legislate the Act violates the democratic principles guaranteed by the California Constitution. Forcing local government to bear the brunt of the Commission's over-reaching regulatory experiments is altogether another problem. The sweepingly thorough Coastal Act is already a very strong piece of legislation that more than adequately protects the State's coastal environment. If the Coastal Commission would like to see it strengthened further it should seek amendments through proper Legislative action, not by strong-arming local jurisdictions and forcing them to advance the Commission's anti-property rights agenda. Our Constitution requires no less.

Jon Corn is a San Diego-based land use attorney who specializes in coastal property rights and associated litigation.
www.joncornlaw.com