Navigating the Coastal Development Process

Presented by:

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For the Uninitiated or Unprepared Applicant...

“Abandon hope all ye who enter here”
Nevertheless an Often Overworked Commission Staff Does a Commendable Job of Attempting to Further its Mission

- Full-time staff at the Commission have been cut from 200+ in 1980 to 138 today* with only 11 enforcement officers for 1100 miles of coastline.

*As of 2004/5
The Coastal Initiative, drafted by, among others, attorney Lew Reid, Assemblyman Alan Sieroty and his capable young assistant Peter Douglas, created a Coastal Commission and gave it permit authority for four years time.

The Commission was made permanent by the Legislature in 1976 with the passage of the Coastal Act of 1976.
Coastal Zone: 1000 Yards or 5 Miles...

- “Coastal zone” means that land and water area of the State of California from the Oregon border to the border of the Republic of Mexico...extending seaward to the state’s outer limit of jurisdiction, including all offshore islands, and extending inland generally 1000 yards from the mean high tide line of the sea.

- In significant coastal estuarine, habitat and recreational areas it extends inland to the first major ridgeline paralleling the sea or five miles from the mean high tide line of the sea, whichever is less, and in developed urban areas the zone generally extends inland less than 1000 yards.
The coastal zone does not include the area of jurisdiction of the San Francisco Bay Conservation and Development Commission, established pursuant to Title 7.2 of the Government Code, nor any area contiguous thereto, including any river, stream, tributary, creek or flood control or drainage channel flowing into such area.

The commission was required, within 60 days after its first meeting, to prepare and adopt a detailed map, for the coastal zone and must file a copy of the map with the county clerk of each coastal zone. The purpose of this provision is to provide greater detail than is provided by the maps in Section 17 of that chapter of the Statues.
Coastal Zones

• See PCR § 30150-30174 for other coastal zone revisions, such as, the Aliso Viejo exemption of 1978.
PCR § 30600(a):

- Except as provided in subdivision (e), and in addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, any person, as defined in Section 21066, wishing to perform or undertake any development in the coastal zone, other than a facility subject to Section 25500, shall obtain a coastal development permit.
(b)(1) Prior to certification of its local coastal program, a local government may, with respect to any development with its area of jurisdiction in the coastal zone and consistent within the provisions of Sections 30604, 30620 and 30620.5, establish procedures for the filing, processing, review, modification, approval, or denial of a coastal development permit.

(2) Those procedures may be incorporated and made a part of the procedures relating to any other appropriate land use development permit issued by a local government.

See “Coastal Development Permit” as defined in PRC § 30101.5. See also 14 Cal. Code of Regs. § 13164.
Every coastal development permit issued for any development between the nearest public road and the sea or the shoreline of any body of water located within the coastal zone shall include a specific finding that the development is in the conformity with the public access and public recreation policies of Chapter 3.

PCR § 30212. New development projects between first public roadway and shoreline required to provide public access.
Public Resources Code § 30106: “Development” Broadly Defined

- “Development” means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredges material or of any gaseous, liquid, solid or thermal waste; grading, removing, dredging, mining or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act and any other division of land, including lot splits; change in intensity of use of water; construction, reconstruction, demolition or alteration to the size of any structure; and the removal of harvesting vegetation other than for agricultural purposes.
Subdivision Pursuant to the Map Act...And Any Other Division of Land

- Broadly defined to encompass the construction or alteration of virtually every type of structure

  - Development held to include the conversion of an apartment building into a stock cooperative.
Constructive, Reconstruction, Erection or Demolition Of Any Structure

- “Structure” includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line.
  - Roads
  - Power lines
  - Cell towers
  - Greenhouses
  - Gates
  - “No trespassing” signs
Determine if CDP is Sought Pursuant to a Local Coastal Program (LCP) That is Fully Certified

- “Local coastal program” means a local government’s (a) land use plans, (b) zoning and ordinances, (c) zoning district maps, and (d) within sensitive coastal resources areas, other implementing action, which, when taken together meet the requirements of, and implement the provisions and policies of, this division at the local level.
“Local coastal element” is that portion of a general plan applicable to the coastal zone which may be prepared by local government pursuant to this division, or any additional elements of the local government’s general plan prepared pursuant to Section 65303 of the Government Code, as the local government deems appropriate.

Verify all elements are current and that there is vertical and horizontal consistency of the elements, including the coastal element (see FUTURE v. El Dorado County).
• Coastal Commission procedural rules for processing Coastal Development Permit applications (pre-certified LCP) are set forth at 14 California Code of Regulations § 13050-13170.
14 California Codes of Regulations (overview)

- Article 1. When local applications must be made first
- Article 2. Application for permit
- Article 3. Applications notice requirements
- Article 4. Schedule of Fees
- Article 5. Determination concerning filing
- Article 6. Staff reports
- Article 7. Public comments
- Article 8. Hearing dates
- Article 9. Oral hearing procedures
- Article 10. Field trips
14 California Codes of Regulations (cont’d)

- Article 11. Additional hearings, withdrawal and off-calendar items, amended applications
- Article 12. Preparation and staff recommendation
- Article 13. Commission review of staff recommendation
- Article 14. Voting procedure
- Article 15. Consent calendar procedures
- Article 16. Revocation of permits
- Article 17. [Reserved]
- Article 18. Reconsideration
• When the Coastal Commission issues coastal development permits, it is also subject to CEQA. Although CEQA requires that the Commission follow certain environmental review requirements before issuing a permit for a development project, the Commission is exempt from preparing an EIR or a negative declaration when it reviews applications for coastal development permits.

• The Secretary of the Resources Agency has certified pursuant to Pub. Res. Code § 21080.5 that the Commission’s process for issuing coastal development permits is equivalent to the EIR process. Thus, the Commission is exempt from Chapter 3, Chapter 4, and Pub. Res. Code § 21167 of CEQA. The exemption is statutorily limited, so that the Commission remains subject to many CEQA requirements.
Moving the CDP Through the “Notice of Incomplete Application” Gauntlet; Supplemental Information and 14 CCR § 13056 (d) Appeals

• Submitting additional information; CCC staff responses; communicating with coastal staff.

• An applicant may also appeal directly to the Commission pursuant to 14 CCR § 13056(d) a determination by the Executive Director and regional staff that an application is incomplete.

• The appeal shall be in writing and shall be scheduled for appeal at the next commission hearing or no later than sixty (60) calendar days after receipt of the appeal of the filing determination.
CDP Filing Status

- Copy of “filing” notice
- 49-day “rule”
- Hearing schedule
- Hearing procedures
Public Resources Code - Article 2.5 (Section 30320-30329)
Fairness and Due Process

- 30320 – Findings and declarations
- 30321 – Jurisdiction of commission
- 30322 – Ex parte communications
- 30323 – Interested persons
- 30324 – Ex parte communications; disclosure; form
- 30325 – Commission proceedings; testimony; written comments
- 30326 – Commission workshops; requests
- 30327 – Commission decision; influence; unreported ex parte communication; civil fine; attorneys’ fees and costs
- 30328 – Violations; remedies
- 30329 – Applicable review
• “Ex Parte Communication” is any oral or written communication between a member of the commission and an interested person, about a matter within the commission’s jurisdiction, which does not occur in a public hearing, workshop, or other official proceeding, or on the official record of the proceeding on the matter.
Ex Parte Communication (Exceptions)

- Any communication between a staff member acting in his or her official capacity and any commission member or interested person.
- Any communication limited entirely to procedural issues, including, but not limited to, the hearing schedule, location, format or filing date.
- Any communication which takes place on the record during an official proceedings of a state, regional or local agency that involves a member of the commission.
- Any communication between a member of the commission, with regard to any action of another state agency or of a regional or local agency of which the member is an official.
Ex Parte Communication
(Exceptions) (cont’d)

- Any communication between a nonvoting commission member and a staff member of a state agency where both are acting in official capacity.
- Any communication between a nonvoting commission member relating to an action pending before the commission, where the nonvoting commission member does not participate in that action, either through written or verbal communication.
Ex Parte Communication (Interested Persons)

- Any applicant, an agent or employee of the applicant, or a person receiving consideration for representing the applicant, or a participant in the proceeding on any matter before the commission.
- Any person with financial interest in a matter before the commission, or an agent or employee of the person with a financial interest, or a person receiving consideration for representing the person with a financial interest.
- A representative acting on behalf of any civic, environmental, neighborhood, business, labor, trade or similar organization who intends to influence the decision of a commission member.
Ex Parte Disclosure Process

- No commission member, nor any interested person, shall conduct an ex parte communication unless the commission member fully discloses and makes public the ex parte communication by providing a full report of the communication to the executive director within seven days after the communication or if the communication occurs within seven days of the next commission hearing, to the commission on the record of the proceeding at that hearing.
Ex Parte Disclosure Process
(cont’d)

- The commission has adopted standard disclosure forms for reporting ex parte communications which include:
  - Date, time and location
  - Identity of the person(s) initiating and receiving the communication
  - Complete description of the content
- Communications shall cease to be ex parte communications when fully disclosed and placed in the commission’s official records.
Government Code Section 84308 (the Levine Act): Contributions Prohibited From Persons With Pending Applications

- Applies to elected officials serving in appointed capacity.
- subsection (b): No officer of any agency shall accept, solicit, or direct a contribution of more than two hundred fifty dollars ($250) from any party, or his or her agent, or from any participant, while a proceeding involving a license, permit, or other entitlement for use is pending before the agency and for three months following the date of final decision is rendered in the proceeding if the other officer knows or has reason to know that the participant has a financial interest, as that term in used in Article 1. The prohibition shall apply regardless of whether the officer accepts, solicits or directs the contribution for himself or herself, or on behalf of any other officer, or on behalf of any candidate for office.
Communicating With Coastal Commissioners: the “Two Issue” Rule

• Be clear.

• Be straightforward and candid.
  – The Commissioners and staff know much more than you think they know (see Gerry Spence).

• If you have more than two “open” issues as you approach your scheduled hearing date perhaps you should consider requesting a continuance!
CDP Expiration: Use It or Lose It

• *Trancas Property Owners Association v. City of Malibu* (1998) 61 CA 4th 1058
  - Developers project had been activated (“development commenced”) before expiration date of CDP by approval of a subdivision map from the City.
A recent series of CDP applications for bluff-fronting, previously subdivided lots in the Boca del Canon area of San Clemente, that our firm is currently handling for the individual owners, illustrate many of the vexing issues that arise on “pre-certification” CDP applications.
Boca del Canon: Issues

Major project issues:

- Prescriptive rights alleged
- Public access survey
- Public views purported
Public Prescriptive Rights

• What is a public prescriptive right?
  – Prescriptive Rights refer to public rights that are acquired over private lands through use. Along the California coast the general public has historically used numerous coastal areas. Trails to the beach, informal parking areas, beaches, and blufftops have provided recreational opportunities for hiking, picnicking, fishing, swimming, surfing, diving, viewing and nature study. The public may have the right to use the property by permission of the owner or the public may acquire the right through use of the property without permission.
A right of access acquired through *use* space is, essentially, an easement over real property that comes into being without the explicit consent of the owner. The acquisition of such an easement is referred to as an “implied dedication”, the right acquired is also referred to as a “public prescriptive easement”. This term recognizes that the use must continue for the length of the “prescriptive period” before a public easement comes into being. In California the prescriptive period is five (5) years.
• Under the California Coastal Act, Coastal Public Access Program, Public Resources Code Sections 30530-34, the Commission is required to prepare and implement a program in coordination with other federal, state, and local agencies, including the State Attorney General’s Office, to maximize public access.

• The program includes a prescriptive rights element whereby the Coastal Commission researches and inventories the historic public use of areas with the potential for significant public access benefits. Where research indicates that the public use is substantial enough to create potential prescriptive rights, the Attorney General's Office has the authority to proceed with the legal action necessary to protect those use areas.

• However, see recent LT-WR, LLC v. CCC, Court of Appeal Case certified for partial publication on 5/25/07
CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

LT-WK, L.L.C.,

Plaintiff and Appellant.

v.

CALIFORNIA COASTAL
COMMISSION et al.,

Defendants and Appellants.

B187666

(Los Angeles County
Super. Ct. No. BS088933)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Dzintra Janavs, Judge. Affirmed.

Gaines & Stacey, Fred Gaines, Lisa A. Weinberg and Noelle V. Bensussen
for Plaintiff and Appellant.

Bill Lockyer, Attorney General, Tom Greene, Chief Assistant Attorney
General, J. Matthew Rodriguez, Assistant Attorney General, John A. Saurenman
and Rosana Miramontes, Deputy Attorneys General, for Defendants and Appellants.

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified
for partial publication. The portions of this opinion to be omitted from publication
are DISCUSSION, sections 1 through 9, as enclosed within double brackets [[]].
In the published portion of this opinion relating to the cross-appeal, we conclude the trial court properly overturned the Commission's denial of a permit for the gates and no trespassing signs. Inherent in one's ownership of real property is the right to exclude uninvited visitors. In prohibiting LT-WR from excluding the public from its property on the theory that "potential exists to establish prescriptive rights for public use," the Commission in effect decreed the existence of such rights. We find the Commission's denial of a permit for the gates and signs, premised on the existence of "potential" prescriptive rights, was speculative and properly was overturned by the trial court.

The judgment is affirmed.
On sites with coastal development permit proposals, where investigation shows that public use is substantial enough to create potential prescriptive rights, the Coastal Commission is required to protect those areas of use prior to approving a development project that would interfere with those rights. The California Coastal Act, Public Resources Code Section 30211, states:

- Development shall not interfere with the public’s right of access to the sea where acquired through use, or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.
• The Commission in conjunction with the State Attorney General’s Office can investigate areas of potential prescriptive rights.

• The goal of a prescriptive rights investigation is to gather enough information about the subject property to accurately detail the property’s history and use status. The initiation of a prescriptive rights investigation is not a judgement that a “prescriptive right” exists or probably exists.

• The outcome of the investigation will determine whether there is a sound factual basis for making a claim of prescriptive rights.
Access Locations Under Investigation As Of 10/18/07

(From Commission website)

- Santa Barbara County – Dump road and parking lot area at Terminus of dump road, City of Carpinteria
- Santa Barbara County – Pathway near Jalama Beach County Park
- Santa Barbara County – Pathway near Naples Beach, Goleta area
- Orange County – Boca del Canon, San Clemente
- Orange County – Sunset Avenue Trail, Laguna Beach
MOU Among Current CDP Applicants and Future CDP Applicants

- Alternative beach access
- Alternative public viewpoint
- Comprehensive development analysis

Questions?

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