ZONING AND PLANNING LAW REPORT

Vol. 24, No. 9 **October 2001**

MARINE FORESTS SOCIETY V. CALIFORNIA COAST COMMISSION: COMEUPPANCE FOR A BULLY OR LEGITIMIZING THE LAST GREAT PROTECTOR OF CALIFORNIA'S COASTLINE?

By Paul J. Weinberg

Paul J. Weinberg is a real estate attorney practicing in Irvine, CA. Since 1979, his Orange County practice has specialized in real estate, title, leasing, and real property development matters. Paul is the only non-architect member of the Laguna Beach Architectural Guild and acts as their legal counsel. He is a member of the Society of Architectural Historians and the American Institute of Architects. Paul is also a member of the faculty at U.C. Hastings College of Law, San Francisco, where he teaches civil trial practice. He also authors articles for the University of California's Continuing Education of the Bar Real Property Law Reporter, and West Group's National Real Property Law Journal. In 1998, Paul announced the formation and opening of a private mediation service devoted to the resolution of real property disputes.

California has been the source of numerous landmark cases closely watched around the United States. Perhaps for that reason, any time an issue constitutional in nature looms in California, lawyers in other states and other courts watch it closely. They all want to see the trend in the law—where it is going and how it is getting there.

The perfect case that fits right within that definition sits on the desk of the First Appellate District for California. Brought by a 72-year-old scuba diver, whose life passion has been to build an artificial reef, a lawsuit pits the diver and his band of hardy followers against one of the largest and most well organized bureaucracies in California, the California Costal Commission.

The Los Angeles Times, chronicling the fight, said it best:

> Early on an overcast Saturday, Rodolph E. Streichenberger dons scuba gear to check on his private reef. In contrast to the day, his mood is bright; he is returning to the scene of a crime that may turn out not to be illegal after all.

Last year Streichenberger sued the Coastal Commission, which had ordered him to remove a two-acre reef he and colleagues built more than a decade ago off Newport Beach as an aqua-cultural venture. Last month, a Superior Court Judge in Sacramento ruled that the underwater habitat may stay for now because the Coastal Commission, as it is set up, is unconstitutional.

"We are going to start coming out here a lot more often," said a jubilant Streichenberger, who uses a sixteen-foot inflatable boat to get to the reef, made of 1500 used tires . . . Streichenberger, seventy-two, seems an unlikely David to be taking on the Goliath state agency that, for thirty years, has been charged with protecting the California coast. Its actions have often outraged developers who say it has far too much power and are now applauding its legal setback . . . While working in his family's coal business, Streichenberger began research in his spare time on farming the ocean floor. He became

Zoning and Planning Law Report
is published by West Group, 50 Broad Street East, Rochester, NY 14694. ISSN 0161-8113

an consultant on marine structures. In 1986, he met a Caltech scientist who encouraged him to come to California. Once here, he organized a non-profit group, the Marine Forests Society, to experiment with artificial underwater habitats for growing food.

In 1988, under Streichenberger's direction, the group built its first and only habitat: the reef forty feet below the surface just off the Balboa Peninsula. The goal for the reef, made of tires strung together with nylon cord in one-hundred-yard-long ribbons, was three-fold: to recycle millions of tires; to create a profitable local industry in mussels for export; and to enhance the marine environment for sports and commercial fishing. Seed money was a one hundred thousand dollar grant from a state program to encourage new ways of recycling tires . . . Scientists have been skeptical all along . . .[1]

So now the battle lines are drawn and, in point of fact, by a 1500-foot-long, two-acre reef made of old tires. Who rules the right to decide what gets built along California's coastline, and in what manner?

Streichenberger's lawsuit seeks to, in effect, dismantle the Coastal Commission on the grounds that eight of its 12 members are appointed by the California Legislature. Streichenberger argues that the Legislature has created a "super agency" that mixes executive, legislative, and judicial powers together to become, in a sense, an animal of its own; able to make and enforce its own rules with some degree of impunity:

First, CCC is granted the authority to adopt rules and regulations. Public Resources Code, Section 30333. This is a legislative function . . . Second, CCC is granted the primary responsibility for implementing the provisions of the act. Public Resources Code, Section 30330. This is an executive function, seeing that the law is faithfully executed. California Constitution Article V, Section 1. Third, CCC is authorized to issue cease and desist orders. Public Resources Code, Section 30809, 30810. This is a judicial function because a judicial power is the power to hear and determine controversies between adverse parties . . . The merger of all three functions of government in CCC is exacerbated by the fact that CCC is a composition of a legislative agency . . . [CCC] consists of twelve voting members of whom eight are appointed by members of the Legislature and four by the Governor. Under the Act, members serve at the pleasure of the appointing authority. Public Resources Code, Section 30312. The effect of these provisions of the Act is that the Legislature, through its power of appointment and removal, controls CCC and through it attains the ability to exercise executive and judicial, as well as legislative powers.[2]

So the David has fired his first shot at the Goliath: the making of a super agency violates the constitutional "separation of powers" protections that the framers originally intended to act as checks and balances to protect the people from abuse of authority. Streichenberger's briefs make much of federal law; they make the point that the separation-of-powers clauses in both Constitutions, State and Federal, go back to the same source, The Federalist Papers.[3]

Streichenberger makes the point that, if Congress could simply remove, or threaten to remove, an officer for executing the laws in a manner unsatisfactory to the legislative branch, such power would constitute a legislative veto.[4]

Streichenberger also is outraged at the ability of the Coastal Commission to issue its own orders: "CCC 'performs a judicial function' when it issues cease and desist orders concerning compliance with the California Coastal Act."[5]

Citing an older California case: " 'It is not the function of the Legislature to determine whether a statute declaring a general policy has been violated in a particular case, that being a judicial function.' This case puts the constitutionality of CCC's authority to perform that judicial function squarely an issue."[6]

Thus, Goliath is being taken to task for being able to do too many things without any oversight.

At first blush, the Superior Court appears to agree:

The California Constitution expressly provides for the separation of governmental powers among the three branches of government. The powers of state government are legislative, executive and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this constitution. (California Constitution, Article III, Section 3). The purpose of separation of powers is to protect the individual liberty by preventing concentration of powers in the hands of any one individual or body. (*Buckley v. Valeo* (1976) 424 U.S. 1, 122). The California Constitution also provides, at Article V, Section 1, that the supreme executive power of this state is vested in the Governor. The Governor shall see that the law is faithfully executed. Plaintiffs here allege that the California Coastal Commission's (CCC) activities are in violation of the provisions of Article III, Section 3 and Article V, Section 1 of the Constitution. They contend that CCC is a legislative agency because two-thirds of its voting members are appointed by, and serve at the pleasure, of the Legislature.

As Defendants point out, it is well established that the Separation of Powers Doctrine does not prevent the establishment of executive agencies that are "hybrid" in nature because they exercise limited quasi-judicial and/or quasi-legislative functions. It is further well established that the Legislature has the power to appoint cer-

tain commissioners and agency board members. The simple fact that the Legislature retains powers of appointment of commission members does not by itself offend the separation of powers. However, a separation of powers violation occurs where the exercise of the power of one branch of government defeats or materially impairs the authority of another branch. (*O'Brien v. Jones,* (2000) 23 Cal.4th 40). The California Coastal Commission is unique in its composition. While identifying a plethora of executive agencies and commissions where some of the members are appointed by the Legislature, Defendants have identified no other present day commission where the majority of the members are appointed by the Legislature and no other statute where appointees serve at the pleasure of the Legislature . . . The Coastal Commission is in the Resources Agency. The Secretary of the Resources Agency is a non-voting member of the Commission. She has no jurisdiction over the Commission. The enabling legislation makes the Coastal Commission an independent body. The members of the Commission have the power to appoint the executive director, who is exempt from civil service provisions; promulgate rules and regulations; and issue permits and cease and desist orders regarding matters within their jurisdiction. The Commission may also apply for and accept grants, appropriations, and contributions in any form . . .

The Court does not find Defendants persuasive . . . The system of checks and balances does not give adequate protection. Neither the fact that the power is disbursed among the legislative branches nor the geographical diversity changes the fact that eight of its members are appointed and subject to at-will dismissal by the legislative branch of government.

In *O'Brien, supra,* the majority decision relied heavily on the fact that the court retained its inherent power as the final decision maker on disciplinary matters. Here, the Coastal Commission has wide powers, only a limited number of which are subject to limited judicial review. Purportedly an executive agency, the Commission is answerable to no one in the executive. The members are not directly answerable to the voters. The Legislature has retained for itself the power of appointment and dismissal at its pleasure. The Coastal Commission is effectively a legislative agency. Comity and pragmatism cannot save it. The judicial and executive powers that it exercises are not incidental to the law making power. They are not properly under the jurisdiction of the Legislature.[7]

Anyone who reads this portion of the opinion carefully realizes very quickly just how powerful this agency is and how much it can do with the powers reserved to it. The point now arises, is this kind of agency typical around the country and how do other states with coastlines regulate them to avoid the issue of separation of powers?

A sampling of eastern seaboard states reveals a system far more reliant on federal law than California's. Rick Hoffman, Associate Counsel for the New York State Department of State, the entity having supervisory authority over compliance with the coastal zone management in New York, finds a two-tiered approach to how other states deal with the problem:

> In New York, as in all the states, we have to demonstrate that the state's own programs are in conformity with federal law. Thirty of the states have approved programs now; all have enforceable policies. Some of the states take the "direct permit route," such as North Carolina and California. Others, like New York, take a network approach and coordinate their approvals under their state statute, which is called "SEQRA," or "New York State Environmental Quality Review Act." The standard is: "significant effect on the environment" and the agencies look at the proposed development to see whether it is consistent with the New York coastal policies.[8]

Mr. Hoffman relates that there are remedies at law for failure of either the agency to do that properly or for someone who has not complied with it, notwithstanding the agency's approval, apparently, to stop them. The agencies work independently of each other rather than caucusing. The Department of State is charged with directly determining whether the proposed development complies with federal requirements and whether it is consistent with the state's policies.

Mr. Hoffman believes that "fragmentation" is better. If the departments within the state do not agree, or, in

ZONING AND PLANNING LAW REPORT

Editorial Director
Tim A. Thomas, Esq.
Contributing Editors
Patricia E. Salkin, Esq.
Kenneth H. Young, Esq.
Electronic Composition
Diane Plassey Gutierrez

Published eleven times a year by
West Group
Editorial Offices: 50 Broad Street East, Rochester, NY 14694
Tel.: 716-546-5530 Fax: 716-258-3774
Customer Service: 610 Opperman Drive, Eagan, MN 55123
Tel.: 800-328-4880 Fax: 612-340-9378

Subscription: $283 for eleven issues

ISSN 0161-8113

particular, if there is a dispute between the local and the state level, then the Secretary of State is charged statutorily to mediate and seek a resolution.

Much of this is done at the local level in New York. If an individual wants to build something within the parameters of local law, they often do not need a state permit to do it and it does not necessarily trigger state review. However, anything that will go before the Planning Commission in New York is something that will then go through the New York Department of State to see if it complies with SEQRA and with NEPA, the federal act.

New York has other agencies that deal with natural problems that would require a permit, such as erosion. There is a coastal erosion hazard zone that is similar to a "flood plain." The State will look at permits in this zone to determine whether there is a public safety issue. Often, municipalities may have what is called a "scenic overlay zone" where the municipality may have more power to regulate what gets built in that zone. There are also "local waterfront revitalization programs" that impose yet another regulatory overlay for local, but not state, bodies to look at.

Even a cursory review of this structure makes it clear that, not only is it fragmented, it devolves a great deal of power to the local level, in sharp contrast to California's "super agency."

New York is not alone, either. Ryke Longest, Special Deputy Attorney General with the North Carolina Department of Justice, describes other procedural safeguards preventing the concentration of power that he sees in the California system. The primary difference between the California system and North Carolina is that, in North Carolina, all of the Coastal Resource Commission members are appointed by the governor of North Carolina; none are appointed by the Legislature or by legislators. This obviates the objection raised by Streichenberger; the North Carolina agency is clearly an executive one and has the authority from the Governor, not the Legislature. He does indicate, though, that no one has challenged the authority of the North Carolina Coastal Resources Commission on separation-of-powers grounds; he agrees that they, like California, have a mixture of quasi-judicial, quasi-legislative, and quasi-executive powers and authorities.

Mr. Longest points out, though, that there has been a proscription against any of the members of the Coastal Resource Commission being members of the Legislature; see *State ex rel. Wallace v. Bone,* 304 N.C. 591, 286 S.E.2d 79 (1982).[9]

The *Bone* case only points out just how different the State's constitutional framework is in limning out the separation of powers issue. The opinion starts out by quoting the relevant section of North Carolina's Constitution: "Section 6 of Article I of our State Constitution provides: '*Separation of powers.* The legislative, executive and supreme judicial powers of the state government shall be forever separate and distinct from each other.' "[10]

The case goes into more detail explaining just how different North Carolina's constitutional structure is from that of other states: "There are many indications that North Carolina, for more than two hundred years, has strictly adhered to the principle of separation of powers. One indication is that ours is one of the few states, if not the only state in the union, that does not provide its Governor with the power to veto enactments of the Legislature. Numerous efforts to change our Constitution to give the Governor that power have failed. The clear implication is that our people do not want the chief executive to have any direct control over our legislative branch."[11]

The *Bone* case draws a distinction between "cooperation" between legislative and executive agencies and the actual usurpation of power. Citing a Kansas case (*State ex rel. Schneider v. Bennett,* 219 Kan. 285, 547 P.2d 786 (1976)), the court quoted the Kansas court: "The Separation of Powers Doctrine does not in all cases prevent individual members of the Legislature from serving on administrative boards or commissions created by legislative enactments. Individual members of the Legislature may serve on administrative boards or commissions where such service falls in the realm of cooperation on the part of the Legislature and there is no attempt to usurp functions of the executive department of the government."[12]

The North Carolina court came down squarely in favor of drawing a broad line demarking the difference between executive and legislative, in particular, how the members of an executive agency are appointed:

> It is crystal clear to us that the duties of the EMC [North Carolina Environmental Management Commission] are administrative or executive in character and have no relation to the function of the legislative branch of government, which is to make laws . . . The Legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointment Legislatures to the governing body of the instrumentality.[13]

In practice, North Carolina splits its agency into two levels. The Executive Branch, according to Ryke Longest, has a staff of professional career employees. They are the ones that initially deal with a permit application when it is submitted. A local government may also be called in if the matter is a minor one; the statutes apparently provide for that.

An appeal from the decision of the CRC *is* in fact possible and the appeal goes to an administrative law judge. A third party cannot appeal, but can ask for a third-party

hearing; the chairman of the CRC apparently makes the decision as to whether that request for a hearing is "frivolous." The standard of what is a "frivolous" request is written into North Carolina's statutes at N.C. General Statute Sections 113(a) through 121.1 and 126.

Perhaps most importantly, the fact that the Governor appoints the coastal commissioners probably would make a constitutional challenge along the lines of *Marine Forests Society* unnecessary. North Carolina's Coastal Commission has to go to its own judiciary to enforce any injunctions it is applying for. However, they get a different set of rules to enforce it than would a private litigant; the State has an office of administrative hearings, which is an independent agency that uses administrative law judges. It is to this entity that the Attorney General applies to get an injunction. When that judge makes findings, the Coastal Commission has very limited power to alter them. The ruling is not final until the litigant either has appealed to North Carolina's Superior Court or to let it go by way of default.

Given the fragmentation of the different administrative agencies regulating the coastlines in North Carolina and New York and, apparently in many other states, including Oregon, the difference in facts might very well render the situation in California narrow. On the other hand, the California Attorney General's office argues forcefully, in a parallel case, that not only is the Coastal Commission an agency acting well within California's Constitution, as they put it:

> ". . . The Commission will show that the authors of our Constitution rejected the federal model. Instead, California's Constitution and contemporaneous legislative enactments recognize the power of the California Legislature to create executive agencies and to determine the manner in which the officers are appointed . . . Further, California courts - in a series of decisions dating to the very first days of statehood - have uniformly found that legislative appointment of executive officers is fully consistent with California's Separation of Power's Doctrine."[14]

The Coastal Commission, by and through the Attorney General, goes through a great deal of prior law to show how, in fact, California's Constitution differs from the federal one and why the Coastal Commission as presently constituted does not violate it:

> California . . . did not adopt the federal appointment model . . . The makers of our Constitution chose to invest a Legislature, not the Governor, with a paramount authority to appoint and remove members of executive agencies . . . The document ultimately presented to and adopted by the people in November, 1849, contained a provision concerning the separation of powers (California Constitution of 1849, Article III).[15]

The brief, an obvious and clear predecessor to the *Marine Forests Society* case, lays out primary differences, in the Coastal Commission's view, between the California and federal Constitutions:

> The first striking difference between the California and federal Constitutions was the California Constitution's fragmentation of executive power. Rather than a single executive officer, the California Constitution provided for independently elected constitutional officers who would share among them the powers that, in the federal constitution, were arrogated under the sole control of the President and his appointments . . . The second striking difference between the federal and state constitutions was the much broader appointive role accorded to the Legislature at the expense of the Governor . . . The Legislature was also empowered to appoint by the joint vote of both houses all of the members of the first Supreme Court and all of the district court judges throughout the State.[16]

The Coastal Commission found a very early case, *People ex rel. Waterman v. Freeman,* 80 Cal. 233, 22 P. 173 (1889), involving a separation-of-powers challenge to the appointive power of the Legislature under the 1879 Constitution. The action was challenging the constitutionality of Section 2292 of the Political Code, which provided that all five members of the Board of Trustees of the State Library were to be appointed jointly by both houses of the Legislature. California's Supreme Court held in favor of the legislative appointees and in doing so, according to the Attorney General representing the California Coastal Commission, rejected Thomas Jefferson's view that the power of appointment to office was an inherently executive function:

> [I]t had not only been decided in other states of the union, under constitutions containing provisions substantially equivalent to the sections above quoted from our own (Article III, Section 1, concerning the separation of powers, and Article XX, Section 4, stating that the Legislature was to provide for election or appointment of officers not provided for in the Constitution), that the Legislature could fill offices by itself created, but our own Supreme Court, construing identical provisions of our old Constitution, had come to the same conclusion.[17]

Finally, the California Coastal Commission's Brief makes three points: (1) in California the Legislature has primary authority over executive branch appointments; (2) the Legislature frequently appointed the majority of the officers of an executive agency; and (3) there are numerous executive agencies today where the Governor

himself appoints fewer than a majority of the agencies' voting members.

It is clear, from looking at these logical points, that the Coastal Commission wants to distance itself from both the Federal Constitution and federal law construing it; relying instead on state law and state history will, in the Coastal Commission's mind, give it the persuasive edge. Peter Douglas, the Coastal Commission's Executive Director, has spoken out publicly on the case. In a column he wrote for the *Los Angeles Daily Journal* on June 15, 2001, he gave his own opinion:

> I am confident that this decision will be reversed, because it ignores the history and purpose of California's separation of powers clause and the multiple, legally mandated functions of the Commission . . . The fact that a majority of its voting members are appointed by the Legislature does not change its status as an executive branch agency. Regardless of how the Commission is characterized, its duties are classified as executive, quasi-legislative and quasi-judicial . . . By arguing that the Separation of Powers Doctrine limits the Commission to setting legislative policy, *Marine Forests* revisits a battle field abandoned long ago when California courts rejected similar attacks on the conduct of the public's business.
>
> More than eighty-three years ago, the California Supreme Court opined: "even a casual observer of governmental growth and development must have observed the ever increasing multiplicity and complexity of administrative affairs—national, state and municipal—and even the occasional reader of the law must have perceived that from necessity, if for no better ground and reason, it has become increasingly imperative that many quasi-legislative and quasi-judicial functions, which in smaller communities and under more primitive conditions were performed directly by the legislative or judicial branches of the government, are entrusted to departments, boards, commissions and agents . . ." The logic of *Marine Forests'* position, if affirmed, would bring government in California to a grinding halt. Based on history, legal precedent and common sense, the Commission's structure is consistent with California's Constitution . . .[18]

The doom sayers are not limited to Mr. Douglas. In an April 27, 2001 *Los Angeles Times* article, writer Kenneth R. Weiss interviewed several legal scholars in California to get their view. They were clearly shaken by *Marine Forests'* arguments:

> Legal scholars said Thursday that the ruling presents a significant legal challenge to the Commission, whose regulations have often delighted environmentalists and infuriated developers. "It is a serious challenge to the Commission that may well be upheld on appeal" said Stephen J. Barnett, a professor at UC Berkeley's Bolt Hall School of Law. J. Clark Kelso, a professor at McGeorge School of Law, said the case raises a "strong argument" that the commission's membership violates the Constitution. "It represents a tremendously important issue," he said.

Peter Douglas was also quoted in the same article: " 'This is a stunning decision that baffles me and defies comprehension' said Peter Douglas, the commissions' longtime executive director. If upheld on appeal, he said, 'it would create chaos. It would totally destroy California's coastal protection program.' "

Lisa Trankley, the Deputy Attorney General representing the Commission, was also quoted in the article: " 'The Legislature doesn't control the commission', she said. She cited a series of checks and balances in selecting the 12-member panel. The Assembly Speaker and the Senate Rules Committee are two separate entities that don't always see eye to eye. Also, half of the commissioners must be local officeholders, drawing from six different parts of the state. 'The Legislature cannot just appoint its friends', she said."[19]

Ms. Trankley elaborated a bit further in a personal interview on September 4, 2001. She reiterated Peter Douglas' concern about the enormity of the loss to the State if the Coastal Commission was ruled unconstitutional, and she reiterated that the State's brief will clearly contain law to the effect that the federal and state Constitutions can easily be distinguished and therefore that federal law is essentially inapplicable. She brought up a new reason that none of the briefs or the news articles really touched on: "The developers need the certainty; they need to be able to rely on the process so that they know what they are facing."

This is in fact a significant issue: If the Coastal Commission is in fact dismantled, will this "fragment" the coastline so that different counties or agencies will have different standards for what is buildable? More to the point, what will happen if a void is created? Ronald A. Zumbrun, the lawyer who represents Marine Forests, was quoted in the same *Los Angeles Times* article on the very point:

> ". . . he wants the Legislature to reconstitute the commission to give the governor a majority of the appointments. That would remake the commissions along the lines of most other government agencies, he said, thus reducing its independence and curbing its tendency toward what he calls the commissions's 'unfair and arbitrary' practices."[20]

Mr. Zumbrun, in a personal interview, gave a cogent summary of the arguments he plans to make before the Appellate Court: "They are still making the argument that they are an executive branch; they don't answer to

the Governor. The Legislature appoints the majority and controls the majority. The Legislature micro-manages the Coastal Commission; it can dismiss the members 'at will'. Since the *O'Brien* case came down (*O'Brien v. Jones,* 23 Cal. 4th 40, 96 Cal. Rptr. 2d 205, 999 P.2d 95 (2000)), the Coastal Commission's authority is in question."[21]

Mr. Zumbrun also referred repeatedly to the dissent in the *O'Brien* case, and in particular, the liberal use of federal authority in it: "Federal cases are useful to the California courts; the same aspects [in *O'Brien*] are in this case."

The *O'Brien* case that Mr. Zumbrun was referring to involved a constitutional challenge brought by previously appointed judges of the State Bar Court, contending that amendments to the California Business and Professions Code violated the separation of powers provisions of the California Constitution, Article III, Section 3, the very same ones that Zumbrun and *Marine Forests Society* are challenging now. The amendments provided that some of the hearing judges would be appointed by the executive and legislative branches and that the lay judge of the review department was replaced with a judge who was a member of the State Bar.

The *O'Brien* court disagreed, and found that, even though the Legislature reserved to itself and to the executive branch the right to appoint the hearing judges, other procedural safe guards alleviated the separation of powers concerns:

> Accordingly, although in 1988 the Legislature directed the creation of the State Bar Court, and also provided for the appointment of State Bar Court judges, the decision to utilize and to rely upon the legislatively created disciplinary structure was reserved to this court. Furthermore, although we have chosen to utilize the assistance of the State Bar court in deciding admission and discipline matters, we have also prescribed procedures and criteria for the evaluation, selection, and appointment of State Bar court judges, as well as procedural rules for the State Bar court itself, that are separate from—and sometimes different from—those in statutory provisions . . .[22]

And so we are left, in essence, where we started: Does California march in lock step with the federal Constitution and its separation-of-powers language and case law construction or, like so many things in California, does the Coastal Commission go its own way, a "super agency" created by California's Legislature and subject to its at-will dismissal and appointment? The matter will certainly come before the California Supreme Court for review. California has a long and well-publicized history of aggressively protecting its coastline, even to the point of regularly filing litigation against the United States of America to prevent offshore drilling. As the writer of the Los Angeles Times' April 27, 2001 article indicated, if the Supreme Court determines that the California Costal Commission is unconstitutionally appointed: ". . . The Legislature can put an initiative on the ballot to change the State Constitution and permit the Commission's makeup to remain unchanged. A citizen's initiative could do the same thing." [23]

California's citizens and voters would then have the last word. Without question, however, given the staggering economic value of California's coastline and the adversary points of view seeking to develop or to preserve it, the decision promises to be one of the most closely watched ones by legal scholars as well as the media, certainly in this decade.

NOTES:

[1] Los Angeles Times, Orange County Edition, May 29, 2001: "Going Against The Current; Ocean: The Coastal Commission's Order To Remove a Newport Reef Is On Hold After A Kelp Farmer Challenged The Panel's Constitutionality." David Haldane, Times Staff Writer.

[2] Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Adjudication—First Cause of Action (Separation of Powers) filed by Plaintiffs Marine Forest Society and Rudolph Streichenberger, Superior Court for the State of California, for the County of Sacramento, Case No. 00AS00567, page 4, line 5 through page 5, line 8.

[3] Memorandum of Points and Authorities, page 6, lines 7 and 8, citing a great deal of federal law, including Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659(1976), and Bowsher v. Synar, 478 U.S. 714, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986).

[4] Memorandum of Points and Authorities, page 13, lines 17-20.

[5] Memorandum of Points and Authorities, page 15, lines 8-9.

[6] Memorandum of Points and Authorities, page 15, lines 11-14.

[7] Order of Judge Charles Kobayashi Granting Plaintiff's Motion for Summary Adjudication of May 8, 2001: State of California, Sacramento County Superior Court, page 1, line 19 through page 3, line 24.

[8] Interview with Rick Hoffman, Associate County for the New York State Department of State, Tuesday, August 28, 2001.

[9] Interview with Ryke Longest, Special Deputy Attorney General with North Carolina Department of Justice, August 30, 2001.

[10] State ex rel Wallace v. Bone (1982), 304 N.C. 591, 595; 286 S.E.2d 79, 81 (1982).

[11] Id., 304 N.C. at 599; 286 S.E.2nd at 83.

[12] State ex rel. Schneider v. Bennett, 219 Kan. 285, 547

P.2d 786, 792 (1976), quoted in State ex rel. Wallace v. Bone, 304 N.C. 599, 606, 286 S.E.2d 83, 87 (1982).

[13] State ex rel. Wallace v. Bone, 304 N.C. 606, 608; 286 S.E.2d 83, 88 (1982).

[14] Appellate Brief of State of California Attorney General in Gregory Parker, Trustee of the Stanford Farm Trust, Plaintiff v. California Coastal Commission, Defendant, Case No. A091220.

[15] Appellate Brief, Parker v. California Coastal Commission, page 4, lines 23-25, page 7, lines 22-24.

[16] Supplemental Brief of Respondent California Coastal Commission, Parker v. California Costal Commission, Case No. A091220, page 8, lines 2-7 and 20-25.

[17] People ex rel. Waterman v. Freeman, 80 Cal. 233, 235-236, 22 P. 173 (1889), as cited in Supplemental Brief of Respondent California Coastal Commission in Parker v. California Coastal Commission, Case No. A091220, at page 15, line 7 through page 16, line 4.

[18] Coastal Catch; *Marine Forests* Ignores the History, Purpose of State's Separation of Powers Clause; Peter Douglas; Daily Journal, June 15, 2001, page 2, paragraph 6-11.

[19] Los Angeles Times, April 27, 2001, Home Edition, "Ruling Seen As Major Blow To Coastal Panel"; Kenneth R. Weiss, Times Staff Writer, pages 1-2.

[20] Los Angeles Times, April 27, 2001, Home Edition: "Ruling Seen As Major Blow to Coastal Panel"; Kenneth R. Weiss, Times Staff Writer at page 2.

[21] Interview with Ronald Zumbrun of September 5, 2001.

[22] O'Brien v. Jones, 23 Cal. 4th 40, 49-50, 96 Cal. Rptr. 2d 205, 999 P.2d 95 (2000).

[23] Los Angeles Times; April 27, 2001; Home Edition; "Rulings Seen As Major Blow to Coastal Panel"; Kenneth R. Weiss, Times Staff Writer, page 2, paragraph 7.

RECENT CASES

Third Circuit Finds that Variance Denial Is Arbitrary Under New Jersey Statute

In *In Re Four Three Oh, Inc.,* 256 F.3d 107 (3d Cir. 2001), a variance was sought to use property in New Jersey as a temple for Hindu worship. A board of adjustment initially denied the variance, citing traffic and parking concerns. In a subsequent ruling involving the same property, the board required, as a condition of granting the variance, that the applicant hire off-duty police officers to direct traffic and monitor compliance with the site's occupancy limits. The Third Circuit Court of Appeals held that both the initial denial of the variance, and the subsequently imposed condition, were arbitrary and unreasonable.

Applying New Jersey's variance law, the court identified the proposed temple as an "inherently beneficial" use under *Sica v. Bd. of Adjustment of the Township of Wall,* 127 N.J. 152, 603 A.2d 30 (1992). The Third Circuit then found that the board had failed to "seriously undertake the balancing test required by *Sica.*" 256 F.3d at 113. The court stated that the record showed "little support" for the negative criteria cited by the board in denying the variance. Furthermore, it found that "the Board shirked its duty under *Sica* to seriously consider conditions designed to alleviate any negative impact that would flow from the grant of the variance. The record reveals that [the applicant] proposed numerous conditions, from reducing the size of its prayer hall to reducing the occupancy limit of its temple, which should have quieted the Board's concerns about over-use, parking and traffic. The Board rebuffed all of these proposals for no apparent reason. Its president simply concluded that 'no organization would voluntarily limit its membership.' " 256 F.3d at 114.

The court also concluded that the requirement of hiring off-duty policemen was arbitrary and unreasonable. "The Board refused to allow [the applicant's] own volunteers to direct traffic and monitor occupancy, concluding that they could not be trusted to do so. We believe that this conclusion . . . has no basis in the record[.]" 256 F.3d at 114-115.

NOTED IN BRIEF

A city's one-month temporary moratorium on applications to construct billboards, enacted after its sign ordinance was struck down as unconstitutional, was not a "final legislative action," and was therefore not a "zoning decision" as defined in the Georgia Zoning Procedures Law. Consequently, the city did not have to comply with the statute's notice and hearing requirements when it enacted the temporary moratorium. *City of Roswell v. Outdoor Systems, Inc.,* 549 S.E.2d 90 (Ga. 2001). The court found that the city had adopted the moratorium "as an emergency measure to preserve the status quo for 30 days pending its enactment of a new ordinance. Because the moratorium was temporary, limited in scope to billboards exceeding a specific size, and enacted in response to a court order invalidating existing sign regulations, we conclude that it was a reasonable interim action and therefore exempt from the procedural requirements of [the Zoning Procedures Law]." 549 S.E.2d at 91-92. Furthermore, examining the purpose of the statute, the court stated that, "Requiring a public hearing on a city's decision to suspend permit applications for one month, an intermediate step in the legislative process, would not give affected persons a meaningful opportunity to be heard on any new substantive proposals." 549 S.E.2d at 92. Rather, the court found, "the purpose of the law would be better met by giving affected persons the opportunity to comment on the proposed regulations, as occurred here when the city council held a public hearing . . . on proposed amendments to its zoning ordinance related to sign regulations." Id.