Coastal Development Permit Appeals: Surprise You've Got ESHA!

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Anyone who has attempted to build along the California coast knows that obtaining a coastal development permit is an enormously challenging exercise. This is particularly true if any part of the potential development site is determined to be an "environmentally sensitive area," or an "environmentally sensitive habitat area" (ESHA) under the California Coastal Act of 1976 (Coastal Act).

ESHAs are subject to severe development restrictions, which in most cases essentially bar development of the area in order to preserve its value for environmental or habitat purposes. Seeking a permit for development on the coast is arguably trickier than ever in light of the California Coastal Commission's recent efforts to declare sites to be ESHA for the first time in the appeal of a locality's approval of an individual permit application. As a result, property owners and developers who are led to believe that they have successfully navigated the regulatory maze of the Coastal Act, learn only after years of effort and enormous expense that the Commission has a different view than the locality on what constitutes ESHA.

The Coastal Act's structure contemplates that ESHA determinations are made by a local government when adopting or amending its Local Coastal Plan (LCP). To the extent that the Commission disagrees with the certified LCP, it can raise the issue when the plan is initially certified or otherwise make its opinions known through the Commission's statutorily mandated periodic review of the LCP.

Instead of using these planning processes, the Commission has attempted to circumvent the Coastal Act by purporting to declare ESHAs not through LCP adoption, amendment or periodic review, but instead by asserting ESHA designations within the context of an individual permit appeal. Property owners and developers are blindsided by this practice because they rely on the LCP's delineation of ESHAs when submitting their applications for a coastal development permit to the local agency. Although the practice has not been reviewed by any court, this article contends that the Commission's efforts to designate ESHA in the context of an individual permit appeal clearly exceed its authority under the Coastal Act and undermine long-standing notions of fairness and notice in permit appeal proceedings.

Planning and Permitting Under the Coastal Act

The Coastal Act creates a comprehensive scheme to govern land use planning for the entire coastal zone of California. Cal. Pub. Res. Code § 30000 *et seq*. In adopting the Coastal Act, the California Legislature sought to strike a delicate balance between preservation of the natural and scenic resources of the coast, and the social and economic needs for development, particularly of coastal-related and coastal-dependent projects. *See* Cal. Pub. Res. Code §§ 30001(a),(b),(d).

A basic premise of the Coastal Act's regime is that local governments, rather than the Commission itself, are responsible for implementing the planning goals and permitting controls called for by the Act. To achieve the goals of the Coastal Act, each city and county within the coastal zone is required to prepare and submit to the Commission for certification of an LCP (unless the locality requests that the Commission prepare its LCP). *See* Cal. Pub. Res. Code § § 30500, 30511, 30512, 30513. The LCP consists of a local government's land use plans, zoning ordinances, zoning district maps, and, within sensitive coastal resource areas, other implementing actions. Cal. Pub. Res. Code § 30108.6. The Coastal Act authorizes the local government to determine the "precise content" of its LCP "in full consultation with the [C]ommission and with full public participation." Cal. Pub. Res. Code § 30500(c). The local government adoption of an LCP is a legislative act, entitling the locality to "wide discretion" to "formulate land use plans for the coastal zone." *Yost v. Thomas* (1984) 36 Cal.3d 561, 574.

Once the LCP is formulated, the Commission reviews the LCP, including the zoning ordinances and maps, and either certifies it as consistent with the policies of the Coastal Act or refuses certification. Cal. Code Regs. tit. 14, § 13520. The Commission's review focuses on, and is, in fact, limited to, an administrative determination that the land use plan conforms to (or does not conform) to the policies of the Act. "The Commission may only reject zoning ordinances, zoning district maps, or other implementing actions on the grounds that they do not conform with, or are inadequate to carry out, the provisions of the certified land use plan." Cal. Pub. Res. Code § 30513. The Coastal Act also specifically prohibits the Commission from diminishing "the authority of a local government to adopt and establish, by ordinance, the precise content of its land use plan." Cal Pub. Res. Code § 30512.2. Despite these limitations, the Commission is in a position to press the local government to designate additional areas as ESHA in its LCP prior to certification.

With the certified LCP in place, the city or county reviews and grants or denies applications for coastal development permits, except in certain circumstances such as applications for major public works projects or energy facilities. Cal. Pub. Res. Code § 30600(c). Coastal development permit decisions by the city or county may be appealed to the Commission only in certain circumstances. *See* Cal. Pub. Res. Code §30627(b); Cal. Code Regs. tit. 14, §§ 13109.2, 13109.5(d). A party appealing a permit decision may only assert as grounds for an appeal the failure to conform either with the applicable LCP or the Coastal Act's coastal access policies. Cal. Pub. Res. Code § 30603(b).

A Time and Place for Everything:
How and When to Designate ESHA

Part of the local government's task in creating a land use plan is determining what areas within the coastal zone are "environmentally sensitive areas" or ESHAs. The Coastal Act defines "environmentally sensitive area" as an area in which plant or animal life or their habitats are either rare or especially valuable because of their nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments." Cal. Pub. Res. Code § 30107.5. ESHAs are not defined separately in the Coastal Act, but development within or adjacent to an ESHA is expressly and severely limited. Under the Coastal Act, ESHAs "shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas." Cal. Pub. Res. Code § 30240(a). The statute, by its terms, and as emphasized by the few courts who have considered the issue, *see Sierra Club v. California Coastal Commission* (1993) 12 Cal. 4th 602, 617, and *Bolsa Chica Land Trust v. Superior Court of San Diego* (1999) 71 Cal. App. 4th 493, restricts development only "to uses dependent on [the] resources" – which would appear to restrict essentially all significant commercial development.

The Coastal Act's structure, described above, makes it clear that local governments are charged with the responsibility of preparing an LCP consisting of land use plans, zoning ordinances, zoning district maps, and, within sensitive coastal resource areas, other implementing actions. Cal. Pub. Res. Code § 30108.6. In preparing these documents in accordance with the Coastal Act, the local government bears the responsibility of adopting ordinances, maps or "other implementing actions" that designate ESHAs. Typically, the LCP contains maps that depict areas determined to be ESHAs, and property owners, developers and their consultants rely on these maps when submitting an application for a coastal development permit to the locality. Given the severe restrictions on, and arguably prohibition against, significant development with any commercial value, the importance of being able to rely on the LCP's designations of ESHAs before initiating the time-consuming and expensive coastal development permit application process is crucial.

The Commission's Post Appeal Surprise

The landowner's or developer's ability to rely on the LCP's designations of ESHAs has recently been thrown into question by the Commission's bold efforts to declare additional lands as ESHA in appeals of individual permit applications. Nothing in the Coastal Act authorizes the Commission to designate parcels as ESHAs when considering an appeal of a development permit. Yet, the Commission has adopted the practice of declaring specific parcels as ESHA even when the local government has not designated the site as ESHA under its LCP or other implementing actions. The effect of this action is that a developer, after spending significant time and financial resources, can never be certain that the Commission will not suddenly designate a potential development site as an ESHA, thus preventing significant development.

The Commission has adopted the practice of ad hoc ESHA designations despite the fact that the Coastal Act provides the Commission with at least one distinct avenue to prompt a locality to designate specific areas as an ESHA -- the periodic review.

How the Coastal Act Contemplates That the Commission Should Propose Additional ESHAs After an LCP Is Certified

Under the Coastal Act, the Commission is statutorily required to periodically review LCPs and is authorized to initiate an LCP amendment. Specifically, the Coastal Act requires the Commission to review every certified LCP from "time to time, but at least once every five years." Cal. Pub. Res. Code § 30519.5. The purpose of the Commission's review is to determine whether the LCP is being implemented in a way that is consistent with the purpose of the Coastal Act.

If the LCP is not in conformity with the Coastal Act, the Commission is authorized to submit to the local government recommendations of corrective action, including amendments to the LCP, that should be taken to bring the LCP's implementation into compliance. Cal. Pub. Res. Code § 30519.5. The Coastal Act mandates that ESHAs be protected against significant disruption. Cal. Pub. Res. Code § 30240. An LCP that arguably does not protect or properly designate an area as an ESHA may be out of compliance with the Act. The LCP periodic review process therefore gives the Commission the statutory vehicle to require that an LCP be amended to comply with the Coastal Act and include a particular area as an ESHA.

Accordingly, if during an LCP periodic review the Commission determines that additional sites within the LCP should be designated an ESHA, the Commission has the ability to initiate an LCP amendment to include additional environmentally sensitive areas. The Coastal Act then obligates the local government to implement the Commission's recommendations within one year, unless the local government produces a report which sets

forth justifications for not taking action. Cal. Pub. Res. Code § 30519.5. Case law reiterates that this periodic review is mandatory. *Citizens of Goleta Valley v. Board of Supervisors*, (1990) 52 Cal. 3d 553, 574.

By following these steps, the Commission could eliminate an element of uncertainty that currently exists due to the Commission's present practice of waiting until an individual permit is appealed before designating a potential development site as an ESHA.

If the Coastal Act establishes this procedure, why is the Commission attempting to declare ESHAs during appeals of individual permit applications instead of addressing its concerns in the mandatory periodic review? There are several possible explanations. Commentators have noted that "[i]n practice, although . . . [periodic review] is mandatory on its face, it has rarely been utilized by the Commission, for budgetary reasons." California Environmental Law and Land Use Practice § 66.27 (Matthew Bender 2000). One also can speculate that the Commission prefers to raise ESHA issues in individual permitting applications because it wants to avoid the difficulty of persuading the local government to redesignate additional areas as ESHAs.

Neither of these possible explanations provides a legitimate justification for side-stepping the amendment process. First, courts have long held that agencies cannot abrogate their statutory duty merely by contending that they have insufficient resources. *See e.g., Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1998) (resource limitations cannot justify Secretary of Interior's failure to comply with duties under the Endangered Species Act). By not adhering to the plain language of the Coastal Act which requires the Commission to undertake periodic review, the Commission is simply not in compliance with the statute.

Second, political and administrative difficulty are insufficient grounds to avoid designating an ESHA through the proper statutory process because it violates one of the basic tenets of administrative action -- the right of a landowner to have notice about agency action that affects his property rights. Moreover, the Coastal Act requires future development to be balanced with the protection of the coastal zone and encourages state and local cooperation and coordinated planning. *See* Pub. Res. Code § § 30001(d); 30001.5(e). Because the Commission is not utilizing the LCP periodic review and amendment process, the Commission is failing to fulfill the goals of the Coastal Act to balance economic development and resource protection through carefully conducted and coordinated planning and review processes. The Commission's decision to designate ESHAs outside of the periodic review process contravenes the basic legislative intent of the Coastal Act by avoiding coordinated planning and review by both local governments and the Commission. A landowner should be able to refer to a particular LCP and know with certainty that coordinated planning, including the Commission's periodic review of the LCP, was conducted and a ESHA designation of particular sites within the LCP has been completed. Instead, under the current state of affairs, a landowner can rely on an LCP in planning his development project, obtain local coastal development approval for a project, and then learn in an appeal by third parties or the Commission that the Commission believes that the landowner's property contains ESHA, effectively vetoing the approved project.

Conclusion

While any land development faces inherent risks, property owners and developers operating within the Commission's jurisdiction face additional regulatory requirements due to the increased protection of coastal resources. The uncertainties and risks stemming from the coastal development permit process are exacerbated when a regulatory agency implements its statutory authority in an unpredictable manner. Under the Coastal Act, an ESHA designation brings with it a very significant limitation on the type of development activity that can take place. Because the Commission is not employing the statutorily mandated periodic review process to identify

potential inadequacies in existing certified LCPs, but instead is attempting to designate ESHA in the context of an individual permit appeal, it has created a great deal of confusion in, and frustration with, the permit process. Until this practice is changed, landowners will continue to face uncertainty about whether a particular piece of property is an ESHA and consequently whether a site can be fully developed.

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