

California Coastal Commission Further Solidifies Enforcement Powers

An informal Attorney General advice letter and recent legislation attempt to clarify the Coastal Commission's powers in carrying out its enforcement authority.

The extent of the California Coastal Commission's legal authority to enforce violations of the California Coastal Act, and how the Commission may conduct enforcement proceedings, remain significant issues for developers and property owners in the Coastal Zone. Recent developments have both clarified and expanded the Commission's authority in conducting enforcement proceedings. The California Attorney General has issued an advice letter that appears to solidify Commission staff's long-held opinion that the Coastal Act does not allow "ex parte" communications in the context of enforcement proceedings. In addition, a new California law provides the Commission, for the first time in its nearly 40-year existence, the ability to impose monetary penalties for certain Coastal Act violations. These two developments arguably provide the Commission with additional power to pursue enforcement of the Coastal Act against developers or property owners.

Introduction

One of the more difficult issues that alleged Coastal Act violators face during the enforcement process is Commission staff's long-held opinion that the Coastal Act does not allow ex parte communications between the alleged violator and Commissioners once an enforcement proceeding has commenced. As a result, alleged violators have been limited to presenting their cases to Commissioners only at public hearings where time to rebut allegations can be limited. On August 15, 2014, an advice letter from the California Attorney General was presented to the Commission that concludes Commissioners may not engage in ex parte communications in the context of enforcement proceedings.¹ While not law, this advice letter solidifies Commission staff's position, and likely ensures that alleged violators will continue to be deprived of the opportunity to communicate with Commissioners outside of the public hearing process during enforcement proceedings — unless and until a judicial challenge or the California Legislature addresses this "procedure."

In addition, recent legislation has expanded the Commission's power to impose monetary penalties for certain Coastal Act violations. Throughout the Coastal Act's existence, the Act has only allowed a Superior Court to impose monetary penalties against Coastal Act violators. However, the Commission has lobbied the California Legislature for years to amend the Act to allow the Commission to impose administrative civil penalties generally. The Legislature has responded to the Commission by expanding its enforcement powers in the area of public access violations. Recently enacted Senate Bill (SB) 861 gives the Commission new authority to impose administrative civil penalties on violators of the Coastal Act's public access provisions, and to record liens against the property of violators who refuse to pay, even in the absence of a lawsuit brought through the California Attorney General's office.

Informal Attorney General Advice Letter Concerning Ex Parte Communications

The Coastal Act provides guidance for Commissioners engaging in ex parte communications. Coastal Act Section 30322 defines an “ex parte communication” as “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” (emphasis added). In turn, Section 30323 defines “interested person” as any applicant, person with a financial interest, or representative of any organization who intends to influence the decision of a Commission member on a matter before the Commission. The Coastal Act expressly allows ex parte communications on specified matters “within the Commission’s jurisdiction,” provided those communications are adequately disclosed to the public so that members of the public have an opportunity to respond.² Commissioners are not required to engage in ex parte communications, and may decline requests to participate in such communications.

A recently released informal Attorney General advice letter concludes that enforcement matters were knowingly omitted from the definition of the “Commission’s jurisdiction” for purposes of ex parte communications.³ Coastal Act Section 30321 lists “matters within the Commission’s jurisdiction” for purposes of the ex parte rules, all of which involve matters where an outside individual or party makes an application or other submission to the Commission seeking its approval or concurrence. Because Section 30321 does not list enforcement proceedings (e.g., cease and desist orders and restoration orders), and because enforcement proceedings are initiated by the Commission and not an applicant, the advice letter concludes that the Coastal Act’s provisions for ex parte communications do not apply to those matters.⁴

The advice letter further states that “improper ex parte communications compromise the fairness of the administrative hearing.”⁵ To ensure fairness, the advice letter recommends that Commissioners should avoid all ex parte communications in situations where the same party is involved in an enforcement action and a Coastal Development Permit application.⁶ Further, the advice letter explains that, while the Legislature could enact legislation authorizing ex parte communications in Commission enforcement proceedings, the Attorney General believes that courts would find such legislation unconstitutional for violating the “due process rights of the parties to the enforcement proceeding and of the public.”⁷ Based on this reasoning, the advice letter concludes that it is impermissible for Commissioners to participate in ex parte communications concerning Commission enforcement proceedings, but Commissioners are allowed to engage in ex parte communications with Coastal Development Permit applicants.⁸

At the Commission’s August 15 public meeting, the Commission discussed the Attorney General’s advice letter and received public input. Some commenters praised the advice letter for encouraging all discussions of active Commission matters to be held in a public forum. Others expressed concerns that prohibiting ex parte communications in enforcement proceedings could hinder alleged violators’ ability to fully present their cases to the Commission, thus obstructing their due process rights.

Several commenters also raised questions about the advice letter’s legal conclusions. They noted that because ex parte communications with decision-makers concerning quasi-judicial matters generally are not prohibited by California law, such communications cannot be prohibited for the Coastal Commission unless the Coastal Act contains an express prohibition. Others questioned how an ex parte communication on an enforcement matter could result in the denial of a fair hearing, since Commissioners are required to disclose ex parte communications and their contents on the public record. Further, since many alleged Coastal Act violators may simultaneously be seeking Coastal Development Permits, some commenters argued the blanket advice that Commissioners not engage in ex parte

communications with those individuals would violate the Coastal Act's explicit right to such communications for Permit applicants.

Several Commissioners also expressed concerns about how the advice letter should be implemented — particularly if an individual is both seeking a Coastal Development Permit and is subject to an enforcement proceeding — and requested additional briefing and analysis from the Attorney General's office and Commission staff. Despite these concerns, we expect that Coastal Commissioners will abide by the Attorney General's advice letter, unless or until the Attorney General provides further guidance, or the Legislature or the courts address the Commission's practice.

The California Coastal Commission's Enforcement Authority

In addition to regulating coastal development and other matters, one of the Coastal Act's primary goals is to protect public access to and along the coast. Specifically, the Coastal Act provides that development must not "interfere with the public's right of access to the sea...including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation."⁹ While the scope of the Commission's authority to regulate development in the Coastal Zone is broad, its ability to enforce the Coastal Act through issuing penalties has been limited. The Commission has the authority to issue cease and desist orders under Coastal Act Section 30810 to halt on-going violations, and to issue restoration orders under Coastal Act Section 30811 to compel the removal of unpermitted development or restoration of coastal resources. In addition, the Commission also has the authority to record a notice of violation on property that has been developed in violation of the Coastal Act.¹⁰ Previously, however, the Commission had no authority to collect fines from an alleged violator who refused to comply with a Commission order. Rather, the Commission was required to request that the Attorney General institute proceedings in Superior Court on behalf of the Commission to enforce such violations.¹¹ This costly and time-consuming option has resulted in a current backlog of nearly 2,000 enforcement actions.¹²

Past Efforts to Expand the Commission's Enforcement Authority Have Failed

Previous legislative efforts have sought to expand the Commission's authority to issue penalties directly against Coastal Act violators. For example, in 2013, California Assembly member Toni Atkins (D-San Diego) authored Assembly Bill No. 976, which would have greatly expanded the Commission's powers by giving it the authority to fine alleged violators directly for nearly any violation of the Coastal Act, including violations of a Coastal Development Permit condition or impeding public access to the coast.¹³ As proposed, the authority granted by AB 976 would have expired in 2019, giving the Commission a "test run" period to impose penalties directly. AB 976 passed in the Assembly, but was defeated in the Senate. Although the Legislature did not pass AB 976 last year, substantial concepts from that bill were added to budget trailer bill SB 861, which the Legislature passed earlier this summer, expanding the Commission's enforcement powers.

SB 861: Commission Obtains New Enforcement Authority

Governor Brown signed SB 861 on June 20, 2014.¹⁴ SB 861 adds a new Section 30821 to the Public Resources Code that authorizes the Commission to assess administrative civil penalties directly for violations of the Coastal Act's public access provisions.¹⁵ What constitutes a violation of the Coastal Act's public access provisions may be broadly construed, as the Coastal Act generally requires that "[d]evelopment shall not interfere with the public's right of access to the sea..."¹⁶ Accordingly, a substantial number of enforcement proceedings brought by the Commission could be characterized as "public access" violations. The failed AB 976 and the newly enacted SB 861 differ primarily in that AB 976 would have applied to virtually all violations of the Coastal Act and would have been limited to a five-year "test run" period, while SB 861 only applies to violations of the Coastal Act's public access requirements but

includes no time limit requiring the Legislature to judge its effectiveness. Thus, while arguably limiting the Commission's ability to impose penalties to a narrower set of violations, SB 861 gives the Commission this new penalty authority in perpetuity.

A Section 30821 penalty must be approved by a majority of the 12-member Commission at a public hearing. Revenues from these penalties will be deposited into the Violation Remediation Account of the Coastal Conservancy Fund.¹⁷ Although Section 30821 places a limit on the amount of a penalty that the Commission may impose, the total amount still could be substantial. Specifically, Section 30821 limits penalties to no more than 75 percent of the maximum civil penalty for a Coastal Act violation, which ranges from \$1,000 to \$15,000 per violation per day the violation persists.¹⁸ Section 30821 also provides that the Commission may apply these penalty amounts to no more than five years of a violation. As a result, if the Commission were to levy the maximum penalty against a single violation that has persisted for at least five years (\$11,250 per day), this would result in a penalty of over \$20 million. Multiple violations over the same period could result in even higher penalty amounts.

In determining the amount of a penalty, the Commission will consider, among other things: (1) the nature, circumstances, extent, and gravity of the violation; (2) whether the violation can be remedied; (3) the sensitivity of the affected resource; (4) the cost to the state of bringing the action; and (5) factors specific to the violator, such as past violations, remedial measures taken, or any profits gained from the violation.¹⁹ Accordingly, providing evidence to support lower penalty amounts using these factors will become extremely important for alleged Coastal Act violators in future enforcement proceedings.

If an individual is found to have violated the Coastal Act and does not pay the penalty once the Commission has imposed it, Section 30821 authorizes the Commission to issue a lien against the individual's property.²⁰ In addition, Section 30821 authorizes an individual against whom the Commission has issued a penalty to challenge the penalty in court. By allowing the Commission to issue penalties directly, the Legislature has shifted the burden of going to court from the Commission to alleged violators.²¹

Notably, Section 30821 prohibits the assessment of administrative civil penalties in certain cases if the property owner corrects the violation. SB 861 expresses that the Legislature intends for the Commission not to levy penalties for "unintentional, minor violations that only cause *de minimis* harm" when the violator acts "expeditiously" to correct the violation. However, Section 30821 does not define what constitutes a "minor violation" and does not expressly prohibit the Commission from issuing penalties under such circumstances. Section 30821 provides that penalties shall not be imposed when the violator corrects the violation within 30 days of notice of such violation, so long as the violation can be corrected without new development requiring a Coastal Development Permit. Despite the apparent intent of this exception, it is doubtful that many violations will fall in this category as virtually all "development" under the Coastal Act requires a Coastal Development Permit, including "construction, reconstruction, demolition, or alteration of the size of any structure."²²

We expect SB 861 to add ammunition to the Commission's ongoing efforts to stop beachfront property owners from taking measures to limit public access to the beach, such as posting "No Parking" signs or erecting barriers to the coast. Currently, about one third of the Commission's nearly 2,000 enforcement case backlog are public access violations, and most of those cases are in Malibu.²³

Proponents have hailed SB 861 as a positive step toward greater enforcement of the Coastal Act's public access provisions. However, opponents have expressed concern that the Commission's new power will infringe on property rights, allow the Commission to impose substantial penalties with no meaningful opportunity to cure violations before a penalty is imposed, and force property owners to take the time and

endure the expense of going to court to challenge a penalty that may be improperly levied.²⁴ These issues will all be watched closely in the coming months as the Commission exercises its new powers.

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Endnotes

¹ Letter from Kamala D. Harris, Attorney General, to Dr. Charles Lester, Executive Director, California Coastal Commission, dated June 20, 2014 (available at <http://documents.coastal.ca.gov/reports/2014/8/F4.5-8-2014.pdf>) (hereafter Attorney General's Letter).

² Cal. Pub. Res. Code § 30324(a).

³ Attorney General's Letter at 3.

⁴ *Id.*

⁵ *Id.* at 4.

⁶ *Id.* at 5.

⁷ *Id.*

⁸ *Id.* at 6.

⁹ Cal. Pub. Res. Code § 30211.

¹⁰ Cal. Pub. Res. Code § 30812.

¹¹ See Cal. Pub. Res. Code §§ 30820, 30821.6.

¹² Angela Howe, *Money Talks – Commission Now Enabled to Fine Local Landowners*, Surfrider Foundation (July 1, 2014), <http://www.surfrider.org/coastal-blog/entry/money-talks-coastal-commission-now-enabled-to-fine-coastal-landowners>.

¹³ Available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB976.

¹⁴ The new provision will be codified at Cal. Pub. Res. Code § 30821; the text of SB 861 is available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB861.

¹⁵ SB 861 (2014), Section 137.

¹⁶ Cal. Pub. Res. Code § 30211.

¹⁷ Funds must be expended pursuant to Coastal Act Section 30823.

¹⁸ Cal. Pub. Res. Code § 30820(b).

¹⁹ Cal. Pub. Res. Code § 30820(c).

²⁰ Notably, Section 30821 also prohibits a violator from being subject to both a penalty assessed by the Commission and a penalty levied by a court for the same violation.

²¹ Further, in challenging the amount of the penalty imposed, these individuals will likely have to overcome the “substantial evidence” standard of review — which is extremely deferential to an agency’s decision.

²² Cal. Pub. Res. Code § 30106.

²³ See Howe, *supra* note 12; Chad Nelsen, *Los Angeles is the Epicenter of Coastal Act Abuse*, Surfrider Foundation (August 26, 2013), <http://www.surfrider.org/coastal-blog/entry/los-angeles-is-the-epicenter-of-coastal-act-abuse>.

²⁴ For commentary from those who support the change, see, e.g., Howe, *supra* note 12; Robin Abcarian, *Long Overdue: Malibu Elitists Who Impede Public Access Now Face Fines*, Los Angeles Times (June 23, 2014), <http://www.latimes.com/local/abcarian/la-me-ra-malibu-public-access-fines-20140623-column.html#page=1>. For criticism of the Commission’s new power, see, e.g., Emily Sawicki, *Coastal Commission Can Now Issue Fines*, The Malibu Times (June 25, 2014), http://www.malibutimes.com/news/article_8a421c24-fc25-11e3-89a5-001a4bcf887a.html; Paul Beard II, *Coastal Commission ‘Penalties’ Bill Resurrected in Assembly*, Pacific Legal Foundation Liberty Blog (May 22, 2014), <http://blog.pacificlegal.org/2014/coastal-commission-penalties-bill-resurrected-assembly>.