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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE

CAPISTRANO SHORES PROPERTY, LLC, a California limited liability company, Petitioner, v. CALIFORNIA COASTAL COMMISSION, and DOES 1 through 30, inclusive, Respondents.	No. 30-2015-00785032-CU-WM-CJC **PETITIONER'S REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON VERIFIED PETITION FOR WRIT OF MANDATE** Dept: C18 Judge: Hon. Theodore R. Howard Trial Date: July 14, 2016 Time: 1:30 p.m. Action Filed: April 29, 2015

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INTRODUCTION

The Wills family[1] sought a coastal development permit to replace their beachfront mobile home on Space 12 in the Capistrano Shores Mobile Home Park (Capistrano Shores) with a slightly smaller new one. The Commission approved that permit only on the condition that the Wills waive rights to shoreline protection that they possess under the Coastal Act and the California Constitution (Special Condition #3). The Commission apparently does not wish to "consider the new mobile home [and other homes in the park] to be entitled to protection if and when [either the Wills, other home owners, or park owner Capistrano Shores] seeks improvements" to the existing seawall, Opp. Br. at 1, and imposed the condition because it wants "to ensure that the Commission is not forced to approve shoreline protection in the future." Opp. Br. at 11. But the Commission's wishes are not the law and, as discussed in Section V below, the proper application of the law provides the Commission all the power it needs to prevent harm to coastal resources from future development without Special Condition #3.

The Commission's opposition confirms the Wills' claim that the condition has nothing to do with mitigating adverse impacts of their mobile home replacement, but is an abuse of discretion aimed at enhancing the Commission's "power to deny or condition any potential future permit for shoreline protection." Pet. Br. at 1. Moreover, in attempting to justify the condition, the Commission: (I) advances an incorrect standard of review; (II) clings to insupportable interpretations of Coastal Act sections 30253 and 30235; (III) fails to rebut—indeed, entirely ignores—the Wills' demonstration that the Commission's decision lacks substantial evidence; and (IV) misstates the unconstitutional conditions doctrine that applies to this case and which requires Special Condition #3 to be set aside. Each of these defects is addressed in turn.

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[1] Petitioner Capistrano Shores Property, LLC is wholly owned by the Wills family and Petitioner is variously referred to as Petitioner, the Wills, or the Wills family throughout.

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I

STANDARD OF REVIEW: THE COMMISSION'S MISINTERPRETATION OF THE COASTAL ACT IS ENTITLED TO NO DEFERENCE

The Commission cites three cases for the proposition that "the Coastal Act and the Act's implementing regulations is entitled to deference" because "great weight must be given to the administrative construction to those charged with the enforcement and interpretation of a statute." Opp. Br. at 6. A fuller statement of the rule cited by the Commission makes clear, however, that Courts do not merely rubber-stamp an interpretation that completely omits key words from a statute's text, as the Commission has done here: "Courts must defer to an administrative agency's interpretation of a statute or regulation involving its area of expertise *unless the challenged construction contradicts the clear language and purpose of the interpreted provision*." *Ross v. California Coastal. Com.*, 199 Cal. App. 4th 900, 938 (2011) (emphasis added).

The Commission's confusion extends to *Yamaha*, which holds nearly the opposite of what the Commission states. Opp. Br. at 6 ("The case is inapplicable here as it dealt with the proper level of deference due to an agency's quasi-legislative actions. Even so, the case recognizes that deference is owed to an administrative agency's interpretations of its governing statutes."). The Court in *Yamaha* was called on to determine what standard of review applied to actions of administrative agencies and it made a distinction between quasi-legislative actions–circumstances in which the legislature had delegated rule-making authority to the agency itself–and administrative interpretations of statutes. Contrary to the Commission's view, the Court held that the former are due more deference whereas the latter "represents the agency's view of [a] statute's legal meaning and effect, questions lying within the constitutional domain of the courts." *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 11 (1998). "Because an interpretation is an agency's *legal opinion*, however 'expert,' rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree of judicial deference." *Id.* And, of course, no deference is due at all where an agency's interpretation is "clearly erroneous," *id*., as is the Commission's interpretation of Sections 30253 and 30235.

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II

THE COMMISSION CONTINUES TO OMIT KEY TERMS FROM SECTIONS 30253 AND 30235

The Commission findings cite Section 30253 and 30235 as the basis for Special Condition #3. 2 AR 466. It is bedrock law that the interpretation of statutes must "begin with the plain, commonsense meaning of the language used by the Legislature. If the language is unambiguous, the plain meaning controls." *Voices of Wetlands v. State Water Resources Control Bd.*, 52 Cal. 4th 499, 519 (2011) (citation omitted). A court cannot insert or omit words to make a statute conform to an agency's contrary interpretation. *See* Code Civ. Proc. § 1858. Further, "courts will not interpret away clear language in favor of an ambiguity that does not exist." *Hartford Fire Ins. Co. v. Macri*, 4 Cal. 4th 318, 326 (1992) (citation and quotation omitted). Yet the Commission clings to insupportable interpretations of Sections 30253 and 30235, which depend on omitting key words or adding new terms, to justify the Commission's failure to proceed according to law.

A. Section 30253

The Commission argues that it has authority to impose Special Condition #3 pursuant to Section 30253 because "[n]ew development must assure stability and structural integrity without the need for a seawall." Opp. Br. at 7. This may be the way the Commission would like to read Section 30253, but that is not in fact what the statute says. It states that new development must "[a]ssure stability and structural integrity" and *not* "in any way require the construction of protective devices *that would substantially alter natural landforms along bluffs and cliffs*." Cal. Pub. Res. Code § 30253 (emphasis added). The Commission's interpretation entirely omits the latter phrase entirely, which is directly applicable to the case at hand.

Once the entire statute is included and given its plain meaning, it forecloses the Commission's interpretation. The Commission concedes that the Wills' property is stable now. Opp. Br. at 12. And even if that were not the case, the statute does not prohibit all protective devices, but only those that "substantially alter natural landforms along bluffs and cliffs." Notably, there is no evidence in the record (and it is not true) that anything which might be done to Space 12 (or to the seawall that adjoins Space 12 and the other spaces in Capistrano Shores) could

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conceivably affect any natural landform along any bluff or cliff. Protecting natural landforms of bluffs and cliffs (but not beaches) is the purpose and plain meaning of Section 30253. Beaches like the one adjacent to Capistrano Shores are protected by Section 30235, discussed below, by limiting development of protective devices to ensure that they are designed to eliminate or mitigate impacts on local shoreline sand supply. When all of the terms of Section 30253 are considered, and read in harmony with Section 30235, it cannot justify the Commission's waiver demand.

The Commission erroneously cites *Barrie v. California Coastal Com.*, 196 Cal. App. 3d 8 (1987), in support of its interpretation. *Barrie* involved a question of whether the Commission was justified in prohibiting the *construction* of a permanent seawall to replace a temporary seawall that had been allowed under an emergency permit. It nowhere states the proposition for which it is cited. Further, it held that substantial evidence existed for denying the construction of the permanent seawall because numerous studies documented a "strong probability" that it would cause beach erosion. *Id.* at 21. That is contrary to the findings in this case that "there is no clear indication of a significant long term erosion trend" at the Wills' location. 2 AR 463.

B. Section 30235

The Commission's opposition acknowledges that the text of Section 30235 establishes standards for the approval of permits for shoreline protective devices, Opp Br. at 4 & 7, but then fails to address the Wills' argument that Section 30235 does not apply to their project, which sought no permit to build a sea wall. *See* Pet. Br. at 10-12.

The Commission's operative theory seems to be that if it allows the Wills to replace their mobile home, Section 30235 may force them to approve the repair, replacement, or enhancement of the existing seawall someday in the future "without regard to the erosional and other adverse impacts of that shoreline protection." Opp Br. at 11. This interpretation, however, depends again on omitting key terms from the statute. Section 30235 requires the approval of shoreline protection "to protect existing structures or public beaches in danger from erosion and *when designed to eliminate or mitigate adverse impacts on local shoreline sand supply*." Cal. Pub. Res. Code § 30235 (emphasis added). The horror that the Commission fears—the prospect of being forced

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to approve shoreline protection in the future that harms coastal resources—is addressed and precluded by the very language they omit in their wrong interpretation.

Relatedly, the Commission wants to ensure that mobile homes replaced now are denied the status of an "existing structure" for purposes of Section 30235 at such times in the future when a permit for maintenance, rebuilding, or enhancement of a seawall is presented by the Wills, other property owners, or Capistrano Shores. Opp. Br. at 11. It is impossible to square this view with the actual language of Section 30235. An existing structure is simply one that "exists" at the time of a *seawall permit decision* that triggers the application of Section 30235.

That is not only the plain meaning of the statute, but the meaning that the Commission itself has successfully argued for in past cases. The Commission is, therefore, barred by *res judicata*, specifically the doctrine of collateral estoppel, from taking the contrary position in this case. In a previous case against the Surfrider Foundation, the Commission litigated the meaning of "existing" in Section 30235 before the First District Court of Appeal. The court noted that,

> Surfrider argued the term "existing structures" must be interpreted to mean structures that existed prior to January 1, 1977, the date on which the Coastal Act became effective. ¶ The Commission . . . opposed Surfrider's petition. The Commission argued Surfrider's interpretation of section 30235 altered the plain meaning of the statute and was inconsistent with its long-standing interpretation which was to allow construction of seawalls when necessary to protect structures that exist *when a permit is sought*.

Surfrider Found. v. California Coastal Com., No. A110033, 2006 WL 1530224, at *2 (Cal. Ct. App. June 5, 2006) (emphasis added) (see Attachment 1).[2] In affirming the decision of the lower court, the court of appeal reports that the trial court ruled in "the Commission's favor on the merits. The court reasoned that the Commission's interpretation was consistent with the plain

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[2] *Surfrider* is an unpublished opinion, but properly cited here. Rule of Court 8.1115(b)(1) allows the citation of unpublished opinions "[w]hen the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel." The California Supreme Court recently noted that res judicata and collateral estoppel are closely related (and often confused) doctrines and clarified that a party may assert collateral estoppel, sometimes known as issue preclusion, "(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." *DKN Holdings LLC v. Faerber*, 61 Cal. 4th 813, 825 (2015). The Supreme Court's description applies directly to the present case, precluding the Commission from arguing a contrary interpretation of the meaning of "existing" in Section 30235 than the one declared in *Surfider*.

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language of Section 30235 and was in harmony with related statutes." *Id*. The Commission cannot be permitted to take a contrary, tactical interpretation of the statute in this case.

III

THE COMMISSION'S FINDINGS LACK SUBSTANTIAL EVIDENCE AND ITS FINDINGS DO NOT SUPPORT ITS DECISION TO IMPOSE SPECIAL CONDITION #3

Special Condition #3 must be set aside if in imposing the condition the Commission failed to proceed in a manner according to law, its demand was not supported by its findings, or those findings were not supported by substantial evidence. The Wills argued in their opening brief that the Commission failed to proceed according to law, Pet. Br. at 9-12, and demonstrated throughout that the Commission's decision was not supported by its findings. *Id*. at 5-7, 9-12 & 13-14. Assuming *arguendo* that it made findings in support of Special Condition #3, the Commission's opposition underscores the fact that they lack substantial evidence.

The Commission states that "shoreline experts generally agree" that shoreline protective devices and sea level rise leads to "a faster loss of the beach," justifying the condition. Opp. Br. at 4-5. But that contradicts the evidence in the record that there is no "clear indication of . . . significant long term erosion" at the Wills' particular location. 2 AR 463. It states that the condition is justified because "[a]ny seaward encroachment of the revetment would directly impact existing lateral public access along the shoreline and encroach onto State tidelands . . . .", Opp. Br. at 5, without any evidence to suggest that future shoreline protection of the Wills' particular property would require a seaward enhancement. In fact, the Commission acknowledges later in its brief exactly the opposite: that the setback on the Wills' space "provides an area that may accommodate any necessary future . . . expansion efforts within the mobile home unit's private property thereby protecting intertidal habitat and avoiding possible future public access impacts." Opp. Br. at 13 (citing 2 AR 467).

All of the Commission's attempts to demonstrate "substantial evidence" follow a similar defective pattern: the Commission acknowledges that the Wills' home is safe now, while expressing speculative concerns about the potential effects of keeping it safe in the future—bereft of any evidence tied to the Wills' actual project or location—for the purpose of gaining more

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power over potential permit applications for different projects that it may receive from the Wills or others in the future. For instance, the Commission variously asserts that the waiver is justified because: "a future shoreline protective device . . . *could* adversely impact public access," *id*. at 10 (emphasis added); "[w]hen a shoreline protection device is placed on a sandy beach, it often results in privatization of the public beach," with no finding that any device will be placed on a sandy beach or that it would have such an effect at this location, *id*.; the waiver "is designed to allow the Commission to avoid *potential future* impacts," *id.* at 11 (emphasis added); "[t]he condition represents a recognition that [the current evidence that the home is safe and will remain safe] could prove wrong, and future shoreline protection *would* have adverse impacts." *Id.* "Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, [or] evidence that is clearly inaccurate or erroneous . . . ." *Hines v. California Coastal Com.*, 186 Cal. App. 4th 830, 856 (2010) (citation omitted). Whatever the status of the Commission's proffered reasons for imposing Special Condition #3 on the Wills' current mobile home replacement, it is not substantial evidence.

IV

THE COMMISSION MISSTATES THE UNCONSTITUTIONAL CONDITIONS DOCTRINE, WHICH REQUIRES SPECIAL CONDITION #3 TO BE SET ASIDE

The Commission erroneously states that the unconstitutional conditions doctrine (represented by the *Nollan*/*Dolan*/*Koontz* line of cases) does not apply to Special Condition #3 and, if it does, is not violated here. Opp. Br. at 13-14. The Commission's view represents a profound misunderstanding of the law. The unconstitutional conditions doctrine applies to any condition that requires a person to give up a constitutional right in exchange for a permit. "[T]he government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government . . . ." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005) (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994)).

The Wills have rights to shoreline protection guaranteed by the California Constitution and the Coastal Act. *See* Pet. Br. at 12. Accordingly, the Commission can only force the Wills to give

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up those rights if their project has adverse impacts on public resources that warrant extinguishment of that right, *i.e.*, they can impose conditions that bear an "essential nexus" and are "roughly proportionate" to adverse impacts caused by the replacement of the Wills' mobile home. *Nollan v. Cal. Coastal. Com.*, 483 U.S. 825, 837 (1987) (requiring an "essential nexus"); *Dolan*, 512 U.S. at 391 (requiring the condition to be roughly proportional to the impact of the project subject to the permit). Special Condition #3 lacks any nexus at all to the Wills' project and the Commission has advanced nothing but hypothetical risks about what might occur if the Wills or *other property owners* someday apply for *entirely different permits* for *entirely unknown future* projects. By the Commission's own admission, the condition is not aimed at mitigating any actual harm attributable to the Wills' current project, but is imposed for the purpose of augmenting the Commission's power to deny future potential seawall applications that may be filed by either the Wills or others. Opp. Br. at 9, 11-12. The very fact that future impacts are unknown, not quantified, and may not even exist, can only mean that the most extreme condition of forcing a complete waiver of the Wills' shoreline protection rights goes too far and must be set aside as an unconstitutional.

V

THE COMMISSION HAS ALL THE POWER IT NEEDS TO ADDRESS FUTURE ADVERSE IMPACTS TO COASTAL RESOURCES

The Commission's opposition demonstrates that Special Condition #3 was motivated by a phantom fear: that unless the Wills are stripped of their shoreline protection rights, the Commission may be "forced to approve shoreline protection [for either the Wills or other property owners] in the future without regard to the erosional and other adverse impacts of that shoreline protection." Opp. Br. at 11. Even if this fear justified the Commission's abuse of discretion (which it would not), it is simply not true. The Coastal Act, properly interpreted, gives the Commission all the power it needs to condition a future permit to protect coastal resources, at such time in the future when Capistrano Shores or others may apply for a permit for shoreline protection.

Section 30235 does not require the Commission to give the existing revetment (or any other shoreline protective device that may in the future be possible or needed) a free pass. That section provides the Commission complete authority to condition or mitigate a future seawall permit to

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"eliminate or mitigate adverse impacts." And Section 30253 gives the Commission the power to prohibit development that will "require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs." One can envision a scenario in the future, for instance, in which Capistrano Shores or the Wills' Space 12 is in need of a new seawall. The Commission might then insist that any construction be done landward (rather than seaward) of the existing revetment, encompassed entirely on the park's private property, to avoid any adverse impact to the public beach—or require a design that "eliminates or mitigates adverse impacts." Such conditions respect the plain meaning of the Coastal Act while also meeting the concerns that allegedly inspire the Commission's overreaching demand in this case.

The Wills did not propose any new seawall, or even enhancement to the existing one, with their permit application. The time for the Commission to address its concerns about future impacts from future permit applications for different projects (and even projects by different property owners) is in the future, when those permit applications are made. The Coastal Act provides the Commission all the power necessary to ensure the public and coastal resources are fully protected when that moment arises.

CONCLUSION

The Commission's opposition fails to justify its abuse of discretion in imposing Special Condition #3 on the Wills' Coastal Development Permit 5-14-1582. For the foregoing reasons, and those provided in the opening brief, Petitioner respectfully requests that the Court order the Commission to set aside that portion of Special Condition #3 that requires Petitioner to waive its rights to shoreline protection.

DATED: June 14, 2016.

Respectfully submitted,

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By _____
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DECLARATION OF SERVICE BY MAIL

I, Tawnda Elling, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 930 G Street, Sacramento, California 95814.

On June 14, 2016, a true copy of PETITIONER'S REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON VERIFIED PETITION FOR WRIT OF MANDATE was sent via e-mail and placed in an envelope addressed to:

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which envelope, with postage thereon fully prepaid, was then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 14th day of June, 2016, at Sacramento, California.

TAWNDA ELLING

ATTACHMENT 1

2006 WL 1530224
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

Court of Appeal, First District, Division 5, California.

SURFRIDER FOUNDATION,
Plaintiff and Appellant,
v.
CALIFORNIA COASTAL COMMISSION,
Defendant and Respondent.

No. A110033.
|
(San Francisco County Super. Ct. No. 503643).
|
June 5, 2006.

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Opinion

JONES, P.J.

***1** Surfrider Foundation [1] filed a petition for a writ of mandate challenging a decision of the California Coastal Commission (the Commission) to approve the construction of a seawall that would protect two private homes and a public street that are located on a bluff overlooking the Pacific Ocean in Pismo Beach. The trial court denied the writ ruling the Commission had interpreted and applied the applicable statutes correctly. Surfrider now appeals. We will affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Gary Grossman owns the home located at 121 Indio Drive in Pismo Beach. The home was constructed prior to January 1, 1977, the effective date of the California Coastal Act. (See Pub. Resources Code, § 30000 et seq.) [2] Walter Cavanaugh owns the home located next to Grossman's home at 125 Indio Drive. Cavanaugh's home, in turn, is located adjacent to the Florin Street cul-de-sac, an important public viewpoint.

The lot on which Cavanaugh's home is located was originally owned by Grossman who in 1997, obtained permission from Pismo Beach to build a new home there. Before granting permission, Pismo Beach considered a report from a geotechnical expert who estimated that the bluff on which the home would be located was retreating at a rate of two to three inches per year. Therefore, the city required that the structure be set back 25 feet from the bluff face; an amount that should have been adequate to withstand 100 years of erosion.

Then nature intervened. The El Nino winter storms of 1997-1998 produced the wettest February in recorded history. Nearly 22 inches of rain fell on the Central Coast from late January through February 1998. The storms caused a five-foot section of bluff at the rear of Cavanaugh's property to break off and fall into the sea.

After the rains subsided, Grossman and Cavanaugh obtained new geotechnical studies. Those studies concluded that both homes were at serious risk of falling into the sea.

Grossman and Cavanaugh filed an application with Pismo Beach to construct a seawall to protect the bluff from further erosion. The city has adopted a local coastal program (LCP) as authorized by the Coastal Act. (See § 30108.6.) An LCP must be certified by the Commission. (§ 30519.) By application of section 30519, subdivision (a), development review authority previously exercised by the Commission is delegated to the local government that has adopted a certified LCP. Accordingly, Pismo Beach had the authority under the Coastal Act to authorize such a structure. (See § 30519, subd. (a).) Pismo Beach approved the application finding it was consistent with section S-6 of its LCP which allows seawalls "when necessary to protect existing principal structures...."

That decision was appealed to the Commission. Applying de novo review (§ 30621, subd. (a)), the Commission also approved the seawall. As approved, the seawall would be 18 inches wide, 15-20 feet tall, and would protect Grossman's home, Cavanaugh's home, and the Florin Street cul-de-sac. The approval was subject to numerous conditions including those that required Grossman and Cavanaugh to:

***2** -Face the seawall with sculpted concrete that would mimic the natural bluffs in color, texture and undulation;

-Replace an existing storm water outfall pipe and make a $50,000 deposit to implement Pismo Beach's storm water runoff control program;

-Install permanent devices to collect all surface runoff from the two houses;

-Implement a native plant landscaping plan;

-Pay $10,000 for public access improvements at the Florin Street cul-de-sac;

-Make an irrevocable offer to dedicate permanent public access to that portion of Grossman's property that is west of the seawall; and

-Monitor the success of the seawall and storm water outfall on a permanent basis.

Surfrider filed a petition for writ of mandate challenging the Commission's decision. As amended and as is relevant here, Surfrider argued the Commission misinterpreted section 30235 of the Coastal Act when it approved the seawall. That section states: "Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect *existing structures* or public beaches in danger from erosion...." (Italics added.) Surfrider argued the term "existing structures" must be interpreted to mean structures that existed prior to January 1, 1977, the date on which the Coastal Act became effective.

The Commission, Grossman, and Cavanaugh all opposed Surfrider's petition. The Commission argued Surfrider's interpretation of section 30235 altered the plain meaning of the statute and was inconsistent with its long-standing interpretation which was to allow construction of seawalls when necessary to protect structures that exist when a permit is sought. Grossman and Cavanaugh made those same arguments and raised two additional ones. They argued Surfrider's petition should be dismissed because it failed to name an indispensable defendant, Pismo Beach, whose interests were at stake in the suit. Grossman and Cavanaugh also argued the petition must be dismissed because it was based on a statute, section 30235, that did not apply under the circumstances.

The trial court rejected the procedural arguments Grossman and Cavanaugh had advanced, but ruled in their and the Commission's favor on the merits. The court reasoned that the Commission's interpretation was consistent with the plain language of section 30235 and was in harmony with related statutes. The court also noted its ruling was consistent with the Commission's long-standing interpretation of the statute and therefore was entitled to deference.

After the court entered a judgment denying the petition, Surfrider filed the present appeal.

II. DISCUSSION [3]

Surfrider contends the trial court erred when it denied its petition for a writ of mandate.

When considering an appeal from a trial court's decision on a writ of mandate, the Court of Appeal occupies the same position as the trial court. (*City of San Diego v. California Coastal Com.* (1981) 119 Cal.App.3d 228, 232.) The Commission's decision must be upheld if it is supported by substantial evidence in light of the entire record. (*Ibid.*) The agency's decision is presumed to be correct, and unless the petitioners produce or cite evidence to the contrary, the decision is presumed to be supported by substantial evidence. (*Smith v. Regents of University of California* (1976) 58 Cal.App.3d 397, 404-405.) As to issues of law, this court exercises independent review. (*Lewin v. St. Joseph Hospital of Orange* (1978) 82 Cal.App.3d 368, 387.)

***3** Here, Surfrider contends the trial court erred because it misinterpreted the term "existing structure" in section 30235, when denying its petition for a writ of mandate. It also urges that the Commission misinterpreted and misapplied section 30235. By framing its argument this way, Surfrider has made a fundamental, and we believe dispositive, error.

The Coastal Act states that any person who wishes to undertake development in the coastal zone must obtain a coastal development permit. (§ 30600, subd. (a).) In general, the Coastal Act grants permitting authority in the first instance to the Commission. (§§ 30519, 30600, subd. (c); see also *Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal.4th 1006, 1011.) However, the Coastal Act requires local governments to adopt LCPs to regulate

proposed development within their jurisdictions. (§ 35000, subd. (a).) An LCP consists of a local government's land use plans, ordinances, and other implementing actions that the Commission has certified as consistent with the policies of the Coastal Act. (See, e.g., §§ 30108.6, 30512, 30519.) After a local government has adopted an LCP, a development permit must be obtained from the local government. (§ 30600, subd. (d); *Landgate, Inc. v. California Coastal Com., supra,* 17 Cal.4th at p. 1011.) The local government must issue the permit if it determines that the proposed development is "in conformity with the certified local coastal program." (§ 30604, subd. (b).)

The Commission retains significant authority even after an LCP is adopted. As is relevant here, action taken by a local government on a proposed development may be appealed to the Commission which is authorized, under certain circumstances, to conduct a de novo review. (§ 30621, subd. (a).) However, after a local government has adopted an LCP, the scope of the Commission's authority changes. Where, as here, the Commission is asked to evaluate a project that will be located between the sea and the first public road that is parallel to the sea, the Commission is limited to determining whether the project "conform[s] to the standards set forth in the certified local coastal program or the public access policies set forth in [sections 30210 through 30214.]" (§ 30603, subd. (b)(1).)

Those procedures were followed in this case. Pismo Beach has adopted an LCP, section S-6 of which regulates the construction of armoring devices such as seawalls. The section states such devices are permitted "only when necessary to protect existing principal structures...." [4] Pismo Beach approved the seawall at issue concluding the standard had been satisfied.

That decision was appealed to the Commission. Applying a de novo review, the Commission also authorized construction of the seawall concluding the "residences qualify as ... existing structure[s] in danger from erosion for purposes [of] section S-6 of the certified LCP."

Surfrider challenged the Commission's decision by filing a petition for writ of mandate. However, Surfrider did not challenge the actual basis for the Commission's decision; i.e., whether the seawall was consistent with section S-6 of Pismo Beach's LCP. Instead, it argued construction of the seawall was inconsistent with section 30235 of the Coastal Act. However, the Commission was not authorized to determine whether the project was consistent with section 30235, because section 30235 has not been made part of Pismo Beach's local coastal program, nor is it contained in the public access policies set forth in sections 30210 through 30214 of the Public Resources Code. (See § 30603, subd. (b)(1).)

***4** In sum, the trial court correctly rejected Surfrider's petition. Our review requires us to assess whether the Commission's decision was supported by substantial evidence that the project conformed to Pismo Beach's LCP. Surfrider makes no such challenge, nor does it address the Commission's conclusion on this point as set forth in the administrative record. As we have explained, Surfrider's petition was instead premised on a section of the Public Resources Code that, by statute, did not apply to the decision being challenged, while it ignored the portion of Pismo's Beach's LCP that was controlling. [5]

Surfrider urges us to ignore this problem because section S-6 of Pismo Beach's LCP contains language that is similar to section 30235 and probably was based on that section. Surfrider also notes, correctly, that an LCP must be consistent with the Coastal Act. (§§ 30108.6, 30512, subd. (c); see also *Yost v. Thomas* (1984) 36 Cal .3d 561, 566.) Under these circumstances, Surfrider contends, section 30235 is controlling.

We simply disagree. The factors Surfrider cites support the conclusion that it might be appropriate to consider section 30235 when interpreting section S-6 of Pismo Beach's LCP. However, Surfrider has not made that argument here. Instead, Surfrider has based its petition and its argument on a section that clearly and explicitly does not apply to the decision being challenged. We will not consider as controlling a statute that is at best persuasive on the issue before us-application of section S-6 of Pismo Beach's LCP.

Alternately, Surfrider argues we should consider section 30235 to be controlling because the members of the Commission mentioned that section when discussing whether to approve the seawall at issue. Again, we are unpersuaded. Surfrider has not cited, and we are not aware of, any authority that holds the coastal commissioners can, by discussion, change their statutorily mandated jurisdiction. Furthermore, while the commissioners did discuss section 30235 when evaluating this seawall proposal, they undoubtedly did so in response to statements by Surfrider's counsel who argued that statute was controlling. However, the Commission's report,

which by regulation sets forth the basis for the Commission's decision (see Cal.Code.Regs., tit. 14, § 13096, subd. (b)), shows the commissioners in fact understood the issue they were required to decide. The report states: "The grounds for appeal under section 30603 are limited to allegations that the development does not conform to the standards set forth in the certified local coastal program or the public access policies of the Coastal Act." The report goes on to recommend that the commissioners, "[approve] a coastal development permit for the proposed development and [adopt] the findings set forth below on grounds that the development as conditioned will be in conformity with the policies of the certified City of Pismo Beach Local Coastal Program." The commissioners approved the seawall finding the "residences qualify as ... existing structure[s] in danger from erosion for purposes [of] section S-6 of the certified LCP."

***5** We conclude the trial court properly denied Surfrider's petition because it was based on a statute that did not apply to decision being challenged.

III. DISPOSITION

The judgment is affirmed.

We concur: GEMELLO, J., and REARDON, J. *

All Citations

Not Reported in Cal.Rptr.3d, 2006 WL 1530224

Footnotes

1 Surfrider describes itself as a "nonprofit public benefit corporation" that is "dedicated to the protection and enjoyment of the world's oceans, waves, and beaches...."

2 Unless otherwise indicated, all further section references will be to the Public Resources Code.

3 On February 15, 2006, while this case was being briefed, Surfrider filed a request asking us to take judicial notice of legal materials from several other states regarding the regulation of seawalls. We deferred ruling on the motion until the merits of the appeal. Having now considered Surfrider's motion, we deny it. The materials are not relevant to our analysis. (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6.)

4 LCP section S-6 states in part, "Shoreline protective devices, such as seawalls, revetments, groins, breakwaters, and riprap shall be permitted only when necessary to protect existing principal structures, coastal dependent uses, and public beaches in danger of erosion."

5 The trial court rejected this argument although it ruled against Surfrider on other grounds. Our review of this issue of law is de novo. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.)

* Judge of the Superior Court of Alameda County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.