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Coastal Catch

'Marine Forests' Ignores the History, Purpose of State's Separation of Powers Clause

By Peter Douglas

Superior Court Judge Charles C. Kobayashi's May 8 ruling in *Marine Forests Society v. California Coastal Commission*, 00AS00567 (Sacramento Super. Ct., filed Jan. 31, 2000) — that the Coastal Commission is unconstitutional because it is, essentially, a legislative body and violates the California Constitution's Separation of Powers Clause — has inspired crusading opponents to dust off time-worn attacks on the commission.

While pursuing a transparent agenda to destroy California's pioneering, effective and publicly supported coastal-protection program, Ronald A. Zumbrun, counsel for Marine Forests Society, and other commentators have obscured the real constitutional issues raised by the court. See, e.g., Ronald A. Zumbrun, "Checks and Balances," Forum, May 30.

To understand why the commission appointment structure is valid, we need to examine how separation of powers works in California. California's 1849 Constitution includes a Separation of Powers Clause similar to constitutions of many other states but far different from its federal counterpart. California's clause simply states that the "powers of state government are legislative, executive, and judicial [and that] [p]ersons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." Article III, Section 3.

The Legislature wasted no time confirming that consistent with this clause, it possessed the power to appoint officers to carry out executive-branch functions. In 1850, it created the office of the state printer and specified that the state printer be appointed by the Legislature. In subsequent litigation, the California Supreme Court held that "the right of the legislature to elect and control the state printer, cannot be defeated by any inference in favor of the appointing power of the Governor." *People v. Fitch*, 1 Cal. 519 (1851).

Almost 30 years later, the court reiterated that "the power of appointment to office, so far as it is not regulated by express provisions of the constitution, may be regulated by law, and if the law so prescribes, may be exercised by members of the legislature." *People v. Freeman*, 80 Cal. 233 (1889).

Until Kobayashi's decision, Zumbrum and others had unsuccessfully argued in several cases that the commission is unconstitutional because the Legislature appoints eight of 12 voting members, while the governor only appoints four (the governor also appoints three non-voting members).

The logic of Marine Forests' position, if affirmed, would bring government in California to a grinding halt.

Although all prior challenges to the commission on this ground had failed, and both the Court of Appeal and the California Supreme Court declined to hear this very argument in 1988 (*Smith v. California Coastal Comm'n*, A041047 (Cal. 1988)), there is no published appellate court decision on this point.

The factual context of this case is straightforward. On one side is the commission, with a mandate to "[p]rotect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural … resources." Public Resources Code Section 30001.5(a). The Coastal Act also provides that "any person wishing to perform … any development in the coastal zone … shall obtain a coastal development permit." Public Resources Code Section 30600. "Development" is defined as "the placement or erection of any solid material or structure." Public Resources Code Section 30106.

The commission may issue a cease-and-desist order if, after a public hearing, it determines that "any person … has undertaken … any activity that … requires a permit from the commission without securing a permit." Public Resources Code Section 30810. It can issue an order directing the person in violation of the Coastal Act to cease and desist and to immediately remove the illegal development, or it can set a schedule for processing a coastal permit. Section 30810.

On the other side is the Marine Forests Society, a nonprofit corporation, whose stated purpose is the development of an experimental research program for the creation of marine forests to replace lost marine habitat. Marine Forests built its first and only "habitat" in the ocean at a depth of 40 feet just off the Balboa Peninsula. This so-called "reef" is made up of approximately 1,500 car tires, 2,000 plastic milk jugs, PVC pipe, nylon rope and concrete blocks.

The Los Angeles Times recently reported that marine biologists are skeptical of the project and that Dennis Bedford, coordinator of the Department of Fish and Game's artificial-reef program, described the project as "totally unscientific" and merely a "repetition of earlier research proving that rubber tires make ineffective artificial reefs."

In mid-1993, commission staff determined that this project was unpermitted development under the Coastal Act. Marine Forests' "after the fact" permit application was denied by the commission in April 1997. In October 1999, after many attempts to resolve the matter amicably, I issued a "Notice of Intent to Commence Cease and Desist Order Proceedings."

After Marine Forests filed suit seeking a preliminary injunction to block commission action, the commission postponed its hearing until the court could act. In denying the injunction, Judge John Lewis rejected Marine

Forests' separation-of-powers argument, saying: "[T]he Court is not persuaded that the Coastal Commission exercises any different powers than those exercised by the myriad of other state agencies. The enabling legislation properly defines and limits the Commission's powers and its quasi-judicial functions are subject to proper judicial review."

The commission then held a hearing and issued a cease-and-desist order requiring removal of the so-called "reef." Marine Forests then filed another suit seeking a writ of mandate to invalidate the commission's cease-and-desist order. In that suit, Judge Talmadge Jones initially stayed enforcement of the cease-and-desist order, pending a decision on the merits of the case, and then denied the writ of mandate.

After this latest loss, Marine Forests renewed its first suit and moved for summary adjudication on grounds that the commission violates the Separation of Powers Clause. It argued that the commission is a "legislative body" because eight of its 12 members are appointed by the Legislature; that the granting, denying or conditioning of a development permit is an "executive power"; and that conducting a cease-and-desist order hearing is a "judicial power."

Marine Forests' theory was that the commission violated the separation-of-powers doctrine because, as a "legislative body," it may not engage in a "judicial" function by holding a cease-and-desist order hearing, or engage in "executive" functions by acting on coastal permit applications and implementing the provisions of the Coastal Act.

Kobayashi, who took over the case after Lewis' retirement, agreed and granted the motion. Pursuant to stipulation of the parties, the court stayed enforcement of its ruling pending exhaustion of all appeals.

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 commission is not a legislative entity. By statute, it is part of the executive branch and is located in the Resources Agency. Public Resources Code Section 30300; Government Code Section 12801.

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. Its executive duties include managing its budget and hiring personnel; its quasi-legislative duties include adopting regulations; and its quasi-judicial functions include issuing coastal development permits and cease-and-desist orders, certifying local coastal programs and reviewing federal activities for consistency with the Coastal Act.

By arguing that the separation-of-powers doctrine limits the commission to setting legislative policy, Marine Forests revisits a battlefield abandoned long ago when California courts rejected similar attacks on the conduct of the public's business.

More than 83 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 grounded 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. No sound objection can … be successfully advanced to this growing method of transacting public business." *Gaylord v. City of Pasadena*, 175 Cal. 433 (1917).

A succinct, more-recent statement of law concludes that "[i]t is too well settled to require a citation of authority that the Legislature may confer quasi-judicial power on an administrative agency." *B.C. Cotton Inc.* v. *Vox*, 33 Cal.App.4th 929 (1995); see also *Obrien v. Jones*, 23 Cal.4th 40 (2000) (legislation permitting executive and legislative branches to appoint some judges to State Bar Court did not violate separation-of-powers doctrine because it did not defeat or materially impair Supreme Court's authority over practice of law).

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. When the Court of Appeal considers our arguments, I am confident the trial court's decision will be overturned.

And we must remember that the coast is never finally saved. It is always being saved. With that in mind, rumors of the demise of California's premier champion of coastal protection are greatly exaggerated.

Peter Douglas is the executive director of the California Coastal Commission.