

# The Struggle for Local Control: An Update from the Coastal Frontline

By Christi Hogin, Esq.\*

Malibu), the Speaker of the Assembly gutted a previously introduced bill (AB 988) and inserted language empowering the Coastal Commission to draft Malibu's LCP. The newly revised bill virtually sailed through the Legislature pushed along by a whisper campaign alleging that Malibu pollutes the ocean with its seaside septic systems, refuses to allow any public access to the beach, and refuses to comply with the Coastal Act. Oblivious to these machinations, Malibu had no representatives there to correct the record.

The Coastal Commission interpreted AB 988 (codified at Public Resources Code Section 30166.5) as conferring it with plenary authority to adopt an LCP for Malibu. Instead of relying on the city's land use plans, zoning ordinance and zoning district maps (as arguably required by the Coastal Act), the Coastal Commission constructed its own LCP and declared it paramount. The Coastal Commission's LCP was adopted (over Malibu's objections) on September 13, 2002.

## IV. MALIBU VOTERS REACT

Resisting disenfranchisement, Malibu voters circulated a referendum petition. Within 30 days of the Coastal Commission's adoption of the LCP, the petition had been signed by nearly a third of the city's registered voters and was presented to the city clerk. The Los Angeles County Registrar of Voters has determined that the petition has sufficient signatures to qualify for the ballot. Under Elections Code Section 9237, a legislative act is "suspended" and not in effect once a valid referendum petition is filed with the city clerk.

A municipality's duties under the Elections Code with respect to voter referendum petitions are ministerial. The municipality does not have the discretion to reject out-of-hand the voter's referendum (such authority would undermine the power of referendum that the people reserved for themselves in the constitution, which power is jealously guarded by the courts).<sup>7</sup> If the Malibu City Council had adopted that LCP, the law is clear that it would be subject to referendum.<sup>8</sup> But the Coastal Commission, not the city, adopted the LCP. This novel circumstance led the city to court.

Malibu filed a lawsuit contending that, under Elections Code Section 9237, the effectiveness of the Coastal Commission's LCP is suspended by operation of law pending the referendum election. The city's theory is that the referendum power reserved by the people can be invoked against any legislative act regardless of what body is exercising legislative authority over the electorate.

The Coastal Commission contends that, since it is an administrative body of the State, its actions are administrative and therefore are not subject to referendum. The Coastal Commission also takes the position that Malibu violates the Coastal Act by not ignoring the referendum petition and issuing coastal development permits in accordance

This is the story of a city that was robbed of its planning and zoning authority and the story of the voters' attempt to invoke the reserved power of referendum as restitution. After you finish reading the (unfinished) tale of Malibu's Local Coastal Program and attempted referendum, given the implications for democracy and separation of powers, you may want to shout "no regulation without representation" and throw tea in a harbor. At a minimum, you should realize this is a time for city attorneys and county counsels to be very alert.

## I. THE BASICS

State law requires that a newly incorporated city prepare and adopt a general plan, which is a long range planning document.<sup>1</sup> The California Supreme Court has dubbed the general plan a "constitution for all future development."<sup>2</sup> In addition, coastal cities<sup>3</sup> are required by the Coastal Act<sup>4</sup> to prepare a local coastal program ("LCP") that implements the State's coastal policies.<sup>5</sup> Public Resources Code Section 30108.6 defines an LCP as follows:

"a local government's (a) land use plans, (b) zoning ordinances, (c) zoning district maps, and (d) within sensitive coastal resource areas, other implementing actions, which, when taken together, meet the requirements of, and implement the provisions and policies of [the Coastal Act] at the local level."

Ordinarily, a coastal city prepares its general plan and zoning ordinances in a manner that implements the State's coastal policies. The coastal city's plans and ordinances ultimately are presented as an LCP to the Coastal Commission<sup>6</sup>, which reviews the LCP to "certify" consistency with the Coastal Act.

Nearly all development in the coastal zone (defined by the Coastal Act) requires a coastal development permit. Until a coastal city has a certified LCP, the Coastal Commission issues coastal development

permits for that community. Once an LCP is certified, coastal development permits are issued by the coastal city instead of the Coastal Commission.

Many coastal cities do *not* have a certified LCP, although all are supposed to.

## II. MALIBU'S LCP PREPARATION

The City of Malibu lies entirely within the coastal zone and is subject to the Coastal Act. When Malibu incorporated in 1991, a task force was established to draft the city's general plan. The task force held numerous public meetings and ultimately prepared a draft document that was submitted to the city council. The general plan took into account Coastal Act policies (it was well-understood that the document would one day be part of the city's LCP). The task force spent four years completing the draft and the city council held 56 public meetings over an 18 month period before approving the general plan. In all candor, by that time, the city had fallen a bit behind schedule. Democracy can be sluggish.

Malibu then went to work assembling an LCP. The city council appointed an advisory committee, much like it had done with the general plan. The committee took a few years, holding over 110 public meetings, to prepare a draft. Ultimately a full draft was completed and in March 2000 city staff sent it to the Coastal Commission for review. All the while, the Coastal Commission continued to issue coastal development permits in Malibu, as it does in many other communities.

## III. AB 988 REMOVES LOCAL CONTROL

Unbeknownst to Malibu, within weeks of its LCP submission, the Coastal Commission's chair, executive director and lobbyist (yes, the Commission has a lobbyist) were working with the appointing authorities to craft legislation to transfer land use planning authority from the city to the Commission.

In August 2000, after floating various ideas (like withholding all State money from

with the LCP. This argument is based on AB 988, which purports to require the city to assume permitting authority upon the Coastal Commission's adoption of the LCP.

**V. SUPERIOR COURT RULES IN FAVOR OF COASTAL COMMISSION**

In a 40-page, single spaced decision, the Superior Court held that the Malibu voters have no right to a referendum on the Coastal Commission's LCP. The court reasoned that, by enacting AB 988, the Legislature decided that the Coastal Commission should adopt the LCP for the Malibu community, even if that means re-zoning and changing the city's general plan. The heart of the court's lengthy opinion is that the lofty environmental goals of the Coastal Act justify any incidental restriction of local power.

Malibu has appealed.

**VI. ANTI-LOCALISM THREATENS FUNDAMENTAL PRINCIPLES**

The complexities of modern administrative bureaucracy have caused administrative agencies to evolve into curious hybrids. To deal with problems inherent in contemporary society, administrative bodies are now routinely delegated substantial quasi-legislative and quasi-judicative powers. And, although this expansion of executive authority initially caused great concern among the courts, these types of agencies have become a fact of modern government.<sup>10</sup> However, even though the lines separating the three branches of government have been allowed to shift somewhat in the interests of functionality and efficiency, they are not infinitely malleable. On the contrary, the law is settled that there is a point certain that cannot be crossed without flying in the face of fundamental constitutional principles of separation of powers.<sup>11</sup>

The doctrine of separation of powers does not require proof that the commingling of powers is resulting in the corruption of government or an intrusion on individual liberties. The framers of the federal and state constitutions were fully aware of the implications of commingling powers. The doctrine of separation of powers seeks proactively to insure the absence of an environment conducive to corruption and intrusion on individual liberties. As James Madison noted: "It will not be denied, that power is of an encroaching nature, and that it ought to be effectively restrained from passing the limits assigned to it."<sup>12</sup>

The authority extended by the Legislature to its appointees on the Coastal Commission through AB 988 is the authority to draft local law. The Coastal Commission wrote laws for Malibu with little or no regard for the city's right of self-governance and its desire to be centrally involved with shaping the law that it enforces. The Coastal Commission's legislation ostensibly is to be the law of Malibu and the rights, duties and obligations of all those residing in, doing business in, or even passing through the city will be affected (and in some instances profoundly so) thereby.<sup>13</sup>

**VII. COASTAL COMMISSION TARGETS OTHER COASTAL CITIES**

At its June 2, 2003 meeting, the Coastal Commission adopted a resolution requesting that Public Resources Code Section 30515 be amended to grant it additional power over coastal cities. Specifically, the Coastal Commission seeks authority to require coastal cities to revise their LCPs, as well as authority to revise the LCPs unilaterally in the event of a refusal.<sup>14</sup>

This idea is not new. Last year Assembly Bill 640 proposed similar broad powers, but it was shelved when it met resistance.

**VIII. A CALL FOR RENEWED PARTNERSHIP**

The Coastal Act is designed to be an alliance between coastal cities and the State to implement statewide coastal policy. The Act declares that "to achieve maximum responsiveness to local conditions, accountability, and public accessibility, it is necessary to rely heavily on local government and local land use planning procedures and enforcement" in carrying out the State's coastal objectives and policies.<sup>15</sup> Public Resources Code Section 30512.2 specifically admonishes the Coastal Commission to allow local governments to choose the methods of implementing Coastal Act policies:

"(a) The commission's review of a land use plan shall be limited to its administrative determination that the land use plan submitted by the local government does, or does not, conform with the requirements of Chapter 3 (commencing with Section 30200). In making this review, the commission is not authorized by any provision of this division to diminish or abridge the authority of a local government to adopt and establish, by ordinance, the precise content of its land use plan.

(b) The commission shall require conformance with the policies and requirements of Chapter 3 (commencing with Section 30200) only to the extent necessary to achieve the basic state goals specified in Section 30001.5."

As a practical matter, in order for the Coastal Act to work, local governments must be involved in and satisfied with the LCP preparation process.<sup>16</sup> At least in the case of Malibu, the Legislature was willing to compromise local control in favor of

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consolidating power in the hands of its statewide commission. In doing so, of course, the balance embedded in the Coastal Act was all but lost. Preservation of local control depends on the restoration of that balance.

The LCP imposed on Malibu has led to a voter revolt, litigation and a stand-off between two governmental agencies. All predictable results from a process that devalues local government's role in formulating the precise plan to implement State coastal policy. Nevertheless, the Coastal Commission has asked the Legislature to authorize it to draft local law throughout the coastal zone. Tsunami alert.

**ENDNOTES**

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- 1 Govt.C. § 65300.
- 2 Leshner Communications, Inc. v. City of Walnut Creek, 52 Cal.3d 531, 540 (1990); Citizens of Goleta Valley v. Board of Supervisors, 52 Cal. 3d 553, 570 (1990). Both cases find that the general plan is the single most important planning document.
- 3 For convenience (mine), throughout the paper I use the term "coastal city" although the Coastal Act applies equally to counties.
- 4 Pub.Res.C. § 30000 et seq.
- 5 Id. § 30200.
- 6 The Coastal Commission consists of 12 members. Four are appointed by the Governor, four are appointed by the Speaker of the Assembly and four are appointed by the President of the Senate Rules Committee. Pub.Res.C. §§ 30300-01. Until recently, all served at the pleasure of the appointing authority. However,

- after the Court of Appeal held that the appointment structure violated separation of powers (because a majority of members of the executive branch commission were controlled by the legislative branch), the Coastal Act was amended to provide for fixed terms for those members appointed by the Legislature. The case challenging the constitutionality of the Coastal Commission's appointment scheme is now pending in the California Supreme Court. See *Marine Forests v. California Coastal Commission*, 132 Cal.Rptr.2d 527 (2003).
- 7 Cf. *Alliance for a Better Downtown Millbrae v. Wade*, 108 Cal.App.4th 123 (2003) (holding that elections official can not refuse to certify initiative petition based on extrinsic evidence relating to manner of petition circulation).
- 8 See *Yost v. Thomas*, 36 Cal. 3d 561 (1984).
- 9 Legislative acts are subject to referendum. See *Midway Orchards v. County of Butte*, 220 Cal.App.3d 765 (1990) (holding that the Elections Code provisions relating to referenda must be read to include all legislative acts in order to protect the people's constitutional right of referendum). Adoption of a local coastal program is a legislative act. *Yost*, supra note 8 (holding that Coastal Act's LCP requirement did not abrogate the power of referendum). See also *San Mateo County Coastal Landowners' Assn. v. County of San Mateo*, 38 Cal.App.4th 523 (1995) (validating an initiative amending the county's local coastal program); *DeVita v. County of Napa*, 9 Cal.4th 763 (1995) (land use plan of county general plan may be amended by initiative); *Citizens for Jobs and the Economy v. County of Orange*, 94 Cal.App.4th 1311 (2002) (reiterating holding that LCP amendments were "analogous to general plan amendments as local legislative acts subject to initiative and that local governments have broad discretion to determine the content of their land-use plans.").

- 10 *Bixby v. Pierno* 4 Cal.3d 130, 142 (1971); *Gaylord v. City of Pasadena*, 175 Cal. 433, 436 (1917).
- 11 See, e.g., *In re McLain*, 190 Cal. 376, 379 (1923); *People's etc. L. Assn. v. Franchise Tax Bd.*, 110 Cal.App.2d 696, 700 (1952).
- 12 *The Federalist No. 48* (James Madison), *The Federalist Papers*, E.H. Scott ed. at 273.
- 13 I cannot resist offering the reader a sampling of provisions in the 500 pages of rules and regulations the Coastal Commission imposed on Malibu: (1) service station buzzers can not generate noise beyond that of a normal residential telephone ring; (2) entrances for ATM drive-up lanes must be 25 feet from driveways entering public streets; (3) parcels used for a community theater must be at least 5 acres; (4) outdoor performances are prohibited everywhere in the city; (5) greenhouses are prohibited on a lot smaller than one acre; (6) no more than eight animals per acre on a property, four of which may be horses and the remainder of which may be any combination of cattle, sheep and/or goats; (7) bowling alleys must provide at least five parking spaces per lane.
- 14 The staff report and the accompanying resolution can be found on the Coastal Commission's website at <http://www.coastal.ca.gov/lcp/th15-6-2003.pdf>.
- 15 Pub.Res.C. § 30004.
- 16 See also *Yost*, supra note 8 (the precise content of a local coastal program remains within the sound discretion of the local government).

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