Second Supplement to Memorandum 94-11

Administrative Adjudication: Exemption Request of Coastal Commission

Attached to this memorandum as Exhibit pp. 1-6 are letters from the Chief Counsel and Executive Director of the California Coastal Commission requesting an exemption from the proposed law. They point out that the Coastal Commission's structure and function are more like that of a city council or board of supervisors than a state quasi-judicial prosecutorial body. "The LRC proposal is wholly inconsistent with the decision-making model chosen for the Coastal Commission by the Legislature because it would require a hearing process that would function more like a trial than that which is typically used for planning and land use decisions. Its implementation would undercut the spirit and purpose of the Coastal Act in a number of ways, including significantly lengthening the decision-making process, substantially increasing its cost and making public participation in the process more burdensome."

The Coastal Commission acknowledges the ability to deviate from the statute where necessary, but believes this would not be available to it, and in any case the regulatory process to accomplish this is too cumbersome. "It seems unnecessary to require that agencies that have statutory requirements that cannot be harmonized with the proposal expend valuable time and resources to conduct a rulemaking proceeding to make the APA statutory provisions inapplicable. The better approach would be to include an express statutory exemption that would obviate the need for rulemaking."

The Coastal Commission indicates several specific problem areas that lead to its exemption request:

(1) Expedited 49 day hearings on permit applications are required by statute but could not be achieved under the procedures provided in the tentative recommendation.

(2) The procedures provided in the tentative recommendation would increase the cost to the agency of conducting hearings.

(3) The procedures provided in the tentative recommendation do not contemplate the public participation necessary for Coastal Commission hearings.

(4) The informal conference hearing procedures provided in the tentative recommendation would be unavailable for Coastal Commission hearings.

(5) The opportunity to modify the procedures provided in the tentative recommendation by regulation would be unavailable to the Coastal Commission.

The rules currently governing Coastal Commission hearing procedures appear to be largely found in regulations rather than statutes. However, to address concerns about the hearing process the Legislature in 1992 imposed statutory ex parte contact rules on Coastal Commission hearings. See Pub. Res. Code §§ 30320-30328 (fairness and due process), reproduced at Exhibit pp. 7-10.

The Coastal Commission's comment that it would not be permitted to tailor its hearings under the tentative recommendation is based on the assumption that its hearings are required to be conducted by the Office of Administrative Hearings under the tentative recommendation. This assumption is not correct; the Law Revision Commission intends to preserve the status quo on the existing ability of agencies to continue to use their own hearing officers; the staff has simply not yet had an opportunity to draft the conforming changes that will exempt the Coastal Commission and other agencies that currently employ their own hearing personnel. We anticipate a provision such as:

> **Pub. Res. Code § 30332 (added). Adjudicative proceedings**
>
> 30332. An adjudicative proceeding of the commission is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings.
>
> **Comment**. Section 30332 preserves the effect of former Government Code Section 11501 to the extent that section required use of Office of Administrative Hearings hearing personnel under the adjudicative proceeding provisions of the administrative procedure act. Adjudicative proceedings of the Coastal Commission are governed by the administrative procedure act, but need not be conducted by the Office of Administrative Hearings. See Gov't Code § 641.110 (when adjudicative proceeding required).

The Coastal Commission's concern about increased formality and consequent expense and delay can be addressed by making available the conference hearing procedures, which also are well-suited to public hearings of the type conducted by the Coastal Commission.

> **§ 647.110. When conference hearing may be used**
>
> 647.110. A conference adjudicative hearing may be used in proceedings where:

(a) There is no disputed issue of material fact.

(b) There is a disputed issue of material fact, if the matter involves only:

(1) A monetary amount of not more than $1,000.

(2) A disciplinary sanction against a prisoner.

(3) A disciplinary sanction against a student that does not involve expulsion from an academic institution or suspension for more than 10 days.

(4) A disciplinary sanction against an employee that does not involve discharge from employment, demotion, or suspension for more than 5 days.

(5) A disciplinary sanction against a licensee that does not involve revocation, suspension, annulment, withdrawal, or amendment of a license.

(c) *The decision is based on a finding of legislative fact.*

(d) By regulation the agency has authorized use of a conference hearing, if in the circumstances its use does not violate a statute or the federal or state constitution.

Comment. Section 647.110 is new.

Subdivision (a) permits the conference hearing to be used, regardless of the type or amount at issue, if no disputed issue of material fact has appeared. An example might be a utility rate proceeding in which the utility company and the Public Utilities Commission have agreed on all material facts. *See also subdivision (c) (decision based on finding of legislative fact).* If, however, consumers intervene and raise material fact disputes, the proceeding will be subject to conversion from the conference adjudicative hearing to the formal adjudicative hearing in accordance with Sections 614.110-614.150.

Subdivision (b) permits the conference adjudicative hearing to be used, even if a disputed issue of material fact has appeared, if the amount or other stake involved is relatively minor, or if the matter involves a disciplinary sanction against a prisoner. The reference to a "licensee" in subdivision (b)(5) includes a certificate holder. Section 610.360 ("license" defined).

Subdivision (c) *enables use of the conference hearing in instances where the decision is based on a legislative rather than judicial finding of fact. Examples of such decisions include planning and land use decisions based in part on information from public hearings, such as permit applications reviewed by the Coastal Commission.*

Subdivision (d) imposes no limits on the authority of the agency to adopt the conference adjudicative hearing by regulation, other than statutory and constitutional due process limits.

The special ex parte communication provisions of Public Resources Code Section 30320-30328 would be repealed in favor of the uniform ex parte contact provisions of the proposed statute.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

STATE OF CALIFORNIA—THE RESOURCES AGENCY PETE WILSON, Governor

CALIFORNIA COASTAL COMMISSION
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September 2, 1993

California Law Revision Commission
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Dear Sirs or Madames:

I am writing concerning the Law Revision Commission's (LRC) tentative recommendation which is titled "Administrative Adjudication by State Agencies." I appreciate the opportunity to comment about this proposal, but have serious concerns about it in light of the effects that it would have on the Coastal Commission.

The proposal would generally require that all state agencies adopt a formalized adjudicatory hearing process that would include trial type procedures such as compulsion of testimony, cross-examination, discovery, and testimony under oath. Although the recommendation provides that agencies may be exempted from some of those formal procedures, it appears that the means provided (the conference adjudicatory hearing process and the adoption of regulations to modify the otherwise required procedures) would not be available to the Coastal Commission.

The California Coastal Zone Conservation Commission was created through a statewide initiative which was passed in 1972. As required by the initiative, that Commission developed a plan for the management of development on the California coast over a four year period, after which time it went out of existence. Through the adoption of the Coastal Act in 1976 (Public Resources Code, Section 30000 et seq.), the Legislature created a permanent agency in the form of the Coastal Commission to address coastal planning and development.

The organizational structure and procedures chosen by the Legislature indicate that it intended that the Commission function as a body that would make planning and land use decisions in a way that is more like that of a city council or board of supervisors than that of a judge. The LRC proposal is wholly inconsistent with the decision-making model chosen for the Coastal Commission by the Legislature because it would require a hearing process that would function more like a trial than that which is typically used for planning and land use decisions. Its implementation would undercut the spirit

and purpose of the Coastal Act in a number of ways, including significantly lengthening the decision-making process, substantially increasing its cost and making public participation in the process more burdensome.

First, the Legislature placed a priority on ensuring that the Coastal Commission's review of the statewide and regional impacts of coastal development projects would occur on an expedited basis while at the same time maximizing public participation. Thus, the Coastal Act directs that the Commission set permit matters for public hearing within only forty-nine days. The Commission has implemented this in part by adopting a regulation that requires that an applicant must have already obtained preliminary approvals from other state and local governments in order to file a permit application with the Commission. (14 Calif. Code of Regs., Section 13052.) Because its permitting process occurs last, the Commission's review allows for an efficient overlay of a statewide perspective on the review of development projects.

The LRC proposal would significantly expand the time required for the Commission to process permits through hearing beyond the 49 days allowable under the Coastal Act. This is due in large part to a proposed adverserial formalization of the process, in particular because of the time required for formal discovery and cross examination. In light of the current political climate in California that emphasizes the perceived need for streamlining (i.e., shortening) governmental review of development applications, it is inappropriate to lengthen the Commission's review period beyond that which the Legislature ever intended. This is particularly true because it does not appear that any real public benefit would occur. As discussed above, the Commission is typically the last agency to review proposed development in the coastal zone. We know of no basis for concluding that adding various new and complex administrative procedures would improve decision-making at such a late point in the permit review process.

Second, in an era of austere budgets, it is important to consider the fiscal impacts that would occur if the proposal is fully implemented. The LRC tentative recommendation would pose a severe financial strain on the Coastal Commission and on state government generally. In this regard the Commission, for example, over the last five years has acted on approximately ninety quasi-judicial actions that require public hearings per month. The Commission would have to hire a number of additional staff, including lawyers, hearing officers, and court reporters. It would need to schedule longer hearings, and would be forced to rent additional hearing rooms. The Commission does not have sufficient resources to absorb those expenses; thus significant supplemental appropriations would be required to implement the proposal.

Finally, the Coastal Act emphasizes the importance of public involvement in the Coastal Commission's decision making process. The Commission's hearings have been conducted for seventeen years so that any member of the public who is concerned about a Commission action may comment orally to the

Commission. This has enabled the public to become involved with no greater expenditure than the time and travel costs to attend a Commission meeting. Under the proposal, members of the public would almost certainly be required to hire an attorney or other representative in order to comply with the additional procedural requirements that would be imposed. This would greatly increase the cost of public participation in Commission hearings, thereby limiting the ability of the public to participate in the Commission's review of coastal development.

In anticipation of the kinds of difficult integration problems discussed above, the proposed legislation authorizes state agencies to adopt regulations in order to modify the provisions of specific chapters of the Act or to make those chapters inapplicable. But these provisions are inadequate to meet the Commission's needs in various ways. First, as drafted, the authority to modify or make inapplicable the new APA provisions would apply only to an adjudicatory proceeding that "by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings." (See for example section 642.110.) Under existing law, the Coastal Commission is exempt from that requirement. (Government Code section 11500-11502.) However, the proposed legislation would also repeal the provisions that currently specify the agencies that are required to hold hearings conducted by administrative law judges employed by the Office of Administrative Hearings. Thus, it is unclear how the Commission or any agency would be authorized under the proposed statute to modify or make inapplicable the otherwise required procedures.

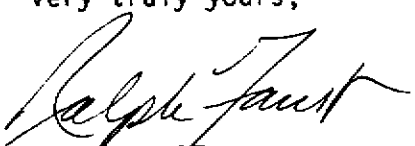
Second, the provisions are procedurally unwieldy because they require that an agency that wishes to avail itself of the opportunity they provide must do so by adopting regulations. The rulemaking process is expensive, time consuming and cumbersome. Rulemaking is a labor intensive endeavor for state agencies. It could take a significant part of one or more attorney's time over the course of a year to prepare proposed regulations for adoption by the Commission and filing with the Office of Administrative Law. Additionally, the Commission as a whole would be required to have lengthy public hearings to consider the pros and cons of modifying the requirements.

It seems unnecessary to require that agencies that have statutory requirements that cannot be harmonized with the proposal expend valuable time and resources to conduct a rulemaking proceeding to make the APA statutory provisions inapplicable. The better approach would be to include an express statutory exemption that would obviate the need for rulemaking. This could be accomplished by revising the proposal to require that only those agencies specified therein would be subject to the new administrative hearing requirements. Then the Legislature could affirmatively decide to which agencies it wanted to apply the proposal and how properly to balance the various procedural and monetary considerations.

In conclusion, I would like to offer some general thoughts about the proposal. Part of the wisdom embodied in the development of government decision-making in this century is reflected in the notion that no single process best suits the variety of needs of all administrative agencies which make determinations. Because different kinds of factual determinations need to be made from one agency to another, because different interests need to be identified and considered, including those without advocates, and because of a potential multiplicity of views among various parties, agency practice justifiably varies greatly within the overall confines of due process of law. To contend that only trial-type adjudications effectively resolve disputes is to cast aside much of this development of law in government. Even in the judicial context, alternative methods of dispute resolution are being explored, developed and utilized. Agencies should develop and refine their administrative procedures, borrowing liberally as necessary from our traditions, to properly implement the specifics of the laws which the Legislature has adopted, in the particular ways best suited to fulfill those various legislative mandates. The boundaries of this search for effective government should not be limited to one unitary procedure imposed without regard to substance or function, but rather be the tradition and law of due process as developed by the courts. Instead of reinventing government into a twenty-first century model, this mandate would recast government into a nineteenth century model, exhalting procedure over the proper implementation of substance. Only lawyers would benefit.

I urge you to reconsider your proposal or the alternative to make it adaptable to the needs of government agencies. Please do not hesitate to contact me if I can answer any questions, or be of further assistance.

Very truly yours,



RALPH FAUST
Chief Counsel

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STATE OF CALIFORNIA—THE RESOURCES AGENCY PETE WILSON, Governor

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September 3, 1993

California Law Revision Commission
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Dear Sirs or Madames:

I have just reviewed the letter sent to you by the Coastal Commission's Chief Counsel, Mr. Ralph Faust, expressing concerns about the proposals being considered by your Commission to require all state agencies responsible for making quasi-judicial decisions to adopt and implement a formalized adjudicatory hearing process that would include trial-type procedures such as cross-examination, discovery (including depositions and subpoenas), and testimony under oath. I write to support Mr. Faust's comments and to express my own serious objections to the proposals.

Everyone associated with doing the public's business today must be acutely aware of and sensitive to changing public needs, demands and new "realities" affecting governance. The public wants less government, not more. At the same time, the public wants better services and it does not want to pay higher taxes unless those taxes go to high priority services that are effective and efficiently provided. Based on my experience and interaction with the public, I believe that in its dealings with administrative decision-making agencies, the public wants easy access to a process that is fair, that gives them an opportunity to be heard, that minimizes costs, that is understandable and relatively simple procedurally, and that results in timely and honest decisions. The Coastal Commission has a twenty year record of providing this type of service in a program that involves high stakes in terms of environmental, economic and individual needs and values. The Coastal Commission is not alone. Other agencies, such as the San Francisco Bay Conservation and Development Commission (BCDC), have a good record making important natural resource use and conservation decisions based on a relatively uncomplicated public hearing process. Two major characteristics of our program, as well as that of BCDC, are flexibility and simplicity (acknowledging that, by definition, virtually no bureaucratic process is perceived to be simple). We pride ourselves in making our processes readily accessible to everyone interested in the Commission's work.

The proposed recommendations would not, in my view, serve any substantial or important public purpose if applied to the Coastal Commission and perhaps many other state agencies. On the contrary! They would, at the very time we are trying to find creative ways to cut costs, government red tape and to make government more effective, increase the size and cost of government. They would make it more expensive and difficult for members of the public to participate in California's coastal protection program or other programs

requiring state agency adjudicatory decisions which do not now utilize the proposed new procedures. They would make it more costly for persons wishing to undertake development projects in the coastal zone. They would result in substantial delays in reaching regulatory decisions. On the other hand, I recognize the new procedures would provide more employment opportunities for attorneys, consultants and permit expeditors.

In conclusion, I fail to see what important public purpose or interest is going to be served by recommendations that state agency procedures be rendered more complicated, rigid and time-consuming. At a time of shrinking public sector budgets and when many vital public programs such as education, health care and public safety are desperately competing for limited public dollars, it seems to me ill advised to adopt recommendations that will be extremely costly to implement and that are devoid of any compelling public purpose. I realize the recommendations are well-intentioned and predicated on considerable study and discussion. I respectfully suggest, however, that, as they now stand, the proposals do not reflect good public policy and should be held for further review and possible future consideration.

I would be happy to discuss my concerns in person with you or the Commission, if you believe that would be helpful.

Sincerely,

PETER M. DOUGLAS
Executive Director

PMD/pmh

2711E

cc: Members, California Coastal Commission
Alan Pendleton, Executive Director, BCDC
Jan Stevens, Deputy Attorney General

Exhibit

Statutes Governing California Coastal Commission

Article 2.5. Fairness and Due Process

30320. Findings and declarations

(a) The people of California find and declare that the duties, responsibilities, and quasi-judicial actions of the commission are sensitive and extremely important for the well-being of current and future generations and that the public interest and principles of fundamental fairness and due process of law require that the commission conduct its affairs in an open, objective, and impartial manner free of undue influence and the abuse of power and authority. It is further found that, to be effective, California's coastal protection program requires public awareness, understanding, support, participation, and confidence in the commission and its practices and procedures. Accordingly, this article is necessary to preserve the public's welfare and the integrity of, and to maintain the public's trust in, the commission and the implementation of this division.

(b) The people of California further find that in a democracy, due process, fairness, and the responsible exercise of authority are all essential elements of good government which require that the public's business be conducted in public meetings, with limited exceptions for sensitive personnel matters and litigation, and on the official record. Reasonable restrictions are necessary and proper to prevent future abuses and misuse of governmental power so long as all members of the public are given adequate opportunities to present their views and opinions to the commission through written or oral communications on the official record either before or during the public hearing on any matter before the commission.

30321. "Matter within commission's jurisdiction"

For purposes of this article, "a matter within the commission's jurisdiction" means any permit action, federal consistency review, appeal, local coastal program, port master plan, public works plan, long-range development plan, categorical or other exclusions from coastal development permit requirements, or

any other quasi-judicial matter requiring commission action, for which an application has been submitted to the commission.

30322. "Ex parte communication"

(a) For purposes of this article, except as provided in subdivision (b), an "ex parte communication" is 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.

(1) Any communication between a staff member acting in his or her official capacity and any commission member or interested person.

(2) Any communication limited entirely to procedural issues, including, but not limited to, the hearing schedule, location, format, or filing date.

(3) Any communication which takes place on the record during an official proceeding of a state, regional, or local agency that involves a member of the commission who also serves as an official of that agency.

(4) Any communication between a member of the commission, with regard to any action of another state agency or of a regional or local agency of which the member is an official, and any other official or employee of that agency, including any person who is acting as an attorney for the agency.

(5) Any communication between a nonvoting commission member and a staff member of a state agency where both the commission member and the staff member are acting in an official capacity.

(6) Any communication to a nonvoting commission member relating to an action pending before the commission, where the nonvoting commission member does not participate in that action, either through written or verbal communication, on or off the record, with other members of the commission.

30323. "Interested person"

For purposes of this article, an "interested person" is any of the following:

(a) Any applicant, an agent or an employee of the applicant, or a person receiving consideration for representing the applicant, or a participant in the proceeding on any matter before the commission.

(b) Any person with a financial interest, as described in Article 1 (commencing with Section 87100) of Chapter 7 of Title 9 of the Government

Code, in a matter before the commission, or an agent or employee of the person with a financial interest, or a person receiving consideration for representing the person with a financial interest.

(c) A representative acting on behalf of any civic, environmental, neighborhood, business, labor, trade, or similar organization who intends to influence the decision of a commission member on a matter before the commission.

30324. Conduct of ex parte communication

(a) No commission member, nor any interested person, shall conduct an ex parte communication unless the commission member fully discloses and makes public the ex parte communication by providing a full report of the communication to the executive director within seven days after the communication or, if the communication occurs within seven days of the next commission hearing, to the commission on the record of the proceeding at that hearing.

(b) (1) The commission shall adopt standard disclosure forms for reporting ex parte communications which shall include, but not be limited to, all of the following information:

(A) The date, time, and location of the communication.

(B) The identity of the person or persons initiating and the person or persons receiving the communication.

(C) A complete description of the content of the communication, including the complete text of any written material that was a part of the communication.

(2) The executive director shall place in the public record any report of an ex parte communication.

(c) Communications shall cease to be ex parte communications when fully disclosed and placed in the commission's official record.

30325. Testimony at official proceeding; Submission of written comments

Nothing in this article prohibits any person or any interested person from testifying at a commission hearing, workshop, or other official proceeding, or from submitting written comments for the record on a matter before the commission. Written comments shall be submitted by mail or delivered to a commission office, or may be delivered to the commission at the time and place of a scheduled hearing.

30326. Workshops

Any person, including a commission member, may request the commission staff to conduct a workshop on any matter before the commission or on any subject that could be useful to the commission. When the executive director determines that a request is appropriate and feasible, a workshop shall be scheduled at an appropriate time and location.

30327. Improper use of official position to influence commission decision

(a) No commission member or alternate shall make, participate in making, or any other way attempt to use his or her official position to influence a commission decision about which the member or alternate has knowingly had an ex parte communication that has not been reported pursuant to Section 30324.

(b) In addition to any other applicable penalty, including a civil fine imposed pursuant to Section 30824, a commission member who knowingly violates this section shall be subject to a civil fine, not to exceed seven thousand five hundred dollars ($7,500). Notwithstanding any law to the contrary, the court may award attorneys' fees and costs to the prevailing party.

30328. Violation of article; Writ of mandate

If a violation of this article occurs and a commission decision may have been affected by the violation, an aggrieved person, as described in Section 30801, may seek a writ of mandate from a court requiring the commission to revoke its action and rehear the matter.