ORIGINAL

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FIVE

SURFRIDER FOUNDATION,
Petitioner and Appellant,
v.
CALIFORNIA COASTAL COMMISSION,
Defendant and Respondent,
WALTER CAVANAGH, et al.,
Real Parties In Interest and Respondents.

Case No. A110033

San Francisco County Superior Court No. CPF 03-503643
The Honorable James L. Warren, Judge

BRIEF OF RESPONDENT CALIFORNIA COASTAL COMMISSION

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INTRODUCTION

This is a case in which the rules of statutory construction, sound public policy and common sense converge in harmony. A landowner's 1997 coastal development permit required that he set his proposed house 25 feet back from the bluff to assure the stability of the site and avoid the later need for a seawall. The 1997-98 El Niño storms unexpectedly caused substantial loss of the bluff top, causing the landowner to apply for a seawall to protect his home. After the California Coastal Commission's staff geologist agreed with the conclusion of numerous experts that the house was in substantial danger, the Commission approved a coastal development permit for the seawall. The Commission imposed 15 stringent conditions that would mitigate the seawall's impacts on sand supply and public access. The Surfrider Foundation then brought this action to argue that the Commission had no discretion as a matter of law to allow the seawall.

The trial court rejected Surfrider's argument, and the trial court's judgment should be affirmed. Section 30235 of the Coastal Act allows the construction of shoreline protective structures to protect "existing" structures in danger from erosion when they are designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Because the Commission found that the landowner's existing home was in danger from erosion and that his proposed seawall as conditioned would mitigate its adverse impacts—factual findings never contested by Surfrider—the Commission properly approved the construction of the seawall.

Surfrider, however, wishes to add some language to section 30235. It contends that "'[e]xisting structure' must be interpreted to mean 'existing structure as of 1976.'" (Surfrider Br. at p. 41.) To support its reworking of section 30235, Surfrider argues that the Commission's interpretation of section 30235 conflicts with section 30253. Section 30253 provides that new

development should not require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs. But there is no conflict between these two provisions—section 30253 requires that new development be constructed in a way that avoids the need for protective devices; section 30235 allows the Commission to approve a seawall if, despite this effort, the development later becomes endangered by erosion and a properly designed seawall can avoid adverse impacts.

The manner in which the word "existing" appears throughout the Coastal Act confirms the trial court's conclusion that existing structures are those structures that exist at the time of the seawall application. Chapter 3 of the Coastal Act (Pub. Resources Code, §§ 30200-30265.5) contains the resource policies that the Commission applies to pending applications. (*Id.*, § 30604(a).) Including section 30235, the word "existing" appears no fewer than 15 times in Chapter 3 and each time refers to currently existing conditions. (*Post*, at pp. 18-19.) It is logical that these Chapter 3 policies, including section 30235, refer to conditions that exist at the time of a permit application. It would make little sense to evaluate permit applications under conditions as they existed thirty or more years ago and ignore the considerable changes that have taken place along California's coast since the Coastal Act's passage.

Finally, Surfrider's antagonism toward the Commission is misdirected. Surfrider suggests that the Commission is indifferent to the impacts of seawalls and that its interpretation of section 30235 would "guarantee" every applicant a seawall. (E.g., Surfrider Br. at p. 37.) Under the Commission's interpretation, however, obtaining approval for a seawall remains a taxing proposition. Applicants must demonstrate that their existing structures are in genuine danger and they must design protective devices in a way to eliminate or mitigate their adverse impacts. (Pub. Resources Code, § 30235.) For the applicants here, that meant submitting over 15 technical reports, accepting important design

modifications, and agreeing to numerous conditions that will mitigate the seawall's possible impact on shoreline processes, visual resources and public access.

When these exacting standards are met, section 30235 authorizes the Commission to approve seawalls. The Commission's interpretation of section 30235 is "absurd" only if one is prepared to say that it would be absurd for the Legislature to pass a law that allows the construction of properly designed seawalls to protect existing houses, roads and other structures, not to mention human lives, that are endangered by the ravages of the ocean.

The trial court's judgment should be affirmed.

BACKGROUND

Surfrider challenges the Commission's approval of a single shoreline protection device, or "seawall," to protect two residential structures at 121 and 125 Indio Drive in Pismo Beach that are located on a bluff overlooking the ocean. (11 Administrative Record ("AR") 2083-2084.) The 165-foot long seawall would connect two existing shoreline protective devices on both sides of a public cul-de-sac. (11 AR 2078-2079, 2083, 2106, 2143-2146 [proposed seawall plans].) Gary Grossman owns the house at 121 Indio Drive and Walter Cavanagh owns the house at 125 Indio Drive. (The real parties in interest are referred to in this brief collectively as "the applicants.")[1/]

The house at 121 Indio Drive was constructed before January 1, 1977, the effective date of the Coastal Act. (11 AR 2102.) In 1997, acting under its local coastal program (or "LCP"), the City of Pismo Beach approved a coastal development permit for construction of the house at 125 Indio Drive. (11 AR

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1. Grossman at one time also owned 125 Indio Drive property, and applied for the 1997 permit to build the house. He later sold the 125 Indio Drive property to Cavanagh, who joined with Grossman as a co-applicant for the seawall in dispute. (1 AR 77; 7 AR 1138.)

2084.) The City's approval was not appealed to the Commission, and therefore the Commission never reviewed the project. (11 AR 2078.) The house at 125 Indio Drive was constructed in 1998. (11 AR 2084.)

Before it approved the house at 125 Indio Drive, the City evaluated the site's potential for bluff erosion and considered the distance that the house would need to be set back so that the project site would be stable. (11 AR 2084.) After receiving expert evidence that the bluff retreat rate was two to three inches per year, the City required that the structure be set back 25 feet from the bluff face. (11 AR 2084, 2132.) The City determined that the 25-foot setback would be adequate to withstand 100 years of erosion. (11 AR 2086; 2102.)

After the City approved the house at 125 Indio Drive house, the El Niño storms of 1997-1998 brought approximately 22 inches of rainfall to the area. (3 AR 400; 11 AR 2103.) These storms caused the loss of a five-foot section of the bluff at the rear of 125 Indio Drive. (11 AR 2083.) This unexpected loss was not predicted in the geological report that the City reviewed and was not reflected in the estimated bluff retreat rate. (2 AR 344-346 [Terratech Inc. Report, Jan. 9, 1997]; 3 AR 400; 11 AR 2084, 2103.) Following the winter storms, the applicants conducted new studies. (11 AR 2087-2088.) The new geological reports concluded that their houses were in serious jeopardy from erosion. (11 AR 2087.) The applicants submitted these reports to the City with an application for a coastal permit to construct a single seawall to protect both houses from future erosion. The City approved the coastal permit, finding that the expert reports demonstrated that both residences required a seawall to insure their stability. (3 AR 400-403; 11 AR 2088; 3 AR 379.) Two Commission members appealed the City's decision to the Commission. (11 AR 2136-2142.)

The Commission determined that the appeals raised a substantial issue whether the City's approval was consistent with the City's LCP. (11 AR 2083-

2091.) Having found a substantial issue, the Commission conducted a de novo review of the project. (Pub. Resources Code, § 30621.) After a public hearing, the Commission approved the proposed seawall, subject to 15 special conditions. (11 AR 2100-2121). The Commission adopted its staff's proposed findings in support of its decision. (11 AR 2077-2160.)

Because the Coastal Act requires that the Commission on appeal apply the policies of the LCP, not the Coastal Act (see Pub. Resources Code, § 30604(d)), the Commission's findings addressed whether the project was consistent with the relevant policies of the City's LCP. The primary policy was LCP policy S-6, which provides that a seawall "be permitted only when necessary to protect existing principal structures . . . in danger of erosion." (11 AR 2100, 2102-2105.) The Commission found that "the residences qualify as . . . existing structure[s]" under LCP policy S-6. (11 AR 2102, 2105.)

The Commission then considered whether these existing structures were in "danger of erosion." To meet this standard, the Commission required proof that the houses "would be unsafe to occupy in the next two or three storm cycles (generally, the next few years) if nothing were to be done [to protect the structures]." (11 AR 2102; see also 10 AR 1835-1836, 1850-1851.) The Commission's staff geologist, Mark Johnsson, visited the site and analyzed no fewer than 14 expert reports to determine whether the two houses were endangered. (11 AR 2086-2088, 2102-2103.)[2/] Using Dr. Johnsson's analysis,

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2. These geotechnical reports included: (1) *Geologic Assessment of Bluff Erosion and Sea Cliff Retreat,* Terratech, Jan. 9, 1997 (1 AR 111); (2) *Geologic Assessment of Bluff Erosion and Sea Cliff Retreat*, GeoSolutions LLC, Jan. 26, 1998 (1 AR 92); (3) *Bluff Protection Plan for 121 and 125 Indo Drive*, Fred Schott & Associates, Nov. 6, 2000; (4) Golden State Aerial Surveys, Inc. photogrammetric data (1 AR 133); (5) R.T. Wooley report, Mar. 11, 2001 (1 AR 130); (6) Earth Systems Pacific report, Jan. 15, 2001 (1 AR 124); (7) Earth Systems Pacific report, June 8, 2001 (1 AR 128); (8) R.T. Wooley report, July 31, 2001 (1 AR 173); (9) R.T. Wooley report, Feb. 13, 2002 (3 AR 448); (10) *Geotechnical Investigation of Potential Seacliff Hazards,* Cotton, Shires, and

the Commission found that the houses were in danger: "the fact that waves now routinely impact an area that consists of poorly consolidated marine terrace material indicates that, absent some form of shore protection, a clear danger from erosion would exist in the very near future." (11 AR 2105.)

The Commission also found that, in addition to the residential structures, the Florin Street cul-de-sac, an important public viewpoint, was in danger from erosion. (11 AR 2104, 2120.) The proposed seawall would protect both the houses and the viewpoint, by connecting with two existing shoreline protection devices, a quarry stone revetment on the Florin Street end and a shotcrete wall at 121 Indio Drive. (11 AR 2106, 2143-2146.)

The Commission also analyzed alternative methods of reducing the bluff-retreat risk, as required by the LCP. For example, the applicants' experts considered relocating the structures farther from the bluff edge, as well as installing alternative shoreline armoring systems such as a drilled caisson system or a rip-rap revetment located on the beach. (11 AR 2105-2106.) Based on feasibility studies evaluating each alternative, the geotechnical reports concluded that a vertical seawall would be the most environmentally suitable and the only feasible alternative. (*Ibid.*) The Commission concurred with these conclusions, but required substantial changes in the proposed seawall's design to insure that the seawall occupied the minimum footprint necessary and that it was less visually intrusive than the one proposed. (11 AR 2114, 2092.) In all, the Commission imposed 15 conditions to mitigate or eliminate any remaining adverse impacts of the project. Among others, these conditions required that

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Assoc., Jan. 23, 2003 (8 AR 1258); (11) *Review of Seacliff Hazards Report*, Earth Systems Pacific, Feb. 13, 2003 (8 AR 1412); (12) *Coastal Hazard Study*, Skelly Engineering, Feb. 17, 2003 (8 AR 1420); (13) *Response to Peer Review,* Cotton, Shires, and Assoc., Mar. 12, 2003 (8 AR 1403); (14) *Beach Bedrock Survey and MHTL Projection to Proposed Protective Structure*, Cotton, Shires, and Assoc., June 5, 2003 (9 AR 1535).

the applicants:

- Limit the width of the toe of the seawall to 18 inches (11 AR 2066);
- Face the seawall with a sculpted concrete surface that mimics natural bluffs in color, texture and undulation (*ibid.*);
- Install a new storm water filtering system, remove the existing storm water outfall pipe, and make a $50,000 deposit to implement the City's nonpoint source storm water runoff control (*ibid.*);
- Install permanent devices to collect all surface runoff from the two houses (11 AR 2068);
- Implement a native plant landscaping plan (11 AR 2068-2069);
- Before finishing construction, test to the Commission's satisfaction that the seawall facing met the permit requirements (11 AR 2069-2070);
- Pay $10,000 for public access improvements at the Florin cul-de-sac (AR 2070-2071);
- Make an irrevocable offer to dedicate permanent public access to the beachfront property that is west of the seawall on Grossman's property (11 AR 2071); and
- Monitor the success of the seawall and storm water outfall on a permanent basis (11 AR 2071-2072).

Surfrider filed a timely petition for a writ of mandate challenging the Commission's decision. (CT 1.) After briefing and oral argument, the trial court denied Surfrider's petition. (CT 301.) The trial court rejected the applicants' argument that the City should have been named as a real party interest. (CT 7-9.) It also rejected the Commission's argument that the writ should be denied because Surfrider failed to challenge whether the project was consistent with the LCP. (CT 9-11.)

On the merits, however, the trial court determined that the Commission's

treatment of the 125 Indio house as an "existing" structure was reasonable and within the Commission's discretion. (CT 310-317.) Among many reasons, the trial court found that the Commission's interpretation of section 30235 comported with the plain language of the statute; that the Commission's interpretation of the statute was longstanding; that the word "existing" throughout the Coastal Act referred to currently existing conditions, not just those that existed as of January 1, 1977; and that sections 30235 and 30253 were not in conflict but easily harmonized. (*Ibid.*)

Surfrider filed a timely appeal and has served its opening brief.

STANDARD OF REVIEW

In reviewing an appeal from a trial court's determination of a petition for a writ of administrative mandamus, the Court of Appeal occupies the same position as the trial court. (E.g., *City of San Diego v. California Coastal Com.* (1981) 119 Cal.App.3d 228, 232; *McGill v. Regents of University of California* (1996) 44 Cal. App. 4th 1776, 1786.) The Commission's permit decisions must be upheld if they are supported by "substantial evidence" in light of the entire record. (E.g., *Paoli v. California Coastal Commission* (1986) 178 Cal.App.3d 544, 550-51.) The agency's decision is presumed correct, and unless the petitioners produce or cite evidence to the contrary, the decision is presumed to be supported by substantial evidence. (See *Smith v. Regents of the University of California* (1976) 58 Cal.App.3d 397, 404-05; *Alford v. Pierno* (1972) 27 Cal.App.3d 682, 690-91.) The Court exercises independent review over questions of law. (E.g., *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.)

In this action, Surfrider raises only a single question of law—the meaning of the word "existing" in Public Resources Code section 30235. Surfrider's tactical decision means that the Court must accept as true the Commission's unchallenged factual findings, including its findings that the applicants' houses

were in danger from erosion and that the permits as conditioned comply with the policies of the Coastal Act. In addition, because Surfrider does not describe the material evidence in the administrative record, it has waived any challenge to the sufficiency of the evidence to support the Commission's decision. (See, e.g., *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

RULES OF STATUTORY CONSTRUCTION

The usual rules apply. The "touchstone" of statutory interpretation is legislative intent. (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632.) In evaluating the meaning of a statute "the aim . . . should be the ascertainment of legislative intent so that the purpose of the law may be effectuated." (*Select Base Materials, Inc. v. Board of Equalization* (1959) 51 Cal.2d 640, 645.) The courts look at "the purpose sought to be achieved and the evils to be eliminated . . . in ascertaining the legislative intent." (*Freedland v. Grecko* (1955) 45 Cal.2d 462, 467.) Statutory provisions must be harmonized if possible (*Consumers Union of United States, Inc. v. California Milk Producers Advisory Board* (1978) 82 Cal.App.3d 431, 445-447), and statutes are to be construed to give meaning to every provision and to avoid making any provision surplusage (*Yoffie v. Marin Hospital Dist.* (1987) 193 Cal.App.3d 743, 752). "[I]t is a well-established rule of construction that when a word or phrase has been given a particular scope or meaning in one part or portion of a law it shall be given the same scope and meaning in other parts or portions of the law." (*Stillwell v. State Bar of California* (1946) 29 Cal.2d 119, 123.)

ARGUMENT

I. SURFRIDER'S PETITION SHOULD BE DENIED BECAUSE SURFRIDER DOES NOT CHALLENGE THE COMMISSION'S FINDING THAT THE PROPOSED SEAWALL IS IN CONFORMITY WITH THE CITY'S LOCAL COASTAL PROGRAM

Surfrider's approach has caused it a real problem. Surfrider raises only the issue whether the Commission's action violated Coastal Act section 30235. But that issue was not before the Commission, which considered (and legally was only allowed to consider) whether the project was consistent with the City's LCP. (Pub. Resources Code, § 30604(d).) Because it failed to challenge the basis upon which the Commission acted, Surfrider's appeal should be denied.

The Coastal Act initially vests the Commission with the authority to issue permits for coastal development. (Pub. Resources Code, § 30600(a).) The Act transfers primary permitting authority to local governments through the creation of local coastal programs. An LCP consists of a local government's land use plans, zoning ordinances and other implementing actions that the Commission has certified as consistent with the resource protection policies contained in Chapter 3 of the Coastal Act. (See *id.*, §§ 30108.6, 30512, 30519.) A certified LCP may be more restrictive than the Chapter 3 policies, but it may not be less restrictive. (Pub. Resources Code, § 30512(c); see *Yost v. Thomas* (1984) 36 Cal.3d 561, 572.) Once the Commission has certified the local government's LCP, permitting authority is transferred to the local government. (Pub. Resources Code, § 30600(d).)

Local government LCP permit decisions in many circumstances may be appealed to the Commission. (Pub. Resources Code, §§ 30603, 30625.) Unless the Commission finds that an appeal raises no substantial issue, the Commission conducts a de novo review of the permit application. (*Id.*, § 30625(b)(2); see *id.*, § 30621; Cal. Code Regs., tit. 14, §§ 13115(b), 13321;

Coronado Yacht Club v. California Coastal Commission (1993) 13 Cal.App.4th 860, 867.) The Commission's de novo review requires that it determine whether the project is in conformity with the LCP and, where applicable, the public access and recreation policies of the Coastal Act, but not the other Chapter 3 policies such as section 30235. (Pub. Resources Code, § 30604(b), (c); Cal. Code Regs., tit. 14, § 13119.) The Commission here found that the seawall as conditioned was in conformity with the seawall policies in the City's LCP. (E.g., 11 AR 2085-2086.)

Therefore, to set aside the Commission's decision on appeal, Surfrider must demonstrate that there is no substantial evidence to support the Commission's finding that the project is in conformity with the City's LCP. But Surfrider does not challenge this finding. It contends that the Commission misinterpreted the word "existing" in section 30235 in the Coastal Act. Even if the Court were to agree with Surfrider, it could not accord Surfrider relief because the Commission's finding that the project was in conformity with the policies of the City's LCP would not be affected.

Surfrider perhaps can be extricated from this dilemma if the Court chooses to do two things. First, the Court would be required to assume that the word "existing" in section 30235 has the same meaning as "existing" in the City's LCP. It is fair to make this assumption because the Commission may not certify an LCP that is less restrictive than the Chapter 3 policies of the Coastal Act. (*Post*, at p. 10.) Second, the Court would be required to treat Surfrider's argument about the meaning of section 30235 as an implicit challenge to the Commission's interpretation of "existing" in LCP Policy S-6. Because Surfrider has never requested to amend its petition to state a proper cause of action, however, there is no compelling reason why the Court on its own should allow a de facto amendment of Surfrider's petition.

In summary of this point, the Court should deny Surfrider's petition

because it failed to challenge the legal basis on which the Commission made its decision. Alternatively, should the Court consider the appeal, it should treat the petition as if it were directed to the Commission's interpretation of the LCP.

For the remainder of this brief, the Commission will assume that the words "existing" in section 30235 and in LCP policy S-6 have the same meaning and that the Court will construe Surfrider's argument about the interpretation of section 30235 as an implicit challenge to the Commission's decision under the LCP.[3/]

II. SURFRIDER'S PETITION SHOULD BE DENIED BECAUSE THE TERM "EXISTING STRUCTURES" REFERS TO EXISTING STRUCTURES AT THE TIME OF THE PERMIT APPLICATION AND IS NOT LIMITED TO STRUCTURES THAT PREDATED THE COASTAL ACT

A. Substantial Evidence Supports the Commission's Decision That the Proposed Seawall Was in Conformity With the City's LCP.

Substantial evidence supports the Commission's decision that the proposed seawall was in conformity with the City's LCP.

Under LCP policy S-6, a seawall may be approved to protect an "existing principal structure," only if no feasible alternative is available and the device is designed to eliminate or mitigate adverse impacts on local shoreline sand supply, maintain public access to the shoreline, and minimize visual impacts.[4/]

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3. Although the trial court rejected this argument, the Commission may raise this argument on appeal without a cross appeal because the trial court made no order adverse to the Commission. (See, e.g., *Selger v. Stevens Bros., Inc.* (1990) 222 Cal.App.3d 1585, 1593-1594.)

4. LCP policy S-6 provides:

> 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. If no feasible alternative is available,

Related LCP policies require that shoreline structures provide lateral beach access, avoid significant rocky points and intertidal or subtidal areas, and enhance public recreational opportunities. (6 AR 1029; 11 AR 2101 [LCP section 17.078.060(6)].)

The Commission found that the applicants' proposed seawall was in conformity with the City's LCP. The Commission found that their houses legally existed at the time of the application, that the houses were in danger from erosion, that there were no feasible alternatives to the proposed seawall, and that, as conditioned, the seawall was designed in a manner that would mitigate its impact on shoreline sand supply, public access and visual resources. (11 AR 2077-2160; *ante*, at pp. 5-7.) The Commission's decision was supported by abundant expert analysis, including the independent review of its own staff geologist. Surfrider does not challenge these findings, and the Commission's decision is presumptively supported by substantial evidence. (*Ante,* at pp. 8-9.)

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shoreline protection structures shall be designed and constructed in conformance with Section 30235 of the Coastal Act and all other policies and standards of the City's Local Coastal Program. Devices must be designed to eliminate or mitigate adverse impacts on local shoreline sand supply, and to maintain public access to and along the shoreline. Design and construction of protection devices shall minimize alteration of natural landforms, and shall be constructed to minimize visual impacts. The City shall develop detailed standards for the construction of new and repair of existing shoreline protective structure and devices. As funding is available, the City will inventory all existing shoreline protective structures within its boundaries. (11 AR 2100-2101.)

B. The Commission's Interpretation of Section 30235 Is Compelled by Both the Language of the Statute and the Legislature's Intent to Allow Seawalls Where Necessary to Protect Life and Property.

In the face of this, Surfrider maintains one argument. It contends that the word "existing" as used in section 30235[5/] (and implicitly LCP policy S-6) means "existing as of January 1, 1977," the date that the Coastal Act went into effect; in other words, the Commission may approve a seawall only to protect structures that existed on January 1, 1977. Because Cavanagh's house did not exist until 1998, Surfrider contends that, as a matter of law, the Commission had no discretion to approve his seawall.

This argument is meritless. The Commission's interpretation follows the plain language of the statute: "Existing" means "existing" and Cavanagh's house legally existed on the date that he applied for the seawall.

The Commission's interpretation makes sense and comports with the Legislature's intent. Protective shoreline devices are disfavored under the Coastal Act, but the Legislature did not ban them. Even Surfrider concedes that, at least as to structures that predated the Coastal Act, section 30235 allows the Commission to approve protective devices in appropriate circumstances. As proof of this, Surfrider does not challenge the Commission's decision to approve a seawall to protect the 121 Indio residence that predated the Coastal Act. (Surfrider Br. at p. 7, fn. 7.)

The question implicitly raised by Surfrider—but one that it scrupulously

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5. Section 30235 provides in part:

> 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 and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply

avoids asking—is whether the Legislature intended that, as a matter of law, the Commission may not approve seawalls to protect structures that were legally built after the enactment of the Coastal Act regardless of how much life and property might be lost if the structures were not protected. Although Surfrider nods in the direction of legislative intent, its abstract conception of legislative intent is divorced from reality and common sense. As the trial court pointed out, section 30235 protects a wide range of existing structures, not just private residences. (CT 317, fn.6.) Assume, for example, that the Commission in the 1980's approved a state park facility that included a parking lot, restrooms, landscaping, public walkways and stairs that were later severely damaged by winter storms. In Surfrider's view, the Commission would be precluded from approving a seawall to protect this public park facility regardless of how endangered it might be. But Surfrider does not demonstrate that the Legislature would have intended such a harmful result.

Although Surfrider asserts that the Commission's interpretation of section 30235 conflicts with section 30253 (Surfrider Br. at pp. 34-39), the Commission's interpretation harmonizes the two statutes because it gives effect to the Legislature's wish to avoid the harmful impacts of seawalls as well as its wish to protect legally existing structures in danger from erosion. Section 30253 provides in part that:

> New development shall: . . . [¶] (2) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.

Section 30253 requires that new development be constructed in a way that does not require the later construction of protective devices. It does not govern already existing development. Read together, sections 30235 and 30253 nicely complement each other. Section 30253 assures that new development is constructed and sited in a way that avoids the future need for a seawall. Section

30235 recognizes that, despite the best efforts to avoid the later need for seawalls, it may sometimes be necessary to protect lives and property endangered by erosion. Therefore, the Commission may approve seawalls for post-Coastal Act structures where the effort to avoid a seawall has failed and the new structure is in danger from erosion.

C. When the Word "Existing" Is Used in Chapter 3 of the Coastal Act, It Refers to Currently Existing Conditions Because Permit Applications Are Typically Evaluated Under Conditions That Exist at the Time of the Application.

When a word or phrase has been given a particular meaning in one part of a law it typically is given the same meaning in other parts of the law. (*Stillwell v. State Bar of California, supra,* 29 Cal.2d at p. 123.) The manner in which the word "existing" appears throughout the Coastal Act confirms the Commission's interpretation.

The word "existing" appears frequently in the Coastal Act but one reference stands out. Section 30236 limits the approval of flood control projects to the situation "where no other method for protecting existing structures in the flood plain is feasible and where such protection is necessary for public safety or to protect existing development." Once again, the Legislature balanced the need to protect the public from physical harm with the need to avoid the adverse impacts of a particular type of development (flood control projects). As in section 30235, the Legislature found that it could prevent the destruction of post-Coastal Act development by permitting the erection of protective structures but adopting strict standards calibrated to avoid environmental harms.

The use of "existing" in the last sentence of section 30235 makes a similar point. This sentence provides that "[e]xisting marine structures causing water stagnation contributing to pollution problems and fishkills should be phased out

or upgraded where feasible." Suppose that the Commission in 1978 approved a permit for a marine structure that today is causing water stagnation and pollution despite the imposition of permit conditions in 1978 designed to avoid those impacts. The polluting marine structure should be treating as "existing" and phased out, even though it was constructed after the Coastal Act's passage.

The Legislature's use of the word "existing" in the remainder of Chapter 3 of the Coastal Act also provides powerful confirmation of the Commission's interpretation of the word "existing." Chapter 3 (Pub. Resources Code, §§ 30200-30265.5) contains the resource policies that the Commission applies when reviewing permit applications. (*Id.*, § 30604(a).) The word "existing" appears throughout Chapter 3 and each time refers to conditions as they exist at the time of the application, not at the time of the Coastal Act's passage. In addition to sections 30235 and 30236, the references to "existing" in Chapter 3 include:

- Providing additional berthing space in "existing harbors" (Pub. Resources Code, § 30224);
- Maintaining "existing" depths in "existing" navigational channels (*id.*, § 30233(a)(2));
- Allowing maintenance of "existing" intake lines (*id.*, § 30233(a)(5));
- Limiting diking, filling and dredging of "existing" estuary and wetlands (*id.*, § 30233(c));
- Restricting reduction of "existing" boating harbor space (*id.*, § 30234);
- Limiting conversion of agricultural lands where viability of "existing" agricultural use is severely limited (*id.*, §§ 30241, 30241.5);
- Restricting land divisions outside "existing" developed areas (*id.*, § 30250(a));
- Siting new hazardous industrial development away from "existing"

development (*id.*, § 30250(b));

- Locating visitor-serving development in "existing" developed areas (*id.*, § 30250(c));
- Favoring certain types of uses where "existing" public facilities are limited (*id.*, § 30254));
- Encouraging multicompany use of "existing" tanker facilities (*id.*, § 30261); and
- Defining "expanded oil extraction" as an increase in the geographical extent of "existing" leases.

These Chapter 3 provisions logically refer to conditions that exist at the time of a permit application. It would make little sense to evaluate permit applications under conditions as they existed thirty or more years ago and ignore the considerable changes that have taken place along California's coast since the Coastal Act's passage. Consistent with the use of "existing" throughout Chapter 3, section 30235 should be construed to refer to currently existing structures.

Outside of Chapter 3, there are a number of other Coastal Act provisions that treat "existing" as currently existing. (See Pub. Resources Code, § 30705(b) ["existing water depths"]; § 30711(a)(3) ["existing water quality"]; § 30610(g)(1) ["existing zoning requirements"]; *id.*, 30812(g) ["existing administrative methods for resolving a violation"].) In addition, the Legislature twice used specific dates when it intended "existing" to mean something other than currently existing. Section 30610.6 limits the section's application to any "legal lot existing . . . on the effective date of this section." Similarly, section 30614 refers to "permit conditions existing as of January 1, 2002." (*Id.*, § 30614.)

Surfrider's response is anemic. Surfrider points to four Coastal Act sections where, it contends, the word "existing" refers to conditions existing on

the date of the Coastal Act's passage. (Surfrider Br. at pp. 25-26 [citing sections 30001(d), 30004(b), 30007 and 30103.5(b)].) Sections 30001(b) and 30007 juxtapose "existing" with references to future developments and future laws, expressing the Legislature's specific intent that "existing" in those provisions refers to conditions on the date of the Coastal Act's passage. Moreover, Surfrider's citations are mostly found in the "findings" section of the Coastal Act, in which the Legislature would be expected to refer to conditions as they then existed to explain the need for the Act. None of the provisions upon which Surfrider relies (other than section 30235 itself) are found in Chapter 3 of the Coastal Act.

The Commission's harmonious construction of the Coastal Act confirms that the Legislature intended that section 30235 be applied to structures that existed on the date of the permit application.[6/]

D. The Court Should Defer to the Commission's Interpretation of Section 30235 and the LCP.

Surfrider incorrectly contends that the Commission's interpretation of section 30235 is "vacillating" and not entitled to deference. (Surfrider Br. at pp. 41-45.) The Commission's interpretation of section 30235 has been consistent, and provides more weight to support the Court's interpretation.

Courts "must give great weight and respect to an administrative agency's interpretation of a statute governing its powers and responsibilities." (*Mason*

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6. Three years ago, the Legislature considered adding the specific language that Surfrider seeks to read into section 30235. AB 2943, if adopted, would have defined "existing structure" in section 30235 to mean "a structure that has obtained a vested right as of January 1, 1977, the effective date of the California Coastal Act of 1976." (CT 119-120 [Sen. Amend. to Assem. Bill No. 2943 (2001-2002 Reg. Sess.) Aug. 26, 2002].) AB 2943 died on the Senate inactive file on November 30, 2002. (CT 122.) Although "only limited inferences can be drawn from [unpassed bills]" (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 795), the Legislature's rejection of AB 2943 undermines Surfrider's interpretation of section 30235.

v. Retirement Board of the City and County of San Francisco (2003) 111 Cal.App.4th 1221, 1228 (Jones, J).) "Consistent administrative construction of a statute, especially when it originates with an agency that is charged with putting the statutory machinery into effect, is accorded great weight." (*Ibid.*)

Here, the Commission evaluated the seawall project for conformity with the City's LCP that the Commission previously had certified. (See Pub. Resources Code, §§ 30512, 30512.1, 30512.2.) The Commission's interpretation of a certified LCP is entitled to deference because, when an appeal reaches it, the Commission is charged with putting the LCP into effect. (*Mason v. Retirement Board of the City and County of San Francisco, supra*, 111 Cal.App.4th at p. 1228; see also Pub. Resources Code, § 30625(c) [Commission decisions shall guide local government actions under the Coastal Act].) The Commission's interpretation of section 30235 is entitled to no less weight, because the Commission alone is responsible for administering the Coastal Act.

In addition, the Court should accord the Commission's interpretation of "existing structures" great weight because the Commission has consistently interpreted section 30235 to refer to structures that exist at the time of the application. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12.) As proof of this, the Commission's chief counsel confirmed at the public hearing that the Commission has "interpreted existing structure to mean whatever structure was there legally at the time that it was making its decision." (11 AR 2018-2019.)

Surfrider contends that the Commission has "vacillated" because in two previous permit decisions the Commission found that it did not need to reach the issue whether the term "existing structure" was limited to pre-Coastal Act structures. (Surfrider Br. at pp. 41-45.) The Commission's decision to refrain from reaching an issue that was not raised by a pending permit application

reflects judicious decisionmaking, not vacillation. (See *id.* at p. 44 [conceding that the issue was not before the Commission].)

Surfrider also cites the chief counsel's testimony as an additional indication that the Commission has "vacillated" in its interpretation of "existing structure." (Surfrider Br. at p. 45.) Surfrider, however, has inaccurately quoted the chief counsel's testimony, improperly inserting the parenthetical "[of existing structure]" into the quotation. (Cal. Style Manual (4th ed. 2000) § 4.16 [may not use brackets to rewrite quotation].) Surfrider then misconstrues the testimony, suggesting that the Commission has previously determined that the term "existing structure" in section 30235 applies only to pre-Coastal Act structures. Instead, the complete text of the chief counsel's statement demonstrates that the "change" to which he referred was the Commission's recent practice of incorporating a "no future seawall" condition in permits for new bluff-top development, not a change in the interpretation of "existing structure." (11 AR 2018-2019; see *post,* at p. 24.)

The Commission is not aware of a single instance in the history of the Coastal Act in which it has determined that "existing structures" in section 30235 refers only to structures that predated the Coastal Act. The Court should defer to the Commission's construction of section 30235 and the corresponding LCP provisions.

III. NONE OF SURFRIDER'S REMAINING ARGUMENTS HAVE MERIT.

Most of Surfrider's arguments have been addressed. There are a few others, but none have merit.

1. Surfrider repeatedly states that the Commission's interpretation would "entitle" or "guarantee" a seawall to any completed structure. (E.g., Surfrider Br. at pp. 4, 37, 39, 47, fn. 9.) This is a gross misstatement. The Commission's interpretation of section 30235 does not entitle or guarantee anyone a seawall.

The Commission may approve a seawall only if, at a minimum, the applicant establishes that a structure is in danger of erosion and that the seawall is designed to eliminate or mitigate the seawall's impacts on sand supply. (Pub. Resources Code, §§ 30235, 30604(a).) The applicant also would be required to satisfy numerous other conditions designed to mitigate project impacts on public access and other coastal resources. The California Environmental Quality Act also requires the Commission to evaluate feasible alternatives and mitigation measures. (Pub. Resources Code, § 21080.5(d)(2)(A).)

2. The Commission agrees that the Coastal Act should be liberally construed in favor of protecting coastal resources. (Surfrider Br. at pp. 12-13.) That rule of construction does not come into play here because the language of section 30235 and rules of statutory construction support the Commission's interpretation. The Commission's interpretation both protects coastal resources and fulfills the Legislature's intent to protect endangered structures in appropriate circumstances.

3. Surfrider argues that the legislative history of the Coastal Act supports its interpretation. (Surfrider Br. at pp. 28-32.) This argument has two components. First, Surfrider argues that the Legislature rejected the "developer friendly" coastal legislation and enacted the bill favored by environmentalists. Surfrider never explains why an "environmentally friendly" Coastal Act would necessarily require that the Commission deny seawalls to protect endangered post-Coastal Act structures.

Second, Surfrider argues that, shortly before the Coastal Act's passage, the Legislature amended SB 1277 to include the word "existing" before structures in section 30235. (Surfrider Br. at p. 32.) Surfrider provides no other evidence about this amendment. Nevertheless, Surfrider says that there was "no rational reason" why the Legislature would have added this word unless to clarify that section 30235 applied only to structures that predated the Coastal Act.

Actually, there is a very rational explanation. Had the Legislature not included the word "existing" in section 30235, applicants could apply to build seawalls to protect a future proposed structure, rather than be forced to site the proposed structure so that it would not necessitate a seawall. Far from making the word "existing" in section 30235 "surplusage," as Surfrider contends (Surfrider Br. at pp. 33-34), the Commission's interpretation harmonizes sections 30235 and 30253. Section 30253 requires that proposed new development be designed so that it does not require a seawall; without the word "existing," section 30235 could have been construed to allow a seawall for a proposed structure that would have been forbidden by section 30253.

4. Surfrider mistakenly relies on Public Resources Code section 30007.5 when arguing that the Court should resolve doubts in its favor. (Surfrider Br. at pp. 14, 15, 38.) Section 30007.5 provides that conflicts among Coastal Act policies should be resolved in a manner that on balance is most protective of coastal resources. Section 30007.5 is a mechanism for resolving policy conflicts that the Commission must employ when reviewing permit applications. (See, e.g., *Sierra Club v. California Coastal Comm'n* (1993) 19 Cal.App.4th 547, 562 [section 30007.5 authorized Commission to resolve conflict] .) It is not a directive to the courts about how to interpret provisions of the Coastal Act, but guides how the Commission should implement conflicting Coastal Act policies as they apply to a specific project. In this case, the Commission found that the project met the criteria in section 30235, and there was no conflict among applicable policies.

5. The Commission's interpretation of section 30235 does not make the "mandatory setback provisions" of section 30253 "meaningless." (Surfrider Br. at p. 4.) Enforcement of section 30253's setback provisions for new structures is meaningful because it makes seawalls unnecessary in most instances. It is only on those infrequent occasions that bluff retreat drastically exceeds its

predicted retreat that a seawall may become necessary.

6. Surfrider argues that landowners would have an incentive to mislead the Commission into approving structures through the use of "purchased science" that would misstate erosion rates with the hope of later qualifying for a seawall, and it suggests that happened here. (Surfrider Br. at pp. 39-41.) Surfrider's insinuations are misguided. There is no evidence that the applicants' experts intentionally tried to mislead anyone; the unchallenged evidence demonstrated that the bluff rate was caused by the unforeseen El Niño storms. Moreover, anyone who intentionally supplies false evidence may be subject to a permit revocation. (Cal. Code Regs., tit., §§ 13104-13108.5.) And, because no one is "guaranteed" a seawall, anyone who plays the high-stakes game proposed by Surfrider risks having their seawall application turned down.

7. Finally, Surfrider contends that the Commission's imposition of a "no new seawall" condition on recent permits for new structures exceeds the Commission's power because this condition would force the Commission to deny seawalls that might otherwise be entitled to a permit under section 30235. (Surfrider Br. at p. 47.) This case does not involve a "no new seawall" condition, and there is no reason for the Court to offer an advisory opinion about whether the Commission might impose one.

Moreover, this is a strange argument for Surfrider to make. The Commission has imposed a "no future seawall" condition on new bluff top development so that property owners will not seek a shoreline protective device in the future. (11 AR 2019.) The Commission's approach deters applicants from circumventing section's 30253 setback requirements and minimizes the need for new seawalls in the future—an approach that is consistent with the philosophy that Surfrider purports to advocate. The Commission's reasoned approach, however, undermines the need to adopt the extreme position advocated by Surfrider, which may explain Surfrider's criticism.

CONCLUSION

The trial court's judgment should be affirmed.

Dated: January 9, 2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 14(c)(1) and (4) of the California Rules of Court, counsel for Respondent California Coastal Commission certifies that this brief contains 7,216 as counted by the Corel WordPerfect version 8 word-processing program used to generate the brief.

Dated: January 9, 2006

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Surfrider Foundation, et al. v. California Coastal Commission***

Case No. **CPF03503643**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On January 10 2006, I served the **BRIEF OF RESPONDENT CALIFORNIA COASTAL COMMISSION** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1515 Clay Street, Suite 2000, P.O. Box 70550, Oakland, California 94612-0550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 10, 2006 at Oakland, California.

TANISHA MARSHALL
Declarant

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Signature