

A Bug in the Programs: The Need to Create Greater Incentives for Local Coastal Program Updates

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Under the California Coastal Act, local governments develop local coastal programs (LCPs) intended to promote Coastal Act policies in a manner that is adapted to the particular needs of each jurisdiction. Once LCPs are certified by the Coastal Commission, they become the key set of policies governing development in the jurisdictions they cover. The certification process ensures that an LCP adequately promotes Coastal Act policies as of the time it is certified. Sometimes, however, it becomes apparent after certification that the LCP is deficient in some significant respect, because of changing physical characteristics of the lands it regulates, developing scientific or policy understandings, or a variety of other reasons. This Article considers that issue, noting that the Coastal Act creates strong incentives for local governments to develop LCPs and obtain certification, but much weaker incentives for local governments to revise their LCPs when necessary to address relevant issues of statewide concern. The Article discusses specific cases in which those weaker incentives have been an obstacle to effective protection of coastal resources. It concludes with a proposal for amending the Coastal Act to provide a more robust appeals process when a local government has declined to implement the recommendations of the Commission's periodic review. This change would increase the incentives for local governments to update their LCPs, and enable both the Coastal Commission and Coastal Act policies to play a greater role in the review of coastal development permit applications when a local government has refused to address significant flaws in its certified LCP.

“The measure of intelligence is the ability to change.”
— **Albert Einstein**

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I. INTRODUCTION

Environmental laws are only as good as the substantive standards they contain: if no rule or an inadequate rule addresses an environmental harm, even the most diligent enforcement efforts will fall short.

The California Coastal Act has protected the California Coast for forty years. In the words of former Commissioner Steve Blank,

California has some of the most expensive land in the country and as we all know, our economy is organized to extract the maximum revenue and profits from any asset. Visitors are amazed that there aren't condos, hotels, houses, shopping centers and freeways, wall-to-wall, for most of the length of our state's coast.

It was the Coastal Act that saved California from looking like the coast of New Jersey.¹

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1. Steve Blank, *In Defense of Reasonableness – Saving the California Coast*, STEVE BLANK (June 28, 2013), <https://steveblank.com/2013/06/28/in-defense-of-unreasonableness-saving-the-california-coast/>.

In most instances, the substantive standards that the California Coastal Act relies upon to protect the coast are the policies found in the local coastal programs (LCPs) that are written by local governments and certified by the Coastal Commission. For purposes of the Coastal Act, a “local government” is a coastal county or city, of which there are 76 in California.² Many of those 76 local jurisdictions have divided their LCPs into “segments.”³ They have prepared a total of 126 LCP segments.⁴ As of June 2016, the Commission had certified 92, or approximately 73% of the segments, representing 87% of the geographic area of the coastal zone.⁵

LCPs are intended to adapt Coastal Act policies to the needs of the geographic areas they cover. Often, they succeed, and constitute a thoughtful, comprehensive implementation of Coastal Act policies as they relate to the particular resources found in a county or city. The Coastal Act mandates that the local governments draft the LCPs because of their familiarity with local coastal resources. The Coastal Act also requires that the Commission certify LCPs to ensure that the LCPs are sufficiently faithful to the underlying statewide purposes of the Coastal Act.

Like any law, however, an LCP must have an effective mechanism for responding to changing conditions and new information about whether it is serving its goals. Accordingly, the Coastal Act provides that the Coastal Commission will periodically review LCPs, and it contains a process for updating LCPs in response to such periodic reviews.

Unfortunately, this process has had mixed results. The Coastal Act creates a strong incentive for local governments to develop LCPs initially: a certified LCP causes primary coastal permitting authority to shift from the Commission to the local government, so the local government gains authority when the Commission

2. Cal. Coastal Comm’n, *Local Coastal Programs*, CAL. COASTAL COMM’N (2016), <http://www.coastal.ca.gov/lcps.html> (last visited Nov. 25, 2016).

3. *Id.*

4. *Id.*

5. *Id.*; see also CAL. COASTAL COMM’N, SUMMARY OF LCP PROGRAM ACTIVITY IN FY 15-16, (Aug. 3, 2016), https://documents.coastal.ca.gov/assets/1a/FY15_16_LCP_StatusSummaryChart.pdf. The coastal zone is defined specifically in the Coastal Act as “that land and water area” along the state’s coast “extending seaward to the state’s outer limit of jurisdiction . . . and extending inland generally 1,000 yards from the mean high tide line of the sea.” CAL. PUB. RES. CODE § 30103(a) (West 2016).

certifies its LCP.⁶

In contrast, the statute confers no jurisdictional benefit for updating an LCP, and imposes no penalty for failing to do so. And local governments may have reasons *not* to adopt revisions that the Commission proposes: they may have political priorities that conflict with the goals of the Coastal Act, or may lack the resources to prioritize an LCP update.

As a result, while some local governments have diligently kept their LCPs in sync with evolving information about their coastal natural resources and current scientific understandings, others have not, rendering their LCPs inadequate tools for serving the environmental protection goals of the Coastal Act.

This Article will discuss the process for adoption and revision of LCPs. It will then consider in greater detail the problem of some local jurisdictions' failure to update their LCPs as intended by the Coastal Act. Finally, it will highlight potential amendments to the Coastal Act that could address this problem.

II. ADOPTION OF LCPs

Local governments prepare LCPs, and the Commission certifies them. The Coastal Act directs local governments within the coastal zone to prepare LCPs:

Each local government lying, in whole or in part, within the coastal zone shall prepare a local coastal program for that portion of the coastal zone within its jurisdiction. However, any local government may request, in writing, the commission to prepare a local coastal program, or a portion thereof, for the local government. Each local coastal program prepared pursuant to this chapter shall contain a specific public access component to assure that maximum public access to the coast and public recreation areas is provided.⁷

An LCP is the central planning document for coastal development in the area for which it is prepared:

Local Coastal Programs (LCPs) are basic planning tools used by local governments to guide development in the coastal zone, in

6. CAL. PUB. RES. CODE § 30519(a) (West 2016).

7. *Id.* § 30500(a).

partnership with the Coastal Commission. LCPs contain the ground rules for future development and protection of coastal resources in the 76 coastal cities and counties. The LCPs specify appropriate location, type, and scale of new or changed uses of land and water. Each LCP includes a land use plan and measures to implement the plan (such as zoning ordinances). Prepared by local government, these programs govern decisions that determine the short- and long-term conservation and use of coastal resources. While each LCP reflects unique characteristics of individual local coastal communities, regional and statewide interests and concerns must also be addressed in conformity with Coastal Act goals and policies.⁸

An LCP often consists of multiple constituent documents, such as a more general land use plan and a more specific implementation plan.

The Coastal Act further directs the Commission to adopt procedures for local governments to follow in preparing LCPs.⁹ The Coastal Act does not contain an exhaustive list of the elements that an LCP must contain.¹⁰ Additionally, other state agencies that manage land or water areas near the coastal zone may identify sensitive resources and advise the local government preparing an LCP.¹¹ The Coastal Act directs that the Commission and local governments should maximize local participation during the preparation, approval, certification, and amendment of LCPs.¹² A local government can either submit a complete LCP to the Commission for certification at one time, submit the land use plan separately from the implementing documents, or divide its submissions up into geographic units.¹³

Once a local government submits an LCP (or partial LCP) to the Commission, the Commission must certify the document if it is consistent with Chapter 3 of the Coastal Act.¹⁴ Chapter 3 contains Public Resource Management and Access Policies.¹⁵ If the Commission declines to certify the LCP, it must provide a

8. Cal. Coastal Comm'n, *Local Coastal Programs*, CAL. COASTAL COMM'N (2016), <http://www.coastal.ca.gov/lcps.html> (last visited Nov. 25, 2016).

9. CAL. PUB. RES. CODE § 30501 (West 2016).

10. *Id.* § 30502.

11. *Id.* § 30525.

12. *Id.* § 30503.

13. *Id.* § 30511.

14. *Id.* §§ 30512, 30512.2.

15. *Id.* §§ 30200-30265.5.

written explanation, which may include suggested modifications, which, if adopted, would result in certification.¹⁶

III. EFFECT OF LCP CERTIFICATION

LCP certification is an important milestone, because it provides a local government with the authority to issue coastal development permits. Generally, an applicant for a permit for development in the coastal zone must submit the application directly to the Commission if the proposed development would be in an area of the coastal zone not covered by a certified LCP.¹⁷ Additionally, before LCP certification, the standard for coastal development permit approval is whether the proposed development conforms to Chapter 3 Coastal Act policies.¹⁸

Once the Commission certifies an LCP (or at least the land use plan component of an LCP), the LCP becomes the main substantive standard for reviewing permit applications.¹⁹ Primary permitting authority shifts to the local government, subject to Commission appellate review for certain types of local permit decisions.²⁰ The grounds for an appeal, however, must be based on the LCP policies, and/or the Coastal Act public access policies.²¹ Although LCP certification gives the local government permitting authority, the Commission retains its original permitting jurisdiction over development proposed in certain areas, including tidelands, submerged lands, public trust lands, ports, and state higher education institutions in the coastal zone.²²

IV. LCP AMENDMENTS

LCP amendments are necessary for a variety of reasons. LCPs may have defects at the time of adoption and initial Commission

16. *Id.* § 30512(b).

17. *Id.* § 30600(c).

18. *Id.* § 30604(a).

19. *Id.* § 30604(b). Thus, the permitting authority must approve a permit if the proposed development conforms to the LCP policies (and the public access and recreation policies of the Coastal Act if the development is located between the first public road and the sea), and deny it if it does not conform to those policies. *See id.* § 30604(c) (stating that development between the nearest public road and the sea or shoreline must conform to public access and public recreation policies).

20. *Id.* §§ 30519(a), 30600(d), 30600.5(d), 30603(a) (specifying grounds for appeal to the Commission); *see also* CAL. CODE REGS. tit. 14, §§ 13544, 13545 (West 2016).

21. CAL. PUB. RES. CODE § 30603(b) (West 2016).

22. *Id.* § 30519(b).

certification, which become apparent only later. Or, they may have provisions that adequately implement Coastal Act policies in the jurisdiction at the time of certification, but subsequently become inadequate because of changes in the coastal resources, or in science or policymaking concerning those resources.

The Commission explains the need for LCPs to evolve:

[D]ue to changes in the amount, condition, and location of development and sensitive resources over time, the Commission and many local governments have also recognized that LCPs need to be updated over time in order to remain effective. Significant changes may have occurred since the last LCP certification that can directly impact efforts to protect California's coast. Population and development patterns may have changed, leading to new pressures on resources and public access. New nonpoint source pollution laws may be in place, and scientists have learned more about sensitive species, habitats and other coastal resources over time. Global climate change and sea level rise are also real concerns that must now be considered in land use decisions and planning.

Similarly, the Commission and local governments have over time encountered numerous procedural issues, for example concerning permit or appeal procedures that can undermine effective implementation of LCPs. Questions and disputes on implementation procedures can delay the development review process and require more staff resources to resolve. Although sometimes unavoidable, procedural conflicts also divert attention from the core LCP objective of coastal resource protection.²³

The general process for certification of LCP amendments is similar to the process for certification of LCPs. The local government prepares a proposed amendment,²⁴ then the Commission reviews it for conformity with Coastal Act Chapter 3 policies.²⁵ Minor amendments can be handled quickly by the Commission's executive director, subject to approval by the Commission.²⁶

23. CAL. COASTAL COMM'N, LCP UPDATE GUIDE, PART 1: UPDATING LCP LAND USE PLAN (LUP) PROCEDURES at *Introduction 2* (2013), <https://www.coastal.ca.gov/rflg/lcp-planning.html>.

24. CAL. PUB. RES. CODE § 30514 (West 2016).

25. *Id.*

26. *Id.* § 30514(c) (proposed amendments exempt from certain requirements if executive director designates them "as being minor in nature or as requiring rapid and

The Commission may “from time to time” recommend amendments to the local government, “to accommodate uses of greater than local importance.”²⁷ The Coastal Act directs the Commission to review LCPs at least once every five years to determine whether the LCP “is being effectively implemented in conformity with” Coastal Act policies.²⁸ If the Commission finds that the LCP is not being carried out in conformity with any Coastal Act policy, the Commission shall recommend corrective actions to the local government, including LCP amendments.²⁹ Within one year of receiving the recommendations, the local government must either follow them or provide a report to the Commission setting forth its reasons for not following them.³⁰ After reviewing the report, the Commission may submit a report to the Legislature recommending that that the Legislature address outstanding issues.³¹

V. THE PROBLEM

A. *Insufficient Incentives to Amend LCPs to Address Statewide Concerns*

The procedure for revising LCPs has proven inadequate. When a local government wants an LCP change—often, to accommodate a development project that the local government supports—a proposed amendment can make its way to the Commission without much difficulty, because local governments are the prime movers of LCP amendments.³² In contrast, when a

expeditious action.”)

27. *Id.* § 30519(c).

28. *Id.* § 30519.5(a) (“The commission shall, from time to time, but at least once every five years after certification, review every certified local coastal program to determine whether such program is being effectively implemented in conformity with the policies of this division.”).

29. *Id.* (“If the commission determines that a certified local coastal program is not being carried out in conformity with any policy of this division it shall submit to the affected local government recommendations of corrective actions that should be taken. Such recommendations may include recommended amendments to the affected local government’s local coastal program.”).

30. *Id.* § 30519.5(b) (“Recommendations submitted pursuant to this section shall be reviewed by the affected local government and, if the recommended action is not taken, the local government shall, within one year of such submission, forward to the commission a report setting forth its reasons for not taking the recommended action.”).

31. *Id.* (“The commission shall review such report and, where appropriate, report to the Legislature and recommend legislative action necessary to assure effective implementation of the relevant policy or policies of this division.”)

32. See, e.g., Cal. Coastal Comm’n, *Meeting Agenda*, CAL. COASTAL COMM’N (Oct. 2016), <https://www.coastal.ca.gov/meetings/mtg-mm16-10.html> (listing proposed

potential LCP amendment does not match the priorities of a local government, the amendment is not likely to occur, even if the amendment is necessary to protect coastal resources.

Accordingly, while there is a statutory process for periodic Commission review of LCPs,³³ the process lacks a mechanism to motivate and require local governments to revise their LCPs when they are not otherwise inclined to do so. The Commission may propose revisions,³⁴ but local governments are free to ignore those recommendations, and often do.³⁵ In practice, they may ignore them for a variety of reasons: because they disagree with the Commission's recommendations, because the recommendations are politically unpopular, because of a lack of resources to carry out the process, or because the local government simply is not prioritizing the task. There are myriad reasons that local governments may ignore the results of the Commission periodic review and the spirit of the Coastal Act. As noted, the Coastal Act gives the Commission the ability to submit a report to the Legislature when local governments ignore recommendations,³⁶ but this mechanism has never resulted in LCP changes.

As a result, of the 92 approved LCP segments, 38—dating back as far as 1980—have never been amended to update their plans, other than on a project-driven basis.³⁷ In fact, only 13 LCP segments have been comprehensively updated (reviewed and amended as a complete unit, as opposed to focusing on one or more components of the LCP segment).³⁸

Many local governments, of course, are committed to effective implementation of the Coastal Act and to protecting coastal resources. Yet in enacting the Coastal Act, as one court explained, the Legislature acknowledged the force of local concerns and their potential to obstruct the statewide goals of the Coastal Act:

Sonoma County LCP amendment to change zoning designations); Cal. Coastal Comm'n, *Meeting Agenda*, CAL. COASTAL COMM'N (Nov. 2016), <https://www.coastal.ca.gov/mtgcurr.html> (listing proposed LCP amendment to accommodate assisted living facility for City of Redondo Beach).

33. CAL. PUB. RES. CODE § 30519.5(a) (West 2016).

34. *See id.*

35. *Id.* § 30519.5(b) (requiring the local government to review the Commission's recommendations, but not requiring the local government to adopt any of them).

36. *Id.*

37. *See infra* Appendix, Table 1.

38. *See infra* Appendix, Table 2.

Clearly, the statutory mandate is a large order. The goals are manifold and the potential for conflict among agencies, property owners and the Commission is great. A most important aim, however, is to insure statewide supervision over coastal zone development, to avoid local pressures having an undue impact upon the planning for this unique and irreplaceable resource.³⁹

Local governments simply have different constituencies and priorities than the Coastal Commission, and sometimes, those priorities conflict with the underlying policies of the Coastal Act. The Coastal Act reflects a policy determination by the Legislature that while local governments should have an important role in management of coastal resources, ultimately, to the extent that the desires of cities or counties conflict with the goals of the Coastal Act, the goals of the Coastal Act take precedence. The periodic review evaluates whether the LCP is “not being carried out in conformity with any policy” of the Coastal Act.⁴⁰ The Commission must have the final say on that question. The need for an LCP to be consistent with the Coastal Act on an ongoing basis is even more important than the need for it to be consistent with the Coastal Act when the local government initially drafts the LCP.

B. *Illustrations of the Concern About Local Government Incentives*

Three examples from across California illustrate the potential challenges when local governments do not keep their LCPs in sync with new information about site ecology or other changed circumstances. As these examples illustrate, issues sometimes arise when LCPs protect certain types of habitat, but do not accurately designate the areas in their jurisdictions where those habitats are located.

1. *Security National Guaranty.*

In Sand City, located just north of Monterey, a developer proposed to build a resort/condo project on the beach.⁴¹ The

39. *City of Chula Vista v. Superior Court*, 133 Cal. App. 3d 472, 482 (1982).

40. CAL. PUB. RES. CODE § 30519.5(a) (West 2016).

41. *Sec. Nat'l Guar. v. Coastal Comm'n*, 159 Cal. App. 4th 402 (2008) [hereinafter *Sec. Nat'l Guar.*]. In the interest of full disclosure, the author of this Article has been lead

developer, Security National Guaranty, applied for a coastal development permit.⁴² Sand City approved the permit, and the approval was appealed to the Commission.⁴³ One issue was whether the project site was in an environmentally sensitive habitat area (“ESHA”).⁴⁴ An ESHA is “[a]ny area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which easily could be disturbed or degraded by human activities and developments.”⁴⁵

Section 4.2.4 of the land use plan in the Sand City LCP described the dunes area where the project was proposed as “provid[ing] no natural habitats, although some native species are found.”⁴⁶ The LCP containing these descriptions had been certified in 1982.⁴⁷ In 1990, the Commission had recommended that Sand City expand protected habitat areas, noting that not all of the sensitive areas had been mapped.⁴⁸

When the project came before the Commission in 2000, the Commission found that the dunes were a significant resource in and of themselves.⁴⁹ The Commission also noted that the dunes provided important habitat for sensitive species, including plants federally designated (or on the candidate list) as threatened or endangered, such as Seaside bird’s beak, sand gilia, Sandmat

counsel for the Coastal Commission in *Security National Guaranty* since 2009, when it returned to the Superior Court after the appellate decision.

42. *Id.* at 411.

43. *Id.*

44. *Id.*

45. See CAL. COASTAL COMM’N, STAFF REPORT: REGULAR CALENDAR COASTAL DEVELOPMENT PERMIT A-3-SNC-98-114 at 13 (2000), <http://documents.coastal.ca.gov/reports/2000/12/Th7a-12-2000.pdf> [hereinafter COMMISSION FINDINGS 2000]. When the Commission acts consistent with staff recommendations in a Commission staff report, the staff report’s findings become the Commission’s findings unless the Commission specifies otherwise when it votes. CAL. CODE REGS. tit. 14, § 13096(b).

46. THE CITY OF SAND CITY, LOCAL COASTAL PROGRAM LAND USE PLAN § 4.2.4 at 36 (1982), <https://www.gpo.gov/fdsys/pkg/CZIC-ht168-c2-s26-1984/html/CZIC-ht168-c2-s26-1984.htm>.

47. *Id.*

48. See CAL. COASTAL COMM’N, STAFF RECOMMENDATION, REPORT TO THE CITY OF SAND CITY ON THE IMPLEMENTATION OF ITS LOCAL COASTAL PROGRAM at 74-81 (1990), <https://www.coastal.ca.gov/recap/sandcity-1990.pdf> (“The sensitive habitat area should be remapped, based on available information, consistent with the Coastal Act/LUP (p.38) definition”); *id.* at 77 (“Implementation of the LCP to date has led to a concern that its provisions may be insufficient to fully protect the dune habitat in a manner consistent with the Coastal Act.”) [hereinafter SAND CITY STAFF REPORT].

49. See COMMISSION FINDINGS 2000, *supra* note 45, at 15.

manzanita, Eastwood's ericameria, coast wallflower, Menzies wallflower, and Monterey ceanothus.⁵⁰ The dunes also provided habitat for the Western snowy plover, a federally threatened bird that foraged along the shoreline and nested in the dunes.⁵¹ The Commission made similar findings about the Smith's blue butterfly, an endangered species whose habitat was also on the site.⁵² Given its importance as a habitat for these species, the Commission determined that the site satisfied the LCP definition of ESHA, because it was an "area in which plant or animal life or their habitats are either rare or especially valuable."⁵³

The Commission denied the permit application, finding it was inconsistent with various LCP policies including water and ESHA protection policies.⁵⁴ Security National Guaranty filed a lawsuit challenging that denial. The trial court upheld the Commission's denial, ruling that the Commission had correctly found the project lacked an adequate water supply, and was therefore inconsistent with the LCP.⁵⁵

The Court of Appeal reversed, rejecting the Commission's application of LCP ESHA policies.⁵⁶ The court did not disagree with any of the Commission's analysis about the physical characteristics of the site. It did not question the inherent value of dunes as part of the larger Monterey Bay dune system.⁵⁷ The court did not disagree with the specific findings that the project site provided habitat for snowy plovers, Smith's blue butterflies, or other species.⁵⁸ Nor did it criticize the Commission's findings that those species were ecologically significant.⁵⁹ It did not even dispute, as a factual matter, the Commission's overall finding that the site was an "area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which easily could be disturbed or degraded by human activities and developments."⁶⁰

50. *Id.* at 16.

51. *Id.*

52. *Id.*

53. *Id.* at 17.

54. *Sec. Nat'l Guar. v. Coastal Comm'n*, 159 Cal. App. 4th 402, 412 (2008).

55. *Id.* at 412-13.

56. *Id.* at 422-25.

57. *See* COMMISSION FINDINGS 2000, *supra* note 45, at 15.

58. *See id.* at 16-21.

59. *Id.*

60. *Id.* at 18.

Rather, the Court of Appeal rejected the Commission's legal authority to consider the evidence about the ecology of the site and determine that it was an ESHA.⁶¹ Thus, according to the court, by examining actual site conditions and concluding that they satisfied the ESHA definition in the LCP, the Commission had essentially amended the LCP, because its conclusion diverged from the statement in section 4.2.4 that the area provides "no natural habitats," and no ESHAs were mapped for the site in the LCP.⁶²

The court rejected the suggestion that the LCP was outdated—or, more precisely, it rejected the notion that evidence about current site conditions could outweigh Section 4.2.4 or the LCP ESHA designations.⁶³ Thus, the court held that the Commission was bound by the LCP's conclusions, and it did not matter whether they matched reality or not.⁶⁴

Security National Guaranty highlights the underlying problem. The periodic review process can bring LCPs back in line with facts on the ground only if that process identifies shortcomings in the LCPs *and* the local government cooperates in remedying those shortcomings. The Commission had recommended earlier that the LCP include habitat protections for the site.⁶⁵ Unfortunately, as *Security National Guaranty* illustrates, Sand City never adopted amendments sufficient to bestow such protection.

2. Long Beach.

Sometimes the problem is not with changes in the ecology of, or information about, an area; instead, the LCP simply has inadequate policies that were not identified earlier. At the time of certification in 1980, the Long Beach LCP had no wetlands policy.⁶⁶ In 1998, the City of Long Beach approved a permit for a

61. *Sec. Nat'l Guar.*, 159 Cal. App. 4th at 422-25.

62. *Id.* at 423.

63. *Id.* at 422 n.10.

64. Presumably, the court (and *Security National Guaranty*) would say that if there is a disconnect between reality and the LCP, then the local government should amend the LCP to reflect reality. *See id.* at 421.

65. *See* SAND CITY STAFF REPORT, *supra* note 48, at 5 ("New information regarding habitats indicates that existing LCP provisions may not adequately protect resources [in Environmentally Sensitive Habitat Areas] consistent with Coastal Act requirements"); *id.* at 71 ("The draft EIR also identifies areas of Smith's blue butterfly habitat outside of the generalized locations shown in the LCP.").

66. CITY OF LONG BEACH, LOCAL COASTAL PROGRAM (1980),

67,930-square-foot retail/commercial shopping center.⁶⁷ The City identified wetland vegetation and water ponding on the site, but concluded that the water and vegetation were not a wetland.⁶⁸ On appeal, the Commission analyzed the water ponding and vegetation, and found that the site did in fact contain a wetland area.⁶⁹ It noted that the applicant's consultants had determined that "the site is partially inundated during the rainy season and that the site supports scattered native hydrophytes (wetland plants)," including saltgrass, alkali heath, heliotrope, pickle weed, alkali bulrush, and southern tarplant.⁷⁰

The Commission found that this evidence satisfied the Coastal Act definition of "wetland," which is "lands within the coastal zone which may be covered periodically or permanently with shallow water and include saltwater marshes, freshwater marshes, open or closed brackish water marshes, swamps, mudflats, and fens."⁷¹ It further noted that:

[t]he Commission's Statewide Interpretive Guidelines state that the Commission also relies on the presence of hydrophytes and/or presence of hydric soils to make a wetlands determination. The presence of **any one** of the three conditions (water, hydrophytes or hydric soils) can result in a determination that a wetland is present.⁷²

Because the site contained a wetland but the LCP did not include adequate wetland policies, the Commission found that an LCP amendment was necessary.⁷³ In this instance, the applicant also desired an LCP amendment, because the proposed project included a retail component, but the LCP did not list retail uses as

<http://www.lbds.info/civica/filebank/blobdload.asp?BlobID=3795>.

67. CAL. COASTAL COMM'N, A-5-LOB-98-336 STAFF REPORT: APPEAL SUBSTANTIAL HEARING AND DE NOVO HEARING 2-3 (1998), <https://documents.coastal.ca.gov/reports/1998/10/T16b-10-1998.pdf> [hereinafter CAL. COASTAL COMM'N APPEAL 1998]; see also Cal. Coastal Comm'n, *October 1998 Agenda*, CAL. COASTAL COMM'N (1998), <https://www.coastal.ca.gov/meetings/mtg-1098.html> (indicating approval of staff recommendation).

68. CAL. COASTAL COMM'N APPEAL 1998, *supra* note 67, at 8.

69. *Id.* at 8-10.

70. *Id.* at 9.

71. *Id.* at 10 (quoting CAL. PUB. RES. CODE § 30121 (West 2016)) (emphasis in original).

72. CAL. COASTAL COMM'N APPEAL 1998, *supra* note 67, at 10.

73. *Id.* at 1, 12.

allowable on the project site.⁷⁴ Accordingly, Commission staff proposed, and the Commission approved, a permit that was conditioned on the adoption of an LCP amendment addressing *both* concerns: adding wetland policies and allowing retail use.⁷⁵ The City proposed, and the Commission certified, an amendment making both changes.⁷⁶

In the Long Beach instance, needed changes were made—but not through the periodic review process. It was fortuitous that the applicant and local government were both motivated to amend the LCP, for reasons independent of the Commission’s concerns about protection of coastal resources. Often, however, when the Commission identifies deficiencies in the LCP, the applicant and the local government do not have their own independent motivations for amending the LCP. In such cases it can be difficult to rely on the local government investing its resources into pursuing the amendment.

3. *Santa Barbara.*

In other circumstances, however, even the local government’s desire for project-specific LCP amendments does not compel it to make other amendments necessary to ensure that the LCP “is being effectively implemented in conformity with” Coastal Act policies.⁷⁷ For example, in 2009, the County of Santa Barbara applied for an LCP amendment.⁷⁸ The Commission determined that the amendment, as submitted, was not fully consistent with the Chapter 3 policies of the Coastal Act. It therefore suggested modifications to the LCP, including policies to enhance protection of environmentally sensitive habitat areas (for example, concerning habitat restoration projects), to incorporate

74. *Id.* at 2.

75. *Id.* at 1, 12, 22; CAL. COASTAL COMM’N, STATUS OF LCP PROGRAM: FY 97-98 ANNUAL REPORT (1998), <https://documents.coastal.ca.gov/reports/1998/10/T12b-10-1998.pdf>.

76. CAL. COASTAL COMM’N, REVISED FINDINGS FOR PERMIT AMENDMENT 6-8, 10 (1999), <https://documents.coastal.ca.gov/reports/1999/8/T12b-8-1999.pdf>.

77. CAL. PUB. RES. CODE § 30519.5(a) (West 2016).

78. CAL. COASTAL COMM’N, SANTA BARBARA COUNTY LCP AMENDMENT NO. MAJ-1-09-A (COUNTYWIDE LAND USE AND DEVELOPMENT CODE) AND LCP AMENDMENT MAJ-1-09-B (MONTECITO LAND USE AND DEVELOPMENT CODE AND MONTECITO COMMERCIAL ZONE CHANGE) FOR PUBLIC HEARING AND COMMISSION ACTION AT THE THURSDAY NOVEMBER 18, 2010, COMMISSION MEETING IN SANTA MONICA, at 1 (Nov. 2, 2010), <https://documents.coastal.ca.gov/reports/2010/11/Th6b-s-11-2010.pdf>.

better science about sea level rise, and to make changes in the standards for bluff development that would be needed for the proposed amendment to be found consistent with the Coastal Act.⁷⁹

The Commission ultimately voted to approve Santa Barbara's proposed LCP amendment with the modifications recommended by the Commission.⁸⁰ Despite the Commission's approval, the Santa Barbara County Board of Supervisors voted to reject the modifications, and therefore, the Commission's certification.⁸¹ As a result, neither the original amendment submitted by Santa Barbara nor the Commission's suggested modifications were added to the LCP.⁸²

VI. POSSIBLE SOLUTIONS

The Coastal Act should contain a stronger incentive for local governments to update their LCPs when a periodic review—or some other process, such as a permit appeal—identifies deficiencies. Such an incentive could take several forms. First, the strongest incentive would be to mandate that all LCPs expire after a certain period of time, say fifteen years. This solution would guarantee that no LCPs become severely outdated, but it would also saddle local governments and the Commission with considerable additional work to recreate LCPs periodically. Moreover, this automatic expiration does not distinguish between local governments that update their LCPs appropriately and those that do not, and would be particularly harsh for the former.

Instead, a second option would be to tie LCP expiration to the periodic review. For example, section 30519.5(b) could be amended to state that if the Commission recommends action to the local government, two years later, the Commission shall determine whether the local government has brought the LCP into conformity with the policies of the Coastal Act. If the

79. *Id.* at 22, 26-29, 287-98.

80. Cal. Coastal Comm'n, *November 2010 Meeting Agenda*, CAL. COASTAL COMM'N (Nov. 18, 2010), <https://www.coastal.ca.gov/meetings/mtg-mmx-11.html> (indicating that Santa Barbara amendments were "approved with modifications").

81. CTY. OF SANTA BARBARA BD. OF SUPERVISORS, ACTION SUMMARY 21 (Feb. 1, 2011), <https://santabarbara.legistar.com/Calendar.aspx>.

82. See *Local Coastal Program Update*, CITY OF SANTA BARBARA, <http://www.santabarbaraca.gov/services/planning/mpe/lcp.asp> (last updated May 12, 2016) (showing that despite receiving a grant from the Commission in 2014 to update the LCP, the Santa Barbara LCP has never been comprehensively updated).

Commission determines that the LCP is still not in conformity with the policies of the Coastal Act, the LCP would lose its certification. Even that, however, would be a fairly drastic measure, and could create a large volume of work for both the local government and Coastal Commission.

A third (and probably better) approach would be to leave the LCP in place, but alter the appeal process for local governments that decline to make amendments recommended as part of a periodic review. If the Commission performs a periodic review, the local government would have one year to implement the recommendations by submitting proposed amendments to the Commission. If the local government did so, the permit application and appeal processes would occur as they do in the status quo, with the local government as the primary permitting authority, and the LCP providing the substantive policy standards.

If, however, the local government failed to adopt measures that the Commission deemed necessary for the LCP to continue to be an adequate implementation of Coastal Act policies, the appeal process would change. The local government would continue to be the primary permitting authority, receiving most permit applications in the first instance, but all permits would be appealable. The local government would continue to measure permit applications against the LCP. Whereas now the main statutory ground for appeal is inconsistency with the LCP and Coastal Act public access policies,⁸³ those grounds would be expanded to include any inconsistency with either the LCP or the Coastal Act Chapter 3 policies. On appeal, the Commission would consider whether the project is consistent with the LCP and the Chapter 3 policies. The Commission would grant a permit only if the project complies with all of those policies. This process would provide a strong incentive for local governments to adopt Commission recommendations for updating their LCPs, and would help ensure that coastal resources are protected even when local governments decline to do so.

Additionally, the Legislature should provide additional funding to the Commission and local governments earmarked for the periodic review and update process, to ensure that it does not

83. CAL. PUB. RES. CODE § 30603(b)(1) (West 2016) (“The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program or the public access policies set forth in this division.”).

receive short shrift at either level.

VII. CONCLUSION

The Coastal Act was a bold and well-designed statute when the California Legislature enacted it in 1976. The processes it put in place are still fundamentally sound forty years later. Like some of the LCPs that have been certified since its inception, however, it needs fine tuning in order to achieve its goals more comprehensively and efficaciously. The local pressures that concerned the Legislature in 1976 still influence local governments, and more needs to be done to ensure that they do not trump the statewide need for coastal resource protection.

APPENDIX

Table 1. LCP segments that have never been amended to update their plans (other than on a project-driven basis) as of August 2016⁸⁴

LCP	Year Adopted	LCP	Year Adopted
City of Trinidad	1980	Del Norte Co. Harbor	1987
City of Avalon	1981	Del Norte Co. Lopez Creek	1987
City of Marina	1982	City of Watsonville	1988
City of El Segundo	1982	Monterey Co. North	1988
City of Irvine	1982	Monterey Co. Carmel Area	1988
Marin Co. South I North II	1981/ 1982	Monterey Co. Big Sur	1988
Del Norte Co./County	1983	Orange Co. Newport Coast	1988
Orange Co. Aliso Viejo	1983	City of Arcata	1989
City of Daly City	1984	Orange Co. Emerald Bay	1989
City of Port Hueneme	1984	City of Capitola	1990
City of Coronado	1984	City of Laguna Niguel	1990
City of Oxnard	1985	City of Guadalupe	1991
Humboldt Co. North Coast	1986	City of Santa Barbara/ Airport	1991
Humboldt Co. Trinidad Area	1986	City of Pacifica	1994
Humboldt Co./Humboldt Bay	1986	City of Encinitas	1995

84. E-mail from Elizabeth Fuchs, Program Manager, Cal. Coastal Comm'n to Joel Jacobs (Nov. 29, 2016 10:26 AM PST) (on file with author).

Humboldt Co. McKinleyville	1986	Mendocino Co. Town	1996
Humboldt Co. Eel River	1986	City of Half Moon Bay	1996
Humboldt Co. South Coast	1986	City of Del Mar	2001
City of San Francisco/City	1986	City of Malibu	2002

Table 2. LCP Segments that have been comprehensively updated (LCP segment reviewed and updated as a whole) as of August 2016⁸⁵

LCP Segments Comprehensively Updated Since Certification	Year Certified	Year Updated
City of Crescent City/City Segment	1983	2011
City of Ft. Bragg	1983	2008
City of Pt. Arena	1981	2006
City of Santa Cruz	1985	1995
City of Sand City	1984	2004
City of Grover Beach	1982	1998, 2000, 2014
LA County Marina/Ballona	1990	1996, 2012
City of Carlsbad Village Redevelopment Area	1987	1996, 2006
City of San Diego La Jolla	1988	1999, 2003, 2004
City of San Diego Pacific Beach	1988	1995, 1999
City of San Diego Centre City	1988	1999, 2012
City of Chula Vista/ Balance segment	1985	2012
City of Imperial Beach	1985	1994

85. *Id.*