

# California Coastal Democracy at Forty: Time for a Tune-up

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## I. INTRODUCTION

California fashions itself a laboratory of democracy,<sup>1</sup> often

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1. Justice Brandeis first articulated the notion of “laboratories” of democracy in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“There must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet the changing social and economic needs. . . . It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”). Modern commentators across the political spectrum have since borrowed the phrase to support a myriad of policy recommendations. While states-rights advocates often employ the concept in service of more limited federal government regulation, some conservative commentators have come to disavow the term, as more progressive state and local governments take on everything from innovative climate legislation to tobacco and soda taxes. See Mike Sabo, *Republicans Should Stop*

pioneering populist voter reforms, sweeping open-government laws, and experimental agency governance structures. Nowhere is this more true than in the design and passage of the California Coastal Act, first enacted through a statewide ballot initiative in response to alarming developments along the coast and subsequently codified by the state legislature.<sup>2</sup> There is little dispute that this transformative legislation slowed the pace of large-scale new development in the coastal zone, although construction activities continue to occur with regularity along California's varied and lengthy shoreline. On the fortieth anniversary of the contemporary Coastal Act, this article takes stock, asking where we are headed over the next forty years and how to get there in a way that remains faithful to the robust public values enshrined in California's most democracy-affirming conservation law.

The voters, and ultimately the California Legislature, designed the Coastal Act decisionmaking process to be widely representative of the diffuse public interest in long-term coastal protection and access. Borrowing from California governance innovations in air and water quality regulation, the Coastal Act relies on a permanent civil service staff to evaluate applications for new development in accordance with specific statutory standards and make recommendations to a twelve-member, unpaid, part-time decision body appointed equally by the Governor, the Speaker of the House, and the Senate Rules Committee. In theory, this structure—a particular form of “overhead democracy”<sup>3</sup>—makes

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Promoting “Laboratories of Democracy,” THE FEDERALIST (Mar. 23, 2015), <http://thefederalist.com/2015/03/23/republicans-should-stop-promoting-laboratories-of-democracy/>; Michael S. Greve, *Laboratories of Democracies: Anatomy of a Metaphor*, AMERICAN ENTERPRISE INSTITUTE (Mar. 31, 2001), <http://www.aei.org/publication/laboratories-of-democracy/>.

2. CAL. PUB. RES. CODE § 30000 *et seq.* (2016). For a deep history of the political struggle and grassroots effort that led to passage of the Coastal Act, see Janet Adams, *Proposition 20 – A Citizens’ Campaign*, 24 SYRACUSE L. REV. 1019 (1973); Jared Orsi, *Restoring the Common to the Goose: Citizen Activism and the Protection of the California Coastline, 1969-1982*, 78 SO. CAL. Q. 257 (1996).

3. First articulated by Emmette Redford, the basic concept of overhead democracy posits that political oversight reduces administrative discretion by giving elected officials more influence over agency decisionmaking, thereby providing enhanced democratic accountability as elected officials aggregate the policy preferences of voters. See e.g., Sidney Shapiro et. al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 468 (2012); Wendy Wagner, *The Participation-Centered Model Meets Administrative Process*, 2013 WIS. L. REV. 671, 675 (2013); Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 581 (2011).

the Commission less vulnerable to the kind of industry “capture”<sup>4</sup> that plagues many agencies<sup>5</sup> and unquestionably concerned those who crafted the original legislation: expert professional staff are guided by the specific decision criteria embedded in the Coastal Act, while politically-appointed commissioners, hailing from different parts of the state and generally serving for relatively short terms, bring a degree of representative democracy to the ultimate decision process. Although many other California environmental permitting agencies utilize a commission or board structure for some regulatory decision purposes, the Coastal Act is fairly unique in delegating virtually every individual permit decision to political appointees.<sup>6</sup>

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4. In simple terms, industry “capture” of a regulatory agency is “shorthand for the phenomenon whereby regulated entities wield their superior organizational capacities to secure favorable agency outcomes at the expense of the diffuse public.” Nicholas Bagley, *Agency Hygiene*, 89 TEX. L. REV. 1, 2 (2010). See also Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1343 (2013) (explaining that “capture can be understood to occur when organized groups successfully act to vindicate their interests through government policy at the expense of the public interest”); Rachel E. Barkow, *Insulating Agencies: Avoiding Agency Capture Through Institutional Design*, 89 TEX. L. REV. 15, 21 n.23 (2010) (“Capture, for purposes of agency design, may be defined as responsiveness to the desires of the industry or groups being regulated.”); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 178 (1990) (defining capture as “the adoption by the regulator for self-regarding (private) reasons, such as enhancing electoral support or postregulatory compensation, of a policy which would not be ratified by an informed polity free of organization costs”); Daniel Carpenter & David Moss, *Introduction to Preventing Regulatory Capture: Special Interest Influence and How to Limit It*, THE TOBIN PROJECT (2013), <http://www.tobinproject.org/sites/tobinproject.org/files/assets/Introduction%20%281-16-13%29.pdf> (defining regulatory capture as “the result or process by which regulation, in law or application, is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself”).

5. In California, for example, charges of agency capture have particularly dogged such nearly invisible agencies as the Division of Oil, Gas and Geothermal Resources within the Department of Conservation, which stands accused of favoring organized oil industry interests over the diffuse public interest in ensuring the protection of water quality and public health. See, e.g., Dan Bacher, *California’s Biggest “Secret” – Oil Industry Capture of Regulatory Apparatus*, EAST BAY EXPRESS (July 29, 2015), <http://www.eastbayexpress.com/SevenDays/archives/2015/07/29/californias-biggest-secret-oil-industry-capture-of-the-regulatory-apparatus>; Mike Gaworecki, *Legislators Call Out California Regulators’ “Corrupt, Inept” Management Of Underground Wastewater Injection*, DESMOG (Mar. 12, 2015), available at <http://www.desmogblog.com/2015/03/12/legislators-call-out-california-regulators-corrupt-inept-management-underground-injection-program>. The California Legislature attempted to respond to this situation by imposing additional environmental review and regulatory permitting requirements on the agency. S.B. 10,4 2013-14 Leg. Reg. Sess. (Cal. 2014).

6. For example, while the political appointees on the California Fish and Game

Has this governance structure achieved the drafters' hopes and goals? Yes and no. Development interests and private property advocates have long decried what they perceive as overly-restrictive decisions by the Coastal Commission and have worked tirelessly to change an agency culture that prioritizes the protection of coastal resources and public access. Unable to dissuade the Commission's long-time maverick executive director from this course, the regulated industry has repeatedly sought reform through the political process and override through the judiciary. It has, for instance, convinced sympathetic governors and legislators to chronically underfund the Commission staff, engaged in relentless property rights litigation to undo Commission policy choices, periodically stacked the Commission with pro-development appointments, and attempted on more than one occasion to undermine staff morale by going after the agency's leadership.

By and large, these efforts have not succeeded in steering the Commission away from what it perceives as its coastal protection mission. But recent events suggest that we may be on the precipice of a significant institutional shift. In early 2016, seven

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Commission are charged with listing endangered and threatened species and setting other regulatory policies, the civil service employees and management of the California Department of Fish and Wildlife issue incidental take permits or consistency determinations for individual projects that affect listed species. *Compare* CAL. FISH & GAME CODE §§ 2070-79 (2016) *with* *Id.* §§ 2080-89 (2016). The Fish and Game Commission hires its own executive director while the director of the Department serves at the pleasure of the Governor and oversees a professional civil service staff. The state agencies with a decision structure perhaps most analogous to the Coastal Commission are the nine Regional Water Quality Control Boards, each of which has its own professional staff and up to nine board members appointed by the Governor. Similar to the Coastal Commission, Regional Water Board staff makes recommendations on individual applications for water discharge permits, which are ultimately decided by the board. Not coincidentally, Regional Water Boards suffer from some of the same political pressure and regulatory capture issues discussed in this article. For instance, when the Central Coast Regional Water Board undertook initial steps to regulate agricultural discharges for the first time, the powerful agricultural lobby was able to work the political process in a number of ways that delayed action—by convincing the Governor's office to leave the board without a voting quorum for two years and to replace the long-time executive officer with an industry-friendly appointment, by floating the concept of legislation to dissolve the Central Coast Board altogether and distribute its responsibilities to other boards, and most recently, by sponsoring a bill to legislatively exempt nitrate discharges, but only in the Central Coast region, from application of the Porter-Cologne Water Quality Control Act. The Regional Water Boards, however, face greater transparency and accountability than the Coastal Commission. For example, Regional Water Boards must comply with the general APA prohibition on *ex parte* communications regarding pending permit applications, CAL. WATER CODE § 13294 (2016) (incorporating CAL. GOV'T CODE § 11430.10 *et seq.* (2016)), and aggrieved parties may obtain review by a second body, the State Water Resources Control Board, subject to appellate-like rules. *Id.* § 13320 (2016).

commissioners maneuvered a vote to summarily dismiss the Commission's relatively new executive director, despite his widespread support among both staff and those who advocate for coastal protection, on what many see as the flimsiest of grounds. The circumstances surrounding this action, and the fallout since, provide ample reason to believe that a majority of the Commission's current political appointees hope to drive future agency decisions in a more developer-friendly direction, even though doing so is arguably inconsistent with the democratically-expressed policy preferences embedded in the Coastal Act.

This article suggests that what started out as a "good government" innovation in institutional design, intended to reduce agency capture by industry interests and to mitigate pressure from wealthy landowners and celebrities looking to wall off their piece of coastal paradise, has ultimately been commandeered by those same well-connected political elites. But the populist instincts that animated the drafters of the Coastal Act remain fundamentally sound and we should take care, in contemplating any course corrections, not to throw the baby out with the bathwater. A possible way forward emerges if we view the appointed commissioners for what they really are: quasi-adjudicatory decisionmakers who apply the law—the highly directive standards set forth in the Coastal Act—to the facts of particular permit applications.

While all permitting agencies engage in some form of this exercise, the Commission is comparatively novel among state and federal regulators. In most instances, agency staff make initial permit decisions, which can then be appealed to an administrative law judge or other appellate body governed by judge-like rules of impartial conduct. Under the Coastal Act, however, the commissioners themselves are the first and last decisionmakers. Yet their actions are subject to almost no standards of ethical conduct and little public scrutiny. Imposing a set of democracy-enhancing constraints—for example, flatly prohibiting *ex parte* communications with commissioners regarding matters pending before the agency, modernizing and liberalizing public transparency and disclosure rules, and resurrecting substantive qualifications for commissioner appointments—would not entirely solve the capture problem, but such reforms would go a substantial way toward restoring the integrity of, and the public's trust in, one of California's most important environmental agencies.

## II. THE POPULIST IMPULSE BEHIND COASTAL PROTECTION

### A. *Coastal Values, Direct Democracy, and California's Historic Proposition 20*

California's iconic 1,100-mile coastline is a defining feature of the state and integral to its self-identity. From the broad sandy beaches of Southern California to the rocky tide pools abutting the oak woodlands of the Central Coast to the steep cliffs and shrouded redwood forests on the North Coast, roughly seventy percent of the state's 38.8 million inhabitants live in coastal communities.<sup>7</sup> These communities account for eighty-five percent of California's gross domestic product, and ocean-related economic activity alone (marine transportation, tourism and recreation, living marine resources, marine construction, ship and boat building, and mineral extraction) generates around \$45 billion annually.<sup>8</sup> Of these direct ocean activities, tourism and recreation is the largest contributor, accounting for thirty-nine percent of the total dollar value and seventy-five percent of the total employment.<sup>9</sup>

But the value of the California coast goes well beyond monetary worth. Standing at the edge of the Pacific after a cross-continental journey in the late nineteenth century, author and travel writer Robert Lewis Stevenson captured the unparalleled splendor of the California coast:

The waves come in slowly, vast and green, curve their translucent necks, and burst with a surprising uproar, that runs, waxing and waning, up and down the long key-board of the beach. The foam of these great ruins mounts in an instant to the ridge of the sand glacia, swiftly fleets back again, and is met and buried by the next breaker. . . . On no other coast that I know shall you enjoy, in calm, sunny weather, such a spectacle of Ocean's greatness, such

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7. STEVEN G. WILSON & THOMAS R. FISCHETT, U.S. CENSUS BUREAU, COASTAL POPULATION TRENDS IN THE UNITED STATES: 1960 TO 2008 4 (2010). The Census Bureau coastal population numbers include residents in counties adjacent to water classified as either coastal water or territorial sea. Nineteen of California's fifty-eight counties fit that definition.

8. See e.g., CENTER FOR THE BLUE ECONOMY, NATIONAL OCEAN ECONOMICS PROGRAM, CALIFORNIA OCEAN AND COASTAL ECONOMIES 1-2 (2015); NOAA OFFICE OF COASTAL MANAGEMENT, THE NATIONAL SIGNIFICANCE OF CALIFORNIA'S OCEAN ECONOMY (2015).

9. CENTER FOR THE BLUE ECONOMY, NATIONAL OCEAN ECONOMICS PROGRAM, CALIFORNIA OCEAN AND COASTAL ECONOMIES 1 (2015).

beauty of changing colour, or such degrees of thunder in the sound.<sup>10</sup>

It is little wonder that access to and use of the state's exceptional coastal assets have been hotly contested since the earliest days of California's statehood.

In particular, efforts to preserve public access to the state-owned coastal tidelands<sup>11</sup> date back to the very first California Constitution, ratified on May 7, 1879.<sup>12</sup> One-hundred thirty-five years later, those same protections remain embedded in the state's chartering document:

No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands . . . shall be permitted to exclude the right of way to such water whenever it is required for any public purpose . . . and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.<sup>13</sup>

The courts have affirmed that this constitutional directive enunciates a strong public policy of "encouraging public use of shoreline recreational areas" and "in favor of allowing public

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10. ROBERT LOUIS STEVENSON, *ACROSS THE PLAINS* 79-80 (1918).

11. California owns all coastal tidelands between the mean daily high and low tides—that is, those lands "covered and uncovered successively by the ebb and flow of the tides," *Marks v. Whitney*, 6 Cal. 3d 251, 257-58 (1971)—as well as all submerged coastal lands continuously covered by water out to three miles. *See Zack's, Inc. v. City of Sausalito*, 165 Cal. App. 4th 1163, 1175 n.4 (2008) (explaining difference between lands subject to daily tides and submerged lands); CAL. CIV. CODE § 670 (2016) (state owns all land below ordinary high-water mark); *People v. Cal. Fish Co.*, 166 Cal. 576, 584 (1913). The common law public trust doctrine imposes an inalienable duty on the state, as sovereign trustee, to protect public access to and use of these lands, waters, and resources for the benefit of the people. *Nat'l Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 434-35 (1983); *Ctr. for Biological Diversity v. FLP Grp., Inc.*, 166 Cal. App. 4th 1349, 1360-65 (2008). In California, these public trust uses extend far beyond traditional navigation and commerce to include fishing, hunting, bathing, swimming, standing, anchoring, boating, general recreation, and other purposes such as preservation of trust resources in their natural state as ecological units of study, as open space, and as environments which favorably affect the scenery and climate of an area. *See Nat'l Audubon*, 33 Cal. 3d at 434-35; *Marks*, 6 Cal. 3d at 259; *City of Berkeley v. Superior Court*, 28 Cal. 3d 515, 521 (1980).

12. *Sumner Hill Homeowners' Assn., Inc. v. Rio Mesa Holdings, LLC*, 205 Cal. App. 4th 999, 1017 (2012) ("This constitutional protection of public access to navigable waters was first adopted in 1879 as then article XV, section 2, and is now found in article X, section 4 of the California Constitution.").

13. CAL. CONST. art. X, § 4 (2016).

access to shoreline areas.”<sup>14</sup> Likewise, the courts have described California’s coastal tidelands as “so particularly the gifts of nature’s bounty that they ought to be reserved for the whole of the populace” and the public trust rights that attach to them as “so intrinsically important and vital to free citizens that their unfettered availability to all is essential in a democratic society.”<sup>15</sup>

Although the Legislature enacted various piecemeal statutes to implement this constitutional protection,<sup>16</sup> concerns about public access to the coast and protection of coastal resources only increased as California’s population grew exponentially throughout the twentieth century. A joint legislative committee report published in 1931 recognized that “[o]ne of the most valuable assets of the State of California lies in its coast line along the Pacific Ocean and in the land and water areas contiguous thereto” and requested that the then-Department of Natural Resources undertake a thorough study of how the coastline could be developed in an orderly manner so “as to meet the needs of the people of all parts of the State.”<sup>17</sup> The resulting study concluded, among other things, that “at many places along the water front of the State there is not provided sufficient access to the tidelands.”<sup>18</sup> Little came of these early studies, however.

By the mid-1960’s, with the post-World War II population of California exploding toward twenty million people—most of whom lived in coastal communities—the Legislature directed the Governor to prepare a Comprehensive Ocean Area Plan to address increasing concerns about coastal development.<sup>19</sup> By then, “the coastline was vanishing before an encroaching frontier of

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14. See *Gion v. Santa Cruz*, 2 Cal. 3d 29, 42 (1970); *Cty. Of Los Angeles v. Berk*, 26 Cal. 3d 201, 222 (1980).

15. *Zack’s, Inc.*, 165 Cal. App. 4th at 1175-76 (citing *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 413-14 (1842)).

16. See *Gion*, 2 Cal. 3d at 43 (enumerating various legislative enactments intended to protect and implement the public’s right to access navigable waters and tidelands). For instance, in 1949, the Legislature declared that “[a]ll navigable waters situated within or adjacent to city shall remain open to the free and unobstructed navigation of the public. Such waters and the water front of such waters shall remain open to free and unobstructed access by the people from the public streets and highways within the city. Public streets, highways, and other public rights of way shall remain open to the free and unobstructed use of the public from such waters and water front to the public streets and highways.” CAL. GOV’T CODE § 39933 (2016).

17. See *Adams*, *supra* note 2, at 1020 (quoting J. LEG. COMM. ON SEACOAST CONSERVATION, REPORT, Cal. Assembly J., 48th Sess., 461-62 (1931)).

18. *Id.*

19. *Id.* at 1021.



development.”<sup>20</sup> In Malibu, for example, “a wall of private homes blocked coastal access and views” and elsewhere “beaches literally ran out of sand, as breakwaters and artificial fill interrupted the migration of sediments.”<sup>21</sup> The Fish and Game Commission concluded that less than fifteen percent of the state’s original 3.5 million of acres of shoreline marsh remained by 1966, and a federal legislative committee concluded that California lost sixty-seven percent of its estuarine habitat in the short period between 1947 and 1967.<sup>22</sup> Another House committee termed the loss of California coastal habitat an “environmental crisis,” and a contemporary commentator noted that coastal estuaries were being destroyed at “an alarming rate.”<sup>23</sup> Coastal access activists were particularly troubled that only 200 miles of California’s 1,100-mile coastline were available for public use.<sup>24</sup>

The Legislature did take some modest steps to address these mounting concerns. For instance, the right of public access to trust tidelands is now embedded in the California Subdivision Map Act, the state’s bedrock land use planning law.<sup>25</sup> Enacting that law in 1974, the Legislature found and declared that (1) “the public natural resources of this state are limited in quantity and that the population of this state has grown at a rapid rate and will continue to do so, thus increasing the need for utilization of public natural resources” and (2) the “demand for private property adjacent to public natural resources through real estate subdivision developments [has] resulted in diminishing public access to public natural resources.”<sup>26</sup> The statute further declared that “it is essential to the health and well-being of all citizens of this state that public access to public natural resources be increased” and that “[i]t is the intent of the Legislature to increase public access to public natural resources.”<sup>27</sup> The Map Act thus requires

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20. Orsi, *supra* note 2, at 258-59.

21. *Id.* at 259.

22. See *California’s Tideland Trust: Shoring It Up*, 22 HASTINGS L. REV. 759, 759-60, n.9, 11 (1971); see also Orsi, *supra* note 2, at 259 (“Nearly half of the coastal sloughs and estuaries that had existed in 1900 had disappeared or had lost all their ecological utility.”).

23. See *California’s Tideland Trust: Shoring It Up*, 22 HASTINGS L. REV. 759, 759 (1971).

24. Orsi, *supra* note 2, at 258.

25. CAL. GOV’T CODE § 66478.1 (2016) (“It is the intent of the Legislature, by the provisions of Sections 66478.1 through 66478.10 of this article to implement Section 4 of Article X of the California Constitution insofar as Sections 66478.1 through 66478.10 are applicable to navigable waters.”).

26. *Id.* § 66478.2.

27. *Id.* § 66478.3.

reasonable public access for subdivisions developed adjacent to public waterways.<sup>28</sup> For coastal property, the statute directs local agencies to assess reasonable public access by considering “the type of coastline or shoreline and the various appropriate recreational, educational, and scientific uses, including, but not limited to, diving, sunbathing, surfing, walking, swimming, fishing, beachcombing, taking of shellfish and scientific exploration.”<sup>29</sup>

But because approvals for development are spread across dozens of local cities and counties, there was no way to ensure consistent access to, and protection of, California’s coastal amenities.<sup>30</sup> In the 1960’s, local public hearings on proposed development “became dismally familiar”: “So long as coastal cities, towns, and counties were forced to rely for their financial base upon the property tax dollar, the California coast was fair game for unrestrained and irreversible commercial development. Meanwhile, conservationists repeated their refrain—‘Where’s the beach?’”<sup>31</sup> After legislative attempts to create a statewide coastal management agency proved unsuccessful, an unprecedented grassroots effort coalesced around a voter initiative to “Save Our Coast.”<sup>32</sup> That initiative, designated on the November 1972 ballot as “Proposition 20,” declared that “the California coastal zone is a distinct and valuable natural resource belonging to all the people and existing as a delicately balanced ecosystem” whose preservation and permanent protection “is a paramount concern to present and future residents of the state and nation.”<sup>33</sup>

Unlike some of the compromise legislation that conservationists had previously proposed in an attempt to deflect opposition from real estate developers, local governments, and the building trades union,<sup>34</sup> Proposition 20 included a full-throated commitment to coastal preservation over development: “[I]n

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28. *Id.* §§ 66478.4.14.

29. *Id.* § 66478.11.

30. Adams, *supra* note 2, at 1022-23.

31. *Id.* at 1023.

32. *Id.* at 1023-29; *see also* Orsi, *supra* note 2, at 260-64.

33. The California Coastal Zone Conservation Act of 1972 (Proposition 20) (hereinafter “Former CAL. PUB. RES. CODE § 27000 et seq.”), *available at* <http://www.coastal.ca.gov/legal/proposition-20.pdf>. *See also* CREED v. Cal. Coastal Zone Conservation Comm’n, 43 Cal. App. 3d 306, 311 (1974) (quoting former CAL. PUB. RES. CODE § 27001 and upholding initiative against legal challenge).

34. Adams, *supra* note 2, at 1029-30 (discussing earlier efforts and the difficulties encountered in trying to get even a significantly diluted conservation bill through the legislative gauntlet of special interest lobbyists).

order to promote the public safety, health, and welfare, and to protect public and private property, wildlife, marine fisheries, and other ocean resources, and the natural environment, it is necessary to preserve the ecological balance of the coastal zone and prevent its further deterioration and destruction.”<sup>35</sup> Accordingly, “it is the policy of the state to preserve, protect, and, where possible, to restore the resources of the coastal zone for the enjoyment of the current and succeeding generations.”<sup>36</sup> Following a hard-fought grassroots effort, the initiative passed with more than 55 percent of the vote—an 800,000-vote margin of victory.<sup>37</sup>

*B. Development and Passage of the Coastal Act of 1976*

Proposition 20 was a temporary stopgap measure intended to usher in a new era of democratic decisionmaking along the California coastline. It created a state-level California Coastal Zone Conservation Commission charged with, among other things, the development and submission to the Legislature of a long-range plan for the “maintenance, restoration, and enhancement of the overall quality of the coastal zone environment, including but not limited to, its amenities and aesthetic values.”<sup>38</sup> The law directed the new Commission to submit its plan to the Governor and Legislature no later than the fifth day of the regular 1976 legislative session, after which Proposition 20 automatically terminated on January 1, 1977.<sup>39</sup>

To protect coastal resources during this four-year study and planning period, Proposition 20 created an interim roadmap for controlling unchecked new uses. It created six regional commissions charged with responsibility for issuing permits for any new “development,” very broadly defined, within the coastal zone.<sup>40</sup> Permitting decisions by these regional commissions were subject to both procedural requirements<sup>41</sup> and substantive standards.<sup>42</sup> On the substantive side, the law left no doubt about its intent to favor rigorous environmental protection. It provided that

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35. Former CAL. PUB. RES. CODE § 27001.

36. *Id.*

37. Adams, *supra* note 2, at 1042; Orsi, *supra* note 2, at 264.

38. Former CAL. PUB. RES. CODE § 27302(a).

39. *Id.* §§ 27600, 27650.

40. *Id.* §§ 27103, 27400.

41. *Id.* §§ 27420-27423.

42. *Id.* §§ 27400-27405.

“no permit shall be issued unless” the regional commission first finds *both* that the development (a) “will not have any substantial adverse environmental or ecological effect” and (b) is consistent with the findings and declarations embedded in the initiative, as well as the statute’s long-range planning objectives.<sup>43</sup> The law explicitly saddled the permit applicant with the burden of proof on these showings.<sup>44</sup> Moreover, a two-thirds vote of the regional commission, rather than the normal majority vote,<sup>45</sup> was required whenever a project involved (a) “dredging, filling, or otherwise altering any bay, estuary, salt marsh, river mouth, slough, or lagoon;” (b) reduction in the size of the beach or other useable area for recreation; (c) reduction or restriction of public access to tidelands or beaches; (d) substantial interference with or detraction from the line of sight between the nearest state highway and the ocean; or (e) adverse effects on water quality, open water free of visible structures, existing and potential commercial and sport fisheries, or existing agricultural uses of land.<sup>46</sup> Finally, the law provided the regional commissions with broad discretion to condition permits in order to protect access to publicly owned coastal areas, to ensure the adequate reservation of public recreation areas and wildlife refuges, to provide for waste management that minimized adverse effects on coastal resources, and to minimize adverse effects on scenic resources and the danger of floods, landslides, erosion, and failure due to earthquakes.<sup>47</sup>

Like its resource protection provisions, Proposition 20’s governance structure was directly responsive to the agency capture concerns and industry bias frustrations that ordinary residents had previously experienced at the local permitting level. By statute, the regional commissions—depending on the region—were composed of elected officials (city council or county board members), local area government association representatives,<sup>48</sup> and members of the general public. In each region, the public members outnumbered the combined total of elected officials and

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43. *Id.* § 27402.

44. *Id.*

45. *Id.* § 27400.

46. *Id.* § 27401. As discussed below, many of these same resource values were later incorporated into the legislative successor to Proposition 20.

47. *Id.* § 27403.

48. For example, Association of Bay Area Governments (covering nine counties), Southern California Association of Governments (covering six counties), etc.

area government officials, in some cases by as much as three to one.<sup>49</sup> The Governor, the Senate Rules Committee, and the Speaker of the Assembly “equally” appointed the public members, with the Governor’s appointments subject to Senate confirmation, while the local government representatives were selected at the local level.<sup>50</sup> The law established specific qualifications for public members: “Each public member . . . shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information, to appraise resource uses in light of the policies set forth in this division, to be responsive to the scientific, social, aesthetic, recreational, and cultural needs of the state.”<sup>51</sup> Moreover, Proposition 20 envisioned that these members would bring a diverse range of backgrounds and skills; the law directed that “[e]xpertise in conservation, recreation, ecological and physical sciences, planning, and education shall be represented” among the public member appointees.<sup>52</sup> Regional commissions were supposed to meet at least once per month, and members received no compensation other than a per diem to cover expenses.<sup>53</sup>

The statewide Commission, which was charged with hearing appeals of regional commission decisions<sup>54</sup> in addition to preparing the long-range plan, adhered to similar constraints. The Commission was composed of twelve members, one selected by each of the six regional commissions and six public members.<sup>55</sup> The public members were subject to the same selection process, qualifications, and service conditions as public members on the regional commissions.<sup>56</sup> The Commission could decline to hear appeals or take up an appeal *de novo* under the same rules that applied to regional commissions, and affirm, reverse, or modify the regional commission decision.<sup>57</sup> This appeal structure mimicked the dual regional/statewide decision process structure contained in the Porter-Cologne Water Quality Act for discharge

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49. Former CAL. PUB. RES. CODE § 27201.

50. *Id.* §§ 27202, 27221.

51. *Id.* § 27220.

52. *Id.*

53. *Id.* §§ 27223, 27224.

54. *Id.* § 27423.

55. *Id.* § 27200.

56. *Id.* §§ 27202, 27220, 27223, 27224.

57. *Id.* § 27423.

permits.<sup>58</sup>

Finally, Proposition 20 included various conflict of interest provisions that precluded any member or employee of a regional commission or the statewide Commission, as well as any of that person's partners, employers or employees, from participating in any proceeding, except in an official capacity, during his or her tenure with the commission or for a year following termination.<sup>59</sup> In an attempt to avoid capture by those with interests in coastal development, Proposition 20 also prohibited any commission member or employee from playing any role in the decision process for a matter for which that individual had a financial interest, broadly defined, within two years prior to his or her tenure with a regional commission or the statewide Commission.<sup>60</sup> Violations of these conflict provisions were subject to fines up to \$10,000 and/or imprisonment of up to two years.<sup>61</sup> Notably, Proposition 20 did not address the subject of *ex parte* communications—a subject that has become increasingly controversial over the past several years.

The planning process launched by Proposition 20 was, by all accounts, an extraordinarily democratic one. The Commission's first executive director, Joseph Bodovitz, steered a course that involved public input to an unprecedented degree, as the commissioners attempted to walk a fine line between competing interests.<sup>62</sup> And by carefully selecting and deciding permit appeals from the regional commissions, the Commission attempted to both develop precedent and build political legitimacy for the new agency.<sup>63</sup> In December 1975, the Commission presented a 443-page *California Coastal Plan* to the Legislature and Governor, a document that one commentator described as representing "the apex of public involvement in coastal protection."<sup>64</sup> The plan, which contained 162 individual policy recommendations, sowed the seeds for the replacement legislation that was ultimately adopted.<sup>65</sup>

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58. See *supra* note 6.

59. Former CAL. PUB. RES. CODE § 27230.

60. *Id.* § 27231. The law provided for exceptions to these rules upon full public disclosure and a two-thirds vote of the commission that the financial interest was not substantial and would not adversely affect the integrity of the commission. *Id.* § 27232.

61. *Id.* § 27234.

62. Orsi, *supra* note 2, at 264-66.

63. *Id.* at 266-70.

64. *Id.* at 269.

65. For instance, the *California Coastal Plan* recommended, among other things, that

Although it attempted to balance competing coastal interests and promised to protect the vested rights of private property owners, the implementation plan was built on two overarching objectives: (1) Protect the California coast as a great natural resource for the benefit of present and future generations; and (2) Use the coast to meet human needs in a manner that protects the irreplaceable resources of coastal lands and waters.<sup>66</sup> To achieve these objectives, the plan incorporated a set of “ecological planning principles” to guide implementation; these principles recognized that the coastal zone has an inherent carrying capacity which should be of primary concern in environmental analysis for future uses and development in order to ensure that we “do not destroy options for the future.”<sup>67</sup>

The *California Coastal Plan* became the basic blueprint for the California Coastal Act of 1976. Negotiations over new legislation to replace the sunseting Proposition 20 involved all the usual suspects —the Governor, legislators, labor unions, business interests, local governments, and environmentalists.<sup>68</sup> The bill that ultimately emerged and was codified in the Public Resources Code retained a strong bias in favor of protecting coastal resources and public access to the shoreline, but jettisoned some of the democracy-enhancing features of Proposition 20.<sup>69</sup> Frequently misconstrued in the subsequent ferocious “property rights” disputes over the next four decades, the Coastal Act was never intended to equitably balance all competing coastal interests and concerns. Consistent with both the California Constitution and the will of the voters, the statute puts a heavy thumb on the scale to protect the coastline from privatization and degradation. The Coastal Act, for instance, opens with virtually the same legislative findings as Proposition 20, declaring that the coastal zone “is a distinct and valuable natural resource of vital and enduring interest to all the people and exist as a delicately balanced

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primary control over coastal land use be returned to local governments, subject to state oversight, by requiring that local jurisdictions incorporate statewide coastal policies into their general plans and that a reconfigured 12-member statewide Commission remain in existence to engage in state-level planning, to assist local governments in implementation, and to hear permit appeals. *California Coastal Plan*, Dec. 1, 1975, 12-13, at <http://www.morrobay.ca.us/DocumentCenter/Home/View/507>. As discussed below, these recommendations were ultimately incorporated into the successor law.

66. *Id.* at iii (Letter of Transmittal), 18 (Public Interest in the Coastal Zone).

67. *Id.* at 19.

68. Orsi, *supra* note 2, at 271.

69. See CAL. PUB. RES. CODE § 30001 (2016); see generally *id.* § 30000 et seq.

ecosystem,” that “permanent protection of the state’s natural and scenic resources is a paramount concern to present and future residents of the state and nation,” and that “it is necessary to protect the ecological balance of the coastal zone and prevent its deterioration and destruction.”<sup>70</sup> To this Proposition 20 list, the codified statute adds the legislative goals to, among other things, “[p]rotect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources” and “[m]aximize public access to and along the coast and maximize public recreational opportunities in the coastal zone.”<sup>71</sup> While the Coastal Act also recognizes the need to protect the state’s economic well-being and private property rights, the statute contains an unambiguous directive on how to balance these interests in the event they conflict with coastal resources or public access: The Legislature finds and declares that conflicts between statutory provisions are to “be resolved in a manner which on balance is the most protective of significant coastal resources.”<sup>72</sup>

While a number of the basic governance innovations pioneered in Proposition 20 were retained in the Coastal Act, many were modified, sometimes substantially, in the permanent law. Perhaps most significant was elimination of the regional commission system for development permits in favor of delegating that function back to local governments, albeit subject to new, powerful statewide standards. The modern Coastal Act operates by requiring local jurisdictions to prepare a local coastal plan and adopt a local coastal program (LCP), in accordance with state statutory standards, as part of their general land use planning authority. Once the Coastal Commission certifies an LCP, the local city or county assumes full authority for evaluating and deciding coastal development permit applications, subject to Commission

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70. CAL. PUB. RES. CODE § 30001(a)-(d) (2016).

71. *Id.* § 30001.5(a), (c).

72. *Id.* § 30007.5. Chapter 3 of the Coastal Act articulates specific standards governing future coastal development, including public access requirements, *id.* §§ 30210-30214, recreational use provisions, *id.* §§ 30220-30224, marine resources/biological productivity standards, *id.* §§ 30230-30237, environmentally sensitive habitat preservation, *id.* § 30240, and scenic protections and public access enhancements, *id.* §§ 30251-30252. The Coastal Act thus stands in sharp contrast to many other environmental laws, like the California Environmental Quality Act, which allows decision agencies to preference economic interests over environmental concerns as long as they provide what has become known as a “statement of overriding considerations.” CAL. PUB. RES. CODE § 21081(a)(3) (2016); 14 CAL. CODE REGS. § 15093 (2016).



appeal under most circumstances.<sup>73</sup> This reversion of permitting authority to local authorities—the very government entities that inspired the drafters of Proposition 20 in the first place—was a necessary political compromise in the face of stiff opposition from local leaders.<sup>74</sup> But this change significantly undermined one of the core democratic features of the voter initiative. Instead of regional permitting commissions comprised of a geographically diverse set of elected official representatives and a voting majority of “exceptionally well qualified” public at-large members with training and expertise in coastal issues, the bulk of coastal development permitting was, once again, placed in the hands of local elected officials whose decisionmaking is often driven by parochial property tax concerns or subject to regulatory capture by local developers. Although the ship long ago sailed on retaining the democratic innovation of a regional commission system, the concept of a statewide Commission charged with administering a set of resource-protective statutory standards survived the political process in 1976 and has proved to be a critical backstop for coastal resource and public access protection over the last forty years.

Like the original statewide Commission created under Proposition 20, today’s Coastal Commission is comprised of twelve appointed members, six of whom are elected officials and six of whom are public members, plus three nonvoting members.<sup>75</sup> The modern Coastal Act retains the appointment process for public at large members first conceived in Proposition 20, giving two appointees each to the Governor, the Senate Committee on Rules, and the Speaker of the Assembly.<sup>76</sup> Two out of each appointing authority’s four appointees are local elected officials nominated by local cities and counties, and two are public members.<sup>77</sup> There are, however, several key differences. First, the Governor’s appointments are no longer subject to Senate confirmation,

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73. CAL. PUB. RES. CODE § 30500 (2016). The statute provides an elaborate process for adoption and certification of LCPs. *Id.* §§ 30501-30526. The Commission retains original permitting jurisdiction over developments in certain sensitive areas, in the area between the first road and the coast, and where the local jurisdiction has not prepared a certified LCP—a so-called “white hole.”

74. Orsi, *supra* note 2, at 266.

75. CAL. PUB. RES. CODE § 30301 (2016). The Commission also has three non-voting members—the Secretary of the Resources Agency, the Secretary of Transportation, and the Chairperson of the State Lands Commission. *Id.* §§ 30301(a)-(c), 30301.5.

76. CAL. PUB. RES. CODE § 30301(d) (2016).

77. *Id.* §§ 30301(c)-(d), 30301.2.

arguably removing an important “checks and balances” provision. Second, after a lawsuit successfully challenged the Senate Committee on Rules’ and Speaker of Assembly’s “at will” appointments as a “separation of powers” violation,<sup>78</sup> the Legislature amended the Coastal Act to provide that its eight appointments serve four-year fixed terms, while the Governor’s appointees continue to serve at the Governor’s pleasure.<sup>79</sup> Third, the Coastal Act jettisoned the detailed qualification requirements imposed by former Public Resources Code section 27220. No longer must public members – let alone elected official members – possess “[e]xpertise in conservation, recreation, ecological and physical science, planning, and education.” No longer must they have the “training and experience” necessary to “analyze and interpret environmental trends and information.” No longer need they be “exceptionally well qualified” to “appraise resource uses” consistent with the Coastal Act’s resource protection standards. Rather, the only qualification seemingly necessary for today’s Commission appointees is the political savvy, ambition, and connections to land an appointment.<sup>80</sup>

Finally, the Coastal Act eliminated financial and other conflict of interest provisions originally incorporated into Proposition 20,<sup>81</sup> but was subsequently amended to include some *ex parte* communication language. California’s general Administrative Procedure Act and regulations, which apply to most permitting agencies,<sup>82</sup> flatly prohibit *ex parte* communications between “presiding officers” and any outside party with an interest in adjudicatory proceedings.<sup>83</sup> The Coastal Act does not, however,

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78. *Marine Forests Society v. California Coastal Comm.*, 160 Cal. App. 4th 867 (2008).

79. CAL. PUB. RES. CODE § 30312 (2016) (phasing in the changes in order to result in staggered appointments).

80. The only restriction on the appointing authority is the vague direction that “[i]n making their appointments pursuant to this division, the Governor, the Senate Committee on Rules, and the Speaker of the Assembly shall make good faith efforts to assure that their appointments, as a whole, reflect, to the greatest extent feasible, the economic, social, and geographic diversity of the state.” CAL. PUB. RES. CODE § 30310.

81. The only conflict of interest provision retained in the Coastal Act is the one that allows local elected officials sitting on the Commission to vote on a matter that came before them in their official local government decisionmaking capacity. CAL. PUB. RES. CODE § 30318.

82. CAL. GOV’T. CODE § 11430.10 (2016) (APA); CAL. CODE REGS. tit. 17, § 60055.13 (2016) (Air Resources Board); CAL. CODE REGS. tit. 23, § 648 (2016) (State Water Boards); CAL. CODE REGS. tit. 20, § 1216 (2016) (Energy Commission).

83. MICHAEL ASIMOW, *Toward A New California Administrative Procedure Act*:

incorporate these general provisions. Instead, the statute was amended in 1992 to include its own different *ex parte* communication provisions.<sup>84</sup> Under the banner of “democracy, due process, fairness, and the responsible exercise of authority” consistent with “good government,” the 1992 amendments declared that restrictions on communications in “quasi-judicial” proceedings are necessary to ensure that the Commission “conduct[s] its affairs in an open, objective, and impartial manner free of undue influence and the abuse of power and authority.”<sup>85</sup> The operative provisions of the statutory amendments are, however, much less impressive than this soaring rhetoric suggests. Unlike the Administrative Procedure Act, the Coastal Act does not prohibit *ex parte* communications between commissioners and interested parties on matters pending before the Commission; it merely requires that such communications be disclosed 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.”<sup>86</sup> Once disclosed, and placed in the Commission’s official record, these communications cease to be *ex parte*,<sup>87</sup> and the disclosing commissioner remains eligible to vote on the matter that was the subject of the communication.<sup>88</sup> These relatively toothless *ex parte* rules trump the more general state law prohibition on such communications.<sup>89</sup>

In short, while the Coastal Act retained—and in some cases, enhanced—the substantive coastal preservation focus of

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*Adjudication Fundamentals*, 39 UCLA L. Rev. 1067, 1128 (1992) (discussing former California Government Code section 11531.5). In 1995, the California Administrative Procedure Act was amended to tighten and strengthen restrictions on *ex parte* communications. CAL. GOV’T CODE §§ 11430.10-11430.80. These provisions clarify that, under general state law, *ex parte* communications with members of an agency decisionmaking body on a matter pending before that body are categorically prohibited.

84. CAL. PUB. RES. CODE §§ 30322-30328 (2016).

85. CAL. PUB. RES. CODE § 30320.

86. CAL. PUB. RES. CODE § 30324.

87. *Id.*

88. CAL. PUB. RES. CODE § 30327.

89. *Id.* § 30329 (“Notwithstanding Section 11425.10 of the Government Code, the *ex parte* communications provisions of the Administrative Procedure Act (Article 7 (commencing with Section 11430.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to proceedings of the California Coastal Commission under this division.”). This exemption was part of the 1995 legislation that strengthened California’s general *ex parte* rules. Stat. 1995, c. 938 § 83 (S.B. 523).

Proposition 20, it shed some of the most innovative democracy-enhancing features of the voter initiative. What had been an open and transparent public process during the Proposition 20 interim planning period was transformed, in the permanent codified law, into a much more traditional agency permitting process, where unpaid, politically-appointed Commission decisionmakers with little relevant expertise or background are free to engage in closed-door conversations with permit applicants and have virtually no accountability to the public on whose behalf they are ostensibly acting. These subtle alterations to the Commission's original governance structure have made all the difference in the ensuing decades, as coastal development interests focused lazar-like on moving the Commission away from robust coastal resource and access protection. Before turning to where we stand today and what might be done to salvage the public values embedded in the Coastal Act, this article briefly examines the industry's forty-year effort to undercut the voters' preferences. It is a tale of uncommon agency leadership and a dedicated professional staff that, against all odds, took its explicit statutory mission to heart.

### III. EFFORTS TO UNDERMINE THE VALUES EMBEDDED IN THE LAW

#### A. *The Early Skirmishes*

Despite the necessary legislative compromises that transformed a passionate voter initiative into a workaday statute, the Coastal Act remains a singularly impressive expression of public values. In addition to its robust substantive standards for coastal protection and access, the law aspires to democratic participation in the decision process to a degree that is rare, if not unparalleled, among complex environmental regimes:

The Legislature further finds and declares that the public has a right to fully participate in decisions affecting coastal planning, conservation, and development; that achievement of sound coastal conservation and development is dependent upon public understanding and support; and that the continuing planning and implementation of programs for coastal conservation and development should include the widest opportunity for public participation.<sup>90</sup>

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90. CAL. PUB. RES. CODE § 30006 (2016).

Even the subsequently-added *ex parte* communication provisions, flawed as they now seem, arose from a democratic impulse. In affirming its commitment to fairness, democracy, and good government in the 1992 amendments, the Legislature additionally declared, in the name of “the people of California,” that the state’s coastal protection program “requires public awareness, understanding, support, participation, and confidence in the commission and its practices and procedures” and that the new *ex parte* disclosure rules were 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.”<sup>91</sup>

That affected coastal landowners and developers disliked such populist aspirations and generally distrusted the Commission is a gross understatement. From the very beginning, the industry fought back with proposed legislative restrictions, hostile political appointments, and lawsuits. Between 1977 and 1981, successful spot legislation stripped the Commission of various powers, including the authority to require affordable housing in new coastal subdivisions.<sup>92</sup> By 1981, a state senator from San Diego was sufficiently emboldened to sponsor legislation—ironically designated S.B. 20—that would have abolished the Commission and returned all decisionmaking to the local level, arguing that the Commission was “usurping property rights and local decision-makers” and “has engaged itself in programming what is good for the public from an elitist’s point of view.”<sup>93</sup> In these early years, several commissioners, tarred as too protectionist, were removed by their appointing authorities.<sup>94</sup> And although then-Governor Jerry Brown had been instrumental in getting the Coastal Act across the finish line in 1976, he appointed some quite controversial individuals to the Commission and often stayed above the political fray – much as he does today in his second go-round as Governor.<sup>95</sup>

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91. *Id.* § 30320(a).

92. Orsi, *supra* note 2, at 277.

93. *Ellis introduces bill to abolish state coastal commission*, CORONADO J. (Feb. 19, 1981), <http://cdnc.ucr.edu/cgi-bin/cdnc?a=d&d=CJ19810219.2.61>.

94. Orsi, *supra* note 2, at 277-78.

95. *Id.* at 278. Although California Democrats had largely backed Proposition 20 and the Coastal Act, when implementation of the law affected wealthy Democratic politicians or their friends, the protectionist commissioners and staff suddenly became “bureaucratic thugs” instead of environmental stewards. *Id.* (comment by Governor Brown, whose then-girlfriend Linda Ronstadt faced legal trouble with the Commission

Efforts to reverse the popular will of the voters accelerated after Brown's predecessor, Governor George Deukmejian, an avowed opponent of Proposition 20, took office in 1983. During his campaign, Deukmejian promised to abolish the Commission, and once in office, he attempted to strangle it through severe funding cuts, slashing the agency's budget by one-third, cutting staff by forty percent, and forcing the closure of satellite offices.<sup>96</sup> To muffle what was perceived as a pro-environment civil service staff, Deukmejian appointed pro-development commissioners, who went on to approve significant new developments in the coastal zone.<sup>97</sup> Over the next two years, these appointees also pushed for the ouster of the Commission's executive director, Michael Fischer, who eventually resigned in 1985.<sup>98</sup>

### B. *The Douglas Era*

Those early skirmishes proved to be merely a warmup for the battles to come. Fischer's successor, Peter Douglas, was a true believer in the principles embedded in Proposition 20 and the Coastal Act, both of which he helped draft, and he had served for many years as the Commission's deputy director before his election to executive director in 1985.<sup>99</sup> When Douglas finally retired from the executive director position 26 years later, he put his finger on one of the key reasons the agency was able to weather successive political attacks during his tenure: "My proudest accomplishment is putting together such an excellent staff. The quality and professionalism of the Coastal Commission's staff is second to none. . . . Another key accomplishment is the empowerment of citizen activists around the state. The Commission has a track record of listening to members of the public and really hearing those voices that might not otherwise be

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when she constructed a seawall without a permit). *See also*, Todd Holmes, *Tides of Tension: A Historical Look at Staff-Commissioner Relations in the California Coastal Commission*, (Stanf. Univ., The Bill Lane Center for the American West), <http://west.stanford.edu/static/tides-of-tension/index.html> (last visited Nov. 8, 2016).

96. *Id.* at 279; *see also* Robert Lindsey, *Deukmejian favors easing of rules on coastal zoning*, New York Times (Apr. 28, 1983), available at <http://www.nytimes.com/1983/04/28/us/deukmejian-favors-easing-of-rules-on-coastal-zoning.html>.

97. Orsi, *supra* note 2, at 279; *see also* Robert Lindsey, *Deukmejian favors easing of rules on coastal zoning*, N.Y. TIMES (Apr. 28, 1983), <http://www.nytimes.com/1983/04/28/us/deukmejian-favors-easing-of-rules-on-coastal-zoning.html>.

98. Holmes, *supra* note 95.

99. The Coastal Act empowers the commissioners to appoint the agency's executive director. CAL. PUB. RES. CODE § 30335.

heard. . . . The Coastal Commission was created by the public, and it is sustained by public support. One of our roles is to promote public participation, it's written right into the law."<sup>100</sup>

Over the quarter century that Douglas led the Commission, its permanent professional staff attempted to remain faithful to the voters' mandate. But doing so, in the face of pressure from coastal-dwelling celebrities like David Geffen and Barbra Streisand, high-profile corporate developers like Disney, property rights advocates like Pacific Legal Foundation, and pro-development local officials, meant that the agency's mission – and at times its very survival – remained in near-constant jeopardy. Budget cuts were relentless,<sup>101</sup> as were attempts to remove the executive director.<sup>102</sup> In 2003, Douglas estimated that he had already survived “at least a dozen attempts” by politicians or their appointees to fire him.<sup>103</sup> And litigation flowed at a steady rate, with the property-rights impact lawyers at Pacific Legal Foundation leading the way.<sup>104</sup> For

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100. Extended Biography and Personal Comments, Peter Douglas, California Coastal Commission Executive Director, 1985-2011, *available at* <http://www.coastal.ca.gov/pd-bio-comments.pdf>.

101. E.g., Mark Gladstone and Ron Russell, *Shortages hurt coastal panel, analyst says*, L.A. Times (Feb. 25, 1990), *available at* [http://articles.latimes.com/1990-02-25/news/we-1748\\_1-california-coastal-commission](http://articles.latimes.com/1990-02-25/news/we-1748_1-california-coastal-commission); Mark Gladstone, *Bad News for Coastal Commission: Another budget cut*, L.A. Times (Aug. 1, 1991) (explaining that after eight years of bare-bones budgets, newly elected Governor Wilson proposed another six percent reduction); John Howard, *Coastal Commission prepares for budget cuts*, Capitol Weekly (July 31, 2007) (noting that prior budget cuts resulted in reductions from 200 to 125 staff and noting possibility for 19 to 25 more), *available at* <http://capitolweekly.net/coastal-commission-prepares-for-budget-cuts/>; Olivia Damavandi, *Coastal delaying, denying permits due to budget cuts*, The Malibu Times (Apr. 8, 2008) (describing that more than 70 staff who pledged 704 staff days of leave without pay to reduce staff layoffs), *available at* [http://www.malibutimes.com/news/article\\_d8628f45-4198-5a34-838d-41447fc6905e.html](http://www.malibutimes.com/news/article_d8628f45-4198-5a34-838d-41447fc6905e.html).

102. E.g., Larry B. Stamer and Mark Gladstone, *Head of Coastal Commission may lose job*, L.A. Times (July 11, 1991), *available at* [http://articles.latimes.com/1991-07-11/news/mn-2874\\_1-coastal-commission](http://articles.latimes.com/1991-07-11/news/mn-2874_1-coastal-commission) (describing “last-gasp maneuver by lame-duck commissioners to fire Douglas before they themselves are replaced” over his opposition to proposed Disney amusement park at Long Beach Harbor); Jeffery I. Rabin, *Coastal Crusader in deep water*, L.A. Times (July 16, 1996), *available at* [http://articles.latimes.com/1996-07-11/news/mn-23120\\_1-coastal-commission](http://articles.latimes.com/1996-07-11/news/mn-23120_1-coastal-commission) (describing newly Republican-dominated Commission's efforts to replace Douglas during Governor Wilson's tenure).

103. David Rolland, *Man and the Sea*, San Diego City Beat (Oct. 22, 2003), *available at* <http://sdcitybeat.com/article-1023-peter-douglas-coastal-commission.html>.

104. See, e.g., Pacific Legal Foundation, *Press Releases*, *available at* <http://www.pacificlegal.org/Release/Coastal-Commissions-war-on-seawalls-targets-two-Encinitas-homeowners> (“Donor-supported PLF is a watchdog legal organization that litigates for limited government and property rights in courts nationwide. Up and down the California coast, PLF is the leading litigator against abuses of coastal property rights by

instance, in 2004, the lead attorney for that organization's "Coastal Land Rights Project" published a scathing law review article touting Pacific Legal Foundation's many lawsuits against the Commission and arguing that "much of the time, the Commission operates by neglect at best, and contempt at worst, when it comes to private property rights."<sup>105</sup> Opponents of the Commission regularly claim that "special interests" – in the form of "environmental groups" – have pressured commissioners into ignoring the law and landowner concerns.<sup>106</sup> But a recent empirical study provides a more nuanced and divergent view: By mining Commission decision data from 1996 to 2014, the study concluded that the agency "rarely issues outright rejections" and "does not engage in stalling tactics"; instead, it engages in negotiations to gain concessions on such items as public access and architectural design, in accordance with staff's understanding of statutory mandates and priorities.<sup>107</sup>

### C. *Recent Developments*

Despite the rocky road the Commission has traveled since 1976, and notwithstanding its approval of some significant new coastal development over the years, the agency has survived with its integrity and fidelity to the Coastal Act principles largely intact. However, there are reasons to be concerned that the tide is turning. In early 2016, seven of the twelve commissioners successfully maneuvered a vote behind closed doors to fire executive director Charles Lester, who succeeded Douglas in 2011 and previously served for many years as deputy director. During his five-year tenure at the top job, Lester was less combative and controversial than Douglas, but he did not steer the staff's

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governments at all levels.").

105. J. David Beemer, *What Property Rights: The California Coastal Commission's History of Abusing Land Rights and Some Thoughts on the Underlying Causes*, 22 UCLA J. Envtl. L. & Pol'y 247, 249 (2004) (repeating negative descriptions of Commission critics like "the poster child for government power run amok," a "rogue organization," and "investing itself with dictatorial powers").

106. See e.g., *Id.* at 292-96 (claiming that "private property advocacy groups" have no similar access or power and that such groups, including presumably PLF, have "nowhere near the financial resources available to groups like the Sierra Club.").

107. Iris Hui, *Shaping the Coast with Permits: Making the Statute Regulatory Process Transparent Through with Text Mining*, Stanford Univ., Bill Lane Center for the American West (Feb. 2016), available at [https://www.researchgate.net/publication/294260809\\_Shaping\\_the\\_Coast\\_with\\_Permits\\_Making\\_the\\_State\\_Regulatory\\_Permitting\\_Process\\_Transparent\\_with\\_Text\\_Mining](https://www.researchgate.net/publication/294260809_Shaping_the_Coast_with_Permits_Making_the_State_Regulatory_Permitting_Process_Transparent_with_Text_Mining).



approach in a significantly different direction or change the agency's prioritization of coastal resource protection and public access. Commissioners who voted for Lester's dismissal attributed their decision to alleged shortcomings in his communication with commissioners, the level of ethnic diversity on the staff, or other management issues, even though much of the staff and hundreds of elected officials and members of the public turned out at the hearing to support Lester's leadership, and thousands more submitted letters of support.<sup>108</sup> Commission watchdogs point to Lester's termination as evidence of agency capture by development interests; others, including Lester himself, suggest that the action was the denouement in a long-term power struggle between commissioners and staff.<sup>109</sup> In the end, these various explanations may amount to the same thing – a pro-development shift by emboldened commissioners who are trying to wrest power from professional staff in order to relax the Commission's unwavering adherence to the conservation and public access policies embodied in the Coastal Act.<sup>110</sup>

Whatever comes next, it seems beyond dispute that the executive director showdown has demoralized staff and cheered coastal developers.<sup>111</sup> Indeed, current commissioners seem almost

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108. Tony Barboza, Dan Weikel, & Sarah Parvini, *Firing of Coastal Commission chief Charles Lester leaves deep divisions*, L.A. TIMES (Feb. 11, 2016, 12:01 PM), <http://www.latimes.com/local/lanow/la-me-ln-ouster-of-coastal-commission-head-leaves-deep-divisions-20160211-story.html>; Peter Fimrite, *Coastal Commission chief Charles Lester responds to firing threat*, S.F. CHRON. (Feb. 6, 2016), <http://www.sfgate.com/science/article/Coastal-Commission-head-responds-to-termination-6810747.php> (noting that 14,000 comments, most of them supporting Lester, were received on the Commission's website since the termination was announced); Aaron Kinney, *Coastal Commission votes 7-5 to dismiss Charles Lester*, SANTA CRUZ SENTINEL (Feb. 10, 2016, 9:38 PM), <http://www.santacruzsentinel.com/article/NE/20160210/NEWS/160219943> (noting that ninety-five percent of Commission staff signed a letter praising Lester as an "exceptional and dedicated" leader, and ten members of Congress, eighteen state legislators, and thirty-five former commissioners lobbied the Commission to retain Lester).

109. E.g., Paul Rogers, *Charles Lester suggests his ouster was part of a power struggle*, THE MERCURY NEWS (Feb. 11, 2016), available at <http://www.mercurynews.com/2016/02/11/charles-lester-suggests-his-ouster-was-part-of-a-power-struggle/>.

110. Steve Lopez, *"Disgrace" isn't a strong enough word to describe Coastal Commission meeting*, L.A. TIMES (Feb. 13, 2016) (voicing concern that "a disturbing shift is at play in the division of labor and power between the commissioners and the commission staff. And that shift benefited property owners rather than the public."), available at <http://www.latimes.com/local/california/la-me-0214-lopez-coastal-demoralization-20160214-column.html>.

111. Lopez, *supra* note 106 (describing how devastated and demoralized staff wept and how the Speaker of the Assembly tweeted an apology, saying she thought "my

liberated from the Coastal Act' mandates and constraints. Since Lester's dismissal in February 2016, numerous media stories have focused on the failure of certain commissioners to timely comply with statutory *ex parte* disclosure obligations, especially in connection with the high profile Newport Banning Ranch project.<sup>112</sup> One watchdog group has even filed a lawsuit seeking millions of dollars in fines under the Coastal Act for hundreds of alleged *ex parte* communication violations by five different commissioners.<sup>113</sup> At least four other recent lawsuits challenging individual coastal development permit decisions on the grounds of *ex parte* violations are likewise winding their way through the courts.<sup>114</sup> Equally disturbing, commissioners with no evident scientific training have shown little restraint in publicly disputing the scientific conclusions of the Commission's professional staff and scientists at other agencies.<sup>115</sup> If nothing else, these

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appointees would be better stewards of the coast"); but see Damien Schiff, *Coastal Commission regulatory overreach continues*, The San Diego Union-Tribune (Mar. 30, 2016) (op-ed by PLF attorney arguing that Lester's dismissal has not changed the Commission), available at <http://www.sandiegouniontribune.com/news/2016/mar/30/california-coastal-property-rights/>.

112. E.g., Bettina Boxall, *Coastal Commission chairman recuses himself from Banning Ranch vote*, L.A. Times (June 8, 2016) (summarizing newspaper's investigation of Commissioner Kinsey's *ex parte* communications and subsequent recusal), available at <http://www.latimes.com/local/la-me-coastal-kinsey-snap-story.html>.

113. Dan Weikel, *Lawsuit seeks millions in fines from 5 coastal commissioners, alleging 590 transparency violations*, L.A. Times (Sept. 19, 2016), available at <http://www.latimes.com/local/california/la-me-ln-commission-lawsuit-20160913-snap-story.html>; also [http://www.spotlightoncoastalcorruption.org/legal\\_action.php](http://www.spotlightoncoastalcorruption.org/legal_action.php) (discussing Spotlight on Coastal Corruption v. Steve Kinsey, Erik Howell, Martha McClure, Wendy Mitchell, Mark Vargas, and Does 11 through 100, Case No. 37-2016-00028494-CU-MC-CTL, Cal. Superior Court, San Diego County (filed Aug. 17, 2016), Complaint on file with author).

114. Dan Weikel, *Coastal Commission slapped with 4 lawsuits over alleged secret communications*, L.A. Times (July 8, 2016), available at <http://www.latimes.com/local/lanow/la-me-ln-coastal-commission-20160630-snap-story.html>; also Don Weikel, *Judge questions private talks between coastal commissioners and developer's consultants*, L.A. Times (July 22, 2016), available at <http://www.latimes.com/local/la-me-ln-commission-trial-20160721-snap-story.html> (reporting on a different case, Friends of the Canyon v. Cal. Coastal Comm., Case Bi, 39-2015-00776088-CU-PT-CJC, Cal. Superior Ct., Orange County (filed Mar. 6, 2015), which challenged decision made after tardy *ex parte* disclosures by several commissioners); Hansen v. Cal. Coastal Comm., Case No. 16-CV-0003, Cal. Superior Ct., San Luis Obispo County (filed May 5, 2016) (challenging 6-5 permit approval with conditions recommended by staff, on grounds, inter alia, that public denied due process where commissioner Howell alleged engaged in undisclosed *ex parte* communications at hearing that affected the outcome).

115. Bettina Boxall, *How the California Coastal Commission pressured scientists to change opinions on major project*, L.A. Times (May 7, 2016), available at

developments suggest that many of the political appointees currently serving on the Commission do not embrace the Coastal Act's mandate for transparency and public participation in the coastal decisionmaking process or share the statute's and staff's commitment to scientific rigor.<sup>116</sup>

#### IV. A MODEST PRESCRIPTION FOR REFORM

Although coastal landowners and their surrogates regularly lament the lack of “balance” in coastal decisionmaking, the Coastal Act does not, in fact, employ a general balancing scheme. While necessarily recognizing constitutional property rights and acknowledging the need for some coastal-dependent development (e.g., ports and harbors), the statute enshrines a clear preference for coastal resource conservation and public access to the shoreline.<sup>117</sup> Given the value of coastal property in much of California and the desire of many wealthy coastal landowners to create a zone of privacy, it is hardly surprising that Coastal Act implementation has continued to be a lightning rod for controversy and litigation. What is surprising, actually, is the Commission's comparative resistance to capture by the regulated community – generally wealthy, well-connected elites with highly salient interests in individual development projects – in favor of championing diffuse conservation benefits. The Coastal Act's strong substantive mandates and democracy-oriented governance structure, together with idiosyncratic staff leadership, may explain this past resilience. But it does not necessarily predict the future.

So how might good government democrats with a small “d,” and those who still take seriously the concept of protecting

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<http://www.latimes.com/local/orangecounty/la-me-banning-ranch-20160507-story.html> (statements disagreeing with staff and the U.S. Fish and Wildlife Service by commissioners McClure, Beland, and Kinsey after personally touring Banning Ranch project site).

116. In 1992, the Legislature amended the Coastal Act to include a declaration on the importance of science in the decision process: “The Legislature further finds and declares that sound and timely scientific recommendations are necessary for many coastal planning, conservation, and development decisions and that the commission should, in addition to developing its own expertise in significant applicable fields of science, interact with members of the scientific and academic communities in the social, physical, and natural sciences so that the commission may receive technical advice and recommendations with regard to its decisionmaking, especially with regard to issues such as coastal erosion and geology, marine biodiversity, wetland restoration, the question of sea level rise, desalination plants, and the cumulative impact of coastal zone development.” CAL. PUB. RES. CODE § 30006.5.

117. See *supra* notes 69-71.

California's magnificent coastal assets for future generations, tweak the decision system to meet these objectives? One possible answer lies in the Coastal Act's express recognition that the Commission is a "quasi-judicial" body.<sup>118</sup> Whether reviewing a city or county coastal development permit decision in its appellate capacity or considering a permit for the first time in its original jurisdiction, the Commission makes decisions that are unquestionably quasi-adjudicatory in nature – that is, commissioners are involved, on a permit by permit basis, in "applying an existing rule to existing facts."<sup>119</sup> Most politically-appointed boards and commissions in California rely on staff to work with applicants and marshal factual evidence about a project, while the voting members themselves adhere to a set of judge-like standards and restrictions when they make quasi-adjudicative decisions.<sup>120</sup> Likewise, California administrative law judges hearing appeals of individual agency decisions are legally bound by the provisions in the Code of Judicial Conduct governing sitting judges.<sup>121</sup> Coastal commissioners' decisions are no less momentous – indeed, for the general public, they may often be significantly more momentous – and thus deserve the same level of ethical rigor. There are several reforms, of increasing political difficulty to achieve, that might bring more transparency and accountability to commissioner decisions.

First, and arguably simplest, the Legislature could repeal the Coastal Act's express exemption of commissioners from the general rule prohibiting *ex parte* communications with interested parties in matters pending before the agency, thereby putting the Commission on the same footing as most other California boards and commissions.<sup>122</sup> This result could be readily achieved by

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118. CAL. PUB. RES. CODE § 30320(a).

119. 20th Century Ins. Co. v. Garamendi, 8 Cal. 4th 216, 275 (1994). See also CAL. GOV'T CODE § 11405.20 ("Adjudicative proceeding" means an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision.").

120. E.g., 23 CAL. CODE REGS. §§ 648-648.8 (regulations governing "adjudicatory proceedings" before State Water Resources Control Board and Regional Water Quality Control Boards).

121. CAL. GOV'T CODE §§ 11475.20 and 11475.40 (applying Supreme Court's Code of Judicial Conduct to administrative law judges and other presiding officers, as specified by law, except for a handful of irrelevant canons).

122. Currently, five sitting commissioners publicly decline *ex parte* communications as a matter of course, see California Coastal Commission Roster at <http://www.coastal.ca.gov/roster.html>, although the pending lawsuits against at least one of them suggests some inaccuracy in these public statements. See *supra* note 112.

repealing the Coastal Act's existing exemption<sup>123</sup> and replacing the statute's alternative disclosure rules<sup>124</sup> with a simple statement incorporating the general APA prohibition on *ex parte* communication<sup>125</sup> or by revising the language of the Coastal Act itself. Following the controversy over Lester's dismissal in February 2016, State Senator Hannah-Beth Jackson sponsored legislation to do precisely this.<sup>126</sup> Unfortunately, the bill was defeated by a coalition of business, labor, construction, agricultural, and real estate interests at the tail end of the 2015-16 regular session.<sup>127</sup> An even more modest reform effort targeted at shining the sunlight of disclosure on backroom lobbying of commissioners – sponsored by former Assembly Speaker Toni Atkins after some of her appointees joined the vote to terminate Lester<sup>128</sup> – also went down to defeat.<sup>129</sup> These legislative setbacks suggest that good government forces need to raise the visibility of the issues and begin to rebuild a coastal democracy coalition for the next legislative session.

As they regroup, pro-Coastal Act interests should dream bigger. Like *ex parte* communications, the lobbying of commissioners should be flatly prohibited, not just disclosed. Because commissioners are unpaid and generally do not bring special expertise or background to the position, appointments are viewed by many commissioners as a stepping stone to higher office or a lucrative credential for future practice before the Commission. In the game of musical chairs that California politics has become

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123. CAL. PUB. RES. CODE § 30329.

124. *Id.* § 30324.

125. CAL. GOV'T CODE § 11430.10.

126. Senate Bill 1190, *available at* [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201520160SB1190](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB1190).

127. Dan Weikel, *Development interests defeat bills seeking to approve transparency at the California Coastal Commission*, L.A. Times (Sept. 1, 2016), *available at* <http://www.latimes.com/local/lanow/la-me-ln-commission-reforms-20160901-snap-story.html> (noting that California Farm Bureau Federation, the California Chamber of Commerce, the Western States Petroleum Assn. and the State Building and Construction Trades Council of California all lobbied against the bill, as did high-priced coastal developer lobbyist and former commissioner Susan McCabe). For more on McCabe's outsized influence on Commission decisions, see also Kim Christensen, *The most influential person on the coastal commission may be this lobbyist*, L.A. Times (Apr. 23, 2016), *available at* <http://www.latimes.com/local/california/la-me-coastal-commission-lobbyist-20160424-story.html>.

128. Assembly Bill 2002 (proposing to amend the Political Reform Act of 1974 to bring the Coastal Commission within its lobbying disclosure requirements), *available at* [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201520160AB2002](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB2002).

129. Weikel, *supra* note 132 (noting that AB 2002 required a two-thirds vote).

since the adoption of term limits, political elites who haunt the halls of the State Capitol seem perpetually on the hunt for a new perch from which to launch their next bid. These political insiders trade in relationships and favors, not the trinkets or meals that are the subject of most conflict-of-interest rules. That means that back channel access and favors, rather than cash or gifts, serve as the coin of the realm, directly undermining the transparency that fosters democratic decisionmaking. A prohibition on lobbying, with significant penalties on commissioners who violate it, would discourage such anti-democratic activities and might dampen the enthusiasm for a commission appointment by those who are not objectively interested in coastal protection.

But reformers might go even further by pressing for changes in the Commission's composition, an amendment that could be game-changing. At the very least, requiring that "public at large" members of the Commission bring some special expertise or training to the position, as Proposition 20 required, could make these appointments less attractive to political climbers and gadflies – and would likely enhance the quality of Commission decisionmaking, to boot. From a democracy perspective, such a reform makes sense: Appointed public members are unaccountable to voters, except through the attenuated connection to their appointing authorities, and it is unlikely that a poor appointment will have sufficient salience for voters when election time rolls around. Even if disgruntled with Commission appointees, pro-conservation voters are unlikely to take it out on what are inevitably Democratic Party officials making the appointments in deep blue California. The fact that the eight legislative appointees now serve fixed terms and cannot be terminated by their appointing authority – as Speaker Atkins painfully experienced and publicly lamented during the firing of executive director Lester – only increases the accountability problem when an agency experiences regulatory capture.

One possible mitigation is to make these appointments more exacting at the front end. Proposition 20 mandated that each public member "shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information, to appraise resource uses in light of the policies set forth in this division, to be responsive to the scientific, social, aesthetic,

recreational, and cultural needs of the state.”<sup>130</sup> Resurrecting the concept of “exceptionally well qualified” commissioners – a kind of “blue ribbon” slate of thoughtful decisionmakers, if you will – might discourage those who seek the position mostly in the hope of reducing regulatory barriers for powerful allies who might later reciprocate in some way and would be entirely in keeping with the policies set forth in the Coastal Act. The pool of commissioner applicants with the educational background, training, or work experience to tackle relevant coastal issues probably differs significantly from the present pool of commissioner wannabes and likely would bring very different incentives to the job.<sup>131</sup> Interestingly, the Legislature has already taken a small step in this direction under the rubric of environmental justice, amending the Coastal Act in 2016 to require that one of the Governor’s appointees “shall reside in, and work directly with, communities in the state that are disproportionately burdened by, and vulnerable to, high levels of pollution and issues of environmental justice, including, but not limited to, communities with diverse racial and ethnic populations and communities with low-income populations.”<sup>132</sup>

The harder question is what to do more generally about the six “elected official” slots. The original notion behind the inclusion of local officials on the Commission’s dais was to ensure broad geographic representation and perhaps some accountability to local constituents – both laudable goals for a populist initiative. But today, especially with the seat-hopping caused by term limits, those local elected officials willing to take on the considerable extra (and uncompensated) responsibilities of a commissioner are, more often than not, driven by political incentives. Doing the behind-the-scenes bidding of powerful local landowners, celebrities, and developers who are perennially unhappy with staff’s devotion to Coastal Act protection policies can help grease the wheels for an elected official’s subsequent climb up the ladder to Sacramento or future career in the private sector. Rather than

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130. *Id.* § 27220.

131. To the extent that the present accountability problem is driven by Governor appointees, as widely believed, there could be some additional benefit to resurrecting Proposition 20’s requirement that the Governor’s nominees need Senate approval.

132. A.B. 2616 (2016) (to be codified at CAL. PUB. RES. CODE § 30301(f)), *available at* [https://leginfo.ca.gov/faces/billCompareClient.xhtml?bill\\_id=201520160AB2616](https://leginfo.ca.gov/faces/billCompareClient.xhtml?bill_id=201520160AB2616).

entirely jettisoning the idea of elected official representatives on the Commission, which is politically infeasible and perhaps even unwise, coastal advocates might press for incremental structural improvements to existing law that could discourage abuse of commissioner power.

For instance, the Political Reform Act prohibits appointed officials, including commissioners, from accepting political contributions of more than \$250 from those appearing before them in a pending matter, and if an appointee has received such a contribution within the 12 months preceding a permit decision, the official must disclose that fact and may not participate in the decision.<sup>133</sup> Watchdogs worried about violations of these requirements may file a complaint with the state Fair Political Practices Commission, and some have done so in connection with coastal commissioners.<sup>134</sup> But that complaint process is notoriously slow and frequently results in no action. In the alternative, the Legislature could add campaign contribution prohibitions and recusal provisions directly to the Coastal Act and make them enforceable through citizen suits, much like the *ex parte* communication disclosure requirements presently are.<sup>135</sup> By incorporating such prohibition and disclosure obligations, the Coastal Act could impose robust standards regarding financial ties, including campaign contributions, on commissioner nominees,<sup>136</sup> sitting commissioners, and even former commissioners for some period of time after their departure. Judicial and quasi-judicial decisionmakers are subject to similar disclosure and participation constraints.<sup>137</sup>

Likewise, although the Public Records Act applies to commissioners, its effectiveness in obtaining timely disclosure is dubious. The statute provides that, upon request, an agency must release any “public record” related to the conduct of official

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133. CAL. GOV'T CODE § 84308(b)-(c).

134. See Sworn Complaint to FPPC by Edward Henry against sitting commissioner Erik Howell, a South Central Coast elected official representative appointed by Governor Brown, available at [http://www.newtimeslo.com/files/news-ErikHowellComplaint\\_03-24.pdf](http://www.newtimeslo.com/files/news-ErikHowellComplaint_03-24.pdf).

135. CAL. PUB. RES. CODE § 30824 (maximum fine of \$7,500 for failing to timely disclose *ex parte* communication).

136. Public disclosure from nominees could help Commission watchdogs articulate arguments to appointing authorities about likely conflicts of interest.

137. See California Code of Judicial Conduct, Canon 3(E).



business,<sup>138</sup> including any “writing” broadly defined to include “any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.”<sup>139</sup> But the problems with the Public Records Act are legion – potentially months of foot-dragging by the responding agency, aggressive withholding of documents pursuant to various statutory exemptions, and the absence of a speedy remedy for violations. Enforcement of the law requires the filing of a complaint in superior court followed by prolonged litigation. By the time public records are released, the matter for which they are relevant may have long ago concluded. Moreover, appointed officials may try to evade disclosure by using personal emails, texts, or apps like Snapchat or Telegram that are beyond the reach of the Public Records Act.<sup>140</sup> It has been an open secret for years that some commissioners routinely receive electronic messages on personal devices from advocates during actual permit hearings, a practice that makes a mockery of disclosure laws.<sup>141</sup>

If we are serious about transparency and accountability in coastal decisionmaking, as the Coastal Act explicitly declares, disclosure and open meeting requirements should be

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138. CAL. GOV'T CODE § 6253.

139. *Id.* § 6252(2)(g).

140. See, e.g., Emily Green, *SF supervisors using messaging app that lets texts vanish*, S.F. Chronicle (Apr. 12, 2016), available at <http://www.sfchronicle.com/politics/article/SF-supervisors-using-messaging-app-that-lets-text-7242237.php>; Robert J. Freeman, *Snapchat and the Public's Right to Know: Poof – And Its Gone*, Sunshine Week (Mar. 8, 2016), available at <http://sunshineweek.rcfp.org/snapchat-and-the-publics-right-to-know-poof-and-its-gone/>. Even if these personal electronic communications do not disappear after they are read, there remains an open legal question of whether they must be disclosed, see *City of San Jose v. Superior Court (Smith)*, Cal. Sup. Ct. Case No. 5218066 (pending), and little hope that a challenger would even know they exist.

141. See, e.g., Paul Payne, *Text messaging, e-mail bring worries of potential Brown Act violations*, The Press Democrat (Feb. 18, 2008), available at <http://www.pressdemocrat.com/csp/mediapool/sites/PressDemocrat/News/story.csp?cid=2175592&sid=555&fid=181>. Note that the Brown Act, CAL. GOV'T CODE § 54950, is the California open meeting law applicable to local government bodies while the Bagley-Keene Opening Meeting Act, CAL. GOV'T CODE §§ 11120-11132, applies to state boards and commissions. Under Bagley-Keene, commissioners may not use a daisy chain of successive personal or electronic communications to conduct business or deliberations. *Id.* § 11122.5.

strengthened and incorporated directly into the Coastal Act itself. To eliminate legal uncertainty, such statutory amendments could and should (1) unequivocally provide that any communication by a commissioner about a pending matter constitutes a Commission public record subject to disclosure, (2) require the preservation and disclosure of any such communication, including those made on personal computers, cell phones, or other electronic devices, and (3) provide for expedited judicial enforcement of disclosure obligations. For instance, the statute could require that all communications regarding a pending matter be disclosed within ten days of any request, that aggrieved parties may enforce this deadline through an expedited judicial proceeding, and that a challenger is entitled to a restraining order against any Commission action until the requested communications are disclosed. None of these reforms, of course, can stop the vanishing Snapchat message.<sup>142</sup> But coupling quick-turnaround sunshine provisions with the threat of steep monetary sanctions – and perhaps an express directive that commissioners are solely and personally liable for any sanctions – could significantly chill the desire of political appointees to abuse their position for the benefit of development interests.

## V. CONCLUSION

California's spectacular coastline is coveted by people from all walks of life, but sky-high real estate prices put it off limits to all but the most well-heeled. Those who can afford to purchase coastal property, especially in the most impacted regions of the state, have a powerful interest in maximizing their investment and protecting their privacy from the beach-seeking masses. By contrast, the general public interest in open access to the state tidelands and long-term protection of coastal assets is a diffuse one; beneficiaries

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142. The law is notoriously ill-suited to keeping pace with evolving technology, especially in the rapidly-advancing arena of electronic communications. Any new legislative language intended to address self-destructing messages is likely to remain perennially a step behind the next new app. If an interested party and a collaborating commissioner are intent on concealing an improper communication, there is little, realistically, that the law can do about it, except to make the penalty for violations both substantial. Thus, these statutory amendments should be coupled with steep, mandatory civil (and perhaps even criminal) penalties that will significantly increase the personal risks for noncompliant commissioners. And to avoid the problem of moral hazard, the Coastal Act should prohibit the California Attorney General's office from defending commissioners against such claims, as is now occurring in the *ex parte* communication cases.

of conservation vastly outnumber coastal developers, but each one's individual interest in being able to visit the beach or knowing that tide pools are protected is less focused and salient. The political science literature predicts that, under these circumstances, the public interest will likely be trampled. And, in fact, that was the situation for many years after World War II, as private residential and industrial development exploded along the urbanized coastline. The diffuse public interest in coastal protection only galvanized to political action when developers greedily overreached in the 1950's and 1960's with ever-more-grandiose projects. The response was passage of what is arguably still the most far-reaching and democratic coastal protection law ever enacted in the United States. That heady victory surely felt miraculous to some advocates, but the real political miracle is that the law has stood the test of time as well as it has.

Unfortunately, the Commission is now engulfed in controversy and litigation as never before, with the Coastal Act facing an existential crisis. That crisis is driven by an open power struggle between short term politically-appointed commissioners cozy with development interests and an increasingly demoralized professional staff trying to hold the public interest line. Without some statutory tinkering and tightening, the law and its champions are unlikely to sustain the voters' expressed preference for coastal protection and access over development and privatization. This article proposes a number of statutory adjustments intended to shine more light on the decision process and to discourage would-be commissioners whose primary objective in landing an appointment is furtherance of their own political ambitions.

While initial efforts at corrective legislation during this last year's regular session proved mostly unsuccessful in the face of organized and powerful opposition,<sup>143</sup> the future of the California coast is still worth the fight. But rather than piecemeal pursuit of spot legislation, coastal advocates would be better served by coming together and working with interested lawmakers to

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143. Indeed, unsatisfied with the inroads they have already made, local development interests continued in 2016 to push in the opposition legislative direction, pressing for greater dilution of the Commission's authority. For instance, Assemblyman Brian Jones sponsored a bill that would allow any coastal county to petition the local superior court for a writ of mandate delegating all of the Commission's authority to the local county, which would then become the "exclusive agent" for enforcing state and federal coastal laws. A.B. 2648 (introduced Feb. 19, 2016), *available at* [http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201520160AB2648](http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB2648).

develop a coordinated package of seemingly minor, but collectively muscular, good government modifications. By framing the new battle as one for transparency and democratic accountability – and preempting the opposition’s inevitable refrain of “environment versus jobs and property rights” – such legislation could conceivably capture the public’s imagination one more time. In today’s milieu of populist unhappiness with political elites and “beltway insiders,” a strategic campaign to take back the California coast from moneyed special interests attempting to subvert the expressed will of the people may be just what the doctor ordered.