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LCP AMENDMENTS In Theory & In Practice

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LCP AMENDMENTS
In Theory & In Practice
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1. LCP: The Theoretical Partnership Between Coastal Cities and the Coastal Commission

The Coastal Act creates a partnership between state and local government. The state Legislature established broad policies set out in Chapter 3 of the Coastal Act and required local governments to adopt local laws (a local coastal program or “LCP”) that implement these broad policies. The Legislature left “wide discretion to a local government not only to determine the contents of its land use plans, but to choose how to implement these plans” *Yost v. Thomas* (1984) 36 Cal.3d 561, 573. The Coastal Commission’s job under the Act is to certify that the LCP is consistent with the State policies:

§ 30512.2. Land use plan; criteria for decision to certify or refuse certification

The following provisions shall apply to the commission's decision to certify or refuse certification of a land use plan pursuant to Section 30512:

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

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precise content of its land use plan.

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

(Emphasis added) Like the Coastal Act, there are numerous statutory schemes that create alliances between local government and a state agency (in areas such as housing law,¹ solid waste reduction,² the National Pollution Discharge Elimination System program³ and traffic congestion management,⁴ to name a few). These statutory schemes work well because they allow the state to set minimum standards without infringing on the diversity of California; when implementing the state policies, local governments still may exercise broad discretion to reflect local conditions. In many ways, the LCP amendment process is still seeking the equilibrium contemplated by the statute which relies on the exercise of *local governments'* discretion on the precise manner to implement *statewide goals*.

The overarching goals of the Coastal Act are to maximize public access to the beach and protect sensitive coastal resources. The state's policies toward these ends are set forth in Chapter 3 of the Coastal Act and constitute the standards by

¹See Govt Code §65585 (providing for state review of local housing elements to determine consistency with state housing policy)

²See Public Resource Code § 40000, *et seq.* (California Integrated Waste Management Act requiring plans and programs to reduce solid waste)

³See Water Code §§ 13370-13389 (State Water Resources Control Board administers federal Clean Water Act, issuing permits to cities for, among other things, stormwater management)

⁴See Gov't Code §65088, *et seq.* (Requiring cities to establish congestion management programs to meet and maintain state and regional levels of service)

which the adequacy of LCPs and, where the Commission is the permitting authority because no certified LCP is in effect in a jurisdiction, the permissibility of proposed developments are determined. Public Resources Code §30200. Chapter 3 is divided into six articles, each dedicated to a subject area: Public Access, Recreation, Marine Environment, Land Resources, Development and Industrial Development. Each article consists of five to seven substantive policies. All together, Chapter 3 is comprised of 41 policies covering six subject areas.

In theory, an LCP amendment should be evaluated by the Commission expeditiously and based on the constrained determination of consistency with Chapter 3 policies. Public Resources Code Sections 30512 and 30605 provide that the Commission shall make its determination within 90 days of its submittal (for “filing” requirements see Section 13552 of the Commission’s Regulations and for procedures for the Executive Director to determine that an LCP amendment is “submitted” see Section 13553 of the Commission’s Regulations). If the amendments are only to the Local Implementation Plan, the statute provides only 60 days for the Commission to act. Indeed, if the Commission fails to act within the required time, the requested amendment is “deemed certified.”

The action deadline is not, however, absolute. Public Resources Code Section 30517 also allows the Commission to extend the action deadline for up to a year for “good cause.” Pursuant to a recent Coastal Commission staff report, “it has generally been the Commission’s practice to extend such deadlines for a full year as provided by the Coastal Act.” Coastal staff would defend this practice as

necessary given the huge workload demand placed on its relatively small staff and limited budget. Coastal Commission critics and cynics (and there are a few out there) tend to suggest that the routine grant of an extension creates more leverage for the Commission to “negotiate” revisions to LCP amendments. The general experience of local governments seeking certification of LCPs or amendments to certified LCPs is that the Commission rarely constrains itself to the mere conformance analysis contemplated by the Coastal Act and, instead, routinely engages in a process that second guesses the local governments’ exercise of their discretion to determine the precise content of their plans. For this reason, a threshold question that every local government should ask itself when considering implementation of a new policy is whether an LCP amendment is really necessary at all.

2. Is an LCP Amendment Really Necessary?

The Coastal Act allows the local government to enact more restrictive regulations without amendment to the LCP. Public Resources Code § 30005 provides that a local government may adopt and enforce additional regulations, not in conflict with the Coastal Act, that impose “further conditions, restrictions, or limitations with respect to any land or water use or other activity which might adversely affect the resources of the coastal zone.”⁵

⁵ **§ 30005. Local governmental powers; nuisances; attorney general's powers**

No provision of this division is a limitation on any of the following:

The constitution provides that a city may enforce all laws “not in conflict with the general laws.” *See* Cal. Const. art. XI, §7. This provision is both a grant of power and a limitation on it: “It is this constitutional power, enjoyed by every municipality, that is commonly termed the ‘police power.’ As the Supreme Court noted in *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885, “[u]nder the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. (Cal. Const., art. XI, § 7.) Apart from this limitation, the ‘police power [of a county or city] under this provision ... is as broad as the police power exercisable by the Legislature itself.’ (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 140)” *California Rifle & Pistol Ass’n v. City of West Hollywood* (1998) 66 Cal.App.4th

(a) Except as otherwise limited by state law, on the power of a city or county or city and county to adopt and enforce additional regulations, not in conflict with this act, imposing further conditions, restrictions, or limitations with respect to any land or water use or other activity which might adversely affect the resources of the coastal zone.

(b) On the power of any city or county or city and county to declare, prohibit, and abate nuisances.

(c) On the power of the Attorney General to bring an action in the name of the people of the state to enjoin any waste or pollution of the resources of the coastal zone or any nuisance.

(d) On the right of any person to maintain an appropriate action for relief against a private nuisance or for any other private relief.

1302, 1310. The *Yost* Court also makes the point that the local government drafting its LCP has the discretion to be more restrictive than the Coastal Act.⁶

Indeed, the Legislature expressly has indicated that it did not intend for local governments to have to amend their LCPs with every variation of policy implementation:

30523. Specificity of local coastal programs; legislative intent

It is the intent of the Legislature that local coastal programs certified by the commission should be sufficiently specific to meet the requirements of Section 30108.5, but not so detailed as to require amendment and commission review for minor changes, or to discourage the assumption by local governments of postcertification authority which ensures and implements effective protection of coastal resources. The Legislature also recognizes that the applicable policies and the level of specificity required to ensure coastal resource protection may differ between areas on or near the shoreline and inland areas.

In *Conway v. City of Imperial Beach* (1997) 52 Cal.App.4th 78, the Court held that a development moratorium enacted as an initiative did not require Coastal Commission certification as an LCP amendment to take effect. The Court relied on its conclusion that the initiative did not change the permitted use of property in the zone, but maintained the zoning as a multi-family residential zone.

⁶ “Under the act, local governments, therefore, have discretion to zone one piece of land to fit any of the acceptable uses under the policies of the act, but they also have the discretion to be more restrictive than the act. The Coastal Act sets minimum standards and policies with which local governments within the coastal zone must comply; it does not mandate the action to be taken by a local government in implementing local land use controls. The Commission performs a judicial function when it reviews a local government's LCP - it determines whether the LCP meets the minimum standards of the act (*City of Chula Vista v. Superior Court, supra*, 133 Cal.App.3d 472, 488), but once an LCP has been approved by the Commission, a local government has discretion to choose what action to take to implement its LCP: it can decide to be more restrictive with respect to any parcel of land, provided such restrictions do not conflict with the act.” *Yost, supra*, 36 Cal.3d at 572-73.

The proposition imposed only a temporary reduction in density and building heights for multi-family residential zones.

After analyzing provisions of the Coastal Act (especially Section 30514) and the Planning Law (Gov't Code Section 65858), the Court concluded that as long as the permitted uses of property in the coastal zone were not altered and there was no change in the relative composition of residential, industrial or recreational uses, the City, under the authority of section 30005, adopted and enforced additional regulations, not in conflict with the Coastal Act, which imposed further conditions and restrictions on multi-family residences within the coastal zone.

The Court held that the City's action did not conflict with the Coastal Act because the initiative protected, maintained and enhanced the overall quality of the coastal zone environment. The initiative did not alter the utilization or conservation of coastal zone resources, impede public access to and along the coastal zone, or interfere with the priorities established for coastal-dependent or coastal-related development:

As the enactment under Government Code section 65858 did not “authorize[] a use other than that designated in the LCP as a permitted use” (*Yost, supra*, 36 Cal.3d at p. 573, fn. 9, 205 Cal.Rptr. 801, 685 P.2d 1152.), it was not in conflict with the purposes sought to be served by the Coastal Act, and no approval by the Coastal Commission was required prior to enforcement

Conway, supra, 52 Cal.App.4th at 89. In other words, with the appropriate findings, where land uses are not themselves changed, more restrictive regulations

may be imposed without having the Coastal Commission certify an LCP amendment.

3. If you Must, Here Is How

Five steps to amending an LCP:

- (1) the local government proposes an amendment and meets the requirements for public participation during review, usually this will require public notice and a hearing before a planning commission and a hearing before the legislative body;
- (2) the local government adopts and submits to the Coastal Commission the proposed amendment, along with supporting materials as set forth in the Coastal Act and related Commission guidelines;
- (3) Commission staff reviews the submittal, filing it if complete and determining if it is a minor or *de minimis* amendment (may be approved administratively) or major (requires a hearing);
- (4) the Commission holds a hearing and votes to certify the amendment or suggests “modifications” or denies the amendment; and
- (5) if certified, the local government takes any necessary steps to implement the LCP amendment; if “modifications” suggested, the local government may accept those or prepare alternatives and re-do steps 1 through 5.

This is a public process; in other words, there are no short cuts. Plan ahead. The review process for LCP amendments is similar to that for original LCP submittals. The local government cannot take any final action on the LCP amendment until six weeks after providing notice of availability of the draft LCP amendment. 14 Cal. Code Regs. Section 13515(c).

The same level of public participation is required for LCP amendments as for the original LCP. *See* 14 Cal. Code Regs. Section 13552(a). These participation standards are found in Section 13515 of the regulations and provide that, among other means of notice, notices of public hearings or availability of draft LCP amendments must be mailed to (i) members of the public requesting such notices; (ii) contiguous and affected local governments (iii) certain regional, state and federal agencies; and (iv) local libraries and media. Individuals may also request that copies of LCP amendment drafts and related documents be mailed to them and the local governments may charge fees sufficient to cover the cost of duplicating and mailing these materials.

Notices of public hearings must be published and mailed to interested persons and public agencies at least 10 working days before the hearing. *See* 14 Cal. Code Regs Section 13515(d).

The City Council or Board of Supervisors submits the LCP amendment to the Coastal Commission by a resolution. 14 Cal. Code Regs Section 13551. The resolution must state that the LCP amendment is “intended to be carried out in a manner fully in conformity with [the Coastal Act].” Public Resources Code Section 30510(a).

An LCP amendment submittal to the Commission must include various supporting materials. These are listed in Section 13552 of the Commission's regulations and include (i) a summary of public participation measures; (ii) a list of interested persons contacted for comment; (iii) significant

comments received and the local government's response; (iv) a full description of the LCP amendment (policies, standards, text with strike-outs and underlines, maps); (v) a discussion of the amendment's relationship to and effect on the rest of the LCP including the access component; (vi) an analysis of how the amendment complies with the "common methodology" for LCP preparation (Commission Regulations Section 13511); (vii) any environmental documents required pursuant to CEQA (*but see* Public Resources Code Section 21080.9 and Section 4, below); and (viii) an indication of the zoning measures that will be used to carry out an LUP Amendment. The Coastal Commission's general checklist of these requirements is attached to this paper.

The local government has two choices with respect to the effective date for a proposed amendment. The local government may elect to have the amendment become effective upon the Coastal Commission's certification or the local government may take final action after the Commission's certification. The resolution of submittal should specify whether the proposed LCP amendment will take effect automatically upon Commission certification or will require local adoption afterward.

An application must be determined to be complete before the review begins (and the clock starts ticking). The Commission staff decides if the submittal is complete for filing. If so, staff files the amendment submittal, starting the Commission's review period. If not, staff notifies the local government in writing of the submittal's inadequacies.

LCP amendments fall into two categories: Those that require a Commission hearing (major) and those that may be certified administratively (*de minimis* or minor). The Commission staff decides if the LCP amendment is "major" or if it is "minor" or "de minimis." If the amendment is deemed minor or *de minimis* the review process is simpler. *De minimis* amendments are those amendments that will have no individual or cumulative impact on coastal resources, will not propose changes in land or water use or change in allowable use of the property, and that comply with certain public noticing criteria as specified in Public Resources Code Section 30514 (d). "Minor" amendments are those that have been defined by the Commission regulations as being "minor in nature" or as "requiring rapid and expeditious action." The Commission's Regulations provide several examples of "minor in nature":

1. Amendments to address newly-annexed or detached territory where the city's LCP proposal and county's LCP proposal for the territory are equivalent.
2. Wording changes in the implementation program which provide more specific guidance without changing the type, location or intensity of use.
3. Change in the notification and hearing procedures that are consistent with the requirements of the Coastal Act.
4. LUP revisions or deletion of pre-1982 housing policies; correction, reorganization, revisions, or deletion of certified language which when taken together do not change the kind, location, intensity or density of use or modify the resource protection measures for any area or property; additions or revisions to certified policies which impose further conditions, restriction or limitations on any use which might adversely affect the resources of the coastal zone, if those amendments do not conflict with any policy of Chapter 3 of the Coastal Act or with any other certified land use plan policy.

In general, **any other proposed change in the type of use would be reviewed as a major amendment.** A single submittal containing several LCP amendments may contain a mix of major and minor items.

***De minimis* and minor amendments are certified administratively.** The Executive Director notifies interested persons of the proposed amendment and reports the determination and any objections to the Commission at its next meeting. Commission certification is automatic unless one-third of the appointed members object, in which case minor amendments are reviewed as a major amendment and *de minimis* amendments are reviewed as either minor or major amendments or, at the request of local government, referred back to the local government. 14 Code Cal. Regs Section 13555(a) and Public Resources Code Section 30514 (d)(3)(B).

Pursuant to Regulations Section 13555(b), **major amendments are reviewed in essentially the same fashion as original LCP submittals.** The Commission must vote on the amendment within 90 days of filing in most cases; if the LCP amendment involves only the implementation program, the Commission has only 60 days (14 Cal. Code Regs. Sections 13522, 13530, and 13542[b]). However, as discussed above, the Commission may (and often does) grant itself a year long extension to act.

Suggested modifications are the norm. Theoretically, for each LCP amendment, the Commission will vote either to deny or to certify the proposed

amendment; recall from the first section of this paper that the Legislature defined a constrained inquiry for the Coastal Commission with respect to LCP policies and their amendments. However, the Commission has the option of suggesting modifications following a denial action (unless the local government requests that it not do so). A typical response from the Coastal Commission to an LCP amendment is to vote to extend the deadline to act the full one year permitted by the statute and to suggest “modifications.”

Certification is a prerequisite. An LCP amendment does not take effect until the Commission certifies it. Minor and *de minimis* amendments are certified administratively, unless the Commission objects to the Executive Director’s determination of the nature of the amendment. After Commission certification of an amendment the local government takes any necessary actions to implement the amendment, such as adopt an ordinance or “accept” modifications by adopting amended ordinances or resolutions. The LCP amendment is effective once the Executive Director then determines that the follow-up actions are legally adequate and the Commission concurs. 14 Cal. Code Regs Sections 13551, 13544, and 13544.5). However, no further action is required if in its submittal resolution the local government specified that the amendment would take effect automatically upon Commission certification and if the Commission's certification did not include any suggested modifications.

NOTE: three’s the limit. In any year a local government may make only three submittals of major amendments to its certified LCP. Each separate

submittal, however, may include many parts or proposed changes. Public Resources Code Section 30514(b). A proposed amendment submittal will be counted toward a year's quota of three submittals only during the year in which it is found to be legally adequate to comply with Public Resources Code Section 30510(b) (which would not necessarily be the same year as when the proposed amendment is received in the Commission's offices). Proposed LCP amendments determined to be "minor" or *de minimis* by the Executive Director pursuant to Public Resources Code Section 30514(c) and (d) are not restricted to three submittals per year.

4. One Last But Important Consideration: Does CEQA apply?

Although the California Environmental Quality Act (CEQA) generally requires an Environmental Impact Report (EIR) prior to the approval of any project that may have a significant adverse effect on the environment, an EIR is not required for the approval of an LCP or LCP amendment by the Commission. CEQA authorizes state agencies with environmental responsibilities, including the Commission, to operate under their own regulatory programs that replace the EIR process with a comparable form of environmental review. (§ 21080.5, subds. (a), (c); *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 113, 65 Cal.Rptr.2d 580, 939 P.2d 1280; *San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 552, 45 Cal.Rptr.2d 117.). *Santa Barbara County Flower and Nursery Growers Ass'n, Inc. v. County of Santa Barbara* (2004) 121 Cal.App.4th 864, 872. This is known as the "functional

equivalent” of CEQA and the Coastal Commission, not the local government is responsible for undertaking the environmental review which is the functional equivalent of CEQA.

CEQA does not apply to activities and approvals by the local government as necessary for the preparation and adoption of a Local Coastal Program amendment.⁷ In order to prevent an inconsistency between the LCP and a local government’s general plan or zoning ordinance, in some cases if an LCP amendment is certified, the local government must also approve the corollary amendments to the general plan and the zoning ordinance. Because these amendments are necessary for the preparation and adoption of the LCP amendment and, because they are entirely dependent on, related to, and duplicative of, the exempt activity, they should be (I think are) subject to the same CEQA exemption.

5. Conclusions

The reluctance of local governments to update and amend their LCPs stems from the concern – valid or not – that in practice the process is not sufficiently respectful of their discretion to determine the precise content of their plans. On the other hand, Commission staff is frustrated by limited resources to enforce the Coastal Act and the apparent reluctance – justified or not – of local governments to update their LCPs in compliance with the Coastal Act. These perceptions tend to lead to practices by all parties counterproductive to implementation of the

⁷Public Resources Code Section 21080.9

Coastal Act. As it happens, the solution lies in the Coastal Act itself. A return to the partnership contemplated by the Legislature with local governments and the Coastal Commission approaching the amendment process with more conscientious adherence to roles assigned by the Coastal Act will lead to more enthusiastic enforcement by local governments and a reduced administrative burden on the Coastal Commission.