

Written comments submitted by Jana Zimmer, Commissioner, California Coastal Commission

Re: August 26, 2014 Hearing on Bagley Keene Amendments

Dear Ms. D'Elia:

Thank you for asking me to share my perspective on the effect of recent amendments to the Bagley-Keene Act on the work of the California Coastal Commission. I did report the date and subject of the anticipated Little Hoover Commission hearing, at the Coastal Commission meeting this last week, and encouraged individual Commissioners and our staff to submit their comments to you. (As this topic was not on our Agenda, under the current language of Bagley-Keene, we could not discuss or deliberate on it). Therefore, I submit these comments as an individual Commissioner, and not on behalf of the agency as a whole, or any other member of my Commission.

I understand that the LHC is interested not only in the effect of the 2009 amendments on the Public Utilities Commission, but on the ability of other state agencies to conduct business. The short answer to this question is that based on my experience, these amendments have indeed created uncertainty and confusion, among professionals and lay persons alike. In my opinion, this uncertainty has, in turn, understandably led to very cautious advice from our attorneys as to the scope of discussions we may have among ourselves, and has frustrated our good intentions to participate, as Commissioners, in improving our own process and work product as an agency.

I have served on the Coastal Commission for over three years, and currently serve as its Vice-Chair. However, prior to this service, I had a thirty year career as a land use attorney, representing and appearing before numerous state and local agencies, including counties, cities, special districts, and the State Lands and Coastal Commission so I am quite familiar with both the salutary purposes and the unintended consequences of various provisions of the Brown Act and Bagley Keene.

I will start by saying that Coastal Commissioners do not 'make policy', but are appointed to implement the policies of the Coastal Act, generally through application to individual development permits and certification of local coastal plans. We have twelve voting members, (and alternates), and 'ex officio' non-voting members from other state agencies (i.e. CalTrans, State Lands, Resources Agency) who may participate in our public deliberations. Half of our members are local elected officials whose work is governed by the Brown Act, the other half are 'at-large' appointees-- civilians from the business or nonprofit world who have little concept of the perils of group discussions in the government agency context. We have, like the PUC, "a large and complex workload", with approximately two thousand pages of material to read for each meeting. We meet only once a month, usually for three days. We do not have a salary, or any staff assigned to individual Commissioners. Thus, we necessarily must rely on our professional staff- who are committed, excellent public servants- for their recommendations.

However, because our agency is perennially understaffed, and the content of our monthly Agenda is in large part dictated by items with various legal deadlines for action, there is little, if any room to organize staff reports and presentations for publicly noticed discussions in which the Commission would like to more fully address emergent and ongoing issues, such as local government/Commission relations, improvements to our internal process, and discussion of 'big picture' concerns such as sea level rise, water supply, the accelerating loss of access to the coast for all except the extremely wealthy, let alone how we might better address these issues through the regulatory process. We have an active and engaged Commission, whose members are ready, willing and able to contribute, but increasingly feel we cannot effectively do so.

One example I recall is that when I first was appointed, several Commissioners were interested in creating an opportunity for give and take on the relationship of the Coastal Act and its development permit requirements to the preservation of agriculture as a viable use in the coastal zone. Five of us (less than a majority) wanted to get together informally and brainstorm approaches, and to organize a *preliminary* meeting with local ranchers and farmers, as well as environmental interests. We were told that if more than two Commissioners met and discussed these issues, even to develop ideas about how to approach them to later share at a full Commission meeting, we would risk becoming an 'illegal' committee under Bagley Keene. Thus, we had to wait for a year and a half until the staff was able to organize a full public workshop. We had the workshop, which was very informative, but there has been no opportunity for follow through, because staff has other, multiple issue areas to try to address, which are even more pressing as Coastal Act priorities. Because the Commission is so constrained in exploring emergent policy issues in public, and to actively participate in the formulation of recommendations, the result can indeed be to effectively 'drive (and keep) decisions down to the staff level', with the appearance that our agency is less transparent than we are actually committed to be.

A second emergent concern with respect to the rules on serial meetings is how these amendments to Bagley Keene relate to the 'ex parte' requirements of the Coastal Act. The Coastal Commission, unlike other state agencies, is expressly authorized, subject to stringent disclosure requirements, to engage in 'ex parte' discussions with interested parties who wish to influence decisions on a permit or other matter. Although the practice of engaging in ex partes has traditionally been viewed as a benefit only to developer lobbyists, the fact is that other interested parties, including environmental advocacy groups, cities and counties, and labor groups, have relied effectively on these ex partes to communicate their concerns to Commissioners.

Our public hearing time allotments are severely constrained, so that individuals may only have a few minutes to convey their views on complex matters to the Commission, and they have very little time to respond to concerns raised by our very complicated and lengthy staff recommendations. Thus, when effectively conducted and fully disclosed, ex partes can provide interested persons (of any stripe) additional opportunity to convey their message to Commissioners. And, I believe that when even handedly applied by Commissioners, ex partes can actually lead to better-informed decision making, and to the sense in the public that their concerns have been heard. This, to me, is the main value in consenting to ex partes.

However, the prohibition in Bagley -Keene on “discussion”, whether or not it leads to concurrence, has so exacerbated concerns about what kinds of communications may lead to a prohibited serial meeting, that Commissioners have been advised not to engage in any ‘give and take’, or any questioning or requests for clarification in such meetings, on the theory that we might disclose our individual deliberative process, which then might be passed on by the participant, as the ‘spoke’ in the wheel of an improper serial meeting. In the absence of an appellate decision interpreting the language of the amendments, our lawyers have effectively recommended that we remain mute while we listen. Thus, from my perspective, the excessive fear of running afoul of Bagley Keene has transformed an opportunity for information gathering and more independent decision making into a useless exercise, and to result in a retreat to the path of least resistance, which, as a practical matter, is to make decisions on complicated cases based only on superficial review of voluminous written materials, and our limited opportunity for public testimony.

Thank you for inviting me to share my experience. If you have any further questions, please do not hesitate to contact me.

Very Truly Yours,

Jana Zimmer

cc: Steve Kinsey, Chair, California Coastal Commission
Pedro Nava, Chair, Little Hoover Commission