



1-1-2003

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Recommended Citation

Jil D. Wright, *Environmental Protection / Chapter 235: Protecting California's Coast*, 34 MCGEORGE L. REV. 476 (2003).
Available at: <https://scholarlycommons.pacific.edu/mlr/vol34/iss2/22>

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Chapter 235: Protecting California's Coast

Jill D. Wright

Code Section Affected

Public Resources Code § 30812 (new).
AB 1913 (Lowenthal); 2002 STAT. Ch. 235.

I. INTRODUCTION

“California’s coast is one of its greatest treasures.”¹ “[W]herever you see open beaches, coastal wetlands and user-friendly access to the ocean, it is because of the California Coastal Act” of 1976 (Coastal Act)² and the protections afforded by it.³ “[T]he Coastal Act has been instrumental in protecting” the natural resources of California’s coast for twenty-six years.⁴ The Coastal Act was enacted by California voters who realized that if we do not take responsibility for our natural resources for coming generations, those resources will cease to exist.⁵ Chapter 235 adds a section to the Coastal Act giving the California Coastal Commission (Commission), the enforcers of the Coastal Act, a cost effective and efficient method of enforcing the laws of the Coastal Act.⁶ Chapter 235 was enacted under the premise that once our natural resources are destroyed they can never be replaced.⁷

II. LEGAL BACKGROUND

A. Existing Law

The Coastal Act was adopted to protect California’s coastal zone from “deterioration and destruction” from unplanned and unregulated development.⁸ The Legislature declared that the coastal zone is a valuable natural resource that

1. Letter from Brendan Fletcher, California Program Associate, Defenders of Wildlife, to Assemblymember Howard Wayne, Chair, Assembly Natural Resources Committee I (Mar. 27, 2002) [hereinafter Fletcher Letter] (on file with the *McGeorge Law Review*).

2. CAL. PUB. RES. CODE § 30000 (West 1996).

3. Linda Sapiro Moon, Editorial, *If It Weren't for the Coastal Commission . . .*, L.A. TIMES, June 24, 2001, at B17.

4. Fletcher Letter, *supra* note 1; Moon, *supra* note 3.

5. Moon, *supra* note 3.

6. ASSEMBLY COMMITTEE ON NATURAL RESOURCES, COMMITTEE ANALYSIS OF AB 1913, at 4 (Apr. 1, 2002).

7. Evan C. Henry, Editorial, *In a Surprise Development, Bolsa Chica Just Might Survive Huntington Beach Plan for Preservation Shows a Welcome Change in Attitude About County's Natural Resources*, L.A. TIMES, Mar. 11, 2001, at B15.

8. CAL. PUB. RES. CODE § 30001(c)-(d) (West 1996).

“is a paramount concern to present and future residents of the state and nation.”⁹ One of the Coastal Act’s many goals was to guarantee systematic organization and balanced utilization of the coastal zone’s resources.¹⁰ In order to achieve the many goals of the Coastal Act, the Legislature created the Commission.¹¹ The Commission was formed to coordinate and orchestrate the many activities that affect the coastal zone and to maintain the coastal resources necessary for the well-being of the state.¹² The Coastal Act also formed local coastal programs¹³ that are set up to enforce the Coastal Act’s provisions at a local level.¹⁴ These local programs are able to set up their own provisions as long as they are prepared pursuant to the Coastal Act, or local governments can ask the Commission to prepare their program for them.¹⁵

Any person wishing to develop in the coastal zone must obtain a permit from the Commission or the local governing program.¹⁶ A permit will be denied if the Commission or the local governing program finds that the development would interfere with or impair any of the coastal resources.¹⁷ The coastal resources being protected include public access to the sea,¹⁸ recreation in the coastal zone,¹⁹ the marine environment,²⁰ and land resources.²¹ In the event of a violation of any of these sections of the Coastal Act, the Commission has options to choose from to tailor the appropriate remedy.²² The Commission can refer the action to the Attorney General and maintain an action for declaratory and equitable relief to restrain any violation of this section upon a prima facie showing of the violation.²³ After a public hearing, the Commission can also issue a cease and desist order to stop the development if the developer has failed to respond to oral

9. *Id.* § 30001(b).

10. *Id.* § 30001.

11. *See id.* § 30004(b) (West 1996) (stating that to provide for continued state coastal programs, planning and management, a state coastal commission was necessary).

12. *Id.*

13. *See id.* § 30108.6 (defining “Local coastal program” as “a local government’s (a) land use plans, (b) zoning ordinances, (c) zoning district maps, and . . . other implementing actions, which, when taken together, meet the requirements of, and implement the provisions . . . [of the California Coastal Act] at the local level.”).

14. *Id.*

15. *Id.* § 30500(a)-(c) (West 1996).

16. *Id.* § 30600(a) (West 1996 & Supp. 2003); *see id.* § 30600(e) (West Supp. 2003) (providing an exception for emergency work necessary to protect life or property); *id.* § 21066 (West 1996) (defining person as “any person, firm, association, organization, partnership, business, trust, corporation, limited liability company, company, district, county, city and county, city, town, the state, and any of the agencies and political subdivisions of such entities”).

17. *See id.* § 30604(a) (stating that a “permit shall be issued if . . . [it] is in conformity with Chapter 3” of the Coastal Act).

18. *Id.* §§ 30210-30214 (West 1996).

19. *Id.* §§ 30220-30224 (West 1996).

20. *Id.* §§ 30230-30237 (West 1996).

21. *Id.* §§ 30240-30244 (West 1996).

22. *Id.* §§ 30800-30811 (West 1996).

23. *Id.* § 30803(a); *id.* §§ 30800-30811 (West 1996).

notice of the violation in a satisfactory manner.²⁴ The Commission can also order restoration of the area if it finds that development occurred without a permit or inconsistently with the issued permit.²⁵

B. Prior Legislation

The Legislature introduced Assembly Bill 989 (AB 989) in 1999, in an attempt to make the same changes that Chapter 235 initiates.²⁶ The Legislature passed AB 989, but it was vetoed by the Governor because it “inappropriately” shifted the burden of proof regarding a violation onto the property owner rather than the governmental agency involved.²⁷ The Governor further found AB 989 was unnecessary because the Commission had other remedies to address violations of the Coastal Act.²⁸ AB 989 revisited Assembly Bill 1956,²⁹ authored in 1998, that was also vetoed by the Governor due to the shifting burden of proof.³⁰ Chapter 235 addresses the problem of the shifting burden of proof “by adding language . . . that requires the executive director [of the Commission] to provide [substantial] evidence of a violation before [issuing a notice of violation].”³¹

III. CHAPTER 235

Chapter 235 allows “the executive director of the Commission to file a notice of violation [(NOV)] . . . if the director determines that real property has been developed in violation of the Coastal Act.”³² The director will mail a notification of intention to record the NOV to the owner of the violating property.³³ The notification will identify the nature of the violation and give the owner an

24. *Id.* § 30810(a).

25. *Id.* § 30811.

26. ASSEMBLY COMMITTEE ON NATURAL RESOURCES, COMMITTEE ANALYSIS OF AB 1913, at 2 (Apr. 1, 2002).

27. *Id.* at 5.

28. *See* ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 1913, at 1-2 (Apr. 4, 2002) (stating that under existing law the Commission can obtain injunctive relief, civil penalties and issue cease-and-desist orders to rectify a violation of the Coastal Act).

29. ASSEMBLY COMMITTEE ON NATURAL RESOURCES, COMMITTEE ANALYSIS OF AB 1956, at 2 (May 7, 1998).

30. *See id.* at 3 (stating that the Governor felt that “[s]hifting the burden of proof from a governmental regulatory agency to the property owner was an inappropriate enhancement of governmental powers at the public’s expense.”).

31. CAL. PUB. RES. CODE § 30812(a) (enacted by Chapter 235); ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 1913, at 2 (Apr. 24, 2002).

32. ASSEMBLY COMMITTEE ON NATURAL RESOURCES, COMMITTEE ANALYSIS OF AB 1913, at 1-2 (Apr. 1, 2002); CAL. PUB. RES. CODE § 30812(a) (enacted by Chapter 235); *see generally* CAL. PUB. RES. CODE §§ 30210-30244 (West 1996) (stating that a violation of the Coastal Act occurs when a development impairs or injures public access to the sea, recreation in the coastal zone, the marine environment, and land resources).

33. CAL. PUB. RES. CODE § 30812(a) (enacted by Chapter 235).

opportunity to present evidence of whether a violation has occurred.³⁴ The owner of the property in question has twenty days to respond in writing to the notification.³⁵ If the property owner does not respond within the twenty days, then the executive director will record the NOV in the county where the property is located.³⁶ If the owner does respond within twenty days, a public hearing will be held in which the owner may present evidence to the Commission to show the NOV should not be recorded.³⁷ If the Commission finds that the property is in violation, the NOV will be recorded.³⁸ The NOV will then serve as notice to all prospective buyers that the Coastal Act has been violated.³⁹ However, the NOV merely serves as notice to buyers. It does not operate as a lien, encumbrance, or defect in title.⁴⁰ Thereafter, when the owner of the violating property resolves the offense, the director will, within thirty days, record a rescission of the NOV that has the same effect as if the NOV has been withdrawn.⁴¹ Thus providing the Commission another option in enforcing violations of the Coastal Act.⁴² Chapter 235 makes it more difficult for a violating property owner to sell his property, encouraging him to cooperate with the Commission to resolve the violation without costly civil litigation.⁴³

IV. ANALYSIS

Chapter 235 is about protection.⁴⁴ It protects consumers, property owners and taxpayers as well as protecting the California coast.⁴⁵ By providing the Commission with a cheaper, more efficient enforcement mechanism, Chapter 235 provides exactly what the Commission needs to enforce the provisions of the Coastal Act.⁴⁶

34. *Id.*

35. *Id.* § 30812(b) (enacted by Chapter 235).

36. *Id.*

37. *Id.* § 30812(c) (enacted by Chapter 235).

38. *Id.* § 30812(d) (enacted by Chapter 235).

39. *Id.* § 30812(e)(2) (enacted by Chapter 235).

40. *Id.*

41. *Id.* § 30812(f) (enacted by Chapter 235).

42. See ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 1913, at 2 (Apr. 10, 2002) (stating that Chapter 235 “provides another enforcement tool to the [C]ommission as an option to the often expensive and rigorous civil action route.”).

43. *Id.*

44. See Memorandum from California Public Interest Resource Group, to Members of the Assembly (n.d.) [hereinafter CALPIRG memorandum] (on file with the *McGeorge Law Review*) (stating that Chapter 235 protects a variety of interests).

45. See SENATE COMMITTEE ON NATURAL RESOURCES AND WILDLIFE, COMMITTEE ANALYSIS OF AB 1913 (May 2, 2002) (stating the various protections of Chapter 235).

46. See Letter from Sarah Christie, Legislative Coordinator, California Coastal Commission, to Alan Lowenthal, Assemblymember 2 [hereinafter Christie Letter] (on file with the *McGeorge Law Review*) (voicing support for AB 1913).

A. Cost Effectiveness

Chapter 235 provides the Commission with an effective but less costly option for resolving violations of the Coastal Act.⁴⁷ Under existing law, if the property owner does not cooperate with the Commission, the Commission's only course of action is to refer the case to the Attorney General to file a civil complaint.⁴⁸ Since the Commission pays the Attorney General's costs,⁴⁹ this kind of litigation is expensive for both the property owner and the Commission.⁵⁰ Chapter 235 allows the Commission to record the NOV, giving the property owner an extra incentive to cooperate in order to avoid costly litigation.⁵¹

B. Notice to Prospective Buyers

Under existing law, property sellers are not required to expressly disclose a violation of the Coastal Act.⁵² This forces buyers to resolve Coastal Act violations of which they were not previously aware.⁵³ Chapter 235 requires the NOV to be recorded in the county recorder's office in each county where the violating property sits.⁵⁴ This provides constructive notice to all prospective buyers that a Coastal Act violation exists, so that they may renegotiate a lower price to compensate for the violation or have the seller remedy the situation.⁵⁵ Proponents of Chapter 235 believe that this will result in a higher percentage of owners achieving compliance with the Coastal Act.⁵⁶

Chapter 235 is believed by some, however, to be an unnecessary expansion of the Commission's authority.⁵⁷ One concern is that the property owner will be effectively "barred from refinancing or selling the property" after the NOV is

47. ASSEMBLY COMMITTEE ON NATURAL RESOURCES, COMMITTEE ANALYSIS OF AB 1913, at 3-4 (Apr. 1, 2002).

48. CAL. PUB. RES. CODE §§ 30800-30811 (West 1996); ASSEMBLY COMMITTEE ON NATURAL RESOURCES, COMMITTEE ANALYSIS OF AB 1913, at 3 (May 2, 2002).

49. ASSEMBLY COMMITTEE ON NATURAL RESOURCES, COMMITTEE ANALYSIS OF AB 1913, at 3 (May 2, 2002).

50. *Id.*

51. ASSEMBLY COMMITTEE ON NATURAL RESOURCES, COMMITTEE ANALYSIS OF AB 1913, at 4 (Apr. 1, 2002).

52. Christie Letter, *supra* note 46.

53. *Id.*

54. CAL. PUB. RES. CODE § 30812(d) (enacted by Chapter 235).

55. Christie Letter, *supra* note 46.

56. *Id.*

57. See Memorandum from Valerie Nera, Director, Agriculture and Resources, California Chamber of Commerce, to Members of the Senate Appropriations Committee (June 13, 2002) [hereinafter Nera Memorandum] (on file with the *McGeorge Law Review*) (stating that "[o]nce a [NOV] has been recorded against real property . . . the property owner is barred from refinancing or selling the property until the [NOV] has been removed."). "In effect the property owner is barred from using the property as an asset to finance a defense against what could be an improper . . . notice." *Id.*

filed with the recorder's office.⁵⁸ This will be a difficulty for the property owner, especially if he is attempting to finance a defense to a possibly improper NOV.⁵⁹

However, Chapter 235 only requires the owner to submit a timely objection to the NOV, after which a public hearing will be held.⁶⁰ This is not the type of costly litigation that would force a property owner to refinance his property.⁶¹ The NOV is specifically "for informational purposes only" and does not serve as a defect or encumbrance so the seller is not prevented from financing or selling the property.⁶²

C. "Red Tagging"

"Red tagging" is also a concern that has been generated by Chapter 235.⁶³ "Red tagging" refers to the cease and desist orders issued by the Commission, stopping all construction on violating property.⁶⁴ Those concerned with "red tagging" believe that Chapter 235 is an inappropriate expansion of the Commission's authority.⁶⁵

However, Chapter 235 merely includes violation information in a title search.⁶⁶ Under existing law, the Commission already has the power to issue cease-and-desist orders.⁶⁷ Chapter 235 does not change the Commission's already existing authority to issue cease-and-desist orders that are the concern of the opposition.⁶⁸ Thus, "red tagging" should not be among the chief concerns surrounding Chapter 235.⁶⁹

58. *Id.*

59. *Id.*

60. CAL. PUB. RES. CODE § 30812(c) (enacted by Chapter 235).

61. See ASSEMBLY COMMITTEE ON NATURAL RESOURCES, COMMITTEE ANALYSIS OF AB 1913, at 3 (Apr. 1, 2002) (stating that expensive civil litigation is what Chapter 235 hopes to avoid); Nera Memorandum, *supra* note 57 (stating that a property owner would be barred from refinancing his home in order to pay for costly litigation by Chapter 235).

62. See CAL. PUB. RES. CODE § 30812(e)(2) (enacted by Chapter 235) (stating that the NOV "is for informational purposes only and is not a defect, lien, or encumbrance on the property."); CALPIRG Memorandum, *supra* note 44 (stating that AB 1913 protects consumers who "have a right to know before they purchase property whether or not there are any state liens against [that property].").

63. Letter from Richard H. Markuson, Deputy Executive Director, Consulting Engineers and Land Surveyors of California, to Alan Lowenthal, Assemblymember (Apr. 1, 2002) [hereinafter Markuson Letter] (on file with the *McGeorge Law Review*).

64. CALPIRG Memorandum, *supra* note 44.

65. Markuson Letter, *supra* note 63. *But see* CALPIRG Memorandum, *supra* note 44 (stating that the CALPIRG group disagrees with the opposition and believes that Chapter 235 will not allow the Commission to "red tag" property).

66. CAL. PUB. RES. CODE § 30812(e)(2) (enacted by Chapter 235).

67. *Id.* § 30810(a) (West 1996).

68. *Id.* § 30812(e)(2) (enacted by Chapter 235).

69. See CALPIRG Memorandum, *supra* note 44 (dismissing the opposition's claims that AB 1913 would allow "red tagging").

D. Burden of Proof

Chapter 235 included language requiring the executive director of the Commission to base a violation decision on substantial proof.⁷⁰ Proponents of Chapter 235 believe that requiring the director to provide substantial proof in order to issue a NOV will obligate the Commission to gather considerable evidence of the violation.⁷¹ Thus, the property owner will be relieved from the expense and burden of proving that there was no violation.⁷² The Commission, which is able to allocate resources, or the responsible local governing agency, will support the expense and time consuming burden of proving a violation.⁷³ This will protect property owners from spending time and funding on what could be an inappropriate NOV.⁷⁴

V. CONCLUSION

Chapter 235 protects California's coast, coastal property owners, and prospective buyers of coastal property.⁷⁵ By giving the Commission a less costly enforcement tool, Chapter 235 will enable more adequate enforcement of existing laws, allowing the public to reap the benefits of the Coastal Act's protections.⁷⁶ Innocent purchasers will no longer fear that they will be "held liable for violations that they did not create."⁷⁷ Chapter 235 will encourage property owners to comply with the Coastal Act and to cooperate with the Commission in resolving Coastal Act violations.⁷⁸ By "mak[ing] the process of enforcing the Coastal Act more [cost] efficient and more effective," the

70. CAL. PUB. RES. CODE § 30812(a) (enacted by Chapter 235).

71. See ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 1913, at 2 (Apr. 24, 2002) (stating that Chapter 235 addresses prior concerns regarding the burden of proof by requiring the director "to provide evidence of a violation before pursuing the NOV process.").

72. See *id.* at 2 (stating the Governor's concern that the burden of proof was inappropriately on the property owner in prior legislation and is rectified by Chapter 235).

73. ASSEMBLY COMMITTEE ON NATURAL RESOURCES, COMMITTEE ANALYSIS OF AB 1913, at 3 (Apr. 1, 2002).

74. *Id.*

75. See Fletcher Letter, *supra* note 1 (stating that Chapter 235 will make the Commission's job of protecting coastal resources easier); ASSEMBLY COMMITTEE ON NATURAL RESOURCES, COMMITTEE ANALYSIS OF AB 1913, at 3 (Apr. 1, 2002) (stating that Chapter 235 will protect "property owners who are attempting to comply with the law."); CALPIRG Memorandum, *supra* note 44 (stating that Chapter 235 "is a consumer protection bill.").

76. ASSEMBLY COMMITTEE ON NATURAL RESOURCES, COMMITTEE ANALYSIS OF AB 1913, at 3 (Apr. 1, 2002).

77. CALPIRG Memorandum, *supra* note 44; see Christie, *supra* note 46, at 2 (stating that under existing law sellers are not required to disclose violations of the Coastal Act).

78. See *id.* (stating that property owners will be more likely to comply with the law if buyers are made aware of the violation).

Commission will be better equipped to protect one of California's greatest natural resources.⁷⁹

79. See Letter from Bill Allayaud, Legislative Director, Sierra Club California, to Howard Wayne, Assemblymember (on file with the *McGeorge Law Review*) (stating that the "cost savings applies to both the State and the property owner.").
