

OCEAN AND COASTAL ISSUES REGARDING THE CALIFORNIA COAST: THE PERFORMANCE OF THE CALIFORNIA COASTAL COMMISSION

**By Edward Everett Vaill
Malibu, CA***

The City of Malibu now faces a crisis of unprecedented proportions as a result of AB988, passed by the California Legislature and signed by Governor Davis in 2001. This legislation purports to grant to the California Coastal Commission the power to draft and “adopt”, in consultation with the City of Malibu, its Local Coastal Program (LCP), including its Land Use Plan (LUP) and the implementing ordinances. This unprecedented abrogation of local control over the planning process of a California city will be completed by September 15, 2002.

The California Coastal Act of 1976 gives the Coastal Commission (CCC) jurisdiction to protect the state’s natural and scenic resources and “the overall quality of the coastal zone environment”. It also empowers the CCC to “assure the orderly, balanced utilization and conservation of coastal zone resources taking into account the social and economic needs of the people of the state”. One of the goals of the Act is to:

...maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone environment consistent with sound resources conservation principles and constitutionally protected rights of private property owners. (Emphasis added)

Malibu is a city which stretches for over 21 miles along the Pacific Ocean coastline and for a mile or so inland. The City of Malibu, by a vote of its citizens, separated itself from the jurisdiction of the County of Los Angeles in 1991 to obtain local control over our land use policies and practices, and to limit unwanted development in our city.

***This presentation is made to the U.S. Commission on Ocean Policy at its meeting in San Pedro, California on April 19, 2002. I am making this statement as a 28 year resident of Malibu, California and not in my other capacity as a Planning Commissioner of the City of Malibu.**

The Coastal Commission has never accepted this, and its latest effort to control Malibu's future (and then to apply it to the other 87 jurisdictions along California's coastline) is a serious threat to our community and the principle of local control of land use policy.

The League of California Cities' position on AB988 is as follows:

It is our view that AB 988 profoundly changes the way the Coastal Commission coordinates with local governments - specifically the City of Malibu. Prior to AB988, the Coastal Commission's role was limited to an administrative decision regarding whether or not the Local Coastal Plan (LCP) submitted by a city or county conforms to the requirements of the Coastal Act. AB988 is a major departure from that practice and how the Commission coordinates with local governments.

(See Exhibit 1 attached hereto) Indeed, the Coastal Act makes it clear that another of its goals is as follows:

To achieve maximum responsiveness to local conditions, accountability, and public accessibility, it is necessary to rely heavily on local government and local land use planning procedures and enforcement.

In its staff's draft LUP for Malibu currently under consideration by the CCC, local land use planning procedures are totally ignored and the CCC is attempting to require the City of Malibu to enforce an LUP much of which is totally opposed by the City officials and most of the citizens of Malibu. In fact, one recently elected member of the City Council stated that he would go to jail rather than vote to enforce the LUP as it is currently drafted. Others share his sentiment.

In 1986, an LUP for the Santa Monica Mountains, including those portions encompassing the City of Malibu, was certified by the CCC. After Malibu became a city in 1991, it prepared its General Plan, which was completed in 1995, and then drafted an LUP. This draft was submitted to the CCC staff in 2000, but it was characterized by the

staff as “dead on arrival” and not reviewed. In July, 2001, the City of Malibu submitted another draft LUP to the CCC, which took the 1986 certified LUP and modified it to conform to the provisions of Malibu’s General Plan. This draft was also summarily rejected by the CCC staff, and in September, 2001, the CCC staff submitted its own draft to the City of Malibu.

An analysis by the Planning Department of the City of Malibu in December, 2001 revealed that of 414 policies in the CCC staff’s September, 2001 draft LUP, 30% of these policies were “Unacceptable” to the City, 34% were “Acceptable with changes” (many of them major) to the City, and 36% were “Acceptable”. At its January, 2002 hearing, the CCC made very few if any changes in the CCC staff’s draft, and the draft LUP is scheduled to become final after a July, 2002 CCC hearing, with the implementation ordinances in place by September 15, 2002, just before the November 2002, election.

There are many outrageous aspects to the CCC staff’s draft LUP, such as wanting to replace the ballfields and open space of Malibu’s beautiful Bluffs Park with an unneeded hotel, replacing landscaping along the roadside of certain Malibu residences with parking places, eliminating fences along property borders to allow free access to such properties by coyotes and mountain lions (without regard to the possible danger to children and pets), and requiring temporary beach permits in order to hold certain beach events. However, the two most serious and misunderstood issues are beach access and the CCC’s designation of much of Malibu as Environmentally Sensitive Habitat Areas (ESHAs), both of which have surface appeal.

The Beach Access Issue

This is the issue the CCC publicists have seized upon in their concerted campaign to paint Malibu as a city filled with a rich bunch of NIMBYs. Many of Malibu’s residents are retired people living on fixed incomes (there are two large mobile home parks within the City) and working families with young children who have recently moved to Malibu. Stories planted on CNN and CBS news programs, and in the Los Angeles Times and the New Times, to name a few, assert that the

CCC is just trying to open up Malibu's beaches to the visiting public. In fact, the following is true:

1. Malibu's 21+ miles of coastline already have many visitor-serving beaches, such as Las Tunas, Surfrider, Malibu Lagoon, Dan Blocker, Paradise Cove, Pt. Dume Headlands, Westward, Zuma, El Matador (which is one of the most beautiful beaches in the world), El Pescador, Nicholas, and Leo Carrillo Beaches. In 28 years living in Malibu, I have never been unable to find a parking place at any Malibu beach which I chose to visit.

2. In addition, considering the fact that Malibu's beaches are only heavily used during the summer months, and perhaps on other major holiday weekends such as Memorial Day (in all, no more than three months per year), the CCC's emphasis on the establishment of "visitor-serving" businesses in Malibu at the expense of other businesses, local recreational uses such as ball fields, private residential uses, and open space, is unrealistic. "Visitor-serving" businesses cannot usually be profitable if they are only visited regularly three months of the year.

3. The issue trumpeted by the CCC regarding "vertical" beach access is also a red herring. In the late 1970s and early 1980s it was the practice of the CCC to require, as a condition to getting a permit, for beach property owners to grant an easement on their property allowing for public beach access, which the CCC euphemistically called "Offers to Dedicate" (OTDs). In 1987, in the case of Nollan v California Coastal Commission, 483 U.S. 825, the U.S. Supreme Court put an end to this practice, branding it "an out-and-out plan of extortion". However, all the pre - Nollan extorted OTDs have since been stockpiled by the CCC, and remain in legal limbo, since neither the CCC nor any local government agency wants to assume the expense, responsibility and legal liability for potential injuries to members of the public resulting from opening these OTDs. Finally, it is quite possible that a Santa Barbara case as to the legality of these past OTDs, and whether or not they represented a "taking", will reach the U.S. Supreme Court this year. See Exhibit 2 hereto.

4. The City of Malibu is not some charitable resource to be dipped into to benefit the citizens of this state. “Visitor-serving” does not mean that the residents of Malibu are to be forced to pay for the recreational needs of the rest of the state. When Malibu became a city in 1991, the County of Los Angeles exacted a terrible price on the City, giving a paltry amount of every property tax dollar, about 7 cents (compared to over 20 cents for every dollar for many other coastal zone cities).

5. The City also gets none of the beach revenues from the beach parking fees generated at Malibu’s beaches. Visitors to Malibu typically do not use Malibu’s “visitor-serving” retail and commercial establishments, but usually come to visit the beach and often, to raise hell. Yet we citizens of Malibu have to pay for most of the law enforcement which polices our City and those who visit it. For this fiscal year, the City of Malibu has budgeted over \$4.3 million of its more than \$11.8 million General Fund budget (or more than 36%) for law enforcement, most of it allocated to deal with problems caused by visitors to Malibu and its beaches, not residents.

The CCC’s Expanded Definition of ESHA

The 1986 LUP carefully designated the areas of Malibu and the Santa Monica Mountains which were considered to be ESHAs. The CCC staff, however, as part of its draft LUP, released a Preliminary Draft of a revised ESHA map for Malibu, based on “junk science”, which classified an additional 2873 acres of Malibu land as ESHAs, or over 70% of all Malibu land. See Exhibit 3 hereto.

The only things that have happened between 1986 and 2002 in Malibu which might affect such ESHA designations are the huge November, 1993 fire, which destroyed 800 or so Malibu homes and burned vast quantities of Malibu open space (and anything therein which might be classified ESHA), and a later fire in 1996. Nevertheless, most of Malibu, developed and undeveloped, is now considered by the CCC staff to be ESHA, which severely limits all future development. The CCC staff draft LUP also deviously puts the burden on the property owner to convince the CCC that the owner’s property is not in an ESHA or should be otherwise excluded. In addition, in a concession to the

possibility that its actions here might be found to be a “taking”, the draft policy allows the minimum amount of development in an area designated as an ESHA by the CCC to avoid a taking (again placing the burden on the property owner to prove that it was a taking.)

Others will provide in detail the ramifications of living and owning property inside Malibu in the CCC’s vastly overinclusive ESHA. Leave it for me to say that the CCC must vastly scale back their staff’s ESHA designation for Malibu, or years of litigation will result. And this litigation would not be the CCC versus an individual homeowner, but protracted litigation with another 800 pound gorilla, the City of Malibu, which has the staying power of the CCC in such litigation. See Exhibit 4 hereto for the City of Malibu’s position regarding the constitutionality of AB 988.

The CCC is known locally at the “Coastal Development Commission”. It is an agency controlled by the Legislature, not by the Governor, and it is responsible to no one and has completely lost its focus, as set forth in the Coastal Act of 1976, which clearly states that the Coastal Commission is to delicately balance its “visitor-serving” charter with the need to preserve and protect the coastal environment, while at the same time preserving the “constitutionally protected rights of private property owners”.

**To reach me: DVAILL@AOL.COM
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