

DOCKETED

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March 3, 2014

Ms. Patricia Kelly
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

Re: Coastal Commission's February 5, 2014 Letter

Dear Ms. Kelley:

On February 5, 2014, Mr. Tom Luster, Senior Environmental Scientist of the California Coastal Commission ("Commission"), submitted a letter to you opining that Redondo Beach's moratorium ordinance¹ "is not effective unless approved by Coastal Commission." As explained below, the view expressed by Mr. Luster is incorrect. No approval by the Coastal Commission is required.

ANALYSIS

I. Coastal Commission Approval Is Only Required For The Addition Of Uses Not Designated In An LCP—Not For The Restriction Of Uses.

The City of Redondo Beach ("City") is disappointed in the Commission's opinion, and is surprised by its position given case law directly on point. The Commission sent a similar letter to the City of Imperial Beach on January 29, 1993, which also stated that its moratorium ordinance would not be effective unless approved by the Coastal Commission. Fortunately for the citizens of Imperial Beach and Redondo Beach, the California Court of Appeal disagreed with the Commission, and upheld the Imperial Beach moratorium

¹ The City initially adopted a 45-day moratorium ordinance pursuant to Government Code § 65858 on December 3, 2013 (Redondo Beach Ordinance 3116-13), which was later extended for 22 months and 15 days (Redondo Beach Ordinance 3120-14). These ordinances state, in part: "There is hereby imposed a moratorium on the approval of any conditional use permit, coastal development permit or any other discretionary City permit or approval for the construction, expansion, replacement, modification or alteration of any facilities for the on-site generation of electricity on any property located within the coastal zone... It is the intent of the City Council that any proposal for new or modified non-coastal dependent electrical generating facilities within the City's coastal zone during the period of the moratorium shall be considered inconsistent with this Ordinance and with the City's land use policies and zoning regulations for all purposes, and by all agencies charged with reviewing any application for such use." (Available online at: <http://laserweb.redondo.org/WebLink/Welcome.aspx>.)

ordinance *without* the Commission's approval/certification. (See *Conway v. City of Imperial Beach* (1997) 52 Cal.App.4th 78.) The City believes the Commission's opinion is plainly incorrect, given the express language of the Coastal Act itself and in light of published opinions from the California Court of Appeal and the California Supreme Court.

The Commission's letter reasoned that certification by the Commission was required because "...the City's ordinance selectively prohibits a type of use that is currently allowed under the LCP, creating a conflict with the LCP." Contrary to the Commission's assertion, an amendment to a certified Local Coastal Program is statutorily defined as including "but is not limited to, any action by a local government *that authorizes the use* of a parcel of land other than a use designated in the certified local coastal program as a permitted use of the parcel." (Pub. Res. Code § 30514(e).) The City's moratorium ordinance does not authorize any use; rather, it temporarily prohibits the City from approving a specified use. (Ordinances 3116-13 and 3120-14, Sections 1 and 2.) Moreover, because the Warren-Alquist Act gives the CEC exclusive jurisdiction over the licensing of power plants, the moratorium ordinance does not actually prohibit the CEC from certifying a new or modified power plant; it merely requires the CEC to make the override findings under Pub. Res. Code § 25525.

Pub. Res. Code § 30005 expressly recognizes that the Coastal Act shall not be interpreted to limit "the power of a city...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." As the California Supreme Court noted: "...*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...*" (*Yost v. Thomas* (1984) 36 Cal.3d 561, 572-573; Pub. Res. Code § 30005.)

The precise argument Coastal Commission raises in their February 5, 2014 letter was expressly rejected by the California Court of Appeal in *Conway v. City of Imperial Beach* (1997) 52 Cal.App.4th 78, 84-90.² In *Conway* the City adopted a moratorium ordinance pursuant to Government Code § 65858 to temporarily reduce height limits and density within portions of the City's certified Local Coastal Program. Coastal Commission sent a letter which stated that the moratorium "...must be submitted for certification prior to becoming

² In recent communications with City regarding this issue, the Commission has cited two opinions by the California Attorney General ("AG") that were issued prior to *Conway* (70 Ops.Cal.Atty.Gen 220 (1987) and an informal opinion dated December 9, 1992). These opinions carry no weight after the *Conway* decision. Tellingly, the Commission has never asked the Attorney General to revisit this issue after *Conway*.

effective.” (*Id.* at 82.) In rejecting this argument the Court of Appeal noted:

...we conclude there is no conflict in this case between section 30514 (or other provisions of the Coastal Act) and Government Code section 65858. As the enactment under Government Code section 65858 did not “authorize a use other than that designated in the LCP as a permitted use,” 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. [¶] Any other conclusion would lead to the absurd consequences that an attempt to advance the purposes of the Coastal Act, which attempt required expeditious action, could be frustrated by the procedures of the very organization, the Coastal Commission, which is designed to advance the purposes of the Act, and thus the very system designed to protect California's coastal resources would be the means by which they were eviscerated. [¶] *We hold that an interim ordinance which does not authorize “a use other than that designated in the LCP as a permitted use” need not be certified by the Coastal Commissions prior to implementation and enforcement.* (*Id.* at 89; Internal cites and footnotes omitted.)

II. The Moratorium Ordinances Further The Purpose Of The Coastal Act By Prohibiting A Use That Is No Longer Coastal Dependent.

As the California Energy Commission (“CEC”) is aware, on May 4, 2010 the State Water Resources Control Board (“SWRCB”) adopted Resolution No. 2010-0020, generally requiring that the use of existing power plant cooling systems that rely on natural ocean water be terminated throughout the State of California by 2020. Two years later, on November 20, 2012, AES Southland Development, LLC (“AES”) filed an application to substantially reconstruct the Redondo Beach AES Power Plant on November 20, 2012. The CEC determined the application was deemed complete on August 27, 2013.

The proposed AES power plant can no longer be considered a coastal dependent or coastal related facility under the Coastal Act. (See Pub. Res. Code §§ 30101, 30101.3.) The City’s current LCP provisions related to the AES site were drafted before SWRCB’s resolution and AES’s current proposal to construct a non-coastal dependent facility. This is the exact situation moratorium ordinances were designed to address. While power plants have historically been coastal dependent, the City should not be forced to accept a new non-coastal dependent facility, which is expressly at odds with the priority of uses under the Coastal Act. (See Pub. Res. Code §§ 30001.5(d) [“The Legislature further finds and declares that the basic goals of the state for the coastal zone are to: ...(d) Assure priority for coastal-dependent and coastal-related development over other development on the coast.”], 30101,

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30255, 30264.)

CONCLUSION

For the foregoing reasons, the moratorium ordinances passed by the City (Ordinances 3116-13 and 3120-14) are currently effective and do not need to be approved by the Coastal Commission.

Very truly yours,



MICHAEL W. WEBB
City Attorney for Redondo Beach