

## Conditions of Approval: "No Do-Overs" On A Condition The Landowner Failed To Challenge When First Imposed.

A landowner's attack on a condition of approval of a development permit was barred by the landowner's failure to contest the same condition when it was imposed on an earlier permit, according to a recent court of appeal decision. [Bowman v California Coastal Commission, B243015 \(2d Dist 2014\)](#).

San Luis Obispo County issued a coastal development permit to rehabilitate a house on a 400-acre beachfront property. The county conditioned the permit upon dedication of an easement for public access along the property's shorefront. The landowner did not appeal to the Coastal Commission or otherwise contest the condition.

Nine months later, the landowner applied for a second coastal development permit, again to rehabilitate the house and also to replace a barn on the property. This second application requested removal of the easement condition. The county approved this second permit, and removed the condition, but environmental groups appealed to the Coastal Commission. The Coastal Commission determined that the easement condition was permanent and binding, and that removal of the condition would violate the Coastal Act policy favoring public access to coastal resources. It conditioned the second permit on implementation of the easement condition of the first permit. The landowner sued, seeking to overturn the condition.

The court sided with the Coastal Commission. It concluded the county made a quasi-judicial determination that the easement condition was valid when it issued the first permit, which became final when the landowner failed to appeal the condition imposed on that permit. That administrative decision is protected by the doctrine of collateral estoppel, the court ruled, which precludes litigation of claims that were contested in a prior proceeding or that could have been contested. Accordingly, the landowner could not launch what amounted to a collateral attack on the first permit condition simply by challenging the second permit.

The court clarified that the status and nature of the coastal development permit were not relevant, since collateral estoppel applied to the final decision to impose the condition rather than to the permit itself. As a result, it was irrelevant that the landowner might have been entitled to "walk away" from the first permit and that the first permit might have expired. Likewise, it did not matter that the Coastal Commission might have modified the permit condition. The landowner pointed to "nothing that would compel the Commission to modify that access easement condition, a condition the validity of which is not subject to attack." The court also found that whether the landowner accepted the first permit was also beside the point.

The court also found that the record contained sufficient evidence to support the Coastal Commission's implied finding that the landowner accepted the permit by completing work on the house restoration; the contention the landowner could accept this benefit while rejecting the burdens of the permit was, according to the court, "untenable." In addition, it found the fact that the landowner completed the work on the house before the first permit was issued even more unavailing. concluding the landowner should not be allowed to obtain an advantage by proceeding with work without a permit.

**Note:** The court has ordered **rehearing** on an important question relating to how the evidence in the record of the agency's proceedings should be treated by a reviewing court. The court has asked the parties to

address specific questions in supplemental briefing including how the rule which provides that a court "must consider all relevant evidence, including evidence detracting from the decision" when determining whether an agency's decision is supported by substantial evidence should be applied and whether it is appropriate for a reviewing court to engage in a "limited weighing of the evidence" under the substantial evidence standard of review. The court's decision on these and related questions when it rehears the case could affect its rulings on whether the evidence in the record supported the Coastal Commissions determinations.

While rehearing is pending, the opinion is not citable as precedent. Nevertheless, the court's rulings on the legal effect of the original conditions of approval illustrates how important it can be to act quickly in contesting unacceptable conditions to a development approval.

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