

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)	
)	
CALIFORNIA COASTAL COMMISSION)	DECISION OF DISAPPROVAL OF REGULATORY ACTION
)	
)	(Gov. Code, sec. 11349.3)
REGULATORY ACTION:)	
Title 14, California Code of)	
Regulations)	OAL File No. 07-1203-01S
)	
ADOPT SECTION 13255.1,)	
AMEND SECTIONS 13055, 13111, 13169,)	
13255.0, 13255.1, 13255.2, AND 13576)	
_____)	
)	

SUMMARY OF REGULATORY ACTION

The California Coastal Commission (“Commission”) proposed to amend the California Code of Regulations, title 14, relating to its filing and processing fees. The Commission sought to increase fee amounts, add four new fee categories, add an escalator clause to update fees each year according to inflation, and add two new provisions for fee reductions.

DECISION

On January 16, 2008, the Office of Administrative Law (“OAL”) disapproved the above referenced regulatory action for failure to comply with the clarity and necessity standards of Government Code section 11349.1.

DISCUSSION

The adoption of regulations by the California Coastal Commission must satisfy requirements established by the part of the California Administrative Procedure Act (“APA”) that governs rulemaking by a state agency. Any rule or regulation adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage. (Gov. Code, sec. 11346.)

Before any rule or regulation subject to the APA may become effective, the rule or regulation is reviewed by the Office of Administrative Law for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards a rule or regulation must be legally

valid, supported by an adequate record, and easy to understand. In this review OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of rules and regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective.

1. CLARITY

The Legislature in establishing OAL, found that regulations, once adopted, were frequently unclear and confusing to the persons who must comply with them. (Gov. Code, sec. 11340(b).) For this reason, OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the “clarity” standard. (Gov. Code, sec. 11349.1(a)(3).) “Clarity” as defined by Government Code section 11349(c) means “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”

- a. Section 13055 of title 14 establishes fees for the processing by the Commission of coastal development permit applications and other filings with the Commission. This regulatory action amends those provisions and adds a new subsection (h)(2) which provides in part:

“The executive director of the commission **may** waive the filing and processing fee **in full or in part** for an application for a housing development that contains housing units the occupancy of which by persons of low or moderate income as defined in Health and Safety Code section 50093 is assured...” (Emphasis added.)

An applicant would not easily understand from the regulation text under what circumstances the executive director may or may not waive the fee for an application for a housing development that contains housing units to be occupied by persons of low or moderate income. Also, if the decision was to waive the fee, an applicant would not know what criteria the executive director would use in determining whether the fee should be waived in full or in part, and if in part, how the amount waived would be determined.

- b. Section 13055 of title 14 establishes fees for the processing by the Commission of coastal development permit applications and other filings with the Commission. This regulatory action amends those provisions and adds a new subsection (h)(3) which provides in part:

“For applications received prior to January 1, 2015, the executive director of the Commission **may** reduce the filing fee for projects that are certified at a minimum of the U.S. Green Building Council’s Leadership in Energy and Environmental Design (LEED) Gold standard or equivalent. After registering a project with an **approved** third-party certification program, applicants expecting to obtain

certification that qualifies for the above-mentioned fee reduction must submit....”
(Emphasis added.)

An applicant would not easily understand from the regulation text under what circumstances the executive director may or may not reduce the filing fees for a project that is certified at a minimum of the LEED Gold standard or equivalent. In addition, the regulation does not specify from whom a third-party certification program must obtain approval, and, if the approval is to be obtained from the Commission, what criteria the Commission would use in determining whether to grant such approval.

2. NECESSITY

Government Code section 11349.1(a)(1) requires that OAL review all regulations for compliance with the “necessity” standard. Government Code section 11349(a) defines “necessity” to mean “. . . the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purpose of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.”

To further explain the meaning of substantial evidence in the context of the “necessity” standard, subdivision (b) of section 10 of the Title 1 of the California Code of Regulations provides:

“In order to meet the ‘necessity’ standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

“(1) a statement of the specific purpose of each adoption, amendment, or repeal;
and

“(2) information explaining why each provision of the adopted regulations is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An ‘expert’ within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.”

In order to provide the public with an opportunity to review and comment upon an agency’s perceived need for a regulation, the APA requires that the agency describe the need for the regulation in the initial statement of reasons. (Gov. Code, sec. 11346.2(b).) The initial statement of reasons must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed or, simply restated, “why” a regulation is needed and “how” this regulation fills that need. (Gov. Code, sec. 11346.2(b)(1).)

The initial statement of reasons must be submitted to OAL with the initial notice of the proposed action and made available to the public during the public comment period, along with all the information upon which the proposal is based. (Gov. Code, secs. 11346.2(b) and 11346.5(a)(16) and (b).) In this way the public is informed of the basis of the regulatory action and may comment knowledgeably. The initial statement of reasons and all data and other factual information, studies or reports upon which the agency is relying in the regulatory action must also be included in the rulemaking file. (Gov. Code, sec. 11347.3(b)(2) and (7).)

The Initial Statement of Reasons (“ISOR”) provided with this regulatory action explains that Commission staff first analyzed the complexity of applications that are received within each fee category and conducted a survey of local governments which charge fees in the Coastal Zone for application review that is similar to the application review performed by the Commission. It is clear from a comparison of the new fee amounts in section 13055 with the local government fee survey that more is needed to explain how the new fee amounts were actually determined. Although the ISOR goes on to discuss each category of fees in greater detail, the information given is not sufficient to determine how each of the new fee amounts were arrived at by the Commission. Information explaining how the new fee amounts were determined should be added to the record and made available to the public pursuant to Government Code section 11347.1.

3. AUTHORITY AND REFERENCE CITATIONS

Subsection (a)(2) of Government Code section 11346.2 provides:

“The agency shall include a notation following the express terms of each California Code of Regulations section, listing the specific statutes or other provisions of law authorizing the adoption of the regulation and listing the specific statutes or other provisions of law being implemented, interpreted, or made specific by that section in the California Code of Regulations.”

Subsection (b) of Government Code section 11349 provides:

“‘Authority’ means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation.”

Subsection (e) of Government Code section 11349 provides:

“‘Reference’ means the statute, court decision, or, other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation.”

The regulation text submitted with this regulatory action did not include authority and reference citations as required by subsection (a)(2) of Government Code section 11346.2. This minor defect can be easily remedied.

We also note that (1) the proposed changes deleted too many words from the second sentence of existing section 13055(d), (2) the depiction of existing regulation language in the regulation text submitted with this regulatory action contained some discrepancies from what is actually printed in the California Code of Regulations, and (3) the proposed new text submitted with this regulatory action contained some misspelled words.

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. If you have any questions, please contact me at (916) 323-6808.

Date: January 23, 2008



CRAIG S. TARPENNING
Senior Staff Counsel

for: SUSAN LAPSLEY
Director

Original: Peter Douglas, Executive Director
cc: Madeline Cavalieri