Filed 4/21/05

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

CALIFORNIA EARTH CORPS, Plaintiff and Appellant, v. CALIFORNIA STATE LANDS COMMISSION et al., Defendants and Respondents; DEVELOPERS DIVERSIFIED REALTY, Real Party in Interest and Respondent.	C041603 (Super. Ct. No. 01CS01556)

APPEAL from a judgment of the Superior Court of Sacramento County, Gail D. Ohanesian, J. Reversed.

Chatten-Brown & Associates, Jan Chatten-Brown, Douglas P. Carstens, and Amy Minteer for Plaintiff and Appellant.

Laurens H. Silver for Coastal Protection, Save Our NTC, Inc., Natural Resources Defense Council, and Surfrider Foundation as Amici Curiae on behalf of Plaintiff and Appellant.

Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistant Attorney General, J. Matthew Rodriquez, Senior Assistant Attorney General, and Alan V. Hager, Deputy Attorney

SEE CONCURRING OPINION

General, for Defendant and Respondent California State Lands Commission.

Robert E. Shannon, City Attorney, James McCabe, Deputy City Attorney; Rutan & Tucker, M. Katherine Jenson, and Robert S. Bower for Defendant and Respondent City of Long Beach.

Radcliff Dongell Lawrence, Richard A. Dongell, John A. Lawrence, and Christopher T. Johnson for Real Party in Interest and Respondent.

Respondents California State Lands Commission (Commission) and City of Long Beach (City) entered into a land exchange agreement to transfer three acres of tidelands in Long Beach protected by the public trust doctrine (the Queensway Bay parcels) out of the public trust in exchange for 10 acres along the Los Angeles River, which would then become public trust land. The transfer would enable the City and the real party in interest developer, Developers Diversified Realty (Developer), to move ahead with the Queensway Bay Development Plan (Development Plan), which would entail construction of a large entertainment and retail complex on the waterfront.

Plaintiff California Earth Corps (Earth Corps) filed a petition for writ of mandate, claiming the Commission's approval of the exchange violated Public Resources Code section 6307 and article X, sections 3 and 4 of the California Constitution.[1] Earth Corps also argued the exchange did not fall within a

[1] All further statutory references are to the Public Resources Code unless otherwise indicated.

statutory exemption from the California Environmental Quality Act (CEQA) (§ 21000 et seq.) relied on by the Commission.

Following a court trial, the court denied the petition. Earth Corps appeals, arguing: (1) the exchange violated both the public trust doctrine and the California Constitution, (2) the exchange violated section 6307, and (3) the exchange was not exempt from CEQA. As a threshold matter, Earth Corps argues we must review the Commission's actions under an independent judgment standard of review. The League for Coastal Protection; Save Our NTC, Inc.; the Natural Resources Defense Council; and the Surfrider Foundation joined together in filing an amici curiae brief in support of Earth Corps. We find the Commission's approval of the exchange not supported by the evidence. Therefore, we reverse the trial court's judgment and grant Earth Corps's petition for writ of mandate.

FACTUAL AND PROCEDURAL BACKGROUND

I. Public Trust Doctrine and the History of the Queensway Bay Parcels

The public trust doctrine, which evolved from Roman law and English common law, holds that the state, as sovereign, owns all of the navigable waterways and the lands lying beneath them "'"as trustee of a public trust for the benefit of the people."'" (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 434 (*National Audubon*), quoting *Colberg, Inc. v. State of California ex rel. Dept. Pub. Wks.* (1967) 67 Cal.2d 408, 416.) Though the rule applies generally to all navigable waters, it had its first application to tidelands. (See

generally *Martin et al. v. The Lessee of Waddell* (1842) 41 U.S. 367, 410 [10 L.Ed. 997, 1013]; *Illinois Central Railroad Co. v. Illinois* (1892) 146 U.S. 387 [36 L.Ed. 1018].) As related to tidelands, the doctrine is codified in article X, section 3 of the California Constitution: "All tidelands within two miles of any incorporated city, city and county, or town in this State, and fronting on the water of any harbor, estuary, bay, or inlet used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations . . . ."

Article X, section 4 of the California Constitution states: "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."

Over 70 conveyances of public trust lands have been made from the state to local agencies. In 1911 the state transferred to the City the state's interest in the tide and submerged lands within the then-existing boundaries of the City, including the Queensway Bay parcels, in trust for the public. The 1911 grant reads, in pertinent part: "[t]hat said lands shall be used by said city and by its successors, solely for the establishment,

improvement and conduct of a harbor, and for the construction, maintenance and operation thereon of wharves, docks, piers, slips, quays, and other utilities, structures and appliances necessary or convenient for the promotion and accommodation of commerce and navigation . . . ." (Stats. 1911, ch. 676, § 1, p. 1305.)

In 1925 the Legislature amended the 1911 transfer of tidelands to add several additional purposes, providing that "none of the lands shall be used or devoted to any purposes other than public park, parkway, highway, [or] playground . . . ." (Stats. 1925, ch. 102, § 1, p. 235.)

The Legislature granted to the Commission the state's residual authority over tidelands granted in trust to local governments. (§ 6301.) This residual authority includes acting as overseer of the activities of the tidelands trustees to ensure that they administer their tidelands grants in conformity with the terms of the grants and the common law public trust for commerce, navigation, and fisheries. (*State of California ex rel. State Lands Com. v. County of Orange* (1982) 134 Cal.App.3d 20.) The trust grantee has primary authority over how its trust lands are administered and the right to select among competing trust uses for a particular trust parcel. The Commission has no approval authority or veto power over a grantee's selection of a particular trust use. The Legislature has the power to amend the trust grant to dictate a particular trust use at a particular trust site. (*County of Orange v. Heim* (1973) 30 Cal.App.3d 694, 707-708 (*Heim*).)

As part of the City's efforts to develop its port, much of the tidelands area was filled and reclaimed. The area now encompassing the Queensway Bay parcels was a public resort area known as the Long Beach Pike. In 1920 the City began filling the tidelands near downtown, building a municipal auditorium on the beach. In the 1950's the City filled more tidelands to construct the Rainbow Pier. During this project, the Queensway Bay parcels were filled in.

In the 1960's the City filled in another 113 acres of the downtown waterfront as part of a waterfront development project. This filling moved the shoreline southward, separating the downtown area from the waterfront. Despite the City's efforts, the area remained largely vacant until the advent of the Queensway Bay development project. The City's local coastal program calls for a "new downtown marina and marina green, hotels and shops, and a new elevated pedestrian promenade to link downtown to the waterfront."

In order to revitalize the area as a major waterfront attraction, the City convened a citizens advisory committee, which met 25 times over two years. With the advisory committee's input, the City devised the Development Plan to rejuvenate the moribund waterfront. The Development Plan consisted of two phases and included a 319-acre portion of the tidelands.

An environmental impact report (EIR), certified in 1995, analyzed the proposed Development Plan. Changes in the Development Plan underwent subsequent environmental review in

1996 and 1998, resulting in an addendum to the EIR and a mitigated negative declaration. In 1995 the California Costal Commission approved an amendment to the local coastal program authorizing the Development Plan and issued a permit for phase II in 2001.[2]

Phase I of the Development Plan consisted of 301 acres and was completed in 1998. Phase I included construction of the Aquarium of the Pacific, and a new commercial harbor with dinner cruises, whale-watching vessels, an events park, and a boat launch. Phase I also included retaining the Queen Mary, docked within the Development Plan area.

Phase II of the Development Plan, at issue in the present case, consists of the construction by a private developer of a complex with restaurant, retail, and entertainment uses on 18 acres. Phase II also seeks to make the shoreline more accessible to the public by constructing a pedestrian walkway over the six-lane Shoreline Drive expressway, eliminating it as an impediment to waterfront access.

As noted, the Queensway Bay parcels are situated on land that was filled and covered with asphalt over 45 years ago. The parcels lie 550 feet from the water at the closest point and are separated from the water by the Shoreline Drive expressway.

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[2] Earth Corps requested revocation of the coastal development permit on the basis that certain requirements related to the tidelands designation were not met. The California Coastal Commission rejected the request, finding it frivolous and without merit.

As part of phase II, the City approved a large-format cinema, a bookstore, a day spa, and a Cost Plus World Market on the Queensway Bay parcels. These approved uses of the parcels led to a dispute between the Commission and the City.

At a Commission meeting, several citizens and citizens groups approached the Commission, objecting to the City's administration of the tidelands and to phase II of the project. These parties contended the proposed uses of the parcels were inconsistent with the public trust limitations on the Queensway Bay parcels. In response, the Commission researched whether tidelands restrictions would permit the disputed uses.

The Commission prepared a report addressing the issue. The report concluded the disputed land uses were not barred by either statute or the public trust doctrine. The report found the uses permitted as "necessarily incidental" to the enjoyment of the tidelands.

At a later public meeting, two members of the Commission disagreed with the report's conclusion, arguing the uses might still be inconsistent with the public trust doctrine. In light of these views, the Commission directed its staff to consider alternatives. Eventually the Commission agreed on a parcel exchange under section 6307 as a way of avoiding litigation with the City.

II. The Parcel Exchange

The Commission evaluated a number of parcels as potential exchange sites. Ultimately, the Commission settled on three parcels along the Los Angeles River (river parcels) totaling

10 acres of land. The Commission determined that, "at the end of the day, the LA River parcels are [of] greater value to the trust, both from trust purposes and non-trust purposes than the parcels we'd be giving up . . . ."

The Commission assessed the fair market value of the river parcels. The investigation leading to an appraisal included a title search, a proposal for title insurance, review of the site (which included plans for development of bikeways and other recreation opportunities along the river), an environmental assessment, and appraisals of both the Queensway Bay and river parcels.

The appraisal determined the river parcels had a value of $3.8 million to $3.9 million, a greater value than the Queensway Bay parcels' estimated value of $2.9 million. Based on its research, the Commission concluded the river parcels were appropriate for designation as public trust lands and therefore appropriate for an exchange under section 6307.

The City held a special meeting and approved the exchange. A few days later, the Commission also held a meeting and approved the exchange. At the meeting, Commission staff proposed the following components to the exchange: (1) the City, as tidelands trustee, will convey to the Commission the Queensway Bay parcels; (2) the Commission will terminate the trust on the Queensway Bay parcels; (3) the City will convey to the Commission the river parcels and receive from the Commission the Queensway Bay parcels free of the public trust; (4) the Commission will impose the public trust for commerce,

navigation, and fisheries on the river parcels; and (5) the Commission will lease to the City under a 49-year lease the river parcels and work with the City to secure legislation including those parcels in the City's tidelands trust grant.

Many citizens, as well as representatives of Earth Corps, submitted written objections to the exchange and spoke in opposition at the Commission meeting. Many voiced concern that the City was sacrificing land that could be used as a public park or open space and instead opting for unnecessary commercial development. Several opponents stated the exchange did not increase public parkland since the river parcels had already been designated by the City for park use.

Following the hearing, the Commission made the following findings regarding the exchange: (1) the exchange is in the best interests of the state and consistent with public trust needs to enhance the configuration and utility of the property adjacent to the shoreline for improvement of public access to the water and development of the uplands; (2) the exchange will not interfere with, but rather enhance, the public's rights of navigation, fishing, and access to the Pacific Ocean and the Los Angeles River; (3) the monetary value of the river parcels to be acquired by the trust is equal to or greater than that of the Queensway Bay parcels that are to be relinquished by the trust; (4) the Queensway Bay parcels, at about three acres, are a very small part of the hundreds of acres of filled tidelands and thousands of acres of unfilled tidelands held by the City in trust; (5) the Queensway Bay parcels have been filled as the

result of a highly beneficial program of harbor development and have for over 30 years been excluded from the public channels, no longer available or susceptible of being used for navigation or fishing; (6) the City can use the river parcels more efficiently than the Queensway Bay parcels to further the public trust; (7) upon the effective date of the exchange, the Queensway Bay parcels no longer will be necessary or useful for the public trust, and the public trust interest in them will be terminated; and (8) the exchange is exempt from the requirements of CEQA under section 21080.11 as an exchange agreement settling a dispute.

III. Earth Corps's Challenges to the Exchange

Earth Corps filed a petition for writ of mandate, alleging three causes of action: the exchange violates section 6307, the exchange violates the California Constitution, and the Commission improperly invoked section 21080.11 to exempt the exchange from CEQA. The petition named the Commission and the City as respondents and the Developer as the real party in interest. The Developer filed a motion for summary adjudication on the first two causes of action. The trial court issued an order requiring the summary adjudication motion to be heard at the same time as the petition for writ of mandate.

A court trial followed briefing by all parties. The court issued a written ruling denying the petition for writ of mandate and declining to rule on the motion for summary adjudication. The court determined the appropriate standard of review for the exchange, a quasi-legislative act, was whether the Commission's

actions were arbitrary, capricious, or entirely lacking in evidentiary support. The court rejected Earth Corps's argument that section 6307 does not allow for the termination of public trust restrictions on land so long as the land is useful for any public trust purpose, finding such an argument ignored the explicit language of section 6307.

The court reviewed the facts and determined Earth Corps failed to show the Commission's actions were arbitrary, capricious, or entirely lacking in evidentiary support. According to the court: "Petitioner has not shown that the exchange was not in the best interests of the state 'to enhance the configuration of the shoreline for the improvement of the water and upland' as required by . . . section 6307. There is evidence in the record that the Queensway Bay parcels had been filled, paved over and used as parking lots for many years, and that the exchange will allow improvements of the upland which will make greater use of the Queensway Bay parcels, will attract additional visitors to the shoreline, and will improve the access to the shoreline and water. The fact that there may also be benefit to the developer does not mean that it is not in the best interests of the state." The court found the appraisals assigned a greater value to the river parcels than to the Queensway Bay parcels. In addition, the court found the Commission's actions did not run afoul of the California Constitution.

Regarding the CEQA exemption, the trial court found the dispute concerning the proper usage of the Queensway Bay parcels

is a bona fide title problem within the meaning of section 21080.11. The court noted: "The exchange was in connection with a settlement of this title problem. Thus, the transaction is exempt from environmental review. The exchange and the removal of the public trust do not need to be examined separately for purposes of the exemption."

The trial court entered judgment denying the petition for writ of mandate. Earth Corps filed a timely notice of appeal.

DISCUSSION

I. Standard of Review

As a preliminary matter, we consider the appropriate standard of review applicable at trial and on appeal. Clearly, we resolve questions regarding statutory interpretation de novo. (*Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 548-549.) According to Earth Corps, independent judgment is the appropriate standard for review of the Commission's factual determinations. Earth Corps reasons the public has a fundamental vested interest in public trust lands and a right to use them for trust purposes.[3] Since the Commission's administrative decision substantively affects this right, Earth Corps insists the court "'not only examines the administrative record for errors of law but also exercises its independent judgment upon the evidence . . . .'" (*Fukuda v.*

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[3] We grant Earth Corps's application for judicial notice of both Attorney General Opinion No. 95-901 (July 8, 1996) and Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention* (1970) 68 Mich. L.Rev. 471.

City of Angels (1999) 20 Cal.4th 805, 816, fn. 8.)[4] The City, the Commission, and the Developer disagree and urge us to affirm the arbitrary and capricious standard employed by the trial court.

The concept of "fundamental vested rights" and the related standard of independent judgment review generally apply to factual determinations by administrative agencies acting in a quasi-judicial capacity. The arbitrary and capricious standard applied by the trial court pertains to quasi-legislative actions of administrative agencies. Earth Corps argues the Commission was acting in a quasi-judicial capacity and not in a quasi-legislative capacity as determined by the trial court.

We consider each argument in turn.

A. Fundamental Vested Rights

In reviewing administrative decisions that substantially affect a fundamental vested right, the trial court "not only examines the administrative record for errors of law but also exercises its independent judgment upon the evidence disclosed in a limited trial de novo."[5] (*Bixby*, *supra*, 4 Cal.3d at p. 143;

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[4] The City briefly argues Earth Corps invited the trial court to apply the arbitrary/capricious standard of review, thereby waiving any objection to the standard of review. We disagree. Our review of the record reveals Earth Corps objected to the arbitrary and capricious standard. We find no waiver.

[5] Thereafter, an appellate court's review of the trial court's factual findings is confined to determining whether the findings are supported by substantial evidence. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143, fn. 10.)

Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28 (*Strumsky*).) This category of fundamental right encompasses quasi-judicial administrative decisions that have an impact on the individual sufficiently vital to compel independent court review. (*Hernandez v. Department of Motor Vehicles* (1981) 30 Cal.3d 70, 83.) Courts have held such fundamental rights to include the opportunity to continue practicing one's profession or the right to receive a service-connected death allowance. (*Drummey v. State Bd. of Funeral Directors* (1939) 13 Cal.2d 75, 85; *Strumsky*, *supra*, 11 Cal.3d at p. 45.)

By contrast, an organization of taxpayers and property owners possesses no fundamental vested right in the granting or denial of a zoning variance, a subdivision map, or a special use permit. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 510, fn. 1; *Friends of Lake Arrowhead v. Board of Supervisors* (1974) 38 Cal.App.3d 497, 518, fn. 18; *Jones v. City Council* (1971) 17 Cal.App.3d 724, 728-729.)

In support of its argument for independent judgment review, Earth Corps asserts: "The public trust is a fundamental vested right of humankind, comparable to the right to vote or to travel." Earth Corps provides no direct authority for this assertion but offers this homily from *National Audubon*: "'By the law of nature these things are common to mankind -- the air, running water, the sea and consequently the shores of the sea.'"

(*National Audubon*, *supra*, 33 Cal.3d at pp. 433-434, quoting Institutes of Justinian 2.1.1.)

As the City points out, while the people of California possess a fundamental interest in the forests, coastline, and tidelands of the state, they possess no vested possessory interest in these natural resources. (*Gallegos v. State Bd. of Forestry* (1978) 76 Cal.App.3d 945, 950; *Sierra Club v. California Coastal Zone Conservation Com.* (1976) 58 Cal.App.3d 149, 155.) "Fundamental" and "vested" are elusive concepts when applied in this context. However, there is no basis in logic or in prior published decisions to view Earth Corps's interest as either vested or fundamental and thus no grounds to invoke the doctrine of fundamental vested interests.[6]

B. Adjudicatory or Legislative

The independent judgment test applies where a "fundamental vested right" has been encroached upon by administrative action. (*Bixby*, *supra*, 4 Cal.3d at p. 144.) Where such rights are not at stake, the trial court applies a more deferential standard. The question then becomes whether the agency abused its discretion. Abuse of discretion is shown if (1) the agency has

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[6] Earth Corps argues the public's rights are vested, relying on *Marks v. Whitney* (1971) 6 Cal.3d 251 (*Marks*) and *Forestier v. Johnson* (1912) 164 Cal. 24 (*Forestier*). In *Marks*, the Supreme Court found it improper to enjoin a property owner from exercising public trust rights to tidelands. (*Marks*, *supra*, 6 Cal.3d at p. 261.) In *Forestier*, the Supreme Court held private landowners cannot exclude the public. (*Forestier*, *supra*, 164 Cal. at pp. 36-40.) Neither case finds the public holds a vested possessory interest in public trust lands.

not proceeded in a manner required by law, or (2) the determination is not supported by substantial evidence. We apply the same standard on appeal. (*Id.* at p. 143.)

An even more deferential standard of review is applied if the administrative action is deemed to be legislative in character. Indeed, "[o]f all the activities undertaken by an administrative agency, quasi-legislative acts are accorded the most deferential level of judicial scrutiny." (*Pulaski v. Occupational Safety & Health Stds. Bd.* (1999) 75 Cal.App.4th 1315, 1331 (*Pulaski*), citing *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 575-576; see also *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 361.) "'As to the quasi-legislative acts of administrative agencies, "judicial review is limited to an examination of the proceedings before the officer to determine whether his action has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether he has failed to follow the procedure and give the notices required by law." [Citations.]'" (*Major v. Memorial Hospitals Assn.* (1999) 71 Cal.App.4th 1380, 1398.)[7]

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[7] The nature of the administrative action or decision also affects the nature of the judicial remedy. Usually, quasi-legislative acts are reviewed by ordinary mandate under Code of Civil Procedure section 1085 and quasi-judicial acts are reviewed by administrative mandate under Code of Civil Procedure section 1094.5. We note the present action was commenced as a petition for writ of mandate action without reference to either Code of Civil Procedure section. In any event, the choice of

Earth Corps contends the Commission's decision regarding the exchange of the Queensway Bay parcels was adjudicatory rather than legislative in nature. The Commission's action was not legislative, according to Earth Corps, because it did not establish any rule or policy; the Commission merely pursued a policy previously set by the Legislature when it adopted section 6307.

Distinguishing between quasi-legislative and quasi-judicial action can be difficult. "Generally speaking, a legislative action is the formulation of a rule to be applied to all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts." (*Strumsky*, *supra*, 11 Cal.3d at p. 35, fn. 2.) However, legislative acts are not limited to rule-making. And the fact that the agency acts after proceedings that bear some indicia of quasi-judicial action does not affect the legislative character of the act. (*Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 230.)

"The courts exercise limited review of legislative acts by administrative bodies out of deference to the separation of powers between the Legislature and the judiciary, to the legislative delegation of administrative authority to the agency, and to the presumed expertise of the agency within its scope of authority." (*California Hotel & Motel Assn. v.*

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remedy does not foreclose Earth Corps's arguments on scope of review.

Industrial Welfare Com. (1979) 25 Cal.3d 200, 211-212; accord, *Pulaski*, *supra*, 75 Cal.App.4th at p. 1331.) It follows that an agency acts in a legislative capacity when it is empowered by statute to make policy choices that would otherwise be made by the Legislature. This policy-making role is fundamentally different from the adjudicative role typically performed by administrative agencies. When acting in a quasi-judicial capacity, the agency is duty bound to apply policies established by the Legislature as expressed in applicable statutes. Mandate lies to enforce that duty. When vested with authority to make policy, the agency has the discretion to define the public interest in the Legislature's stead. Judicial review in such a circumstance is extremely deferential as it would be had the policy judgment been made by the Legislature directly. The fact that the Legislature circumscribes the agency's policy-making discretion with decisional criteria and fact-finding requirements does not alter the legislative character of the act.

The authority to remove lands from the public trust has been recognized as an instance of such a delegation. In *Heim*, *supra*, 30 Cal.App.3d 694, Orange County entered into an agreement with The Irvine Company to develop upper Newport Bay as a harbor. The parties entered into a land exchange agreement, which the Commission approved. The agreement was made pursuant to an amendment to the county's statutory trust grant, which created a limited exception to its prohibition on the alienation of granted tidelands. (*Id.* at p. 702.) The

Commission found the land exchange came within the limited exception.

The appellate court found the Commission's approval of the agreement involved the exercise of its authority delegated by the Legislature to administer tidelands grants. According to the *Heim* court: "As we have previously observed, administration of the tidelands trust is a legislative function. We think it beyond question that the determinations of the [Commission] pertaining to administration of the trust pursuant to an express delegation of authority from the Legislature must be classified as quasi-legislative in character. It is established that in reviewing quasi-legislative actions of administrative agencies the scope of judicial review is limited to an examination of the proceeding before the agency to determine whether its actions have been arbitrary, capricious or entirely lacking evidentiary support, or whether it has failed to follow the procedure or give the notices required by law." (*Heim*, *supra*, 30 Cal.App.3d at pp. 718-719.)[8]

In *People ex rel. State Lands Commission v. Superior Court* (1974) 36 Cal.App.3d 727, 743-744, the appellate court adopted *Heim*'s reasoning, finding the Commission's proceedings "quasi-legislative in character." The appellate court clearly

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[8] The court in *Heim* ultimately found the exchange invalid since it would have resulted in the relinquishment of two-thirds of the shoreline of the bay to private ownership. Such a large-scale exchange did not conform to the mandated "relatively small parcel" criterion. (*Heim*, *supra*, 30 Cal.App.3d at p. 726.)

differentiated the Commission's legislative character from that of a judicial body. (*Id.* at p. 743.)

Earth Corps labels the discussion in *Heim* of the standard of review applicable to Commission decisions "sweeping dicta." Instead, Earth Corps relies on *Martin v. Smith* (1960) 184 Cal.App.2d 571 (*Martin*), which found an action by the Commission administrative in nature.

However, the discussion of the standard of review was not unnecessary to the court's discussion; it directly impacted the outcome of the case and can hardly be regarded as "sweeping dicta." Nor does *Martin* compel a different result. In *Martin*, the court considered a referendum and a local entity's authority under a lease to consent to the subleasing of tidelands properties by the lessee. (*Martin*, *supra*, 184 Cal.App.2d at p. 577.) *Martin* found the city council's findings regarding the leases were administrative since the council was merely implementing policies declared by the state. (*Id.* at pp. 576-577.) *Martin* also noted the grant of tidelands and the approval of the original lease were legislative acts. (*Id.* at pp. 575-576.) *Martin* never considered the nature of exchange agreements or the termination of public trust restrictions. Accordingly, we find *Heim* both well reasoned and controlling.[9]

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[9] In its reply brief, Earth Corps seizes for the first time on the decision in *Sierra Club v. City of Hayward* (1981) 28 Cal.3d 840 (*Hayward*) as providing the paradigm for differentiating between adjudicatory and legislative acts. *Hayward* considered a decision to cancel a Williamson Act contract. The City of Hayward argued the decision was legislative in nature and

II. The Exchange of the Queensway BAY Parcels

Section 6307

Section 6307 lies at the heart of the dispute among the parties. Section 6307 states, in part: "Whenever it appears to the commission to be in the best interests of the state, for the improvement of navigation, aid in reclamation, or for flood control protection, or to enhance the configuration of the shoreline for the improvement of the water and upland, on navigable rivers, sloughs, streams, lakes, bays, estuaries, inlets, or straits, and that it will not substantially interfere with the right of navigation and fishing in the waters involved, the commission may exchange lands of equal value, whether filled or unfilled with any state agency, political subdivision, person, or the United States or any agency thereof. Any land so acquired shall have the same status as to administration, control and disposition as the lands for which it was exchanged. . . . The lands exchanged may be improved, filled and reclaimed by the grantee, and upon the adoption of a resolution by the State Lands Commission finding and declaring

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reviewable in a mandamus action. The Supreme Court found the cancellation proceedings were adjudicatory in nature. (*Id.* at p. 849.) According to Earth Corps, under the analysis of *Hayward*, the Commission's decision to exchange the Queensway Bay parcels was also adjudicatory. We disagree. Earth Corps painstakingly attempts to pigeonhole the Commission's activities into the categories considered adjudicatory by the court in *Hayward*. However, in *Hayward*, the court found that Williamson Act "cancellation proceedings are classically adjudicatory in nature." (*Ibid.*) Nothing in the proceedings surrounding the exchange strikes this "classically adjudicatory" note in the present case.

that such lands have been improved, filled, and reclaimed, and have thereby been excluded from the public channels and are no longer available or useful or susceptible of being used for navigation and fishing, are no longer in fact tidelands or submerged lands, such lands shall thereupon be free from the public trust for navigation and fishing. . . ."

Earth Corps mounts a spirited attack on the Commission's conveyance of the Queensway Bay parcels, arguing the conveyance violated both common law public trust doctrine requirements and the California Constitution. Since section 6307 forms the heart of the Commission's action in approving the exchange, we examine these arguments in detail.

Section 6307 permits a land exchange only for the purposes of the improvement of navigation, aiding in reclamation, flood control protection, or of enhancing the configuration of the shoreline for the improvement of the water and upland on navigable rivers, sloughs, streams, lakes, bays, estuaries, inlets, or straits. The land must be exchanged for land of equal value. Once these conditions are met, the land may be exchanged. Only if an exchange takes place may the former public trust lands be filled and reclaimed after adoption of a finding by the Commission.

Enhance the Configuration of the Shoreline

We begin our analysis with a consideration of whether the exchange complies with the exacting requirements of section 6307. The debate centers on whether the exchange will "enhance the configuration of the shoreline" as required by the

statute. The Developer, Commission, and City all contend the Development Plan will enhance the use of and public access to the shoreline. Earth Corps argues the statutory requirement is not met.

Under section 6307, an exchange is authorized in order "to enhance the configuration of the shoreline for the improvement of the water and upland." The Commission, in its findings in support of the exchange, stated: "The exchange agreement is in the best interests of the state and consistent with public trust needs *to enhance the configuration and utility of the property adjacent to the shoreline for improvement of public access to the water and development of the upland.*" (Italics added.) In its findings, the Commission altered the required purpose underlying an exchange by adding the concepts of utility of public access and development, not improvement, of the uplands.

The trial court, in upholding the exchange, found: "Petitioner has not shown that the exchange was not in the best interests of the state 'to enhance the configuration of the shoreline for the improvement of the water and upland' as required by . . . section 6307. There is evidence in the record that the Queensway Bay parcels had been filled, paved over and used as parking lots for many years, and that the exchange will allow improvements of the upland which will make greater use of the Queensway Bay parcels, will attract additional visitors to the shoreline, and will improve the access to the shoreline and water."

The court's reasoning also employs the language of improved access as a purpose of the exchange. Nothing in section 6307 supports such a construction. The statute speaks of enhancing the configuration of the shoreline. It is silent on the issue of access or utility.

In addition, the trial court's focus on the present paved-over state of the parcels has no bearing on a section 6307 analysis. It is undisputed the Queensway Bay parcels are tidelands protected by the public trust doctrine. Their current state does not alter the statutory restriction that land may be exchanged only for certain purposes and only for land of equal value. Section 6307 makes no exception for land that is currently being used for purposes other than those enumerated in the statute. Parking lot or not, the exchange of the Queensway Bay parcels must conform to the requirements of section 6307.

On appeal, Earth Corps argues the Development Plan "in no way affects the shoreline itself." According to Earth Corps, since the Queensway Bay parcels are separated from the shoreline by an expressway, termination of the public trust protection cannot enhance the configuration of the shoreline. Earth Corps also contends any enhancement of the shoreline must be the result of physical changes to the shoreline.

Respondents present a variety of responses to this argument. The Developer points out the Queensway Bay parcels "have been covered in asphalt and remained unused for over 20 years, and in their current state pose an obstacle to the City's development and use of its waterfront area." The

Developer asserts it is indisputable the Development Plan as a whole "'enhances the configuration of the [City's] shoreline for the improvement of the water and upland.'"

Unfortunately, although the Developer uses the magic words "enhances the configuration of the shoreline," its brief contains absolutely no discussion of what this enhancement entails. Instead, the Developer rather circuitously states the Commission concluded that the exchange "will enhance the configuration of the shoreline for the improvement of the waterfront area in the City by allowing for the completion of the Development Plan." In other words, removing the final obstacle to the Development Plan will enhance the shoreline. The Developer provides no authority for this assertion.

The Commission argues the Queensway Bay parcels have been virtually unused for over 20 years, providing no significant trust benefit to the public. To fill this void, the development plan "is transforming the City's filled tidelands adjacent to its downtown area into an area that will attract people to the shoreline and provide for public use of this previously unused or minimally used area." However, section 6307 does not permit exchanges to encourage or increase public use, nor does section 6307 exempt minimally used public trust land from its requirements.

Finally, the City contends the removal of the public trust designation will allow the development of the Queensway Bay parcels as a premier urban waterfront attraction to proceed without the delay caused by a title dispute. The exchange will

also improve public access to the shoreline and "will facilitate access to the public trust resources of the tidelands area." Again, section 6307 does not allow for an exchange based upon facilitating access.

The City also argues the exchange will enhance the configuration of the shoreline: "The Exchange effectively rearranges the tidelands so that they are now those actively-utilized parcels located directly adjacent to the Los Angeles River, rather than those unused parcels located over 550 feet from Rainbow Harbor. This rearrangement of tidelands fits squarely within the definition of configuration."

We find the City's argument unconvincing. The City claims the exchange of the Queensway Bay parcels for the river parcels is a "rearrangement of [the] tidelands." However, a rearrangement of two parcels of land does not denote an enhancement of the configuration of the shoreline. The river parcels are not part of the shoreline, and the removal of the Queensway Bay parcels does not, in itself, enhance the shoreline.

During oral argument, respondents urged us to read section 6307 as requiring that either the land conveyed *or* the land acquired enhance the configuration of the shoreline. Thus, under respondents' theory, the proposed improvement of the river parcels "enhanced the configuration of the shoreline" and satisfied section 6307.

We find such a construction does not comport with the language of section 6307. Section 6307 sets forth the purposes

to be served by the exchange: "improvement of navigation, aid in reclamation, or for flood control protection, or to enhance the configuration of the shoreline." These purposes refer to the land to be conveyed, land "on navigable rivers, sloughs, [and] streams . . . ." Section 6307 then precludes any exchange that "substantially interfere[s] with the right of navigation and fishing in the waters involved." Once these conditions are met, the statute then allows the Commission to exchange "lands of equal value," subjecting the land acquired to the same status as the land conveyed. The purposes served by the exchange unambiguously refer to the land to be exchanged, not the land to be acquired.

No one, not the Commission in its findings, the trial court in its ruling, or any of the respondents in their briefs, focuses squarely on section 6307's requirement that the underlying purpose of the exchange be "to enhance the configuration of the shoreline for the improvement of the water and upland." Instead, the concept of access and utility creeps into the various analyses, as though development itself is an unquestionable "enhancement."

We agree with Earth Corps that the use of the phrase "configuration of the shoreline for the improvement of the water and upland," when read in context, denotes a change to the physical shoreline or construction of an improvement at the shoreline. Section 6307 begins: "Whenever it appears to the commission to be in the best interests of the state, *for the improvement of navigation, aid in reclamation, or for flood*

control protection, or to enhance the configuration of the shoreline for the improvement of the water and upland . . . the commission may exchange lands of equal value." (Italics added.) These purposes all evoke changes to the physical geography of the natural shoreline, such as dredging for improvement of navigation or filling for reclamation, or constructing improvements such as dikes and levees for flood control.

Read in context, the goal of enhancing the configuration of the shoreline requires a change of the physical geography of the shoreline or the construction of an improvement to the shoreline. The exchange at issue does neither. It does not change the physical geography of the shoreline, nor does it add an improvement to the shoreline.

After considering the record before us, we conclude the Commission's finding that the exchange "enhance[s] the configuration . . . of . . . the shoreline for improvement of . . . water and . . . upland" is lacking in evidentiary support. In the absence of such evidence, the Commission erred in finding the exchange met the criteria set forth in section 6307.

As the Supreme Court has observed: "'[S]tatutes purporting to authorize an abandonment of . . . public use will be carefully scanned to ascertain whether or not such was the legislative intention, and that intent must be clearly expressed or necessarily implied. It will not be implied if any other inference is reasonably possible. And if any interpretation of the statute is reasonably possible which would not involve a

destruction of the public use or an intention to terminate it in violation of the trust, the courts will give the statute such interpretation.'" (*National Audubon*, *supra*, 33 Cal.3d at p. 438.)

Although the abandonment of the public trust is within the power of the Legislature, such abandonment takes place under limited, unique circumstances. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 485.) Section 6307 permits the Legislature to delegate to the Commission the power to abandon the public trust. To exercise this power, the Commission must find the specific requirements of section 6307 are met before the exchange may take place. In the present case, these conditions have not been met, and the Commission may not exchange the Queensway Bay parcels for the river parcels.

DISPOSITION

The judgment is reversed. Earth Corps's petition for writ of mandate is granted. Earth Corps shall recover its costs on appeal.

RAYE, J.

I concur:

NICHOLSON, J.

I concur in the judgment that Public Resources Code section 6307 does not authorize the State Lands Commission (Commission) to enter into a land exchange with the City of Long Beach (City) by which the Commission would free former tidelands from the public trust over commerce, navigation and fisheries. I do so on the view that section 6307 does not apply to former tidelands that are not on navigable waters because they have been filled.

I

The lands to be conveyed, three acres of former tidelands (the Queensway Bay parcels), are part of a 1911 grant by the Legislature of tidelands and submerged lands to City for uses connected with the development of Long Beach Harbor.[1]

By the terms of the exchange City would convey to the State the parcels, which were filled in the 1960s and rendered useless

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[1] The grant provided "[t]hat said lands shall be used by said city and its successors *solely* for the establishment, improvement and conduct of a harbor, and for the construction, maintenance and operation thereon of wharves, docks, piers, slips, quays, and other utilities, structures and appliances necessary or convenient for the promotion and accommodation of commerce and navigation . . . ." (Stats. 1911, ch. 676, § 1, p. 1305, italics added.)

In 1925 the grant was amended to add the additional uses of a "public park, parkway, highway, [or] playground . . . ." (Stats. 1925, ch. 102, § 1, p. 235.) In 1935 the grant was again amended to allow the leasing of the subject lands by certain nonprofit benevolent and charitable institutions for the benefit of seamen and other persons engaged in commerce, fishery, and navigation. (Stats. 1935, ch. 158, § 1, p. 794; see *People v. City of Long Beach* (1959) 51 Cal.2d 875.)

for harbor development, and 10 acres along the Los Angeles River which City owns. The Commission would free the parcels from the public trust and reconvey them to City for development as a cinema, market, bookstore and other entertainment uses. The parties then would ask the Legislature to include the Los Angeles River lands within the public trust.

California Earth Corps challenges the exchange because it violates the common law public trust in tidelands and the alienation provisions of article X, section 3 of the state Constitution. The Commission contends it has authority to effect the exchange pursuant to Public Resources Code section 6307.

II

Public Resources Code section 6307

The State holds the tidelands and submerged lands "in trust for public purposes, which have traditionally been delineated in terms of navigation, commerce, and fisheries." (C*ity of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 482; see also *People v. California Fish Co*. (1913) 166 Cal. 576, 583-603.)[2] Article X, section 3 (former article XV, section 3)[3] bars the alienation of

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[2] "[T]he public trust is not limited by the reach of the tides, but encompasses all navigable lakes and streams." (*National Audubon Society v. Superior Cour*t (1983) 33 Cal.3d 419, 435.)

[3] As applicable in 1911, article XV provided that "[a]ll tidelands within two miles of any incorporated city, city and county, or town in this State, and fronting on the water of any harbor, estuary, bay, or inlet used for the purposes of navigation, shall be withheld from grant or sale to private

tidelands into private ownership. "[It] flatly forbids alienation of . . . tidelands within two miles of an incorporated city - *whether or not* they are trust lands at the time of alienation." (*Mansell*, *supra*, 3 Cal.3d at p. 482.) Notwithstanding, the courts have held the Legislature may alienate a small part of a tidelands grant, and remove the public trust from the lands conveyed, if they are the product of a comprehensive system of harbor development. (*Id.* at pp. 485-486.)

The authority to do so prospectively has been delegated to the Commission in Public Resources Code section 6307. It was amended in 1965 as the first two sentences of the present section. (Stats 1965, ch. 1354, § 1.) They read, with numbers added to show the relation of the clauses: "Whenever it appears to the commission to be in the best interests of the state, [1] for the improvement of navigation, aid in reclamation, or for flood control protection, or to enhance the configuration of the shoreline for the improvement of the water and upland,[4] [2] on navigable rivers, sloughs, streams, lakes, bays, estuaries, inlets, or straits, and [3] that it will not substantially interfere with the right of navigation and fishing in the waters involved, [4] the commission may exchange lands of equal value,

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persons, partnerships or corporations." (Adopted May 7, 1879; see also *City of Long Beach v. Mansell, supra,* 3 Cal.3d at p. 478.)

[4] The placement of the comma indicates the following phrase, "on navigable [waters]," was intended to modify the preceding clauses.

whether filled or unfilled with any state agency . . . . [5] Any land so acquired shall have the same status as to administration, control and disposition as the lands for which it was exchanged."

It can be seen that [1] concerns the purposes to be served by an exchange, [2] refers to the land to be conveyed, namely land "*on* navigable" waters [the traditional subject of the common law public trust doctrine], [3] precludes interference with navigation and fishing on the affected waters, and [4] refers to the lands to be acquired, namely "lands of equal value, whether filled or unfilled . . . ." Lastly, [5] refers to the land in [4], namely the "land so acquired," and as to that land says the Commission has the same control over it as the land conveyed.[5] (Italics added.)

The last sentences of Public Resources Code section 6307, authorizing the filling of lands conveyed by the Commission, were added by amendment in 1968. (Stats. 1968, ch. 1354, § 1, p. 2587.) Three years earlier the Legislature enacted Statutes of 1965, chapter 1688, regarding the tide and submerged lands of Alamitos Bay, another part of the 1911 grant to City.[6] It

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[5] At oral argument it was claimed the phrase, "exchange lands of equal value" in clause [4], refers in the plural to both the land conveyed and the land acquired. But [5] makes clear the phrase refers to the "land so acquired," not the land conveyed. (See also fn. 4, *supra*.)

[6] The lands in Alamitos Bay are a portion of the lands conveyed to the City of Long Beach for the purposes specified by Statutes of 1911, chapter 676 and Statutes of 1925, chapter 102.

specifically authorized the Commission to convey former tidelands that had been filled.[7]

With the 1965 legislation as a ready example, the Legislature, in 1968, added the last sentences to Public Resources Code section 6307, authorizing the grantee of unfilled tidelands to fill them, without a hint that section 6307 applies to tidelands that are no longer on navigable waters because they have been filled.

It is clear the Queensway Bay parcels are not "on navigable" waters, as shown in the majority opinion. For that reason, the proposed exchange cannot "enhance the configuration of the shoreline . . . ." There is no shoreline to be reconfigured.

Conclusion

Public Resources Code section 6307 does not authorize the Commission to convey former tidelands that have been filled and are no longer "on navigable" waters. To accomplish an exchange

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(See Stats. 1965, ch. 1688, § 1; *Mansell*, *supra*, 3 Cal.3d at p. 501.)

[7] The 1965 legislation is the subject of *City of Long Beach v. Mansell*, *supra*. The legislation provided that if "[i]t is found . . . that portions of [the] land . . . have been heretofore improved in connection with the development of the Alamitos Bay area, and in the process of said development have been filled and reclaimed . . . are no longer submerged or below the line of mean high tide and are no longer necessary or useful for commerce, fisheries, or navigation" the Commission is instructed to determine that fact and upon the recordation of its determination the "lands shall be thereupon freed of the public use and trust for commerce, fisheries and navigation." (*Mansell*, *supra,* 3 Cal.3d at pp. 501-505.)

of the Queensway Bay parcels, City must obtain the approval of the Legislature.

BLEASE, Acting P. J.