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OPINION	:	No. 79-606
	:	
of	:	October 4, 1979
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SUBJECT: LIABILITY OF COASTAL COMMISSION—The California Coastal Commission would not be liable for any accident or injury resulting from a hazardous condition on a road or highway where the Commission denies a permit application for a project which is designed to alleviate or eliminate that dangerous condition.

The California Coastal Commission has requested an opinion on the following questions:

1. Is the California Coastal Commission liable for accident or injury which results from a continuing hazardous or dangerous condition on a road or highway where the Commission denies a permit application for a project which is designed to eliminate that dangerous condition?

2. Would any liability of the California Coastal Commission for accident or injury resulting from a continuing hazardous or dangerous condition on a road or highway be affected by the fact that alternatives to a proposed project more consistent with the objectives of the Coastal Act and which alternatives might also alleviate the dangerous or hazardous condition had not, in the Commission's judgment, been fully or adequately explored?

CONCLUSIONS

1. The California Coastal Commission would not be liable for any accident or injury resulting from a continuing hazardous or dangerous condition on a road or highway where the Commission in furtherance of the purposes and objectives of the Coastal Act, denies a permit application for a project which is designed to alleviate or eliminate that dangerous condition.

2. In light of the conclusion to question number 1, it is not necessary to answer question number 2.

ANALYSIS

The California Coastal Commission (commission) under the California Coastal Act of 1976 (Pub. Resources Code, § 30000 *et seq.*) is the successor to the California Coastal Zone Conservation Commission established by initiative act, the California Coastal Zone Conservation Act of 1972. (Pub. Resources Code, § 30331.) The Coastal Act also provides, on a temporary basis, for six regional coastal commissions (regional commissions). (Pub. Resources Code, §§ 30105(a), 30303, 30305.) The Coastal Act is essentially a land use planning mechanism for the coastal zone of the state. This is to be accomplished by the preparation of local coastal programs by local governments or regional commissions, which programs in turn are to be certified by the commission. (Pub. Resources Code, § 30500 *et seq.*) Development within the coastal zone is to be subject to and consistent with that land planning and the criteria specified in the Coastal Act. (Pub. Resources Code, §§ 30200–30264.)

Unless otherwise provided, any person desiring to perform or undertake any development¹ in the coastal zone, must obtain a coastal development permit. (Pub.

¹ Public Resources Code section 30106 defines development:

“‘Development’ means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber

Resources Code, § 30600.) Initially, in addition to any permit required from other agencies, a coastal development permit must be obtained from the appropriate regional commission during its existence, and afterwards from the appropriate local government (city or county). (Pub. Resources Code, §§ 30600, 30601; see also Pub. Resources Code, §§ 30519, 30603.) The term “person” includes the state and any local government or special district. (Pub. Resources Code, § 30111.) Appeals from either the granting or denying of such a permit are taken to the commission, which may hear the matter de novo, after notice. (Pub. Resources Code, §§ 30602, 30603.) At the present time, during the existence of the regional commissions and before the certification of local coastal programs, a coastal development permit is to be issued “. . . if the issuing agency, or the commission on appeal, finds that the proposed development is in conformity with the provisions of Chapter 3 . . . [of the Coastal Act] . . .” (Pub. Resources Code, § 30604.)²

harvesting plan submitted pursuant to the provisions of the Z’berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511).

“As used in this section, ‘structure’ includes, but is not limited to, any building, road, pipe, flue, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line.”

² Public Resources Code section 30604 reads as follows:

“(a) Prior to certification of the local coastal program, a coastal development permit shall be issued if the issuing agency, or the commission on appeal, finds that the proposed development is in conformity with the provision of Chapter 3 (commencing with Section 30200) of this division and that the permitted development will not prejudice the ability of the local government to prepare a local coastal program that is in conformity with the provisions of Chapter 3 (commencing with Section 30200). A denial of a coastal development permit on grounds it would prejudice the ability of the local government to prepare a local coastal program that is in conformity with the provisions of Chapter 3 (commencing with Section 30200) shall be accompanied by a specific finding which sets forth the basis for such conclusion.

“(b) After certification of the local coastal program a coastal development permit shall be issued if the issuing agency or the commission on appeal finds that the proposed development is in conformity with the certified local coastal program.

“(c) Every coastal development permit issued for any development between the nearest public road and the sea or the shoreline of any body of water located within the coastal zone shall include a specific finding that such development is in conformity with the public access and public recreation policies of Chapter 3 (commencing with Section 30200).

“(d) No development or any portion thereof which is outside the coastal zone shall be subject to the coastal development permit requirements of this division, nor shall anything in this division authorize the denial of a coastal development permit by the commission or any regional commission on the grounds the proposed development will have an adverse environmental effect outside the coastal zone.”

Chapter 3 contains the coastal resource planning and management policies established by the Legislature. (Pub. Resources Code, §§ 30200–30264.)

In analyzing the questions presented, we have assumed that an existing condition is in fact a danger to the public and that condition is located on a road or highway owned or controlled by a public agency other than a regional commission or the commission.³ We further have assumed that the work needed to correct and alleviate the dangerous condition is of sufficient magnitude to require a coastal development permit (see Pub. Resources Code, § 30610) and is designed to accomplish that result. Finally, we have assumed that the denial of such a permit by the Commission has been in furtherance of the purposes and objectives of the Coastal Act. The question, then, is whether the denial of that permit by a regional commission or the commission on appeal results in liability for any accident or injury proximately caused by the dangerous condition after such denial.

The question presented requires an analysis of the pertinent provisions of the California Tort Claims Act (Gov. Code, § 810 *et seq.*)⁴ That Act provides that public entities are liable only for injuries as provided by statute, and further, such entities have immunities from liability as provided by statute (§ 815). The statutory immunities from liability are available to the commission. (*State of California v. Superior Court (Veta Co.)* (1974) 12 Cal. 3d 237, 245–246.) Further, except as provided by statute, a public entity is not liable when the entity’s employee whose act or omission resulted in injury is immune. (§ 815.2(b).)

Section 815.2(a) provides that a public entity is liable for injury caused by an act or omission of an employee of the entity. There are two immunities, however, that are pertinent here. Section 818.4 provides:

“A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked.”

Assuming that denial of a coastal development permit under the circumstances under consideration is the proximate cause of an injury, under section 818.4 the commission would not be liable for such injury. The California Supreme Court in *State of California v. Superior Court, supra*, held that this immunity was applicable to the commission’s

³ We have not reviewed and express no opinion on any particular existing factual situation.

⁴ All references to code sections are to the Government Code unless otherwise indicated.

predecessor since that Coastal Commission was authorized to determine whether a permit should be issued. (12 Cal. 3d at 245.) The current commission, as successor, and the regional commissions have equal authority to determine whether a permit should be issued. (Pub. Resources Code, § 30601–30604.) There is little doubt that a denial of a permit as described would be protected by an immunity under this section. (See also *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal. 3d 110, 127 (city not liable for refusal to issue permit); and see 57 Ops. Cal. Atty. Gen. 332, 337 (1974); 57 Ops. Cal. Atty. Gen. 358, 359 (1974).) Moreover, section 818.4 provides immunity to public entities which issue licenses for injury to third parties caused by the wrongful issuance of a license (*Papelian v. State of California* (1976) 65 Cal. App. 3d 958, 961–962; *Hirsch v. Department of Motor Vehicles* (1974) 42 Cal. App. 3d 252, 257–258), barring a mandatory duty to act. (See § 815.6 and discussion, *infra*.)

The second pertinent immunity is applicable to employees, which would include the commissioners (§§ 810.2, 811.4), and through section 815(b) would generally inure to the public entity. Section 820.2 provides:

“Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.”

The court in *State of California v. Superior Court, supra*, also indicated that this immunity was available to the Coastal Zone Conservation Commission and its members and employees in the granting or denial of a coastal permit. (12 Cal. 3d at 245–247.) We know of no reason why it should not apply to the present commission, the regional commissions, commission members and employees.

Whether a particular act is discretionary within the meaning of section 820.2 is not an easy determination. The California Supreme Court in *Johnson v. State of California* (1968) 69 Cal. 2d 782, noted that no mechanical tests can be devised to determine whether a particular duty is discretionary, and thus subject to immunity, or is ministerial. (69 Cal. 2d at 789–790.) The court noted, however, that the policy of this immunity lies in recognizing that “. . . [m]uch of what is done by officers and employees of the government must remain beyond the range of judicial inquiry. . . .” (69 Cal. 2d at 793.) The court went on:

“. . . Courts and commentators have therefore centered their attention on an assurance of judicial abstention in areas in which the responsibility for *basic policy decisions* has been committed to coordinate branches of government. Any wider judicial review, we believe, would place the court in the unseemly

position of determining the propriety of decisions expressly entrusted to a coordinate branch of government. Moreover, the potentiality of such review might even in the first instance affect the coordinate body's decision-making process" (*Id.*)

We conclude that the decision making process of the commission and the regional commissions in granting or denying a coastal development permit is a task involving basic policy decisions of the type contemplated by the *Johnson* case discussion, and therefore is a discretionary act within the meaning of the Tort Claims Act.

The commission and the regional commissions have been entrusted with the task of developing a series of local coastal programs in accordance with the goals and criteria specified by the Legislature. Development in the coastal zone is to be controlled by the permit system on a basis of consistency with the goals and criteria and ultimately the local coastal programs. (Pub. Resources Code, § 30604.) Within that framework, the decision of whether to grant or deny a particular permit is one of the basic policy decisions given to those agencies. It is, in our opinion, a discretionary act. It should be contrasted with acts designed to carry out that policy decision, which acts may well be ministerial. (See *Johnson v. State, supra* (decision to release a juvenile ward to foster home is basic policy decision; decision to warn foster parents of dangerous proclivities of the ward is ministerial.) Also to be distinguished is the mandatory duty imposed on an agency by section 815.6 which may result in liability for injury caused by the failure. (§ 815.6.⁵ (See, e.g., *Morris v. County of Mann* (1977) 18 Cal. 3d 901 (county failed to require builder to post evidence of worker's compensation coverage as required by Labor Code; held liable for damages to injured employee when builder went bankrupt); *Bison v. Public Utilities Commission* (1975) 51 Cal. App. 3d 577 (PUC held liable for failure to enforce its general order requiring common carriers to maintain liability insurance in force) and see *State of California v. Superior Court, supra*, 12 Cal. 3d at 247.)

A public entity is liable for injury caused by a dangerous condition of its property if certain elements are established. (§ 835.)⁶ One of these elements is that the property is

⁵ Section 815.6 states:

"Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."

⁶ Section 835 states:

"Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in

owned or controlled by the public entity. (§ 830(c).) In the situation under consideration, of course, we have assumed that the road or highway on which the hazardous or dangerous condition exists is not owned or controlled by the commission or any regional commission. The degree of regulatory control possessed by the commission and the regional commissions over land in the coastal zone is not such as would constitute ownership or control of that property. (Pub. Resources Code, § 30010; see *Sierra Club v. California Coastal Zone Conservation Com.* (1976) 58 Cal. App. 3d 149, 155.)⁷ Here again, the situation where the granting of the permit itself creates a dangerous or hazardous condition should be distinguished. (See *Hill v. People* (1979) 91 Cal. App. 3d 426 (Caltrans granted a permit for oversize load; truck struck a too-small bridge, causing accident; § 818.4 held not applicable.)

From the above analysis we conclude that the California Coastal Commission would not be liable for injury resulting from a continuing hazard or dangerous condition on a road or highway when the commission has denied, in furtherance of the purposes and objectives of the Coastal Act, a coastal development permit, the performance under which was designed to correct or alleviate that condition.

The extended discussion herein of the immunity provisions of the Tort Claims Act does not indicate any belief of their inapplicability to the commission. Indeed, *State v. Superior Court, supra*, squarely holds that they are applicable to the commission and its members in a permit denial situation. (12 Cal. 3d at 245–247.) Rather, it is our intention to provide an indication of the dimensions of the immunity provisions for the guidance of the commission.

The second question presented asks whether, assuming some basis for liability of the commission for injury resulting from a denial of a coastal development permit, that liability would be affected by the fact, if established, that in the commission's judgment equally effective alleviating measures more consistent with the objectives of the Coastal

a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:

“(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

“(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.”

⁷ We express no opinion on whether the public entity that did own or control the property in question would be liable for injuries occurring after the denial of a permit by a regional commission or the commission.

Act and the California Environmental Quality Act (Pub. Resources Code, § 21000 *et seq.*) had not been fully or adequately considered by the applicant. In view of our conclusion above that the cited immunity sections of the Tort Claims Act do immunize the commission and its employees as to the granting or denial of a permit, it is not necessary to analyze this second question. We do note, however, that the factors presented in the question, that of considering feasible alternatives more consistent with the policies of the basic statute strengthen our conclusion that the determination of whether to grant a permit is a discretionary act. Those factors of the availability and feasibility of alternatives are the very factors which are entrusted to the commission to consider in its policy decision and are the type that should not be subject to judicial scrutiny. Thus, the immunities are applicable.
