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OPINION	:	No. 81-1002
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of	:	<u>JANUARY 28, 1982</u>
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THE HONORABLE BARRY KEENE, MEMBER OF THE CALIFORNIA
STATE SENATE, has requested an opinion on the following questions:

1. Does the submission of a written appeal under Health and Safety Code section 19957.5 regarding an action taken by a local building department in enforcing building access requirements for physically handicapped persons require that an appeals board be appointed to consider the matter?

2. What is the scope of the review powers of an appeals board appointed pursuant to Health and Safety Code section 19957.5?

3. May a city council or county board of supervisors render the same decisions for the same matters as may be rendered by an appeals board appointed pursuant to Health and Safety Code section 19957.5?

CONCLUSIONS

1. The submission of a written appeal under Health and Safety Code section 19957.5 regarding an action taken by a local building department in enforcing building access requirements for physically handicapped persons does not require that an appeals board be appointed to consider the matter.

2. The scope of the review powers of an appeals board appointed pursuant to Health and Safety Code section 19957.5 is limited to approving or disapproving the local building department's interpretations of Health and Safety Code sections 19955-19959 and enforcement actions taken thereunder.

3. A city council or county board of supervisors may render the same decisions for the same matters as may be rendered by an appeals board appointed pursuant to Health and Safety Code section 19957.5 if local law so allows.

ANALYSIS

The Legislature has enacted a statutory scheme (Health and Safety Code 19955-19959)¹ specifically requiring that public accommodations or facilities constructed in California with private funds² be accessible to physically handicapped persons. Such facilities include auditoriums, hospitals, theaters, restaurants, hotels, motels, stadiums, and convention centers (see § 19955); also covered are passenger vehicle service stations, shopping centers, offices of physicians and surgeons, and office buildings (see § 19955.5).

Under the statutory scheme, the local governmental body required to enforce the access requirements is the building department of each city and county. Section 19958 states:

"The building department of every city, county, or city and county shall enforce this part within the territorial area of its city, county, or city and county. . . .

"'Building department' means the department, bureau, or officer charged with the enforcement of laws or ordinances regulating the erection or construction, or both the erection and construction, of buildings."

¹ All section references hereafter are to the Health and Safety Code unless otherwise indicated.

² Buildings and facilities constructed with public funds are required to be accessible to physically handicapped persons pursuant to Government Code sections 4450-4458.

The questions presented for analysis concern the enforcement actions taken by local building departments and the methods by which such actions may be reviewed.

1. Appointment of an Appeals Board

The first question presented is whether the filing of a written appeal regarding an enforcement action taken by a building department requires the appointment of an appeals board under section 19957.5. We conclude that it does not.

Local building department officials occasionally will be faced with complex problems in interpreting and enforcing the statutory access provisions. Of particular significance in this regard is the language of section 19957:

"In case of practical difficulty, unnecessary hardship, or extreme differences, a building department responsible for the enforcement of this part may grant exceptions from the literal requirements of the standards and specifications required by this part or permit the use of other methods or materials, but only when it is clearly evident that equivalent facilitation and protection are thereby secured."

In 1976 the Legislature amended the statutory scheme to include a provision, section 19957.5, authorizing the appointment of an appeals board to review decisions made by local building department officials. (Stats. 1976, ch. 700, § 1.) The statute provides:

"(a) Every city, county, or city and county may appoint a local appeals board composed of five members to hear written appeals brought by any person regarding action taken by the building department of the city, county, or city and county in enforcement of the requirements of this part, including the exceptions contained in Section 19957.

"(b) Two members of the appeals board shall be physically handicapped persons, two members shall be persons experienced in construction, and one member shall be a public member.

"(c) The appeals board shall conduct hearings on written appeals made under Subdivision (a) and may approve or disapprove interpretations of this part and enforcement actions taken by the building department of the city, county, or city and county. All such approvals or disapprovals shall be final and conclusive as to the building department in the absence of fraud or prejudicial abuse of discretion. The appeals board shall adopt regulations

establishing procedural rules and criteria for the carrying out of its duties under this part."

In the situation presented to us for consideration, a written appeal has been submitted, challenging an action taken by the local building department in enforcing sections 19955-19959. Must an appeals board be created in order to review the written appeal?

We believe that the answer may be found by applying well recognized principles of statutory construction. The cardinal rule in interpreting a statute is to "ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*Select Base Materials v. Board of Equal.* (1959) 51 Cal.2d 640, 645; accord, *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698.)

In determining legislative intent, we first turn to the words of the statute (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230), giving the language its usual and ordinary import. (*People v. Bellici* (1979) 24 Cal.3d 879, 884.)

Here, the Legislature has used the word "may" in authorizing cities and counties to appoint local appeals boards. "May" is usually permissive, as distinguished from "shall" which is ordinarily mandatory. (Webster's New Internat. Dict. (3d ed 1966) pp. 1683, 2085; *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 133.)

Moreover, section 19957.5 contains both "may" and "shall" within its provisions. "It has been held where the Legislature has used both words in the same section it must be presumed to have attached to them their ordinary meanings. (*National Automobile etc. Co. v. Garrison*, 76 Cal.App.2d 415, 417; *Cannizzo v. Guarantee Ins. Co.*, 245 Cal.App.2d 70, 73.)" (*Hogya v. Superior Court*, *supra*, 75 Cal.App.3d 122, 133, fn. 8; accord, *In re Richard E.* (1978) 21 Cal.3d 349, 353-354.)

This interpretation is consistent with the Legislature's declaration that for purposes of interpreting the provisions of the Health and Safety Code, "'shall' is mandatory and 'may' is permissive." (§ 16.) We have found nothing in the statutory scheme to suggest a different interpretation.

Since the creation of an appeals board under section 19957.5 is discretionary with each city and county, the submission of a written appeal challenging a building department decision cannot act to force creation of such a board.

In answer to the first question, therefore, we conclude that the submission of a written appeal regarding an action taken by a local building department in enforcing the

provisions of sections 19955-19959 does not require the appointment of an appeals board under section 19957.5.

2. Powers of an Appeals Board

The second question presented concerns the scope of the review powers of an appeals board created under the provisions of section 19957.5. We conclude that the board is limited to reviewing decisions made by the local building department with regard to the provisions of sections 19955-19959 and it may not delve into matters outside the scope of the legislative scheme.

The key language of section 19957.5 requiring interpretation is contained in subdivision (a) [the board shall "hear written appeals brought by any person regarding action taken by the building department . . . in enforcement of the requirements of this part, including the exceptions contained in Section 19957"] and in subdivision (c) [the board "may approve or disapprove interpretations of this part and enforcement actions taken by the building department"]

Besides those principles of statutory construction mentioned with regard to the first question, we note that "legislation should be construed so as to harmonize its various elements" (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 788) and "the various parts of a statutory enactment" must be considered "in the context of the statutory framework as a whole." (*Moyer v. Workmen's Comp. Appeals Bd.*, *supra*, 10 Cal.3d 222, 230.)

Applying these principles, we believe that when the Legislature authorized appeals boards to approve or disapprove "enforcement actions taken by the building department," the Legislature was referring only to actions taken with regard to enforcing sections 19555-19559.

In the context of the statutory scheme as a whole, no other definition of "enforcement actions" is appropriate. Subdivision (a) of section 19557.5 refers solely to "enforcement of the requirements of this part [sections 19555-19559]." Although section 19958 speaks in terms of a building department official "charged with the enforcement of laws or ordinances regulating the erection or construction, or both the erection and construction, of buildings," such generalization is merely for purposes of identification in defining "building department;" it does not purport to constitute a grant of authority such as is contained in the first sentence of the statute: "The building department of every city, county, or city and county shall enforce *this part* within the territorial area of its city, county, or city and county." (Italics added.)

Reading these various provisions together in light of the "principle that administrative agencies have only such powers as have been conferred on them, expressly or by implication, by constitution or statute" (*Ferdig v. State Personnel Bd.* (1969) 71 Cal.2d 96, 103), we conclude in answer to the second question that the powers of an appeals board appointed under section 19957.5 are limited to approving and disapproving the local building department's interpretations of sections 19955-19959 and enforcement actions taken thereunder.

3. Powers of a City Council or County Board of Supervisors

The third question presented concerns whether by authorizing the creation of an appeals board, the Legislature intended to preclude any other administrative review of access decisions made by local building departments. In other words, if an appeals board is not established, may a city council or county board of supervisors review access decisions made by the building department, and if an appeals board is created, may the board's decision be reviewed by a city council or county board of supervisors? We conclude that the Legislature did not intend to remove any appellate review authority held by a city council or county board of supervisors.

Local governments may and frequently do put appeal procedures in their local ordinances. (See Cal.Const., art. XI, §§ 1-7; *Board of Permit Appeals v. Control Permit Bureau* (1960) 186 Cal.App.2d 633, 639-640; Sato, "Municipal Affairs" in *California* (1972) 60 Cal.L.Rev. 1055, 1077-1081 (hereafter "Sato").) Does section 19957.5 preempt this power, or does it merely suggest a particular manner in which the appeal process may be implemented?

We view this matter as again one of statutory interpretation to which may be applied the previously mentioned principles of construction. The phrase that demonstrates the Legislature's intent concerning the issue at hand is found in subdivision (c) of section 19957.5: "All such approvals or disapprovals [by the board] shall be final and conclusive *as to the building department of the city, county, or city and county.*" (Italics added.)

The Legislature has expressly declared that an appeals board decision only binds the local government insofar as constituting the decision of the building department. If the Legislature had intended to cut off any further administrative appeal to a city council or county board of supervisors, it could easily have used other language. (See *Tracy v. Municipal Court* (1978) 22 Cal.3d 760, 764; *Safer v. Superior Court* (1975) 15 Cal.3d 230, 237- 238.) Section 19957.5 simply does not purport to affect any rights of appeal other than to establish that the decision of an appeals board constitutes the decision of the local building department.

Accordingly, if local ordinances allow, a city council or county board of supervisors may review decisions of a city or county building department in interpreting and enforcing the provisions of sections 19955-19959. Where an appeals board has not been created, the department's decision could go directly to the city council or board of supervisors. Where an appeals board has been created, its decision would take the place of the building department administrator's decision and be reviewable as such to the city council or board of supervisors if local law so provides.

We have found no expression of legislative intent in the statutory scheme as a whole to support a contrary conclusion. While the Legislature has directed local building departments to administer the access provisions, we do not believe it has addressed the issue of whether a local building department decision may be reviewed by a city council, board of supervisors, or other body. The designation of the building department as the enforcement agency (§ 19958) merely reflects the fact that the access requirements would normally be within its area of expertise rather than within the province of some other department such as police, fire, or sanitation.³ Also, the specification of certain qualifications for members of an appeals board (§ 19957.5, subd. (b)) cannot be said to preclude review outside the building department appeals board process.

Although the issue is a close one, we believe that in order for the Legislature to deny review of city and county building department decisions by locally elected representatives, more expressive language is required than is now contained in sections 19955-19959. This is especially true in this field of the law where the "home rule" constitutional grant of authority to charter cities and counties may affect such a legislative decision. (See Cal. Const., art. XI, §§ 3-5; *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 315-316; *Rivera v. City of Fresno* (1971) 6 Cal.3d 132, 135; *Sato, supra*, at pp. 1077-1081.)

In answer to the third question, we conclude that a city council or a county board of supervisors may render the same decisions for the same matters as could be rendered by an appeals board appointed pursuant to section 19957.5 if local law so provides.

³ The Legislature has made this abundantly clear by defining "building department" for purposes of the statutory scheme as "the department, bureau, or officer charged with the enforcement of laws or ordinances regulating the erection or construction, or both the erection and construction, of buildings." (§ 19958.)