

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

MARINE FORESTS SOCIETY et al.,

Plaintiffs and Respondents,

v.

CALIFORNIA COASTAL COMMISSION et al.,

Defendants and Appellants.

C038753

(Super. Ct. No.
00AS00567)

ORDER MODIFYING
OPINION AND DENYING
REHEARING; NO CHANGE
IN JUDGMENT

THE COURT:

It is ordered that the opinion filed in this case on December 30, 2002, be modified in the following particulars:

1. At the end of the first paragraph on page 15, line 12, after the sentence ending "We disagree" add the following new footnote:

Relying on *Brown v. Superior Court, supra*, 15 Cal.3d 52 and other cases cited in their briefs and petition for rehearing, the

Commission claims that an "extensive body of law addressing the removal question" has "reaffirmed an appointing authority's power of removal and blessed a 'politically responsive' appointment scheme that is virtually identical to the one [used in appointing the voting members of the Commission]." However, the Commission fails to recognize that none of the cases upon which it relies concerned a separation-of-powers challenge to the Legislature's ability to remove its appointees at will, let alone to its ability to remove a majority of an executive agency's officers at will. "Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered." (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2; accord, *People v. Albritton* (1998) 67 Cal.App.4th 647, 655-656.)

2. On page 25, line 6, after the citation "[115 L.Ed.2d at p. 254].)" add the following new footnote:

The Commission claims this presumption, akin to that recognized by the United States Supreme Court in *Bowsher, supra*, 478 U.S. at page 727, fn. 5 [92 L.Ed.2d at p. 597], is erroneous because it "conflicts with California's legal presumption, not addressed by the opinion, that public officials will comply with the law." (Citing Evid. Code, § 664 ["It is presumed that official duty has been regularly performed. . . ."].)

The Commission overlooks that there is a similar presumption with respect to federal officials which, thus, applied in *Bowsher*.

(*United States v. Chemical Foundation* (1926) 272 U.S. 1, 14-15 [71 L.Ed. 131, 142-143] ["The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties"]; *United States v. State of Washington* (9th Cir. 1956) 233 F.2d 811, 816 [there is a presumption that "the ordinary course of business was followed and that the law was obeyed; also that official duty was regularly and faithfully performed"]; *La Porte v. Bitker* (7th Cir. 1944) 145 F.2d 445, 447 ["a presumption of regularity . . . must be accorded the acts of a government official"].)

In light of significant political influences that affect the decisionmaking process of the Commission, and the broad discretion possessed by members of the Commission in executing the law and making quasi-judicial determinations, we would be naive, indeed, to conclude that the legal presumption of Evidence Code section 664 has not been rebutted by another realistic, commonsense presumption--members of the Commission, who are subject to removal at will by the Senate Committee on Rules and the Speaker of the Assembly, will "'desire to avoid removal by pleasing [their appointing authorities], which creates the here-and-now subservience to another branch that raises separation-of-powers problems.'" (*Bowsher, supra*, 478 U.S. at p. 727, fn. 5 [92 L.Ed.2d at p. 597].)

3. These modifications require renumbering subsequent footnotes.

[There is no change in the judgment.]

Appellant's petition for rehearing is denied.

FOR THE COURT:

_____ SCOTLAND _____, P.J.

_____ DAVIS _____, J.

_____ ROBIE _____, J.