

ITEM 2
PROPOSED MINUTES

COMMISSION ON STATE MANDATES

State Capitol, Room 126
Sacramento, California
December 6, 2007

Present: Member Tom Sheehy, Chairperson
 Representative of the Director of the Department of Finance
Member Francisco Lujano, Vice Chairperson
 Representative of the State Treasurer
Member Richard Chivaro
 Representative of the State Controller
Member Cynthia Bryant
 Director of the Office of Planning and Research
Member J. Steven Worthley
 County Supervisor
Member Sarah Olsen
 Public Member
Member Paul Glaab
 City Council Member

CALL TO ORDER AND ROLL CALL

Chairperson Sheehy called the meeting to order at 9:45 a.m.

**CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTIONS
11126 and 17526 (action)**

PENDING LITIGATION

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matters pursuant to Government Code section 11126, subdivision (e)(1):

1. *State of California, Department of Finance v. Commission on State Mandates, et al.*, Sacramento Superior Court Case No. 03CS01432, CSM Case No. 03-L-02 [*Behavioral Intervention Plans*]
2. *County of San Bernardino v. Commission on State Mandates, et al.*, Los Angeles County Superior Court, Case No. BS106052; San Bernardino County Superior Court, Case No. SCVSS 138622 [*Standardized Emergency Management Systems (SEMS)*]
3. *California School Boards Association, Education Legal Alliance; County of Fresno; City of Newport Beach; Sweetwater Union High School District and County of Los Angeles v. State of California, Commission on State Mandates and Steve Westly, in his capacity as State Controller*, Third District Court of Appeal, Case No. C055700; [AB 138; *Open Meetings Act, Brown Act Reform*,

Mandate Reimbursement Process I and II; and School Accountability Report Cards (SARC) I and II]

4. *Department of Finance v. Commission on State Mandates, Sacramento County Superior Court, Case No. 07CS00079, CSM 06-L-02, [Peace Officer Procedural Bill of Rights]*
5. *Department of Finance and California Integrated Waste Management Board v. Commission on State Mandates, Santa Monica Community College District, and Lake Tahoe Community College District, Sacramento County Superior Court, Case No. 07CS00355, CSM 06-L-03 [Integrated Waste Management]*
6. *San Diego Unified School District v. Commission on State Mandates and California Department of Finance, San Diego County Superior Court, Case No. 37-2007-00064077-CU-PT-CTL, CSM 06-04 [Emergency Procedures: Earthquake Procedures and Disasters]*

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matter pursuant to Government Code section 11126, subdivision (e)(2):

- Based on existing facts and circumstances, there is a specific matter which presents a significant exposure to litigation against the Commission on State Mandates, its members and/or staff (Gov. Code, § 11126, subd. (e)(2)(B)(i).)

Hearing no further comments, Chairperson Sheehy adjourned into closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda.

REPORT FROM CLOSED EXECUTIVE SESSION

In open session, Chairperson Sheehy reported that the Commission met in closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda. The chairperson recessed the meeting until 10:00 a.m.

RECONVENE IN OPEN SESSION

At 10:02 a.m., Chairperson Sheehy reconvened the meeting.

APPROVAL OF MINUTES

Item 1 September 27, 2007

The September 27, 2007 hearing minutes were adopted 7-0.

APPEAL OF EXECUTIVE DIRECTOR DECISIONS PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTION 1181, SUBDIVISION (c)

Item 2 Staff Report (if necessary)

There were no appeals to consider.

PROPOSED CONSENT CALENDAR

INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 (ACTION)

PARAMETERS AND GUIDELINES

- Item 13 *Pupil Safety Notices (02-TC-13)*
Education Code Sections 32242, 32243, 32245, 46010.1; 48904, 48904.3, 48987; As Added and Amended by Statutes 1983, Chapter 498 (SB 813); Statutes 1984, Chapter 482 (AB 3757); Statutes 1984, Chapter 948 (AB 2549); Statutes 1986, Chapter 196 (AB 1541); Statutes 1986, Chapter 332 (AB 2824); Statutes 1992, Chapter 445 (AB 3257); Statutes 1992, Chapter 1317 (AB 1659); Statutes 1993, Chapter 589 (AB 2211); Statutes 1994, Chapter 1172 (AB 2971); Statutes 1996, Chapter 1023 (SB 1497); Statutes 2002, Chapter 492 (AB 1859)
California Code of Regulations, Title 5, Section 11523
San Jose Unified School District, Claimant

ADOPTION OF COMMISSION ORDER TO INITIATE RULEMAKING

- Item 16 Implementation of AB 1222 (Stats. 2007, ch. 329)
Proposed Amendments to California Code of Regulations, Title 2, Chapter 2.5, Article 1. General, Article 3. Test Claims, Article 7. Hearings

Member Olsen made a motion to adopt items 13 and 16 on the consent calendar. With a second by Member Worthley, the items were unanimously adopted.

HEARINGS AND DECISIONS ON TEST CLAIMS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (Gov. Code, §§ 17551 and 17559) (action)

Paula Higashi, Executive Director, swore in the parties and witnesses participating in the hearing.

TEST CLAIMS

- Item 3 *Interagency Child Abuse and Neglect (ICAN) Investigation Reports, 00-TC-22*
Penal Code Sections 11165.1, 11165.2, 11165.3, 11165.4, 11165.5, 11165.6, 11165.7, 11165.9, 11165.12, 11166, 11166.2, 11166.9, 11168 (Including Former Penal Code Section 11161.7), 11169, and 11170; Statutes 1977, Chapter 958 (AB 1058); Statutes 1980, Chapter 1071 (SB781); Statutes 1981, Chapter 435 (AB 518); Statutes 1982, Chapters 162 (AB 2303) and 905 (SB 1848); Statutes 1984, Chapters 1423 (SB 1899) and 1613 (AB 2709); Statutes 1985, Chapter 1598 (AB 505); Statutes 1986, Chapters 1289 (AB 1981) and 1496 (AB 3608); Statutes 1987, Chapters 82 (AB 3608), 531 (AB 1632) and 1459 (SB 1219); Statutes 1988, Chapters 269 (AB 3022), 1497 (SB 2457) and 1580 (AB 4585); Statutes 1989, Chapter 153 (AB 627); Statutes 1990, Chapters 650 (SB 2423), 1330 (SB 2788), 1363 (AB 3532) and 1603 (SB 2669); Statutes 1991, Chapter 132 (AB 1133); Statutes 1992, Chapters 163 (AB 2641), 459 (SB 1695) and 1338 (SB 1184); Statutes 1993, Chapters

219 (AB 1500), 346 (AB 331) and 510 (SB 665); Statutes 1996, Chapters 1080 (AB 295) and 1081 (AB 3354); Statutes 1997, Chapters 842 (SB 644), 843 (AB 753) and 844 (AB 1065); Statutes 1999, Chapters 475 (SB 654) and 1012 (SB 525); Statutes 2000, Chapters 287 (SB 1955) and 916 (AB 1241)
California Code of Regulations, Title 11, Sections 901, 902, and 903;
Department of Justice Forms SS 8572 and SS 8583
County of Los Angeles, Claimant
CITIES/COUNTIES ONLY

Ms. Higashi clarified that on December 5, the Commission received a request from Department of Finance to postpone the hearing and determinations of those portions of Item 3 related to the pending court case: *Department of Finance v. Commission on State Mandates*, (POBOR) currently pending in the California Court of Appeal, case number C056833. This request was approved. Therefore, only those portions of Item 3 that relate to cities and counties were heard. The remainder of Item 3 that may apply to other types of local governmental entities were severed and consolidated with another pending test claim, *Child Abuse and Neglect Reporting*, 01-TC-21, which was Item 5. Ms. Higashi stated that since these claims were being consolidated, the hearing on Item 5 would be postponed until final adjudication of the *Department of Finance v. Commission on State Mandates* case. Ms. Higashi stated that all parties involved in these two test claims were in agreement with this action, and stated that Item 3 would be presented by Commission Counsel Katherine Tokarski.

Ms. Tokarski indicated that the County of Los Angeles filed the claim in 2001, alleging amendments to California's mandatory child abuse reporting laws since 1975, including changes to the Penal Code, impose a reimbursable state-mandated program on law enforcement agencies and other county departments. Ms. Tokarski stated that both the Department of Finance and Department of Social Services opposed the test claim because the claim alleged duties of law enforcement and child protective services that were required by prior law. Where the state agencies acknowledged that some new duties may have been imposed, they contend that adequate funding was already provided to counties as part of the joint federal, state, local funding scheme for child welfare.

Ms. Tokarski stated that there was no evidence in the record to demonstrate that the mandated activities had been fully offset or funded by the state or federal government in an amount sufficient to fund the costs of the program, and that the test claim statutes and executive orders created numerous new local duties for reporting child abuse to the state that were not required by prior law, and thus mandate a new program or higher level of service. Therefore, Ms. Tokarski recommended that the Commission adopt the staff analysis to partially approve the test claim for counties and cities.

Parties were represented as follows: Leonard Kaye, County of Los Angeles, Sergeant Daniel Scott, Los Angeles Sheriff's Department, Susan Geanacou and Carla Castaneda, with the Department of Finance.

Mr. Kaye concurred with the staff analysis and urged the Commission to adopt staff's recommended position, but cautioned that there is a tremendous amount of work to be done to

complete the subsequent parameters and guidelines. Sergeant Scott explained that the program was extremely important because it provided perspective on child abuse and child safety from both law enforcement and the Department of Children and Family Services.

Ms. Castaneda stated no objections to the staff analysis and indicated Finance would work with all parties to develop the parameters and guidelines. Ms. Geanacou had nothing further to add.

Member Worthley made a motion to adopt the staff recommendation. With a second by Member Glaab, the motion carried unanimously.

- Item 4 Proposed Statement of Decision
Interagency Child Abuse and Neglect (ICAN) Investigation Reports,
00-TC-22
See Above

Commission Counsel Katherine Tokarski presented this item. She recommended that Commission adopt the proposed Statement of Decision with modifications reflecting today's hearing testimony, and also limiting the analysis and conclusions to cities and counties only. She noted that staff will make such changes and circulate the document to the parties before issuing the final Statement of Decision.

Member Glaab made a motion to adopt the proposed Statement of Decision. With a second by Member Worthley, the motion carried unanimously.

- Item 5 *Child Abuse and Neglect Reporting; 01-TC-21*
Penal Code Sections 273a, 11164, 11165, 11165.1, 11165.2, 11165.3, 11165.4, 11165.5, 11165.6, 11165.7, 11165.9, 11165.14, 11166, 11166.5, 11168, 11174.3, Including Former Penal Code Sections 11161.5, 11161.6, 11161.7; Statutes 1975, Chapter 226 (AB 1063); Statutes 1976, Chapters 242 (AB 2641) and 1139 (SB 42); Statutes 1977, Chapter 958 (AB 1058); Statutes 1978, Chapter 136 (AB 2238); Statutes 1979, Chapter 373 (SB 925); Statutes 1980, Chapters 855 (AB 2497), 1071 (SB 781) and 1117 (SB 1877); Statutes 1981, Chapters 29 (SB 322) and 435 (AB 518); Statutes 1982, Chapter 905 (SB 1848); Statutes 1984, Chapters 1170 (AB 2702), 1391 (SB 1124), 1423 (SB 1899), 1613 (AB 2709), and 1718 (AB 2710); Statutes 1985, Chapters 189 (AB 701), 464 (SB 254), 1068 (AB 366), 1420 (AB 442), 1528 (SB 1306), 1572 (SB 1358) and 1598 (AB 505); Statutes 1986, Chapters 248 (SB 2451) and 1289 (AB 1981); Statutes 1987, Chapters 640 (AB 285), 1020 (SB 691), 1418 (AB 1359), 1444 (SB 646) and 1459 (SB 1219); Statutes 1988, Chapters 39 (AB 1241), 269 (AB 3022) and 1580 (AB 4585); Statutes 1990, Chapters 931 (AB 3521) and 1603 (SB 2669); Statutes 1991, Chapters 132 (AB 1133) and 1102 (AB 2232); Statutes 1992, Chapter 459 (SB 1695); Statutes 1993, Chapters 346 (AB 331), 510 (SB 665) and 1253 (AB 897); Statutes 1994, Chapter 1263 (AB 1328); Statutes 1996, Chapters 1080 (AB 295), 1081 (AB 3354) and 1090 (AB 3215); Statutes 1997, Chapters 83 (AB 327) and 134 (AB 273); Statutes 1998, Chapter 311 (SB 933); Statutes 2000, Chapters 287 (SB 1955) and 916 (AB 1241); Statutes 2001, Chapters 133 (AB 102) and 754 (AB 1697)
San Bernardino Community College District, Claimant

- Item 6 Proposed Statement of Decision
Child Abuse and Neglect Reporting; 01-TC-21
See Above

Items 5 and 6 were postponed.

- Item 7 *Academic Performance Index*, 01-TC-22
Education Code Sections 44650, 44654, 52050, 52055.51, 52056-52057,
52058
California Code of Regulations, Title 5, Sections 1031-1039
Statutes 1999-2000x1 Chapter 3 (SBx11); Statutes 1999, Chapter 52
(AB 1114); Statutes 2000, Chapters 71 (SB 1667), 190 (AB 2162) and
695 (SB 1552); Statutes 2001, Chapters 159 (SB 662), 745 (SB 1991),
749 (AB 961), and 887 (SB 1295)
San Juan Unified School District, Claimant

- Item 8 *Academic Performance Index*, 01-TC-22
Proposed Statement of Decision
See Above

Items 7 and 8 were postponed.

- Item 9 *Prevailing Wages*, 03-TC-13
Labor Code Sections 1720, 1720.3, 1720.4, 1726, 1727, 1735, 1742,
1770, 1771, 1771.5, 1771.6, and 1773.5
Statutes 1976, Ch. 1084 (SB 2010); Statutes 1976, Ch. 1174 (AB 3365);
Statutes 1980, Ch. 992 (AB 3165); Statutes 1983, Ch. 142 (AB 1390);
Statutes 1983, Ch. 143 (AB 1949); Statutes 1989, Ch. 278 (AB 2483);
Statutes 1989, Ch. 1224 (AB 114); Statutes 1992, Ch. 913 (AB 1077);
Statutes 1992, Ch. 1342 (SB 222); Statutes 1999, Ch. 83 (SB 966);
Statutes 1999, Ch. 220 (AB 302); Statutes 2000, Ch. 881 (SB 1999);
Statutes 2000, Ch. 954 (AB 1646); Statutes 2001, Ch. 938 (SB 975);
Statutes 2002, Ch. 1048 (SB 972)
Title 8, California Code of Regulations, Sections 16000-16802
(Register 56, No. 8; Register 72, No. 13; Register 72, No. 23; Register
77, No. 02; Register 78, No. 06; Register 79, No. 19; Register 80, No. 06;
Register 82, No. 51; Register 86, No. 07; Register 88, No. 35; Register
90, No. 14; Register 90, No. 42; Register 91, No. 12; Register 92, No. 13;
Register 96, No. 52; Register 99, No. 08; Register 99, No. 25; Register
99, No. 41; Register 00, No. 03; Register 00, No. 18)
City of Newport Beach, Claimant

Senior Commission Counsel Deborah Borzelleri presented this item. The test claim addressed changes to the California prevailing wage law, which were designed to enforce prevailing wage standards on projects funded in whole or in part with public funds. Private contractors in public

works projects are required to pay local prevailing wages to construction workers on any projects that exceed \$1,000. This requirement does not apply to work carried out by a public agency with its own forces.

Ms. Borzelleri explained that the test claim statutes and regulations modified several provisions of the prevailing wage law that affect local agencies that contract out their public works projects. However, in order to determine whether those new Labor Code requirements are truly mandated by the state, case law requires the analysis to focus on the nature of the claimant's participation in the underlying program, and whether the decision to participate triggers the new requirements. If the test claim statutes or other law require the underlying activity that constitutes legal compulsion. Absent legal compulsion, the courts have found practical compulsion exists. Under the *Kern High School District* case, practical compulsion exists under narrow circumstances where a local agency could face penalties so severe, such as double taxation or other severe consequences, leaving no reasonable alternative but to participate in the underlying activity.

Ms. Borzelleri indicated that public works projects include a broad variety of projects from construction to repair of buildings to installing carpet. And, the decision to undertake a public works project could be driven by any number of reasons, from a local decision to a ballot initiative. There is nothing in the test claim or elsewhere in law to indicate such projects are legally compelled by the state, and claimant provided no evidence in the record to demonstrate that public works are practically compelled. Therefore, staff recommended the Commission adopt the staff analysis to deny the test claim.

The parties were represented as follows: Juliana Gmur, representing the City of Newport Beach, Tony Brine and Glenn Everroad with the City of Newport Beach; Anthony Mischel and Gary O'Mara with Department of Industrial Relations, and Carla Castaneda and Susan Geanacou with Department of Finance.

Ms. Gmur stated that prior to the *Kern* case, there was the *City of Merced* case where once a local government makes a decision, i.e., building a building versus acquiring a building through eminent domain, they are forced to comply with the law that relates to their decision. Ms. Gmur went on to ask if a local decision is actually discretionary if it involves health, safety, and welfare of the public.

Mr. Brine explained that the City contracts with a private contractor to maintain the City's 112 traffic signals. He stated that this type of work is mandated work because it is maintaining traffic safety for the public.

Mr. Everroad added that the test claim statutes added maintenance to the definition of a public works project thereby now requiring the City to increase its costs to pay prevailing wage rates to its contractors.

Member Bryant asked if there was anything that prevented the City from training a city employee to perform maintenance of the signals. Mr. Brine responded that since the City only has two staff responsible for the traffic signals, adding annual maintenance to existing duties may not be reasonable. Member Bryant stated that the City is making a choice to contract out to maintain the signals. Chairperson Sheehy asked for clarification, and Mr. Brine responded that the City has contracted out for this project for 30 years because it is cost efficient.

Mr. Everroad clarified that for general law cities, there is a threshold under which cities are required to contract out, and the cost of signal maintenance exceeds that threshold, thus requiring the City to contract out for the service.

Mr. Mischel clarified that the *City of Merced* case was decided early in the history of mandates law and on that case is built a whole analysis about what is discretionary that really culminates in the *Kern* case, which is extremely clear about what is a mandate.

Mr. O'Hara stated that maintenance was added to the definition public works in 1974, so it is not a new requirement. Mr. Mischel added that therefore, the traffic signal would not be subject to subvention.

Mr. Mischel also discussed the fact that cities perform less work now than they did prior to 1976. The state has taken over responsibilities for setting the prevailing wage rate, enforcing the prevailing wage rate, and adjudicating the prevailing wage. Local governments merely have to make sure that everybody knows to check Industrial Relation's website. The real problem is that the cost of construction has increased since 1976. But the bulk of that cost is imposed on private contractors because it's on the payment of the prevailing wage side. And that is not subject to this test claim.

Ms. Geanacou stated that Finance generally supports the staff analysis and urges its adoption. She noted that the issue regarding traffic signal maintenance was not raised before today, so Finance would need more information in order to address it.

Ms. Gmur added that they used signal maintenance as an example that everyone is familiar with. She also noted regarding the *Merced* case, that although counsel from Industrial Relations raises some excellent points, regarding the application of the Labor Code and what exactly all of this means, there is a threshold issue and that issue is the application of the *Merced* case and the concept of voluntary. Ms. Gmur noted that counsel pointed out that the case came about in 1984, but overlooked the fact the Commission was preceded by the Board of Control. So although it was an early decision, it was not an early decision for this Commission. Ms. Gmur stated that Mr. Mischel also pointed to the *Finance* case and the issue of practical compulsion. But there is also the *San Diego* case where the Supreme Court refers to the *Merced* case. You must look at the intent of the Legislature or the voters and see if the application of *Merced* defeats that intent. The Supreme Court cited the *Carmel Valley* case which is the fire protection safety program. The court pointed out that you could control your costs under the *Merced* case by simply not hiring firefighters, but that is an inappropriate way to apply *Merced*.

Member Worthley asked about an argument that Mr. Mischel made which he understood to mean this issue is long standing law which is not really before the Commission today.

Mr. Mischel explained that the maintenance provision in the Labor Code preexists the operative date that triggers whether or not a change in the Labor Code creates a mandate.

Member Lujano asked staff about both issues of the traffic signal contract. Ms. Borzelleri responded that at a certain threshold, the city is required to contract out, but the rules apply differently depending on the size of the city and whether it is a charter city or general law city.

Regarding the *Merced* case, Ms. Borzelleri reiterated that it is on point for this test claim as far as the voluntary nature of the project absent any evidence to the contrary in the record.

Chief Legal Counsel Camille Shelton added that the claimant is asking for both administrative activities and any increased costs for paying prevailing wage rates. She agreed with Mr. Mischel that the test claim is very broad and encompasses many layers of decision making with respect to the different laws that apply to different types of entities. She also agreed that today is the first time Vehicle Code requirements have been discussed. Ms. Shelton stated that staff has thoroughly researched this issue and there are many provisions that have impact on this law. The

staff analysis before the Commission addresses the record before us until today, and just the first threshold issue of whether there's a state-mandated program based on the test claim statutes that were pled. The test claim statutes on their face do not require them to take on any public works projects, and they do not require claimants to contract out. And nothing has been placed in the record to show claimants are practically compelled by the state to make those decisions, at least until today. Ms. Shelton explained that the Commission could direct staff to take a look at some of the issues discussed today and request additional briefing from claimants and state agencies. But at this point, the record is so broad and there is no evidence in the record suggesting any type of practical compulsion.

Member Worthley discussed the statute of limitations of the 1974 addition of maintenance, and asked if practical compulsion, particularly regarding maintenance, was before the Commission today. Ms. Shelton stated that it was, but there is no evidence in the record to support the practical compulsion argument.

Ms. Shelton also responded that regarding the statute of limitation on maintenance, staff did not analyze that issue, because we have not done a new program, higher level of service analysis. The claimants alleged statutes and regulations after 1975. The Commission has jurisdiction over those laws, but this analysis has not gone that far. Also, if you're specifically talking about transportation, there is also funding to consider: transportation funds, and state and federal funds that pay for maintenance schedules of traffic signals. Staff has not done that analysis either.

Ms. Geanacou asked the claimants if the traffic signal issue is an example of the types of activities for which the claimant would be seeking reimbursement or a limitation on what they are seeking in their test claim. Ms. Gmur responded that it was an example. She described the problem as being that as the definition of public works expanded, activities that the claimant didn't have to do under prevailing wage before, it has to do now. She agreed that the test claim is a "bare bones" pleading that was filed some time ago under previous Commission rules. Ms. Gmur also agreed that this issue is extremely broad, and explained that they used the example of traffic signal maintenance to show that public works is not limited to erecting a building. She stated that she would be happy to provide the Commission with additional briefing.

Ms. Higashi clarified that the staff analysis is what was before the Commission. The Commission can vote on the staff analysis, modify it, or return it to staff and ask for more briefing based on today's testimony. There were different issues raised today, such as traffic signal maintenance, but they are not in the record before the Commission.

Member Bryant asked if the Commission adopted the staff analysis today, can the claimants come back with a second test claim. Ms. Shelton responded that they could not.

Chairperson Sheehy asked when this test claim was filed. Ms. Borzelleri responded September 26, 2003.

Members Lujano and Glaab stated that they were not prepared to vote today and that additional briefing should occur. Mr. Glaab stated that as a city council member, he is sensitive to traffic signal issues and overall maintenance.

Member Bryant stated that the issue before the Commission is very narrow, but there may be an issue or practical compulsion as it relates to the Public Contract Code. She stated that she would not approve a mandate for this program unless it was very narrow.

Members Olsen and Chivaro stated that they were prepared to vote on the test claim today. Member Chivaro stated his concern that the test claim has been active since 2003 and new issues were only being brought up today. Chairperson Sheehy agreed with Member Chivaro and also stated that it was likely that the state already subvented hundreds of million dollars to cities and counties specifically for the purposes of maintaining local streets and roads.

Member Lujano asked if we had previously held items over because additional information was presented at the hearing. Ms. Higashi stated that we had. Member Worthley stated that if the issue before the Commission is the *Merced* case and practical compulsion, he was prepared to vote on that issue today. He stated that there are things that are discretionary and things that are not, however, you have to fix roofs, maintain roads and surfaces, and that some of these issues could be addressed in the parameters and guidelines. Ms. Shelton clarified that these are not issues for parameters and guidelines. They must be decided at the test claim phase because the question whether a statute imposes a mandated activity and the scope of the mandate are questions of law.

Mr. Mischel added that the *Kern* case is about practical compulsion mandated by the state. He agreed that local government must ensure the health and safety and protection of its populace, but that does not create a state mandate. Ms. Shelton added that this is an unsettled area of law. While that is true about the *Kern* case, a year later the Supreme Court decided the *San Diego Unified School District* case. That decision dealt with a school district's discretionary decision to expel a student for possession of drugs, explosives, or assault and battery. There, the court looked at the constitutional provision that requires schools to have a safe environment for pupils and employees. The schools were trying to get reimbursement for the downstream due-process requirements that were required by the state once they took on that discretionary decision. There must be evidence in the record or in the law. The Commission cannot just make the finding that there's practical compulsion.

Ms. Bryant asked about exceptions in the Public Contract Code, particular regarding emergency situations, and stated that generally governing bodies have discretion in those situations. Ms. Borzelleri agreed.

Member Lujano asked if under the Public Contract Code, claimants had no discretion to fire more staff, but had to contract out. Ms. Borzelleri stated that each situation can differ, but generally, cities are required to contract out if the project is going to exceed \$5,000, but again, there are many exceptions where they can use their own employees. Member Lujano asked if claimants do not have discretion that would constitute legal compulsion. Ms. Borzelleri stated that it would if there were no exceptions. Ms. Shelton stated that there is still another decision to make: the decision to engage in the public works project. Member Lujano stated that he still had questions on this issue.

Chairperson Sheehy stated that it is a matter of record here that two members of the Commission have asked this item to be put over. However, there are a majority of members who are prepared to vote on the item today. Mr. Lujano asked for a ten minute recess prior to voting.

Member Glaab stated that comments made by Members Olsen and Bryant resonated with him, but suggested that the claimant could return with a narrower claim.

The Commission took a ten-minute recess. Chairperson Sheehy then asked Ms. Higashi to clarify several points. Ms. Higashi reiterated that the claimant had opportunity prior to the hearing to amend the claim; that at other hearings the Commission has taken testimony at the

hearing and changed the staff analysis. But when that occurs, it is typically based on factual information of costs and funding. It has not necessarily been because additional statutes were mentioned that had not been pled, and were not before the Commission.

Chairperson Sheehy asked Ms. Gmur is she was aware of the process for amending a test claim. She responded that she was, but she was not certain that it should be amended.

Member Olsen moved adoption of the staff analysis. With a second by Member Chivaro, the item was approved by a vote of 6-1, with Member Worthley voting no.

- Item 10 *Prevailing Wages*, 03-TC-13
Proposed Statement of Decision
See Above

Ms. Borzelleri also presented this item. She noted that the sole issue before the Commission was whether the proposed Statement of Decision accurately reflected the Commission's decision.

Member Olsen made a motion to adopt the proposed Statement of Decision. With a second by Member Chivaro, the motion carried unanimously.

INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 (ACTION)

PARAMETERS AND GUIDELINES

- Item 11 *Mentally Disordered Offenders: Treatment as a Condition of Parole* - 00-TC-28, 05-TC-06
Penal Code Section 2966
Statutes 1985, Chapter 1419(SB 1296); Statutes 1986, Chapter 858 (SB 1845); Statutes 1987, Chapter 687 (SB 425); Statutes 1988, Chapter 658 (SB 538); Statutes 1989, Chapter 228 (SB 1625); Statutes 1994, Chapter 706 (SB 1918)
County of San Bernardino, Claimant

This item was postponed.

STAFF REPORTS

- Item 17 Chief Legal Counsel's Report (info)
Recent Decisions, Litigation Calendar

Ms. Shelton stated that she had nothing further to add to her written report, unless there were any questions.

- Item 18 Executive Director's Report (info/action)
Workload, Budget, Legislation, and Next Hearing

Ms. Higashi reported that her report included the State Controller's recent report to the Legislature and Department of Finance on pending mandate reimbursement claims, and a tentative agenda for the Commission's January 31, 2008 hearing. Ms. Higashi also noted that staff would be providing information on AB 1222 implementation at the January hearing.

PUBLIC COMMENT

There was no public comment.

ADJOURNMENT

Hearing no further business, and with a motion by Member Glaab and second by Member Worthley, Chairperson Sheehy adjourned the meeting at 11:23 a.m.

PAULA HIGASHI
Executive Director