

ITEM 4

RECONSIDERATION OF PRIOR STATEMENT OF DECISION PROPOSED STATEMENT OF DECISION

Government Code Sections 65302, Subdivision (c), and Sections 65580 – 65589;
Statutes 1980, Chapter 1143 (Assem. Bill No. 2853)

Board of Control Decision Nos. 3759, 3760 and 3916

Regional Housing Needs Determination (04-RL-3759-02, 04-RL-3760-03, and
04-RL-3916-04)

Reconsideration Directed by Statutes 2004, Chapter 227, Sections 109 and 110
(Sen. Bill No. 1102)

EXECUTIVE SUMMARY

The sole issue before the Commission on State Mandates (“Commission”) is whether the Proposed Statement of Decision accurately reflects any decision made by the Commission at the March 30, 2005 hearing on the above named test claim.¹

Recommendation

Staff recommends that the Commission adopt the Proposed Statement of Decision, beginning on page two, which accurately reflects the staff recommendation on the test claim. Minor changes, including those that reflect the hearing testimony and vote count, will be included when issuing the final Statement of Decision.

If the Commission’s vote on item 3, however, modifies the staff analysis, staff recommends that the motion on adopting the Proposed Statement of Decision reflect those changes, which will be made before issuing the final Statement of Decision. Alternatively, if the changes are significant, staff recommends that adoption of a Proposed Statement of Decision be continued to the May 2005 Commission hearing.

¹ California Code of Regulations, title 2, section 1188.1, subdivision (a).

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

RECONSIDERATION OF PRIOR BOARD
OF CONTROL DECISION ON:

Statutes 1980, Chapter 1143

Claim Nos. 3759, 3760 and 3916.

Directed by Statutes 2004, Chapter 227,
Sections 109-110 (Sen. Bill No. 1102),

Effective August 16, 2004.

Nos. 04-RL-3759-02, 04-RL-3760-03, and
04-RL-3916-04

Regional Housing Needs Determination

PROPOSED STATEMENT OF DECISION
PURSUANT TO GOVERNMENT CODE
SECTION 17500 ET SEQ.; CALIFORNIA
CODE OF REGULATIONS, TITLE 2,
DIVISION 2, CHAPTER 2.5, ARTICLE 7

(Proposed for adoption on March 30, 2005)

PROPOSED STATEMENT OF DECISION

The Commission on State Mandates (“Commission”) heard and decided this test claim during a regularly scheduled hearing on March 30, 2005. [Witness list will be included in the final Statement of Decision.]

The law applicable to the Commission’s determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission [adopted/modified] the staff analysis at the hearing by a vote of [vote count will be included in the final Statement of Decision].

BACKGROUND

Statutes 2004, chapter 227 (Sen. Bill No. 1102, effective Aug. 16, 2004) directs the Commission to reconsider the Board of Control’s final decision and parameters and guidelines on the *Regional Housing Needs* program. Sections 109 and 110 of the bill state the following:

Notwithstanding any other provision of law, the Commission on State Mandates shall reconsider former State Board of Control decisions 3916, 3759, 3760, and 3929 regarding the regional housing needs mandate enacted by Chapter 1143 of the Statutes of 1980 to determine whether the statute is a reimbursable mandate under Section 6 of Article XIII B of the California Constitution in light of federal and state statutes enacted and federal and state court decisions rendered since this statute was enacted, including the existence of fee authority pursuant to Section 65584.1² of the Government Code. The

² Government Code section 65584.1 (added by Stats. 2004, ch. 227) reads:

Councils of government may charge a fee to local governments to cover the projected reasonable, actual costs of the council in distributing regional housing

commission, if necessary, shall revise its parameters and guidelines to be consistent with this reconsideration.

Any changes by the commission shall be deemed effective July 1, 2004.

The Commission on State Mandates shall amend the appropriate parameters and guidelines, and the Controller shall revise the appropriate reimbursement claiming instructions to be consistent with this act.

Board of Control Decision

The Board of Control determined that Statutes 1980, chapter 1143 imposes a reimbursable mandate for claims 3759 (County of Los Angeles), 3760 (City and County of San Francisco) and 3916 (City of El Monte) in 1981. The test claim legislation enacted content requirements for housing elements that cities and counties are required to adopt as part of their general plans.³ For example, section 65583⁴ of the test claim legislation requires the housing element to contain an assessment of housing needs and inventory of resources and constraints relevant to meeting those needs, including detailed content as specified.⁵ The housing element is also required to include “A statement of the community’s goals, quantified objectives, and policies relative to the maintenance, improvement, and development of housing.”⁶ The test claim statute also requires the housing element to contain:

A program which sets forth a five-year schedule of actions the local government is undertaking or intends to undertake to implement the policies and achieve the goals and objectives of the housing element through the administration of land use and development controls, provision of regulatory concessions and incentives,

needs pursuant to this article. Any fee shall not exceed the estimated amount required to implement its obligations pursuant to Section 65584. A city, county, or city and county may charge a fee, not to exceed the amount charged in the aggregate to the city, county, or city and county by the council of governments, to reimburse it for the cost of the fee charged by the council of government to cover the council's actual costs in distributing regional housing needs. The legislative body of the city, county, or city and county shall impose the fee pursuant to Section 66016, except that if the fee creates revenue in excess of actual costs, those revenues shall be refunded to the payers of the fee.

Although not expressly listed in Senate Bill No. 1102, section 65104 also falls within the class of fee statutes that are analyzed herein because the Legislature used the word “including.”

³ Government Code section 65350.

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

⁵ Government Code section 65583, subdivision (a).

⁶ Former Government Code section 65584, subdivision (b). This was later amended to add “preservation.”

and the utilizations of appropriate federal and state financing and subsidy programs when available.⁷

The content of the program in the housing element is also outlined in detail. The test claim statute defines the locality's share of the regional housing need, and requires the Department of Housing and Community Development ("HCD") or the applicable council of government ("COG") to determine that share.⁸ And cities and counties are required by the test claim statute to submit their housing elements to the HCD.⁹

Although the requirement that the general plan include a housing element dates to 1967 (Stats. 1967, ch. 1658), the housing element had no detailed content requirements until the Legislature enacted the test claim statute in 1980. Also, the HCD had enacted regulations or guidelines for housing elements,¹⁰ but these were not mandatory for cities or counties.¹¹

The Board of Control adopted parameters and guidelines for the test claim statute in March 1982. As stated in the parameters and guidelines:

At its December 16, 1981 and January 20, 1982 meetings, the Board considered the proposed Parameters and Guidelines under Chapter 1143/80. Considerable controversy centered around the basis for measuring the "increased level of service." A majority of the Board then directed Board staff to use the 1971 Housing Element Guidelines [sic] adopted by the Department of Housing and Community Development as a basis for determining the pre-SB 90 service level requirements. Consequently, those requirements in Chapter 1143/80 that exceeded the 1971 Housing Element Guideline were identified as reimbursable increases in service levels.

Under the heading "Reimbursable Costs," the parameters and guidelines state:

AB 2853 made numerous changes in the housing law, which, the Board concluded, resulted in an "increased level of service." In order to determine what requirements constitute an "increased level of service," the Board ruled that the 1971 Housing Element Guidelines issued by the State Department of Housing and Community Development represented the standard of compliance to be used by local governments in preparing the housing element of their respective general plans prior to AB 2853.

⁷ Former Government Code section 65584, subdivision (c). The current provision also includes this language.

⁸ Government Code section 65584.

⁹ Government Code section 65585, subdivision (b).

¹⁰ The housing element guidelines were repealed in 1982. See California Code of Regulations, title 24, chapter 6, subchapters 3 and 4.

¹¹ Government Code section 65585, subdivision (a); *Stevens v. City of Glendale* (1981) 125 Cal.App.3d 986, 997; *Bownds v. City of Glendale* (1980) 113 Cal.App.3d 875, 885-886.

Consequently, reimbursable costs is the "additional costs" as a result of an "increased level of service" found in AB 2853 when compared to the 1971 Guidelines. Costs associated with the following activities under Title 7, Div. 1, Ch. 3, Art. 10.6, of the Government Code, are reimbursable:

- A. documentation of the relationship of zoning and public facilities [sic] and services to land suitable for residential development - Section 65583 (a) (3). This activity shall only be reimbursed if it was not documented in the claimant's plan developed pursuant to the 1971 Housing Element Guidelines;
 - B. collection and tabulation of employment data, and the analysis and documentation of employment trend including its consideration in the housing need projections - Section 65583 (a) (1);
 - C. review of the allocation data provided by the Council of Governments or the Department of Housing and Community Development regarding the locality's share of regional housing need and, if necessary, revision to the claimant's housing elements as a result of the allocation data.
 - D. collection and tabulation of data regarding the handicapped and farmworkers, and the analysis and documentation of their housing needs - Section 65583 (a) (6) ;
 - E. collection and tabulation of data regarding energy conservation and the analysis and documentation of opportunities for energy conservation with respect to residential development - Section 65583 (a) (7); and,
 - F. one-time costs for the documentation of the public participation process - Section 65583 (b) (5).
- Limitation: Reimbursable costs for the above activities will be limited (1) to the conformance requirement pursuant to Section 65587 and (2) as a result of an evaluation pursuant to Section 65588.

State Agency Position

The Department of Finance (DOF), in comments received December 1, 2004, does not dispute a new program or higher level of service for the test claim statute, but contends there are not costs mandated by the state pursuant to section 17514. According to DOF: (1) Statutes 2004, chapter 227 (Sen. Bill No. 1102) makes optional, at local discretion, the "analysis of opportunities for energy conservation with respect to residential development."¹² (2) Section 65584.2 states that the local government may, but is not required to, conduct a review or appeal regarding allocation data provided by HCD or the COG pertaining to the locality's share of regional housing need. Thus, DOF argues these activities should not be reimbursable. Also, section 65584 states that distribution of regional housing needs be based on available data, negating the need for local governments to undertake studies or acquire or generate additional data. DOF also argues that cities and counties have fee authority pursuant to section 65584.1, thereby precluding state reimbursement.

¹² Although Statutes 2004, chapter 227 (eff. Aug. 16, 2004) made this optional, Statutes 2004, chapter 724 (Assem. Bill No. 2348, eff. Jan. 1, 2005) deleted the amendment making it optional.

No other state agency submitted comments on this reconsideration.

Interested Party Positions

Senator Ducheny: In comments received November 19, 2004, Senator Ducheny states that the test claim statute “probably does impose a higher level of service on local government” than under the prior housing element law, but contends that the parameters and guidelines allow for reimbursement for activities that are not mandated. The Senator argues that local governments are not required, by section 65584 nor the new 2004 regional housing needs standards of Assembly Bill No. 2158, to review the allocation data provided by a council of governments or HCD regarding the locality's share of regional housing need. Rather, local governments have the option to review and appeal their allocation, as evidenced by the enactment of section 65584.2 which states “A local government may, but is not required to, conduct a review or appeal regarding allocation data provided by the department or the council of government pertaining to the locality’s share of regional housing need or the submittal of data or information for a proposed allocation” The Senator also argues that local governments have fee authority pursuant to section 65104, referring to the “fees to support the work of the planning agency.”

League of California Cities: The League of California Cities (LCC), in comments received December 1, 2004, argues that Statutes 1980, chapter 1183 has not changed and continues to impose a new program or higher level of service on cities and counties, and disagrees with Senator Ducheny that the original parameters and guidelines were in error. LCC states that local governments have been allowed to seek reimbursement for review of the allocation data provided by COGs or HCD regarding the share of regional housing needs to determine whether the data is a fair reflection of its share of the region’s housing needs. Although LCC admits the statute does not require it, it contends that the review or appeal is part of the process for the locality receiving its fair share of the regional housing needs. According to LCC, “A local government’s fair share of regional housing needs is the foundation of the housing element. Preparation of the housing element is a mandate imposed by the statute. Review of regional fair share numbers is an essential step in the preparation of the housing element and, therefore, a reimbursable activity.”

As to fee authority of section 65104 on developers (fees to support the work of the planning agency) discussed by Senator Ducheny, LCC argues that it may not be “sufficient to pay for the mandated program or increased level of service” (Gov. Code, § 17556, subd. (d)). Fees pursuant to section 65104 may not exceed the reasonable cost of providing the service. A city spending \$100,000 on the housing element, for example, may be unable to determine the reasonable cost of providing the housing element service to the developer. LCC notes that a fee that exceeds the reasonable cost of providing the service is a tax that requires voter approval (Gov. Code, § 50076’s definition of special tax). Finally, LCC notes that developer fees increase the cost of housing, arguing that it is “highly ironic for the state to encourage a city ... or county to impose a fee on a housing developer to pay for the preparation of a housing element which has, as its objective, providing for the local government’s fair share of the regional housing need for all income levels.”

California State Association of Counties: The California State Association of Counties, in a December 12, 2004 letter, states that it concurs with the LCC comments.

California Building Industry Association: The CBIA, in comments received December 30, 2004, submits that section 65584.1 (COG fee authority) should not be given weight by the Commission in conducting its review. CBIA asserts that section 65584.1 “not serve as a new argument in support of any attempt to foist these state-mandated costs, which are ostensibly for the benefit of State and regional communities as a whole, onto that fraction of the community which may be involved in building and buying new homes.” CBIA argues that allowing costs of state-mandated regional planning to promote housing to be passed onto cities and counties, and from there to homebuilders, would further exacerbate the difficulties of providing affordable housing. CBIA states that fees and exactions on residential development help drive up the cost of housing in California, and cited a HCD study that noted problems with residential development fees. CBIA argues that section 65584.1 does not provide authority for COGs to pass on their state-mandated costs to homebuilders or homebuyers by way of city or county fees. According to CBIA, COGs that use section 65584.1 would impair or interfere with their joint powers agreements in violation of article I, section 9 (the contracts clause) of the California constitution. CBIA also argues that even if a COG implemented this new fee authority, the statute provides no guidance on how it could be lawfully implemented, which would be magnified if cities or counties attempted to pass on their costs to developers.

CBIA asserts that the fee statute does not provide a valid basis for cities and counties to pass through costs they may incur for the support of the housing needs work performed by the COGs, and would not provide a basis for a valid fee for several reasons. First, there is no basis for seeking reimbursement of costs incurred by other agencies. City/County fee authority is limited to the reasonable costs imposed on the city or county. There is no authority “to impose fees on private property owners or developers to ‘reimburse’ costs incurred by others.” Second, article XIII D prohibits imposing a fee for general governmental services (art. XIII D, § 6, subd. (b)(5)). The fee prohibition applies to services available to the public at large in substantially the same manner as property owners. Because the service provided by COGs in distributing regional housing needs is available to the community on an equal basis, and “regional housing is a matter of statewide concern,” charging a fee for it is constitutionally prohibited. Also prohibited is a fee on property owners unless the service is actually used by, or immediately available to them (art. XIII D, § 6, subd. (b)(4)). The fee cannot be based on potential or future use of a service. Thus, any city/county fee for housing elements would actually be a tax requiring voter approval. Third, the fee authorized by section 65584.1 would not meet the criteria for the two types of fees recognized by the California Supreme Court: development and regulatory fees. A development fee is defined “for the purpose of defraying all or a portion of the cost of public facilities related to the development project.” (Gov. Code, § 66000, subd. (b)). The planning costs in section 65584.1’s fee do not defray costs of public facilities, nor do they defray impacts caused by particular development projects, as required by law, and therefore do not constitute a lawful development fee. Since housing element activities are incurred independent of any particular development project, regardless of the level of development, and even in its absence, development fees imposed for housing element activities would be unlawful. Regulatory fees, according to CBIA, would also not apply to this case because they cannot exceed the reasonable cost of providing the service or regulatory activity for which they are charged, and they cannot be levied for general revenue purposes. If revenue is the primary purpose of the regulatory fee, and regulation is merely incidental, the fee would actually be a tax. CBIA argues that there is no regulatory function for this fee, as COGs have no

role regulating individual housing development projects. Rather, the intent is to raise revenue to free the state from reimbursing the state-mandated program. Finally, CBIA argues that there is no nexus between new residential development projects and the COG's costs incurred in helping develop the housing element. Conditions on development not related to the use of the property, but to shift the burden of providing the costs of a public benefit to another not responsible or only remotely or speculatively benefiting from it, is an unreasonable exercise of the police power, according to case law cited by CBIA. It also asserts that there must be a reasonable nexus between development activity and exactions imposed as a condition of that activity.

Southern California Association of Governments: The Southern California Association of Governments (SCAG), in comments on the draft staff analysis submitted jointly with other COGs, argues that the regional housing needs assessment is in the state's interest, and not the cities or counties interest. SCAG concludes, "it would be contrary to the policies underlying SB 90 to force local agencies to shoulder the costs of this state service."¹³

SCAG also argues that even if COGs have the authority to charge their members fees to perform regional housing needs assessments, member cities and counties cannot pass their fees on to developers. Cities and counties have fee authority to offset costs of their own planning agencies (section 65104) but do not have authority to levy fees to offset costs incurred by COGs. This argument is addressed below.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution¹⁴ recognizes the state constitutional restrictions on the powers of local government to tax and spend.¹⁵ "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."¹⁶ A test claim statute or executive order may impose a reimbursable state-mandated

¹³ The Commission is no longer governed by SB 90. The Commission is governed by article XIII B, section 6 of the California Constitution, and Government Code section 17500, et seq.

¹⁴ Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "(a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

¹⁵ *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

¹⁶ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

program if it orders or commands a local agency or school district to engage in an activity or task.¹⁷

In addition, the required activity or task must be new, constituting a “new program,” or it must create a “higher level of service” over the previously required level of service.¹⁸

The courts have defined a “program” subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.¹⁹ To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.²⁰ A “higher level of service” occurs when the new “requirements were intended to provide an enhanced service to the public.”²¹

Finally, the newly required activity or increased level of service must impose costs mandated by the state.²²

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.²³ In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”²⁴

¹⁷ *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

¹⁸ *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.*); *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

¹⁹ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.)

²⁰ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.

²¹ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878.

²² *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

²³ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

²⁴ *County of Sonoma*, *supra*, 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

I. What is the scope of the Commission’s jurisdiction directed by Senate Bill 1102?

Statutes 2004, chapter 227, sections 109-110 (Sen. Bill No. 1102, eff. Aug. 16, 2004), requires the Commission on State Mandates, “notwithstanding any other provision of law” to “reconsider former State Board of Control decisions 3916, 3759, 3760, and 3929 regarding the regional housing needs mandate enacted by Chapter 1143 of the Statutes of 1980 to determine whether the statute is a reimbursable mandate under Section 6 of Article XIII B of the California Constitution”²⁵

Administrative agencies, such as the Commission, are entities of limited jurisdiction that have only the powers that have been conferred on them, expressly or by implication, by statute or constitution. An administrative agency may not substitute its judgment for that of the Legislature. When an administrative agency acts in excess of the powers conferred upon it by statute or constitution, its action is void.²⁶

The Commission was created by the Legislature (Gov. Code, §§ 17500 et seq.) and its powers are limited to those authorized by statute. Section 17551 requires the Commission to hear and decide upon a claim by a local agency or school district that the local agency or school district is entitled to reimbursement pursuant to article XIII B, section 6 of the California Constitution. Section 17521 defines the test claim as “the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state.”

Thus, the statutory scheme gives the Commission jurisdiction only over those statutes and/or executive orders pled by the claimant in the test claim. The Commission does not have the authority to approve a claim for reimbursement on statutes or executive orders that have not been pled by the claimant. For this reason, this analysis does not apply to amendments to the test claim statutes subsequent to Statutes 1980, chapter 1143.²⁷

Furthermore, section 17559 grants the Commission the authority to reconsider prior final decisions only within 30 days after the statement of decision is issued. But in the present case, the Commission’s jurisdiction is based solely on Senate Bill No. 1102. Absent Senate Bill No. 1102, the Commission would have no jurisdiction to reconsider any of its decisions relating to housing element provisions in the Government Code since the decision on those statutes was adopted and issued years ago.

Thus, the Commission must act within the jurisdiction granted by Senate Bill No. 1102, and may not substitute its judgment regarding the scope of its jurisdiction on reconsideration for that of

²⁵ Statutes 2004, chapter 227, section 109.

²⁶ See *Ferdig v. State Personnel Board* (1969) 71 Cal.2d 96, 103-104.

²⁷ Section 65583 has been amended by Statutes 1984, chapter 1691, Statutes 1986, chapter 1383, Statutes 1989, chapters 1140 and 1451, Statutes 1991, chapters 730 and 889, Statutes 1992, chapter 1030, Statutes 1999, chapter 967, Statutes 2001, chapter 671, Statutes 2002, chapter 971, Statutes 2004, chapters 227 and 724. Section 65584 has been amended by Statutes 1984, chapter 1684, Statutes 1989, chapter 1451, Statutes 1990, Chapter 1441, Statutes 1998, chapter 796, Statutes 2001, chapter 159, Statutes 2003, chapter 760, and Statutes 2004, chapter 696. The 2004 statute repealed and replaced section 65584.

the Legislature.²⁸ Since an action by the Commission is void if its action is in excess of the powers conferred by statute, the Commission must narrowly construe the provisions of Senate Bill No. 1102.

The parameters and guidelines for the *Regional Housing Needs* program were originally adopted in 1982, with a reimbursement period beginning January 1, 1981. Senate Bill 1102 (Stats. 2004, ch. 227) directs the Commission to reconsider Board of Control test claims relating regional housing. Section 109 of the bill states “[a]ny changes by the commission shall be deemed effective July 1, 2004.”

Therefore, based on the plain language of Senate Bill 1102 (Stats. 2004, ch. 227, § 109), the Commission finds that the period of reimbursement for the Commission’s decision on reconsideration begins July 1, 2004.

II. Does the test claim legislation impose “costs mandated by the state” on cities and counties within the meaning of article XIII B, section 6 of the California Constitution and section 17556?

Because the Commission finds that the fee authority of cities and counties is dispositive of the issues in this reconsideration, there is no need to discuss whether the test claim statute constitutes a program within the meaning of article XIII B, section 6, or whether it is a new program or higher level of service.

In order for the test claim legislation to impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution, the test claim legislation must impose costs mandated by the state within the meaning of Government Code section 17514.²⁹ In addition, no statutory exceptions listed in Government Code section 17556 can apply. Section 17514 defines “cost mandated by the state” as follows:

[A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

Section 17556 (as amended by Stats. 2004, ch. 895, Assem. Bill No. 2855) provides:

The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:

(a) The claim is submitted by a local agency or school district that requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district that requests authorization for that local

²⁸ *California State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 346-347.

²⁹ See also *Lucia Mar, supra*, 44 Cal.3d 830, 835.

agency or school district to implement a given program shall constitute a request within the meaning of this paragraph.

(b) The statute or executive order affirmed for the state a mandate that had been declared existing law or regulation by action of the courts.

(c) The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. This subdivision applies regardless of whether the federal law or regulation was enacted or adopted prior to or after the date on which the state statute or executive order was enacted or issued.

(d) *The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.*

(e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

(f) The statute or executive order imposed duties that were expressly included in a ballot measure approved by the voters in a statewide or local election.

(g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction. [Emphasis added.]

In this case, there are two statutes that authorize local agencies to charge fees to cover their costs. The first is section 65104 (added by Stats. 1984, ch. 690), which states:

The legislative body shall provide the funds, equipment, and accommodations necessary or appropriate for the work of the planning agency. If the legislative body, including that of a charter city, *establishes any fees to support the work of the planning agency*, the fees shall not exceed the reasonable cost of providing the service for which the fee is charged. The legislative body shall impose the fees pursuant to Section 66016. [Emphasis added.]

Section 66016 (cited in section 65104) requires that fees be imposed only after the local agency holds at least one open public meeting, with specified notice requirements. This section also states, in pertinent part:

Unless there has been voter approval, as prescribed by Section 66013 or 66014, *no local agency shall levy a new fee or service charge or increase an existing fee or service charge to an amount which exceeds the estimated amount required to provide the service for which the fee or service charge is levied.* If, however, the fees or service charges create revenues in excess of actual cost, those revenues shall be used to reduce the fee or service charge creating the excess. [Emphasis added.]

The other fee statute for this program is section 65584.1 (Stats. 2004, ch. 227), which reads:

Councils of government may charge a fee to local governments to cover the projected reasonable, actual costs of the council in distributing regional housing needs pursuant to this article. Any fee shall not exceed the estimated amount required to implement its obligations pursuant to Section 65584. *A city, county, or city and county may charge a fee, not to exceed the amount charged in the aggregate to the city, county, or city and county by the council of governments, to reimburse it for the cost of the fee charged by the council of government to cover the council's actual costs in distributing regional housing needs.* The legislative body of the city, county, or city and county shall impose the fee pursuant to Section 66016, except that if the fee creates revenue in excess of actual costs, those revenues shall be refunded to the payers of the fee. [Emphasis added.]

The issue, therefore, is whether cities and counties have the authority in subdivision (d) of section 17556, “to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.”

Senator Ducheny asserts that local governments have fee authority based on section 65104 (fee authority of planning agencies). She states that many local governments have used this authority to charge long-range planning fees, including fees for the development of a housing element.

LCC argues that the fee authority of section 65104 may not be sufficient to pay for the mandated program. Both sections 65104 and 66016 prohibit the fee from exceeding the cost of providing the service. Section 17556, subdivision (d) requires the fee to be sufficient to pay for the cost of the new program or higher level of service. LCC asserts, “A city that spends \$100,000 to develop and adopt a housing element may be unable to determine what portion of the total amount is the ‘reasonable cost’ or ‘estimated amount’ of providing the service to the developer who will pay the fee. Should a developer that proposes to build 500 homes pay a higher fee than a developer who proposes to build 100 homes? Should a developer that proposes to build apartments pay a higher fee than the developer that proposes to build single-family homes? Will a fee be ‘sufficient’ to pay for the preparation of a housing element if the costs are recovered over a seven-year period? [two years to prepare the housing element plus the five-year housing element cycle]. A fee that exceeds the reasonable cost of providing the service is a tax which requires voter approval.”

CBIA presents various arguments against imposing the fee authority in section 65584.1, which are summarized above under “interested party positions.”

In comments on the draft staff analysis, SCAG and other COGs argue that even if COGs have the authority to charge their members fees to perform regional housing needs assessments, member cities and counties cannot pass their fees on to developers. According to SCAG, cities and counties have fee authority to offset costs of their own planning agencies (section 65104) but do not have authority to levy fees to offset costs incurred by COGs.

The Commission finds that the test claim legislation does not impose “costs mandated by the state” on cities and counties because sections 65584.1 and 65104 provide cities and counties with authority to levy fees sufficient to pay for the mandated program.

The fee authority of 65104 is plenary authorization to charge fees for services of the local planning agency. The only limitation is that the fee, “not exceed the reasonable cost of providing the service for which the fee is charged” (Gov. Code, § 65104). Or as similarly stated in section

66016, that it not exceed “the estimated amount required to provide the service for which the fee or service charge is levied.”

The 65584.1 fee authority applies to reimbursement “for the cost of the fee charged by the council of government to cover the council’s actual costs in distributing regional housing needs.” Therefore, because it is authority limited to reimburse cities and counties for the costs of the COGs, but not the costs of the cities and counties themselves, the Commission does not consider section 65584.1’s fee authority in this analysis except in response to SCAG’s comments.

SCAG argues that cities and counties do not have authority to levy fees to offset costs incurred by COGs. The Commission disagrees. Section 65584.1 provides this authority to cities and counties. It reads, in part:

A city, county, or city and county may charge a fee, not to exceed the amount charged in the aggregate to the city, county, or city and county by the council of governments, to reimburse it for the cost of the fee charged by the council of government to cover the council's actual costs in distributing regional housing needs.

Thus, section 65584.1 grants authority to cities and counties to levy fees to offset costs incurred by COGs. And section 65104 grants authority to cities and counties to levy fees to offset their own planning agency costs. Therefore, together these statutes provide sufficient authority to cover all the activities identified in the parameters and guidelines for this program.

In *Connell v. Superior Court of Sacramento County*,³⁰ the court considered whether regulations that increased the purity of recycled water resulted in a reimbursable mandate. The *Connell* court found the fee authority is a question of law, so the evidence submitted regarding the fee’s economic feasibility or sufficiency was not relevant.³¹ The water districts’ possession of the fee authority was dispositive of the question of the existence of a reimbursable mandate. The court rejected the districts’ arguments that the fee would not be “sufficient to pay for the mandated costs” because it is unfeasible or economically undesirable for the districts to recover their costs.³² As the *Connell* court stated:

On appeal, appellants argue the sole inquiry is whether the local agency has “authority” to levy fees sufficient to pay the costs, and it does not matter whether the local agency, for economic reasons, finds it undesirable to exercise that authority. ... [¶] ... [¶] We agree with appellants.”³³

The *Connell* court first explained the purpose of subvention. As the California Supreme Court stated regarding article XIII B, section 6 of the California Constitution, “Section 6 requires subvention only when the costs in question can be recovered solely from tax revenues.”³⁴ In

³⁰ *Connell v. Superior Court of Sacramento County* (1997) 59 Cal.App.4th 382.

³¹ *Id.* at page 400.

³² *Id.* at page 399.

³³ *Id.* at page 400.

³⁴ *Id.* at page 398, citing *County of Fresno v. State of California, supra*, 53 Cal.3d 482, 487.

upholding the constitutionality of the fee authority provision in section 17556, the Supreme Court stated that it “effectively construes the term ‘costs’ in the constitutional provision as excluding expenses that are recoverable from sources other than taxes. Such a construction is altogether sound.”³⁵

The *Connell* court went on to interpret the plain meaning of “fee authority” in section 17556, subdivision (d), as the “right to exercise powers,” or the “power or right to give commands [or] take action ...”³⁶ The court rejected interpreting the statute to mean “a practical ability in light of surrounding economic circumstances,” stating that if that had been the legislative intent, the Legislature would have used the term “reasonable ability” in the statute rather than “authority.”³⁷

The *Connell* court also considered an argument that “fees levied by the districts ‘cannot exceed the cost to the local agency to provide such service,’ because such excessive fees would constitute a special tax.”³⁸ The court stated that no one is suggesting the districts levy fees that exceed their costs.

The Commission finds the reasoning of the *Connell* case applies to this test claim reconsideration. Section 65104 states in part: “If the legislative body, including that of a charter city, establishes any fees to support the work of the planning agency, the fees shall not exceed the reasonable cost of providing the service for which the fee is charged.” This statute grants fee authority to cities and counties to support the work of their planning agencies. It is the planning agency that is responsible for the general plan,³⁹ of which the housing element is a part.⁴⁰ There is no limitation on the fee, except that it not exceed the reasonable cost of providing the service.

In view of *Connell*, the Commission does not find convincing LCC or CBIA’s arguments regarding the fee’s sufficiency or the difficulty of deciding the basis for it. These arguments are not relevant to the legal inquiry because the sole consideration is whether cities or counties have fee authority.⁴¹ Since section 65104 provides this authority to cities and counties, section 17556, subdivision (d) precludes the Commission from finding a state mandate for developing or adopting the housing element.

CONCLUSION

The Commission finds that the test claim legislation (Stats. 1980, ch. 1143) does not impose “costs mandated by the state” on cities and counties within the meaning of article XIII B, section 6 of the California Constitution and section 17556, subdivision (d) because the cities and counties have fee authority statutes to cover the cost of the *Regional Housing Needs* program.

³⁵ *Ibid.*

³⁶ *Id.* at page 401.

³⁷ *Id.* at pages 400-401.

³⁸ *Id.* at page 402.

³⁹ Government Code section 65300.

⁴⁰ Government Code section 65302, subdivision (c).

⁴¹ *Connell v. Superior Court of Sacramento County, supra*, 59 Cal.App.4th 382, 400.