

ITEM 2

APPEAL OF EXECUTIVE DIRECTOR'S DECISION THAT SECTION 1188.4 OF THE COMMISSION'S REGULATIONS DOES NOT APPLY TO THE RECONSIDERATION OF THE DECISION IN *REGIONAL HOUSING NEEDS DETERMINATION: COUNCILS OF GOVERNMENTS (04-RL-3929-05)*

Association of Bay Area Governments, Appellant

EXECUTIVE SUMMARY

Appellant, Association of Bay Area Governments ("ABAG"), appeals the Commission on State Mandates' ("Commission") Executive Director's decision that section 1188.4¹ of the Commission's regulations should not apply to the reconsideration of the decision in *Regional Housing Needs Determination: Councils of Governments*. The Legislature ordered the reconsideration in Senate Bill No. 1102 (Stats. 2004, ch. 227, hereafter "S.B. 1102"), requiring the Commission to reconsider the Board of Control's 1981 *Regional Housing Needs Determinations* decisions.²

If the Commission were to apply section 1188.4 to this reconsideration, it would conflict with S.B. 1102's reconsideration requirement by avoiding the reconsideration altogether,³ or requiring five affirmative Commissioner votes to grant the reconsideration hearing⁴ and change the prior final decision.⁵

For reasons stated in the analysis below, staff finds that the Executive Director was correct in determining that section 1188.4 does not apply to the reconsideration of *Regional Housing Needs Determination: Councils of Governments (04-RL-3929-05)*.

If the Commission agrees that the Executive Director's action finding that section 1188.4 does not apply to this reconsideration was correct, then the Commission should deny this appeal.

If the Commission agrees with appellant ABAG, then it should grant the appeal, void the Executive Director's decision, and reconsider the *Regional Housing Needs Determinations: Councils of Governments* claim under section 1188.4.

¹ California Code of Regulations, title 2, section 1188.4, hereafter referred to as "section 1188.4."

² Originally, there were four *Regional Housing Needs Determinations* claims decided. Claim 3929, filed by ABAG, affects councils of governments. The other claims addressed housing element activities of cities and counties, but are not at issue in this appeal.

³ Section 1188.4, subdivision (j) precludes reconsiderations of decisions made before "the operative date of this regulation." The regulation was operative on July 17, 1998.

⁴ California Code of Regulations, title 2, section 1188.4, subdivision (f).

⁵ California Code of Regulations, title 2, section 1188.4, subdivision (g)(2).

STAFF ANALYSIS

Background

This is an appeal based on California Code of Regulations, title 2, section 1181, subdivision (c), which states, “Any party in interest may appeal to the commission for review of the actions and decisions of the executive director.”

S.B. 1102 (Stats. 2004, ch. 227, effective Aug. 16, 2004), “notwithstanding any other provision of law,” directs the Commission to reconsider the Board of Control’s 1981 final decision on the *Regional Housing Needs* program, and revise the parameters and guidelines, if necessary, “in light of federal and state statutes enacted and federal and state court decisions rendered since this statute was enacted” The Board of Control determined that Statutes 1980, chapter 1143 (which specified detailed components of local government’s housing elements) imposes a reimbursable mandate on councils of governments for the regional housing needs assessments that they perform for cities and counties within their regions. The Board of Control adopted parameters and guidelines in 1981 to reimburse specified activities.

As a result of S.B. 1102, the Executive Director issued, on November 5, 2004, a notice of reconsideration, briefing, and hearing schedule for decision in *Regional Housing Needs Determination: Councils of Governments* (04-RL-3929-05).⁶ The notice included the following statement:

With the exception of section 1188.4 of the Commission’s regulations, the hearing procedures in article 7 of the Commission’s regulations in effect at the time of the hearing will apply. Since this reconsideration was not requested pursuant to Government Code section 17559, the hearing procedures set forth in section 1188.4 do not apply in this case. [Emphasis added.]

On December 23, 2004, the Executive Director issued an amended notice of reconsideration, briefing, and hearing schedule that included the same statement. On January 21, 2005, the Executive Director issued a notice with the draft staff analysis that included the same statement. And on March 10, 2005, the Executive Director issued a notice with the final staff analysis that included the same statement that section 1188.4 does not apply to the reconsideration.⁷

On March 11, 2005, appellant Association of Bay Area Governments (“ABAG”) submitted a letter to the Commission appealing the Executive Director’s determination that section 1188.4 of the Commission’s regulations does not apply to this reconsideration. ABAG contends that section 1188.4 does apply to this reconsideration, as discussed below.

The Commission responded to ABAG on March 16, 2005 that the appeal would appear on the Commission’s March 30, 2005 hearing agenda. ABAG’s letter appealing the Executive Director’s decision and the Commission response were posted to the Commission’s website on March 17, 2005.

No comments have been submitted on this appeal.

⁶ See items 5 and 6 on this meeting agenda.

⁷ California Code of Regulations, title 2, section 1188.4. Subsequent citations to this regulation will be to “section 1188.4.”

Analysis

The Legislature implemented article XIII B, section 6 of the California Constitution by enacting Government Code sections 17500 et seq., which provide the sole and exclusive procedure for a local agency or school district to claim reimbursement under article XIII B, section 6.⁸

Government Code section 17559, the Commission statute governing reconsiderations, applies to “a reconsideration of all or part of a test claim or incorrect reduction claim on petition of any party.” It also states, “The power to order a reconsideration or amend a test claim decision shall expire 30 days after the statement of decision is delivered or mailed to the claimant.”⁹ Because the decision being reconsidered in this case was decided in 1981, and it is not on petition of a party,¹⁰ Government Code section 17559 does not apply to this decision.

To implement section 17559, the Commission adopted section 1188.4, a regulation governing procedures for reconsiderations. Section 1188.4 contains the following provisions:

- Subdivision (a) states that the power to reconsider a Commission decision expires 30 days after the decision is delivered or mailed to the claimant and authorizes the Commission to grant a stay of that expiration up to 30 days solely to consider the petition. If no action is taken on a petition, it is deemed denied. Subdivision (a) also states that it does not apply when the court orders the Commission to reconsider a decision.
- Subdivision (b) of section 1188.4 states, “Except as provided elsewhere in this section, any interested party, affected state agency, or commission member may request that the commission reconsider or amend a test claim decision and change a prior final decision to correct an error of law.”
- Subdivision (c) specifies the contents for a reconsideration request.
- Subdivision (d) states that, “Commission member requests [to reconsider a decision] may be made orally during a regularly scheduled commission meeting. Commission staff shall prepare such written request, as specified in subsection (c)”
- Subdivision (e) provides, “Any signatory to a written agreement that settles a claim may not request reconsideration of that claim if the claim is settled with prejudice.”
- Subdivision (f) of section 1188.4 requires a written staff analysis and recommendation on whether or not to grant the reconsideration before the Commission considers it. This

⁸ Government Code section 17552. By accepting this appeal, the Commission does not make any finding on the merits of item 5, including the issue of appellant’s status as an eligible claimant.

⁹ Government Code section 17559, subdivision (a). Subdivision (b) of this section authorizes the claimant or the state to commence legal action against the Commission to set aside a Commission decision, and authorizes the court to order reconsideration of a decision.

¹⁰ A “party” is defined as “the test claimant, the Department of Finance, Office of State Controller, or affected state agency.” California Code of Regulations, title 2, section 1181.1, subdivision (m).

subdivision also requires that the reconsideration request be considered at a scheduled meeting, and requires five affirmative votes to grant the reconsideration request.

- Subdivision (g) provides that if the Commission grants the reconsideration request, “a hearing shall be conducted to determine if the prior final decision is contrary to law and to correct an error of law.” Procedures are outlined, including staff preparation of a written analysis with comments from all parties and interested persons. At least eight weeks before the commission hearing, a draft staff analysis is prepared and distributed to all interested persons, and anyone who requests one. Subdivision (g) allows anyone to submit comments on the draft staff analysis, which are reviewed and may be incorporated into the final analysis. Subdivision (g)(2) specifies that procedures in Article 7 (of the Commission’s regulations) shall “govern the commission’s hearing and decisions process, except that five affirmative votes shall be required to change a prior final decision.”
- Subdivision (h) requires that section 1183.1 and 1183.3 of the Commission’s regulations govern the adoption of the parameters and guidelines, if applicable.
- Subdivision (i) of section 1188.4 states, “Failure to seek commission reconsideration of a prior final decision shall not affect a claimant’s or state agency’s right to seek judicial review pursuant to Government Code Section 17559.”
- Subdivision (j) states, “No prior final decision made by the commission or Board of Control before the operative date of this regulation may be reconsidered.”¹¹

The issue raised by ABAG is whether section 1188.4 applies to the reconsideration that is directed by S.B. 1102. S.B. 1102 requires, “notwithstanding any other provision of law,” the Commission to reconsider the *Regional Housing Needs Determinations* decisions.¹² ABAG states that the Commission’s noticed statement that section 1188.4 does not apply to the reconsideration is “wrong on its face.” ABAG quotes a sentence from subdivision (a) of section 1188.4, “This provision does not apply when the court exercises its authority under Government Code section 17559 and orders the Commission to rehear a claim.” According to ABAG, “this is exactly the opposite of what the Notice states. Since this rehearing occurs pursuant to SB 1102 and not as a result of a court order, section 1188.4 does apply.”

S.B. 1102 expressly requires this reconsideration. Neither Government Code section 17559, nor section 1188.4 are invoked. Further, staff disagrees with ABAG’s interpretation. The sentence ABAG quotes from section 1188.4, subdivision (a), “This provision does not apply when the court exercises its authority under Government Code section 17559” is not the *only* situation in which section 1188.4 does not apply. It also does not apply when the Legislature orders the reconsideration.

In *Pacific Trust Company v. Fidelity Federal Savings and Loan* (1986) 184 Cal.App.3d, 817, the court interpreted Civil Code section 1671, which states, “This section does not apply in any case

¹¹ The operative date of section 1188.4 was July 17, 1998.

¹² Originally, there were four claims decided in *Regional Housing Needs Determinations*. Claim 3929, filed by ABAG, affects councils of governments. The other claims addressed regional housing needs activities of cities and counties, but are not at issue in this appeal.

where another statute expressly applicable to the contract prescribes the rules or standard for determining the validity of a provision in the contract liquidating the damages for the breach of the contract.” The court expanded this provision’s lack of applicability beyond the express “other statute” scenario. In interpreting this statute, the court stated Civil Code section 1671 also does not apply, “where a federal regulation establishes the validity of a liquidated damages provision.”¹³

Staff interprets section 1188.4 similarly to the court’s interpretation of Civil Code section 1671 – that it does not apply when it says it does not, but that it does not apply in other situations as well. Specifically, section 1188.4 does not apply to reconsiderations when the court exercises its authority under Government Code section 17559 (as stated in § 1188.4), but also that it does not apply to reconsiderations ordered by the Legislature (in this case, by S.B. 1102).

Section 1188.4 does not fit here. Taken as a whole, a “plain meaning” reading of section 1188.4 and the other Commission regulations indicates that section 1188.4 applies only to a request for reconsideration that comes from a “party” (defined as “the test claimant, the Department of Finance, Office of State Controller, or affected state agency.”¹⁴), or on the motion of a Commissioner, and is limited in scope. None of the terms used to describe those who have standing to request a reconsideration (“party,” “interested party,”¹⁵ or “affected state agency”¹⁶) applies to the Legislature. Thus, section 1188.4, by its terms, does not apply where the Legislature has ordered reconsideration of a test claim decision, just as it expressly does not apply (§ 1188.4, subd. (a)) to court-ordered reconsiderations because they would always occur more than 30 days after a prior final decision.

This plain reading is consistent with the rule that the Commission has limited jurisdiction to hear and decide claims.¹⁷ If the Legislature chooses to give the Commission jurisdiction to reconsider a decision, as it has through S.B. 1102, the Commission cannot (through section 1188.4 or any regulation) limit (or expand) the legislative grant of authority.¹⁸

¹³ *Pacific Trust Company v. Fidelity Federal Savings and Loan* (1986) 184 Cal.App.3d 817, 822. Although a Comment of the Law Revision Commission supported the court’s decision, the court stated that it would reach the same conclusion because the federal regulations preempted state law. *Id.* at pages 822-823.

¹⁴ California Code of Regulations, title 2, section 1181.1, subdivision (m).

¹⁵ “‘Interested party’ means a local agency or school district; an organization or association representing local agencies or school districts; or a person authorized to represent a local agency or school district, having an interest in a specific claim or request other than the claimant.” California Code of Regulations, title 2, section 1181.1, subdivision (k).

¹⁶ “‘Affected state agency’ means a state department or agency that is responsible, in whole or in part, for implementation, enforcement, or administration of any statute(s) or executive order(s) that is the subject of a claim.” California Code of Regulations, title 2, section 1181.1, subdivision (a).

¹⁷ Cf. *Ferdig v. State Personnel Board* (1969) 71 Cal.2d 96, 103.

¹⁸ A regulation cannot restrict an agency’s statutory power. *City of San Jose v. Department of Health Services* (1998) 66 Cal.App.4th 35, 42.

In requiring the reconsideration, S.B. 1102 includes the phrase, “notwithstanding any other provision of law.” One court recently interpreted this phrase in a Water Code statute. The court stated that the phrase, “declares the legislative intent to override all contrary law. [Citation.] By use of this term, the Legislature expresses its intent ‘to have the specific statute control despite the existence of other law which might otherwise govern.’ [Citation.]”¹⁹ The same interpretation applies here. The Legislature by inserting this phrase, expressly made S.B. 1102 prevail over section 1188.4, or any other law that might otherwise govern the reconsideration.

If section 1188.4, subdivision (j), applies to this reconsideration, as ABAG urges, there could be no reconsideration. Subdivision (j) prohibits reconsidering a final decision by the Commission or Board of Control “before the operative date of this regulation ...” In other words, section 1188.4 would prohibit reconsidering any decision made before July 17, 1998. This would render void the provision in S.B. 1102 that requires the Commission to reconsider the 1981 *Regional Housing Needs Determination* decision. Section 1188.4 cannot be interpreted to void a statute. As one court stated regarding a city’s authority to regulate tobacco, “rules and regulations do not have the authority and force of *statutory law*, and must themselves yield to *statutory law* when in conflict therewith.”²⁰ [Emphasis added.] In this case, section 1188.4 does not conflict with S.B. 1102 (unless interpreted as ABAG urges). Rather, it does not apply to this type of reconsideration – one requested by the Legislature.

In addition to subdivision (j), ABAG requests that subdivision (f) of section 1188.4 apply to this reconsideration. Subdivision (f) requires a written staff analysis and recommendation on whether or not to grant the reconsideration before the Commission considers it. This subdivision also requires that the reconsideration request be considered at a scheduled meeting, and requires five affirmative votes to grant the reconsideration request. Staff disagrees that (f) applies. Applying it would mean that the Commission could choose not to reconsider the *Regional Housing Needs Determination* decision, which would contravene the Legislature’s directive to do so in S.B. 1102. As explained above, section 1188.4 cannot be interpreted to preclude action required by a statute.

ABAG also requests that section 1188.4, subdivision (g), apply to this reconsideration. As stated above, subdivision (g) provides for a hearing on the prior final decision, and written staff analyses issued at specified intervals before the hearing. Subdivision (g)(2) specifies that procedures in Article 7 (of the Commission’s regulations) shall “govern the commission’s hearing and decisions process, except that five affirmative votes shall be required to change a prior final decision.”

Except for the five-vote provision of subdivision (g)(2), staff has already complied with this subdivision by providing a written draft analysis and final analysis on the Commission’s website, and providing e-mail notice to all parties and interested parties, within the timeframes specified.

As to the five-vote provision to change a prior final decision, there is no statute that requires this. (see Gov. Code, § 17559, subd. (a)). The requirement for five votes is only found in section 1188.4, which is presumed to be a valid, duly adopted regulation under authority of Government Code sections 17527 and 17553 (the Commission’s rulemaking power). Section 1188.4 provides for reconsideration of a prior final decision in limited circumstances. By its terms, it applies to a

¹⁹ *Klajic v. Castaic Lake Water Agency* (2004) 121 Cal.App.4th 5, 13.

²⁰ *City of San Jose v. Department of Health Services, supra*, 66 Cal.App.4th 35, 41.

request from a claimant or state agency, and does not concern court-ordered reconsiderations. Reading each subdivision separately and together, section 1188.4 does not apply to the reconsideration required by S.B. 1102.

Subdivision (h) of section 1188.4, which ABAG also requests to be applied to this reconsideration, requires that regulations on the parameters and guidelines (1183.1) and the statewide cost estimate (1183.3) apply to any change of a prior final decision, if applicable. If revising the parameters and guidelines were necessary, the Commission would apply Government Code section 17557 (which governs parameters and guidelines), and S.B. 1102, which states in pertinent part, “The commission, if necessary, shall revise its parameters and guidelines to be consistent with this reconsideration.”

Finally, determining that section 1188.4 does not apply to the reconsideration at issue is a proper exercise of the Executive Director’s authority to “expedite all matters within the jurisdiction of the commission.”²¹

Conclusion

Staff finds that the Executive Director was correct in determining that section 1188.4 does not apply to the reconsideration of *Regional Housing Needs Determination: Councils of Governments* (04-RL-3929-05).

Recommendation

If the Commission agrees that the Executive Director’s action finding that section 1188.4 does not apply to this reconsideration was correct, then the Commission should deny this appeal.

If the Commission agrees with appellant ABAG, then it should grant the appeal, void the Executive Director’s decision, and reconsider the *Regional Housing Needs Determinations: Councils of Governments* claim under section 1188.4.

²¹ Government Code section 17530.