

ITEM 5

RECONSIDERATION OF PRIOR STATEMENT OF DECISION FINAL STAFF ANALYSIS

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

Board of Control Decision No. 3929

Regional Housing Needs Determination: Councils of Governments
(04-RL-3929-05)

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

EXECUTIVE SUMMARY

Statutes 2004, chapter 227 (Sen. Bill No. 1102, effective Aug. 16, 2004) directs the Commission on State Mandates (“Commission”) to reconsider the Board of Control’s 1981 final decision and, if necessary, revise the parameters and guidelines of the *Regional Housing Needs* program, “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 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.

Comments on the reconsideration, as summarized in the analysis, were received from the Department of Finance, Senator Ducheny, the League of California Cities, the California Association of Councils of Governments, the Sacramento Area Council of Governments, the San Diego Association of Governments, the Southern California Association of Governments, the California State Association of Counties, the California Building Industry Association, and the Mendocino Council of Governments.

For reasons stated in the analysis, staff finds that (1) the Commission has jurisdiction to reconsider Board of Control Decision No. 3929, and that the reconsideration decision is effective as of July 1, 2004; (2) councils of governments are not eligible claimants for purposes of mandate reimbursement under article XIII B, section 6; and as an alternative grounds for denial, (3) the test claim legislation does not impose “costs mandated by the state” on councils of governments within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17556 because of the councils’ fee authority provided in Government Code section 65584.1.

Recommendation

Therefore, staff recommends that the Commission adopt this analysis and deny Board of Control claim no. 3929 effective July 1, 2004.

STAFF ANALYSIS

Chronology

- 07/22/81 Test Claim filed with the Board of Control by the Association of Bay Area Governments (“ABAG”)
- 08/19/81 Board of Control determines that Statutes 1980, chapter 1143 imposes a reimbursable mandate for claim no. 3929
- 10/12/81 Board of Control adopts parameters and guidelines
- 12/16/81 Board of Control amends parameters and guidelines
- 01/20/82 Board of Control adopts statewide cost estimate
- 10/25/84 Board of Control amends parameters and guidelines
- 08/16/04 Legislature enacts Statutes 2004, chapter 227, requiring the Commission to reconsider the Board of Control Decision No. 3929
- 11/03/04 Commission issues Notice of Reconsideration, Briefing and Hearing Schedule
- 11/19/04 Senator Ducheny submits comments
- 11/30/04 Department of Finance (“DOF”) submits comments
- 12/01/04 League of California Cities (“LCC”) submits comments
- 12/01/04 California Association of Councils of Governments (“CACOG”) submits comments
- 12/01/04 Sacramento Area Council of Governments (“SACOG”) submits comments
- 12/01/04 San Diego Association of Governments (“SANDAG”) submits comments
- 12/01/04 Southern California Association of Governments (“SCAG”) submits comments
- 12/22/04 SCAG requests extension of time to file rebuttal comments
- 12/23/04 California State Association of Counties (“CSAC”) submits comments
- 12/23/04 Commission issues Notice of Reconsideration, Briefing and Hearing Schedule as amended on 12/23/04
- 12/30/04 California Building Industry Association (“CBIA”) submits comments
- 01/10/05 SCAG, SACOG, ABAG, CACOG, and SANDAG submit rebuttal comments
- 01/20/05 Commission issues draft staff analysis
- 01/20/05 Mendocino Council of Governments (“MCOG”) submits comments¹
- 02/17/05 SACOG submits comments on the draft staff analysis
- 02/17/05 SCAG, ABAG, SACOG, CACOG, and SANDAG jointly submit comments on the draft staff analysis
- 03/10/05 Commission issues final staff analysis and proposed Statement of Decision

¹ MCOG’s comments were not included in the draft staff analysis because the comments were received after the analysis was issued.

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, 3760,² 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 65584.1³ of the Government Code. The 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

In 1981, the Board of Control determined that Statutes 1980, chapter 1143 imposes a reimbursable mandate for claim no. 3929 (filed by the Association of Bay Area Governments, or "ABAG"). The test claim legislation enacted content requirements for housing elements that cities and counties are required to adopt as part of their general plans.⁴ For example, section 65583⁵ 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.⁶ The housing element is also required to include "A

² The reconsideration for claims 3916, 3759, and 3760 is in a separate analysis entitled *Regional Housing Needs Determinations*.

³ 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 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.

⁴ Government Code section 65350.

⁵ All statutory references are to the Government Code unless otherwise indicated.

⁶ Government Code section 65583, subdivision (a).

statement of the community’s goals, quantified objectives, and policies relative to the maintenance, improvement, and development of housing.”⁷ A five-year program for implementation is also required, with content outlined in detail.⁸

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 the existing and projected housing needs for its region, and to determine each locality’s share of the housing need.⁹ After the COG determines the housing needs for each locality in its region, a county or city may revise the definition of its share based on available data. The COG is then required to accept the revision or indicate, based on available data and accepted planning methodology, why the revision is inconsistent with the regional housing need.¹⁰

Although the housing element requirement in the general plan 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, HCD had promulgated regulations or guidelines for housing elements,¹¹ but these were not mandatory for cities, counties or COGs.¹²

The Board of Control adopted parameters and guidelines for the test claim statute in October 1981. As stated in the parameters and guidelines:

By enacting Chapter 1143, Statutes of 1980, the Legislature required that each council of government (COG) determine the existing and projected need for housing for its region, and determine each City and County share of such need, based upon these factors:

- Market demand for housing
- Employment opportunities
- Availability of Suitable [sic] sites and public facilities
- Commuting patterns
- Type and tenure of housing
- Housing needs of farmworkers
- Desire to avoid impaction of localities with relatively high proportions of lower income households

If a local government revises its share of regional housing needs determined by each COG, the COG shall accept the revision, or shall indicate, based upon

⁷ Former Government Code section 65584, subdivision (b). This was later amended to add “preservation.”

⁸ Former Government Code section 65584, subdivision (c).

⁹ Former Government Code section 65584, subdivision (a).

¹⁰ Former Government Code section 65584, subdivision (c).

¹¹ The housing element guidelines were repealed in 1982. See California Code of Regulations, title 24, chapter 6, subchapters 3 and 4.

¹² 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.

available data and accepted planning methodology, why the revision is inconsistent with the regional housing need.

Under the heading “Reimbursable Costs,” the parameters and guidelines specify the following activities (omitted paragraphs are those labeled “reimbursable costs”):

1. Activity: If necessary, adjust data provided by [HCD] to determine existing and projected housing needs of the region. Coordination of COG determinations of regional housing needs should take place with [HCD]. [¶]...[¶]
2. Activity: Preparation of draft plan that distributed regional housing needs to cities and counties within the geographical area of the COG, utilizing available data and the factors cited in section 65584 (a). [¶]...[¶]
3. Activity: Conducting of public hearings by the Board of Directors for the purpose of adopting determinations of local shares of regional housing needs. Meetings, briefing, training sessions, seminars and advisory committees are not reimbursable. [¶]...[¶]
4. Activity: Review of all local government revisions to the COG’s determined shares of regional housing needs, if any, and acceptance of such revisions or indications that such revisions are inconsistent with regional housing needs within 60 days of local government’s revisions. [¶]...[¶]
5. [This paragraph specifies costs incurred by specific COGs (e.g., SCAG) within stated deadlines for revisions. The parameters and guidelines also included some express limitations on reimbursement.]

State Agency Position

In comments received November 30, 2004, the Department of Finance (“DOF”) states that COGs are not eligible claimants under article XIII B, section 6 of the California Constitution because they have no independent power of taxation, nor do the fees they receive from cities and counties constitute “proceeds of taxes” subject to article XIII B appropriation limits. According to DOF, COGs are analogous to redevelopment agencies that were found ineligible for state reimbursement under two cases: *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1997) 55 Cal. App. 4th 976, and *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266. In those cases, the redevelopment agencies were ineligible for state reimbursement because their financing was not “deemed the receipt by an agency of proceeds of taxes ... within the meaning of Article XIII B of the California Constitution” DOF states that COGs are organized pursuant to the Joint Powers Act (Gov. Code, § 6500 et seq.) and have no ability to levy taxes, and therefore, are not eligible claimants. DOF also argues that COGs have fee authority under section 65584.1, so the Commission cannot find there are costs mandated by the state. DOF asserts that funds in past budgets appropriated and paid to COGs for this program “should be considered a voluntary state subvention, not required by mandate law.”

No other state agency submitted comments on this reconsideration.

Interested Party Positions

Senator Ducheny: In comments received November 19, 2004, Senator Ducheny states that given budget deficits, it is not realistic to expect ongoing General Fund appropriations for the

regional housing needs determinations process. Senator Ducheny also states that *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates, et al.* (1996) 43 Cal. App. 4th 1188, and *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App. 4th 976, make COGs ineligible for reimbursement. She also asserts that the Legislature provided fee authority to COGs in section 65584.1 for the activities in the test claim statute, “and for local governments in turn to pass these costs on to developers as fees.” According to the Senator, this fee authority was intended to meet the requirement in section 17556, subdivision (d), concluding that while there is a mandate on COGs “to perform the distribution of the regional housing need,” it is not a reimbursable mandate.

California Association of Councils of Governments: CACOG’s position is that the original Board of Control decision should remain in effect without change, and the cases cited by Senator Ducheny concern redevelopment agencies and not COGs, so they do not directly decide the issue. Also, CACOG asserts that redevelopment agencies are created pursuant to specific state laws, whereas COGs are joint powers agencies with no dedicated state revenues and no taxing authority. CACOG argues that the court decisions state that redevelopment agencies are agencies of the state and not a local government, although governed by local officials, and their activities carry out a state function. COGs (except ABAG) also carry out state functions in transportation, with state funding. CACOG argues, “It would be a different issue were the Commission to be considering a responsibility that is imposed upon entities that are Councils of Governments for activities they are carrying out as a transportation planning agency or transportation commission which includes state funding.” CACOG argues that there is a difference between activities a city carries out as a redevelopment agency for which it is not eligible for reimbursement, and those it carries out as a city for which it is. As to the COGs’ fee authority, CACOG argues that applying it would violate the state and federal constitutional provision against impairment of contracts because the joint powers agreements between COGs and member cities/counties are contracts that contain the only terms for amendment. CACOG reiterates the League of California Cities’ (LCC) position that a COG fee on a local government that is not used for a local purpose, but for a statewide purpose, is a tax and is therefore invalid.

Sacramento Area Council of Governments: In its original comments, SACOG urges the Commission to find that the regional housing needs assessments continue to be reimbursable. SACOG concurs with and incorporates CACOG’s and LCC’s comments. SACOG asserts that section 65584.1 does not grant legitimate fee authority and does not exempt regional housing needs assessments from reimbursement. Because COGs have only the powers enumerated in their fee agreements with member agencies, COGs have no power to levy fees because member agencies would have to amend their joint powers agreements to grant COGs this authority. SACOG’s remaining arguments on COG’s fee authority are summarized in the analysis below.

In comments on the draft staff analysis submitted in February 2005, SACOG disagrees with the staff recommendation. According to SACOG, the draft staff analysis did not address several of the arguments in favor of reimbursement made by the interested parties, so recommendations in the draft staff analysis should not be followed. SACOG’s arguments are further summarized and addressed below.

San Diego Association of Governments: SANDAG supports the comments submitted by CACOG, and states that COGs are eligible claimants. In support, SANDAG cites the Board of Control decision and the State Controller’s Mandated Cost Manual.

Southern California Association of Governments: In its comments filed in December 2004, SCAG argues that the state is required to reimburse local governments for the cost of implementing the regional planning mandate. SCAG asserts that whether COGs may actually impose the fee in section 65584.1 is an unresolved issue. According to SCAG, until the issue is resolved it is premature for the Commission to determine section 65584.1's effect on the reimbursability of the regional housing needs assessment process. SCAG also states that the COG's authority to collect fees amounts to COGs collecting from themselves. "Collecting from their [COGs'] members hardly results in any sort of reimbursement to the COGs." So COGs, according to SCAG, would be paying for the assessments themselves. SCAG asserts that this runs counter to the SB 90¹³ policy to prevent the state from shifting costs of providing public services to local agencies.

SCAG states that pursuant to section 65584, it must allocate shares of regional housing need to cities and counties in the region, and allocate shares of subregional housing need to subregional agencies that choose to accept the delegation of responsibility from SCAG. As to whether COGs are eligible claimants, SCAG submits that they are and cites the Board of Control decision and the State Controller's Mandated Cost Manual in support. SCAG asserts that since Revenue and Taxation Code section 2211 has not changed,¹⁴ COGs are still eligible claimants. As to whether the test claim statute imposed a new program, SCAG argues that it did. Before the test claim statute, COGs were not required to determine a regional housing need, nor required to determine local shares of the need. Despite amendments to section 65584 since the test claim statute, it continues to mandate COGs to perform these activities, and is therefore still a new program. As to the new fee authority of section 65584.1, SCAG asserts that its validity is unresolved, and repeats the League of California Cities' assertion that the fee constitutes an unconstitutional local tax. SCAG also argues that such a fee to member agencies would essentially be charging themselves in violation of the principle not to shift costs for public services to local agencies. SCAG states that in light of past reimbursement by the state for this program, the new fee authority should have no bearing on state reimbursement. Finally, SCAG points out that according to the 2003-2004, and 2002-2003 state budget acts, only \$1000 has been appropriated for reimbursements to local agencies for the test claim activities.

SCAG (along with ABAG, SACOG, CACOG, and SANDAG) submitted rebuttal comments on January 10, 2005, taking issue with the argument that the fee authority of section 65584.1 precludes COG reimbursement. The fee arguments are summarized below in the analysis.

In commenting on the draft staff analysis, SCAG (in comments submitted jointly with ABAG, SACOG, CALCOG and SANDAG) states that staff fails to address the COGs' prior comments. SCAG also argues that the plain language of Government Code section 17518 does not support staff's interpretation that COGs are not eligible claimants under article XIII B, section 6. These arguments are addressed below.

League of California Cities: LCC 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.

¹³ The Commission is currently governed by article XIII B, section 6 of the California Constitution and Government Code section 17500 et seq.

¹⁴ *Ibid.*

LCC further comments that COGs are eligible claimants because article XIII B, section 6 requires reimbursement to a “local agency,” meaning “any city, county, special district, authority, or other political subdivision of the state.” (Gov. Code, § 17518). LCC argues that as a “joint powers authority,” which is a public entity separate and distinct from the parties that created it, a COG is an “authority” within the meaning of section 17518. LCC disagrees with Senator Ducheny’s reference to two cases for the proposition that a COG may not submit a claim for reimbursement. According to LCC, these cases did not hold that a COG may not submit a claim for reimbursement, but only that a redevelopment agency may not submit one. LCC also makes various arguments against the fee authority of section 65584.1, as summarized below in the analysis.

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: CSAC, in a December 23, 2004 letter, states that it concurs with the LCC comments.

California Building Industry Association: CBIA, in comments received December 30, 2004, submits that section 65584.1 (fee authority) should not be given weight by the Commission in conducting its review. CBIA asserts that 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 should cities or counties attempt to pass on costs to developers.

CBIA presents various other arguments against the fee authority of section 65584.1, which are summarized below in the analysis.

Mendocino Council of Governments: In comments received January 20, 2005, MCOG states that it “has no interest in conducting periodic regional housing needs allocation plans for Mendocino County. ... We do it only because it is required by state law. It is a state mandate.” [Emphasis in original.] MCOG also concurs with comments submitted by SCAG.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution¹⁵ recognizes the state constitutional restrictions on the powers of local government to tax and spend.¹⁶ “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.”¹⁷ A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.¹⁸

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.¹⁹

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.²⁰ 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

¹⁵ Article XIII B, section 6, subdivision (a), (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.”

¹⁶ *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

¹⁷ *County of San Diego v. State of California (County of San Diego)*(1997) 15 Cal.4th 68, 81.

¹⁸ *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

¹⁹ *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*).

²⁰ *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.)

legislation.²¹ A “higher level of service” occurs when the new “requirements were intended to provide an enhanced service to the public.”²²

Finally, the newly required activity or increased level of service must impose costs mandated by the state.²³

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 6.²⁴ 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.”²⁵

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”²⁶

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.²⁷ 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.²⁸

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 (as amended by Stats. 2004, ch. 890) defines a test claim as “the first claim filed

²¹ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.

²² *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878.

²³ *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.

²⁴ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

²⁵ *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.

²⁶ Statutes 2004, chapter 227, section 109.

²⁷ *Ferdig v. State Personnel Board* (1969) 71 Cal.2d 96, 103-104.

²⁸ *Ibid.*

with the Commission alleging that a particular statute or executive order imposes costs mandated by the state.”

Thus, the Government Code 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 1143.²⁹

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 of the Government Code since the decisions on those statutes were 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 the Legislature.³⁰ Since a Commission action is void if it exceeds 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 1981, with a reimbursement period beginning January 1, 1981. Senate Bill 1102 (Stats. 2004, ch. 227) directs the Commission to reconsider Board of Control regional housing test claims. 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), staff finds that the period of reimbursement for the Commission’s decision on reconsideration begins July 1, 2004.

II. Are COGs eligible claimants under article XIII B, section 6 of the California Constitution?

Section 65584, as added by Statutes 1980, chapter 1143, requires each COG to determine the existing and projected housing needs for its region, and to determine each locality’s share of the housing need.³¹ After the COG determines the housing needs for each locality within its region, a county or city may revise the definition of its share based on available data. The COG is then required to accept the revision or indicate, based on available data and accepted planning methodology, why the revision is inconsistent with the regional housing need.³²

As indicated above, the Board of Control determined in 1981 that section 65584 of the test claim legislation imposed a reimbursable state-mandated program under article XIII B, section 6 on

²⁹ Section 65584, the test claim statute that applies to COGs, 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.

³⁰ *California State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 346-347.

³¹ Former Government Code section 65584, subdivision (a).

³² Former Government Code section 65584, subdivision (c).

COGs. For purposes of this reconsideration, several COGs urge the Commission to continue to find that they are eligible claimants and are entitled to reimbursement under article XIII B, section 6 for the costs listed in the parameters and guidelines to implement section 65584.³³ SANDAG argues, for example, that the Board of Control’s August 1981 decision on this test claim that the test claim statute results in state-mandated costs supports its contention that COGs are eligible claimants. SANDAG also argues that the Mandated Cost Manual issued by the State Controller’s Office that lists COGs as eligible claimants support SANDAG’s contention as to the eligibility of COGs as claimants.

For the reasons provided below, however, staff finds that the Board of Control’s decision is legally incorrect under current law. Since 1981, there have been 31 court decisions interpreting article XIII B, section 6. Based on the courts’ interpretation of article XIII B, sections 6 and 8, staff finds that the “costs” incurred by COGs are not the type of costs that are state reimbursable under the Constitution. Thus, COGs are not eligible claimants for purposes of mandate reimbursement under article XIII B, section 6 and Government Code section 17500 et seq.

The California Supreme Court has repeatedly held that the subvention requirement of article XIII B, section 6 must be interpreted in light of its textual and historical context.³⁴ Thus, before describing COGs, it is necessary to outline the history and purpose of mandate reimbursement under the California Constitution.

In 1978, the voters adopted Proposition 13, which added article XIII A to the California Constitution. Article XIII A imposes a limit on the power of state and local governments to adopt and levy taxes. In 1979, the voters added article XIII B to the Constitution, which “imposes a complementary limit on the rate of growth in government spending.”³⁵ The spending limit in article XIII B is accomplished by limiting the “total annual appropriations subject to limitation” so that “a government entity may not spend more in one year on a program funded with the proceeds of taxes than it did in the prior year.”³⁶ Articles XIII A and XIII B work in tandem, restricting California governments’ power both to levy and to spend for public purposes. Their goals are to “protect residents from excessive taxation and government spending.”³⁷

Article XIII B, section 6 requires, with exceptions not relevant to this issue, that 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 the local government for the costs of the new program or higher level of service. In *County of San Diego v. Commission on State Mandates*,³⁸ the Supreme Court explained that section 6 represents a recognition that together articles XIII A and XIII B severely restrict the taxing and spending powers of local agencies. The purpose of section 6 is to preclude the state from shifting financial responsibility

³³ See comments from CACOG, SACOG, SANDAG, and SCAG.

³⁴ *County of Fresno v. State of California* (1991) 53 Cal.3d 482,487; *County of San Diego, supra*, 15 Cal.4th 68, 81.

³⁵ *County of San Diego, supra*, 15 Cal.4th at page 81.

³⁶ *Huntington Park Redevelopment Agency v. Martin* (1985) 38 Cal.3d 100, 107.

³⁷ *Ibid.*

³⁸ *County of San Diego, supra*, 15 Cal. 4th at page 81.

for governmental functions to local agencies, which are ill equipped to undertake increased financial responsibilities *because they are subject to taxing and spending limitations under articles XIII A and XIII B.*³⁹ [Emphasis added.]

Thus, a local agency must be subject to the tax and spend limitations of articles XIII A and XIII B to be eligible for reimbursement of costs incurred to implement a “program” under section 6.

In the present case, COGs are joint powers agencies established pursuant to the Joint Exercise of Powers Act (Gov. Code, § 6500 et seq.). They are made up of cities and counties that voluntarily become members of the joint powers authority. Under the Act, local agencies are authorized to enter into agreements to “jointly exercise any power common to the contracting parties.”⁴⁰ The entity provided to administer or execute the agreement may be one or more of the parties to the agreement; a person, firm or corporation, including a nonprofit corporation, designated in the agreement; or a public entity, commission or board.⁴¹ A joint powers authority is a separate entity from the parties to the agreement and is not legally considered to be the same entity as its contracting parties.⁴²

A joint powers agency, such as a COG in this case, has only the powers that are specified in the joint powers agreement.⁴³ Unlike one of their city or county members, COGs do not have the independent statutory authority to levy and to collect tax revenue. Rather, they receive funds through membership dues paid with the proceeds of taxes of their city and county members.⁴⁴

In addition, as explained below, COGs are not subject to the spending limitation prescribed by article XIII B. Article XIII B, section 8, subdivision (b), defines “appropriations subject to limitation” for local government to mean “any authorization to expend during a fiscal year the *proceeds of taxes levied by or for that entity* and the proceeds of state subventions to that entity (other than subventions made pursuant to section 6) exclusive of refunds of taxes... .” [Emphasis added.] As indicated above, COGs do not have the independent power to tax. Thus, the issue is whether their local agency members, which do have the power to tax, can levy taxes “for” the COGs, making those tax proceeds subject to the spending limitation of article XIII B.

In 1985, the Second District Court of Appeal, in *Bell Community Redevelopment Agency v. Woosley*, interpreted the phrase “taxes levied by or for an entity” in the definition of “appropriations subject to limitation” in article XIII B, section 8.⁴⁵ Although the *Bell* case

³⁹ *Ibid*; See also, *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 980-981, 985; and *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 280-281.

⁴⁰ Government Code section 6502.

⁴¹ Government Code sections 6506, 6508.

⁴² Government Code section 6507; 65 Opinions of the California Attorney General 618, 623 (1982).

⁴³ Government Code section 6508.

⁴⁴ See rebuttal comments of the Councils of Governments, page 9.

⁴⁵ *Bell Community Redevelopment Agency v. Woosley* (1985) 169 Cal.App.3d 24.

involved a redevelopment agency, the court’s interpretation of the spending limit in article XIII B is instructive and relevant to this case.

The *Bell* court determined that the phrase “taxes levied by or for an entity” has a long-standing special meaning, dating back to an 1895 law that provided for the levy of taxes “by and for” municipal corporations. Based on the interpretation of the phrase, the court concluded that a local agency does not levy taxes for a redevelopment agency since a redevelopment agency does not have the power to tax. Thus, “costs” incurred by an entity that does not have the power to tax are not subject to the spending limit in article XIII B. The court’s holding is as follows:

This [1895] act allowed general law and charter cities to continue to exercise their taxing power directly or, if they so desired, to have the county levy and collect their taxes for them. [Citations omitted.] The legal effect of this arrangement, as explained by case law, was that the taxing power exercised was that of the city, and it remained in the city. The county officers in levying taxes for the city became ex-officio officers of the city and exercised the city’s taxing power. [Citation omitted.] In levying taxes for the city the county was levying “municipal taxes” through the ordinary county machinery. [Citation omitted.]

Thus, the salient characteristics of one entity levying taxes “for” another entity are: (1) the entity for whom the taxes are levied has the taxing power; (2) the levying officers of the county exercise the taxing power of the entity for whom they are levying; (3) they exercise such power as ex-officio officers of that entity, and (4) the taxes collected are those of the “levied for” entity.” *It is obvious that none of these characteristics has any applicability to the redevelopment process ... The first and foremost fact which mandates this conclusion is that a redevelopment agency does not have the power to tax. [Citation omitted.] That being the case, we resolve that the county is not levying taxes “for” the Agency. (Emphasis added.)*⁴⁶

Similarly, a county or city member of a COG does not levy taxes for the COGs because COGs do not have the power to tax. Therefore, the “costs” incurred by COGs for this program are not subject to the tax and spend limitations of articles XIII A and XIII B. Accordingly, article XIII B, section 6 does not apply to COGs.

SACOG, in comments on the draft staff analysis, argues that, “because the COGs receive their revenue from dues paid by member agencies, the COGs’ activities are paid for nearly exclusively from local agency tax revenues.” So SACOG asserts that without state reimbursement “local tax revenues will be used to pay for the cost of the program.” Staff finds that using the tax revenue of other local agencies is not relevant to whether COGs are independently eligible as claimants. What is relevant, as stated above, is that (1) COGs do not have power to tax; (2) COGs are not subject to the spending limitation under article XIII B because COGs’ local agency members cannot levy taxes “for” the COGs to make the tax proceeds subject to the spending limitation of article XIII B.

This conclusion is further supported by the Legislature’s interpretation of article XIII B, section 6 in section 17500 et seq., which the Legislature enacted as the “sole and exclusive procedure by which a local agency or school district may claim reimbursement for costs

⁴⁶ *Id.* at pages 32-33.

mandated by the state” as required by article XIII B, section 6.⁴⁷ Thus, the definitions of eligible claimants in the Government Code are the statutes that are relevant to an analysis of eligible claimants under article XIII B, section 6, and not the definitions in the Revenue and Taxation Code as asserted by SCAG.⁴⁸

CSAC asserts that COGs are eligible claimants based on the Legislature’s definition of “local agency” in section 17518, which defines “local agency” to mean “any city, county, special district, authority, or other political subdivision of the state.” SCAG, ABAG, SACOG, CALCOG, and SANDAG, in comments on the draft staff analysis, argue:

The fact that cities, counties and special districts have the power to tax, does not mean the “authorities” must also have this same power. A less strained and more reasonable interpretation is that the Legislature intended to include all forms of cities, counties, and special districts including “authorities” and “political subdivisions” in its definition of local agencies.” Joint powers authorities like COGs consist of cities and counties, and the term “political subdivision” includes “any city, city and county, county, tax or assessment district, or other legally authorized local governmental entity with jurisdictional boundaries.” Govt. Code § 12650 (b)(3).

This interpretation is supported by the language of the statute: “[l]ocal agency’ means any city, county, special district, authority, or other political subdivisions of the state.” Govt. Code § 17518 (emphasis added). The use of the words “other political subdivision” implies that a city, county, special district, and authority each qualify as a political subdivision of the state. Indeed, this is consistent with the definition of “political subdivision.”

Staff disagrees with this interpretation of Government Code section 17518. Although the Legislature includes the word “authority” in the definition of local agency, it is not clear from the plain language of the statute what type of authority the Legislature intended to include within the definition. Since the language in section 17518 is unclear, the rules of statutory construction must be followed to determine legislative intent.

Under the rules of statutory construction, the courts will “seek to ascertain common characteristics among things of the same kind, class, or nature when they are cataloged in legislative enactments.”⁴⁹ The California Supreme Court explained the rule as follows:

The principle requires that when we interpret general statutory terms following the listing of specific classes of persons or things, we must construe the terms as applying to persons or things of the same general nature or class as those listed. The rule is based on the obvious reason that if the writer had intended the general words to be used in their unrestricted sense, he or she would not have mentioned

⁴⁷ Government Code section 17552.

⁴⁸ Senate Bill No. 1102 (Stats. 2004, ch. 227), requires the Commission to reconsider this reimbursement determination, “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”

⁴⁹ *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 573.

the particular things or classes of things which would in that event become mere surplusage.⁵⁰

In the present case, the Legislature placed the word “authority” next to the words “city, county, and special district” when defining eligible claimants for purposes of reimbursement under article XIII B, section 6. Thus, under the rule of statutory construction described above, it is presumed that the Legislature intended that an “authority” would be of the same general nature or class as a city, county or special district. Cities, counties, and special districts have the power to tax⁵¹ and are subject to the spending limitation of article XIII B and, thus, are eligible claimants under article XIII B, section 6. Joint powers authorities, such as COGs, do not have the power to tax and are not subject to the spending limitation in article XIII B. Thus, joint powers authorities are not in the same class as a city, county, or special district for purposes of reimbursement under article XIII B, section 6.

Moreover, before 2004, the Legislature, in section 17520, specifically defined a “special district” that was eligible to claim reimbursement under article XIII B, section 6 to include a joint powers agency and a redevelopment agency. In 2004, the Legislature amended section 17520 to *delete* joint power agencies and redevelopment agencies from the definition of special district.⁵² It is a fundamental rule of statutory construction that “the Legislature is deemed to be aware of ... judicial decisions already in existence, and to have enacted or amended a statute in light thereof.”⁵³ In addition, it is presumed the Legislature intends to change the meaning of a law when it alters the statutory language by deleting express provisions of the statute.⁵⁴

In the present case, two decisions by the courts of appeal were published before the Legislature amended section 17520, concluding that redevelopment agencies are not subject to article XIII B, section 6 since they are not bound by the spending limitations in article XIII B, and are not required to expend any proceeds of taxes.⁵⁵ As stated above, it is presumed that the Legislature was aware of these court decisions and deleted from the definition of “special district” the entities that were not subject to the tax and spend provisions of article XIII A and XIII B, i.e., redevelopment agencies and joint power agencies.

Thus, the deletion of joint power agencies from the definition of special districts in section 17520 supports the conclusion that the Legislature did not intend that the word “authority” in section 17518 included an authority, such as a COG, that does not have power to tax and is not subject to the spending limitations in article XIII B. A statute must be construed in the context of the entire

⁵⁰ *Ibid.*

⁵¹ Revenue and Taxation Code sections 93, 95.

⁵² Statutes 2004, chapter 890 (Assem. Bill No. 2856).

⁵³ *People v. Harrison* (1989) 48 Cal.3d 321, 329.

⁵⁴ *People v. Mendoza* (2000) 23 Cal.4th 896, 916.

⁵⁵ *Redevelopment Agency, supra*, 55 Cal.App.4th at page 986. The Third District Court of Appeal adopted the reasoning of the *Redevelopment Agency* decision in *City of El Monte, supra*, 83 Cal.App.4th at page 281.

statutory scheme of which it is a part, in order to achieve harmony among its parts. It is not appropriate to confine interpretation to the one section to be construed.⁵⁶

As to SANDAG's argument that the Board of Control decision and State Controller's Office Mandated Cost Manual support its contention that COGs are eligible claimants, staff disagrees. The Commission was ordered to reconsider the Board of Control decision by Senate Bill No. 1102 (Stats. 2004, ch. 227), "in light of federal and state statutes enacted and federal and state court decisions rendered since this statute was enacted" Senate Bill No. 1102 also requires the Commission to "amend the appropriate parameters and guidelines, and the Controller shall revise the appropriate reimbursement claiming instructions to be consistent with this act." The original Board of Control decision and State Controller's Office Mandated Cost Manual (containing the claiming instructions), therefore, are not relevant to whether COGs are eligible claimants because these contain the decisions the Commission is ordered to reconsider by the Legislature.

Therefore, staff finds that the "costs" incurred by COGs are not the type of costs that are reimbursable under article XIII B, section 6. Accordingly, COGs are not eligible claimants for purposes of mandate reimbursement under article XIII B, section 6 or section 17500 et seq.

Although this conclusion by itself is sufficient grounds to deny the test claim, staff will also discuss the COG fee authority as a separate and independent ground to deny the claim.

III. Does the test claim legislation impose "costs mandated by the state" on COGs within the meaning of article XIII B, section 6 of the California Constitution and section 17556?

Staff finds that, in addition to the COG eligibility issue discussed above, the fee authority of COGs is dispositive of the issues in this reconsideration. Therefore, 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 statute to impose a reimbursable state-mandated program under the California Constitution, two criteria must be met. First, the test claim legislation must impose costs mandated by the state.⁵⁷ Second, no statutory exceptions listed in 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:

⁵⁶ *Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809, 1816.

⁵⁷ *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

(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 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.]

The issue, therefore, is whether COGs, even if deemed a “local agency,” 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.”

DOF argues that COGs have fee authority under section 65584.1 and therefore, the Commission cannot find there are costs mandated by the state.

Senator Ducheny also states that the Legislature provided fee authority to COGs in section 65584.1 for the activities in the test claim statute, “and for local governments in turn to pass these costs on to developers as fees.” According to the Senator, this fee authority was intended to meet the requirement in section 17556, subdivision (d).

CACOG argues that applying the fee authority would violate the state and federal constitutional provision against impairment of contracts because the joint powers agreements between COGs and member cities/counties are contracts that contain the only terms for amending them.

CACOG reiterates the LCC’s position that a COG fee on a local government that is not used for a local purpose, but for a statewide purpose, is actually a tax and therefore invalid.

SACOG concurs with and incorporates the CACOG's and LCC's comments, and asserts:

- Section 65584.1 does not grant legitimate fee authority and does not exempt regional housing needs assessments from reimbursement. Because COGs have only the powers enumerated in their fee agreements with member agencies, COGs have no power to levy fees because member agencies would have to amend their joint powers agreements to grant COGs this authority. The fee authority, according to SACOG, is not real authority because it cannot be exercised until the member agencies authorize it.
- Moreover, SACOG points out that if the joint powers agreements were amended to include a fee, some member agencies may withdraw from the COG, in which case the housing needs assessments would need to be conducted by the state. HCD may delegate this to the local agency if it has the resources and capability, and the local agency agrees to prepare the assessment. Under the new fee statute, COGs can only request that local agencies be subject to the new fee, and cities and counties likely do not have fee authority. According to SACOG, "Government Code section 65584.1 hinges on the hope that local agencies, and in turn, developers, will agree to pay the costs of the regional housing needs determination, despite the lack of genuine authority to levy such fees."
- In February 2005 comments on the draft staff analysis, SACOG argues that the issue is not one of the fee authority's convenience or political expediency. SACOG reiterates its argument that, "fees authorized by Government Code section 65584.1 are not legitimate fees, and that local agencies will not be able to levy these fees at all." [Emphasis in original.]

SCAG's comments that:

- Whether COGs may actually impose the fee in section 65584.1 is an unresolved issue, and therefore, until it is resolved, it is premature for the Commission to determine whether 65584.1 affects reimbursability of the regional housing needs assessment process.
- The COG's authority to collect fees amounts to COGs collecting from themselves.
- Until the issue of the validity of section 65584.1's fee authority is resolved, the fee constitutes an unconstitutional local tax. SCAG restates these arguments in commenting on the draft staff analysis.

Rebuttal comments submitted by SCAG, ABAG, SACOG, CACOG and SANDAG, repeat some of SCAG's arguments, stating:

- COG fee authority amounts to COGs collecting it from themselves.
- COGs have no authority to assess fees on their members unless their joint powers agreements empower them to, but that none of the agreements do. Thus, COGs lack authority to impose fees on their members without amending the agreements.
- To force COGs to assess fee authority would, under the contracts clause, unconstitutionally interfere with their agreements (Cal. Const., art. I, § 9).
- Even if COGs have fee authority, the cities and counties cannot pass the fees onto developers because they do not have authority to levy fees to offset costs incurred by other agencies such as COGs. Rather, their fee authority only pertains to offset costs incurred by the city or county's own planning agency.

- Also, since the regional housing needs assessment does not provide a direct benefit to developers, the reasonable cost of providing the service would be difficult or impossible to determine.

LCC also asserts, regarding the fee authority of section 65584.1, that:

- This fee authority provides neither the COGs nor cities and counties with valid authority to impose fees for the distribution of regional housing needs. LCC asserts that the COG fee authority “unconstitutionally interferes with the organic structure of these councils of governments.” Because COGs exist pursuant to a joint powers agreement between them and their cities and counties, LCC argues that the fee authority statute violates the state constitution when the agreement does not authorize the imposition of fees.
- Assuming there is COG fee authority, section 65584.1 purports to authorize the city or county to impose a fee on developers to reimburse itself for the COG fee. Section 65584.1 requires the fee to be imposed pursuant to section 66106, which limits the fee to the estimated cost of providing the service. However, the city or county is not providing the service to the developer, nor did the city or county incur costs to distribute regional housing needs. Since the COG provided the service and incurred the cost, LCC argues that the pass through fee is a tax that requires voter approval.

CBIA also presents various arguments against the fee authority in section 65584.1.

- 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.
- 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 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.
- 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 of the California Constitution 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. 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, according to case law CBIA cites, conditions on development unrelated to the use of the property, that 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. CBIA also asserts that there must be a reasonable nexus between development activity and exactions imposed as a condition of that activity.

In response to SCAG’s argument that the validity of section 65584.1 is unresolved so the Commission’s decision would be premature, staff disagrees. The issue is not premature because the fee authority statute became effective August 16, 2004.⁵⁸ So by law, COGs have the authority to charge a fee as of August 16, 2004.

As to SCAG’s argument that COGs are in reality collecting from themselves, staff also disagrees. COGs are separate entities from their member agencies, although funded primarily by member agencies.⁵⁹ Each entity has separate funds, which are accounted for separately.⁶⁰ Thus, staff disagrees that COGs are collecting from themselves by collecting fees from member agencies.

In response to the arguments by CACOG, SCAG, LCC and CBIA that the fee authority of section 65584.1 impairs contracts, or SACOG’s argument that this fee authority is not legitimate,

⁵⁸ Statutes 2004, chapter 227, section 58 (Sen. Bill No. 1102). The statute was amended by Statutes 2004, chapter 818, section 1 (Sen. Bill No. 1777).

⁵⁹ Government Code section 6504.

⁶⁰ Government Code section 6505.

staff also disagrees. The Commission, as an administrative agency, has no authority to declare a statute unconstitutional. Article III, section 3.5 of the state Constitution states:

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

- (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional.
- (b) To declare a statute unconstitutional.
- (c) To declare a statute unenforceable, or refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

In 1988, the California Supreme Court, in *Reese v. Kizer*,⁶¹ described the purpose of article III, section 3.5. This provision was added to the Constitution in 1978 through Proposition 5. The purpose of the amendment was to prevent administrative agencies from using their own interpretation of the Constitution to thwart the mandates of the Legislature.⁶² According to the ballot materials in support of Proposition 5, the proponents argued that the amendment would “insure that appointed officials do not refuse to carry out their duties by usurping the authority of the Legislature and the Courts.”⁶³

Staff finds, therefore, that the Commission has no power to declare section 65584.1 unconstitutional or refuse to recognize it because no appellate court has determined that it is unconstitutional.

In the final analysis, staff finds that the test claim legislation does not impose “costs mandated by the state” on COGs because of the existence of fee authority in section 65584.1.

Section 65584.1 (added by Stats. 2004, ch. 227, Sen. Bill No. 1102, and amended by Stats. 2004, ch. 818, Sen. Bill No. 1777) states:

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.

⁶¹ *Reese v. Kizer* (1988) 46 Cal.3d 996.

⁶² *Id.* at page 1002.

⁶³ *Id.* at page 1002, footnote 7.

This fee authority is plenary authorization to charge fees for services. The only limitation on the COG fee is that it “not exceed the estimated amount required to implement its obligations pursuant to Section 65584.”

In *Connell v. Superior Court of Sacramento County*,⁶⁴ 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.⁶⁵ 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.⁶⁶ 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.”⁶⁷

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.”⁶⁸ In 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.”⁶⁹

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 ...”⁷⁰ 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.”⁷¹

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

⁶⁴ *Connell v. Superior Court of Sacramento County* (1997) 59 Cal.App.4th 382.

⁶⁵ *Id.* at page 400.

⁶⁶ *Id.* at page 399.

⁶⁷ *Id.* at page 400.

⁶⁸ *Id.* at page 398, citing *County of Fresno v. State of California*, *supra*, 53 Cal.3d 482, 487.

⁶⁹ *Ibid.*

⁷⁰ *Id.* at page 401.

⁷¹ *Id.* at page 400-401.

constitute a special tax.”⁷² The court stated that no one is suggesting the districts levy fees that exceed their costs.

Staff finds the reasoning of the *Connell* case applies to this test claim reconsideration. Section 65584.1’s fee authority provision grants authority to COGs for the “council’s actual cost in distributing regional housing needs.” The only limitation on the COG fee is that it “not exceed the estimated amount required to implement its obligations pursuant to Section 65584.”

In view of *Connell*, staff does not find convincing the various arguments regarding the sufficiency or the difficulty of the basis for the fee. These arguments are not relevant to the legal inquiry because the sole consideration is whether COGs have fee authority.⁷³

Staff finds, therefore, that because COGs possess fee authority based on section 65584.1, COGs cannot be reimbursed for their activities in developing the regional housing needs analyses.

Conclusion

Staff finds that the test claim legislation (Stats. 1980, ch. 1143) does not impose “costs mandated by the state” on COGs within the meaning of article XIII B, section 6 of the California Constitution and section 17556, subdivision (d) because (1) COGs are not eligible claimants for purposes of mandate reimbursement under article XIII B, section 6; and (2) the test claim legislation does not impose “costs mandated by the state” on COGs within the meaning of article XIII B, section 6 and Government Code section 17556 because of the COGs’ fee authority provided in Government Code section 65584.1.

Recommendation

Therefore, staff recommends that the Commission adopt this analysis and deny Board of Control claim no. 3929, effective July 1, 2004.

⁷² *Id.* at page 402.

⁷³ *Id.* at page 400.