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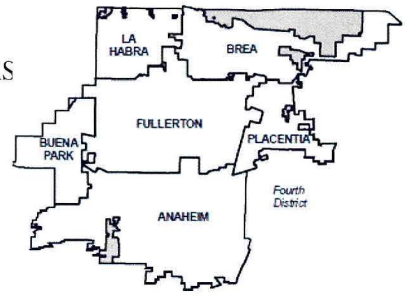

Received
August 22, 2013
Commission on
State Mandates

August 20, 2013

Ms. Heather Halsey
Executive Director
California Commission on State Mandates
900 Ninth Street, Suite 300
Sacramento, CA 95814

Re: ***12-MR-01, Mandate Redetermination Request, CSM-4509, Department of Finance, Requestor—Comments to the Draft Staff Analysis and Proposed Statement of Decision for the Second Hearing***

Dear Ms. Halsey:

The County of Orange hereby submits the following comments in opposition to the Commission on State Mandates' Draft Staff Analysis and Proposed Statement of Decision for the Hearing of September 27, 2013, in case 12-MR-01.

Orange County is the sixth most populous county in the nation. Since the SVP mandate was determined by the Commission in 1998, three Orange County agencies have performed state mandated services, made claims and received partial reimbursement relating to the SVP mandate. Those three agencies are the District Attorney, the Public Defender and the Sheriff. The collective annual reimbursement claims from these three agencies over the past five years have ranged from a low of $1,151,024 to a high of $2,516,553. The proposed statement of decision will greatly impact Orange County's ability to continue providing the services associated with SVP laws.

I. Background

In 1979, the voters of the State of California passed Proposition 4, which "required the state to reimburse local governments for the costs of complying with state-imposed programs." (*California School Boards Assn. v. State of California* (2009) 171 Cal.App.4th 1183, 1190, fn. omitted.) Proposition 4 amended the state Constitution by adding article XIII B, section 6, which requires that "[w]henever 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 …." The purpose of the section 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" imposed by other constitutional provisions. (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.)

The Commission on State Mandates (the "Commission") is the body the Legislature has charged with determining whether the state has an obligation under the Constitution to reimburse the state for the costs of new state mandates. To determine whether or not the State must reimburse local governments, the Commission is guided by a variety of statutes and regulations.

Title 2, section 1190.05 of the California Code of Regulations governs the two-part hearing procedure for "test claims"[1] to determine whether costs to local government are reimbursable by the state.

Government Code section 17514 defines "costs mandated by the state" to mean "any increased costs which a local agency or school district is required to incur after July 1, 1980, as result of 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."

While the state must reimburse local governments for costs mandated by the state, there is no such requirement for costs which are not mandated by the state. Government Code section 17556 guides the Commission in determining whether costs are not mandated by the state. Relevant to this comment is subdivision (f), which provides that costs are not mandated by the state if "the statute or executive order imposes duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters in a statewide or local election."

Subdivision (a)(2) of Government Code section 17570 allows for the redetermination of a prior test claim decision where there has been a "subsequent change in law," which is defined, in pertinent part as, "a change in law that requires a finding that an incurred cost is a cost mandated by the state, as defined by Section 17514, or is not a cost mandated by the state pursuant to Section 17556, or a change in mandates law…."

The Sexually Violent Predators Act ("SVPA") was created by the Legislature and signed by the governor in 1995 and is codified in Welfare and Institution Code section 6600, et seq. The SVPA established civil commitment procedures for the continued detention and treatment of sexually violent offenders following their completion of a prison term for certain sex-related offenses.

On June 25, 1998, the Commission issued a Statement of Decision (CSM-4509) approving reimbursement to local government for costs associated with implementing the SVPA, including prosecution and defense of SVPA petitions, retention of experts and other professionals to prepare cases for litigation and the housing and transportation of those individuals subject to the SVPA.

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[1] "'Test claim' means the first claim filed with the commission alleging that a particular statute or executive order imposes costs mandated by the state…."

On September 20, 2006, the Legislature amended the SVPA. (Stats. 2006, Chapter 337, § 53 (SB 1128).) The amendments largely conformed to a then-pending ballot initiative, Proposition 83, commonly known as "Jessica's Law." Proposition 83 was passed by the voters on November 7, 2006. Because most of the amendments proposed by Proposition 83 had already been effectuated by SB 1128, the ballot initiative had little impact on the statutory scheme. Most significantly, Proposition 83 made some changes related to the findings the State Department of Mental Health must make before individuals adjudicated to be a sexually violent predator could be released to a less restrictive level of confinement (Welf. & Inst. Code, & 6605, subd. (b)) and modified the definition of a "sexually violent predator" from a person who has been convicted of sexually violent offense against two victims, to a person who has been convicted of sexually violent offense against one victim (Welf. & Inst. Code, § 6600 subd. (a)(1)). Nothing in Proposition 83 altered the laws or the duties on local entities that were imposed by the SVP laws and previously determined to be reimburseable costs pursuant to the Commission's 1998 decision.

On January 15, 2013, the Department of Finance filed a Request to Adopt a New Test Claim Decision, essentially a redetermination of the prior test claim decision (CSM-4509) with respect to the SVPA on the grounds that Proposition 83 created a "subsequent change in law" within the meaning of Government Code section 17570 and that subvention to local governments was no longer required under subdivision (f) of Government Code section 17556.

II. Analysis

A. Proposition 83 did not create a subsequent change in law

The Department of Finance's argument is wholly reliant on this single claim: "The enactment of Prop. 83 constituted a 'subsequent change in law', as defined in Government Code section 17570, because all of the Welfare and Institutions Code section of the SVP mandate are either expressly included in Prop. 83 or are necessary to implement Prop. 83." (Dept. of Finance, Request to Adopt a New Test Claim Decision (Jan. 13, 2013), § 5, p. 2.)

This argument was accepted by the Commission in its Statement of Decision on the first hearing, adopted on July 26, 2013: "[W]ith respect to the code sections reenacted in Proposition 83, it must be said that the test claim statutes impose duties that are expressly included in a voter-enacted ballot measure. Therefore, DOF has made an adequate showing…." (Statement of Decision, pp. 18-19, footnote omitted.) This finding, however, is not binding at the second hearing as the Department of Finance only had to show that there "was a substantial possibility of prevailing at the second hearing." (Cal. Code Regs., tit. 2, § 1190.05.) However, it is repeated in the Draft Staff Analysis for the second hearing. The Executive Summary to the Draft Staff Analysis succinctly states:

> Staff finds that Proposition 83, by which the voters amended and reenacted Welfare and Institutions Code sections 6601, 6604, 6605 and 6608, constitutes a subsequent change in law, as defined in section 17570. Pursuant to Government Code section 17556(f), the Commission shall not find costs mandated by the state for the

> activities imposed by sections 6601, 6604, 6605 and 6608, as determined in the original test claim decision, which are now expressly included in a ballot measure approved by the voters in a statewide election. Therefore a new test claim decision is required.

(Draft Staff Analysis and Proposed Statement of Decision, Second Hearing, p. 4.)

The underlying reasoning which the Department of Finance and the Commission claim support this argument is that the reenactment of existing legislation by way of ballot proposition triggers subdivision (f) of Government Code section 17556 and thereby satisfies the criteria for finding that the costs associated with implementing the statutes are not mandated by the state. In other words, because Government Code section 17556, subdivision (f), states that duties expressly included in a ballot initiative do not create costs mandated by the state, the mere reiteration and non-substantive amendment in a ballot initiative of an existing statute enacted by the Legislature relieves the state of its constitutional obligation to reimburse the counties for the cost of implementing the statutory scheme.

This is a flawed and legally incorrect premise and it establishes a dangerous precedent from a public policy perspective. For over a hundred years, the appellate courts of this state have repeatedly held that the restatement of a statute or its amendment does not mean it has been reenacted: "[T]o construe a statute amended in certain particulars as having been wholly re-enacted as of the date of the amendment, is to do violence to the code and all canons of construction." (*County of Sacramento v. Pfund* (1913) 165 Cal. 84, 88.)

The confusion stems from article IV, section 9 of the California Constitution, which provides, in part, "A section of a statute may not be amended unless the section is re-enacted as amended." The purpose of this rule, however, is not to create a new law or change in law by virtue of the statute's reenactment at the time of the amendment—the premise suggested by the Department of Finance. The use of the word "re-enacted" is a requirement that the statute be restated in its entirety when it is amended "'to make sure legislators are not operating in the blind when they amend legislation and to make sure the public can become apprised of changes in the law.'" (*St. Johns Well Child and Family Center v. Schwarzenegger* (2010) 50 Cal.4th 960, 983, fn. 20, quoting *American Lung Assn. v. Wilson* (1996) 51 Cal.App.4th 743, 749.) Put plainly, the requirement that a statute or statutory scheme be restated in a ballot measure—even as to those sections not amended—is meant to provide the voters with additional context to inform their decisions. Accordingly, Government Code section 9605, provides, in relevant part,

> Where a section or part of a statute is amended, it is not to be considered as having been repealed and reenacted in the amended form. The portions which are not altered are to be considered as having been the law from the time when they were enacted; the new provisions are to be considered as having been enacted at the time of the amendment; and the omitted portions are to be considered as having been repealed at the time of the amendment.

Proposition 83's mere restatement of large portions of the statutory scheme in accordance with article IV, section 9 of the Constitution, did not create a change in law. The restatements were legal requirements to educate the voters on how the proposed amendments would affect the SVPA as a whole. The restatements did not morph a legislatively created statutory scheme that had previously been determined a state mandate into one created by the voters. In other words, because the SVPA was enacted by the Legislature, thereby imposing significant duties on the counties, the restatement and amendment of the statutory scheme by a ballot measure did not impact the State's subvention duties. Had Proposition 83 failed SVPA would still exist as it now exists; Proposition 83's failure would not have repealed the act. Instead, Proposition 83 merely asked voters whether they wanted to amend the act in the limited manner described above and recited a large portion of the remaining statutory scheme to provide the voters with context to guide their decision. The non-substantive changes to the SVP laws resulting from the electorate's approval of Proposition 83 did not require local entities perform new services or provide a "higher level of service" and thus nothing thereunder would be the basis for the Commission to determine that Proposition 83 is a mandate imposed by voter initiative. This is especially true in light of the fact that the information provided to the electorate regarding the fiscal impact of Proposition 83 explicitly indicated that the passage of Proposition 83 would not alter the funding the local entities receive.

B. Dangerous Precedent

The proposed statement of decision now pending before the Commission would establish a dangerous public policy precedent. Effectively, one body of the state government – the Attorney General – could lead the electorate down the primrose path by providing information to the electorate that ultimately results in the passage a voter initiative. Based on the information provided to the electorate, the electorate believes their vote effects no substantive changes to the laws at issue, and that the fiscal impact of the initiative is neutral to local government. All the while, another body of the state government is lying in wait to seek redetermination of a State Mandate on the basis that the voter initiative caused a change in the law and thus the state should no longer be required to reimburse local governments for costs rightfully determined state mandated costs. Such a decision invites the state government to engage in activities contrary to the will of the electorate and allows the state to avoid their subvention duties under article XIII B, section 6 of the California Constitution.

If the Commission alters the determination of the SVP mandate as proposed in the statement of decision, there is nothing to stop the state legislature from bringing initiative measures pertaining to previously determined mandates to the voters, not to obtain a substantive change to the law but rather to render the laws imposed by voter initiative instead of by the legislature and thereby provide a basis to seek redetermination of the mandate. The Commission would be providing the legislature with the ability to avoid previously determined fiscal obligations through by abusing the voter initiative process.

For the foregoing reasons, the Orange County Board of Supervisors respectfully requests the Commission to deny the Department of Finance's request for redetermination.

On behalf of the County of Orange, I want to extend our thanks for your time and consideration of this important matter. Please address your comments or questions to Nicholas Chrisos, County Counsel, at 714-834-3300.

Sincerely,

CHAIRMAN SHAWN NELSON
Board of Supervisors
Fourth District

cc: Members, Board of Supervisors
Michael B. Giancola, County Executive Officer
Nicholas, Chrisos, County Counsel