EXHIBIT F

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

	)	CSM No. 97-TC-01
Response by The City of San Diego	)	Senate Bill 821 wherein California Code of Civil Procedure sections 1235.155 & 1263.321 were added and section 1263.320 was amended; California Evidence Code section 824 was added and section 823 was amended; and Government Code 7267.9 was added
To	)	
Draft Staff Analysis of Test Claim	)	*Nonprofit, Special Use Property Requirements*

I. INTRODUCTION

The City of San Diego (CITY) filed a test claim seeking reimbursement as a result of the new program or higher level service required as a result of Senate Bill 821 (hereafter referred to as the test claim legislation). It is your staff's recommendation that the CITY'S test claim be denied.

II. CITY OF MERCED DOES NOT APPLY

The Draft Staff Analysis of the Test Claim relies heavily on *City of Merced v. State of California.* 153 Cal. App. 3d 777 (1984) to support its contention that the exercise of the power of eminent domain is discretionary. In fact, *City of Merced* does state that "the exercise of eminent domain is, essentially, an option of the city or county, rather than a mandate of the state." *Id.* at 783. However, while discussing Senate Bill 90, the Court in *City of Merced* also stated "[s]ubdivision (h) appears to have been included in the bill to provide for reimbursement of increased costs in an optional program such as eminent domain **when the local agency has no reasonable alternative to eminent domain.** *Id. at* 784 (emphasis added). This sentence clearly indicates the *City of Merced* Court's acknowledgment that there are circumstances under which the use of eminent domain is *not* a discretionary act. Thus, while eminent domain may "essentially" be characterized by discretion, there are times when a lack of reasonable alternatives results in the absence of any real discretion.

Additionally, as this Commission is well aware, case law is frequently determined to apply only to the particular facts of the individual case and/or is overturned as having been decided incorrectly. Reason and logic demand that *City of Merced* no longer be relied upon to exclude all eminent domain actions as being discretionary. Accordingly, the City of San Diego respectfully requests that this Commission independently review the facts of this test claim without regard to the holding in *City of Merced*. *City of Merced* dealt with a very specific area of eminent domain law regarding the payments for loss of goodwill and the facts and circumstances of that case do not apply to all eminent domain actions. An important difference between *City of Merced* and the test claim legislation is what *City of Merced* **did not** do. *City of Merced* did not mandate the manner in which the loss of goodwill was to be calculated, and it did not mandate that the value of the affected businesses could not be lowered based on obsolescence or depreciation. In contrast, the test claim legislation does impose rigid and blind requirements that unquestionably create a higher level of service.

III. EMINENT DOMAIN IS NOT NECESSARILY A DISCRETIONARY ACT

Correcting the Staff's assertion on page 4 of their Analysis, the City is not arguing "that the exercise of eminent domain is state mandated." In fact, the City is claiming that the exercise of eminent domain to condemn the subject special use property (a church) was necessary and not a discretionary act. The area in which the church stood had one of the highest crime rates in the City. Based on all criteria, the subject area was deemed best for the necessary redevelopment, which included a police station. The redevelopment comprised a multi-block area in which the church was located in the center.

If the Legislature had meant to determine that all uses of the power of eminent domain were discretionary, specifically those affecting special use properties, they **would not have included the reimbursement language that they did within the subject Bill**. The Legislature has within its power the ability to specifically declare that certain bills they pass are not subject to reimbursement. The Legislature did not make such a declaration in regard to the subject Bill. Instead, they specifically included wording regarding reimbursement.

Additionally, as stated above, *City of Merced* set forth that there are times when "the local agency has no reasonable alternative to eminent domain". There is no other interpretation for this statement other than the fact that some condemnation actions are not discretionary.

The Draft Staff Analysis points to *Lucia Mar Unified School District v. Honig*, 44 Cal. 3d 830 (1988) to support its contention that "downstream" or "consequential activities" of a permissive act are not state mandated. True, the court in *Lucia Mar* did not find that a certain sum was state mandated, but it also did not find that the sum was **not** state mandated. That question was not addressed by the Court, but was remanded back to the Commission on State Mandates. The Draft Staff Analysis' use of *Lucia Mar* is a case of representing a half-truth as a legal authority.

Similarly, the Draft Staff Analysis relies on *County of Los Angeles v. State of California*, 43 Cal. 3d 46 (1987) for its position that an increase in costs alone does not automatically equate to a reimbursable state mandated program. As set forth below, our Test Claim is based on more than simply an increase in costs; it is truly a new program and a higher level of service. *County of Los Angeles,* moreover, has a fact pattern is dissimilar to ours. And, very importantly, in the City of San Diego's Claim, unlike the situation in *County of Los Angeles*, the test claim legislation imposes unique requirements on local agencies (i.e., the City of San Diego) that are peculiar to government and does **not apply generally to all state residents and entities.**

IV. THE COMMISSION HAS PREVIOUSLY APPROVED DISCRETIONARY ACTS FOR REIMBURSEMENT

The Staff Analysis brushed over and does not appear to want to address the City's argument regarding other Test Claims that have been approved for reimbursement. Specifically, the City requests that this Commission consider the Mandate Summary attached hereto as Exhibit A. The facts which constituted a reimbursable mandate for Exhibit A are as follows: an amendment to Penal Code section 853.6 required a revision in the booking and fingerprinting process for persons arrested for misdemeanors. Under the new process, local law enforcement agencies are required to provide verification, at the time of booking or fingerprinting, of the booking or fingerprinting by either making an entry on the citation or providing the arrested person a verification form.

It should first be noted that making misdemeanor arrests is a discretionary act. "As with the decision to investigate, an officer's "decision to arrest, or to take some protective action less drastic than arrest, is an exercise of **discretion** for which a peace office may not be held liable in tort." *David Smith Bonds v. State of California*, 138 Cal. App. 3d 314, 321 (1982). *See also McCarthy v Frost*, 33 Cal. App. 3d, 872 (1973) and *People v Richardson,* 33 Cal. App. 4th Supp. 11 (1994). Accordingly, in spite of the fact that the actions specified in Exhibit A are clearly contingent upon a discretionary act (arrest), the Commission "concluded that the verification procedure is a new program or a higher level of service in an existing program imposed by the State upon local agencies, but that this new program or higher level of service in an existing program is very limited in scope." Exhibit A (emphasis added).

Although the City firmly contends that the use of eminent domain is a necessary act, even if this Commission finds that the City's act of condemning the church contained elements of discretion, it should not preclude reimbursement. Arrests and condemnation are, in fact, mandatory for the preservation of certain standards of habitability and safety in our society. Circumstances dictate the degree to which an arrest **must** be made or a property **must** be condemned. The parallels between these two acts are obvious. Both are acts which share circumstantial degrees of discretion and mandate. The Commission's acknowledgment that the program outlined in Exhibit A is a state mandate is indicative that the subject test claim legislation should also fall within the category of a state mandate. By mandating a new appraisal methodology with severe restrictions, the State has mandated a new program or a higher level of

service in an existing program. Additionally, it should be noted that the very nature of "special use properties" sets forth that those properties are "very limited in scope" and will not open the floodgates for massive demands for reimbursements.

Another approved Test Claim, attached hereto as Exhibit B, is similar in that it also is contingent upon the discretionary act of charging a person with a crime. Again, if the requirements associated with a discretionary act can be considered a state mandate, then the present test claim legislation must also be considered a state mandate.

V. THE SUBJECT MANDATE REQUIRES MORE THAN MERE ADDITIONAL COSTS

The subject mandate does not just cause local entities to incur additional costs. The entire process obligates the City to investigate alternative sites to specifically avoid taking the special use property. It also obligates the City to bring its legal counsel in at an earlier stage and requires additional meetings with City staff, appraisal staff, and legal counsel to make sure that all legal mandates are met and complied with. Contrary to footnote 11, page 7, of the Staff Analysis, the requirement that the local agency must seek alternative property to the special use property, **does not** "first come into play until after a local agency elects to take a nonprofit, special use property through eminent domain proceedings". Such a notion flies in the face of proper planning procedures. As stated in the Declaration of Michael Steffen, attached hereto as Exhibit C, the contemplation of the inclusion of special use property must begin at a much earlier stage of the process to allow for changes that may have to be made in the project. Reason dictates that investigation cannot wait until the local agency elects to take the property — it would be too late at that point.

VI. THE APPRAISAL METHOD SPECIFIED IN SENATE BILL 821 IS NOT MANDATED BY THE U.S. CONSTITUTION

Federal and State law both mandate that payment of "just compensation" must be made to the owners of land condemned for public purposes. However, just compensation is and always has allowed for deductions for obsolescence and depreciation in order to avoid the landowner receiving a windfall at the public taxpayers' expense.

The Staff Analysis seriously misleads the Commission when it states that "the appraisal method specified in the test claim legislation is federally mandated by the U.S. Constitution" (page 7 of Staff Analysis). Without doubt, the 5th Amendment to the U.S. Constitution does mandate the payment of just compensation for property taken. However, the cases cited in the Staff Analysis, which staff alleges are in support of the appraisal method specified in the test claim legislation **do not** support the Staff Analysis. A quick read of the Staff Analysis would lead the reader to believe that the "substitute facilities" doctrine was used in all of the cases cited. Such is not the case. Contrary to the Staff Analysis' assertion that the test claim legislation resembles the federal "substitute facilities" doctrine, the "substitute facilities" doctrine does not

specifically disallow consideration of obsolescence and or depreciation. A reading of the cases would indicate just the opposite.

In *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949), the Court stated that "[p]erhaps no warning has been more repeated than that the determination of value cannot be reduced to inexorable rules." And, further when discussing the occasion when there are no or few similar sales, the court stated "[a]nd it is here that other means of measuring value may have relevance - - but only, of course, as bearing on what a prospective purchaser would have paid." *Id.* This statement clearly indicates that the Court still firmly believes that the hypothetical "willing purchaser" still must exist. With that in mind, what willing purchaser would agree to pay a price that represents the value for a brand new building when the building is in fact many years old or in disrepair. The hypothetical willing purchaser would not make such a purchase.

The case *United States v. 50 Acres of Land*, 469 U.S. 24 (1984), discusses the background for the "substitute facilities" doctrine that the Staff Analysis relies upon. Here the court stated that the source of the doctrine is dictum in *Brown v. United States*, 263 U.S. 78. The Court further stated that "the facts of the Brown case were, in the Court's word, 'peculiar.'" *Id.* at 456. This case supports the City of San Diego's contention that the subject test claim legislation mandates a higher level of service because the City is not allowed to consider obsolescence or depreciation in determining the value of the property to be taken when it holds that "[t]his view is consistent with our holding in Lutheran Synod that fair market value constitutes 'just compensation' for those private citizens who must replace their condemned property with more expensive substitutes and with **our prior holdings that the Fifth Amendment does not require any award for consequential damages arising from a condemnation**." *Id.* at 457 (emphasis added). The consequential damages that the Court refers to are the costs above the value of the property that may be incurred in purchasing a new property. The Court goes on to state, "[i]f the replacement facility is more costly than the condemned facility, it presumably is more valuable, and any increase in the quality of the facility may be as readily characterized as a "windfall" as the award of cash proceeds for a substitute facility that is never built. *Id.* at 457. And, "[i]n view, however, of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship." *Id.* at 458.

As stated in *United States v 564.54 Acres of Land*, 441 U.S. 506, 512 (1979), "the dominant consideration always remains the same: What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?" The test claim legislation's mandate of not allowing obsolescence or depreciation sets up a "rigid, blind measure" which allows a condemning entity no flexibility or discretion in ascertaining a property's value. The harshness of the test claim legislation is contrasted with the reference to *United States v Board of Education,* 253 F.2d 760 (1958) cited on page 8 of the Staff Analysis. *Board of Education* specifically stated it was **not** dealing with a "rigid, blind measure . . . but rather with an equitable

concept of justice and fairness". Further, the Court in *State of California v. United States,* 395 F.2d 261 (1968) stated that the general principle of just compensation is that the owner of the condemned property "must be made whole but is not entitled to more". *Id.* at 265. By having a rigid, blind rule that mandates that obsolescence and depreciation cannot be considered, the owner in many circumstances will receive "more."

United States v. The Board of Education also addresses the substitute issue and states, "[a]ccordingly, the equivalence requirement which must be met with respect to the substitute facility is more than that of utility than of mere dollar and cents value. And the substitute facility must be that which the claimant is legally required to construct and maintain, whether or not this type be more expensive or efficient than the facility which was condemned." *Id.* at 764. This holding again demonstrates the need to determine the actual need for the condemned facility to be reconstructed. If a property has fallen into obsolescence, then there is no need for it to be reconstructed, and it would be gift of public funds, a true windfall, for the property owner to be paid the value that would compensate for the building being reconstructed with no consideration for obsolescence or depreciation.

Staff's submission that the exclusion of depreciation or obsolescence from the eminent domain valuation is designed to avoid short changing the condemned owner from establishing the same facility in a new location may be correct (page 8 of staff Analysis). However, the concept is **not** mandated or accepted in the cases that have reviewed the Fifth Amendment's mandates. Additionally, the test claim legislation's mandate goes beyond the holding in *Redevelopment Agency v. First Christian Church,* 140 Cal.App.3d 690. The facts of the *First Christian Church* case are peculiar to a gothic church. The Court never even hinted that all special use properties should be valued without regard to obsolescence or depreciation.

VII. CONCLUSION

The test claim legislation specifically directs or obligates local agencies to perform a task. The underlying act of condemnation is one which, in the circumstances of the Test Claim, cannot realistically be considered a discretionary act. Accordingly a reimbursable state mandate does exist. Additionally, the required activity or task is new and creates an increased or higher level of service over the former required level of service. As discussed in our Test Claim, the City of San Diego was obligated to perform tasks regarding the appraisal of the church that it would not otherwise have been obligated to do but for the test claim legislation. These obligated tasks required a substantially higher level of service than under the former required level of service.

Accordingly, the City of San Diego respectfully requests that this Commission grant reimbursement.

CERTIFICATION

I certify by my signature below that the statements made in this document are true and correct of my own knowledge, and as to all other matters, I believe them to be true and correct based upon information and belief.

Executed on Oct 5, 1998 at San Diego, California, by:

CASEY GWINN, City Attorney

By _____
Debra J. Bevier, Deputy
Attorneys for the City of San Diego

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

Declaration by Michael R. Steffen In Support of the Response by The City of San Diego To Draft Staff Analysis of Test Claim	C.S.M. No. 97-TC-01 Senate Bill 821 wherein California Code of Civil Procedure sections 1235.155 & 1263.321 were added and section 1263.320 was amended; Evidence Code section 824 was added and section 823 was amended; and Government Code section 7267.9 was added *Nonprofit, Special Use Property Requirements*

I, MICHAEL R. STEFFEN, declare as follows:

1. I am the Deputy Director for the Real Estate Assets Department, Real Estate Acquisition and Valuation Division, of The City of San Diego. I and my staff were directly responsible for and active in all stages of the acquisition of the church property which is the subject of the present Test Claim. If called as a witness in this matter, I could and would testify to the following facts of which I have personal knowledge.

2. I am familiar with the provisions and requirements of California Code of Civil Procedure sections 1235.155, 1263.321 and 1263.320; California Evidence Code sections 823

and 824; and Government Code section 7267.9. All of said sections were either added or amended by the enactment of Senate Bill No. 821.

3. Because the church property was included within the proposed project area and the church property was a special use property within the meaning of the above-listed code sections, special consideration had to be made by my staff and me to investigate the possibility of whether or not an alternative site could be found for the project and/or if the church property could be eliminated from the project. Unfortunately, because an existing structure was to be used in the construction of the proposed police station, our ability to reposition the project or add or eliminate particular parcels was severely limited. Further, because the church property was situated in the center of the project area, it was impossible to exclude the church property from the project.

4. Because this property fell within the definition of special use property, consultation with legal counsel was required at a much earlier stage in the acquisition process. Legal counsel was required not only to consult with staff, but also to be involved with all instructions that were to be given to the appraiser for the project because of the legal requirements that were peculiar to special use property and the way that these properties are to be appraised.

5. The assigned appraiser was also required to consult with other outside experts to form opinions on the costs of and requirements for constructing new structures to replace the structures that existed on the church property.

6. All of these activities required substantial expenditures of time and resources for additional meetings as well as additional costs that would not ordinarily be required but for the

special provisions mandated by Senate Bill 821 regarding appraisal methodologies for special use properties.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct to my own personal knowledge.

Executed this 22ND day of September, 1998.

Michael R. Steffen

PROOF OF SERVICE

Test Claim Name: Claim of the City of San Diego
Test Claim Number: CSM-97-TC-01 (97-238-01)
Government Code Sec.: SB 821 wherein Code of Civl Proc. Sections 1235.155 & 1263.3
Chapters: Evidence Code section 824 was added and section 823 was amen
Issue: Nonprofit, Special Use Property Requirements
Originated: 09-Sep-97

I, Sharon L. Wood, the undersigned, declare as follows:

I am employed in the County of San Diego, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 1200 Third Avenue, Suite 1100, San Diego, CA 92101.

On October 5, 1998, I served the attached **Response by The City of San Diego To Draft Staff Analysis of Test Claim and Declaration by Michael R. Steffen In Support** to the following state agencies and interested parties by placing a true copy thereof in a sealed envelope with first class postage fully prepaid and placing in the United States mail at San Diego, California, and to the Commission on State Mandates via Federal Express:

SEE ATTACHED MAILING LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on October 5, 1998, at San Diego, California.

Sharon L. Wood

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