BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM:

Health and Safety Code Sections 1531.2, 1569.149, 1596.809, 13144.5, 13235;

Statutes 1989, Chapter 993;

Filed on June 3, 2002 by the City of San Jose, Claimant.

Case No.: 01-TC-16

Fire Safety Inspections of Care Facilities

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

(Adopted on March 29, 2006)

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

Paula Higashi

PAULA HIGASHI, Executive Director

March 30, 2006

Date

Background

This test claim addresses amendments to the Health and Safety Code regarding fire inspections of specified community care facilities required by the State Fire Marshal. The purpose of the test claim legislation (Stats. 1989, ch. 993) is to ensure that community care facilities, residential care facilities for the elderly, and child day care facilities, during the process of being licensed by the State Department of Social Services, receive in a timely fashion the correct fire clearance information from the local fire enforcing agency or State Fire Marshal. The test claim legislation sets forth the Legislature's intent as follows:

> It is in the best interest of the California public that private citizens be encouraged to develop and operate community care facilities, residential care facilities for the elderly, and child day care facilities throughout the state in order to meet the critical demand for quality, specialized care homes.
>
> Complex and unclear fire safety codes have frustrated the attempts of persons seeking to establish community care facilities, residential care facilities for the elderly, and child day care facilities, and have resulted in significant loss of money and resources to individuals who have received incorrect information regarding fire safety requirements from state or local officials, or no guidance at all.
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> Interpretation of state and local fire safety regulations varies between the more than 1,200 fire jurisdictions, and in some cases varies within the same jurisdiction, causing confusion and, in numerous instances, project cancellation.
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> Therefore, it is the intention of the Legislature that a prospective applicant for community care facility, residential care facility for the elderly, or child day care facility licensure shall be clearly informed in advance of making design modifications to a structure to meet specific fire safety requirements.
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> The Legislature further intends that it is incumbent on state and local agencies to assist persons in the interpretation of fire safety regulations for community care facilities, residential care facilities for the elderly, and child day care facilities, and that greater efforts must be made to clarify and streamline the fire safety clearance process.[1]

The State Fire Marshal establishes statewide fire safety standards[2] which are generally enforced at the local level by fire enforcing agencies established in cities and counties.[3] Although local fire enforcing agencies are tasked with fire-related enforcement and inspections, such as the fire clearances required for the community care facilities, the State Fire Marshal carries out these duties when there is no local fire enforcing agency or may carry them out when asked to do so by the local fire official or local governing body.[4] The statutory

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[1] Senate Bill 1098, Statutes of 1989, chapter 993, Section 1.

[2] Health and Safety Code sections 13100 et seq.

[3] Health and Safety Code sections 13800 et seq.

[4] Health and Safety Code section 13146, subdivisions (c) and (d).

- fire inspector conducting pre-inspection and consultation regarding interpretation and application of fire safety regulations;
- fire inspector providing written information regarding what is needed to be done in order to obtain fire clearance; and
- fire inspector conducting final fire clearance inspection.

Department of Finance Position

Department of Finance submitted comments on the test claim contending that "the test claim legislation applies to the State Fire Marshal as well as local fire agencies, and is therefore not unique to local government" and that, accordingly, the test claim should be denied.

State Fire Marshal

The State Fire Marshal responded to Commission staff's request for information by providing copies of materials that pertain to community care facilities, residential care facilities for the elderly and child day care facilities, used in the quarterly Statutes and Regulations training for state and local officials. The State Fire Marshal also stated: "Under [Health and Safety Code] section 13146(d), the local enforcing agency could request the [State Fire Marshal] to assume jurisdiction for these community care facilities provided that we have the resources to fulfill the request."

Sacramento Metropolitan Fire District

The Sacramento Metropolitan Fire District commented that the Northern California Fire Prevention Officers Association (NORCAL), Building Standards Committee in cooperation with the State Fire Marshal's Office has drafted a manual called the *California Fire Service Guide to Licensed Facilities.* The District supplied a copy of that draft to the Commission. The District also reiterated that the current costs for pre-inspections "far exceed[ ] the fees allowed by statute."

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[6] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[7] "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

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[6] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "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."

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

This test claim presents the following issues:

- Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?
- Does the test claim legislation impose a "new program" or "higher level of service" on local agencies within the meaning of article XIII B, section 6 of the California Constitution?
- Does the test claim legislation impose "costs mandated by the state" within the meaning of article XIII B, section 6 of the California Constitution?

Issue 1: Is the test claim legislation subject to article XIII B, Section 6 of the California Constitution?

Mandatory or Discretionary Activities?

In order for the test claim legislation to impose a reimbursable state-mandated program under article XIII B, section 6, the statutory language must mandate an activity or task upon local governmental agencies. If the statutory language does not mandate or require local agencies to perform a task, then article XIII B, section 6 is not triggered. In such a case, compliance with the test claim statute is within the discretion of the local agency.

Under the test claim legislation, the local fire enforcing agency or State Fire Marshal, whichever has primary jurisdiction, is required to: 1) conduct a preinspection of the facility prior to the final fire clearance approval; 2) provide consultation, interpretation and written notice to the facility applicant regarding applicable fire safety regulations;[17] and 3) complete the final fire clearance inspection within 30 days of a request to do so.[18] However, Health and Safety Code section 13146, subdivision (d), gives the State Fire Marshal authority to enforce building standards and regulations on behalf of the local fire enforcing agency upon request of the chief fire official or local governing body. According to information provided by the State Fire Marshal: "Under [Health and Safety Code] Section 13146(d), the local enforcing agency could request the [State Fire Marshal] to assume jurisdiction for these community care facilities provided that we have the resources to fulfill the request."[19]

Because the local fire enforcing agency or local governing body could ask the State Fire Marshal to assume the enforcement duties pursuant to Section 13146, subdivision (d), the issue is raised as to whether those duties could be considered a discretionary activity by the local agency. Based on the following analysis, the enforcement duties are not discretionary.

Providing fire protection services by enforcing building standards is legally compelled by the statutory scheme under which the test claim legislation was enacted. The Health and Safety Code requires the State Fire Marshal or the chief of any city or county fire department or

[17] Health and Safety Code section 13235, subdivision (a).

[18] Health and Safety Code section 13235, subdivision (b).

[19] Letter from Ruben Grijalva, State Fire Marshal, to Paula Higashi, Executive Director, Commission on State Mandates, December 27, 2005.

Does the Test Claim Legislation Constitute a "Program?

The test claim legislation must also constitute a "program" in order to be subject to article XIII B, section 6 of the California Constitution. The Department of Finance argues that the test claim legislation is not a program subject to reimbursement under article XIII B, section 6, because the test claim legislation is not unique to local government since the same requirements are imposed on the state, through the State Fire Marshal. The Commission disagrees with this position for the reasons cited below.

The relevant tests regarding whether this test claim legislation constitutes a "program" within the meaning of article XIII B, section 6 are set forth in case law. The California Supreme Court, in the case of *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, defined the word "program" within the meaning of article XIII B, section 6 as a program that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[23] (Emphasis added.) Only one of these findings is necessary to trigger the applicability of article XIII B, section 6.

The *County of Los Angeles* case also found that the term "program" as it is used in article XIII B, section 6, "was [intended] to require reimbursement to local agencies for the costs involved in carrying out functions *peculiar to government*, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities." (Emphasis added.)[24] In this case, the court found that no reimbursement was required for the increase in workers' compensation and unemployment insurance benefits applied to all employees of private and public businesses.[25]

Here, on the other hand, the requirements imposed by the test claim statute are carried out by state and local fire officials. Although both state and local officials perform the requirements imposed by the test claim legislation in conducting a prelicensure inspection for specified care facilities, these requirements do not apply "generally to all residents and entities in the state," as did the requirements for workers' compensation and unemployment insurance benefits in the *County of Los Angeles* case.

In addition, the Court of Appeal, Third Appellate District, in *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App3d 521, has recognized that fire protection is a peculiarly governmental function, and that, along with police protection, fire protection is one of the "most essential and basic functions of local government."[26] In this respect, the prelicensure fire inspections provide basic fire protection services for the public.

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[23] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 (*County of Los Angeles).*

[24] *County of Los Angeles, supra,* 43 Cal.3d 46, 56-57.

[25] *County of Los Angeles, supra,* 43 Cal.3d 46, 57-58.

[26] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537 *(Carmel Valley).*

The Enrolled Bill Report submitted by the State Fire Marshal[29] provided a summary of the procedures in existence at the time the test claim legislation was enacted. The Report stated that upon application to the State Department of Social Services for a license, the Department would send a request for a fire safety inspection to the appropriate fire authority, either the local fire enforcing agency or the State Fire Marshal. Upon receipt of the request, the local fire agency or State Fire Marshal would then conduct an inspection of the facility and issue the fire clearance approval. It is apparent from the statements of the State Fire Marshal that at least one inspection of the facility was already required in order to issue the fire clearance.

New Requirements under Test Claim Legislation

The test claim legislation requires the local fire enforcing agency to "conduct a *preinspection* of the facility prior to the final fire clearance approval." (Emphasis added.)[30] The fire enforcing agency is also required, at the time of the preinspection, to "provide consultation and interpretation of fire safety regulations,"[31] "notify the prospective licensee of the facility in writing of the specific fire safety regulations which shall be enforced in order to obtain fire clearance approval,"[32] and "complete the final fire clearance inspection ... within 30 days of receipt of the request for final inspection, or as of the date the prospective facility requests the final prelicensure inspection ..., whichever is later."[33]

Since the fire clearance approval requirement, which also required an inspection of the facility, was in effect prior to passage of the test claim legislation, the finding of a new program or higher level of service must be limited to activities relating to the *preinspection.* Any inspection activities related to the pre-existing final fire clearance approval requirements would not be considered a new program or higher level of service.

Therefore, the Commission finds that *with regard to the preinspection only*, the following activities fall within the meaning of "new program" or "higher level of service" under article XIII B, section 6:

1. the preinspection;
2. the consultation and interpretation of applicable fire safety regulations; and
3. written notice to the prospective licensee of the specific fire safety regulations which shall be enforced in order to obtain the final fire clearance approval.

The new requirement to complete the final fire clearance inspection for a facility within 30 days of receipt of the request does not mandate a new activity, since the final fire clearance inspection and approval requirement was already in existence. Instead it merely adds a timeline under which the activity must be completed. Therefore, the Commission finds that

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[29] State Fire Marshal Enrolled Bill Report, Senate Bill 1098, September 18, 1989.

[30] Health and Safety Code section 13235, subdivision (a).

[31] *Ibid.*

[32] *Ibid.*

[33] Health and Safety Code section 13235, subdivision (b).

> which necessitates the training of new fire inspectors, is also part of the equation. The San Jose Fire Department Bureau of Fire prevention is mandated by the City to be 100% cost recovery. The hourly rate at which our department charges in order to achieve full cost recovery is $110. The present $50 fee allowance for a preinspection does not quite cover the cost of one-half hour.

Thus, there is evidence in the record, signed under penalty of perjury, that there are increased costs as a result of the test claim legislation.

Government Code section 17556 lists several exceptions which preclude the Commission from finding costs mandated by the state. Because some fee authority exists for this program, section 17556, subdivision (d) — which requires the commission to deny the claim where a local agency has "the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service" — must be analyzed to determine whether it is applicable.

Government Code section 66014 allows local entities to charge fees to recover costs for local zoning and permitting activities, including building inspections, which "may not exceed the estimated reasonable cost of providing the service for which the fee is charged ..."[34] Health and Safety Code section 13146, subdivision (e), similarly addresses fee recovery for fire-related enforcement and inspections to "the reasonable cost of providing the service for which the fee is charged, pursuant to Section 66014 of the Government Code."

The test claim legislation, however, states that fees charged for the preinspection cannot exceed: 1) $50 for a facility with a capacity to serve 25 or fewer persons; and 2) $100 for a facility with a capacity to serve 26 or more persons.[35] A further potential limitation on fees that can be charged is located in the Community Care Facilities Act (Health and Safety Code sections 1500 et seq.), applicable to all three types of facilities. Section 1566.2 states that "... [n]either the State Fire Marshal nor any local public entity shall charge any fee for enforcing fire inspection regulations pursuant to state law or regulation or local ordinance, with respect to residential facilities which serve six or fewer persons."

The question then is whether the local fee authority found in Government Code section 66014 is sufficient to recover preinspection costs in light of the two potentially fee-limiting provisions. The applicable rule of statutory construction states that when a general provision of law cannot be reconciled with a more specific provision, the general provision is controlled by the special provision and the special provision is treated as an exception.[36] Here, the two fee-limiting provisions found in the test claim legislation and the Community Care Facilities Act are exceptions to the more general local fee authority. Accordingly, fee recovery for the preinspection activity is limited to: 1) $0 for facilities which serve six or fewer persons; 2) $50 for facilities with a capacity to serve seven to 25 persons; and 3) $100 for facilities with a capacity to serve 26 or more persons.

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[34] Government Code section 66014, subdivision (a).

[35] Health and Safety Code section 13235, subdivision (a).

[36] *People v. Superior Court* (2002) 28 Cal. 4th 798; *Garcia v. McCutchen* (1997) 16 Cal. 4th 469.

DRAFT PARAMETERS AND GUIDELINES

Health and Safety Code Section 13235, Subdivision (a)

Statutes 1989, Chapter 993

Fire Safety Inspections of Care Facilities, 01-TC-16

City of San Jose, Claimant

I. SUMMARY OF THE MANDATE

The test claim legislation amended the Health and Safety Code regarding fire inspections of specified community care facilities required by the State Fire Marshal. The purpose of the test claim legislation (Stats. 1989, ch. 993) is to ensure that community care facilities, residential care facilities for the elderly, and child day care facilities, during the process of being licensed by the State Department of Social Services, receive in a timely fashion the correct fire clearance information from the local fire enforcing agency or State Fire Marshal.

II. ELIGIBLE CLAIMANTS

Any city, county, and city and county that incurs increased costs as a result of this reimbursable state-mandated program is eligible to claim reimbursement of those costs.

III. PERIOD OF REIMBURSEMENT

Government Code section 17557, subdivision (c), as amended by Statutes 1998, chapter 681, states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The City of San Jose filed the test claim on June 3, 2002. Therefore, costs incurred on or after July 1, 2000, in compliance with Statutes 1989, chapter 993 are eligible for reimbursement.

Actual costs for one fiscal year shall be included in each claim. Estimated costs of the subsequent year may be included on the same claim, if applicable. Pursuant to Government Code section 17561, subdivision (d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.

If the total costs for a given fiscal year do not exceed $1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and

that were performed during the period covered by the reimbursement claim. If the contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant and attorney invoices with the claim and a description of the contract scope of services.

4. Fixed Assets and Equipment

Report the purchase price paid for fixed assets and equipment (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset or equipment is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination point, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1, Salaries and Benefits, for each applicable reimbursable activity.

B. Indirect Cost Rates

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include both (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in the Office of Management and Budget (OMB) Circular A-87. Claimants have the option of using 10% of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10%.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in OMB Circular A-87 Attachments A and B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in OMB Circular A-87 Attachments A and B). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distribution base may be (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) classifying a department's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect

Pursuant to Government Code section 17561, subdivision (d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557, subdivision (d), and California Code of Regulations, title 2, section 1183.2.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The Statement of Decision is legally binding on all parties and provides the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for the test claim. The administrative record, including the Statement of Decision, is on file with the Commission.