BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Education Code Sections 17620, 17621, 17622, 17623, 17624, 17625, and 17626as Renumbered or Amended by Statutes 1996, Chapter, 277, Statutes 1998, Chapter 207, Statutes 1999, Chapter 300 and Statutes 2000, Chapter 135

Government Code Sections 65970, 65971, 65972, 65973, 65974, 65974.5, 65975, 65976, 65977, 65978, 65979, 65980, 65981, 65995, 65995.1, 65995.2, 65995.5, 65995.6, 65995.7, 65996, 65997, 65998, 66002, 66004, 66005, 66006, 66007, 66008, 66016, 66017, 66018, 66018.5, 66020, 66022, 66023, 66024, 66025, 66030, 66031, 66032, 66034, and 66037 as added, amended or renumbered by Statutes 1977, Chapter 955, Statutes 1979, chapter 282, Statutes 1980, Chapter 1354, Statutes 1981, Chapter 201, Statutes 1982, Chapter 923, Statutes 1983, Chapters 921 and 1254, Statutes 1984, Chapter 1062, Statutes 1985, Chapter 1498, Statutes 1986, Chapters 136, 685, 887, and 888, Statutes 1987, Chapters 927, 1002, 1037, 1184 and 1346, Statutes 1988, Chapters 29, 160, 418, 912 and 926, Statutes 1989, Chapters 170, 1209 and 1217, Statutes 1990, Chapters 633 and 1572, Statutes 1992, Chapters, 169, 231, 487, 605 and 1354, Statutes 1993, Chapters 589 and 1195, Statutes 1994, Chapters 300, 686, 983 and 1228, Statutes 1995, Chapter 686, Statutes 1996, Chapters, 277, 549, 569, and 799, Statutes 1997, Chapter 772, Statutes 1998, Chapters 207, 407 and 689, Statutes 1999, Chapters 300 and 858, Statutes 2000, Chapter 135 and Statutes 2002, Chapters 33 and 1016

Filed on June 27, 2003 by

Clovis Unified School District, Claimant

Case No.: 02-TC-42

Developer Fees

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

Adopted: December1, 2011

STATEMENT OF DECISION

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

Dated: December 14, 2011

Nancy Patton
Acting Executive Director

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Education Code Sections 17620, 17621, 17622, 17623, 17624, 17625, and 17626 as Renumbered or Amended by Statutes 1996, Chapter, 277, Statutes 1998, Chapter 207, Statutes 1999, Chapter 300 and Statutes 2000, Chapter 135

Government Code Sections 65970, 65971, 65972, 65973, 65974, 65974.5, 65975, 65976, 65977, 65978, 65979, 65980, 65981, 65995, 65995.1, 65995.2, 65995.5, 65995.6, 65995.7, 65996, 65997, 65998, 66002, 66004, 66005, 66006, 66007, 66008, 66016, 66017, 66018, 66018.5, 66020, 66022, 66023, 66024, 66025, 66030, 66031, 66032, 66034, and 66037 as added or amended by Statutes 1977, Chapter 955, Statutes 1979, chapter 282, Statutes 1980, Chapter 1354, Statutes 1981, Chapter 201, Statutes 1982, Chapter 923, Statutes 1983, Chapters 921 and 1254, Statutes 1984, Chapter 1062, Statutes 1985, Chapter 1498, Statutes 1986, Chapters 136, 685, 887, and 888, Statutes 1987, Chapters 927, 1002, 1037, 1184 and 1346, Statutes 1988, Chapters 29, 160, 418, 912 and 926, Statutes 1989, Chapters 170, 1209 and 1217, Statutes 1990, Chapters 633 and 1572, Statutes 1992, Chapters, 169, 231, 487, 605 and 1354, Statutes 1993, Chapters 589 and 1195, Statutes 1994, Chapters 300, 686, 983 and 1228, Statutes 1995, Chapter 686, Statutes 1996, Chapters, 277, 549, 569, and 799, Statutes 1997, Chapter 772, Statutes 1998, Chapters 407 and 689, Statutes 1999, Chapter 858 and Statutes 2002, Chapters 33 and 1016

Filed on June 23, 2003 by

Clovis Unified School District, Claimant

Case No.: 02-TC-42

Developer Fees

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

Adopted: December 1, 2011

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on December 1, 2011. Art Palkowitz testified on behalf of claimant, Clovis Unified School District. Susan Geanacou and Chris Ferguson testified on behalf of Department of Finance.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 *et seq*., and related case law.

The Commission adopted the staff analysis to partially approve the test claim at the hearing by a vote of 5-0.

Summary of the Findings

This test claim addresses activities required as a condition of imposing developer fees to help pay for school facilities. There are three developer fee programs at issue in this test claim which are commonly referred to as: the School Facilities Act, AB 2926, and the Mitigation Fee Act. This test claim also addresses mediation and settlement proceedings that are authorized under the Mediation and Resolution of Land Use Disputes Law when a litigant brings an action in superior court to contest, among other things, actions taken or developer fees imposed under the AB 2926 and the Mitigation Fee Act programs.

The Commission finds that the School Facilities Act[1] imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution, beginning July 1, 2001 for school districts to perform the following activities:

- Notify the city council or county board of supervisors if the school district finds, based on clear and convincing evidence, that:
    1) Conditions of overcrowding exists in one or more of the attendance areas within the district that will impair the normal functioning of educational programs, and
    2) All reasonable methods of mitigating conditions of overcrowding have been evaluated and no feasible methods for reducing those conditions exist.
- Specify in the notice of findings the reason for the existence of the overcrowding conditions and the mitigation measures considered and include a copy of a completed application to the OPSC for preliminary determination of eligibility under the Leroy F. Greene State School Building Lease-Purchase Law of 1976.
- Submit to the city council or county board of supervisors a schedule for the use of fees, including the school sites to be used, classroom facilities to be made available, and the times when those facilities will be available. The schedule shall be submitted before the city or county makes a decision to require the dedication of land or the payment of fees, or to increase the amount of land to be dedicated or the fees to be paid.

[1] Government Code sections 65970, 65971, 65972, 65973, 65974, 65974.5, 65975, 65976, 65977, 65978, 65979, 65980, 65981 as added or amended by Statutes 1977, chapter 955, Statutes 1979, chapter 282, Statutes 1980, chapter 1354, Statutes 1981, chapter 201, Statutes 1982, chapter 923, Statutes 1983, chapter 1254, Statutes 1984, chapter 1062, Statutes 1985, chapter 1498, Statutes 1986, chapters 136 and 887, Statutes 1994, chapter 1228.

If an ordinance is adopted by the city council or county board of supervisors pursuant to Government Code section 65974 requiring the dedication of land, the payment of fees in lieu thereof, or a combination of both:

- Make a recommendation regarding the amount of fees to be assessed, within 60 days following the initial permit for the development, when required by the city council or county board of supervisors; and
- Where two separate school districts operate schools in an attendance area where overcrowding conditions exist for both school districts, enter into an agreement with the city or county for the purpose of determining the distribution of revenues to both school districts from the fees levied pursuant to the School Facilities Act.

If a school district receives funds pursuant to the School Facility Act:

- Maintain a separate account for any fees paid; and
- File a report by October 15 of each year with the city council or county board of supervisors which specifies:
    - The balance in the account at the end of the previous fiscal year;
    - The facilities leased, purchased, or constructed;
    - The dedication of land during the previous fiscal year; and
    - Which attendance areas will continue to be overcrowded when the fall term begins and where conditions of overcrowding will no longer exist.

The Commission further finds that the remaining test claim statutes[2] do not impose a state-mandated program for school districts within the meaning of article XIII B, section 6 of the California Constitution and are not reimbursable.

COMMISSION FINDINGS

Chronology

06/27/2003 Claimant, Clovis Unified School District, files the test claim with the Commission on State Mandates (Commission)[3]

[2] Education Code sections 17620, 17621, 17622, 17623, 17624, 17625, and 17626 and Government Code sections 65995, 65995.1, 65995.2, 65995.5, 65995.6, 65995.7, 65996, 65997, 65998, 66002, 66004, 66005, 66006, 66007, 66008, 66016, 66017, 66018, 66018.5, 66020, 66022, 66023, 66024, 66025, 66030, 66031, 66032, 66034, and 66037 as added, amended or renumbered by Statutes 1983, chapter 921, Statutes 1986, chapters 685, 887, and 888, Statutes 1987, chapters 927, 1002, 1037, 1184 and 1346, Statutes 1988, chapters 29, 160, 418, 912 and 926, Statutes 1989, chapters 170, 1209 and 1217, Statutes 1990, chapters 633 and 1572, Statutes 1992, chapters, 169, 231, 487, 605 and 1354, Statutes 1993, chapters 589 and 1195, Statutes 1994, chapters 300, 686, and 983, Statutes 1995, chapter 686, Statutes 1996, chapters, 277, 549, 569, and 799, Statutes 1997, chapter 772, Statutes 1998, chapters 207, 407 and 689, Statutes 1999, chapters 300 and 858, Statutes 2000, chapter 135 and Statutes 2002, chapters 33 and 1016.

07/10/2003	Commission staff issues a completeness review letter for the test claim and requests comments from state agencies
08/11/2003	The Office of Public School Construction (OPSC) submits comments on the test claim
08/11/2003	The Department of Education (CDE) submits comments on the test claim
07/29/2003	Department of Finance (DOF) requests a 30-day extension to file comments on the test claim
07/30/2003	Commission staff grants DOF an extension to August 11, 2003 to file comments on the test claim
09/13/2003	Claimant submits a response to OPSC's comments on test claim
10/28/2003	DOF requests an extension to February 2004 to file comments on test claim
11/07/2003	Commission staff grants DOF an extension to February 7, 2004 to file comments on the test claim
02/09/2004	DOF submits comments on the test claim
02/27/2004	Claimant submits a response to OPSC's comments on test claim
10/20/2011	Commission staff issues the draft staff analysis

I. Background

This test claim addresses activities required as a condition of imposing developer fees to help pay for school facilities. There are three developer fee programs at issue in this test claim which are commonly referred to as: the School Facilities Act, AB 2926, and the Mitigation Fee Act. This test claim also addresses mediation and settlement proceedings that are authorized under the Mediation and Resolution of Land Use Disputes Law when a litigant brings an action in superior court to contest, among other things, actions taken or developer fees imposed under the AB 2926 and the Mitigation Fee Act programs. These programs are summarized below.

A. A Brief History of the Role of the State in School Facility Finance[4]

Prior to 1976, and before the test claim statutes were enacted, school facilities were funded entirely by local tax revenues with the assistance of state loans and land grants and private donations. The State Allocation Board (SAB) was created in 1947 and was directed by the Legislature to allocate state funds for school construction and renovation. Originally, the funds allocated were loans to the local districts. However, in 1978, the voters enacted Proposition 13 which fundamentally altered the ability of school districts to raise funds through local property tax revenues. Proposition 13 capped the ad valorem tax rate at one percent of its value, thereby

[3] Based on the filing date of June 27, 2003, the period of reimbursement for this test claim begins on July 1, 2001.

[4] This overview draws extensively from the history of California school facility finance provided by two reports: *School Facility Financing – A History of the Role of the State Allocation Board and Options for the Distribution of Proposition 1A Funds* (Cohen, Joel, February 1999) and *Financing School Facilities in California* (Brunner, Eric J., October 2006) (Exhibit H).

dramatically reducing the income from property taxes, and eliminated the ability of school districts to levy additional special property taxes to pay off their facility indebtedness.

To assist the school districts in funding school facilities, the Legislature enacted state grant programs, most importantly the Leroy Greene State School Building Lease-Purchase Law and the Leroy F. Greene School Facilities Act of 1998, which established the state school facility program (SFP). The SFP provides grants for school districts to acquire school sites, construct new school facilities, or modernize existing school facilities. The primary grants available are "new construction" and "modernization." The new construction grant provides funding on a 50/50 state and local match basis. The modernization grant provides funding on a 60/40 basis. Districts that are able to meet the financial hardship provisions may be eligible for additional state funding of up to 100 percent of the local share of cost. To qualify for financial hardship funding, a district must demonstrate that: (1) it is levying developer fees up to the maximum amount allowed by law; (2) it has made every reasonable effort to raise local revenue to fund a project; and (3) it can show evidence of financial inability to contribute the required local matching funds.[5] The Legislature also provided school districts with several sources of statutory fee authority to raise the local match under the SFP and to provide for interim facilities until more permanent funding becomes available, including the School Facilities Act and the AB 2926 developer fee programs that are at issue in this claim.

B. The School Facilities Act

The School Facilities Act[6] provides authority for cities and counties to enact ordinances to require developers to pay fees for temporary school facilities. Under the Act, a school district is required to notify the city council or county board of supervisors if a school district finds, based on clear and convincing evidence, that conditions of overcrowding exist in one of the attendance areas that impairs the functioning of the educational programs, and that all reasonable methods of mitigating conditions of overcrowding have been evaluated by the district and no feasible method exists to reduce the overcrowding conditions. Government Code section 65971 provides, in pertinent part, the following:

> (a) The governing body of a school district…shall notify the city council or board of supervisors of the city or county within which the school district is located if the governing body makes both of the following findings supported by clear and convincing evidence:
>
> (1) That conditions of overcrowding exist in one or more attendance areas within the district that will impair the normal functioning of educational programs, including the reason for the existence of those conditions.
>
> (2) That all reasonable methods of mitigating conditions of overcrowding have been evaluated and no feasible method for reducing those conditions exist.

[5] *Ibid* (Exhibit H).

[6] Government Code sections 65970-65981 as added by Statutes 1977, chapter 955 and amended by Statutes 1979, chapter 282, Statutes 1982, chapter 923, Statutes 1985, chapters 150, 836 and 1498, Statutes 1986, chapter 887 and Statutes 1994, chapter 1228. The School Facilities Act has also been non-substantively amended by Statutes 2006, chapter 538, but that statute has not been pled in this test claim.

The Act defines "reasonable methods for mitigating conditions of overcrowding" to include "agreements between a subdivider and the affected school district whereby temporary-use buildings will be leased to the school district or temporary-use buildings owned by the school district will be used."[7]

Government Code section 65971(b)(1) requires that the notice provided to the city council or county board of supervisors specify the mitigation measures considered by the school district and requires that the notice include a completed application to the Office of Public School Construction (OPSC) for the preliminary determination of eligibility under the Leroy F. Greene School Building Lease-Purchase Law of 1976. The local city council or board of supervisors may impose a fee, require the dedication of land, or both, to accommodate the interim facilities for the school district.

However, the value of the land and the amount of fees to be paid shall not exceed the amount necessary to pay five annual lease payments for the interim facilities.[8] If the ordinance adopted by the city council or county board of supervisors provides for the school district to recommend the amount of fees to be assessed against the developer, such recommendation is required to be provided to the city or county within 60-days following the initial permit for the development. If the district makes the findings and provides the notice, it must also submit a schedule, including the school sites to be used, classroom facilities to be made available, and the times when those facilities will be available, to the local city council or county board of supervisors specifying how the district will use the fees, land, or both.[9] If two school districts operate in an attendance area where both schools have overcrowding, the city or county is required to enter into an agreement with both districts to determine the distribution of revenues from the fees. [10]

In addition, once a city or county approves a request imposing a developer fee, the statutes require school districts to perform accounting, reporting and other related requirements.

If the district receives approval of state grant funds for a school facility project under the Leroy F. Greene School Building Lease-Purchase Law of 1976, the district can use all or a portion of the fee or fair market value of the land dedicated under the School Facilities Act towards the district's share of costs for the project.[11] One year after receipt of an apportionment under the Leroy F. Greene School Building Lease-Purchase Law of 1976, the city or county is not permitted to levy a fee or require the dedication of land under the School Facilities Act unless a new finding of overcrowding is made by the school district. [12]

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[7] Government Code section 65973(b).

[8] See Government Code section 65974. Note that funds collected pursuant to the School Facilities Act under a local ordinance, resolution, or regulation in existence prior to November 1, 1986 may be used for any construction or reconstruction purposes authorized under Government Code section 53080 and is not restricted to interim facilities.

[9] Government Code section 65976.

[10] Government Code section 65977.

[11] Government Code section 65975.

[12] Government Code section 65979.

The purpose of the School Facilities Act "is to encourage local school districts to identify, and local governments to deal with, the effects of residential development on school facilities and to provide local governments with 'new and improved methods' to cope with the effects of such development 'within a reasonable period of time' and on a short-term basis."[13]

C. AB 2926 Developer Fees

In 1987, the Legislature enacted AB 2926 authorizing school districts to directly levy statutory developer fees on new residential and commercial/industrial developments.[14] Originally codified as Government Code sections 53080 and 65995, this legislation granted school districts the authority to levy fees to offset the impacts to school facilities from new development.

There are three levels of developer fees that may be levied under the AB 2926 program.[15] The Level I fee is assessed if the district conducts a fee justification study that establishes the connection between the development coming into the district and the assessment of fees to pay for the cost of the facilities needed to house future students. The maximum assessment for the amount of a Level I fee is required to be adjusted by the State Allocation Board (SAB) every two years by the change in the Class B construction cost index, as determined by the SAB at its January meeting.[16] Since 2008, those fees have been set at $2.97 per square foot for residential and $0.47 per square foot for industrial.[17] The Level II fee is assessed if a district makes a timely application to SAB for new construction funding, conducts a school facility needs analysis pursuant to Government Code Section 65995.6, and makes at least two of the hardship related findings listed in Government Code Section 65995.5(b)(3). The Level III fee is assessed when the state's SFP grant funds are exhausted; in that case, the district may impose a developer's fee up to 100 percent of the SFP new construction project cost.[18] Imposition of any of the three levels of fees triggers a number of fee study, notice, accounting, and other related requirements.

D. The Mitigation Fee Act

The Mitigation Fee Act imposes a statutory nexus requirement on the use of developer fees. Whenever establishing, imposing, or increasing a fee "as a condition of approval of a development project," the local agency imposing the fee must identify the purpose of the fee and the use to which it will be put. For purposes of the Mitigation Fee Act "local agency" includes

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[13] *Candid Enterprises, Inc. v. Grossmont Union High School Dist*. (1985) 39 Cal.3d 878, 889; Government Code section 65970 (Exhibit H).

[14] AB 2926, Statutes 1986, chapter 887. The code sections that make up the "AB 2926" program have been amended by several other statutes, including some of the other test claim statutes, but "AB 2926" is what the program is commonly called.

[15] AB 2926 authorized only Level I fees. However, the authority for Level II and III fees was added by SB 50 (Sts. 1998, ch. 407). For ease of discussion, this analysis refers to all three levels of fees as "AB 2926 fees" as they work in conjunction with one another and are found in the same part of the code.

[16] Government Code section 65995.

[17] See generally, Education Code section 17620, Government Code section 65995 and the Report of the Executive Officer, State Allocation Board Meeting, January 26, 2011 (Exhibit H).

[18] Government Code section 65997.

school districts.[19] The local agency must also specify the nexus between the development project (or class of project) and the improvement being financed.[20] It must further establish that the amount of funds being collected will not exceed that needed to pay for the improvement.[21]

The U.S. Supreme Court holding in *Nollan v. California Coastal Commission*[22] established that the power to impose exactions on development is not without limits under the United States Constitution. The *Nollan* decision requires that government establish the existence of a "nexus" or link between the exaction and the governmental interest being advanced by that exaction. Once the adverse impacts of a project have been quantified, the local agency must document the relationship between the project and the need for the conditions which mitigate those impacts. This link may be forged by general plan policies or by special ordinances that are based upon studies or other objective evidence. Adoption of detailed findings, supported by evidence in the hearing record, is crucial to the enactment of a legally defensible fee ordinance. The Mitigation Fee Act imposes these requirements by statute. Likewise, amendments to the Act implement the requirements of other court decisions as follows: *Dolan v. City of Tigard*[23] (requiring rough proportionality between impact and mitigation) and *Ehrlich v. City of Culver City*[24] (requiring developers who wish to challenge a development fee on either statutory or constitutional grounds to do so under provisions of the Mitigation Fee Act).

Revenues resulting from such fees must be kept in a separate fund dedicated to the public improvements being financed and must not be commingled with other revenues and funds of the local agency.[25] In addition, five years after the first deposit into the account or fund, the local agency must make specific findings regarding any unexpended funds, whether those funds are committed to expenditure or not.[26] The same findings must continue to be made once every five years thereafter. If these findings are not made, the agency is required to refund the fees to the current owner of the affected property. Refunds may be made by direct payment, temporary suspension of fees, or "other reasonable means," at the discretion of the local agency.

In its findings, the agency must:

(1) Identify the purpose to which the fee is put;

(2) Demonstrate a reasonable relationship between the fee and purpose for which it is charged;

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[19] Government Code section 66000(c).

[20] Government Code section 66001.

[21] Government Code section 66005.

[22] *Nollan v. California Coastal Commission* (1987) 107 S.Ct. 3141 (*Nollan*) Reports of the Executive Officer, State Allocation Board Meeting, January 30, 2008 (the last meeting at which the fees were increased) and January 26, 2011(Exhibit H).

[23] *Dolan v. City of Tigard* (1994) 114S.Ct. 2309 (Exhibit H).

[24] *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854 (Exhibit H).

[25] Government Code section 66006.

[26] Government Code section 66001.

(3) Identify all sources and amounts of funding anticipated to be used to finance the incomplete improvements; and

(4) Designate the approximate dates on which the above funding is expected to be deposited into the appropriate account or fund.[27]

When sufficient funds have been amassed to complete the financing of public improvements for which impact fees have been collected (as determined in the annual fiscal report required under section 66006), but the improvements have not been completed, the agency must either identify "an approximate date by which the construction of the public improvement will be commenced" or refund the unexpended portion of the funds to the current record owners of the affected properties on a prorated basis.[28]

Fees collected for an improvement related to a development project must be deposited in a separate fund or account and are to be expended "solely for the purpose for which the fee was collected." Local agencies are further required to make a yearly public financial disclosure for each of its fee accounts for all development projects, including residential, commercial, and industrial. Within 180 days of the end of each fiscal year, the agency must make the following information available:

(1) A brief description of the type of fee in the account;

(2) The amount of the fee;

(3) The beginning and ending balance of the account;

(4) The fees collected that year and the interest earned;

(5) An identification of each public improvement for which the fees were expended and the amount of the expenditures for each improvement;

(6) An identification of an approximate date by which construction of the improvement will commence if the local agency determines that sufficient funds have been collected to complete financing of an incomplete public improvement;

(7) A description of each inter-fund transfer or loan made from the account or fund, including the public improvement on which the transferred or loaned fees will be expended, the date on which any loan will be repaid, and the rate of interest to be returned to the account; and

(8) The amount of money refunded under section 66001.[29]

The public agency must review the fiscal report at its next scheduled public hearing after public release of the report. Section 66006 specifies the requirements for the 15-day advance public notice.

The Mitigation Fee Act also requires local agencies to perform further public notice, hearing, accounting, and auditing activities, and allows judicial challenges to newly adopted or increased fees.[30]

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[27] *Ibid.*

[28] *Ibid.*

[29] Government Code section 66006.

E. The Mediation and Resolution of Land Use Disputes Law

The Mediation and Resolution of Land Use Disputes Law provides the courts with authority to invite parties to legal challenges to the developer fees imposed under the AB 2926 or to actions taken under the Mitigation Fee Act to participate in mediation and, if the mediation is unsuccessful, to order a settlement conference between the parties.[31]

II. Positions of the Parties and Interested Parties

A. Claimant's Position

Claimant alleges that the test claim statutes require school districts to impose developer fees and comply with a number of related process, notice, public hearing, and accounting requirements. Claimant alleges further that these activities are new and subject to reimbursement under article XIII B, section 6 of the California Constitution. More specifically, claimant alleges the following programs are new and reimbursable:

- The School Facilities Act (Gov. Code § 65970-65981), which requires school districts, under specified circumstances to:
    - Make written findings of:
        - Overcrowding; and
        - Exhaustion of reasonable methods of mitigating the overcrowding;
    - Establish a schedule of fees for interim facilities;
    - Request that the local city council or board of supervisors adopt an ordinance imposing the fee;
    - Assist the city council or board of supervisors in determining whether there are specific overriding fiscal, economic, social, or environmental factors thereby justifying the approval of the development without imposing the fee; and
    - Comply with a number of related process, notice, public hearing, and accounting requirements.
- AB 2926, which claimant alleges requires school districts to:
    - Apply to the State for grant funding under the SFP program;
    - Directly impose developer fees for new school construction. If a district imposes developer fees pursuant to the AB 2926 program, it must comply with a number of requirements; and
    - Comply with a number of related process, notice, public hearing, and accounting requirements.
- The Mitigation Fee Act which claimant alleges requires school districts to:
    - Identify the purpose of the developer fee and the use to which it will be put;
    - Prepare a fee study to:

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[30] Government Code sections 66007, 66008, 66016, 66017, 66020, 66022, and 66023.

[31] Government Code sections 66030-66037.

        - Specify the nexus between the development project (or class of project) and the improvement being financed through the fee;
        - Establish that the amount of funds being collected will not exceed that needed to pay for the improvement; and
    - Comply with certain accounting, disclosure and other related requirements.
- The Mediation and Resolution of Land Use Disputes Law, which claimant alleges requires school districts to:
    - Participate in mediation when a litigant brings an action in superior court to contest developer fees imposed and actions taken by a school district under the AB 2926 and the Mitigation Fee Act programs;
    - Participate in settlement conference requirements when the mediation is unsuccessful; and
    - Comply with a number of related requirements.[32]

Claimant also alleges the test claim statutes generally require school districts to "establish policies and procedures" to implement each of the laws discussed above.[33]

B. Department of Finance's Position

DOF states that a school district's collection of developer fees is a discretionary action of the district and is not state-mandated; therefore this test claim should be denied. Education Code section 17620 and Government Code section 65971 merely authorize school districts to levy developer fees and "the majority of the remaining statutes pertain to 'downstream' activities that would only apply if a school district chooses to collect developer fees." (Emphasis in original.)[34]

C. Department of Education's Position

CDE asserts that the test claim statutes do not impose a mandated program. Rather, "this is a funding option available to local school boards, whereby they can elect to establish developer fees to pay for the construction or re-construction of facilities." Any requirements that apply to the establishment and collection of developer fees are applicable only after districts elect to levy development fees, charges, or dedications. [35]

D. Office of Public School Construction's Position

OPSC states that the levying of developer fees is not a requirement to participate in the SFP. OPSC asserts that many school districts do levy fees to assist with local matching share requirements; however, other funding sources are available for districts such as the passage of local school facility bonds. Government Code section 17556(d) precludes the Commission from finding that any of the provisions of the test claim impose costs mandated by the state because

[32] Claimant, test claim, p.p. 119-153 (Exhibit A).

[33] *Id*. at 128 (Exhibit A).

[34] DOF, comments on the test claim, dated February 9, 2004, p. 1 (Exhibit E).

[35] CDE, comments on the test claim, August 11, 2003, p. 2 (Exhibit C).

there is statutory authority to raise program costs through the passage of local bonds and other revenue sources, including developer fees.[36]

III. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> 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 such local government for the costs of such programs or increased level of service.

The purpose of article XIII B, section 6 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."[37] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[38]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[39]
2. The mandated activity either:
   a. Carries out the governmental function of providing a service to the public; or
   b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[40]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[41]
4. The mandated activity results in the local agency or school district incurring increased costs. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[42]

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[36] OPSC, comments on the test claim, August 11, 2003, p. 1 (Exhibit B).

[37] *County of San Diego*, *supra*, 15 Cal.4th 68, 81.

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

[39] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

[40] *Id*. at 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.)

[41] *San Diego Unified*, *supra*, 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

[42] *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; Government Code sections 17514 and 17556.

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.[43] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[44] 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."[45]

Issue 1: Do the test claim statutes mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution?

A. The School Facilities Act[46] imposes a state-mandated new program or higher level of service for school districts within the meaning of article XIII B, section 6 of the California Constitution when specified conditions are met.

1. Requirements of the School Facilities Act

The School Facilities Act requires school districts to notify the city council or county board of supervisors if the school district finds, based on clear and convincing evidence, that conditions of overcrowding exists in one or more of the attendance areas that impairs the normal functioning of the educational programs, and that all reasonable methods of mitigating conditions of overcrowding have been evaluated by the district and no feasible method exists to reduce the overcrowding conditions. Government Code section 65971 provides, in pertinent part, the following:

> (a) The governing body of a school district…*shall* notify the city council or board of supervisors of the city or county within which the school district is located if the governing body makes both of the following findings supported by clear and convincing evidence:
>
> (1) That conditions of overcrowding exist in one or more attendance areas within the district that will impair the normal functioning of educational programs, including the reason for the existence of those conditions.
>
> (2) That all reasonable methods of mitigating conditions of overcrowding have been evaluated and no feasible method for reducing those conditions exist. (Emphasis added.)

The Act defines "reasonable methods for mitigating conditions of overcrowding" to include "agreements between a subdivider and the affected school district whereby temporary-use

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[43] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487; Government Code section 17551 and 17552.

[44] *County of San Diego*, *supra*, 15 Cal.4th 68, 109.

[45] *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.

[46] Government Code sections 65970, 65971, 65972, 65973, 65974, 65974.5, 65975, 65976, 65977, 65978, 65979, 65980, 65981 as added or amended by Statutes 1977, chapter 955, Statutes 1979, chapter 282, Statutes 1980, chapter 1354, Statutes 1981, chapter 201, Statutes 1982, chapter 923, Statutes 1983, chapter 1254, Statutes 1984, chapter 1062, Statutes 1985, chapter 1498, Statutes 1986, chapters 136 and 887, Statutes 1994, chapter 1228.

buildings will be leased to the school district or temporary-use buildings owned by the school district will be used."[47]

Based upon the plain language of this statute, the school district is required to (i.e. "shall") notify the local city council or county board of supervisors if findings of overcrowding are made and are based on clear and convincing evidence. Clear and convincing evidence is a very high standard and is defined as follows:

> "Clear and convincing" evidence means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the fact[s] for which it is offered as proof. Such evidence requires a higher standard of proof than proof by a preponderance of the evidence.[48]

Once the findings are made by the school district, the Act imposes several additional requirements on the school district.

Government Code section 65971(b)(1) requires that the school district, in its notice to the city council or county board of supervisors, specify the mitigation measures considered by the district and further requires the district to include a completed application to OPSC for the preliminary determination of eligibility under the SFP state grant program. Section 65971(b)(1) specifies in pertinent part:

> The notice of findings sent to the city or county pursuant to subdivision (a) shall specify the mitigation measures considered by the school district. The notice of findings shall include a completed application to the Office of Public School Construction for preliminary determination of eligibility under the Leroy F. Greene State School Building Lease-Purchase Law of 1976 (Chapter 12 (commencing with Section 17000) of Part 10 of the Education Code). . . .

Subdivision (b)(1) also provides times for action and a requirement for the findings to be made available to the public for 60 days after the notice is received by the city or county before the city or county takes action.

The Commission finds further that the School Facilities Act does not require school districts to complete the SFP application for grant funds, since participation in the SFP program is not a state-mandated activity.[49] What is required by this provision, however, are the costs of copying the application and providing it to the city council or board of supervisors.

If the local city council or board of supervisors concurs in the school district's finding, it may impose a fee on the developer, require the dedication of land, or both, to accommodate the

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[47] Government Code section 65973(b).

[48] CA BAJI 2.62, *Burden of Proof and Clear and Convincing Evidence*.

[49] See the Commission's Statement of Decision in *School Facilities Funding Requirements* (02-TC-43). Note that though participation in the SFP is not a state-mandated program, it is one of the many options available to school districts for funding school facilities and is the primary state grant program. A school district cannot find by clear and convincing evidence that "*all feasible methods*" of mitigating the overcrowded have been exhausted if it has not even applied to a grant program which may pay for 50-100 percent of construction costs for new school facilities.

interim facilities for the district. However the value of the land and the amount of fees to be paid cannot exceed the amount necessary to pay five annual lease payments for the interim facilities.[50]

If the district makes the findings and provides the notice, the plain language of Government Code section 65976 states that it must also submit a schedule to the city council or county board of supervisors explaining how the district will use the fees, land, or both. The schedule must identify the school sites to be used, classroom facilities to be made available, and the times when those facilities will be available. The schedule may be submitted with the notice or any time before the city council or county board of supervisors makes a decision to require the dedication of land or payment of fees, or to increase the amount of land to be dedicated or the fees to be paid.

Government Code section 65981 states that if the ordinance adopted by the city council or county board of supervisors provides for the school district to recommend the amount of fees to be assessed, such recommendation is required to be provided to the city or county by the school district within 60 days following the initial permit for the development. If two school districts operate in an attendance area where both schools have overcrowding, the city or county is required to enter into an agreement with both districts to determine the distribution of revenues from the fees.[51]

Once the city or county approves the payment of fees, the dedication of land, or both, additional requirements on school districts are triggered. Specifically, Government Code section 65978 requires the school district to:

- Maintain a separate account for any fees paid; and
- File a report by October 15 of each year with the city council or board of supervisors which specifies:
    - The balance in the account at the end of the previous fiscal year;
    - The facilities leased, purchased, or constructed;
    - The dedication of land during the previous fiscal year; and
    - Which attendance areas will continue to be overcrowded when the fall term begins and where conditions of overcrowding will no longer exist.

The board of supervisors or city council may approve a 30-day extension for the filing of the report in the case of extenuating circumstances, as determined by the board of supervisors or city council. During the time that the report has not been filed as prescribed, there is a waiver of the requirement to pay fees or dedicate land. If overcrowding conditions no longer exist, the city or county must cease levying a fee or requiring the dedication of any land.

If the school district receives approval of a school facility project under the Leroy F. Greene School Building Lease-Purchase Law of 1976 and has collected fees or dedication of land

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[50] Government Code sections 65974. Note that funds collected pursuant to the School Facilities Act under a local ordinance, resolution or regulation in existence prior to November 1, 1986 may be used for any construction or reconstruction purposes authorized under Government Code section 53080 and is not restricted to interim facilities.

[51] Government Code section 65977.

pursuant to the School Facilities Act, Government Code section 65975 states that the district "may use all or a portion of the fee" and "may use the fair market value of the land" to "provide all or a portion of its 10 percent of the school project share of costs for the project.[52] The Commission finds that the plain language of Government Code section 65975 is permissive and does not require any activities. A school district "may" use all or a portion of the fees or fair market value of land dedicated under the School Facilities Act program to meet its share of costs. There is nothing in the statutory language that legally compels the claimant to apply these fees to its share of costs for permanent facilities under the SFP and there is no evidence in the record that claimant has been practically compelled to do so.

Government Code section 65979 provides that "one year after receipt of an apportionment under the Leroy F. Greene School Building Lease-Purchase Law of 1976 for the construction of a school, the city or county shall not be permitted to levy a fee or require the dedication of land under the School Facilities Act or under an agreement with builders of residential development, unless a new finding of overcrowding is made by the school district.[53] The Commission finds that this provision is prohibitive, but does not require school districts to engage in any activity.

Accordingly, the School Facilities Act imposes the following requirements on school districts:

- Notify the city council or county board of supervisors if the school district finds, based on clear and convincing evidence, that:
    - Conditions of overcrowding exists in one or more of the attendance areas within the district that will impair the normal functioning of educational programs, and
    - All reasonable methods of mitigating conditions of overcrowding have been evaluated and no feasible method for reducing those conditions exists.
- The notice of findings shall specify the reason for the existence of the overcrowding conditions and the mitigation measures considered. Copying and providing a completed application to the OPSC for preliminary determination of eligibility under the Leroy F. Greene State School Building Lease-Purchase Law of 1976 shall also be provided with the notice of findings.[54]
- Submit to the city council or county board of supervisors a schedule for the use of fees, including the school sites to be used, classroom facilities to be made available, and the times when those facilities will be available. The schedule shall be submitted before the city or county makes a decision to require the dedication of land or the payment of fees, or to increase the amount of land to be dedicated or the fees to be paid.[55]

If an ordinance is adopted by the city council or county board of supervisors pursuant to Government Code section 65974 requiring the dedication of land, the payment of fees in lieu thereof, or a combination of both:

[52] Government Code section 65975.

[53] Government Code section 65979.

[54] Government Code section 65971(a).

[55] Government Code section 65976.

- Make a recommendation regarding the amount of fees to be assessed, within 60 days following the initial permit for the development, when required by the city council or county board of supervisors;[56] and
- Where two separate school districts operate schools in an attendance area where overcrowding conditions exist for both school districts, enter into an agreement with the city or county for the purpose of determining the distribution of revenues to both school districts from the fees levied pursuant to the School Facilities Act. [57]

If a school district receives funds pursuant to the School Facility Act:

- Maintain a separate account for any fees paid; and
- File a report by October 15 of each year with the city council or county board of supervisors which specifies:
    - The balance in the account at the end of the previous fiscal year;
    - The facilities leased, purchased, or constructed;
    - The dedication of land during the previous fiscal year; and
    - Which attendance areas will continue to be overcrowded when the fall term begins and where conditions of overcrowding will no longer exist.[58]

2. <u>The requirements of the School Facilities Act impose a state-mandated new program or higher level of service on school districts.</u>

Unlike other programs for school facilities that authorize school districts to apply for state grant funds, the plain language of Government Code section 65971 mandates school districts to provide notice to the city or county when new development results in overcrowding for one or more school attendance areas and the school district has exhausted all feasible methods of reducing the overcrowding. These feasible methods, as stated in section 65973, include "agreements between a subdivider and the affected school district whereby temporary-use buildings will be leased to the school district or temporary-use buildings owned by the school district will be used." They may also include transferring students to other schools in the district, double session kindergarten programs, district boundary changes, adding portable classrooms, or other modernization projects using funding from one of state grant programs including the Leroy F. Greene State School Building Lease-Purchase Law of 1976, using multi-track year round scheduling, and reopening closed school sites. However, when all methods have been exhausted and the overcrowding conditions remain, and a school district finds there is clear and convincing evidence of these facts, school districts are mandated by the state to provide notice to the city or county and to participate in the program.

It has been recognized that later enacted statutes, including the AB 2926 program, provide better options for schools seeking to address overcrowding issues which may make the School Facilities Act Program unnecessary. The Governor's Office of Planning and Research has determined that "[b]ecause AB 2926 allows for the funding of permanent facilities, it has

[56] Government Code section 65981.

[57] Government Code section 65977.

[58] Government Code section 65978.

generally supplanted the use of the School Facilities Act."[59] Nonetheless, the Commission finds, based on the plain language of the statute, that the School Facilities Act constitutes a state-mandated program for school districts when, due to new development, it finds clear and convincing evidence of overcrowding that cannot be mitigated without the use of the temporary developer fees.

The Commission further finds that the state-mandated activities are newly required, and create a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution. The activities serve the governmental function of providing a service to the public. As declared by the Legislature, the School Facilities Act was enacted because new housing developments frequently cause conditions of overcrowding in existing school facilities that cannot be alleviated under existing laws within a reasonable period of time.[60] The courts have recognized that programs relating to public education provide a service to the public.

> …although numerous private schools exist, education in our society is considered to be a peculiarly governmental function. . . Further, public education is administered by local agencies to provide a service to the public. Thus public education constitutes a "program" within the meaning of Section 6.[61]

B. The remaining test claim statutes governing the AB 2926 program, the Mitigation Fee Act, and the Mediation and Resolution of Land Use Disputes Law, do not impose a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

Because school districts have many options for funding construction and the option of choosing not to engage in construction projects, the Commission finds that the remaining test claim statutes do not impose a state-mandated program.

1. School districts make the decision to build or modernize school facilities and are not mandated by the state to do so.

The AB 2926 program grants school districts the authority to levy fees to offset the impacts to school facilities from new development. As explained in the background, there are three levels of developer fees that may be levied under the program. The Level I fee is assessed if the district conducts a fee justification study that establishes the connection between the development coming into the district and the assessment of fees to pay for the cost of the facilities needed to house future students. The Level II fee is assessed if a district makes a timely application to SAB for new construction funding, conducts a school facility needs analysis pursuant to Government Code Section 65995.6, and makes at least two of the hardship-related findings listed in Government Code Section 65995.5(b)(3). The Level III fee is assessed when the state's SFP grant funds are exhausted; in that case, the district may impose a developer's fee up to 100 percent of the SFP new construction project cost. Imposition of any of the three levels of fees triggers a number of fee study, notice, accounting and other related requirements.

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[59] Governor's Office of Planning and Research, *A Planner's Guide to Financing Public Improvements*, June, 1997, Chapter 5 (Exhibit H).

[60] Government Code section 65970.

[61] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 172.

Under the Mitigation Fee Act, a school district is required to identify the purpose of a fee levied and the use of the fee whenever a school district establishes, imposes, or increases a fee "as a condition of approval of a development project." If a school district decides to impose developer fees, it is required to comply with the Mitigation Fee Act and the other downstream requirements of these programs.

As more fully discussed below, the school district is not legally compelled by the state to construct or modernize school facilities, or to impose developer fees for the purpose of funding the construction. The school district makes those choices.[62]

In comments filed February 27, 2004, claimant argues that "constructing new school facilities is not optional."[63] In support of this contention, claimant cites to *Butt v. State of California*[64] for the propositions that the state has a responsibility to "provide for a system of common schools, by which a school shall be kept up and supported in each district" and that those schools are required to be "free."

It is true, as claimant states, that courts have consistently held public education to be a matter of statewide rather than a local or municipal concern, and that the Legislature's power over the public school system is plenary.[65] These conclusions are true for every Education Code statute that comes before the Commission on the question of reimbursement under article XIII B, section 6 of the California Constitution. It is also true that the state is the beneficial owner of all school properties and that local school districts hold title as trustee for the state.[66]

Nevertheless, article IX, section 14 of the California Constitution allows the Legislature to authorize the governing boards of all school districts to initiate and carry on any program or activity, or to act in any manner that is not in conflict with state law. In this respect, it has been and continues to be the legislative policy of the state to strengthen and encourage local

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[62] The nexus and fee study requirements imposed by the Mitigation Fee Act are arguably required by the United States Constitution. The U.S. Supreme Court decision in *Nollan v. California Coastal Commission* requires that government establish the existence of a "nexus" or link between an exaction and the governmental interest being advanced by that exaction. The Mitigation Fee Act implements this constitutional requirement (Exhibit H). Likewise, amendments to the Act implement the requirements of the *Dolan v. City of Tigard* (1994) 114S.Ct. 2309 (requirement for rough proportionality between impact and mitigation required) and *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854 (developers who wish to challenge a development fee on either statutory or constitutional grounds must do so under provisions of the Mitigation Fee Act) (Exhibit H). However, it is unnecessary for this analysis to reach that issue since the requirements of the Act are triggered by the school district's discretionary decision to impose developer fees.

[63] Claimant's response to DOF comments, February 27, 2004, p. 2 (Exhibit F).

[64] *Butt v. State of California* (1992) 4 Cal.4th 688 (Exhibit F).

[65] See *Hayes v. Commission on State Mandates, supra*, 11 Cal.App.4th 1564, 1579, fn.5; *California Teachers Assn. v. Hayes* (1992) 5 Cal.App.4th 1513, 1524 (formerly known as *California Teachers Assn. v. Huff*); and *Hall v. Taft* (1956) 47 Cal.2d 177, 179.

[66] *Hayes v. Commission on State Mandates, supra*, 11 Cal.App.4th 1564, 1579, fn.5.

responsibility for control of public education through local school districts.[67] The governing boards of K-12 school districts may hold and convey property for the use and benefit of the school district.[68] Governing boards of K-12 school districts have also been given broad authority by the Legislature to decide when to build and maintain a schoolhouse and, "when desirable, may establish additional schools in the district."[69] With regard to new construction of school buildings, the Second District Court of Appeal has stated: "[w]here, when or how, if at all, a school district shall construct school buildings is within the sole competency of its governing board to determine."[70]

In *Santa Barbara School District v. Superior Court*, the California Supreme Court addressed a school district's decision to abandon two of its schools that were determined unsafe, instead of reconstructing a new building, as part of its desegregation plan.[71] The court held that absent proof that there were no school facilities to absorb the students, the school district, "in the reasonable exercise of its discretion, could lawfully take this action."[72] The court describes the facts and the district's decision as follows:

> On August 12, 1971, the Board received a report that the Jefferson school was structurally unsafe within the requirements of section 15503 [a former statute with language similar to Education Code sections 17367 and 81162]. The report recommended that a structural engineer be retained to determine whether the school should be repaired or abandoned, since if it cannot be repaired, it must be abandoned pursuant to section 15516. On May 15, 1972, three days before the final meeting of the Board, the superintendent received a report concerning the rehabilitation or replacement costs of the Jefferson school. The report found that it would cost $621,800 to make the existing structure safe and $655,000 to build an entirely new building. Accordingly, in fashioning the Administration Plan, the superintendent made provision therein for closing the Jefferson school. The Board would certainly be properly exercising its discretion in a reasonable manner were it to approve abandoning this building in view of the extreme cost. The determination of the questions whether a new school was needed to replace this structure or whether existing facilities could handle the Jefferson school students due to an expected drop in elementary enrollment, was properly within the Board's discretion.[73]

Thus, under state law, the decision to construct or modernize school facilities lies with the governing boards of school districts and is not required by the state.

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[67] *California Teachers Assn., supra*, 5 Cal.App.4th 1513, 1523; Education Code section 14000.

[68] Education Code section 35162.

[69] Education Code sections 17340 and 17342.

[70] *People v. Oken* (1958) 159 Cal.App.2d 456, 460 (Exhibit H).

[71] *Santa Barbara School Dist. v. Superior Court* (1975) 13 Cal.3d 315, 337-338 (Exhibit H).

[72] *Id.* p. 338 (Exhibit H).

[73] *Id*. p. 337 (Exhibit H).

a) School districts are authorized, but not required, to levy developer fees for school facilities.

Moreover, school districts are not required by state law to levy developer fees under AB 2926 and comply with the downstream requirements imposed by that program and the Mitigation Fee Act. The plain language of Education Code section 17620(a)(1), a statute within the AB 2926 program, provides that: "[t]he governing board of any school district *is authorized* to levy a fee, charge, dedication, or other requirement against any construction within the boundaries of the district, for the purpose of funding the construction or reconstruction of school facilities." (Emphasis added.) The exercise of the school district's discretion to levy fees triggers the requirements of these programs.

In addition, school districts have several options when funding school facility projects. A school district can seek grant funding from the state through the SFP, which is funded through state bonds or it may issue local bonds pursuant to one of several local bond acts. Schools may rely on a combination of state and local bond funding for facilities. If a school district decides to seek state grant funding through the SFP, the district must come up with funding for its share of cost. The district can do that in a number of ways including issuing local bonds, creating a Mello-Roos district, or imposing developer fees under the test claim statutes at issue here.

b) The AB 2926 and Mitigation Fee programs do not impose state-mandated activities on school districts.

The Commission finds that the test claim statutes do not impose state-mandated activities on school districts. Based on the court's analysis in *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*)[74] and the law described above, whether a district imposes a developer fee pursuant to the AB 2926 program or takes action under the Mitigation Fee Act is completely at the discretion of the school district.

In *Kern*, the Supreme Court analyzed the issue of legal compulsion by examining the nature of the claimants' participation in the underlying programs themselves. The court ruled that even if participation in the programs in question was legally compelled, the claimants were not eligible for reimbursement because they were "free at all relevant times to use funds provided by the state for that program to pay required program expenses. . ."[75]

The Court also addressed the issue of whether a district that incurs costs as a result of participating in an optional government funding program is eligible for reimbursement. The court held that there was no "practical" compulsion to participate in these programs because a district that chooses to not participate in the program or ceases participation in a program does not face "certain and severe…penalties" such as "double… taxation" or other "draconian" consequences.[76] The court rested its analysis on the premise that local entities possessing discretion will make the choices that are ultimately the most beneficial for the parties involved:

> As to each of the optional funded programs here at issue, school districts are, and have been, free to decide whether to (i) continue to participate and receive program funding, even though the school district also must incur program-related

[74] *Kern High School Dist., supra*, 30 Cal.4th 727.

[75] *Id*. at 731 (Exhibit H).

[76] *Id*. at 754 (Exhibit H).

> costs associated with the [new] requirements or (ii) decline to participate in the funded program. Presumably, a school district will continue to participate only if it determines that the best interests of the district and its students are served by participation – in other words, if, on balance, the funded program, even with strings attached, is deemed beneficial. And, presumably, a school district will decline participation if and when it determines that the costs of program compliance outweigh the funding benefits. (Emphasis in original.)[77]

The holding in *Kern* applies here. School districts have complete discretion in determining whether to build or modernize school facilities and whether to impose developer fees. There is nothing in the body of law making up the AB 2926 program or the Mitigation Fee Act that requires a district to impose a developer fee. Therefore, the Commission finds that the test claim statutes do not legally compel school districts to participate in these programs.

Furthermore, there is no evidence that school districts are practically compelled to comply with these programs. School districts are not subjected to any penalties for not participating in these programs. Nothing in the law imposes a consequence or penalty for choosing to not impose developer fees. The imposition of such fees is but a means that school districts have to generate revenues for school facilities.

Accordingly, the Commission finds that the AB 2926 and Mitigation Fee programs do not impose a state-mandated program within the meaning of article XIII B, section 6, and are not reimbursable.

2. The Mediation and Resolution of Land Use Disputes Law does not impose state-mandated activities.

The Mediation and Resolution of Land Use Disputes Law[78] provides the courts with authority to invite parties in litigation over the imposition of developer fees under the AB 2926 and Mitigation Fee Act programs to participate in mediation and, if the mediation is unsuccessful, to order a settlement conference between the parties.

The mediation and settlement conference activities authorized by Government Code sections 66031 and 66034 were addressed in another test claim brought by the claimant, which was recently denied by the Commission. In 03-TC-17 (CEQA), sections 66031 and 66034 as amended by Statutes 1994, chapter 300 and Statutes 1996, chapter 799 were pled as the same mediation and settlement provisions may be applicable to challenges to governmental decisions under CEQA. In the CEQA test claim, the Commission found that any requirements imposed by these sections are the downstream requirements of the district's discretionary decision to approve a project. Likewise here, the Commission finds that any requirements imposed by these code sections are the downstream requirements of the district's discretionary decision to impose a developer fee.

Only when the district makes the discretionary decision to impose AB 2926 developer fees or take action pursuant to the Mitigation Fee Act is the Mediation and Resolution of Land Use

[77] *Id*. at 753 (Exhibit H).

[78] Government Code sections 66030-66037.

Disputes Law triggered.[79] The Mediation and Resolution of Land Use Disputes Law does not apply to fees imposed under the School Facilities Act.[80] Even when this law is triggered, the court is only authorized to "invite" the parties to participate in mediation. The law specifies:

> Within five days after the deadline for the respondent's reply, the court may invite the parties to consider mediation. If the parties do not select a mutually agreeable moderator and notify the court within 30 days, the action shall proceed.[81]

Thus, if the parties choose not to select a moderator, the action proceeds in court. Therefore, the parties are not required to engage in mediation and the Commission finds the Mediation and Resolution of Land Use Disputes Law does not impose any requirements on school districts.

If mediation is entered into:

a. All time limits for the action are tolled; and

b. At the end of the mediation, the mediator shall file a report with the Office of Permit Assistance for the purpose of providing information needed by the Office to prepare its report to the Legislature.[82]

> If the mediation does not resolve the action, the court may, in its discretion, schedule a settlement conference before a judge of the superior court. If the action is later heard on its merits, the judge hearing the action shall not be the same judge who conducted the settlement conference, except in counties with only one judge of the superior court.[83]

These additional activities are imposed by the court, not the state. Moreover, the purpose of this program is to reduce the delay, uncertainty, and cost that litigation adds to the cost of development by authorizing alternative dispute resolution in lieu of a costly court process.[84] School districts are free to remain in litigation, if they choose.

Based on the analysis above, the Commission finds that the Mediation and Resolution of Land Use Disputes Law does not qualify as a state-mandated program within the meaning of article XIII B, section 6.[85]

Issue 2: Does the School Facilities Act impose costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514?

The final issue is whether the state-mandated activities impose costs mandated by the state,[86] and whether any statutory exceptions listed in Government Code section 17556 apply to the test

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[79] Government Code sections 66031(a)(1),(4) and (5), note that this Act applies to other types of decisions as well, which are not at issue in this test claim.

[80] *Ibid*.

[81] Government Code sections 66031(b) and (d).

[82] Government Code sections 66032 and 66033.

[83] Government Code section 66034.

[84] Government Code sections 66030 (a)(3) and (b).

[85] *Kern, supra*, 30 Cal.4th 727, 754.

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

claim. Government Code section 17514 defines costs mandated by the state as any increased cost a local agency is required to incur as a result of a statute that mandates a new program or higher level of service.

Government Code section 17564 requires reimbursement claims to exceed $1,000 to be eligible for reimbursement. Claimant asserts that it has costs exceeding one-thousand dollars per year.[87] The Commission, however, cannot find "costs mandated by the state" within the meaning of Government Code section 17514 if any exceptions in Government Code section 17556 apply, as discussed below. Claimant asserts that none of the exceptions to finding a reimbursable state-mandated program under Government Code section 17556 apply here.[88]

The School Facilities Act authorizes the imposition of fees. If the fees levied from this program are intended to pay for the mandated activities and are sufficient to cover the costs the mandated activities, Government Code section 17556(d) bars reimbursement.

Government Code section 65974(a)(3) provides the following: "The land or fees, or both, transferred to a school district shall be used *only* for the purpose of providing interim elementary or high school classroom and related facilities." (Emphasis added.) Based on the plain language of the statute and the lack of any legislative history indicating otherwise, the Commission finds that the fee authority granted by the School Facilities Act is not specifically intended to fund the mandated activities, which are administrative in nature. Moreover, the statute does not authorize the use of fees imposed under the School Facilities Act for administrative purposes since fees may be used "only for the purpose of providing interim elementary or high school classroom and related facilities." Therefore, the Commission finds School Facilities Act imposes costs mandated by the state, which are not offset by fees imposed under the School Facilities Act.

CONCLUSION

The Commission finds that the School Facilities Act[89] imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution, beginning July 1, 2001 for school districts to perform the following activities:

- Notify the city council or county board of supervisors if the school district finds, based on clear and convincing evidence, that:
    1) Conditions of overcrowding exists in one or more of the attendance areas within the district that will impair the normal functioning of educational programs, and
    2) All reasonable methods of mitigating conditions of overcrowding have been evaluated and no feasible methods for reducing those conditions exist.
- Specify in the notice of findings the reason for the existence of the overcrowding conditions and the mitigation measures considered and include a copy of a completed

[87] Declaration of William McGuire, June 23, 2003, p. 17 (Exhibit A).

[88] Claimant, test claim, *supra*, p. 154 (Exhibit A).

[89] Government Code sections 65970, 65971, 65972, 65973, 65974, 65974.5, 65975, 65976, 65977, 65978, 65979, 65980, 65981 as added or amended by Statutes 1977, chapter 955, Statutes 1979, chapter 282, Statutes 1980, chapter 1354, Statutes 1981, chapter 201, Statutes 1982, chapter 923, Statutes 1983, chapter 1254, Statutes 1984, chapter 1062, Statutes 1985, chapter 1498, Statutes 1986, chapters 136 and 887, Statutes 1994, chapter 1228.

application to the OPSC for preliminary determination of eligibility under the Leroy F. Greene State School Building Lease-Purchase Law of 1976.

- Submit to the city council or county board of supervisors a schedule for the use of fees, including the school sites to be used, classroom facilities to be made available, and the times when those facilities will be available. The schedule shall be submitted before the city or county makes a decision to require the dedication of land or the payment of fees, or to increase the amount of land to be dedicated or the fees to be paid.

If an ordinance is adopted by the city council or county board of supervisors pursuant to Government Code section 65974 requiring the dedication of land, the payment of fees in lieu thereof, or a combination of both:

- Make a recommendation regarding the amount of fees to be assessed, within 60 days following the initial permit for the development, when required by the city council or county board of supervisors; and
- Where two separate school districts operate schools in an attendance area where overcrowding conditions exist for both school districts, enter into an agreement with the city or county for the purpose of determining the distribution of revenues to both school districts from the fees levied pursuant to the School Facilities Act.

If a school district receives funds pursuant to the School Facility Act:

- Maintain a separate account for any fees paid; and
- File a report by October 15 of each year with the city council or county board of supervisors which specifies:
    - The balance in the account at the end of the previous fiscal year;
    - The facilities leased, purchased, or constructed;
    - The dedication of land during the previous fiscal year; and
    - Which attendance areas will continue to be overcrowded when the fall term begins and where conditions of overcrowding will no longer exist.

The Commission further finds that the remaining test claim statutes[90] do not impose a state-mandated program for school districts within the meaning of article XIII B, section 6 of the California Constitution and are not reimbursable.

[90] Education Code sections 17620, 17621, 17622, 17623, 17624, 17625, and 17626 and Government Code sections 65995, 65995.1, 65995.2, 65995.5, 65995.6, 65995.7, 65996, 65997, 65998, 66002, 66004, 66005, 66006, 66007, 66008, 66016, 66017, 66018, 66018.5, 66020, 66022, 66023, 66024, 66025, 66030, 66031, 66032, 66034, and 66037 as added, amended or renumbered by Statutes 1983, chapter 921, Statutes 1986, chapters 685, 887, and 888, Statutes 1987, chapters 927, 1002, 1037, 1184 and 1346, Statutes 1988, chapters 29, 160, 418, 912 and 926, Statutes 1989, chapters 170, 1209 and 1217, Statutes 1990, chapters 633 and 1572, Statutes 1992, chapters, 169, 231, 487, 605 and 1354, Statutes 1993, chapters 589 and 1195, Statutes 1994, chapters 300, 686, and 983, Statutes 1995, chapter 686, Statutes 1996, chapters, 277, 549, 569, and 799, Statutes 1997, chapter 772, Statutes 1998, chapters 207, 407 and 689, Statutes 1999, chapters 300 and 858, Statutes 2000, chapter 135 and Statutes 2002, chapters 33 and 1016.