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January 22, 2010

VIA FACSIMILE & U.S. MAIL

Paula Higashi  
Executive Director  
Commission on State Mandates  
980 Ninth Street, Suite 300  
Sacramento, CA 95814



Re: *Airport Land Use Commissions/Plans II, Amended: 03-TC-12 and 08-TC-05:*  
*Comments on Draft Staff Analysis*

Dear Ms. Higashi:

We have reviewed the draft staff analysis for the above-described test claim and offer the following comments.

The Draft Analysis too Narrowly Interprets County Duties Under § 21671.5(c)

The draft staff analysis asserts that the mandate imposed on counties pursuant to Public Utilities Code Section 21675(c) “does not include providing substantive and procedural assistance form planners, GIS technicians, county counsel or the costs associated with ALUCP amendments of the environmental review of ALUCP amendments required by CEQA, beyond the mailing of notices and keeping of minutes and related secretarial activities.”<sup>1</sup> The staff analysis focuses on the “mailing of notices” and “keeping of minutes” requirements, but fails to discuss the broader requirement that “[t]he usual and necessary operating expenses of the commission shall be a county charge.”

The usual and necessary operating expenses of an ALUC would logically and necessarily include costs associated with those activities that are necessary to fulfill its statutorily-mandated duties. Those duties include amending its comprehensive land use plan (“CLUP”) (including compliance with CEQA), and reviewing and making decisions on referrals. (§§ 21675(a), 21676.) As explained in the County’s amended test claim, the support activities the County provides are necessary to the ALUC’s ability to implement its statutory obligations.

<sup>1</sup> All further statutory references are to the Public Utilities Code, unless otherwise indicated.

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The Mandated Functions are Not Pre-1975

As explained in the County's amended test claim, the Legislature significantly expanded the mandatory duties of ALUCs after 1975. As of the date this claim was initially filed, Section 21675 provided as follows:

(a) Each commission shall formulate a comprehensive land use plan that will provide for the orderly growth of each public airport and the area surrounding the airport within the jurisdiction of the commission, and will safeguard the general welfare of the inhabitants within the vicinity of the airport and the public in general. The commission plan shall include and shall be based on a long-range master plan or an airport layout plan, as determined by the Division of Aeronautics of the Department of Transportation, that reflects the anticipated growth of the airport during at least the next 20 years. In formulating a land use plan, the commission may develop height restrictions on buildings, specify use of land, and determine building standards, including sound proofing adjacent to airports, within the planning area. The comprehensive land use plan shall be reviewed as often as necessary in order to accomplish its purposes, but shall not be amended more than once in any calendar year.

(b) The commission shall include, within its plan formulated pursuant to subdivision (a), the area within the jurisdiction of the commission surrounding and military airport for all purposes specified in subdivision (a). The plan shall be consistent with the safety and noise standards in the Air Installation Compatible Use Zone prepared for that military airport. This subdivision does not give the commission any jurisdiction or authority over the territory or operations of any military airport.

(c) The planning boundaries shall be established by the commission after hearing and consultation with the involved agencies.

(d) The commission shall submit to the Division of Aeronautics of the department one copy of the plan and each amendment to the plan.

(e) If the comprehensive land use plan does not include the matter required to be included pursuant to this article, the Division of Aeronautics of the department shall notify the commission responsible for the plan.

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Although this section was added by Chapter 1182, Statutes of 1970, and was subsequently amended by Chapter 844, Statutes of 1973, Chapter 725, Statutes of 1980, and Chapter 714, Statutes of 1981, (and later amended by Chapter 306, Statutes of 1989, Chapter 563, Statutes of 1990, Chapter 438, Statutes of 2002 and Chapter 971, Statutes of 2002) there was no mention of amending the comprehensive land use plan until the enactment of Chapter 1117, Statutes of 1984.

Moreover, it was not until the enactment of Chapter 1018, Statutes of 1987, that section 21675 set forth the current requirement that comprehensive land use plans be reviewed as often as necessary and amended no more often than once a year. At the time, although a reimbursable state mandate had been found in Chapter 1117, Statutes of 1984, in October 1987 for the establishment of ALUCs, this section was not part of that test claim.

#### These Issues Were Not Considered in Prior Test Claim Decisions

The draft staff analysis erroneously asserts that the mandates imposed by section 21670 were conclusively addressed in CSM 4507. However, that decision only addressed the requirement to adopt an initial CLUP. It did not address the newly-imposed requirement in the last section of section 21675(a) to amend and update the CLUP.

Beginning in 1990, first by lack of funding and later by the enactment of Chapter 59, Statutes of 1993, the mandate to amend CLUPs was made optional. When the establishment of an ALUC became mandatory again in 1994, this provision lost its voluntary character. The Commission has already determined that Chapter 644, Statutes of 1994, requiring the creation of airport land use commissions under Section 21670 imposed a new program when compared to Chapter 59, Statutes of 1993 (the legislation in effect immediately before the enactment of the test claim legislation). (CSM-4507, Statement of Decision, p. 3.)

In ruling on the San Bernardino County test claim, the Commission found that the duty to develop the initial CLUP was not reimbursable because the initial CLUP was required to be adopted prior to January 1, 1995. The San Bernardino County test claim did not, however, address several points incumbent within the newly-mandated establishment of an ALUC. In particular, that test claim did not examine all of the attendant mandates related to ALUC activities that flow from the legislative mandate to establish an ALUC. Several of these ancillary mandates remain unreviewed and unconsidered by the Commission. For example, the San Bernardino County claim did not address the requirement in section 21675(a) that the CLUP "shall be reviewed as often as necessary in order to accomplish its purposes, but shall not be amended more than once in any calendar year." The instant test claim seeks to correct this gap.

A CLUP must comply with the statutory criteria in Section 21675, including that it be based on a long-range master plan or airport layout plan. These airport plans are amended from time to time by the airport operators, thereby triggering CLUP amendments. (*Muzzy Ranch Co. v. Solano County Airport Land Use Comm'n* (2007) 41 Cal.4th 372, 378.)

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If an ALUC determines that it is necessary or appropriate to amend its CLUP, then a county is obligated to provide assistance for this effort pursuant to Section 21671.5, subdivision (c), including the obligation to comply with the California Environmental Quality Act ("CEQA"), Public Resources Code Section 21000 *et seq.*, because CLUP amendments are subject to compliance with CEQA. (Pub. Res. Code § 21080; *Muzzy Ranch*, 41 Cal.4th at p. 385.) Thus, as a result of the ALUC mandate, counties must also bear the costs associated with the environmental review of CLUP amendments required by CEQA. (Stats. 1970, c. 1433.) For example, when the Santa Clara County ALUC amended its CLUP in 2004, the City of San Jose filed a lawsuit against the ALUC alleging noncompliance with CEQA. If the County had not provided legal representation to the ALUC, the ALUC would have had no means of obtaining representation. There can be no question that this legal representation falls within the "usual and necessary operating expenses" requirement of Section 21671.5(c).

The draft staff analysis disregards the Commission's prior conclusion in CSM-4507 that all of the activities associated with ALUCs constitute new mandates, not modified mandates. Instead, it illogically asserts that changing an activity from mandatory to discretionary did not really give counties discretion to get rid of any ALUCs that were already in existence. (Draft staff analysis, pp. 19-20.)

The draft staff analysis also asserts that the Commission does not have jurisdiction over the test claim because the subjects of the test claim were the subject of a final decision in CSM 4507. (Draft staff analysis, p. 18) As explained above, CSM 4507 did not address the issues in this test claim. Moreover, the County was not a party to the prior test claim. The staff position also seems inherently inconsistent with its unsupported assertion that the Commission's prior decisions are not binding on the Commission. (*Id.*, p. 9.)<sup>2</sup>

#### Unexercised ALUC Fee Authority Does Preclude Counties from Recovering Their Costs.

The draft staff analysis states that, "to the extent an ALUC decides not to fully exercise its statutory fee authority, it shifts its costs to the county, and cites *Lucia Mar*<sup>3</sup> and *City of San Jose*<sup>4</sup> cases as support for this assertion." (Draft staff analysis, p. 31.) Neither of those cases supports staff's claim.

Here, the Legislature imposed new requirements on ALUCs that did not previously exist, which in turn imposed new costs on counties pursuant to their obligation to cover the "usual and necessary operating expenses" of an ALUC pursuant to Section 21671.5(c). This was not simply

<sup>2</sup> Staff's assertion that the Commission's prior decisions are not binding is at odds with *California School Boards Ass'n v. State of California* (2009) 171 Cal.App.4th 1183, 1200-1201.

<sup>3</sup> *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830 (finding that the state had imposed new duties on local agencies that triggered reimbursement).

<sup>4</sup> *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802. This case involved a shift of responsibilities from cities to counties for jail booking activities – activities that had been required of local agencies for many years. It did not deal with a new state program or a shift of costs from the state to local agencies.

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a shifting of pre-existing costs between local agencies. As the Supreme Court explained in *Lucia Mar*:

Whether the shifting of costs is accomplished by compelling local governments to pay the cost of entirely new programs created by the state, or by compelling them to accept financial responsibility in whole or in part for a program which was funded entirely by the state before the advent of article XIII B, the result seems equally violative of the fundamental purpose underlying section 6 of that article.<sup>5</sup>

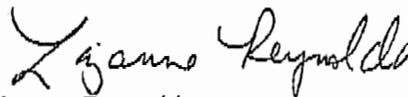
The authority to adopt fees rests solely with ALUCs, and counties have no ability to force ALUCs to exercise this authority. Thus, to the extent the state imposes new duties on an ALUC that a county is required to pay for pursuant to section 21671.5(c) and the ALUC chooses not to adopt fees or does not adopt fees that provide for full cost recovery, those activities constitute a new unfunded state mandate requiring reimbursement pursuant to Article XIII B, Section 6 of the California Constitution.

Conclusion

Thank you for the opportunity to provide comments on the draft staff analysis. We intend to attend and testify at the Commission's hearing on this claim, which is currently scheduled for March 26, 2010.

Very truly yours,

MIGUEL MÁRQUEZ  
Acting County Counsel



Lizanne Reynolds  
Deputy County Counsel

c: Interested Party Mailing List

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<sup>5</sup> 44 Cal.3d at p. 836.

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COMMISSION ON STATE MANDATES

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*Airport Land Use Commissions/Plans II*

I, Linda Ramos, say:

I am now and at all times herein mentioned have been over the age of eighteen years, employed in Santa Clara County, California, and not a party to the within action or cause; that my business address is 70 West Hedding, East Wing, 9<sup>th</sup> Floor, San Jose, California 95110-1770. I am readily familiar with the County's business practice for collection and processing of correspondence for mailing with the United States Postal Service. I served a copy of the

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on **January 22, 2010**, at San Jose, California.

  
Linda Ramos

224000.wpd

**Commission on State Mandates**

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| Last Updated:       | 12/23/2009  |                      |                      |
| List Print Date:    | 12/23/2009  |                      | <b>Mailing List</b>  |
| Claim Number:       | 08-TC-05  |                      |                      |
| Issue:              | Airport Land Use Commissions/Plans II, 03-TC-12 Amended |                      |                      |

**Related Matter(s)**

03-TC-12                  Airport Land Use Commissions/Plans II

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