

REPORT OF THE EXECUTIVE OFFICER
State Allocation Board Meeting, February 27, 2002

ATTORNEY GENERAL OPINION
ON GOVERNMENT CODE SECTION 65995.7

PURPOSE OF REPORT

To present to the State Allocation Board (SAB) the Attorney General's opinion regarding Government Code Section 65995.7.

BACKGROUND

At its July 2001 meeting, the SAB directed the Office of Public School Construction (OPSC) to file a request for an opinion with the Office of the Attorney General (AG) regarding the legislative notification requirements pursuant to Government Code Section 65995.7.

Under Government Code Section 65995.7(a), a part of Senate Bill (SB) 50, the SAB shall notify the legislature that "...state funds are not available if the SAB is no longer approving apportionments for new construction...due to a lack of funds available for new construction." This notification must be made before school districts can increase fees charged against local development. These increased assessments are known as "level three fees", and are designed to provide the full cost of needed school facilities through the assessments on development alone.

The SAB adopted the School Facility Program (SFP) Regulations, which were intended to address this statute requirement, prior to the institution of the priority funding mechanism. While projects with sufficient priority points continue to be funded, the priority funding mechanism generated a list of "unfunded" applications ready for apportionment in excess of the amount of available new construction funds. Under the regulations, the SAB would be required to notify the legislature that State funds are no longer available *even though funds remain for new construction apportionments*.

Notification to the legislature under these circumstances appeared to be in conflict with the intent of the original language of SB 50. As a result, the SAB requested an opinion from the AG regarding the following:

"Is the notice requirement of Government Section 65995.7 triggered when the New Construction Grant requests that are ready for apportionment exceed the total bond funds available for new construction?"

The OPSC provided the AG with relevant background information pertaining to the issue, including the Board's regulations, as a part of the request for opinion.

DISCUSSION

The AG has provided the OPSC with its Attorney General's Opinion Number 01-803 (see Attachment) that indicates the following conclusion:

"The State Allocation Board is not authorized to notify the Secretary of the Senate and the Chief Clerk of the Assembly when new construction grant requests from school districts that are ready for apportionment exceed the state funds available for new school construction as long as the board continues to approve apportionments."

The AG Opinion further indicated that the SFP Regulations are in conflict with the governing statute, Government Code Section 65995.7(a). Based on these findings, staff recommends that the SAB repeal SFP Regulation Section 1859.91(c).

(Continued on Page Two)

DISCUSSION (cont.)

It is anticipated that the SFP new construction funds will be exhausted at the August 28, 2002 SAB meeting. If this occurs, the OPSC will present at that meeting a request to the make the notification to the legislature pursuant to the statute requirements in Government Code Section 65995.7(a).

RECOMMENDATIONS

1. Accept the AG's Opinion as indicated on the Attachment.
2. Request staff to present the proposed SFP Regulation amendments to the March 2002 SAB meeting to repeal SFP Regulation Section 1859.91(c) in alignment with the Attorney General's Opinion Number 01-803.

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

BILL LOCKYER
Attorney General

OPINION

No. 01-803

of

February 13, 2002

BILL LOCKYER
Attorney General

THOMAS S. LAZAR
Deputy Attorney General

The STATE ALLOCATION BOARD has requested an opinion on the following question:

Is the State Allocation Board authorized to notify the Secretary of the Senate and the Chief Clerk of the Assembly when new construction grant requests from school districts that are ready for apportionment exceed the state funds available for new school construction?

CONCLUSION

The State Allocation Board is not authorized to notify the Secretary of the Senate and the Chief Clerk of the Assembly when new construction grant requests from school districts that are ready for apportionment exceed the state funds available for new school construction as long as the board continues to approve apportionments.

01-803



ANALYSIS

The Legislature has enacted the School Facilities Act (Gov. Code, §§ 65970-65981)¹ to help provide financing for the expansion of school classrooms made necessary by new residential developments (§ 65970). (See *Grupe Development Co. v. Superior Court* (1993) 4 Cal.4th 911, 915-923; *Loyola Marymount University v. Los Angeles Unified School Dist.* (1996) 45 Cal.App.4th 1256, 1262-1263; *Canyon North Co. v. Conejo Valley Unified School Dist.* (1993) 19 Cal.App.4th 243, 247-250; *Corona-Norco Unified Sch. Dist. v. City of Corona* (1993) 13 Cal.App.4th 1577, 1583-1587; *Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 225-234.)² School districts may impose "school impact fees" upon developers according to statutory formulas contained in sections 65995-65995.7. The general formula for the fees is set forth in section 65995 at "Level I." If certain conditions are met, an increase in the fees is authorized in section 65995.5 to "Level II." A further increase in the fees to "Level III" is authorized in section 65995.7 if additional circumstances are present.

The question presented for resolution concerns one of the requirements for increasing the fees from Level II to Level III. When does the condition of "state funds for new school facility construction are not available" (§ 65995.7, subd. (a)) become applicable so as to allow assessment of the Level III fees? We conclude that the requirement is met as defined in the governing statute rather than as defined in the regulations adopted by the State Allocation Board ("Board") in implementing the statute.

Subdivision (a) of section 65995.7 provides:

"If state funds for new school facility construction are not available, the governing board of a school district that complies with Section 65995.5 may increase the alternative fee . . . by an amount For purposes of this section, state funds are not available if the State Allocation Board is no longer approving apportionments for new construction pursuant to Article 5 (commencing with Section 17072.20) of Chapter 12.5 of Part 10 of the Education Code due to a lack of funds available for new construction. Upon making a determination that state funds are no longer available, the State Allocation Board shall notify the Secretary of the Senate and the Chief Clerk of the Assembly, in writing, of that determination and the date when state

¹ All references hereafter to the Government Code are by section number only.

² Education Code sections 17620-17626 also authorize the imposition of school construction fees subject to the same limitations to be discussed hereafter.

funds are no longer available for publication in the respective journal of each house.”

The Level III fees may be imposed by qualifying school districts when the Board notifies the Secretary of the Senate and the Chief Clerk of the Assembly that “state funds for new school facility construction are not available.” The statute itself defines when this requirement is met: “For purposes of this section, state funds are not available if the State Allocation Board is no longer approving apportionments for new construction pursuant to [Education Code sections 17072.20-17072.35] due to a lack of funds available for new construction.”

Under the authorizing provisions of Education Code sections 17072.20-17072.35, school districts submit applications to the Board for school construction funding, the Board ranks the applications according to criteria set forth in its implementing regulations, the Board apportions the funds, and the money is released to the districts. Education Code section 17072.30 states:

“Subject to the availability of funds, and to the determination of priority pursuant to Section 17072.25, the board shall apportion funds to an eligible school district only upon the approval of the project by the Department of General Services pursuant to the Field Act, as defined in Section 17281, and certification by the school district that the required 50 percent matching funds from local sources have been expended by the district for the project, or have been deposited in the county fund, or will be expended by the district by the time the project is completed, in an amount at least equal to the proposed apportionment pursuant to this chapter, prior to release of the state funds.”

The Board has construed its notification responsibilities under section 65995.7 by adopting Regulation 1859.91, subdivision (c) (Cal. Code Regs., tit. 2, § 1859.91, subd. (c))³ as follows:

“The Board shall declare that State funds are not available for new facility construction when the New Construction Grants requests Ready for Apportionment exceed the funds available for that purpose. This declaration shall serve as the mechanism for the Board to make the appropriate notifications as required, pursuant to Government Code Section 65995.7(a).”⁴

³ All references hereafter to title 2 of the California Code of Regulations are by regulation number only.

⁴ The term “Ready for Apportionment” is defined to mean “a final review of an Approved Application has been completed by the [Office of Public School Construction] and it has been determined

We are informed that at the Board's meeting on July 25, 2001, the Office of Public School Construction reported that state funds of \$951.8 million remained available for apportionment, while \$1.179 billion of unfunded new construction grant requests were on the approved but unfunded list. We are also informed that, as a result of the establishment of allotments of funds to be apportioned on a quarterly basis, the Board will continue to make apportionments with available funds until at least June 26, 2002.

Under these circumstances, the requirements of Regulation 1859.91 conflict with the requirements of section 65995. The former mandates the Board to notify the Secretary of the Senate and the Chief Clerk of the Assembly that state funds are "not available" when grant requests ready for apportionment exceed the amount of remaining available state funds. The latter mandates notification only when the "Board is no longer approving apportionments for new construction," which it is conceded here will not be until at least June 26, 2002. State funds currently are available for apportionment.

The establishment of allotments to be apportioned to the districts on a quarterly basis by the Board (Reg. 1859.91, subd. (b)) does not cause the state funds to be "unavailable" for purposes of section 65995.7 or reserve the funds for particular projects. Only apportionment, not the establishment of allotments, causes the funds to be reserved for individual school districts. (See Ed. Code, § 17070.15, subd. (a).)

The rules governing our analysis of the question presented are clear. "Where a statute empowers an administrative agency to adopt regulations, such regulations 'must be consistent, not in conflict with the statute, and reasonably necessary to effectuate its purpose.' [Citations.]" (*Woods v. Superior Court* (1981) 28 Cal.3d 668, 679; see § 11342.2; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 381; *Ontario Community Foundations, Inc. v. State Bd. of Equalization* (1984) 35 Cal.3d 811, 816; *Gregory v. State Bd. of Control* (1999) 73 Cal.App.4th 584, 594.) "Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations. [Citations.]" (*Morris v. Williams* (1967) 67 Cal.2d 733, 748.)

Regulation 1859.91 is void to the extent it is in conflict with the directive of section 65995.7. As long as state funds are available and the Board is approving apportionments, school districts may not increase their school impact fees from Level II to Level III.

that it meets all requirements of law for an apportionment or eligibility determination, and the [Office of Public School Construction] will recommend approval to the Board." (Reg. 1859.2.)

We conclude that the Board is not authorized to notify the Secretary of the Senate and the Chief Clerk of the Assembly when new construction grant requests from school districts that are ready for apportionment exceed the state funds available for new school construction as long as the Board continues to approve apportionments.

