REPORT OF THE EXECUTIVE OFFICER
State Allocation Board Meeting, May 25, 2016

DEVELOPER FEES

PURPOSE OF REPORT

To present the State Allocation Board (Board) with options to take action that could allow school districts the ability to impose Level III developer fees.

DESCRIPTION

At the April 2016 meeting, the Board heard a staff report on the developer fee statutory framework (Attachment A). There are three levels of residential construction fees that may be levied by school districts onto developers commonly known as Levels I, II, and III.

A district may charge the highest fee, Level III, when it has met the Level II requirements and when, pursuant to Government Code Section 65995.7, "state funds for new school facility construction are not available." The Board must make a finding that state funds for new construction are not available in order for districts to charge Level III fees. The Board must also notify the Secretary of the Senate and the Chief Clerk of the Assembly of its finding.

The Board directed staff to return with an action item related to Level III fees. This item presents the Board with options related to making a finding that could allow school districts to impose Level III developer fees.

AUTHORITY

See Attachment B.

BACKGROUND

Pursuant to Government Code Section 65995.7, if a school district meets the requirements to charge developers Level II fees, and "if state funds for new school facility construction are not available," a school district may begin to charge developers Level III fees. "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."

Historically, the conditions necessary for districts to charge Level III fees have not been met.

However, there was a short time period in 2001 and 2002 when this issue also came before the Board for consideration. The SFP regulations in effect during this timeframe specified that Level III fees could be charged when the Board had more "New Construction Grants requests Ready for Apportionment" than funds available for that purpose. At that time, the Board was making apportionments on a quarterly basis. In July 2001, the program had $1.179 billion in grant requests, but only $951.8 million in funds available for apportionment. Because there was still bond authority available, and the Board was still making apportionments (regardless of the timing of such action) the Attorney General ruled that the Board could not make a finding that funds were not available, and further ruled that the regulation was invalid because it was in direct conflict with statute (the Attorney General's opinion is included as Attachment C). The opinion stated, "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."

(Continued on Page Two)

STAFF ANALYSIS/STATEMENTS

Government Code Section 65995.7 allows school districts to charge Level III developer fees "if state funds for new school facility construction are not available." This section further identifies two conditions within the definition of funds being considered "not available":

- **The Board is no longer approving apportionments for new construction pursuant to Article 5 of Chapter 12.5 of Part 10 of the Education Code.**
- **There must be a lack of funds available for new construction.**

Staff has provided an analysis of these two conditions below for the Board's consideration.

Is the Board still approving apportionments for new construction pursuant to Article 5?

No. The last time the Board approved an apportionment for new construction pursuant to Article 5 was September 8, 2015. The unfunded approval for the September 2015 apportionments was February 2015 and there have been no new construction unfunded approvals since that date.

While the Board is still approving apportionments for projects under the Facility Hardship and Seismic Mitigation Program (SMP), these projects are funded pursuant to Article 8 of Chapter 12.5 of Part 10 of the Education Code, not Article 5.

ARTICLE 5

* New Construction
*Addition of Classroom Space
*Housing Unhoused Pupils

ARTICLE 8

*Facility Hardship
*Seismic Mitigation Program
*Financial Hardship
*Excessive Cost Hardship - Supplemental grants

The Board has statutory authority pursuant to Education Code (EC) Section 17075.15(a) to use funds from any bond act to provide funding for the purposes of Article 8. Further, the Board has specific statutory authority in EC Section 17075.15(b) to adopt regulations for the purposes of Article 8.

(Continued on Page Three)

STAFF ANALYSIS/STATEMENTS (cont.)

The Board has taken two actions to specify that health and safety projects in the Facility Hardship program will receive priority for bond authority over typical new construction and modernization projects. This priority was first adopted by the Board in a policy decision made at the August 4, 2010 meeting and was formalized into the priority funding process through SFP Regulation Section 1859.93.1, which was adopted in April 2015.

This regulation section reads in part:

"Applications, except those identified in (c) through (e) below, shall be funded as follows:
(a) First, to applications for Facility Hardship pursuant to Section 1859.82, except those for the seismic mitigation of the Most Vulnerable Category 2 Buildings, in order of receipt of an Approved Application for funding; then,
(b) If there are no applications pursuant to subsection (a), to applications for New Construction Grant(s) in order of receipt of an Approved Application for Funding…"

Due to continual submittals of Facility Hardship applications, the result of the Board's action has been that the Board is no longer providing apportionments pursuant to Article 5.

Is there a lack of funds available for new construction?

Yes. Since the inception of the SFP, over $13 billion in bond authority has been made available for new construction. The Status of Funds report currently shows a remaining balance of $2.2 million in new construction funds. However, the Board, through its statutory discretion, has committed those funds first to Facility Hardship projects submitted under Article 8.

Since the Board established the "True" Unfunded List (the list of projects outside of bond authority) for applications received between July 13, 2012 and November 1, 2012, only 17 new construction projects have moved off of that list to receive an unfunded approval and receive an apportionment. It has been over seven months (September 2015) since the Board took action in granting a new construction apportionment from a project that was originally on the "True" Unfunded List. There are still 26 new construction projects on the "True" Unfunded List that represent a need of approximately $181 million in new construction bond authority.

The graph below shows the amount of funds that have been apportioned to both Article 5 and Article 8 projects over the past two years. It is important to note that the apportionments were made possible in large part due to returns of funds to the program from project rescissions and closeouts, and the transfer of funds from the Career Technical Educational Facilities Program and the High Performance Incentive Grant.

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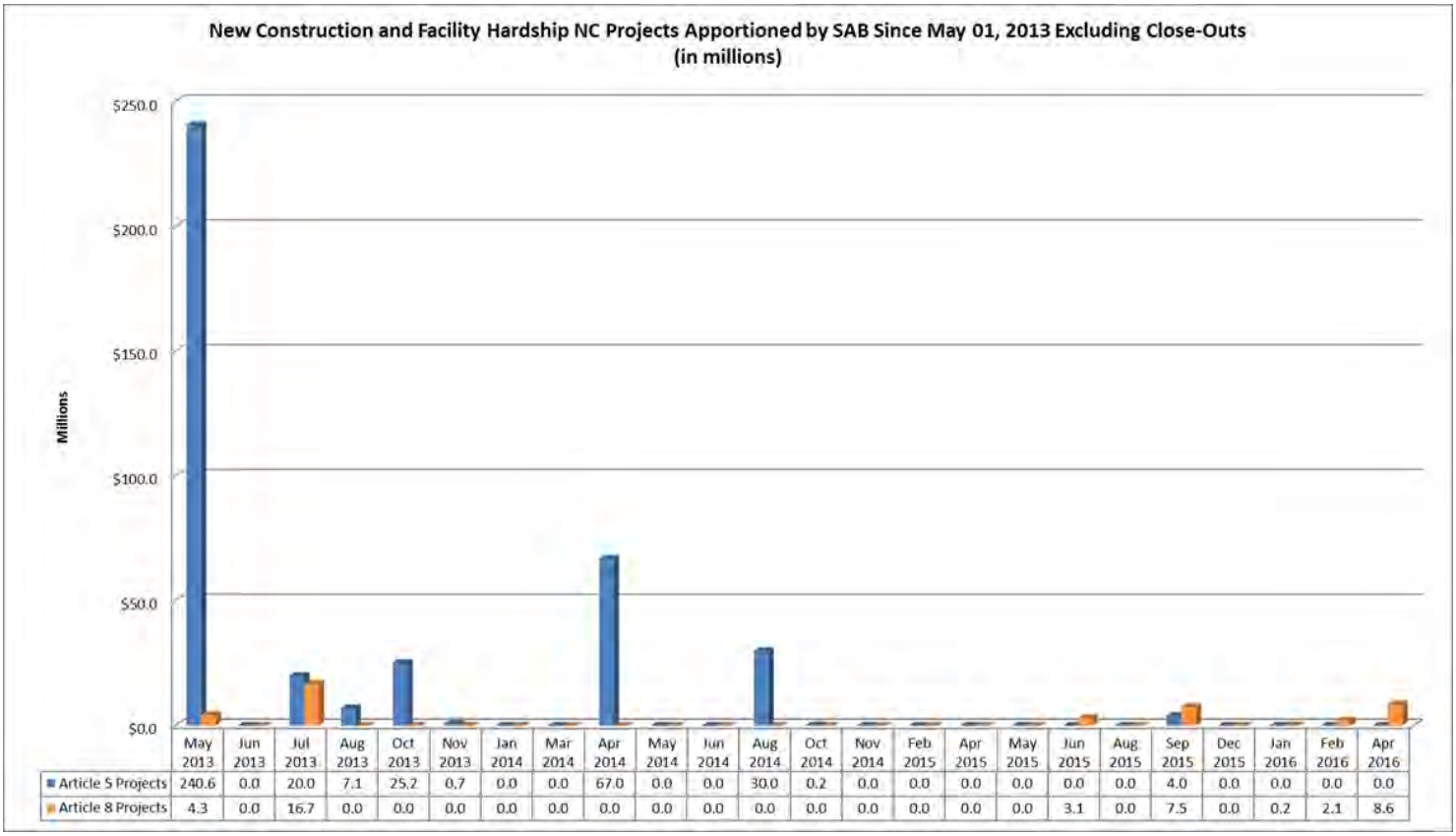
STAFF ANALYSIS/STATEMENTS (cont.)

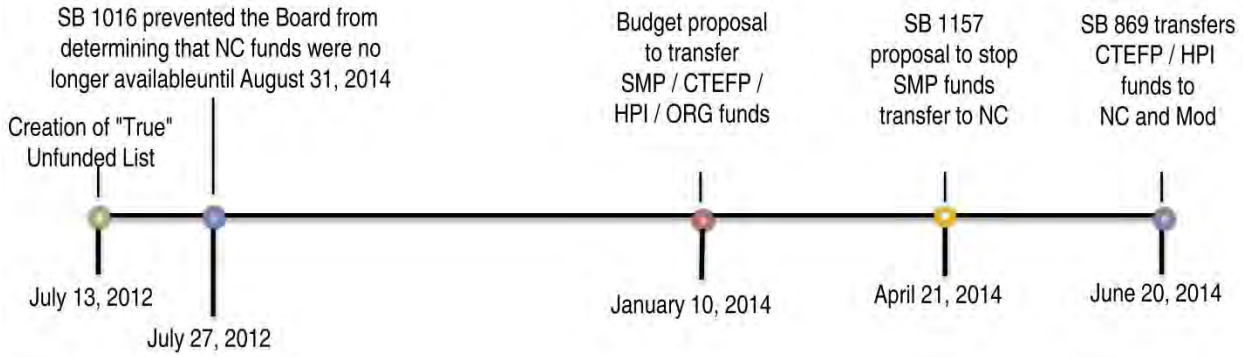


	May 2013	Jun 2013	Jul 2013	Aug 2013	Oct 2013	Nov 2013	Jan 2014	Mar 2014	Apr 2014	May 2014	Jun 2014	Aug 2014	Oct 2014	Nov 2014	Feb 2015	Apr 2015	May 2015	Jun 2015	Aug 2015	Sep 2015	Dec 2015	Jan 2016	Feb 2016	Apr 2016
Article 5 Projects	240.6	0.0	20.0	7.1	25.2	0.7	0.0	0.0	67.0	0.0	0.0	30.0	0.2	0.0	0.0	0.0	0.0	0.0	0.0	4.0	0.0	0.0	0.0	0.0
Article 8 Projects	4.3	0.0	16.7	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	3.1	0.0	7.5	0.0	0.2	2.1	8.6

Seismic Mitigation Program Funds

Proposition 1D provided that of the $1.9 billion made available for New Construction, "up to 10.5 percent shall be available for purposes of seismic repair, reconstruction, or replacement pursuant to Section 17075.10." EC Section 17075.10 falls in Article 8 of Chapter 12.5. At its January 2008 meeting, the Board approved regulations to administer the seismic funds. Those regulations specified that the entire 10.5 percent, or $199.5 million, was available for the SMP.

SMP funds do remain; however, to date there has not been a consensus leading to action to transfer any of these funds back to new construction. Below is a timeline showing various actions from legislators and the Administration related to shifting funds into the new construction program and delaying Level III fees.



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STAFF ANALYSIS/STATEMENTS (cont.)

Summary

It has been over seven months since the Board apportioned funds for new construction pursuant to Article 5, and 15 months since an unfunded approval was provided. The Administration, members of the Legislature and the Board have all differentiated the funds within the original allotment between funds available for the new construction housing of unhoused pupils pursuant to Article 5 and funds available for Facility Hardship and SMP projects pursuant to Article 8. The new construction funds and other options to replenish the new construction funds seem to be exhausted. The Board appears to be within its statutory authority to make a finding that new construction funds are not available for new construction apportionments.

BOARD OPTIONS

1. **Make a finding to allow districts to impose Level III fees.**

    - Pursuant to Government Code Section 65995.7, upon finding that the conditions in statute have been met, determine that state funds for new construction are not available.
    - Notify the Secretary of the Senate and the Chief Clerk of the Assembly that this determination was made as of May 25, 2016.

2. **Take no action (does not require a vote).**

BOARD ACTION

In considering this Item, the SAB approved a motion: 1) making a finding that, pursuant to Government Code Section 65995.7, state funds for new construction are no longer available; and 2) the SAB is no longer approving apportionments for new construction pursuant to Article 5, Chapter 12.5 of Part 10 of the Education Code, due to a lack of funds for this purpose thereby authorizing school districts to begin to impose Level III developer fees if they so choose. The motion also included that the Secretary of the Senate and the Chief Clerk of the Assembly be notified that this determination was made as of May 25, 2016.

ATTACHMENT A

REPORT OF THE EXECUTIVE OFFICER
State Allocation Board Meeting, April 20, 2016

DEVELOPER FEES

PURPOSE OF REPORT

To provide the State Allocation Board (Board) with information related to developer fees.

DESCRIPTION

At the January 27, 2016 meeting, the Board directed Staff to report on the developer fee statutory framework. There are three levels of residential construction fees that may be levied by school districts onto developers commonly known as Levels I, II, and III.

A school district may charge developers the lowest fee, Level I, if the district conducts a Justification Study that establishes a connection between the development in the district and the assessment of fees to pay for the cost of the facilities needed to house future students that will reside in new residential units.

A district may charge the Level II fee when it makes a timely application to the Board for new construction funding, conducts a School Facility Needs Analysis pursuant to Government Code, and satisfies other statutory requirements. The Level II fee was designed to cover the district's 50 percent matching requirement of a new construction project, minus any fees imposed on commercial and industrial construction. The Level II fee may only be expended on the facilities identified in the Needs Analysis as being "attributable to projected enrollment growth from the construction of new residential units."

A district may charge the highest fee, Level III, when it has met the Level II requirements and when, pursuant to Government Code Section 65995.7, "state funds for new school facility construction are not available." The Board must making a finding that state funds for new construction are not available in order for districts to charge Level III fees. The Board must also notify the Secretary of the Senate and the Chief Clerk of the Assembly of its finding. The Level III fee was designed to cover the entire cost of a project, minus any fees imposed on commercial and industrial construction.

AUTHORITY

See Attachment.

BACKGROUND

Developer fees, in their present form, have been used by districts to construct and reconstruct school facilities since 1987. In that time, who could charge fees, the amount of the fees, the requirements districts had to meet to charge fees, and the state's contribution to school facility construction have all seen changes. This section includes a table that compares the different fee levels, a brief statutory history of these changes, and a discussion of other facility factors like maintenance.

(Continued on Page Two)

BACKGROUND (cont.)

Requirements to Charge Developer Fees

The following table compares the differences between the developer fee rates, the justifications required for charging those rates, and any additional program requirements for the Levels I, II, and III fees.

Circumstances	Level I	Level II	Level III
Developer Fee Rate	The fee is established on a per-square-foot basis. The fee is adjusted every two years, according to the adjustment for inflation set forth in the statewide Class B Construction Cost Index, as determined by the Board.	The calculations in the School Facility Needs Analysis determine the amount of the Level II fee. The fee is designed to give a district enough to cover its share of the 50/50 New Construction project.	Essentially a doubling of the Level II fee, the Level III fee is designed to give a district enough to cover its share and the state's share of a new construction project.
Justification	Justification study required	School Facility Needs Analysis Required	School Facility Needs Analysis Required
Additional Requirements		Must satisfy at least two of the following: 1) 30% of pupils must be multi-track-year-round in unified or elementary district 2) In the previous four years, a local general obligation bond must have received a majority of the vote 3) District has issued debt for capital outlay in an amount of at least either 15% or 30% of the district's local bonding capacity 4) At least 20% of teaching stations within the district are relocatable	1) The Level II additional requirements. 2) State funds for new construction must not be available [the Board may no longer be approving apportionments for new construction]. 3) The Board must determine that state funds for new construction are not available.

Statutory History

January 1, 1987

Chapter 887, Statutes of 1986 (Assembly Bill 2926) created the framework that authorizes school districts to levy Level I fees on new development that is still in use today. Until 1990, the Board was required to adjust the cap every year. Since 1990, the Board has been required to adjust the Level I fee caps every two years.

November 3, 1998

The Class Size Reduction Kindergarten-University Public Education Facilities Bond Act of 1998 (Proposition 1A) was approved by the voters, which included $2.9 billion for K-12 new construction. The frameworks for the Level II fees and the Level III fees that are still in use today were established.

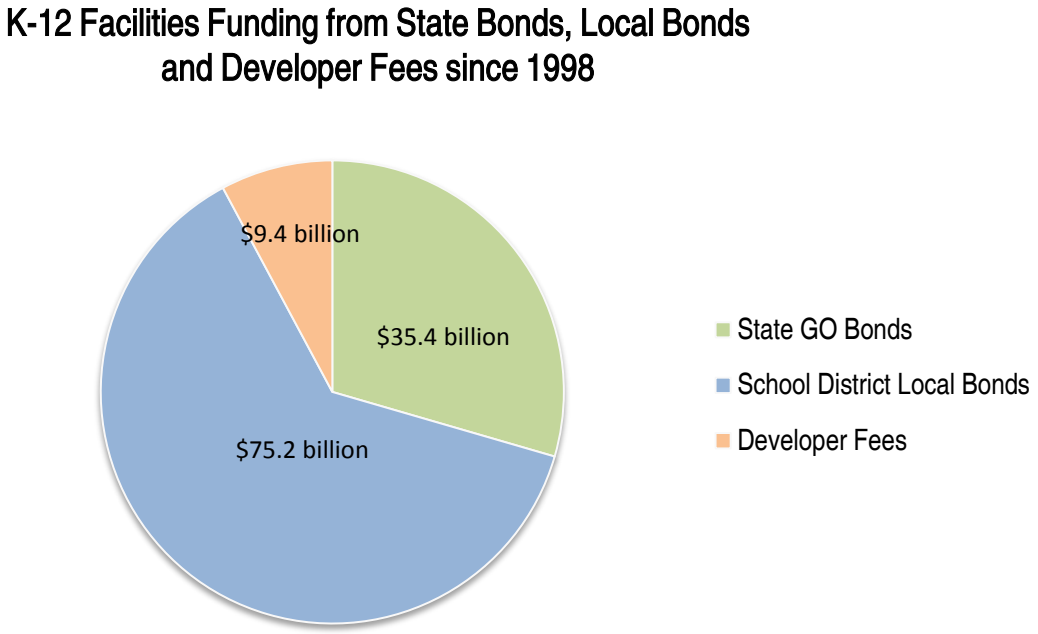
(Continued on Page Three)

BACKGROUND (cont.)

November 5, 2002 to November 7, 2006
Voters passed three Kindergarten-University Public Education Facilities Bond Acts in 2002 (Proposition 47), 2004 (Proposition 55) and 2006 (Proposition 1D). Respectively, the acts included $6.25 billion, $4.96 billion, and $1.9 billion for K-12 new construction.

June 27, 2012 – August 31, 2014
Chapter 38, Statutes of 2012 (Senate Bill 1016) temporarily halted the Board's ability to determine that New Construction funds are no longer available. As a direct result, districts could not charge developers Level III fees. During this time, several bond bills were introduced and considered by the Legislature.

Historical Funding Amounts
The chart below is from the February 2015 Legislative Analyst's Office report titled "The 2015-16 Budget: Rethinking How the State Funds School Facilities" and shows the amounts contributed through State GO Bonds, School District Local Bonds and Developer Fees.



(Continued on Page Four)

BACKGROUND (cont.)

Other Facility Costs

Pursuant to Education Code Section 17620, the fees charged to new developments by school districts may be used for the purpose of funding the construction or reconstruction of school facilities. The construction or reconstruction of school facilities does not include regular maintenance, routine repair, or deferred maintenance. Therefore, developer fees do not contribute to ongoing facility costs like maintenance. The following sections summarize districts' maintenance requirements when they participate in the School Facility Program.

Routine Maintenance

At the inception of the School Facility Program, statute required school districts to establish a restricted account within the district's general fund for the exclusive purpose of providing funds for ongoing and major maintenance of school buildings, known as a restricted routine maintenance account (RRMA) as a condition of participating in the program. Funds in the account may now also be used for drought mitigation purposes.

By July 2000, districts were required to deposit three percent of their total general fund expenditures into their RRMA. From July 2008 to June 2015, districts only had to deposit one percent, due to the state's fiscal crisis and subsequent recession. Recent legislation – Chapter 13, Statutes of 2015 (AB 104) – phases-in increases to the required RRMA deposit until the requirement is back to three percent in July 2020.

Deferred Maintenance

School districts may still establish, and deposit funds into, "district deferred maintenance funds" for purposes including, but not limited to, "major repair or replacement of plumbing, heating, air-conditioning, electrical, roofing, and floor systems." However, recent legislation – Chapter 47, Statutes of 2013 (AB 97) – established the Local Control Funding Formula and effectively eliminated the state's matching share Deferred Maintenance Program by repealing the Board's authority to apportion funds from the State School Deferred Maintenance Fund to districts.

Level III Fees in Statute

While statute describes a starting point whereby districts may begin charging Level III fees, it does not describe an ending point. Districts may begin charging Level III fees when state funds for new school facility construction are not available, a time described as when the Board "is no longer approving apportionments for new construction ... due to a lack of funds available for new construction." The Board must make a finding that state funds for new construction are not available in order for districts to charge Level III fees. No similar language exists in statute describing exactly when new construction funds may be deemed available again, in the event voters approve a future statewide general obligation bond.

Pursuant to Government Code Section 65995.7(b), a school district may offer a reimbursement election to a developer that provides the developer with the "right to monetary reimbursement" of the difference between the Level II fee and the Level III fee should the district later receive "funds from state sources for construction of the facilities...."

RECOMMENDATION

Acknowledge this report.

This Report was acknowledged by the State Allocation Board on April 20, 2016, with two items coming back to the May 25, 2016 meeting.

ATTACHMENT A

ATTACHMENT

AUTHORITY

Education Code Section 17620 states in part:

(a) (1) The 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, subject to any limitations set forth in Chapter 4.9 (commencing with Section 65995) of Division 1 of Title 7 of the Government Code. This fee, charge, dedication, or other requirement may be applied to construction only as follows:

(A) To new commercial and industrial construction. The chargeable covered and enclosed space of commercial or industrial construction shall not be deemed to include the square footage of any structure existing on the site of that construction as of the date the first building permit is issued for any portion of that construction.

(B) To new residential construction.

. . .

(2) For purposes of this section, "construction" and "assessable space" have the same meanings as defined in Section 65995 of the Government Code.

(3) For purposes of this section and Section 65995 of the Government Code, "construction or reconstruction of school facilities" does not include any item of expenditure for any of the following:

(A) The regular maintenance or routine repair of school buildings and facilities.

(B) The inspection, sampling, analysis, encapsulation, or removal of asbestos-containing materials, except where incidental to school facilities construction or reconstruction for which the expenditure of fees or other consideration collected pursuant to this section is not prohibited.

(C) The purposes of deferred maintenance described in Section 17582.

. . . .

"Level I"

Government Code (GC) Section 65995 states:

(a) Except for a fee, charge, dedication, or other requirement authorized under Section 17620 of the Education Code, or pursuant to Chapter 4.7 (commencing with Section 65970), a fee, charge, dedication, or other requirement for the construction or reconstruction of school facilities shall not be levied or imposed in connection with, or made a condition of, any legislative or adjudicative act, or both, by any state or local agency involving, but not limited to, the planning, use, or development of real property, or any change in governmental organization or reorganization, as defined in Section 56021 or 56073.

(b) Except as provided in Sections 65995.5 and 65995.7, the amount of any fees, charges, dedications, or other requirements authorized under Section 17620 of the Education Code, or pursuant to Chapter 4.7 (commencing with Section 65970), or both, shall not exceed the following:

(1) In the case of residential construction, including the location, installation, or occupancy of manufactured homes and mobilehomes, one dollar and ninety-three cents ($1.93) per square foot of assessable space. "Assessable space," for this purpose, means all of the square footage within the perimeter of a residential structure, not including any carport, covered or uncovered walkway, garage, overhang, patio, enclosed patio, detached accessory structure, or similar area. The amount of the square footage within the perimeter of a residential structure shall be calculated by the building department of the city or county issuing the building permit, in accordance with the standard practice of that city or county in calculating structural perimeters. "Manufactured home" and "mobilehome" have the meanings set forth in subdivision (f) of Section 17625 of the Education Code. The application of any fee, charge, dedication, or other form of requirement to the location, installation, or occupancy of manufactured homes and mobilehomes is subject to Section 17625 of the Education Code.

(2) In the case of any commercial or industrial construction, thirty-one cents ($0.31) per square foot of chargeable covered and enclosed space. "Chargeable covered and enclosed space," for this purpose, means the covered and enclosed space determined to be within the perimeter of a commercial or industrial structure, not including any storage areas incidental to the principal use of the construction, garage, parking structure, unenclosed walkway, or utility or disposal area. The determination of the chargeable covered and enclosed space within the perimeter of a commercial or industrial structure shall be made by the building department of the city or county issuing the building permit, in accordance with the building standards of that city or county. For the determination of chargeable fees to be paid to the

appropriate school district in connection with any commercial or industrial construction under the jurisdiction of the Office of Statewide Health Planning and Development, the architect of record shall determine the chargeable covered and enclosed space within the perimeter of a commercial or industrial structure.
(3) The amount of the limits set forth in paragraphs (1) and (2) shall be increased in 2000, and every two years thereafter, according to the adjustment for inflation set forth in the statewide cost index for class B construction, as determined by the State Allocation Board at its January meeting, which increase shall be effective as of the date of that meeting.
. . . .

"Level II"
GC Section 65995.5 states:

(a) The governing board of a school district may impose the amount calculated pursuant to this section as an alternative to the amount that may be imposed on residential construction calculated pursuant to subdivision (b) of Section 65995.
(b) To be eligible to impose the fee, charge, dedication, or other requirement up to the amount calculated pursuant to this section, a governing board shall do all of the following:
(1) Make a timely application to the State Allocation Board for new construction funding for which it is eligible and be determined by the board to meet the eligibility requirements for new construction funding set forth in Article 2 (commencing with Section 17071.10) and Article 3 (commencing with Section 17071.75) of Chapter 12.5 of Part 10 of the Education Code. A governing board that submits an application to determine the district's eligibility for new construction funding shall be deemed eligible if the State Allocation Board fails to notify the district of the district's eligibility within 120 days of receipt of the application.
(2) Conduct and adopt a school facility needs analysis pursuant to Section 65995.6.
(3) Until January 1, 2000, satisfy at least one of the requirements set forth in subparagraphs (A) to (D), inclusive, and, on and after January 1, 2000, satisfy at least two of the requirements set forth in subparagraphs (A) to (D), inclusive:
(A) The district is a unified or elementary school district that has a substantial enrollment of its elementary school pupils on a multitrack year-round schedule. "Substantial enrollment" for purposes of this paragraph means at least 30 percent of district pupils in kindergarten and grades 1 to 6, inclusive, in the high school attendance area in which all or some of the new residential units identified in the needs analysis are planned for construction. A high school district shall be deemed to have met the requirements of this paragraph if either of the following apply:
(i) At least 30 percent of the high school district's pupils are on a multitrack year-round schedule.
(ii) At least 40 percent of the pupils enrolled in public schools in kindergarten and grades 1 to 12, inclusive, within the boundaries of the high school attendance area for which the school district is applying for new facilities are enrolled in multitrack year-round schools.
(B) The district has placed on the ballot in the previous four years a local general obligation bond to finance school facilities and the measure received at least 50 percent plus one of the votes cast.
(C) The district meets one of the following:
(i) The district has issued debt or incurred obligations for capital outlay in an amount equivalent to 15 percent of the district's local bonding capacity, including indebtedness that is repaid from property taxes, parcel taxes, the district's general fund, special taxes levied pursuant to Section 4 of Article XIII A of the California Constitution, special taxes levied pursuant to Chapter 2.5 (commencing with Section 53311) of Division 2 of Title 5 that are approved by a vote of registered voters, special taxes levied pursuant to Chapter 2.5 (commencing with Section 53311) of Division 2 of Title 5 that are approved by a vote of landowners prior to November 4, 1998, and revenues received pursuant to the Community Redevelopment Law (Part 1 (commencing with Section 33000) of Division 24 of the Health and Safety Code). Indebtedness or other obligation to finance school facilities to be owned, leased, or used by the district, that is incurred by another public agency, shall be counted for the purpose of calculating whether the district has met the debt percentage requirement contained herein.
(ii) The district has issued debt or incurred obligations for capital outlay in an amount equivalent to 30 percent of the district's local bonding capacity, including indebtedness that is repaid from property taxes, parcel taxes, the district's general fund, special taxes levied pursuant to Section 4 of Article XIII A of the California Constitution, special taxes levied pursuant to Chapter 2.5 (commencing with Section 53311) of Division 2 of Title 5 that are approved by a vote of registered voters, special taxes levied pursuant to Chapter 2.5 (commencing with Section 53311) of Division 2 of Title 5 that are approved by a vote of landowners after November 4, 1998, and revenues received pursuant to the Community Redevelopment Law (Part 1 (commencing with Section 33000) of Division 24 of the Health and Safety Code).

Indebtedness or other obligation to finance school facilities to be owned, leased, or used by the district, that is incurred by another public agency, shall be counted for the purpose of calculating whether the district has met the debt percentage requirement contained herein.
(D) At least 20 percent of the teaching stations within the district are relocatable classrooms.
(c) The maximum square foot fee, charge, dedication, or other requirement authorized by this section that may be collected in accordance with Chapter 6 (commencing with Section 17620) of Part 10.5 of the Education Code shall be calculated by a governing board of a school district, as follows:
(1) The number of unhoused pupils identified in the school facilities needs analysis shall be multiplied by the appropriate amounts provided in subdivision (a) of Section 17072.10. This sum shall be added to the site acquisition and development cost determined pursuant to subdivision (h).
(2) The full amount of local funds the governing board has dedicated to facilities necessitated by new construction shall be subtracted from the amount determined pursuant to paragraph (1). Local funds include fees, charges, dedications, or other requirements imposed on commercial or industrial construction.
(3) The resulting amount determined pursuant to paragraph (2) shall be divided by the projected total square footage of assessable space of residential units anticipated to be constructed during the next five-year period in the school district or the city and county in which the school district is located. The estimate of the projected total square footage shall be based on information available from the city or county within which the residential units are anticipated to be constructed or a market report prepared by an independent third party.
. . . .

"Level III"
GC Section 65995.7 states:

(a) 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, charge, dedication, or other requirement calculated pursuant to subdivision (c) of Section 65995.5 by an amount that may not exceed the amount calculated pursuant to subdivision (c) of Section 65995.5, except that for the purposes of calculating this additional amount, the amount identified in paragraph (2) of subdivision (c) of Section 65995.5 may not be subtracted from the amount determined pursuant to paragraph (1) of subdivision (c) of Section 65995.5. 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 funds are no longer available for publication in the respective journal of each house. For the purposes of making this determination, the board shall not consider whether funds are available for, or whether it is making preliminary apportionments or final apportionments pursuant to, Article 11 (commencing with Section 17078.10).
(b) A governing board may offer a reimbursement election to the person subject to the fee, charge, dedication, or other requirement that provides the person with the right to monetary reimbursement of the supplemental amount authorized by this section, to the extent that the district receives funds from state sources for construction of the facilities for which that amount was required, less any amount expended by the district for interim housing. At the option of the person subject to the fee, charge, dedication, or other requirement the reimbursement election may be made on a tract or lot basis. Reimbursement of available funds shall be made within 30 days as they are received by the district.
(c) A governing board may offer the person subject to the fee, charge, dedication, or other requirement an opportunity to negotiate an alternative reimbursement agreement if the terms of the agreement are mutually agreed upon.
(d) A governing board may provide that the rights granted by the reimbursement election or the alternative reimbursement agreement are assignable.

ATTACHMENT B

AUTHORITY

Government Code Section 65995.7 states:

(a) 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, charge, dedication, or other requirement calculated pursuant to subdivision (c) of Section 65995.5 by an amount that may not exceed the amount calculated pursuant to subdivision (c) of Section 65995.5, except that for the purposes of calculating this additional amount, the amount identified in paragraph (2) of subdivision (c) of Section 65995.5 may not be subtracted from the amount determined pursuant to paragraph (1) of subdivision (c) of Section 65995.5. 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 funds are no longer available for publication in the respective journal of each house. For the purposes of making this determination, the board shall not consider whether funds are available for, or whether it is making preliminary apportionments or final apportionments pursuant to, Article 11 (commencing with Section 17078.10).

(b) A governing board may offer a reimbursement election to the person subject to the fee, charge, dedication, or other requirement that provides the person with the right to monetary reimbursement of the supplemental amount authorized by this section, to the extent that the district receives funds from state sources for construction of the facilities for which that amount was required, less any amount expended by the district for interim housing. At the option of the person subject to the fee, charge, dedication, or other requirement the reimbursement election may be made on a tract or lot basis. Reimbursement of available funds shall be made within 30 days as they are received by the district.

(c) A governing board may offer the person subject to the fee, charge, dedication, or other requirement an opportunity to negotiate an alternative reimbursement agreement if the terms of the agreement are mutually agreed upon.

(d) A governing board may provide that the rights granted by the reimbursement election or the alternative reimbursement agreement are assignable.

Education Code Section 17072.20 (within Article 5) states:

a) An applicant school district that has been determined by the board to meet the eligibility requirements for new construction funding set forth in Article 2 (commencing with Section 17071.10) or Article 3 (commencing with Section 17071.75) may submit at any time a request to the board for a project apportionment for all or a portion of the funding for which the school district is eligible.

(b) The application shall include, but shall not be limited to, the school district's determination of the amount of state funding that the district is otherwise eligible for relating to site acquisition, site development, new construction, and hardship funding provided pursuant to Article 8 (commencing with Section 17075.10), if any. The amount shall be reduced by the amount of the alternative fee collected pursuant to subdivision (a) of Section 65995.7 of the Government Code if a reimbursement election or agreement pursuant to Section 65995.7 of the Government Code is not in effect.

(c) The board shall verify and adjust, as necessary, and approve the district's application.

Education Code Section 17072.35 (within Article 5) states:

A grant for new construction may be used for any and all costs necessary to adequately house new pupils in any approved project, and those costs may only include the cost of design, engineering, testing, inspection, plan checking, construction management, site acquisition and development, evaluation and response action costs relating to hazardous substances at a new or existing schoolsite, demolition, construction, acquisition and installation of portable classrooms, landscaping, necessary utility costs, utility connections and other fees, equipment including telecommunication equipment to increase school security, furnishings, and the upgrading of electrical systems or the wiring or cabling of classrooms in order to accommodate educational technology. A grant for new construction may also be used to acquire an existing government or privately owned building, or a privately financed school building, and for the necessary costs of converting the government or privately owned building for public school use. A grant for new construction may also be used for the costs of designs and materials that promote the efficient use of energy and water, the maximum use of natural lighting and indoor air quality, the use of recycled materials and materials that emit

a minimum of toxic substances, the use of acoustics conducive to teaching and learning, and other characteristics of high performance schools.

Education Code Section 17075.10 (within Article 8) states:

(a) A school district may apply for hardship assistance in cases of extraordinary circumstances. Extraordinary circumstances may include, but are not limited to, the need to repair, reconstruct, or replace the most vulnerable school facilities that are identified as a Category 2 building, as defined in the report submitted pursuant to Section 17317, determined by the department to pose an unacceptable risk of injury to its occupants in the event of a seismic event.

(b) A school district applying for hardship state funding under this article shall comply with either paragraph (1) or (2).

(1) Demonstrate both of the following:

(A) That due to extreme financial, disaster-related, or other hardship the school district has unmet need for pupil housing.

(B) That the school district is not financially capable of providing the matching funds otherwise required for state participation, that the district has made all reasonable efforts to impose all levels of local debt capacity and development fees, and that the school district is, therefore, unable to participate in the program pursuant to this chapter except as set forth in this article.

(2) Demonstrate that due to unusual circumstances that are beyond the control of the district, excessive costs need to be incurred in the construction of school facilities. Funds for the purpose of seismic mitigation work or facility replacement pursuant to this section shall be allocated by the board on a 50-percent state share basis from funds reserved for that purpose in any bond approved by the voters after January 1, 2006. If the board determines that the seismic mitigation work of a school building would require funding that is greater than 50 percent of the funds required to construct a new facility, the school district shall be eligible for funding to construct a new facility under this chapter.

(c) The board shall review the increased costs that may be uniquely associated with urban construction and shall adjust the per-pupil grant for new construction or modernization hardship applications as necessary to accommodate those costs. The board shall adopt regulations setting forth the standards, methodology, and a schedule of allowable adjustments, for the urban adjustment factor established pursuant to this subdivision.

Education Code Section 17075.15 (within Article 8) states:

(a) From funds available from any bond act for the purpose of funding facilities for school districts with a financial hardship, the board may provide other construction, modernization, or relocation assistance as set forth in this chapter or Chapter 14 (commencing with Section 17085) to the extent that severe circumstances may require, and may adjust or defer the local financial participation, as pupil health and safety considerations require to the extent that bond act funds are provided for this purpose.

(b) The board shall adopt regulations for determining the amount of funding that may be provided to a district, and the eligibility and prioritization of funding, under this article.

. . .

Education Code Section 101012 states in part:

(a) The proceeds from the sale of bonds, issued and sold for the purposes of this chapter, shall be allocated in accordance with the following schedule:

(1) The amount of one billion nine hundred million dollars ($1,900,000,000) for new construction of school facilities of applicant school districts under Chapter 12.5 (commencing with Section 17070.10) of Part 10. Of the amount allocated under this paragraph, up to 10.5 percent shall be available for purposes of seismic repair, reconstruction, or replacement, pursuant to Section 17075.10.

. . .

(3) The amount of three billion three hundred million dollars ($3,300,000,000) for the modernization of school facilities pursuant to Chapter 12.5 (commencing with Section 17070.10) of Part 10.

(4) (A) The amount of five hundred million dollars ($500,000,000) for the purposes set forth in Article 13 (commencing with Section 17078.70) of Chapter 12.5 of Part 10, relating to facilities for career technical education programs.

(B) Of the amount not yet approved for allocation by the State Allocation Board pursuant to this paragraph by January 1, 2015, 50 percent shall be available for the purpose of paragraph (1), and 50 percent shall be available for purposes of paragraph (3). If an apportionment or State Allocation Board approval pursuant to this paragraph is rescinded after January 1, 2015, the rescinded amount shall be available for the purposes of paragraphs (1) and (3). The State

Allocation Board shall determine the percentage of the rescinded amount to be used for purposes of paragraph (1) and the percentage of the rescinded amount to be used for purposes of paragraph (3).

. . .

(8) (A) The amount of one hundred million dollars ($100,000,000) for incentive grants to promote the use of designs and materials in new construction and modernization projects that include the attributes of high-performance schools, including, but not limited to, the elements set forth in Section 17070.96, pursuant to regulations adopted by the State Allocation Board.

(B) Of the amount not yet approved for allocation by the State Allocation Board pursuant to this paragraph by January 1, 2015, 50 percent shall be available for purposes of paragraph (1), and 50 percent shall be available for purposes of paragraph (3). If an apportionment or State Allocation Board approval pursuant to this paragraph is rescinded on or after January 1, 2015, the rescinded amount shall be available for purposes of paragraphs (1) and (3). The State Allocation Board shall determine the percentage of the rescinded amount to be used for purposes of paragraph (1) and the percentage of the rescinded amount to be used for purposes of paragraph (3).

. . .

(d) (1) The Legislature may amend this section to adjust the funding amounts specified in paragraphs (1) to (8), inclusive, of subdivision (a), only by either of the following methods:

(A) By a statute, passed in each house of the Legislature by rollcall vote entered in the respective journals, by not less than two-thirds of the membership in each house concurring, if the statute is consistent with, and furthers the purposes of, this chapter.

(B) By a statute that becomes effective only when approved by the voters.

(2) Amendments pursuant to this subdivision may adjust the amounts to be expended pursuant to paragraphs (1) to (8), inclusive, of subdivision (a), but may not increase or decrease the total amount to be expended pursuant to that subdivision.

(e) Funds available pursuant to this section may be used for acquisition of school facilities authorized pursuant to Section 17280.5.

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.

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

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[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

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

notifications as required, pursuant to Government Code Section 65995.7(a)."[4]

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

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[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 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.)

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.

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.

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