TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

GEORGE DEUKMEJIAN
Attorney General

OPINION	:	No. 79-625
of	:	October 16, 1979
GEORGE DEUKMEJIAN Attorney General	:	
Rodney Lilyquist, Jr. Deputy Attorney General	:	

SUBJECT: INTERIM SCHOOL FACILITIES—This opinion deals with the need limitation requirements of Government Code section 65974 and the building of temporary facilities in relation to interim school facilities.

The Honorable Donald L. Clark, County Counsel of San Diego County, has requested an opinion on questions we have rephrased as follows:

1. May a city council or county board of supervisors rely upon the determination of a school district as to the relationship and need limitation requirements of Government Code section 65974, subdivision (d), in enacting an ordinance providing for interim school facilities?

2. Are the interim school facilities funded pursuant to Government Code section 65974 limited to temporary facilities?

3. If interim school facilities under Government Code section 65974 are limited to temporary facilities, may a city or county levy an additional fee upon builders of residential developments for the purpose of providing permanent facilities?

CONCLUSIONS

1. A city council or county board of supervisors may rely upon the determination of a school district as to the relationship and need limitation requirements of Government Code section 65974, subdivision (d), in enacting an ordinance providing for interim school facilities.

2. The interim school facilities funded pursuant to Government Code section 65974 are limited to temporary facilities.

3. A city or county may not levy an additional fee upon builders of residential developments for the purpose of providing permanent school facilities.

ANALYSIS

In 1977 the Legislature enacted a statutory scheme (Gov. Code §§ 65970–6598 1)[1] designed to help alleviate the overcrowding of local school facilities caused by new residential developments. The Legislature found that under the traditional method of financing such facilities,[2] the necessary amount of funds was often unavailable within a reasonable period of time to prevent overcrowding. (§ 65970.) It thus authorized local governments to impose a new method of financing "interim" school facilities necessitated by new residential developments. (§ 65070, subd. (e).)

The questions presented for analysis concern the procedures under which the interim facilities are funded and whether limitations exist as to the types of facilities that can be provided.

A. <u>The Relationship and Need Limitation Requirements</u>

The key financing provision of the statutory scheme is section 65974,[3] which states:

> "For the purpose of establishing an interim method of providing classroom facilities where overcrowding conditions exist, as determined necessary pursuant to Section 65971 and notwithstanding Section 66478, a city, county, or city and county may, by ordinance, require the dedication of

[1] All unidentified section references hereinafter refer to the Government Code.

[2] Traditionally, the levy of an ad valorem property tax has funded new school construction in California. (See Ed. Code §§ 15250, 15252, 15527, 15576, 15742, 16090, 16204, 16214, 39308, 39311.)

[3] Section 65974 was recently amended on an urgency basis. (Stats. 1979, ch. 282, § 53.)

land, the payment of fees in lieu thereof, or a combination of both, for classroom and related facilities for elementary or high schools as a condition to the approval of a residential development, provided that all of the following occur:

"(a) The general plan provides for the location of public schools.

"(b) The ordinance has been in effect for a period of 30 days prior to the implementation of the dedication or fee requirement.

(c) 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.

"(d) *The location and amount of land to be dedicated or the amount of fees to be paid, or both, shall bear a reasonable relationship and will be limited to the needs of the community for interim elementary or high school facilities and shall he reasonably related and limited to the need for schools caused by the development; provided, the fees shall not exceed the amount necessary to pay five annual lease payments for the interim facilities.* In lieu of the fees, the builder of a residential development may, at his or her option and at his or her expense, provide interim facilities, owned or controlled by such builder, at the place designated by the school district, and at the conclusion of the fifth school year the builder shall, at the builder's expense, remove the interim facilities from such place.

"(e) A finding is made by the city council or board of supervisors that the facilities to be constructed from such fees or the land to be dedicated, or both, is consistent with the general plan. "The ordinance may specify the methods for mitigating the conditions of overcrowding which the school district shall consider when making the finding required by subdivision (b) of Section 65971. "If the payment of fees is required, such payment shall be made at the time the building permit is issued. "Only the payment of fees may be required in subdivisions containing 50 parcels or less." (Emphasis added.)

The first question we must answer involves the application of subdivision (d) of section 65974. Specifically, the issue is whether a city council or county board of supervisors must make its own, independent evaluation and finding under the subdivision, or whether reliance can be placed upon such a finding by the school district requiring assistance. We conclude that a city council or board of supervisors may provide in its

ordinance that the location and amount of land or the amount of fees shall be determined by the school district within the limits specified in section 65974, subdivision (d).

Subdivision (d) does not specify any particular procedure for determining the location and amount of land to be dedicated or the amount of fees to be paid. While the subdivision establishes a limit on the amount dedicated or paid, it does not indicate which entity is responsible for making the determination.

In contrast, the Legislature expressly provided that the condition under subdivision (e) of section 65974 must be determined "by the city council or board of supervisors."

Hence, the Legislature clearly knew how to place direct responsibility upon the city council or board of supervisors to make the determinations under the statute.

In subdivision (e) it did so, while in subdivision (d) no such expression can be found. This change of wording between the two consecutive paragraphs strongly suggests that the Legislature intended differing consequences of the language used. (See *In re Dees* (1920) 50 Cal. App. 11, 19; *McCarthy v. Board of Fire Commrs.* (1918) 37 Cal. App. 495, 497; 59 Ops. Cal. Atty. Gen. 109, 111 (1976).)

We know of no reason why a city council or board of supervisors may not rely upon the expertise of a school district board in determining whether the requirements of subdivision (d) of section 65974 are met. The "needs of the community for interim elementary or high school facilities," the "need for schools caused by the development," and the "amount necessary to pay five annual lease payments for the interim facilities" would all be within the particular knowledge of the school district board requiring assistance. Of course, the final responsibility for the approval of the residential development remains with the city council or board of supervisors.

The conclusion to the first question, therefore, is that a city council or county board of supervisors may rely upon the determination of a school district as to the relationship and need limitation requirements of section 65974, subdivision (d), in its ordinance providing for interim school facilities and approval of residential developments.

B. Temporary School Facilities

The second question that we must answer is whether "interim" school facilities under the statutory scheme means "temporary" facilities or whether permanent facilities may also be constructed with the fees collected. We conclude that only temporary facilities may be provided under sections 65970–65981.

Prior to the recent amendment of the statutory scheme, an argument could have been made that "interim" school facilities encompassed more than temporary structures. "Interim" in adjective form is generally defined as belonging to an interval period of time, as well as temporary or provisional. (Webster's New Internat. Dict. (3d ed. 1966) p. 1179; *Random House Dict. of English Language* (1966) p. 741.) The argument is that if the Legislature had intended to foreclose the building of permanent facilities (used while awaiting the traditional methods of financing school construction), the Legislature would have used the word "temporary" rather than "interim."

Whatever validity this argument once had, the Legislature has now put the matter to rest by adding section 65980 to the statutory scheme. It provides: "Interim facilities for purposes of Section 65974 shall be limited to temporary classrooms, including their utilities, furnishing, and toilet facilities not constructed with permanent foundations."

We believe that section 65980 clarifies what the Legislature initially intended "interim" facilities to mean when it enacted the statutory scheme. The nature of the amendment demonstrates an intent to prevent uncertainty in applying the existing law rather than to change the law as it was originally enacted. (See *Verreos v. City and County of San Francisco* (1976) 63 Cal. App. 3d 86, 99; *Standard Oil Co. v. State Bd. of Equalization* (1974) 39 Cal. App. 3d 765, 770.)

The conclusion to the second question, therefore, is that interim school facilities funded pursuant to section 63974 are limited to temporary facilities.

C. Permanent Facilities

The third question presented is whether a fee in addition to that for interim school facilities can be levied upon builders of residential developments to cover the costs of constructing permanent school facilities. We conclude that such an additional fee may not be imposed.

The Constitution provides for local ordinances and regulations by cities and counties as follows:

> "For its own government, a county or city may adopt a charter by majority vote of its electors voting on the question. County charters adopted pursuant to this section shall supersede any existing charter and all laws inconsistent therewith. The provisions of a charter are the law of the State and have the force and effect of legislative enactments." (Cal. Const. art. XI, § 3, subd. (a).)

> "It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith." (Cal. Const. art. XI, § 5, subd. (a).)
>
> "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const. art. XI, § 7.)

The effect of these constitutional provisions is that all cities and counties may make and enforce local ordinances and regulations not in conflict with general laws, while chartered cities and counties have the additional power to make and enforce ordinances and regulations in respect to *municipal affairs* without restriction by general law. (See *Harman v. City and County of San Francisco* (1972) 7 Cal. 3d 150, 161; *Baron v. City of Los Angeles* (1970) 2 Cal. 3d 535, 539; *Bishop v. City of San Jose* (1969) 1 Cal. 3d 56, 61–63; 59 Ops. Cal. Atty. Gen. 242, 245–246 (1976).)

The Constitution does not forbid counties and cities from legislating upon matters that are of statewide concern, nor does it forbid the state from legislating with respect to purely municipal affairs. Instead, the Constitution provides the answer as to which (state or county or city) legislation will control in the event of a conflict.

State laws control over local ordinances with regard to local matters if the subject matter is also of statewide concern. (*Pacific Tel. & Tel. Co. v. City & County of San Francisco* (1959) 51 Cal. 2d 766, 771, 775–776; *Codding Enterprises v. City of Merced* (1974) 42 Cal. App. 3d 375, 377–378.) In discussing whether a particular matter is of statewide as well as local concern, the Supreme Court stated in *Bishop v. City of San Jose* (1969) 1 Cal. 3d 56, 63:

> ". . . In exercising the judicial function of deciding whether a matter is a municipal affair or of statewide concern, the courts will of course give great weight to the purpose of the Legislature in enacting general laws which disclose an intent to preempt the field to the exclusion of local regulation (see *Ex parte Daniels* (1920)183 Cal. 636, 639–640 [192 P. 442, 21 A.L.R. 11723], and it may well occur that in some cases the factors which influenced the Legislature to adopt the general laws may likewise lead the courts to the conclusion that the matter is of statewide rather than merely local concern.

> However, the fact, standing alone, that the Legislature has attempted to deal with a particular subject on a statewide basis is not determinative of the issue as between state and municipal affairs, nor does it impair the constitutional authority of a home rule city or county to enact and enforce its own regulations to the exclusion of general laws if the subject is held by the courts to be a municipal affair rather than of statewide concern; stated otherwise, the Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern.

In applying these principles to the state legislation in question, we note that the Legislature has declared that adequate school facilities should be available for children residing in new residential developments throughout the state. (§ 65970, subd. (a).) It has found that existing state law frequently could not be used to alleviate conditions of overcrowding in school facilities caused by new housing developments within a reasonable period of time. (§ 65970, subd. (d).) Accordingly, the Legislature enacted the statutory scheme as a new and improved method of financing interim school facilities necessitated by new development . . . in California." (§ 65970, subd. (e).)

We believe that the factors which influenced the Legislature to adopt the statutory scheme lead to the conclusion that the matter of developer land dedications and fees for the purpose of providing school facilities is of statewide rather than merely local concern. As previously noted, the traditional method of financing new school construction in California has been governed by state law. Moreover, although zoning, land use controls, and certain revenue raising activities of a city or county may generally be considered to be "municipal affairs" (see Builders Assn. of *Santa Clara-Santa Cruz Counties v. Superior Court* (1974) 13 Cal. 3d 225, 231–232; *Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal. 3d 633, 643–645; *Gadding Enterprises v. City of Merced, supra,* 42 Cal. App. 3d 375, 378), the regulation of subdivision developers has been held to be preempted by state law (the Subdivision Map Act, §§ 66410–66499.37); local ordinances concerning subdivider fees and land dedications that are inconsistent with the language and apparent intent of the Subdivision Map Act are invalid. (See *Codding Enterprises v. City of Merced, supra*, 42 Cal. App. 3d 375, 378; *Friends of Lake Arrowhead v. Board of Supervisors* (1974)38 Cal. App. 3d 497, 505; *Santa Clara County Contractors etc. Assn. v. City of Santa Clara* (1965) 232 Cal. App. 2d 564, 573–579; *Newport Bldg. Corp. v. City of Santa Ana* (1962) 210 Cal. App. 2d 771, 776–777; *Kelber v. City of Upland* (1957)155 Cal. App. 2d 631, 637–638.) Thus, the courts have concluded that the matter of land development may be of statewide as well as local concern, particularly with regard to development fees and land dedications.

Having determined that a statewide interest in requiring land dedications and fees from developers may exist for the purpose of providing school facilities, we next consider whether the Legislature has preempted the field through its legislation.

State control of a field of law may occur through express language of a state statute or by implication, where the stature's scope and purpose indicate a legislative intent to entirely exclude local control. (*Lancaster v. Municipal Court* (1972) 6 Cal. 3d 805, 808; *Galvan v. Superior Court* (1969) 70 Cal. 2d 851, 859–860; *In re Lane* (1963) 58 Cal. 2d 99, 102–103; *Younger v. Berkeley City Council* (1975) 45 Cal. App. 3d 825, 830; 61 Ops. Cal. Atty. Gen. 61, 62 (1978).)

The statutory provisions concerning school impact fees and dedications do not expressly forbid local exactions for permanent school facilities. Hence, the question becomes whether the Legislature has by implication precluded such exactions.

Several factors lead to the conclusion that the Legislature intended to preclude the imposition of developer fees for permanent facilities. First, the school impact fee and dedication statutes place substantial limitations upon a city council or county board of supervisors to exact fees from residential developers. As previously set forth, subdivision (d) of section 65974 limits the land dedication or fees payment to "a reasonable relationship . . . to the needs of the community for interim elementary or high school facilities and shall be reasonably related and limited to the need for schools caused by the development," not to "exceed the amount necessary to pay five annual lease payments for the interim facilities." Such restrictions imposed by the Legislature would be meaningless if a city council or board of supervisors c6uld exact additional developer fees for permanent school facilities.

Second, as previously stated, the statutory scheme imposing school impact fees and dedications upon developers was arguably broad enough to cover permanent facilities when initially enacted. However, with the amendment of the statutory scheme to define "interim" facilities as "temporary" facilities (§ 65980), the Legislature indicated an intent to restrict the amount and purpose of the fees to be collected from developers. If the Legislature had intended that developers could be assessed fees for permanent school facilities pursuant to local ordinance, the addition of section 65980 would appear to be inconsistent with such an intention.

Third, the history of subdivider fees and dedications under the Subdivision Map Act indicates a legislative intent to allow but restrict local control in this area. In *Kelber v. City of Upland, supra,* 155 Cal. App. 2d 631, and *Santa Clara County Contractors etc. Assn. v. City of Santa Clara, supra,* 232 Cal. App. 2d 564, local ordinances imposing fees for schools and parks were struck down by the Court of Appeal as contrary to the provisions

of the Subdivision Map Act. Subsequently, the Legislature added what are now sections 66477 and 66478 to the Subdivision Map Act, expressly authorizing certain fees and dedications for schools and parks. The apparent intent of the Legislature was to allow a city or county to exact from subdividers what otherwise could not be accomplished by local ordinance. The grant of authority, however, was also in effect a restriction upon local regulations, where specific limitations were incorporated into the grant of authority. (See also §§ 66483–66486.)

Similarly, we believe that the express grant of authority to impose school impact fees and dedications upon developers under sections 65970–6598 1, with strict limitations as to amount, evidences an intent by the Legislature to preempt the field to the exclusion of local regulation. The Legislature believed not only that the statutory scheme was necessary but that developer fees and dedications for school purposes should be controlled by state law.

We recognize that newly enacted section 65979 might suggest a different conclusion. It provides:

> "After a school district has received an apportionment pursuant to [Education Code sections 17700–17749] the city or county shall not be permitted thereafter, pursuant to this chapter *or pursuant to any other school facilities financing arrangement such district may have with builders of residential developments,* to levy any fee or to require the dedication of any land within the attendance area of the district." (Emphasis added.)

The implication of section 65979 is that local exactions other than a section 65974 dedication or fee may be placed upon residential developers by a school district as long as the district has not received funding under Education Code sections 17700–17749. While a city council, board of supervisors, or school district board could reasonably supplement and further the purposes of sections 65970–65981 through additional regulation,[4] we believe that any developer fees for permanent school facilities would be invalid as contrary to the Legislature's intent in enacting sections 65970–65981.

[4] While local regulation may not enter an area fully occupied by general law, it may reasonably supplement and further the apparent intent of the governing state law. (*Baron v. City of Los Angeles. supra,* 2 Cal. 3d 535, 541; *Nat. Milk etc. Assn. v. City etc. of S.F.* (1942) 20 Cal. 2d 101, 109; *Madsen v. Oakland Unified Sch. Dist.* (1975) 45 Cal. App. 3d 574, 581; *Friends of Lake Arrowhead v. Board of Supervisors, supra*, 38 Cal. App. 3d 497, 505; *Santa Clara County Contractors etc. Assn. v. City of Santa Clara, supra*, 232 Cal. App. 2d 564, 573–575.)

The conclusion to the third question, therefore, is that a city or county may not levy a fee upon builders of residential developments for the purpose of providing permanent school facilities in addition to the fee for interim school facilities under section 65974.

*****