Developer Fees: An Overview of the Law and Recent Developments

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Overview

Purpose of Developer Fees
Types of Fees
Accounting Requirements
Replacement Development
Negotiating Mitigation Agreements

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To pay for the construction of school facilities necessitated by student population increases resulting from development.

Types of Fees

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• ‘Level 1’
  – Ed. Code, § 17620
  – Gov. Code, §§ 65995, et seq.

• ‘Level 2’
  – Gov. Code, §§ 65995.5, 65995.6

• ‘Level 3’
  – Gov. Code, §§ 65995.7
Level 1 Fees

- Statutorily-designated level of fees
- Subject to an inflationary increase by the State Allocation Board (SAB) in every even year, currently:
  - $3.48 per square foot of residential development
  - $0.56 per square foot of commercial development

Level 1 Fees (cont.)

- Requires justification study establishing the following:
  - Purpose of the fee;
  - Use to which the fee is to be put;
  - Reasonable relationship between the fee’s use and the type of development project; and
  - Reasonable relationship between the need for the public facility and the type of development project.

(Gov. Code, § 66001)

Level 2 Fees

- No set amount – unique to each district.
- For eligibility, must have established eligibility for State funding.
### Level 2 Fees (cont.)

- Additional eligibility requirements – must satisfy at least two of four requirements:
  - Substantial enrollment in multi-track year-round (MTYRE) schedule.
  - Local bond in the last four years with a vote of more than 50%.
  - Debt issuance or obligations for capital outlay equivalent to 30% of the local bonding capacity.
  - At least 20% of the teaching stations in relocatable classrooms.

(Gov. Code, § 65995.5, subd. (b)(3))

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### Level 2 Fees (cont.)

- Amount established by statutory formula, intended to be equal to 50% of construction costs and 50% of site development costs.
- Amount determined by School Facilities Needs Analysis (“SFNA”) pursuant to the following formula:
  - Multiply the number of projected unhoused pupils by the standard school facilities program grant, which is based upon grade level;
  - Add all site acquisition and development costs.
  - Subtract local funds dedicated by the governing board to facilities necessitated by new construction.
  - Divide the subtotal by the projected total square footage of assessable space of residential units anticipated to be constructed within the next five years.

(Gov. Code, § 65995.5)

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Level 3 Fees

- Effectively doubles Level 2 fees
- Requires authorization / trigger by the SAB when the State is no longer making apportionments for New Construction
- Requires current School Facility Needs Analysis (SFNA) pursuant to Government Code sections 65995.5-65995.7

How are Level 3 fees calculated?
- In many cases, the total fee charged under Level 3 will simply be double the District's Level 2 fee
- Can be more than double Level 2 fees because no adjustment is required for available local funds

Status of Level 3 Fees

- May 25, 2016: SAB certification that state funds are no longer available for new school construction
- May 26, 2016: California Building Industry Association (“CBIA”) lawsuit and temporary restraining order preventing the SAB from implementing or taking further action authorizing imposition of Level 3 fees
  - Court denied request for injunction in August, 2016
  - CBIA appealed and the Appellate Court issued a stay of the trial court proceedings
- November 1, 2016: Appellate Court lifted the stay of proceedings, at which point eligible school districts could collect Level 3 fees if statutory criteria are met
Status of Level 3 Fees (cont.)

- November 8, 2016: Passage of Proposition 51, a statewide school facilities bond measure
- September 6, 2017: $433 million in funding apportionments by the State
- What does this mean for Level 3 fees?

Accounting Requirements

- Annual requirements
  - Gov. Code, § 66006
- Five-year finding requirements
  - Gov. Code § 66001
Accounting Requirements: Annual

- Within 180 days of the end of the district's fiscal year, the District must make public a detailed report concerning each account containing funds received.
- Must include specific information as required by Government Code section 66006(b)(1).
- Public review.

Accounting Requirements: Five-Year

- At five year intervals from the first deposit into the developer fee account, district must also make the findings regarding unexpended funds:
  - The purpose of the fee.
  - A reasonable relationship between the fee and the fee’s purpose.
  - All sources and amounts of funding anticipated to complete financing of incomplete projects.
  - The approximate dates on which such funding is expected.
- Warning: the penalty for noncompliance can be a mandatory refund of all unexpended fees.
## Replacement Property

### Replacement Property and “Type” of Development

- Districts may impose fees upon replacement projects.
- District’s justification study must demonstrate a reasonable relationship between the fee and the use to which it will be put.

## Replacement Property (cont.)

Other “types” now being tested...stay tuned!
Negotiating Mitigation Agreements

• SB 50 was not the end of the story

Negotiating Mitigation Agreements (cont.)

• Ability to raise issues other than school facility overcrowding (*Chawanakee Unified School District v. County of Madera* (2011) 196 Cal.App.4th 1016.)

• Other options

Developer Fee Handbook for School Facilities

• Copies can be ordered by visiting the following link: http://www.lozanosmith.com/dfhreg.php

• Questions can be directed to clientservices@lozanosmith.com
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Harold M. Freiman is a Partner in Lozano Smith’s Walnut Creek office. He represents school districts, county offices of education, and community college districts in such areas as school facilities, property, general education law, governing boards, student issues, business, and general litigation. He is a recognized leader on such topics as developer fees, school district reorganization, surplus property, the Brown Act and the Public Records Act. Additionally, he provides advice and litigation services related to the California Environmental Quality Act (CEQA) to cities, special districts and educational agencies. He has been with the firm and representing public entities for over 20 years. Mr. Freiman has appeared before the California Supreme Court on behalf of the California School Boards Association on several occasions. He has been named a Northern California “Super Lawyer.” He also received the 2014 CASBO Associate of the Year Award for his exemplary service to schools and to CASBO for many years.

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Ms. Rem has extensive experience advising clients regarding CEQA issues, including procedural requirements, deadlines and statutes of limitation, exemptions, and adequacy of environmental impact reports and other documents. She represented the California School Boards Association as an amicus curiae in the matter of Berkeley Air Quality Preservation v. City of Berkeley, a recent CEQA case before the California Supreme Court. She also has extensive eminent domain experience, and assists school districts with a variety of real property issues including sale and lease transactions, land use and zoning issues, and surplus property requirements. Ms. Rem is experienced in reviewing and providing advice to clients relating to various types of business contracts. She also regularly advises clients regarding school facilities fees and construction matters.