

CASBO
2022

Annual Conference

March 29 – April 1, 2022 | SAFE Credit Union Convention Center

JEOPARDY!
DEVELOPER FEES EDITION
OVERVIEW, WHAT'S NEW,
AND
ALL ABOUT ADUs

Presented by:
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DANNIS WOLIVER KELLEY

The views and opinions expressed in this presentation are those of the authors and do not necessarily reflect those of CASBO. Attorneys at Law

The background of the title card features a vibrant, radial gradient transitioning from deep blue at the edges to a bright, glowing yellow-orange at the center. This central glow is composed of numerous fine, radiating lines that create a sunburst or lens flare effect. The overall aesthetic is dynamic and energetic, suggesting a sense of excitement and discovery.

JEOPARDY!

DEVELOPER FEES EDITION

**ELEMENTARY
MY DEAR
WATSON**

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ELEMENTARY
MY DEAR
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ORDER IN THE
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ELEMENTARY MY DEAR WATSON

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**AN AMOUNT OF MONEY THAT IS PAID
TO SCHOOL DISTRICTS BY
DEVELOPERS/PROPERTY OWNERS**

What are Developer Fees?



- Fees paid to school districts by property owners/developers to mitigate the impact created by new development within a school district's boundaries and on the school district's facilities
- Also referred to as: School Impact Fees; Development Impact Fees; or "Level 1, 2, 3 Fees"

	LEVEL 1	LEVEL 2	LEVEL 3
PURPOSE	To fund the construction and reconstruction of school facilities necessary to address the impacts of new development.	Same as Level 1. School facilities must be listed in the Schools Facility Needs Analysis. Intended to represent 50% of the school district's costs to accommodate increased enrollment.	Same as Level 1. School facilities must be listed in the Schools Facility Needs Analysis. Intended to cover 100% of a school district's cost to accommodate the district's increased enrollment.
AMOUNT	Rates set by State Allocation Board (SAB) in January of even numbered years.*	Varies by district according to local factors.	Amount is approximately double the Level 2 fee.
LEVIED ON	Residential Commercial	Residential Only	Residential Only
	Ed. Code, § 17620 et. seq.: Authorizes the collection of Level 1 Developer Fees. Gov. Code, § 65995: Establishes the rates and parameters for Level 1 fees.	Gov. Code, §§ 65995.5-65995.7: Establishes the procedures for adoption of Level 2/3 fees.	

* Gov. Code, § 65995 et. seq.: Establishes the types of fees and rates.

* Gov. Code, § 66000 et. seq. (Mitigation Fee Act): Sets process for justifying fees and appealing or challenging fees.



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**NAME OF THE FORM THAT IS ISSUED
BY A SCHOOL DISTRICT TO A
DEVELOPER WHEN FEES ARE PAID
FOR A PROJECT**

What is a Certificate of Compliance?



- A form used by a school district to confirm either (i) payment of school impact fees for a project, or (ii) waiver/exemption from fee payment for a project, as determined by the school district, before the building permit is issued
- This form should include:
 - the development category (residential or commercial/industrial)
 - type of construction (new construction, tear-down/rebuild, addition/remodel/expansion)
 - project square footage as certified by the City/County, and
 - fee computation and amount paid to the school district, and further provides **notice of the protest process**.

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A CONTRACT ENTERED INTO
BETWEEN A DEVELOPER AND SCHOOL
DISTRICT THAT PROVIDES
ALTERNATIVE MEANS OF
MITIGATING THE PROJECT IN LIEU
OF FEE PAYMENT

What is a Mitigation Agreement?



- A developer fee mitigation agreement is a freely negotiated and voluntary agreement entered into between a developer and a school district upon mutually agreeable terms which provides alternative means of mitigating the impact of the development on school district facilities in lieu of the payment of statutory developer fees
- Also referred to as a Mutual Benefit Agreement

What is in it for the developer?

- Why would a developer voluntarily agree to pay more than the current developer fee?
 - To guarantee the timing of school construction
 - Project support
 - Marketing and promotional materials
 - Timing
 - Advantage to a developer not to have to come out-of-pocket for the developer fee at the time of building permit.
 - May allow developer more time to construct project.
 - May actually be cheaper for developer (i.e., locked in rates; use of own manpower for developer built facilities, etc.)



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“SFNA”

What is a School Facilities Needs Analysis?



- Evaluation of:
 - individual school district's need for facilities for unhoused students attributable to new development over the next five years
 - district's surplus sites and other local funding sources
 - enrollment and capacity
- Valid for ONE year
- Alternative fee rates are effective immediately upon adoption (Level 2/Level 3 fees)

SFNA: Eligibility for Alternative Fees

- Timely application to SAB for state funding
 - Receipt of an eligibility determination from SAB
- Meet TWO of the following four statutory criteria:
 - Have specified percentage of “substantial enrollment” in multitrack year-round education
 - Meet specified bonding/debt capacity requirements
 - Had a GO Bond on the ballot within last four years that received at least 50% plus one of votes cast
 - At least 20% of teaching stations are portable



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THE STATE ALLOCATION BOARD
RECENTLY INCREASED THE RATES
FOR THIS TYPE (OR LEVEL) OF
DEVELOPER FEES

What are Level 1 Fees?



- The “Statutory Fee” amount is set by statute and adjusted every two years by the State Allocation Board
- As of “January” 2022
 - \$4.79 per sq. ft. of residential
 - \$0.78 per sq. ft. of commercial/industrial
- Applies to new residential, new commercial/ industrial, and “other” residential when an increase of assessable space exceeds 500 sq. ft.
- Fee-Sharing for non-unified school districts
 - What can go wrong?

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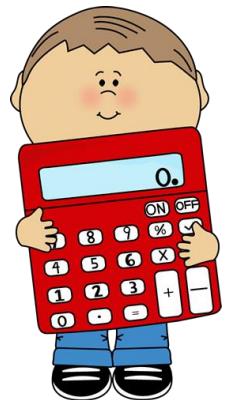
THE LAW REQUIRES SCHOOL DISTRICTS TO BE ACCOUNTABLE FOR DEVELOPER FEES COLLECTED AND EXPENDED, AND PREPARE TWO TYPES OF REPORTS

What are the annual and five-year reports?



- The law requires school districts to be accountable on both an annual and five-year basis for the developer fees collected and expended
- Annual Report:
 - Presents the amount of developer fees collected and expended throughout the fiscal year
- Five-Year Report:
 - Detailed analysis of a school district's overall use of developer fees to illustrate the extent to which the fees are necessary to serve the district's facilities needs
- What are the penalties for non-compliance?

Comparing the Two Reports



ANNUAL REPORT GOV. CODE, § 66006(b)

1. Type of fees collected
2. Amounts collected
3. Beginning and ending balances
4. Total amounts collected and interest earned
5. Project(s) information
6. Interfund transfers
7. Amount of refunds

FIVE-YEAR REPORT GOV. CODE, § 66001(d)

1. Nexus
2. Purpose of fees
3. All sources of funds needed for projects
4. Anticipated date of receipt of funds
5. Approximate dates of construction

Make available no later than one hundred (180) days from end of last fiscal year (i.e., by December 27).

- Prepared five years after the first fiscal year the district collected fees. May be prepared annually.
- Make available no later than 180 days from end of last fiscal year (i.e., by December 27).

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**AS OF JANUARY 1, 2022, AB 602
MANDATES THIS DOCUMENT BE
UPDATED AT LEAST ONCE EVERY
EIGHT YEARS IN ORDER FOR A
SCHOOL DISTRICT TO IMPOSE
LEVEL 1 DEVELOPER FEES**

What is a “Nexus Study” or Fee Justification Study?



- Level 1 fee amount is based on a Fee Justification Study
 - Show reasonable relationship between the need for a public facility and type of development
- Establish Nexus:
 - Identify purpose of fees
 - Identify use to which fee is to be put
 - Determine if there is a reasonable relationship between type of development and use of fees
 - Determine if there is a reasonable relationship between type of development and need for school facility

What's Up with AB 602?

- When applicable, the nexus study shall identify the existing level of service for each public facility, identify the proposed new level of service, and include an explanation of why the new level of service is appropriate.
- If a nexus study supports the increase of an existing fee, the local agency shall review the assumptions of the nexus study supporting the original fee and evaluate the amount of fees collected under the original fee.
- All studies shall be adopted at a public hearing with at least 30 days' notice, and the local agency shall notify any member of the public that requests notice of intent to begin an impact fee nexus study of the date of the hearing.
- Studies shall be updated at least every eight years, from the period beginning on January 1, 2022.



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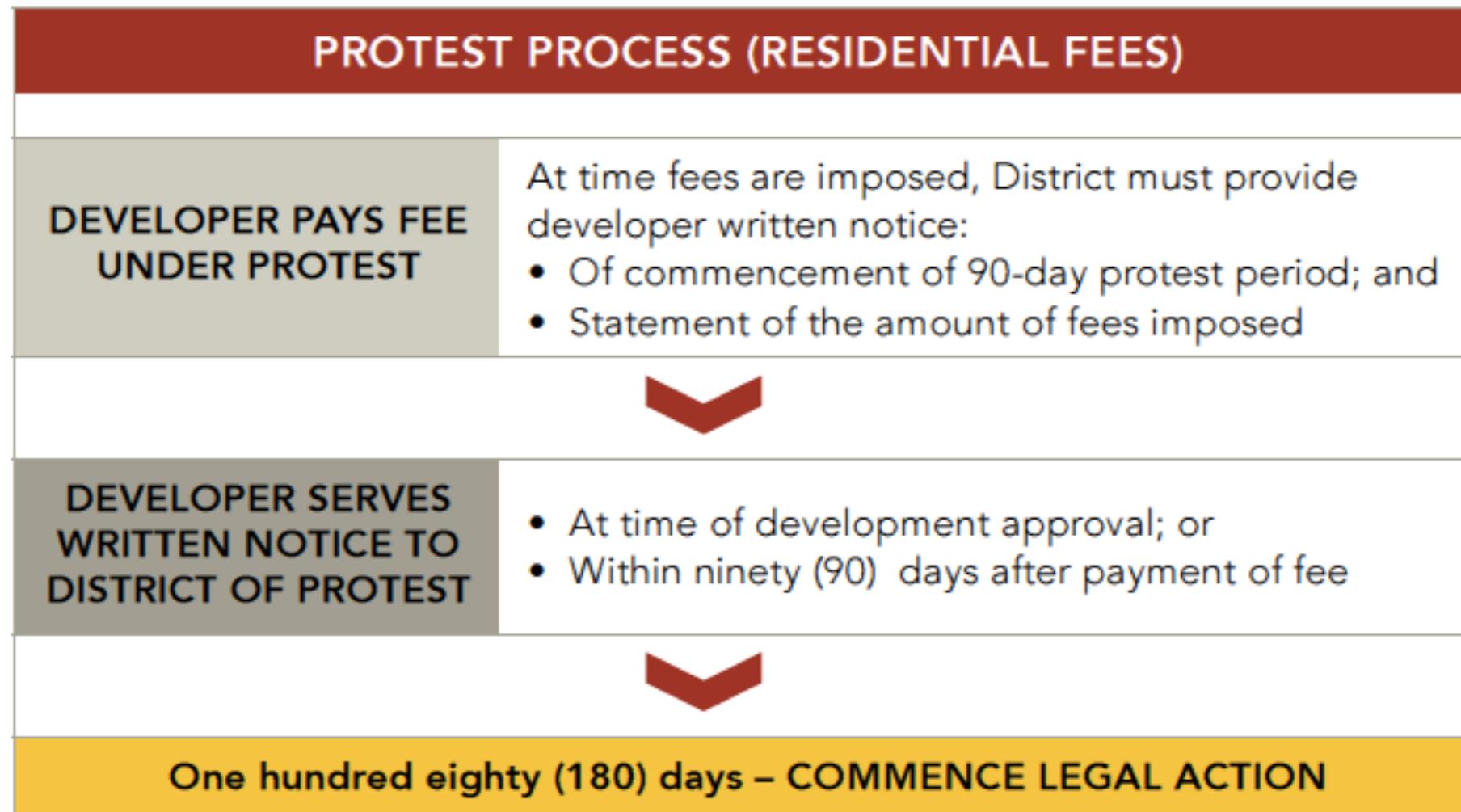
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“PAC”

What are Protests, Appeals, and Challenges?



More PAC Details

- What happens if Developer wins the protest?
 - 8% interest
- Protests for Commercial/Industrial Fees?
 - The Board must set forth the protest process in the fee resolution
 - Includes opportunity for a hearing
 - Grounds for an appeal, include:
 - Project category is inaccurate
 - Employee/pupil generation factors under project category are inaccurate as applied to project
 - Burden is on the appealing party
- *CP V Walnut, LLC vs. Fremont Unified School District*



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**THE POINT IN TIME WHEN THE
DEVELOPER IS REQUIRED TO PAY
SCHOOL FEES**

What is prior to building permit issuance?



- Absent an agreement with the Governing Board, a city, county, or OSHPD “shall not issue a building permit for any construction absent certification” by the school district that the fee was paid or the fees don’t apply to the construction in the district’s determination
- Who collects the fee payment?
 - School district’s legal authority to collect developer fees even if the local planning agency is not collecting fees

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**SCHOOL DISTRICTS CAN USE
DEVELOPER FEES TO PAY FOR THESE
TYPES OF PROJECTS**

What is “Construction and Reconstruction of School Facilities”? (impacted by student enrollment)



- In general, the law requires the school district show a reasonable relationship between the impact of the development and the use of the fees
- “Refurbishment”
- Most questions regarding permissible expenditures of developer fees can be answered by considering the following:
 - Does the work include construction or reconstruction of a school facility?
 - Would the same work have to be done absent the student growth resulting from new development?

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**AB 602 REQUIRES THE NEXUS STUDY
TO EVALUATE THIS QUALITATIVE
CONDITION OF SCHOOL FACILITIES**

What is “Level of Service”?



- “When applicable, the nexus study shall identify the existing level of service for each public facility, identify the proposed new level of service, and include an explanation of why the new level of service is appropriate.”
- What does this mean?
 - condition and adequacy of existing capacity
 - service and educational goals of the school district
 - facilities master plan

How do we maintain current levels of service?

- Law allows fees to include the costs attributable to the increased demand for public facilities reasonably related to the development project(s) in which the fee is imposed in order to (1) refurbish existing facilities to maintain the existing level of service or (2) achieve an adopted level of service that is consistent with the general plan
- May developer fees be used to “modernize” existing facilities?
 - Yes, if refurbishment is tied to increased demand and necessary to maintain existing levels of service
 - Reminder! May not be for deferred or routine maintenance
 - *Shapell Industries, Inc. v. Governing Board of the Milpitas Unified School District* (1991)



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“ADU”



What is Accessory Dwelling Unit?



- Can be called casitas, granny flats, in-law units, accessory units, or converted living space
- An attached or a detached residential dwelling unit that provides complete independent living facilities
- What exactly is a “residential dwelling unit”?
 - facilities and provisions for living, sleeping, eating, cooking, and sanitation
 - within that living space or within (or adjacent to) the attached single-family or multifamily dwelling unit

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Questions?



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