



SCHOOL & COLLEGE LEGAL SERVICES OF CALIFORNIA

*A Joint Powers Authority
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LEGAL UPDATE

February 10, 2016

To: Superintendents, Member School Districts (K-12)

From: Loren W. Soukup 
Associate General Counsel

Subject: Procedure for Increasing School Facilities Fees
Memo No. 06-2016

At its January 16, 2016 meeting, the State Allocation Board (SAB) increased its Level 1 developer fees. The maximum fees on residential construction are now set at \$3.39 and on commercial and industrial construction at \$0.55.

Attachment 1 to this memorandum discusses, in detail, the steps that **must** be followed before levying Level 1 fees at these higher rates. Neither this attachment nor this memorandum will address the alternative fees permitted by SB 50-- frequently referred to as Level 2 and Level 3 fees, which are governed by different procedures and requirements.

Attachment 2 to this memorandum is a resolution to increase statutory school facilities fees to the amounts now permitted by the SAB's action. This resolution does the following:

1. Provides for increasing fees as authorized by Government Code Section 65995 by the increase of the State Allocation Board's statewide cost index adopted in January on a non-urgency basis. (If your district wishes to adopt the increase on an urgency basis, please contact our office.)
2. Provides for review of the district's continuing need to levy fees and to increase those fees as authorized and described in item 1 above.
3. Provides for inclusion of the School Facility Plan/Developer Fee Study (sometimes called a "Superintendent's Report") or other justification document(s) (see **Attachment 1**) as Exhibit "A" to the resolution your board adopts, and includes a page marked as Exhibit "A." **Given that a number of recent court decisions have invalidated School Facility Plan/Developer Fee Studies, we**

recommend that you contact our office to review the justification document(s) that the district obtains before they are adopted by the governing board.

Attachment 3 is a notice which can be used to give the notice required by Government Code Section 6062a. This section requires notice to be published twice in a newspaper published weekly or more often, with at least five days between the two publications and the first publication at least ten days prior to the board meeting.

If you have any questions or if your individual situation requires tailoring of a specific resolution or other documents, please feel free to contact this office for assistance.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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ATTACHMENT 1

INCREASING SCHOOL FACILITIES FEES

Prior to increasing fees you must review and update your School Facilities Plan/Developer Fee Study (also called Superintendent's Report) in order to show that your district can justify the increased fees. If you have not recently updated your study, this gives each district the opportunity to fine tune its justification documents in order to show both the need for the fees (construction or reconstruction of school facilities) and the nexus between the fees and the residential, commercial or industrial construction occurring in the district. The following guidelines are provided for increasing the fees:

1. **Determining Whether to Increase Fees**

Your district must have evidence that justifies increasing the fees. The court decisions that have recently invalidated a number of districts' developer fees have invariably focused on lack of evidence to support the fees. The increased fees must therefore bear a reasonable relationship to the need for construction and reconstruction of school facilities caused by the residential, commercial or industrial construction. The fees may not exceed the cost of the school facilities that are needed because of the residential, commercial or industrial construction.

A district should revise its School Facilities Plan that justifies fees to reflect changes in enrollment projections and likely increases in the costs for school construction. The district may also need to update the scope of school construction projects towards which fees will be applied. There may also be previously unanticipated residential, commercial or industrial construction that will increase a district's need for facilities that should be included. A revised five-year Capital Facilities Plan or construction schedule should also be included.

2. **Commercial/Industrial Development Study**

Districts may analyze the impact of commercial/industrial development by categories (i.e. warehouse, office complex, retail store, etc.) pursuant to either an individual study or by use of a study based upon a San Diego Association of Governments ("SANDAG") Report. A copy of this report entitled "Smart Growth: Trip Generation/Parking Study" may be obtained at:

<http://www.sandag.org/index.asp?projectid=334&fuseaction=projects.detail>

If you do not analyze impact by category, you must determine impact on a case-by-case basis.

3. The Plan

The plan justifying the increase of fees, including any revisions, should be completed at least ten (10) days prior to the public hearings by the district governing board on the levying of fees.

4. Environmental Impact of Increasing Fees

In 1990, the Legislature added Government Code Section 53080.1 (now Education Code Section 17621) which clarified that the adoption or increase of fees is not subject to CEQA. It is not necessary for districts to file a negative declaration or categorical exemption prior to enacting or increasing fees.

5. Notification of Public Hearing

The district must hold a public hearing, at which oral or written presentations may be made, as part of a **regularly scheduled** board meeting to consider levying developer fees. At least 14 days before the meeting, written notice must be given to all persons and organizations who have filed a written request for notice on new or revised fees. Such notice must include a general explanation of the matter to be considered and a statement that data is available justifying the fees, including the estimated cost of providing facilities for which fees are to be levied and anticipated revenue sources. Written request for these mailed notices are valid for one year from the date they are filed unless a renewal request is filed. Such renewal request must be filed on or before April 1st of each year. The district may establish a reasonable annual charge for sending these notices. (Also see Government Code Section 66016, attached.)

At least 10 days prior to the date of the meeting, you must begin to publish notice of the time and place of the public hearing, together with a general explanation of the matter to be considered, in a newspaper published once a week or oftener (sample attached). The notification must be published two times with at least 5 days between the dates of the first and last publication, not counting publication dates (Example: your meeting is on the 11th. Date of first publication is the 1st, second publication is the 6th. Also see Government Code Section 6062a and 66018, attached.) While not required by the law, the district should obtain a proof of publication from the newspaper and file it with the agenda or minutes of the board meeting.

The Agenda and the Board meeting should also meet the requirements of the Brown Act.

6. Availability of Documentation

At least 10 days before the public meeting, the district should also make available for public review all documents, including the revised School Facilities Plan, which the Board will consider. The data should include:

- A) The purpose of the fee.

- B) The intended use of the fee. If the use is financing public facilities, the data may reference a capital improvement plan or other public documents that identify the public facilities for which the fee is charged.
- C) A showing of how there is reasonable relationship between the fee's use and the type of development project on which the fee is imposed.
- D) A showing of how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.
- E) A showing of how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development project on which the fee is imposed.
- F) The amount of cost or estimated cost to provide the school facilities and the revenue sources estimated to provide the facilities.
- G) A copy of the district's master plan or capital improvement plan for use of fees. (See Government Code Sections 66001(a)(2), 66002 and 65403, attached)
- H) A map of school district boundaries (area in which fees will be charged).

7. Public Hearing

At the time and date specified, the board should conduct a public hearing. This public hearing should be clearly listed on the agenda, including the time of the public hearing. The hearing cannot start until the time set, but may start later than the time set. The Superintendent should present the School Facilities Plan and any further explanations regarding the recommendation to increase fees. A summary of the data supporting the recommendation should be presented. The public should be specifically invited to make oral and written comments. Following public comment, the hearing should be formally concluded and the board should then consider adoption of the resolution justifying the fees. The Board may also wish to formally adopt a master plan or capital improvement plan for use of fees (see Government Code Sections 66001(a)(2), 66002 and 65403, attached). Following adoption, certified copies of the resolution, together with all relevant supporting documentation and a map clearly indicating the boundaries of the area subject to the fee should be provided as notice to the appropriate city or county agencies.

A non-urgency resolution setting fees shall become effective no sooner than 60 days from the date of adoption of the resolution. A majority vote is required for its successful adoption.

8. Notification of City or County

As discussed above, upon acting to increase fees, you must notify the appropriate city and/or county planning department of this action.

9. Sharing Fees

If your district is sharing fees with another district due to common territory, the agreement to share fees may require an amendment, although, if you are using the standard agreement prepared by our office, fee increases are already included in the agreement. An amended agreement may be adopted at the same time your district acts on the fee increase. Education Code Section 17623 provides for a method for districts with common territory, which cannot otherwise agree, to arbitrate the division of fees. A copy of your fee sharing agreement must be sent to the State Allocation Board.

If you have any questions regarding these procedures, please contact any of the attorneys in our office.

ATTACHMENT 2

NON-URGENCY RESOLUTION

RESOLUTION OF THE GOVERNING BOARD OF THE
_____ SCHOOL DISTRICT OF _____ COUNTY
INCREASING SCHOOL FACILITIES FEES ON RESIDENTIAL,
COMMERCIAL, OR INDUSTRIAL CONSTRUCTION PROJECTS
PURSUANT TO GOVERNMENT CODE SECTION 65995.

a. WHEREAS, the territory within the _____ School District has experienced significant amounts of growth and new residential, commercial, and industrial construction in recent times, causing increased and changing student enrollments in the district's schools and placing demands upon the district's capital facilities; and

b. WHEREAS, Education Code Section 17620 authorizes school districts to levy a fee, charge, dedication, or other form of requirement against any development project for the construction or reconstruction of school facilities; and

c. WHEREAS, this Board has previously adopted a Resolution to levy school facilities fees pursuant to Education Code Section 17620, and it is now appropriate to review the findings made in that Resolution to determine whether it is still necessary to levy such fees and appropriate rates; and

d. WHEREAS, Government Code Section 65995(b)(3) provides that the maximum fee rates allowed under Education Code Section 17620 shall be bi-annually increased according to the adjustment for inflation in the statewide cost index for Class B construction as determined in January of 1990 and every two years thereafter by the State Allocation Board; and

e. WHEREAS, the maximum fee rates set in 2014 for school facilities were \$3.36 per square foot of assessable space for residential construction and \$.54 per square foot for commercial/industrial construction and senior citizen housing; and

f. WHEREAS, the State Allocation Board has set the inflation adjustment for 2016, setting the maximum fee rates under Education Code Section 17620 at \$3.39 per square foot for residential construction and \$.55 per square foot for commercial/industrial construction and senior citizen housing; and

g. WHEREAS, this Governing Board has received and considered at a duly noticed public meeting a report from its Superintendent analyzing the capital facilities needs of the district and the revenue sources available, as well as other evidence, and has concluded that it was necessary and appropriate to continue to levy fees under the authority of Education Code Section 17620 and to increase the fees in the amounts stated below; and

h. WHEREAS, Education Code Sections 17622 and 17625 impose requirements for the assessment of fees on agricultural buildings and manufactured and mobile homes; and

i. WHEREAS, Education Code Section 17620 provides school district school facilities fees are subject to the requirements of Government Code Section 66007, which in turn provides that fees such as school facilities fees shall be collected at the time of final inspection or certification of occupancy unless a District has justified collection at an earlier time; and

j. WHEREAS, by previous Resolution this governing board has made specific findings, as required by Government Code Section 66007, justifying the collection of fees at time of building permit, and

k. WHEREAS, Education Code Section 17621 further requires that school districts adopting or increasing fees transmit a copy of the Resolution to each city and each county in which the district is situated, accompanied by all relevant supporting documentation and a map clearly indicating the boundaries of the area subject to the fee.

NOW, THEREFORE, BE IT RESOLVED by the Governing Board of the _____ School District as follows:

1. Based on all the findings and evidence contained in this Board's earlier Resolutions on the adoption of fees, and the evidence presented to this Board at the hearings, and the report of its Superintendent, attached hereto as Exhibit 1 and hereby incorporated by reference, the Board reaffirms its earlier Resolutions, adopts the findings and conclusions set forth in Exhibit "A" as its own, and further finds:

(a) The purpose of the fees adopted and confirmed in this Resolution is to fund the construction or reconstruction of school facilities;

(b) These fees will be used to fund the construction or reconstruction of school facilities needed to reduce overcrowding which exists in the District and impairs the normal functioning of educational programs;

(c) The overcrowding to be reduced by use of these fees exists because the enrollment projected to result from continuing residential, commercial, or industrial construction exceeds the capacity of the District to provide adequate housing;

(d) The amount of fees to be paid pursuant to this Resolution bears a reasonable relationship and is limited to the needs of the community for elementary or high school facilities and is reasonably related and limited to the need for schools caused by residential, commercial, or industrial construction; and

(e) The amount of fees to be paid pursuant to this Resolution does not exceed the estimated reasonable costs of providing for the construction or reconstruction of school facilities necessitated by the construction projects from which the fees are to be collected.

2. This Board adopts and levies the following fees upon any construction project within the boundaries of the district, for the construction or reconstruction of school facilities:

(a) \$ 3.39 per square foot of all assessable residential space as defined by Government Code Section 65995(b)(1); and

(b) \$.55 per square foot of all chargeable and enclosed space of all new commercial and industrial development as defined by Government Code Section 65995(b)(2).

(c) \$.55 per square foot for all assessable residential space for senior citizen housing, as defined by Government Code Section 65995.1(a).

3. Before the levying of fees upon any greenhouse or other space that is offered or enclosed for agricultural purpose, the Board shall comply with the requirements of Education Code Section 17622, and any amendments of any successor law thereto.

4. The Board acts to provide that the District shall levy fees upon a manufactured home or mobile home in accordance with the provisions of Education Code Section 17625, and any amendments or any successor laws thereto.

5. The Board directs that fees collected shall be placed in a separate account and expended or committed for the lawful purposes authorized under Education Code Section 17620. The Board shall review this account every fiscal year. Should the district have unexpended or uncommitted fees within five (5) years of collection, the district shall make findings or refund the fees as required by state law.

6. The Board directs that fees collected pursuant to this Resolution be collected at time of application for building permits.

7. The policies set forth in this Resolution are not exclusive and the Board reserves the authority to undertake other or additional methods to finance school facilities, including, but not limited to, the Mello Roos Community Facilities Act of 1982 (Government Code Section 53311 et seq.) and any such other funding mechanisms as authorized by law. This Board reserves the authority to substitute at its discretion the dedication of land or other property or other requirement in lieu of the fees levied by way of this Resolution. The Board further reserves the authority to require further mitigation in excess of the statutory fee if so authorized by law.

8. The Superintendent is directed to deliver a copy of this Resolution supporting documents and a map of the district boundaries to the Building Officials of the County of _____ (and the City of _____) and to request that no building permits be issued after _____ (the 60th day from date of adoption of this Resolution) for any construction subject to the above fees absent certification from this district of compliance with said fee requirements.

The foregoing Resolution was moved by Board Member _____, seconded by Board Member _____, and adopted on roll call vote of the members of the Governing Board of the _____ School District.

Board Member _____ (AYE/NO)

AYES: _____ NOES: _____ ABSENT/NOT VOTING: _____

WHEREUPON, the President declared the foregoing Resolution adopted, and

SO ORDERED;

PRESIDENT

SCHOOL DISTRICT

* * * * *

EXHIBIT A

(Superintendent's Report and/or Developer Fee Study)

ATTACHMENT 3

**NOTICE
PUBLIC HEARING
_____ SCHOOL DISTRICT**

PLEASE BE ON NOTICE that on (Date) at (Time) at (Address) the _____ School District Governing Board will hold a public hearing at which oral and written presentations may be made. The purpose of the public hearing is for public input on the consideration by the Board of increasing school facilities fees to be levied against residential, commercial, or industrial construction within the boundaries of the District, such fees to be collected for the purpose of funding the construction or reconstruction of school facilities.

Government Code Sections

§ 6062a. Ten days; optional publications

Publication of notice pursuant to this section shall be for 10 days in a newspaper regularly published once a week or oftener. Two publications, with at least five days intervening between the dates of first and last publication not counting such publication dates, are sufficient. The period of notice commences upon the first day of publication and terminates at the end of the tenth day, including therein the first day.

§ 65403. Five-year capital improvement program; adoption by special district, unified, elementary or high school district or joint powers agency that constructs or maintains public facilities

(a) Each special district, each unified, elementary, and high school district, and each agency created by a joint powers agreement pursuant to Article 1 (commencing with Section 6500) of Chapter 5 of Division 7 of Title 1 that constructs or maintains public facilities essential to the growth and maintenance of an urban population may prepare a five-year capital improvement program. This section shall not preclude, limit, or govern any other method of capital improvement planning and shall not apply to any district or agency unless it specifically determines to implement this section. As used in this section, "public facilities" means any of the following:

- (1) Public buildings, including schools and related facilities.
 - (2) Facilities for the storage, treatment, and distribution of nonagricultural water.
 - (3) Facilities for the collection, treatment, reclamation, and disposal of sewage.
 - (4) Facilities for the collection and disposal of storm waters and for flood control purposes.
 - (5) Facilities for the generation of electricity and the distribution of gas and electricity.
 - (6) Transportation and transit facilities, including, but not limited to, streets, roads, harbors, ports, airports, and related facilities.
 - (7) Parks and recreation facilities. However, this section shall not apply to a special district which constructs or maintains parks and recreation facilities if the annual operating budget of the district does not exceed one hundred thousand dollars (\$100,000).
- (b) The five-year capital improvement program shall indicate the location, size, time of availability, means of financing, including a schedule for the repayment of bonded indebtedness, and estimates of operation costs for all proposed and related capital improvements. The five-year capital improvement program shall also indicate a schedule for maintenance and rehabilitation and an estimate of useful life of all existing and proposed capital improvements.
- (c) The capital improvement program shall be adopted by, and shall be annually reviewed and revised by, resolution of the governing body of the district or local agency. Annual revisions

shall include an extension of the program for an additional year to update the five-year program. At least 60 days prior to its adoption or annual revision, as the case may be, the capital improvement program shall be referred to the planning agency of each affected city and county within which the district or agency operates, for review as to its consistency with the applicable general plan, any applicable specific plans, and all elements and parts of the plan. Failure of the planning agency to report its findings within 40 days after receipt of a capital improvement program or revision of the program shall be conclusively deemed to constitute a finding that the capital improvement program is consistent with the general plan.

A district or local agency shall not carry out its capital improvement program or any part of the program if the planning agency finds that the capital improvement program or a part of the capital improvement program is not consistent with the applicable general plan, any specific plans, and all elements and parts of the plan. A district or local agency may overrule the finding and carry out its capital improvement program.

(d) Before adopting its capital improvement program, or annual revisions of the program, the governing body of each special district, each unified, elementary, and high school district, and each agency created by a joint powers agreement shall hold at least one public hearing. Notice of the time and place of the hearing shall be given pursuant to Section 65090. In addition, mailed notice shall be given to any city or county which may be significantly affected by the capital improvement program.

§ 66002. Capital improvement plan; adoption; updates; hearings

(a) Any local agency which levies a fee subject to Section 66001 may adopt a capital improvement plan, which shall indicate the approximate location, size, time of availability, and estimates of cost for all facilities or improvements to be financed with the fees.

(b) The capital improvement plan shall be adopted by, and shall be annually updated by, a resolution of the governing body of the local agency adopted at a noticed public hearing. Notice of the hearing shall be given pursuant to Section 65090. In addition, mailed notice shall be given to any city or county which may be significantly affected by the capital improvement plan. This notice shall be given no later than the date the local agency notices the public hearing pursuant to Section 65090. The information in the notice shall be not less than the information contained in the notice of public hearing and shall be given by first-class mail or personal delivery.

(c) "Facility" or "improvement," as used in this section, means any of the following:

(1) Public buildings, including schools and related facilities; provided that school facilities shall not be included if Senate Bill 97 of the 1987-88 Regular Session is enacted and becomes effective on or before January 1, 1988.

(2) Facilities for the storage, treatment, and distribution of nonagricultural water.

(3) Facilities for the collection, treatment, reclamation, and disposal of sewage.

- (4) Facilities for the collection and disposal of storm waters and for flood control purposes.
- (5) Facilities for the generation of electricity and the distribution of gas and electricity.
- (6) Transportation and transit facilities, including but not limited to streets and supporting improvements, roads, overpasses, bridges, harbors, ports, airports, and related facilities.
- (7) Parks and recreation facilities.
- (8) Any other capital project identified in the capital facilities plan adopted pursuant to Section 66002.

§ 66016. Local agency fees; new fees and increases; procedures

(a) Prior to levying a new fee or service charge, or prior to approving an increase in an existing fee or service charge, a local agency shall hold at least one open and public meeting, at which oral or written presentations can be made, as part of a regularly scheduled meeting. Notice of the time and place of the meeting, including a general explanation of the matter to be considered, and a statement that the data required by this section is available, shall be mailed at least 14 days prior to the meeting to any interested party who files a written request with the local agency for mailed notice of the meeting on new or increased fees or service charges. Any written request for mailed notices shall be valid for one year from the date on which it is filed unless a renewal request is filed. Renewal requests for mailed notices shall be filed on or before April 1 of each year. The legislative body may establish a reasonable annual charge for sending notices based on the estimated cost of providing the service. At least 10 days prior to the meeting, the local agency shall make available to the public data indicating the amount of cost, or estimated cost, required to provide the service for which the fee or service charge is levied and the revenue sources anticipated to provide the service, including General Fund revenues. Unless there has been voter approval, as prescribed by Section 66013 or 66014, no local agency shall levy a new fee or service charge or increase an existing fee or service charge to an amount which exceeds the estimated amount required to provide the service for which the fee or service charge is levied. If, however, the fees or service charges create revenues in excess of actual cost, those revenues shall be used to reduce the fee or service charge creating the excess.

(b) Any action by a local agency to levy a new fee or service charge or to approve an increase in an existing fee or service charge shall be taken only by ordinance or resolution. The legislative body of a local agency shall not delegate the authority to adopt a new fee or service charge, or to increase a fee or service charge.

(c) Any costs incurred by a local agency in conducting the meeting or meetings required pursuant to subdivision (a) may be recovered from fees charged for the services which were the subject of the meeting.

(d) This section shall apply only to fees and charges as described in Sections 51287, 56383, 65104, 65456, 65584.1, 65863.7, 65909.5, 66013, 66014, and 66451.2 of this code, Sections 17951, 19132.3, and 19852 of the Health and Safety Code, Section 41901 of the Public Resources Code, and Section 21671.5 of the Public Utilities Code.

(e) Any judicial action or proceeding to attack, review, set aside, void, or annul the ordinance, resolution, or motion levying a fee or service charge subject to this section shall be brought pursuant to Section 66022.

§ 66018. Hearing

(a) Prior to adopting an ordinance, resolution, or other legislative enactment adopting a new fee or approving an increase in an existing fee to which this section applies, a local agency shall hold a public hearing, at which oral or written presentations can be made, as part of a regularly scheduled meeting. Notice of the time and place of the meeting, including a general explanation of the matter to be considered, shall be published in accordance with Section 6062a.

(b) Any costs incurred by a local agency in conducting the hearing required pursuant to subdivision (a) may be recovered as part of the fees which were the subject of the hearing.

(c) This section applies only to the adopting or increasing of fees to which a specific statutory notice requirement, other than Section 54954.2, does not apply.

(d) As used in this section, “fees” do not include rates or charges for water, sewer, or electrical service.