

Date of Hearing: April 10, 2024

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Juan Carrillo, Chair

AB 2729 (Joe Patterson) – As Introduced February 15, 2024

**SUBJECT:** Residential fees and charges

**SUMMARY:** Removes the authorization in current law that allows a local agency to require the payment of fees or charge on a residential development before the date of the final inspection or the date the certificate of occupancy is issues, whichever occurs first.

**EXISTING LAW:**

- 1) Prohibits a local agency that imposes any fees or charges on a residential development for the construction of public improvements or facilities from requiring the payment of those fees or charges until the date of the final inspection, or the date the certificate of occupancy is issued, whichever occurs first, with specified exceptions. [Government Code (GOV) § 66007]
- 2) Exempts a local government from the above prohibition if it determines that the fees or charges will be: collected for public improvements or facilities for which an account has been established and funds appropriated, and for which the local government has adopted a proposed construction schedule or plan prior to final inspection or issuance of the certificate of occupancy; or the fees or charges are to reimburse the local government for expenditures previously made.
  - a. This exception does not apply to units reserved for occupancy by lower income households included in a residential development proposed by a nonprofit housing developer in which at least 49% of the total units are reserved for occupancy by lower income households, as defined. A city or county may require a performance bond or letter of credit to guarantee the payment of the nonprofit housing developer's fees. (GOV 66007)
- 3) If any fee or charge in 1) is not fully paid prior to the issuance of a building permit, the local agency issuing the building permit may require the property owner, or lessee if the lessee's interest appears of record, as a condition of issuing a building permit, to execute a contract to pay the fee or charge, or applicable portion, within the time specified in 1). If the fee or charge is prorated, the obligation under the contract shall be similarly prorated. (GOV § 66007)
- 4) A local agency may defer the collection of one or more fees up to the close of escrow. (GOV § 66007)

**FISCAL EFFECT:** None.

**COMMENTS:**

- 1) **Bill Summary.** This bill removes from existing law the ability of a local agency to collect fees or charges on a residential development before the final inspection or the date of the certificate of occupancy. This bill is author sponsored.

- 2) **Author Statement.** The author states, “California is facing a serious housing affordability crisis that is exacerbated by extremely high impact fees that increase the cost of housing for nearly every California resident. While these fees may be necessary for local jurisdictions, requiring developers to pay the fees before a home is even built increases financing costs and decreases the availability of capital to complete projects.”

“Assembly Bill 2729 does not impact the ability of local jurisdictions to collect the fees. Rather, it simply requires payment of impact fees when the home is actually going to be occupied. This small change reduces the financial burden, improves cash-flow, and increases the likelihood that projects will be completed.”

- 3) **Local Government Police Power.** The California Constitution allows cities and counties to “make and enforce within its limits, all local, police, sanitary and other ordinances and regulations not in conflict with general laws.” It is from this fundamental power (commonly called the police power) that cities and counties derive their authority to regulate behavior to preserve the health, safety, and welfare of the public—including land use authority. Local governments use their police power to enact zoning ordinances that shape development, such as setting maximum heights and densities for housing units, minimum numbers of required parking spaces, setbacks to preserve privacy, and lot coverage ratios to increase open space, among others. These ordinances can also include conditions on development to address community impacts or other particular site-specific considerations. Local governments have broad authority to define the specific approval processes needed to satisfy these considerations, including the permits the developer must obtain.
- 4) **Local Government Finance After Proposition 13.** A series of propositions have drastically cut into local revenue sources, requiring local governments to look elsewhere to fund services that the public demands. First, Proposition 13 (1978) capped property tax rates at 1% of assessed value (which only changes upon new construction or when ownership changes) and required 2/3 voter approval for special taxes; as a result local governments turned to general taxes to avoid the higher voter threshold. When Proposition 62 (1986) required majority voter approval of general taxes, local agencies imposed assessments that were more closely tied to the benefit that an individual property owner receives. Subsequently, Proposition 218 (1996) required voter approval of parcel taxes, assessments, and property-related fees.

In response to the reduction in property tax revenues from Proposition 13 and the difficulty of raising other taxes, local agencies have turned to other sources of funds for general operations, including sales taxes and transient occupancy taxes, also known as hotel taxes. Commercial enterprises generate sales tax and hotel tax revenue, and simultaneously pay property taxes and demand relatively few services (such as public safety or parks). Residential developments, by contrast, do not directly generate sales or hotel tax revenue, and the new residents demand a wider variety of more intensive services. As a result, cities and counties face a disincentive to approve housing because of the higher net fiscal cost of residential development, particularly if they have the option to instead permit commercial development that may produce net fiscal benefits, also known as the fiscalization of land use.

Since they cannot impose broad-based taxes without great difficulty, cities and counties follow a simple principle: new developments should pay for the impacts they have on the community and the burden they impose on public services.

- 5) **Mitigation Fee Act.** When approving development projects, counties and cities can require the applicants to mitigate the project's effects by paying fees—known as mitigation fees, impact fees, or developer fees. The California courts have upheld impact fees for sidewalks, parks, school construction, and many other public purposes.

When establishing, increasing, or imposing a fee as a condition of approving a development project, the Mitigation Fee Act requires local officials to:

1. Identify the fee's purpose;
2. Identify the fee's use, including the public facilities to be financed;
3. Determine a reasonable relationship between the fee's use and the development; and
4. Determine a reasonable relationship between the public facility's need and the development.

When imposing a fee as a condition of approving a development project, the Mitigation Fee Act also requires local officials to determine a reasonable relationship between the fee's amount and the cost of the public facility. In its 1987 *Nollan* decision, the U.S. Supreme Court said there must be an "essential nexus" between a project's impacts and the conditions for approval. In the 1994 *Dolan* decision, the U.S. Supreme Court said that conditions on development must have a "rough proportionality" to a project's impacts.

In the 1996 *Ehrlich* decision, the California Supreme Court distinguished between "legislatively enacted" conditions that apply to all projects and "ad hoc" conditions imposed on a project-by-project basis. *Ehrlich* applied the "essential nexus" test from *Nollan* and the "rough proportionality" test from *Dolan* to "ad hoc" conditions. The Court did not apply the *Nollan* and *Dolan* tests to the conditions that were "legislatively enacted." In other words, local officials face greater scrutiny when they impose conditions on a project-by-project basis.

As a result of these decisions and the Mitigation Fee Act, local agencies must conduct a nexus study to ensure any proposed impact fees meet these legal tests for most impact fees. Other requirements in the Mitigation Fee Act ensure that impact fees are appropriately levied and spent, including that a local agency must:

1. Hold at least one open and public meeting prior to levying a new fee or increasing an existing one;
2. If they decide to adopt capital improvement plans, indicate the approximate location, size, time of availability, and estimates of cost for all facilities or improvements to be financed with the fees;
3. Deposit and spend the fees within five years of collecting them; and
4. Refund fees or make specific findings on when and how the fees will be spent for construction, if the fees are not spent within five years of collection.

If a local agency levies an impact fee to fund a capital improvement associated with a development, it must deposit the fees with any other fees for that improvement in a separate account or fund.

Local officials must also produce an annual report within 180 days of the end of the fiscal year that includes information on the fee amounts, how they used the revenue, and any unspent funds.

- 6) **Impact Fee Collection.** Generally, cities and counties cannot collect impact fees before they conduct the final inspection or issue a certificate of occupancy, whichever occurs first. Utilities can collect impact fees at the time the utility receives an application for service, which can happen before a final inspection. For residential developments with more than one dwelling, the local agency can determine whether developers pay fees on a pro rata or on a lump sum basis when the first dwelling in the development receives its final inspection or certificate of occupancy, whichever occurs first.

However, current law allows a local agency to require payment earlier than described above if it has determined that the fees of charges will be collected for public improvement of facilities which has an account has been established. This requirement does not apply to a nonprofit housing developer that reserves at least 49% of units for lower income households. Cities and counties can require performance bonds or letters of credits to guarantee these specific payments.

If the developer has not fully paid the impact fees before the local agency has issued a building permit for construction of any portion of the residential development, the local agency can require the developer, as a condition of receiving the building permit, to enter into a contract to pay the fees, secured by a lien on the property. Additionally, the local agency can require the developer to provide notification of the opening of any escrow for the sale of the property, and disclose in the escrow instructions that the fees must be paid before disbursing proceeds to the seller. The local agency can defer collection of one or more fees up to the close of escrow.

- 7) **Previous Legislation.** AB 1386 (Chen) of 2019 was a substantially similar bill. AB 1386 was never heard in Assembly Local Government Committee.

AB 2604 (Torrico), Chapter 246, Statutes of 2008, authorized a local agency to defer the collection of one or more fees up to the close of escrow.

AB 641 (Torrico), Chapter 603, Statutes of 2007, prohibited local governments from requiring the payment of local developer fees before the developer has received a certificate of occupancy, pursuant to a specified exemption, for any housing development in which at least 49 percent of the units are affordable to low or very low income households.

- 8) **Related Legislation.** SB 937 (Wiener) makes various changes to the process for local agencies for local agencies to collect development impact fees, and extends development entitlements. SB 937 is in the Senate Committee on Local Government.
- 9) **Arguments in Support.** The California Building Industry Association write in support, “AB 2729 (Patterson) does not eliminate fees; it simply delays when fees are due to local governments. Deferring fees allows projects to pay impact fees after construction rather than before construction, as is currently the practice. In a high interest rate environment, this change will result in significant savings on financing costs, rendering more projects financially feasible and allowing them to move forward, providing housing, jobs, and tax revenue.”

“California currently has a serious affordability crisis for millions of Californians in the middle-class. Access to market-rate housing has become extremely limited, in part, because of impact fees imposed by local municipalities on housing construction projects. Impact fees, which are a serious portion of “soft costs,” become responsible for a serious fluctuation in cost across jurisdictions in the same housing market. The fees can account for 15 percent of overall construction costs.”

10) **Arguments in Opposition.** The California Special Districts Association and the California State Association of Counties write in opposition, “By universally prohibiting a local agency from collecting fees on any type of development project at any point prior to the completion of that project, AB 2729 risks delaying those vital improvements. Furthermore, it denies the flexibility for communities to work with, and partner with, development proponents to build the thriving and equitable communities that the residents deserve and right-size the timeline of delivery of payments and improvements. This measure creates a one-size fits all approach for all communities and all projects. The additional prohibition on seeking reimbursement for public improvements that are already planned to serve that community only serves to exacerbate this issue.”

11) **Double-Referral.** This bill is double-referred to the Assembly Committee on Housing and Community Development.

#### **REGISTERED SUPPORT / OPPOSITION:**

##### **Support**

Bay Area Council  
 California Building Industry Association (CBIA)  
 California Chamber of Commerce  
 California Community Builders  
 California Housing Consortium  
 California Yimby  
 Circulate San Diego  
 Housing Action Coalition  
 Monterey Bay Economic Partnership  
 SPUR  
 Yimby Action.

##### **Opposition**

California Fire Chiefs Association  
 California Special Districts Association  
 California State Association of Counties  
 California's Coalition for Adequate School Housing (CASH)  
 Fire Districts Association of California  
 New Livable California DbA Livable California

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