Date of Hearing: June 12, 2024

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT
Juan Carrillo, Chair
SB 937 (Wiener) – As Amended April 8, 2024

SENATE VOTE: 36-0

SUBJECT: Development projects: permits and other entitlements: fees and charges

SUMMARY: Extends development entitlements for certain housing development projects by two years and places certain restrictions on the fees and charges a local agency may impose on these projects. Specifically, **this bill**:

1) Extends by 24 months the time frame for any housing entitlement for a priority residential development project that was issued prior to and was in effect on January 1, 2024, and will expire prior to December 31, 2025.

2) Defines "priority residential development project" as residential developments that meet any of the following:

    a) Contain 10 units or less with the exception of manager's units.

    b) 100% of the units are affordable.

    c) Meet the affordable housing or mixed-income requirements of AB 2011 (Wicks) Chapter 647, Statutes of 2023.

    d) Meet the requirements for streamlined ministerial approval under SB 423 (Wiener) Chapter 778, Statutes of 2023,

    e) Meet the requirements for developments on land owned by institutions of faith or independent institutions of education under SB 4 (Wiener), Chapter 771, Statutes of 2023.

    f) Are entitled to a density bonus.

3) Provides that if a state or local agency extends a housing entitlement between January 1, 2024 and the effective date of this bill, that housing entitlement shall not be extended for an additional 24 months.

4) Defines "housing entitlement" as:

    a) A legislative, adjudicative, administrative, or any other kind of approval, permit, or other entitlement necessary for, or pertaining to, a housing development project issued by a state agency.

    b) An approval, permit, or other entitlement issued by a local agency for a housing development project that is subject to the Permit Streamlining Act.

c) A ministerial approval, permit, or entitlement by a local agency required as a prerequisite to issuance of a building permit for a housing development project.

d) A requirement to submit an application for a building permit within a specified period after the effective date of a housing entitlement.

e) A vested right associated with an approval, permit, or other entitlement.

5) Provides that a "housing entitlement" does not include:

a) Development agreements.

b) Approved or conditionally approved subdivision map acts that have already been extended pursuant to SB 9 (Atkins) Chapter 162, Statutes of 2021.

c) Preliminary applications under the Housing Crisis Act of 2019 (SB 330, Skinner, Chapter 654, Statutes of 2019).

6) Provides that the 24 month extension in this bill shall be tolled during any period that the housing entitlement is the subject of a legal challenge.

7) Provides that nothing in this bill shall preclude a local government from providing an extension in addition to the 24 months specified in this bill.

8) Provides that utility service fees related to connections may be collected at the time an application for service is received, provided those fees do not exceed the costs incurred by the utility provider resulting from the connection activities.

9) Provides that when a local agency requires a property owner or lessee to execute a contract to pay any outstanding fees or charges as a condition of issuing the building permit, the local agency may authorize an officer or employee of the local agency to approve and execute contracts on its behalf. Requires a local agency, prior to execution of a contract, to post a model form of the contract on its website.

10) Clarifies, for priority residential development projects, that if a local agency imposes any fees or charges on the housing development for the construction of public improvements or facilities, then all of the following conditions apply:

a) Prohibits the local agency from requiring the payment of those fees or charges until the date the certificate of occupancy is issued. Utility service fees related to connections may be collected at the time of application for service is received, provided that those fees do not exceed the costs incurred by the utility provider resulting from the connection activities.

b) Requires the amount of fees and charges to be the same amount as would have been paid had they been paid prior to the issuance of building permits. Prohibits the local agency from charging interest or other fees on any deferred amount.

c) Provides that if the housing development includes more than one dwelling, the local agency may determine whether fees and charges shall be paid:

i) On a pro rata basis for each dwelling when it receives its certificate of occupancy;

ii) On a pro rata basis when a certain percentage of the dwellings have received their certificate of occupancy; or

iii) On a lump sum basis when all the dwellings in the development receive their certificate of occupancy.

11) Provide specified limited exceptions to 10), above.

12) Provides that if the local agency does not issue certificates of occupancy for these types of housing developments, the final inspection shall serve as the certificate of occupancy.

13) Provides that no reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because a local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this bill.

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. 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) Provides that 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) Allows a local agency to defer the collection of one or more fees up to the close of escrow. (GOV § 66007)

FISCAL EFFECT: This bill is keyed fiscal and contains a state mandated local program.

COMMENTS:

1) **Bill Summary.** This bill extends the expiration of an entitlement by 24 months for a priority residential development projects that was issued an entitlement prior to and was in effect on January 1, 2024 and who's entitlement will expire prior to December 31, 2025. "Priority residential development projects" are defined as residential developments that meet any of the following:
   a) Contain 10 units or less with the exception of manager's units.

   b) 100% of the units are affordable.

   c) Meet the affordable housing or mixed-income requirements of AB 2011 (Wicks) Chapter 647, Statutes of 2023.

   d) Meet the requirements for streamlined ministerial approval under SB 423 (Wiener) Chapter 778, Statutes of 2023,

   e) Meet the requirements for developments on land owned by institutions of faith or independent institutions of education under SB 4 (Wiener), Chapter 771, Statutes of 2023.

   f) Are entitled to a density bonus.

   This extension does not apply to projects that have already received an extension of at least 24 months on or after January 1, 2024, but before the enactment of the bill.

   The bill also defers payment of development fees imposed on priority residential development projects to the date of final inspection or the issuance of a certificate of occupancy. Housing Action Coalition, California Housing Consortium, and California YIMBY are cosponsors of this bill.

2) **Author's Statement.** According to the author, "Senate Bill 937 seeks to minimize the impact of market fluctuations and high interest rates on housing production by delaying development fees and providing additional time post-entitlement.

   "Many cities have deferred the collection of development fees during periods of economic hardship to prevent housing production from halting. Additionally, economic volatility can cause some projects to die because their entitlements expire before the developer can raise the money to complete the project. Cities grant entitlements to developers as the last step before construction begins, but they are typically only valid for a limited period before expiring. With today's high interest rates and rising costs driven by COVID-related inflation, developers are facing a challenge to make projects pencil.

   "SB 937 helps address these concerns by delaying the payment of development fees imposed by a local government until the certificate of occupancy is issued. Local governments may not charge interest rates on any deferred fees. Further, SB 937 provides developers with much-needed wiggle room by extending housing entitlements issued prior to Jan. 1, 2024 and set to expire on or before Dec. 31, 2025 by 18 months. These provisions will ensure market

conditions do not dampen California's work towards addressing our housing crisis."

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:

a) Identify the fee's purpose.

b) Identify the fee's use, including the public facilities to be financed.

c) Determine a reasonable relationship between the fee's use and the development.

d) 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 have generally faced 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 have conducted nexus studies 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.

On April 12 of this year, the United States Supreme Court decided *Sheetz v. County of El Dorado, California*. The case involved the takings clause of the Fifth Amendment to the U.S. Constitution. An El Dorado County resident challenged the county's legislatively enacted traffic impact mitigation fee, arguing the county should only charge him based on the impact associated with his specific parcel. The main question was whether or not the same standards of "essential nexus" and "rough proportionality" apply to legislatively enacted fees as they do to ad-hoc fees.

In the *Sheetz* decision, the Court stated, "A legislative exception to the *Nollan/Dolan* test 'conflicts with the rest of our takings jurisprudence,' which does not otherwise distinguish between legislation and other official acts. *Knick v. Township of Scott*, 588 U. S. 180, 185 (2019)." The Court also proclaimed that, "...as we have explained, a legislative exception to the ordinary takings rules finds no support in constitutional text, history, or precedent. We do not address the parties' other disputes over the validity of the traffic impact fee, including whether a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development. The California Court of Appeal did not consider this point—or any of the parties' other nuanced arguments—because it proceeded from the erroneous premise that legislative permit conditions are categorically exempt from the requirements of *Nollan* and *Dolan*. Whether the parties' other arguments are preserved and how they bear on Sheetz's legal challenge are for the state courts to consider in the first instance."

In addition, Justice Kavanaugh filed a concurring opinion, in which Justices Kagan and Jackson joined saying that, "I join the Court's opinion. I write separately to underscore that the Court has not previously decided—and today explicitly declines to decide—whether 'a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development.' *Ante,* at 10–11. Importantly, therefore, today's decision does not address or prohibit the common government practice of imposing permit conditions, such as impact fees, on new developments through reasonable formulas or schedules that assess the impact of classes of development rather than the impact of specific parcels of property. Moreover, as is apparent from the fact that today's decision expressly leaves the question open, no prior decision of this Court has addressed or prohibited that longstanding government practice."

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 or charges will be collected for public improvement of facilities for which 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 credit 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.

   This bill prohibits the collection of fees prior to the issuance of a certificate of occupancy or the final inspection for priority residential developments projects, as defined.

7) **Entitlements and Extensions.** In general, constructing a housing development project requires local government approval at multiple stages; this approval process is often referred to as the entitlement process. An approval is generally considered an entitlement when it locks in the regulatory standards that a local government or state agency can apply to a project. Entitlements are powerful documents as they provide certainty to developers, which can help them secure financing for a project. However, entitlements also constrain the ability of local governments and state agencies to adjust for new conditions. Additionally, when an issued entitlement is outstanding, it alters the ability of the local government or state agency to approve other projects that could potentially be impacted by the pending project.

Therefore, various entitlements are subject to expiration, although many may be extended at the discretion of the local government or state agency.

The Legislature has occasionally sought to assist developers by extending certain entitlements. For example, AB 1561 (C. Garcia and Grayson) Chapter 195, Statutes of 2020 included a provision for an 18-month extension for planning level and pre-building permit entitlements that were issued prior to the COVID State of Emergency declared by the Governor on March 4, 2020 and were set to expire prior to December 31, 2021. This bill, in recognition of factors such as rising interest rates, changes in insurance markets, and labor and construction costs, provides a 24-month extension for entitlements for priority residential development projects, as defined.

8) **Policy Considerations.** The Committee may wish to consider the following:

   a) **Fee Deferral.** While deferral of fees may help a project's financing options and long term feasibility, local governments have expressed concerns that they will be on the line for providing infrastructure to a new development that may or may or may not get built in a timely fashion, if at all. Past legislation has allowed local governments to encourage construction of certain projects within a specified period of time to take advantage of ordinances, policies, or standards a project is locked into. For example, in SB 330 (Skinner) Chapter 654, Statutes of 2019 the Legislature allowed a local government to impose current ordinance, policies, and standards on a housing project if the project has not begun construction within two and one-half years of the date of final approval. The Committee may wish to consider the impact of granting deferrals of impact fees on local governments in providing services and critical infrastructure to the communities they serve.

   b) **The Interwebs.** Local public agencies can be huge and compete with other states in the size of their budgets and constituency, or they are small but mighty and have two part-time employees. To this effect, not all local agencies have a website. This bill requires a local agency to post a model contract on its website prior to entering into a contract if impacts fees are not paid prior to the issuance of a building permit. The Committee may wish to consider if exempting local agencies that do not have a website may provide relief to smaller agencies while preserving the policy goals of the bill.

9) **Committee Amendments.** In order to address the policy considerations identified above, the committee may wish to consider the following amendments:

   a) Require the developer of a priority residential development project to begin construction of the project within five years of the date of the building permit being issued. If the developer does not begin construction within five years, the fee deferral expires.

   b) Amend paragraph (5) of subdivision (d) of Section 2 as follows "Prior to requiring execution of a contract under this subdivision, the local agency shall post a model form of contract on its internet website***, if the agency has a website***."

10) **Related Legislation.** AB 1820 (Schiavo) establishes a process through which development proponents can request preliminary project fee and exaction estimates when submitting a preliminary application, and receive a final list of all fees and exactions related to the project after final approval, within a specified timeframe. This bill is pending in the Senate Local

Government Committee.

AB 2729 (Joe Patterson) prohibits a local agency from requiring payment of fees or charges on a residential development before the date of final inspection or the issuances of a certificate of occupancy, whichever occurs first, except under specified conditions. This bill is pending in the Senate Local Government Committee.

11) **Previous Legislation.** AB 434 (Grayson), Chapter 740, Statutes of 2023 added specified housing laws to the list of laws that the Department of Housing and Community Development is required to enforce.

AB 2234 (Rivas), Chapter 651, Statutes of 2022 established time limits and procedures for approval of, and requires online permitting of, post-entitlement permits.

AB 1561 (C. Garcia and Grayson), Chapter 195, Statues of 2020 provides an 18-month entitlement extension for specified approvals of housing development projects and includes a provision extending, by 18 months, the time frame for the expiration, effectuation, or utilization of a housing entitlement that was issued prior to, and was in effect on, March 4, 2020, and was set to expire prior to December 31, 2021.

12) **Arguments in Support.** California YIMBY, California Housing Consortium, and Housing Action Coalition, sponsors of this bill, write, "SB 937 does not eliminate fees; it simply changes when the fees are collected. SB 937 seeks to strike a balance between meeting the needs of local governments and providing the flexibility developers require to ensure that housing units are built. While impact fees are an expected part of construction, they are a burden and can be a barrier to new development. Fees range significantly between jurisdictions, with Los Angeles reporting a multifamily development fee of $12,000 per unit, while Fremont reports $75,0001. Deferring fees can result in less reliance on pre-development funding, which is often more expensive or difficult to secure.

"When impact fees are collected at the early stages of development, such as when building permits are issued, the actual cost to the developer can exceed the cost of the fee. The developer will often borrow money to pay for impact and entitlement fees. A paper by UCLA's Lewis Center looking at fee deferrals in Los Angeles found that 'assessing fees at earlier stages can do real harm by deterring housing production.' It further goes on to say that 'Fee deferral programs can efficiently reduce costs and increase the viability of housing production, and they can do so without asking local governments to forfeit any revenue.'

"Additionally, SB 937 provides an entitlement extension to development projects that were negatively impacted by COVID-related inflation and are at risk of not being built. To curb growing inflation, the Federal Reserve has regularly raised interest rates over the past two years. While these increases helped stifle rapidly growing inflation, loans for acquiring properties or funding development projects became too expensive and crippled the viability of many projects. As interest rates begin to lower, the financing for some projects might again be possible, but these projects will not be built unless an entitlement extension can be provided. SB 937 provides a solution to this problem by extending housing entitlements issued prior to January 1, 2024, and set to expire on or before December 31, 2025, by 24 months. This extension would only be provided to developments that have a high percentage

of affordable units."

13) **Arguments in Opposition.** The California Special Districts Association, the California Fire Chiefs Association, and the Fire Districts Association of California have an oppose unless amended position and write, "Development related fees pay for the costs to install infrastructure necessary to build new homes and other development in livable, equitable, and thriving communities. These fees pay for critical services such as water, sewer, fire protection, parks and open space, flood protection, libraries, and other essential needs. Specifically, these fees and the infrastructure they fund make new housing and economic development possible.

"SB 937 would, among other things, for certain developments, defer development impact fees until the certificate of occupancy or its equivalent, locks in those fees at prior to the issuance of a building permit, and prohibit the charging on interest on those deferred fees.

"While we are grateful for the Author's efforts to dialogue and find compromise, having made several substantive amendments to date, we find that the measure would still benefit from several changes to mitigate the challenges it presents to local agencies and their efforts to provide essential services and infrastructure.

"Some amendments that have been discussed broadly include the following:

- Narrow the scopes and types of developments that fall under the category of 'priority residential development project', such as the 10 unit or fewer provision,
- To prevent long running projects from making it too risky or expensive for local agencies to execute their plans to provide essential infrastructure and services to a new development:
  - Clarify that fees may be indexed for inflation at the point of the fee 'lock-in', and
  - A deadline on the development project to break ground to benefit from the measure.
- Recognize the special district hardship exception to the website requirement as applied to the model contract found mandate in the bill found per GC 53087.8"

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

REGISTERED SUPPORT / OPPOSITION:

Support
21st Century Alliance
Apartment Association of Greater Los Angeles
California Apartment Association
California Hispanic Chambers of Commerce
California Housing Consortium
California Rental Housing Association
California Yimby
East Bay for Everyone
East Bay Yimby
Eastside Housing for All
Elk Grove; City of
Fremont for Everyone

Grow the Richmond
House Sacramento
Housing Action Coalition
Housing Trust Silicon Valley
How to Adu
Livable Communities Initiative
MidPen Housing
Mountain View Yimby
Napa-solano for Everyone
Northern Neighbors
Peninsula for Everyone
People for Housing - Orange County
Progress Noe Valley
San Francisco Yimby
San Luis Obispo Yimby
Santa Cruz Yimby
Santa Rosa Yimby
South Bay Yimby
Southside Forward
Streets for People
Urban Environmentalists
Valley Industry Commerce Association
Ventura County Yimby
Yimby Slo

Support If Amended
Field stead and Company, INC.
Habitat for Humanity California
Housing Leadership Council
Silicon Valley Leadership Group
Spur
Yimby Action

Oppose
City of Santa Clarita
Kern County Superintendent of Schools Office
Los Angeles Unified School District
San Marcos, City of
South Bay Cities Council of Governments
Thousand Oaks; City of

Oppose Unless Amended
California Building Industry Association
California Special Districts Association
California Fire Chiefs Association
East Bay Housing Organizations
Fire Districts Association of California

Analysis Prepared by: Linda Rios / L. GOV. / (916) 319-3958