

Date of Hearing: April 25, 2018

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Cecilia Aguiar-Curry, Chair

AB 3147 (Caballero) – As Introduced February 16, 2018

**SUBJECT:** Fee mitigation act: housing developments.

**SUMMARY:** Limits fees, exactions, and other charges for specified housing development projects to no more than what was in effect at the time that the application for the housing development project was determined to be complete by the city or county. Specifically, **this bill:**

- 1) Prohibits a housing development project from being subject to a fee, charge, (including a fee or charge described in the section of law that specifies the imposition of water or sewer connection fees and capacity charges), dedication, reservation, or other exaction that is more than the fee, charge, dedication, reservation, or other exaction in effect at the time that the application for the housing development project is determined to be complete.
- 2) Provides that the fact that a housing development project may require a land use approval that is considered legislative in nature shall not be construed to limit or narrow the applicability or scope of the protection provided for in 1), above.
- 3) Defines housing development project to mean a use consisting of any of the following:
  - a) Residential units only;
  - b) Mixed-use development consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use; and,
  - c) Transitional housing or supportive housing.
- 4) States that the Legislature finds and declares the following:
  - a) Providing certainty in the housing approval and development process is essential for achieving the state's housing policies;
  - b) Although the Legislature has attempted to provide certainty through the enactment of Sections 65589.5, 65866, 65961, and 66474.2, among other statutes, these efforts have not been adequate. Applicants for housing projects continue to be subjected to demands by local agencies to comply with new or increased requirements after an application is determined to be complete, including through the imposition of conditions of approval that require the project to comply with whatever fee, charge, community benefit, public benefit or other requirement is in effect when a building permit or similar subsequent approval is issued; and,
  - c) It is the intent of the Legislature in enacting this section to provide effective and meaningful certainty for applicants for housing projects by prohibiting them from being subjected to new or increased requirements not in effect when an application is complete, and it is the policy of this state that this section should be interpreted and implemented broadly to effectuate that intent.

- 5) 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 act, within the meaning of Section 17556 of the Government Code.

**EXISTING LAW:**

- 1) Establishes the Mitigation Fee Act specific to local agency fees for development projects.
- 2) Defines, for the purposes of the Mitigation Fee Act, the following terms:
  - a) “Development project” to mean any project undertaken for the purpose of development. “Development project” includes a project involving the issuance of a permit for construction or reconstruction, but not a permit to operate;
  - b) “Fee” to mean a monetary exaction other than a tax or special assessment, whether established for a broad class of projects by legislation of general applicability or imposed on a specific project on an ad hoc basis, that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project, but does not include fees specified in Section 66477, fees for processing applications for governmental regulatory actions or approvals, fees collected under development agreements adopted pursuant to Article 2.5 (commencing with Section 65864) of Chapter 4, or fees collected pursuant to agreements with redevelopment agencies that provide for the redevelopment of property in furtherance or for the benefit of a redevelopment project for which a redevelopment plan has been adopted pursuant to the Community Redevelopment Law (Part 1 (commencing with Section 33000) of Division 24 of the Health and Safety Code);
  - c) “Local agency” to mean a county, city, whether general law or chartered, city and county, school district, special district, authority, agency, any other municipal public corporation or district, or other political subdivision of the state; and,
  - d) “Public facilities” to include public improvements, public services, and community amenities.
- 3) Requires the local agency to do all of the following, in any action establishing, increasing, or imposing a fee as a condition of approval of a development project by a local agency:
  - a) Identify the purpose of the fee;
  - b) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. That identification may, but need not, be made by reference to a capital improvement plan as specified in Section 65403 or 66002, may be made in applicable general or specific plan requirements, or may be made in other public documents that identify the public facilities for which the fee is charged;
  - c) Determine how there is a reasonable relationship between the fee’s use and the type of development project on which the fee is imposed; and,

- d) Determine 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.
- 4) Requires, in any action imposing a fee as a condition of approval of a development project by a local agency, the local agency to determine 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 on which the fee is imposed.
- 5) Requires, upon receipt of a fee subject to this section, the local agency to deposit, invest, account for, and expend the fees, as specified.
- 6) Allows any action to be brought in the superior court relating to the Mitigation Fee Act. Specifies that an action may be subject to a mediation proceeding, as specified.

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

**COMMENTS:**

- 1) **Bill Summary.** This bill would freeze all fees, exactions and other charges at the time a housing development project is deemed complete by a city or county. This bill is sponsored by the California Building Industry Association.
- 2) **Author's Statement.** According to the author, "California is in the depths of a housing crisis – both in terms of supply and affordability. There is much to do to expedite the process of building homes and to make it less expensive to build. One of the largest barriers to home construction is the burden of excessive exactions, often through imposition of development impact fees and other requirements beyond those in effect when a project's application is complete and the project proponent has made key financial decisions about the project including the cost that can be paid to acquire the land."
- 3) **Mitigation Fee Act.** In 1987, the Legislature adopted AB 1600, which set forth certain requirements a city or county must follow in establishing or imposing certain fees. In 1996, the Legislature relabeled AB 1600 and other related section (Government Codes 66000 – 66025) as the "Mitigation Fee Act."

Section 66001(a) requires any city that establishes, increases, or imposes a fee as a condition of approval of a development project to do all of the following for both ad hoc fees and those established by legislation of general applicability: a) Identify the purpose of the fee; b) Identify how the fee will be used; c) Demonstrate there is a reasonable relationship between the purpose of the fee and the type of development project on which the fee is imposed; and, d) Demonstrate that there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.

Under the Mitigation Fee Act, a developer may challenge the imposition of a fee, dedication, or other exaction if the developer follows a specified procedure that includes protesting the fee in writing, at the time of approval or conditional approval of the development or within 90 days after the date of the imposition of the exactions. A city is required to provide written notice of the 90-day protest period to the developer at the time of project approval or imposition of the fees, though the statute is silent regarding any consequences of a city's

failure to provide such notice. Any party who files a protest may then file an action attacking the imposition of the fees within 180 days after delivery of the city's notice.

- 4) **Connection Fees and Capacity Charges.** Water retailers and sanitation agencies levy connection fees to ensure that a new development pays for the costs that it imposes on the water system, such as to maintain water pressure for firefighting or expand wastewater treatment capacity. These fees are a key part of these agencies' rate structures – monthly water and sewer bills do not entirely fund an agency's operations. Local agencies are authorized, pursuant to Government Code Section 66013, to impose fees for water connections or sewer connections, and impose capacity charges, but are prohibited from exceeding the “estimated reasonable cost of providing the service for which the fee or charge is imposed, unless a question regarding the amount of the fee or charge imposed in excess of the estimated reasonable cost of providing the services or materials is submitted to, and approved by, a popular vote of two-thirds of those electors voting on the issue.”

This section of law requires an order to attack, review, set aside, void, or annul the fee or service charge, to be commenced within 120 days of the effective date of the ordinance, resolution, or motion adopting the new fee or service charge, and to be brought pursuant to Chapter 9 of Title 10 of Part 2 of the Code of Civil Procedure.

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

- a) **AB 879 (Grayson), Chapter 374, Statutes of 2017.** AB 879 (Grayson) requires the Department of Housing and Community Development, by June 30, 2019, to complete a study to evaluate the reasonableness of local fees charged to new developments, and requires the study to include findings and recommendations regarding potential amendments to the Mitigation Fee Act to substantially reduce fees for residential development.

The Committee may wish to consider waiting for that report to be completed and reviewed before enacting major policy changes to the Mitigation Fee Act.

- b) **Can Fees be Finalized at Application Stage?** The American Planning Association, California Chapter (APA California), notes that “there are important reasons that fees cannot be finalized at the time an application is determined complete. Preventing fees from being imposed if they were ‘not in effect’ at the time an application is complete is an odd deadline. Many fees or exactions cannot be determined at the application stage as they depend on the scope of the project at the time the project is approved and entitled.”
- c) **Tracking Nightmare.** APA California writes that “the concept of freezing fees and other charges at the time a housing project application is determined to be complete would be impossible to track and appears to encourage developers to delay building the housing that we are all trying to accelerate...what if the developer doesn't build for many years? What if it is part of a subdivision map? How are cities and counties going to be able to track what fees were in place at the time the project is deemed complete when it may take the developer seven years or more to build after the completeness determination?”

- d) **Legal Jeopardy?** Limiting local agencies' ability to charge necessary fees to operate and maintain these impacted facilities and services in some cases could put local agencies in legal jeopardy due to their obligation to comply with Propositions 218 and 26.
- e) **Will the Bill Discourage Speedy Approval of Housing?** The Rural County Representatives of California, the Urban Counties of California, the California State Association of Counties, the League of California Cities, and the California Special Districts Association, write that this bill “perversely *discourages* speedy approval of housing developments. If the “freeze” commences with the very first development entitlement, conscientious local governments, who desire to fully fund and provide adequate public facilities and services, will be encouraged to defer that approval until the developer can provide positive assurances that the project will actually proceed immediately without delay. Further, the inability to ensure that the applicable fees will *actually produce* sufficient funding to construct the necessary facilities within a reasonable timeframe may make it more difficult to rely on those fee mechanisms as mitigation for environmental impacts under CEQA, thereby encouraging legal challenges and delays.”
- f) **Circular Thinking.** If the Legislature does not allow local agencies to charge the estimated reasonable cost, there may be a reimbursable state mandate cost. This bill, however, in Section 2, states that no reimbursement is required because “a local agency has the authority to levy service charges, fees, or assessment sufficient to pay for the program or level of service” mandated by the bill’s provisions.
- 6) **Arguments in Support.** Supporters argue that the bill will help spur housing production by making the fee process more transparent and possibly reducing extraneous fees assessed on a housing project, and will provide home builders certainty, at least with regard to fees assessed on a project.
- 7) **Arguments in Opposition.** Opposition notes that certainty often comes with social costs and that the roads, fire stations, water and sewer facilities and other necessary assets that will serve future residents of the development, or to mitigate the development’s environmental impacts, are not without cost. Opponents also note that these costs do not become less expensive as time goes on, and that the bill’s freezing of fees ultimately means that the local government cannot recover the ever-increasing costs of those facilities.
- 8) **Double-referral.** This bill is scheduled to be heard in the Housing and Community Development Committee on April 25, 2018.

- 9) **Committee Amendments.** Housing Committee has suggested the following committee amendments, which would need to be taken in Local Government Committee because of the timing of the bill being heard in both Committees on the same day.

The Committee may wish to consider the following amendments:

- a) Require each city, county, and city and county to publish, on their website, a schedule of impact and development fees applicable to housing developments. This information should include the fee rate, the method of calculation, factors that could adjust the fee up or down, and at what stage in the development process the fee is charged.
- b) Define "impact and development fees" as those fees that are established by the local government separate from its action on a specific application" and are limited to fees imposed under the Mitigation Fee Act, other fees based on the impact of a project, parkland dedication fees imposed under the Quimby Act, and affordable housing fees.
- c) Freeze impact and development fees (this does not include community benefit agreements) at the point that a project is entitled instead of when the application is approved. Require the fees to be frozen for up to two years.

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

##### **Support**

California Building Industry Association [SPONSOR]  
Bay Area Council  
California Apartment Association  
California Association of REALTORS  
California Business Properties Association  
CalChamber  
California Council for Affordable Housing  
California Housing Consortium  
California YIMBY  
National Federation of Independent Business

##### **Opposition**

American Planning Association, California Chapter (unless amended)  
California Special Districts Association  
California State Association of Counties  
League of California Cities  
Rural Counties of California  
Urban Counties of California

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