

Date of Hearing: April 14, 2021

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT  
Cecilia Aguiar-Curry, Chair  
AB 602 (Grayson) – As Amended April 6, 2021

**SUBJECT:** Development fees: impact fee nexus study.

**SUMMARY:** Adds new requirements to impact fee nexus studies prepared by cities, counties, and special districts. Requires cities, counties, and special districts to request certain information from development proponents and requires the Department of Housing and Community Development (HCD) to develop a nexus study template. Specifically, **this bill:**

- 1) Establishes new standards and practices for impact fee nexus studies conducted after January 1, 2022, specifically the bill requires cities counties, and special districts to:
  - a) Adopt an impact fee nexus study prior to the adoption of a development fee or exaction;
  - b) Identify the existing level of service, when applicable, and the proposed new level of service and explain why the new level of service is appropriate;
  - c) Include information in the nexus study that supports the local agency's actions, as defined;
  - d) Review the assumptions of the original fee and evaluate the amount of fees collected under the original fee if the new study supports an increase to the existing fee;
  - e) Adopt a capital improvement plan as a part of the study when infrastructure costs exceed \$2 million;
  - f) Adopt nexus studies at a public hearing with at least 30 days' notice, and provide specific notification to members of the public that request a notice of intent to begin an impact fee nexus study; and,
  - g) Update nexus studies every eight years.
- 2) Requires, after July 1, 2022, cities, counties, or special districts adopting nexus studies to:
  - a) Calculate fees imposed on a housing development project proportionately to the square footage of the units of the proposed development, or make findings demonstrating that another metric is more appropriate; and,
  - b) Consider targeting fees geographically.
- 3) States that the nexus study requirements do not apply to capacity charges, as defined.
- 4) Requires cities, counties, and special district to request development proponents to note the total amount of fees and exactions associated with a project once the certificate of occupancy is issued, and requires the local government to post this information on its website.

- 5) Specifically authorizes any member of the public to submit evidence that a city, county or other local agency's findings and determinations made in support of fees subject to the nexus study requirements included in this bill are insufficient, as specified.
- 6) Requires cities, counties, and other local agencies to consider any evidence claiming that its findings and determinations in support of a fee are insufficient, if the evidence is received in a timely manner.
- 7) Requires HCD to create an impact fee nexus study template and authorizes local jurisdictions to use the template.

**EXISTING LAW:**

- 1) Establishes the Mitigation Fee Act specific to local agency fees for development projects.
- 2) Defines "housing development projects" to mean a use consisting of any of the following:
  - a) Residential units only;
  - b) Mixed-use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use; or,
  - c) Transitional housing or supportive housing.

**FISCAL EFFECT:** This bill is keyed fiscal.

**COMMENTS:**

- 1) **Constitutional Limits on Local Government Revenues.** Local governments have seen their tax revenues decline on a per-capita basis since Proposition 13 (1978) capped property tax rates at 1% of assessed value (which only changes when ownership changes), limited the growth in assessed value to 2% per year, 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 governments turned to 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 and created a landowner-voter process for approving assessments and property-related fees.

As a result of these limitations, the revenue that local governments in California receive from taxes has declined on a per-capita basis. A 2018 report on Proposition 13 by the Legislative Analyst's Office notes that, "adjusted for inflation, cities and counties received roughly \$790 per person in 1977-78, but only about \$640 per person in 2014-15." Local governments made up for this shortfall by imposing other types of fees and assessments. Overall, local revenues per capita have increased in California since the passage of Proposition 13, but less so than has occurred for local governments in other parts of the United States.

- 2) **Legal Framework for Impact Fees.** When approving development projects, counties and cities can require the developers to mitigate the project's effects by paying impact fees. Impact fees stem from a straightforward principle: new developments should pay for the impacts that they have on the community and the burden they impose on public services.

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; and,
- d) Determine a reasonable relationship between the public facility's need and the development.

In its 1987 *Nollan* decision, the U.S. Supreme Court said that there must be an "essential nexus" between a project's impacts and the conditions for approval, which is similar to the "reasonable relationship" requirement under the Mitigation Fee Act. 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, but local officials have more leeway when setting fees that apply broadly to all projects in a given category.

Other requirements in the Mitigation Fee Act ensure that development fees are appropriately levied and spent, including that a local agency must:

- a) Hold at least one open and public meeting prior to levying a new fee or increasing an existing one;
  - b) Deposit and spend the fees within five years of collecting them; and,
  - c) 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.
- 3) **Uses of Impact Fees.** To ensure that any proposed impact fees meet all legal requirements, including the essential nexus test and the reasonable relationship test, local governments must conduct a nexus study prior to imposing a new impact fee or increasing a fee above the level of fees allowed by the previous nexus study. These nexus studies often identify the new demand for services from development, usually on a per-unit or per-capita basis, an expected level of service provision, and a maximum level of impact fees needed to fund the facilities to meet that level of service provision. Some nexus studies also consider the feasibility of different levels of fees and their effects on local housing production. Local governments must spend the revenues generated by impact fees on capital projects and cannot use them to support ongoing operations and maintenance. These fees can be used to improve existing facilities, but can't be spent to remedy existing service deficiencies.

Impact fees support a wide range of community services and benefits, including:

- a) Public safety infrastructure, including fire stations, police stations, and correctional facilities;
- b) Transportation infrastructure, including roads, traffic improvements, public transportation systems, and sidewalks;
- c) Affordable housing;
- d) Environmental mitigation (such as habitat conservation);
- e) Libraries;
- f) Parks and open space;
- g) Flood control; and,
- h) Public art requirements.

In addition, local agencies that provide public utility services, including water, wastewater, and electricity, impose fees on new developments for any needed infrastructure and capacity increases, and school districts impose fees to construct school facilities needed to serve new students. While these are broadly defined as impact fees, they are governed by different statutory rules than those that apply to other types of impact fees, which contain more specific limitations on rates that can be charged.

Not all local governments impose fees on new developments for all of the purposes noted above—instead, they reflect the jurisdiction’s priorities for service delivery.

- 4) **Other Development Costs.** Local governments also impose other costs on developers that are not strictly impact fees. These include:
  - a) Fees to recover the costs of processing permits, reviewing plans, or performing inspections;
  - b) Dedications of parkland or fees charged in lieu of this dedication imposed pursuant to the Quimby Act (these dedications may be combined with other park impact fees);
  - c) Dedications of property for public infrastructure, such as streets and roads, and utility easements;
  - d) Conditions that a developer and a city or county agree to in a development agreement;
  - e) Mello-Roos Taxes, in which a special tax is assessed on properties that benefit from the construction of public facilities;
  - f) Mitigation requirements under other statutes, such as the Subdivision Map Act or the California Environmental Quality Act;
  - g) Construction excise taxes; and,

h) Inclusionary housing requirements that mandate a percentage of units in a development be rented or sold at a price that is affordable to lower-income households.

- 5) **Development Fee Practices.** Impact fees apply to many type of developments, not just housing. New commercial and industrial developments also pay development fees, but in general these fees are lower because the demand for services generated by these types of development is lower than residential development.

Local governments have flexibility in how they structure these fees. Importantly, local governments can lower fees below the maximum authorized by a nexus study, and many local governments do so to achieve varied policy goals. Some local governments charge lower fees for certain classes of projects to reduce barriers to their development, such as affordable housing, higher density housing, or accessory dwelling units. For example, the City of Sacramento does not impose impact fees for developments that contain certain proportions of affordable housing units and does not charge its affordable housing impact fee to certain high-density developments. Local governments can also lower fees based on other considerations, such as project feasibility under given market conditions, or desire to channel development to certain areas. For example, the City of Santa Rosa only imposes impact fees on the first three stories of a development in its downtown core, and the City of Oakland lowers fees in particular zones of the city based on estimates of project feasibility in those areas.

Local governments also vary the basis for imposing a charge, such as charging fees on a per-square-foot basis or per-bedroom basis, rather than on a per-unit basis. For example, a city that wants to encourage multifamily development might charge fees on a per square foot basis so that a multifamily project with multiple units on a parcel pays lower per-unit fees than a single family home on the same parcel.

- 6) **HCD Report.** The Legislature has considered several bills related to impact fees in the past few years. AB 879 (Grayson) Chapter 374, Statutes of 2017, required HCD to complete a study to evaluate the reasonableness of local fees charged to new developments. On August 7th, 2019, HCD released the study, performed by the Turner Center for Housing Innovation. The findings from the study on fees were split into three categories: fee transparency; fee structure; and, fee design. Among other conclusions, the study argued that fees can be a barrier to development and raise prices of both new and existing homes. However, the study also noted that local governments face substantial fiscal constraints and thus have turned to fees as a source of revenue to fund public services for new developments.
- 7) **Bill Summary and Author's Statement.** With respect to nexus studies, this bill will require local governments to update their nexus studies used to justify certain impact fees at least once every eight years. This bill will additionally require jurisdictions to base rate calculations on the square footage of individual units, unless the jurisdiction demonstrates that another metric is more appropriate. This bill will also require jurisdictions to incorporate capital improvement plans into their nexus studies if the cost of the improvements exceeds \$2 million. Finally this bill adds additional public hearing requirements and requires local agencies to make additional findings supporting their fee calculations and address evidence challenging the validity of their findings.

This bill will also require local governments to post information they receive from developers regarding the total amount of fees and exactions the developer paid prior to

receiving their certificate of occupancy. Finally, this bill will require HCD to develop a nexus study template by 2024 that may be used by local governments.

According to the author, “AB 602 establishes basic transparency and accountability standards for nexus studies, and tasks the Department of Housing and Community Development (HCD) with developing a template for nexus studies that local governments can use.”

This bill is cosponsored by California YIMBY and Habitat for Humanity of California.

- 8) **Policy Considerations.** The Committee may wish to consider the following:
- a) **Certificates of Occupancy.** The bill requires cities, counties, and special districts to request development proponents to report the total amount of fees and exactions associated with a project upon issuance of a certificate of occupancy. Certificates of occupancy are typically only issued by a city or a county. In most cases, a special district would not be aware of the issuance of a certificate of occupancy and reporting information to the special district would be duplicative. The Committee may wish to consider if it is appropriate to include special districts in this requirement.
  - b) **Capital Improvement Plans.** The bill requires local governments to include a capital improvement plan in nexus studies associated with projects that costs more than \$2 million. Preparing a capital improvement plan may prove cost prohibitive for smaller jurisdictions. Additionally, linking the exemption to a dollar amount may encourage jurisdictions to design projects to come in below the dollar threshold even if the needs of the development are greater. The Committee may wish to consider using the population based threshold for “larger jurisdictions” in the Infill Infrastructure Grant (IIG) program (counties with populations greater than 250,000, and the cities located in those counties) as a method to exempt smaller cities and counties.
- 9) **Technical Clarifications.** The Committee may wish to consider the following:
- a) **Fees, Charges, and Exactions.** The bill states that the nexus study provisions do not apply to fees adopted pursuant to Government Code (GC) Section 66013, however there are several areas of the language that introduce ambiguity in this section. The Committee may wish to consider specifying the exact fees that are included.  
  
In the reporting section of the bill (GC Section 65940.1) the definition of exaction was inadvertently narrowed to exclude items that impact the total cost of the project. The Committee may wish to consider restoring the definition of exaction as it currently reads in that section
  - b) **Square Footage.** The language currently requires a local government to use square footage as the metric for calculating the fee rate in the nexus study, or make several findings that square footage is not appropriate. It is unclear if this authorizes a local government to use an alternative metric. The Committee may wish to clarify that, if a jurisdiction makes the findings required by the bill, it may use another appropriate metric.

- 10) **Committee Amendments.** In order to address the considerations noted above, the Committee may wish to consider the following amendments:
- a) Remove the reference to special districts in Section GC 65940.1 (a)(3)(A) and (B);
  - b) Restore the existing definition of “exaction” in GC 65940.1(b) (2)(A);
  - c) Delete “exaction” from GC 65940.2(a)(1);
  - d) Amend GC 65940.2(a)(5) to require the use of square footage unless the city, county, or special district makes the findings specified in that subparagraph;
  - e) Amend GC 65940.2 (a)(5)(II) to replace “demonstrate” with “an explanation” and delete the second sentence;
  - f) Amended GC 65940.2(III) to replace “demonstrate” with “an explanation” and make corresponding grammatical corrections;
  - g) Amend GC 65940.2(a)(7) to apply the requirements to prepare a capital improvement plan to “large jurisdictions” as defined in Section 53559.1 of the Health and Safety Code;
  - h) Amend GC 65940.2(a)(9) to clarify that nexus studies shall be updated “at least” every eight years;
  - i) Amend GC 65409.2(b) to apply to “fees or charges pursuant to Section GC 66013;” and,
  - j) Define “development fee” as a fee defined in Section GC 66000(b).
- 11) **Arguments in Support.** California YIMBY writes in support, “AB 602 adopts many best practices for reforming fees in California, while ensuring that reforms will not undermine important government services. It focuses on aligning fees with their impact and development feasibility, by, for example, requiring that certain fees be assessed on a per square foot basis, rather than a per unit basis, rewarding smaller, naturally-more-affordable, lower-impact projects.”
- 12) **Arguments in Opposition.** The California Special Districts Association is opposed unless amended and writes, “While we are sympathetic to efforts to address California’s housing crisis, we believe AB 602 has the potential to create an unproductive precedent and unnecessary challenges to special districts’ ability to provide essential services to the state’s communities while providing little or no relief to potential homebuyers or help to provide the affordable infrastructure and services that must accompany any new housing development.”
- 13) **Double-Referral.** This bill is double-referred to the Housing and Community Development Committee.

**REGISTERED SUPPORT / OPPOSITION:****Support**

California YIMBY [SPONSOR]

Habitat for Humanity of California [SPONSOR]

Bay Area Council  
California Association of Realtors  
California Building Industry Association  
Casita Coalition  
Council of Infill Builders  
Desert Valleys Builders Association  
East Bay Leadership Council  
Greenbelt Alliance  
Hello Housing  
Lisc San Diego  
San Francisco Bay Area Planning and Urban Research Association (SPUR)  
Sv@home  
Terner Center for Housing Innovation at the University of California, Berkeley  
The Two Hundred  
Tmg Partners

**Oppose Unless Amended**

American Planning Association California Chapter  
California Association of Sanitation Agencies  
California Special Districts Association  
California State Association of Counties  
League of California Cities  
Urban Counties of California

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