

Date of Hearing: June 20, 2018

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Cecilia Aguiar-Curry, Chair

SB 1202 (Stone) – As Amended May 15, 2018

SENATE VOTE: 39-0

SUBJECT: Land use: development fees.

SUMMARY: Requires local governments that have not completed a required report on mitigation fees for three consecutive years to pay the costs of requested audits of their Mitigation Fee funds.

EXISTING LAW:

- 1) Requires, if a local agency requires the payment of a fee pursuant to the Mitigation Fee Act, in connection with the approval of a development project, the local agency receiving the fee to deposit it with the other fees for the improvement in a separate capital facilities account or fund in a manner to avoid any commingling of the fees with other revenues and funds of the local agency, as specified, and expend those fees solely for the purpose for which the fee was collected.
- 2) Requires, for each separate account or fund established pursuant to 1), above, the local agency to, within 180 days after the last day of each fiscal year, make available to the public the following information for the fiscal year:
 - a) A brief description of the type of fee in the account or fund;
 - b) The amount of the fee;
 - c) The beginning and ending balance of the account or fund;
 - d) The amount of the fees collected and the interest earned;
 - e) An identification of each public improvement on which fees were expended and the amount of the expenditures on each improvement, including the total percentage of the cost of the public improvement that was funded with fees;
 - f) An identification of an approximate date by which the construction of the public improvement will commence if the local agency determines that sufficient funds have been collected, as specified;
 - g) A description of each interfund transfer or loan made from the account or fund, as specified; and,
 - h) The amount of refunds made, as specified.
- 3) Requires the local agency to review the information made available to the public pursuant to 1), above, at the next regularly scheduled public meeting not less than 15 days after this

information is made available to the public. Requires notice of the time and place of the meeting, as specified.

- 4) Defines “fee” for purposes of this section, to mean any fee imposed to provide for an improvement to be constructed to serve a development project, or which is a fee for public improvement within the meaning of subdivision (b) of Section 66000, and that is imposed by the local agency as a condition of approving the development project.
- 5) Allows any person to request an audit of any local agency fee or charge that is subject to Section 66023, including fees or charges of school districts, as specified.
- 6) Finds and declares that untimely or improper allocation of development fees hinders economic growth and is, therefore, a matter of statewide interest and concern, and specifies the intent of the Legislature to apply these provisions to charter cities.
- 7) Requires, at the time the local agency imposes a fee for public improvements on a specific development project, the local agency to identify the public improvement that the fee will be used to finance.
- 8) Allows any person to request an audit in order to determine whether any fee or charge levied by a local agency exceeds the amount reasonably necessary to cover the cost of any product, public facility, as defined in Section 66000, or service provided by the local agency. If a person makes that request, the legislative body of the local agency may retain an independent auditor to conduct an audit to determine whether the fee or charge is reasonable, but is not required to conduct the audit if an audit has been performed for the same fee within the previous 12 months.
- 9) Requires, to the extent that the audit determines that the amount of any fee or charge does not meet the requirements of this section, the local agency to adjust the fee accordingly. This subdivision does not apply to a fee authorized pursuant to Section 17620 of the Education Code, or Sections 65995.5 and 65995.7.
- 10) Requires the local agency shall retain an independent auditor to conduct an audit only if the person who requests the audit deposits with the local agency the amount of the local agency’s reasonable estimate of the cost of the independent audit. At the conclusion of the audit, the local agency shall reimburse unused sums, if any, or the requesting person shall pay the local agency the excess of the actual cost of the audit over the sum which was deposited.
- 11) Requires any audit conducted by an independent auditor to determine whether a fee or charge levied by a local agency exceeds the amount reasonably necessary to cover the cost of providing the product or service shall conform to generally accepted auditing standards.

FISCAL EFFECT: None

COMMENTS:

- 1) **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 mitigation 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; and,
- 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 that 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 governments must conduct a nexus study to ensure that any proposed development fees meet these legal tests. 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) Adopt capital improvement plans;
- c) Deposit and spend the fees within five years of collecting them; and,
- d) 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.

[Cities and counties cannot collect developer fees before they conduct the final inspection or issue a certificate of occupancy, although developer fees for utilities may be collected earlier].

If a local agency levies a developer 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:

- a) A brief description of the type of fee in the account or fund;
- b) The amount of the fee;
- c) The beginning and ending balance of the account or fund;
- d) The amount of the fees collected and the interest earned;
- e) An identification of each public improvement on which fees were expended and the amount of the expenditures on each improvement, including the total percentage of the cost of the public improvement that was funded with fees;
- f) An identification of an approximate date by which the construction of the public improvement will commence;
- g) A description of each interfund transfer or loan made from the account or fund; and
- h) The amount of refunds of fees unspent after five years.

Any person may request an independent audit of how the fees have been collected and spent, including an assessment of whether the fees exceed the amount reasonably necessary to cover the costs of the stated projects or services. A local agency must adjust its fees if the audit finds that the fees are set too high.

- 2) **Bill Summary.** This bill prohibits a local agency from requiring a deposit for an independent audit should that agency not comply with provisions of the Mitigation Fee Act that require an annual report within 180 days of the end of the fiscal year about the establishment, increase, or imposition of a specified fee, but that local agency continues to require payment of that fee in connection with the approval of a development project for three consecutive years. The bill also requires the local agency to pay for the cost of the independent audit of the fee. This measure is sponsored by the Desert Valleys Builders Association.
- 3) **Author's Statement.** According to the author, "Nearly 30 % of local agencies with local ordinances allowing for the collection of Mitigation Fees fail to meet the annual reporting requirements of the Mitigation Fee Act (AB 1600, 1987). The Mitigation Fee Act is currently without corrective measures when a local agency fails to comply its directives, which can force local development to a complete halt.

"As a way to correct this problem, Senator Stone has introduced SB 1202. This bill states that local governments that have not completed a required report on mitigation fees for three consecutive years to pay the costs of requested audits of their Mitigation Fee funds. SB 1202 provides a stronger incentive to local governments to complete these reports, and ensures that the intent of the Legislature is fully carried out."

- 4) **Arguments in Support.** Supporters argue that not every agency is fulfilling their annual reporting obligation, and that this bill adds some incentive to doing so, as well as providing a necessary tool for transparency in the collection and spending of impact fees.
- 5) **Arguments in Opposition.** Opponents argue that agencies should be given the opportunity to cure the missing report first, instead of being made to pay for the cost of the audit.

REGISTERED SUPPORT / OPPOSITION:

Support

Desert Valleys Builders Association [SPONSOR]
Building Industry Association of the Greater Valley
California Building Industry Association
City of La Quinta
Coachella Valley Association of Governments
Construction Lead Sheets
Greater Coachella Valley Chamber of Commerce
Law Offices of Edward H. Cross & Associates
Lippert Construction, Inc.
Nobell Energy Solutions, LLC
Peter Rabbit Farms
Palm Desert Area Chamber of Commerce
Sunrise Company

Opposition

California Special Districts Association (unless amended)

Analysis Prepared by: Debbie Michel / L. GOV. / (916) 319-3958