

Date of Hearing: June 23, 2021

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Cecilia Aguiar-Curry, Chair

SB 319 (Melendez) – As Introduced February 4, 2021

SENATE VOTE: 36-0

SUBJECT: Land use: development fees: audit.

SUMMARY: Expands the scope of audits local agencies must prepare if they fail to comply with reporting provisions of the Mitigation Fee Act.

EXISTING LAW: Establishes the Mitigation Fee Act, which governs fees local agencies may levy on development projects.

FISCAL EFFECT: None.

COMMENTS:

- 1) **The Mitigation Fee Act.** Local agencies approving development projects can require developers to mitigate a 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. Prior to 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.

The Mitigation Fee Act also requires local officials that impose a fee as a condition of approving a development project to demonstrate a reasonable relationship between the amount of the fee and the cost of the public facilities supported by the fee.

- 2) **“Essential Nexus” and “Rough Proportionality.”** The U.S. Supreme Court, and the California Supreme Court issued a series of decisions in the 1980s and 1990s that affected the scope and application of impact fees. In its 1987 *Nollan* decision, the U.S. Supreme Court decided 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 opined that conditions placed 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 that any proposed impact fees meet these legal tests. Other requirements in the Mitigation Fee Act ensure that impact 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.
 - 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) **Impact Fee Reports.** 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:
- 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.
 - h) The amount of refunds of fees unspent after five years.
- 4) **Impact Fee Audit Requirements.** Any person may request an independent audit of how the impact 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. If a person makes that request, the local agency retains an independent auditor to conduct the audit provided that an audit has not been performed for the same fee within the previous 12 months and the requestor deposits the estimated cost for the audit with the local agency. A local agency must adjust its fees if the audit finds that the fees are set too high.

In response to reports of some local agencies not filing the annual impact fee reports in a timely fashion, the Legislature enacted SB 1202 (Stone) Chapter 357, Statutes of, 2018, which required local agencies that do not complete their impact fee annual reports for three consecutive years to pay the costs of any requested audits.

- 5) **Bill Summary and Author’s Statement.** This bill expands the scope of the audit that a local agency must provide on impact fee accounts. Under existing law, if a local agency fails to prepare an annual report on impact fees for three consecutive years and a person requests an audit of that impact fee account, the local agency must provide the audit free of charge. This bill specifies that, under these circumstances, the audit must cover each consecutive year that the local agency failed to report on.

According to the author, “This is a district bill that is good policy. It increases transparency and ensures the general public and or builders have an opportunity to review and question new or adjusted fees.”

This bill is sponsored by the Desert Valley Builders Association.

- 6) **Related Legislation.** SB 602 (Grayson) adds new requirements to impact fee nexus studies. The bill requires cities and counties to request certain information from development proponents and requires the Department of Housing and Community Development (HCD) to develop a nexus study template. AB 602 is pending in the Senate Governance and Finance Committee.

AB 678 (Grayson) imposes caps on various impact fees and other exactions. Among its other provisions, the measure requires local agencies to calculate fees as a percentage of median home process, limits the ability of local agencies to use fees for existing services, and creates the Housing Cost Reduction Incentive Program in HCD. AB 678 is pending in the Assembly Local Government Committee.

SB 318 (Melendez) requires that independent auditors who conduct impact fee audits be certified public accountants, and prohibits the local agency from retaining an independent auditor that has recently worked with the local agency under specified conditions. SB 318 is pending in the Senate Governance and Finance Committee.

SB 695 (Ochoa Bogh) prohibits a local agency from imposing a housing impact requirement on a housing development project, unless it meets specified requirements. SB 695 is pending in the Senate Governance and Finance Committee.

- 7) **Arguments in Support.** According to the Desert Valley Builders Association, “Two years ago, the passage of SB 1202 (Stone – signed September 11, 2018) the Mitigation Fee Act’s public audit request mechanism was amended with the addition of Government Code Section 66023(h). This clause provided that if an agency failed to comply with its annual reporting requirements for three (3) consecutive years a request could be made for an audit of Mitigation Fee Act fund accounts without cost to those calling for the audit.

“However, this amendment did not stipulate the years subject to the audit. SB 319 would require the audit to include each consecutive years the local agency did not comply with the annual disclosure requirement.”

8) **Arguments in Opposition.** None on file.

REGISTERED SUPPORT / OPPOSITION:

Support

Desert Valleys Builders Association [SPONSOR]
California Association of Realtors
California Building Industry Association
California Business Properties Association

Opposition

None on file.

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