

Facilities, Construction and Property Practice Group

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AALRR Alert

State Allocation Board Authorizes the Imposition of Level III Developer Fees



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At the May 25, 2016, State Allocation Board meeting, the State Allocation Board authorized, for the first time ever, the imposition of Level III Developer Fees.

Developer Fees or school impact fees are paid by property owners and developers to mitigate the impacts of new construction on the school district's facilities. There are three levels of Developer Fees, commonly referred to as Level I, II, and III. Until May 25, 2016, school districts have never been authorized to levy Level III fees because the State Allocation Board has never determined that state funds for new construction projects were not available.

Level I fees, the basic mitigation fee, were authorized in 1987 by AB2926. In order to levy Level I fees, the school district performs a Justification Study to establish that new residential and commercial development within the school district's boundaries will impact the school district with new students.

Currently the Level I fees are \$3.48/sq. ft. for residential development, and \$0.56/sq. ft. for commercial development and are reviewed and adjusted every two years by the State Allocation Board. Developer Fees may only be used for the construction or reconstruction of school facilities and may not be applied to maintenance, routine repair, or deferred maintenance projects.

Level II fees only apply to residential construction and are intended to represent the school district's 50% matching contribution for new school construction projects. The Level II fees vary from district to district and are established through a School Facilities Needs Analysis. In order to qualify for Level II fees, a School Facilities Needs Analysis must be performed, and a school district must meet two of the following: (1) 30% of the district's pupils are in a multitrack-year round program, (2) a local general obligation bond received a majority vote in the past four years, (3) debt for capital outlay

has been issued at 15% or 30% of the local bonding capacity, and (4) 20% of the teaching stations are portable. The Level II fees may only be expended on facilities identified in the School Facilities Needs Analysis that are attributable to projected enrollment growth from the construction of new residential units.

Level III fees are intended to represent 100% of the new construction projects and are essentially double the Level II fees. In order to qualify for Level III fees, a school district must qualify for Level II fees, and there must be a lack of state funds for new construction projects, and the State Allocation Board must determine that state funds are not available for new construction projects. Under Government Code section 65995.7 "state funds are not available if the State Allocation Board is no longer approving apportionments for new construction pursuant to Article 5 (commencing with Section 17072.20) of Chapter 12.5 of Part 10

of the Education Code due to a lack of funds available for new construction.” In determining that state funds are not available for new construction projects, the State Allocation Board reasoned that the last time an apportionment for new construction under Article 5 was made was on September 8, 2015, which was for a February 2015 unfunded approval, and that the remaining \$2.2 million in state bond authority for new construction projects has been committed to facility hardship projects under different statutory authority.

While Government Code section 65995.7 sets forth the conditions that must be met to implement Level III fees, the statute is silent as to when Level III fees must cease. This is especially important in light of the Kindergarten through Community College Public Education Facilities Bond Act on the November 8, 2016, ballot. Once the State Allocation Board resumes making apportionments for new construction under Article 5, the requirement for Level III fees that state funds are not available for new construction projects will no longer be met. Government Code section 65995.7 does allow for the reimbursement to the developer of the difference between the Level II and III fees if the school district receives state funds in the future for the construction of the facilities.

Accordingly, we recommend that school districts review their developer fee status and consult with

legal counsel. Atkinson, Andelson, Loya, Ruud & Romo has extensive experience advising school districts concerning all real property issues, including the assessment of developer fees. For further information, please contact one of the attorneys listed above.