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**A SHORT OVERVIEW OF**  
**DEVELOPMENT IMPACT FEES**

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**BY:**

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### **I. DEFINITION OF DEVELOPMENT IMPACT FEE**

A development impact fee is a monetary exaction other than a tax or special assessment that is charged by a local governmental agency to an 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. (Gov. Code § 66000(b).) The legal requirements for enactment of development impact fee program are set forth in Government Code §§ 66000-66025 (the "Mitigation Fee Act"), the bulk of which were adopted as 1987's AB 1600 and thus are commonly referred to as "AB 1600 requirements." A development impact fee is not a tax or special assessment; by its definition, a fee is voluntary and must be reasonably related to the cost of the service provided by the local agency. If a development impact fee does not relate to the impact created by development or exceeds the reasonable cost of providing the public service, then the fee may be declared a special tax and must then be subject to a two-thirds voter approval. (Cal. Const., Art. XIII A, § 4.)

*Practice Pointer:* Both the political and legal implications of having a development impact fee declared to be a special tax can be exceedingly grim. The best defense against such an outcome is careful construction of the development impact fee program and scrupulous attention to substantive and procedural requirements of the Mitigation Fee Act. The City Attorney must play an active role in this process.

### **II. PUBLIC AGENCY'S AUTHORITY TO IMPOSE DEVELOPMENT IMPACT FEES**

The power to exact development impact fees arises from the city's police power to protect the public health, safety and welfare. (Cal. Const., Art. XI, § 7.) The police power allows a city to act in the interest of its citizenry and to enact and enforce ordinances and regulations that are not in conflict with state law. Charter cities have the additional power to regulate by virtue of their plenary authority with respect to municipal affairs. (Cal. Const., Art. XI, § 5.)

**A. A TRUNCATED HISTORY OF CITIES' AUTHORITY TO EXACT DEVELOPMENT IMPACT FEES.**

While the California Mitigation Fee Act was enacted in 1987, local governmental agencies had been collecting impact fees for many years. Impact fees, originally called exactions, were first adopted in the 1920s by cities seeking new infrastructure financing alternatives. (*Practical Issues in Adopting Local Impact Fees*, Jerry Kolo and Todd J. Dicker, excerpt from **State and Local Government Review**, Vol. 25, no. 3 (Fall 1993); 197-206). In 1949, California courts first adopted the "reasonable relationship" test between a project's conditions of approval and development impacts. (See *Ayers v. City of Los Angeles*, 207 P.2d 1 (1949).) This original pronouncement of the test required that an exaction by a local agency be reasonably related to the development project's impact on the need for public infrastructure. The concept of exactions expanded in the 1960s with the enactment of the Quimby Act, which authorized either the dedication of land or payment of in-lieu fees for development of parks. (Gov. Code § 66477; see also *Guide to California Planning*, 2nd Ed., William Fulton, p. 181.)

In the 1970s, California courts and the California Attorney General affirmed cities' ability to exact from new development both the dedication of land and the payment of funds. In *Associated Homebuilders, Inc. v. City of Walnut Creek*, the California Supreme Court upheld the imposition of development impact fees to mitigate indirect impacts created by new development. (4 Cal.3d 633 (1971).) In 1976, the California Attorney General issued an opinion affirming a city's authority to impose an exaction provided it furthers implementation of the city's general plan and bears at least an indirect relationship to the impacts created by the proposed development. (59 Ops.Cal.Atty.Gen. 129 (1976).)

The modern law of exactions was established beginning in the late 1980s.

**1. *Nollan v. California Coastal Commission* and the Enactment of the Mitigation Fee Act.**

In 1987, the U.S. Supreme Court decided *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). As most every land use lawyer now knows, the Nollans proposed construction of a two-story home within the same footprint as their existing one-story beachfront house. As a condition of issuing a coastal development permit, the Coastal Commission required that the Nollans grant a public access easement across the beach in front of their house. The Nollans successfully argued, and the U. S. Supreme Court held, that the exaction (the grant of public easement) was not related to the impact created by the development (increased building height). Proof of such an "essential nexus" was required if exaction was to be lawful. The Supreme Court, however, did not specify how close the nexus must be.

With the passage of Proposition 13 in 1978 and the decline in local government revenues, local government increasingly relied on impact fees in order to mitigate the impacts created by new development. In response, developers lobbied the State Legislature to curtail the growing use of impact fees. In response, the Legislature passed AB 1600, the Cali-

ifornia Mitigation Fee Act, which codified many of the principles laid out in *Nollan* and established a statewide procedure (discussed below) for exacting certain fees from development projects.

## 2. *Dolan v. City of Tigard*

The U.S. Supreme Court revisited the question of exactions in the *Dolan* case. (*Dolan v. City of Tigard*, 512 U.S. 319 (1994)). In this case, Dolan applied to the city for an expansion of her downtown hardware store, which was located on a flood plain. The city sought to condition approval of her project on the dedication to the city of a bike path and a greenway along a stream that bounded her property. The Supreme Court laid down a more refined test for the exaction of real property, ruling that in order for the government to require project-specific exactions, the government must demonstrate that (i) an essential nexus exists between the legitimate state interest and the exaction imposed by the city (as *Nollan* had held), and (ii) the nature of the exaction must be “roughly proportional” to the impact the project is creating. The *Dolan* court found that, while the city had demonstrated the required essential nexus, the exactions involved were not roughly proportional to the project's impacts. The court noted that it was dealing with an ad hoc quasi-adjudicative, rather than legislative, decision by the city.

The *Dolan* case concerned physical exactions, and is significant chiefly in that context. For a good summary of *Dolan's* applicability for contemporary permit conditions that involve exaction of real property, see Curtin's *California Land Use and Planning Law* (2002), page 271.

## 3. *Ehrlich v. City of Culver City*

When the *Dolan* decision came down, a California appellate court had just ruled on an impact fee case involving a recreation fee and a public art fee. Unlike *Dolan*, *Ehrlich v. City of Culver City* involved the payment of money, not the exaction of real property. (12 Cal.App.4<sup>th</sup> 854 (1996).) After deciding *Dolan*, the Supreme Court vacated the California appellate court's ruling in *Ehrlich* and remanded it for reconsideration in light of *Dolan*.

Ehrlich purchased a 2.4-acre parcel and developed a private tennis club. The parcel was zoned for commercial uses, which included use as a sports facility. After a few years, the tennis club failed. Ehrlich applied to the city for approvals to tear down the facility and to construct thirty townhouses, which would require a rezoning of the property and a general plan amendment. The city ultimately conditioned approval of Ehrlich's project on the payment of a \$280,000 recreation facilities mitigation fee for the loss of the tennis courts and a \$33,200 “art in public places” fee. The art in public places fee had been enacted legislatively pursuant to AB 1600, but the fee for recreational facilities was imposed on an ad hoc basis, purportedly to address the specific impacts of Ehrlich's proposal.

In deciding the case, the California Supreme Court laid out a new test to address the lawfulness of exactions. First, the court clarified that the same legal standard applies whether the exaction is in the form of a land dedication, a monetary fee, or the required construction of certain public facilities. Second, an exaction imposed pursuant to an ordinance or rule of general applicability is constitutionally permissible unless the landowner meets his or her burden of proving that the exaction either does not substantially advance a legitimate governmental purpose or deprives the landowner of any economically viable use of the land. Third, an exaction imposed on a specific development, whether in the form of dedication of property or payment of fees in an ad hoc way rather than via legislation, is subject to the *Nollan/Dolan* “essential nexus” and “rough proportionality” standards. To meet this test, the government must show that (1) the exaction is directly related to the impacts of the development giving rise to the exaction, and (2) the nature of the exaction is roughly proportional to the impacts of the project.

Because the \$280,000 recreation fee was specific to Ehrlich’s project, and not imposed uniformly upon all developers, the court applied the *Nollan/Dolan* test. The court held the city met the “essential nexus” portion of the *Nollan/Dolan* test in that it had established that the development of townhouses would result in the loss of recreational facilities. Thus, the city had demonstrated a potential basis for a connection between a social need generated by the project and the recreation fee imposed by the city. (*Ehrlich, supra*, at 879.) However, the city failed to demonstrate a rough proportionality between the impact created and the fee imposed. The court found the record “devoid” of any findings related specifically to support the required fit between the amount of the recreation fee and the loss of a parcel zoned for recreational use. (*Id.*) Without such project-specific findings, the city’s imposition of the recreational fee failed to meet the “rough proportionality” prong of the *Nollan/Dolan* test and was thus invalid. In contrast to the recreation fee, the court held that, if an exaction such as the “art in public places” fee uniformly applies to all development as part of a broad-based plan, the fee need only bear a “reasonable relationship” to the impact created. The court held that the imposition of such a fee is more akin to traditional land use regulations, which are regularly held to be valid exercises of the city’s police power.

***Practice Pointers:***

- It is well settled law that, since at least the *Associated Homebuilders* case, a development project need only contribute to (rather than cause) an infrastructure impact in order to render lawful a development impact fee to mitigate the impact. The enactment of a valid development impact fee pursuant to the Mitigation Fee Act establishes the required connection between development projects and required infrastructure improvements.
- Avoid imposing ad hoc, project-specific fees if possible. Under *Ehrlich*, a project-specific fee that is imposed on an ad hoc basis is subject to the *Nollan/Dolan* heightened scrutiny standard. Project-specific fees must be supported by individualized findings demonstrating a direct relationship between the impact created and the fee collected and that the amount of the fee is roughly proportional to the impact created. Legislative fees of general application, on the other hand, are subject to a more deferential standard of review under the

city's traditional "police power" authority. (See *Garrick Dev. Co. v. Hayward Unified School District* (1992) 3 Cal.App.4th 320.)

- After *Nollan* and *Dolan*, the government rather than the developer bears the burden of proof to show that the fee bears a reasonable relationship to the impact of the proposed development. However, once the city enacts the proper legislative fee, the burden shifts to the developer to show that the fee either fails to advance a legitimate state interest or deprives the developer of any viable economic use of its land. The city's burden is met through legislatively-enacted findings, which comply with the Mitigation Fee Act. The burden is not met by conclusory statements. Again, involvement by the City Attorney is crucial.
- In order to meet the "rough proportionality" component of *Dolan* for ad hoc project-specific fees, the city doesn't need to make a precise mathematical calculation; however, it must make some sort of individualized determination that the required exaction is related both in nature and extent to the actual impact of the proposed development.
- Monetary fees, dedications of land and the construction of public facilities all must meet the same legal standard: i.e., that the exaction advances a legitimate state interest, that a proper nexus between the impacts caused by the development and the condition which advances the governmental interest has been demonstrated, and – if imposed in an ad hoc manner – that the amount of the exaction is roughly proportional to the impacts of the project.
- All exactions, whether ad hoc or legislatively-enacted, require findings demonstrating the proper relationship between the impact created and the fee exacted. Thus, the language of the adopted findings is extremely important. Findings are an opportunity for the government to explain why the fee is necessary, what impact is created by development, how new development impacts the existing citizenry, and how the collection of a fee will alleviate all or a portion of this impact. Failure to make the proper findings may result in an invalidation of the fee. (See *Bixel Associates v. City of Los Angeles* (1989) 216 Cal.App.3d 1208.)
- A city may impose an exaction on a specific development to mitigate the loss of a previously private use (such as the private tennis club in *Ehrlich*) if the loss of the private use has quantified public consequences and the city can satisfy the *Nollan/Dolan* heightened scrutiny standard.
- For an example of a development fee supported by a defensible nexus study, refer to *Russ Bldg. Partnership v. City and County of San Francisco* (1987) 199 Cal.App.3d 1496. Although the case was decided before *Nollan* and the effective date of AB 1600, it follows the same principles.
- Remember: If the government doesn't make adequate findings connecting the fee and the impact, the fee may be subject to challenge as an illegal, non-voter-approved "special tax".

- If voter approval under Propositions 62 and 218 can be obtained for a special tax, a development fee program can be imposed that lacks the narrow drafting and careful findings of a proper fee under AB 1600. This alternative, however, requires voter approval

### III. CREATING A VALID DEVELOPMENT IMPACT FEE PROGRAM

#### A. Preliminary Considerations

Before creating a comprehensive fee program, a city should make a few preliminary decisions. The city should plan ahead. Creating an impact fee program can be a costly and labor-intensive process that should not be undertaken more often than necessary. A well-planned fee program can generate sufficient funds to allow the city to adequately mitigate impacts created by new development. Conversely, a poorly planned fee can result in the city either collecting too little money and being forced to pay for new development through its general fund, or collecting too much money based on an unsupported fee program, thus exposing the city to a fee challenge. Either of these results can lead to a dissatisfied citizenry and a frustrated city council. The following principles should guide the creation and implementation of a fee program:

- **Plan for future development.** Anticipate where and how growth will occur in your city. The city's general plan should be your guideline; however, if the general plan hasn't been updated recently, you might consider such an update before basing your fees on the general plan's growth projections.

Understanding where growth may occur within the city will also help the city plan for specific public facilities and infrastructure that may be needed in several respects. First, if new development is projected to occur in a concentrated area geographically separated from existing development, the city may decide that new, stand-alone facilities, such as fire stations and libraries, are required to service new development rather than expansion of existing facilities. This will have an impact on the cost of new infrastructure and, of course, on the uses to which the resulting fee revenues may be devoted. Second, you may wish to consider adopting a fee program that is limited to a particular geographic area within the city and that addresses the area's peculiar needs.

- **Don't try to fix every problem with one fee.** It is important to tailor each fee to address a particular impact. Broad-brush fees are subject to legal challenge under AB 1600. Remember that each fee must bear a reasonable relationship to the impact it is intended to mitigate. You must also be able to clearly account for each fee collected. On the flip side, creating too many fee categories may create administrative difficulties in implementing and accounting for fees once they are collected.
- **Review the general plan and decide what level of service the city wants to provide.** Fees should be designed to collect sufficient funds to provide public facilities and infrastructure at a certain level of service. The general plan may

specify the size and level of service at which certain types of public infrastructure must be maintained. While a city cannot require new development to pay for existing deficiencies, it can require new development to provide an acceptable level of service. When considering new fees, the city should decide whether it wants to raise the current level of service for public facilities. If so, the city could raise the level of service for existing development through expenditures from the general fund, while requiring new development to pay for a level of service above what is currently in place.

- **Don't try to make new development pay more than its fair share.** New development cannot be required to pay for existing deficiencies, and the amount of any impact fee must bear a reasonable relationship to the actual cost of providing the public services demanded by the new development on which the fee is imposed.
- **Keep your council informed.** At the beginning of the process to enact fees, ensure that your council understands the nexus requirement. If your jurisdiction is a slow-growth community, explain to your city council that new development cannot be required to mitigate current deficiencies. If your council is pro-growth, explain that undercharging new development may mandate that general fund monies be used to maintain required service levels.
- **Too many exactions might hurt, rather than help, the city's economy.** Although California has seen a robust economy during the last decade, the reality is that development can only absorb so many fees before development doesn't pencil out. Before a city starts creating multiple layers of fees, it should consider what types of developments are most affected by high impact fees and whether the kinds of development the city wants to encourage will be helped or hindered by new fees. For example, housing advocates often argue that impact fees on residential projects can price many low- and moderate-income wage earners out of the local housing market and encourage developers to construct larger, more expensive homes because high-end occupants can more easily absorb higher impact fees. Similarly, business groups argue that imposing fees on commercial development may prevent the city from attracting businesses into the city. If the city is interested in revitalizing its downtown area, high impact fees for commercial development may drive commercial tenants to a neighboring city or into an unincorporated area that has lower fees. One way to address such issues is to provide fee waivers for certain types of projects. Such waivers should be included in whatever fee legislation your city adopts. However, please note that waivers cannot be funded with fee revenues, as this cross-subsidy would prove that fee payers are over charged. Other local government revenues must be relied upon to backfill revenues that are lost due to fee waivers.
- **Consider use of development agreements as appropriate.** Agreements to pay fees or to construct infrastructure, which are contained in development



agreements evidence contractual agreements between government and the developer, and are not constrained by AB 1600 requirements. To be safe, include a provision in your development agreement whereby the developer waives any right to contest fees under AB 1600 protest provisions.

## ***B. Applicability of AB 1600 to Fee Programs***

### ***1. When AB 1600 Applies***

AB 1600 applies to all local agencies in the state, including all general law and charter cities. (Gov. Code § 66000(c).) However, AB 1600 does not apply to every fee or exaction collected by a local agency. AB 1600 only applies when a local agency imposes a fee on an applicant in connection with approval of a development project to defray all or a portion of the cost of public facilities related to the project. (Gov. Code § 66001.) “Public facilities” are defined to include public improvements, public services and community amenities. (Gov. Code § 66000(d).)

#### ***Practice Pointer:***

- “Public facilities” is defined very loosely and can be broadly interpreted. Case law provides little guidance in this area, so cities are left to apply the definition to specific infrastructure needs created by new development. Clearly “public facilities” includes works of public improvements such as fire stations, libraries, sewer plants, traffic improvements and city administrative buildings. Less clear are items that don’t readily constitute an “improvement”, “service” or “amenity”, such as police weapons and service vehicles.

### ***2. When AB 1600 Does Not Apply***

AB 1600 does not apply to the following exactions that are regularly collected by cities:

- School fees (the Legislature has occupied the field in Gov. Code § 65995).
- Quimby Fees (Gov. Code § 66477)
- Fees collected under development agreements pursuant to Government Code §65864
- Fees for processing applications for governmental regulatory actions or approvals (Government Code Section 66017).
- Fees collected pursuant to agreements with redevelopment agencies (*Public Needs & Private Dollars*, p. 122.)
- Reimbursement agreements between a developer and an agency for the cost of public facility, which exceeds the developer’s proportionate share of the cost (Gov. Code § 66003).
- Penalties assessed against developers who receive a density bonus pursuant to Government Code § 65917.5, but failed to use the space for child care facilities (Gov. Code § 65917.5(f)).

***Practice Pointer:***

- Water and sewer connection fees are treated differently than are other fees under AB 1600. Fees collected for these services are not subject to the findings and accounting requirements contained in Chapter 5 (§§ 66000-66009), but are subject to the provisions of Sections 66016 (notice), 66022 (legal challenge), and 66023 (audits).<sup>1</sup> As with other development impact fees, water and sewer charges cannot exceed the reasonable cost of providing service unless approved as a special tax by two-thirds of the electorate. Capacity charges collected pursuant to this section must meet similar accounting and public notice requirements as fees adopted pursuant to §66001. (See Gov. Code § 66013(c).) Any legal challenge to a water or sewer connection fee or capacity charge must be brought pursuant to §§ 66022 and 66023.<sup>2</sup>
- Some non-AB 1600 exactions interrelate with AB 1600 fees. For example, Quimby Fees can be collected from residential subdivisions for park or recreational purposes. However, Quimby fees cannot be collected from commercial developments, apartment projects, or subdivisions of fewer than five (5) parcels. To ensure that such development mitigates its parks impacts, an equivalent AB 1600 fee could be collected. Also, there is authority for the proposition that Quimby fees can only be based on the value of unimproved land. (*Norsco Enterprises v. City of Fremont* (1976) 54 Cal.App.3d 488.)<sup>3</sup> Cities will often adopt an AB 1600 impact fee to “fill in the gap” left by Quimby. Also, Quimby fees cannot be used to maintain parks or recreation facilities, only for the initial development. Therefore, under this approach, cities could have three separate fees that relate to park and recreation facilities: (1) a Quimby fee applicable to residential subdivisions for the purchase of park or recreation acreage, (2) an AB 1600 fee applicable to commercial, condominium and residential developments of fewer than five parcels for the same purpose, and (3) an AB 1600 fee applicable to all new development for the construction of park improvements. The authors have been informed that some jurisdictions in California have not adopted a Quimby Fee and instead impose AB 1600 fees on residential subdivisions.

***C. General Considerations for Establishing an AB 1600 Impact Fee***

Once a city has considered the areas where growth may occur and the scope of public improvements that will be required by this growth, the city should prepare a fee study and capital improvements plan to establish the necessary impact fees. Establishing an impact fee requires (1) projecting the future growth that will be served, (2) identifying the current and projected level of service for each public facility, (3) identifying any additional facilities or improvements that will be needed to accommodate future growth, and (4) al-

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<sup>1</sup> Technically these provisions of the government code were not adopted by AB 1600 and there is some diversity of practice as to whether the term AB 1600 refers to them. They are discussed here in the interest of completeness.

<sup>2</sup> A case is now pending in the California Supreme Court on a challenge to a water connection charge imposed by a special district. In *Richmond v. Shasta Community Services District*, Case No. S105078, a developer argues that the District’s water connection charge is an assessment for which property owner approval is required. The case is fully briefed and awaiting oral argument and may be decided in 2003.

<sup>3</sup> Fees, once collected, may be used for the development of park facilities. (81 Ops. Ag. 293 (1998).)

locating the costs of providing the needed public services between the existing population and new population.

*Practice Pointers:*

- **Don't adopt too long a time horizon for future growth.** Pick a time frame within which you can be reasonably sure that the required improvements will be built and projected development will occur. Even with a legislatively-adopted fee, requiring development to pay for infrastructure that is not needed for 20 years may erode the required nexus determination. In addition, any fees collected now will likely be a fraction of the real cost to develop improvements that are 20 years off.
- **A repeated admonition: Don't make new development pay for existing deficiencies.** While development impact fees are intended to prevent the city from footing the bill for new development, they are not intended to compensate the city for existing deficiencies
- **The existing citizenry can receive some incidental benefit from new public improvements.** While development impact fees can't be used to fix existing problems, a fee is not invalid just because existing residents receive an incidental benefit from the new public improvements created through development impact fees. In *Shapell Industries v. Governing Board* (1991) 1 Cal.App.4th 218, the court upheld a fee that required new development to pay for new science laboratories, libraries, gymnasiums and administrative buildings to support additional classrooms, even though these new facilities incidentally benefited existing residents who happened to live in the same school district as the new development.
- **Develop a package of infrastructure improvements for study.** Some impact areas may be obvious, such as congested intersections. Others may be less obvious, such as the lack of art in public places. Your council may wish to schedule a workshop to receive public input prior to initiating a fee study.
- **Think creatively about the use of development impact fees in your community.** If the improvements to be funded by development impact fees constitute "public facilities," fees may be assessed to support their construction, installation, or purchase. Examples of public facilities that have been supported by development impact fees include streets, bridges, traffic control devices, flood control improvements, city government administrative facilities, recreation facilities, libraries, public safety facilities, day care facilities, and art in public places.
- **Do Not Assess Fees for Operation and Maintenance.** Development impact fees cannot be assessed for operation and maintenance of capital facilities, with limited exceptions related to assessment districts. (See Gov. Code § 65913.8.)
- **Consider holding at least one public workshop before finalizing a fee study and developing a Capital Improvement Plan.** Public participation at the beginning of the fee process allows the city to hear from its residents and land owners and answer questions

and to incorporate concerns into its fee program. Public participation near the end of the process, prior to bringing the required ordinance to the city council for action, can provide early notice of any potential legal challenges to the program. The city will also be able to learn which fees may be subject to challenge and respond accordingly before final action is taken.

#### ***D. Preparing the Fee Study***

Once a city decides what public services and infrastructure will require funding through impact fees, it should prepare a fee study. A fee study provides the quantified basis for the imposition of fees. The goal of the fee study is two-fold. First, the fee study provides the city with the legal support to impose the fee. A fee study demonstrates the required nexus between the impact created by new development and the amount of the fee. Second, the fee study quantifies the projected burden that new development will create on the city's infrastructure. The city may review the fee study and decide that the level of service it would like to provide cannot be met simply through the imposition of impact fee.

#### ***Practice Pointers:***

- **Hire a consultant.** Unless the fee being considered is extremely rudimentary, it is advisable to hire a consultant. Many consulting firms are experienced in creating defensible AB 1600 fees, which will be invaluable to the city's position in the event of a legal challenge. Consultants can also help the city come up with fees it had not considered and can propose funding alternatives. When selecting a consultant, ask other similarly sized cities whom they would recommend. Don't just hire the first consultant you find. Ask to see samples of fee studies they have completed.
- **Avoid a rush to the planning counter.** Once a city proposes the preparation of a fee study, developers may rush to secure project approval before the new fees are in place. To avoid this, the city should consider passing a resolution requiring all future development to participate in the pending fee program. (See *Kaufman & Broad-Central Valley, Inc. v. City of Modesto*, 25 Cal.App.4th 1577 (1994)). Alternatively, the city may attach conditions of approval requiring new development to comply with whatever fee program is ultimately adopted. (See *Russ Building Partnership v. City and County of San Francisco*, 199 Cal.App.3d 1496 (1987).) For tract map applications, any subsequently adopted fee program will be effective if the city initiates proceedings regarding the fee study and publishes notice prior to a map application's completeness determination, and completes proceedings prior to action on the map. (Gov. Code § 66474.2.) In order to fully inform developers of the potential exactions that may be required, a city could include in any resolution or other action initiating the fee program an estimate of the maximum level of the new fee. If a maximum amount can't be determined, the city can put a cap on the amount collected from development projects that are pending during the fee study. Without such an estimate or cap, the city may face a due process challenge if it tries to impose the fee on projects pending during the fee study. (See *Kaufman & Broad, supra.*)

- **Assess current service levels as part of your fee study.** To help ensure that new development is not required to mitigate existing infrastructure deficiencies, it is useful to establish a baseline for current infrastructure operation, either in your fee study or elsewhere. This baseline should then be considered in deciding how to allocate the cost of required infrastructure between existing and future development. This is a fact-intensive inquiry.

#### ***E. Preparing a Capital Improvement Plan in Conjunction with the Fee Study***

Many jurisdictions prepare a capital improvements plan (“CIP”) in conjunction with a fee program. AB 1600 encourages the use of a CIP to assist in scheduling and implementing the services and improvements funded through impact fees. (Gov. Code § 66002.) A CIP establishes a schedule of improvements necessary to accommodate the projected growth. The CIP must indicate the approximate size, location, time of availability, and estimated costs of all improvements to be financed through fees. (Gov. Code § 66002(a).) In order to create a usable CIP, a city must have an accurate understanding of its current service baseline and its projected growth. This requires an understanding of when, where, and how growth may occur within the city. The more information the city can collect about future growth, the more comprehensive and accurate will be the CIP. A CIP can also help a city determine when new public improvements or expansion of existing public improvements need to be constructed in relation to the timing of new development.

#### ***Practice Pointers:***

- **Consider Sub-Areas for Study.** Capital improvements may be developed for the entire city or for specific geographic areas of the city. Make sure the area serviced and the new development to be charged for the improvement coincide.
- **Properly Allocate Costs for Capital Improvements.** Different types of development will require the construction of public facilities at different rates (i.e. commercial development affects the demand for the development of new park facilities at a different rate than does single-family residential development). The CIP and fee study, taken together, can assess how best to allocate the costs of public improvements among user categories.
- **Avoid creating numerous fees that are too specific.** Implementing, collecting and accounting for numerous fees can prove difficult for city staff.

#### ***F. Role of the City Attorney.***

The City Attorney's role in the creation of a legally defensible AB 1600 program is critical. Because you will be defending the program from any legal challenges, you must be sure it is defensible. Although obviously this involves many tasks, at least three components are critical. First, the City Attorney should draft the fee ordinance carefully and review all project documents (fee study, staff report, council resolution, etc.) to ensure that a full and proper record is created. Second, the City Attorney should ensure that the

fee study complies with the critical legal principles involved in AB 1600 law (i.e., that fees support only improvements which are required by new development, do not exceed the cost of constructing the improvement, and are not to be used for maintenance and operation expenses). Last, the City Attorney should make sure the fee study is written in understandable English. If you can't understand the report, you can be sure the public will not, and, most likely, the judge hearing a mandate challenge to your program will not. The evidence supporting the city's legislative findings must be clear and straightforward. Do not be afraid to ask the consultant to explain any item you do not understand; your questions will undoubtedly lead to clarifying language in the text of the fee study and may well identify legal deficiencies in the draft analysis.

**Practice Pointers** (These Practice Pointers focus on the City Attorney's review of the fee study):

- Make sure you understand the numbers.** Fee studies are filled with charts, tables, and graphs that lay out current services provided, the cost for those services, projected growth and the anticipated cost for servicing future growth. These calculations are the factual support for new impact fees. However, fee studies often do not adequately explain how calculations were derived or what assumptions were used in projecting future needs. Take the time to understand what each calculation means and how it is used to create the proposed fees. You may need to have the consultant revise the fee study to explain the calculations.
- Check the development projections.** Generally, the consultant doesn't know the city's development trends as well as you and city staff do. Make sure the study's projections are consistent with what realistically will happen in the next ten years. If the projections are wrong, the city could end up collecting too little money to mitigate the impacts of new growth.
- Ensure that a justification is provided for "administrative" fees.** A fee study will frequently recommend inclusion of an administrative fee to cover ongoing program administration that is added on to all impact fees. While AB 1600 permits imposition of fees for this purpose, the fees must be supported by evidence that the fees are reasonable and do not collect more than the cost of the service.
- Make sure that fee calculations are adequately supported.** Consultants and city staff work together in developing the fee study since staff is more familiar with the actual operation of the city. Sometimes a fee study will base a growth projection or anticipated impact on city staff's "professional judgment" or opinion. While staff's opinion and expertise are invaluable in the fee process, the basis for all conclusions articulated in the fee study must be supported by evidence which, for safety's sake, you will want to be at the level of substantial evidence.

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**G. Required Findings for AB 1600 Fee Program.**

Government Code § 66001(a) requires that any action establishing, increasing or imposing a fee as a condition of approval of a development project must do all of the following:

- Identify the purpose of the fee;
- Identify how the fee is to be used;
- Determine how a reasonable relationship exists between the fee's use and the type of development project on which the fee is imposed;
- Determine how a reasonable relationship exists between the need for the public facility and the type of development project on which the fee is imposed.

In addition, when a city imposes a project-specific fee, the city must also demonstrate a reasonable relationship between the amount of the fee and the cost of the public facility or the portion of the public facility attributable to the development on which the fee is imposed. (Gov. Code § 66001(b); see *Garrick Dev. Co., et al. v. Hayward Unified Sch. Dist.*, 3 Cal.App.4<sup>th</sup> 320, 336 (1992)). Typically the fee study and CIP provide the basis of the required findings.

*Practice Pointer:*

- **The findings required by § 66001 must be made in the ordinance which establishes the fee program.** The findings should also be made in the consultant's fee study and in the staff report that is submitted to the city council when it takes action on the program. Both the fee study and the staff report should explain the evidence that supports the validity of each required finding.

***H. Public Hearings; Procedure for Adoption of Fees.***

AB 1600 governs both the establishment of new fees and the increase of an existing fee, and requires that specified procedural requirements be satisfied. The procedural requirements for impact fees are fairly general. (Gov. Code § 66018.) The requirements for adopting particular processing fees are more specific. (Gov. Code § 66017.)

**1. Development Impact Fees (Gov. Code § 66018)**

Government Code § 66018 contains the public hearing requirements for the adoption or increase of impact fees. Under § 66018, the local agency must conduct at least one regularly scheduled meeting with notice given pursuant to § 6062a, which requires publication of notice twice, at least five days apart, with the first ten days prior to the hearing. Any costs incurred in conducting the required public hearing may be recovered from the proceeds of the enacted fee. Upon adoption of the required ordinance and resolution, the development impact fees become effective sixty (60) days thereafter. (Gov. Code § 66017.)

**2. Processing and Other Fees (Gov. Code § 66016.)**

The provisions of § 66016 only apply to those classes of fees set forth in § 66016(d). Speaking generally, § 66016 applies to a variety of fees charged for processing applications (i.e., specific plans, LAFCO applications, use permits, map processing, etc.) and to water or sewer connection fees covered by § 66013. For these types of fees, the following specific requirements apply:

- Prior to levying the new fee or increasing the existing fee, the local agency must hold at least one open and public regularly scheduled hearing. Notice for the meeting must be mailed to those who have filed a written request therefor at least fourteen (14) days prior to the meeting.
- At least ten (10) days before the meeting, the local agency must make available for public review the data indicating the amount of the cost required to provide the service for which the fee is charged and the revenue sources anticipated to provide the service, including general fund monies.
- Any new fee or increase in a fee must be made by ordinance or resolution of the legislative body.
- Any cost incurred in conducting the public meeting may be recovered from the fees to be collected.
- Upon adoption, the fees become effective sixty (60) days thereafter. (Gov. Code § 66017).

**3. For all types of AB 1600 fees, a local agency may also adopt or increase fees pursuant to an urgency ordinance.**

- For all types of AB 1600 fees, a local agency may also adopt or increase fees through an urgency ordinance. (Gov. Code § 66017(b).) If the legislative body determines that a new fee or an increase in an existing fee is necessary to protect the public health, safety and welfare, then the fee can be adopted or increased on an interim basis without following the procedures otherwise required. The urgency measure must be adopted by a four-fifths (4/5<sup>ths</sup>) vote of the legislative body and must include written findings that describe the immediate and current threat to the public health, safety and welfare that justifies the urgency action. The urgency measure is effective for thirty (30) days unless the legislative body, after a noticed public hearing, extends the urgency measure for an additional thirty (30) days. No more than two extensions may be granted.

*Practice Pointers:*

- Your city council may wish to consider adopting a fee amount that is lower than the actual cost of providing public services. Taking a conservative approach in adopting a fee of less than 100% of full recovery can help avoid challenges that the fee is too high.



- **Don't seek to recover study costs.** Although both § 66016 and § 66018 provide for the recovery of costs expended for conducting the public hearing, the legislative history suggests that these costs were not intended to include the costs of the fee study and CIP.
- **The city council is the ultimate decisionmaker.** The legislative body cannot delegate the responsibility of adopting or increasing impact fees to its planning commission or other body. The city council alone must adopt the necessary ordinance and resolution.
- **Consider adopting both a regular and urgency ordinance at the same time, provided that urgency findings can be made.** This will ensure that there is not a gap in the applicability of the fees during the 60-day period before the regular ordinance becomes effective.
- **In passing an urgency ordinance, make sure to include specific facts supporting the need for immediate action.** A mere declaration by the local agency that an immediate danger to the public health or welfare exists is neither conclusive nor sufficient. (*Crown Motors v. City of Redding* (1991) 232 Cal.App.3d 173, 179.)

### ***I. Staff Report***

In addition to the fee study and CIP, the staff report for adoption of a development impact fee provides the city one more opportunity to support its fee. The staff report is also part of the administrative record and can be used by the city (or a disgruntled developer) in any later legal challenge. The staff report serves as an opportunity to explain the need for public improvements and steps the city has taken to reach the fee it is recommending. A well-drafted staff report can be the crux of the legal defense of the fee. The staff report should refer to any improvement or infrastructure standards set forth in the general plan or any specific plan and explain how the fee will help the city meet these standards. Finally, staff should conclude that the fee bears a reasonable relationship to the projected impacts of new development and is necessary to mitigate these impacts.

#### ***Practice Pointers:***

- **The staff report is part of the administrative record.** Any conclusions or opinions made by staff in the staff report or at the public hearing constitute "substantial evidence" for purposes of any future legal challenge. The city attorney should work with community development or public works staff to ensure that all required evidence is presented.

### ***J. Ordinance and Fee Resolution***

The ordinance establishing the fee program provides the legal basis for the imposition of the fee and all required procedures; the resolution contains the actual amount of the fee. Do not include the amount of the fee in the ordinance; otherwise, any change to the fee itself will require a formal ordinance amendment.

The ordinance should include the following elements:

- Legislative findings regarding the reasons why the fees are being imposed;
- A section formally establishing distinct fund categories for each of the fees;
- Provision for an automatic annual adjustment for inflation;
- A statement as to when the fees shall be paid;
- A provision providing an appeal procedure, which allows a developer to contend that, for his particular project, the required legal nexus for imposition of the fee does not exist. Failure to include such a provision may make it difficult for the city to defend a facial challenge to the fee program or an as-applied challenge to a fee condition on a particular project; including such a provision creates an administrative procedure which arguably must be exhausted prior to an as applied challenge or a refund claim (the exhaustion issue is discussed further below);
- Provisions for exemptions or credits.

Samples of fee ordinances and resolutions are attached hereto as Exhibits A-C. Exhibit B relates to a development impact fee created for a geographic area within the city.

#### **IV. PROCEDURES FOLLOWING PASSAGE OF FEE PROGRAM**

##### ***A. Annual Accounting for Fees.***

Once the fee ordinance has been passed, the city will start collecting fees. AB 1600 requires that both general law and charter cities account for every fee that they collect under its terms. Funds collected for each capital facility or service shall be deposited in separate accounts and not commingled with any other funds for other impact fees. (Gov. Code § 66006(a).) While funds are accruing for individual capital facilities, the city must keep track of each fund and provide an annual report. (Gov. Code § 66006(b).) If the city fails to accurately account for the collected fees, the city can be required to refund the fees. (Gov. Code § 66001(d).)

Within 180 days after the last day of the fiscal year, the city must make available the following information:

- A brief description of the type of fee in each account or fund;
- The amount of the fee;
- The beginning and ending balance of the account or fund;
- The amount of the fees collected and the interest earned;
- An identification of each public improvement on which fees were expended and the amount of each expenditure;
- An identification of the approximate date by which the construction of the public improvement will commence;

- A description of any inter-fund transfer or loan and the public improvement on which the transferred funds will be expended;
- The amount of refunds made and any allocations of unexpended fees that are not refunded. (Gov. Code § 6606(b)(1).)

At the next regularly scheduled public meeting not less than 15 days after making the above information available to the public, the city must review the information provided. (Gov. Code § 66006(b)(2).)

Section 66001 contains some extremely important, additional, accounting requirements to which scrupulous compliance is required. Section 66001(d) provides that, for the 5th fiscal year following the first deposit into each public improvement account or fund, and every 5 years thereafter, the agency must make the following findings for funds remaining in each development impact fee account:

- (1) Identify the purpose to which the fee is to be put.
- (2) Demonstrate a reasonable relationship between the fee and the purpose for which it is charged.
- (3) Identify all sources and amounts of funding anticipated to complete financing in incomplete improvements identified in paragraph (2) of subdivision (a).
- (4) Designate the approximate dates on which the funding referred to in paragraph (3) is expected to be deposited into the appropriate account or fund.

If the agency fails to make the findings, it must refund any undisbursed monies to the owner of record of the project sites originally contributing to the funds. (Gov. Code § 66001(d).)

Similarly, when sufficient funds have been collected to complete financing of the public improvements contained in the CIP, the public agency within 180 days of collection of the required funds shall identify "an approximate date by which the construction of the public improvement will be commenced." (Gov. Code § 66001(e).) Failure to comply with this requirement also mandates return of the collected funds, as stated above.

*Practice Pointers:*

- **Annual accounting requirements apply to both general law and charter cities.**
- **As part of adjudicatory decisions, identify improvements to be constructed.** When a local agency imposes a fee for public improvements on a specific project, the local agency must identify the public improvement that the fee will be used to finance at the time the fee is imposed. This is a difficult requirement to meet if the identifica-

tion must be done on an ad hoc, project-by-project basis. (Gov. Code § 66020(d)(1).) The authors believe this requirement can be met through the annual review of the city's CIP (see below), at which time funding priorities can be established for each class of public improvements in the CIP.

- **Establish a tickler system.** When the city first establishes its fee program, it should set up a tickler system in the department of public works to establish the date of the first deposit into each fund and to calendar the required 5-year review. If you have an existing fee program but are unsure if your city has been making the required 5-year findings, investigate and pursue substantial compliance.

#### ***B. Annual Review of CIP.***

If the public agency adopts a CIP, the CIP must be updated annually. (Gov. Code § 66002(b).) Ten days' published notice is provided pursuant to Government Code § 65090, and is also provided to any city or county that may be significantly affected by the capital improvement plan.

An example of a combined Government Code §§ 66002/66006 report and resolution is attached hereto as Exhibit D.

#### ***C. Audits***

Anyone can request an audit of a local agency's fee in order to determine whether the fee exceeds the amount reasonably necessary to cover the cost of the product or service provided. (Gov. Code § 66006(d); § 66023(a).) The local agency or an independent auditor may conduct the audit. All costs incurred by the local agency in preparing the audit may be recovered from the person requesting the audit. (Gov. Code § 66023(b).)

#### ***D. When Fees Can Be Collected***

Development impact fees for the construction of public improvements or facilities are typically collected at the date of final inspection or upon issuance of a certificate of occupancy, whichever is earlier. (Gov. Code § 66007(a).) However, the following exceptions apply:

- Utility service fees may be collected at the time an application for utility service is received. (*Id.*)
- Fees can be received earlier if the local agency determines that (1) the fee will be collected for public improvements or facilities for which an account has been established and funds appropriated and for which the local agency has adopted a proposed construction schedule or plan prior to final inspection or issuance of the certificate of occupancy or (2) the fees are to reimburse the local agency for expenditures previously made. (Gov. Code § 66007(b).)

Different rules govern the collection of fees from residential projects. Residential developments that include more than one dwelling may be required to pay fees (1) on a pro rata basis for each dwelling when it receives its final inspection or certificate of occupancy, (2) on a pro rata basis when a certain percentage of dwellings have received their final inspection or certificate of occupancy, or (3) on a lump sum basis when the first dwelling in the development receives its final inspection or certificate of occupancy, whichever occurs first. It is up to the local agency to decide which of these three payment options it requires. (Gov. Code §66007(a).) If a different payment schedule is critical for the local agency, execution of a development agreement may provide the only alternative approach.

For residential developments, the local agency may require a contract from the developer to pay the applicable fee at the time required by the local agency consistent with Government Code § 66007(a). This contract may be imposed as a condition of issuing a building permit for the project. (Gov. Code § 66007(c)(1).) The contract may also require that the developer provide appropriate notification of the opening of any escrow for the sale of the property for which a building permit was issued and fees have yet to be paid. In addition, the local agency can also require that any proceeds from the sale of the property be used to pay the outstanding fees. (Gov. Code § 66007(c)(3).)

## V. FEE CHALLENGES AND REFUNDS

### A. *Fee Challenges.*

AB 1600 provides a very specific procedure for challenging development impact fees. Failure to follow the requisite procedures can preclude challenge.

1. **Challenge to Imposition of Fee on a Development Project.** In order to protest a condition imposing a specific fee on a development project, a party must: (i) tender any required payment in full or provide satisfactory evidence of arrangements to pay the fee when due or to ensure performance of the conditions necessary to meet the requirements of imposition, and (ii) serve written notice to the local agency that the required payment has been tendered. The notice must inform the local agency of the factual elements of the dispute and the legal theory forming the basis of the protest. (Gov. Code § 66020(a).) The protest must be filed at the time of approval or conditional approval of the development or within 90 days after the imposition of the fee. Failure to file a timely protest will preclude a subsequent lawsuit.

The local agency must provide the developer with written notice at the time of project approval or at the time the fees are imposed stating the amount of the fee and providing notice that the 90-day protest period has begun. (Gov. Code § 66020(d)(1).)

A developer has 180 days after receiving notice from the local agency as to the imposition of a project specific fee within which to file a legal challenge regarding

the project-specific fee. (Gov. Code §66020(d)(2).) Failure to file challenge within this time bars any challenge to the fee.

If the developer claims that the impact fee constitutes a special tax, thirty (30) days prior to filing suit, the developer must request a copy of the city's documents that demonstrates how the fee was calculated. If the fee is claimed to be a special tax, the city bears the burden of producing evidence that the fee does not exceed the cost of providing the required service, facility, or regulatory activity.

**2. Challenge to Legislative Approval of Fee Program.** A party has 120 days from the date on which an ordinance or resolution to establish or modify certain fees is enacted to challenge such ordinance or resolution. These fees are restricted to water and sewer connection charges, capacity charges, and processing fees. Any such challenge must be brought pursuant to the validation statute contained in CCP § 860 et seq. (Gov. Code § 66022(b).) For challenges to legislative enactments of other types of fees, Government Code § 65009 does not apply, and the applicable statute appears to be the four-year statute of limitations contained in Code of Civil Procedure § 343. (See *Balch Enterprises v. New Haven Unified School District*, 219 Cal.App.3d 783 (1990).) If a party challenges both the imposition of a fee on a specific development and the ordinance that created the fee, the 180-day statute of limitation applies, as it is the more specific provision. (*Western/California, Ltd. v. Dry Creek Joint Elementary School Dist.*, 50 Cal.App.4<sup>th</sup> 1461 (1996).)

*Practice Pointers:*

- **Help your council know the rules.** A local agency cannot withhold approval simply because a party protests the fee; however, a local agency certainly can deny a project on other grounds even if the fee is going to be challenged. Ensure that decision makers know this principle before they commence deliberations on a project when fees are likely to be an issue.
- **Know when fees are imposed.** "Imposition of fees" which triggers the protest period begin when the local agency first imposes the fees as a condition of approval, not when the developer actually pays the fee. (See *Ponderosa Homes, Inc. v. City of San Ramon*, 23 Cal.App.4<sup>th</sup> 1761 (1994).)
- **Pay attention to procedural requirements.** Government Code § 66022 applies when a lawsuit challenges a legislative decision by a local agency promulgating or changing certain designated fees or service charges; Government Code § 66020 applies when a lawsuit challenges an adjudicatory decision by a local agency imposing such a fee or service charge on a specific development. (*N. T. Hill, Inc. v. City of Fresno* (1999) 72 Cal.App.4<sup>th</sup> 977.) A petitioner's failure to follow the correct statutory procedures could result in his or her claim being subject to the agency's demurrer and dismissal.
- **Ditto.** A party's failure to file the required written protest that complies with § 66020 precludes the party from challenging the fee, even if the party has challenged the fee orally or

in writing before the fee was imposed. (*See North State Development Co. v. Pittsburg Unified School Dist.*, 220 Cal.App.3d 1418.)

- **Provide written notice.** Make sure your agency provides written notice consistent with § 66020(d)(1) at the time a development project is approved. The 180-day notice to file suit does not begin to run until notice is delivered to the developer, so failure to file the notice may result in an open-ended statute of limitations. This could place the agency in an extremely difficult position should the developer build out the project and then file its protest and lawsuit. The easiest way to ensure that proper notice is provided is to build the required language into the agency's "macro" or standard fee condition.
- **Provide for permit suspension upon litigation if appropriate.** To partially mitigate the issue set forth above, the agency at the time of project approval may make specific findings that the construction of public facilities that are directly attributable to the development project is required to protect the public health, safety and welfare. If such a finding is made, the agency may suspend the permit pending resolution of any dispute as to the propriety of the fees.
- **Use the validation procedure.** To ensure an early resolution of any claims regarding the lawfulness of the fee program, the agency can initiate a validation action after enactment of the fee program, which would serve to consolidate all possible claims into a single action.
- **Consider exhaustion of remedies issues.** It is not clear how the specific protest procedure established in § 66020(a) intersects with the statutory exhaustion of remedies doctrine enunciated in Government Code § 65009(b)(1). This latter doctrine requires that the applicant present every factual dispute it has to the agency at the time of the adjudicatory decision. Imposition of development impact fees falls within the planning and zoning law (Title 7 of the Government Code) and is subject to § 65009. Of course, the statutory exhaustion requirement only operates if the agency has provided prior written notice that the exhaustion doctrine will apply should subsequent litigation be filed. (Gov. Code § 65009(b)(2).)

### ***B. Refunds***

If a project-specific challenge is successful, the local agency may be required to refund the collected fee with interest. If the court finds in favor of the developer in a challenge to the imposition of a fee on a specific project, the court shall direct the local agency to refund the unlawful portion of the payment, with interest at an annual rate of 8 percent. (Gov. Code § 66020(e).)

Similarly, if in a challenge to the enactment of the fee ordinance the court finds that a fee ordinance or resolution is invalid as enacted, the court shall direct that any local agency refund the unlawful portion of the fee, plus interest. The refund will go to any person who has complied with the protest provisions of the Mitigation Fee Act.

**RECOMMENDED REFERENCE SOURCES:**

- William W. Abbott, et al, *Exactions and Impact Fees in California* (Solano Press Books, 2001)
- Daniel J. Curtin, Jr. and Cecily T. Talbert, *Curtin's California Land Use and Planning Law* (Solano Press Books, 22nd Ed. 2002), pp. 261-297, 403-405
- League of California Cities, Community Land Use Project of California; Institute for Local Self Government, *Special Issues Under Takings Law: Findings, Fees & Dedications* (1999)
- Lawrence S. Weiner, *The "How To's" of Development Impact Fees*, League of California Cities City Attorneys Department Continuing Education Seminar (February 1990)