CLIENT NEWS BRIEF

Level 3 Developer Fees are Again Moving Forward after Latest Court Decision

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A recent court decision has again opened the door for eligible school districts to impose 'Level 3' developer fees. As Lozano Smith previously reported, the State Allocation Board (SAB) took unprecedented action in May to authorize eligible school districts to collect Level 3 fees. SAB's determination that state funds are no longer available for new school construction, which triggers the Level 3 fees, was challenged in court by the California Building Industry Association (CBIA), and a temporary restraining order (TRO) was issued halting further action by SAB to allow for collection of Level 3 developer fees. On August 22, 2016, the Sacramento County Superior Court issued a ruling denying CBIA a preliminary injunction and lifting the TRO. As a result of this latest ruling, SAB is again permitted to authorize school districts to impose Level 3 developer fees. (For further discussion of the SAB's actions, see 2016 Client News Brief No. 33.) In light of a possible appeal by CBIA and the upcoming November statewide bond election, the question of how to move forward remains somewhat clouded.

Level 3 fees were intended as part of Senate Bill (SB) 50 essentially to replace matching funds from the state for new construction and modernization projects when state funding is not available. As a result, they roughly double 'Level 2' fees currently being collected by eligible school districts. As soon as the SAB took its action in May, CBIA immediately filed a lawsuit claiming that state funds remained available, largely because hardship funds for the Seismic Mitigation Program still exist. The TRO issued by the court in May did not resolve the CBIA's claims for the long-term.

After considering the further arguments made by CBIA and SAB, the court found that no state funding is available within the meaning of SB 50, in large part because the amount approved by SAB for "next in line" funding applications exceeds the amount of available state funds for new construction. The court concluded that CBIA had demonstrated "no likelihood of success on the merits" of its claims and terminated the TRO. As a result, the SAB may now proceed to "notify the Secretary of the Senate and the Chief Clerk of the Assembly, in writing" of its determination that state funds are not available, which will open the door to the levying of Level 3 fees by individual school districts in accordance with law.

Although the recent ruling is good news for many school districts, it also may not be the end of the story. CBIA has expressed intent to oppose all efforts by the SAB to authorize Level 3 fees. It is possible that CBIA may rapidly appeal the superior court's decision, and further may request that the trial court or the court of appeal stay the decision, in another attempt to halt imposition Level 3 fees. Additionally, the court's denial of the injunctive relief does not terminate CBIA's case, which may continue to move forward in the court.

In addition to a potential appeal, there are several practical issues facing school districts interested in levying Level 3 fees. Only school districts who are eligible for Level 2 fees may impose Level 3 fees; this issue will not be immediately relevant for school districts who have been eligible only for Level 1 statutory


Harold M. Freiman
Partner and Co-Chair
Technology & Innovation Practice Group
Walnut Creek Office
hfreiman@lozanosmith.com


Megan E. Macy
Partner and Co-Chair
Facilities and Business Practice Group
Sacramento Office
mmacy@lozanosmith.com


Shawn A. VanWagenen
Associate
Fresno Office
svanwagenen@lozanosmith.com

Lozano Smith
ATTORNEYS AT LAW

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fees. Additionally, adoption of Level 3 fees may be only a temporary measure in place for the next several months. If voters approve the Kindergarten through Community College Public Education Facilities Bond Act of 2016 (Proposition 51), a $9 billion school bond measure on the November ballot, Level 3 fees will likely no longer be authorized once the SAB again begins to approve and fund apportionments.

Another consideration is that Level 3 fees are, by the terms of SB 50, a "supplemental" fee above the amount of the Level 2 fee. Once state funds are received, the supplemental amount (the difference between the Level 2 and Level 3 fees) must either be reduced from the state's future funding to a school district or must be reimbursed to the developer who paid the fee. School districts can negotiate with developers as to whether and how the Level 3 supplement may be reimbursed to developers. With these thoughts in mind, and with the political pressure that developers may bring in some communities around the impact of school fees on the cost of housing, school districts should carefully evaluate whether and how to levy Level 3 fees and address the reimbursement issue at this time.

Should eligible school districts decide to proceed, they should first review their existing school facilities needs analyses and previously adopted board resolutions for Level 2 fees to determine what procedural steps remain to impose the Level 3 fees. School districts are encouraged to work with their legal counsel to ensure that they are taking the appropriate and necessary steps to impose Level 3 fees. It is very likely that local developers and CBIA will be watchdogging Level 3 fee imposition and that school districts may face legal challenges to any perceived procedural defect.

Lozano Smith's developer fee handbook addresses imposition of Level 3 fees and related procedures, and remains available to current Lozano Smith school district clients at no cost, and to other school districts at a low cost. School districts that have not previously ordered the handbook can do so here or by contacting Client Services at clientservices@lozanosmith.com or (800) 445-9430.

For any questions about school impact fees, or Level 3 fees in particular, please contact the authors of this Client News Brief or an attorney at one of our nine offices located statewide. You can also visit our website, follow us on Facebook or Twitter or download our Client News Brief App.

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