



## Memorandum

Date: September 29, 2008

To: Joe Farley

From: Tim Holcomb and John Oskoui

Subject: Building Industry Association Request for Deferral of School Fees

### Introduction

On July 14, 2008; the district received a letter from the Orange County Chapter of the Building Industry Association requesting that the district adopt a policy to defer the collection of school development impact fees until such time as the lead land use authority agency issues a certificate of occupancy. At its meeting of July 24, 2008; the Board of Trustees directed us to evaluate this request and bring back the results to them for their review and consideration.

### Background

The State of California Education Code (Education Code), section 17620 (a) (1) provides that the governing board of any school district is authorized to levy a fee, charge, dedication, or other requirement against any construction within the boundaries of the district for the purpose of funding the construction or reconstruction of school facilities, subject to any limitations set forth in Chapter 4.9 of Division 1 of Title 7 of the Government Code.

Per section 17620 (b) of the Education Code, a city or county, whether general law or chartered, may not issue a building permit for any construction absent certification by the appropriate school district that any fee, charge, dedication, or other requirement levied by the governing board of that school district has been complied with, or if the district's determination that the fee, charge, dedication, or other requirement does not apply to the construction. The school district shall issue the certification immediately upon compliance with the fee, charge dedication or other requirement. In either case, it is the district that determines whether to issue the fee compliance certification, and the city or county can not issue a building permit unless it has received the required clearance form the district.

Our district facilities department administers this process for all properties located within our district boundaries and collects the fees for our district and for the elementary districts within our boundaries.

## Analysis

There are two major processes that would have to change if the board is interested in postponement of collection of development impact fees. First, the mechanism for the actual collection of the fees and second, the timing of projects (design and construction) funded with this source of revenue.

**1) Collection Process:** The board can change the collection mechanism by formally revising its current policies and practices regarding collection of fees, and putting in place a mechanism for postponing collection of fees utilizing one or both of the following strategies:

### A) Postponement of Collection Date

The Education Code sections 17620 (c) and 17620 (c), allow for postponement of collection of fee, charge, dedication or other requirement until the date of final inspection or issuance of certificate of occupancy, whichever occurs first. In cases where a school district decides to postpone collection, the Education Code requires that formal notice of that decision be forwarded to the applicable city or county. In order to proceed with this option, the board would need to take formal action to amend its resolution and/or policies requiring payment of fees prior to issuance of a building permit, and to provide that notice to the city or county.

Postponement of collection of fees can pose certain risks. For example, projects could be abandoned, and could be sold to developers who are unaware of the obligation to pay fees at a later date; creating serious logistical challenges in collecting the fees with diminished leverage over the developer. In cases of phased development projects, the postponement of collection of fees may negatively impact the required timeline for construction of a school or school facility. In cases of multi-unit developments, tracking occupancy will certainly impose enforcement challenges with collection of fees. There may need to be an arrangement with the city or county to address enforcement of the new rules.

Additionally, as related to collection of fees for the feeder districts, collection of those fees cannot be postponed unless agreement is reached with the feeder districts.

### B) Mitigation Agreement

Another available option in postponing collection of development of impact fees is for the district to enter into mitigation agreements with interested developers. To proceed with this approach, a sample or model agreement would need to be developed, and individual agreements tailored as necessary. The mitigation agreement would need to be recorded against the property and made binding on successors. Further, notice of each mitigation agreement would need to be provided to the city or county with instructions not to issue a certificate of occupancy until fees have actually been paid under the mitigation agreement.

The district would need to assume a development tracking and fee collection enforcement role as it needs to follow up with the city or county to ensure that certificates of occupancy can not be issued until fees are paid. Consistent enforcement may prove to be difficult to ensure, and the district may need to reach a formal agreement with the city or county to address enforcement issues.



Employment of mitigation agreement as a mechanism to postpone collection of fees would pose a certain amount of risk similar to those indicated for the postponement of collection date option. Additionally, while a mitigation agreement can be prepared in a way that anticipates and minimizes the risks, it is no guarantee against a legal challenge, or even an unfavorable decision, depending on the facts. This approach would likely require board approval, since the district resolutions and /or policy allow issuance of a certification of payment of fees.

Regardless of which type of mechanism is selected as related to collection of fees, paying up-front may result in payment of lower fees because of possible bi-annual increases.

**2) Project Process** – If the collection of fees is postponed until a residential or commercial development is granted the certificate of occupancy, the timing of the activities needed to house new students including securing funding, design and construction of new projects would be affected. This would create a serious timing gap between the time students are generated directly or indirectly from the proposed developments, and the time the school district is able to provide adequate housing for the new students. The negative impact due to postponement of collection of fees on various phases of a new construction project will be:

A) Funding

When the district has eligibility for funding from the state, there is a matching requirement to access those funds. Developer fees are a source of funding to satisfy the required match. If the collection of these funds is postponed, the district would have to postpone its applications for funding, and quite possibly lose the opportunity to obtain funding from the state.

B) Design

Due to lack of funding, the design and DSA approval phase of a new project, which typically takes from one and a half to two years to complete, would be delayed. This in turn could result in the district losing the opportunity to access state funds because it is a requirement to have DSA approved plans for the specific project before filing for funding.

C) Construction

The construction phase of a new project, including procurement, construction, close-out and occupancy, on average takes between a year and a half to three years depending on the size of the project and its level of complexity. In the case of projects involving site acquisition, there would be an additional two years added to the life of the project. By delaying this phase of the project, the district will incur additional costs due to increases in cost of construction and possible unfavorable bidding environment.

**Conclusion**

The district may chose to postpone collection of development impact fees through the aforementioned methods; however, doing so incurs a certain amount of legal and practical difficulties and risks. If the district desires to fund a project utilizing alternative funding sources rather than collecting and utilizing development impact fees, then, in essence and indirectly, the district would be subsidizing a private development project. Therefore, it is respectfully recommended that the district continues to collect development impact fees prior to issuance of building permits.