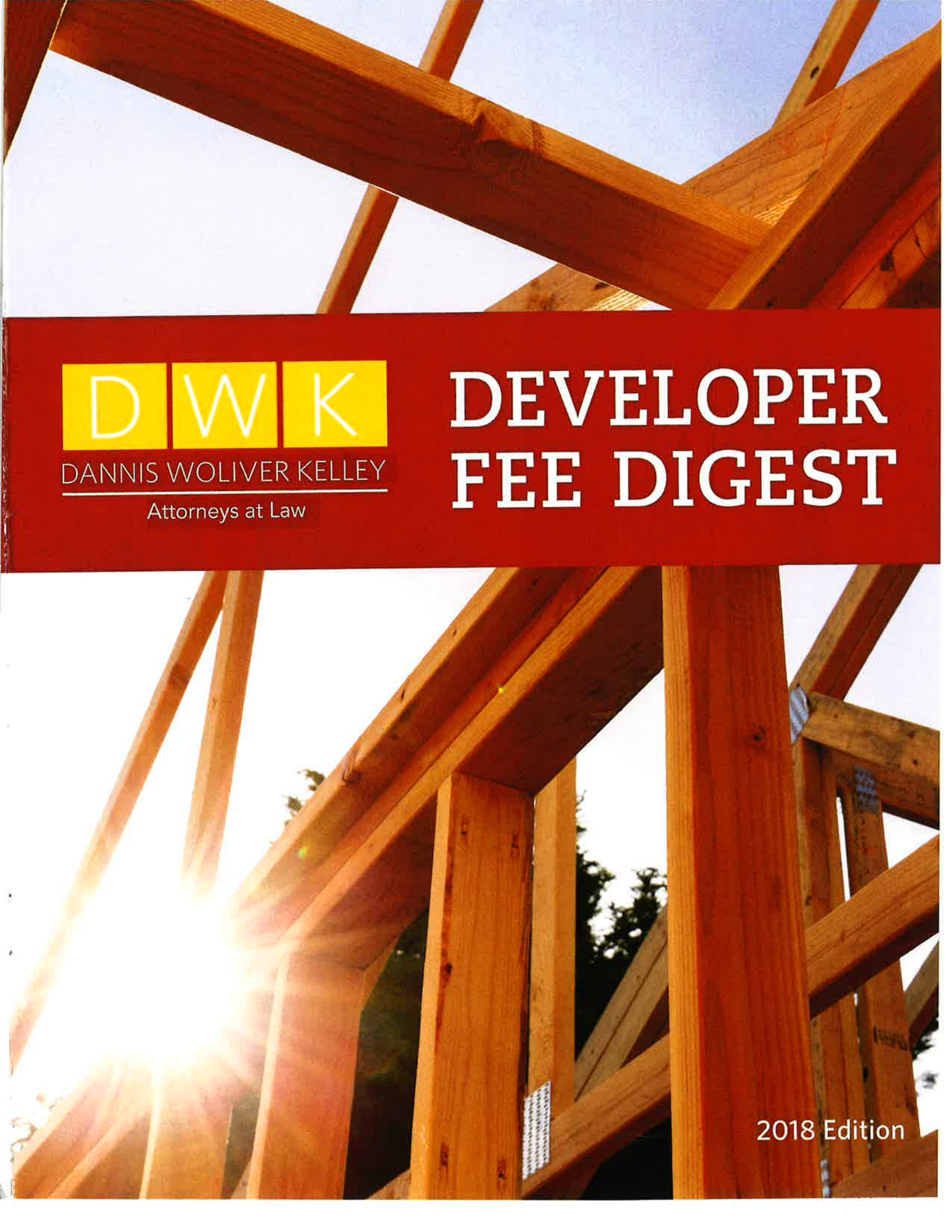

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DEVELOPER FEE DIGEST

2018 Edition

This "digest" is not intended to provide or be a substitute for legal advice. Information provided in the digest is current as of February 2018. Please consult your DWK attorney with questions.

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TYPES AND DISTINCTIONS

What Are "Developer Fees?"

Developer fees, also known as "school fees," "school impact fees," "development impact fees," and "Level 1, 2 and 3 fees," are fees that are paid by property owners and developers to school districts to mitigate the impact on the school district's facilities created by new development within a school district's boundaries. Fees are paid to the school district as a condition of a property owner or developer obtaining a building permit from the city or county for a construction project. School districts have been authorized by law since January 1, 1987, to impose developer fees, but the laws have changed over time as a result of state bond measures, legislation, case law, and other events. However, the basic propositions that fees may only be collected if the need for additional or improved facilities has been "justified," and that fees may only be expended to accommodate growth resulting from new development, remain true.

What are the Types of Developer Fees?

Under Senate Bill 50, signed into law in 1998, three types of developer fees are authorized and commonly described as "Level 1," "Level 2" or "Level 3" fees. Level 2 and Level 3 fees are also referred to as "Alternative Fees." On May 25, 2016, the SAB determined that it is no longer approving apportionments for new construction, authorizing eligible school districts to charge Level 3 fees. Accordingly, school districts should be familiar with the authority, purpose, uses, and procedures applicable to Level 1, Level 2 and Level 3 fees.

	LEVEL 1	LEVEL 2	LEVEL 3
PURPOSE	To fund the construction and reconstruction of school facilities necessary to address the impacts of new development.	Same as Level 1. School facilities must be listed in the Schools Facility Needs Analysis. Intended to represent 50% of the school district's costs to accommodate increased enrollment.	Same as Level 1. School facilities must be listed in the Schools Facility Needs Analysis. Intended to cover 100% of a school district's cost to accommodate the district's increased enrollment.
AMOUNT	Rates set by State Allocation Board (SAB) in January of even numbered years.*	Varies by district according to local factors.	Amount is approximately double the Level 2 fee.
LEVIED ON	Residential Commercial	Residential Only	Residential Only
	Ed. Code, § 17620 *et. seq.*: Authorizes the collection of Level 1 Developer Fees. Gov. Code, § 65995: Establishes the rates and parameters for Level 1 fees.	Gov. Code, §§ 65995.5-65995.7: Establishes the procedures for adoption of Level 2/3 fees.	

* Gov. Code, § 65995 *et. seq.*: Establishes the types of fees and rates.
* Gov. Code, § 66000 *et. seq.* (Mitigation Fee Act): Sets process for justifying fees and appealing or challenging fees.

What Are the Basic Distinctions Between Level 1, Level 2, and Level 3 Fees?

Level 1 fees are set by the SAB every two years as a dollar amount per square foot for residential construction and a dollar amount per square foot for commercial/industrial construction.

- From January 1, 2018, through the date in January 2020 when SAB adjusts the amounts, the rates for Level 1 fees are $3.79 for residential and $0.61 for commercial/industrial construction per square foot of construction.
- The adjustment for inflation occurs at the SAB's January meeting in each even numbered year.[1] The next adjustment will be in January 2020.
- These fees represent the amount that a school district may impose on new construction, either residential or commercial, if the district is able to justify that its costs to construct facilities to meet the facility needs of students generated by new development meet or exceed the funds to be generated by new development. Level 1 fees represent the maximum amount that school districts may impose if they do not qualify for imposition of Level 2 or Level 3 fees.
- Unified districts may levy the entire Level 1 fee, but non-unified districts must apportion the Level 1 fee between or among themselves pursuant to a fee-sharing agreement.

Level 2 fees, referred to in the Government Code as "alternative fees," may be imposed by a school district that has met the qualifying requirements of Government Code section 65995 *et seq.*

- Level 2 fees theoretically represent 50 percent of the school district's costs to accommodate increased enrollment due to new residential development.
- Level 2 fees may only be imposed on residential development.
- Unlike Level 1 fees, non-unified districts do not share Level 2 fees. Each district imposes its own.

Level 3 fees, also alternative fees, are intended to represent 100 percent of a school district's cost to accommodate the district's increased facility needs due to increased enrollment as a result of new residential construction. Since the SAB's determination on May 25, 2016, school districts have been able to levy Level 3 fees, subject to removal of a restraining order on November 1, 2016.[2]

[1] In 2016 and 2017, rates were $3.48 per sq. ft. for residential and $0.56 per sq. ft. for commercial/industrial.

[2] See page 12 for information about the prerequisites for adopting Level 2 and 3 fees.

PURPOSES & USES OF DEVELOPER FEES

What Are the Permissible Uses of Developer Fees?

School districts have been authorized by law since January 1, 1987 to impose developer fees to mitigate the impact on the district's school facilities created by new development within a school district's boundaries. Because developer fees are imposed on new development within a school district, the fees collected may only be expended on "the construction or reconstruction of school facilities" to accommodate growth generated from new development, subject to certain statutory limitations. (Ed. Code, § 17620(a)(1).)

Education and Government Code sections and case law require that a school district be able to show a reasonable relationship between the impact of the development and the use of the fees. (*See*, e.g., Ed. Code, § 17621 and Gov. Code, § 66001(b).) Therefore, a school district may not use developer fees to fund construction that the district would or should perform in the absence of growth caused by new development.

Most questions concerning permissible expenditures of developer fees can be answered by considering the following:

- Does the work include, or is it in furtherance of, construction or reconstruction of a school facility?
- Would the same work have to be done absent the student growth due to new development?

The developer fee statutes do not define the terms "construction and reconstruction." The term "school facility" has not been precisely defined in developer fee laws, except that the Legislature has taken a broad view of the term by declaring that the financing of school facilities and mitigation of development impacts are a matter of statewide concern, noting that "school facilities" is defined in the Government Code as "any school-related consideration relating to a school district's ability to accommodate enrollment." (Gov. Code, § 65995(e).)

The Education Code specifically allows school districts to use developer fees to pay for (1) preparation of a Developer Fee Justification Study (Justification Study) and/or a School Facility Needs Analyses (SFNA); (2) reimbursement of administrative costs incurred for collecting the Level 1 fees, up to 3 percent of Level 1 fees collected in the same fiscal year; and (3) preparation of enrollment projections from Level 1 fees collected. (*See* Ed. Code, § 17620(a)(5).)

May Developer Fees Be Used to Meet Any Kind of Capital Need of a School District?

A new facility constructed with developer fees must be a "school facility" as defined by the Government Code, and must accommodate student population growth resulting from new development. There must be a reasonable relationship between the impact of new development and the use of the fees.

May Developer Fees Be Used to Install Portable Classrooms?

Installing portable classrooms meets the requirement of construction or reconstruction of a school facility. The question to ask, therefore, is whether the work would have to be performed absent new development. If, for instance, a portable is being installed to reduce class size and the school district

has not experienced an increase in student population, the school district could not use developer fees to fund the installation. If, however, the district can show that it has experienced an increase in student population, and in order to accommodate that increase and reduce class sizes it must install the portable, the district probably can justify using developer fee funds to install the portable classroom.

May Developer Fees Be Used to Modernize Existing Facilities?

School districts may only expend developer fees to modernize or improve existing facilities if the refurbishment is related to increased demand on the facility due to development, is necessary for the school district to maintain existing levels of service, and the refurbishment does not include the kinds of expenditures prohibited below. (*See* Gov. Code, § 66001(g).)

School districts are specifically prohibited from using developer fees for any of the following:

- The regular maintenance or routine repair of school buildings and facilities.
- The inspection, sampling, analysis, encapsulation, or removal of asbestos-containing materials, except where incidental to school facilities construction or reconstruction for which the expenditure of developer fees or other consideration collected is permissible.
- Deferred maintenance, which expressly includes:
  - Major repair or replacement of plumbing, heating, air conditioning, electrical, roofing, and floor systems;
  - The exterior and interior painting of school buildings;
  - The inspection, sampling, and analysis of building materials to determine the presence of asbestos-containing materials, the encapsulation or removal of asbestos-containing materials;
  - The inspection, sampling, and analysis of building materials to determine the presence of lead-containing materials; the control, management, and removal of lead-containing materials; and
  - Any other items of maintenance approved by the SAB. (Ed. Code, §§ 17582(a) and 17620(a)(3).)

May Developer Fees Be Used for Interim Housing of Students During Modernization?

It depends. Developer fees may only be spent for interim housing if the interim housing is part of a project that will increase school capacity to house children generated by new development.

May Developer Fees Be Used to Pay Staff Salaries?

Developer fees may be used towards a portion of the salary of a staff member if the same portion of the staff member's time is related to construction and reconstruction of school facilities necessitated by enrollment growth resulting from new development. To the extent that a school district staff member's duties are related to construction and reconstruction of school facilities necessitated by growth resulting from new development, the district should be able to use developer fees for that portion of the staff member's salary which relates to growth.

May a District Use Developer Fees to Pay a Staff Member's Salary for the Time the Employee is Gathering Information With Respect to Vacant Properties Within the District's Boundaries Which Will Be Utilized in the District's Fee Reports?

A school district may use developer fees towards a staff member's salary to the extent that the duties of that staff member relate to conducting studies or gathering information which is necessary to complete the Justification Studies for developer fees. However, the expenditure of developer fees is probably not permissible if the collection of information relates only to applications under the State Schools Facilities Program.

May a District Use Developer Fees to Pay a Staff Member's Salary for the Time the Employee is Coordinating Various Tasks Relating to Moves Which Are Required by the District's Various School Construction Projects?

A school district may expend developer fees towards the salary of a district staff member if the various tasks with which the staff member is involved are related to "the construction or reconstruction of school facilities" which is a result of new growth. With respect to a staff member's time coordinating moves as a result of construction projects, the school district may expend developer fees for that portion of the staff member's salary that relates to moves caused by construction projects to accommodate enrollment growth resulting from residential development.

May Developer Fees Be Used to Purchase Textbooks, Furniture, and Supplies?

While textbooks, furniture, and supplies might be "school-related considerations relating to a school district's ability to accommodate enrollment," they do not fall within the concepts of "construction" or "reconstruction." Therefore, the purchase of textbooks, furniture or supplies is not generally a proper use of developer fees.

May Developer Fees Be Used to Install Technology?

Components of technology projects that constitute "fixtures" (i.e., permanently attached to land or imbedded in a permanent structure) may be considered part of school construction or reconstruction. If a district can show that the need is a function of growth resulting from new development, it should be able to use developer fees to cover those costs. Purchase and installation of fiber optics networks, cabling, speaker systems, or intrusion detection systems are some examples of technology-related "fixtures." However, an expenditure for these technology-related fixtures should be distinguished from the purchase of laptops and other technology equipment. Furniture and equipment are not generally considered to be components of school construction or reconstruction and thus a different source of funds would be needed for these purchases. The school district should retain records that would justify the proper allocation in the event that a developer or interested party later requests documentation.

May Developer Fees Be Used to Pay the Salary of a Construction Manager?

If the construction manager is working on a construction project that is to accommodate enrollment growth related to residential development, his or her salary may be paid by developer fees.

How About Using Developer Fees to Pay Legal Counsel?

If legal fees are incurred in connection with a construction project properly paid by developer fees, then legal counsel's fees and costs for that work may also be paid by developer fees.

What Types of Development Are Subject to a Level 1 Fee?

- New residential construction;
- "Other" residential construction when there is an increase of 500 square feet or more in assessable space (e.g., a remodel that expands the home's footprint); and
- Location, installation, or occupancy of manufactured homes and mobile homes.[2]
- New commercial and industrial construction (not including square footage of existing commercial and industrial site construction when building permit was first issued);

What Types of Development Are Exempt from the Payment of Developer Fees?

- Facilities used exclusively for religious purposes that are exempt from property taxation under state law;
- Any facility used exclusively as a private full-time day school (See Ed. Code, § 48222);
- Facilities that are owned and occupied by one or more agencies of the federal, state or local government are exempt.
- Migrant worker housing that is owned by the State of California and that is financed by Health & Safety Code section 50710 *et seq.* is exempt from developer fees. This exemption is applicable only to migrant worker housing that is subject to continued compliance with Health & Safety Code section 50710 *et seq.*

What Fees May Be Imposed on Senior Housing Projects and Short Term Lodgings Such as Hotels?

- Residential development that is dedicated solely for senior citizen housing development, as defined in Civil Code section 51.3 or a residential care facility for the elderly as defined in Health & Safety Code section 1569.2 may only be charged the commercial/industrial fee.
- Hotels, inns, motels, tourist homes or other lodging for which the maximum term of occupancy for guests does not exceed thirty (30) days are charged at the commercial/ industrial rate. (Gov. Code, § 65995 (d).)

How Does the District Compute the Total Square Footage on Which a Fee May Be Charged?

Generally, the city or county is responsible for providing a calculation of the total square footage of a residential or commercial project for purposes of the payment of developer fees, and must do so in accordance with building department standards. However, with respect to residential construction, fees are only charged per square foot of "assessable space," and with respect to commercial/industrial construction, fees are only charged per square foot of "chargeable covered and enclosed space."

[2] Education Code section 17625 contains the rules regarding the application of developer fees to the installation, relocation, and replacement of a mobile home or manufactured home. This is a technical area of developer fee law, and districts should seek legal counsel for guidance on the applicable statutes for each unique situation.

"Assessable space" means all of the square footage within the perimeter of a residential structure, not including any carport, covered or uncovered walkway, garage, overhang, patio, enclosed patio, detached accessory structure, or similar area. (Gov. Code, § 65995 (b)(1).) Covered or uncovered walkways are excluded from the definition of assessable space. Enclosed walkways, such as hallways inside the perimeter of a residential building, remain within the definition of assessable space.

"Chargeable covered and enclosed space" means the covered and enclosed space within the perimeter of a commercial or industrial structure, not including any storage areas incidental to the principal use of the construction, garage, parking structure, unenclosed walkway, or utility or disposal area. (Gov. Code, § 65995 (b)(2).)

What Types of Development Are Subject to Level 2 and/or Level 3 Fees?

Level 2 and Level 3 fees apply solely to residential construction. The same definition of "assessable space" applies to Level 2 and Level 3 fees.

How are Fees Applied to Residential Expansions, Remodels, Tear-Downs and Rebuild Projects?

Remodels or Additions

- For remodels or expansions of an existing residential structure, a district may only charge the Level 1 fee if "the resulting increase in assessable space exceeds 500 square feet." (Ed. Code, § 17620(a)(1)(C)(i).) This must be a net increase in assessable space, subtracting any decrease in assessable space in the same structure. If the net increase in assessable space exceeds 500 square feet, the Level 1 fee is charged on the total number of new square feet (i.e., An addition of 600 square feet pays on 600 square feet). If the net increase in assessable space is less than 500 square feet, the remodel/addition is exempt from payment of developer fees.
- Level 2/3 fees do not appear to be subject to the 500 square foot threshold.

Demolition/Rebuild – Natural Disaster or Voluntary

- If a person requests a Certificate of Compliance for a remodel that includes demolition and reconstruction of an existing structure, the first question is whether the rebuild is the result of a natural disaster or is a voluntary tear down/reconstruction. A rebuild is exempt from developer fees if the original structure is damaged or destroyed due to a catastrophic loss or act of nature, such as fire, flood, earthquake, landslide, mudslide, tidal wave, or other unforeseen event that produces material damage or loss, so long as the reconstruction does not increase the prior assessable space for residential property by more than 500 square feet and the construction replaces, and is equivalent in kind to, the damaged or destroyed property. (See Ed. Code, § 17626.)

If the demolition and reconstruction is voluntary, the analysis is more complex and consultation with legal counsel is advised. In accordance with the reported decisions of *Warmington Old Town Associates v. Tustin Unified School District* (2002) 101 Cal.App.4th 840 and *Cresta Bella LP v. Poway Unified School District* (2013) 218 Cal.App.4th 438, before any fee may be charged on the footprint of the original residential structure, the district's Justification Study (for a Level 1 fee) or SFNA (for a Level 2/3 fee) must contain a defensible explanation of how such a charge is justified, i.e., how reconstruction of pre-existing residential units contributes to increases in student population. If the district's study does not justify charging on replacement square footage or redevelopment, then the owner/developer must be given a credit for the original footprint of the demolished structure.

If the project entails the demolition of a commercial-industrial structure and replacement with new residential housing, the district should not be subject to the above limitations and should be able to charge fees for the full replacement structure square footage at the applicable residential rate.

If the property is commercial/industrial demolition and replacement, the developer fee should be charged at the applicable commercial or industrial rate, minus the square footage of any commercial/industrial structure existing on the site of that construction as of the date the first building permit is issued for any portion of that construction.

The application for a permit from the city or county with jurisdiction should indicate the number of square feet for which the permit will be granted, and the school district should be able to rely upon that application in making the foregoing determinations.

Would a Change in a Building Permit from an Addition of Less Than 500 Square Feet to an Addition of More Than 500 Square Feet Trigger Developer Fees?

That depends. A change in permit would trigger Level 1 fees if the project were previously exempt. The statutory scheme for developer fees allows a school district to levy a Level 1 fee on any new construction or "other residential construction, only if the increase in assessable space… exceeds 500 square feet." (Ed. Code, § 17620(a)(1)(B) & (C).) The exemption from Level 1 fees for residential construction, other than new construction, that is less than 500 square feet applies to a building permit for the life of the building permit and applies to the total resulting increase in assessable space, taking into account any decrease in assessable space in the same structure for work performed pursuant to the same building permit. (*See* Ed. Code, § 17620(a) (1)(C).) Therefore, when a building permit is amended to increase the size of the structure in excess of 500 square feet, the developer fee requirement is triggered as to the entire area of increase in size of the structure. If the new building permit is subject to Level 2/3 fees, the 500 square foot exemption would not apply and the entire increase in size would be subject to the Level 2/3 fees.

What Do School Districts Need to Know About Levying Fees on Commercial/ Industrial Projects?

The approach to levying fees on commercial/industrial construction projects is a little different than for residential projects. A school district must make its nexus findings on an individual project basis or on the basis of categories of development, including categories such as office, retail, transportation, warehouse, and the like. The impact of such development on school facilities must be based on a study of the impact of the increased number of employees likely to result from the new construction. The governing board's resolution that adopts the commercial/industrial fees must contain a process for appealing the imposition of the fee, including a hearing.

FEE ADOPTION PROCESS

What is the Process to Adopt Level 1 Fees?

The school district typically prepares a Justification Study (or similar document) to establish: (i) that a nexus exists between new development in a school district and the need for school facilities; and (ii) the amount of the Level 1 fees imposed on each type of development. The Justification Study must:

- Identify the purpose of the fee;
- Identify the use to which the fee is to be put;
- Determine a reasonable relationship between the fee's use and the type of developement project on which the fee is imposed; and
- Determine a reasonable relationship between the need for the public facility and the type of development on which the fee is imposed. (Gov. Code, § 66001.)

Level 1 fees may be updated when the maximum fee is increased by the SAB every two years, even if a school district has adopted Level 2 or 3 fees. This ensures a continuing ability to levy a Level 1 fee in the event a Level 2 or 3 fee cannot be imposed for any reason.

Once the Justification Study is prepared, it must be made available for public review for at least ten (10) days prior to a public hearing by the governing board at a regular meeting. Notice of the public hearing must be published and mailed to those requesting notice. (Gov. Code, §§ 66016 and 66018.) Level 1 fees are adopted by governing board resolution making the required findings, and generally become effective sixty (60) days after adoption by the governing board, unless adopted on an urgency basis in limited circumstances. Upon adoption of the fee by the board, the district must transmit a copy of the resolution to the appropriate cities and counties, along with all relevant supporting documentation and a map indicating the boundaries of the areas subject to the fee.

LEVEL 1 FEES	
JUSTIFICATION STUDY	ESTABLISH NEXUS: - Identify purpose of fee. - Identify the use to which the fee is to be put. - Determine reasonable relationship between fee's use and type of development. - Determine reasonable relationship between need for public facility and type of development.
PUBLIC REVIEW PERIOD AND NOTICE OF HEARING	- Notice of public hearing during regular board meeting. - Fourteen days prior to hearing, mail notice of hearing to those who requested. - Publish the notice of public hearing for ten days or twice with five days intervening between publications, in a newspaper regularly published once a week or more. - Ten days before hearing, make Justification Study available to public.
PUBLIC HEARING	- By governing board, at regularly scheduled board meeting.
ADOPT RESOLUTION	- Level 1 fees become effective sixty days after board adoption. - Transmit copy of resolution to applicable cities and counties.

How Often Must a District Redo or Update its Justification Study?

Every time a school district implements a Level 1 fee increase, it should consider redoing or updating its Justification Study. However, if the increased fee is already justified and the development and cost variables have remained relatively constant, the school district is not legally required to update its Justification Study. Updating any Justification Study that is five years old or more is preferable, although there is no hard and fast rule regarding how often Justification Studies should be updated.

How May a District Prevent the Loss of Several Months of an Increased Level 1 Fee Because of Time Needed to Pass a Board Resolution?

Since Level 1 fees are usually adjusted at the January SAB meeting in even-numbered years, school districts may begin planning for the preparation of a Justification Study in September or October of the prior year by gathering all the relevant data and contracting with a consultant or determining the appropriate staff to update the district's data. Approval of the Justification Study and fee adjustment may be included on the school district's February board meeting agenda, and prior to the board meeting, staff can complete the required ten (10)-day public review period and two publications with at least five (5) days between (or one publication for ten (10) days) of the notice. Notice of the hearing must also be mailed at least fourteen (14) days before the hearing to persons requesting notice.

In some circumstances, the school district may adopt an urgency resolution, which allows Level 1 fees to go into effect immediately upon adoption by the governing board and avoids the sixty (60)-day waiting period before the increased fees become effective. An urgency resolution requires a 4/5ths vote of the board and is only effective for thirty (30) days, so it must be adopted twice to eliminate the sixty (60)-day waiting period. Each adoption requires the statutory publications of a notice of public hearing and a 4/5ths vote of the board. An urgency resolution may only be adopted if the board makes a finding that the new fee must be collected immediately in order to protect the public health, welfare and safety of the district. (*See* Ed. Code, § 17621.)

May a District Adopt an "Evergreen" Board Resolution That Automatically Adopts Maximum Level 1 Fees Approved by the SAB?

No. The sections of the Education Code and the Government Code that authorize a school district to levy developer fees require that the district prepare a Justification Study, a SFNA, or both, that prove that the district's facilities costs meet or exceed the school fee amounts. Without this documentation, a district may not include in a resolution that its costs meet or exceed the costs established by the SAB. A school district or other local agency is prohibited from collecting a fee that exceeds the estimated reasonable cost of providing the services or facilities for which the fee is imposed. (*See* Gov. Code, § 66005.)

May All School Districts Adopt Level 2 Fees or Level 3 Fees?

No. To qualify for Level 2 fees or Level 3 fees, a school district must have applied for State funding under the School Facility Program (*See* Ed. Code, § 17070.10, *et seq.*, Leroy F. Greene School Facilities Act of 1998) ("SFP"), received an eligibility determination from the SAB, and met two of the following four criteria:

1. Have the specified percentage of "substantial enrollment" in multi-track year-round education;
2. Meet specified bonding/debt capacity requirements;
3. Have held a local general obligation bond election in the prior four years that received at least 50 percent plus one of all votes cast; and
4. Have more than a certain number of relocatable classrooms throughout the school district. (Gov. Code, § 65995.5(b).)

Level 2 fees and Level 3 fees also need to meet the nexus requirements of the Government Code.

How Are Level 2 Fees and Level 3 Fees Calculated?

Level 2 and Level 3 (Level 2/3) fees are calculated for each individual school district using a statutory methodology. Accordingly, the fee amount will vary for each school district, but Level 2/3 fees should not be adopted unless the fee amount will exceed the State-established Level 1 fee amount (or for non-unified districts, the apportioned amount). Level 2 fees are deemed to represent 50 percent of a school district's school facility costs for purposes of obtaining State construction funding from the SFP. Level 3 fees are intended to cover 100 percent of a school district's costs to accommodate the district's increased enrollment and are generally twice the amount per square foot of Level 2 fees.

Level 2 and Level 3 fees are calculated using the same statutory process. A qualifying school district must prepare a SFNA to calculate and justify the amount of the Level 2/3 fee. While similar to a Justification Study in that the proper nexus requirements must be met, the SFNA follows a separate methodology to calculate the Level 2/3 fee. (*See* Gov. Code, § 65995.6.) This analysis must evaluate historical student generation rates for new residential dwelling units constructed over the immediately preceding five years, in order to project the number of students to be generated from residential dwelling units anticipated to be constructed in the upcoming five years. In addition, excess seating capacity, surplus school sites and local sources of funding for school facilities must be considered in calculating the Level 2/3 fee, however, for Level 3 fees, the excess capacity, surplus sites, or local funding only reduce the fee once, not twice. While the Level 2/3 fee is intended to represent 50 or 100 percent, respectively, of a school district's school facility costs based on a statutory cost per student, the analysis should also include a calculation of the school district's actual school facilities costs for purposes of comparison and to support the required nexus findings.

What is the Process to Determine and Adopt Level 2/3 Fees?

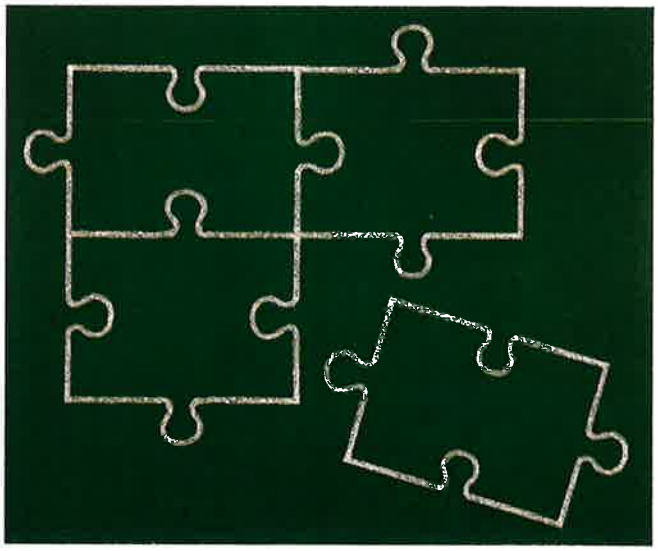
Before adopting a Level 2/3 fee, local planning agencies must be notified at least forty five (45) days prior to completion of the SFNA and be provided the opportunity to meet with the district to discuss potential expansion of school sites and/or need to acquire additional school sites. A copy of relevant, available documentation that will support the SFNA should be provided to the local agency. (Gov. Code, § 65352.2.) The SFNA must be made available for public review for no less than thirty (30) days before a public hearing is conducted. Notice of the public review period must be published, and the SFNA must be mailed as required by statute. (Gov. Code, § 65995.6(c) and (d).)

The governing board must respond to written comments it receives on the SFNA with the assistance of the consultant who prepared the SFNA and legal counsel.

Upon governing board adoption by resolution, Level 2/3 fees become effective immediately, but are only valid for one year. (Gov. Code, § 65995.6(f).) This process **must be repeated annually** with sufficient lead time to keep a Level 2/3 fee continually in place. It is particularly important for a school district seeking financial hardship funding through the SFP not to revert to a Level 1 fee when it would otherwise qualify for a Level 2/3 fee because the SFP requires the imposition of the maximum developer fee authorized by law.

May School Districts Impose Level 3 Fees?[3]

Under Government Code section 65995.7, Level 3 fees may be imposed by an eligible school district "if state funds for new school facility construction are not available." (Gov. Code, § 65995.7(a).) The statute expressly states that state funds are not available if the SAB is no longer approving apportionments for new construction "through the State School Facilities Program" due to a lack of funds available for new construction." (Ibid.) On May 25, 2016, the SAB made the required finding that it was no longer approving apportionments for new construction, authorizing eligible school districts to charge Level 3 fees. Subsequently, on November 1, 2016, the SAB notified the California Legislature of that determination. Since the SAB triggered the availability of Level 3 Fees, school districts follow the same process to determine and adopt Level 3 Fees as for Level 2 Fees.



Note that when state funds are available, the amount for which a district is eligible and may receive from the state for its site acquisition, site development, new construction, and hardship funding projects will be reduced by the net amount of Level 3 fees in excess of Level 2 fees that the district has collected for the same project, unless the district has entered into a reimbursement election or agreement with the developer(s) under Government Code section 65995.7(b) (*See* Ed. Code, § 17072.20.).

[3] Readers are advised to consult with their legal counsel for specific advice on this issue. This information is only current as of its publication date.

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ADOPTION PROCESS FOR LEVEL 2 FEES AND LEVEL 3 FEES

PREPARE SFNA	- Project unhoused students over next five years. - Evaluate surplus sites owned by school district. - Project enrollment and calculate capacity. - Calculate cost of needed sites and facilities. - Determine cost per square foot of new development.
GIVE EARLY NOTICE TO PLANNING AGENCIES	- Forty five (45) days prior to completion of SFNA. - Thirty (30) days before public hearing and adoption of SFNA, give notice to local planning agencies and provide copy of SFNA, if available, or other relevant and available information. - If requested, meet with planning agency within fifteen (15) days of request.
GIVE NOTICE TO PUBLIC	At least thirty (30) days before public hearing: - Make SFNA available to public for review and comment. - Publish notice of hearing and location to view SFNA in newspaper of general circulation. - Mail copy of SFNA to those who provided written requests forty five (45) days prior to the hearing.
RESPOND TO WRITTEN COMMENTS	- Before public hearing and adoption of SFNA respond to all written comments.
PUBLIC HEARING	- Governing board adopts SFNA via resolution. - Level 2/3 fees become effective immediately.

Is it Possible for a District to Justify Raising its Fees if It Is In Declining Enrollment?

That depends on the factual circumstances. With regard to Level 1 fees, if the Justification Study shows that the district's costs to house students generated by new development meet or exceed the maximum Level 1 fee, the school district is allowed to levy the justified amount even when enrollment is declining, provided that excess capacity for the period of time analyzed in the Justification Study has been considered in the calculation of district costs.

With regard to Level 2/3 Fees, if the SFNA shows that the school district's costs exceed the Level 1 fee amount and the projected enrollment exceeds any excess capacity for the five-year period for which the SFNA calculates future enrollment, the district is justified to levy Level 2/3 fees after the adoption of the SFNA.

If a District Has Declining Enrollment and Has Not Changed its Level 1 Developer Fee Rates, Is it Legal to Continue to Charge the Earlier Developer Fee Rate Without Doing Any Additional Fee Studies?

It depends. A school district is not required to prepare a new Justification Study or update an existing one if the district does not intend to levy school fees above the amount that was justified in the most recently adopted Justification Study. However, after some period of time, a Justification Study may no longer support the current fees or an increase in fees if current conditions do not justify the fee. (*See* additional discussion on page 11 regarding updating Justification Studies above.)

If a District's Justification Study Indicates It Should Charge Less Than the Current Fees, May the District Ignore the Study and Just Continue to Charge the Existing Level 1 Rates?

No. Fees imposed by a local agency may not exceed the estimated reasonable cost of providing the service or facility for which the fee is imposed. (Gov. Code, § 66005.) A district should not charge a fee that is not justified by a Justification Study or an update.

FEE COLLECTION PROCESS

When Are the Fees Collected?

Developer fee laws prohibit the collection of fees earlier than the date of final inspection or the date a certificate of occupancy is issued for residential development, unless a school district determines – as many do – that the fees will be collected for improvements for which an account has been established and for which the local agency has a proposed construction schedule or plan prior to final inspection/ certificate of occupancy, or the fees are to reimburse the district for expenditures previously made. In those circumstances, a district may collect fees earlier, and it is typical for districts to collect the fees at the time the builder or developer is seeking issuance of a building permit by the city or county planning office. The developer provides the school district with the local planning office's calculation of assessable or chargeable square footage, and the district collects the fee payment and issues a "Certificate of Compliance" to the developer that reflects the number of square feet and type of construction upon which the fees have been paid. Alternatively, the local planning office or county office of education may collect fees on behalf of school districts. For consistency, best practice is for the district to develop a Certificate of Compliance form that contains a section for the local city/county to provide the assessable square footage and that also gives notice of the expiration date for the certificate and the time within which any protest must be filed.

May a District Prevent Early Payment of Developer Fees that Allows a Developer to Pay its Fees at a Lower Rate than the Fee that Would Be in Effect at the Time Building Permits are Pulled?

No. Legal authority currently supports or disapproves this strategy. However, school districts may include in their Certificates of Compliance a date after which, if construction is not commenced, the Certificate of Compliance expires and needs to be updated. Providing an expiration date may be consistent with the purpose of the developer fee statutes; however, school districts considering adoption of an expiration date should first consult with legal counsel to assess potential benefits and risks.

May a District Recover the Costs of Collecting Developer Fees?

In addition to expending fees for preparation of the Justification Study or SFNA, a school district may use up to three percent of Level 1 developer fees collected on the administrative requirements for collecting developer fees. This includes staff time to collect the fees or payments made to another agency to collect the fees. The reimbursement may not exceed three percent in any fiscal year.

PROTESTS, APPEALS AND CHALLENGES

Is There a Standard Appeal Process That Includes Mandated Time Periods for Response by Both the Developer and School District?

Yes. The statutory process for the protest of a developer fee requires that the fee be paid under protest and the developer prepare a written notice to the school district setting forth the basis for the protest. The protest must be filed at the time of approval of the development or within ninety (90) days after the imposition of the fee. A school district is required to notify a developer of the date on which the ninety (90) days begins to run, and best practice is to include this information on its Certificate of Compliance. A person who files a protest may file a legal action challenging the fees within one hundred (180) days of the District's delivery of the ninety (90) day notice of protest (typically the day a Certificate of Compliance is issued). (*See* Gov. Code, § 66020.)

If a Developer Wins a Protest Based on the Imposition of Developer Fees, May a Court Award Interest on Any Amounts Awarded?

A district is required to pay interest in the amount of eight percent per annum of the unlawful portion of the payment, if a court finds in favor of a plaintiff who has filed a protest against the imposition of the fees. (*See* Gov. Code, § 66020(e).) While this provision provides a mechanism for charging interest, it is not clear that this would apply in the context of resolving a protest short of court action.

PROTEST PROCESS (RESIDENTIAL FEES)	
DEVELOPER PAYS FEE UNDER PROTEST	At time fees are imposed, District must provide developer written notice: • Of commencement of 90-day protest period; and • Statement of the amount of fees imposed
⌄	
DEVELOPER SERVES WRITTEN NOTICE TO DISTRICT OF PROTEST	• At time of development approval; or • Within ninety (90) days after payment of fee
⌄	
One hundred eighty (180) days – COMMENCE LEGAL ACTION	

If a Court Issues a Judgment to a Developer Invalidating all or a Portion of a School District's Board Resolution Enacting a Fee, Must the District Refund Fees Paid by Other Developers as well?

It depends. If the protesting developer files its action challenging the imposition of the fee within one hundred-twenty (120) days of the effective date of the resolution, the portion of the payment invalidated must also be returned to any developer who paid the same fee under protest during the 90-day period prior to the date of the filing of the action.

Is the Process the Same for Disputing Fees for Commercial/Industrial Projects?

The appeal of commercial and industrial fees has a slightly different procedure. (*See* Ed. Code, § 17621(e)(2).) The governing board must provide a process that permits the fee payer the opportunity for a hearing to appeal that imposition. Grounds for an appeal include:

- Project category pursuant to which the fee is to be imposed is inaccurate.
- Employee/pupil generation factors utilized under the applicable category are inaccurate as applied to the project.

The appealing party bears the burden of establishing that the fee is improper. The process for appealing a commercial/industrial fee must be described in the fee resolution.

How Do Districts Meet the Reporting Requirements for Developer Fees?

The law requires school districts to be accountable on both an annual and a five-year basis for the developer fees collected and expended. (Gov. Code, §§ 66001 & 66006.) The annual report focuses on the amount of developer fees collected and expended throughout the fiscal year.

The five-year report requires a more detailed analysis of a school district's overall use of developer fees. The purpose is to illustrate the extent to which the collected developer fees are necessary to serve a school district's facilities needs.

- The report must identify: (i) the nexus between the development for which fees are collected and the use of the fees; (ii) all sources and amounts of funds anticipated to complete financing of incomplete projects; (iii) anticipated date of receipt of those funds; and (iv) approximate date when construction will commence on pending projects for which sufficient funds have been collected.
- Where sufficient funds have been collected but construction of projects has not commenced, the district must identify, within one hundred (180) days of the end of the fiscal year, a date by which construction of the improvements will commence, or must refund any unexpended developer fees to the parties who paid those fees.

The five-year report is triggered five years after the first fiscal year that a school district collected developer fees.

- For example, for school districts that began collecting developer fees in fiscal year 1986-1987, five-year reports would be required in 1992, 1997, 2012, 2017, and 2022.
- The five-year report must be presented for approval by the governing board in conjunction with the annual report. It may be more convenient for staff to prepare a comprehensive report each fiscal year that includes both the annual and five-year collection and expenditure information. Doing so guards against the penalty of refunding unexpended developer fees for failure to report expenditures in a timely manner during the appropriate year.

The annual and five-year reporting information must be made available to the public by no later than one hundred eighty (180) days from the last day of the fiscal year—in other words, by December 27 of the applicable year.

- Because school districts are generally closed at this time of year, the better practice is for school districts to begin preparing the report no later than October, with a plan to complete the public and board review process by early December (with any adjustments for school holidays and vacations).
- The completed report(s) must be made available for public review at least fifteen (15) days before review and approval by governing board resolution at a regular meeting.
- Although a formal public hearing is not required, the statute requires fifteen (15) days' notice of the time and place of the meeting, including mailing the notice of the board's meeting to any interested party who files a written request with the district for mailed notice of the meeting. (*See* Gov. Code, § 66006.)

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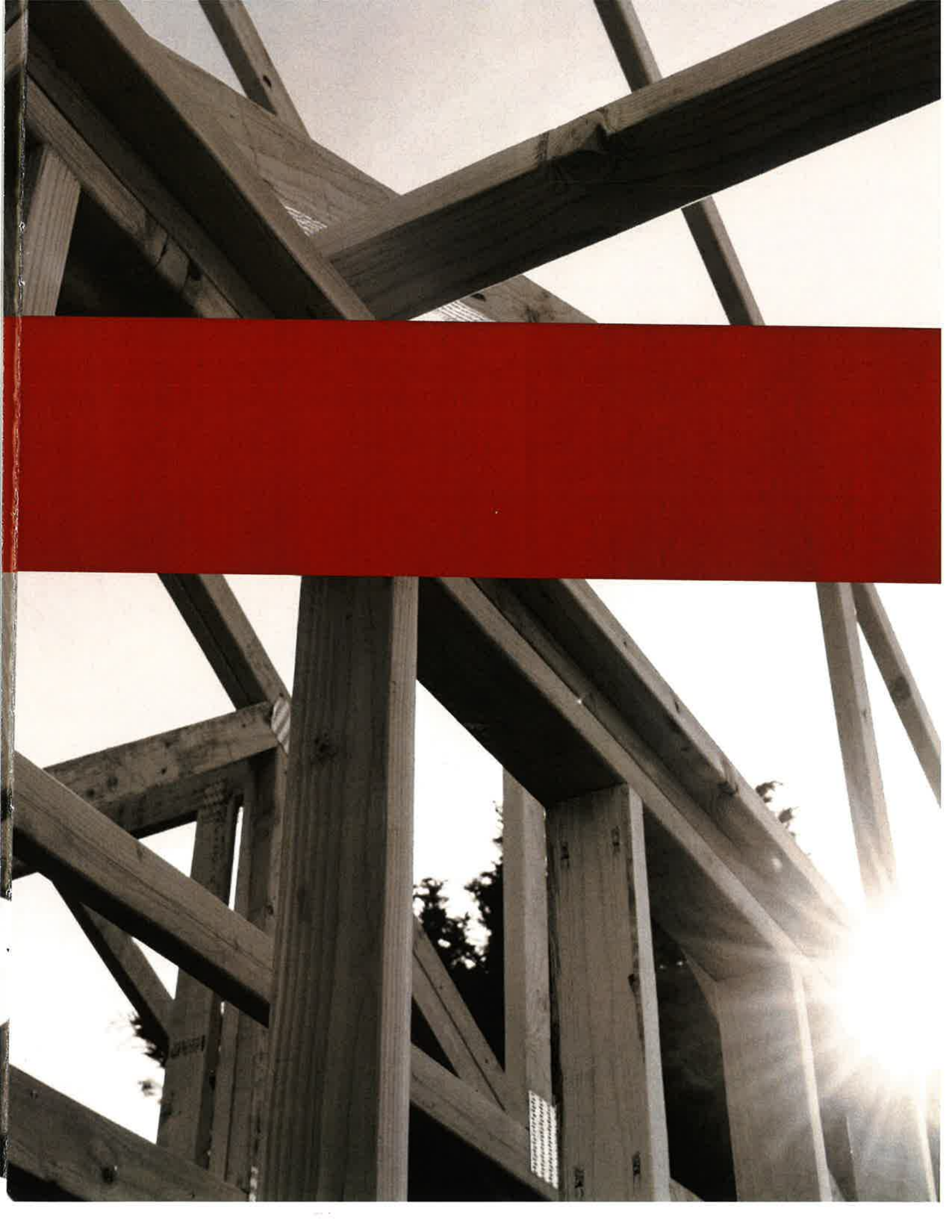
REPORTING REQUIREMENTS: ANNUAL AND FIVE YEAR REPORTS

ANNUAL REPORT GOV. CODE, § 66006(b)	FIVE-YEAR REPORT GOV. CODE, § 66001(d)
1. Type of fees collected 2. Amounts collected 3. Beginning and ending balances 4. Total amounts collected and interest earned 5. Project(s) information 6. Interfund transfers 7. Amount of refunds	1. Nexus 2. Purpose of fees 3. All sources of funds needed for projects 4. Anticipated date of receipt of funds 5. Approximate dates of construction
Make available no later than one hundred (180) days from end of last fiscal year (i.e., by December 27).	• Prepared five years after the first fiscal year the district collected fees. May be prepared annually. • Make available no later than 180 days from end of last fiscal year (i.e., by December 27).



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