

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

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August 19, 2025

John Calise, Assistant Superintendent, Facilities Division
Berkeley Unified School District
2515 Ninth Street
Berkeley, CA 94710

Dear John Calise:

**RE: Berkeley Unified School District Housing Accountability Act Fee Vesting –
Letter of Technical Assistance**

The California Department of Housing and Community Development (HCD) received a request for technical assistance regarding Berkeley Unified School District's (District) development impact fee as it relates to the Housing Accountability Act (HAA).¹ Among other provisions, the HAA limits the ability of local governments to revise fees on a project to a higher amount following the submission of a preliminary application pursuant to Government Code section 65941.1. The purpose of this letter is to provide technical assistance to the District on whether it can impose a higher fee on a specific development project subsequent to the vesting of the Project's preliminary application and applicable fees on that date.

Background

HCD understands that the project applicant (Applicant) filed a preliminary application for a 207-unit housing development project at 1598 University Avenue on May 5, 2023 (Project). At the time, the District's impact fee for residential development was \$3.48 per square foot. Following the City of Berkeley's approval of the Project on September 23, 2023, the District adopted a new residential development impact fee of \$5.17 per square foot on June 12, 2024,² which it subsequently charged the Applicant on December 6, 2024. Although the Applicant paid the higher fee amount, it contested the higher fee through the notice of protest process, claiming that the submission of the preliminary application should have locked in the fee at \$3.48 per square foot. The District rejected the Applicant's appeal on January 17, 2025, arguing that the impact fee qualified for the HAA's exemption to fee vesting because the fee was based on a

¹ Gov. Code, § 65589.5.

² Berkeley Unified School District Board of Education Resolution No. 24-045, June 12, 2024, <https://simbli.eboardsolutions.com/Meetings/Attachment.aspx?S=36030527&AID=818075&MID=30808>, page 1; Berkeley Unified School District Board of Education June 12, 2024 Official Minutes, <https://www.berkeleyschools.net/wp-content/uploads/2025/04/Board-Minutes-06.12.2024-.docx-3.pdf>, page 5.

statewide cost index³ and was necessary to mitigate impacts under the California Environmental Quality Act (CEQA).⁴ The Applicant has filed a request with HCD for technical assistance.

HAA Annual Fee Cost Index Exemption

Government Code section 65589.5, subdivision (o) requires that housing development projects that have submitted a valid preliminary application be subject only to the ordinances, policies, and standards in place when the preliminary application was submitted. This includes fees, charges, and exactions. Subdivision (o)(2)(A) exempts fee increases “resulting from an automatic annual adjustment based on an independently published cost index that is referenced in the ordinance or resolution establishing the fee.” In other words, the exemption applies when the following three criteria are met:

1. The fee increase must be an automatic annual adjustment.
2. The automatic annual adjustment must be based on a current independently published cost index.
3. The automatic annual adjustment must be established through an ordinance or resolution.

While the District’s impact fee may satisfy the second and third criteria as it is presumably based on an independently published cost index established through resolution, the fee does not result from an automatic annual adjustment. School district fees in California are regulated by the State Allocation Board. Every two years, the Board adjusts the maximum fee per square foot of floor area that can be charged in the state.⁵ In fact, the District’s resolution indicates that the District affirmatively adopted the increased fee of \$5.17 and did not rely on an automatic annual adjustment.⁶ Therefore, the District’s impact fee does not qualify for the exemption from the statutory requirement that the Project is subject only to the fees, charges, and exactions in effect at the time of the preliminary application’s submission. Therefore, the District is not authorized to impose a higher fee on the Project under this HAA exemption.

³ Gov. Code, § 65589.5, subd. (o)(2)(A).

⁴ Gov. Code, § 65589.5, subds. (o)(2)(C), (o)(6).

⁵ Gov. Code, § 65995, subd. (b)(3).

⁶ Berkeley Unified School District Board of Education Resolution No. 24-045, June 12, 2024, <https://simbli.eboardsolutions.com/Meetings/Attachment.aspx?S=36030527&AID=818075&MID=30808>, page 1.

HAA Project-Specific CEQA Exemption

A housing development project may be subject to ordinances, policies, and standards adopted after the preliminary application was submitted pursuant to Government Code section 65941.1 if subjecting the project to an ordinance, policy, standard, or any other measure, beyond those in effect when a preliminary application was submitted is necessary to avoid or substantially lessen an impact of the project under CEQA.⁷

However, the purpose of the District's fee increase is not to avoid or lessen the impact of housing projects under CEQA. In fact, neither the District Board's resolution adopting the fee increase nor the fee justification report for the increase reference CEQA impacts.

In addition, a local agency may require mitigation measures to lessen the impacts of a housing development project under CEQA.⁸ However, on the date of the Applicant's submittal (May 5, 2023), the District fee was \$3.48 per square foot, applicable to **all** development projects. Likewise, the fee increase is applicable to **all** development projects. The exemption under the HAA, on the other hand, pertains to **project-specific** impacts. Therefore, the Applicant is entitled to the fee in effect at the time of its preliminary application submittal.

In response to the Applicant's appeal, the District argues that the fee qualifies for the exemption because it is the exclusive method of mitigating impacts under CEQA, and that facility expansion due to increased enrollment caused by new development was identified in the City of Berkeley's housing element draft environmental impact report (DEIR) as a potential impact that would be mitigated by impact fees. Further, the District cites Government Code section 65996 as the legal basis for its subsequent imposition of a higher fee on the Project and its denial of the Applicant's appeal of the same.

However, Government Code section 65996, subdivision (a) itself provides for the "exclusive methods of considering and mitigating impacts on school facilities that occur or might occur as a result of any legislative or adjudicative act, or both, by any state or local agency involving, but not limited to, the planning, use, or development of real property or any change of governmental organization or reorganization...." The methods provided in subdivision (a) allow school fees to fund construction and reconstruction of school facilities,⁹ as well as empower local agencies to condition residential development approvals on land dedication or in-lieu fees as a means of providing interim facilities to relieve overcrowding.¹⁰ However, the District has asserted that the

⁷ Gov. Code, § 65589.5, subd. (o)(2)(C).

⁸ Gov. Code, § 65589.5, subd. (o)(6).

⁹ Ed. Code, § 17620.

¹⁰ Gov. Code, § 65974.

increased fee is to mitigate impacts under CEQA (which it had not previously identified), not for the purposes described in subdivision (a).

In addition, subdivision (d) expressly notes that “[n]othing in this chapter shall be interpreted to limit or prohibit the ability of a local agency to utilize other methods to provide school facilities ***if these methods are not levied or imposed in connection with, or made a condition of, a legislative or adjudicative act, or both, involving, but not limited to, the planning, use, or development of real property***” (Emphasis added.) In other words, local agencies may use other means to provide school facilities as long as they do not involve development review. Here; however, the District is proposing to levy a fee in connection with an act involving the development of real property.

Conclusion

The District is not authorized to impose a higher fee on the Project after the Project has vested. The District’s reliance on a CEQA exemption to impose an additional \$1.69 per square foot on the Applicant’s Project approximately one year after the Applicant’s submission of its preliminary application has no legal basis. The fee is not charged to mitigate specific impacts that arise from the Project. Therefore, the District is not authorized to impose a higher fee on the Project under this HAA exemption.

HCD remains committed to supporting local governments in facilitating housing at all income levels and hopes the District finds this clarification instructive. If you have questions or need additional information, please contact David Ying at david.ying@hcd.ca.gov.

Sincerely,

A handwritten signature in blue ink, appearing to read "D. Zisser", with a long horizontal flourish extending to the right.

David Zisser
Assistant Deputy Director
Local Government Relations and Accountability