



BUILDING INDUSTRY ASSOCIATION
1350 Treat Blvd. Suite 140
Walnut Creek, CA 94597
925.961.6844

June 13, 2016

Dr. Stephen Hanke
Superintendent
Dublin Unified School District
Via Email

Re: 2016 School Facilities Needs Analysis

Dear Dr. Hanke:

The Building Industry Association of the Bay Area (BIA) respectfully submits the following comments regarding the Dublin Unified School District (District)'s School Facilities Needs Analysis (SFNA) dated May 5, 2016. On June 1, 2016, BIA's governmental affairs director Lisa Vorderbrueggen provided you with a series of questions related to the SFNA. As of the preparation of this letter, BIA has not received a response and therefore does not have the benefit of any District responses in submitting this comment letter.

For the reasons set forth, BIA believes the SFNA fails to comply with governing state law. BIA requests the District defer action on the SFNA and associated fee resolution until a valid SFNA is prepared and substantial evidence is publicly available to support a school fee exceeding the maximum set forth in Gov't Code¹ §65995(b).

The Leroy F. Greene School Facilities Act of 1998 (SB 50) establishes rules governing the preparation of an SFNA, as well as the exclusive methodology for calculating alternative maximum school fee amounts pursuant to §§ 65595.5 and 65595.7 (SB 50 Fees):

This bill would provide, in the case of residential construction, a governing board of a school district may increase the per square foot fee by an amount determined pursuant to a formula for the purpose of generating funds to match the state per pupil and site assistance grant for which the district is eligible to accommodate the projected number of new pupils attributable to the construction of new residential units as demonstrated by a school facility needs analysis. This bill would require the needs analysis to be adopted in accordance with specified

¹ Unless otherwise noted, statutory references are to the Gov't Code.

notice and procedural requirements. (Legis. Counsel Dig., Sen. Bill No. 50 (1997–1998 Reg. Sess.) Stats.1998, ch. 407.)

The SFNA impermissibly deviates from the mandatory step-by-step process for preparing an SFNA and determining SB 50 Fees:

- **The SFNA improperly excludes some new housing units.** SB 50 Fees must be based on the total number of new residential units projected to be built in the district over the next 5 years. The SFNA projects 3,955 such units. However, the SFNA excludes some new units from the SB 50 Fee calculation based on these units having entered into unspecified “mitigation agreements” with the District. The mitigation fees, land, and/or facilities the District will receive from these units represent fees, charges, dedications, or other requirements on new development that the District apparently has negotiated. These mitigation requirements are reportedly greater than the maximum allowable SB 50 Fees currently imposed or purportedly justified by the 2016 SFNA. SB 50 does not grant districts discretion to make a determination to exclude new units (and associated mitigation payments) that are projected to be constructed over the next 5 years from the SFNA and the determination of the allowable SB 50 Fees. All new units must be counted and treated equally for purposes of the step-by-step analysis. The SFNA’s treatment of “mitigated” units has the effect of artificially inflating the SB 50 Fees by, among other things: (i) improperly excluding mitigation revenues from the local revenues that “shall be subtracted” from the amount determined by multiplying the number of projected unhoused pupils by the applicable construction grant amounts pursuant to §65995.5(c); and (ii) skirting SB 50’s per pupil construction, site acquisition, and site development cost containment ceilings by introducing the District’s cost, capacity, and other standards set forth in Exhibit H into the SB 50 Fee calculation.
- **Lack of evidence supporting the housing forecast.** The SFNA projects 1,719 unmitigated units over the next 5-year period. The 2015 SNFA projected 927 unmitigated units over its 5-year period. The record contains insufficient evidence to support the SFNA’s projection of unmitigated units especially in light of the unexplained dramatic increase in the 5-year projection from the 2015 SFNA.
- **Existing school capacity.** The SFNA identifies the District’s capacity at 9,134 students. It appears this figure has not been adjusted upward since 2009 as may be required pursuant to Education Code §17071.35.

- **Student generation rates.** The SFNA appears to rely on SGRs that were based on a sample of the units constructed during the last 5 years. SB 50 requires the SGRs to be based on the actual students generated from all of the new units constructed rather than a sample. Further, there is not an adequate explanation provided in the SFNA to allow the public to assess the validity of the sampled units or to trace the analytic route from the sampled units to the ultimate SGRs used in the SFNA.
- **The SFNA does not properly account for local funds.** §65995.5(c) (2) provides that “the full amount of local funds the governing board has dedicated to facilities necessitated by new construction shall be subtracted from the amount determined pursuant to paragraph (1). Local funds include fees, charges, dedications, or other requirements imposed on commercial or industrial construction.” The SFNA identifies substantial local funds that are, or will be, dedicated to facilities necessitated by new construction, including general obligation bond proceeds, mitigation fees, and commercial/industrial developer fees. The SFNA, however, declines to reduce SB 50 Fees pursuant to §65995.5(c)(2). The SFNA suggests that whether subtraction under (c) (2) occurs is a completely discretionary decision by a district. The SFNA’s approach to available local funding, and its failure to reduce the fee pursuant to (c) (2), is improper for several reasons. First, SB 50 imposes a nondiscretionary duty to subtract all local funds that are “dedicated to facilities necessitated by new construction.” Once it is established that a district will expend local funds on school facilities that will be attended by students from new housing units over the 5-year period, those funds “shall” be subtracted under (c)(2). Districts do not have discretion to undertake an enrollment “accounting” that deems school facilities that are funded by local funds and will accommodate new students from new housing units, as “not dedicated” to facilities necessitated by new construction. The relevant statutory phrase “facilities necessitated by new construction” refers not to an abstract paper accounting of “per pupil expenditures” necessitated by new construction but actual school facilities necessitated by new construction. The SFNA confirms that some portion of the local funds identified in Table G-1 will be spent on facilities necessitated by new construction, and therefore must be subtracted under (c) (2).

Even if a district has some discretion in this process, it cannot exercise that discretion contrary to the statutory prescriptions. Here, the SFNA indicates that the Board has exercised discretion to “dedicate” a large part of these local funds to new facilities for students from existing housing, new mitigated units, and inter-district transfers. As previously noted, this improperly skirts SB 50’s per pupil construction, site acquisition, and site development cost containment ceilings by injecting the District’s cost, capacity, and other standards into the SB 50 Fee calculations. The SFNA also provides no rational explanation or legal authority for “reserving” existing school capacity for the currently

unhoused pupils the SFNA identifies from existing residential units, new mitigated units, and inter-district transfers. This approach violates the legal principle that in calculating development impact fees, local agencies cannot withhold current and projected excess capacity and “reserve” it for future users such that it is taken off the table in calculating the maximum justified fee on new development. *Russ Bldg. Partnership v. City and County of San Francisco* (1987) 199 Cal.App.3d 1496, 1515-16 [review granted and opinion superseded, (Cal. 1987) 236 Cal.Rptr. 403, modified, (Cal. 1987) 237 Cal.Rptr. 456 [737 P.2d 359] and aff'd in part, rev'd in part, partial publication ordered, (1988) 44 Cal.3d 839 [244 Cal.Rptr. 682, 750 P.2d 324]. There is also no evidence supporting the SFNA’s assumption that all or any specific number of the pupils from existing housing, mitigated units, and inter-district transfers will be accommodated in new school facilities as estimated in Appendix H. The SNFA includes no information about how or where it has provided facilities historically for these pupils and therefore it is arbitrary to assume that the District will incur these costs from the available Local Funds. The SFNA’s representation that mitigation fees and Level II SB 50 Fees collected in prior years have been, or will be, expended on facilities to house pupils from existing residential units and out-of-district units is also evidence of violation of law governing imposition and expenditure of development impact fees. Similarly, the SFNA’s representation that students from residential units that will be assessed SB 50 Fees (due to not being covered by a mitigation agreement) will not receive equal access to the school facilities that will be funded in part by SB 50 Fees and may not be allowed to attend these school facilities is inconsistent with SB 50, §66000 *et seq.* and the unconstitutional conditions doctrine of the federal and state Constitutions for failure to maintain a legally required nexus between an exaction and the impacts of development on which the exaction is imposed.

The SFNA appears to double count general site development costs. §65995.5(c) (1) provides that the number of unhoused pupils “shall be multiplied by the appropriate amounts provided in subdivision (a) of [Education Code] Section 17072.10.” The per pupil grant amounts are set by statute in Education Code §17072.10 subdivision (a). The SFNA, however, multiplies the number of unhoused pupils by a combination of the grant amount in Education Code §17072.10 (a) added to the separate grant amount for general site development in Section 17072.10 (b). The SFNA includes general site development in the first step of the fee calculation. The SFNA then appears to include general site development again pursuant to the site acquisition and site development provisions in §65995.5(h). That section governs the calculation of site acquisition and site development for purposes of the SB Fee calculation and expressly caps those components. With respect to site development pursuant to §65995.5(h), the SFNA provides an estimate of total site development costs expressed as a per acre cost by grade level. The SFNA provides no indication that this total site development cost does not

include general site development costs. By apparently including general site development costs in this part of the calculation, while also including general site development in the per pupil grant amount, the SFNA appears to double count general site development and therefore arrives at excessive SB 50 Fees.

- **Lack of evidence supporting the SFNA's per-acre land acquisition cost and site size.** The SFNA utilizes a per-acre land cost of \$3.7 million. The SFNA states that this figure is based on the District's recent purchase of the Amador site and various "adjustments" made by the District. The SFNA does not adequately support or explain the adjustments made to the Amador site per acre cost and does not adequately disclose the analytic route used by the District to arrive at the \$3.7 million/acre figure. The SFNA also fails to justify the school facilities site sizes on which the SB Fees are based. The SB 50 Fees are based on K-8 facilities on 13.4 acres. However, while this is the maximum allowable site size, there is no evidence that the District will use SB 50 Fees to acquire a site of that size and the record indicates that any sites that are acquired will be smaller. There is also no evidence that the District will actually acquire elementary sites with the SB 50 Fees. With respect to high school facilities, the SFNA bases the SB 50 Fee on a site size of 47.1 acres. This, however, is the maximum site size allowable for a school for 2,500 students. The SFNA indicates that over the next 5 years and the relevant period in the future, a new high school facility will in fact enroll no more than 1,500 pupils. The maximum allowable acreage for SB 50 Fee purposes is therefore a site based on 1,500 pupils. These improper site sizes also render the total site development costs excessive due to the increased acreage. There is also no evidence supporting a determination that the District will actually acquire a high school site of that size with the SB 50 Fees. The 2015 SFNA did not include land acquisition and site development costs for a K-8 facility based on the existence of the MOU between the District and the City of Dublin to enter into a lease agreement for the next two K-8 school sites. Despite the fact that since the 2015 SFNA the relationship between the District and City has progressed from an MOU to actual execution of the option agreement in the District's favor, the 2016 SFNA includes K-8 site acquisition and development in the SB 50 Fees. There is no adequate explanation or justification for this changed position by the District and it is arbitrary and capricious to include K-8 site acquisition and development in the SB 50 Fee in light of the legal rights the District has, the reasonably foreseeable exercise of the options within the next year, and the District's prior position regarding the leased sites. The SFNA also makes no provision for holding the portion of the SB 50 Fees attributable to these facilities in escrow or refunding them upon the District's exercise of the option.
- **Failure to identify and consider rental income** The 2015 SFNA identifies and takes into account \$28,000/year in rental income from Nielsen Education. The 2016 SFNA does not identify or consider this revenue source. The failure to do so, and to provide an

explanation of why this funding source is no longer reflected in the SB 50 analysis is improper.

- **Site development costs are not supported by substantial evidence and are not limited to allowable categories and amounts.** § 65995.5(h) limits site development costs to 50% of the amount that would be funded by the State Allocation Board pursuant to its regulations governing grants for site development costs. The SFNA provides no documentation or justification for its site development figures and does not acknowledge or reference the detailed provisions governing site development in the SAB regulations in Regulation 1859.76.²

Failure to identify school facilities attributable to new residential units. As noted above, §65995.5(f) provides that SB 50 Fees “shall be expended solely on the school facilities identified in the needs analysis as being attributable to projected enrollment growth from the construction of new residential units.” The SFNA, however, does not identify school facilities at sufficient level of detail to enable judicial review and enforcement of this statutory mandate. The SFNA’s identification of per pupil expenditures necessary to house pupils from new residential units over the next 5 years does not fulfill the statutory requirement to identify “the school facilities” needed to accommodate these pupils. SB 50 requires identification of the actual school facilities that a district reasonably anticipates will be funded with SB 50 Fees to house the students from new housing units over the next 5 years.

Yours very truly,



Paul Campos
General Counsel

² <http://www.documents.dgs.ca.gov/opsc/Resources/PowerPoint/OPSC-PVT.ppt>