



BUILDING INDUSTRY ASSOCIATION
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May 10, 2016

Larry Sweeney, President
and Members of the Board
Fremont Unified School District
4210 Technology Drive
Fremont, CA 94538

Re: 2016 School Facilities Needs Analysis

Dear Board Members:

The Building Industry Association of the Bay Area (BIA) respectfully submits the following comments regarding the Fremont Unified School District (District)'s School Facilities Needs Analysis (SFNA) dated April 8, 2016. 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 notice and procedural requirements. (Legis. Counsel Dig., Sen. Bill No. 50 (1997–1998 Reg. Sess.) Stats.1998, ch. 407.)

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

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 6,705 such units. However, the SFNA excludes 2,551 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 2,551 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 E into the SB 50 Fee calculation.
- **The SFNA improperly reaches beyond 5 years.** SB 50 Fees must be based on a projection of pupils from new residential housing units over a 5-year period, and can only consider unhoused pupils and facilities needs over that limited 5-year period. The SFNA projects new residential units (and therefore facilities needs) out to 2035—almost a 20-year period. The SFNA’s utilization of an excessive planning horizon has the effect of inflating SB 50 Fees by, among other things: (i) improperly excluding GO bond, RDA, and commercial/industrial 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 E into the SB 50 Fee calculation. The SFNA’s approach would countenance districts’ adjusting the future projection period to whatever horizon is “necessary” to show that there are no local funds available (the 2013 SFNA reached out 22 years while the 2015 SFNA extended 20 years). This approach also improperly allows districts to claim there is no existing school facilities capacity for purposes of the SB 50 Fee calculations even though the data may show there will be existing school capacity over the 5-year horizon prescribed by SB 50 using state school capacity and enrollment standards (as the 2013 and 2015 SFNAs did)

- **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. The largest single source is \$110,924,500 in local general obligation funds:

On June 3, 2014, the voters of the school district approved Measure E, which authorized the issuance of \$650,000,000 in GO bonds. Of the \$650,000,000 to be issued, \$110,924,500 has been earmarked for the construction of new classrooms at existing school facilities. Therefore, it has been determined that at this time \$110,924,500 is available to offset the impacts of students generated from Future Units over the next five (5) years. (SFNA Exhibit L)

Other identified local funds include RDA (\$28 million) and commercial/industrial impact fees (\$3 million). The SFNA, however, declines to reduce SB 50 Fees pursuant to §65995.5(c)(2) on the basis that the Board “has determined that no local sources...are available to finance the construction or reconstruction of school facilities to accommodate any Projected Student Enrollment generated from Future Units (see Exhibit L for more detail on local sources, including Local Funds).” The SFNA suggests that whether subtraction under (c) (2) occurs is a completely discretionary decision by a district:

The second step in calculating the maximum Alternative No. 2 Fee is to subtract the amount of local sources, including Local Funds, if any, the School District has decided to dedicate to school facilities necessitated by the construction of non-mitigated Future Units from the Alternative No. 2 Fee School Facility Costs in order to calculate the Net Alternative No. 2 Fee School Facility Costs. As stated in Section IV of the Analysis, the School District has determined that no credit is available to accommodate Projected Unhoused Students generated from Future Units.

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. Exhibit L confirms that these local funds will be spent on facilities necessitated by new construction, and therefore must be subtracted under (c) (2).

Second, even if a district has some discretion in this process, it cannot exercise that discretion contrary to the statutory prescriptions. Here, the SFNA declares that the Board has exercised discretion to “dedicate” a large part of the GO bond, RDA, and commercial/industrial funds to new school facilities ostensibly necessitated by new residential construction that will occur through 2035—including new units over the next 5 years. 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 set forth in Exhibit E into the SB 50 Fee calculations. This approach also 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]

Third, the SFNA provides no rational explanation or legal authority for “reserving” a large part of the local funds for the 933 currently unhoused pupils the SFNA identifies from existing residential units. New residential units will pay a higher per unit share of the GO bond repayment based on higher assessed valuations than existing housing units. In addition, the SFNA cannot use the District’s cost, capacity, and other standards to calculate the purported cost of facilities to house the students from existing units as part of the SB 50 Fee calculation.

Fourth, the SFNA’s approach to (c) (2) countenances arbitrarily different treatment of the same local funds from year-to-year without reasoned explanation or justification. For example, the District’s 2015 SFNA identified the same GO bond funds of approximately \$110 million as “earmarked for the construction of new classroom facilities at existing school facilities” but then “apportioned” these funds “between students to be generated from Future Units and students to be generated from residential units constructed beyond the next five (5) years,” and determined that of the \$110 million, only \$29.9 million was “available to offset the impact of students generated from Future Units over the next five (5) years (as opposed to \$110 million found to be available in 2016). The 2015 SFNA then declared that the Board exercised discretion not to subtract any of the \$29.9 million in available funds pursuant to §65995.5(c).

The different treatment of the same \$110 million in GO bond funds found in Tables L-2 and L-3 in the 2015 and 2016 SFNAs shows the arbitrary and capricious results that flow from the SFNA’s approach to available local funds. The only consistent result that flows from this interpretation is the key determination never to subtract any local funds pursuant to 65995.5(c)—effectively rendering this important statutory provision a dead letter.

- **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.
- **There is no substantial evidence supporting the SFNA’s per-acre land acquisition cost.** The SFNA utilizes a per-acre land cost of \$2.45 million. The SFNA states that this figure is based on the District’s recent purchase of a new school site and real estate comparisons provided to the District by Dutra Enterprises. However, according to publicly available information, the recently acquired site is a 33-acre site at 35068 Fremont Boulevard with a purchase price of \$52.8 million—a figure of approximately \$1.6 million/acre, which is substantially less than the SFNA’s per-acre figure. The SFNA provides no information regarding any of the comparisons purportedly provided by Dutra Enterprises. In addition, the SFNA’s per acre figure represents an almost half-million dollars per acre increase from the 2015 SFNA with no explanation or evidence justifying the higher figure.
- **Failure to identify and consider surplus site.** The SFNA identifies and considers one surplus site pursuant to §65995.6(b) (1). However, it is BIA’s understanding that there is at least one additional site that should be identified and considered—the “Marshall site” that is currently being leased for \$450,000/year to a private school (Stratford School). According to the summary of the March 9, 2016 District Board meeting on the District’s web site², the Board recently began the process of terminating the lease so that the premises can be devoted to public school purposes. Identification of this site and consideration of its use pursuant to §65995.6(b) (1) is mandated in the SFNA.

²<http://www.fremont.k12.ca.us/site/default.aspx?PageType=3&DomainID=5545&ModuleInstanceID=4613&ViewID=047E6BE3-6D87-4130-8424-D8E4E9ED6C2A&RenderLoc=0&FlexDataID=55302&PageID=28509>;
<http://www.thereporter.com/general-news/20160324/fremont-board-gives-stratford-school-until-june-18-to-leave-campus>

- **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 1859.76.³
- **Improper expenditure of SB 50 Fees.** §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, indicates the District’s intent to expend SB 50 Fees on school facilities that are not attributable to projected enrollment growth from the construction of the new residential units on which the SB 50 Fees will be imposed. For example, the SFNA states that SB 50 Fees will be used to repay the COPs issued to acquire the Fremont Boulevard Site. Yet the SFNA also states that that site is not available to house projected unhoused pupils from the new residential units that will pay those SB 50 Fees over the next 5 years. Similarly, publicly available information indicates that the District is actively considering directing unhoused pupils from new residential units to be constructed over the next 5 years (units on which the SB 50 Fees will be imposed) to neighboring school districts.⁴ This would result in the imposition of SB 50 Fees on new residential units identified in the SFNA and expenditure of those fees on school facilities that are not attributable to projected enrollment growth from the new residential units, in violation of §65995.5(f). This would also violate §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. 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.

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

³ <http://www.documents.dgs.ca.gov/opsc/Resources/PowerPoint/OPSC-PVT.ppt>

⁴ http://www.eastbaytimes.com/my-town/ci_29812163/newark-school-district-talks-possible-territory-transfer-fremont

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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,

A handwritten signature in black ink, appearing to read "Paul Campos". The signature is written in a cursive style with a large initial "P".

Paul Campos
General Counsel