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MEMORANDUM

TO: Carol Korade, City Attorney

FROM: Ellen J. Garber

DATE: February 25, 2014

RE: Application of SB 50 to Consideration of Development Applications

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INTRODUCTION and SUMMARY OF CONCLUSIONS

The Leroy F. Greene School Facilities Act of 1998 ("SB 50")[1] preempts the issue of impacts of new development on school facilities. Therefore, if a developer agrees to pay the fees established by SB 50, the impacts on school facilities may not be analyzed under the California Environmental Quality Act ("CEQA"),[2] no mitigation for impacts on school facilities may be required, and the project may not be denied due to impacts on schools or due to the inadequacy of school facilities. Hence, state law limits the City's discretion to (i) consider the effects of new development on the ability of schools to accommodate enrollment, (ii) require mitigation, and (iii) deny projects.

A relatively recent case, *Chawanakee Unified School District v. County of Madera* (2011) 196 Cal. App. 4th 1016, holds that development applications may be analyzed under CEQA, and mitigation may be required, if the potential impacts are indirectly caused by the operation or construction of schools on the non-school physical environment.

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[1] Gov. Code §§ 65995-65998 and Educ. Code §§ 17620-17621.

[2] Pub. Resources Code § 21000 *et seq*.

DISCUSSION

I. SB 50

Pursuant to SB 50, which was enacted in 1998, impacts on school facilities are not to be considered in an EIR, and SB 50 fees constitute adequate mitigation of those impacts. As SB 50 states, payment of fees "shall be the exclusive method[] of considering and mitigating impacts on school facilities," and "are . . . deemed to provide full and complete school facilities mitigation. Gov. Code §§ 65996 (a) and (b). See Part II, below. In addition,

> A state or local agency may not deny or refuse to approve a legislative or adjudicative act, or both, involving, but not limited to, the planning, use, or development of real property, or any change in governmental organization or reorganization as defined in Section 56021 or 56073 on the basis of a person's refusal to provide school facilities mitigation that exceeds the amounts authorized pursuant to this section or pursuant to Section 65995.5 or 65995.7, as applicable.

Gov. Code § 65995(i).

Even where applicants have agreed to pay school impact mitigation fees, however, if the proposed development, including the school expansion it requires, would cause other environmental impacts—traffic or construction impacts, for example—then those impacts to non-school resources may be analyzed under CEQA. This is discussed in Part III, below.

II. Impacts of New Development On School Facilities

SB 50 limited the scope of CEQA analysis of impacts on school facilities, making the fees set forth in Government Code section 65995 "the exclusive means of both 'considering' and 'mitigating' school facilities impacts of projects. The provisions of [S.B. 50] are 'deemed to provide full and complete school facilities mitigation.'" Kostka & Zischke, Practice Under the California Environmental Quality Act (2012), § 14.28 (citations omitted). According to the Kostka & Zischke treatise, SB 50 appears to transform CEQA review of impacts on school facilities into a ministerial function after the applicant agrees to pay the required mitigation fees. *Id.*, § 14.28 (concluding that the law limits not only mitigation but also the scope of the EIR).[3] No case expressly reached

[3] *Cf.* 9 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 25.49, 25–213 to 25–214, fns. omitted ("SB 50 employs three primary means to preempt the field of development (footnote continued)

this conclusion until the *Chawanakee Unified School District* case, discussed below, but logic seemed to dictate this outcome based on the statutory language.

Therefore, if a project applicant has agreed to pay school mitigation fees, the lead agency may not consider the following items in an EIR, nor deny the project based on these considerations:

- impacts on the physical structures at the school (on school grounds, school buildings, etc.) related to the ability to accommodate enrollment;
- mitigation measures above and beyond the school mitigation fee ;
- other non-fee mitigation measures the school district's ability to accommodate enrollment.

3. Physical Effects on the Environment Because of School Facilities

Despite the restrictions on environmental review and mitigation discussed above, SB 50 also states that "[n]othing in this section shall be interpreted to limit or prohibit the ability of a local agency to mitigate the impacts of land use approvals other than on the need for school facilities, as defined in this section." Gov. Code, § 65996(e). This leaves the agency free to reject a project based on impacts *other* than impacts on the need for "school facilities."[4] Any number of impacts could fall outside of this definition; for example, impacts on wildlife in the development site, impacts on air quality, or inadequate water supply.

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fees and mitigation measures related to school facilities and to overturn [*Mira* and its progeny]. First, it provides for a *cap on the amount of fees, charges, dedications or other requirements* which can be levied against new construction to fund construction or reconstruction of school facilities. Second, SB 50 *removes denial authority* from local agencies by prohibiting refusals to approve legislative or adjudicative acts based on a developer's refusal to provide school facilities mitigation exceeding the capped fee amounts, or based on the inadequacy of school facilities. Third, it *limits mitigation measures* which can be required, under the California Environmental Quality Act or otherwise, to payment of the statutorily capped fee amounts and deems payment of these amounts 'to provide full and complete school facilities mitigation [.]'" (emphasis in original).

[4] SB 50 defines "school facilities" as "any school-related consideration relating to a school district's ability to accommodate enrollment." Gov. Code § 65996(c).

In 2011, the court in *Chawanakee Unified School District* carefully interpreted the statutory language of SB 50 and held that while an EIR need not analyze the impacts on school facilities as a result of accommodating more students, the document must consider the impacts on traffic of additional students traveling to the school and consider other impacts to the non-school physical environment from construction of additional facilities. 196 Cal. App. 4th at 1028-1029.[5]

Courts have found the physical activities caused by school growth to be outside the definition of "school facilities," and therefore not shielded from review by SB 50. For example, as discussed above, *Chawanakee Unified School District* interpreted the traffic associated with more students traveling to a school to be something other than impacts on school facilities, and therefore subject to review and mitigation under CEQA. Accordingly, traffic impacts resulting from more students traveling to the school, dust and noise from construction of new or expanded school facilities, and any other impacts to the non-school physical environment were not impacts on "school facilities," and must be addressed in an EIR. According to the court in *Chawanakee*:

> Consequently, the phrase 'impacts on school facilities' used in SB 50 does not cover all possible environmental impacts that have any type of connection or relationship to schools. As a matter of statutory interpretation . . . the prepositional phrase 'on school facilities' limits the type of impacts that are excused from discussion or mitigation to the adverse physical changes to the school grounds, school buildings and 'any school-related consideration relating to a school district's ability to accommodate enrollment.' Therefore, the project's indirect impacts on parts of the physical environment that are not school facilities are not excused from being considered and mitigated.

196 Cal. App. 4th at 1028 (internal citation omitted).

Hence, the lead agency must determine whether impacts fall outside the definition of "school facilities," thereby making them subject to environmental review. In light of the *Chawanakee* case, however, the agency's discretion to conduct environmental review, to require mitigation, and to consider denying the would be limited to physical effects on the non-school environment.

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[5] While SB 50 was not at issue in this case, in *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal. App. 4th 889 the court held that an EIR prepared in connection with the construction of a new school properly analyzed health and safety issues, air quality, traffic impacts, and land use issues.

Therefore, a lead agency may consider, in an EIR, among other factors the following impacts potentially caused by school expansion or construction:

- traffic impacts associated with more students traveling to school;
- dust and noise from construction of new or expanded school facilities;
- effects of construction of additional school facilities (temporary or permanent) on wildlife at the construction site;
- effects of construction of additional school facilities on air quality;
- other "indirect effects" as defined by CEQA Guidelines § 15258 (a)(2) (growth-inducing effects, changes in pattern of land use and population density, related effects on air and water and other natural systems). *See Chawanakee Unified School District*, 196 Cal. App. 4th at 1029.

CONCLUSION

When it comes to arguments about the impact of a proposed development on existing school facilities and their ability to accommodate more students, the CEQA process is essentially ministerial. Agencies must accept the fees mandated by SB 50 as the exclusive means of considering and mitigating the impacts of the proposed development on school facilities. However, nothing in SB 50 or in CEQA or current case law prohibits an agency from conducting environmental review of an application that creates significant environmental impacts on non-school-facility settings or sites, regardless of whether the applicant has agreed to pay mitigation fees under SB 50.

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