TO: JAMES L. APP, CITY MANAGER

FROM: BOB LATA, COMMUNITY DEVELOPMENT DIRECTOR

SUBJECT: HOUSING LEGISLATION SPONSORED BY THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION

DATE: NOVEMBER 1, 2005

Needs: For the City Council to receive a report on current housing legislation sponsored by the California Building Industry Association.

Facts:

1. On September 14, 2005, the California Building Industry Association (CBIA) hosted a housing forum at the River Oaks Development. The agenda included an announcement of a package of 8 bills sponsored by the CBIA to alleviate the lack of entry-level housing.

2. Two of the 8 bills were substantially altered to address issues other than housing: one now proposes renaming the Circulation Element to the Transportation Element, another applies only to public works construction projects in Los Angeles County.

3. All of the remaining 6 CBIA-sponsored bills are now 2 year bills, meaning that, although they were introduced in 2005, they were carried over to 2006 for further discussion and action.

4. Attached is a report on the remaining 6 bills which includes a brief description each bill, legislative analysis (if available), position of the League of California Cities, and the potential effect that the bills may have on City policy and operations.

5. The state legislature does not re-convene until January 2006.

Analysis and Conclusion: From the attached report, it appears to be prudent to closely follow the two bills that address development fees: AB 1205 (Blakeslee) and SB 321 (Morrow), as they have the potential to affect the assumptions on City development fees are based. The other 4 bills are worthy of watching, but it does not appear that they will have much impact on City policy or operations.

Policy Reference: Bills listed in the attached report

Fiscal Impact: The two fee-related bills could, if passed, generate a need to revisit the methodology for determining fees. Such an activity could entail use of General Funds to hire a consultant.

Options:

a. Via minute action, receive and file the attached report and direct staff to take action as appropriate.

b. Amend, modify or reject the foregoing option.

Prepared By:

Ed Gallagher
Housing Programs Manager

Attachments:
1. Report on CBIA-Sponsored Housing Bills 2005-2006

ED\HOUSING\LEGISLATION\2005\ STATECCR RE BIA-SPONSORED BILLS 110105

CALIFORNIA BUILDING INDUSTRY-SUPPORTED LEGISLATION 2005-2006

The following is an analysis of those bills sponsored by the Building Industry in 2005. All of the bills listed below are two-year bills, meaning that they were introduced in 2005, but were held over to 2006 for further consideration.

The discussion includes a summary of the bill, legislative analysis (if available) and the position of the League of California Cities (LOCC). The California Chamber of Commerce expressed a position for only one of the following bills, SB 948 (Murray). The California State Association of Counties did not have a position on the following bills.

AB 108 (Houston)

Summary: Would amend the Business and Professions Code to further regulate the information to be included in advertisements sent by trial attorneys in construction defect legislation.

Legislative Analysis: This bill would require a lengthy list of disclosures in any advertisement by a plaintiff's attorney that "urges" a person or entity to take an action that "may" lead to filing a claim for residential construction deficiencies.

Supporters argue that homeowners should be presented with these disclosures so that they have all necessary information to make an informed decision before pursuing litigation. They also contend that the bill would limit the cost of insurance for builders and contractors and thereby increase the availability of such insurance, presumably because fewer homeowners would sue.

Opponents point out that the bill would require a highly speculative worst-case scenario analysis by the attorney, before even initial client contact takes place. They also point out that attorneys are not required to make these disclosures in any other practice areas, including commercial construction defect, nor would the bill require disclosures by defense attorneys handling residential construction defect matters. Opponents also express doubts about the constitutionality of the bill's restraint on speech. In addition, opponents argue, the bill would likely have the effect of making it more difficult for owners of defective homes to obtain a legal remedy.

LOCC Position: watch

Significance to City: No direct impact.

AB 941 (Canciamilla)

Summary: This bill would amend the Civil Code to require homeowners to contact and meet with builders to resolve construction defect complaints prior to filing suit.

Legislative Analysis: This bill would establish a general requirement for homeowners to contact the builder to inform the builder of the nature and location of a construction defect and allow the builder to inspect the defect at a mutually convenient time before the homeowner could seek legal remedies for homes purchased prior to January 2003.

Supporters contend that it would help to resolve disputes quickly and effectively, avoiding the time and cost of litigation, and thereby lower the cost of insurance for builders.

The Consumer Attorneys of California opposes the bill, arguing that it is unfair and unnecessary and upsets the consensus underlying SB 800 of 2002, which applies only prospectively to homes sold after January 2003. The analysis raises questions of interpretation and implementation in light of the ill-defined nature of the obligations imposed by the bill. This ambiguity might have the inadvertent consequence of creating ancillary

legal battles over interpretation of and compliance with the law - complicating rather than preventing litigation. The prospect of creating new battles issues in construction defect litigation could be heightened because noncompliance by the homeowner would relieve the builder of all legal responsibility.

LOCC Position: watch

Significance to City: No direct impact.

AB 1205 (Blakeslee)

Summary: This bill would amend Section 66020 of the Government Code, relating to development fees. This bill would make it easier to challenge fees in court.

Existing law provides that in specified actions imposing a fee as a condition of approval of a development project, the local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed.

Existing law also authorizes any party to file a protest to attack, review, set aside, void, or annul the imposition of any fees, dedications, reservations, or other exactions on a development project by a local agency pursuant to specified procedures within 180 days after the delivery of a written notice by the local agency.

This bill would provide that any party may file a protest regardless of whether the action includes a facial challenge to the ordinance, resolution, or motion authorizing the fee, dedication, reservation, or other exaction imposed on the development project.

Legislative Analysis: None available.

LOCC Position: watch

Significance to City: It is unknown at this point whether this bill would cause the City to revisit and strengthen the analysis underlying its development fees. On its face, it appears that this bill would broaden the field of potential litigants for fee-related suits.

SB 321 (Morrow)

Summary: This bill would amend Section 66001 of the Government Code, relating to development fees. It would shift the burden of proof to the City to demonstrate that a particular fee had a "reasonable relationship" between the fees that a project would pay and the improvements funded by the fees.

Legislative Analysis: The indented text below is from the Senate's Legislative Analyst

> Background and Existing Law
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> When approving development projects, counties and cities can require the applicants to mitigate the project's effects by paying fees. The California courts have upheld these mitigation fees for sidewalks, parks, school construction, and many other public purposes.
>
> When establishing, increasing, or imposing a fee as a condition of approving a development project, the Mitigation Fee Act requires local officials to:
>
> - Identify the fee's purpose.

- Identify the fee's use, including the public facilities to be financed.
- Determine a reasonable relationship between the fee's use and the development.
- Determine a reasonable relationship between the public facility's need and the development.
- Determine a reasonable relationship between the fee's amount and the cost of the public facility.

In its 1987 Nollan decision, the U.S. Supreme Court said that there must be an "essential nexus" between a project's impacts and the conditions for approval. In the 1994 Dolan decision, the U.S. Supreme Court said that conditions on development must have a "rough proportionality" to a project's impacts.

In the 1996 Ehrlich decision, the California Supreme Court distinguished between "legislatively enacted" conditions that apply to all projects and "ad hoc" conditions imposed on a project-by-project basis. Ehrlich applied the "essential nexus" test from Nollan and the "rough proportionality" test from Dolan to "ad hoc" conditions. The Court didn't apply the Nollan and Dolan tests to the conditions that were "legislatively enacted." In other words, local officials face greater scrutiny when they impose conditions on a project-by-project basis.

Judges usually presume the constitutionality of local officials' regulatory powers, putting the burden of proof on the person challenging a regulation. In the Dolan decision, however, the US Supreme Court said that local officials had the burden to show that a project's impacts justified the conditions.

Comments

1. Rough proportionality. In deciding the Dolan case, the US Supreme Court looked at the standards that various states use, including the "reasonable relationship" standard in California's Mitigation Fee Act. That test was close to the constitutional standard, but the Supreme Court found the term confusing. Instead, the Court came up with the term "rough proportionality." Conceding that "no precise mathematical calculation" is needed, the justices said that local officials must determine that condition is related to the nature and extent of the project's impacts. SB 321 moves California's Mitigation Fee Act closer to the Supreme Court's "rough proportionality" test by requiring local officials to show that their mitigation fees don't exceed the costs of the conditions.

2. Reverses Ehrlich? In its 1996 Ehrlich decision, California's Supreme Court acknowledged that the Nollan and Dolan tests apply to development conditions that local officials impose on a project-by-project basis. When imposing fees on a specific development, there's a greater chance for mischief. But the Court didn't use those tougher tests on the other fee that applied to all projects. SB 321 confuses these already confusing tests by inserting language similar to the Dolan "rough proportionality" test into the Mitigation Fee Act. Unlike Ehrlich, SB 321 applies to both kinds of mitigation fees. The Senate Committee may wish to consider whether the Nollan and Dolan tests should apply to "legislatively enacted" mitigation fees that apply to all projects.

3. Invites judicial activism. Instead of using the "reasonable relationship" standard enacted by many states, the US Supreme Court invented the term "rough proportionality" and set off an arcane debate over the differences (if any) between the two terms. In its Dolan decision, the Supreme Court also appeared to depart from the established presumption of constitutional validity and required local officials to shoulder the burden of proof to justify their mitigation requirements. Some observers wonder if Dolan signals the Supreme Court's interested in shifting the burden of proof from challengers to governments. The Committee may wish to consider whether SB 321 invites that kind of judicial activism by putting the burden of proof on local officials when they impose any mitigation fees. Do legislators want the courts to second-guess local elected officials' calculations?

4. Creates a double standard. School districts' ability to charge school developer fees is legally separate from the Mitigation Fee Act that counties and cities must follow. SB 321 declares that its

language similar to the Dolan "rough proportionality" test does not apply to school developer fees. If the Dolan test is based on the United States Supreme Court's interpretation of constitutional protections, why shouldn't schools use that language? Why should the Legislature treat schools differently from counties and cities when it comes to developer fees?

5. Be careful, be very careful. Nollan, Dolan, Ehrlich, and other decisions use rarified constitutional arguments and highly refined terms in their attempts to distinguish between subtle differences in mitigation fees. Even a decade after the courts wrote these decisions, legal commentators are still debating their meaning. Rewriting the statutory standards could be as simple as codifying those judicial interpretations or as complex as writing new tests for local officials to follow. Legislators should be wary of blundering into a sophisticated debate without solemn reflection. The Committee may wish to consider holding SB 321 for deeper study.

LOCC Position: watch

Significance to City: This bill could make more work for the City if the effect of this bill mandates a reconsideration of adopted fees.

SB 785 (McClintock)

This bill would amend CEQA to require that all petitioners (litigants) against a development project on the grounds of CEQA disclose all parties in interest, financial or otherwise, in their petition. This bill would exempt a governmental entity or agency from those requirements.

Legislative Analysis: None available.

LOCC Position: watch

Significance to City: No direct impact. This may be a beneficial bill.

SB 948 (Murray)

Summary: This bill would amend would amend CEQA to provide for a streamlined EIR process for urban infill projects that are consistent with the General Plan..

By imposing new duties on local agencies with respect to determining whether requirements for a short form environmental impact report apply to specific projects, the bill would impose a state-mandated local program. However, this bill would provide that the California Constitution's requirement that reimbursement to local agencies for certain costs for state-mandated programs not apply to this matter.

Legislative Analysis: None available.

LOCC Position: watch
California Chamber of Commerce: Support

Significance to City: Unknown at this time. There could be benefits and liabilities.