



# **OAKLAND IMPACT FEE PROGRAM CEQA COMPLIANCE**

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## EXECUTIVE SUMMARY

This report provides an assessment of the potential applicability of the California Environmental Quality Act (CEQA) to the adoption of an Oakland Development Impact Fee Program. This report provides a general assessment of whether impact fees (in broad terms) are subject to CEQA, whether established statutory exemptions pursuant to CEQA apply to the establishment of impact fee programs, and specifically how these general CEQA provisions apply to the Oakland Impact Fee Program. As summarized here and explained below, adoption of an Oakland Impact Fee program:

- ◆ Is not a “project” under CEQA and is therefore exempt pursuant to CEQA Guidelines section 15378 (b)(4);
- ◆ Is statutorily exempt pursuant to CEQA Guidelines section 15273(4) (Rates, Tolls, Fares and Charges for obtaining funds for capital projects necessary to maintain service within existing service area);
- ◆ Is statutorily exempt pursuant to CEQA Guidelines section 15267 (Financial Assistance to Low or Moderate Income Housing) as it pertains to the affordable housing fee component;
- ◆ Is not intended to apply to specific capital improvement projects, and as such it would be speculative to evaluate such projects now. Any specifically identified transportation projects were already evaluated under CEQA and imposed as mitigation measures in previously certified EIRs and/or adopted mitigated negative declarations; and/or
- ◆ Is not intended to, nor does it provide CEQA clearance for future development-related projects by mere payment of the fees.

## NOT A ‘PROJECT’ UNDER CEQA

According to the General Concepts of CEQA (CEQA Guidelines section 15002), “CEQA applies in situations where a government agency can use its judgment in deciding whether and how to carry out or approve a project. A project subject to such judgmental controls is called a “discretionary project”. For the Oakland Impact Fee Program, the City of Oakland will use its judgment in deciding whether and how to carry out or approve the Program, and thus the Fee Program is clearly a discretionary action. However, the Fee Program is not necessarily a “project” pursuant to CEQA. CEQA Guidelines section 15378 provides that:

*“A project means the whole of an action which has the potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.”*

Whereas CEQA Guidelines section 15378 (b)(4) further provides that:

*“A project does not include . . . the creation of government funding mechanisms or other government fiscal activities which do not involve any commitment to any specific project which may result in a potentially significant physical impact on the environment.”*

The anticipated Oakland Impact Fee Program is precisely intended to create a City of Oakland funding mechanism, but the Impact Fee Program does not include any specific commitment to an individual project or any specific collection of individually identified projects. Rather, the Impact Fee Program is intended to enable the City to:

- maintain the existing level of capital investment per unit of demand in transportation infrastructure;
- maintain the existing level of capital investment per unit of demand in storm drain infrastructure and capital improvements related to parks, libraries, and fire and police protection; and to
- enhance and improve the availability of affordable housing opportunities based on the increased need for such housing attributable to new residential development within the City.

The Impact Fee Program does not commit the City to use this per capita investment to fund any specific, readily identifiable future project or projects that can be singled out as resulting in an environmental impact. As such, the Impact Fee Program is not considered a “project”, and thus is not subject to CEQA.

## **STATUTORY EXEMPTION CRITERIA**

Article 18 of the California Environmental Quality Act (CEQA Guidelines Sections 15260 to 15285), includes a list of the specific types of projects for which the State legislature has granted specific exemptions from CEQA, further clarifying the issue of creation of a funding mechanism, versus implementation of the whole of a project with potential direct or indirect effects. All of the components of the anticipated Oakland Impact Fee Program fall within the definition of one or more of these statutory exemptions.

### **15267: Financial Assistance to Low or Moderate Income Housing**

CEQA Guidelines section 15267 specifically provides that CEQA does not apply to “actions taken . . . to provide financial assistance for the development and construction of residential housing for persons and families of low or moderate income, as defined in Section 50093 of the Health and Safety Code.” An important component of the Oakland Impact Fee Program is anticipated to be an affordable housing fee, specifically intended to provide financial assistance for the creation of residential housing affordable to persons and families of very low, low and/or moderate incomes. This component of the Impact Fee Program not only falls outside of the definition of a “project” and thus not subject to CEQA, but has been specifically granted an exemption by statute.

Future residential projects that receive financial assistance through the affordable housing component of the Impact Fee Program will be subject to CEQA at such time as approvals for those projects are considered. Individual affordable housing projects may be found to be exempt from CEQA on the basis of their individual or unique characteristics, but that decision can only be made at a later date, when the specifics of such housing projects are known.

**15273: Rates, Tolls, Fares and Charges**

Among the types of projects that have been granted a statutory exemption from CEQA review are those projects that are specifically identified as rates, tolls, fares and charges. CEQA Guidelines section 15273 provides that:

- a) *“CEQA does not apply to the establishment, modification, structuring, restructuring or approval of rates, tolls, fares or other charges by public agencies which the public agency finds are for the purpose of:*
- [1] Meeting operating expenses, including employee wage rates and fringe benefits,*
  - [2] Purchasing or leasing supplies, equipment or materials,*
  - [3] Meeting financial reserve needs and requirements,*
  - [4] Obtaining funds for capital projects necessary to maintain service (underline added) within existing service areas, and*
  - [5] Obtaining funds necessary to maintain such intra-city transfers as are authorized by city charter.*
- b) *Rate increases to fund capital projects for the expansion of a system remain subject to CEQA. The agency generating the rate increase shall act either as Lead Agency if no other agency has prepared environmental documents for the capital project, or as a Responsible Agency if another agency has already complied with CEQA as the Lead Agency.*
- c) *The public agency shall incorporate written findings in the record of any proceedings in which an exemption under this section is claimed, setting forth with specificity the basis for the claim of exemption.”*

These provisions of CEQA provide further clarification regarding exemptions from CEQA for the creation of government funding mechanisms. The provisions of CEQA Guidelines Section 15273 (a[1]) through (a[5]) above, cover a broad range of funding mechanisms (even though not specifically using the term “fees”) which are directly applicable to the anticipated use of the Oakland Impact Fee Program funds. The Fee Program anticipates using funds derived from the fees to purchase capital equipment and vehicles, and to fund capital projects necessary to maintain existing levels of investment and service related to transportation, storm drains, parks, libraries, police, and fire.

The use of this statutory exemption by other governmental agencies is widespread and common. A search of the State Office of Planning and Research (OPR) CEQA-net database of documents recently filed with OPR<sup>1</sup> indicates that the 15273 exemption for rates, tolls and other charges has recently been used for such wide-ranging purposes as:

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<sup>1</sup> as of November 2015

- Placer County Airport Land Use Commission’s establishment of project review fees to meet operating expenses incurred by the ALUC in providing its services;
- Sacramento Metropolitan Air Quality Management District’s establishment of fees used to recover costs associated with renewing and updating emission reduction credits and implementing emission reduction projects;
- Bethel Island Municipal Improvement District’s fee revisions for development permit fees;
- Western Placer Waste Management Authority’s increase to tipping fees to reflect current and future financial needs and ensure sufficient funding for ongoing operations and future projects;
- Riverside-Corona Resource Conservation District’s in-lieu fee program for the benefit of the Santa Ana, San Jacinto, Temescal and other associated waterways in the Santa Ana watershed, including offsetting environmental losses resulting from impacts to these watersheds;
- Roseville City School District and numerous other school districts’ development impact fees to mitigate the impact of new development on school facilities; and
- Placer County and numerous other local agencies’ fee and reimbursement programs to allow for the recovery of expended monies associated with development of specific plans and associated documents.

It is also apparent from a quick internet search for the key words “impact fee exemption” that numerous other government agencies have relied on the 15273 CEQA exemption for many other types of fee programs including transportation impact fees, infrastructure impact fees, and other development impact fee programs, but many of those other local agencies did not file their exemption findings with the State OPR.

### **Potential Exceptions**

As indicated in CEQA Guidelines section 15273(b) above, fees or rate increases to fund capital projects that provide for “expansion of a system” remain subject to CEQA. This provision could potentially be considered pertinent to the Oakland Impact Fee Program’s anticipated funding of expansions to the City’s transportation system and expansion of the storm drain system with specific, previously identified physical improvements. However, there are important qualifying circumstances associated with the types of potential system expansion improvements of the Impact Fee Program.

- ◆ The specific components of the Impact Fee Program that provide for expansion of the transportation system consist entirely of intersection and roadway improvements that have been previously identified as mitigation measures to address cumulative transportation impacts. These mitigation improvements have been identified in prior City of Oakland EIRs, and the secondary effects that may be associated with their implementation have been fully vetted and considered under these previous CEQA reviews. These transportation system expansion projects have already undergone CEQA review and no further environmental analysis is required unless (pursuant to CEQA Guidelines section 15162) there are changes in the description of these planned transportation system projects, changes in circumstances, or new information which

indicates that there are new or substantially more severe environmental impacts that could occur upon their implementation.

- ◆ Fees for the storm drain system are intended to maintain the current depreciated replacement value of that infrastructure, but not fund system-wide capacity expansion. Any required expansion of storm drain infrastructure would be addressed on a project-by-project basis. Maintenance projects for the City's storm drain system and its capacity, as anticipated under the Impact Fee Program, are derived from a list of improvements identified in the City's Storm Drainage Master Plan. The Storm Drainage Master Plan's list of improvements is extensive, city-wide in scope, and substantially under-funded. It is not anticipated that the Impact Fee Program will be funded to the extent necessary to financially support the full scope of improvements identified in the Storm Drainage Master Plan, and no specific improvements under that Master Plan have been singled out to be implemented under the Impact Fee Program. Thus, adoption of the Impact Fee Program makes no commitment to fund all, or any specific improvement that may be included in the Storm Drainage Master Plan.

## **SUBSEQUENT ENVIRONMENTAL REVIEW**

As discussed above relative to affordable housing, all future capital projects (whether affordable housing projects; capital improvements related to transportation; or capital improvements related to parks, libraries, fire and police protection, and storm drain infrastructure) that receive financial assistance through the Impact Fee Program will be subject to environmental review at such time as approvals for those projects are considered. Individual capital projects may, or may not be found to be individually exempt from CEQA on the basis of their unique characteristics. That decision can only be made at a later date, when the investment in a specific capital project is identified. The exemptions from CEQA that apply to establishment of the Fee Program do not apply to the individual projects funded by the Fee Program.

Furthermore, the Impact Fee Program is **not** intended to provide a means for exempting any future development projects of any sort from the requirements of CEQA, simply by payment of established fees. Instead, all future development projects will undergo CEQA review as appropriate and applicable to their unique characteristics, and payment of fees pursuant to the Impact Fee Program may satisfy certain mitigation obligations otherwise currently exacted by the City through ad hoc negotiations.