LAW OFFICES OF YOUNG, MINNEY & CORR, LLP
THE CHARTER LAW FIRM

SARAH J. KOLLMAN ESQ.
PARTNER ▪ ATTORNEY AT LAW
skollman@mycharterlaw.com

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Via Electronic Mail
estagg@sclscal.org

Erin Stagg
School and College Legal Services of California
5350 Skylane Boulevard
Santa Rosa, CA 95403

***Re: Objection to Level 1 Developer Fee Study***

Dear Ms. Stagg,

As you know, our office represents the Northern California Association of Home Builders ("NCHB"). Please let this letter serve as NCHB's notice that it objects to the Level 1 Developer Fee Study (the "Study") prepared on behalf of Eureka City Unified School District (the "District") and dated April 5, 2022. The Study contains significant legal and methodological errors and fails to provide a legal justification for the issuance of developer fees pursuant to Education Code Section 17620, subdivision (a). It is our understanding that the District intends to take action at its May 19, 2022 Board meeting to approve the Study and commence imposing fees on developers within the District's boundaries. We strongly urge the District Board not to take this action as the Study is flawed, and there are alternative ways for the District to qualify for financial hardship grant funds under the California Preschool, Transitional Kindergarten and Full-Day Kindergarten Facilities Grant Program.

In short, the Study justifies the imposition of developer fees solely to fund deferred maintenance projects and modernization needs that currently exist throughout the District's facilities and which would exist whether or not any new development occurs in the District. These costs cannot be reasonably attributed to the impact of future new development within the District, and it would be palpably unfair to force new families moving to Eureka to shoulder the cost of renovating the District's aging school facilities on their own, when that renovation would clearly benefit all of Eureka's families equally.

For the reasons laid out further herein, NCHB respectfully requests that the Board take no action to implement the developer fees as recommended pursuant to the Study's legally flawed justification and to instead issue an alternative study or pursue an alternative course of action that takes the points raised herein into account.

Please be advised that should the Board issue a resolution implementing the school facility developer fees as recommended by the Study in its current form and upon the justification therein identified, it would be subject to legal challenge and invalidation.

**Education Code Section 17620 Does Not Permit the Imposition of Developer Fees to Pay for Deferred Maintenance or Pre-existing Modernization Needs**

The Study itself gets off on the wrong foot by boldly misrepresenting the language of the operative statute. On page 4, the Study claims that Education Code Section 17620 provides authority to levy fees "for the construction or modernization of school facilities." This language is presented as a direct quotation from the statute. However, Section 17620 states no such thing. It provides for fees to fund "construction and reconstruction of school facilities." (Education Code § 17620, subd. (a) [emphasis added].)

The distinction is critical, because while the law permits developer fees to be assessed as a source of funding for the reconstruction of school facilities to increase their capacity in response to new development, the law does not permit developer fees to be used to fund deferred maintenance/modernization needs that do not result directly from the impact of new development.

Education Code Section 17620, subdivision (a)(3), provides that "'construction or reconstruction of school facilities' does not include any item of expenditure for" the purposes of deferred maintenance described in Education Code Section 17582.

Deferred maintenance purposes are described in Education Code Section 17582 to include but not be limited to "major repair or replacement of plumbing, heating, air-conditioning, electrical, roofing, and floor systems; the exterior and interior painting of school buildings; the inspection, sampling, and analysis of building materials to determine the presence of asbestos-containing materials; the encapsulation or removal of asbestos-containing materials; the inspection, identification, sampling, and analysis of building materials to determine the presence of lead-containing materials; and the control, management, and removal of lead-containing materials."

In *Shappell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 238 the Sixth District California Court of Appeal opined that developers should not be "accountable for costs of correcting problems of deferred maintenance or modernizing existing structures which are still functional" but rather should only be accountable for fees to fund reconstruction to the extent necessary to maintain a similar level of service or where such renovation provides enhanced capacity for increased enrollment caused by new development.

Neither of these grounds exists here or is identified by the Study as being the purpose of the developer fees to be assessed. From all appearances, it appears that the Study, by simply replacing words in the statute, is claiming that the District may impose fees to pay for its deferred maintenance/modernization needs without further justification. Whether the projects are categorized as reconstruction, renovation, modernization or anything else, if the actual work to be done consists of deferred maintenance of the type prohibited from being funded through developer

fees under the law, the fees will be void and developers forced to pay them will be entitled to a refund.

**The Deferred Maintenance/Modernization Costs the Fee is Being Sought to Fund Are Pre-Existing and not Reasonably Attributable to the Impacts of New Development.**

The fee scheme recommended by the Study violates the Mitigation Fee Act because the modernization to be funded is not in any way necessitated by or caused by new development. In short, there is no causal "nexus" whatsoever between new residential units being built and the District's need to modernize its aging school facilities—and the Study makes no attempt to demonstrate the causal nexus.

The Mitigation Fee Act provides, in Government Code Section 66001, subdivision (a), that "in any action establishing, increasing, or imposing a fee as a condition of approval of a development project by a local agency, the local agency shall" among other things, "[d]etermine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed."

Further, Section 66001, subdivision (g), provides that a fee "shall not include the costs attributable to existing deficiencies in public facilities, but may include the costs attributable to the increased demand for public facilities reasonably related to the development project in order to (1) refurbish existing facilities to maintain existing levels of service or (2) achieve an adopted level of service that is consistent with the general plan."

The entire premise of the Study is that developer fees are justified to pay for "modernization" that is necessary to "maintain the existing level of service or achieve an adopted level of service that is consistent with a general plan." (Study, page 7.) However, the Study fails to establish how the District's modernization needs are specifically the consequence of new development and are not just the natural result of its existing facilities aging over time. The Study does not address levels of service beyond merely averring to the general need to keep school buildings upright—which, again, is purely a deferred maintenance cost that would exist whether or not new development occurs at all.

To justify fees on the grounds identified (maintaining levels of service), the Study would have to demonstrate an actual causal relationship between new development and the need to spend money on school reconstruction. The Study makes no attempt to do so; it merely refers to the existing need to refurbish facilities on a roughly 25-year increment and assigns those existing deferred maintenance obligations to be paid for by new development. The Study does not claim, for example, that there are nonfunctional school facilities that need to be refurbished to meet new demand stemming from new development, which facilities would not need to be refurbished otherwise.

Here, the District has not and cannot show a causal nexus. If no new development occurred in Eureka over the next 25 years, its school facilities would still require the same modernization upkeep (i.e., deferred maintenance). Pinning the upkeep costs of old facilities on new development is also deeply unfair. Those just moving to Eureka will have contributed nothing to these facilities'

worn-down state of repair but will be forced to carry the burden of renewing Eureka's school facilities for the benefit of all. This is precisely what the Study would implement.

This is not only unfair but also illegal. California case law and Section 66001, subdivision (g), have long prohibited developer fees from being used to pin the costs of old obligations on new development. In *Bixel Associates v. City of Los Angeles* (1989) 216 Cal.App.3d 1208, the Court of Appeal sustained a challenge to a fire hydrant fee imposed as a condition of being granted a new a building permit. The court held that the fee was invalid because it sought to make new residential development shoulder the cost for replacing a 97-year old water main when the main should have been replaced 47 years previously. (Id. at p. 1220.) In other words, the fee was invalid because it attempted to make new development pay for an old deficiency.

Likewise, in *Rohn v. City of Visalia* (1989 214 Cal.App.3d 1463, the Court of Appeal invalidated a condition on a development project that required dedication of 14% of the project's land to realign an intersection. The court found that the dedication requirement (a "fee" under the Mitigation Fee Act) was invalid because the project itself had no traffic impacts, and the dedication was sought merely to implement a long-planned intersection improvement. (Id. at. 1476.) In other words, it is clear that developer fees cannot be used to fund agency projects that have no causal nexus to the development being burdened.

And again, as mentioned above, in *Shapell Industries, Inc. v. Governing Board*, *supra*, 1 Cal.App.4th 218, 234-239, the Court found that a school district could not properly impose the full cost of new, already-needed school facilities on new development, but could only extract such funds that were proportional to the amount of increased enrollment actually attributable to the new development. The *Shapell* court further noted, along those same lines, that the school district could only charge fees for refurbishment to the extent necessary to maintain a similar level of service in light of increased facilities needs. Existing facilities deficiencies were not a valid use of fees extracted pursuant to the Mitigation Fee Act.

Pursuant to *Shapell* and Section 66001, subdivision (g) which codifies it, the Study must show how new development causes the continuing need for the District's facilities to be modernized on a 25-year interim. If it cannot, the fee is illegal. The Study makes no such demonstration of causation, and so the developer fees and any resolution implementing them are illegal. The Study merely reasons backward from how much money the District would like to extract by cherry-picking generic statewide values that have no bearing on Eureka and then skipping over the essential causal relationship justifying the imposition of fees.

Furthermore, the Study admits that the fees are intended to fund a grab-bag of District spending priorities by making theoretical new development pay for them. It mentions that the fees may also be used to pay for over-budget deferred maintenance projects from 2014 and 2020 bonds, to fund compliance with universal TK program requirements entirely unrelated to new development, and "other modernization needs," none of which have any causal nexus to new development and would be clearly illegal uses of developer fees. The proposed use of developer fees on new residential development to fund these District renders the fee illegal and invalid, as the Study makes no attempt to justify the use of fees for these purposes as required by the Mitigation Fee Act.

To be clear, this is not the typical case where new development has an actual impact on existing facilities capacity and thus necessitates the imposition of a fee to pay for facilities sufficient to meet the increased demand. There are no facilities capacity issues here, as the District's enrollment has not increased for many years, following a state-wide pattern of declining public school enrollment, and will likely continue to decline even with new development.

In fact, the Study states on page 7 that the facilities needs at issue are not related to capacity and exist "regardless of the availability of capacity to house student enrollments, inclusive of student enrollment generated from new development." Further, the information contained in the Study regarding planned development in the District for the next 25 years is inconsistent with the City's public planning documents such as the General Plan regarding the population trends of the area, as well as assuming the theoretical construction of housing that 1) will not accommodate families with children (such as half of the City's planned development being in the form of accessory dwelling units that the City publicly acknowledges is intended for elderly residents, and could not legally accommodate families), 2) is currently not able to be fully built due to limitations in the City and County's sewer and water infrastructure, and 3) is likely to be the replacement of much older construction that will need to be replaced, rather than the construction of new homes. Moreover, the study's entire premise and justification is based on informal statements by the City Planner and Planner for the County regarding the number of anticipated housing units to be built in the area in the next 25 years. These informal statements are not tied to actual studies, reports, or formal positions taken by the Planning Departments, and thus cannot serve as the foundation for the entire study. Moreover, these development estimates are not consistent with the patterns in housing development in the City and County for the last 20 years, as reflected in the City's General Plan and Housing Element updates.

Capacity is not the problem facing the District's facilities; nor is maintaining level of service in Eureka's schools. Rather, the District has significant deferred maintenance obligations to cover and other priorities it would rather spend that money on, and the Study improperly, and in a manner inconsistent with law, offers it a way to push its deferred maintenance costs on others. By pinning those significant costs on the new families theoretically expected to move to Eureka over the coming years, however, the District would be risking making Eureka unaffordable to move to, stunting the area's overall economic growth and diverting new jobs and families, and thus enrollment, away from Eureka.

As explained herein and in the court cases cited above, as well as in Government Code Section 66001, subdivision (g), pre-existing facilities deficiencies are not the responsibility of new development, and any fee that attempts to force new development to pay for the District's deferred maintenance and existing facilities deficiencies is illegal and will be subject to refund under the Mitigation Fee Act.

Lastly, the Board confirmed in its August 26, 2021 meeting that this effort is for the purpose of allow the District to qualify for financial hardship grant funds under the California Preschool, Transitional Kindergarten and Full-Day Kindergarten Facilities Grant Program as it meets the law's requirements to offer expanded pre-school and transition kindergarten commencing in the 2022-23 school year. However, the applicable regulation requires only that the District certify that

is has "**made all reasonable efforts to fund its matching share of the project** by demonstrating it is levying the developer fee **justified under law** or an alternative revenue source equal to or greater than the developer fee otherwise justified under law." (2 CCR Section 1860.14(a).)

This language makes clear that as long as the District has made reasonable efforts to fund its matching share through efforts that are justified under law, it meets the requirement for eligibility for the hardship grant. As we have described above, the District currently does not meet the legal standard to levy developer fees under the law, and thus is not justified in levying developer fees. We also understand the District has explored all other current sources of funds and has not identified other sources as its bonding capacity does not provide for it, and there are no other available state funds to cover its matching share. Thus, the District has met the standard for eligibility and does not need to actually adopt the developer fees to qualify for the hardship grant funding.

We would be more than happy to offer further input to the Board on this issue, but respectfully recommend that the District not move forward with adopting the Study and implementing developer fees in the District. The long-term consequences on the District's enrollment, and on the ability of the District's families to afford housing, and thus remain in the District, will be significant. If the District does move forward, NCHB will have no choice but to explore all of its options.

Sincerely,

**LAW OFFICES OF YOUNG, MINNEY & CORR, LLP**

Sarah Kollman

Sarah Kollman
**ATTORNEY AT LAW**