SUBJECT: Apportionment of municipal infrastructure costs to development projects

COMMITTEE: Urban Affairs — committee substitute recommended

VOTE: 6 ayes — Talton, Wong, A. Allen, Bailey, Blake, Menendez

0 nays

1 absent — Rodriguez

WITNESSES: For — Jerry Harris, Pohl Brown and Associates

Against — None

On — Michael Boyle, City of Austin

BACKGROUND: Municipal infrastructure costs are not apportioned under current state law, which means cities have authority to charge development fees that exceed the actual cost of a development project.

The U.S. Supreme Court ruled on the issue of apportionment in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), holding that permit conditions, dedications, and exactions must be "roughly proportionate" to the needs of the development. Cities must bear the burden of proof of rough proportionality through individualized inquiries into each development project. When a city imposes permit requirements exceeding rough proportionality, compensation for a takings would be invoked under the Fifth Amendment. In 2004 the Texas Supreme Court made a similar ruling in *Town of Flower Mound v. Stafford Estates, Ltd Partnership*, 13 S.W.3d 620 (Tex. 2004).

DIGEST: CSHB 1835 would authorize a city to charge a developer for a portion of infrastructure improvements and construction costs that did not exceed costs roughly proportionate to the proposed development.

When charged for costs exceeding rough proportionality, a developer could appeal to a city's governing body and present evidence and testimony. The governing body would have to make a determination within 30 days, and the prevailing party would be entitled to reasonable

costs and attorney's fees. Within 30 days of a determination, a developer could appeal in county or district court. A city could not require a developer to waive appeal rights as a condition for project approval. In addition, the bill would not prohibit a governing body from issuing impact fees as provided for in Local Government Code, ch. 395.

The bill would not affect projects approved prior to September 1, 2005. It would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2005.

SUPPORTERS SAY:

CSHB 1835 would put into law a principle about which both the United States and Texas supreme courts agree — a city cannot charge a development project for costs in excess of rough proportionality. It would prevent cities from unfairly increasing permit conditions, dedications, and exactions on development projects beyond the minimal adopted standards for on-site development.

By allowing developers to appeal to municipalities, the bill would encourage negotiation rather than litigation. However, when a developer was unsatisfied with a governing body's decision, litigation still would be an option. Under current law, attorney's fees and court costs are not awarded to prevailing parties in such cases. The bill would entitle prevailing parties to these fees.

The bill would not cause local government units to incur additional costs. Cities and counties already have staff engineers who could determine rough proportionality.

OPPONENTS SAY:

This bill would require cities incrementally to implement infrastructure improvements. Cities plan for improvements according to the greatest need to accommodate growth and facilitate efficiency. The city of Austin, for example, sometimes requires development projects to meet higher sewer line standards than originally planned for the project. When the city requires upgraded standards, it compensates the developer for the differences in expense. The current system allows cities efficiently to implement long-range improvements without penalizing property owners.

The bill would be costly to cities. While offering dispute resolution as an option to litigation would save resources, it also could raise local costs. Additionally, smaller cities and counties that did not have professionally

certified engineers would have to contract with outside sources to certify rough proportionality.

NOTES:

The substitute differs from the original bill in that it would require cities to make a determination on an appeal within 30 days of the hearing and would allow developers to appeal that determination within 30 days. The substitute would refund fees even when a voluntary agreement was negotiated, rather than determined, by the governing body.

A similar bill, SB 1174 by Armbrister, was reported favorably by the Intergovernmental Relations Committee and recommended on April 25 for the Senate Local and Uncontested Calendar. SB 1174 would not place a deadline on when a developer could appeal a governing body's determination and would not entitle cities to reasonable costs and attorney fees.