

## Failure to Make Findings Specified in Mitigation Fee Act Requires Refund of All Unexpended Development Fees

The Fourth District Court of Appeal has upheld an order requiring refund of over \$10 million in accumulated development impact fees because the City's findings "were mere conclusions, not the specific findings required under the [Mitigation Fee] Act." *Walker v. City of San Clemente*, No. G050552 (Fourth Dist., Aug. 28, 2015).

**Statutory Requirements.** Under the Mitigation Fee Act, Gov't. Code §§ 66000 *et seq.*, each development fee must be deposited in a separate capital facilities account and may be expended only for the purposes for which it was collected. For all unexpended fees, the agency must make findings every five years that (1) demonstrate a reasonable relationship between the unexpended balance and the purpose for which the fee was charged; (2) identify the sources and funding for any as-yet uncompleted public improvements; and (3) designate the approximate date the agency expects the funding for uncompleted improvements to be deposited in the account. § 66001(d)(1) The Act provides that "[i]f the findings are not made as required by [the Act], the local agency shall refund the moneys in the account" to the current owners of the properties for which the fees were paid. § 66001(d)(2). The Beach Parking Impact Fee. In 1989, the City of San Clemente adopted a "Beach Parking Impact Fee" whose stated purpose was to "mitigate the impact of the increased demand on beach parking caused by new residential development." For some 20 years, the City collected the fee, but expended very little of it (less than 3%) on beach parking improvements. In 2009, the City Council "receive[d] and file[d]" a "Five-Year Required Report" prepared by staff to justify its continued retention of the fees under the Mitigation Fee Act. Plaintiffs challenged the City's retention of the fees, contending that the Five-Year Report failed to satisfy the requirements of the Act. **Inadequate Findings.** Based on the language and legislative history of the Act, the court determined that a local agency's five-year findings must "affirmatively demonstrate that it still needs the unexpended fee to achieve the purpose for which it was originally imposed, and that the agency has a plan on how to use the unexpended balance to achieve that purpose." Measured against this standard, the court held, the City's findings were clearly inadequate: *Relationship Between Unexpended Balance and Purpose of the Fee.* The Act required the City to make a finding demonstrating a reasonable relationship between the amount of the unexpended Beach Parking Impact Fees and the purpose for which the fee was charged. In an effort to make that finding, the City's 2009 Five-Year Report stated: "New parking facility improvements are determined by the City Engineering department and cost estimates established. The fee is calculated based on the number of new residential dwelling units planned through build-out of the City." This finding, the court said, "dodges the question." The finding failed to discuss the relationship between the \$10 million balance in the Beach Parking Impact Fee account and the purpose for which the fee was established, "let alone demonstrate a reasonable relationship between the unexpended fees and their purpose." The City argued that the Act did not require it to provide any further detail because it was still in the process of identifying specific beach parking improvement projects to be funded. The court rejected this justification, explaining that "the five-year findings requirement imposed a duty on the City to *reexamine* the need for the unexpended Beach Parking Impact Fees to finance improvements that purportedly were required by the new development," which necessarily required identification of the facilities to be financed. *Sources of Funds for Uncompleted Improvements.* The Act also required the City to make findings that identified the sources and funds anticipated to complete financing for remaining beach parking improvements. To this end, the 2009 Five-Year Report stated, "This funding source is anticipated to be sufficient to complete the financing of identified improvements." This finding fell short, the court said, because it "fails to identify the amount of funding needed to complete the improvements and generally refers to 'identified improvements' without specifying or describing those improvements." The City "could not rely on findings it made 20 years earlier to justify the original establishment of the Beach Parking

Impact Fee." Instead, the Act required the City to make new findings identifying the public improvements intended to be financed with the fees and demonstrating a continuing need for those improvements, which it failed to do. *Anticipated Full Funding Date.* As to the requirement that the City identify the approximate date on which it anticipated the funding for uncompleted improvements to be available, the 2009 Five-Year Report stated "*Not applicable.*" This was appropriate, the City claimed, because the specific improvements to be funded had not yet been identified. Again, however, the court said, "the Act does not allow the City to identify no public improvement projects it intends to finance with the Beach Parking Impact Fee 20 years after establishing the fee and still retain the unexpended balance." **Required Remedy.** The City argued that the appropriate remedy under the circumstances was to remand the matter to the City Council to make new findings correcting the "technical deficienc[ies]" in the report, rather than requiring a refund of the fees. This was impermissible, the court determined, because section 66001(d)(2) "clearly and unambiguously" established that the sole remedy for failure to make the required findings was "refund of the moneys in the account or fund." Nor, the court said, was there any merit to the City's argument that the Act requires a refund only when a local agency fails to make *any* findings; rather, the Act expressly requires a refund when "the findings are not made *as required by this subdivision.*" (Emphasis added.) Under the City's interpretation, the court observed, "a local agency could avoid refunding unexpended development fees by making any findings no matter how inadequate, and the only repercussion would be another opportunity to repeat the process. That is not what the statute's clear language requires."

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Under the *Walker* decision, local agencies may not continue to hold development fees for extended periods without making findings reflecting "a clear and demonstrable plan to use the fee for the purpose for which it is imposed." The findings may not simply refer back to the purposes and uses of the fee described in the enabling ordinance, and may not defer to a later date identification of the improvements to be financed, cost estimates, funding requirements or other matters specified in the Act. Rather, the findings must (1) affirmatively demonstrate that the agency intends to construct specific improvements with the accumulated funds; (2) explain how the City intends to use the funds to acquire or construct the improvements; (3) specify the estimated cost of the improvements; and (4) indicate whether the agency requires additional funds and, if so, when it anticipates receiving those funds. Failure to make findings meeting these standards risks a judicial order requiring refund of all unexpended fees.

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