



# The Mitigation Fee Act's Five-Year Findings Requirement: Beware Costly Pitfalls

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**THE MITIGATION FEE ACT'S FIVE-YEAR FINDINGS REQUIREMENT:  
BEWARE COSTLY PITFALLS**

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**OVERVIEW**

The Mitigation Fee Act (specifically Government Code section 66001, subdivision (d)) requires local agencies to adopt “five-year findings” accounting for development impact fee proceeds held unexpended for more than five years. It further provides that agencies must refund the moneys held if they fail to make the required findings. The statute is vaguely written, and recent court decisions have interpreted it in a draconian manner, suggesting that a local agency must automatically refund its development fee proceeds if the court determines the findings to be defective, without any chance for the agency to cure the defect. As a result, there appears to be an increase in lawsuits seeking such refunds.

Every city that has development fee proceeds collected and unexpended for more than five years faces the risk of such litigation, including arguments that it is too late for the city to cure any defects in its most-recent five-year findings and that it must automatically refund all of the retained funds. City attorneys and staff should scrutinize their most recently adopted five-year findings and, even more importantly, make sure to carefully review and “bullet-proof” the next five-year findings when those become due. In addition, the League of California Cities should seriously consider pursuing legislative reform to clarify existing requirements (perhaps working from recently-adopted legislation imposing new requirements for nexus studies, including a requirement to update them every eight years). In the meantime, municipal litigation counsel should strive to carefully brief these issues in currently pending appeals, to better educate the appellate courts and to hopefully succeed in obtaining rulings that are workable for public agencies and consistent with the Act’s purpose of offsetting the impacts of new development.

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The following analysis outlines the existing legal requirements, summarizes recent court decisions, and identifies potential areas for legislative reform.

**ANALYSIS:**

**I. DEVELOPMENT FEES IMPOSED BY CITIES**

**A. Authority To Impose Development Fees**

- Cities have the inherent police power to impose development impact fees on development projects. (*Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 638; *Shappell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 234.)
- Cities “commonly impose[]” such fees “in order to lessen the adverse impact of increased population generated by the development.” (*Russ Bldg. Partnership v. City and County of San Francisco* (1987) 199 Cal.App.3d 1496, 1504.)
- Such fees are “only fair” because the “developer has created a new, and cumulatively overwhelming, burden on local government facilities, and therefore ... should offset the additional responsibilities required of the public agency by the dedication of land, construction of improvements, or payment of fees, all needed to provide improvements and services required by the new development ....” (*Trent Meredith, Inc. v. City of Oxnard* (1981) 114 Cal.App.3d 317, 325.)

**B. Limitations For Imposing Development Fees**

- Federal Takings Jurisprudence – The U.S. Supreme Court has interpreted the Takings Clause to impose certain limitations on the ability of public agencies to impose exactions on development projects, so that they do not use their leverage over development approvals to require developers to give up property rights having nothing to do with their development impacts.
  - Nexus - *Nollan v. California Coastal Commission* (1987) 483 U.S. 825
  - Rough Proportionality - *Dolan v. City of Tigard* (1994) 512 U.S. 374
  - Applies to Monetary Exactions - *Koontz v. St. Johns River Water Management Dist.* (2013) 570 U.S. 595

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- California Constitution
  - Legislatively imposed development mitigation fees “*must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development.*” (*San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 671.)
- The Mitigation Fee Act (aka “AB 1600”) – Government Code §§ 66000 *et seq.* (“MFA”) – Discussed below.

## II. MITIGATION FEE ACT REQUIREMENTS

### A. MFA Requirements For Legislative Adoption

- The MFA essentially requires nexus findings for all legislatively-adopted development fees (Govt. Code § 66001, subd. (a)). The findings must:
  - Identify the purpose of the fee
  - Identify the use to which the fee is to be put
  - Determine how there is a reasonable relationship between the fee’s use and the type of development project on which the fee is imposed
  - Determine how there is a reasonable relationship between the need for the public facilities to be funded by the fee and the type of development projects on which the fee is imposed
- Nexus studies (Govt. Code § 66016.5 [effective 1/1/22]) Originally, the term “nexus” or “nexus study” never actually appeared in the Mitigation Fee Act. However, the Legislature has now adopted new legal requirements for such nexus studies. The new nexus requirements:
  - Require identification of the existing level of service, the proposed new level of service, and an explanation why the new level of service is appropriate (where applicable)
  - Generally require fees on housing developments to be proportional to square footage unless the city makes findings in support of a different metric
  - Require adoption at public hearing with 30 days’ notice
  - Must be updated at least every 8 years, starting 1/1/22

### B. MFA Requirements for Fee Imposition on Individual Development Projects

- If the development impact fees are imposed on a particular project based on a legislatively-adopted fee schedule, the requirements in Government Code

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section 66001, subdivision (a), apply, and not the requirements of subdivision (b):

- *See Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 336 [“Subdivisions (a) and (b) describe different stages of a fee imposition process. Subdivision (a)--which speaks of use and need in relation to a ‘type’ of development project and of agency action ‘establishing, increasing, or imposing’ fees--applies to an initial, quasi-legislative adoption of development fees. Subdivision (b)--which speaks of ‘imposing’ fees and of a reasonable relationship between the ‘amount’ of a fee and the ‘cost of the public facility or portion of [it] attributable to the development on which the fee is imposed’--applies to adjudicatory, case- by-case actions.”)]
- *See AMCAL Chico LLC v. Chico Unified School Dist.* (2020) 57 Cal.App.5th 122, 127 [“For a general fee applied to all new residential development, a site-specific showing is not required”]. *See also Tanimura & Antle Fresh Foods, Inc. v. Salinas Union High School Dist.* (2019) 34 Cal.App.5th 775, 786; *Cresta Bella Cresta Bella, LP v. Poway Unified School Dist.* (2013) 218 Cal.App.4th 438, 447.
- By comparison, if the development impact fees are imposed based on an administratively imposed (ad hoc) assessment, then subdivision (b) of section 66001 applies:
  - “In any action imposing a fee as a condition of approval of a development project by a local agency, 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.” (§ 66001(b).)
  - “At the time the local agency imposes a fee for public improvements on a specific development project, it shall identify the public improvement that the fee will be used to finance.” (§ 66006(f).)
- Developers have 90 days to protest and 180 days to bring an as-applied challenge.

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- Caveat: The 90-day exhaustion requirement and 180-day statute apply *ASSUMING* city has given developer written notice of protest rights under § 66020(d)(1)! Failure to give such notice of protest rights could toll the statute of limitations for bringing legal action challenging the fee (subject to potential laches defenses).
- § 66020 provides the exclusive method for making an “as applied” challenge to a development fee. (*Merkoh Associates, LLC v. Los Angeles Unified School Dist.* (2016) 245 Cal.App.4th 1031.)

**C. MFA Requirements for Post-Collection Use and Accounting of Fee Revenues**

- Development fee proceeds must be deposited in separate account or fund and be expended “solely for the purpose for which the fee was collected.” (§ 66006 (c).)
- Cities must adopt annual reports within 180 days of the close of each fiscal year (§ 66006 (b).):
  - Describing of the type of fee, its amount, and beginning and ending balance
  - Specifying the amounts collected during the year and interest earned
  - Listing each public improvement for which fees were expended, including the percentage of the project costs funded by the fees
  - Providing an approximate date by which construction of the improvements will commence, if sufficient funds have been collected
- Fee refund remedies (§ 66001(e), (f))
  - Once sufficient funds have been collected to complete financing of public improvements, cities have 180 days to identify an approximate date when construction will be commenced.
  - If a city does not identify an approximate construction commencement date, then it must refund the fees to the current property owners on a prorated basis, including accrued interest.
  - “By means consistent with the intent of this section, a local agency may refund the unexpended revenues by direct payment, by providing a temporary suspension of fees, or by any other reasonable means.”

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- If administrative costs of refunding fees exceed the amount to be refunded, the agency may hold a public hearing to determine how to allocate the revenues “for some other purpose for which fees are collected ... and which serves the project on which the fee was originally imposed.”

**D. MFA’s Five-Year Findings Requirement**

- Statutory five-year findings requirement (§ 66001(d)(1))
  - For the fifth fiscal year following the first deposit into the account or fund, and every five years thereafter, the local agency shall make specified findings with respect to that portion of the account or fund remaining unexpended, whether committed or uncommitted. The findings must:
    - A. Identify the purpose to which the fee is to be put.
    - B. Demonstrate a reasonable relationship between the fee and the purpose for which it is charged.
    - C. Identify all sources and amounts of funding anticipated to complete financing in incomplete improvements ...
    - D. Designate the approximate dates on which the funding referred to in subparagraph (C) is expected to be deposited into the appropriate account or fund.
  - Five-year findings “shall be made in connection with [the annual reporting under § 66006(b)].”  
[§§66006(b) requires the report to be filed within 180 days of the end of the fiscal year]
- Refund remedies for failure to make five-year findings (§ 66001(d)(1))
  - “If the findings are not made as required by this subdivision, the local agency shall refund the moneys in the account or fund as provided in subdivision (e).”
  - In *Walker v. City of San Clemente* (2015) 239 Cal.App.4th 1350:

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- The city was ordered city to refund over \$10 million in development fees that had been collected over two decades to fund beach parking.
  - The city never developed any plan to use the funds.
  - The city had multiple studies conducted that concluded that there was no need for additional beach parking, but the city continued collecting the fee.
  - The court found that the “Five-Year Report” the city adopted failed to make the specified findings and “dodges the question.”
  - The court rejected challenges to prior expenditures to purchase a vacant lot and for administrative overhead costs – the city need only refund “unexpended” funds.
  - “The five-year findings requirement imposed a duty on the City to *reexamine* the need for the unexpended Beach Parking Impact Fees . . . . The City may not rely on findings it made 20 years earlier to justify the original establishment of the Beach Parking Impact Fee, or the findings it made 13 years earlier to justify reducing the amount of the fee. *Instead, the Act required the City to make new findings demonstrating a continuing need for beach parking improvements caused by the new development in the noncoastal zone.*”
  - The court held that the city was required to make the refunds without any opportunity to cure the defects.
- In *County of El Dorado v. Superior Court* (2019) 42 Cal.App.5th 620, 625-627:
- The court held that challenges to five-year findings seeking refunds are subject to a one-year statute of limitations, because the refunds are a “penalty or forfeiture” subject to Code of Civil Procedure section 340(a).
  - But the court also confusingly held that a claim for refund of development impact fee payments could be pursued after the running of the one-year statute of limitations based on the “continuous accrual doctrine.” (*County of El Dorado v. Superior Court, supra*, 42 Cal.App.5th at pp. 620, 627-628 [“If [plaintiff’s claim is] not made within one year of the deadline for findings, the plaintiff has only a limited remedy for the subsequent payments made within one year before filing a refund action, not the entire corpus existing at the time of the deadline. The County’s liability for failure to

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comply with its statutory duty is accordingly limited.”)]  
This holding is troubling insofar as it seems to confuse the need to adopt findings for funds held more than five years with the ongoing collection of new development fees, which shouldn't be subject to any such findings requirements unless and until held for more than five years.

- Current issues and questions regarding Five-Year Findings (which could warrant statutory clarification from the Legislature):
  - Must cities make the five-year findings for all amounts in the fund, or only for amounts held for over five years as of the close of the fiscal year? The “plain language” of Section 65001(d) could be interpreted either way.
  - Are five-year findings required for any accounts that had some balance five years prior, even though the funds from five years ago have been fully expended, if a balance still exists in the fund five years later due to the collection of subsequently-paid fees?
  - If a refund is required, is a city required to refund all amounts held in the fund, or only amounts held for more than five years? What about amounts recently collected after the close of the fifth fiscal year?
  - Must cities conduct new nexus studies or other analysis in support of the five-year findings? (Presumably not since new Section 66016.5 only requires updated studies every eight years. However, note the language in *Walker v. City of San Clemente* that “the Act required the City to make new findings demonstrating a continuing need for beach parking improvements caused by the new development in the noncoastal zone.”)
  - The five-year findings are due within 180 days after the close of the fiscal year (typically, by December 27). If a city is late in making the findings, must it refund all the funds for which the findings were required?
  - If a court later determines that a city's five-year findings are legally inadequate, should the city be given the opportunity to cure any such inadequacy before being required to refund the funds?

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- What is the statute of limitations for challenging the adequacy of a city's five-year findings? While the court in *County of El Dorado* held that the statute of limitations is only one year, that holding is premised on a questionable finding that the refund requirement is analogous to a forfeiture or penalty. It is not clear whether other appellate courts will agree.

- Possible legislative reforms

Legislative reforms that could help cities accountably manage their development fee programs and avoid litigation and refund risks include:

- Clarifying the procedures for challenging five-year findings, including providing an opportunity to cure any procedural defects and setting forth a statute of limitations.
  - Removing any suggestion that the refund requirement is a “penalty or forfeiture”
  - Perhaps adding an administrative procedure that requires litigants to raise objections with the local agency before they are able to sue in court
- Clarifying accounting requirements for improvements included in capital improvement programs.
- Giving agencies more flexibility on how to address shifting infrastructure needs.
- Reconciling the requirement for “five-year findings” with the newly-adopted statutory requirement to update nexus studies every eight years, as set forth in Government Code section 66016.5 (effective 1/1/22)