

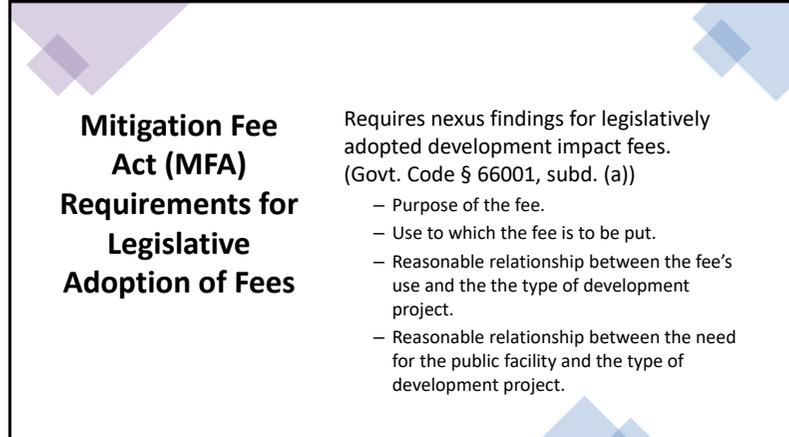
The Mitigation Fee Act's Five-Year Findings Requirement: Beware Costly Pitfalls

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Mitigation Fee Act (MFA) Requirements for Legislative Adoption of Fees

Requires nexus findings for legislatively adopted development impact fees.
(Govt. Code § 66001, subd. (a))

- Purpose of the fee.
- Use to which the fee is to be put.
- Reasonable relationship between the fee's use and the the type of development project.
- Reasonable relationship between the need for the public facility and the type of development project.

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MFA Requirements for Legislative Adoption of Fees

Nexus studies (§ 66016.5 [effective 1/1/22])

- Requires identification of the existing level of service, proposed new level of service, and an explanation why the new level is appropriate (where applicable)
- Generally requires fees on housing developments to be proportional to square footage unless the city makes findings in support of a different metric
- Requires adoption at public hearing with 30 days' notice
- Must be updated at least every 8 years, starting 1/1/22

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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 § 66001, subdivision (a) apply, and not the requirements of subdivision (b).
- If the development impact fees are imposed based on an administratively imposed (ad hoc) assessment, then the requirements of subdivision (b) apply.

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MFA Requirements for Fee Imposition on Individual Development Projects

- “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, from when agency provides notice of protest rights. (§ 66020.)

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

- Development fee proceeds must be:
 - Deposited in separate account or fund
 - Expended solely for the purpose for which the fee was collected. (§ 66006 (c).)
- Annual reports within 180 days of the close of each fiscal year:
 - Describing fee type, amount and balances;
 - Specifying amounts collected during the year;
 - Listing public improvement for which fees were expended;
 - Providing approximate date by which construction of the improvements will commence. (§ 66006 (b).)

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

Fee Remedies (§ 66001(e), (f))

- Once sufficient funds have been collected to complete financing of public improvements:
 - The city has 180 days to identify an approximate date when construction will be commenced;
 - If it does not, then the city must refund the fees to the current property owners on a prorated basis.

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

Fee Remedies (§ 66001(e), (f))

- The city may refund the unexpended revenues by direct payment, temporary suspension of fees, or any other reasonable means.
- If administrative costs of refunding fees exceed the amount to be refunded, the city may allocate the revenues.

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**MFA's 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.

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**MFA's Five-Year
Findings
Requirement
(§ 66001(d)(1))**

- 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.

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**MFA's Five-Year
Findings
Requirement
(§ 66001(d)(2))**

- "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)."

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Walker v. City of San Clemente
(2015) 239 Cal.App.4th 1350

- City collected \$10 Million in development fees over two decades for beach parking.
- The city never developed any plan to use the funds.
- No need for additional beach parking, but the city continued collecting the fee.
- The "Five-Year Report" adopted by the city failed to make the specified findings in § 66001(d)(1).
- Court held that the MFA "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.

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Walker v. City of San Clemente
(2015) 239 Cal.App.4th 1350

“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.”

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Walker v. City of San Clemente
(2015) 239 Cal.App.4th 1350

“Section 66001, subdivision (d)(2), unmistakably declares, ‘If the findings are not made as required by this subdivision, the local agency shall *refund the moneys* in the account or fund...’”

“According to the City, section 66001, subdivision (d)(2), requires a refund only when a local agency fails to make any findings. Not so. Section 66001, subdivision (d)(2), requires a refund when ‘the findings are not made as required by this subdivision.’”

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County of El Dorado v. Superior Court
(2019) 239 Cal.App.4th 1350

- 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 CCP § 340(a).
- Suggests the “continuous accrual doctrine” applies:
 - “Having breached its statutory duty to justify its fees, the ongoing collection was subject to refund until the County remedied its breach.”
 - “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.”

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**Current Issues
and Questions**

- A. 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?
- B. 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?

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Current Issues and Questions

- C. 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?
- D. Must cities conduct new nexus studies or other analysis in support of the five-year findings?

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Current Issues and Questions

- E. 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?

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Current Issues and Questions

- F. 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?
- G. What is the statute of limitations for challenging the adequacy of a city's five-year findings?

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Possible Legislative Reforms

- Clarifying the procedures for challenging five-year findings, including providing an opportunity to cure any procedural defects and setting forth a statute of limitations.
- Clarifying accounting requirements for improvements included in capital improvement programs.

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Possible Legislative Reforms

- 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)