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LAW ALERT

YOU CAN'T ALWAYS GET (OR KEEP) WHAT YOU WANT: COURT UPHOLDS MASSIVE MITIGATION FEE REFUND

In *Walker v. City of San Clemente*, a California court of appeal upheld a judgment against San Clemente requiring it to refund more than $10 million in unspent mitigation fees to homeowners because the City failed to follow the precise requirements contained in the Mitigation Fee Act. The decision serves as a cautionary tale to public agencies: do not collect fees pursuant to the Mitigation Fee Act without strictly following all of the Act's requirements.

Background

The Mitigation Fee Act (Government Code § 66000 et seq.) authorizes public agencies to impose fees on a development project to fund new or enhanced public facilities needed to serve the proposed development. Among other requirements, the Mitigation Fee Act requires that the public agency reexamine the fees every five years and make specific findings to justify its continued retention of the fees. If the required five-year findings are not made, then the public agency must refund any unspent fees to the current owners of the affected properties.

In 1989, the City of San Clemente adopted a "Beach Parking Impact Fee" imposed upon new inland development in accordance with the Mitigation Fee Act to fund the acquisition and construction of public parking facilities serving the City's beaches. Over the next 20 years, the City collected approximately $10 million in impact fees and accrued interest, but the only expenditures it made were the purchase of a vacant parcel of land for less than $350,000 and administrative costs to operate the program.

In 2009, the City re-adopted its original findings to justify the retention of the unspent impact fees. The plaintiffs brought a suit challenging the need for the impact fee and the adequacy of the City's findings. The trial court found that the City had not complied with the Mitigation Fee Act's requirements and ordered the City to refund more than $10 million in unspent fees to affected property owners.

Ruling

The Court of Appeal upheld the trial court's ruling because the City failed to make sufficient five-year findings as required by the Mitigation Fee Act, and the Act's stated remedy is the refund of all unspent fees.

The Fee Must be Reexamined Every Five Years

The Mitigation Fee Act requires agencies holding unspent impact fees to adopt findings every five years that (1) identify the purpose for which the balance is to be used; (2) demonstrate the reasonable relationship between the balance and the purpose for which the fee was charged; (3) identify all sources and amounts of additional funding needed to complete the public improvements; and (4) designate the approximate date by which the additional funds are expected to be received. The City, however, merely stated that it would determine new parking facility improvements and establish costs through build out of the City and summarized the findings originally made upon adopting the fee. Because it failed to discuss the relationship between the balance of the unspent fees and the fee's purpose, and because it failed to reexamine the need to continue holding the unspent balance of the collected fees, the City's findings failed to satisfy the Mitigation Fee Act.

Failure to Adopt Proper Findings Results in a Refund
The Mitigation Fee Act states that if the required findings are not adopted, then the public agency shall refund the balance. The court held that the clear language of the statue prohibited the City from having the opportunity to adopt the proper findings in lieu of refunding the fee, as requested by the City. However, the court also rejected the plaintiff's claim that the City should be forced to sell the vacant land it purchased with the impact fee, because the Mitigation Fee Act's remedy provision only applies to the unspent portion of the fee.

Fees May Be Used for Administrative Costs
Finally, the court rejected the plaintiff's contention that the Mitigation Fee Act prohibited the City from using a portion of the impact fee to pay for its overhead costs associated with administering the impact fee. Although the Mitigation Fee Act only permits agencies from spending fees "solely and exclusively for the purpose . . . for which the fee was collected," the court reasoned that funding administrative costs furthered the purpose for which the fee was collected and therefore complied with the Mitigation Fee Act.

Future Application
Any public agency that collects impact fees for public facilities must strictly follow the Mitigation Fee Act's requirements. If there is an unspent balance, then agencies must reexamine the relationship between the balance and the purpose for which the fee was established every five years and adopt findings in accordance with the Mitigation Fee Act, or the unexpended balance must be refunded.

Commercial linkage fees and affordable housing impact fees have not been determined by the courts to be "fees for public facilities" subject to the Mitigation Fee Act. Nonetheless, some communities have assumed that the Mitigation Fee Act applies to these fees and have adopted such fees under the Act's authority. These communities should make the required findings every five years if there is an unspent balance.

To avoid the requirement to make findings every five years, cities may wish to adopt in-lieu fees for inclusionary requirements applied to for-sale housing under the authority of their general police power in accordance with the California Supreme Court's holding in *California Building Industry Association v. City of San Jose*.

If you have any questions, please contact Barbara Kautz, Eric Phillips, or any other attorney at Goldfarb & Lipman.

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