

REPORTING AND IMPLEMENTATION REQUIREMENTS UNDER THE MITIGATION FEE ACT FOR IMPACT FEES

Commercial linkage fees and affordable housing impact fees are impact fees, based on the impact of commercial development and new market-rate housing on the need for affordable housing. In California, most impact fees must be adopted under the provisions of the Mitigation Fee Act (Gov't Code § 66000 et seq.)¹ (MFA), which establishes procedures for adoption, expenditure, and reporting on impact fees.

While it has never been determined that fees for affordable housing are "fees" as defined by the MFA, many cities and counties choose to comply with the MFA in accounting for and expending these fees. The purpose of this memo is to describe the MFA's requirements regarding impact fees.

I. Fees Subject to the Mitigation Fee Act.

The Mitigation Fee Act (the "MFA") applies to "fees" imposed on "development projects" to fund "public facilities." (§ 66000(b).) "Public facilities" are "public improvements, public services, and community amenities." (§ 66000(d).) "Fees" include both ad hoc impact fees imposed on individual development projects and generally applicable impact fees that are imposed on all projects of a certain type (such as a citywide commercial linkage fee).

No court has decided in a published decision whether impact fees for affordable housing are subject to the MFA, although the issue has been raised but not resolved in at least three cases. Many nexus studies prepared by consultants state, without analysis, that commercial linkage fees and housing impact fees are subject to the MFA.

If a community chooses to comply with the MFA regarding its impact fees, it should be careful to use language such as that used by San Jose in adopting its rental housing impact fee:

"The City has determined that the Housing Impact Fee should be administered consistent with the requirements applicable to fees for public facilities in California Government Code Section 66000 *et seq.*, commonly referred to as the "Mitigation Fee Act," without determining that it is required to do so."

II. Accounting Requirements under the MFA.

Fees subject to the MFA must be deposited in separate capital facilities accounts or funds to avoid any commingling of the fees with other City funds and may be spent only for the purpose

¹ All further references are to the Government Code.

for which the fee was originally collected. Any earned interest must remain within the fund. (§ 66006(a).) Administrative overhead costs supported by a study may be charged to the fund.²

III. Reporting Requirements under the MFA.

The MFA contains requirements for two public reports. An annual report is required to be prepared between July 1 and January 1 each year. After the fifth fiscal year following the first deposit into each fund, if any funds remain “unexpended,” the city or county must make findings to retain the unexpended funds and continue to collect the fees. Typically the one-year reports and any required five-year findings are presented to the City Council or Board of Supervisors at the same time.

a. Annual Report Requirement.

Annual Report Contents. Within 180 days after the last day of the fiscal year (or, by January 1), a report must be made available to the public that contains:

- (1) A brief description of the type of fee in the account;
- (2) The amount of the fee;
- (3) The account balance at the beginning and end of the fiscal year;
- (4) The amount of fees collected and interest earned;
- (5) An identification of each expenditure from the account, including a brief description of the expenditure and the percentage of the total cost of the expenditure funded by the fees;
- (6) An approximate date when construction will begin if the city or county determines it has sufficient funds to complete a public improvement [in this case affordable housing];
- (7) A description of any interfund transfer or loan made from the account; and
- (8) The amount of any refunds made from the account. (§ 66006(b)(1).)

The requirement for an annual report also applies to fees for public facilities collected under development agreements entered into after January 1, 2004.

Action on Annual Report. The City Council or Board of Supervisors must review the information at the next regularly scheduled public meeting held at least 15 days after the information is made available to the public, and notice must be given at least 15 days before the meeting to any party that has requested mailed notice. (§ 66006(b)(2).) The Council or Board does not need to take any specific action.

² *Walker v. City of San Clemente* (2015) 239 Cal. App 4th 1350, 1372-74.

Adequate Funds to Construct Affordable Housing. If the city or county determines in the annual report or elsewhere that it has sufficient funds to complete an affordable housing project, then within 180 days from the date the agency determines that sufficient funds have been collected, it must identify an approximate date to start construction of the housing. If the city or county does not identify this date, any unexpended funds and interest must be refunded *pro rata* to the then current record owner(s) of the property that originally paid the fee. (§ 66001(e).)

Note that construction of the housing does not need to begin within any time limit; the agency need only identify when it *expects* construction to begin.

b. Five-Year Findings Requirement

Five-Year Report Contents. At the public meeting for the fifth fiscal year following the first deposit into the account, and every five years thereafter, the City Council or Board of Supervisors make specific legislative findings to continue its collection of the fees if any unexpended funds remain in the account. (§ 66001(d).) The Council or Board must:

- (A) Identify the purpose of imposing the fee;
- (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 any incomplete improvements that were identified when enacting the fee, and;
- (D) Identify the approximate dates when the anticipated funds listed in paragraph (C) are expected to be received. (§ 66001(d)(1).)

This requirement does *not* apply to fees paid for affordable housing under development agreements

Refund Required If Five-Year Findings Not Made. If the five-year findings are not made, "*the local agency shall refund the moneys in the account* or fund [to the then current record owner(s) of the development project(s) on a prorated basis]." (§ 66001(d)(2).) In *Walker v. City of San Clemente*, the San Clemente City Council approved a five-year report but made the required findings in a very brief and conclusory fashion supported by no evidence. The Court of Appeal held that the five-year findings had not actually been made because the report failed to show that the City still needed the collected fees, how it intended to use the fees, the cost of any intended improvements, or whether the City needed more money to finish the improvements. It emphasized that the five-year findings requirement "imposed a duty on the City to *reexamine* the need" for the fee and for the collected funds. (239 Cal. App. 4th at 1364-66.) San Clemente was ordered to refund the \$10 million contained in the account.

Given *Walker*, the five-year review must include evidence in the record regarding the fee's purpose, amount, intended uses, and proposed funding.

IV. Imposing the Fee on a Development Project.

When a fee is imposed on a specific development project, a local agency must "identify the public improvement that the fee will be used to finance" (§ 66006(f)).

It is not clear exactly what information must be provided when a fee is imposed to comply with Section 66006(f). In enacting a new impact fee, the City may identify either specific public facilities or simply the type or category of public improvements it intends to construct. (239 Cal. App. 4th at 1366.) Accordingly, reference to the specific fee being paid (traffic fee, housing fee, storm drain fee) may be adequate to satisfy the § 66006(f) requirement.

V. Conclusions and Recommendations.

A community that wishes to follow the MFA in administering its fees for affordable housing should do the following:

- Ensure that a separate account has been established for the affordable housing fee so that the revenues and expenditures can be tracked, and interest can be properly assigned. City overhead costs may be charged if supported by appropriate analysis.
- Establish a procedure and form for preparation of the required annual report on each account.
- Determine in what fiscal year the first deposit was made into the account (not required for public facilities fees paid under development agreements) and when the five-year findings must be made. Any required five-year findings are made at the same meeting at which the annual reports are considered. Ensure that substantial evidence supports each of the required findings.
- When imposing fees on projects, identify that the fees will be used for affordable housing.

This document has been prepared by Goldfarb & Lipman LLP as a service to provide general information regarding housing fees. This document does not represent the legal opinion of the firm or any member of the firm on the issues described, and the information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the attorney with whom you normally consult.