The Mitigation Fee Act— Controversy, Confusion, and Resulting Caution

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I. INTRODUCTION

Consider, if you will, the following: a city or county or other local agency requires, as a condition of permit approval, that a developer dedicate land or avoid a sensitive area to offset or prevent the impact of a proposed development project. Disregard, for this exercise, the substantive constitutional, statutory, and/or case law grounds for challenge that are normally associated with such conditions, and instead focus on the procedural and technical issues that may arise and potentially control whether and when such a challenge can be brought. Is the condition an "exaction" requiring that an interest be transferred to the public agency or simply a "land use regulation" designating the placement of uses on the site? Was the condition attached to a subdivision map approval or a zoning approval, and does that matter? Is the scope/breadth of the condition fixed and understood right now, or is it open-ended, to be determined at some point in the future? Does the statute under which the approval was granted apply (e.g., Map Act, Planning and Zoning Law, etc.) or does the Mitigation Fee Act trump those statutes in whole or part? Recent court decisions have helped answer some of these questions, yet confusion and uncertainty remain for developers and agencies alike.

In particular, two fundamental problems loom, which are the focus of this article. First, it remains unclear which statute of limitations applies when an exaction is attached to a map or zoning approval—the 90-day statute in the Subdivision Map Act and Planning and Zoning Law, or the 180-day statute in the Mitigation Fee Act. Second, even where the applicable statute can be established with certainty, it may be unclear when that statute begins to run if the exaction is "dormant"; that is, where the amount or timing of the condition is itself conditioned on some future occurrence. In short, it is time for a legislative fix.

The Mitigation Fee Act arose through a series of well-intentioned statutes designed to provide project applicants with modest relief from onerous conditions of approval, to provide a method to both go forward with a project and challenge a project condition of approval, and to provide clarity to all parties regarding the creation and imposition of certain fees, dedications, and other exactions. These statutes were enacted over a period of years beginning in the 1980s, highlighted by Assembly Bill 1600, which adopted Government Code sections 66000-66011 in 1987. The bill was originally considered "nexus legislation," an attempt to reflect and emulate the holdings of the then-recent *Nollan v. California Coastal Commision*[1] U.S. Supreme Court case. Later, the term "Mitigation Fee Act" was coined to refer to those and other related sections, and the judiciary soon heralded the Act as the exclusive means of challenging certain development fees, dedications, reservations, and other exactions.

The genesis of the Act as a whole centered around three related remedial goals: (1) codify the holding of *Nollan* and the 1994 U.S. Supreme Court case *Dolan v. City of Tigard*[2] to ensure a well-documented "relationship" between the impacts of development and a locally imposed exaction (imposed as a condition of approval); (2) establish a clear and navigable system for establishing, imposing, and challenging certain fees, dedications, reservations, and other exactions; and (3) provide a pay-and-protest option to relieve developers of the "Hobson's Choice" between acquiescing to a possibly unlawful fee or halting the project while the fee was challenged in court, a dilemma that was magnified in 1977 by two landmark cases.[3]

However, the Mitigation Fee Act has proven to be unclear in many respects, and its relationship with existing and often overlapping statutory schemes has created confusion. As set forth above, a chief uncertainty is determining which statute of limitations controls in a given situation. The Mitigation Fee Act provides a 180-day period to file (sue) on a formally protested fee, dedication, reservation or other exaction, whereas other statutes, like the Subdivision Map Act and the Planning and Zoning Law, contain 90-day file (sue) and serve statutes of limitations. Many assume that the Mitigation Fee Act and its longer statute of limitations apply where an "exaction" is challenged. But it will not always be clear whether a condition attached to an approval constitutes an "exaction" in the first place, and it may be even less clear whether an exaction attached to a map or planning approval falls under the Mitigation Fee Act at all.

The recent court of appeal decision in *Fogarty v. City of Chico* demonstrates the lack of consensus regarding the scope of the Act.[4] In that case, the City—represented by the authors of this article—argued successfully that the Map Act's 90-day statute of limitations governs where the challenged condition of approval was not an "exaction" within the meaning of the Mitigation Fee Act and was attached to the decision of a legislative body concerning subdivision and zoning approvals. While the court in *Fogarty* was able to determine that the condition at issue was not an "exaction"—in that instance, the designation of an 80-acre parcel as a no-development zone—and that as a result the longer 180-day statute of limitations in the Mitigation Fee Act did not apply, the narrow holding does not resolve whether other conditions of approval in different contexts will constitute "exactions" or simply "land use regulations." More importantly, *Fogarty* did not address whether the Mitigation Fee Act's statute

of limitations will trump the 90-day statutes of limitations of the Subdivision Map Act or the Planning and Zoning Law where the condition of approval is an exaction but attached to a map or zoning approval.

While *Fogarty* was being litigated, the Sixth District Court of Appeal issued its decision in *Branciforte Heights v. City of Santa Cruz*.[5] The *Branciforte* court considered the seemingly narrow issue of whether the Quimby Act (Gov't Code § 66477(e)) imposed a duty on the City to provide a private open space credit against the park fees assessed against the developer. In considering the applicable statute of limitations, though, the court stated its holding broadly: "where a party properly avails itself of the fee protest procedures of section 66020 [of the Mitigation Fee Act] to challenge allegedly excessive fees imposed on a development project," that section's 180-day statute of limitations period applies.[6] The court explained further that its holding "harmonizes potentially conflicting statutes and effectuates the legislative intent to create a unified system for protesting fees and other exactions imposed on developments."[7] However, the challenge raised in *Branciforte* was not to the validity of a subdivision map approval or a condition attached thereto; rather, the developer merely claimed that it was entitled to a credit against an otherwise valid park and recreation fee imposed by the city.[8] The court did not address that factual distinction, though; as a result, the court's holding, read in absentia, could be misleading.

Fogarty and *Branciforte* showed that the Mitigation Fee Act needs some housecleaning. Yet these cases did not even reach the critical issue of dormant conditions. Properly understood, the Mitigation Fee Act's true value is providing a means of challenging dormant fees, dedications, reservations, or other exactions, where the precise amount, nature, and scope of the condition cannot be known at the time the condition is imposed on the approval. A local agency may structure a condition such that the fee it imposes does not yet exist (future fees) or the potential amount fluctuates. Thus, it is unsettled at the time of approval whether, and when, the condition is in fact "imposed" for purposes of exhaustion of administrative remedies and timely challenge. In such circumstances, the developer is truly faced with a dilemma as to whether to challenge the condition; while its terms and scope are not known, if a challenge is not immediately commenced the local agency will later assert that a challenge brought when the amount of the fee is finally established is time-barred.

Because of the confusion as to which statute of limitations applies, the cautious practitioner will seek to bring an action challenging a condition within the shortest statute of limitations arguably applicable—90 days. However, even the cautious practitioner may not know when those 90 days begin if it is unclear when the exaction applies. As a result, the usefulness of the Mitigation Fee Act to developers has become circumscribed.

This article discusses the current status of the law and then offers some modest legislative solutions—an amendment to mirror the 90-day statutes of limitations in the Map Act and Planning and Zoning Law; clarification of which exhaustion requirements govern; and a precise definition of dormant conditions and their role within the Mitigation Fee Act.

II. BACKGROUND AND ORIGIN OF THE MITIGATION FEE ACT

A. Nexus and Rough Proportionality Cases

Between 1987 and 1996, the U.S. and California Supreme Courts refined the jurisprudence regarding exactions attached to development approvals. First, the U.S. Supreme Court held in *Nollan v. California Coastal Commission* that there must be an essential nexus between the impact of the development project and the exaction imposed on it, meaning that the condition itself must actually relate to the purpose of the land-use regulation.[9] Seven years later, in *Dolan v. City of Tigard,* the Court held that, even where such a nexus exists, the condition imposed must be related both in nature and extent to the impact of the proposed development—the "rough proportionality" test.[10]

Nollan prompted many state legislatures to codify the holding of the case and enact legislative protections to ensure that a reasonable relationship exists between development projects and the conditions imposed on them, thereby preventing local governments from "manipulating the police power to impose conditions *unrelated* to legitimate land use regulatory ends."[11]

In *Ehrlich v. City of Culver City,* the California Supreme Court addressed the unsettled question of the extent to which the *Nollan* and *Dolan* holdings apply to development permits that exact a *fee* as a condition of issuance, rather than the possessory dedication of real property.[12] The Court reached its conclusion—that the *Nollan* and *Dolan* holdings do apply to monetary exactions—"not by reference to the constitutional takings clause alone, but within the statutory framework presented by the Mitigation Fee Act."[13] Use of the term "Mitigation Fee Act" stuck, and was eventually codified in 1996 at Government Code section 66000.5. So, too, did the Court's interpretation of the Act's "reasonable relationship" standard as an embodiment of the standard of review formulated in *Nollan* and *Dolan*—proof by the local permitting authority of both an essential nexus between the permit condition and the public impact of the proposed development, and a rough proportionality between the magnitude of the fiscal exaction and the effects of the proposed development.[14]

Notably, the Court in *Ehrlich* explained that the Mitigation Fee Act was passed by the Legislature "in response to concerns among developers that local agencies were imposing development fees for purposes unrelated to development projects."[15] The holding in *Ehrlich* therefore "serve[d] the legislative purpose of protecting developers from disproportionate and excessive fees, and carr[ied] out the legislative intent of imposing a statutory relationship between monetary exaction and development project...."[16]

Because of its connection with these well-publicized Supreme Court cases, the Mitigation Fee Act is often thought of in this vein—as nexus legislation. But the less-heralded cases that also contributed to the Act's birth may be more germane today, especially in the context of fashioning a legislative solution.

B. 1977 Pay or Protest Cases

1. *Pfeiffer v. City of La Mesa*[17]

In 1977, California courts unleashed a double whammy on developers. First, the Fourth District Court of Appeal held that a landowner who accepts a building permit and complies with its conditions *waives* his or her right to assert the invalidity of the conditions and sue the agency, regardless of whether the landowner announced it was proceeding under protest.[18] The landowners in *Pfeiffer* believed that the city's conditions attached to a building permit—the granting of an easement and the construction of a storm drain across the property—were invalid. However, the landowners were compelled by other practical considerations to move forward with their project. As a result, they were faced with a dilemma: accept the conditions and continue with the project, or protest the conditions and deal with the consequences of having to shut the project down.[19] Once they complied with the conditions, they had waived their right to challenge them. The appellate court had little sympathy for the landowners' practical realities, stating:

> If plaintiffs in this instance were "compelled" to accept the conditions of the permit and proceed with the construction rather than challenge the conditions in a mandamus proceeding, the compulsion was of their own making. They signed the lease agreement and unilaterally decided it was to their economic advantage to proceed with the construction to meet its requirements rather than make use of the orderly procedure which has been provided to resolve such controversies.[20]

2. *County of Imperial v. MacDougal*[21]

The California Supreme Court followed suit shortly thereafter in *County of Imperial v. MacDougal.*[22] The landowner in *MacDougal* was a successor in interest to a use permit that contained limitations regarding the sale of water from the property. The successor landowner sought to challenge the conditions, but the Court held that he was estopped from doing so because the original holder of the use permit had not challenged them: "A landowner or his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he had acquiesced therein by either specifically agreeing to the condition or failing to challenge its validity, and accepted the benefits afforded by the permit."[23]

The Hobson's Choice that developers encountered when faced with onerous and possibly over-reaching conditions clearly required a remedy.

C. The Taxpayer Revolt: Proposition 13 and the Gann Limit

At roughly the same time, a taxpayer revolt took hold in California, led by Proposition 13 and the subsequent Gann spending limit initiative. Proposition 13, adopted by voter initiative in 1978, provided that property tax rates could not exceed one percent of the property's market value and that valuations could not grow by more than two percent per year unless the property was sold. However, the initiative did not simultaneously limit local or state spending—as a result, taxpayers were left vulnerable in other areas. The 1979 Gann initiative arose in response, implementing a state spending limitation.

The resulting reduction in funding available for infrastructure and public works projects prompted local agencies to increase impact fees and explore other inventive new ways to generate revenue, usually at the expense of developers.[24] The dramatic increase in monetary exactions prompted similar demand for a check on government excess in that arena. Indeed, the constitutional protections that emerged have often stymied the ability of local governments to spend at their leisure.[25] Nevertheless, as the variety of impact fees, facilities fees, and special assessment districts grew, so too did the various checks and limitations to protect developers, which eventually became spread throughout the Government Code and other statutes.

Against this backdrop, the Mitigation Fee Act was born.

III. OVERVIEW OF MITIGATION FEE ACT PROCEDURES

The Mitigation Fee Act is largely procedural in nature. It establishes a set of rules for agencies to follow in establishing and levying fees, dedications and other exactions and for developers to follow in protesting and challenging such fees, dedications and other exactions.[26] The Act is set forth in Government Code sections 66000 to 66025.[27] This overview focuses on the key provisions of the Act that relate to protesting a condition of approval. For developers and practitioners, the key is navigating the perform (e.g., pay) and protest provisions while keeping the relevant statute of limitations in mind.

A. Section 66000—Definitions

The Mitigation Fee Act defines four key terms, and those definitions are critical for determining the Act's scope. Indeed, it is the lack of precise definition in some instances that has led to confusion regarding what constitutes an exaction, and which statutory scheme controls. While the Act broadly defines "local agency," "development project," and "public facilities," it is the definition of "fee" which has garnered significant recent attention.[28] A "fee" is defined as;

> "a monetary exaction, other than a tax or special assessment, whether established for a broad class of projects by legislation of general applicability or imposed on a specific project on an ad hoc basis, that is charged

by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project."[29]

B. Section 66001—Findings

The substantive portion of the Act is found in its requirement for local agency findings, which provides that the local agency shall:

- 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; and
- Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.

In addition, local agencies are required to establish the reasonable relationship between the amount of the fee and the cost of the public facility or amenity attributable to the development.[30]

C. Section 66020—Pay and Protest Exhaustion Requirements

A party[31] may protest the imposition of any fees, dedications, reservations, or other exactions imposed on a development project by a local agency by:

(1) tendering any required payment in full, or providing satisfactory evidence of arrangements to pay the fee when due or ensure performance of the conditions necessary to meet the requirements of the imposition; and

(2) serving written notice on the local agency containing a statement that:

(a) payment is or will be tendered, or that any conditions which have been imposed are provided for or satisfied, under protest; and

(b) informing the governing body of the factual elements of the dispute and the legal theory forming the basis for the protest.

The protest must be filed at the time of approval or conditional approval of the development, or within 90 days after the date of the imposition of the fees, dedications, reservations, or other exactions to be imposed on a development project.

Once an applicant has complied with these protest provisions, a local agency may not withhold approval relating to the development project. In addition, the local agency must provide written notice to the project applicant at the time of the approval or at the time of the imposition of the fees, including a statement of the amount of the fees or a description of the exaction, and notification that the 90-day protest period has begun.

D. Section 66020—Statute of Limitations

After the agency has delivered the notice, the project applicant has 180 days to file an action to challenge the imposition of the fees or other exactions imposed on the project.[32] The statute prescribes that the remedy for such an action shall be a refund of the unlawful portion of the payment, with interest, or a return of the unlawful portion of the exaction imposed. By contrast, the statute of limitations for an action challenging an ordinance or resolution adopting or modifying a fee must be brought within 120 days of the effective date.[33]

IV. INTERPLAY WITH THE SUBDIVISION MAP ACT AND PLANNING AND ZONING LAW

Both the Subdivision Map Act and the Planning and Zoning Law contain 90-day statutes of limitations for challenging conditions of approval. In addition, those statutory schemes do not require that would-be petitioners first comply with a pay-and-protest procedure.[34] As a result, it is often unclear which statute governs a challenge to certain conditions attached to a subdivision map or zoning permit. Resolving that ambiguity hinges in part on whether the challenged condition constitutes an "exaction" under the Mitigation Fee Act. However, even where it is established that a condition is an exaction, there may be confusion as to which statute applies where that exaction is attached to a subdivision map or zoning approval.

The Subdivision Map Act provides that any action to attack, review, set aside, void, or annul the decision of a legislative body concerning a subdivision, or to determine the reasonableness, legality or validity of any condition attached thereto, must be filed and served within 90 days of the date of the decision.[35] Similarly, the Planning and Zoning Law provides that actions challenging certain planning and zoning decisions by the legislative body, such as adoption of a general plan or issuance of a conditional use permit, must be filed and served within 90 days of the decision.[36] Under the plain language of these statutes, then, conditions attached to the approval of a tentative map or a planned development permit, for example, would *appear* to be subject to 90-day statutes of limitations, and not require a party follow any pay-and-protest procedures.

In *Fogarty v. City of Chico*, the challenged condition was the designation of an 80-acre parcel of land as a no-development zone. The applicant had sought a vesting tentative map, a planned development permit, and a conceptual master plan. The City of Chico approved the applications subject to certain enumerated conditions, including one that shifted planned development to adjacent land and created a no-development zone. However, there was no transfer of interest in the land to the City. Instead, the land stayed within the ownership of the project applicant; he was simply not allowed to develop that portion. The applicant protested this condition and purported to do so under the pay-and-protest procedures of the Mitigation Fee Act. He then filed suit within 90 days of the City Council's decision to impose the condition, but failed to *serve* the petition on the City within 90 days as well, which the Map Act requires.[37]

The applicant ultimately lost because of the failure to timely serve the petition; however, to reach that holding, the appellate court had to first determine which statutory scheme applied. To do that, the court examined whether the condition at issue was an "exaction" governed by the Mitigation Fee Act. Section 66020(d) authorizes project applicants who have complied with the pay-and-protest procedures to challenge "the imposition of any fees, dedications, reservations, or other exactions imposed on a development project within 180 days of the agency's notice of the right to protest." The *Fogarty* court explained that the specific terms contained in section 66020 all involve divesting a developer of either money or a possessory interest in the subject property. A "fee" is a "monetary exaction" other than a tax or special assessment. A "dedication" is the "transfer of an interest in real property to a public entity for the public's use." And a "reservation" is "an offer to transfer an interest in real property to a public agency for parks, recreational facilities," or other public uses.[38] By contrast, the land use conditions at issue in *Fogarty* were none of these, but rather were simply restrictions on the manner in which the plaintiffs could use their property.[39]

Significantly, the statutes of limitations in the Map Act and Planning and Zoning Law were designed to benefit developers and local agencies by shortening the time period during which an opponent could challenge a decision. There is no evidence that the intent of the Mitigation Fee Act was to trump those statutes, and either render their related project approvals *more* vulnerable to attack by giving project opponents 180 days to challenge them, or to allow developers to select the longer statute. In fact, the legislative history of section 66020 shows that its intent was:

> [T]o remedy the current situation: Existing law does not contain a procedure allowing a party to protest the imposition of any fees, taxes, assessments, dedications, reservations, or other exactions on residential housing developments by local governmental entities.
>
> This bill would permit any party to protest the imposition of those exactions in accordance with a specified procedure; would permit any party who so protests to file an action to attack, set aside, void or annul those impositions; and would specify the effect of the filing of that protest or action upon conditional approvals or residential housing developments.[40]

Because Map Act section 66499.37 already existed, and because Mitigation Fee Act section 66020 was adopted to address a deficiency in the code, it does not appear that the intent was to supersede the applicability of the Map Act statute of limitations in any way, particularly because the new Mitigation Fee Act section 66020 said nothing to that effect.

Similar confusion may result from the inconsistent exhaustion requirements. In *Branciforte Heights, LLC v. City of Santa Cruz*, the court analyzed which statute of limitations applied to a condition of approval for a development project that imposed an in-lieu fee for dedication of parkland.[41] The court concluded that "where a property owner invokes the protest procedures of section 66020 to challenge allegedly excessive fees imposed upon a development project... the limitations period is the one established by [Mitigation Fee Act] section 66020."[42] While this language could be read to suggest that selection of the remedy controls which statute applies, the court held just the opposite, which the court in *Fogarty* confirmed. In fact, it is the nature of the right sought to be enforced that controls—in *Branciforte Heights*, it was the right to a refund for a fee imposed on the development project. For that reason, the Mitigation Fee Act statute of limitations governed. The *Branciforte* court never addressed the applicability of the rule articulated by the California Supreme Court in *Hensler v. City of Glendale*: "to determine the statute of limitations which applies to a cause of action, it is necessary to identify the nature of the cause of action, i.e., the 'gravamen' of the cause of action."[43] Instead, the court found an ambiguity as to which statutory period applied because the underlying right was not a challenge to the map approval itself or to a condition attached thereto.[44] It is difficult, then, to read *Branciforte* as establishing any kind of holding with broad applicability in a Mitigation Fee Act context.

V. PRACTICAL APPLICATION

Clearly, *Fogarty* and *Branciforte* do not settle the issue. *Fogarty* held only that the particular condition at issue in that case was not an exaction, and therefore was subject to the shorter Map Act statute of limitations. It did not address whether an exaction that *is* a condition to a subdivision map or planning and zoning approval is subject to the 180 or the 90-day statute of limitations. And it will not always be as clear in the first place whether a particular condition qualifies as an exaction. As agencies develop more creative means of imposing conditions, the line between land use regulations and exactions will continue to blur. It may not be difficult for an agency to achieve the same result via an apparent land use regulation as by way of an exaction. In *Fogarty*, the city could have required the actual dedication of the 80-acre parcel to the city or other local agency, which would have been a clear exaction. Instead, it required the developer to designate the land as a no-development zone, which the court interpreted as a land use regulation. Yet even where the condition is clearly an exaction, the project applicant is left with the conundrum of having to choose between the 90-day and the 180-day limitations period, assuming the pay-and-protest procedures have been exhausted.

To add to the confusion, it may not even be obvious to the developer whether a condition has in fact been imposed, and what its precise terms will be. The Mitigation Fee Act provides that the "imposition of fees" occurs "when they are levied on a specific development."[45] But this merely begs the question: when is a fee "levied"? In *Ponderosa Homes v. City of San Ramon*, the developer claimed that the statute of limita-

tions had not begun to run when its approval was issued with the condition—a per-unit traffic mitigation fee attached to a vesting tentative map—but rather only began running when the developer started paying the fees several years later.[46] The court rejected the argument, and held that the "imposition" occurred when the City first set the traffic mitigation fees as a condition on its tentative map approval.[47]

And what if the obligation to pay a future fee is attached as a condition to a map approval, but the fee is not yet adopted and the amount is not yet known? For instance, a condition may itself be conditioned on some future occurrence, such as when the city revises its traffic mitigation study to determine its new fees. The developer cannot know until that occurrence what the fees will be, and whether they warrant being challenged. Must a protest of the yet-unknown fee be brought immediately, followed by a lawsuit that may not be ripe? The dormant condition presents yet another quandary for the developer.

What does this uncertainty mean for the project applicant, the practitioner, or the local agency? As a practical matter, when a local agency issues an approval, the applicant should scour the conditions to see which ones qualify as exactions. Where it is unclear, the applicant should contact the local agency and ask which ones the agency considers to be exactions. For any condition that may be an exaction and which the applicant may want to challenge, the pay-and-protest procedures should be exhausted as a precaution. In addition, where feasible, the applicant should negotiate with staff to amend the conditions to specify expressly that dormant conditions only need to be challenged *after* the fee amount is determined. Ideally, the applicant and the agency can agree to terms fixing the date of imposition, so that all parties know with certainty when the statute begins to run, and when it expires.

Agencies would be well served to support such an approach as well. The Legislature's clear intent in creating these short statutes of limitations, in addition to the pay-and-protest procedures, was to establish certainty in the project approval process and expedite judicial review where necessary. Thwarting this policy, whether by obfuscating the nature or timing of an exaction or by refusing to clarify the terms for an applicant, would leave the agency vulnerable in court, at the ballot box, and in the Legislature.

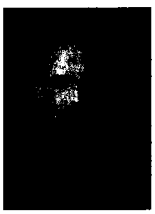
Where this is not feasible, though, the risk-averse applicant should not simply roll the dice and presume that the longer 180-day statute of limitations controls. That applicant should file suit—and serve the petition—within 90 days of the triggering decision, just in case the shorter statute of limitations contained in the Planning and Zoning Law or Subdivision Map Act controls. It therefore becomes difficult to discern much value or purpose to the Mitigation Fee Act, if project applicants are reluctant even to utilize its 180-day limitations period where true exactions are present, or to challenge a fee as a precaution—even where the precise terms of the fee are not known—just to avoid missing the statute of limitations.

VI. LEGISLATIVE SOLUTIONS—A POST-APPROVAL STATUTE

It is not clear that the longer 180-day statute of limitations benefits a project applicant or developer. After all, the shorter 90-day statutes were designed to benefit developers and local agencies by reducing the window of opportunity for project opponents to challenge an agency's approval and by attaching certainty to agency decisions. In addition, there is no need for a 180-day statute, if the Act is shaped strictly as a post-approval remedy; that is, it kicks in only when dormant conditions finally ripen, so that developers know what they are challenging.

A legislative solution is appropriate. The Act should be amended to restrict its scope—at least with respect to protesting the imposition of exactions—to the *Pfeiffer* and *MacDougal* dilemma discussed above in Section II. Those cases forced developers to decide between halting a project or acquiescing to a potentially unlawful condition. The Fee Act's pay-and-protest procedures alleviated this burden, but the 180-day statute of limitations is unnecessary to achieve the goal, and instead only serves to cause confusion. Accordingly, the statute of limitations should be reduced to 90 days to be uniform with other statutes in the Map Act and Planning and Zoning Law.

In addition, the definition of "exaction" should be clarified to limit the Act's applicability to post-approval exactions. *Fogarty* highlighted the uncertainty that results from fuzzy conditions that may or may not be exactions as currently contemplated under the Act. The definition should hinge on whether the developer knew what the exaction was at the time. If not, the condition is considered dormant, and the Act kicks in when its terms become certain and apply.



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ENDNOTES

1 *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).
2 *Dolan v. City of Tigard*, 512 U.S. 374 (1994).
3 *Pfeiffer v. City of La Mesa*, 69 Cal. App. 3d 74, 78 (1977); *County of Imperial v. MacDougal*, 19 Cal. 3d 505 (1977).
4 *Fogarty v. City of Chico*, 148 Cal. App. 4th 587 (2007).
5 *Branciforte Heights, LLC v. City of Santa Cruz*, 138 Cal. App. 4th 914 (2006).
6 *Id.*
7 *Id.*
8 *Id.*
9 *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).
10 *Dolan v. City of Tigard*, 512 U.S. 374 (1994).
11 *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 869 (1996).
12 *Id.* at 859.
13 *Id.* at 860.
14 *Id.*
15 *Id.* at 864.
16 *Id.* at 867.
17 *Pfeiffer v. City of La Mesa*, 69 Cal. App. 3d 74, 78 (1977).
18 *Id.*
19 *Id.* at 76.
20 *Id.* at 78.
21 *County of Imperial v. MacDougal*, 19 Cal. 3d 505 (1977).
22 *Id.*
23 *Id.* at 510-11.
24 *See, e.g.* Robert H. Freilich and Stephen P. Chinn, *Finetuning the Taking Equation: Applying It to Development Exactions*, LAND USE LAW & ZONING DIGEST, Vol. 40, No. 2, p.3 (February 1988) (citing the "need for creative mechanisms to fund the reconstruction and expansion of the nation's infrastructure" in the wake of the *Nollan* decision).
25 *See, e.g.*, William W. Abbott, et al., *Exactions and Impact Fees in California*, 2001 ed., p.4 ("the web of constitutional amendments approved by the voters over the last 20 years has snarled public officials' ability to raise money for their agencies' operating budgets and accumulate capital needed for public works").
26 *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 865 (1996).
27 Sections 66000-660011 govern fees for development projects; sections 66012-66014 deal with fees for other specific purposes, such as water and sewer connections, and zoning and building permits; sections 66016-66018.5 establish the procedures agencies must follow in adopting various fees; and sections 66020-66025 contain the rules for protesting fees as well as for legal challenges to fees and exactions.
28 Govt. Code § 66000 (2000).
29 Govt. Code § 66000(b) (2000).
30 Govt. Code § 66001(b) (2000).
31 While the statute reads "any party may protest...," the procedure logically applies only to the actual project applicant, because it requires the tender of payment, or satisfactory evidence thereof. Govt. Code § 66020 (2000).
32 Govt. Code § 66020 (2000).
33 Govt. Code § 66022 (2000).
34 As a result, the 90-day statutes of limitations in the Map Act and Planning and Zoning Law apply to project applicants and project opponents; by contrast, because the Mitigation Fee Act contains the pay-and-protest requirement, the 180-day statute presumably does not apply to project opponents.
35 Govt. Code § 66499.37 (2000).
36 Govt. Code § 65009(c)(1) (2000).
37 *Fogarty v. City of Chico*, 148 Cal. App. 4th 537 (2007).
38 *Id.* at 541.
39 *Id.*
40 *N. State Dev. Co. v. Pittsburg Unified Sch. Dist.*, 220 Cal. App. 3d 1418, 1424-25, n.6 (1990) (citing 1984 Legislative Counsel digest).
41 *Branciforte Heights, LLC v. City of Santa Cruz*, 138 Cal. App. 4th 914 (2006).
42 *Id.* at 928.
43 *Hensler v. City of Glendale*, 8 Cal. 4th 1 (1994).
44 *Branciforte Heights*, 138 Cal. App. 4th at 926.
45 Govt. Code § 66020(h) (2000).
46 *Ponderosa Homes v. City of San Ramon*, 23 Cal. App. 4th 1761, 1770 (1994).
47 *Id.*