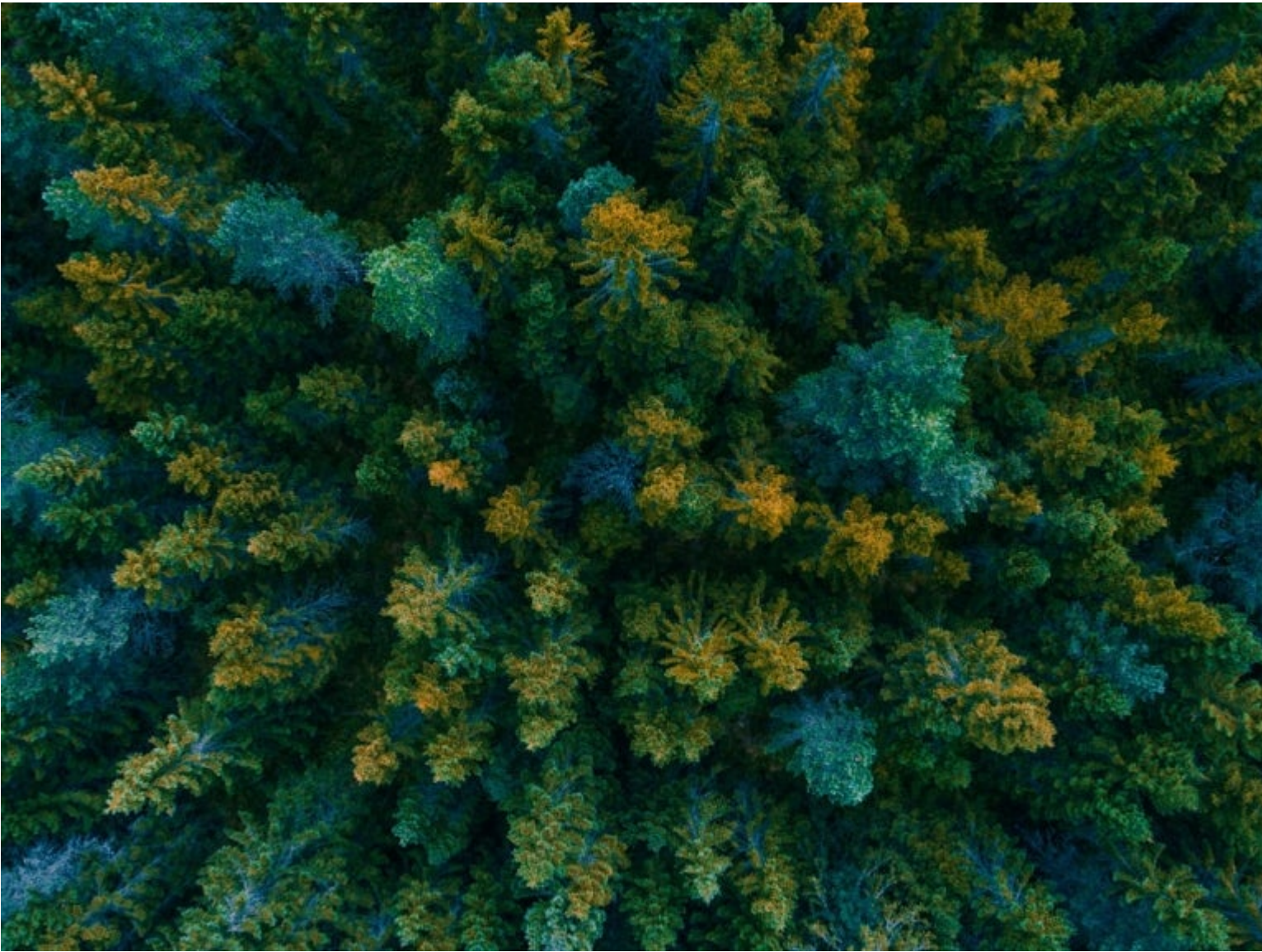


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March 24, 2023



A recent case involving developer Charles Keenan and the City of Palo Alto highlights the importance of strict compliance with Mitigation Fee Act's requirement that findings be made every five years concerning unexpended fees. The court held that the City's failure to make such findings within the statutory deadline mandated refund of *all* unexpended fees, not merely fees held for more than five years. *Hamilton and High, LLC, et al., v. City of Palo Alto, et al.*, No. H049425 (6th Dist., March 20, 2023).



In 2013, Charles Keenan paid an "in-lieu parking fee" of \$972,000 imposed as a condition of approval of a commercial development project on Hamilton Avenue in Palo Alto. The fee was imposed on all new commercial development to fund parking facilities in the downtown area. As of the end of 2019, the City had a balance of over \$6 million in unexpended parking fees.

The Mitigation Fee Act requires public agencies to make findings every five years concerning unexpended development impact fees. The City made findings for the parking fees for the 2007-08 and 2012-13 fiscal years but did not make such findings by the statutory deadline for the 2017-18 fiscal year (i.e., within 180 days of June 30th.) Keenan demanded a refund of the fee, claiming the City failed to comply with the Mitigation Fee Act. The appellate court agreed and ordered the City to refund all unexpended parking fees. In reaching that conclusion, the court made several important clarifications to the law governing such refund claims.

***In-lieu fees are exactions subject to the Act's findings requirements.***

The City argued that findings were not required for the parking fees because developers had the election either to provide parking or pay an in-lieu fee. The court disagreed, finding that the fee was a "monetary exaction" imposed as a condition of approval of a project to fund facilities related to the project and therefore met all requirements of the Act. Based on an extensive review of the caselaw regarding in-lieu fees and the Mitigation Fee Act, the court found no support for the claim that the "in-lieu" or elective aspect of the imposition changed the nature of the fee for purposes of the Act.

***The statute of limitations runs from the date a request for refund is denied.***

Keenan requested a refund in January 2020, which the City rejected in February 2020, and Keenan filed suit three months later. The trial court held that Keenan's action was time-barred because it was not filed within one year of the December 2018 deadline for adoption of the five-year findings. The appellate court concluded that the thrust of Keenan's lawsuit was enforcement of a refund of the unexpended fees rather than a challenge to the City's failure to make findings. As such, the limitations period did not begin to run until the City denied Keenan's refund request.

***Belated findings do not satisfy the Act.***

After denying Keenan's refund request, the City adopted five-year findings in May 2020 and contended these findings satisfied the Act's requirements. The court found that this argument "ignore[d] the language specifying '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).'" Because the May 2020 findings were not made within the statutory deadline, they were not made "as required" by the Act, and a refund was therefore mandated.

***Failure to make five-year findings that comply with the Act requires refund of all unexpended fees.***

The City maintained that the five-year findings requirement applied only to fees held for more than five years and, because the City had transferred \$1.3 million from the parking fund to a capital fund, this had exhausted the balance of fees held in the fund for over five years and excused the findings requirement. The court rejected this argument, ruling that the plain language of the statute required the five-year findings to address *all* unexpended fees, not merely those held for more than five years. The court noted that its reading was consistent with the five-year reports issued by the City, which did not break out fees by date of deposit. The consequence of failure to make timely findings for the 2107-18 fiscal year was refund of all unexpended fees, regardless of the date of collection.

\* \* \*

This decision underscores the importance of meticulous compliance with the requirements and deadlines of the Mitigation Fee Act. Five-year findings must be made for all development fees that fall within the Act's definition, whether or not paid electively in-lieu of some other condition of approval. The findings must be made within 180 days of the end of the applicable fiscal year and must cover all unexpended fees in the fund, not merely fees held for more than five years. Agencies that fail to adopt findings within the statutory period or adopt findings that do not meet the strictures of the Act are at risk of having to refund the entire balance to then-current owners of the properties subject to such fees.



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