USE OF IMPACT FEE PROGRAMS FOR CEQA MITIGATION

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August 2015

Properly administered impact fee programs can operate to streamline CEQA review of later development projects. At the same time, impact fee programs that are not implemented in accordance with the original expectations or which are founded upon unrealistic assumptions may offer the lead agency and affected applicant little or no real relief. Significant court cases illustrate how this can play out. In *Napa Citizens for Honest Government v. Board of Supervisors* (2001) 91 Cal.App.4th 342, the court of appeal found that a pre-existing fee program failed to provide the "mitigation cover" to avoid a determination that a project impact may be cumulatively significant. The County previously adopted a Napa Airport traffic fee, and collected over $2 million pursuant to this fee. However, the improvements necessary to maintain an adequate circulation totaled over $70 million and although the current project was obligated to pay its fair share of fees, the evidence showed that the necessary improvements would not be funded. As a result, no evidence existed that cumulative impacts would be mitigated simply by paying the adopted fee. To avoid this type of problem, fee programs (in combination with other reliable funding) should fully fund their capital improvement programs (CIPs). Further, this program should include all improvements contained in the general plan circulation element and associated improvements on the State highway system that would be required to achieve the desired LOS threshold contained in the general plan. If this type of program does not exist, then the fee program is unlikely to provide adequate mitigation per the discussion above. However, an alternative approach is available to address potential impacts to Caltrans facilities.

Since many communities exclude Caltrans facilities from their fee programs, Caltrans will often request a fair-share contribution from local development projects as part of mitigating cumulative impacts to the State highway system. This type of request is an 'ad-hoc' fee, which is different from the fee programs established by local agencies under Government Code Section (GC) 66000, which apply to subdivisions of the State. Since Caltrans is not a subdivision, GC 66000 does not apply to them and an ad-hoc fee payment is an adequate form of mitigation for cumulative State highway impacts based on historical case law. Since CEQA does not include any provisions for concurrency (i.e., constructing mitigation at the time of impact), accepting an ad-hoc fee that Caltrans can hold until sufficient funding has accumulated to pay for a mitigation improvement fulfills CEQA mitigation requirements based on court decisions such as the *Friends of Lagoon Valley (FLV) v. City of Vacaville*. The FLV decision held that paying an impact fee to cover a portion of impacts is adequate mitigation since CEQA does not require a time-specific schedule for completion of the mitigation. The only requirement is that the money is linked to the specific mitigation improvements.

Caltrans supports this position and has the ability to hold fees for specific improvement projects until such time as any remaining funds have accumulated. Further, in the *City of Marina v. Board of Trustees of the California State University (2006)* 39 Cal.4th 341, the California Supreme Court acknowledged that some uncertainty may exist as to the success of long-term mitigation, but this was not a basis to reject a fee payment. Further, Caltrans will explicitly state that they intend to implement the cumulative mitigation or something equivalent so this combination of factors will likely constitute substantial evidence that this approach fulfills CEQA requirements for mitigation.

One question likely to come up when discussing this form of mitigation is whether Caltrans must have an established financing mechanism to provide the remaining portion of the mitigation cost to determine that the mitigation is feasible. While court decisions such as *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors, supra,* 87 Cal.App.4th 99, have consistently found that, "…*a commitment to pay fees without any evidence that mitigation will actually occur is inadequate.*", they have differentiated between AB 1600 fee programs and 'ad-hoc' fees. The court cases above would suggest that ad-hoc fees do not have to pass the same feasibility test as a fee program as long as there is evidence that the entity collecting the fee intends to fulfill the obligation to mitigate. Caltrans can and does make this commitment so the ad-hoc fee would be adequate mitigation when a fee program does not meet all the requirements noted above to provide full mitigation.

A final issue related to fee programs is that another court has held that in order for a project to rely on a fee program for mitigation of impacts, the fee program itself also had to be analyzed in an EIR (*California Native Plant Society v. County of El Dorado* (2009) 170 Cal.App.4th 1026).

> *"For such a program to satisfy CEQA, it must at some point pass CEQA muster, either at the programmatic level or the individual project level."* (*Id*. at 1049).

In other words, the fee program had to be subject to the CEQA process before the agency could rely on it for mitigation for future projects (at least if the agency wanted to avoid an EIR for those future projects).

The main takeaway from this discussion is that an early discussion is warranted about whether impact fees or fair-share contributions would constitute feasible mitigation. In cases where the fee program (in combination with other funding sources) does not fully fund the mitigation, then the mitigation is not feasible. Likewise, a fair-share contribution may not result in mitigation implementation if the remaining fair-share is not secured although responsible agencies like Caltrans have some latitude in using this approach if substantial evidence exists that collecting a fair-share fee will ultimately be used for specific mitigation measures even if the implementation is years or decades in the future. In cases where the likely outcome is infeasible mitigation, the lead agency (and project applicant) may want to investigate other mitigation options that could lessen the cumulative impact. These typically take the form of smaller improvements that could be delivered by the project. They are often not sufficient to lessen an impact to less than significant but they would meet the obligation to reduce the severity of significant impacts.