

EL DORADO COUNTY 2017-2018 GRAND JURY

OVERSIGHT OF SPECIAL DISTRICT MITIGATION FEES

Case 17-12 • June 30, 2018

SUMMARY

A lawsuit against El Dorado County and special districts in El Dorado Hills raised concerns over how fees developers pay for roads, parks and fire services are being managed, administered and spent. The County has responsibility to collect, administer and manage many fees. This report focuses on County oversight and administration of its Traffic Impact Mitigation (TIM) fees and its involvement with special district fees, which were the subject of the lawsuit.

The California Mitigation Fee Act (MFA) governs the establishment and accountability of impact fees such as TIM and special districts fees. The Fees offset the impacts of new development on public facilities such as roads, parks, and fire. Strict reporting requirements are required to demonstrate the need and continuation of the fees. The lawsuit alleges that the reporting requirements were not followed. Thus, the fees are no longer needed and the fees should be returned to the property owners from whom the fees were collected.

The County is currently doing a good job handling TIM fees. However, the County's past record from past administrations show that it did not comply with its own ordinance regarding the administration of the special district fees. The County has since adopted a revised version of its mitigation fee ordinance to reflect the State MFA.

The County Administrative Office (CAO) oversees the administration of the Special District Fees. Unlike the TIM Fees, there are no policies or procedures specific to County's administration of Special District Mitigation Fees. Policies and procedures need to be formalized.

BACKGROUND

A civil lawsuit, in December 2015, against El Dorado County was filed by El Dorado Hills residents alleging that the County, El Dorado Hills Community Services District, and El Dorado Hills Water/Fire District failed to comply with the MFA. Specifically, the County failed to file a series of five-year nexus reports as mandated by the MFA and, therefore, is mandated to return the unexpended fees to the property owners. It was alleged that approximately \$30 million in unexpended funds remain in various *special districts* accounts collected from property owners during the building permit process. With its mandate to promote government accountability, the Grand Jury reviewed the County's administration and management practices regarding the reporting requirements of these fees under the Mitigation Fee Act.

METHODOLOGY

- Reviewed the Mitigation Fee Act.
- Interviewed County personnel and reviewed policies and practices.
- Reviewed El Dorado Superior Court Case #PC-20150633, Austin vs. County of El Dorado.

DISCUSSION

Mitigation Fee Act

Prior to 2017 the County collected and administered mitigation fees on behalf of the special districts in accordance with County Code Chapter 13. In 2017, the County Code was amended to incorporate the Mitigation Fee Act (MFA) to ensure compliance, avoid duplication, and limit the liability of the County when collecting the fees on behalf of the special districts.

The California Mitigation Fee Act (MFA), Government Code 66000, allows fees to be collected by a local agency to pay for public facilities and services needed for new development. In El Dorado County, the mitigation fees are collected at the time when the building permit is issued, and are generally listed as a Traffic Impact Mitigation (TIM), special district, fire district, public safety facilities (sheriff substation), or ecological preserve fees.

Mitigation fees must be deposited in a separate capital facility account for each facility and may only be expended for the purposes for which they were collected. The Act requires that County/Special Districts account for every fee collected and that an annual report be presented to the governing board showing revenues and expenditures of each fee account. In addition to the annual report, a nexus report of all unexpended fees is to be generated every five years with findings that

- 1) Identify the purpose to which the fee is to be expended,
- 2) Explain unexpended monies and justify the purpose for having a balance in the account,
- 3) Identify the sources and funding for any as-yet uncompleted improvements, and
- 4) Designate the approximate date the agency expects the funding for uncompleted improvements will be needed.

If the local agency fails to make the findings or properly account fees, the Act provides that the agency shall refund the monies to the property owners of record.

Interviews and Policies

The Grand Jury interviewed County staff responsible for the fees including staff at the County Auditor, Planning and Building Department, and Chief Administrative Office. TIM fees have been managed via the Capital Improvement Program (CIP). The County's administration of Special District Fees was not effectively administered during previous years.

Mitigation fees are calculated and collected by the Planning and Building Department then administered and distributed by the Auditor and Chief Administrative Officer.

TIM Fees are based on funding needed for transportation projects that will accommodate growth. Transportation projects are identified from the County's General Plan and proposed developments. Once identified, the projects are included in the Capital Improvement Program (CIP) with estimated time frames for completion. The CIP is a 20-year plan periodically updated with new major projects. TIM fees, in combination with other revenue sources, fund these transportation projects. The County has adopted a TIM Fee Administrative Manual containing policies that govern the use of and reporting of the TIM Fees. Community Development Services, including the Planning and Building Department, administers and manages the CIP and are responsible for submitting updates for approval by the Board of Supervisors (BOS).

In addition to TIM Fees, the County collects other mitigation fees on behalf of special districts. In 1995, the County passed Ordinance 4404 authorizing the County to adopt and collect mitigation fees on behalf of community services districts, as permitted by the MFA. Special district fees, unlike Countywide TIM fees, are specific to particular service districts. These fees fund new or expanded fire protection facilities or equipment and new or expanded park and recreational improvements within those districts.

Current special districts are:

- Georgetown Divide Recreation District
- El Dorado Hills Community Services District
- El Dorado Hills County Water/Fire District
- Cameron Park Community Service District (Fire, Parks & Recreation)
- Rescue Fire Protection District
- Pioneer Fire Protection District
- Mosquito Fire Protection District
- Lake Valley Fire Protection District
- Georgetown Fire Protection District
- Garden Valley Fire Protection District
- El Dorado County Fire Protection District
- Diamond Springs/ El Dorado Fire Protection District

The special districts listed above determine their capital improvement needs and must comply with the reporting requirements of the Mitigation Fee Act. However, these districts typically do not have the expertise or staff to generate those reports. The County assists special district compliance on a voluntary basis and provides the facility fee accounts. Witnesses acknowledged that personnel and administrative changes over the years contributed to inconsistent County assistance with reporting requirements.

In March 2013, the County Auditor advised the Board of Supervisors (BOS), the then Chief Administrative Officer (CAO) and County Counsel, that the County was not, and has not been, in compliance with the MFA regarding special districts. Specifically, the special districts failed to submit the required five-year nexus studies and findings to the County demonstrating the need and expenditures of mitigation fees. This same admonition was repeated for several years. The failure to submit five-year nexus reports was the basis of the Austin lawsuit.

The County recently assigned staff to oversee Special District Mitigation Fee compliance. However, there are no formal County procedures or policies giving guidance for the administration and management of Special District Fees.

MFA reporting requirements have not been strictly adhered to by the County and Special Districts. There must be an annual report accounting for all MFA fees and five-year findings. Both reports are to be presented to and approved by the BOS as having complied with the MFA.

Court Case #PC-20150633, Austin Vs County of El Dorado

The Grand Jury reviewed this petition which seeks to compel the County to refund all unexpended mitigation fees, as required by the Act, because the required five-year studies were not submitted. Hearings on the petition are ongoing and there has not been a final determination in the case at the time of this report.

The California Fourth Appellate District court recently ordered the City of San Clemente to refund impact fees to current owners of affected properties that had been assessed a "Beach Parking Impact Fee" to defray the cost of new beach parking. The City collected almost ten million dollars, yet less than \$350,000 was spent to purchase property without constructing parking facilities. The court found that the City's five-year report failed to make specific findings required by the MFA and ordered the City to refund approximately \$10.5 million.

The El Dorado County Austin case is based on the same concept.

FINDINGS

- F1. The Chief Administrative Office (CAO) has designated staff with responsibility for assisting special district compliance with the MFA.
- F2. There are no County internal policies and procedures governing the County's assistance in the administration of special district mitigation fees.
- F3. All County mitigation fees accounting is up to date and in full compliance with the MFA.

RECOMMENDATION

- R1. The County should formalize policies and procedures with regard to the County's role in assisting special districts to comply with the Mitigation Fee Act.

REQUEST FOR RESPONSES

This Grand Jury report is an account of an investigation or review. It contains findings and recommendations, and names those who should respond to each finding and each recommendation pertaining to matters under the respondent's control.

Responses are requested in accordance with California Penal Code §933 and §933.05.

- Response to all findings and recommendations from the El Dorado County Board of Supervisors.

The written response of each named respondent will be reprinted in a publication to the citizens of El Dorado County. Each must include the name of the Grand Jury report along with the name and official title of the respondent.

California Penal Code Section 933.05 mandates specific requirements for responding to grand jury reports. You are advised to review the Penal Code sections and carefully read the pertinent provisions included below before preparing your official response. Each respondent must use the formats below for each separate finding and recommendation identified above.

Please pay attention to required explanations and time frames. Incomplete or inadequate responses are likely to prompt further investigative inquiries by the grand jury and/or the court.

Response to Findings

Finding F# *[Retype the text of the finding as written in the Grand Jury report, # is the finding number in the report.]*

Response: *[Review California Penal Code section 933.05 (a) (1) and (2). Respondents must specify one of three options – a) Respondent agrees with finding, b) Respondent disagrees wholly with finding or c) Respondent disagrees partially with finding. If respondent uses option b or c then the response shall specify the portion of the finding that is disputed and shall include an explanation.]*

IMPORTANT NOTE ABOUT GRAND JURY FINDINGS

Grand Jury Findings are derived from testimony and evidence. All testimony and evidence given to the Grand Jury is confidential by law, and it is the Grand Jury's responsibility to maintain it. California Penal Code §929 provides "... the name of any person, or facts that lead to the identity of any person who provided information to the grand jury, shall not be released." Further, 86 Ops. Cal. Atty. Gen. 101 (2003) prohibits grand jury witnesses from disclosing anything learned during their appearance including testimony given. This is to ensure the anonymity of witnesses and to encourage open and honest testimony.

Response to Recommendations

Recommendation R# *[Retype the text of the recommendation as written in the Grand Jury report, # is the recommendation number in the report.]*

Response: *[Review California Penal Code section 933.05 (b) (1) - (4). Respondents must specify one of four options – a) recommendation has been implemented, b) recommendation has not been implemented but will be implementing noting a timeframe, or c) recommendation requires further analysis or study noting a timeframe not to exceed six months from date Grand Jury Report was issued or d) recommendation will not be implemented because it is not warranted or reasonable, with an explanation.]*

Response Times

The California Penal Code specifies response times.

PUBLIC AGENCIES

The governing body of any public agency (also referring to a department) must respond within 90 days from the release of the report to the public.

ELECTIVE OFFICERS OR AGENCY HEADS

All elected officers or heads of agencies/departments are required to respond within 60 days of the release of the report to the public.

Failure to Respond

Failure to respond as required to a grand jury report is a violation of California Penal Code Section 933.05 and is subject to further action that may include further investigation on the subject matter of the report by the grand jury.

Where to Respond

All responses must be addressed to the Presiding Judge of the El Dorado County Superior Court.

Honorable Suzanne N. Kingsbury
Presiding Judge of the El Dorado County Superior Court
1354 Johnson Blvd, Suite 2
South Lake Tahoe CA 96150

Response via Email to courtadmin@eldoradocourt.org is preferred.

The Court requests that you respond electronically with a Word or PDF document file to facilitate economical and timely distribution.

California Penal Code Section 933

933.

(a) Each grand jury shall submit to the presiding judge of the superior court a final report of its findings and recommendations that pertain to county government matters during the fiscal or calendar year. Final reports on any appropriate subject may be submitted to the presiding judge of the superior court at any time during the term of service of a grand jury. A final report may be submitted for comment to responsible officers, agencies, or departments, including the county board of supervisors, when applicable, upon finding of the presiding judge that the report is in compliance with this title. For 45 days after the end of the term, the foreperson and his or her designees shall, upon reasonable notice, be available to clarify the recommendations of the report.

(b) One copy of each final report, together with the responses thereto, found to be in compliance with this title shall be placed on file with the clerk of the court and remain on file in the office of the clerk. The clerk shall immediately forward a true copy of the report and the responses to the State Archivist who shall retain that report and all responses in perpetuity.

(c) No later than 90 days after the grand jury submits a final report on the operations of any public agency subject to its reviewing authority, the governing body of the public agency shall comment to the presiding judge of the superior court on the findings and recommendations pertaining to matters under the control of the governing body, and every elected county officer or agency head for which the grand jury has responsibility pursuant to Section 914.1 shall comment within 60 days to the presiding judge of the superior court, with an information copy sent to the board of supervisors, on the findings and recommendations pertaining to matters under the control of that county officer or agency head and any agency or agencies which that officer or agency head supervises or controls. In any city and county, the mayor shall also comment on the findings and recommendations. All of these comments and reports shall forthwith be submitted to the presiding judge of the superior court who impaneled the grand jury. A copy of all responses to grand jury reports shall be placed on file with the clerk of the public agency and the office of the county clerk, or the mayor when applicable, and shall remain on file in those offices. One copy shall be placed on file with the applicable grand jury final report by, and in the control of the currently impaneled grand jury, where it shall be maintained for a minimum of five years.

(d) As used in this section "agency" includes a department.

California Penal Code Section 933.05

933.05

(a) For purposes of subdivision (b) of Section 933, as to each grand jury finding, the responding person or entity shall indicate one of the following:

(1) The respondent agrees with the finding.

(2) The respondent disagrees wholly or partially with the finding, in which case the response shall specify the portion of the finding that is disputed and shall include an explanation of the reasons therefor.

(b) For purposes of subdivision (b) of Section 933, as to each grand jury recommendation, the responding person or entity shall report one of the following actions:

(1) The recommendation has been implemented, with a summary regarding the implemented action.

(2) The recommendation has not yet been implemented, but will be implemented in the future, with a timeframe for implementation.

(3) The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a timeframe for the matter to be prepared for discussion by the officer or head of the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This timeframe shall not exceed six months from the date of publication of the grand jury report.

(4) The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation therefor.

(c) However, if a finding or recommendation of the grand jury addresses budgetary or personnel matters of a county agency or department headed by an elected officer, both the agency or department head and the board of supervisors shall respond if requested by the grand jury, but the response of the board of supervisors shall address only those budgetary or personnel matters over which it has some decisionmaking authority. The response of the elected agency or department head shall address all aspects of the findings or recommendations affecting his or her agency or department.

(d) A grand jury may request a subject person or entity to come before the grand jury for the purpose of reading and discussing the findings of the grand jury report that relates to that person or entity in order to verify the accuracy of the findings prior to their release.

(e) During an investigation, the grand jury shall meet with the subject of that investigation regarding the investigation, unless the court, either on its own determination or upon request of the foreperson of the grand jury, determines that such a meeting would be detrimental.

(f) A grand jury shall provide to the affected agency a copy of the portion of the grand jury report relating to that person or entity two working days prior to its public release and after the approval of the presiding judge. No officer, agency, department, or governing body of a public agency shall disclose any contents of the report prior to the public release of the final report.