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## **United States: To Pay and Protest or Not to Pay and Protest: California Supreme Court Decision Clarifies Remedies in Mitigation Fee Act Challenges**

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The California Supreme Court recently issued an important decision clarifying the rights of developers who file lawsuits under California's Mitigation Fee Act challenging fees that are imposed on new development projects. The Legislature enacted the Fee Act (Government Code sections 66000-66025) in 1996 in response to concerns that some local agencies were imposing excessive fees on new developments. This new decision, *Barratt American, Inc. v. City of Rancho Cucamonga*, 37 Cal. 4th 685 (2005), contains a number of rulings, but is important primarily because it clarifies the remedy that is available when a developer challenges building inspection and permit fees, as opposed to impact fees.

In *Barratt American*, the developer challenged building inspection and building permit fees imposed by the City of Rancho Cucamonga, and the developer sought a refund of the excess fees under the "pay and protest" provisions of the Fee Act. These provisions allow a developer to pay a development fee and proceed with the project, while at the same time preserving the developer's right to litigate its claim that a fee is excessive by filing a protest. The Court held that these "pay and protest" rules apply only to "development fees" as defined in the statute, such as a fee that is imposed on a project to offset the cost of needed facilities. A developer can also challenge an inspection or processing fee as excessive, but the Court held that the remedy in that type of case is a court order requiring the city or county to use the excess amount collected to reduce such fees in the future.

The Court also clarified the statute of limitations setting the time within which a fee claim must be filed with the courts. Generally, the Fee Act requires a challenge to be filed as a validating action within 120 days after the fee is adopted. Many local agencies adopt fee schedules each year, and the Court held that each annual fee adoption triggers a new 120-day period to challenge the fees, even if the fees are not increased from the prior year.

Finally, the Court also rejected several other claims advanced by the developer, including claims that the building permit and inspection fees were illegal "special taxes" and that the California Constitution required local agencies to conduct annual financial audits of their fees.

Notably, the Court did not decide the merits of *Barratt American's* underlying claim that the City's fees were excessive; this case will now be returned to the trial court for decision on that issue. The Supreme Court decision is important, however, in confirming that fee challenges may be brought each time an agency re-enacts its fees, and in establishing the remedy in such cases.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

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