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## Lawsuit claims Atherton's road impact fees are illegal, demands \$298,000 refund.

By Bonnie Eslinger  
Daily News Staff Writer

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A development company has sued Atherton to recover \$298,000 in road maintenance fees it alleges the town illegally charged for years and should have returned.

"The town promised people refunds, we took them up on it and they reneged," Walter McNeill, the attorney for Menlo Park-based developer Pacific Peninsula Group, said in an interview.

From 2000 until last December, the town charged a so-called "road impact fee" for construction projects based on the premise that traffic from work crews contributes to street damage. The validity of that levy came into question when a state appellate court determined in 2005 that a fee Kern County charged for trucking sewage violates state laws.

In the wake of persistent complaints from builders and legal questions, the Atherton City Council rescinded the fee in December 2009. Two months later, the council voted to refund road impact fees paid between July 2006 and September 2009, up to a total of \$1.6 million.

Then last month, due to budget constraints, the council instead decided to refund just 40 percent of

the fees, and only those paid between August 2007 and September 2009.

"Council and staff are struggling to come up with a balanced budget for next year," City Manager Jerome Gruber wrote to council members before the vote. "While we run a higher risk of potential litigation by refunding less, there had been a tacit acceptance of the fee before it was increased by 40 percent."

The

council formally adopted the 40 percent refund at its meeting Wednesday.

McNeill said Pacific Peninsula Group should get back all the \$298,000 it has paid in road impact fees, not just the \$50,000 or so it would receive under the town's latest refund formula.

"The fee was illegal to begin with, so they're hanging on to illegal money," he said.

But Atherton City Attorney Wynne Furth said just because the town decided to return some of the fees doesn't mean they were illegal. She said the council was just being cautious.

"No court has ever ruled if a road impact fee levied on construction has been illegal," Furth said. "The Kern County case is about sewage sludge trucking."

She added that Pacific Peninsula Group's lawsuit isn't valid because state law requires that refund claims be submitted within 90 days of paying the fee.

"These fees, they need to be spent to repair the roads, we just can't hold onto them," Furth said. "We can't refund the fees collected, we've spent them."

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McNeill contends the 90-day provision doesn't apply in this case because the fees were illegal.

Atherton collected \$5.5 million in road impact fees since 1990, including \$2.6 million between September 2006 and September 2009, according to city officials.

In February, town officials said in a statement that the \$1.6 million available for refunds was from road impact fees that had not yet been spent.

But a staff memo for the Feb. 17 council meeting in which the refunds were approved reveals there was actually only \$542,000 left from road impact fees but the town's finance director recommended boosting the balance by \$1,113,000. The bulk of that amount reflected a questionable expenditure of \$432,713 in road impact fees on construction of a corporation yard and the transfer of \$542,192 into the town's general fund.

In July, the council authorized the transfer of the \$432,713 "to correct inappropriate charges" and directed staff to return with further information about the \$542,192 that went into the general fund.

E-mail **Bonnie Eslinger** at [beslinger@dailynewsgroup.com](mailto:beslinger@dailynewsgroup.com).

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