S204771

LIU, J.

CASE NO. _____

In the Supreme Court of the State of California

STERLING PARK, L.P., a California limited partnership, and CLASSIC COMMUNITIES, INC., a California corporation,

Plaintiffs and Appellants

vs.

CITY OF PALO ALTO,

Defendant and Respondent

PETITION FOR REVIEW

After a Decision by the Court of Appeal
Sixth Appellate District

Case No. H036663

On Appeal from the Santa Clara Superior Court
The Honorable Kevin McKenney, Judge

Case No. 1-09-CV-154134

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PETITION FOR REVIEW

To the Honorable Tani G. Cantil-Sakauye, Chief Justice of California, and the Honorable Associate Justices of the Supreme Court of California:

Sterling Park, L.P. and Classic Communities, Inc. ("Sterling"), plaintiffs and appellants, hereby petition the Supreme Court for review of the decision of the Court of Appeal, Sixth Appellate District, filed on July 17, 2012, and pray that, upon review, the decision be reversed and remanded for further proceedings on the merits. A true copy of the Court of Appeal's unpublished Opinion ["Opn."] is attached as **Exhibit A**.

Sterling timely petitioned the Court of Appeal for rehearing of the decision on July 31, 2012. That petition for rehearing was denied on August 16, 2012. A copy of the Court of Appeal's registry of actions, from the Court's website, reflecting that order denying the petition for rehearing is attached as **Exhibit B**.[1]

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[1] The Court's written Order denying the petition for rehearing still has not been received by counsel for petitioner Sterling (nor by counsel for the respondent City of Palo Alto) as of the date of this Petition.

I.

ISSUES PRESENTED FOR REVIEW

Since 1984, the California Legislature has expressly provided a statutory procedure for "protest" and judicial review of "any fees, dedications, reservations, or other exactions" imposed by a local agency as conditions of development approval. (Government Code §§ 66020, 66021.) This Court (and at least three appellate courts) have interpreted the "broadly-formulated and unqualified" wording used by the Legislature (e.g., affording review of "any fees ..." etc.) as intended to make these statutes widely applicable for efficient judicial review of the multitude of fees (and other exactions) imposed on development projects in California (e.g., *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 866; *Williams Communications v. City of Riverside* (2003) 114 Cal.App.4th 642, 657-661).

As reflected by this decision, however, this Court of Appeal has gone in a different direction. Instead, this anomalous decision would "re-interpret" and judicially narrow the statutes, so as to deny their applicability to the development fees (and other exactions) involved in this case, thereby shattering previous "uniformity of decision," unsettling an important question of law as to the scope of the remedial procedures of §§66020 and 66021, and calling for review by this Court (CRC, Rule 8.500(b)).

This petition therefore presents the following important questions for review:

1. Did the Legislature really intend that §§ 66020 and 66021 be limited by judicial "interpretation" so as to apply only if the disputed development fees are imposed "for the purpose of defraying all or a portion of the costs of public facilities related to the development project" — despite the total absence of any such limiting language in those sections?

2. If so, then how is a party upon whom a "fee ... or other exaction" imposed to know whether the fee actually meets this "purpose of the fee" test, and how is that "purpose of the fee" to be proven in court?

3. Do the "broadly-formulated and unqualified" provisions of Government Code §§ 66020 and 66021 that expressly provide for effective and constructive judicial review of "any fees, dedications, ... or other exactions" imposed as conditions of development approval apply to development requirements that mandate both (a) the dedication of price-restricted, privately-subsidized housing units, and (b) the payment of fees in lieu of providing additional housing units at arbitrary below-market prices?

4. Is the decision here inconsistent with the line of judicial decisions "broadly" interpreting the scope of §§ 66020 and 66021, such as *Ehrlich v. Culver City, supra*, 12 Cal.4th at 866-70; *San Remo Hotel v. City & County of San Francisco* (2002) 27 Cal.4th 643; *Barratt American Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685; *Fogarty v. City of Chico* (2007) 148 Cal.App.4th 537; and *Williams Communications v. City of Riverside* (2003) 114 Cal.App.4th 642

5. Did the Court of Appeal err by unquestioningly applying its holding in *Trinity Park v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014, to the distinct facts, and the fees imposed in this case, notwithstanding: (a) *Trinity Park* involved only required dedications of below market rate housing units, not fees; (b) the record in this case happened to include evidence showing that the housing fees were imposed for the "purpose" of alleviating impacts of new development on the community, in contrast to *Trinity Park*; and (c) the Court's admonition in *Trinity Park* emphasizing that its holding there was "limited to the facts of that case" ?

6. Was it error or abuse of discretion to hold as a matter of law that Sterling could not possibly show that the fees in this case were in fact imposed for the "purpose of defraying the costs" of public facilities or "community amenities" as demanded under *Trinity Park*, and was not even entitled to any opportunity to address the issue (despite the fact that the issue had not been raised prior to the summary judgment motion, and the *Trinity Park* case was not decided till after the motion was heard)?

7. Was it error for the Court of Appeal to affirm the trial court's actions, granting summary judgment (on shortened notice) on the basis of its unprecedented, *sua sponte*, decision to "allow defendant City to pursue" arguments on new statute of limitations defense raised only belatedly in its moving papers, where the City (a) had not raised the issue in its answer,

and (b) had not disclosed the issue in response to discovery, and (c) had never even sought leave to amend to introduce the issues before the court?

II.

WHY REVIEW SHOULD BE GRANTED

Review should be granted because, otherwise, two carefully and clearly written remedial statutes that have been consistently interpreted for the past 25 years as being intended to be broadly applicable will be arbitrarily narrowed, gutted, clouded with uncertainty, and rendered virtually useless.

Review should be granted because, otherwise, the Legislature's intentions to establish an efficient means for reviewing disputed development fees and other exactions (without disrupting work on the project or jeopardizing the public agency's exactions) will be not only disregarded, but will be nullified.

The predecessors to Government Code §§ 66020 and 66021 were enacted back in 1984 and 1985, to establish a statutory procedure providing for judicial review of "any fees ... or other exactions" imposed as conditions of development approval by paying, or performing, "under protest." This Court accurately described the statutory language as "broadly-formulated and unqualified" and this Court and other appellate courts have consistently approved the application of the protest procedures to a wide range of development fees and exactions — whether or not they

were ostensibly imposed to "serve the purpose" of defraying the costs of public facilities.

However, the Sixth Appellate District has recently re-written this legislation, in disregard of established case law governing the interpretation and broad application of the protest procedures, and to arbitrarily inject new (and unworkable) "qualifications" on their applicability, adding severe new limits on their scope and usefulness. The decision here reflects "legislation from the bench" -- limiting the scope of these statues in a manner never approved by the real Legislature.

The decision in this case extends, and grossly exacerbates, the judicial re-writing of the clear and unqualified statutes that began with the Sixth District's anomalous decision in *Trinity Park v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014. This decision would erroneously disregard the Court's explicit admonition in *Trinity Park,* "emphasizing that our decision is limited to the facts of this case" (p. 1046). This decision would instead extend the Sixth District's own "purpose of the exaction" test (first announced in that *Trinity Park* decision) not just to property exactions (as in that case) but to "the entire universe" of development fees, thereby magnifying the mischief and uncertainty created by *Trinity Park.*

Review should be granted because the decision in this case, even unpublished, will engender uncertainty as to the scope of the protest statutes. Such uncertainty is likely to result in more litigation being filed,

and being filed sooner, than under the established interpretations of those statutes. Developers, and courts, will be uncertain as to what type of judicial review may be appropriate for a challenged fee or exaction, and when action should be taken to seek such review.

Under this decision, it will be necessary to guess at whether the "purpose" of a fee or exaction ordinance meets the Sixth District's new"purpose" test – before being able to ascertain whether it is subject to payment under protest at such time as the agency may give written notice of the fee imposition as required under §66020(d), or whether litigation must be immediately filed upon the first whiff of a possible fee or exaction being required. Developers will likely be wary of proceeding with work "under protest" and may halt construction because they will not know whether the protest procedure applies to the particular fee or exaction in question, unless it passes the "purpose of the exaction" test. It will not often be possible to definitely ascertain the "purpose" for a fee or exaction until after the parties are in litigation and able to conduct discovery.

And even where — as in this case — the local ordinance happens to include a statement as to the ostensible "purposes" of the local fees or exactions, there will be the danger that the courts will eventually second-guess that statement of purpose, with the result that a protest action for judicial review will be deemed to be untimely -- because the applicant

guessed "wrong" as to the "purpose" of the fee ordinance. That was the erroneous, and unjust, result of the decision in this case.

This is exactly the type of counter-productive legal uncertainty that the Legislature sought to prevent by enacting §§ 66020 and 66021.

The decision in this case, even unpublished, wreaks havoc with the Legislature's intent to create a clear and constructive protest procedure, applicable broadly to virtually all development fees and exactions.[2]

The novelty and the potentially devastating "significance" of the Opinion as written by the Court of Appeal was recognized immediately by the respondent City, which requested (unsuccessfully) that the Court of Appeal certify the Opinion for publication. Other advocacy groups that support limitations on effective judicial review of the numerous (and often unjustified and extortionate) fees and other exactions imposed on development applicants in California also chimed in to request publication of the radical and strikingly anomalous Opinion.

These counter-intuitive and counter-productive consequences of the decision are likely even where the amount of the fee or exaction is not yet

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[2] With the exception of those fees specifically excluded by statute from using the protest procedure, such as the building inspection fees involved in *Barratt America v. City of Rancho Cucamonga, supra,* 37 Cal.4th 685, 692. No such statutory provision excludes the "affordable housing in lieu fees and exactions" involved in this case from the scope or applicability of §§66020 and 66021.

specified and even where the city imposing the fee or exaction expressly informs the developer that the actual amount of the fee or exaction will not be determined until much later in the development approval process – and never even gives the developer any statutory notice of the fee imposition.

After all, that is what happened in this case — with the appellate court's approval. The City told Sterling that it would be required to "comply with" the City's "below market rate" housing requirements by paying fees or dedicating homes, or both, but the City also entered into a written agreement assuring Sterling that the actual amount of the BMR prices would not be set until after the houses were built, sold, and ready to close escrow. Similarly, the City assured Sterling that the actual amount of the "in lieu fees" would not be determined until the homes were built and ready to close escrow. Sterling relied on those assurances, waited till the homes were built and the fees adjusted, and then submitted its protest and sought judicial review under §§ 66020/66021.

Even though the City itself always admitted in its pleadings and discovery responses that these statutes applied to Sterling's action, the trial court held that Sterling's action was not timely — and granted summary judgment on the basis of Government Code § 66499.37, even though the City never raised that statute of limitations in its pleadings or discovery responses. Indeed, even though Sterling objected when that argument first surfaced in the City's summary judgment motion on the eve of trial, and

even though the City never even requested leave to amend to properly introduce that issue into the case the Court of Appeal saw nothing wrong with such cavalier disregard of the rules of civil procedure and principles of due process of law (see, Sterling's Petition for Rehearing).

Although the Court of Appeal has eschewed publication of its Opinion in this case, that does little or nothing to prevent the real-world impacts on the development process, outlined above, nor does the lack of publication do anything to correct the gross irregularities and abuses as detailed in the Petition for Rehearing, nor to alleviate the substantial prejudice (and losses) inflicted on Sterling without a fair "day in court."

Review should be granted for each and all of these reasons.

III.

STATEMENT OF THE FACTS

The background and relevant facts are well stated in the Opinion (pages 5–7) attached as Exhibit A, and more fully detailed in Appellants' Opening Brief on appeal.

In brief, Sterling applied to develop a small "infill" residential project on the site of former industrial buildings in Palo Alto. The City informed Sterling at the outset of the application process that the City had a "below market rate" (BMR) housing policy as part of its Housing Element, and Sterling would at some point be required to comply with it. The precise form of such "compliance" was not spelled out, however, it was

generally understood that the policy sought to require the dedication of new homes at BMR prices, or the payment of fees in lieu of dedications of actual homes, or some combination of homes and fees.

Once the development application was filed, the City's "architectural review board" (ARB) approved the design of the proposed project (which was not a "subdivision" approval), but the approval was appealed to the City Council. In connection with the appeal of the ARB's approval to the Council in June 2006, the City's planning staff prepared a letter outlining the City's BMR requirements that City staff characterized as "a guidance or estimate" (JA 0976) and which described an agreement for provision of 10 BMR houses and payment of fees in lieu of dedicating additional BMR houses. The letter described the "tentative pricing" for BMR houses, to be adjusted annually (JA 0376), and stated that the City will "recalculate the BMR sales prices just prior to" sales of the completed homes (JA 0378). That letter also assured Sterling that "actual BMR in lieu fees" would not be determined "until just prior to sale closing" (JA 0393). City staff advised Sterling that it would be helpful if Sterling signed the letter before the Council considered the ARB appeal. The letter was not approved by the Mayor or Council.

Sterling later applied for approval of a tentative subdivision map, and that application was approved by Council in November 2006 (JA 1018). The City, however, did not include any conditions of subdivision

map approval requiring any specific "compliance with BMR housing requirements." (See, JA 1474-78.)

When the Council one year later took the "ministerial action" of approving the final subdivision map for the Sterling project in November 2007, it incorporated the BMR letter of June 2006. Even then, however, the tentative BMR letter of June 2006, and the "more formal" BMR "regulatory agreement" dated September 2007 (JA 0408) continued to represent to Sterling that the final terms and conditions of the BMR requirements as applied to Sterling's project were subject to change and adjustment, and that both the final BMR sales prices and the actual in lieu fees would not be determined until after the homes were actually built and ready for sale.

Sterling did not challenge those tentative outlines of the BMR requirements because they were not yet final, by their own terms and by the City's own deposition testimony in the record (JA 0977-978.) Had Sterling filed suit then, such action would likely have been deemed to be premature and not "ripe." (Cf., *Home Builders' Assn' v. City of Napa* (2001) 90 Cal.App.4th 188 [challenge to affordable housing requirements was not ripe until actually and finally applied].) It was entirely possible that the final BMR terms could have been adjusted or determined in amounts that would not have provoked litigation.

When Sterling had finally completed building some of the homes in the project by mid-2009, and began readying them for sale, Sterling contacted the City to ascertain how the BMR requirements would be applied. The City had never given Sterling the written notice specifying the final amount of its BMR exactions, despite the statutory requirement that it do so in § 66020(d). Failing to obtain a satisfactory response from the City, Sterling sent a written statement of protest pursuant to § 66020(d). When the City still failed to respond, Sterling filed this action for review on October 5, 2009, within the time provided by § 66020 (JA 0001-0021).

The City demurred to the Complaint, arguing the action was untimely, but citing only CCP § 338(a) and — ironically — Gov't Code § 66020(a) (JA 0022). The City's demurrer was overruled on all grounds, by the Hon. Judge Levinger.

The City then filed its Answer to the Complaint (JA 0084). That Answer alleged only the same two limitations defenses, and affirmatively alleged that the action was subject to §66020.

The City later responded to Sterling's discovery requests, requiring the City to identify and state all facts in support of its affirmative defenses. Once again, the City referred to only the same two statutes of limitations (JA 1434-1436).

At a trial setting conference in June 2010, the trial date was set for September 27, 2010. Shortly thereafter, the defendant City requested that

the time for noticing a motion for summary judgment be shortened, to less than the statutory time otherwise mandated, and that the summary judgment motion be heard within 30 days of the newly-set trial date. The parties entered into a stipulation to that effect, based on the existing pleadings (JA 0097).

The City's motion for summary judgment included, for the first time, arguments that this action should be deemed to be time barred by the statute of limitations applicable to Subdivision Map Act decisions, Gov't Code § 66499.37. There was no mention of section 66499.37 in any pleadings or briefing or discovery documents prior to it appearing in the City's moving papers in support of summary judgment. Defendant did not seek leave to amend its pleadings in order to include these new arguments.

Sterling promptly objected to the untimely attempt to include section 66499.37 as a basis for the City's motion for summary judgment (JA 0847). The trial court gave no indication it would even consider the new, previously-waived, defense; however, its Order granting the City's motion for summary judgment included a footnote explaining, after-the-fact, that the court "is allowing (*sic*) the ... defense to be pursued [?] by Defendant because Plaintiff will not suffer any prejudice thereby." (JA 1442.)[3]

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[3] However, when the parties agreed to shorten the statutory notice period, however, there was no pleading nor any information produced through discovery regarding a potential defense based on (footnote continued)

The City, however, never even requested leave to "pursue the defense" — much less leave to amend in order to properly introduce the new defense. These procedural irregularities and abuses, and the resulting extreme "prejudice" to Sterling by having its case dismissed on the basis of a new defense never included in the pleadings in the case, and without adequate opportunity to respond to it because of the trial court's decision to "consider" the new defense — essentially *sua sponte* — were detailed in Sterling's Petition for Rehearing.

Sterling filed a timely motion for new trial to allow the trial court to reconsider and correct these errors. That motion was denied.

Sterling timely appealed. A panel of the Sixth Appellate District duly issued its Opinion on July 17, 2012. Sterling timely filed a Petition for Rehearing, which was denied. The City, along with two advocacy groups, submitted requests that the Opinion be published. The Court of Appeal denied those requests. This Petition followed.

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the Subdivision Map Act statute of limitations in Gov't Code § 66499.37, and plaintiffs did not consent to shorten notice as to summary judgment as to any issues other than those embraced in the then-existing pleadings. (Cf., *Urshan v. Musician's Credit Union* (2004) 120 Cal.App.4th 709, 711-12 [it is a violation of due process to shorten notice for summary judgment without parties' affirmative consent — and logically, to grant summary judgment on shortened notice as to a new issue or defense].)

IV.

ARGUMENT

A. Review Is Necessary to Restore "Uniformity of Decision" and Consistency With Prior Decisions by This Court:

The Court of Appeal's decision erroneously purports to judicially impose new "qualifications" on the scope of the statutory protest procedure, and erroneously narrows the applicability of these statutes — directly contradicting the Supreme Court's reading of the Legislature's intent behind these statutes.

The Legislature enacted Government Code sections 66020 and 66021 (and their predecessors) in 1984 and 1985 in response to earlier case law which had indicated that a developer who questioned a fee, exaction or condition of development approval was required to halt work on the development project and detour into court to fully litigate the validity of the exaction before proceeding with the project, or be deemed to have "waived" any right to question the fee or exaction. (E.g., *Building Industry Ass'n v. City of Oxnard* (1985) 40 Cal.3d 1, 3, n. 1.) The Legislature recognized the unnecessary delays and burdens, and particularly the impairment of housing production, inherent in such decisions, and acted to provide a more constructive statutory procedure for protest and judicial review of development "fees and ... other exactions." (*Hensler v. City of*

Glendale (1994) 8 Cal.4th 1, 19-20.; *Shapell Industries Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 241.)

Thus the Legislature used broad language in writing Section 66020(a): "Any party may protest the imposition of any fees, dedications, reservations, or other exactions imposed on a development project ..." by following the procedure for payment or performance under protest.

In *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 19-20, the Court explained that the statutory protest procedure of Section 66020 was enacted to provide a procedure "under which a residential housing developer may challenge a permit condition such as that in issue here [application of a local ordinance to prohibit construction along ridge-line portions of the property] while proceeding with development" without being deemed to have "waived" the right to seek judicial review. (Emphasis added.) The Supreme Court indicated that Section 66020 would be applicable to protest such a development condition, even though the condition was clearly not imposed for the "purpose" of "defraying the costs of public facilities."

In *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 866, this Court carefully examined the history and text of Sections 66020 and 66021. The Court specifically quoted — and emphasized — the same "broadly-formulated and unqualified" wording of Section 66021, describing the inclusive scope of the statutory protest procedure:

> [T]he statutory scheme authorizes "any party on whom a fee, tax, assessment, dedication, reservation, or other exaction has been imposed, the payment or performance of which is required to obtain governmental approval of a development," to protest such an imposition by following the procedures provided in section 66020 of the Act. (Gov. Code § 66021, subd. (a), italics added.) Such a **broadly formulated and unqualified authorization** is consistent with the view that the Legislature intended to require *all* protests to a development fee that challenge the sufficiency of its relationship to the effects attributable to a development project **— regardless of the legal underpinnings of the protest** — to be channeled through the administrative procedures mandated by the Act. [Italics in the original; **emphasis added.**]

Ehrlich approved the developer's use of the statutory protest procedure to seek review of a "so-called mitigation fee of $280,000" (12 Cal.4th at 860) supposedly representing the "impacts" of demolition of privately-owned tennis courts "lost" to redevelopment, rather than "development fees" as defined by Section 66000. The disputed fees were not imposed for the "purpose" of defraying the costs of public facilities made necessary by new development, nor was the Court concerned with the ostensible "purpose" of the fees. *Ehrlich* nevertheless held that the statutory protest procedures of Section 66020 and 66021 were applicable to the purported mitigation exactions. See also, *Ehrlich, supra,* 12 Cal.4th at 867, n.5, again citing "the unqualified statutory language channeling all

protests to development fees through the procedures prescribed by the Act ...."

Barratt American Inc. v. City of Rancho Cucamonga (2005) 37 Cal.4th 685, 692, is not to the contrary. The Court there described the protest procedure under § 66020(d) — including the requirement that the City give statutory notice in order to trigger the period of limitations. The Court held that the fees there, for building inspection and plan check services, were "regulatory" or "service" fees, not "development fees," and held that the Legislature had expressly provided for judicial review of an ordinance setting such "service fees" separately under § 66022, rather than by protest under § 66020.

Contrary to the misreading of the *Barratt American* decision by the Court of Appeal (first in *Trinity Park*, and now echoed in this case), the Court did not hold that the protest procedure of § 66020 was limited to fees (much less "other exactions" – which were not at issue in *Barratt American*) only if it were shown they were imposed for the narrow "purpose" of defraying the costs of public facilities.

The Court of Appeal's decision here is inconsistent with *Barratt American,* by erroneously asserting that this Court had demanded a non-statutory narrowing of §§66020 and 66021 so that those statutes would only be applicable to protest and review fees that were ostensibly imposed for "the purpose of defraying the costs of public facilities related to new

development."[4] The language used in *Barratt American* regarding the distinction between the "service fees" involved there (expressly made subject to review under §66022) and more typical "development fees" however, was descriptive, rather than prescriptive.

In *San Remo Hotel v. City & County of San Francisco, supra*, 27 Cal. 4th at 658, n. 9 , this Court noted that the Court of Appeal for the First Appellate District had held, in the context of an action seeking judicial review of hotel conversion in lieu fees, that "the Mitigation Fee Act ... allows a developer to pay a mitigation fee under protest and subsequently litigate its validity." Such a fee closely resembles the type of fees involved in this case, and were not claimed to be imposed for the "purpose of defraying costs of public facilities." The Court also noted, however, the City had not challenged that holding in its petition for review, so "its correctness is not before us."

B. The Decision Conflicts with Other Appellate Decisions:

The Court of Appeal decision also conflicts with other published appellate authority, applying the statutory protest procedure of Section 66020 to a wide variety of fees and exactions — regardless of whether the

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[4] This raises the question: what legitimate public purpose (or legal authority) other than defraying the costs of public facilities (broadly defined, as in Gov't Code §66000(d)) attributable or 'reasonably related to' impacts of new development, might allow a local government to impose fees or exactions on new development?

exaction was imposed for the ostensible "purpose" of "defraying the costs of public facilities related to the development."

For example, in *Williams Communications, LLC v. City of Riverside* (2003) 114 Cal.App.4th 642, 657-661, the Fourth Appellate District explicitly held that § 66020 was applicable to an action protesting unlawful "fees" paid pursuant to a written agreement demanded as a condition of permitting placement of communications cable in the city's streets. That Court reviewed the legislative history and interpreted the statutory term "other exactions" using its "plain meaning" — as broadly defined in dictionaries, and in the context of related legislation. The Court held that the disputed fee for permission to use the streets for private cable purposes was within the broad scope of the protest statutes. The Court did not attempt to "interpret" the legislation narrowly so as to preclude the applicability of the protest procedure -- even though the purpose of the street trenching "fee" in that case was not to defray the cost of public facilities related to the development.

Similarly in *Fogarty v. City of Chico* (2007) 148 Cal.App.4th 537, the Third Appellate District addressed the interplay of § 66020, applicable to fees and "other exactions" without regard to the purpose of the exaction, and the statute of limitations applicable to other types of "land use regulations" imposed under the Subdivision Map Act. The Court distinguished "exactions" — which "divest" an applicant of money or

property — from ordinary "regulations" which merely limit the use of property (148 Cal.App.4th at 544). Since the development condition in that case merely limited the use of part of the developer's property – and was neither a fee nor an "exaction" -- the Court held that § 66020 was not applicable. Conversely, the decision indicated that § 66020 would have been applicable and controlling if the City had required the transfer of an interest in the developer's property — as in this case.

Similarly, in *Bright Development v. City of Tracy* (1993) 20 Cal.App.4th 783, 790, the Third Appellate District did not question the applicability of § 66020 to protest and seek review of the City's demand that a developer install off-site utilities underground as a condition of approval, again without regard to whether such a requirement was imposed to defray or alleviate costs of public facilities caused by new development.

In *Building Industry Ass'n of Central California v. City of Patterson* (2009) 171 Cal.App.4th 886, 899, the Fifth Appellate District invalidated the City's "affordable housing in lieu fees" which had been paid under protest pursuant to Section 66020. The propriety of that procedure was not contested on appeal. The Court also noted that it was not expressing any opinion on whether the requirements of the Mitigation Fee Act in general (e.g., factual findings under §66001) applied to such fees for the purpose of providing affordable housing (*id.*, at n. 13). The Court nevertheless held

that such in lieu fees were subject to the same legal standards as generally applied to other types of development fees and exactions.

C. The Decision Is NOT Consistent With Established Canons of Statutory Construction:

The Court of Appeal's "interpretation" of the term "any ... other exactions" as used by the Legislature in Sections 66020 and 66021 conflicts with the ordinary rules of statutory construction in several ways, and leads to an impractical, if not "absurd" result.

The Legislature's use of the word "any" in drafting a statute has significance, as this Court has clearly stated: "[T]he ordinary meaning of the word 'any' is clear, and **its use in a statute unambiguously reflects a legislative intent for that statute to have a broad application**.... (*Utility Cost Management v. Indian Wells Valley Water Dist.* (2001) 26 Cal.4th 1185, 1191 [use of the word 'any' serves to 'broaden the applicability' of a provision].)" (*California Highway Patrol v. Superior Court* (6th Dist. 2008) 158 Cal.App.4th 726.)

The Legislature deliberately choose broad and inclusive wording to describe the applicability of the protest statutes, and did not include any such "purpose of the fee" qualifications in its writing of section 66020, or its even more inclusive and comprehensive companion section 66021. (*Williams Communications, LLC. v. City of Riverside* (2003) 114 Cal. App. 4th 642, 656-660 [Section 66021 expanded on that description of the scope

of the protest remedy, and held that the term "any ... other exactions" applied broadly, to protest of fees paid for permission to use street].)

The decision in this case simply adopted its flawed "statutory interpretation" from *Trinity Park,* and did not address the literal text of the statute. Both decisions erroneously took parts of the decision in *Barratt American v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, out of context. As discussed above, *Barratt* merely recognized the distinction in section 66000(b), between "fees" charged for "processing applications" such as plan review and inspection services (explicitly covered by section 66016 and 66022, and thus statutorily excluded from the protest procedures of §66020 and 66021) and other "fees" imposed as conditions of development approval (covered by §66020).

D. The Decision Is NOT Consistent With Legislative History

The decision in this case simply adopted the holding of the Trinity Park case, without critical analysis, and as a result the decision here erroneously fails to reflect the legislative history and intent of Sections 66020 and 66021. In doing so, however, the decision unjustifiably purports to interpret the Legislature's usage of "any ... other exactions" in these protest statutes by judicially grafting on new language taken from subsequent — and distinct — legislation. The Legislature enacted § 65913.5 (predecessor to § 66020) in 1984 (Stats. 1984, ch. 653) to provide a statutory procedure for residential development projects to seek

review of from development fees or exactions without being required to file and exhaust litigation before commencing work on the approved project, by submitting a written protest following the "imposition" of an unreasonable development condition. (*Hensler v. City of Glendale, supra*, 8 Cal.4th at 19-20.) The Legislature also enacted the predecessor to current § 66021 in 1985 (Stats. 1985, ch. 671), applying the protest remedy more broadly to more types of "exactions" and making the procedure available not just to residential developments. (*Williams Communications, supra,* 114 Cal.App.4th at 657-661.)

The enactment of these protest statutes was thus prior to, and distinct from, the subsequent enactment of even the earliest versions of what became known as the Mitigation Fee Act. ("AB-1600" first adopted §§ 66000-66006; Stats. 1987, ch. 927.)

The decision here, however, is based on the flawed and illogical assumption that when the Legislature enacted the protest statutes in 1984-85, and made them applicable to "any fees, ... or other exactions," those statutes should be "interpreted" by reference to language defining and limiting "development fees" that was not even enacted until 1987 (as part of § 66000(b)). Even though the protest statutes were later renumbered (current §§ 66020 and 66021) and relocated into what is now referred to as the Mitigation Fee Act, they are in an entirely different Chapter of the Act, distinct from Chapter 6 where "fees" were subsequently defined.

Following the appellate court decision in *Ponderosa Homes v. City of San Ramon* (1994) 23 Cal.App.4th 1761, the Legislature amended Section 66020(d) to address and remove the "uncertainty" introduced by that decision as to when the time for "protest" a fee or other exaction should be deemed to commence ("AB-3081" at Stats. 1996, ch. 549). As suggested in comments from the American Planning Association, and the League of California Cities, the bill was amended to require each local agency to serve written notice of the commencement of the time to protest such fees or other exactions. The Legislature did not amend the "fees or other exactions" language of § 66020 to incorporate any "qualifying" language as to the "purpose" of the exactions subject to the protest remedy.

The 1996 amendments to § 66020(d) should have removed any uncertainty regarding the commencement of the applicable time for protesting and seeking judicial review of development fees and other exactions. (*Barratt American* v. *City of Rancho Cucamonga, supra,* 37 Cal.4th 685, 692 [city must give statutory written notice of time for protest of development fees or exactions]; see also, *Geneva Towers, Ltd. v. City & County of San Francisco* (2003) 29 Cal.4th 769, 781 [the period of limitations on tax refund action did not begin running in absence on showing that city gave requisite notice of rejection of refund request].)

This Court of Appeal decision, however, has created and expanded new uncertainty as to the applicability of the protest procedure.

E. Review Is Necessary In Order to Prevent Needless Uncertainty and Nullification of the Statutory Protest Procedure:

Even if the appellate court decision were not otherwise flawed, and in conflict with previous authorities as summarized above, its addition of this newly conjured "purpose of the fee" test would be unworkable in real life. Review should be granted because this decision, otherwise, requires unnecessary (and unlegislated) speculation as to what may ultimately be judicially determined to have been the "purpose" behind each and every questioned local agency action imposing "any fee ... or other exaction" as a condition of development approval.

Development applicants confronted by legally questionable or unjustified fees or other exactions will be required to speculate — before knowing what process for review to pursue, and before being able to ascertain what statute of limitations may apply as to the "purpose" of the particular fee or exaction.

Since the "purposes" of local ordinances may not often be ascertained with absolute certainty until after litigation is filed, developers will be loath to guess whether any particular development fee or exaction may meet this new "purpose of the exaction" test. Litigation will therefore be filed as soon as there is a hint that a questionable fee or exaction may be required — and work may be halted.

The decision would apparently make the applicability of the protest procedure dependent upon a new, judicially-created, requirement that the parties (local governments, developers, and the courts) must try to speculate as to the ostensible "purpose" behind the imposition of the particular development exaction. The uncertainty inherent in such a new "test" is likely to result in developers erring on the side of caution and challenging every questionable fee or exaction immediately by litigating their validity in court before commencing work, as if there were no effective protest procedure. The result of the decision is to nullify the use of section 66020. This is not economically constructive, is ruinously burdensome for the beleaguered California home building industry, and unnecessarily burdensome on the court system — contrary to the Legislature's true "intent" when it established a statutory protest procedure in 1983.

V.

CONCLUSION

Review should be granted, to secure uniformity of decision and to settle important questions of law with statewide implications, as to the proper scope and applicability of §§66020 and 66021.

The appellate opinion in this case is in direct conflict with existing authorities, including several decisions by this Court and published decisions from at least three other Courts of Appeal. It disregards standard rules of statutory interpretation, and confounds the legislative history and

previously-recognized legislative intent behind the relevant statutes. The decision injects new inconsistencies and confusion regarding the applicability of these "broadly formulated" statutes, and thereby deters parties from relying upon it, and effectively nullifies the Legislature's action in creating these protest procedures.

Accordingly, it is respectfully requested that this petition be granted.

Dated: August 27, 2012

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By _____
DAVID P. LANFERMAN
JAMES G. HIGGINS

Attorneys for Plaintiffs and Appellants
STERLING PARK, L.P. and
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CERTIFICATE OF WORD COUNT
[California Rules of Court, Rule 8.504]

The text of this Petition, exclusive of cover page, tables and attachments, consists of 6,527 words, as counted by the word processing program that was used to generate this document.

Dated: August 27, 2012

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By _____
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

In Re: ***Sterling Park L.P. et al., v. City of Palo Alto et al.* – 6th Civil No. H036663**
Caption: ***Sterling Park L.P. and Classic Communities, Inc. v. City of Palo Alto*** **Santa Clara County Superior Case No. 109-CV-154134**
Filed: **IN THE COURT OF APPEAL, Sixth Appellate District**

I am employed in the County of San Francisco; I am over the age of eighteen years and not a party to the within entitled action; my business address is Four Embarcadero Center, 17th Floor, San Francisco, California 94111-4109.

On August 27, 2012, I served the following document(s) described as

PETITION FOR REVIEW

the interested party(ies) in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

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California Court of Appeal
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☒ **BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at San Francisco, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ **STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 27, 2012, at San Francisco, California.

Jennie Chin

COPY

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

STERLING PARK, L.P. et al.,

Plaintiffs and Appellants,

v.

CITY OF PALO ALTO,

Defendant and Respondent.

H036663
(Santa Clara County Super. Ct. No. 1-09-CV154134)

Defendant City of Palo Alto (City) conditions its approval of certain residential development applications upon the developer's compliance with City's below market rate (BMR) housing program. Plaintiffs Sterling Park, L.P. and Classic Communities, Inc., sued City, challenging the BMR housing exactions City required for approval of their development. The trial court granted summary judgment for City, finding that the complaint was time-barred. Plaintiffs had argued that the action was governed by a portion of the Mitigation Fee Act (Gov. Code, §§ 66020, 66021),[1] which allows a developer to obtain reimbursement of certain development fees paid under protest. Under those sections, the statute of limitations does not begin to run until City gives the developer notice of the amount of the fees and the right to file a protest. (§ 66060, subd. (d)(1).) Plaintiffs claimed that City never gave them the notice required to trigger the running of the statute and, therefore, their suit was filed timely.

[1] Hereafter all unspecified section references are to the Government Code.

The trial court rejected plaintiffs' position and accepted City's contention that the applicable statute of limitations is section 66499.37, which gives a plaintiff 90 days from the date of the "decision . . . concerning a subdivision" to challenge the decision. Since the decision conditioning plaintiffs' subdivision upon compliance with the BMR program occurred well over a year before suit was filed, the time to file suit had expired. The court allowed the defense even though City had not cited section 66499.37 in its answer. We shall affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs owned two lots totaling 6.5 acres on West Bayshore Road in Palo Alto. Plaintiffs planned to demolish existing commercial improvements and construct 96 residential condominiums on the site. The proposed development was subject to City's BMR housing program, which is set forth in the Palo Alto Municipal Code (PAMC). PAMC section 18.14.030, subdivision (a) provides, "Developers of projects with five or more units must comply with the requirements set forth in Program H-36 of the City of Palo Alto Comprehensive Plan." Program H-36 of City's Comprehensive Plan appears in the plan's Housing Element, Chapter 4 (hereafter, Program H-36). As pertinent here, Program H-36 requires that housing projects involving the development of five or more acres must provide at least 20 percent of all units as BMR units. "*For an application to be determined complete, the developer must agree to one or a combination* of the following requirements or equivalent alternatives that are acceptable to the City." (Program H-36, p. 26, italics added.) One of the requirements applicable to plaintiffs' project is that three fourths of the BMR units "be affordable to households in the 80 to 100 percent of median income range, and one-fourth may be in the higher price range of between 100 to 120 percent of the County's median income." (*Ibid.*) The developer may provide off-site units or vacant land if providing on-site units is not feasible. If no other alternative is feasible, "a cash payment to the City's Housing Development Fund, in lieu of providing BMR units or land, may be accepted." (*Id.* at p. 27.) The in-lieu payment

for projects of five acres or more is 10 percent of the greater of the actual sales price or fair market value of each unit. (*Ibid.*)

Plaintiffs submitted their initial application for approval of the project in 2005. City's planning staff found the project would not cause any significant adverse environment impact and recommended a negative declaration as allowed by the California Environmental Quality Act. (See Cal. Code Regs., tit. 14, § 15020.) City's Architectural Review Board (ARB) recommended approval of the design and site plan in March 2006.

In a letter dated June 16, 2006 (the BMR letter), City set forth the terms of an agreement between plaintiffs and City's planning staff pursuant to which plaintiffs agreed to provide 10 BMR units on the project site and pay in-lieu fees of 5.3488 percent of the actual selling price or fair market value of the market-rate units, whichever was higher. The BMR letter contains an estimate of the anticipated sales price for the BMR units and states that the price may increase or decrease depending upon the market at the time of the actual sale. The opening paragraph of the BMR letter states: "This letter summarizes the agreement between Classic Communities, Inc. . . . and the Director of the Department of Planning and Community Environment . . . regarding satisfaction of the provisions of the City of Palo Alto's [BMR] Program for the [ARB] application for the 96-unit residential condominium development . . . . [¶] . . . You and Planning Division staff have discussed and negotiated the terms of this agreement, and the signature of Classics corporate officers on this letter confirms that Classics agrees to these terms and conditions. On March 23, 2006 the Director issued a conditional approval letter of the ARB's approval of the Project, with execution of the BMR agreement listed as one of the Project's conditions. The Director's action was appealed and the appeals will be considered by the City Council in June 2006. You have also submitted an application for a vesting tentative subdivision map to allow the residential units to be sold separately as condominiums. The provisions of this BMR letter agreement must be referenced in the

subdivision map conditions and incorporated into a formal BMR agreement to be recorded concurrently with the final subdivision map agreement, if the Director's approval is upheld by Council." Scott Ward, vice president of plaintiff, Classic Communities, Inc., executed the BMR letter on June 19, 2006, the same day the city council upheld the ARB's approval of the project.

City approved plaintiffs' application for a tentative subdivision map on November 13, 2006. In recommending approval of the application for a final subdivision map City staff noted, "The map satisfies all approval conditions for the Tentative Map, including the preparation of a Subdivision Improvement Agreement and BMR Agreement." The application for a final subdivision map was approved September 10, 2007. A document entitled "Regulatory Agreement Between Sterling Park, LP and City of Palo Alto Regarding [BMR] Units" was executed on September 11, 2007 and recorded November 16, 2007. This document referred to and attached the 2006 BMR letter.

Over a year later, when the new units were being finished, City began requesting conveyance of the BMR designated homes. On July 13, 2009, plaintiffs submitted a "notice of protest" to City, claiming the prior agreements were signed under duress and arguing that the BMR housing requirements are invalid. When City failed to respond to the protest, plaintiffs filed this case on October 5, 2009. Plaintiffs sought an injunction and a judicial declaration that the BMR requirements are invalid and "that the City may not lawfully impose such BMR affordable housing fees or exactions as a condition of providing building permits or other approvals for the Project." Plaintiffs' third cause of action cited sections 66020 and 66021 and sought "restitution or equitable relief for the compelled conveyance of houses under restrictive terms."

City at first demurred to the complaint, arguing that the third cause of action was barred by the time limit found in section 66020 and that the entire action was barred by Code of Civil Procedure section 338, subdivision (a), which applies a three-year time limit to actions based upon "a liability created by statute." The trial court overruled the

demurrer. Thereafter, City filed an answer, including as its fifth affirmative defense, "the applicable statutes of limitation," again citing Code of Civil Procedure section 338 and section 66020. Later, City's answers to form interrogatories also cited these two code sections as bases for City's defense. City did not mention section 66499.37 in any of these documents.

Trial was set for September 27, 2010. At City's request, time was shortened for notice of cross motions for summary judgment. City moved for summary judgment on statute of limitations grounds, this time adding section 66499.37 to its argument that the case was filed too late. Plaintiffs' cross-motion for summary judgment argued that City's BMR housing program was invalid as a matter of law. Plaintiffs' opposition to City's motion maintained that section 66499.37 did not apply and that City was barred from relying upon that code section because it had not raised the defense in its answer.

The trial court granted City's summary judgment motion and denied plaintiffs' cross-motion. In a footnote, the trial court acknowledged that City had not raised section 66499.37 in its answer. Citing *Cruey v. Gannett Co.* (1998) 64 Cal.App.4th 356, 367 (*Cruey*) and *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 385, the trial court concluded that it would allow the defense because plaintiffs "will not suffer any prejudice thereby."

Plaintiffs moved for a new trial or for an order vacating the trial court's prior order arguing, in more detail than it had in its summary judgment papers, that City was barred from relying upon section 66499.37. The trial court denied the motions and entered judgment in favor of City. Plaintiffs have timely appealed from the judgment.

II. CONTENTIONS

The two statutes of limitations that we will consider, section 66020 and section 66499.37, are found, respectively, in the Mitigation Fee Act (§ 66000 et seq.) and the Subdivision Map Act (§ 66410 et seq.). Both impose short time periods for filing an action to challenge specified development fees. Section 66020 imposes a 180-day time

period and section 66499.37 is a 90-day statute. Given the differing procedural requirements of the two code sections, this action might be timely under section 66020 but not under section 66499.37. Not surprisingly, plaintiffs maintain that section 66020 is the applicable statute and that section 66499.37 is inapplicable. Plaintiffs also argue that even if section 66499.37 is the applicable statute of limitations, City was not entitled to rely upon it because it had failed to raise it at any time prior to filing its summary judgment motion.[2]

III. STANDARD OF REVIEW

"An appellate court reviewing a judgment of dismissal after an order granting summary judgment must review the record de novo to determine whether the moving party is entitled to summary judgment as a matter of law or whether there exist genuine issues of material facts. [Citation.] [¶] Code of Civil Procedure section 437c, subdivision (o)(2), mandates a burden-shifting which requires defendant to show a complete defense to the action or that one or more elements of the cause of action cannot be established. If defendant makes this showing, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or defense thereto." (*Cruey, supra*, 64 Cal.App.4th at p. 361.)

With regard to plaintiffs' claim that the trial court erred in considering the defense of section 66499.37, we view that decision as we would a grant of leave to amend the answer. The grant or denial of leave to amend is an exercise of discretion that should not be disturbed on appeal unless it has been clearly abused. (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 296-297.)

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[2] In its summary judgment motion City also cited the statute of limitations contained in section 65009, another code section it had not listed in its answer. City relies upon that section as well as section 66499.37 on appeal. Since we conclude that section 66499.37 applies, we do not consider the alternative argument.

IV. DISCUSSION

A. Applicability of sections 66020 and 66021

We begin with plaintiffs' argument that this case is subject to section 66020. Sections 66020 and 66021 allow a developer to protest the imposition of "a fee, tax, assessment, dedication, reservation, or other exaction . . . the payment or performance of which is required to obtain governmental approval of a development . . ." (§ 66021, subd. (a)) and to obtain a refund of any overpayments (§ 66020, subd. (e)). Protest is effected by paying the fees and serving a written notice of protest upon the local agency. (*Id.* subd. (a).) The local agency must provide the applicant written notice of the amount of the fees when imposing them and notice that the applicant has 90 days to file a protest. (*Id.* subd. (d)(1).) An applicant who has filed a protest then has 180 days to file an action "to attack, review, set aside, void, or annul the imposition of the fees, dedications, reservations, or *other exactions* imposed . . . ." (*Id.* subd. (d)(2), italics added.)

Plaintiffs argue that the phrase "other exactions" as used in these code sections applies to the BMR housing requirements imposed upon them here. The argument is identical to one raised in *Trinity Park, L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014 (*Trinity Park*), in which developers (including one of the plaintiffs in this case) challenged another city's BMR housing requirements. In *Trinity Park*, the City of Sunnyvale conditioned approval of a development permit and tentative subdivision map upon compliance with that city's BMR housing ordinance. (*Id.* at p. 1021.) The developers signed an agreement with the city, promising to sell five units at specified below market prices but about a year later the developers sent the city a notice protesting the requirements under sections 66020 and 66021. (*Trinity Park, supra,* at p. 1022.) The developers then sued the city seeking to invalidate the BMR agreement, which they maintained had been executed under duress. The trial court sustained the city's demurrer citing section 66499.37. (*Trinity Park, supra,* at pp. 1045-1046.)

On appeal, the developers argued that the BMR requirements fell within the meaning of sections 66020 and 66021. Since the city had never provided notice of the right to protest, their protest and subsequent civil suit were timely. This court rejected the argument, holding that these code sections did not apply. The phrase "other exactions" as used in sections 66020 and 66021 does not refer to the universe of exactions that may be imposed in connection with a development. Rather, "the statutory language of the relevant provisions of the Mitigation Fee Act and the legislative history of sections 66020 and 66021 demonstrate that the Legislature intended that the exactions that may be protested under the Mitigation Fee Act are those exactions imposed for the purpose of 'defraying all or a portion of the cost of public facilities related to the development project.' " (*Trinity Park, supra,* 193 Cal.App.4th at p. 1043, quoting § 66000, subd. (b) and citing *Barratt American, Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 696.) Because the Sunnyvale municipal code stated that the purpose of the BMR requirement was to " 'enhance the public welfare by ensuring that future housing development contributes to the attainment of the housing goals,' " and, because there was no suggestion in the material under review that the BMR requirements were designed to defray the cost of public facilities related to the development, this court concluded that sections 66020 and 66021 were inapplicable to the BMR housing concessions imposed in that case. (*Trinity Park, supra,* at pp. 1040-1041.)

The present case is almost identical to *Trinity Park.*[3] As explained in the preface to Program H-36, "[City's] BMR program is intended to increase the supply of for-sale housing and rental housing for individuals and families whose incomes are insufficient to afford market rate housing." (Program H-36, at p. 26.) PAMC section 18.14.020 states that the purposes of the BMR housing program are to "[e]ncourage the development and

[3] The parties did not have benefit of *Trinity Park* as the opinion was filed about a month after judgment was entered in this case.

availability of housing affordable to a broad range of households with varying income levels . . . . [¶] . . . [p]romote the city's goal to add affordable housing units to the city's housing stock . . . . [¶] . . . [o]ffset the demand on housing that is created by new development. . . . [¶] . . . [m]itigate environmental and other impacts that accompany new residential and commercial development . . . . [and] [¶] . . . increase the supply of for-sale and rental housing for families and individuals employed in Palo Alto whose incomes are insufficient to afford market rate housing. . . ." These listed purposes do not describe an attempt to defray the cost of public facilities necessitated in a development project. The purpose is to increase the number of residences in the City where people of modest means can afford to live. Under *Trinity Park*, sections 66020 and 66021 do not apply.

Plaintiffs argue that *Trinity Park* was wrongly decided and that demands for affordable housing units or in-lieu fees are "exactions" subject to sections 66020 and 66021. Plaintiffs repeat many of the same arguments raised in the *Trinity Park* case. We decline to revisit the issue. Plaintiffs also argue that even if *Trinity Park*'s interpretation of "other exaction" is correct, it is distinguishable because plaintiffs were required to pay in-lieu fees whereas the *Trinity Park* plaintiffs were not required to pay fees. The distinction makes no difference that we can see. The in-lieu fees are imposed if City determines that BMR designation of the required number of on-site units, off-site units, or vacant land is not feasible. Fees are payable to City's Housing Development Fund. There is no evidence that the fees go to defray the cost of public facilities necessitated by the new development.

Plaintiffs further argue that *Trinity Park* is distinguishable because PAMC section 18.14.020, subdivisions (c) and (d) indicate that City's BMR exactions are intended for the purposes *Trinity Park* described. We disagree. Subdivision (d) of PAMC section 18.14.020 describes one purpose of the ordinance, which is to "[m]itigate environmental and other impacts that accompany new residential and commercial development by protecting the economic diversity of the city's housing stock, with the

goal of reducing traffic, transit and related air quality impacts, promoting jobs/housing balance and reducing the demands placed on transportation infrastructure in the region." That is, one purpose of the BMR housing program is to improve air quality and reduce demand on regional transportation infrastructure by insuring that people of all economic levels can afford to live and work within the city limits rather than commute. This has nothing to do with defraying the cost of public facilities necessitated by the new development itself.

Subdivision (c) of PAMC section 18.14.020, states that another purpose of the BMR housing ordinance is to "[o]ffset the demand on housing that is created by new development." The only way a housing development could create a demand for housing would be if the new development eliminated existing housing. We need not decide whether an exaction imposed to offset lost housing could be subject to sections 66020 and 66021 because plaintiffs' project did not demolish existing housing; the BMR exactions imposed upon them had nothing to do with replacement housing.

Given the express purposes of City's BMR housing program, and for all the reasons set forth in *Trinity Park, supra*, 193 Cal.App.4th 1014, we conclude that sections 66020 and 66021 do not apply to the BMR housing concessions exacted from plaintiffs in this case.

B. Applicability of Section 66499.37

We now turn to section 66499.37, which provides, "Any action or proceeding to attack, review, set aside, void, or annul the decision of [a] . . . legislative body concerning a subdivision, or of any of the proceedings, acts, or determinations taken, done, or made prior to the decision, or to determine the reasonableness, legality, or validity of any condition attached thereto, including, but not limited to, the approval of a tentative map or final map, shall not be maintained by any person unless the action or proceeding is commenced and service of summons effected within 90 days after the date of the decision. . . ." As the court stated in *Timberidge Enterprises, Inc. v. City of Santa Rosa*

(1978) 86 Cal.App.3d 873, 886, section 66499.37 "manifests a legislative purpose that a *decision* such as that of the City, approving a subdivision map and attaching a *condition* thereto, shall be judicially attacked within 180 days [now 90 days] of that decision, or not at all." (See also, *Aiuto v. City & County of San Francisco* (2011) 201 Cal.App.4th 1347, 1357 [facial challenge to BMR ordinance subject to § 66499.37; time began to run when the ordinance was passed].)

In reviewing the trial court's conclusion that section 66499.37 applies to this action, we again turn to *Trinity Park, supra*, 193 Cal.App.4th at page 1044, where this court concluded that section 66499.37 applied to the BMR housing concession imposed in that case because the action challenged "a condition of subdivision approval . . . ." (*Trinity Park, supra*, at p. 1044.) Here, plaintiffs had to promise to comply with City's BMR housing program before City would even consider the project. Plaintiffs' project called for the merger of two lots into a 6.5 acre parcel and the subdivision of that parcel into 96 separate condominiums. It would be difficult to characterize the action as anything but a challenge to City's decision to make compliance with its BMR program a condition of subdivision approval.

Plaintiffs argue that because the conditions were part of an agreement or had something to do with ARB approval, there was no "decision . . . on a subdivision." Plaintiffs also maintain that compliance with the BMR housing program is "a gateway condition" for having any development application accepted for processing, whether or not it involved a subdivision. This, according to plaintiffs, means that BMR conditions are imposed independently of the Subdivision Map Act and, thus, section 66499.37 does not apply. But plaintiffs challenge the application of the BMR housing program *to them.* Plaintiffs' project involved the subdivision of the property and, therefore, required approval of a subdivision map pursuant to the Subdivision Map Act. City's approval of the final subdivision map was conditioned upon plaintiffs' agreement to the terms contained in the BMR letter. The case clearly challenges the "validity of any condition

attached" to City's "decision . . . concerning a subdivision." The 90-day limitations period of section 66499.37 runs from the date of the decision being challenged. Here, the decision being challenged is City's decision imposing the BMR exactions with which plaintiffs would have to comply for approval of their subdivision. Whether we consider the date of that decision to be June 2006, when City issued the BMR letter, November 2006, when City approved the tentative subdivision map, or September 2007, when the final subdivision map application was approved, plaintiffs' 2009 complaint was untimely.

C. City's Failure to Plead Section 66499.37

Having concluded that section 66499.37 applies to make this case time-barred, we now consider whether the trial court abused its discretion in considering it. The court acknowledged that City had not named that code section in its answer but concluded, citing *Cruey*, *supra*, 64 Cal.App.4th 356, that City could raise the defense on summary judgment because plaintiffs would not be prejudiced.

Cruey was a defamation case in which the defendant moved for summary judgment based upon the affirmative defense of privilege, which he had not raised in his answer. (*Cruey*, *supra*, 64 Cal.App.4th at pp. 366-367.) The Court of Appeal observed: "Although the general rule is that a privilege must be pled as an affirmative defense [citation], recent California authority suggests an exception where the complaint alleges facts indicating applicability of a defense or where the affirmative defense is raised during a summary judgment proceeding. [Citations.] . . . Given the long-standing California court policy of exercising liberality in permitting amendments to pleadings at any stage of the proceedings [citation] and of disregarding errors or defects in pleadings unless substantial rights are affected [citation], we believe that a party should be permitted to introduce the defense of privilege in a summary judgment procedure so long as the opposing party has adequate notice and opportunity to respond. Here, the defense of privilege was asserted in the opening brief in the motion for summary judgment. [The plaintiff] took the opportunity to respond by arguing the inapplicability of the privilege.

He has not shown that he was prejudiced by the process." (*Id.* at p. 367; accord, *Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 75.) The same reasoning applies here.

It is true, as plaintiffs argue, that "the pleadings set the boundaries of the issues to be resolved at summary judgment." (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 648.) Thus, where the exclusive remedy of the Workers' Compensation statutes (Lab. Code, § 3600 et seq.) did not appear in the answer, the defendant could not rely upon it to support a motion for summary judgment. (*Dorado v. Knudsen Corp.* (1980) 103 Cal.App.3d 605, 611.) In such a case, the judgment must be reversed and the defendant "permitted to amend to raise this defense." (*Ibid.*) The *Dorado* court noted that the defendant would not necessarily be "entitled to a summary judgment on the basis of the showing already made." (*Ibid.*)

In this case, City raised the question of timeliness from its very first pleading. By citing *FPI Development, Inc. v. Nakashima, supra*, 231 Cal.App.3d at page 385, the trial court referred to that court's concern that "it would be unfair to ground a ruling on the inadequacy of the pleadings *if* the pleadings, read in the light of the facts adduced in the summary judgment proceeding, give notice to the plaintiffs of a potentially meritorious defense." Given City's persistent focus on timeliness, plaintiffs necessarily had notice of the potential defense. And, unlike the situation in *Dorado*, City would be entitled to judgment on the basis of the showing already made. Had the trial court denied the motion based upon City's failure to plead section 66499.37, given the courts' policy of liberality in allowing amendments to a pleading, City would have amended its answer and then succeeded, either by way of another summary judgment motion or at trial, on the statute of limitations defense. Indeed, the lack of prejudice to which the trial court referred here meant that plaintiffs' action would fail in the long run, even if the court rejected City's defense on summary judgment. Under the circumstances, the exception to the waiver rule described by *Cruey* applies. There was nothing to be gained by denying

the motion. Accordingly, the trial court did not abuse its discretion in allowing the defense.

Plaintiffs' reliance upon *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 912-913, and *Minton v. Cavaney* (1961) 56 Cal.2d 576, 581, is misplaced. Both cases concern a statute of limitations that was raised for the first time on appeal. That is not the case here; the issue was fully litigated below. *Mitchell v. County Sanitation Dist.* (1957) 150 Cal.App.2d 366, is equally unavailing because that case involved the public entity's express, intentional waiver of the statute and the appellate court's refusal to allow the defense on appeal. (*Id.* at p. 369.)

Plaintiffs also argue that due to its delay in raising section 66499.37, City is estopped from relying upon it altogether. We reject that argument as well. "The sine qua non of estoppel is that the party claiming it relied to its detriment on the conduct of the party to be estopped." (*Orange County Water Dist. v. Association of Cal. Water etc. Authority* (1997) 54 Cal.App.4th 772, 780.) Plaintiffs cannot show reliance, let alone detrimental reliance. The estoppel doctrine does not apply.

We conclude that the trial court did not abuse its discretion in allowing City the defense of section 66499.37 in its motion for summary judgment. Section 66499.37 bars the instant action as a matter of law.

V. DISPOSITION

The judgment is affirmed. Respondent is entitled to its costs on appeal.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.

Sterling Park, L.P. et al. v. City of Palo Alto
H036663

FROM THE DOCKET OF THE SIXTH APPELLATE DISTRICT (printed 8/24/2012)

Case No. H 036663, Sterling Park v. City of Palo Alto:

08/15/2012	Order denying publication filed.	The request for publication of the opinion filed in the above entitled action by City of Palo Alto, The League of California Cities and Public Interest Law Project on August 3, 2012 and August 6, 2012, is denied. The opinion does not establish a new rule of law, nor does it meet any of the other criteria set forth in California Rules of Court, rule 8.1105(c). In compliance with California Rules of Court, rule 8.1120, the Clerk shall transmit the request for publication and a copy ofthis order to the Supreme Court.
08/15/2012	Petition for rehearing denied.	Appellants' petition for rehearing is denied.