CASE NO. S204771

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

OPENING BRIEF ON THE MERITS

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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I. INTRODUCTION

Plaintiffs and appellants Sterling Park, L.P. and Classic Communities, Inc. (Sterling) sought judicial review of fees and other exactions of real property interests that defendant and respondent City of Palo Alto (City) imposed as conditions of approving Sterling's housing development. The City required Sterling to pay fees to the City's below-market-rate (BMR) housing program in amounts to be calculated after the homes were built and to convey ten new homes in the project at below market prices that would not be determined until the homes were completed. After Sterling built the homes, it filed this action to challenge these exactions by complying with the "payment under protest" procedure provided by sections 66020 and 66021 of the Government Code (the protest statutes).

The protest statutes authorize "any party" to protest the imposition of "any fees, dedications, reservations, or other exactions imposed on a development project" by following a prescribed procedure. In contrast to earlier case law under the Subdivision Map Act (the Map Act) and other land use statutes, the protest statutes allow a developer to continue work on an approved development project without waiving the right to seek judicial review of the disputed "fees or other exactions." The time for submitting a protest does not begin running until the local agency gives written notice to the project applicant that the 90-day period "in which the applicant may

protest has begun." (Gov't Code §66020, subd. (d)(1).)[1] The applicant then has 90 days to submit a protest and 180 days to file an action to challenge the fees or other exactions at issue if the protest is not resolved.

The City did not give Sterling any written notice of its right to protest under section 66020, subdivision (d)(1). The trial court nonetheless granted the City's motion for summary judgment on the grounds that the protest statutes did not apply in this case, and Sterling's action was thus barred by the 90-day statute of limitations of the Map Act (§ 66499.37). The court of appeal affirmed, concluding that although the protest statutes apply to certain "fees or other exactions," they did not apply to the BMR fees and exactions at issue because, in its view, they were not imposed "for the purpose of 'defraying all or a portion of the cost of public facilities related to the development project.'"

The question this case raises is whether the protest procedures in sections 66020 and 66021 apply to the BMR fees and exactions of property the City imposed upon Sterling. Consistent with the plain meaning of the relevant statutes, this Court's jurisprudence, long-established practice, and sound public policy, the answer is yes. For these reasons, this Court should reverse.

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[1] Unless otherwise specified, all statutory references in this brief are to the California Government Code.

II. STATEMENT OF THE CASE

A. The Proceedings in the Trial Court

At pages 2-5 of its opinion, the Court of Appeal describes the factual and procedural background in this case as follows:

"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., Title 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 exactions 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 exactions 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 [of the Government Code] 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.[2] 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.

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[2] In fact, Sterling did not argue the City's BMR *program* was invalid. It alleged the City's "imposition of such unjustified and arbitrary fees and exactions *on this Project* was not based on substantial evidence demonstrating a reasonable 'nexus' to adverse impacts of the Project, or 'rough proportionality' between the amount of the exactions imposed on the Project and the City's costs of addressing impacts reasonably attributed to the Project [in violation of the federal and state Constitutions]." (JA 1:010, italics added.)

"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." Sterling timely filed an appeal from the trial court's order.

B. The Court of Appeal's Opinion

The court of appeal affirmed. Relying on its own recent opinion in *Trinity Park, L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014 (*Trinity Park*), which erroneously imported language from distinct chapters of the Mitigation Fee Act (the Fee Act) that defined "Fees," not "exactions," to conclude that the protest statutes (which authorize the protest of "any fees . . . or other exactions) should be read to include only those exactions that may be deemed to be "imposed for the purpose of 'defraying all or a portion of the cost of public facilities related to the development project.'" (*Id.* at pp. 1036, 1043.) Finding that the "present

case is almost identical to *Trinity Park*," the court of appeal held the City's demands for conveyances of new homes at below-market prices and payments of substantial in-lieu fees were not "exactions" subject to sections 66020 and 66021 because the purposes the City listed for its BMR program did not "describe an attempt to defray the cost of public facilities necessitated in a development project." (Slip Op. at p. 9.)

The court rejected Sterling's attempt to distinguish *Trinity Park* on the grounds that Sterling was 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." (Slip Op. at p. 9.) The court also rejected Sterling's argument that *Trinity Park* was distinguishable because at least some of the City's stated purposes for its BMR exactions would, in fact, have met the "purpose of the fee" test announced in *Trinity Park*. According to the court, it made no difference that "one purpose of the BMR housing program [in Palo Alto] 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."[3] In the court's view, "[t]his has nothing to do with

[3] The court made no mention, however, of a second purpose the City articulated to justify its BMR program, and which Sterling cited at page 40 of its opening brief on appeal, namely, to "[o]ffset the demand on housing that is created by new development." (JA 2:0349.)

defraying the cost of public facilities necessitated by the new development itself." (*Ibid.*)

After the court of appeal denied Sterling's petition for rehearing, this Court granted review.

C. The Statutory Background

Below, the City argued, albeit belatedly, that Sterling's action was barred by the 90-day statute of limitations in section 66499.37 of the Map Act. The Map Act has a long history dating back to at least 1907. (Longtin's California Land Use (2d ed. 1994 printing) § 6.02, p. 582.) Its current version was codified as sections 66410-66499.37 in 1974. (*Ibid.*)

The Map Act concerns a specific type of land use activities: local approval of subdivisions of land. This Court has explained that the Map Act has three principal goals: to encourage orderly community development, to prevent undue burdens on the public, and to protect individual real estate buyers. (*Gardner v. County of Sonoma* (2003) 29 Cal.4th 990, 997-998.) It vests the regulation of the *design* and *improvement* of subdivisions in the legislative bodies of local agencies. (Section 66411; *Beck Dev. Co. v. So. Pacific Transp. Co.* (1996) 44 Cal.App.4th 1160, 1197-1200.) Cities may approve subdivision maps, subject to conditions of approval regulating design and improvement, consistent with state law, and the time for the city to impose such

conditions is when the tentative subdivision map is under consideration. (*Beck Dev., supra*, 44 Cal.App.4th at 1199.)

The Map Act includes its own statute of limitations, limited to this discrete aspect of the development process, i.e., decisions "concerning a subdivision" and conditions attached to a decision approving a subdivision. Specifically, section 66499.37 provides, in part, that "[a]ny action or proceeding to attack, review, set aside, void or annul the decision of an advisory agency, appeal board, or legislative body concerning a subdivision . . . or to determine the reasonableness, legality, or validity of any condition attached thereto . . . 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. . . ."

In several older cases under the Map Act, developers paid disputed subdivision and other development fees "under protest" and were allowed to sue for refunds of the disputed fees. (See, e.g., *Kelber v. City of Upland* (1957) 155 Cal.App.2d 631, 634 [subdivider paid park and school site fees, drainage fees "under protest"]; *S.C. Lawrence v. City of Concord* (1958) 156 Cal.App.2d 531, 533 [drainage fees paid under protest by subdivider]; *Longridge Estates v. City of Los Angeles* (1960) 183 Cal.App.2d 533, 535 [sewer outlet charges paid under protest].)

However, during the 1970s and early 1980s , case law increasingly held that compliance with a subdivision requirement was deemed to

"waive" any right to challenge it. Thus, a development applicant who was subjected to a legally-dubious fee, dedication requirement, or other exaction as a condition of approval under the Map Act (or other land use regulatory regime) either had to stop any work based on the approval and pursue litigation within the applicable limitations period, or proceed with work on the project but be deemed to have waived any right to ever question the condition of approval. (See, e.g., *Pfeiffer v. City of La Mesa* (1977) 69 Cal.App.3d 74, 78.)

The Legislature eventually recognized the inefficiency and unfairness of such a rule.[4] And it recognized that at least some types of conditions of approval (such as those involving payment of money, dedications, some works of improvement, and other exactions) could feasibly be performed or secured "under protest" without harm or risk to the public agency imposing the condition, while the validity of the condition was being adjudicated and the work on the approved project proceeded.

In 1984, the Legislature enacted section 65913.5 (now section 66020), which allowed any party to protest the imposition of "any fees,

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[4] See, e.g., Exhibit (A)(9) to Appellants' two-volume Motion for Judicial Notice of Legislative History (AMJN) that Sterling filed with the court of appeal: "Currently a developer has few alternatives, he must pay the fee or shut the project down. . . ." (*Assembly Housing & Comm. Dev. Committee Report – Minority* – on SB 2136 (1984).)

dedications, reservations, or other exactions imposed on a development project" by (1) giving a written statement of protest within 90 days of when the fees or other exactions were "imposed" and (2) making payment of the disputed fees, or making arrangements to secure the performance of the demanded dedication, reservation or other exaction. (*Shapell Indus., Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 241 (*Shapell Indus.*).) The next year, the Legislature enacted section 65958 (now section 66021) and expanded the applicability of the protest procedure to other types of exactions (e.g., taxes and assessments) and to other types of development projects. (*Williams Commc'ns LLC v. City of Riverside* (2003) 114 Cal.App.4th 642, 657-661.)

This Court recognized that the Legislature enacted these protest statutes as an exception to the prevailing notion that compliance with a condition (even 'under protest') may be deemed a waiver of objections, and in order to provide a statutory process allowing a development applicant to "challenge a permit condition . . . while proceeding with the development." (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 19, fn.9 (*Hensler*).)

The significance of the protest statutes in providing a more effective alternative remedy and process for judicial review of a wide range of fees and other exactions, as well as a different statute of limitations, was widely recognized by local governments and land use practitioners:

> The 1984 and 1985 legislatures have enacted a statutory method, consisting of two procedures, for the challenge (protest) and judicial review of conditions and exactions. *Taken together, the two procedures cover most dedication, improvement, or fee exactions imposed by public entities.* Any party may now protest, pursuant to the procedure set forth in Govt. Code 65913.5 and 66475.4 below, the establishment or imposition of any fees, taxes, assessments, dedication, reservations or other exaction imposed on any development as defined in Govt. Code 65927 or 65928.

(Longtin's California Land Use, *supra*, § 8.30, p. 805, italics added.)

Several years after the two protest statutes were enacted, the Legislature adopted the first few sections of what would later become known as "the Mitigation Fee Act." AB-1600, adopted in 1987 but not effective till 1989, enacted Sections 66000-66003 to provide statutory requirements for the adoption of valid and reasonably-justified development fees.

As discussed below, the legislative history of the Fee Act is something of a patchwork. One aspect of this history, however, is particularly important: for several years, the protest statutes existed as stand-alone statutory enactments before they were moved to the Fee Act for purposes of "consolidation." And, at no point did they contain the "for the purpose of defraying the cost" language that was the centerpiece of the court of appeal's opinion below. More about that later.

For present purposes, three sections of the Fee Act in its present form are particularly important: sections 66000, 66020, and 66021.

Section 66000 provides definitions, "[a]s used in this chapter [5]," for "Development Project," "Fee," "Local Agency," and "Public Facilities," as follows:

> As used in this chapter, the following terms have the following meanings:
>
> (a) "Development project" means any project undertaken for the purpose of development. "Development project" includes a project involving the issuance of a permit for construction or reconstruction, but not a permit to operate.
>
> (b) "Fee" means a monetary exaction other than a tax or special assessment, whether established for a broad class of projects by legislation of general applicability or imposed on a specific project on an ad hoc basis, that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project, but does not include fees specified in Section 66477, fees for processing applications for governmental regulatory actions or approvals, fees collected under development agreements adopted pursuant to Article 2.5 (commencing with Section 65864) or Chapter 4, or fees collected pursuant to agreements with redevelopment agencies that provide for the redevelopment of property in furtherance or for the benefit of a redevelopment project for which a redevelopment plan has been adopted pursuant to the Community Redevelopment Law (Part 1 (commencing with Section 33000) of Division 24 of the Health and Safety Code).
>
> (c) "Local agency" means a county, city, whether general law or chartered, city and county, school district, special district, authority, agency, any other municipal public corporation or district, or other political subdivision of the state.
>
> (d) "Public facilities" includes public improvements, public services, and community amenities.

Section 66020, which now appears in Chapter 9 of the Act, sets forth the procedure for protesting the "imposition of any fees, dedications, reservations, or other exactions imposed on a development project, by a local agency." In broad outline, "any party" party may utilize this protest procedure by doing two things:

"(1) Tendering any required payment in full or providing satisfactory evidence of arrangements to pay the fee when due or ensure performance of the conditions necessary to meet the requirements of the imposition.

"(2) Serving written notice on the governing body of the entity, which notice shall contain all of the following information [list]."

Section 66020, subdivision (d)(1), provides that such a protest must be filed "within 90 days after the date of the imposition of the fees, dedications, reservations, or other exactions to be imposed on a development project." It also imposes an affirmative obligation on the city or other local agency to provide the project applicant a written "notification that the 90-day approval period in which the applicant may protest has begun." Section 66020, subdivision (d)(2), then provides that "[a]ny party who files a protest pursuant to subdivision (a) may file an action to attack, review, set aside, void, or annul the imposition of the fees, dedications, reservations, or other exactions imposed on a development project by a local agency within 180 days after the delivery of the notice."

Section 66021, the later and even more comprehensive protest statute, likewise provides that "[a]ny 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 as defined by section 65927, or development project, may protest [such imposition] as provided in section 66020."

For the Court's convenience, Sterling has attached the full text of the four statutes discussed above to this brief.

III. SUMMARY OF THE ARGUMENT

The Court should reverse the opinion below for four reasons:

First, because the City's BMR exactions at issue are "exactions" within the meaning of section 66020, subdivision(a), Sterling's action is governed by the 180-day statute of limitations in section 66020, subdivision (d)(2). The court of appeal disagreed, holding that because the BMR exactions were not imposed "for the purpose of defraying all or a portion of the cost of public facilities related to the development project" within the meaning of section 66000, subdivision (a), they were not subject to the payment under protest procedure. This holding is at odds with both the plain meaning and the legislative history of the relevant protest statutes, and the court of appeal's opinion effectively adds a limitation the Legislature did not enact.

Section 66020 makes the payment under protest procedure applicable to *any* "fees, dedications, reservations, or other exactions imposed on a development project." Section 66021, subdivision (a), extends the protest procedure even more broadly to include the right to protest any "tax[es]" or "assessment[s], subject to certain limitations, as well as any "[f]ees . . . or other exaction[s]."

Consisting of real property and cash that Sterling is required to transfer to the City, the BMR requirements are classic "exactions" that fall squarely within this broad language. They are not, by contrast, "regulations." (See, e.g., *Fogarty v. City of Chico* (2007) 148 Cal.App.4th 537, 544 [describing "exactions" subject to these protest statutes, and distinguishing them from more traditional land use "restrictions" that are subject to the Map Act].)

There is a logical and functional basis for this distinction between exactions and regulations. Local decisions under the Map Act are primarily intended to *regulate* the use of the land being subdivided. Regardless of how broadly the word "regulate" may be defined, California courts have always differentiated between "regulation" and governmental demands for the transfer of property or money in lieu thereof. Decisions under the Map Act primarily regulate the use of the subdivided lands and such matters as the configuration of lots and the placement of roads and utilities. Disputes over such physical and non-fungible requirements obviously must be

resolved before those roads and utilities are built. Disputes over "exactions," however, the performance of which can be adequately secured while the development proceeds, can be resolved under the protest procedure, if necessary, even after the project is built.

By implying an unwritten limitation on sections 66020 and 66021 and narrowing their applicability only to exactions that may be determined to have been imposed for the purpose of "defraying all or a portion of the cost of public facilities related to the development project," the Court of Appeal misread the statute. The language of the protest statutes, which predates the enactment of the Fee Act, contains no such limitation.

Under the plain meaning of these statutes, there is no inherent conflict between the limitations periods in the Map Act and the protest statutes, and they are not mutually exclusive. As explained in *Fogarty v. City of Chico, supra*, the protest statutes do not apply to all land use restrictions imposed as conditions of subdivision approval, but only those demanding the exaction or "contribution" of property interests or money. Conversely, the Map Act's short period of limitations does not preclude the use of the protest remedy where the condition of subdivision approval demands the exaction of property interests, money, or other exactions not connected with the physical layout of the development.

Second, the court of appeal's holding is also inconsistent with this Court's opinion in *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854

(*Ehrlich*). There, the Court described the statutory scheme that authorizes "'*any party* on whom a fee, tax, assessment, dedication, reservation, or *other exaction* has been imposed'" to utilize the statutory protest procedure. (*Id.* at p. 866, original italics, citation omitted.) The Court observed that the "broadly formulated and unqualified authorization [in section 66020] is consistent with the view that the Legislature intended to require *all* protests to a development fee that challenged the sufficiency of its relationship to the effects attributable to a development project — regardless of the legal underpinnings of the protest — to be channeled to the administrative procedures mandated by the [Mitigation Fee] Act." (*Ibid.*, original italics.)

Sterling challenged the BMR exactions on precisely this basis. Specifically, Sterling alleged the City's imposition of the BMR exactions "was not based on substantial evidence demonstrating a reasonable 'nexus' to adverse impacts of the Project, or 'rough proportionality' between the amount of the exactions imposed on the Project and the City's costs of addressing impacts reasonably attributed to the Project. . . ."

Third, even if the court of appeal was correct in limiting the protest procedure to "exactions imposed for the purpose of 'defraying all or a portion of the cost of public facilities related to the development project,'" the BMR exactions still qualify. Rightly or wrongly, the City *claimed* it imposed such exactions, at least in part, for this reason, i.e., to "[o]ffset the demand on housing that is created by new development" and to "[m]itigate

environmental and other impacts that accompany new residential and commercial development." The City's "mitigate the impact" justification compels the applicability of the protest statutes.

The legislative history of the protest statutes confirms the expansive scope of the protest remedy and the Legislature's efforts to create a "bright line" for determining which types of exactions can be challenged in this way. Permitting such a challenge whenever a local agency justifies imposing a fee or "other exaction" by claiming it has a "reasonable relationship" with the public impacts of the development, or when a developer claims that no such nexus exists, is exactly this type of bright line.

Fourth, interpreting the payment under protest statutes expansively in the manner Sterling suggests also avoids any constitutional issue that might otherwise be raised regarding the sufficiency of the standards developed under California law to review development exactions, an issue this Court attempted to put to rest in *Ehrlich, supra.* The bright line rule chosen by the Legislature, under which an exaction is an exaction, avoids re-opening this constitutional concern.

IV. ARGUMENT

A. The Opinion Below is at Odds with the Plain Meaning and Legislative History of Section 66020 and 66021

Section 66020 makes the payment under protest procedure applicable to challenge the "imposition of any fees, dedications, reservations, or other exactions imposed on a development project, as defined in section 66000, by a local agency." Section 66021 expanded on the scope of the protest procedure. The question, as the court of appeal framed it, was whether the BMR requirements at issue constituted an "other exaction" within the meaning of this section. According to common dictionary definitions, requiring Sterling to convey real property and money to the City qualifies as an "exaction," i.e., "compensation arbitrarily or wrongfully demanded." (*Williams Commc'ns v. City of Riverside, supra,* 114 Cal.App.4th at pp. 658-659.)

Similarly, in *Fogarty v. City of Chico, supra,* 148 Cal.App.4th 537, the Third District addressed the interplay of section 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 Map Act. The court distinguished "exactions," which "divest" an applicant of money or property, from ordinary "restrictions" which merely limit the use of property. (*Id.* at p. 544). Because the development condition in that case merely limited the

use of part of the developer's property, and thus was neither a fee nor an "exaction," the court held that section 66020 was not applicable. Conversely, the opinion indicated that the payment under protest procedure in section 66020 *would* have been applicable if the City had required the transfer of an interest in the developer's property, as in this case. (*Ibid.*)

Likewise, in *Bright Development v. City of Tracy* (1993) 20 Cal.App.4th 783, 790, the Third District did not question the applicability of section 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 the costs" of public facilities caused by new development.

In *Building Industry Association of Central California v. City of Patterson* (2009) 171 Cal.App.4th 886, 899-890, the Fifth District invalidated the City's "affordable housing in lieu fee," which the developer had paid in accordance with section 66020. No party challenged the propriety of that procedure on appeal. And, although the court cautioned that it was not expressing any opinion on whether the general requirements of the Mitigation Fee Act (e.g., factual findings under section 66001) applied to such fees for the purpose of providing affordable housing, it held that such in-lieu fees were subject to the same legal standards as generally applied to other types of development fees and exactions. (*Id.* at p. 897 & fn. 13.)

The court of appeal, however, rejected this straightforward interpretation. Instead, drawing upon the definition of "Fee" in section 66000, subdivision (b), the court held that the only exactions that may be protested under the 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.'" (Slip Op. at p. 8, citing *Trinity Park, supra,* 193 Cal.App.4th at p. 1043.)

There are three problems with the court of appeal's interpretation. First, it gives no weight to the Legislature's use of the broad and inclusive word "any" in the protest statutes in describing the category of 'fees, dedications . . . or other exactions' that may be protested. (See *Utility Cost Management v. Indian Wells Valley Water Dist.* (2001) 26 Cal.4th 1185, 1191 [Legislature's use of the word "any"' serves to "broaden the applicability" of a statutory provision.)

Second, section 66000 provides that the definitions in that section, including the definition of "[f]ee" in subdivision (b), only apply "[a]s used in this chapter," i.e., Chapter 5 of the Mitigation Fee Act. The payment under protest procedure set forth in section 66020, however, appears in Chapter 9 of the Act.

Third, although section 66020, subdivision (a), includes a cross-reference to "development project, as defined in section 66000," it does *not* include a cross-reference, or any reference, to the definition of "Fee" in

section 66000. At the threshold, then, the "for the purpose of defraying the cost" limitation the court of appeal imposed on the otherwise unlimited "exactions" in section 66020 is at odds with a straightforward interpretation of the relevant statutory language. In interpreting a statute, courts "begin by examining the statutory language, giving the words their usual and ordinary meaning. If we find no ambiguity, we presume that the Legislature meant what it said, and the plain meaning of the language governs." (*Dept. of Cal. Highway Patrol v. Superior Court* (2008) 158 Cal.App.4th 726, 735.) The word "any," as used in modifying "exactions" in section 66020, subdivision (a) is not ambiguous.

The relevant legislative history also supports a broad interpretation of the payment under protest procedure. In *Branciforte Heights, LLC v. City of Santa Cruz* (2006) 138 Cal.App.4th 914, 928 (*Branciforte*), the court of appeal observed that the "[t]he legislative history of the 1998 amendment of section 66021 suggests the Legislature's understanding was that the Fee Act generally governed developer's protests against fees imposed upon developments." In particular, the court noted that, "[b]efore it passed the Mitigation Fee Act in 1990, the Legislature had already created a procedure in the Map Act for challenging subdivision fees." (*Ibid.*) The court concluded that where, as here, "a party properly avails itself of the fee protest procedures of section 66020 to challenge allegedly excessive fees imposed upon a development project or as a condition of

obtaining governmental approval of a development or development project (see §§ 66020, 66021), the [180-day] limitations period is the one established by § 66020." (*Ibid.*)

Significantly, when section 66020 was first enacted in 1984 as section 65913.5 (Sen. Bill No. 2136), it did *not* include the limiting "purpose of defraying all or a portion of the cost of public facilities" language that was the centerpiece in the court of appeal's opinion. Instead, it applied broadly and without limitation to the "imposition of any fees, taxes, assessments, dedications, reservations, or other exactions imposed on a residential housing development. . . ." (AMJN, Vol. 2, Exh. C.)

Before section 65913.5 was enacted in 1984, a developer had no way of challenging the fees a local agency imposed on a residential project without refusing to pay them. (See, e.g., *Pfeiffer v. City of La Mesa, supra,* 69 Cal.App.3d at p. 78.) "Since payment is a condition of obtaining the building permit, a challenge meant that the developer would be forced to abandon the project. . . . [Sen. Bill No. 2136] provided a procedure whereby a developer could pay the fees under protest, obtain the building permit, and proceed with the project while pursuing an action to challenge the fees. If the action were successful, the fees would be refunded with interest." (*Shapell Indus., supra,* 1 Cal.App.4th at p. 241.)

Likewise, current section 66021, the other payment under protest statute, which was enacted in 1985 as section 65958 in Assembly Bill 2492

also did not include the limiting "purpose of defraying all or a portion of the cost of public facilities" language. In addition to adding new section 65958, AB 2492 amended section 65913.5 to exclude "ad valorem taxes" — but nothing else — from the payment under protest procedure. (AMJN, Vol. 2, Exh. C.)

In 1987, the Legislature enacted sections 66000–66003 (AB 1600), the foundation for what later became the Fee Act, to "establish a procedure for all cities, counties and districts to follow when imposing fees as a condition of approval of development." New section 66000, subdivision (b) defined "fee" in a way that included the "purpose of defraying the cost" language. This new legislation did not, however, make any change to the payment under protest procedures, which continued to apply broadly to "any fees, taxes, assessments, dedications, reservations or other exactions" (except with respect to section 65913.5, ad valorem taxes). (AMJN, Ex. B.)

In 1988, section 65913 was renumbered as section 66008. No change was made, however, in the substance of the statutory language, which still applied to "any" fees, etc. (except ad valorem taxes). (AMJN, Vol. 2, Exh. C [Assem. Bill No. 3980].)

In 1990, the Legislature adopted Assembly Bill 3228 which renumbered section 66008 as section 66020 and added it to what for the first time was called the "Mitigation Fee Act." The purpose of the Act was to "consolidate 'various limitations and procedural requirements applicable

to the imposition by local governmental agencies of fees and exactions of real property and development.'" (*Branciforte, supra,* 138 Cal.App.4th at p. 926, citation omitted.) AB 3228 did not, however, make any change in the substance of section 66020. Nor, as discussed above, did it include any cross-reference in section 66020 to the definition of "fee" in section 66000, subdivision (b), including its "purpose of defraying the cost" language.

In 1996, the Legislature enacted Assembly Bill 3081 to amend section 66020 to delete the words "residential housing" before the word "development" and to add the phrase, "project, as defined in section 66000" after the word "development." Although these changes were made to broaden the scope of section 66020 to apply to all "development projects" (not just residential housing), the Legislature made no changes to limit the scope of the payment under protest procedure. (AMJN, Vol. 2, Exh. D [Assem. Bill No. 3081].) Stated another way, by adding the cross-reference to the definition of "development project" in section 66000 and deleting the limitation to "residential" development, the Legislature demonstrated its intent to *broaden* the payment under protest procedure. This definitional cross-reference is the same language the court of appeal misconstrued as *narrowing* section 66020, subdivision (b), in *Trinity Park, supra,* 193 Cal.App.4th 1014.

Assembly Bill 3081 also added a second sentence to section 66020, subdivision (d)(1), requiring each local agency to provide specific written

notice to protest applicants to trigger the running of the period for protest and the corresponding statutes of limitation. The purpose of this change was to remove the uncertainty caused by *Ponderosa Homes, Inc. v. City of San Ramon* (1994) 23 Cal.App.4th 1761, as to when the 90-day protest period began running. In so doing, the Legislature acted to clarify the payment under protest procedure. In doing so, it again did not narrow its scope. (AMJN, Vol. 2, Exh. D [Assem. Bill No.3081].)

In sum, the legislative history of the payment under protest statutes set forth in sections 66020 and 66021 shows they were enacted, with no "purpose of defraying the cost" limitation, before the Fee Act became law. And, although these two statutes were added to the Act in 1990 (to "consolidate various limitations and procedural requirements"), the Legislature did not purport to limit their scope, whether through a cross-reference to the definition of "fee" in section 66000, subdivision (b), or otherwise.

The all-important limitation the court of appeal implied and imposed on section 66020, i.e., that the only exactions that can be challenged by the payment under protest procedure "are those exactions imposed for the purpose of 'defraying all or a portion of the cost of public facilities related to the development project,'" thus finds no support in either the language of sections 66020-66021 or their legislative history.

In addition, applying the wrong statute of limitations, the 90-day period in section 66499.37 of the Map Act, would frustrate the Legislature's intent in establishing the protest procedure. When challenges are properly allocated between the Subdivision Map Act and the protest procedure, actions that must be decided before ground is broken are properly subject to the limitations period of section 66499.37, while actions that need not be challenged before construction begins can be challenged by the protest procedure by making arrangements to secure the demanded payments or performance while the project proceeds. Fees and most other types of exactions, including the BMR fees and exactions in this case, fall into this category.[5]

By contrast, using the protest procedure to challenge whether there is a reasonable nexus between the exactions imposed by a public agency and a project's effects, as in the present case, is both feasible and desirable. Indeed, the Legislature created the protest procedure so that such "nexus" disputes could be resolved without halting construction of the development project so that building and protest could proceed at the same time.

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[5] If a local agency believes that the immediate construction of "certain public improvements or facilities" demanded as conditions of approval are essential to the public health, safety, and welfare, section 66020, subdivision (c) allows the agency, after making proper and valid findings, to suspend the approval. Thus, in those rare situations, the local government can protect itself against risk of any bona fide harm to public welfare that might arise from use of the protest procedure.

(*Shapell Indus., supra*, 1 Cal.App.4th at p. 241.) Requiring such challenges to be made instead through the procedures in the Subdivision Map Act, including its limitations period, would run counter to this clearly apparent Legislative intent.

Even if there were ambiguity as to which statute applied, the Legislature's intent is best served by resolving the ambiguity as it was resolved in *Branciforte, supra,* 138 Cal.App.4th at p. 927. In *Branciforte*, as here, the question "is whether the statute of limitation provided by the Map Act (§66499.37) or the Mitigation Fee Act (§66020) applies to this mandate action." (*Id.* at p. 926.) The court noted that, "'[i]t is a settled rule of statutory construction that a special statute dealing with a particular subject controls and takes priority over a general statute.'" (*Id.* at p. 924, citations omitted.) Hence, if the statute of limitations in section 66020 applies, which Sterling submits it does, this more specific special statute controls and takes priority over the statute of limitations in the more general Map Act.

B. The Court of Appeal's Opinion Is Also Inconsistent with This Court's Jurisprudence

The opinion below also cannot be squared with this Court's holding in *Ehrlich, supra,* 12 Cal.4th at p. 866. There, after reviewing the relevant legislative history, the Court held that the Fee Act 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 through the payment under protest procedure. (Original italics, citation omitted.)

The Court went on to observe that, "[s]uch a broadly formulated and unqualified authorization is consistent with the view that the Legislature intended to require *all* protests to a development fee that challenged the sufficiency of its relationship to the effects attributable to a development project, regardless of the legal underpinnings of the protest, to be channeled to the administrative procedures mandated by the Act." (*Ehrlich, supra,* 12 Cal.4th at p. 866, original italics.)

Sterling's lawsuit was quintessentially "a protest to a development fee that challenged the sufficiency of [the BMR exactions] to the effects attributable to [Sterling's development]." Specifically, Sterling alleged that, "the City's imposition of such unjustified and arbitrary fees and exactions on this Project was not based on substantial evidence demonstrating a reasonable 'nexus' to adverse impacts of the Project, or 'rough proportionality' between the amount of the exactions imposed on the Project and the City's costs of addressing impacts reasonably attributed to the Project or to new residential development, in violation of the requirements of the Constitutions of the United States and the State of California (*Nollan v. Cal. Coastal Comm'n* (1987) 483 U.S. 825 [(*Nollan*)];

Dolan v. City of Tigard (1994) 512 U.S. 374; *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854), and in violation of the above-described legal requirements applicable to such development fees and exactions (see, without limitation, Paragraph 15 above)." (Joint Appendix (JA) 1:010.)

The Court's opinion in *Barratt American, Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685 (*Barratt*) underscores this conclusion. There, the Court recognized the Legislature had expressly excluded "a long list of local regulatory fees" described in sections 66014 and 66016 from the scope of the protest remedy, including "building permit and plan review fees." In distinguishing such regulatory fees and service charges from "development fees" that may be subject to the protest remedy, the Court explained that the payment under protest statute "applies only to 'development fees' that alleviate the effects of development on the community and does *not* include fees for specific regulations or services," including fees for building permits. (*Id.* at p. 696, original italics.) The BMR exactions at issue here are plainly *not* fees for specific regulations or services.

In *Barratt,* the Court also observed that section 66016 of the Mitigation Fee Act expressly made the inspection and permit fees at issue, as well as the water and sewer connection fees under section 66013, subject to the 120-day statute of limitations in section 66022, not section 66020. (*Barratt, supra,* 37 Cal.4th at p. 695-696.) This "included unless expressly

excluded" approach is exactly the bright line Sterling urges, in the alternative, in this case.

C. Even If the Court of Appeal Was Correct in Limiting the Definition of "Exactions," the BMR Exactions Fall Within This Definition

Even if the court of appeal correctly concluded the payment under protest procedure is limited to exactions that are "imposed for the purpose of 'defraying all or a portion of the cost of public facilities related to the development project,'" the City's demand for affordable housing units and in-lieu fees still qualifies. The court of appeal disagreed because, in its view, the purposes listed in the City's BMR program did not "describe an attempt to defray the cost of public facilities necessitated in a development project." (Slip Op. at p. 8, citing *Trinity Park, supra,* 193 Cal.App.4th at p. 1043.) This conclusion is erroneous for three reasons.

First, subdivision (c) of the Palo Alto Municipal Code (PAMC) section 18.14.020 describes one purpose of the BMR ordinance as being to "[o]ffset the demand on housing that is created by new development." (JA 2:0349.) Likewise, PAMC, subdivision (d), states a second purpose of the BMR ordinance 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 and transit related air quality impacts, promoting jobs/housing balance and reducing the demands placed on transportation infrastructure in

the region." (JA 2:0349.) Thus, from the City's standpoint, the exactions of housing units and in-lieu fees it imposed upon Sterling were, in fact, imposed for the "purpose of deferring all or a portion of the cost of public facilities related to the development project" within the meaning of section 66000, subdivision (b).

The court of appeal made no mention of PAMC, subdivision (c). And, although it acknowledged the "[m]itigate environmental and other impacts that accompany new residential and commercial development" purpose in PAMC, subdivision (d), the court held this had "nothing to do with deferring the cost of public facilities necessitated by the new development itself." (*Id.* at p. 10.) Not so. That the City obviously *intended* the BMR requirements to mitigate environmental and other impacts that accompany new residential and commercial development, by its terms, brought such requirements within the broad statutory language in section 66000, subdivision (b).

Second, even though the court of appeal disagreed that the City's stated rationale fairly describes the purpose of the BMR requirements, the City *claimed* that it did. In terms of whether Sterling was entitled to invoke the payment under protest procedure, that should have been the end of the matter. Rightly or wrongly, because the City attempted to justify its BMR requirements as a mitigation measure necessitated by Sterling's development, the City thereby also defined the applicable statute of

limitations as being the 90-day limitations period under the payment under protest procedure. Just as the nature of the claims in a party's complaint defines the applicable statute of limitations,[6] so also should a city's claim that the BMR requirements were necessary to "[m]itigate environmental and other impacts that accompany new residential and commercial development" (PAMC section 18.14.020, subdivision (d)) permit Sterling to challenge those requirements within the 90-day limitations period in section 66020, subdivision (b).

Third, if the court of appeal was correct in importing the definitions in section 66000 into the payment under protest procedure in section 66020, it should have done so comprehensively to create a "bright line" for determining when the procedure could and could not be used. Specifically, instead of construing the definition 66000 narrowly to apply the "defray the cost" definition of "fee" to "other exaction" in section 66020, subdivision (a) (and presumably also to "dedications" and "reservations"), the court should have construed section 66000 to encompass *all* "fees, dedications, reservations, or other exactions" except as expressly *excluded* from the definition of "Fee" in subdivision (b).

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[6] "'[T]he nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of the statute of limitations under our code.' [Citation.]." (*Hensler, supra,* 8 Cal.4th at pp. 22-23.)

Construed in this way, the payment under protest procedure would not apply to, in the language of section 66000, subdivision (b), "fees specified in section 66477 [Quimby Act park fees], fees for processing applications for governmental regulatory actions or approvals, fees collected under development agreements . . . , or fees collected pursuant to [certain] agreements with redevelopment agencies." It would also not apply to fees for which the Fee Act specifically designates the 120-day statute of limitations in section 66022, e.g., fees for water or sewer connections (§ 66013), zoning variances, zoning changes, use permits, building permits, and building inspections (§ 66014), or existing fees or service charges (§ 66016).

Likewise, the payment under protest procedure would also not apply when no "fee" or "other exaction" divesting a developer of either money or a possessory interest in land is at issue, e.g., so-called "regulatory takings" (*Hensler, supra,* 8 Cal.4th at p. 9 [ordinance prohibiting construction on major ridge lines]) and *Fogarty, supra,* 148 Cal.App.4th at pp. 540, 544 [city council action reducing density of development].)

All *other* fees and other monetary exactions, however, however, including the BMR exactions at issue here, could be challenged under section 66020 and be governed by its 180-day statute of limitations. This easily-grasped "bright line" is consistent with the relevant statutory language. It also comports with the legislative history of section 66020 that

reflects the Legislature's intent to clarify and expand the applicability of the payment under protest procedure.

D. An Expansive Interpretation of the Payment Under Protest Statute Also Avoids Reopening the Constitutional Issue The Court Put to Rest in *Ehrlich*

Finally, by removing the BMR real property in-lieu fees at issue here from the scope of the payment under protest procedure, the court of appeal created a situation that threatens to revive the constitutional problems this Court put to rest in *Ehrlich, supra.* There, the Court recognized that the Supreme Court's then-new heightened scrutiny mandate on development exactions, as set forth in *Nollan* and *Dolan*, *supra,* had "cast substantial doubt on the sufficiency" of the standards developed in California law to review development exactions. (*Ehrlich, supra,* 12 Cal.4th at p. 866.) The Court removed any constitutional doubts about the sufficiency of California's procedures for reviewing development exactions by interpreting the Fee Act precisely as the statute's plain language demands, in a broad and unqualified manner, to ensure that "*any* party" may channel "*all* protests to a development fee that challenge the sufficiency of its relationships to the effects attributable to a development project" through the administrative procedures mandated by the Fee Act. (*Ibid.*)

Although the precise question in *Ehrlich* concerned the scope of the legal grounds for challenges under the Fee Act, the same type of constitutional doubts arise from the court of appeal's opinion interpreting

the Fee Act to apply only to fees for the "purpose of defraying all or a portion of the cost of public facilities." For example, if the court of appeal's interpretation were correct, then an exaction of the type at issue in *Nollan, supra,* 483 U.S. at p. 860 (beach access) would be unreviewable under the Fee Act because beach access would be unlikely to meet the straitened definition of "public facility" adopted both in *Trinity Park, supra,* 193 Cal. App. 4th at pp. 1040-1041, and the opinion below (Slip. Op. at p. 10.)

Likewise, the developmental impact *Ehrlich* considered, the loss of *private* recreational space (*Ehrlich, supra,* 12 Cal.4th at p. 860), would also be removed from the scope of an Fee Act under the narrow definition of "public facilities" the court of appeal adopted. The bright line rule chosen by the Legislature, however, under which an exaction is an exaction, avoids re-opening the constitutional concerns *Ehrlich* put to rest.

V. CONCLUSION

For these reasons, the Court should reverse the judgment of the court of appeal with instructions to reverse the trial court's grant of summary judgment in favor of the City and remand the matter to the trial court for further proceedings.

Dated: January 29, 2013

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c), I certify that the foregoing Opening Brief on the Merits is proportionately spaced, has a typeface of 13 points, and contains 9,182 words, according to the word processing program with which it was prepared.

Dated: January 29, 2013

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California Code

- California Code
- CALIFORNIA GOVERNMENT CODE
- TITLE 7. PLANNING AND LAND USE
- DIVISION 2. SUBDIVISIONS
- Chapter 7. Enforcement and Judicial Review
- Article 3. Judicial Review

§ 66499.37 Gov't

Any action or proceeding to attack, review, set aside, void, or annul the decision of an advisory agency, appeal board, or 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. Thereafter all persons are barred from any action or proceeding or any defense of invalidity or unreasonableness of the decision or of the proceedings, acts, or determinations. The proceeding shall take precedence over all matters of the calendar of the court except criminal, probate, eminent domain, forcible entry, and unlawful detainer proceedings.

(Added by Stats. 1974, c. 1536, p. 3511, § 4, operative March 1, 1975. Amended by Stats. 1980, c. 1152, p. 3799, § 14; Stats. 2007, c. 612, § 9.)

California Code

California Code

CALIFORNIA GOVERNMENT CODE

TITLE 7. PLANNING AND LAND USE

DIVISION 1. PLANNING AND ZONING

Chapter 5. Fees for Development Projects

§ 66000 Gov't

As used in this chapter, the following terms have the following meanings:

(a) "Development project" means any project undertaken for the purpose of development. "Development project" includes a project involving the issuance of a permit for construction or reconstruction, but not a permit to operate.

(b) "Fee" means a monetary exaction other than a tax or special assessment, whether established for a broad class of projects by legislation of general applicability or imposed on a specific project on an ad hoc basis, that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project, but does not include fees specified in Section 66477, fees for processing applications for governmental regulatory actions or approvals, fees collected under development agreements adopted pursuant to Article 2.5 (commencing with Section 65864) of Chapter 4, or fees collected pursuant to agreements with redevelopment agencies that provide for the redevelopment of property in furtherance or for the benefit of a redevelopment project for which a redevelopment plan has been adopted pursuant to the Community Redevelopment Law (Part 1 (commencing with Section 33000) of Division 24 of the Health and Safety Code).

(c) "Local agency" means a county, city, whether general law or chartered, city and county, school district, special district, authority, agency, any other municipal public corporation or district, or other political subdivision of the state.

(d) "Public facilities" includes public improvements, public services, and community amenities.

(Added by Stats. 1987, c. 927, § 1, operative Jan. 1, 1989. Amended by Stats. 1988, c. 418, § 7; Stats. 1990, c. 1572, § 14; Stats. 1996, c. 549, § 1; Stats. 2006, c. 538, § 319.)

California Code

California Code

CALIFORNIA GOVERNMENT CODE

TITLE 7. PLANNING AND LAND USE

DIVISION 1. PLANNING AND ZONING

Chapter 9. Protests, Legal Actions, and Audits

§ 66020 Gov't

(a) Any party may protest the imposition of any fees, dedications, reservations, or other exactions imposed on a development project, as defined in Section 66000, by a local agency by meeting both of the following requirements:

(1) Tendering any required payment in full or providing satisfactory evidence of arrangements to pay the fee when due or ensure performance of the conditions necessary to meet the requirements of the imposition.

(2) Serving written notice on the governing body of the entity, which notice shall contain all of the following information:

(A) A statement that the required payment is tendered or will be tendered when due, or that any conditions which have been imposed are provided for or satisfied, under protest.

(B) A statement informing the governing body of the factual elements of the dispute and the legal theory forming the basis for the protest.

(b) Compliance by any party with subdivision (a) shall not be the basis for a local agency to withhold approval of any map, plan, permit, zone change, license, or other form of permission, or concurrence, whether discretionary, ministerial, or otherwise, incident to, or necessary for, the development project. This section does not limit the ability of a local agency to ensure compliance with all applicable provisions of law in determining whether or not to approve or disapprove a development project.

(c) Where a reviewing local agency makes proper and valid findings that the construction of certain public improvements or facilities, the need for which is directly attributable to the proposed development, is required for reasons related to the public health, safety, and welfare, and elects to impose a requirement for construction of those improvements or facilities as a condition of approval of the proposed development, then in the event a protest is lodged pursuant to this section, that approval shall be suspended pending withdrawal of the protest, the expiration of the limitation period of subdivision (d) without the filing of an action, or resolution of any action filed. This subdivision confers no new or independent authority for imposing fees, dedications, reservations, or other exactions not presently governed by other law.

(d) (1) A protest filed pursuant to subdivision (a) shall be filed at the time of approval or conditional approval of the development or within 90 days after the date of the imposition of the fees, dedications, reservations, or other exactions to be imposed on a development project. Each local agency shall provide to the project applicant a notice in writing at the time of the approval of the project or at the time of the imposition of the fees, dedications, reservations, or other exactions, a statement of the amount of the fees or a description of the dedications, reservations, or other exactions, and notification that the 90-day approval period in which the applicant may protest has begun.

(2) Any party who files a protest pursuant to subdivision (a) may file an action to attack, review, set aside, void, or annul the imposition of the fees, dedications, reservations, or other exactions imposed on a development project by a local agency within 180 days after the delivery of the notice. Thereafter, notwithstanding any other law to the contrary, all persons are barred from any action or proceeding or any defense of invalidity or unreasonableness of the imposition. Any proceeding brought pursuant to this subdivision shall take precedence over all matters of the calendar of the court except criminal, probate, eminent domain, forcible entry, and unlawful detainer proceedings.

(e) If the court finds in favor of the plaintiff in any action or proceeding brought pursuant to subdivision (d), the court shall direct the local agency to refund the unlawful portion of the payment, with interest at the rate of 8 percent per annum, or return the unlawful portion of the exaction imposed.

(f) (1) If the court grants a judgment to a plaintiff invalidating, as enacted, all or a portion of an ordinance or resolution enacting a fee, dedication, reservation, or other exaction, the court shall direct the local agency to refund the unlawful portion of the payment, plus interest at an annual rate equal to the average rate accrued by the Pooled Money Investment Account during the time elapsed since the payment occurred, or to return the unlawful portion of the exaction imposed.

(2) If an action is filed within 120 days of the date at which an ordinance or resolution to establish or modify a fee, dedication, reservation, or other exactions to be imposed on a development project takes effect, the portion of the payment or exaction invalidated shall also be returned to any other person who, under protest pursuant to this section and under that invalid portion of that same ordinance or resolution as enacted, tendered the payment or provided for or satisfied the exaction during the period from 90 days prior to the date of the filing of the action which invalidates the payment or exaction to the date of the entry of the judgment referenced in paragraph (1).

(g) Approval or conditional approval of a development occurs, for the purposes of this section, when the tentative map, tentative parcel map, or parcel map is approved or conditionally approved or when the parcel map is recorded if a tentative map or tentative parcel map is not required.

(h) The imposition of fees, dedications, reservations, or other exactions occurs, for the purposes of this section, when they are imposed or levied on a specific development.

(Amended by Stats. 1996, Ch. 549, § 2, effective January 1, 1997.)

California Code

§ 66021 Gov't

(a) 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, as defined by Section 65927, or development project, may protest the establishment or imposition of the fee, tax, assessment, dedication, reservation, or other exaction as provided in Section 66020.

(b) The protest procedures of subdivision (a) do not apply to the protest of any tax or assessment (1) levied pursuant to a principal act that contains protest procedures, or (2) that is pledged to secure payment of the principal of, or interest on, bonds or other public indebtedness.

(Added by Stats. 1990, c. 1572, § 22. Amended by Stats. 1998, c. 689, § 7.)

Sterling Park L.P. et al., v. City of Palo Alto et al.
In the Supreme Court of the State of California, Case No. S204771
On Review from the Sixth District Court of Appeal, 6th Civil No. H036663
After an Appeal from the Superior Court of Santa Clara County, Case No. 109-CV-154134

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

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 January 29, 2013, I served the following documents described as

OPENING BRIEF ON THE MERITS

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

Juliet E. Cox
Goldfarb Lipman LLP
1300 Clay Street, 9th Floor
City Center Plaza
Oakland, CA 94612
Attorney for City of Palo Alto

☒ **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 January 29, 2013, at San Francisco, California.

Richard Breese