Civil No. S204771

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Sterling Park L.P. *et al.*,
Plaintiffs, Appellants, and Petitioners;

v.

City of Palo Alto,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, SIXTH APPELLATE DISTRICT (Case No. H036663)

ON APPEAL FROM A JUDGMENT OF THE SANTA CLARA COUNTY SUPERIOR COURT (Case No. 1-09-CV-154134)

Honorable Kevin McKenney, Judge Presiding

CITY OF PALO ALTO'S ANSWER BRIEF ON THE MERITS

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners Sterling Park L.P. and Classic Communities Inc. (together, "Petitioners") applied to the City of Palo Alto for permission to demolish light industrial buildings and replace them with 96 for-sale residential condominiums. Palo Alto approved a tentative subdivision map for this proposal in November 2006, on various conditions including the express condition that Petitioners make some of the 96 housing units affordable to households with moderate and low incomes (the "Inclusionary Requirement"), as required by Palo Alto's Comprehensive Plan. When Petitioners began selling the finished condominiums nearly three years later, they filed suit seeking either to avoid complying with the Inclusionary Requirement or to recover from Palo Alto the revenue they claim to have lost as a result of compliance.

The Subdivision Map Act requires any lawsuit challenging the conditions of approval of a tentative subdivision map to be filed and served within 90 days after the approval decision. Moreover, this Court and the Courts of Appeal have held that a person who accepts the benefits of a local government's conditional land-use approval by commencing the land use waives any later challenge to the conditions of that approval. On Palo Alto's motion for summary judgment, the trial court ruled that Petitioners' October 2009 challenge to the Inclusionary Requirement was untimely under the Subdivision Map Act, and the Court of Appeal affirmed.

Under limited circumstances, the Government Code permits a developer to delay initiating a challenge to the conditions on which a local government agency has approved the developer's project, and to proceed with the project despite the challenge. This "performance under protest" system gives developers 90 days to object to "fees, dedications, reservations, or other exactions to be imposed on a development project," and 180 days to sue, as long as they perform the "fees, dedications, reservations, or other exactions" fully while the litigation is pending. (Gov. Code, § 66020, subds. (a), (d).) In reliance on this exception both to the Subdivision Map Act's statute of limitations and to the rule barring challenges to conditions of development approval after commencement of development, Petitioners ask this Court to reverse the judgment of the Court of Appeal and to remand this action to the trial court.

But Government Code section 66020 does not apply to this lawsuit. Rather than being a "fee[], dedication[], reservation[], or other exaction[]," the Inclusionary Requirement is a land-use regulation, which restricts the use Petitioners may make of their property. If Petitioners had objected to following this regulation in developing and selling their homes, they should have commenced litigation within 90 days after the City Council approved their tentative subdivision map, and before building and selling the condominiums. Because they did not, Palo Alto asks this Court to affirm the judgment of the Court of Appeal.

II. FACTUAL SUMMARY

For almost forty years, Palo Alto has required new housing developments in Palo Alto to include affordable housing. Palo Alto applied this requirement as a condition of approving Petitioners' proposal for a condominium development called Sterling Park, and Petitioners accepted this conditional approval by subdividing the project site and constructing new homes. Three years later, Petitioners challenged the conditions on which Palo Alto had approved Sterling Park.

A. Palo Alto's Affordable Housing Requirements

In Palo Alto, homes for sale on the open market typically are affordable only to households with incomes well above the area median. (Joint Appendix on Appeal ["JA"], 1:0188-89.) In 2000, for example (the latest date for which the appellate record includes figures), the median household income in Palo Alto was $90,377, considerably higher than the median of $74,355 for all of Santa Clara County. (JA, 1:0188.) The median sales price for a detached home in Palo Alto in that same year was approximately $1 million, a price that would have been affordable only to a household with an income over $275,000 (three times Palo Alto's median). (JA, 1:0189.) Even an attached condominium-style home in Palo Alto that sold in 2000 for the median price ($546,000) would have been affordable only to a household with an income over $163,000, nearly twice Palo Alto's median. (JA, 1:0189.)

To address this issue, Palo Alto has required since 1974 that new housing developments include units affordable to households with low and moderate incomes. (JA, 1:0190.) This inclusionary affordable housing program provides most of the new housing in Palo Alto that is affordable to households with moderate incomes, and also is an essential tool for meeting Palo Alto's share of regional housing needs under the state Housing Element Law. (JA, 1:0190; *see* Gov. Code, § 65580, subd. (d) ["Local and state governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community."].) At all times material to this action, the Housing Element of Palo Alto's Comprehensive Plan[1] has required 20% of housing units in new residential developments on more than 5 acres of land to be affordable to households with low or moderate incomes.[2] (JA, 1:0142, 1:0211-13.)

The Comprehensive Plan requires a developer to design its project to include affordable housing units, "comparable to other units in the development." (JA, 1:0211.) The "program objective is to obtain actual

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[1] The Comprehensive Plan is a "General Plan," as Government Code section 65300 uses that term (JA, 1:0142), and as such is the "constitution" for Palo Alto's planning and zoning decisions. (*Lesher Communications Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540.)

[2] The Inclusionary Requirement applicable to Sterling Park derives from the Comprehensive Plan. Palo Alto amended the Palo Alto Municipal Code to add a description of the inclusionary affordable housing program in 2008, after approving Sterling Park. (JA, 2:0348-50.)

housing units or buildable parcels within each development rather than off-site units or in-lieu payments." (JA, 1:0211.) If, but only if, inclusion of affordable housing units would be infeasible, a developer of market-rate housing may propose an alternative method of satisfying the Inclusionary Requirement, such as providing affordable housing units elsewhere, offering "vacant land suitable for affordable housing construction," or paying into Palo Alto's "Housing Development Fund," which Palo Alto uses to subsidize affordable housing development. (JA, 1:0212, 1:0274.) If a would-be developer proposes to include the requisite proportion of affordable units in its project, however, Palo Alto cannot demand off-site units, vacant land, or money instead. (JA, 1:0211-12.)

The Comprehensive Plan also provides a procedure for a residential development applicant to seek a complete waiver of the requirement to include affordable housing in an otherwise market-rate development. (JA, 1:0213.) An application for such a waiver is due within fifteen days after a project applicant enters into a "BMR ['Below Market Rate'] agreement" describing how the applicant will satisfy the affordability requirement. (JA, 1:0213.) The procedure allows both the City Council and the public to comment on whether Palo Alto should modify or waive the inclusionary affordable housing program with respect to the proposed development. (JA, 1:0213.)

B. The Sterling Park Development

When Petitioners applied to Palo Alto for permission to develop Sterling Park, the development site was two adjacent legal parcels improved with buildings suitable for commercial and industrial use. (JA, 2:0375.) Petitioners proposed to merge the parcels, demolish the existing improvements, resubdivide the site, construct 96 attached housing units, and sell the resulting residential condominiums. (JA, 2:0375-76.) This proposal required approval through Palo Alto's Architectural Review process (JA, 2:0354-74), as well as approval of tentative and final subdivision maps (JA, 2:0401-07).

Palo Alto gave its initial Architectural Review approval to the Sterling Park proposal in June 2006. (JA, 2:0354-74; Slip Op., at 4.) This approval carried numerous conditions to ensure compliance with Palo Alto's Comprehensive Plan and Municipal Code and to promote the public welfare. (JA, 2:0354-56.) In particular, the Architectural Review approval reflected the Inclusionary Requirement: "A written Below Market Rate agreement, in compliance with Housing Element Program H-36 of the Palo Alto Comprehensive Plan, must be obtained prior to City Council approval of the required Tentative Map application."[3] (JA, 2:0359.)

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[3] The approval also required Petitioners to pay "[d]evelopment impact fees and transportation impact fees . . . prior to issuance of any building permits," in the estimated total amount of $581,042. (JA, 2:0359.)

By November 2006, when the Palo Alto City Council considered whether or not to approve a tentative subdivision map for Sterling Park (JA, 2:0403), Petitioners' method for satisfying the Inclusionary Requirement had taken shape. Although the Comprehensive Plan expresses a strong preference for on-site affordable units, Palo Alto staff members agreed with Petitioners in June 2006 to present the City Council with a proposal for Petitioners to fulfill Sterling Park's Inclusionary Requirement with both housing units and money. (JA, 2:0375-0400.) Specifically, the "BMR Agreement" executed by Petitioners and Palo Alto's Director of Planning and Community Development called for Sterling Park to include 10 affordable housing units, rather than the 19.2 that strict application of the 20% requirement to the 96-unit total would have required. (JA, 2:0376; Slip Op., at 3.) In lieu of the remaining 9.2 units, the BMR Agreement called for Petitioners to contribute to Palo Alto's Housing Development Fund, but at a rate (5.3488% of sales prices for the 86 market-rate units) below the 10% rate set forth in the Comprehensive Plan as a default.[4] (JA, 2:0379; *cf.* JA, 1:212; *see* Slip Op., at 3.)

[4] The Comprehensive Plan sets the in-lieu payment at a percentage of market-rate unit sales prices equal to half the percentage of affordable units that would be required in the entire development. (JA, 1:0212.) Arithmetically, the rate reduction for Sterling Park amounts to a credit for the 10 affordable units Petitioners' project would include in the 96-unit total; in lieu of the remaining 9.2 units, the payment is a percentage of sales prices for the 86 market-rate units equal to one-half the percentage that 9.2 affordable units is of 86 market-rate units. ($0.5 \cdot [9.2 \div 86] = 0.053488$.)

Although Petitioners allege that they "questioned" this BMR Agreement "[t]o the extent feasible," they do not allege that they asked Palo Alto to waive it as described in the Comprehensive Plan. (JA, 1:0004-05.) The City Council approved the tentative subdivision map for Sterling Park in November 2006 (JA, 2:0403-07), and approved a final map in September 2007 (JA, 2:0401-02; Slip Op., at 4). Immediately upon approval of the final subdivision map for Sterling Park, Palo Alto recorded—with Petitioners' express consent[5]—a Regulatory Agreement memorializing the BMR Agreement and giving constructive notice of the Inclusionary Requirement to any subsequent purchaser of any portion of the project site. (JA, 2:0408-47; Slip Op., at 4.)

Petitioners allege only in vague terms what happened next (JA, 1:0007-08), and the summary judgment record includes little evidence on this topic. Petitioners commenced construction of Sterling Park in 2007, and began selling the condominium units in 2009. (JA, 1:0008; Slip Op., at 4.) By the time the trial court resolved this matter, Petitioners had made some or all of the payments they had agreed to make to Palo Alto's Housing Development Fund, and conveyed some or all of the ten condominiums they had agreed to convey to moderate- and low-income households at affordable prices. (JA, 1:0008-09.)

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[5] Petitioners also procured a commercial lender's consent to the Regulatory Agreement. (JA, 2:0413-14.)

III. PROCEDURAL SUMMARY

Petitioners commenced this action in October 2009. (JA, 1:0001.) After motion practice (JA, 1:0020-83) and discovery, Palo Alto and Petitioners made cross-motions for summary judgment (JA, 1:0101-03, 4:1074-78). The trial court granted Palo Alto's motion; denied Petitioners' as moot; and entered judgment for Palo Alto. (JA, 5:1441-45, 6:1527-28.)

Although both Palo Alto and Petitioners had moved on multiple grounds for summary judgment or adjudication of issues (JA, 1:0101-03, 4:1074-78), the trial court addressed only Palo Alto's limitations defense. (JA, 5:1441-45.) The trial court ruled that because Petitioners had failed to file suit within 90 days after approval in November 2006 of the Sterling Park tentative subdivision map, and because the exception stated in Government Code section 66020 to this 90-day limitations period did not apply to Petitioners' claims, the action was untimely. (JA, 5:1441-45.) The Court of Appeal affirmed on the same rationale. (Slip Op., at 7-12.)

Petitioners petitioned this Court for review, and Palo Alto did not answer the petition. Although the Petition for Review complained of several errors by the Court of Appeal, Petitioners' Opening Brief on the Merits identifies just one: Petitioners contend that the Court of Appeal erred in refusing to apply Government Code section 66020 to extend the statute of limitations applicable to Petitioners' complaint. Because the Court of Appeal did not err, Palo Alto asks this Court to affirm.

IV. ARGUMENT

In this Court, Petitioners do not renew their argument that the trial court erred in entertaining Palo Alto's limitations defense. Petitioners also do not argue in this Court that the 90-day statute of limitations in Government Code section 66499.37 does not apply generally to a suit, such as this one, challenging the conditions a city imposes on approval of a tentative subdivision map. Rather, Petitioners effectively concede that unless the "perform under protest" system set forth in Government Code section 66020 applies to their claims, their suit was untimely.

The Legislature did not intend Government Code section 66020 to permit belated challenges, such as this one, to conditions of land-use approval. Rather, the Legislature always has intended to "ensure that any challenge to local legislative or administrative acts or decisions taken pursuant to ordinances enacted under the authority of the Subdivision Map Act will be brought promptly." (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 7.) Consistent with this intent, the Legislature enacted Government Code section 66020 as a limited exception to the rules generally governing challenges to local land-use decisions.

Government Code section 66020 applies only where a local government requires, as a condition of land-use approval, that a developer contribute money or real property toward public facilities or services. Because the Inclusionary Requirement is not such a condition, Government

Code section 66020 does not apply to this case. Palo Alto asks this Court to affirm the judgment of the Court of Appeal.

A. The Subdivision Map Act Required Petitioners to File and Serve Their Challenge to the Sterling Park Conditions of Approval Within Ninety Days.

The Subdivision Map Act requires both filing and service of 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 to determine the reasonableness, legality or validity of any condition attached thereto" within 90 days after the decision. (Gov. Code, § 66499.37.) The purpose of such a short, strict limitations period is to avoid "waste of funds," by providing certainty to developers about whether or not their approvals are valid. (*Griffis v. County of Mono* (1985) 163 Cal.App.3d 414, 422). Such a rule protects the public as well, by requiring challenges to approval conditions imposed for the public welfare to occur promptly or not at all. (*See, e.g., Soderling v. City of Santa Monica* (1983) 142 Cal.App.3d 501, 505-06 [holding a developer's challenge to a tentative map approval condition untimely, because the developer did not raise it until challenging the city's refusal to approve a final map].) And such a rule permits a local government to revise an approval condition that a court has found to be unlawful before that unlawful condition causes irreparable injury. (*Hensler*, 8 Cal.4th at p. 7.)

This Court has applied Government Code section 66499.37 broadly. In *Hensler v. City of Glendale*, for example, this Court held that the 90-day limitations period of section 66499.37 applied to a suit alleging that the City of Glendale had acted unlawfully in approving a tentative subdivision map on condition that no construction occur on a major ridgeline. (*Hensler*, 8 Cal.4th at pp. 26-27 ["Every appellate decision which has considered the issue in a case involving a controversy related to a subdivision has held that section 66499.37 is applicable no matter what the form of the action."].) The Courts of Appeal have applied this statute of limitations broadly as well. (*See Aiuto v. City & County of San Francisco* (2011) 201 Cal.App.4th 1347, 1358-59 [collecting cases], 1360 [noting that the purpose of the short limitations period in section 66499.37 "would be subverted if we created different rules for different 'types' of subdivision-related decisions and allowed facial challenges to some ordinances to be brought years after the challenged actions were taken"].) In particular, the Court of Appeal for the Sixth Appellate District has applied section 66499.37 to hold that a developer's challenge to an approval condition nearly identical to the Inclusionary Requirement was untimely.[6] (*Trinity Park L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014, 1044-45.)

[6] Petitioner Classic Communities Inc. was an Appellant in *Trinity Park* as well. (*Trinity Park*, 193 Cal.App.4th at p. 1020.)

Here, Petitioners sought Palo Alto's approval in November 2006 for a tentative subdivision map for Sterling Park. (JA, 2:0401-07.) Before seeking that tentative map approval, Petitioners understood that Palo Alto's planning staff would present the tentative map to the City Council along with the BMR Agreement calling for 10 of Sterling Park's 96 housing units to be affordable and for Petitioners to pay into the Housing Development Fund in lieu of making more units affordable. (JA, 2:0375-400.) Rather than asking to waive that BMR Agreement in accordance with the Comprehensive Plan (JA, 1:0213), Petitioners sought and received approval of the Sterling Park tentative subdivision map in reliance on it. Because the Inclusionary Requirement was a condition of approval of Sterling Park's tentative subdivision map, and because Petitioners did not bring this action challenging the Inclusionary Requirement within 90 days after receiving that conditional approval, Government Code section 66499.37 makes this action untimely.

B. Government Code Section 66020 Does Not Extend the Deadline for Petitioners' Lawsuit.

To escape the bar of Government Code section 66499.37, Petitioners argue that Government Code section 66020 applies to this action. If section 66020 applied to the Inclusionary Requirement, Petitioners could have lodged a "protest" of the Inclusionary Requirement and then filed suit

later.[7] (Gov. Code, § 66020, subds. (a), (d).) Contrary to Petitioners' contention (Opening Brief, at p. 21), however, section 66020 provides not an "expansive" exception to the general rules governing challenges to land-use approvals, but a limited one that does not apply to the approval condition at issue in this case.

1. Government Code Section 66020 Applies Only to Challenges to "Fees, Dedications, Reservations, or Other Exactions," Not to Land-Use Regulations Such as the Inclusionary Requirement.

The Subdivision Map Act states that its 90-day limitations period applies to actions challenging "any condition attached" to approval of a tentative subdivision map. (Gov. Code, § 66499.37.) In contrast, Government Code section 66020 does not say that it applies to "any condition." Rather, section 66020 uses four terms to describe the types of approval conditions that it covers: "fees, dedications, reservations, [and] other exactions." (Gov. Code, § 66020, subds. (a), (d)(1).) These terms' customary meanings in land-use law share two features that the Inclusionary Requirement does not share: (1) they describe payments of money or conveyances of property to a public agency for public facilities or services, rather than limitations on use of private property; and (2) they describe payments or conveyances that are mandatory, not optional.

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[7] Although the summary judgment record demonstrates that Petitioners' suit is untimely under Government Code section 66499.37, the record does not demonstrate as a matter of law that this action would be timely if the exception of Government Code section 66020 applied. (*See* IV.G, *infra.*)

a) "Fees, Dedications, Reservations, or Other Exactions" Are Conditions Requiring Payment for a Public Service or Facility.

The Legislature has supplied an express definition for only one of the four types of approval conditions subject to challenge under section 66020. With certain exceptions, a "fee" is

> a monetary exaction . . . 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[8] related to the development project.

(Gov. Code, § 66000, subd. (b); *see Barratt American Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 696 [holding that "fees," in section 66020, means "fees," as defined in section 66000].)

Although the Subdivision Map Act refers repeatedly to the concepts of "dedication" and "reservation," it currently does not define either term.[9] Historically, however, "dedication" has meant "the transfer of an interest in real property to a public agency for the public's use" (*Fogarty v. City of Chico* (2007) 148 Cal.App.4th 537, 543), such as for public rights of way (*see, e.g.*, Gov. Code, § 66475) or parks (*see id.*, § 66477). Similarly, a

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[8] "Public facilities" are "public improvements, public services, and community amenities." (Gov. Code, § 66000, subd. (d).)

[9] The Map Act formerly included a definition of "dedication": "a transfer by a subdivider to a city, county, or city and county of title to real property or any interest therein, or of an easement or right in real property, the transfer of facilities, or the installation of improvements as defined in Section 66419, or any combination thereof." (Gov. Code, § 66475.4(a) [former] [Appellants' Motion for Judicial Notice ("AMJN"), Vol. 2, at pp. B071-72].)

"reservation" under the Subdivision Map Act is an offer to convey real property to a public agency for "parks, recreational facilities, fire stations, libraries, or other public uses" (Gov. Code, § 66479), which terminates automatically "two years after the completion and acceptance of all improvements" unless the agency enters into an agreement to acquire the interest and compensate the landowner at the property's entitled but undeveloped fair market value (*id.*, §§ 66480, 66481). Both a "dedication" and a "reservation" involve an offer of real property to a public agency for a public use; the chief difference is that a public agency accepting a "reservation" must pay for the real property (*id.*, § 66480), whereas a public agency accepting a "dedication" need not (*id.*, §§ 66477.1, 66477.3).

Finally, section 66020 uses the term "other exactions" as a fourth variety of condition that a developer may protest under section 66020. As Petitioners concede (Opening Brief, at p. 18), "exactions" in this context does not mean simply "regulations" or "conditions." Rather, the customary understanding of the term "exaction," in the context of land-use regulation, means a requirement that the prospective user of land *pay* the regulating public agency, in either money or property, for the privilege of undertaking the regulated land use. (*Fogarty*, 148 Cal.App.4th at p. 544 n.10 [*citing* Abbott *et al.*, Exactions and Impact Fees in California (2001 ed.) Defining the Terms, p. 15]; *see also City of Monterey v. Del Monte Dunes at Monterey Ltd.* (1999) 526 U.S. 687, 702 [defining "exactions" as "land-use

decisions conditioning approval of development on the dedication of property to public use"].)

This Court has noted that "if a statute contains a list of specified items followed by more general words, the general words are limited to those items that are similar to those specifically listed." (*Clark v. Superior Court* (2010) 50 Cal.4th 605, 614.) Palo Alto urges this Court to interpret "other exactions" in section 66020 in a manner consistent with the more specific "fees," "dedications," and "reservations," all of which are requirements that a would-be developer give a public agency either land or money for public services or facilities. Where a local government conditions land-use approval but does not demand either money or property in return, section 66020 does not expand the time or manner in which the recipient of that approval may challenge the approval conditions.

b) The Requirement to Sell Homes to Income-Eligible Households at Affordable Prices is Not an "Exaction."

Without analysis, Petitioners call the Inclusionary Requirement a "classic 'exaction[].'" (Opening Brief, at p. 18.) This characterization of the Inclusionary Requirement contradicts the record, however. The Inclusionary Requirement is not an "exaction," because the Inclusionary Requirement does not oblige Petitioners to provide public facilities or services to Palo Alto.

Rather, the Inclusionary Requirement requires Petitioners to sell private residences at Sterling Park to income-eligible households at affordable prices. (JA, 1:0211, 2:0417-18.) Palo Alto serves at most as a middleman, connecting qualified and interested households with housing opportunities at Sterling Park and providing continuing regulatory supervision to ensure that buyers do not simply resell at a windfall.[10] (JA, 2:0419-20, 2:0428-33.) The Inclusionary Requirement regulates who may own and occupy some of Sterling Park's homes, but it does not require Petitioners to give or sell anything to Palo Alto.

Zoning ordinances routinely distinguish among land uses, privileging some in certain locations while discouraging or prohibiting others. (*See, e.g., Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 289-90 [describing city zoning ordinance that "generally prohibits the sale of furniture in the PC district"].) But although all zoning systems must serve the public welfare, this Court has never held that a private land use becomes a "public facility" simply because a regulation declares it desirable or restricts its location. (*Id.* at p. 296-97; *cf. Moerman v. State of California* (1993) 17 Cal.App.4th 452, 458-59 [holding that the State's efforts to restore and protect the population of wild tule elk did not make the herd a "public improvement"].) The Inclusionary Requirement regulates

[10] Municipal code or general plan requirements are insufficient to control sale and resale of owner-occupied affordable housing; cities must use recorded regulatory agreements. (*See* Gov. Code, § 27281.5.)

the amount and location of privately owned affordable housing, but this regulation for the public welfare does not make housing a public facility.

Petitioners' suggestion that Palo Alto's explanation for its Inclusionary Requirement might defeat this characterization, turning privately owned affordable housing into a "public facility" (Opening Brief, at pp. 20-21, 34-37), is unreasonable. Land-use regulations that are consistent with the "general welfare of the municipality" always can be justified or explained by their effects on the community, because they either promote beneficial results or discourage harmful ones. (*Hernandez*, 41 Cal.4th at p. 297.) If a municipality's efforts to protect the quality of life, the natural environment, or property values community-wide made development regulations serving those efforts "public services" or "public facilities," however, Government Code section 66020 would apply to any condition a municipality might impose on a land-use permit or tentative subdivision map. (*See, e.g.*, Pub. Resources Code, § 21081.6(b) [requiring "measures *to mitigate or avoid significant effects on the environment* [to be] fully enforceable through *permit conditions*, agreements, or other measures"] [emphasis added].) Nothing in section 66020 suggests that the Legislature intended it to have such an all-encompassing effect.

Here, Palo Alto has explained its Inclusionary Requirement as a way of preventing negative community impacts that might occur if housing developers in Palo Alto built only market-rate housing, affordable to

households with incomes well above the area median. (*See, e.g.*, JA, 1:0192, 2:0269-71.) As Petitioners note, their compliance with the Inclusionary Requirement avoids harm to Palo Alto's economy and environment that otherwise might have resulted if all housing at Sterling Park were affordable only to high-income households. (Opening Brief, at pp. 34-35.) But Petitioners fail to note that the Inclusionary Requirement contemplates no public service or public facility to address or prevent this harm. Instead, by regulating a small segment of Palo Alto's private housing market, it requires affordable *private* housing, which is not an "exaction" within the meaning of Government Code section 66020.

c) Section 66020 Does Not Apply to Optional Fees In Lieu of Restrictions on Land Use.

In some circumstances, municipalities require fees or dedications, to be used by the municipality for public services and facilities, as mandatory conditions of development approval. For instance, Palo Alto required Petitioners to pay "[d]evelopment impact fees" and "transportation impact fees" for Sterling Park. (JA, 2:0359; *see also, e.g.*, *Branciforte Heights LLC v. City of Santa Cruz* (2006) 138 Cal.App.4th 914, 921-22 & n.3 [describing requirement either to dedicate land for public parks or to pay into city park fund].) In other circumstances, however, municipalities permit development applicants to choose between incorporating design features into their developments and providing money to the municipality,

not for general use but so that the municipality can achieve those design features elsewhere. (*See, e.g., Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 885-86 [analyzing municipal requirement that developer either incorporate art into "an area of the project reasonably accessible to the public" or pay into city arts fund].) Whether or not section 66020 applies to the former situation, it does not apply to the latter.

Payments or dedications in lieu of private design features are conceptually dissimilar to the "fees" described in section 66000, because they are not for "public facilities." (*See* Gov. Code, § 66000, subd. (d).) Rather, they are substitutes for restrictions or requirements directing use of private property for the common good, such as requirements to provide art or housing or to preserve wildlife habitat or wetlands. When the applicant prefers to pay rather than to modify its proposal, such an in-lieu payment enables the local agency receiving the payment to obtain another site and provider—perhaps public, perhaps private—for the art, housing, habitat, or wetlands the paying developer has chosen not to provide.

Petitioners acknowledge that section 66020 does not apply to disputes over regulatory conditions of approval, such as conditions limiting what a developer may build and where the developer may build it. (Opening Brief, at p. 18.) Petitioners fail to acknowledge, however, that because a dispute over a city's requirement to integrate affordable housing with market-rate housing is not subject to section 66020, neither is a

dispute over a payment the developer makes into a Housing Development Fund as a substitute for full compliance with that requirement. Neither the letter nor the spirit of section 66020 provides for protest and belated challenge of development approval conditions that are not mandates to create or contribute to public facilities.

Petitioners repeat that the BMR Agreement called for them to pay money. The record confirms, however, that without modification for this project, the Inclusionary Requirement would have obliged Petitioners to make 20% of Sterling Park's 96 condominiums affordable to moderate- or low-income households. (JA, 1:0211-13.) Petitioners' in-lieu payment was not required by Palo Alto, but instead proposed as an alternative to strict compliance with the Inclusionary Requirement.[11] Further, the record confirms that the amount of the payment corresponded precisely to the standard in the Comprehensive Plan, under which a developer of housing on 5 or more acres pays a percentage of sales prices for market-rate units equal to half the percentage of affordable units the payment replaces.

If Petitioners had included more than 10 affordable units in Sterling Park, they would have paid a smaller percentage of the sales prices for the remaining market-rate units into the Housing Development Fund; if Sterling Park had included 20 affordable units, Petitioners would have paid

[11] Petitioners did not protest, and do not complain, that Palo Alto should have permitted them to satisfy the Inclusionary Requirement entirely with housing units instead of partially with money. (JA, 2:0462-68.)

nothing. A reviewing court could not evaluate the validity of the Inclusionary Requirement's in-lieu payment option independently of its requirement to provide affordable housing units as part of every new housing development. For this reason, the Court of Appeal did not err in analyzing the Inclusionary Requirement, for purposes of applying section 66020, as a requirement that Petitioners provide affordable housing and not as a requirement that Petitioners pay money to Palo Alto.

2. Section 66020 Applies Only to Approval Conditions That Are Susceptible to Total or Partial Refund or Return in Kind.

Petitioners' attempt to shoehorn their challenge to the Inclusionary Requirement into section 66020 conflicts not only with section 66020's substance but with its procedure. A developer invoking Government Code section 66020 must comply with the condition of approval in dispute unless—and until—the developer prevails in its lawsuit. To make a valid "protest," the developer must "[t]ender[] any required payment in full or provid[e] satisfactory evidence of arrangements to pay the fee when due or ensure performance of the conditions." (Gov. Code, § 66020, subd. (a)(1).) Then, if the developer prevails, "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."[12] (*Id.*, § 66020, subd. (e).)

Although a losing defendant might elect in a suit over a non-monetary dedication, reservation, or other exaction to keep the "exaction" and pay damages rather than to return the "exaction" to the prevailing plaintiff, Government Code section 66020 does not contemplate such damages as a remedy to be imposed over the defendant's objection.[13] Rather, section 66020 contemplates only payment or performance under protest, and restitution—with interest, if the condition required payment of money—if the protest succeeds. For these reasons, an approval condition that does not result in transfer to the public agency of money or property that can be returned in whole or in part to a successful plaintiff cannot be an "exaction" subject to payment under protest, and delayed litigation, under Government Code section 66020. (*Cf. Barratt American*, 37 Cal.4th at p. 699 [holding that because a statute precluded refunding the payments in question, they were not subject to challenge under section 66020].)

The Inclusionary Requirement cannot be an "other exaction," as the Legislature used that term in section 66020, because complete application of section 66020 to this litigation is impossible. (*Garcia v. McCutchen*

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[12] This "performance under protest" system is a significant departure from the rules that apply generally in land-use litigation. (*See* IV.C.2, *infra*.)

[13] If it did, it could impair a governmental agency's right under the California Constitution "to rescind its action rather than pay compensation for a taking." (*Hensler*, 8 Cal.4th at pp. 7, 10-12.)

(1997) 16 Cal.4th 469 476 [noting that courts must "give effect and significance to every word and phrase of a statute"].) The Inclusionary Requirement, as expressed through the BMR Agreement, obliged Petitioners to disperse Sterling Park's 10 affordable homes evenly throughout Sterling Park, rather than clustering them together or building them elsewhere. (JA, 2:0447.) The Inclusionary Requirement also obliged Petitioners to sell the 10 affordable homes, if at all, only to income-eligible households selected from an interest list maintained for Palo Alto by the Palo Alto Housing Corporation. (JA, 2:0428-49.)

If Government Code section 66020 truly governed this litigation, Petitioners would have had to comply fully with the Inclusionary Requirement pending resolution of this suit. (*See, e.g., Williams Communications LLC v. City of Riverside* (2003) 114 Cal.App.4th 642, 645 [noting payment under protest of more than $700,000]; *Branciforte Heights*, 138 Cal.App.4th at 929 [noting payment under protest of nearly $40,000].) But if Petitioners had performed the Inclusionary Requirement under protest, Sterling Park's ten affordable homes would be owned and occupied by ten income-eligible households—none of whom Petitioners named as a defendant. (JA, 1:0001-19.) If Petitioners prevailed with respect to the homes themselves, Palo Alto would have nothing to refund or return to Petitioners—a fatal flaw that the Petition attempts to conceal by praying not for "damages" but for "restitution *or compensation* for the compelled

conveyance of BMR restricted housing units." (JA, 1:0017.) Because Petitioners can litigate the validity of the Inclusionary Requirement effectively only by withholding performance until conclusion of any litigation or by demanding damages instead of restitution, the Inclusionary Requirement cannot be an "exaction" subject to payment or performance under protest under Government Code section 66020.

The same analysis defeats Petitioners' claim that its in-lieu payment should be subject to section 66020. Any in-lieu payment Petitioners have made is due to market-rate sales of condominiums at Sterling Park, which Petitioners cannot un-sell. For this reason, if the trial court permitted Petitioners' belated challenge only to the in-lieu payment and then ruled that the payment was too high, Palo Alto would have no opportunity to ask instead for Petitioners to include any of the remaining 9.2 affordable units in Sterling Park. Section 66020 requires a developer challenging an approval condition to which section 66020 applies to preserve, not foreclose, the defendant city's remedies.

C. The Court of Appeal's Construction of Section 66020 is Consistent With the Usual Rules Governing Land-Use Litigation.

Short, strict statutes of limitation are the general rule for lawsuits challenging local governments' land-use decisions, not only under the Subdivision Map Act but under related statutes such as the Planning and Zoning Law and the California Environmental Quality Act. The

Legislature, this Court, and the Courts of Appeal have affirmed repeatedly that these rules apply widely and that they are good public policy. Only a limited application of section 66020 is consistent with these rules.

1. The Planning and Zoning Law and the California Environmental Quality Act Also Impose Short Limitations Periods on Challenges to Land-Use Decisions.

The Planning and Zoning Law, like the Subdivision Map Act, allows only 90 days to file and serve a challenge to a local government's decision to grant or deny a zoning permit, or a challenge to "any condition attached" to such a permit. (Gov. Code, § 65009, subd. (c)(1)(E).) The express Legislative purpose for such a short limitations period is "to reduce delays" (*id.*, § 65009, subd. (a)(1)), and to protect both local governments and property developers against the risk of belated suits after development has occurred in reliance on a land-use approval (*id.*, § 65009, subd. (a)(3)). This Court has confirmed that this 90-day limitations period applies to a developer's challenge to an affordable housing requirement imposed as a condition of granting a development permit. (*Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 767, 768 [noting that "an action is not removed from the purview of section 65009, subdivision (c)(1)(E) merely because the plaintiff claims the permit or condition was imposed under a facially unconstitutional or preempted law"].)

For the same policy reasons, the California Environmental Quality Act applies very short limitations periods to actions alleging that local governments' land-use decisions violate CEQA's requirements for analysis and mitigation of potential environmental impacts. (*Committee for Green Foothills v. Board of Supervisors* (2010) 48 Cal.4th 32, 50.) Frequently, of course, some or all of the causes of action in suits under either the Subdivision Map Act or the Planning and Zoning Law arise under CEQA. (*See, e.g., Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 515 n.16.) When they do, to effectuate the Legislative intent that litigation over land-use decisions in general and CEQA issues in particular should occur promptly or not at all, the shortest possible deadlines for filing and service govern the timeliness of those causes of action. (*See, e.g., id.* at pp. 499-500 [analyzing timeliness of CEQA challenges to development approval under CEQA statutes of limitations, rather than under the Planning and Zoning Law]; *Friends of Riverside's Hills v. City of Riverside* (2008) 168 Cal.App.4th 743, 755-56 [dismissing action alleging noncompliance with CEQA in approval of final subdivision map, because action was untimely served under Government Code section 66499.37 although timely filed under both section 66499.37 and Public Resources Code section 21167.6].)

2. Project Proponents Generally May Not Proceed With Development While Challenging Conditions of Development Approval.

The 90-day limitations period applies to suits challenging decisions denying approval both for tentative subdivision maps and for zoning permits. (*See, e.g., Sprague v. City of San Diego* (2003) 106 Cal.App.4th 119, 128-29.) It applies as well to suits by members of the public challenging decisions approving such maps or permits (*see, e.g., Torrey Hills Community Coalition v. City of San Diego* (2010) 186 Cal.App.4th 429, 435); for example, it would have applied to a suit by a member of the public challenging Palo Alto's conditional approval of Sterling Park. And it applies to suits by would-be developers who receive approvals, but on conditions they find unacceptable. (*See, e.g., Travis*, 33 Cal.4th at p. 767; *Hensler*, 8 Cal.4th at p. 28.)

A developer generally cannot, however, sue over a conditional approval, even within the limitations period, but then proceed with the conditionally permitted activity while the lawsuit proceeds. (*County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510-11; *City of Santee v. Superior Court* (1991) 228 Cal.App.3d 713, 718-19; *Pfeiffer v. City of La Mes*a (1977) 69 Cal.App.3d 74, 78.) Rather, the law generally requires a user of land subject to local government regulation to take interrelated permit conditions as a package, rather than choosing for itself which conditions to follow and which to challenge. (*Edmonds v. County of Los*

Angeles (1953) 40 Cal.2d 642, 653.) Otherwise, if individual property owners could accept the benefits of some conditions on which a public agency had approved their activities while challenging the burdens of others, "complete chaos would result in the administration of this important aspect of municipal affairs." (*Pfeiffer*, 69 Cal.App.3d at p. 78.)

3. An "Expansive" Interpretation of Section 66020 Would Undermine Both of These Policies.

If it applied to this case, Government Code section 66020 would alter these long-standing rules governing land-use litigation. Most important, section 66020 permits a party to act on its land-use approval while challenging one or more conditions of that approval: It requires the party to perform the disputed condition "when due" (Gov. Code, § 66020, subd. (a)(1)); forbids the local agency, unless it has made specific findings, to suspend approval for the tentative map or land-use permit while the litigation proceeds (*id.*, § 66020, subds. (b), (c)); and requires the local agency "to refund the unlawful portion of the payment . . . or to return the unlawful portion of the exaction" if the court determines that the local agency should not have imposed the condition (*id.*, § 66020, subd. (e)). The broad application of section 66020 proposed by Petitioners would encourage "chaos," allowing developers to ask courts to micro-manage a municipality's permitting decisions by considering land-use approval

conditions one by one rather than in relation to one another and to the entire development's potential community benefits and burdens.

Such wide application also would conflict with CEQA, which requires a comprehensive analysis of a development proposal's foreseeable environmental impacts rather than piecemeal analyses of each feature or stage. (*Bozung v. Local Agency Formation Comm.* (1975) 13 Cal.3d 263, 283-84.) Furthermore, because CEQA requires the public's involvement in a public agency's consideration of measures to control or mitigate a proposed development's potentially significant environmental impacts, the Courts of Appeal have held that it also requires the public's involvement in revising those mitigation measures after the public agency initially has approved them. (*Lincoln Place Tenants' Assn. v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1508-09; *Napa Citizens for Honest Government v. Board of Supervisors* (2001) 91 Cal.App.4th 342, 359.) Finally, if a court resolves a CEQA challenge to a public agency's approval of a project by determining that the public agency's environmental review or mitigation measures do not have adequate evidentiary support, the court—not developer or the public agency—has the authority to decide whether to halt the whole project or to segregate the deficient analysis or mitigation measure from the rest. (Pub. Resources Code, § 21168.9.) A system in which a developer could pick out one environmental mitigation condition among many and ask a court to invalidate or revise it, without giving the

court the opportunity to invalidate the whole approval or the public the opportunity to weigh in on whether and how the entire approval, with all conditions, should be revised, would conflict with the letter and the spirit of CEQA.

Finally, broad application of section 66020 would be unfair to the public, because section 66020 is asymmetric: It allows a developer, but not the public, to invoke its special procedure. If any community member in Palo Alto had believed, for example, that Palo Alto should have required Petitioners to provide more than 10 affordable homes in Sterling Park, that community member would have had to bring suit within 90 days after Palo Alto approved the Sterling Park tentative subdivision map. Yet Petitioners assert here that they should be able to delay seeking a court order allowing them to provide fewer affordable homes until the public's window of opportunity to demand more has expired.

Even a narrow interpretation of section 66020 could raise these conflicts. The interpretation Petitioners advocate, however, would magnify them, because it would extend section 66020's application far beyond the "fees, dedications, reservations, or other exactions" the statute describes. Palo Alto urges this Court to harmonize Government Code sections 66020, 66499.37, and 65009, and CEQA by construing Government Code section 66020 not to apply to the Inclusionary Requirement.

D. The Court of Appeal's Construction of Section 66020 is Consistent With the Legislative History of Section 66020.

The legislative history of Government Code section 66020 demonstrates that the Legislature intended section 66020 to apply narrowly, rather than to supplant the short statutes of limitation in Government Code sections 66499.37 and 65009. Moreover, the legislative history confirms that the Legislature wished to bring only conditions involving mandatory contributions for public services and facilities within the ambit of section 66020. The Legislature did not intend section 66020 to encompass Petitioners' claims regarding the Inclusionary Requirement.

1. The Legislature Did Not Intend Section 66020 to Repeal Section 65009 or Section 66499.37.

If the Legislature had intended section 66020 to provide a "performance under protest" option for any and every condition to which a firm 90-day statute of limitations otherwise would apply, section 66020 would not have used terms ("fees, dedications, reservations, or other exactions") different from and narrower than those in sections 65009 and 66499.37 ("any condition"). (*Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 342 [relying on "significant linguistic differences" between two sections of the Business and Professions Code to hold that they applied to different activities]; *People v. Trevino* (2001) 26 Cal.4th 237, 242 ["When the Legislature uses materially different language in statutory provisions addressing the same subject or related subjects, the normal

inference is that the Legislature intended a difference in meaning."].) Furthermore, if the Legislature had intended the protest-and-sue provisions of section 66020 to be a wholesale replacement for the strict limitations periods in sections 65009(c)(1) and 66499.37, it could have repealed or amended sections 65009(c) and 66499.37 rather than adopting section 66020. (*See Clark*, 50 Cal.4th at p. 612 ["Had the Legislature intended section 3345 to be limited to actions under the Consumers Legal Remedies Act, it could simply have amended only that act. Instead, the Legislature simultaneously enacted Civil Code section 3345 as a separate statute."].) Instead, the Legislature initially adopted the "performance under protest" system in 1984, and has amended it numerous times without repealing either section 66499.37 or subdivision (c) of section 65009. (Stats. 1984, ch. 653, § 1; Stats. 1985, ch. 186, § 2; Stats. 1985, ch. 671, § 1; Stats. 1988, ch. 418, § 4; Stats. 1990, ch. 1572, § 22; Stats. 1992, ch. 605, § 1; Stats. 1993, ch. 589, § 80; Stats. 1996, ch. 549, § 2.)[14] Meanwhile, in 1995, the Legislature shortened the limitations period in subdivision (c) of section 65009 from 120 to 90 days, to match the period in section 66499.37. (Stats. 1995, ch. 253, § 1, pp. 873-76.)

If possible, this Court must construe sections 65009, 66020, and 66499.37 in a manner that does not render any of them surplus or imply repeal of one by another. (*Garcia*, 16 Cal.4th at pp. 476-77; *Walters v.*

[14] Photocopies of these statutes are at AMJN, Volume 2, Exhibit C.

Weed (1988) 45 Cal.3d 1, 9.) The only construction that accomplishes this result is one in which section 66020 provides a partial, not a total, exception to the limitations rules set forth in section 66499.37 and in subdivision (c) of section 65009. Palo Alto urges this Court to adopt such a construction.

2. The Legislative History of Section 66020 Reveals a Concern About Mandatory Contributions of Land or Money for Public Facilities, Not About Restrictions on Private Land Use.

The Legislature enacted the "performance under protest" system in 1984, as Government Code section 65913.5. (Stats. 1984, ch. 653, § 1 [AMJN, Vol. 2, Exh. C].) The legislator who introduced the bill described it as addressing the increasing incidence, after enactment of Proposition 13, of local governments' using "fee revenue to support planning and building activities." (AMJN, Vol. 1, Exh. A-4.) Reports to the Assembly and Senate about the proposed bill gave examples of the kinds of requirements that it would permit a developer to perform under protest: "fees and dedications . . . to provide services such as schools, parks, capital facilities, etc." (AMJN, Vol. 1, Exh. C-12.)

For a time, the Subdivision Map Act included a parallel provision. (AMJN, Vol. 2, Exh. B.) This provision as well was intended by its sponsor to require developers to "pay for needed new municipal services and facilities but not in excess of the burden on those services that a

development project creates." (AMJN, Vol. 2, Exh. B, at p. B021.) The Legislature harmonized this Map Act provision with section 66020 (*see, e.g.*, Stats. 1990, ch. 1572, § 22 [AMJN, Vol. 2, Exh. C]), and it now has expired.

When the Legislature enacted the predecessor statutes to section 66020, it undoubtedly understood that local government agencies imposed, in addition to fees and dedications, many conditions on subdivision maps and planning permits restricting how private developers could use their land. (*See, e.g., Soderling*, 142 Cal.App.3d at p. 504 [discussing condition of tentative subdivision map approval requiring various alterations and improvements to buildings on property proposed for subdivision].) Yet none of the Legislative discussion of the "performance under protest" system refers anywhere to such regulations or restrictions; all discussion refers only to mandatory contributions of money or land for public services and facilities. The Court of Appeal below did not err in interpreting the Legislature's reference in section 66020 to "fees, dedications, reservations, or other exactions" as encompassing only approval conditions that "defray the cost of public facilities necessitated in a development project." (Slip Op., at 9.)

E. The Decision Below Extends the Courts of Appeal's Consistent and Practical Interpretation of Section 66020.

On many occasions since enactment in 1984 of the predecessor statute to section 66020, the Courts of Appeal have followed this Court's lead by applying sections 65009 and 66499.37 to bar untimely suits challenging development approval conditions. (*See, e.g., Travis*, 33 Cal.4th at p. 771; *Hensler*, 8 Cal.4th at pp. 26-28; *Aiuto*, 201 Cal.App.4th at pp. 1358-59; *Friends of Riverside's Hills*, 168 Cal.App.4th at pp. 755-56.) On several occasions, litigants have agreed to allow development and litigation to occur at the same time; and on a few occasions, the Courts of Appeal have either compelled or refused to compel this result. These opinions reflect workable rules that are consistent with the Court of Appeal's holding in this case.

1. The Courts of Appeal Have Declined to Apply Section 66020 to Approval Conditions Like the Inclusionary Requirement.

No published opinions of the Courts of Appeal have applied section 66020 to approval conditions resembling the Inclusionary Requirement. Instead, the Courts of Appeal have concluded that section 66020 does not apply to such conditions. These decisions rest on a reasonable and stable legal foundation.

The published Court of Appeal opinion most closely resembling this case is *Trinity Park*. (*Trinity Park*, 193 Cal.App.4th 1014.) The facts of that

case were nearly identical to the facts of this case, except that Sunnyvale did not permit the *Trinity Park* developer to make a payment in lieu of providing affordable housing units. (*Id.* at pp. 1021-22 & 1027 n.4.) The Court of Appeal for the Sixth Appellate District held in *Trinity Park* that the developer could not use section 66020 to justify its delay in challenging the inclusionary affordable housing condition Sunnyvale had applied in approving the developer's tentative subdivision map, because "the requirement that Trinity sell five houses in the Trinity Park development at below market rates as a condition of subdivision approval cannot be construed to constitute an exaction within the meaning of sections 66020 and 66021." (*Id.* at p. 1041.) As in this case, because the developer in *Trinity Park* had elected to proceed with its project despite full knowledge of the approval condition requiring affordable housing units, and then to sue years after receiving that conditional approval, the lawsuit was untimely under Government Code section 66499.37. (*Id.* at pp. 1044-45.)

The Court of Appeal for the Third Appellate District has concluded as well that section 66020 covers conditions requiring transfer of money or property to a public agency, but not conditions controlling private land use. (*Fogarty*, 148 Cal.App.4th at p. 544.) In *Fogarty*, the petitioners challenged a tentative map approval that restricted construction on a portion of the mapped site, requiring the area to remain "open space" for aesthetic, environmental, and possibly recreational reasons. (*Id.* at p. 540 & n.3.) The

suit was untimely under section 66499.37,[15] but the petitioners attempted to salvage it by citing to section 66020. (*Id.* at pp. 541-42.) The Court of Appeal rejected this argument, noting that the approval condition restricted petitioners' construction, but required no conveyance of property to the City of Chico. (*Id.* at p. 544 ["As plaintiffs concede, the specific terms in section 66020 all involve divesting a developer of either money or a possessory interest in the subject property. The present land use conditions at issue do not result in either consequence; they are simply a restriction on the manner in which plaintiffs may use their property."].)

Petitioners cite no case to the contrary. Petitioners assert that the plaintiff developer in *Building Industry Association of Central California v. City of Patterson* ((2009) 171 Cal.App.4th 886) relied on section 66020 to force the City of Patterson to accept the affordable housing fee in question under protest, and to justify suit some years after obtaining initial development approvals. (Opening Brief, at p. 23.) Contrary to this assertion, however, the published opinion does not apply section 66020, stating instead that it expresses "no opinion on the question whether section 66001, or the Mitigation Fee Act in general (*see* Gov. Code, § 66000.5), applies to affordable housing in-lieu fees." (*Building Industry Assn.*, 171 Cal.App.4th at p. 897 n.13.) Similarly, in *Bright Development v. City of*

[15] The *Fogarty* petitioners filed their suit within 90 days after the City of Chico approved their tentative subdivision map, but failed to serve it on time. (*Fogarty*, 148 Cal.App.4th at pp. 540-41.)

Tracy ((1993) 20 Cal.App.4th 783), the published opinion notes that the plaintiff developer invoked section 66020 but does not state whether or not the defendant city objected to this procedure. (*Bright Development*, 20 Cal.App.4th at p. 790 & n.9.) Neither *City of Patterson* nor *Bright Development* applies section 66020 over the defendant city's opposition or analyzes the conditions of approval to which section 66020 should apply.

2. The Courts of Appeal Have Applied Section 66020 Only to Mandatory Payments and Similar Exactions.

In two cases, however, the Courts of Appeal have resolved disputes over the proper application of section 66020 in favor of its application. (*Branciforte Heights*, 138 Cal.App.4th at p. 928; *Williams Communications*, 114 Cal.App.4th at pp. 657-58.) Both of these cases involved mandatory transfers to the defendant city of money or property for public facilities. In *Branciforte Heights*, the developer could have chosen either to dedicate parkland to the City of Santa Cruz or to pay a park fee (*Branciforte Heights*, 138 Cal.App.4th at pp. 921-22 & n.3); in *Williams Communications* a telecommunications provider had to pay the City of Riverside a fee that could not, by law, exceed the amount necessary to compensate the City for costs associated with the provider's installation of cables under public streets (*Williams Communications*, 114 Cal.App.4th at pp. 655-56). These decisions are consistent with the Court of Appeal's decisions in *Trinity Park* (193 Cal.App.4th at p. 1041) and in this case.

F. This Court's Precedents Are Consistent With the Rule Applied in This Case by the Court of Appeal.

Finally, although this Court has not decided precisely how sections 66020 and 66499.37 interact, it has addressed related questions. It has construed section 66020 narrowly, and has not implied any Constitutional necessity for the special litigation procedure the Legislature enacted in section 66020. Application of section 66020 to the Inclusionary Requirement would be inconsistent with these precedents.

1. This Court Has Construed Section 66020 Narrowly.

This Court has analyzed Government Code section 66020, and has refused to apply it to a developer's belated suit. In *Barratt American*, the plaintiff developer attempted to use section 66020 to pay construction permit and plan-check fees under protest, and then to seek a refund to the extent these fees were "excessive." (*Barratt American*, 37 Cal.4th at pp. 692-93.) This Court held, however, that although the payments in question were mandatory, they were not "fees, dedications, reservations, or other exactions" within the meaning of section 66020, because the statute stated expressly that it did not cover "fees for processing applications for governmental regulatory actions or approvals." (*Id.* at p. 696 ["Thus, section 66020, by its own terms, applies only to "development fees" that alleviate the effects of development on the community and does *not* include fees for specific regulations or services."] [emphasis original].)

2. This Court Has Never Applied Section 66020 to Extend the Deadline for Challenging a Development Approval.

On a few occasions, this Court has considered suits that might have presented, but did not, the question Petitioners present to this Court. For example, in *Travis*—a suit, like this one, over an affordable housing condition—the time-barred Sokolow plaintiffs apparently did not attempt to bring their lawsuit within the exception of section 66020. (*Travis*, 33 Cal.4th at p. 762.) Conversely in *Ehrlich*, the plaintiff invoked section 66020 in paying the disputed fees "under protest," and then secured the defendant city's express agreement that the plaintiff's development proposal could proceed in parallel with the litigation. (*Ehrlich*, 12 Cal.4th at p. 863.) And similarly, in *San Remo Hotel L.P. v. City and County of San Francisco*, although the parties may have argued in the Court of Appeal over whether section 66020 applied to the housing replacement fee at issue in the case, they did not renew that argument in this Court. (*San Remo Hotel* (2002) 27 Cal.4th 643, 658 n.9.)

This Court has discussed the interplay between section 66020 and section 66499.37 just once. In *Hensler*, as in *Travis*, the plaintiff did not attempt to bring his action within the "perform-under-protest" exception, which this Court described as a "*limited* exception" to section 66499.37. (*Hensler*, 8 Cal.4th at p. 19 n.9.) Although this Court stated that the Legislature had enacted section 66020 in 1990, and suggested that it could

have applied to Hensler's suit (*id.*), the predecessor statute to section 66020 (at that time, former Government Code section 66008) *was* effective when Hensler commenced his action. (*Hensler*, 8 Cal.4th at p. 8 [noting commencement of action in September 1989]; *see* Stats. 1988, ch. 418, § 4 [AMJN, Vol. 2, Exh. C] [amending former Government Code section 65913.5 and renumbering it to section 66008].) Because Hensler did not raise the issue, this Court in *Hensler* had no occasion to determine whether or not the statute that is now section 66020 really would have permitted Hensler to construct his no-ridgeline development "under protest" and then seek "restitution" from the City of Glendale after completing it.

Petitioners acknowledge, however, that section 66020 would *not* have applied to Hensler's claims. (Opening Brief, at p. 37.) Palo Alto agrees. The ridgeline development restriction at issue in *Hensler* was a limit on Hensler's private use of property, not an "exaction" that Hensler could have performed under protest and then recovered the value of through belated litigation. The same analysis applies to Petitioners' challenge to the Inclusionary Requirement.

3. This Court Has Never Suggested That the Constitution May Require a "Performance Under Protest" Procedure.

What this Court did hold in *Hensler* was that such a procedure was not constitutionally necessary. Hensler lost his suit, even though he alleged that Glendale's ridgeline construction ban was an unconstitutional taking,

because he had not sought judicial review promptly after receiving conditional approval for his development plans. (*Hensler*, 8 Cal.4th at pp. 14-15.) Petitioners' suggestion—despite *Hensler*—that a "pay under protest" procedure is necessary to avoid unconstitutionality (Opening Brief, at pp. 38-39) is therefore baseless.

Petitioners rest their constitutional argument on a misreading of *Ehrlich*. This Court in *Ehrlich* noted uncertainty as to whether or not the tests California's courts had developed were adequate to evaluate whether or not a land-use regulation "takes" property without compensation in violation of the United States Constitution. (*Ehrlich*, 12 Cal.4th at p. 866.) But this uncertainty was over the constitutionally necessary relationship between the effect of the land use on the public and the effect of the public's regulation on the land user, not over the procedure or timetable for asserting any mismatch. (*Id.* at pp. 867-69.) Because Culver City agreed that Ehrlich could pursue his development while the parties determined how much, if anything, Ehrlich had to pay to mitigate the loss of recreational facilities the development would cause (*id.* at p. 865), this Court in *Ehrlich* had no reason to address—and did not—whether or not the city might have had any constitutional need to permit payment under protest.

Moreover, this Court noted just two years after *Ehrlich* that even "significant delays in the development process" resulting from litigation

under the Subdivision Map Act and similar statutes ordinarily do not constitute "takings." (*Landgate Inc. v. Calif. Coastal Comm.* (1998) 17 Cal.4th 1006, 1030-32.) If such delays do cause unconstitutionally great and sustained interference with private use of property, compensation may be due. (*See id.* at pp. 1032-34 [Chin, J., dissenting, citing *First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 322].) This Court's decisions lend no support to Petitioners' suggestion that application of section 66020 to their claims is or even may be necessary to avoid unconstitutionality.

G. If This Court Does Not Affirm the Court of Appeal's Decision, Palo Alto Asks This Court to Remand the Action to the Court of Appeal.

Government Code section 66020, subdivision (d), sets forth timing requirements for Petitioners' protest and suit, which Petitioners would have had to meet if section 66020 applied to their claims. First, section 66020 requires a protesting developer to give notice of its protest in writing no more than 90 days after "imposition of" the "fees, dedications, reservations, or other exactions" at issue. (Gov. Code, § 66020, subds. (a)(2), (d)(1).) Second, section 66020 then requires the developer to commence suit "within 180 days after the delivery of the notice." (*Id.*, § 66020, subd. (d)(2).)

These requirements are linguistically ambiguous. Section 66020 calls for a local agency to give a permit recipient "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 . . . that the 90-day approval period within which the applicant may protest has begun." (Gov. Code, § 66020, subd. (d)(1).) It does not state that this agency notice, rather than the conditional approval itself, is the event that begins the 90-day protest period, however. (*Cf.* Pub. Resources Code, § 21167 [stating that limitations periods for CEQA suits run either from the date an agency makes a decision or from the date the agency files a statutorily required notice regarding that decision].) Moreover, the reference to the "notice" in subdivision (d)(2) of section 66020 does not specify whether the "notice" commencing the 180-day period within which the developer may sue is the *agency's* notice under section 66020, subdivision (d)(1), or the *developer's* notice under section 66020, subdivision (a)(2). Finally, even assuming the Legislature intended these statutory subdivisions to make the agency's notice, rather than the developer's actual knowledge of the conditions on which the agency has permitted development, the key to commencement of either the 90-day protest period or the 180-day lawsuit period, no Court of Appeal has determined whether or under what circumstances the courts may excuse strict compliance with this notice requirement. (*See Branciforte Heights*, 138 Cal.App.4th at p. 925 n.6 [noting, but not deciding, that a developer's laches might bar protest and suit under section 66020 even if

the local government had failed to give any notice satisfying section 66020, subdivision (d)(1)].)

Palo Alto moved for summary judgment in part on the ground that Petitioners' protest of the Inclusionary Requirement was untimely under section 66020, subdivision (d). (JA, 1:0102, 1:0119-21.) Petitioners disputed the factual predicate for this aspect of Palo Alto's motion (JA, 3:0860), and made their own cross-motion for summary adjudication seeking an order declaring their protest and suit timely (JA, 4:1077). Because the trial court concluded that section 66020 did not apply to this action at all, however, neither it nor the Court of Appeal addressed any legal or factual disputes regarding potential application of section 66020 to the facts of this case. (JA, 5:1443-44.) Furthermore, untimeliness was just one of Palo Alto's alternative grounds for seeking summary judgment; Palo Alto also raised estoppel, and argued that Petitioners had failed to allege any tenable claim that the Inclusionary Requirement violated any law. (JA, 1:0101-03, 1:1:0118-19, 1:0121-27.)

Although the Court of Appeal affirmed the judgment of the trial court by adopting the trial court's rationale (Slip Op., 7-12), it could have affirmed on any of the grounds Palo Alto presented. (*See Jiminez v. County of Los Angeles* (2005) 130 Cal.App.4th 133, 140.) For these reasons, if this Court does not affirm the decision of the Court of Appeal, Palo Alto asks this Court to remand the matter so that the Court of Appeal may consider

Palo Alto's alternative grounds for seeking summary judgment. (Cal. Rules of Court, Rule 8.528(c) *see Arnel Dev. Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511, 525; *Taylor v. Union Pac. R.R. Corp.* (1976) 16 Cal.3d 893, 895.)

V. CONCLUSION

Petitioners were, and are, subject to a variety of generally applicable regulations in the Palo Alto Comprehensive Plan and Municipal Code, all designed to protect the common good in Palo Alto by controlling individual developers' business decisions. Some of these regulations—those that require developers to give Palo Alto money or property for public facilities in the form of "fees, dedications, reservations, or other exactions"—may be subject to challenge on the extended timetable provided by Government Code section 66020. Others—including those requiring residential developers to ensure that new neighborhoods include affordable homes—are subject to challenge only on the short, strict timetables provided by Government Code sections 65009 and 66499.37. Because the Inclusionary Requirement is in the latter, not the former, category, the Court of Appeal held correctly that Petitioners' action was untimely.

DATED: April 11, 2013

GOLDFARB & LIPMAN LLP

By: _____
JULIET E. COX
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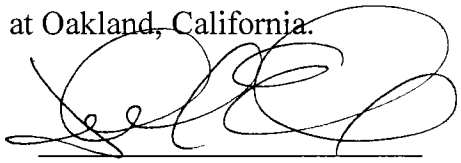
City of Palo Alto

CERTIFICATE OF CONFORMITY

In accordance with Rule 8.520(c) of the California Rules of Court, I certify under penalty of perjury that the Answer Brief on the Merits by Defendant and Respondent City of Palo Alto in the case of *Sterling Park L.P. et al. v. City of Palo Alto* does not exceed 14,000 words, including footnotes. According to the word count function on the word processing program I used, this brief contains 11,141 words.

Executed on April 11, 2013, at Oakland, California.



JULIET E. COX

PROOF OF SERVICE BY MAIL

Sterling Park L.P., et al. v. City of Palo Alto
State of California Supreme Court Civil Case No.: S204771
State of California Court of Appeal, Sixth Appellate District Case No.: H036663
Santa Clara County Superior Court Case No.: 1-09-CV-154134

I, Tina Glenn, certify and declare as follows:

I am over the age of 18 years, and not a party to this action. My business address is 1300 Clay Street, Eleventh Floor, City Center Plaza, Oakland, California 94612, which is located in the county where the mailing described below took place.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 12, 2013, at my place of business at Oakland, California, a copy of each of the following:

- **CITY OF PALO ALTO'S ANSWER BRIEF ON THE MERITS**

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Executed this 12th day of April, 2013, at Oakland, California

Tina Glenn

Sterling Park, L.P., et al. v. City of Palo Alto
Supreme Court of the State of California Case Civil No.: S204771
State of California Court of Appeals, Sixth Appellate District Case No.: H036663
Santa Clara County Superior Court Case No.: 1-09-CV-154134

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