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

SUPREME COURT
FILED

JUN - 3 2013

Frank A. McGuire Clerk

Deputy

REPLY 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 E. McKenney, Judge

Case No. 1-09-CV-154134

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
ROBERT J. STUMPF, JR., CAL. BAR NO. 72851
JAMES G. HIGGINS, CAL. BAR NO. 238188
FOUR EMBARCADERO CENTER, 17TH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-4109
TELEPHONE: 415-434-9100

RUTAN & TUCKER, LLP
DAVID P. LANFERMAN, CAL. BAR NO. 71593
5 PALO ALTO SQUARE
3000 EL CAMINO REAL, SUITE 200
PALO ALTO, CA 94306-9814
TELEPHONE: 650-320-1500

ROSEN BIEN GALVAN & GRUNFELD LLP
SANFORD JAY ROSEN, CAL BAR NO. 62566
ERNEST J. GALVAN, CAL. BAR NO. 196065
315 MONTGOMERY STREET, TENTH FLOOR
SAN FRANCISCO, CA 94104
TELEPHONE: 415-433-6830
Attorneys for Plaintiffs and Appellants
STERLING PARK, L.P. AND CLASSIC COMMUNITIES, INC.

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ERNEST J. GALVAN, CAL. BAR NO. 196065
315 MONTGOMERY STREET, TENTH FLOOR
SAN FRANCISCO, CA 94104
TELEPHONE: 415-433-6830
Attorneys for Plaintiffs and Appellants
STERLING PARK, L.P. AND CLASSIC COMMUNITIES, INC.

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I. INTRODUCTION

Sterling has two principal responses to the City's Answer Brief on the Merits (AB):

First, the City all but abandons the rationale the court of appeal used in ruling against Sterling, i.e., that the City did not impose the below-market rate (BMR) housing exactions at issue "for the purpose of 'deferring all or a portion of the cost of public facilities related to the development project.'" Instead, the City's main argument is that the fees and transfers of real property at issue are "land use regulations," not "exactions," and thus not subject to the "protest" procedure in section 66020 of the Government Code.[1] Here, the City parts company with the court of appeal, which did regard the BMR requirements as exactions, just not a particular *type* of exaction. Moreover, the City did not raise this argument below.

Sterling agrees the distinction between land use regulations and exactions is important, indeed dispositive, in this case. If the line between the two blurs in some cases, it is very clear here. As the court of appeal noted, the City required Sterling Park "to provide 10 BMR units on the project site and pay in-lieu fees [based on a percentage] of the actual selling price or fair market value of the market-rate units, whichever was higher." (Slip Op. at p. 3.) These requirements do not "regulate" the "use" of

[1] All statutory references are to the California Government Code.

Sterling's property. Nor are they general regulations prescribing the design, construction, density, or aesthetics of Sterling's Project. Instead, they require Sterling to transfer interests in real property and pay money to a City fund.

As the court held in *Fogarty v. City of Chico* (2007) 148 Cal.App.4th 537, 544 (*Fogarty*), the "specific terms in section 66020 all involve divesting a developer of either money or a possessory interest in the subject property." A land use regulation, by contrast, is "simply a restriction on the manner in which plaintiffs may use their property." (*Ibid.*) Applying this bright-line rule here, the Court should conclude Sterling properly sought judicial review of the City's demand for money and interests in real property in accordance with the procedures and limitations period under section 66020.

Second, the City makes no response to one of Sterling's main arguments: that the court of appeal's opinion conflicts with this Court's observation in *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854 (*Ehrlich*) that the "Legislature intended to require *all* protests to a development fee that challenge the sufficiency of its relationship to the effects attributable to a development project—regardless of the legal underpinnings of the protest—to be channeled through the administrative procedures mandated by the [Mitigation Fee] Act." (*Id.* at p. 866, original italics.) Sterling's lawsuit is just such a protest because it alleges the City

imposed the disputed BMR fees and property transfers upon Sterling without any showing that they are reasonably related to effect, costs, or deleterious public impacts attributable to the Sterling's Project. (JA 1:0005-0009.)

In addition to these two broad responses, either of which provides a sufficient basis for the Court to reverse the judgment, Sterling's reply will demonstrate that:

(a) Sterling's plain meaning interpretation of section 66020 is consistent with the "usual rules" governing land-use litigation;

(b) Sterling's interpretation is also consistent with opinions from this Court and the courts of appeal; and

(c) the Court need not remand this case to the court of appeal to consider the City's alternative grounds for summary judgment.

II. ARGUMENT

A. The City's BMR Housing Requirements Are Exactions, Not "Land Use Regulations"

Below, the court of appeal held the BMR requirements were not subject to the protest statutes because they were not "'imposed for the purpose of "defraying all or a portion of the costs of public facilities related to the development project."'" (Slip Op. at pp. 8-9.) The court did not question that the BMR housing requirements were "exactions." It merely held, erroneously in Sterling's view, they were not exactions the City

imposed to "defray the cost of public facilities necessitated by the new development." (*Id.* at p. 9.)

Similarly, in its earlier opinion, in *Trinity Park, L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014, 1042 (*Trinity Park)*, which involved BMR housing dedication requirements the City of Sunnyvale imposed, the court observed that the "Legislature intended that the exactions that may be protested under the Mitigation Fee Act are those exactions imposed" for this purpose. The court of appeal again regarded BMR requirements as "exactions," just not exactions imposed for a particular "purpose."

The City now takes a different view in two respects. First, it effectively abandons the "for the purpose of" limitation that was the centerpiece of the court of appeal's opinion. Second, the City rejects the court of appeal's recognition that the BMR housing requirements were exactions. Instead, the City argues such requirement is a "land-use regulation, which restricts the use Petitioners may make of their property." (AB at 2.) This argument has no merit for three reasons:

First, the City's requirement that Sterling transfer ten new housing units on BMR terms and pay in-lieu fees does not "regulate" the manner in which Sterling may use its property. Sterling's Project continues to be used for residential development with the same number of homes, on the same plan, the same design, and under the same construction standards as if the

BMR requirements had not been imposed. Instead, the City's requirement divests Sterling of both money and possessory interests in real property. (See *Fogarty*, *supra*, 148 Cal.App.4th at p. 544.) This distinction is clear, straightforward, and dispositive. In *Nollan v. California Coastal Commmission* (1987) 483 U.S. 825, 831, the Court observed that calling the Commission's demand for a public easement across a landowner's property a "'mere restriction on its use'" is "to use words in a manner that deprives them of all their ordinary meaning." So, too, is the City's attempt to characterize its demand that Sterling transfer money and property as a mere "land use regulations."

In attempting to develop a "working definition of exactions," a leading treatise noted its "first notion was to focus on those aspects of development regulation that require a builder or developer to give something to the city or county." (Frank & Rhodes, Development Exactions (Planners Press, American Planning Ass'n., 1987) p. 4, emphasis added. (Frank & Rhodes)) Later, it "expanded slightly that definition to include regulations requiring something be turned over to a common maintenance entity such as a property owners association. That something could be a piece of land, a building, a community facility (e.g., a park, a sewer) or a cash payment." (*Ibid.*)

Combining both these elements, this definition of "exactions" includes both the "traditional exactions such as mandatory land dedications

and cash payments in-lieu of land, as well as the newer techniques such as facility donations, impact fees, impact taxes, and *payments for low- and moderate-income housing in an inclusionary zoning scheme*." (Frank & Rhodes, *supra*, at p. 4, italics added.) According to the treatise, this definition "also has the desirable feature of excluding from the definition the customary regulatory constraints imposed on development such as restrictions on use, building size, yard size, etc." (*Ibid.*)

Second, California courts have viewed exactions in the same inclusive and comprehensive sense to refer generally to the wide range of contributory requirements imposed as conditions of development. (See, e.g., *Grupe Dev. Co. v. Superior Court* (1993) 4 Cal.4th 911, 920 ["[t]here is textual evidence that the Legislature intended the phrase 'other requirement' [as used in Gov't Code section 65995, limiting school facilities fees and exactions] to serve as a catchall for *all* exactions imposed as a condition to development, however denominated."], original italics.)

When the statutory protest procedures were established in 1984-1985, courts used the term "exactions" to refer to a wide range and types of required "contributions," such as land, money, and improvements, commonly imposed as conditions of development. See, e.g., *Associated Home Builders v. City of Walnut Creek* (1971) 4 Cal.3d 633, 641; *Georgia-Pacific Corp. v. Cal. Coastal Com.* (1982) 132 Cal.App.3d 678, 699-700; *Liberty v. Cal. Coastal Com.* (1980) 113 Cal.App.3d 491, 504.)

This comprehensive usage of the term "exactions" was echoed in a 1985 Senate Committee report: "'When they approve development projects, local officials often require developers to install public facilities, dedicate land, or pay in lieu fees. These requirements are commonly called "exactions" . . . .' (Sen. Local Gov. Com., Rep. on Sen. Bill No. 1454 (1985-86 Reg. Sess.) Jan. 9, 1985.)" (*Rincon del Diablo Mun. Water Dist. v. San Diego County Water Authority* (2004) 121 Cal.App.4th 813, 820.)

In addition, by 1984, courts, California planning agencies, and legal scholars recognized so-called "inclusionary housing" requirements and demands for "affordable housing" units or in-lieu fees as "exactions." (See, e.g., "Inclusionary zoning requirements are just one of many types of exactions that local governments impose on landowners as a precondition to granting permission to develop." (Ellickson, *The Irony of "Inclusionary Zoning"* (1980-1981) 54 So. Cal. L. Rev. 1167, 1211; Kleven, *Inclusionary Ordinances — Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing* (1973-1974) 21 U.C.L.A. L. Rev. 1432, 1493-1494.)

Likewise, a widely-used treatise referred to inclusionary housing requirements as "exactions." (Longtin, Cal. Land Use Law (2d ed., 1987) ch. 8, *Conditions and Exactions*, § 8.02[5], p. 775 ["Current new and unusual types of exactions include: . . . [¶] (3) Exactions to relieve housing shortage problems . . . ." (referring to San Francisco's hotel conversion

ordinance and Palo Alto's below-market-rate affordable housing requirements]; see also Babcock, *Foreword* to *Exactions: A Controversial New Source for Municipal Funds* (1987) 50 Law & Contemp. Problems 1-4 [including analysis of San Francisco's policies requiring contribution of subsidized housing or in-lieu fees as a form of exaction].) Similarly, in December 1982, the Governor's Office of Planning and Research issued a publication describing various ways of financing public facilities and amenities and characterized "affordable housing" requirements, as a new form of "exaction." (*Paying the Piper: New Ways to Pay for Public Infrastructure in California,* ch. 5, *"Exactions: Squeezing Developers"* (Dec. 1982).)

Third, this Court has applied a similar standard to distinguish between exactions and land use regulations. In *Ehrlich*, the Court observed that the "requirement of providing art in an area of the project reasonably accessible to the public is, like other design and landscaping requirements, a kind of aesthetic control well within the authority of the city to impose." (*Ehrlich*, *supra*, 12 Cal.4th at p. 886.) In finding the public art requirement was not a "development exaction," the Court noted that it was "more akin to traditional land-use regulations imposing minimal building setbacks, parking and lighting conditions, landscaping requirements, and other *design* conditions such as color schemes, building materials and architectural amenities." (*Ibid.*, original italics.) Such "aesthetic conditions . . . do not

amount to [development exactions] merely because they might incidentally restrict a use, diminish the value, or impose a cost in connection with the property." (*Ibid.*)

In the present case, the City's BMR housing requirements would not affect the use of Sterling's property nor the design, construction, appearance, or scope of Sterling's Project. With or without such requirements, Sterling's project would look exactly the same. Moreover, the City's demand that Sterling transfer real property and money is not merely "incidental" to some broader regulation of Sterling's Project; it is the very essence of what is at issue.

The City argues section 66020 does not apply to the BMR housing requirements it imposed upon Sterling for three reasons. First, it argues the BMR housing requirement "does not require Petitioners to give or sell anything to *Palo Alto*." (AB at 18, italics added.) The City cites no authority for this proposition, and the language of the statute contains no such requirement. The fact that Sterling would transfer real property to third party homebuyers, not the City directly, makes no difference and does not change the scope or character of what the City is requiring Sterling to do. In any event, the City *does* receive a direct property interest in the BMR units in the form of restrictions on leasing and resale and the City's right to capture any price appreciation of the units, which the City characterizes as its "continuing regulatory supervision to ensure that buyers

do not simply resell at a windfall." (AB at 18.) The in-lieu fees are, of course, specific amounts of money Sterling would pay directly to the City.

Second, the City argues, citing no authority, that section 66020 does not apply to "optional fees in lieu of restrictions on land use." (AB at 20-23.) The argument appears to be that because the City's requirements gave Sterling the "option" to transfer property *and* money, not just property, such requirements are not exactions. This distinction, however, makes no difference. (See Kautz, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing* (2002) 36 U.S.L.Rev. 971, 1007 ["[I]nclusionary ordinances look like exactions when they allow developers to pay fees in lieu of actually constructing affordable units]."") "The optional fee payment may distinguish these ordinances from typical zoning and planning requirements such as maximum height and minimum setbacks. Cities do not generally allow developers to pay a fee in lieu of limiting building height, for example." (*Id.*)

Third, the City argues, again without authority, that section 66020 applies only to "approval conditions that are susceptible to total or partial refund or return in kind." (AB at 23-26.) Not so. For one thing, the City does not claim Sterling did not comply with the protest statutes. In any event, if Sterling prevails at trial, the City must return Sterling's payments of in-lieu fees with interest (see §66020, subd. (d)(2).) The City would

(and could) also restore to Sterling its right to sell any previously-designated BMR units at market rates.

In sum, the BMR housing requirements are not "land use regulations" because (1) as in *Fogarty*, they divest Sterling of both money and possessory interests in real property; and (2) they do not, in fact, "regulate" any aspect of the design, construction, or aesthetics of Sterling's Project. None of the City's contrary assertions has merit. For these reasons, the City's lead argument—which it did not raise below and the court of appeal did not mention—is a non-starter.

B. The City Makes No Response To Sterling's Argument That The Court Of Appeal's Opinion Is Inconsistent With *Ehrlich*

Although the Court has not squarely decided the issue this petition raises, several of its opinions seem to point the way. We discuss some of those opinions in Section C.2 below. Of particular note, however, is the fact the City makes no response to Sterling's argument that the court of appeal's opinion is inconsistent with the Court's opinion in *Ehrlich.* There, the Court observed that the Mitigation 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 by following the procedures provided in section 66020 of the Act." (*Ehrlich*, *supra*, 12 Cal.4th at p. 866, original italics, citation omitted.)

The City does not dispute it imposed the BMR housing requirement as a condition of approving Sterling's Project. It argues, however, that "[w]here 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." (AB at 17.) Presumably, the City agrees the reverse is also true, i.e., that where, as here, a local government *does* condition its approval by demanding either money and/or property in return, the protest procedure of section 66020 applies.

In *Ehrlich*, after referencing the broad "any party" and "any fee" language in section 66020, the Court observed 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 challenge the sufficiency of its relationship to the effects attributable to a development project—regardless of the legal underpinnings of the protest—to be channeled through the administrative procedures mandated by the Act." (*Ehrlich*, *supra*, 12 Cal.4th at p. 866, original italics.)[2]

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[2] In his concurring opinion in *Ehrlich*, Justice Mosk observed that "the plurality is, of course, correct in concluding that anyone challenging either the statutory or constitutional validity of a development fee must follow the procedures set forth in Government Code section 66020 et seq." (*Id.* at p. 898, fn. 2.)

Thus, because the City's BMR housing requirement is a "development fee" for the reasons discussed above, the only question is whether Sterling's lawsuit challenges the "sufficiency of its relationship to the effects attributable to a development project" under *Ehrlich*. It does, and the City does not contend otherwise. (See JA 1:0009-0010.) The City's verified Answer admits its BMR requirements are not supported by any "nexus study" or other evidentiary analysis that demonstrates a reasonable relationship to needs created by Sterling's Project. (JA 1:0086, ¶¶ 11 & 15.)

Contrary to court of appeal's conclusion, Sterling's "no nexus" claim is exactly the "sufficiency of the relationship" challenge *Ehrlich* requires "to be channeled through the administrative procedures mandated by the Act." In accordance with *Ehrlich*, the Court should hold that Sterling is properly pursuing its challenge under the payment under protest statutes, including their applicable limitations periods.

C. Three Additional Points

Either of the these reasons—(1) the BMR requirements are exactions, not land use regulations, and (2) Sterling is asserting the type of claim *Ehrlich* requires "to be channeled through the administrative procedures mandated by the Act"—provides a sufficient basis for the Court to reverse the judgment. Before closing, however, Sterling will briefly respond to three other points in the Answer Brief.

1. Sterling's "Plain Meaning" Interpretation of Section 66020 is Consistent with "Usual Rules Governing Land-Use Litigation"

The Answer Brief argues that Sterling's interpretation of section 66020, which gives effect to the "broadly formulated and unqualified" (*Ehrlich,* 12 Cal.4th at p. 866) meaning of "any fees . . . or other exactions" language in section 66020, subdivision (a), is inconsistent with the "usual rules governing land-use litigation," namely, other laws that impose short limitations periods on challenges to land use litigation, and the "general rule" that a developer cannot "sue over a conditional approval, even within the limitations period, but then proceed with the conditionally permitted activity while the lawsuit proceeds." (AB at 26-32.) Neither argument has merit.

First, as the City notes, several other statutes impose short limitations periods for challenging land use decisions and reflect the Legislature's intent that such challenges be resolved promptly. (AB at 28.) This case does not, however, present a choice between a short limitations period and a long one. Both the contenders are short. Section 66020, subdivision (d), includes a 90-day "protest" period and a 180-day limitations period. Section 66020, subdivision (d)(2), also provides that "[a]ny proceeding brought pursuant to this subdivision shall [with certain exceptions] take precedence over all matters of the calendar of the court."

In addition, by virtue of section 66020, subdivision (d)(1), a local agency can control of when these short time periods begin running. That section requires the local agency to "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] notification that the 90-day approval period in which the applicant may protest has begun." Thus, if a local agency wants to expedite the resolution of any disputes regarding its imposition of development fees or exactions, it need only give this statutory notice. Indeed, the Legislature enacted AB 3081, which created this notice trigger, to avoid the uncertainty the opinion in *Ponderosa Homes, Inc. v. City of San Ramon* (1994) 23 Cal.App.4th 1761 created as to when the applicable limitations period begins running. (Appellants' Motion for Judicial Notice, Vol. 2, Exh. D, sub-Exhs. A- G.)

Second, the City notes that before the protest statutes were enacted, several court opinions held a developer would be deemed to have waived any right to challenge various types of development conditions if it proceeded with its project without first bringing a court action. (AB at 29-30; see, e.g., *Pfeiffer v. City of La Mesa* (1977) 69 Cal.App.3d 74, 78.) The Legislature enacted the protest statutes, however, to *change* this situation and permit a developer to pay a fee, or perform or satisfy any other exaction, "under protest." "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." (*Shapell Indus., Inc. v. Governing Bd.* (1991) 1 Cal.App.4th 218, 241.)

2. Sterling's Interpretation Is Also Consistent with This Court's Jurisprudence and Opinions From the Courts of Appeal

The City argues the Court "has construed section 66020 narrowly." (AB at 41-45.) Sterling disagrees. The starting point is again the Court's broad statement in *Ehrlich* that "'*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'" may resort to section 66020; and "the Legislature intended to require *all* protests to a development fee that challenge the sufficiency of its relationship to the effects attributable to a development project—regardless of the legal underpinnings of the protest—to be channeled through the administrative procedures mandated by the Act." (*Ehrlich*, *supra*, 12 Cal.4th at p. 866, original italics.)

The City cites *Barratt American Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685 (*Barratt*) for the proposition that section 66020 does not apply to "'fees for processing applications for governmental regulatory actions or approvals,'" e.g., building permit or plan review fees. (AB at

41.) In this case, however, the City's BMR housing requirements are not processing fees, i.e., "'fees to defray the administrative and enforcement costs of a local regulatory program.'" (*Barratt, supra*, 37 Cal.4th at p. 697.)[3] Nor are they fees authorized by section 66013 that are "tied directly to a benefit conferred on the property assessed," e.g., sewer and water connection fees. (*Id.* at p. 698.) Nor are they included in the "long list of local regulatory fees" described in section 66016. (*Id.* at p. 696.)

Instead, Sterling is challenging the City's BMR requirements on the grounds they are improper "development fees," i.e., fees that "alleviate the effects of development on the community." (*Barratt, supra*, 37 Cal.4th at p. 696.) (See also section 66000, subdivision (d) which broadly defines "public facilities" as used in the definition of "fee" in subdivision (b), to include "public improvements, public services, and community amenities.") Because the City imposes its BMR housing requirements "to finance public improvements or programs" (*Barratt* at p. 696)—not to defray the City's administrative or processing costs, or fees Sterling paid in return for benefits it received—they are "development fees" that *Barratt* holds are subject to section 66020.

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[3] Section 66000, Subdivision (b). also excludes "fees for processing applications for governmental regulatory actions or approvals" from the definition of "fee" in that subdivision.

The City also cites the Court's opinion in *Hensler v. City of Glendale* (1994) 8 Cal.4th 1. Although it acknowledges the Court "suggested that [section 66020] could have applied" to the developer's challenge to a zoning restriction prohibiting development on a ridgeline (AB at 42-43), the City argues the restriction "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." (*Id.*) Even under the City's analysis, however, the BMR requirements are not a limit on Sterling's private use of its property; they require Sterling to pay money and convey property, i.e., exactions that Sterling can protest and recover in this litigation.

The City also argues the court of appeal's opinion extends the "consistent and practical interpretation of section 66020" by other courts of appeal. (AB at 37-40.) Not so. First, the City cites *Trinity Park*, *supra*, 193 Cal.App.4th 1014. (AB at 37-38.) Because that case came from the same court of appeal and was the basis of its opinion in this case, *Trinity Park* merely restates the question the Court will decide.

Next, the City cites *Fogarty*, *supra*, 148 Cal.App.4th 537, which involved a challenge to subdivision conditions that required the developer plaintiffs to retain a portion of their property in undeveloped condition (like a very large "set back" requirement) to preserve the "'unique and natural features present on the site.'" (*Id.* at p. 540, fn. 3, citation omitted.) The

Third District held section 66020 did not apply, noting that the "specific terms in section 66020 all involve divesting a developer of either money or a possessory interest in the subject property." It added that 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." (*Id.* at p. 544.)

Fogarty provides strong support for Sterling's position. Unlike the "land *use* restrictions" in that case, which did not require any form of payment, the City's BMR housing requirements divest Sterling of both money and property. In *Fogarty*, the court also noted that the treatise plaintiffs cited "calls for an expansive interpretation of 'exaction'" that included "fees, interests in real property, and expenditures for onsite or offsite public improvements, facilities, equipment, or other 'public amenities.'" It added that "[a]ll of these involve some form of payment or transfer of an interest." (*Fogarty*, *supra*, 148 Cal.App.4th at p. 544, fn. 10, citation omitted.) The City's BMR requirements involve both.

In addition, the City cites two cases—*Branciforte Heights, LLC v. City of Santa Cruz* (2006) 138 Cal.App.4th 914 (*Branciforte*) and *Williams Communications v. City of Riverside* (2003) 114 Cal.App.4th 642 (*Williams*)—where the "Courts of Appeal have resolved disputes over the proper application of section 66020 in favor of its application." (AB at 40.) The City argues these cases are consistent with the opinion below because

they "involved mandatory transfers to the defendant city of money or property for public facilities." (*Id.*)

Both these case support Sterling's position. *Branciforte* involved a challenge to a city's requirement that a developer dedicate land for park or recreational purposes or pay a fee in lieu thereof, or both, under section 66477 (the Quimby Act). Fees imposed under this section are expressly excluded from the definition of "fee" in section 66000, subdivision (b). Based on its review of the relevant legislative history, the court held 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 project . . . the limitations period is the one established by section 66020." (*Branciforte*, *supra,* 138 Cal.App.4th at p. 928.) Under *Branciforte*, therefore, even a "fee" excluded from the definition of "fee" in section 66000 may be challenged under the section 66020.

In *Williams*, a communications company challenged a license agreement that required the company to pay a fee to install fiber optic cable in conduit in the city streets. The court agreed the fee was not a "fee" within the meaning of section 66000, subdivision (b) "because it was not assessed for the purpose of defraying the cost of Williams's project." (*Williams*, *supra*, 114 Cal.App.4th at p. 645, 658.) Nonetheless, the court held the plaintiff company properly invoked the protest statutes because the

fee was an "exaction" under sections 66020 and 66021. (*Id.* at p. 659.) The court noted that a standard dictionary defines "exaction" as "compensation arbitrarily or wrongfully demanded" (*id.* at p. 658), i.e., exactly what Sterling is challenging in this case.

3. On Remand, the Court Need Not Direct the Court of Appeal to Consider the City's Alternative Arguments for Summary Judgment

Finally, the City argues that if the Court does not affirm the judgment below, its remand should direct the court of appeal to consider the City's alternative grounds for seeking summary judgment. (AB at 45-48.) Specifically, the City argues the court of appeal could still affirm the judgment on the City's arguments that (1) Sterling's action is barred under the 90-day protest requirement and the 180-day limitation periods in section 66020, subdivision (d); (2) Sterling is estopped from objecting the BMR conditions; and (3) Sterling "failed to allege any tenable claim that the Inclusionary Requirement violated any law." (*Ibid.*) As a matter of law, none of these grounds has merit.

First, in arguing Sterling's action *might* be barred even if section 66060, subdivision (d) applies because this subdivision is "linguistically ambiguous" (AB at 45), the City misinterprets the plain meaning of the protest statute. There is no ambiguity. Section 66020, subdivision (d)(1), requires the local agency to "provide to the project applicant a notice in writing . . . that the 90-day approval period in which the applicant may

protest has begun." That notice creates a clear bright line that starts the 90-day protest period running. Otherwise, there would be no point in giving such notice.

Likewise, section 66020, subdivision (d)(2) distinguishes between the "protest" a developer gives and the "notice" a local agency gives and requires a developer to file within 180 days "after the delivery of the notice." In other words, the "180-day limitations period under section 66020, subdivision (d)(2), does not commence running until written notice of the 90-day protest period has been delivered to a party complying with the protest provisions." (*Branciforte*, *supra,* 138 Cal.App.4th at p. 925.)

Second, in a situation where, as here, the City did not give the notice the statute required it to give, there is no basis to find that Sterling is "estopped" to assert its claim. (Cf. *Nasir v. Sacramento County* (1992) 11 Cal.App.4th 976, 987 [action to challenge forfeiture declaration held timely where the county failed to give the required notice, rejecting the county's argument that "a claimant must rigidly comply with statutory procedures but close is good enough for government work].")

The only authority the City cites on this point is dicta that if a local agency fails to deliver the required notice, the defense of laches (not estoppel) might be a bar. (*Branciforte*, *supra*, 138 Cal.App.4th at p. 925, fn. 6.) Here, as in *Branciforte*, however, the "City asserted the affirmative defense of laches in its answer but did not argue laches in its [motion for

summary judgment]." (*Ibid.*) The City's estoppel argument merely reprises its assertion (at AB 29-30) that a developer generally cannot proceed with the conditionally permitted activity while its lawsuit proceeds. Section 66020 was enacted for the purpose of permitting a developer to do exactly that. (*Hensler*, *supra*, 8 Cal.4th at 19, fn. 9.) And a claim of estoppel is a classic fact issue not properly resolved on summary judgment. (See, e.g., *State Comp. Ins. Fund v. Workers Comp. Appeals Bd.* (1985) 40 Cal.3d 5, 16.)

Third, the City's argument that Sterling is only asserting a "facial constitutional challenge which lacks any basis in law" (JA 1:0121-0127) both incorrectly characterizes Sterling's claim and in any event provides no basis for summary judgment. Sterling's complaint challenges the particular BMR exactions *as applied* to Sterling's Project. (JA 1:0009-0010.) In addition, the Court has held that even "legislatively imposed" fees and exactions (such as the City's BMR requirements) must be shown to bear a reasonable relationship to burdens created by new development. (*San Remo Hotel L.P. v. City and County of San Francisco* (2002) 27 Cal.4th 643, 671; see also *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 767-768 [developers' as-applied challenge to conditions of project approval could also include attacks on the validity of underlying ordinances].)

Accordingly, on remand the Court need not direct the court of appeal to address any of the City's alternative summary judgment arguments.

III. CONCLUSION

For these reasons, the Court should reverse the judgment and direct the court of appeal to reverse the trial court's grant of summary judgment and remand to the trial court for further proceedings.

Dated: June 3, 2013

RUTAN & TUCKER, LLP
ROSEN BIEN GALVAN & GRUNFELD LLP
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By _____
ROBERT J. STUMPF, JR.
Attorneys for Plaintiffs and Appellants
Sterling Park, L.P. and Classic Communities, Inc.

CERTIFICATE OF COMPLIANCE

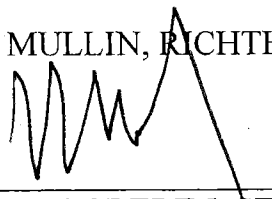
Pursuant to California Rule of Court 8.204(c), I certify that the foregoing Reply to Answer to Petition for Review is proportionately spaced, has a typeface of 13 points, and contains 5,404 words, according to the word processing program with which it was prepared.

Dated: June 3, 2013

RUTAN & TUCKER, LLP

ROSEN BIEN GALVAN & GRUNFELD LLP

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By 

ROBERT J. STUMPF, JR.
Attorneys for Plaintiffs and Appellants
Sterling Park, L.P. and Classic Communities, Inc.

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 June 3, 2013, I served the following documents described as

REPLY 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 June 3, 2013, at San Francisco, California.

James Livingston