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"PAY UNDER PROTEST" PROCEDURE FOR "OTHER EXACTIONS" IS NOT APPLICABLE TO ALL DEVELOPMENT EXACTIONS

[*Trinity Park, L.P., et al. v. City of Sunnyvale*, 2011 WL 1054221, ___ Cal.App.4th ___, \(6th Dist. 2011\)](#)

By [Dave Lanferman](#)

A California appellate court has ruled that the "pay-or-perform under protest" procedures of Government Code sections 66020 and 66021 do not apply to all types of development exactions. In its opinion, the Sixth Appellate District narrowed the scope of the statutory pay under protest provisions, and held that they should be interpreted so as to be available for review of exactions imposed by a local agency as a condition of development approval only if the exaction is "for the purpose of defraying all or a portion of the cost of public facilities related to the development project."

The court held that there was no showing that the City's affordable housing requirement imposed on the developer (exacting five homes at admittedly "below market" prices set by the City) was intended to serve the purpose of defraying the cost of public facilities related to the development project, so the pay under protest procedure was not applicable and the developer's protest and action for review were deemed untimely. The court emphasized that its decision was limited to the facts of this case.

The City approved a 42 home development project in 2007, subject to a condition that required the developer to execute a "Below Market Rate" housing agreement prior to obtaining building permits. The BMR agreement required the developer to sell five of the new homes to qualified buyers selected by the City at below market prices, to be adjusted annually. In 2009, when construction was underway and the time for sale of the BMR homes was approaching, the developer sent a written protest of the requirements to convey the new homes at the BMR prices as required by the City, and filed suit for review and relief from the BMR exactions, under Government Code section 66020. The City demurred on the grounds that the action was barred by the short statutes of limitations for either section 66499.37 (for challenges to decisions under the Subdivision Map Act) or section 65009 (for challenges to planning or zoning decisions). Plaintiff argued that neither applied, because the BMR requirement was not imposed as a tentative map condition, but rather as a special permit condition; and because section 66020 was the more specific statute applicable to review of development fees and other exactions. The lower court sustained the City's demurrer, and the appellate court affirmed, albeit on somewhat different grounds.

The Court of Appeal agreed that if the protest procedure of section 66020 applied to this action for review of the City's requirement that the developer provide "below market rate" homes, then it would have been error to sustain the demurrer. The "pay under protest" procedure enacted in 1983 (and currently codified at Government Code Section 66020) provides: "Any party may protest the imposition of any fees, dedications, reservations, or other exactions imposed on a development project . . ." by tendering payment, or performance, of the disputed exaction under protest within 180 days of receiving written notification from the City that the protest period has commenced. Since the City had never given that statutory notification, the action would not be untimely if section 66020 were applicable to review of these housing exactions.

The court tried to ascertain the Legislature's intent in providing for protest of development fees or "other exactions" in section 66020 and 66021. The decision appears to acknowledge that the BMR housing requirements could be viewed as a form of "exaction" for some purposes, but not necessarily for the limited purpose of determining whether the pay under protest statute may apply. The court observed that "not all exactions imposed by a public entity on a development project constitute an 'other exaction' within the meaning of section 66020 and 66021." Noting that the term "other exaction" is not defined in either of the pay under protest statutes, the court concluded that "exaction" should be interpreted for purposes of this protest statute by reference to language from a distinct part of the Mitigation Fee Act (Gov't Code section 66000(a)) defining "fees" as charges "to defray the cost of public facilities, etc." Alternatively, the decision appears to hold that the protest statutes also apply to "other exactions" if imposed for the substantially broader "purpose" as stated in a 2005 Supreme Court decision "to alleviate the effects of the development on the community."

The decision thus requires that "the purpose of the exaction ... must be scrutinized," in order to determine the applicable procedure for seeking review of a development exaction, and the applicable statute of limitations. It may be difficult to definitively identify and conclusively ascertain the "purpose" of an exaction in many cases. In this case, the court took judicial notice of the City's Municipal Code to determine that the City's "purpose" for its below market rate housing requirement was to "enhance the public welfare" by mandating that future housing development contribute to attaining the City's housing goals, rather than to defray the cost of public facilities related to the development. (The decision did not examine whether the housing exactions here met the alternative purpose test, i.e., "to alleviate the effects of the development on the community.") Despite announcing a new pleading requirement to be met by parties seeking to follow the pay under protest procedure (i.e., the "purpose" of the challenged exaction), the court affirmed the denial of any leave to amend, and apparently accepted "the express language of the City's below market housing ordinance" as being conclusive as to the purpose of the exaction in this case. The court concluded by emphasizing that its decision "is limited to the facts of this case."

To the extent that this decision interprets the pay (or perform) under protest statutes as being applicable only to such "exactions" as may be imposed for one of the newly required limiting purposes set forth in the

decision, it raises several questions. The decision ascertains the "legislative intent" for the term "other exactions" as used in the 1983 and 1984 protest statutes, by incorporating a limitation (i.e., for the "purpose" of "defraying the cost of public facilities") from distinct legislation that wasn't adopted until 1987. The Legislature amended the protest statute in 1996 to require written notification of the final amount of a fee or exaction and the commencement of the time for protest because of concern that there was uncertainty as to when a fee or exaction might be deemed to have been "imposed" for purposes of timely protests and limitations. By limiting the protest procedures to only such exactions as are imposed for the specified "purpose," the decision may add to such uncertainty. The decision would apparently require local governments, development applicants, and the courts to try to identify the ostensible "purpose" for each of the many types of exactions imposed as conditions of development approval, in order to determine what method of review and what statute of limitations may be applicable. The new uncertainty inherent in such efforts, requiring applicants to guess as to whether the protest procedure is applicable in any particular case, may limit the utility of a perform under protest process, or fail to achieve the Legislature's purpose for creating a distinct statutory protest process for fees and other development exactions.

Authored By:

[David P. Lanferman](#)

(415) 774-2996

DLanferman@sheppardmullin.com