Case No. C088409

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

COUNTY OF EL DORADO; COUNTY OF EL DORADO COMMUNITY DEVELOPMENT AGENCY, DEVELOPMENT SERVICES DIVISION
Petitioners,

v.

SUPERIOR COURT OF EL DORADO COUNTY, *Respondent,*

THOMAS AUSTIN AND HELEN AUSTIN, *Real Parties in Interest.*

[PROPOSED] AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, THE RURAL COUNTY REPRESENTATIVES OF CALIFORNIA AND THE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF PETITIONERS COUNTY OF EL DORADO AND COUNTY OF EL DORADO COMMUNITY SERVICES AGENCY, DEVELOPMENT SERVICES DIVISION

On Appeal from El Dorado County Superior Court
Case No. PC2015063
The Honorable Warren C. Stracener

Jennifer B. Henning (SBN 193915)
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814-3941
Tel: (916) 327-7535 Fax: (916) 443-8867
jhenning@counties.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

GOVERNMENT PUBLICATIONS

JOURNALS

I. INTRODUCTION

California's Mitigation Fee Act ("MFA" or the "Act")(Gov. Code, § 66000 et seq.), as with many current public infrastructure programs, "was enacted to offer local agencies an alternative local funding source for public infrastructure after the passage of Proposition 13." (Powell, *Impact Fees: Breaking New Ground Doesn't Need to Break the Bank* (July/Aug. 2018), California Special Districts Magazine, at p. 40.)[1] With reduced property taxes available to meet the infrastructure needs that accompany increased demands caused by development, there was an increasing sentiment that either growth should be reduced, or it should "pay its own way." (Cal. Dept. of Housing and Community Development, Div. of Housing Policy Development, Pay to Play: Residential Development Fees in Calif. Cities and Counties (Aug. 2001), p. 13.) As such, fees collected under the Act are used to defray the costs of new or additional public facilities that are needed to serve development projects, facilities that are essential to creating and maintaining safe and livable communities as the State continues to grow.

Along with providing a funding source for development mitigation projects, the Act also includes safeguards to ensure that the fees are collected and expended for proper purposes. The Legislature intended the Act to address concerns raised by the development community that fees not

[1] Article also available online at: https://www.csda.net/blogs/csda-admin/2018/08/27/impact-fees-breaking-new-ground-doesnt-need-to-bre

be used for purposes unrelated to development projects, and to create a mechanism to guard against unjustified fee retention. (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 864; *Home Builders Assn. of Tulare/Kings Counties, Inc. v. City of Lemoore* (2010) 185 Cal.App.4th 554, 565.) The Act therefore strikes a balance between providing a mechanism for development to pay for public improvements related to the development project without relying on the public resources limited by Proposition 13, and providing protections to fee payors to ensure that fees are used properly.

That historical context of the Mitigation Fee Act is important in this case because here it is undisputed that the projects that have been constructed, or are planned for construction, have the proper nexus to the development. Further, there is no allegation before the Court that the fees that have been collected are for improper purposes or must be refunded because there is no longer a need for the mitigation projects to be completed. Instead, the only basis on which the refund claim before this Court is made is that the five-year report explaining the proper use of the fees collected was not timely made. Put another way, the claim is not based on the *substance* of the use of the funds, but only the *timeliness* of the report describing the substantive use of the funds.

This Court is thus confronted with the issue of whether a Mitigation Fee Act claimant can successfully request a refund under the Act when

---

(last accessed on Mar. 1, 2019).

there is no allegation that the collected fees have been put to an improper or unjustified use. The answer to that question must be no. The Act is designed to: (1) provide funding for project mitigation paid by the development project rather than the general taxpaying public, and (2) protect against misuse of funds. Yet the trial court's ruling allows the development to enjoy the benefits of the impact mitigation projects without either paying for those projects or alleging that the funds were misused. That contravenes the intent of the Mitigation Fee Act and should be rejected.

II. LEGAL ARGUMENT

A. The Mitigation Fee Act is intended to provide a mechanism for addressing the impacts of development while protecting fee payors from misuse of funds.

One of the cornerstones of local government power in California is the police power. (Cal. Const., art. XI, § 7.) Land use authority is the quintessential exercise of the police power to protect the public health, safety and welfare of residents. (*Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 600-601.) The authority for local government to impose conditions and collect impact fees is predicated on its police power, and the proper test of that power is reasonableness. (*Trent Meredith, Inc. v. City of Oxnard* (1981) 114 Cal.App.3d 317, 325.) That concept of reasonableness, as flushed out through the "nexus" tests

developed by the United States and California Supreme Courts,[2] is at the heart of the Mitigation Fee Act: that cities and counties exercise their police power when imposing fees to mitigate development impacts in a way that reasonably relates to the development (i.e., with a nexus between the impacts of the development project and use of the fees). (Gov. Code, § 66001, subd. (a)(3) and (4); *Cresta Bella, LP v. Poway Unified School Dist.* (2013) 218 Cal.App.4th 438, 446-447.)

Mitigation fees collected under the Act therefore serve an important policy objective. As an extension of the use of police powers to regulate for health and safety, the fees are used to offset the impact of development in order to create safe and livable communities. Projects can include any number of community needs reasonably related to the impact of the development, such as: road improvements, drainage, parking, recreational facilities, sewer lines, landscaping, libraries, police substations, bikeways, community centers, and so many other projects that provide for the safety and wellbeing of our communities.

Of course, the Mitigation Fee Act is not a blank check. As an extension of the "reasonableness" test of police powers, the Act creates a framework to protect against the misuse of funds. In adopting the Act, the Legislature was concerned about excessive fees, and about fees for purposes unrelated to the development project. (*Sterling Park, L.P. v. City*

---

[2] *Nollan v. California Coastal Commission* (1987) 483 U.S. 825; *Associated Homebuilders, Inc. v. City of Walnut Creek* (1971) 4

of Palo Alto (2013) 57 Cal.4th 1193, 1205.) To that end, the Act creates a mechanism to guard against unjustified fee retention. (*Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 332.)

Taken together, the MFA provides a framework through which local agencies can exercise their police powers in reasonable ways to mitigate the impact of development, while at the same time ensuring that the fees that are collected are not excessive, are being put to uses that are related to the development project's impacts, and are not unjustly retained when no longer needed. These concepts form the basis through which the statute should be read when addressing interpretation questions.

B. The Mitigation Fee Act must be interpreted with the purpose of the legislation in mind.

In the present case, this Court is confronted with several questions of first impression, including what defenses are available to a local agency when a refund claim is based solely on the timeliness of a report, and not the reasonableness, purpose, or justification for the fees. In resolving that question, this Court should consider what best serves the purpose of the Act.

As the trial court itself acknowledged, the issues that require resolution involving the refund provision in this case are not directly answered by the statute itself or by controlling legal precedent, and thus

---

Cal.3d 633.

"leaves the court to construe the statute in light of its legislative intent." (Trial Court Ruling on Demurrer, p. 9.) In construing a statute to comport with the Legislature's apparent intent, a court should "strive to promote rather than defeat the general purpose of the statute and avoid an interpretation that would lead to absurd consequences." (*Sneed v. Saenz* (2004) 120 Cal.App.4th 1220, 1235.)

Even where a statute may arguably appear clear on its face, "the 'plain meaning' rule does not prevent a court from determining whether the literal meaning of the statute comports with its purpose." (*Bay Area Citizens v. Assn. of Bay Area Governments* (2016) 248 Cal.App.4th 966, 999.) Courts should not follow the plain meaning of a statute when to do so would "frustrate[] the manifest purposes of the legislation as a whole or [lead] to absurd results. Instead, we will 'interpret legislation reasonably and … attempt to give effect to the apparent purpose of the statute.'" (*Ibid*, citing *People v. Nelson* (2011) 200 Cal.App.4th 1083, 1097-1098.)

Government Code section 66001(d) states that every five years, a local agency collecting fees under the Act must make findings regarding the purpose and reasonableness of the fees. It further states that if the "findings are not made as required by this subdivision, the local agency shall refund the moneys in the account or fund . . . ." Real parties in interest make much of this specific language, arguing that on its face, failure to make the findings alone makes continued retention and collection of the fees unjustified, without regard to the purpose or reasonableness of the

collection and expenditure of the fee. (See, e.g., Return to Writ, p. 40.)

Yet, as explained above, this Court does not consider statutory language in isolation or without regard to the purpose of the statute. The MFA on its face does not address: (1) the applicable statute of limitations; (2) whether the continuing accrual doctrine applies; and (3) whether claimants seeking a refund under the MFA must satisfy the prejudice and substantial injury requirements in Government Code section 65010. Reference to section 66001(d) alone cannot resolve those questions as that language in isolation does not address the purposes of the legislation as a whole. Rather, this Court must determine whether refunding the fees – including those that are committed to pay for projects for which there is no allegation of unreasonableness or lack of nexus and that are already constructed or are presently under construction – would meet the goals of the MFA: to provide for development mitigation and ensure that impact fees are reasonable and used for projects that have a nexus to the development's impacts.

C. The trial court order does not advance the Act's purposes, but rather incentivizes avoidable lawsuits and encourages refund requests even when, as here, mitigation projects are otherwise proceeding in compliance with the Act.

The trial court order overruling the demurrer in this case fails to interpret the Act in a manner that is consistent with its purposes. In concluding that the accrual doctrine applies to refund claims made under Government Code section 66001(d)(2), and by allowing such claims to

move forward without a showing of prejudice or substantial injury, the court disregarded the essential purpose of the Act: to provide funding to offset development impacts in a reasonable way that both allows local agencies to provide safe and livable communities and protects against abuses in the imposition, collection and use of fees. The result of the court's order is that the fee payors or developers in this case will enjoy the benefits of the development mitigation projects without having fully paid the fees required to fund those projects, and without having even alleged, much less proven, that the mitigation projects are for purposes unrelated to the development, violate the nexus requirement, or are otherwise unjust or unreasonable. This certainly cannot be the intended result of the statute.

Real parties in interest cite throughout their Return the opinion in *Walker v. City of San Clemente* (2015) 239 Cal.App.4th 1350, for the proposition that the Act requires the return of unexpended fees when a local agency fails to make the required five-year findings. However, as the trial court noted, *Walker* did not address the applicable statute of limitations or the accrual doctrine, and did not discuss the application of Government Code section 65010 (requirement to show prejudice or substantial injury to make a refund claim). (Trial Court Ruling on Demurrer, pp. 6, 8.)

More importantly, however, the language in *Walker* pertaining to the importance of the five year findings and the refund remedy arises in a context that is wholly different than the situation before this Court. In *Walker*, the City of San Clemente had collected nearly $10 million dollars

in parking mitigation fees over a 20 year period, but in that 20 years, had only spent $350,000 on a vacant parcel on which it had not constructed any parking facilities. (*Walker, supra,* 230 Cal.App.4th at p. 1356.) Further, the city's own studies determined that the parking structures initially contemplated when the fee was established were no longer needed because there was a surplus of parking in the mitigation area. (*Id.* at p. 1360.) Subsequent studies conducted by the city failed to identify or predict a parking shortage, but rather recognized that the city had adequate parking. (*Id.* at p. 1361.) During the two decades that the fee was collected, the city did not have a specific plan for using the impact fees, let alone have a record of constructing any facilities. (*Ibid.*) Thus, in *Walker,* the city not only failed to make the required findings, but more importantly, the record demonstrated that the city could not make the requisite findings, whether timely or not.

Given those facts, it is no wonder that the *Walker* opinion focuses on the substance of what the five year report is required to show: the purpose of the unexpended balance of the fees, the justification for continued retention of the fees, a demonstrated reasonable relationship between the fee and the development, and so on. In other words, it was the deficiency in the city's planning and actual use of the funds that created the MFA violation, and the five year report merely evidenced that deficiency. (See *Walker, supra,* 230 Cal.App.4th at p. 1366-1367.)

Here, there is no allegation that the Petitioners have failed to develop

a compliant plan for use of the fees, that the proposed projects are not reasonably related to the development, or that there is any other violation of the requirements for the use of MFA funds. Indeed, as noted in the Petition for Writ of Mandate, the fees collected have already been used or are earmarked for planned projects. (Writ Petition, p. 11.) Some are designated as the sole source for reimbursement of public traffic infrastructure projects that have already been built. In fact, the trial court determined that the developers who have done the work and are due reimbursement of the funds are indispensable parties in this litigation. (Writ Petition, p. 55.) Though a particular finding may not have been timely issued, the parties and the public were well aware of the use and planned use of the fees, as public reports have regularly been made by Petitioners about the fees collected and how they are being used. (Writ Petition, pp. 53-55.) In short, quite the opposite of the facts in *Walker*, this case is not about a deficiency in Petitioners' actual use of the fees. The basis for the refund is only that the report on that activity was not timely adopted. Thus, while *Walker* focused on the substance of the use of the fees rather than the technical aspects of the MFA, there is no dispute here on the substantive use of the fees, but rather on the technical compliance with the timeliness of the report.

To reach such a strict interpretation of the five year report requirement, as the trial court did here, with application of the accrual doctrine and without a requirement that claimant show prejudice or injury,

is inconsistent with the purposes of the MFA. In particular, the trial court found that applying the continuing accrual doctrine to refund claims based on allegations of untimely findings would incentivize against "a local agency from collecting and holding a development fee for an extended period of time without a clear and demonstrable plan to use the fee for the purpose it was imposed." (Trial Court Ruling on Demurrer, p. 6.) But here, the allegation is not that Petitioners lack a clear and demonstrable plan for the fees. All parties acknowledge that the mitigation projects have already occurred in part and continue to move forward. There is no allegation to the contrary. The allegation only relates to the timing of formally adopting findings, not the actual use of funds. In facts such as these, therefore, application of the continuing accrual doctrine does not serve to incentivize proper use of the fees; proper use is already occurring. Instead, applying the continuing accrual doctrine here does little more than encourage litigation to refund fees that are actually being used for precisely the purposes envisioned by the Act. Further, the trial court ruling allows claimants to wait until much of the mitigation work is completed or contracted for completion before filing a claim, thereby obtaining both the benefit of the mitigation project and receiving the fee refund. This moves so far away from the "reasonableness" test of the use of a local agency's police power that it loses the cornerstone principle of the Act itself.

As such, rather than providing a funding mechanism for mitigating development impacts, the trial court ruling eliminates a funding source for

failure to timely issue a report, even if collection, use and retention of the fees would otherwise meet nexus and other reasonableness requirements. And while the MFA is certainly designed to protect fee payors against unreasonable fees or fees unjustly retained, the trial court order here goes far beyond fee payor protection. It allows fee payors to enjoy the benefits of mitigation impact projects that the payors do not challenge as unreasonable or without nexus to the development, without having to pay the costs of those projects. Those costs are instead shifted to the local agency, and by extension, the other taxpayers in the community, and to the developers that have performed that work on the assumption that the impact fees would be available as payment. This shift away from the development paying to mitigate its own impacts, as intended by the Act, would occur merely because of a failure to timely file a report. Such a result does not further the objectives of the Act, and should be reversed by this Court.

III. CONCLUSION

Amici recognize that one of the purposes of the Mitigation Fee Act is to ensure that mitigation fees are collected and used for a valid purpose. In a factual situation, such as the one presented by *Walker*, where an agency has collected fees for years without a demonstrable need for the fees, application of the Act's findings requirement to protect the fee payor is certainly appropriate. But as explained throughout this brief, the Act is also intended to provide a mechanism for local agencies to generate funds to mitigate the impact of development. After local agency revenue was

limited by Proposition 13, the electorate and the Legislature determined that development impact costs should be borne by the development itself, and not the taxpayers generally. The Act, therefore must be interpreted with that purpose in mind.

By applying the continuing accrual doctrine and allowing claims to go forward without a showing of harm or substantial injury, the trial court did not further the objective of making sure the fees were put to proper use. In fact, the record here shows that the fees have been and are being used for valid mitigation projects, and there are no allegations to the contrary. What the trial court has done, however, is eviscerate the other purpose of the MFA—to provide local agencies with a revenue source for development mitigation and to ensure the fiscal burden of such mitigation is borne by the development itself. While the trial court order would encourage unnecessary litigation, it does nothing to advance the goals of the Act. Amici therefore respectfully request that the Petition for Writ of Mandate be granted, or that the Court grant other relief as appropriate.

Dated: March 19, 2019 Respectfully submitted,

/s/
By _____
Jennifer B. Henning

Attorney for Amici Curiae

California State Association of Counties,
Rural County Representatives of
California and League of California Cities

CERTIFICATION OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the word count feature in my Microsoft Word software, this brief contains 3,252 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 19th day of March, 2019 in Sacramento, California.

Respectfully submitted,

/s/

By: _____
JENNIFER B. HENNING

Attorney for Amici Curiae

California State Association of Counties, Rural County Representatives of California and League of California Cities