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MITIGATION FEE ACT MAY NOT REQUIRE SPECIFIC IDENTIFICATION OF NEW FACILITIES

Home Builders Ass'n of Tulare/Kings Counties v. City of Lemoore, (5th Dist. 06/09/2010)

By David Lanferman

On June 9, 2010, a panel of the Fifth Appellate District rejected challenges by a builders association to six out of seven "development fees" recently adopted by the City of Lemoore. The Mitigation Fee Act (Government Code § § 66000 – 66025) requires that a local agency seeking to establish or impose development fees to finance public facilities must "identify" the new public facilities purportedly justifying the fees. Two justices held that the City had satisfied these statutory requirements by adopting a consultant's report that listed examples of the "types" of new facilities that the City may in the future decide to construct to accommodate growth from new developments, but the third justice wrote separately to question whether such lack of specificity complied with the statute.

The City's new "fire protection facilities fee," in contrast, was invalidated because the City's own evidence acknowledged that new development would not add to the burden on the existing fire protection facilities in the service area for which the fee was imposed, and the proposed use of the fee to repay the City's general fund was not a legally valid use of development fees.

The decision also addressed the burden of proof in a facial challenge to the validity of development fees on statutory grounds under the Fee Act. The court distinguished cases historically placing the burden on the agency imposing the development fees, and concluded that there should be separate (but similar) burdens on both the City establishing the fee and on the plaintiff challenging the evidence and analysis purporting to justify the fee.

In a separate concurring opinion, Presiding Justice Ardaiz questioned the proffered justification for the City's new "community recreation facilities fee." His opinion analyzed the language in the Fee Act, and concluded that the statutes require that the public need for new facilities used to justify the imposition of fees, whether a specific new facility or class of facilities, "must be a consequence of or have a direct relationship to the proposed [new] development." He did not question that the examples of facilities in the class of municipal projects to be funded by this fee (e.g., municipal aquatic center and a naval air museum) may be "desirable or beneficial." Justice Ardaiz explained, however, that he had "great difficulty concluding that their desirability or need are a consequence of or have a direct relationship to the proposed project." He

concluded that the City's type of reasoning "justifies a development fee for almost anything, and I do not glean that type of result from the words of this statute."

Facts

The City of Lemoore adopted ordinances in 2007 establishing thirteen new fees to be imposed on new residential developments in the city, based on a consultant's report. The consultant purported to calculate and justify the new fees by using a methodology he described as "standards-based." As summarized in the opinion, the fee consultant "calculated these fees based on the existing ratio of … facility asset value to population, …" based on his assumption that new residents would need to be charged an equivalent amount "to maintain the current level of service" as the City grows.

For example, the "community recreational facility impact fee" was based on the City's estimate that it had "invested" $5.4 million in existing facilities in a category described as "community recreation" (such as a civic auditorium, skate park, teen center, golf course, and "the train depot complex") divided by the current population of Lemoore "to arrive a the per capita cost." That cost per resident was then multiplied by the number of occupants per unit of each type of anticipated new development to calculate the new community recreation facility fee per unit of new development. The consultant did not appear to generate an actual baseline of existing facilities standards (such as park acreage per resident), or levels of service, other than this gross "cost of facilities per resident" factor.

The local home builders association filed a petition for writ of mandate raising facial challenges to seven of the new fee ordinances. The decision indicates that plaintiffs later amended their pleadings, and the court notes at the outset that "all constitutional issues were removed" from the litigation, so that the case proceeded only as to "the City's alleged noncompliance with the Mitigation Fee Act."

The Mitigation Fee Act

The Mitigation Fee Act "embodies a statutory standard against which monetary exactions by local government … are measured." (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 865.) Government Code § 66001 details the statutory requirements for agencies establishing fees, including the requirement that, if the fees are to be used to finance public facilities, then "the facilities shall be identified." The Act permits such identification to be provided "in a capital improvement plan, or in applicable general or specific plan requirements," or in other "public documents that identify the facilities for which the fee is charged." The Act also requires the agency to determine "how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed."

The consultant's report apparently included a list generally describing examples of the types of public

facilities the City might eventually intend to construct. Plaintiff argued that the Fee Act requires that "the public facilities" to be financed with new fees be specifically identified, and that failure to do so would make it difficult if not impossible to determine how they are "reasonably related" to needs caused by new development. The court, however, concluded that the statute could be interpreted to allow the local agency "to identify the facilities via general plan requirements. " (Emphasis in original.)

The City's "Standards-Based" Methodology to "Justify" Its Fees:

The City's consultant claimed to have used a so-called "standards-based" approach to calculate the new fees. However, the consultant's approach described in the case did not appear to actually derive existing "standards" for public facilities or existing "levels of service" as its baseline, but rather justified the new fees based on the City's valuation of its existing public facilities, or a "dollars invested" standard, on a per capita basis.

Plaintiff questioned this approach as inadequate because it did not demonstrate that continuing public expenditures at the same per capita levels was in fact reasonably necessary to provide the same level of service to accommodate demands created by new development. The approach was faulted for failing to reveal whether the existing facilities are adequate to meet the existing (or future) population needs – except in the case of the fire protection facilities fees, which were admitted to be adequate. The Fee Act does not permit fees to be based on costs of curing existing deficiencies or upgrading existing levels of service, but rather permits "standards-based" fees to be used only to (a) maintain the city's "existing level of service" or (b) to achieve "an adopted level of service that is consistent with the general plan." (Section 66001(g).) The lead opinion accepted this approach as complying with the Fee Act.

The Invalid Fire Protection Fee:

The decision also invalidated a new "fire protection fee" established for a service area where the City's evidence showed that "the facilities and equipment needed to serve future development are already in place." The court rejected the City's argument that the new development fees would allow the City to recoup its previous general fund investments in creating those fire facilities for the benefit of new development. Based on that evidence the court concluded that "the new development will not burden the current facilities." Accordingly, there was no legal basis for imposing these new development fees in the absence of impact.

The "Burden of Proof" to Demonstrate the Reasonableness of Development Fees:

The decision notes that "there have been occasional comments from courts of appeal that the burden of proof in a fee case falls on the local agency" and discussed the 1985 decision in *Beaumont Investors v.*

Beaumont-Cherry Valley Water Dist. (1985) 165 Cal.App.3d 227 to that effect. The decision attempts to distinguish those cases, and instead concludes that there should be two distinct "burdens" in facial challenges to fee enactments as in this case.

The decision acknowledges that the local agency first has "the burden of producing evidence in support of its determination" that the amount of its fee and "the need for the public facility are reasonably related to the burden created by the development project." However, the decision then states that "this burden of producing evidence" on the agency "is not the equivalent of the burden of proof." Instead, it states that there is a separate second "burden of proof" on the plaintiff to show that the evidence or record before the agency did not support the agency's underlying determination of a reasonable relationship between the fees and the development – "in the absence of a legislative shifting of the burden of proof."

Conclusion:

As the California Supreme Court has acknowledged, "the Mitigation Fee Act was passed by the Legislature in response to concerns among developers that local agencies were imposing development fees for purposes unrelated to development projects." (*Ehrlich v. City of Culver City, supra*, 12 Cal.4th at 864.)

The decision in this case appears likely to renew -- and intensify -- such concerns among surviving developers and home builders in California.

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