CASE NO. S117590

IN THE
SUPREME COURT OF CALIFORNIA

BARRATT AMERICAN, INCORPORATED,
Plaintiff and Petitioner
vs.

CITY OF RANCHO CUCAMONGA,
Defendant and Respondent

After a Decision by the Court of Appeal
Fourth Appellate District
Case No. E032578

On Appeal from the Superior Court of the County of San Bernardino,
The Honorable Joseph E. Johnston
Case No. RCV 063382

PETITIONER'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

Relying on mischaracterizations of both the statutory scheme and the allegations of the complaint, Respondent City argues a construct of the Mitigation Fee Act (Government Code §66000-§66024[1]) that is a labyrinth in which fee payers wander forever but never find a remedy. The City hopes to keep its ongoing excessive building permit fees as a perpetual profit center, forever immune from attack by fee payers lost in the maze. However, rising above this confusion one finds that the Mitigation Fee Act does in truth provide clear avenues for relief. The complaint alleges five distinct but complimentary remedies that are well pled and should be taken to trial.

[1] Hereafter all statutory references are to the Government Code, unless otherwise noted.

REPLY ARGUMENT

I. §66016(a): FEE ADJUSTMENT MECHANISM

A. THE REMEDY PROVIDED BY §66016(a) IS NOT AN "ATTACK" ON THE LEGISTATIVE ACT ESTABLISHING FEES.

The Complaint alleges *inter alia* that the City has collected more than $3,000,000 of building permit fee revenues in excess of the City's actual cost of services, and therefore Plaintiff seeks a writ of mandate to compel the City to apply the surplus to reduce the fees. §66016(a) plainly states:

> If, however, the fees or service charges create revenues in excess of actual cost, those revenues shall be used to reduce the fee or service charge creating the excess.

The foregoing statutory directive is not made contingent upon a finding of invalidity of the fee. It is a mandatory duty enforceable by writ of mandate. (Sacramento County v. Hickman (1967) 66 Cal. 2d. 841, 845; May v. Board of Directors (1949) 34 Cal 2d. 125, 129) and the amount of the excess fee revenue, whether large or small, obviously has no bearing on the enforceability of this duty. It is a ministerial directive which ensures that valid fees remain valid by maintaining their cost/revenue equivalency.

Respondent City attempts to vitiate this remedy by mischaracterizing §66016 as requiring a validation action per §66022 to enforce the statutory duty of §66016(a). (Respondent Answer Brief – hereafter "RAB"- at page 9-16.) This is a *non-sequitur*. A validation action is required by §66016(e) in any proceeding "to attack, review, set aside, void, or annul the ordinance, resolution, or motion levying a fee or service charge subject to this section..." The cost/revenue adjustment mechanism of §66016(a) preserves and maintains the validity of a fee rather than "attack" it.

B. §66016(a) IS NOT AN EXCUSE FOR THE CITY TO SPEND EXCESS FEE REVENUES RATHER THAN REDUCE FEES

If the City cannot extirpate the cost/revenue adjustment mechanism of §66016(a) altogether, then it would change the meaning of the provision's plainly stated words to something unrecognizable but much more to the City's liking. The City argues that:

> 'As Barratt acknowledges, SECTION 66016 quite sensibly requires cities to spend any "surplus" plan-check and building inspection fees for future building safety…' (RAB 37-38)
>
> 'The city may not treat even "surplus" building permit fees as taxes, because the city may use such fees only for the "benefit" of improved building safety." (RAB 41)
>
> 'In cases of "surplus," SECTION 66016 requires the city to use that "surplus" in lieu of some fee revenue, to cover future building safety program costs." (RAB 41)

If the City cannot avoid the duty of §66016(a) it will transmogrify §66016(a) into a directive to spend more money! Barratt has never acknowledged, nor would common sense allow, that cities may "**spend** any surplus plan check and building inspection fees for future building safety," or use them "for the benefit of improved building safety," or apply them "to cover future building safety program costs." The purpose of §66016(a) is to provide some collective relief to <u>fee payers</u> collectively, not to further pad the budgets of cities who have knowingly (or unknowingly) overcharged fee payers in the past.

In plain English §66016(a) requires that "those revenues shall be used to **reduce the fee or service charge creating the excess.**" (Emphasis added) It is essential to the integrity of §66016(a) that not just the availability of the remedy but the nature of the remedy be confirmed here.

C. THE FREQUENCY OF FEE ADJUSTMENTS IS DICTATED ONLY BY OFFICIAL RECOGNITION OF SURPLUSES RESULTING FROM FEE REVIEW, OR THE DISCRETION OF THE CITY

If the City never reviews its fees then it might never recognize a fee surplus and never encounter the duty of the fee adjustment mechanism in §66016(a). Such is the City's current state of denial with respect to building permit fee surpluses.

In reality, there are recurring unavoidable occasions wherein the City must review its fees and make the necessary accounting and adjustments for any surplus. The most salient occasion is when the City gives a fee legislative review and approval pursuant to §66016. Such occurred in this case with the City's review and approval of Resolution 02-023. The City's unlawful refusal to account and adjust for the building permit fee revenue surplus breached it's statutory duty under §66016(a), giving rise to both Plaintiff's writ of mandate claim to enforce that duty (Second Cause of Action, CT 14) and the validation action (Fifth Cause of Action, CT 18).

In addition, it is likely, though not necessarily a certainty, that the annual audit required by California Constitution Article XIIIB would expose the building permit fee surplus as part of the annual review for "proceeds of taxes." If the City were compliant with competent governmental accounting standards (a competency standard underlying bond ratings, etc., but not a legal requirement) the building permit fee surplus would be exposed both in its annual budget and the annual Article XIIIB audit. (See Governmental Accounting Standards Board "Statement No. 34 on Basic Financial Statements for State and Local Governments," p.26-27, 141-143.) As it now stands, the

City conducts no accounting of its fee surpluses either on a permissive basis or as part of the constitutionally mandated annual audit. While the City takes in over $1,000,000 each year in excess building permit fee revenue, its accounting practices mimic the proverbial three monkeys that "see no evil, hear no evil, speak no evil."

If a fee surplus is not officially recognized, there is no fee adjustment per §66016(a), annually or otherwise. (See RAB p.20.) Nothing prevents the City from using a multi-year financial planning cycle. (See RAB p.21.) And it is absurdly paranoid for the City to suggest that it might have to "reconcile actual revenue and costs with estimates, and adjust fees after a noticed public meeting, each hour, each day, or even each month." (See RAB p.19.) The City always has discretion to review its fees more frequently than may be legally required, but it may not escape that duty altogether.

II. §66020/§66021: REFUNDS

A. THE REMEDY PROVIDED BY §66020/§66021 IS BROADLY INCLUSIVE OF BUILDING PERMIT FEES AND "OTHER EXACTIONS"

Respondent City strains to argue that the refund remedies of §66020 and §66021 apply only to "development fees" (Chapter 5 of the Mitigation Fee Act, §66000-§66008), and "taxes and assessments" (per §66021) but not to anything else – specifically "regulatory fees" such as building permit and plan review fees. (RAB 31-36.) Respondent's argument fails to address the plain language of §66020 and §66021, and the following passage from Ehrlich v. City of Culver City (1996) 12 Cal.4th 854, 864:

relief for "any party" required to pay any sort of fee, charge or exaction at the tollgates of the development process.

B. A §66020 REFUND CLAIM DOES NOT ATTACK THE FACIAL VALIDITY OF A FEE ORDINANCE, EXCEPT TO THE EXTENT IT IS COUPLED WITH A §66022 VALIDATION ACTION

Respondent City makes two false assertions that deserve response, along with a reminder of the dual nature of §66020. The City claims that (1) Petitioner has not alleged any "as-applied" challenge to any fees Barratt has already paid (RAB 28), and (2) Barratt's refund claim for fees paid from June, 2000 through and after May, 2002 present only "individualized facial challenges" (RAB 40 and 38) to the City's building permit fees. In fact, Petitioner's refund claim in the Complaint presents an "as-applied" challenge as to every single fee payment made by Petitioner. (See RT 26: 9-27:23.)

The peculiar and anachronistic method of setting building permit fees followed by the City (described in the Complaint at CT 10:19-12:2) results in a two part fee: (a) the City Council approves a graduated "rate table" of charges based on "Total Valuation of Work" under the permit (see CT 24-25), and (b) the Building Official is given complete administrative discretion for every single building permit to determine the "Total Valuation of Work" (CT 11; Rancho Cucamonga Municipal Code §15.12.020 and §15.12.030). As noted in the Complaint (CT 6:27-7:1) "the amount of the building permit or plan review fee to be charged for a particular application cannot be determined solely by reference to Resolution No. 02-023 or by the ministerial application of any objective standards." That is, there is no fee until the <u>Building Official</u>

determines what the amount of the fee will be.[2] Petitioner's refund claim therefore presents an "as-applied" challenge as to each and every fee payment.[3]

In addition to the "as-applied" basis for refunds on all of Plaintiff's fee payments, the facial invalidity of Resolution 02-023 gives rise to refund claims on all fee payments made under that resolution, by virtue of Plaintiff's validation action and §66020(f). In fact, any fee payer (not just Petitioner) is entitled to a refund if a validation action is successfully prosecuted (by anyone) and the fee payer has tendered a refund protest based on the invalidity of the resolution, during the period from 90 days prior to filing of the validation action to the date of entry of judgment. (§66020(f)(1)(2).) This was explained in N.T. Hill, Inc. v. City of Fresno (1999) 72 Cal.App.4th 977, 993-994:

> "We do not see either part of subdivision (f) of section 66020 as undermining our construction of the two statutes in issue. The language and apparent purpose of subparts (1) and (2) indicate they were intended to apply to actions, such as those covered by section 66022, which challenge a legislative decision to enact or modify a fee and not to actions which challenge an adjudicative decision imposing a fee upon a particular project. [FN16] With respect to subdivision (f)(1), the description of the lawsuit in the subpart is comparable to the description of the lawsuit in section 66022, subdivision (a). In addition, subdivision (f)(1) prescribes a remedy which is a logical adjunct to a section 66022 action but which is not provided for in that statute. If subdivision (f)(1) were applied to actions covered by section 66020, subdivision (d), then it would be substantially duplicative of subdivision (e) of the same statute, which directs the court to order the local agency to "refund [to the plaintiff] the unlawful portion of the payment" (with interest) or "return the unlawful portion of the exaction" if the court "finds in favor of the plaintiff in the action...brought" under subdivision (d)...With respect to section (f)(2), it permits a person who has timely protested, under section 66020, the imposition if a charge on a particular development to have the benefits of another party's successful lawsuit

[2] Note that in Petitioner's validation claim it is alleged that Resolution 02-023 violates Gov.Code §66016(b), which prohibits the legislative body of a local agency from delegating its fee setting authority.

[3] When the matter goes to trial Petitioner will offer proof that there is no rational method for determining "Total Valuation of Work" on any individual permit; it is only a question of whether the Building Official is satisfied with the quantity of fee revenue generated.

> overturning a legislative decision to enact or modify a fee. The lawsuit must be brought within 120 days of the effective date of the ordinance, the same time limit found in section 66022. We do not think it irrational for the Legislature to provide for a refund to a person who has protested in compliance with section 66020 if the ordinance which authorized the imposition is later declared unlawful, even though such person was not the one who sued under section 66022 to invalidate the ordinance."

Thus, Petitioner is fully entitled to seek refunds of fee payments made under Resolution 02-023, based on the facial invalidity of Resolution 02-023, provided that the refund claims are coupled with a successful validation action. (§66020(f)(1).) And of note is that other fee payers may "piggyback" the validation action merely by filing their own refund protests with the City, and receive the benefits of a refund without even joining the litigation. Respondent City's constrained analysis of refund rights is controverted by the plain statutory scheme.

C. INDIVIDUAL REFUNDS ARE NOT FORFEITED TO THE COLLECTIVE REMEDY OF §66016(a)

Respondent City ventures the cynical argument against §66020 refunds that the §66016(a) fee adjustment mechanism is the exclusive remedy the Legislature intended for any facial "excess." (RAB 29-30) (Of course, Respondent City also argues that the §66016(a) remedy either does not exist or is subject to the pure discretion of the City; RAB 9-22.) Conceptually Respondent's theory is flatly refuted by the previously quoted reasoning from N.T. Hill, Inc. v. City of Fresno (1999) 72 Cal.App.4th 977, 993-994.

Further, there is no indication in the statutory scheme that individual refunds conflict with the collective fee adjustment remedy of §66016(a). Any refunds paid out by the City to individuals would necessarily be subtracted from the pool of excess fee revenues, and only the remainder would then be applied for

the fee adjustment mechanism. Consequently there is no double recovery by Petitioner or any other individual refund claimant when the §66016(a) remedy is concurrently applied.

III. §66022: VALIDATION ACTION

A. LEGISLATIVE RE-EXAMINATION OF FEES MUST ALLOW FOR JUDICIAL SCRUTINY AS WELL

Respondent City has undertaken the laudable practice of bringing up its entire fee schedule for legislative re-examination and approval on a recurring basis (about every 2 years). The City does not deny that the legislative review of its comprehensive fee schedule laws was given public notice and brought before the City Council generally in accordance with the procedures allowed by §66016. Putting aside the extent to which the City Council took action on any particular fees, there is no question that the City Council had invoked its power to modify any fee in the entire comprehensive fee schedule, through its legislative re-examination of all of them. That is the juncture at which the building permit fee surplus (among other things) should have been taken into account. The Council's approval of the fee schedule represents its judgment that the fees which will be charges for building permits, etc., do "not exceed the estimated reasonable cost of providing the service for which the fee is charged." (§66014; see also §66016(a).) The City argues that, despite legislative re-examination of the building permit fees, judicial review is foreclosed, purportedly because the fees are not "new." (RAB 14-16)

Petitioner submits that the fees may be attacked because they have been made "new" by reenactment (Brown v. Superior Court, (1982) 33 Cal.3d. 242;

People v. Scott, (1987) 194 Cal.App.3d 550). Respondent City argues authorities which hold, in effect, the reenactment continues the effect of the unmodified portion of a statute unabated and without interruption. (Orange County Water District v. F.E. Farnsworth, (1956) 138 Cal.App.2d. 518; In Re: Estate of Childs, (1941) 18 Cal.2d. 237.) However, there is no true conflict in the authorities when one recognizes that the "re-enactment rule" is a rule of judicial construction to effectuate legislative purpose and intent. For example, a fee payer who becomes liable for fee payments under Rancho Cucamonga Resolution No. 00-268 would not escape the payment obligation simply because that resolution had been superceded by Resolution No. 02-023. On the other hand, fee payments collected under Resolution No. 02-023 would reflect the City's judgment that the fees charged do not exceed the estimated reasonable cost of providing the services for which the fee is charged, as those costs were estimated and projected into the future from the date of enactment of Resolution 02-023. The City Council's judgment that the fees are reasonable becomes indisputable if a validation action is not filed within the time permitted following enactment of Resolution No. 02-023. But that is precisely what Petitioner did in this case.

B. THE CITY HAS CHOICES IN HOW IT ADOPTS FEES

Respondent City has choices in how it goes about adopting fees. The City would like for the Court to treat Resolution No. 02-023 as if it were a stand alone resolution for building permit fees that had not been subjected to legislative re-examination and approval in January of 2002. But the City didn't make that choice. Having put these fees through the process of §66016, with

consequence is loss of the same funds illegally retained. The penalty provision of §53728 exists independently of the Mitigation Fee Act and other revenue measures, just so it may provide the incentive for local agencies to conform to the law. Petitioner gains nothing from enforcement of the penalty, but the public at large profits when this deterrent results in honest government services and lawfully regulated fees from local agencies.

V. CALIFORNIA CONSTITUTION ARTICLE XIIIB: THE COMPLAINT SEEKS PROSPECTIVE RELIEF TO COMPEL THE BARE MINIMUM OF CONSTITUTIONAL ACCOUNTABILITY

Respondent City makes more of this claim than it is, apparently to make straw men that are more easily knocked down than if the City addressed the minimalist constitutional claim actually presented. Petitioner has not, as argued by Respondent (RAB 43) raised the Article XIIIB audit requirement as any sort of attack on the validity of the fees or as a basis for refunds. This claim seeks no more than it asks for on its face – annual audit review of fee revenues for the presence of "proceeds of taxes." Petitioner trusts that even such a modest level of compliance by Respondent City (and hopefully other cities) will aid in the detection and correction of excessive fees.

Petitioner alleges a "continuing pattern and practice" (CT 12; see RAB 22) by Respondent City in repudiating its audit duties, because, rather than challenge any past audit or Gann limit determination, Petitioner seeks only prospective relief to compel City to conduct proper audits in the future. Respondent's argument that this claim is time barred by Gov. Code §7910

(RAB 44) is irrelevant, because Petitioner's claim doesn't threaten any past audit or determination.

CONCLUSION

The remedies sought by Petitioner are elemental and fair. They pose no onerous burden for local agency compliance. At bottom, fee payers merely seek and deserve honest government services, in the form of reasonable fees, with public financial accountability in the full light of day. Nothing more is asked. With a legally sound interpretation and application of the Mitigation Fee Act, nothing less is given.

Respectfully submitted,

LAW OFFICES OF WALTER P. McNEILL

Dated: January 20, 2004

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Appeal From The Superior Court Of The County Of San Bernardino,
No. RCV 063382.
The Honorable Joseph E. Johnston, Judge

CERTIFICATE OF WORD COUNT

Pursuant to Rule 29.1(c)(1) of the California Rules of Court, counsel for Petitioner and Appellant hereby certifies and affirms that Petitioner's Reply Brief On The Merits contains approximately 3,633 words, which is under the limit of 4,200 words prescribed by Rule29.1(c)(1). In making this certification, appellate counsel relies upon the word count function of the computer program (Microsoft Office 98) used to prepare the Brief.

Respectfully submitted,

LAW OFFICES OF WALTER P. McNEILL

DATED: January 20, 2004

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I am employed in Shasta County, California; I am over the age of 18 years and not a party to the within action; my business address is Law Office of Walter P. McNeill, Attorney at Law, 280 Hemsted Drive, Suite E, Redding, California 96002; on this date I served:

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