

California Supreme Court Makes It Easier To Challenge Local Affordable Housing Requirements

Under the Mitigation Fee Act, when a city imposes a fee, dedication, reservation or other exaction on a development project, the developer has the right to pay under protest, obtain the necessary project approvals and proceed with construction, while at the same time disputing the legality of the requirement. In [Sterling Park v. City of Palo Alto](#), No. S204771 (Cal. S. Ct., Oct. 17, 2013), the California Supreme Court held that this procedure was available to challenge the City of Palo Alto's inclusionary housing requirements. To obtain approval for its 96-unit condominium project, the developer was required to set aside 10 affordable units, giving the city the option to purchase them at below-market rates (which the city could then assign to qualifying buyers). The developer was also required to pay in-lieu fees based on a percentage of the actual selling price or fair market value of its market-rate units, whichever was higher. The developer agreed to comply and the city approved the project. As the project was nearing completion a year later, the city requested conveyance of the affordable units, but the developer submitted a protest letter and, when the city failed to respond, filed a lawsuit. In dismissing the case as untimely, the court of appeal relied on a provision in the Subdivision Map Act (Govt. Code § 66499.37) that requires any lawsuit challenging a condition of a subdivision approval to be filed within 90 days of the approval. Under this provision, the developer must delay construction until the dispute is resolved by the courts. Relying on *Trinity Park, L.P. v. City of Sunnyvale*, 193 Cal. App. 4th 1014 (2011), the court of appeal ruled that the "pay under protest" option is available only to challenge fees and exactions designed to defray the costs of public facilities related to the project and that Palo Alto's affordable housing requirements did not fit this description. The Supreme Court reversed, ruling that the "pay under protest" provision in the Mitigation Fee Act (Govt. Code § 66020) governed. The Court found that Palo Alto's requirement that the developer provide it with an option to purchase the 10 affordable units amounted to an "exaction" under this provision. The Court explained that, in enacting the "pay under protest" statute, the Legislature did not want developers to be compelled to choose between either acceding to a disputed exaction with no recourse or delaying the project while challenging it. The Court observed that the interpretation set forth in *Trinity Park* conflicted both with this clear legislative intent and with the broad language in the statute, which encompasses "*any* fees, dedications, reservations or other exactions." The decision, however, leaves several key questions unanswered. First, the court did not address whether, in fact, the lawsuit was timely. Under the "pay under protest" procedure, the developer must file a protest within 90 days after being notified by the city that the exaction is being imposed and the protest period has begun. Here, the developer argued that since the city never provided this notification, the protest was timely. But the Supreme Court expressly avoided this issue and remanded the case to the court of appeal to resolve it. Second, the Supreme Court decided only that the "pay under protest" statute applies to Palo Alto's requirement that the developer provide it with an option to purchase the affordable units. The Court found it unnecessary to decide whether forcing a developer to sell some units below market value, by itself, would constitute an exaction under the Mitigation Fee Act. Despite its limited rulings, the Court's decision is noteworthy in that it removes a significant obstacle to challenges to local affordable housing rules and thus provides developers with greater flexibility when faced with these types of requirements. The case may also presage the outcome in [California Building Industry Association v. City of San José](#), No. H038563 (June 6, 2013). As we reported in our September 16th [post](#), the California Supreme Court has granted a petition by the California Building Industry Association for review of the appellate court's decision upholding a San Jose affordable housing ordinance. The court of appeal there held that the affordable housing requirement was not an exaction, but rather simply an exercise of the City's police powers, a holding that appears at odds with the Supreme Court's ruling in this case.

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