

CASE NO. S117590

IN THE  
SUPREME COURT OF CALIFORNIA

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BARRATT AMERICAN, INCORPORATED,  
Plaintiff and Petitioner

vs.

CITY OF RANCHO CUCAMONGA,  
Defendant and Respondent

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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

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**PETITIONER'S OPENING BRIEF ON THE MERITS**

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OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED<sup>1</sup>

1. Does a fee payer have an individual refund remedy under GC §66020 and §66021 for excessive building permit fees?
2. Is there an enforceable collective statutory remedy under GC §66016(a) to compel the City to use the fee surplus to reduce future fees?
3. When a local agency reviews and reenacts a fee ordinance without increasing the fee in question, is the legislative action extending the excessive fees nonetheless subject to attack under GC §66022?
4. Is a local government that unlawfully collects "taxes" in the form of excessive fees, subject to the penalty provisions of GC §53728 ("Proposition 62")?
5. Can a local government be compelled to make a determination of whether or not its fee revenues "exceed the costs reasonably borne by such entity in providing the regulation, product or service..." (California Constitutional Article 13B, §8(c)) as part of its annual audit of tax revenues and expenditure limitation (Article 13B, §1.5)?

## INTRODUCTION

In California there are certain constitutional and statutory safeguards which assure minimum standards of accountability by public agencies, to protect consumers from overcharging of “user fees” and subsequent expenditure of the accumulated ill-gotten gains. In this action Plaintiff seeks to hold the City of Rancho Cucamonga to those minimum standards of public accountability and to recover its own losses from excessive charges for residential building permits. In an unfortunate parallel to the corporate scandals of recent note, the City denies its duties of accountability and seeks to evade their effect.

This is a case of first impression, interpreting and enforcing the Mitigation Fee Act (GC §66000-§66024) as it applies to building permit and plan review fees governed by GC §66014. As to every potential remedy sought for the City’s ongoing collection of excessive building permit fees, the Court of Appeal erroneously held that the Mitigation Fee Act and the Constitution provide no right to relief. The decision below strips virtually all protections against local agency fee abuse out of the Mitigation Fee Act for all fees/charges governed by GC §66014 (“Local Agency Zoning and Permit Fees” encompassing a wide variety of regulatory fees/charges).<sup>2</sup> It is inconceivable that the Legislature could have intended to deprive fee payers of their remedies, nor would the Constitution allow it.

The power of local agencies to exact “user fees” is tempered by the restrictions and standards of accountability set out in the Mitigation Fee Act. To

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<sup>1</sup> The five issues listed are identical to the issues presented in the Petition For Review, but reformatted for clarity. The first three issues listed were combined in first issue of the Petition but are stated separately here.

<sup>2</sup> The only remedy arguably left standing by this decision would be a non-monetary validation action to challenge a newly minted fee.

finally bring public accountability to the user fee process, the Mitigation Fee Act must be enforced, and the decision of the Court of Appeal must be reversed.

### FACTUAL AND PROCEDURAL HISTORY

The principal business activity of Plaintiff Barratt American, Inc. is in developing residential housing for which it is charged building permit and plan review fees, and at the time of commencing the action Barratt was about mid-way through the development and sales of homes in a 123-unit subdivision in the City of Rancho Cucamonga. (CT 2.) Each of the claims presented by Plaintiff relates to the City's practice of collecting excessive fees for building permits and plan reviews.

It is alleged (CT 11-12) that the City's building permit and plan review fees are the product of the valuation based fee-setting methodology that the Attorney General's Office had concluded to be invalid. (76 OPS Cal.Atty.Gen. 4, Opinion No. 92-506, March 9, 1993.)

It is alleged that the resulting fees are, *inter alia*, unlawfully excessive (CT 19) and improperly delegate fee-setting authority (GC §66016(b)) to the Building Official, who supplies the final "valuation" component of the fee (CT 19). The fees are alleged to generate excess revenues of over \$1 million annually (CT 12), with an accumulated surplus of over \$3 million (CT 14). Plaintiff's individual overpayments for building permit and plan review fees at the time of filing the complaint were estimated to be in excess of \$110,000 (CT 18).

The City had recently reviewed its fees and adopted a comprehensive Fee Resolution (No. 02-023, effective January 16, 2002), which

reenacted the building permit and plan review fees essentially without change (except for a minor 50¢ correction). (CT 11, 18-21.) The new Fee Resolution did not account for past overcharges of fees or the accumulated surplus (CT 18-21). It is also alleged that it is the City's practice to deliberately omit review its fee revenues in its annual audits that account for "proceeds of taxes" (CT 12).

Accordingly, the Complaint and Petition filed May 14, 2002 sought relief in the form of: refunds of Plaintiff's excessive fee payments, estimated to be in excess of \$110,000 (fourth cause of action; CT 17-18); writ of mandate to compel the City to apply the accumulated excess fee revenues—estimated to be over \$3 million—to reduce future fees (second cause of action; CT 14-15); invalidation of Fee Resolution No. 02-023, effective January 16, 2002 reenacting the excessive building permit and plan review fees (fifth cause of action; CT 18-21); declaration and imposition of penalties for collection of unlawful taxes per GC §53728 (third cause of action; CT 15-17); and writ of mandate to compel the City to audit excess fee revenues from building permits and plan reviews as part of its annual fiscal audit per Article 13B, §1.5, §8(c) (first cause of action; CT 7-8).

The City of Rancho Cucamonga responded by Demurrer, with the hearing set for 8/22/02. (CT 97-322.) Following a hearing and oral argument upon the matter, the County of San Bernardino Superior Court, Honorable Joseph E. Johnston, Judge, issued his ruling by Minute Order dated 8/22/02 holding that "Demurrer by City to Petition Writ of Mandate and Complaint is sustained on all causes of action without leave to amend." (CT 324-325.) A Judgment of Dismissal was subsequently entered September 10, 2002. (CT 326.) Notice of Entry of Judgment was filed September 23, 2002 (CT 329),

having been served September 20, 2002 (CT 335). Plaintiff filed its Notice of Appeal on October 15, 2002. (CT 336.) After briefing and consideration of the legal arguments the Court of Appeal filed its unpublished Opinion on May 28, 2003. Following request by Defendant City to publish the Opinion, based on issues of first impression and wide spread importance, the Court of Appeal issued its Order for publication filed June 10, 2003.

## LEGAL DISCUSSION

### A. THE STATUTORY AND CONSTITUTIONAL FRAMEWORK BEHIND THE MITIGATION FEE ACT

The impetus for the Mitigation Fee Act began in 1978, with the popular approval of "Proposition 13," and then in 1979, with the approval of "Proposition 4." With these initiatives the people of California enacted constitutional protections changing not only the definition and authority for adoption of "taxes," but also the duties of governmental agencies to account for and limit their expenditures of "proceeds of taxes" –which were defined to include fees that "go too far." As explained in *Oildale Mutual Wat. Co. v. North of the River Mun. Wat. Dist.* (1989) 215 Cal.App.3d 1628, 1632-1633, 264 Cal. Rptr. 544:

"In summary, for local entities, 'proceeds of taxes' includes, but is not restricted to: (1) all tax revenues; (2) **excessive regulatory license fees and excessive user charges and fees**; (3) the investment of tax revenues; and (4) subventions from the state." (*County of Placer v. Corin, supra*, 113 Cal.App.3d at p. 448, 170 Cal.Rptr. 232. (emphasis added.))

Under Article 13B (Prop. 4) local agencies now had a mandatory nondiscretionary duty as provided in § 1.5 :

### 1.5. Annual calculation of appropriations limit

**Sec. 1.5. The annual calculation of the appropriations limit under this article for each entity of local government shall be reviewed as part of an annual financial audit.**

This constitutional duty has the effect of ensuring that at least once per year local agencies will review their fee revenues, determine whether or not those revenues "exceed the costs reasonably borne by such entity in providing the regulation, product, or service," and identify the excess revenues as "proceeds of taxes."

Following up on Prop. 13 and Prop. 4, in 1981 and in 1990 the Legislature adopted the statutes to become known as "The Mitigation Fee Act" (see GC §66000 - §66024). These statutes were designed to prevent the creation and collection of excessive fees which would generate "proceeds of taxes," and to ameliorate the consequences if overcharges should be found to have occurred.

The legal framework of the Mitigation Fee Act is neither an impenetrable mystery (though misunderstood by the Court of Appeal below) nor a simple roadmap, but it does provide a reasonably clear path for local agencies and fee payers to follow, based on its fundamental organizing concepts: (1) two groups of fees/charges –"development fees," and others; (2) fee adoption restrictions to conform to constitutional standards; (3) post adoption accounting and reconciliation of fee revenues and "actual costs"; (4) individual fee payer remedy –refunds; (5) collective" remedies to fee payers generally; and (6) challenge to legislative adoption of fees. These concepts are summarized below, with greater detail provided as it pertains to building permit and plan review fees which are the subject of the instant case.

## 1. Two Groups of Fees/Charges –“Development Fees,” and Others.

In creating the Mitigation Fee Act the Legislature clearly gave special attention to “fees for development projects” –aka “development fees”—governed by Chapter 5 of the Act and defined in GC §66000(b) as a fee other than a tax or special assessment charged by a local agency in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project, but excluding (among other limited exceptions) fees for processing applications for governmental regulatory actions or approvals.<sup>3</sup> Fees other than “development fees”<sup>4</sup> are described primarily in Chapter 7 “Fees For Specific Purposes”; in particular GC §66014 covers the broad range of “Local Agency Zoning And Permit Fees,” specifically including “building inspections” and “building permits.” Though the Legislature sets up this dichotomy in the Mitigation Fee Act between “development fees” and all other fees, it then provides procedurally distinctive but substantively parallel requirements and remedies in connection with both types of fees.

## 2. Fee Adoption Restrictions to Conform to Constitutional Standards.

To avoid imposition of fees which might be considered “proceeds of taxes” under California Constitution Article 13B, §8(c), development fees “shall not exceed the estimated reasonable cost of providing the service or facility for which the fee or exaction is imposed.” (GC §66005.) As for fees charged for “building inspections” and “building permits” covered by GC §66014:

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<sup>3</sup> The building permit and plan review fees in the instant case would be “fees for processing applications for governmental regulatory actions or approvals” in addition to their specific coverage by GC §66014.

...those fees shall not exceed the estimated reasonable cost of providing the service for which the fee is charged, unless a question regarding the amount of the fee charged in excess of the estimated reasonable cost of providing the services or materials is submitted to, and approved by, a popular vote of two-thirds of those electors voting on the issue. (emphasis added)

This requirement is buttressed by Government Code §66016, which likewise provides that:

Unless there has been voter approval, as prescribed by Section 66013 or 66014, **no local agency shall levy a new fee or service charge or increase an existing fee or service charge to an amount which exceeds the estimated amount required to provide the service for which the fee or service charge is levied.** (emphasis added)

3. Post Adoption Accounting and Reconciliation of Fee Revenues and "Actual Costs."

For development fees, typically collected to finance long-term capital projects for public facilities, Chapter 5 requires an annual accounting (GC §66006(b)) with public disclosure of the amount of the fee, beginning and ending balances in fee accounts, amounts of fee revenues collected and interest earned, identification of public improvements on which fee revenues were expended and the total percentage of cost that was funded with fees. And no less than every five years after fee revenues are first collected (GC §66001(d)), the local agency must re-approve findings as to the reasonable relationship between the fee and its purpose, identify funding to complete the public facilities, and designate dates for the completion of funding.

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<sup>4</sup> For clarity the term "development fee" is used herein as a term of art, referring only to those fees defined as such by GC §66000(b).

Then for other fees, such as regulatory service fees covered by GC §66014 and §66016, a reconciliation and accounting is necessarily required to comply with the mandate of §66016(a), which 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.**

In this regard it is critical to recognize the distinction made in GC §66016, which allows fees to be adopted based upon the “**estimated amount** required to provide the service” but determines the existence of a surplus by comparing the subsequent fee revenues to the “**actual cost**” of providing the service. The adoption of fees is based only on future projections of costs and anticipated revenues, whereas the existence of excess revenues depends on a retrospective accounting based on actual costs and actual revenues.

The Mitigation Fee Act does not prescribe a recurring accounting cycle for review of regulatory service fees and other non-development fees, because it doesn't need to. The annual audit constitutionally required by Article 13B, §1.5 demands that a local agency determine whether or not its fee revenues “exceed the cost reasonably borne by that entity in providing the regulation, product, or service” (Article 13B, §8(c)) to determine if any of those fee revenues should be accounted for as “proceeds of taxes.”

In addition, it is commonplace for local agencies to periodically review their fees as to projected revenues and costs, and take legislative action to increase, modify, or extend those fees at what they deem to be appropriate levels (as did the City of Rancho Cucamonga in this case). It would be impossible for the local agency to fulfill its statutory duty under GC §66016 to limit prospective

fee revenues to the “estimated amount required to provide the service for which the fee or service charge is levied” without knowing if a reduction of the fees is necessary due to past over-collection of a surplus.<sup>5</sup> Consideration of whether there have been past over-collections is a mandatory component of the legislative fee setting process.

#### 4. Individual Fee Payer Remedy –Refunds

A fee payer that believes he or she has been required by the local agency to pay an excessive fee may file a written protest with the local agency, and if satisfaction is not obtained sue for a refund pursuant to GC §66020. By the express terms of subdivision (a) of §66020, the refund remedy is made applicable to development fees described in Chapter 5 of the Mitigation Fee Act. However, the remedy is expanded and made broadly applicable by GC §66021 to “any party to whom a fee, tax, assessment, dedication, reservation, or other exaction has been imposed, the payment or performance of which is required to obtain governmental approval of a development, as defined by §65927...” The scope of “development” embraced by §65927 is extremely broad, encompassing virtually any physical alteration of land or water, expressly including construction, reconstruction, demolition, or alteration of the size of any “structure” or “building.” Suffice it to say that building permit and plan review fees paid to obtain approval of building permits to construct single-family residential housing—the case presented here— qualify as fees paid to obtain “governmental approval of a development, as defined by §65927” under GC

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<sup>5</sup> The obligations of the local agency are re-enforced and enhanced by the constitutional provisions of Article 13C, §2(b) and (d) (adopted by initiative measure Proposition 218 subsequent to legislative establishment of the Mitigation Fee Act), which provide that a local government may not impose, extend, or increase any tax unless and until that tax is approved by a vote of the electorate. An excessive fee which collects “proceeds of taxes” cannot be extended, even if unchanged in amount, without voter approval.

§66021.” In fact, the breadth of application of §66020 made available by §66021 is made patent by the latter’s coverage of any “fee, tax, assessment, dedication, reservation or other exaction,” virtually taking in the entire universe of potential exactions.

##### 5. “Collective” Remedies to Fee Payers Generally

The fee setting process is vulnerable to inaccuracy in at least two major respects. Future projections of future estimated reasonable costs and fee revenues are susceptible to the inherent unpredictability of forecasting future events, future levels of business activity, etc. Secondly, whether attributable to “conservative” budgeting that errs on the side of revenue or less honorable motives, local government managers have a proclivity fueled by strong financial incentives to overstate future costs while underestimating projected fee revenues, resulting in the collection of fee surpluses. The Mitigation Fee Act does not bother ascribing a cause when a fee surplus is discovered (nor does this case need to engage in that pursuit), but it does provide “collective” remedies that require the local government to disgorge the fee surplus in a manner that promotes the public interest.

For developer fees GC §66001(e) requires that leftover fee revenues be distributed in the form of a “refund to the then current record owner or owners of the lots or units, as identified on the last equalized assessment role, of the development project or projects on a prorated basis, the unexpended portion of the fee, and any interest accrued thereon,” or by other means that the Legislative body deems appropriate. (See GC §66001(e) and (f).)

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<sup>6</sup> To be absolutely clear about it, this does not mean that building permit fees or other such fees are “development fees” under Chapter 5 of the Mitigation Fee Act.

For other fees governed by GC §66016, the straightforward legislative mandate is:

**If, however, the fees or service charges create revenues in excess of actual costs, those revenues shall be used to reduce the fee or service charge creating the excess. (Emphasis added.)**

Regardless of the precise method used, the local agency will have disgorged the fee surplus that otherwise would be susceptible of treatment as “proceed of taxes,” and the expenditures of the surplus would benefit the “collective” public interest of the fee payers generally, even though the specific fee payers who created the surplus may have none of their money returned.

It must also be understood that this mechanism exists independently of the availability of individual fee payer refunds and the opportunity to attack the legislative validity of a fee. In particular, the discovery of surplus fee revenues does not compel the conclusion that the fee which generated the surplus was invalidly adopted. Both Government Code §66014 and §66016 (and §66005 for developer fees) require only that the local agency set the fee at the estimated cost of providing the service for which the fee is charged. The estimated cost is at best only a reasoned approximation, made in good faith, that cannot be expected to yield absolute precision. Further, any number of the underlying components of the estimated cost may change unpredictably after adoption of a fee, due to unforeseen circumstances; e.g. market rates for certain types of labor or materials may become dramatically more or less expensive, or state/federal funding may appear or disappear. A legally valid fee that is adopted with the utmost care through the proper procedures may nonetheless

turn out to be wildly inaccurate or subject to temporary volatility over the course of a year. The accumulation of surplus fee revenues does not, in and of itself, mean that the underlying fee is invalid. By the same token, if a local agency refuses to disgorge the surplus as required by statute, an action to compel the agency to do so is not an attack on the validity of the underlying fee.

#### 6. Challenge to Legislative Adoption of Fees

Both developer fees and other types of fees are subject to a validation action attacking the validity of the legislative adoption of a fee. Chapter 5 of the Mitigation Fee Act does not prescribe a validation action as the sole means for legal attack, but it does provide in GC §66017(a) that the effective date of enactment of a developer fee shall be no less than sixty days after the date of its legislative adoption; given the sixty day statute of limitations in validation actions generally (CCP §860 et seq.), interested members of the public would have at least 120 days to file a validation action. For other types of fees governed by GC §66016, a validation action is the prescribed remedy for attacking the legislative validity of the fee per GC §66022; there is no delay in the effective date of such fees, but the special 120-day statute of limitations provided in §66022 provides these fee payers with an opportunity equal to that for developer fees to file a legal challenge. For both types of fees, if the legal challenge alleges that the fee is an unlawful tax, GC §66024 requires that the challenger investigate by requesting documents from the agency before filing suit, but then the agency is forced to carry the burden of proving that the fees are reasonable and do not exceed the cost of providing services.

## B. ARGUMENT ON THE ISSUES PRESENTED

### 1. A FEE PAYER HAS AN INDIVIDUAL REFUND REMEDY UNDER GC §66020 AND §66021 FOR EXCESSIVE BUILDING PERMIT FEES.

The Court of Appeal held that Plaintiff's Fourth Cause of Action for a refund of excessive building permit and plan review fees pursuant to GC §66020 and §66021 was barred on two separate grounds (Dec. 7-9): that Plaintiff had waived any right of recovery by paying for and accepting the benefits of the building permits (*Pfeiffer v. City of La Mesa* (1977) 69 Cal.App.3d 74, 78, 137 Cal.Rptr. 804); and that, regardless, building permit fees governed by GC §66014 and §66016 are not "development fees" and therefore there can be no refund remedy under §66020 and §66021 (relying on *Utility Cost Management v. Indian Wells Valley Water Dist.* (2001) 26 Cal.4<sup>th</sup> 1185, 1191, 114 Cal.Rptr.2d 459, and *Capistrano Beach Water Dist. v. Taj Development Corp.* (1999) 72 Cal.App.4<sup>th</sup> 524, 85 Cal.Rptr.2d 382). Neither grounds relied upon by the Court of Appeal is a correct statement of the current law.

First, without need for debating whether *Pfeiffer* (*supra*) retains general vitality today, it is enough that the 1977 decision in *Pfeiffer* was statutorily abrogated by the legislature's subsequent adoption of the Mitigation Fee Act and the refund provisions of GC §66020 and §66021. This Court explained the import of the legislative action in *Hensler v. City of Glendale* (1994) 8 Cal.4<sup>th</sup> 1, 19, 32 Cal.Rptr.2d 244:

Contrary to plaintiff's assertion, *Pfeiffer v. City of La Mesa, supra*, 69 Cal.App.3d 74, 137 Cal.Rptr. 804, was not "nullified" by *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 218 Cal.Rptr. 839, which cited the case with approval, but distinguished it. The Legislature has now codified the rule that one who accepts the benefits of a permit may

not later challenge conditions imposed on or in the permit. Government Code section 66020 creates a limited exception under which a residential housing developer may challenge a permit condition such as that in issue here while proceeding with development. That section, enacted in 1990, permits a protest if the developer provides evidence of arrangements made to ensure performance of the condition if it is upheld. The developer must also serve notice of the protest on the agency and the protest must be filed at the time the condition is approved or within 90 days after it is imposed and initiate a legal action to review or attack the condition within 180 days after the date of imposition.

In the instant case Plaintiff has carefully followed the statutory procedures required by GC §66020 and §66021 to avail itself of the remedies allowed by the Legislature. There is no basis to apply the “Pfeiffer rule” to block Plaintiff’s claim for refund.

The Court of Appeal then misreads the decisions in *Indian Wells (supra)* and *Capistrano (supra)* to stand for the proposition that the refund remedy of §66020 is available only for “development fees” levied under Chapter 5 of the Mitigation Fee Act. However, the *Indian Wells* decision involved only the application of the 120-day statute of limitations in GC §66022 to bar a refund action that in substance was no more than a facial attack on the adoption of a fee; the Court did not construe GC §66020 or in any way limit the scope of its application to just “development fees”. In *Capistrano (supra)* a fee payer who had been charged “sewer connection fees” governed by GC §66013, five years later sought a refund of the unexpended portion of the sewer connection fee revenue pursuant to GC §66001. (*Capistrano, supra*, 72 Cal.App.4<sup>th</sup> 524 at 525, 528.) The Appellate Court in *Capistrano* correctly held that “sewer connection

fees” (GC §66013) are not “development fees” governed by Chapter 5 of the Mitigation Fee Act or the refund provisions of §66001. With a five-year lapse of time after payment of the fee, there was no possibility that the Plaintiff in *Capistrano* could comply with the statutory requirements of GC §66020, and indeed the refund provisions of §66020 are not even raised as an issue in that decision.

The decision in this case limiting the application of §66020 to Chapter 5 “development fees,” is contrary to the plain language of GC §66021 as well as the expansive interpretation of the refund remedy as found by this Court in *Ehrlich v. City of Culver City* (1996) 12 Cal.4<sup>th</sup> 854, 864-866, 50 Cal.Rptr.2d 242. In *Ehrlich, supra*, this Court found the refund procedures to be broad enough to include takings claims as part of the broad range of claims authorized by the Legislature:

First, the statutory scheme authorizes “*any party* on whom a fee, tax, assessment, dedication, reservation, or *other exaction* has been imposed, the payment or performance of which is required to obtain governmental approval of a development,” to protest such an imposition by following the procedures provided in section 66020 of the Act. (Gov.Code, 66021, subd.(a), italics added.) Such a broadly formulated and unqualified authorization is consistent with the view that the Legislature intended to require *all* protests to a development fee that challenge the sufficiency of its relationship to the effects attributable to a development project—regardless of the legal underpinnings of the protest—to be channeled through the administrative procedures mandated by the Act. Such claims would encompass not only statutory grounds, but contentions that a given imposition offends the commands of the takings clause of the Fifth Amendment.

There should be no quarrel that payment of a fee to obtain approval of a building permit for construction of residential housing qualifies under §66021(a) as a fee “the payment or performance of which is required to obtain governmental approval of a development, as defined by §65927.” GC §66021 and §66020 clearly apply to Plaintiff’s claim for refund.

Finally, the suggestion by the Court of Appeal (Dec. p. 8) that “the remedy is the prospective fee reduction described in Section 66016” is perverse and inaccurate. In nearly the same breath (see Dec. p. 5) the Court of Appeal held that the “prospective fee reduction” remedy of §66016 simply does not exist as an enforceable remedy, holding (erroneously) that the statutory directive to apply a surplus to reduce future fees is part of “a legislative budget process” that is a “quintessential discretionary act” immune from judicial compulsion. More important, a “prospective fee reduction” is no remedy at all to the actual fee payer who has paid excessive fees and wants to get them back. There may be broad social benefit in a separate remedy to offset future fees with the surplus from past over-collections, but that is no substitute for the due process owed to the individual fee payer.

As Plaintiff argued to the trial court (RT 19:24 -- 20:15), the notion that no fee remedy is available would be offensive to the constitutional guarantee of due process. There must be a meaningful pre-deprivation or post-deprivation remedy for the exaction of an unlawful fee from the individual fee payer. The Due Process Clause of the Fourteenth Amendment of the United States Constitution obligates the City to provide meaningful backward-looking relief to rectify any unconstitutional deprivation. (*General Motors Corp. v. City & County of San Francisco* (1999) 69 Cal.App. 4<sup>th</sup> 448, 454, citation to *McKesson Corp. v. Florida*

*Alcohol & Tobacco Div.* (1990) 496 US 18, 31, 110 S. Ct. 2238.) The fee payer is entitled to “a fair opportunity to challenge the accuracy and legal validity” of the fee obligation and a “clear and certain remedy.” (See *Meeke v. City of Mill Valley* (1995) 39 Cal.App. 4<sup>th</sup> 946, 965, citation to *McKesson Corp., supra*, 496 US at p. 39, 110 S. Ct. at p. 2251.) The refund remedy extended by Government Code §66021 and §66020 is just that “clear and certain remedy” that due process requires.

**2. THERE IS AN ENFORCEABLE COLLECTIVE STATUTORY REMEDY UNDER GC §66016(a) TO COMPEL THE CITY TO USE THE FEE SURPLUS TO REDUCE FUTURE FEES.**

Plaintiff’s Complaint alleges that the City has collected in excess of \$3 million of surplus building permit and plan review fees (CT 14) and seeks a writ of mandate to compel the City to comply with the statutory directive of GC §66016(a) that if “**the fees or service charges create revenues in excess of actual costs, those revenues shall be used to reduce the fee or service charge creating the excess.**” The Court below held that the action was “not timely under §66022” and generally impermissible as an invasion of the City’s legislative discretion (Dec. p. 5).

The rationale of the Appeal’s Court holding the action “not timely” appears to be based on the misconception that such an action seeks to “attack, review, set aside, void, or annul the ordinance, resolution, or motion levying a fee or service charge” (GC §66016(e) and §66014(c)). In fact, due to the unpredictable dynamics of fee revenues and fee costs, a perfectly valid fee may nonetheless over-collect fee revenues in unforeseen amounts. When that surplus occurs, the duty of the local agency to apply the excess to reduce future

fees under §66016(a) is plain.<sup>7</sup> The statutory directive is not made contingent upon a finding of invalidity of the fee, because the Legislature understood that the existence of a fee surplus (whether small or large) does not by that very fact make the underlying fee invalid.

If nothing else, the temporal distinction between the statutory terms “estimated reasonable cost” and “actual cost” as used in GC §66016 makes clear that the validity of the legislative action originally adopting a fee is not implicated here. Only the “estimated reasonable cost” is knowable and relied upon in originally setting the fee, whereas the “actual cost” is knowable only at some later date as part of a retrospective accounting. A fee surplus generated by fee revenues in excess of “actual cost” would not give rise to any statutory duty nor any claim for enforcement thereof until the future date well removed from the original legislative enactment of the fee. The rationale of the Court of Appeal would trigger the running and expiration of a 120-day statute of limitations (GC §66022) long before the cause of action even arises.

Even when the validation issue is put to rest, though, the Court (Dec. p. 5-6) would still preclude any enforcement whatever. Without reasoning or analysis, the Court below concludes that enforcement of the statutory directive of §66016(a) would intrude on the discretion of the City and “would be completely wrong.” (Dec. p. 6.) This contravenes a long line of authority in which the Courts have not been reluctant to use their equitable power to compel a

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<sup>7</sup> Though the phrase “those revenues shall be used to reduce the fee or service charge creating the excess” should engender no confusion, Plaintiff is informed and believes that the City asserts this obligation may be satisfied by spending the excess on future Building Department services and supplies (a practice endorsed in nearby Orange County that is currently being challenged in the Orange County Superior Court), rather than reducing the actual fee paid by fee payers. Ultimately upon confirmation by this Court that the statutory duty of §66016(a) is enforceable by writ of mandate, the simply stated directive of the foregoing phrase should also be confirmed. That is, the excess must be applied to reduce fees, and cannot be used by the City as a windfall for Building Department expenditures.

public agency to comply with its statutory duty, notwithstanding economic impacts that are an inevitable result.

In a wide variety of cases the courts have compelled local agencies and their officers to comply with statutory duties relating to taxes and assessments, as summarized in 8 *Witkin, Cal. Procedure* (4th ed. 1997) writ, section 85, page 873:

Mandamus has been frequently issued to compel assessors, county boards of equalization, and other officials to perform duties required by the tax laws. (See *Long Beach City School Dist. v. Payne* (1933) 219 C. 598, 601, 28 P.2d 663 [compel county auditor to credit taxes to appropriate fund]; *McAlpine v. Baumgarten* (1937) 10 C.2d 409, 74 P.2d 753 [compel city officials to levy tax to provide funds for city employees' retirement system]; *McGrath v. Butte* (1939) 30 C.A.2d 734, 87 P.2d 381 [compel county supervisors to levy tax to pay for lands purchased at delinquent sale]; *Glenn-Colusa Irr. Dist. v. Ohrt* (1939) 31 C.A.2d 619, 88 P.2d 763 [compel cancellation of assessment of taxes on exempt property]; *May v. Board of Directors* (1949) 34 C.2d 125, 129, 208 P.2d 661, supra, 72 [compel directors of irrigation district to levy assessments to pay bonds and interest]; *Sacramento v. Hickman* (1967) 66 C.2d 841, 845, 59 C.R. 609, 428 P.2d 593; *State Bd. of Equalization v. Watson* (1968) 68 C.2d 307, 311, 66 C.R. 377, 437 P.2d 761 [duty of local taxing officer, under Govt.C. 15612, to disclose records to governmental agency]; *Knoff v. San Francisco* (1969) 1 C.A.3d 184, 195, 81 C.R. 683, infra, 93; 52 Am.Jur.2d, Mandamus 257 et seq.; 9 Summary (9th, taxation, 254.)

In *Sacramento County v. Hickman, supra*, the Supreme Court issued its writ of mandate commanding the Assessor of Sacramento County to comply with a statute to "assess property at the publicly announced ratio of between 20 and 25% of full cash value" rather than 100% of full cash value (as had been the Assessor's practice). And, in *McAlpine v. Baumgarten*, (1937) 10

Cal.2d. 409, 74 Pacific 2d 753, the Supreme Court issued its writ of mandate to compel the Controller of the City of Los Angeles to provide funds to meet the budget for the city employee's retirement fund.

Finally, though Plaintiffs submit that enforcement of Government Code §66016(a) involves no interference whatsoever with the legislative functions of Defendant City, relief would still be required even if it is characterized as "legislative" in nature. In *Santa Clara County Counsel Attorney's Association, v. Woodside* (1994) 7 Cal.4<sup>th</sup> 525, 540, this Court held:

Mandamus is available to compel a public agency's performance or correct an agency's abuse of discretion whether the action being compelled or corrected can itself be characterized as "ministerial" or "legislative". Thus, we held that an ordinance passed by a city council imposing a certain salary adjustment, usually a legislative act, was an abuse of the city council's discretion because it violated a previously enacted agreement with an employee association, and was therefore subject to challenge via writ of mandate. (*Glendale City Employees' Ass'n, Inc. v. City of Glendale, supra*, 15 Cal.3d 328, 343--345, 124 Cal.Rptr. 513, 540 P.2d 609.)

At the risk of redundancy, the directive of GC §66016(a) that "those revenues **shall** be used to reduce the fee or service charge creating the excess" (emphasis added) is mandatory in nature and cannot be given a permissive construction. "The ordinary meaning of 'shall' or 'must' is of mandatory effect, while the ordinary meaning of 'may' is purely permissive in character." *Larson v. State Personnel Bd.* (1994) 28 Cal.App. 4<sup>th</sup> 265, 276; *California Teachers' Assn. v. Governing Board* (1977) 70 Cal.App. 3d 833, 842. Government Code §14 provides: "Shall 'is mandatory' and 'may' is

permissive.” And Government Code §5 provides: “Unless the provision or the context otherwise requires, these general provisions, rules of construction, and definitions shall govern the construction of this code.”

(See *People v. Durbin* (1963) 218 Cal.App. 2d 846, 849.)

It is mandatory that the City Defendant in this case be compelled to apply the fee surplus to reduce future fees, as required by GC §66016(a).

**3. WHEN A LOCAL AGENCY REVIEWS AND REENACTS A FEE ORDINANCE WITHOUT INCREASING THE FEE IN QUESTION, THE LEGISLATIVE ACTION EXTENDING THE EXCESSIVE FEES IS NONETHELESS SUBJECT TO ATTACK UNDER GC §66022.**

In the instant case the City carried out annual review of its comprehensive fee ordinance (a single ordinance setting fees on a vast menu of different of City services), with sufficiently detailed review of the building permit fee provisions to recommend correction of a fifty-cent clerical error. (Dec. p. 10.) A new comprehensive fee ordinance was adopted by the City in January of 2002 by Resolution No. 02-023. The building permit and plan review fees—which Plaintiff alleges were excessive and had already generated a \$3 million surplus— were readopted essentially unchanged (except for correction of the fifty-cent clerical error). Plaintiff’s fifth cause of action (CT 18-21) challenges the validity of the new comprehensive fee Resolution 02-023 as it pertains to building permit and plan review fees. The Court of Appeal held (Dec. p. 10-11) that Plaintiff’s validation action did not meet the requirements of GC §66016 and §66022 which allowed validation actions only as against “new,” “increased,” or “modified” fees. Plaintiff submits that the Court below erred in

failing to recognize the reenacted fees as “new” fees open to challenge under GC §66016 and §66022.

The action taken by the City in reenacting its building permit fees as part of a revised comprehensive fee resolution is analagous to legislation at the state level which amends a portion of a statute while leaving the unamended portion unchanged. The well-established rule for interpretation of the effect of such legislative action (known as the “reenactment rule”) is that the unamended portion of the statute is “reenacted” along with enactment of the amendment, so that the statute is deemed to have been acted upon as a whole. On this basis the courts have held, for example, that a two-thirds vote approving an amendment to a statute which required but did not originally receive a two-thirds vote has the effect of approving the amended statute as a whole, curing the initial invalidity of the unaltered portion of the legislation effective from the date of amendment. *Brown v. Superior Court* (1982) 33 Cal.3d 242 (legislation creating 18 new appellate court judgeships held an implied appropriation requiring a two-thirds vote of the legislature, but subsequently cured by amendment of appropriation bill receiving two-thirds vote); *People v. Scott* (1987) 194 Cal.App.3d 550 (special evidentiary exclusionary rule requiring two-thirds vote held to be subsequently reenacted and validated by two-thirds approval of a partial amendment.) See also *County of Los Angeles v. Jones* (1936) 6 Cal.2d. 695, 708 (“an amendment to a statute which for any reason has been declared invalid constitutes a valid enactment”); *Howard Jarvis Taxpayers Association v. State Board of Equalization* (1993) 20 Cal.App.4<sup>th</sup> 1598, 1605; *Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal. 3d. 531, 545. If an amendment reenacts legislation in its entirety, and the amendment may even be employed to cure the defects in

the unaltered original legislation, then it cannot be said that the amended legislation as a whole is not "new."

The foregoing conclusion is particularly compelling for user fees that are subject to the requirements of Government Code §66016(a). Adoption or reenactment of a fee resolution requires consideration of whether as of that date there are surplus fee revenues that require reduction of future fees. The necessary implication of adoption or reenactment of a fee schedule is that the required accounting of potential surplus revenues has been carried out going back at least to the last such accounting, and the results are reflected in the new fee schedule.<sup>8</sup> It's possible, for example, that prospective fees should be increased to cover increased operating expenses, while a preexisting surplus requires offsets to the prospective fee, so that the net effect is no change in the fee charged to a fee payer, but the basis for making the current determination would be completely different from the basis used to set the fee previously. Government Code §66016(a) requires that the public agency make public the data supporting its fee calculations prior to a public hearing and adoption of the fee schedule, so that there can be informed public input and debate prior to enactment of the new schedule of fees. When the Rancho Cucamonga City Council adopted Resolution No. 02-023 it implicitly represented that it had considered whether or not these fees had generated surplus revenues going back to at least the last time these fees were acted upon in 2000. The fees adopted in Resolution No. 02-023 uniquely represent the results of that legally required accounting, and accordingly must be considered a "new" fee charged

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<sup>8</sup> If such accounting revealed that the fees were collecting more than the reasonable cost of providing services the fee would constitute a tax (Article 13B §8(c)), and even if the fees remained unchanged the City would be constitutionally forbidden from extending a tax by Article 13C §2 unless approved by a two-thirds majority.

to prospective fee payers. The fee resolution therefore was subject to challenge by a validation action, which Plaintiff has brought as prescribed by law.

**4. A LOCAL GOVERNMENT THAT UNLAWFULLY COLLECTS  
"TAXES" IN THE FORM OF EXCESSIVE FEES, IS SUBJECT TO THE  
PENALTY PROVISIONS OF GC §53728 ("PROPOSITION 62").**

The excessive building permit and plan review fees collected by the City constitute "unlawful taxes" under accepted constitutional definitions and case law. *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 448, 170 Cal.Rptr. 232; (*City of Madera v. Black* (1919) 181 Cal. 306, 313-314, 184 P. 397; see *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 6610663, 166 Cal.Rptr. 674; *United Business Com. V. City of San Diego* (1979) 91 Cal.App.3d 156, 165, 154 Cal.Rptr. 263.).

Under the provisions of Proposition 62 (GC §53720 through §53730), the collection of unlawful taxes should subject the City to liability for the dollar-for-dollar penalty under GC §53728. However, the Court of Appeal held that such penalty could not be available because (Dec. p. 6-7): "Section 66016 prohibits fees being used as taxes because Section 66016 provides its own remedy, a prospective fee reduction, in circumstances where it has been determined there are surplus fees. The dollar-for-dollar offset or penalty allowed by Section 53728 would contravene the remedy supplied by Section 66016. Section 53728 simply does not apply to Barratt's claims."

Putting aside for the moment the conflict between the above and the Court's simultaneous holding that there is no enforceable "prospective fee reduction" remedy (Dec. p. 5-6), Plaintiff agrees that there is a "safe harbor" provided by the fee reduction mechanism of §66016(a) but only if the local agency makes use of it.

The lower Court's holding negates the penalty of GC §53728 by giving the offending local agency a "free pass" to retain unlawfully collected taxes with no adverse consequences.

It should be clear that application of the penalty provision of §53728 provides the needed incentive—as intended by the Legislature—for local agencies to comply with the provisions of Proposition 62 (and the Mitigation Fee Act). As this Court noted in *Howard Jarvis Taxpayers' Assn. v. City of La Habra* (2001) 25 Cal.4<sup>th</sup> 809, 825, 107 Cal.Rptr.2d 369: "Cities and counties must eventually obey the state laws governing their taxing authority and cannot continue indefinitely to collect unauthorized taxes."

**5. A LOCAL GOVERNMENT CAN BE COMPELLED TO MAKE A DETERMINATION OF WHETHER OR NOT ITS FEE REVENUES "EXCEED THE COSTS REASONABLY BORNE BY SUCH ENTITY IN PROVIDING THE REGULATION, PRODUCT OR SERVICE..." (CALIFORNIA CONSTITUTIONAL ARTICLE 13B, §8(c)) AS PART OF ITS ANNUAL AUDIT OF TAX REVENUES AND EXPENDITURE LIMITATION (ARTICLE 13B, §1.5).**

The Complaint alleges that the "City has a continuing pattern, practice, and course of conduct, by which City fails and refuses to review or audit its revenues generated from user fees and charges to determine whether those revenues—in particularly the revenues from building permits and plan reviews—exceed the costs reasonably borne by the City in providing the services." Plaintiff sought to correct this abuse in seeking a writ of mandate in the first cause of action to enforce the mandatory constitutional duties of Article 13B §1.5 and §8(c). (CT 12-

13.) The Court of Appeal rebuffs the claim, however, holding (Dec. p. 4-5) that the audit Plaintiff seeks is a subterfuge to attack the validity of the fee, citing *Trend Homes, Inc. v. Central Unified School Dist.* (1990) 220 Cal.App.3d 102, 269 Cal.Rptr. 349. The *Trend Homes* decision is clearly distinguishable because the Claimant there alleged a constitutional violation of Article 13B as the gravamen of its cause of action to invalidate a fee, without even asking for an audit. Here, Plaintiff's first cause of action seeks only to compel an audit, nothing more.

Realizing that an audit will not directly result in invalidation of the fees, or reduction of the fees, or refunds of any fees, Plaintiff's motivation in demanding an audit is merely the simple political principal that: dishonesty shrinks from sunlight. Local agencies pretend not to be aware of the fee surpluses they collect, in part because they never carry out the constitutionally mandated fiscal audit that would publicly reveal the presence of a surplus. Plaintiff seeks an end to this gamesmanship, with the belief that public exposure of fee surpluses through the required audit will ultimately bring about needed reform.

The lower Court's secondary basis for denying relief—the 45-day statute of limitations of GC §7910 for "Gann limit" determinations—also is not apt. The relief sought by Plaintiff is not to correct some past occurrence but rather to compel the future performance of Defendant's constitutional duty to audit fee revenues for the existence of "proceeds of taxes." As stated in *Knoll v. Davidson* (1974) 12 Cal.3d 335, 343, FN6, the law is well settled that "mandate does now clearly lie to compel performance of future acts where it is clear that public officers do not intend to comply with their obligation when the time for performance arises. (*Young v. Gness* (1972) 7 Cal.3d 18, 21, FN4, 101 Cal.Rptr.

533, 496 P.2d 445; *Hollman v. Warren* (1948) 32 Cal.2d 351, 196 P.2d 562.)”

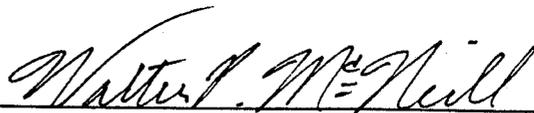
### CONCLUSION

Based upon all of the foregoing, the decision of the Court of Appeal should be reversed, and the matter remanded to the trial court with appropriate directions to proceed with the action accordingly.

Respectfully submitted,

LAW OFFICES OF WALTER P. McNEILL

Dated: October 29, 2003

A handwritten signature in cursive script, reading "Walter P. McNeill", is written over a horizontal line.

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IN THE  
SUPREME COURT OF CALIFORNIA

Barratt American, Inc.  
Petitioner and Appellant

vs.

City of Rancho Cucamonga,  
Defendant and Respondent.

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CASE NO. \_\_\_\_\_

(Appellate Court No. E032578)

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 Appellant's Petition contains approximately 7,975 words, which is under the limit of 14,000 words prescribed by Rule 29.1(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 Petition.

Respectfully submitted,

LAW OFFICES OF WALTER P. McNEILL



Walter P. McNeill  
Attorney for Petitioner and Appellant

DATED: October 29, 2003

**CERTIFICATE OF SERVICE**

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:

• **PETITIONERS' OPENING BRIEF ON THE MERITS**

  X   BY MAIL: I mailed a true copy thereof in a sealed envelope, with postage thereon fully prepaid, in the United States Mail at Redding, California, addressed as set forth below.

  X   BY FACSIMILE: I sent a true copy of the above document via facsimile transmission to the office(s) of the parties as set forth below on this date before 5:00 p.m.

       BY PERSONAL SERVICE: I caused such true copy of the above document to be hand-delivered to the office(s) of the parties as set forth below.

James Markman, Atty.  
Richards, Watson & Gershon  
1 Civic Center Circle  
Brea, CA 92821  
(1 copy [714] 990-6230 fax)

Tilden Kim, Atty.  
Richards, Watson & Gershon  
355 S. Grand Ave., 40<sup>th</sup> Fl.  
Los Angeles, CA 90071  
(1 copy) [213] 626-0078 fax)

  x   BY FEDERAL EXPRESS: I caused such true copy of the above document to be delivered to Federal Express for overnight courier service to the office(s) of the parties as set forth below.

California Supreme Court  
Office of the Clerk  
350 McAllister Street – Room 1295  
San Francisco, CA 97102  
(1 original + 13 copies)

Court of Appeal  
4<sup>th</sup> District, Division Two  
3389 12<sup>th</sup> Street  
Riverside, CA 92501  
(5 copies)

Superior Court  
Honorable Joseph H. Johnston  
8303 Haven Avenue  
Rancho Cucamonga, CA 91730  
(1 copy)

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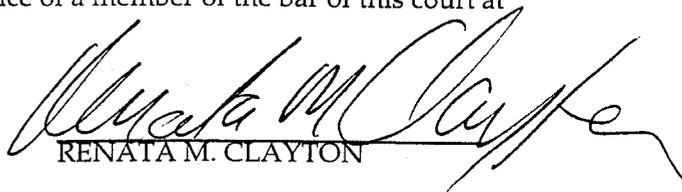
I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

  X   I hereby certify that the document(s) listed above was/were produced on paper purchased as recycled.

  X   STATE: I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

       FEDERAL: I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on October 29, 2003, at Redding, California.

  
RENATA M. CLAYTON