CASE NO.: S117590

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA

BARRATT AMERICAN, INCORPORATED

Plaintiff and Appellant,

vs.

CITY OF RANCHO CUCAMONGA, ET AL.

Defendants and Respondents.

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

Appeal from a Judgment of the
San Bernardino County Superior Court (Case No. RCV 063382)
Honorable Joseph E. Johnston, Judge

ANSWER BRIEF ON THE MERITS

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant Barratt American, Inc. ("Barratt") is a builder specializing in Southern California tract homes. In June 2000, Barratt started a 123-house single-family residential development in the City of Rancho Cucamonga ("City"). (Clerk's Transcript ["C.T."] 17:11-18.) Now, several years after paying for and receiving construction permits for the houses in that development, Barratt seeks a belated refund of those permit fees.

In dismissing Barratt's suit, the courts below did not hold that the California statutes governing construction and land-use regulatory fees provide no protection against local government abuses. Instead, they simply held that Barratt was time-barred from presenting its claims. This result comports with both the plain text and the clear intent of the relevant statutes mandating the 120-day statute of limitations period, as well as with this Court's precedents.

Thus, this Court should likewise hold that Barratt cannot state its claims that the City's construction permit fees are facially excessive because Barratt delayed filing its suit until long after the 120-day statute of limitations had expired. Moreover, Barratt's allegation that the City did review and revise its fees within 120 days before Barratt filed its suit not only conflicts with its allegation that the City has never done so, but

contradicts the text of the City resolution allegedly accomplishing that revision. And Barratt's argument that it may rest its claim on the City's annual ministerial duty to review and revise its permit fees fails, because neither the Legislature nor California's voters have imposed a ministerial duty upon the City to perform such review every year.

Even if Barratt could prove that the City's construction permit fees were facially excessive, as a matter of law, it could not receive a refund of permit fees it had already paid. Moreover, the trial court could not order that the City forfeit those fees to compensate for any surplus fees, because the Legislature has prescribed instead that local governments apply surplus regulatory fees against future regulatory costs. Were the City overcharging as Barratt alleges, the trial court could at most order the City to exercise its discretion within the limits imposed by Government Code Section 66016, and to revise its fee structure if appropriate.

In truth, Barratt seeks far more than $110,000. Barratt's suit demands review and refund of construction permit fees, but the statutes that Barratt asks this Court to misinterpret govern a wide range of local regulatory fees. (Gov. Code § 66016(d).) With this case, Barratt seeks a decision from this Court that would cripple local building and planning regulation in California.

Specifically, Barratt urges this Court to impose complex and costly analysis and reporting requirements on local regulatory fees, with no corresponding benefit to fee payers, to taxpayers, or to the general public. Meanwhile, Barratt asks this Court to hold that sophisticated businesses need exercise no vigilance to protect their own interests, but may instead raise their objections to regulatory fees at any time, even long after the fees are established and the regulated activity is complete and paid for. And finally, Barratt asks this Court to hold that local governments must perform this complex analysis, subject to challenge at any time, at the risk of having to disgorge any "overcharges" threefold: once through individual refunds, a second time through application of "excess" fees to future costs, and a third time through forfeiture of property tax revenues.

In opposing Barratt's demands, the City does not seek to evade its statutory responsibilities. Instead, the City seeks a decision from this Court striking a reasonable balance between the public's right to impose the costs of regulation on the private parties whose activities make that regulation necessary, and those private parties' right to pay only their fair share of those costs. This balance, consistent with the Legislature's intent and with sound public policy, should lead this Court to affirm the decision of the Court of Appeal.

II. STATEMENT OF FACTS

In June 1999, the City adopted a resolution setting forth its schedule of fees for building, mechanical, plumbing, and electrical permits and for plan review.[1] (Resolution 99-146 [C.T. 123-67].) One year later, in June 2000, Barratt began construction on a 123-house project in the City. (C.T. 17:11-15.) Over the next two years, Barratt paid approximately $143,000 in building permit fees on 83 houses (about $1,725 per house), as required by the fee schedule set forth in the June 1999 resolution and repeated in a December 2000 resolution. (C.T. 17:15-18; Resolution 99-146 [C.T. 123-67]; Resolution 00-268 [C.T. 179-231].)

In September 2001, fifteen months after beginning its project, Barratt notified the City by letter that Barratt considered the City's permit fees to be too high. (C.T. 75-78.) Nevertheless, Barratt neither stopped construction nor filed suit. Instead, Barratt waited eight more months until May 2002 to file this stale action, alleging, with the benefit of two years' hindsight, that

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[1] For the Court's convenience, the City follows Barratt's practice of referring collectively to all the fees at issue in this case as "building permit fees." This simplification obscures two key facts, however. First, each new house may require as many as four regulatory construction permits (building, mechanical, electrical, and plumbing), as well as a plan review. (C.T. 11:9-10, 11:17-19.) Second, each of these four permits carries a separate—and separately calculated—permit fee. (*See* Resolution 02-023, §§ 1.0, 1.1, 1.9, 1.10, 1.11 [C.T. 234-44].)

the City should have been able to review, inspect, and permit Barratt's houses for less than $400 each. (C.T. 18:3-8.)

III. STATEMENT OF THE CASE

In a case resembling several others Barratt has brought against various cities and counties,[2] Barratt alleges that the City's building permit fees are unlawfully high. On this basis, Barratt seeks a refund of fees it has already paid, for benefits it has already received, as well as a writ of mandate compelling the City to charge less in the future. (C.T. 6-22.) The trial court sustained the City's demurrers to all causes of action in Barratt's complaint (C.T. 326-27); and the Court of Appeal affirmed.

IV. STANDARD OF REVIEW

For the purpose of argument on demurrer, the City assumes the truth of all material facts properly pleaded, as well as the truth of any judicially noticeable matters. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The trial

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[2] The City is aware of at least four other actions that Barratt has instituted on legal theories similar to those raised here:

(1) *Barratt American, Inc., etc. v. County of Orange*, Orange County Superior Court Case No. 814037;

(2) *Barratt American, Inc. v. City of Encinitas*, San Diego County Superior Court Case No. GIN008310, Fourth Appellate District Civil No. D041162;

(3) *Paladin Fair Housing Coalition & Barratt American, Inc. v. City of Corona*, Riverside County Superior Court Case No. RIC331444; and

(4) *Barratt American, Inc. v. City of Corona*, Riverside County Superior Court Case No. RIC293494, Fourth Appellate District Civil No. E027124.

court's decision on the City's demurrer is a matter of law over which this Court exercises independent review. (*Id.*)

The trial court's decision on whether or not to permit amendment, however, was a matter of discretion, subject to review by this Court only for abuse. (*Id.*) Barratt bore the burden of persuading the trial court that amendment was possible, and bears the burden of persuading this Court that the trial court abused its discretion in evaluating any amendment Barratt proposed. (*See Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 636-637.)

V. ARGUMENT

Barratt has not stated any claim that the City has violated any legal duty in setting, maintaining, or collecting building permit fees. (*See* Section V.B below.) For this reason, the Court of Appeal affirmed the trial court's decision to dismiss Barratt's suit. For this reason as well, this Court may affirm the Court of Appeal's judgment without further consideration of the remedial measures Barratt proposes.

Only if Barratt had alleged a legal violation by the City would Barratt's action present to this Court the issues Barratt and its supporters ask this Court to decide. Even then, however, the statutes governing City building permit and plan-check fees would not permit, let alone require, most of the remedies Barratt seeks. Barratt could not obtain permit fee

refunds long after receiving permits and completing construction (*see* Section V.C below), and could not force the trial court to "punish" the City by denying it property tax revenue (*see* Section V.D below). At most, by alleging and proving that City building permit and plan-check fees were unlawfully high, Barratt could obtain prospective modification of those fees.

Barratt urges this Court to select words, phrases, and subsections out of context, creating a complex statutory and constitutional scheme under which local governments must frequently review and revise their fee structures to meet Barratt's exacting standards. Barratt would further revise the statutes, however, to relieve Barratt of any corresponding duty to act carefully or promptly, allowing Barratt at any time to present either facial or as-applied challenges to fees it paid years ago and to fees that have not changed. The relevant statutory and constitutional scheme governing building permit and plan-check fees is both simpler and more reasonable than Barratt believes, and it bars all of Barratt's causes of action.

A. Statutory Overview

The State Housing Law, the State Building Standards Law, and the Earthquake Protection Law implement a state-mandated construction safety program, which ensures that all building activity in California uses safe, reliable materials and techniques. (*See* Health & Safety Code §§ 17922,

17958, 18909(a), 19150.) Local governments must enforce program standards in their jurisdictions. (*Id.* §§ 17960, 19120.) They do so by requiring permits for all but the most minor construction projects, and by reviewing those projects, both before and during construction, to confirm that they meet minimum standards.

Local governments need not, however, fund this state-mandated regulatory program from their scarce general tax revenues. Instead, state law allows local governments to charge permit fees making such regulation self-supporting, so that the regulated parties bear the cost. (*See* Gov. Code §§ 66014(a), 66016(a); Health & Safety Code §§ 17951(c), 19132.3.) These permit fees may meet, but may not exceed, the full "reasonable cost" of providing regulatory services. (Gov. Code §§ 66014(a), 66016(a).)

A local government considering a building permit or plan-check fee must project "the estimated amount required to provide the service for which the fee or service charge is levied," and must ensure that projected revenues from the fee do not exceed this cost estimate. (Gov. Code § 66016(a).) If the actual costs turn out to be less (or the revenues more) than the local government estimated, this over-recovery does not invalidate the fee. Instead, Section 66016(a) requires the government to take any over-recovery into account the next time it modifies its fee structure. (*See id.*) Through this procedure of recursive estimation and adjustment, the

local government sets fees with certainty, while ensuring that regulated parties supply no more funding overall than necessary to cover the costs of building regulation.

To attack these revenue and cost estimates, anyone affected by the fee must bring a "validation" action within 120 days of the date the governmental body adopts the ordinance or resolution setting the fee. (*See* Gov. Code §§ 66016(e), 66022(a).) If no such challenge occurs, the estimate—and thus, the fee—is valid, and the local agency may properly assess those fees. This statutory scheme provides the framework governing Barratt's claims.

B. Barratt Has Not Stated a Claim for Violation of Government Code Section 66016.

The allegations in Barratt's complaint, even if true, would not establish that the City had ever violated its duty under Section 66016 to match permit fee revenues against construction regulation costs. Barratt did not bring a validation action under Section 66022 within 120 days of June 1999, the date the City adopted its current fee schedule. Moreover, the City has discretion under Section 66016 to decide how long to wait until adopting a new schedule; and Barratt has not stated facts that, if true, would show the City's abuse of this discretion. Because Barratt has not stated any

violation of the City's statutory duty under Section 66016, the Court of Appeal correctly refused Barratt any remedy.

1. Barratt Has Not Stated a Claim Under Government Code Section 66022.

According to the Legislature,

> *Any* judicial action or proceeding to attack, review, set aside, void, or annul the ordinance, resolution, or motion levying a fee or service charge subject to this section shall be brought pursuant to Section 66022.

(Gov. Code § 66016(e) [emphasis added].)

Section 66022 imposes a 120-day limitations period on such challenges (*id.* § 66022(a)) to give public agencies "certainty with respect to the enforceability of their fee ordinances and resolutions." (*Utility Cost Mgmt. v. Indian Wells Valley Water Dist.* (2001) 26 Cal.4th 1185, 1197.) As to the City "ordinance, resolution, or motion" that actually established the City's current building permit and plan-check fee schedule, Barratt's lawsuit is untimely.

a. The City Established its Current Building Permit Fees At Least Three Years Before Barratt Sued.

When Barratt began its construction project in June 2000, the most recent City "Comprehensive Fee Schedule" had been adopted a year before, in June 1999. (Resolution 99-146 [C.T. 123-67].) Even if this resolution had adopted, modified, or amended City building permit and plan-check

fees, Barratt could not have brought a timely action in June 2000 to challenge it under Section 66022. Instead, Barratt no doubt took this validated fee structure into account in evaluating the economic risks and benefits of its tract-home development. (*See N.T. Hill v. City of Fresno* (1999) 72 Cal.App.4th 977, 992 fn.13.)

Since June 2000, City permit fees have not changed. The City adopted Resolution 00-268 in December 2000, and Resolution 02-023 in January 2002, without altering building permit and plan-check fees.[3] Meanwhile, Barratt continued its project. Because Barratt's May 2002 effort to challenge the City's building permit and plan-check fee schedule was at least three years too late, the trial court and the Court of Appeal correctly dismissed Barratt's suit.

b. Resolution 02-023 Is Not Subject to Validation Under Section 66022.

Barratt did not sue within 120 days of the City's initial adoption of its building permit and plan-check fee schedule, but it did sue within 120 days of the adoption of Resolution 02-023. The City asks this Court to hold, however, that the courts below ruled correctly in sustaining the City's

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[3] Resolution 00-268 specifically notes that it corrects a "typographical error" in a previous comprehensive fee schedule by increasing the permit fee for work valued at $100,000 or more from $555.00 to $555.50. (C.T. 225.)

demurrer to this putative "validation" action. Although Government Code Sections 66016 and 66022 combine to permit a validation action for a resolution "adopting a new fee or service charge or modifying or amending an existing fee or service charge" (Gov. Code § 66022(a)), City Resolution 02-023 is not such a resolution.

(1) A Typographical Error Is Not a Substantive Fee Change.

Pages 47 to 50 of Resolution 02-023 (C.T. 280-83) list all changes that resolution was intended to make to previous fees, with an explanation for each. No building permit fees are listed among these changes. At most, Resolution 02-023 reintroduced a typographical error Resolution 00-268 had corrected (C.T. 225); but by doing so, it did not adopt, modify, or amend every fee Barratt challenges.

(2) Resolution 02-023 Did Not Amend or Modify Building Permit and Plan-Check Fees.

In substance, Resolution 02-023 neither establishes nor alters the City's building permit and plan-check fees. Instead, a comparison between Resolution 02-023 and Resolution 00-268 shows that Resolution 02-023 modified no City fees, and established new fees only for passport applications, passport photographs, and map reproductions. (*Compare* Resolution 02-023, §§ 3, 4 [C.T. 245-46], *with* Resolution 00-0268 §§ 3, 4 [C.T. 190-91].) Whether or not Government Code Section 66022 permits a challenge to the City's fees for these services, Barratt does not allege that it ever purchased or intends to purchase these items, or that the City's prices for them exceed reasonable cost estimates.

Furthermore, Barratt cannot manufacture a challenge to the City's building permit and plan-check fees by attacking a resolution that lists those fees without increasing them. The plain language of both Government Code Sections 66016 ("to levy a new fee or service charge or to approve an increase in an existing fee or service charge") and 66022 ("adopting a new fee or service charge, or modifying or amending an existing fee or service charge") requires a *new or different* fee. Section 66022 does not provide for "validation" challenges to fees that stay the same.

(3) Listing Unmodified Fees on a Comprehensive Schedule Does Not Re-establish Them For Purposes of Section 66022.

The simple organizing device of a "comprehensive fee schedule," with all fees listed for easy staff and public reference, does not imply that the City reconsiders or re-enacts every fee on the list by adding or reconsidering any fee. To the contrary, California law has long held that a legislative enactment repeating a predecessor enactment without substantial change "is but a continuation of the old. There is no break in the continuous operation of the old statute, and no abatement of any of the legal consequences of acts done under the old statute." (*Sobey v. Moloney* (1940) 40 Cal.App.2d 381, 385; *see also In re Dapper* (1969) 71 Cal.2d 184, 189.)

Additionally, California courts have held that the portions of a statute that have not been modified when re-enacted remain continuously in force straight through the repeal and re-enactment process. *(See, e.g., Orange County Water Dist. v. F. E. Farnsworth* (1956) 138 Cal.App.2d 518.) In *Farnsworth*, the appellants challenged the validity of an assessment on the basis, *inter alia*, that the act establishing that assessment was repealed and re-enacted. In affirming the lower court's decision validating that assessment, the court in *Farnsworth* held that "where a statute is repealed and some of it is at the same time re-enacted, the re-

enacted provisions of the repealed act continue in force without interruption." *(Id.* at 524-525; *see also In re Martin's Estate* (1908) 153 Cal. 225, 229-230; *Perkins Mfg. Co. v. Clinton Constr. Co. of Cal.* (1930) 211 Cal. 228, 238 ["Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes place at the same time."]; *In re Estate of Childs* (1941) 18 Cal.2d 237, 242-243.)

Barratt did not challenge Resolution 99-146, and enactment of subsequent fee schedules repeating the building permit fees in that Resolution does not cure Barratt's failure. The unabated legal consequence of that failure is that the City's building permit fees are immune to facial challenge. (*See* Gov. Code § 66022(a).)

The purpose of having a short time limit for validation actions is to quickly confirm the enforceability of public agencies' fees. (*Utility Cost Management, supra*, 26 Cal.4th at 1197.) Similarly, a comprehensive fee schedule provides certainty and clarity for City staff and the public as to all fees the City charges for its goods and services. This Court would create a harsh trap for cities by holding that a city exposes every fee on its

comprehensive schedule to re-examination whenever the city alters any one of those fees.

Instead, under established decisional law, only those fees that were actually and substantially changed by Resolution 02-023 should be open to validation. Building permit fees were neither actually nor substantially changed within 120 days before Barratt filed this action. The City asks this Court to affirm the lower courts' rulings dismissing Barratt's challenge to Resolution 02-023.

2. Barratt Has Not Stated a Claim for Writ of Mandate.

Where the Legislature has provided for validation actions to review local government actions, the Courts of Appeal hold that mandate is not available to bypass the statutory remedy after the limitations period has expired. (*Embarcadero Mun. Improvement Dist. v. County of Santa Barbara* (2001) 88 Cal.App.4th 781, 792-793; *Hills for Everyone v. Local Area Formation Comm.* (1980) 105 Cal.App.3d 461, 467-468.) Were mandate ever available to enforce Government Code Section 66016(a), however, Barratt could not state a claim without identifying specifically a clear and present legal duty that the City had breached. (*Building Indus. Assn. v. Marin Mun. Water Dist.* (1991) 235 Cal.App.3d 1641, 1645.) Because the City's duty to review and adjust building permit fees is neither

clear nor present, the City asks this Court to hold that Barratt has stated no such claim.

a. Fee-Setting Under Government Code Sections 66014 and 66016 Requires the Exercise of the City's Legislative Discretion.

Government Code Section 66016 describes a quintessentially legislative budgetary process for setting building permit and plan-check fees. (*See* Gov. Code § 66016(a) [authorizing cities to set such fees according to the "estimated amount required" for service].) To adopt a fee structure, a city must choose the level of service it wishes to provide, consistent with the general requirements of Health and Safety Code Sections 17951(c) and 19132.3 and with the community's needs. For example, the city must choose acceptable turn-around times for plan review, and acceptable levels of inspector experience, so that it may budget accordingly for staff.

It must then estimate the cost of that service, as well as the resources—including accumulated or anticipated fee revenues—it expects to have available to meet that cost. (*See* Gov. Code §§ 66014, 66016.) This process necessarily requires:

> a complex balancing of public needs in many and varied areas with the finite financial resources available for distribution among those demands. It involves interdependent political,

> social and economic judgments which cannot be left to individual officers acting in isolation; rather, it is, and indeed must be, the responsibility of the legislative body to weigh those needs and set priorities for the utilization of the limited revenues available.

(*County of Butte v. Superior Court* (1985) 176 Cal.App.3d 693, 699.)

Because budgeting is a legislative function, "a court is generally without power to interfere in the budgetary process." (*Id.* at 698.)

b. The Frequency of Fee Revision Under Section 66016 Is Also a Matter of Legislative Discretion.

Furthermore, even if Government Code Section 66016(a) requires a periodic comparison between actual revenues and costs, it does not specify how frequently the City must conduct this analysis. Where a statute is imprecise or ambiguous, this Court holds that it must receive a reasonable interpretation, rather than one creating absurd results. (*Torres v. Parkhouse Tire Serv.* (2001) 26 Cal.4th 995, 1003; *People v. Pieters* (1991) 52 Cal.3d 894, 898-899.) To inform its reasonable interpretation, the court may consider "the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute." (*Torres*, 26 Cal.4th at 1003.) In the case of Section 66016, these factors show that the Legislature intended local governments to decide for themselves how frequently to revise permit fees.

(1) Local Governments May Choose a Revision Schedule that Meets Local Needs and Conditions.

The evident purpose of Government Code Section 66016 is to restrict the fees it governs to levels necessary to sustain the programs they fund. (*See* Gov. Code § 66016; *see also County of Plumas v. Wheeler* (1906) 149 Cal. 758, 764 [holding that a permit fee "may properly be fixed with a view to reimbursing the city, town, or county for all expense imposed upon it by the business sought to be regulated"].) Contrary to Barratt's apparent belief, the purpose of the statute is not to bury local governments in paperwork, or to raise fees to prohibitive levels through needlessly complex administrative processes.[4] (*Cf. Cal. Assn. of Prof. Scientists v. Dept. of Fish & Game* (2000) 79 Cal.App.4th 935, 954 [noting that "the cost and administrative difficulty" of alternative fee structures are legitimate factors to consider in evaluating the reasonableness of a fee].) The City need not reconcile actual revenues and costs with estimates, and adjust fees after a noticed public meeting, each hour, each day, or even each month.

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[4] A city may use building permit and plan-check fees to recover the full costs of auditing and revising those fees. (*See* Gov. Code §§ 66014(b), 66016(c).) More frequent fee audits and revisions mean higher fee administration costs, and thus higher fees.

(2) Annual Fee Revision Is Not Constitutionally Required.

Moreover, Article XIIIB, Section 1.5, of the California Constitution does not require fee revision under Section 66016 each year. Article XIIIB expressly governs City *spending* rather than City *revenues*, by requiring cities, special districts, and the state to limit budgetary appropriations. (*See* Cal. Const., art. XIIIB, § 1.) "While article [XIIIA] was aimed at controlling ad valorem property taxes and imposition of new special taxes, article [XIIIB] is directed at controlling government spending." (*County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 449 [citation omitted].) Barratt's lawsuit does not challenge any of the City's spending or appropriations decisions. (C.T. 12:9-16:11.)

An article XIIIB annual financial audit must identify only "proceeds of taxes" (Cal. Const., art. XIIIB, §§ 1.5, 8(a)-(c)), which include regulatory fees that "exceed the costs reasonably borne" in providing regulatory services (*id.* § 8(c)). Neither Section 1.5 nor Section 8 says that those costs must be "actual" costs, rather than reasonable estimates, and neither says that the fee-cost relationship at issue must necessarily be determined over the course of a single year. To the contrary, the most reasonable building permit fee, for example, might well be one that adjusts for fluctuations in

construction activity by incorporating an estimate of fees and costs over several years.

Any other interpretation would be truly absurd. Government Code Section 66016 applies to a long list of regulatory fees described in Government Code Sections 51287, 56383, 57004, 65104, 65456, 65863.7, 65909.5, and 66451.2; to building, planning, and zoning fees described in Section 66014; and to public facility capacity and connection charges described in Section 66013. (Gov. Code § 66016(d).) Barratt contends, in other words, that article XIIIB, Section 1.5, forbids *any* city to use a multi-year financial planning cycle for *any* such fee, and instead requires that *every city* audit and revise *every fee* on this long list *every year*. But constitutional and statutory provisions *limiting* governmental charges and expenditures cannot possibly mandate such an enormous investment in municipal bureaucracy, all to maintain unreasonable, annually-changing fee structures that fail to reflect economic cycles.

c. Barratt's Allegations Cannot Justify Overriding the City Council's Discretion.

Barratt did not ask the trial court or the Court of Appeal, and does not ask this Court, to decide on any principled basis what length of time between fee reviews might be an abuse of the City's legislative discretion. Instead, in addition to stating that the City must perform such review

annually, Barratt merely alleges that the City has a "continuing pattern" of failing to do so.[5] (C.T. 12:11-25.) Such an allegation fails to establish a ministerial duty on the City's part to adjust fees with any particular frequency. (*Marin Mun. Water Dist.*, *supra*, 235 Cal.App.3d at 1649 [holding that petitioner's mere "disagreement with the District's approach to this difficult problem" did not state a ministerial duty justifying mandate].) Whether or not mandate is ever available to enforce a local government's duties under Section 66016, the City asks this Court to hold that Barratt has not stated such a claim.

C. Government Code Sections 66020 and 66021 Do Not Create a Refund Remedy for "Excess" Regulatory Fees.

On the basis of its allegation that the City's building permit fee schedule became facially invalid at some unstated time after the City last revised it, Barratt seeks a refund of "excessive" building permit and plan-check fees it has paid since June 2000. (*See* C.T. 17:9-18:20.) But even assuming that Barratt has alleged and could prove the invalidity of the fee schedule in effect when it paid any fees, the City urges this Court to hold that the applicable statutes would not permit, let alone require, refunds.

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[5] Barratt's opposition to the City's demurrer did not propose any amendments to its complaint that might have stated this duty more clearly, and did not request leave to amend. (C.T. 285-303.)

Any other interpretation of these statutes would be not only unworkable, but counter to the Legislature's overall intent.

1. Fee Refunds Are the Exception, Not the Rule.

No statutory or constitutional principle makes post-payment refunds routinely available to people who have paid for and received governmental permits. To the contrary, such refunds are ordinarily unavailable in California:

> It is fundamental that a landowner who accepts a building permit and complies with its conditions waives the right to assert the invalidity of the conditions and sue the issuing public entity for the costs of complying with them.

(*Pfeiffer v. City of La Mesa* (1977) 69 Cal.App.3d 74, 78; *see also McLain Western #1 v. County of San Diego* (1983) 146 Cal.App.3d 772, 776-777.)

Unless some specific exception to this general rule covers Barratt's claims, it has waived any right to a refund by accepting and using its building permits.

Barratt's suggestion that the state and federal constitutions require a refund remedy is frivolous. A "post-deprivation" refund must be available for an unlawful exaction only if statutes and ordinances governing the collection of that exaction require payment to avoid asset forfeiture, or as a prerequisite to litigation over the exaction's validity. (*McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco* (1990) 496 U.S. 18, 38-39.) In the permit fee context, by contrast, a builder may refuse to pay the fee with no

sanction other than the inability to obtain a building permit; this inability is not a deprivation of constitutional magnitude. (*Pfeiffer*, 69 Cal.App.3d at 78.) Indeed, a tract-home builder such as Barratt need not build in any city if it believes that the city's fee structure unduly burdens its business activities. (*See N.T. Hill, supra*, 72 Cal.App.4th at 992 fn.13.)

Alternatively, before accepting a building permit the permittee may bring a mandate action to establish the lawfulness of any permit condition. (*Selby Realty v. City of San Buenaventura* (1973) 10 Cal.3d 110, 128; *McLain Western, supra*, 146 Cal.App.3d at 776-777.) Under ordinary circumstances, any delay associated with resolving such a dispute is also not a constitutional deprivation. (*Landgate, Inc. v. Cal. Coastal Com.* (1998) 17 Cal.4th 1006, 1030-1031.) No constitutional principle requires this Court to recognize refund claims initiated long after a builder has silently accepted the benefits of a City building permit.

In essence, Barratt argues that Government Code Sections 66020 and 66021 are constitutionally necessary, and that their application must be as broad as possible to avoid constitutional violation. This Court has held otherwise, calling Section 66020 a "limited exception" to the general rule. (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 19 fn.9.) As Barratt has made no allegation taking its refund claim outside the general rule (C.T.

17:9-18:20), this Court need decide only whether Sections 66020 and 66021, in context, affirmatively authorize the refund remedy Barratt seeks.

2. Sections 66016, 66020, and 66022 Work Together to Preclude, Not to Require, a Refund Remedy for Facially Excessive Regulatory Fees.

This Court construes statutes in context, harmonizing separate statutes and code sections on the same topic to "give effect, when possible, to all the provisions thereof." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 779 [internal quotations and citations omitted]; *People v. Thomas* (1992) 4 Cal.4th 206, 210.) By seizing on Government Code Sections 66020 and 66021 to support its refund claim, however, Barratt divorces these statutory sections from their context, and disregards other sections that make plain the Legislature's intent not to allow refunds even for facially excessive permits subject to a timely validation action. The City asks this Court to hold that such refunds are not statutorily authorized.

a. This Court Has Already Interpreted Sections 66020 and 66022 to Bar Barratt's Refund Claim.

This Court held in *Utility Cost Management* that plaintiffs could not circumvent the short statute of limitations in Section 66022 by casting their facial challenges to municipal fees in the form of refund suits. (26 Cal.4th at 1194-1195.) Despite this straightforward holding, Barratt seeks refunds

of fees it paid nearly two years before filing this suit, even though this suit is Barratt's first-ever challenge to the City's permit fee schedule. Following the holding and the logic of *Utility Cost Management*, the City urges this Court to reject Barratt's refund claims.

(1) Unless Barratt Has Stated a Violation of Section 66016, *Utility Cost Management* Directly Bars Barratt's Refund Claim.

Barratt filed its suit within 120 days after January 16, 2002, the date the City adopted a new master fee schedule that Barratt alleges re-adopted City building permit fees. As set forth more fully in Section V.B.1.b above, however, the City disagrees with this description of Resolution 02-023. And Barratt indisputably did not sue within 120 days of the City's previous comprehensive fee schedule revision in 2000, or within 120 days of the last time the City actually re-evaluated its construction permit fee schedules in 1999 or before.

Barratt's failure to challenge the current fee schedule under Government Code Section 66022 within 120 days of that schedule's initial adoption now insulates the fees from facial challenge. (*Utility Cost Management*, 26 Cal.4th at 1194-1195.) Were this Court to hold that Resolution 02-023 re-adopted the City's building permit fees, *Utility Cost Management* would nevertheless bar indirect facial challenges, through

refund claims, to Resolutions 99-146 and 00-268. (*Id.*) Only if this Court were to hold that Barratt had stated a mandate action under Section 66016 might the *Utility Cost Management* decision not squarely bar most or all of Barratt's refund claims.

(2) *Utility Cost Management* Also Prohibits Barratt's Using a Refund Claim to Evade the Requirements for a Mandate Action.

Should this Court hold that Barratt has stated a claim for writ of mandate, the City nevertheless urges the Court to hold Barratt's refund claim barred by *Utility Cost Management*. Barratt suggests that this Court should allow it to assert refund claims starting in June 2000, based on its allegation that the City's fees had by then "become" excessive; but Barratt did not bring any facial challenge to the fee at that time. Instead, Barratt paid for City building permits for nearly two years before deciding to ask a court to review the City's discretionary decision not to review those fees.

Under *Utility Cost Management*, Barratt could not bring a timely refund claim in May 2002 based solely on an allegation that a City permit fee had been facially invalid as of its adoption more than 120 days before. (26 Cal.4th at 1194-1195.) Barratt's twist on this allegation—that the fee may have been acceptable when adopted, but became invalid over time—does not alter the disruptive effect its suit would have on City

finances (*id.* at 1197), and does not explain Barratt's delay in acting to protect its perceived rights. The City asks this Court to hold that fee payers cannot sit silently by for years before claiming refunds based on allegedly facially excessive fees.

(3) Barratt Has Not Alleged Any As-Applied Errors.

Where both Section 66022 and Section 66020 apply, the Courts of Appeal have reconciled the two statutes by holding that only "as-applied" challenges are possible outside the 120-day limit. (*See Cal. Psychiatric Transitions, Inc. v. Delhi County Water Dist.* (2003) 111 Cal.App.4th 1156, 1161-1162; *N.T. Hill, supra*, 72 Cal.App.4th at 986-987, 992.) *Utility Cost Management* did not decide whether this distinction is valid, and this Court need not do so to decide this case: Barratt has not alleged any "as-applied" challenge to any fees Barratt has already paid. Should this Court believe that Section 66020 might apply to building permit fees, the City urges it nevertheless to hold that *Utility Cost Management* bars Barratt's refund claims.

b. Section 66020 Does Not Apply to Regulatory Fees.

In addition, the City urges this Court to hold that Section 66020 does not apply to building permit fees at all. This principle provides an independent basis for holding that no part of Barratt's refund claim is

viable. Moreover, because Section 66020 does not apply to building permit fees in any circumstance, Barratt could not use it to obtain refunds even if Resolution 02-023 were subject to Barratt's validation action.

(1) Section 66016 Prescribes a Prospective Remedy for Surplus Regulatory Fees.

Although Government Code Section 66016 forms the statutory basis for Barratt's allegation that City fees are too high, it affirmatively refutes Barratt's contention that it is entitled to a refund. Instead, the plain language of Section 66016 describes the exclusive remedy the Legislature intended for any facial "excess":

> 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.

(Gov. Code § 66016(a) [emphasis added].)

Surplus fees that have been "paid back" to refund-seekers cannot simultaneously be "paid forward" to reduce fees.[6] Section 66016 mandates

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[6] Barratt alleges, for example, that the City must use its alleged and estimated $3 million surplus to reduce future fees. (*See* C.T. 14:8-19.) Yet at the same time, Barratt alleges that the City owes Barratt at least $110,000 in refunds (*see* C.T. 18:1-8), amounting to Barratt's "share" of that $3 million surplus. Finally, Barratt alleges that the City must also lose that same $3 million, including for a third time Barratt's $110,000 "share," as a "penalty" under Government Code Section 53728. (*See* C.T. 15:13-22.) Only the first of these demands finds the slightest statutory support in Section 66016.

prospective, *not* retrospective, correction, and bars Barratt's refund claim for building permit fees it has already paid.

In contrast to surrounding sections of the Mitigation Fee Act that describe the types of fees they cover, Section 66016 explicitly names the fees to which it applies. (Gov. Code § 66016(d) ["This section shall apply only to fees and charges as described in . . . Sections 17951, 19132.3, and 19852 of the Health and Safety Code . . ."].) Because Section 66016 applies specifically to building permit fees, it prevails over more general statutes that might otherwise seem to conflict with it. (*San Francisco Taxpayers Assn. v. Bd. of Supervisors* (1992) 2 Cal.4th 571, 577-578; *N.T. Hill, supra*, 72 Cal.App.4th at 989-990.) If the Legislature had intended any other disposition besides prospective fee adjustment for "surplus" building regulation revenue, Section 66016 would have listed that disposition.

Instead, Section 66016(a) states flatly that surplus actual revenues "shall be used" in place of future fees. (Gov. Code § 66016(a).) In addition, Section 66016(e) requires that "[*a*]*ny* judicial action" challenging a fee subject to Section 66016 "*shall be brought* pursuant to Section 66022." (*Id.* § 66016(e) [emphasis added].) Because Section 66016 conspicuously omits any reference to refunds or to a statutory refund

procedure, the Court of Appeal below correctly held that it simply does not permit refunds to cure "overcharging" of any fee to which it applies.

(2) Sections 66020 and 66021 Forbid a Retrospective Remedy for Surplus Development Fees.

Having prescribed a "pay it forward" remedy for permit fee over-recovery in Section 66016, the Legislature did not simultaneously prescribe a "pay it back" remedy in Sections 66020 and 66021. These sections apply to development fees and to taxes and assessments on development activities, not to permit fees. They do not contradict Section 66016, allow building permit fee payments under protest, or make building permit fee refunds available long after construction is complete. Even if the City had altered or extended its building permit fees, Barratt could not use Section 66020 to pay these fees under protest pending the outcome of a timely validation action.

(a) Section 66020 Does Not Apply to Permit Fees.

By its own terms, Section 66020 applies only to "development fees" and "development project[s]," as defined in the Mitigation Fee Act. (*See* Gov. Code §§ 66020(a) & 66000(a), (b).) Section 66000 defines a "fee" subject to Section 66020 as:

> a monetary exaction . . . that is charged by a local agency to the applicant in connection with the 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 does not include . . . fees for processing applications for governmental regulatory actions or approvals* . . . .

(*Id.* § 66000(b) [emphasis added].)

A "development project" is "any project undertaken for the purpose of development." (*Id.* § 66000(a).) In other words, a "development fee" ensures that developers accommodate the increased public governance and service costs attributable to land development; it is not a fee for specific regulation or service. (*See* Gov. Code §§ 66000 (a), (b).)

As this Court has noted, a fee does not become a "development fee" simply because a developer pays it. (*Utility Cost Management*, *supra*, 26 Cal.4th at 1191 [noting that certain fees "might well apply to development projects," without qualifying as "development fees"].) The Courts of Appeal have followed this logic, refusing to hold that fees are "development fees" subject to payment and protest under Section 66020 simply because they happen to be paid in connection with new or altered buildings. (*Cal. Psychiatric Transitions*, 111 Cal.App.4th at 1161 [holding that water and sewer connection fees "are not 'fees . . . imposed on a development project' for purposes of Section 66020"]; *Capistrano Beach Water Dist. v. Taj Dev. Corp.* (1999) 72 Cal.App.4th 524, 529-530.)

Whether or not Barratt considers itself a "developer," it did not pay building permit fees "in connection with the approval of a development project." (Gov. Code § 66000(b).) Instead, Barratt—like any handy homeowner adding a laundry room—paid the building permit and plan-check fees at issue in this case to cover the costs of ensuring public safety by controlling construction quality. (*See* Health & Safety Code §§ 17951(c), 19132.3.) Section 66020 does not subject such fees to post-payment protest and refund.

The California Legislative Counsel agrees with the City's position. In response to a direct query from Assembly Member Keith Olberg, Legislative Counsel Opinion #1518 concluded in relevant part:

> [t]he fees that may be protested pursuant to Section 66020 of the Government Code do not include fees associated with plan check or inspection fees, as defined in Section 106.3.1, 106.3.2, or 108.1 of the California Building Standards Code.[7]

(Ops. Cal. Legis. Counsel, No. 1518 (January 28, 1997), Development Fees, p. 1 [C.T. 316-21].)

The Legislative Counsel reached this conclusion because building permit fees such as those in question here are "separately authorized under the Health and Safety Code and do not relate to fees in the nature of

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[7] These fees are the very fees at issue in this case. (*See* Cal. Code Regs., tit. 24, Part 1, §§ 106.3.1, 106.3.2, 108.1 [adopted by reference in Rancho Cucamonga Municipal Code § 15.04.010].)

monetary exactions" on development. (*Id.*, p. 6 [C.T. 321].) This Court has held that Legislative Counsel opinions have great persuasive weight, "since they are prepared to assist the Legislature in its consideration of pending legislation." (*Cal. Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17.) Accordingly, the Legislature did not intend Section 66020 to authorize Barratt's refund action.

(b) Section 66021 Does Not Expand Section 66020 to Cover Building Permit Fees.

Section 66021 operates not to extend Section 66020's protest procedures to ministerial or regulatory fees, but to extend them to "taxes and assessments." (*Compare* Gov. Code § 66020(a) ["Any party may protest the imposition of any *fees, dedications, reservations, or other exactions* . . . ."] *with id.* § 66021(a) ["Any party on whom a *fee, tax, assessment, dedication, reservation, or other exaction* has been imposed . . . ."] [emphases added]; *see also id.* § 66000(b) [excluding taxes and assessments from the Mitigation Fee Act's definition of "fee"].) In addition, Section 66021 limits its scope to those fees or taxes that are "required to *obtain governmental approval* of a development, as defined by Section 65927." (*Id.* § 66021 [emphasis added].) Although Section 65927 defines "development" expansively (*id.* § 65927), it does not render

building permit fees subject to Section 66020, because they are not "required to obtain governmental approval of a development."

Many cities combine several types of ministerial and discretionary review in their "building permit" processes. Before issuing building permits, for example, many cities make applicants pay certain mitigation fees. (*See, e.g., Trend Homes, Inc. v. Central Unified Sch. Dist.* (1990) 220 Cal.App.3d 102, 108 [noting that the City of Fresno required certain homebuilders to pay school impact fees before becoming eligible for building permits].) Fees for these preconditions to building permit issuance might reasonably be characterized as "required for governmental approval of a development" under Section 66020 or 66021, because they pay for review that addresses *whether or not the applicant may build at all.*

Here, however, a far narrower class of "building permit fees" is at issue. Plaintiff has challenged only the Rancho Cucamonga Building Department's charges for ministerial, regulatory building plan review and construction inspection—activities implementing state and local building safety standards. (*See* C.T. 11:9-19.) These fees, for regulatory services required by the Health and Safety Code, fund a program that supervises *how, not whether*, Barratt may build.

Government Code Section 66020, by its own terms, applies only to "development fees" that alleviate effects of development on the community.

(*See* Gov. Code §§ 66020(a), 66000(a), (b).) Section 66021 expands the application of Section 66020 to taxes and assessments. (*Id.* § 66021.) However, nothing in Sections 66020, 66021, or 66016 suggests that the Legislature intended any statute to permit refunds of even "excessive" regulatory building permit fees.

c. Barratt's Interpretation of Sections 66016, 66020, and 66022 Would Be Unreasonable and Unworkable.

Barratt posits that any builder may seek a refund based not on any allegation that the City has overcharged that builder specifically, but on allegations that the City is generally overcharging all builders for permits. (*See* C.T. 17:9-18:20.) Furthermore, by arguing that an action is available under Section 66020 irrespective of any action under Sections 66016 or 66022, Barratt necessarily argues that any builder may seek such a refund at any time, *whether or not* that builder could bring a timely validation action under Section 66022 and *whether or not* that builder could state a mandate claim under Section 66016. Finally, by invoking the protest and refund procedure in Section 66020, Barratt necessarily argues that such protests are timely *up to three months after* a builder has paid for its permit. (*See* Gov. Code § 66020(d)(1).) These contentions contradict public policy and common sense.

(1) An Individual Refund Remedy Cannot Cure a Generally Excessive Fee.

The Legislature undoubtedly understood that a typical city issues hundreds, if not thousands, of building, mechanical, electrical, and plumbing permits each year, to builders ranging in scale from single-family homeowners replacing plumbing or adding bedrooms to tract-home builders such as Barratt. To ensure consistency, predictability, and fairness, cities price those permits using a standardized, uniform fee schedule. (*See, e.g.*, Resolution 02-023, § 1 [C.T. 234-45].) Retrospective, individualized adjustment—either up or down—of those generally-applicable and frequently-paid fees, which fund ongoing building safety regulation rather than personalized service, would be an absurd requirement.

When fees fall short, the Legislature has not allowed for retrospective fee increases: Cities may not upset builders' financial plans, months or perhaps years after they finish construction, by billing them for deficiencies in the Building Department budget. Instead, if the City's fee schedule generates insufficient revenues to cover the City building safety budget, the City's only way to recover this shortfall is to raise its price for future building permits. Similarly, the Legislature has not allowed for retrospective fee decreases in the form of refunds. As Barratt acknowledges, Section 66016 quite sensibly requires cities to spend any

"surplus" plan-check and building inspection fees for future building safety, not for a complex and administratively expensive across-the-board refund program.

In addition, individual refund actions under Section 66020 for violations of Section 66016 would produce a remedy bearing little relationship to the alleged wrong. If a plaintiff could allege and prove that actual building permit fee revenues had exceeded actual building regulation costs over some period, resulting in a surplus, the statutorily-required remedy would be an adjustment in the across-the-board permit fees. (*See* Gov. Code § 66016(a).) A Section 66020 challenge for facial invalidity of the City's building permit fees, however, would require the trial court first to revise fees across the board (to determine how much the plaintiff should have had to pay), and then to apply that revised fee schedule only to a single builder, only for fees already paid. (*See id.* § 66020(e) [directing the local agency to refund "the unlawful portion of the payment"].)

(2) Allowing Post-Payment Protests Would Create Local Government Chaos.

Moreover, if Section 66020 applied to building permit fee payments, it would allow everyone who obtains a permit for a skylight or a new half-bath to stew for three months over the permit price before deciding whether to complain. (*See id.* § 66020(d)(1) ["A protest . . . shall be filed . . . within

90 days *after* the date of the imposition of the fees . . . ."][8] [emphasis added].) This Court has noted that the Legislature placed a very short limitations period on fee challenges under Section 66022 to give local governments "certainty with respect to the enforceability of their fee ordinances and resolutions." (*Utility Cost Management*, *supra*, 26 Cal.4th at 1197.) Barratt's proposed refund remedy would completely undermine this certainty, by subjecting cities to suits for building permit fee refunds at any time, on any disgruntled builder's allegation that the city had begun, at some unstated time before that builder paid for its permit, to accumulate "surplus" permit fees. (*Cf. Pfeiffer*, *supra*, 69 Cal.App.3d at 78 ["If every owner who disagrees with the conditions of a permit could unilaterally decide to comply with them under protest, do the work, and [then sue], complete chaos would result in the administration of this important aspect of municipal affairs."].)

The City asks this Court to give the terms of Section 66016(a), 66020, 66021, and 66022 a reasonable interpretation, rather than one creating absurd results. (*Torres*, *supra*, 26 Cal.4th at 1003.) Barratt offers a patently unreasonable interpretation by attempting to twist a statutory

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[8] Barratt's "protest" was filed on September 21, 2001, C.T. 75-78, and, therefore, even if Section 66020 applied, was untimely as to any payments Barratt made before June 23, 2001.

scheme providing for as-applied challenges to development fees into one providing for individualized facial challenges to widely-applicable regulatory fees. The City asks this Court to hold that Barratt's claims of facial excess, even if true, would not entitle Barratt to refunds of any permit fees it had paid under that facially excessive fee schedule.

D. Proposition 62 Does Not Create a Remedy for "Excess" Regulatory Fees.

This Court should reject Barratt's effort to use Government Code Sections 53720 through 53730 ("Proposition 62") as a supplemental remedy for the City's alleged violation of Section 66016 because Proposition 62 is a red herring: The specific statutory remedies for violations of Section 66016 ensure that building permit fees are not and cannot be taxes. Even if an audit were to reveal that the City's building permit fee revenues over some period had exceeded its costs over that same period, Section 66016, *not* Proposition 62, would supply the exclusive remedy.

1. The Fee Adjustment Remedy Ensures that Excess Building Regulation Fees Are Not and Cannot Be Taxes.

Barratt's action under Proposition 62 rests on the incorrect premise that any "excess" building permit and plan-check fees constitute taxes. This Court has never held, however, that the mere allegation that a regulatory fee must be reduced transforms that fee into a tax. (*See Sinclair Paint Co. v.*

State Bd. of Equalization (1997) 15 Cal.4th 866, 876-878.) Instead, this court reviews the overall purpose of a fee, as well as the statutes or ordinances governing its calculation and imposition, to determine which financial label—"tax," "assessment," or "regulatory fee"—best describes it. (*Id.*; *see also Alamo Rent-a-Car, Inc. v. Bd. of Supervisors* (1990) 221 Cal.App.3d 198, 205-206 [holding that "reverse logic" could not compel the conclusion that an allegedly excessive fee was a tax].)

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. Under Section 66016(a), if actual revenues exceed actual costs, the City may neither refund the excess nor transfer it to the City's general fund to replace or augment tax revenue. (*See* Gov. Code § 66016(a); *see also* Health & Safety Code §§ 17951(c), 19132.3 [prescribing uses for permit fees].) Instead, if the City finds—upon its own review or upon court-ordered audit—that fee revenues go farther than expected, the City must make a prospective fee adjustment.

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. (*See* Gov. Code § 66016(a) ["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 surplus."].)

Moreover, the requirement that initial fee-setting use reasonable revenue and cost estimates, combined with the prospective fee-adjustment remedy, ensures that over time, no "excess" fee revenues will accumulate. Accordingly, any violation of Section 66016 can be, at most, temporary.

Barratt ignores this specific remedy, alleging instead that any temporary surplus—permitted and cured by Section 66016(a)—would violate Proposition 62. Yet if the trial court ordered the City to reduce building permit fees under Section 66016(a), this remedy would cure any Proposition 62 violation that might otherwise have existed during the period when the "surplus" accumulated. For this reason, the court could not simultaneously order a "dollar-for-dollar" reduction in the City's property tax revenues over the same period under Government Code Section 53728.

2. The "Dollar for Dollar" Remedy Does Not Apply Where No Unlawful Tax Exists.

Barratt offers no authority for its contention that Government Code Section 53278 is designed to impose a "penalty" for unauthorized "special taxes," and no authority for its theory that Proposition 62 applies to building permit fees if a permittee seeks judicial intervention. The Fifth Appellate District has described Section 53278 as imposing not a "penalty," but an "offset":

> If the local government fails to comply with the voter approval provisions of the statutory scheme, *the tax burden imposed in violation of the scheme is offset* by a withholding of property taxes which would otherwise be distributed to the local government.

(*City of Woodlake v. Logan* (1991) 230 Cal.App.3d 1058, 1069 [emphasis added] [*overruled on other grounds in Santa Clara County Local Transp. Auth. v. Guardino* (1995) 11 Cal.4th 220].) Under Section 66016, however, this "offset" is accomplished for permit fees *not* by reducing "tax" revenue, but by reducing future permit fees and applying any current surplus toward future building department expenses.

E. Article XIIIB Does Not Create a Remedy for "Excess" Regulatory Fees.

Barratt's complaint sought to state an "excessive fee" claim under article XIIIB of the California Constitution. (C.T. 12:9-13:21.) In this Court, Barratt backpedals, insisting that the only goal of its article XIIIB "cause of action" is to force the City to examine its building permit fees, at no cost to Barratt, in the City's next "annual financial audit." Even this lesser demand finds no support in the Constitution.

1. Article XIIIB Does Not Govern Permit Fees.

In its attempt to cobble together an article XIIIB claim, Barratt has lifted Sections 1.5 and 8 of article XIIIB from their context. Rather than imposing generalized duties, both sections state clearly that they apply only

to the duties created by article XIIIB. (*See* Cal. Const., art. XIIIB, § 1.5 ["The annual calculation of the appropriations limit *under this article* . . . shall be reviewed as part of an annual financial audit."] [emphasis added], § 8 [defining terms "used in this article"].) Neither article XIIIB, Section 1.5, nor article XIIIB, Section 8(c), creates a free-floating duty for the City to conduct an audit of its "proceeds of taxes," enforceable at any time by writ of mandate.

Under the Legislature's implementing scheme, the City must adopt an annual resolution setting its "appropriations limit" and making "other necessary determinations for the following fiscal year pursuant to [a]rticle XIIIB." (Gov. Code § 7910.) Any challenge to this resolution is due within forty-five days of the date the City adopts it. (*Id.*) Because an audit under article XIIIB, Section 1.5, is necessary to determine the City's annual "appropriations limit" under article XIIIB, Section 1, Government Code Section 7910[9] would govern any challenge to the sufficiency of the City's annual Section 1.5 audit.

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[9] Furthermore, as set forth in Section V.B.2.b above, a city's annual audit could comply with this requirement without analyzing regulatory fee revenues and costs.

2. Permit Fee Audits Are Available Under Government Code Section 66023.

If Barratt has failed to timely challenge the City's annual article XIIIB resolution, but wishes an audit for some reason unrelated to the City's article XIIIB appropriations limit, it may pay for one itself:

> (a) Any person may request an audit in order to determine whether any fee or charge levied by a local agency exceeds the amount reasonably necessary to cover the cost of any product or service provided by the local agency. If a person makes that request, the legislative body of the local agency may retain an independent auditor to conduct an audit to determine whether the fee or charge is reasonable.
>
> (b) Any costs incurred by a local agency in having an audit conducted by an independent auditor pursuant to subdivision (a) may be recovered from the person who requests the audit.

(Gov. Code § 66023(a), (b).)

Only by lifting article XIIIB, Section 1.5, from its constitutional and statutory context can Barratt argue to this Court that Section 1.5 authorizes Barratt's First Cause of Action. Thus, Barratt has stated no claim for any relief under article XIIIB.

F. A Timely Validation Action Under Section 66022 Would Bar Barratt's Other Claims.

Barratt's insistence that Resolution 02-023 is subject to a "validation" challenge under Government Code Section 66022 fatally

undermines its other demands. Conversely, if Barratt can state its claim for mandate, it must necessarily admit that Resolution 02-023 is not subject to challenge. Were this Court to reinstate any of Barratt's causes of action, it could not reinstate them all.

1. If Resolution 02-023 Is Subject to Challenge Under Section 66022, Barratt's Other Claims Are Barred.

Two conclusions follow from Barratt's position that Resolution 02-023 re-established or modified building, mechanical, electrical, plumbing, and plan-check fees. First, Resolutions 99-146 and 00-268 similarly re-established those fees, and would be similarly subject to validation under Government Code Section 66022.[10] Second, in adopting Resolutions 99-146, 00-268, and 02-023, the City had to perform the very analysis under Government Code Section 66016 that Barratt's other causes of action demand. (*See* Gov. Code § 66016.)

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[10] Like Resolution 02-023, Resolution 00-268 made a trivial change in the price of permits for work valued at $100,000 or more. (*Compare* Resolution 00-268, § 1 [C.T. 180], *with* Resolution 99-146, § 1 [C.T. 124].) Also like Resolution 02-023, Resolution 00-268 did not otherwise change the City's fees for building, mechanical, electrical, and plumbing permits and plan-checking, but did "resolve that the following fees are established." (*Compare generally* Resolution 00-268 [C.T. 179-231] *with* Resolution 99-146 [C.T. 123-72].)

a. If Resolution 02-023 Is Subject to Challenge Under Section 66022, All Claims Arising Before January 16, 2002, Are Time-barred.

Although Barratt's validation claim necessarily implies that Barratt could have challenged Resolutions 99-146 and 00-268 under Section 66022, Barratt did not. If this Court reinstated Barratt's Fifth Cause of Action, its decision in *Utility Cost Management* would compel the additional conclusion that Resolutions 99-146 and 00-268 represented, as of their effective dates, reasonable estimates of costs and revenues, including proper adjustment for over- or under-recovery under previous fee structures. (*See Utility Cost Management*, *supra*, 26 Cal.4th at 1194-1195; *see also* Gov. Code § 66016(a).) Accordingly, if Barratt could state a validation action for Resolution 02-023, it would be time-barred from challenging the facial validity of the fee schedules in Resolutions 99-146 and 00-268.

This scenario would render any fees Barratt paid before the effective date of Resolution 02-023 immune to challenge. Barratt's claim that the City failed to audit its "proceeds of taxes" in any year before it adopted Resolution 02-023 would fail, because as a matter of law, no fees collected before Resolution 02-023's effective date would be "proceeds of taxes." Barratt's claim that the City has retained "surplus" fee revenues "for its own benefit" would also fail, because the allegation that fees collected before

Resolution 02-023's effective date were "surplus" would be time-barred. And Barratt's claim that it should receive refunds for fees it paid before January 16, 2003, would fail, because these fees would be reasonable as a matter of law. (*Utility Cost Management*, *supra*, 26 Cal.4th at 1191.)

b. If Resolution 02-023 Is Subject to Validation Under Section 66022, All Other Claims Are Barred.

If the City did revise its permit fees, albeit improperly, by adopting Resolution 02-023, it exercised its discretion to review and revise fees. Barratt's "validation" action under Section 66022 asks the trial court to decide whether or not the City did so correctly. No parallel mandate action would be necessary or even appropriate, because "[a]lthough a court may order a public body to exercise its discretion in the first instance when it has refused to act at all, the court will not compel the exercise of that discretion in a particular manner or to reach a particular result." (*Marin Mun. Water Dist.*, *supra*, 235 Cal.App.3d at 1646.)

Such a timely validation action would also render any additional remedies unavailable. Validation of Resolution 02-023 would establish whether the City should revise it further; mandate would be superfluous. (*Cf. Hills for Everyone*, *supra*, 105 Cal.App.3d at 467-468.) Moreover, invalidation of Resolution 02-023 would require fee revision under Section 66016; but as set forth above, this remedy would cure any violation fully.

Should this Court conclude that Resolution 02-023 did re-enact the City's building permit fees, the City urges it nevertheless to affirm dismissal of Barratt's remaining causes of action.

2. Alternatively, if Barratt Can State its Other Claims, Resolution 02-023 Is Not Subject to Challenge Under Section 66022.

On the other hand, Barratt's non-validation causes of action depend on its allegation that the City should have reviewed and revised its fees according to Section 66016, but has never done so. As set forth above, the City urges this Court to hold that Barratt's factual allegations fail to support this claim. In any event, however, this claim can survive, even theoretically, only if Resolution 02-023 and its predecessors are not and were never subject to facial challenge under Government Code Section 66022. Should this Court conclude that the City has abused its discretion under Section 66016 by failing to revise its permit fees, the Court should nevertheless affirm the dismissal of Barratt's validation cause of action.

G. Barratt Did Not and Does Not Seek Leave to Amend.

Once the trial court determined that Barratt had not stated any cause of action, Barratt bore the burden of showing the trial court that it could amend its complaint to state a claim. (*See Cooper, supra*, 70 Cal.2d at 636-637.) Barratt offered no suggestions about how it might do so. (*See* C.T.

285-302.) Barratt has also not requested leave to amend, nor proposed to this Court any amendments that could cure the complaint's flaws. Accordingly, the trial court did not abuse its discretion in denying leave to amend. (*Cooper*, 70 Cal.2d at 637.)

VI. CONCLUSION

In essence, Barratt asks this Court for an advisory opinion that would arm Barratt to continue its crusade against local government construction regulation. Barratt's protestations that the Court of Appeal eviscerated its remedies overlook a fatal flaw in its complaint: Barratt did not and could not state sufficient facts to establish the violation of any of Barratt's rights. Moreover, Barratt seeks unauthorized remedies for the statutory violations it alleges, and the Court of Appeal did not err in so holding. Because Barratt has not made a timely challenge, and because Barratt seeks remedies the Legislature has not approved, the City asks this Court to affirm the decision of the Court of Appeal.

DATED: December 31, 2003

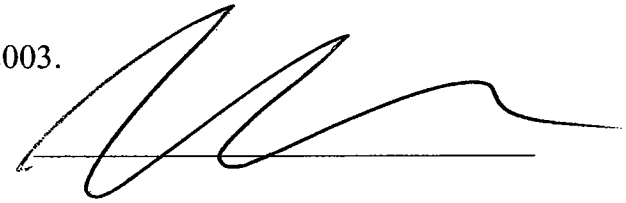
RICHARDS, WATSON & GERSHON
A Professional Corporation

By: _____
JULIET E. COX
Attorneys for Defendants and Respondents, CITY OF RANCHO CUCAMONGA and CITY COUNCIL OF THE CITY OF RANCHO CUCAMONGA

CERTIFICATE OF CONFORMITY

In accordance with California Rules of Court, Rule 14 (c)(1), I certify under penalty of perjury that the Answer Brief in the case of *Barratt American, Inc. v. City of Rancho Cucamonga*, does not exceed 14,000 words, including footnotes. According to the word count function on the word processing program I used, this brief contains 10,752 words.

Executed on December 31, 2003.



B. TILDEN KIM

PROOF OF SERVICE

I, Sylvia Dickerson, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Richards, Watson & Gershon, 355 South Grand Avenue, 40th Floor, Los Angeles, California 90071-3101. On December 31, 2003, I served the within document:

ANSWER BRIEF ON THE MERITS

by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below. I am readily familiar with the firm's practice for collection and processing correspondence for mailing with the United States Postal Service. Under that same 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 contained in this affidavit.

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

Executed at Los Angeles, California, on December 31, 2003.

Sylvia Dickerson

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