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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BARRATT AMERICAN INC., Plaintiff and Appellant, v. CITY OF ENCINITAS el al., Defendants and Respondents.	D041162 (Super. Ct. No. GIN008310)

APPEAL from a judgment of the Superior Court of San Diego County, Thomas P. Nugent, Judge. Affirmed in part, reversed in part.

Law Office of Brent & Klein and Jason G. Brent for Plaintiff and Appellant.

Best, Best & Krieger, Jeffrey V. Dunn and Mark D. Servino for Defendants and Respondents.

Government Code section 66016, subdivision (b) (all undesignated section references are to this code) requires that a local government agency approve by ordinance or resolution any fee increase for building permits and other services, and section 66022, subdivision (a) requires that any challenge to a fee increase be commenced within 120

days of the effective date of the legislation or the effective date of any automatic adjustment increase. In this case, we conclude that the trial court erroneously applied the 120-day limitations period to a claim that a local government agency improperly increased such fees without having the increase approved by resolution or ordinance and we reject the argument of the local agency that its regulatory scheme provided for automatic adjustment of its fees. Accordingly, we reverse the judgment and remand the matter to the trial court for further proceedings on this issue. We also conclude that the 120-day limitations period barred all challenges to an original resolution setting forth a schedule for such fees and we affirm that part of the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 1987, the City of Encinitas (the City) adopted Ordinance 87-58 (the Ordinance), which requires that building permit fees be set by a duly-adopted resolution of the city council, but authorizes the city building official to set the "determination of value or valuation" of particular types of planned structures. The city building official carries out this authorization by assigning a valuation (known as the valuation multiplier) to different categories of structures, based on the type of building and its expected occupancy. The Ordinance gave the city's building official complete discretion on setting the valuation multipliers.

In 1992, the city council approved Resolution No. 92-36 (the 1992 Resolution), which included a schedule of fees that would be charged for the city's building department services, including issuing building permits and conducting building inspections. The fee schedule listed a range of building values and provided a method

for calculating the various permit and inspection fees based on the monetary value of the proposed building. The City calculates permit and other fees owed on the development of a particular structure by multiplying the square footage of the proposed building by the valuation multiplier attributable to the structure type and occupancy category of the proposed building. The City provides informational handouts to building permit applicants to assist them in calculating the amount of fees that will be charged for a proposed structure.

Homebuilder Barratt American Incorporated (Barratt) sued the City and its city council for a refund of building permit fees the City charged in connection with Barratt's development of three residential neighborhoods. Barratt alleges it paid the City over $500,000 in fees in connection with the three residential developments. The City calculated the amount of the fees using valuation multipliers set forth in a schedule issued by the San Diego Area Chapter of the International Conference of Building Officials (ICBO) in a document entitled "Building Valuation Multipliers for 1995-1996; Effective Date August 1, 1995." However, the ICBO valuation multipliers varied from those used by the City in the 1992 Resolution and Barratt alleges this change increased the fees applicable to its developments.

In October 2000, Barratt filed this action seeking a fee refund under section 66020 of the Mitigation Fee Act (§§ 60000-66025 (the Act)). In its complaint, Barratt asserted that the fees charged under the 1992 Resolution violated the law because, among other things, (1) the fees exceeded both the estimated reasonable and actual costs to the City of providing the service for which they were charged, in violation of sections 66014 and

66016, (2) the amount of the fees was not submitted to, or approved by, a popular vote of two-thirds of electors eligible to vote on the issue, as required under sections 66014 and 66016, and (3) the increase in fees from those set forth in the 1992 Resolution was not approved by City Council ordinance or resolution, as required under section 66016, subdivision (b).

At trial, the City contended that Barratt's claims were barred by the applicable statute of limitations and, pursuant to the parties' stipulation, the trial court conducted trial on that issue first. In a bench trial, the court concluded that Barratt's claims were time-barred in accordance with the limitations period set forth in section 66022 and it entered judgment in the City's favor. Barratt appeals.

I

All Challenges To The 1992 Resolution Are Untimely Under Section 66022

Barratt asserts that the fees charged under the 1992 Resolution are improper because the 1992 Resolution did not include a valuation multiplier schedule or an independent standard by which the city building official was required to set the valuation multiplier and it seeks a refund of fees paid to the City under the 1992 Resolution. The trial court concluded that the limitations period contained in section 66022 barred Barratt's claims. We affirm this conclusion as to these claims because the plain language of the statutes supports it.

We examine the words of a statute to give them their usual and ordinary meaning and construe the statutory words and clauses in the context of the statute as a whole.

(*People v. Murphy* (2001) 25 Cal.4th 136, 142.) The plain language of a statute governs if it is unambiguous and does not involve an absurdity. (*People v. Ledesma* (1997) 16 Cal.4th 90, 95.)

Section 66020 establishes procedures for any party to protest the imposition of any fees levied on a particular development project by a local agency. (§ 66020, subd. (a); *N.T. Hill Inc. v. City of Fresno* (1999) 72 Cal.App.4th 977, 988 (*Hill*).) This section requires a local agency to provide a project applicant written notice of the amount of the fees, indicating that the applicant has 90 days to protest the fees. (§ 66020, subd. (d)(1).) Any party who files a protest may then file an action attacking the imposition of the fees within 180 days after delivery of the City's notice. (§ 66020, subd. (d)(2).)

Barratt contends the limitations period of section 66020 applies to this action and that the statute never began to run because the City failed to provide the required 90-day written notice. However, we conclude that section 66022, which applies to lawsuits challenging the decision of a local agency to promulgate or change a fee and requires that such an action be commenced within 120 days of the effective date of the legislation or any automatic adjustment increase sets forth the applicable limitations period. (§ 66022, subd. (a); see *Hill*, *supra*, 72 Cal.App.4th at p. 989.)

Barratt challenges the 1992 Resolution under sections 66014 and 66016. Section 66016, which expressly applies to building permits and inspection fees (§ 66016, subd. (d)), specifies that any judicial action or proceeding challenging a fee there under is subject to the requirements of section 66022. (§ 66016, subd. (e).) Similarly, section 66014, which specifies that fees associated with building inspections and building

permits "shall not exceed the estimated reasonable cost of providing the service for which the fee is charged" (§ 66014, subd. (a)) also specifies that a judicial action or proceeding to challenge a fee charged under an ordinance or resolution "shall be brought pursuant to [s]ection 66022." (§ 66014, subd. (c).)

In contrast, section 66020 only applies to "fees, dedications, reservations, or other exactions imposed on a development project, as defined in Section 66000 . . . ." (§ 66020, subd. (a).) Section 66000 defines a "fee" and expressly excludes from this definition "fees for processing applications for governmental regulatory actions or approvals," the fees at issue in this action. (§ 66000, subd. (b).) Thus, the plain language of the applicable statutes shows that the limitations period contained in section 66020 does not apply to Barratt's claims. (*Utility Cost Management v. Indian Wells Valley Water Dist.* (2001) 26 Cal.4th 1185, 1188, 1192-1194 [concluding that the plain meaning of section 66022 supported its application to a claim seeking a refund of capital facilities fee charges].)

Barratt points out that section 66020 does not specifically cite to subdivision (b) of section 66000, contending that the application of section 66020 should not be limited by the definition of "fees" contained within subdivision (b) of section 66000. However, this argument ignores the specified purpose of section 66000, which is to provide definitions for certain terms, including a "fee." (See § 66000.) The Legislative Counsel has similarly concluded that section 66020 does not include fees associated with plan check or inspection fees. (Ops. Cal. Legis. Counsel, No. 1518 (Jan. 28, 1997) Development Fees, p. 6.)

Based on the foregoing, we reject Barratt's assertion that section 66020 applies to this action and agree with the trial court's conclusion that Barratt's challenges to the validity of the 1992 Resolution, including the assertion that it failed to attach a valuation multiplier schedule, are untimely because they were brought more than 120 days after its effective date. (§ 66022, subd. (a).)

In a final attempt to avoid the statute of limitations bar, Barratt asserts that the "effective date" of the 1992 Resolution is not the date the City passed it, but rather when the City actually charged the fees because the lack of a valuation multiplier schedule made it impossible for anyone to precisely calculate the fee amount. Barratt asserts this uncertainty tolled the limitations period until the fee amount could be determined.

We reject Barratt's suggestion as antithetical to the purpose of the shortened limitations period – to promptly inform financially constrained local agencies of "'any challenges to their ability to collect fees and spend the revenues thereby generated.' [Citation.]" (*Hill*, *supra*, 72 Cal.App.4th at p. 992.) Moreover, Barratt's suggestion is contrary to the express language of section 66022 and is not supported by any authority. The defect alleged by Barratt – lack of a valuation multiplier schedule – could easily have been ascertained by reviewing the 1992 Resolution. Thus, there is no reason this review could not have been completed within the 120-day limitations period.

Finally, Barratt suggests that the Legislature could not have intended an illegal fee to remain merely because it was not challenged within 120 days of its effective date. However, we must apply the statutory scheme as written and such concerns are more appropriately brought to the attention of the Legislature.

II

Section 66022 Does Not Apply To Barratt's Allegation That The City Improperly Increased Fees

As discussed above, the 1992 Resolution did not adopt a particular valuation multiplier schedule and any challenge to the validity of the 1992 Resolution on this ground, or any other ground, is untimely. Similarly, any challenge to the Ordinance on the ground that it improperly delegated the City's authority over fees to the city building official is also untimely. However, Barratt also alleges that the City increased the fees charged under the 1992 Resolution without having the increase approved by the city council by ordinance or resolution as required by subdivision (b) of section 66016. Specifically, Barratt claims that the valuation multiplier schedule used to calculate its fees increased the valuation multipliers from those originally used by the City when it enacted the 1992 Resolution. Barratt contends this increase is invalid.

Any challenge to an ordinance or resolution adopted by a local agency implementing a new fee or modifying an existing fee must be commenced within 120 days of the effective date of the ordinance or resolution. (§ 66022, subd. (a).) "If an ordinance, resolution, or motion provides for an automatic adjustment in a fee or service charge, and the automatic adjustment results in an increase in the amount of a fee or service charge" any action or proceeding to challenge the increase must be commenced within 120 days of the effective date of the increase. (*Ibid*.)

The Legislature set this short limitation period intending that a local agency would vote on any proposed fee increases (§ 66016, subd. (b)) and that the public would receive

notice and an opportunity to be heard before a local agency implemented any new fees or fee increases. (§§ 66004 & 66018.) To further this aim, the Act allows any interested party to file a written request with a local agency to receive mailed notice of any meetings on new or increased fees. (§ 66016, subd. (a).) This provision provides some assurance that interested parties, such as Barratt, will be aware of proposed fee increases and thus have the opportunity to challenge any modifications within the 120-day period after the effective date of the ordinance or resolution.

In 1995, the City began using a new (presumably higher) valuation multiplier schedule to calculate its fees and this change necessarily modified the fees charged by the City. It is undisputed that the City never adopted this new schedule by resolution or ordinance. By changing a variable used to calculate a fee without following the Act's statutory mandates, the City frustrated the entire statutory scheme. The 120-day limitations period of section 66022 does not apply in this situation because this limitations period only begins to run on the effective date of any new ordinance or resolution implementing the change. (§ 66022, subd. (a).) Thus, the trial court erred by applying this limitation period to Barratt's allegation that the City improperly increased the fees.

At oral argument, the City asserted that even if the 1995 valuation multiplier schedule increased the fees and the increase is invalid, Barratt had 120 days from the date of injury (i.e., when it paid the fees) to challenge the increase. Because more than 120 days have passed since payment, the City contends that Barratt's claims are nonetheless time-barred. This argument has no merit because the limitations period of section 66022

expressly runs from the effective date of the fee legislation. (*Utility Cost Management v. Indian Wells Valley Water Dist.*, *supra*, 26 Cal.4th at p. 1195.) The statute does not speak in terms of injury and the City is creating a hybrid statute by grafting portions of sections 66020 and 66022.

The City's argument is partially based on language contained in *California Psychiatric Transitions, Inc. v. Delhi County Water Dist.* (2003) 111 Cal.App.4th 1156 (*Transitions*). In *Transitions*, respondent water district notified appellant that the residential care facility it sought to build was subject to certain fees established by an ordinance adopted in 1975 and last amended in 1997. (*Id.* at pp. 1158-1159.) Appellant paid the fees under protest (§ 66020) and immediately filed a complaint seeking a refund under section 66020 alleging that the fees were in excess of the estimated reasonable cost of providing the services. (*Id*. at p. 1159.) The trial court granted summary judgment based on expiration of the applicable limitations period and the appellate court affirmed, concluding that section 66020 did not apply because appellant was not challenging fees imposed under a development project. (*Id*. at p. 1161.) The *Transitions* court concluded that section 66022 applied because appellant was attacking the ordinance and, although not expressly stated, more than 120 days had passed since the 1997 amendment and the filing of the complaint. (*Id*. at p. 1163.) Unlike the instant case, there was no contention that the ordinance and amendment were not properly adopted.

However, the *Transitions* court also noted that while the ordinance at issue expressly applied to residential developments and resthomes, for all other types of developments, "'application may be made to the Board of Directors for establishment of a

charge . . . .'" (*Transitions*, *supra*, 111 Cal.App.4th at p. 1162.) In this context, where an ordinance is uncertain as to what fee could be charged as to other types of developments, the *Transitions* court indicated the decision to impose the fee "is itself a 'resolution or motion' establishing the fee, and the 120-day statute of limitations *under section 66022* begins to run with the adoption of that resolution or motion." (*Id*. at p. 1163, italics in original.) This reasoning does not apply here because Barratt does not challenge application of the fees to its specific project; rather, it alleges that the 1995 fee increase was not approved by the city council ordinance or resolution, as required under section 66016, subdivision (b).

The City next contends that the fee increase was "automatic" because the Ordinance gave the city building official the authority to change the valuation multipliers and any change to the valuation multipliers "automatically" adjusted (i.e., increased the fees). In accordance with this argument, because the fees "automatically" increased when the valuation multiplier increased, this "automatic adjustment to the fees" would be subject to the limitation period set forth in section 66022 and any challenge to the increase would be untimely because it was not commenced within 120 days of the effective date of the increase. (§ 66022, subd. (a).)

The Legislature derived section 66022 from former sections 54995 and 54996. (Stats. 1990, ch. 1572, § 22.) We have reviewed the legislative history for these sections, but found no indication of what the Legislature intended when it used the words "automatic adjustment." Although there is little law in this area, we conclude that the words "automatic adjustment" clearly do not mean the unfettered discretion to change a

fee at any time. The few cases we have located that address automatic adjustment clauses indicate such clauses will be upheld where the hearing adopting any automatic adjustment satisfied due process, the automatic adjustment formula was expressly set forth and grounded upon some sort of objective criteria.

For example, automatic adjustment clauses are not unusual for electrical utility companies and title 16 of the United States Code, section 824d(f)(4), which addresses the rates and charges for electric utility companies engaged in interstate commerce, defines an "automatic adjustment clause" as "a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility . . . ." As recently noted by an Arizona appellate court in *Residential Utility Consumer Office v. Arizona Corp. Com'n* (2001) 199 Ariz. 588, such automatic adjustment clauses allow a utility to increase or decrease rates automatically "'in relation to fluctuations in certain, narrowly defined, operating expenses'" (*id*. at p. 591) and such provisions are generally upheld when they are initially adopted in accordance with all statutory and constitutional requirements. (*Id.* at p. 594.)

Similarly, in *City of Los Angeles v. Public Utilities Com.* (1975) 15 Cal.3d 680, our high court concluded that the Public Utilities Commission possessed both statutory and constitutional authority to implement an annual adjustment scheme for telephone rates to take account of changing federal tax expenses of telephone companies taking advantage of accelerated depreciation under the Internal Revenue Code. (*Id*. at pp. 685-686.) Significantly, the court noted that the adjustment scheme comported with due

process because a full hearing was held before adoption of the annual adjustment formula. (*Id*. at pp. 698-699.) The court also concluded that periodic application of the formula to the figures in the utility's books did not entail any denial of due process because once the formula was applied, the statutes provided for another full hearing in which challenges could be raised. (*Id*. at p. 699.)

This authority shows that any automatic adjustment clause must be expressly set forth and it must be grounded upon some sort of objective criteria. Here, while enactment of both the Ordinance and the 1992 Resolution satisfied due process, neither expressly "provide[d] for" automatic fee adjustments. (§ 66022, subd. (a).) Stated differently, nothing within these two enactments put the public on notice that the City would periodically adjust the ultimate fees charged based on some objective criteria such as the ICBO publishing a changed valuation schedule.

Furthermore, despite what method the city building official actually used in 1995 to change the valuation multipliers, the fact remains that the building official had unfettered discretion to set the valuation multipliers however and whenever he or she desired. Hypothetically, the Building Official could change the valuation multiplier for a wood frame dwelling from $78 to $780 and thus significantly change the ultimate fee charged to an applicant.

Moreover, a local agency may not charge building permit fees that are in excess of the estimated reasonable cost of providing the services rendered (§ 65909.5) unless the amount of the fees is approved by two-thirds of the electorate. (§ 66014.) In a 1993 opinion, the Attorney General concluded that where a local agency charges building

permit fees based upon the Uniform Building Code Valuation Tables (the Tables) without supporting evidence regarding the relationship between the fees and the services rendered, such fees are invalid to the extent they exceed the reasonable costs of providing the services rendered. (76 Ops.Cal.Atty.Gen. 4, 5 (1993).) The Attorney General reasoned that because a local agency must have data "available to the public . . . indicating the amount of cost, or estimated cost, required to provide the service for which the fee or service charge is levied" (§ 66016, subd. (a)), "a local agency may not, under the statutory scheme provided in the Government Code, adopt the fee schedules set forth in the Tables." (76 Ops.Cal.Atty.Gen. at p. 8.)

Although this opinion is not binding on us, we agree with its reasoning. (See *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1013.) Here, nothing prevented the Building Official from changing the valuation multiplier, and thus changing the fees, in any way he or she desired. We do not believe the Legislature envisioned allowing a local agency to simply pass off such an important decision when it allowed for automatic adjustments. At a minimum, due process requires a local agency to adopt an automatic adjustment formula based on some readily determinable and objective criteria that are expressly stated.

Moreover, the Act allows the public to contest any automatic fee increase within 120 days of the effective date of the increase (§ 66022, subd. (a)) and thus challenge whether the increased fees exceed the reasonable costs of providing the services for which the fees are charged. (§ 66014, subd. (a).) Here, the City's regulatory scheme allowed the fees to be increased at the whim of its building official without providing any

notice to the public of the impending change. This scheme frustrates two fundamental purposes of the Act – ensuring that the public receives notice of proposed fee increases and that local government agencies do not charge excessive fees for services they provide. (Sen. Rules Com., Off. of Sen. Floor Analyses, analysis of Sen. Bill No. 647 (1995-1996 Reg. Sess.) as amended July 21, 1995, p. 2.) Finally, while the City points out that it approved other resolutions pertaining to all three projects and that these resolutions required Barratt to pay fees at the established rate, these subsequent enactments do not negate the illegality alleged by Barratt.

In summary, we conclude that the trial court erroneously applied the 120-day limitation period of section 66022 to Barratt's allegations that the City improperly increased the fees and that the increased fees exceeded the reasonable cost of providing the services rendered. Although the City appears to concede that the 1995 valuation multiplier schedule increased fees, the parties never stipulated to this fact and the trial court never considered any evidence on this point. Thus, we remand the matter to the trial court for further proceedings. The trial court must determine whether the 1995 valuation multiplier schedule used to calculate Barratt's fees resulted in a fee increase as alleged by Barratt. If this question is answered affirmatively, then the trial court must determine the appropriate remedy.

DISPOSITION

That portion of the judgment concluding Barratt's allegations that the City improperly increased the fees and that the increased fees exceeded the reasonable cost of providing the services rendered are time-barred is reversed and the matter is remanded

for further proceedings in accordance with this opinion. Otherwise, the judgment is affirmed. Barratt is entitled to its costs on appeal.

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McINTYRE, J.

WE CONCUR:

McDONALD, Acting P. J.

O'ROURKE, J.