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## LAW ALERT

### EXACTLY WHAT IS AN EXACTION?

## AFFORDABLE HOUSING REQUIREMENTS MAY BE CHALLENGED UNDER THE MITIGATION FEE ACT

In *Sterling Park, L.P. v. City of Palo Alto* ("*Sterling Park*"), the California Supreme Court held on October 17, 2013 that local affordable housing requirements are "other exactions" that may be challenged using the protest provisions of the Mitigation Fee Act (Government Code Section 66000 *et seq.*).

#### Facts

The City of Palo Alto, which has among the highest housing costs in California, requires developers of for-sale housing to provide 20 percent of their units as moderate-income housing, affordable to households earning 80 to 120 percent of the median income. The developer of Sterling Park proposed in 2005 to meet the City's requirements by setting aside 10 condominium units for sale to moderate-income households and paying \$3.2 million into the City's Housing Fund in-lieu of providing an additional 10 affordable units. The City approved his proposal in 2006.

The developer did not object to this condition of approval until 2009, after most of the homes in Sterling Park had been built and offered for sale.

#### The Issue

Normally, litigation challenging conditions of approval must be filed within 90 days of the decision.

However, the Mitigation Fee Act (Section 66020) provides a "pay under protest" procedure for the imposition of any "fees, dedications, reservations, or other exactions." The provision allows a development to proceed

under most circumstances while the developer protests certain conditions.

Under the "pay under protest" provisions, a developer may file a protest within 90 days of receiving a notice from a local government stating both that: 1) the fees or exactions have been imposed, *and* 2) a protest must be filed within 90 days of the date of the notice. A lawsuit must be filed within 180 days after the date that the city or county provides the notice, and the developer must pay the fees or perform the dedications, reservations, or "other exactions" when due, or make satisfactory arrangements to perform them, with the prospect of getting the money or property back if successful. The Sterling Park developer argued that he had never received the notice from the City (an issue that was not resolved by the decision) and so his protest in 2009, *three years* after receiving approval, was timely.

#### The Court's Ruling

In a unanimous decision, the Court concluded that the Mitigation Fee Act's protest provisions would apply if the affordable housing conditions would "divest the developer of money or a possessory interest in property," but would not apply if the conditions simply restricted the manner in which the developer could use his property. The in-lieu fee clearly divested the developer of money. The requirement to sell the homes below market-rate, with an option to purchase reserved for the City, was also ruled by the Court to be an exaction. Consequently, the Mitigation Fee Act's protest provisions could be used to object to the affordable housing conditions.

The Court did not decide whether a requirement to sell homes below market-rate, by itself, with no City purchase option, would constitute an "exaction." Nor did the Court decide whether Sterling Park's challenge was, indeed, timely.

**Providing Early Notice to Prevent Late Challenges to Conditions**

In response to the Court's ruling, and to avoid challenges to conditions of approval many years after they were imposed, local agencies should provide the written notice required by Section 66020 at the time of approval of any development project. The notice could be provided through a standard condition of approval. It must include:

- "A statement of the amount of the fees or a description of the dedications, reservations, or other exactions"; and
- "Notification that the 90-day approval period in which the applicant may protest has begun."  
(Section 66020(d)(1).)

The notice should also be provided whenever impact and other fees are recalculated or additional requirements are imposed on a development after all discretionary approvals have been received. (Note that developers cannot challenge building permit fees, utility charges, and certain other fees under the Mitigation Fee Act.)

**Suspension of Development Approvals Under Certain Conditions**

While the protest procedures normally allow a developer to continue with a project after filing a protest, in certain circumstances the local government may suspend development approvals. In particular, if a protest is filed regarding requirements for

*construction of public improvements or facilities*, the local government may suspend approval of the project if it finds that: 1) the need for the public facilities is directly attributable to the project; and 2) the facilities are required for reasons related to the public health, safety, and welfare. (Section 66020(c).)

**Impact on Mitigation Measures and Other Conditions**

*Sterling Park* is troubling because of its potential to allow challenges to many types of conditions years after they were imposed, whether as mitigation measures under the California Environmental Quality Act, in response to community concerns, or otherwise. It is not always clear whether a condition of approval is an "exaction" or merely a restriction on the use of property. Consequently, it is important for the Section 66020 notice to be given whenever any discretionary entitlement is approved, even if the local government does not believe that any of the conditions of approval constitute "exactions."

If you have questions about this case, please feel free to contact Barbara Kautz, Juliet Cox, or any other attorney at Goldfarb & Lipman LLP for more information.

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