

[Menu](#) [Practice Areas](#) [Directions](#) [Contact](#)

call 408-261-4252 email [RHRC](#)



A Below Market Rate Purchase Option is an Exaction under the mitigation fee

By Richard Gullen

January 31, 2014

When developers seek entitlements for a project, the local agency that has jurisdiction may impose fees or other exactions as a condition of approval. The purpose of the fee or exaction is to alleviate the impact of the development on the community by defraying the cost of the additional burden on public services and facilities created by the project. Generally, the fee or exaction cannot exceed the estimated reasonable cost of providing the service or facility.

Before 1984, a developer could not challenge the validity of any fees without refusing to pay them. Since payment was a condition of obtaining a building permit, developers were forced to choose between paying the fees without recourse, or delaying the project pending litigation, which was typically cost-prohibitive or disastrous, and therefore rarely justified challenging the exaction.

In 1984, the Legislature enacted a procedure allowing developers to pay or perform the exaction under protest, obtain the building permit, and then pursue the project and the litigation in parallel. Under Government Code Section 66020, so long as the developer tenders satisfactory evidence of arrangements to perform the exaction with a notice of protest, the local agency cannot withhold any approval for the project including any map or permit. The developer must then file any action challenging the exaction within 180 days of the notice.

In a recent case, the California Supreme Court ruled on whether a below market rate (BMR) purchase option requirement constituted an "other exaction" under this statute. In *Sterling Park, LP v. City of Palo*

Alto (2013) 57 Cal. 1193, a developer sought to build 96 residential condominiums on 6.5 acres in Palo Alto. Under the City's BMR housing program, developments of 5 or more acres must sell at least 20% of all units as BMR units. To implement the requirement, the City takes an option to purchase the units for the specified BMR price, which it then assigns to the selected buyers. The developer signed an agreement with the City to provide 10 BMR units and pay in-lieu fees. Later, when the units were being finished and the City requested conveyance of the BMR units, the developer protested, and filed an action to enjoin the City from enforcing the BMR requirement.

The issue before the trial court was whether the BMR condition constituted an exaction under Section 66020 of the Mitigation Fee Act, and therefore the developer's action was timely under the 180-day deadline, or whether it fell within the Subdivision Map Act's shorter deadline, which required any action attacking the City's BMR condition to be filed within 90 days, and therefore was untimely. The trial court granted summary judgment for the City, and the court of appeal affirmed.

The Supreme Court reversed, holding that the BMR requirement constituted an exaction under the Mitigation Fee Act. The Court rejected the City's narrow interpretation of the phrase "any fees...or other exactions" to mean only those items which defray public costs. The Court agreed with prior decisions which interpreted the phrase to include conditions which divest the developer of money or a possessory interest in the property, but not land use restrictions. The Court reasoned that requiring a developer to set aside units to be sold below market is more like a monetary exaction which can be litigated while the project is being built, rather than a land use restriction (such as a limit on the number of units) which must be decided before construction. Ultimately, the Court held that the City's purchase option requirement triggered the application of Section 66020, including the protest procedure and longer filing deadline.

The bottom line from this case is that developers facing a BMR requirement that grants an option to the local agency can invoke the "perform-under-protest" procedure and litigate the validity of the BMR condition without incurring the risk and cost of delaying their project.



Laurie and I had two very challenging real estate rights issues that we were advised were going to be difficult to prevail on. The RHRC team engaged with us and helped us understand our rights and prevailing position. RHRC were thoughtful advocates for us from the beginning to conclusion of our cases. We feel fortunate to know we will always be able to call on the firm in the future and that they are our legal counsel.

Albert "Rocky" and Laurie Pimental, President of Global Markets and Customers, Seagate Technology

Office Locations

Rossi, Hamerslough, Reischl and Chuck
1960 The Alameda
Suite 200
San Jose, CA 95126

Phone: 408-261-4252

[Map & Directions](#)

Rossi, Hamerslough, Reischl and Chuck
8 Harris Court
Suite A1
Monterey, CA 93940

Phone: 831-655-3180

[Map & Directions](#)

The California law firm of Rossi, Hamerslough, Reischl & Chuck provides legal representation to real estate and business clients throughout Silicon Valley and the San Francisco Bay Area including San Francisco, San Jose, Palo Alto, Los Altos, Los Gatos, Menlo Park, Gilroy, Hollister, Santa Cruz, Santa Clara, Aptos, Monterey, Carmel, Salinas, Morgan Hill, Saratoga, San Francisco County, Santa Clara County, Santa Cruz County, San Benito County, Alameda County, San Mateo County, Monterey County, and Contra Costa County.

© 2015 by [Rossi, Hamerslough, Reischl & Chuck](#). All rights reserved. [Disclaimer](#) | [Site Map](#)
[Privacy Policy](#) | [Business Development Solutions](#) by [FindLaw](#), a Thomson Reuters business.