BURKE, WILLIAMS & SORENSEN, LLP

Representing the face of California

Public Law Update

Court Clarifies Meaning of a Mitigation Fee Act "Exaction"

By J. Leah Castella, Esq.

To obtain a free monthly subscription, visit: http://visitor.constantcontact.com/email.jsp?m=1101737815828

Public Law Update

BURKE, WILLIAMS & SORENSEN, LLP

March 2011 **Volume 5, Number 3**

J. Leah Castella, Esq.
Partner
Email: jcastella@bwslaw.com
1901 Harrison Street
Suite 900
Oakland, CA 94612-3501
Phone: (510) 273-8780
Fax: (510) 839-9104

Court Clarifies Meaning of a Mitigation Fee Act "Exaction"

By J. Leah Castella, Esq.

INTRODUCTION

On March 24, 2011 the Sixth Appellate District released its decision in *Trinity Park, L.P. v. City of Sunnyvale. Trinity Park* considered whether a challenge to a requirement that Trinity Park sell five houses in a forty-two house subdivision at below market rates ("BMR Requirement") was governed by the 180-day Mitigation Fee Act statute of limitations outlined in Government Code sections 66020 and 66021. The Court upheld the trial court's decision and found that the statute of limitations in the Mitigation Fee Act did not apply to Sunnyvale's BMR Requirement.

ANALYSIS

The *Trinity Park* case is notable for two reasons. First, it provides clarity about what constitutes an "exaction" under the Mitigation Fee Act, and unambiguously holds that a BMR Requirement that is not imposed to defray the costs of development is not an exaction under the Mitigation Fee Act. Second, it strongly suggests that a public agency must give a project applicant the precise notice required by the Mitigation Fee Act in order to trigger the Act's statute of limitations.

Below Market Rate Requirements and the Mitigation Fee Act

The Court determined that to be an "exaction" under the Mitigation Fee Act, the condition must be: "(1) imposed by a local agency as a condition of approval of a development project; and (2) for the purpose of 'defraying all or a portion of the costs of public facilities related to the development project.'" (*Trinity Park*, at p. 20.) The Court found support for this conclusion in other sections of the Mitigation Fee Act, notably section 66000(b)—which defines a "fee" as a "monetary exaction…charged by a local agency…for the purpose of defraying all or a portion of the cost of public facilities related to the development project"—and sections 66005 and 66010(b)—which both equate a "fee" with a monetary exaction. (*Id*. at p. 21.) Based on this language, the Court concluded that under the doctrine of *ejusdem generis*—which establishes that a court construing general terms following specific terms should interpret the general terms as including only items similar to those that are specifically listed—the word "exaction" is a more general word following a list of specified items which includes fees, dedications, and reservations. The Court therefore reasoned that, as is the case with fees, dedications, and reservations, an exaction must be

imposed for the purpose of defraying all or a portion of the cost of public facilities related to development projects. (*Id*. at p. 22.) The Court found additional support for this proposition in both the legislative history of the Mitigation Fee Act and in other decisions interpreting the Mitigation Fee Act. (*Id*. at pp. 22-26.)

The Court then applied this principle to Sunnyvale's BMR Requirement. It noted that the stated purpose of the BMR Requirement was to ensure that all future housing developments in Sunnyvale contribute to the attainment of the housing goals set forth in the City's general plan. (*Id*. at p. 28.) According to the Court, nothing in either Sunnyvale's underlying ordinance or in the agreements that were the subject of the lawsuit indicated that the BMR Requirement was imposed to defray all or a portion of the costs of public facilities related to development projects. (*Id*.) Consequently, the Court held that Sunnyvale's BMR Requirement was not an exaction within the meaning of the Mitigation Fee Act, and that the limitations period in sections 66020 and 66021 were therefore inapplicable. (*Id*.)

Trinity Park made clear that its decision was "limited to the facts of [the] case where there was no showing that the 'issuance of a development permit was intended to serve the purpose of defraying all or a portion of the costs of public facilities related to the development project.'" (*Id*. at 35.) Thus, after this case, if public agencies do not want their inclusionary ordinances to be evaluated under the Mitigation Fee Act, they should not attempt to tie their inclusionary requirements to the impact of residential development on the need for affordable housing. This is a positive development, because as we learned from *Building Industry Assn. of Central California v. City of Patterson,* establishing a reasonable relationship between a City's regional housing need and the need for affordable housing associated with new market rate development of remaining land is extremely challenging. ((2009) 171 Cal.App.4th 886.)

Notice Under the Mitigation Fee Act

A secondary, but equally important issue addressed by *Trinity Park* is notice under the Mitigation Fee Act. The trial court had held that, even if the BMR Requirement was an exaction, Trinity Park would still be outside the 180-day statute of limitations because "notice of the BMR conditions was provided to [Trinity] both in 2007 and in the April 2008 BMR agreement and this lawsuit was not filed within 180 days of [the City] providing this notice to [Trinity]." (*Id*. at p. 8.) The Appellate Court rejected this holding, and instead suggests that a public agency *must* give the developer the precise type of notice contemplated by the Mitigation Fee Act, and that more generalized notice is insufficient. (*See Id*. at p. 18.)

This raises the question of what statute of limitations would apply in the event that a public agency fails to give the precise notice required by the Mitigation Fee Act. The answer is not clear, but there is at least one case that suggests that in these situations, the applicable statute of limitations would be the four-year

catch-all provision in Code of Civil Procedure section 343. (*See Balch Enterprises, Inc. v. New Haven Unified School District* (1990) 219 Cal.App.3d 783, 788 ("Balch").) In *Balch*, the Court held that the 180-day statute of limitations did not apply because, at the time, section 66020 only applied to development fees imposed on residential developments and the plaintiff's claim involved development fees imposed on commercial development. (*Id*.) Since the 180-day statute of limitations was inapplicable, the Court applied the four-year catch-all statute of limitations contained in Code of Civil Procedure section 343. Thus, the *Balch* case seems to indicate that a four-year statute of limitations would apply to claims under the Mitigation Fee Act in cases where the public agency did not give the notice required by section 66020. (*Id*.)

Public agencies can easily avoid inadvertently extending the statute of limitations in this way. Section 66020 requires that each local agency "provide to the project applicant a notice in writing at the time of the approval of the project or at the time of the imposition of the fees, dedications, reservations, or other exactions, 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." (Cal. Gov. Code § 66020.) The best way to do this is for public agencies to include the following language on permits issued to the project applicant:

> NOTICE: You may protest any of the fees assessed for this permit in accordance with California Government Code section 66020(a). The protest must satisfy the requirements of Government Code section 66020(a) and must be filed within 90 days of the date of this notice. In addition, you must tender payment of the protested fees at the time of the payment or provide evidence of arrangements to pay the protested fees or exactions at the time they are due if they are not already due.

By including this language on permits issued to the project applicant, a public agency can easily ensure that the statute of limitations on a challenge to the fees begins to run.

CONCLUSION

Trinity Park provides clear and unequivocal support for the proposition that below market requirements that are not imposed to defray all or a portion of the costs of public facilities related to development projects are not exactions under the Mitigation Fee Act. Not only is this significant for statute of limitations purposes, it also means that the strict proportionality requirements of the Mitigation Fee Act do not automatically apply to these kinds of inclusionary housing requirements. How this will impact the Court's analysis of challenges to these kinds of requirements remains to be seen, but it does send a strong signal that public agencies should not seek to design these ordinances around a nexus study.

Trinity Park also signals to public agencies that they need to strictly comply with the notice provisions in section 66020 if they want to take advantage of the statute of limitations in the Mitigation Fee Act. Fortunately, public agencies can easily provide this notice via a revision to the language in permits issued to project applicants.

Public Law Update

March 2011 **Volume 5, Number 3**

PUBLIC LAW

To the extent that city's housing ordinance prohibits "bad faith" interruption, termination or failure to "provide housing services," and failure to perform maintenance and repairs, the ordinance is not, on its face, violative of state Constitution's judicial powers clause; since violations would normally produce a quantifiable, pecuniary loss, ordinance's provision for a "restitutive" remedy in the form of a rent reduction falls within city's quasi-judicial powers. To the extent that ordinance defines various acts of harassment or discrimination as a "decrease in [housing] services" for which a rent board can order a reduction in rent, such reduction is not restitutive and the ordinance, on its face, violates the judicial powers clause. Provision authorizing action for damages and/or criminal prosecution against landlord or agent causing tenant to "vacate a rental housing unit through fraud, intimidation or coercion" is not unconstitutionally vague and does not, on its face, target constitutionally protected speech. Provision barring landlord or agent from causing tenant "to vacate with offer(s) of payments to vacate which are accompanied with threats or intimidation" is a reasonable restriction on the time, place, or manner of speech. Provision barring landlord from "continuing to offer payments to vacate after tenant has notified the landlord in writing that they no longer wish to receive further offers of payments to vacate" is an unconstitutional regulation of commercial speech. City lacks authority to effectively add, by local ordinance, an attorney fees provision to the state unlawful detainer statutes.

Larson v. City and County of San Francisco; First District, Div. One; filed February 23, 2011
http://www.metnews.com/sos.cgi?0211%2FA125887
Cite as 2011 S.O.S. 1115

Corporations do not have "personal privacy" meriting protection by application of exemption to Freedom of Information Act's disclosure requirements.

Federal Communications Commission v. AT&T Inc.; filed March 1, 2011
http://www.metnews.com/sos.cgi?0211%2F09-1279
Cite as 09-1279

State constitutional language stating that when a mandate on local government was determined during a prior year to be reimbursable, "the Legislature shall either appropriate...the full payable amount...or suspend the operation of the mandate," does not preclude the governor from exercising a line-item veto striking the appropriation, thus forcing suspension of the mandate. Where amount determined by state controller to be required for local governments to comply with a specific mandate was included in a larger appropriation, governor was not precluded from exercising a line-item veto solely against the smaller amount.

California School Boards Association v. Brown; Second District, Div. Three; filed February 25, 2011
http://www.metnews.com/sos.cgi?0211%2FB228680
Cite as B228680

Dispute as to whether homeowners association or city was responsible for maintaining a berm that laterally supports bulkheads located on property managed by the association that act as a retaining wall for a waterway belonging to the city presented an actual controversy even though berm was not in need of maintenance or repair. Language within special use permit providing that city "shall accept interior waterways as fee lands for dedication and maintenance, including maintenance of the easement and right-of-way areas reserved by the developer" required city to maintain berm since it was located within waterway dedicated to the city, within an area reserved by the developer.

Coronado Cays Homeowners Association v. City of Coronado; Fourth District, Div. One; filed February 28, 2001, publication ordered March 16, 2011
http://www.metnews.com/sos.cgi?0311%2FD056377
Cite as 2011 S.O.S. 1426

City did not violate Contract Clause by repudiating agreements to convey property to private citizens in connection with its leasehold conversion program where those agreements explicitly contemplated that the city council could end the program if it found such conversions no longer promoted the public interest, and the council in fact did so, and nothing in the record suggested the council did so in bad faith or without due care.

Young v. City and County of Honolulu; filed March 22, 2011
http://www.metnews.com/sos.cgi?0311%2F09-16034
Cite as 09-16034

Ordinance which allowed individuals with permits to sell "merchandise constituting, carrying or making a religious, political, philosophical or ideological message or statement which is inextricably intertwined with the merchandise" was unconstitutionally vague since it failed to define or provide any examples of acceptable merchandise; individual had standing to challenge constitutionality of ordinance after it was enforced against him. Amended ordinance which allowed permit holders to sell any item "which ha[s] been created, written or composed by the vendor," "is inherently communicative," and "has nominal utility apart from its communication," such as "books, cassette tapes, compact discs, digital video discs, paintings, photographs, [and] sculptures" was not unconstitutionally vague and vendors of products which fell squarely within examples of prohibited items lacked standing to challenge ordinance. Plaintiffs' incorporation of spiritual elements into their sales pitch and products did not transform their proposal of a commercial transaction into fully protected speech. Ordinance limiting the number of individuals that may set up booths and assigning individuals to particular spaces on public boardwalk was not an improper restriction on commercial speech. Plaintiffs who were granted permits were not injured by ordinance's alleged shortcomings in permitting process.

Hunt v. City of Los Angeles; filed March 22, 2011
http://www.metnews.com/sos.cgi?0311%2F09-55750
Cite as 09-55750

Either a litigant or his counsel may be held responsible for reimbursing a public entity for its costs in paying a subpoenaed peace officer pursuant to Government Code section 68097.2(b).

Maddox v. City of Costa Mesa; Fourth District, Div. Three; filed March 24, 2011
http://www.metnews.com/sos.cgi?0311%2FG043297
Cite as 2011 S.O.S. 1571

Requirement that a subdivision developer sell a certain percentage of a subdivision's houses at below market prices as a condition of development approval does not constitute a development fee, dedication, reservation or "other exaction" within the meaning of Government Code section 66020—which allows a developer 180 days to challenge such a requirement, rather than the 90 days usually allowed for challenges to development conditions—where the affordable housing requirement was clearly not intended to defray the cost of public facilities associated with the development.

Trinity Park, L.P. City of Sunnyvale; Sixth District; filed March 24, 2011
http://www.metnews.com/sos.cgi?0311%2FH035573
Cite as 2011 S.O.S. 1575

Public Law Update

BURKE, WILLIAMS & SORENSEN, LLP

March 2011 **Volume 5, Number 3**

ENVIRONMENTAL LAW

Summary judgment on defendant's liability for discharges into two watersheds was warranted where plaintiffs established that stormwater exceeding allowable limits passed through monitoring stations in a section of municipal separate storm sewer systems owned and operated by defendant and that pollutants were detected before the stormwater was discharged into two rivers; precise location of where this polluted water flowed into navigable waterway was irrelevant since there was no dispute that this water eventually joined the rivers downstream from the monitoring stations. Legislature intended that an exceedance detected through mass-emissions monitoring may give rise to liability for contributing dischargers; Clean Water Act does not distinguish between those who add pollutants to water and those who convey what is added by others. Plaintiffs did not provide evidence sufficient for district court to determine if stormwater discharged from municipal separate storm sewer systems controlled by defendant caused or contributed to pollution exceedances in two other rivers where monitoring stations which detected pollutants were located within the rivers and not the defendant's sewer system.

Natural Resources Defense Council, Inc. v. County of Los Angeles; filed March 10, 2011
http://www.metnews.com/sos.cgi?0311%2F10-56017
Cite as 10-56017

Holder of a revocable permit to use real property is not an "owner" of that property for purposes of imposing liability under the Comprehensive Environmental Response, Compensation, and Liability Act for the cleanup of hazardous substances disposed on that property by others; "owner" liability under CERCLA does not extend to holders of mere possessory interests in land, such as permittees, easement holders, or licensees, whose possessory interests have been conveyed to them by the owners of real property, which owners continued to retain power to control the permittee's use of the real property. Permit holder that did not know or have reason to know of the pollution or contamination could not be liable for public or private nuisance.

City of Los Angeles v. San Pedro Boat Works; filed March 14, 2011
http://www.metnews.com/sos.cgi?0311%2F08-56163
Cite as 08-56163

Trial court erred in implementing its remedies for the California Environmental Quality Act violations without first issuing a peremptory writ of mandate. An EIR may not be certified "in part."

Landvalue 77, LLC v. Board of Trustees of the California State University (Kashian Enterprises, L.P.); Fifth District; filed February 23, 2011, publication ordered March 16, 2011
http://www.metnews.com/sos.cgi?0311%2FF058451
Cite as 2011 S.O.S. 1402

Fish and Wildlife Service's ability to enforce Endangered Species Act's "no-take" provision had a "determinative or coercive effect" which compelled the Bureau of Reclamation to reduce water flows, which resulted in claimed injury to orchard growers; growers had standing to raise as-applied challenge to application of Act's "no-take" provision to the California delta smelt and this claim was ripe for review. Act is "substantially related" to interstate commerce.

San Luis & Delta-Mendota Water Authority v. Salazar; filed March 25, 2011
http://www.metnews.com/sos.cgi?0311%2F10-15192
Cite as 10-15192

LABOR AND EMPLOYMENT LAW

Non-member public employees who have not disclosed their personal information to the union that represents them are entitled to notice and an opportunity to object before employer may disclose that information, pursuant to union's right to communicate with non-members concerning the benefits of membership and their rights and obligations as agency-shop employees.

County of Los Angeles v. Los Angeles County Employee Relations Commission (Service Employees International Union, Local 721); Second District, Div. Three; filed February 24, 2011
http://www.metnews.com/sos.cgi?0211%2FB217668A
Cite as 2011 S.O.S. 1090

Back Pay Act explicit waiver of sovereign immunity applies to interest on an award of back pay against the federal government for terminating an employee in violation of the Age Discrimination in Employment Act.

Adam v. Norton; filed March 1, 2011
http://www.metnews.com/sos.cgi?0211%2F09-17091
Cite as 09-17091

Employee was effectively terminated on date upon which county employer placed her on "unpaid status" and entitled to an administrative appeal based on county's "disciplinary" and "punitive" actions in denying her wages and other benefits of her employment during the period she was on unpaid status; fact that

government later rescinded employee's termination and sought disability retirement benefits on her behalf did not change fact that employee was still denied the benefits of her employment during the period she was on unpaid status.

Riverside Sheriffs' Association v. County of Riverside; Fourth District, Div. Two; filed February 8, 2011, publication ordered February 28, 2011
http://www.metnews.com/sos.cgi?0211%2FE050596
Cite as E050596

A classified employee of a nonmerit system school district who attains permanent status and then is laid off from her position and thereafter reemployed by the district in a different, lower position does not retain her permanent status and may be required to serve a probationary period in the new position; an employee's permanent status is restricted to the position or class in which it was attained.

California School Employees Association v. The Governing Board of the East Side Union High School District; Sixth District; filed March 15, 2011
http://www.metnews.com/sos.cgi?0311%2FH034866
Cite as H034866

In action alleging that employer violated Family and Medical Leave Act by failing to reinstate plaintiff at the conclusion of her approved leave, district court erred in instructing jury that burden was on plaintiff to prove she was terminated "without reasonable cause;" under a proper reading of the act and its implementing regulations, once plaintiff shows that he or she was terminated at the end of an approved leave, burden shifts to employer to prove that plaintiff would have been dismissed regardless of the request for, or taking of, FMLA leave. Instructional error was prejudicial where district court did not define "reasonable cause," rendering it impossible for reviewing court to determine what verdict jury would have reached had burden been properly shifted to defendant. Appellate court could not, in absence of correct instructions and verdict forms, determine whether jury would have found for defendant on its asserted defense that it did not reinstate plaintiff because plaintiff had multiple chemical sensitivities that defendant could not reasonably accommodate. Vacating of jury verdict in favor of defendant under FMLA required that district court's findings in favor of plaintiff on her equitable claims under parallel Oregon law be vacated as well, then reconsidered after retrial of the FMLA claims.

Sanders v. City of Newport; filed March 17, 2011
http://www.metnews.com/sos.cgi?0311%2F08-35996
Cite as 08-35996

Government Code section 12965(b)'s one-year statute of limitations begins to run on the date a right-to-sue notice is issued to plaintiff.

Hall v. Goodwill Industries of Southern California; Fourth District, Div. One; filed March 16, 2011
http://www.metnews.com/sos.cgi?0311%2FB215860
Cite as 2011 S.O.S. 1421

ABOUT OUR LAW FIRM

At Burke, Williams & Sorensen, LLP, "diversity" precisely describes not only our demographic makeup but also the scope of our legal expertise, both of which support our ability to fulfill your legal needs.

We are as diverse as California itself. The broad range of our areas of expertise mirrors California's own vitality, with respected, proven practices in six general areas:

- Public Law
- Education Law
- Environmental Law & Sustainability
- Labor & Employment Law
- Litigation
- Real Estate & Business Law

Our firm has offices throughout California:

- Los Angeles
- Inland Empire
- Oakland
- Orange County
- Palm Desert
- Silicon Valley
- Ventura County