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SUPERIOR COURT OF CALIFORNIA

COUNTY OF MARIN

11
12 DARTMOND CHERK, AND THE CHERK)
FAMILY TRUST,)
13)
Petitioners and Plaintiffs,)
14)
v.)
15)
COUNTY OF MARIN,)
16)
Respondent and Defendant.)
17)

FILED

AUG 15 2016

JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: J. Chen, Deputy

No. CIV 1602934

**VERIFIED PETITION
FOR PEREMPTORY WRIT
OF MANDATE AND COMPLAINT
FOR DECLARATORY RELIEF
(CODE CIV. PROC. §§ 1060, 1085, 1094.5;
GOV'T CODE §§ 66001, 66020)**

INTRODUCTION

1. Petitioners and Plaintiffs Dartmond Cherk and The Cherk Family Trust (collectively referred to herein as “the Cherks”) bring this action for declaratory relief, combined with a Petition for Writ of Mandate, seeking a declaration that Marin County (County) has applied its “affordable housing” ordinance, Marin County Code § 22.22.080 (Ordinance), to unlawfully exact \$39,960 from the Cherks as a condition of dividing a residential lot. The Cherks therefore seek a refund of those same funds paid under protest to the County.

2. The Ordinance establishes a program of exactions that requires property owners who divide small lots to pay a fee to the County for the purpose of creating affordable housing. The County imposed a fee of \$39,960 as a condition of approving the division of the Cherks’ vacant residential parcel of land into two lots, known as 600 and 700 Upper Road, San Rafael. The County did so without any demonstration of a reasonable relationship or essential nexus between the division of the Cherks’ property and the County’s affordable housing problem. Moreover, the County has treated similarly situated property owners differently from the Cherks without rational basis, by waiving the affordable housing fee for some while refusing the Cherks’ requests for a waiver.

3. The Cherks seek a declaration that the County’s application of its Ordinance to their lot split is (a) an unlawful exaction pursuant to Cal. Gov’t Code § 66001, Cal. Const. art. 1, § 19, and the Fifth and Fourteenth Amendments to the U.S. Constitution, and (b) a violation of the Cherks’ Equal Protection rights pursuant to Article 1, Section 7, of the California Constitution, as well as the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. They further request a writ of mandate instructing the County to refund the unlawfully exacted affordable housing fee, and an award of attorney fees and costs incurred in this action.

Accordingly, the Cherks allege as follows:

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PARTIES

4. Petitioner and Plaintiff Dartmond Cherk is a resident of Marin County and a beneficiary and trustee of Petitioner and Plaintiff The Cherk Family Trust, which held title to the subdivided lot involved in the instant dispute at all times relevant to this action. As trustee, Mr. Cherk has the authority to bring this action on behalf of the Trust.

5. Respondent and Defendant Marin County is a county organized under the laws of the State of California. Its agents are responsible for enforcing the Ordinance and for applying the Ordinance to impose the fee at issue as a condition of the Cherks' lot split.

JURISDICTION AND VENUE

6. The Court has jurisdiction over this petition for writ of mandate and complaint for declaratory relief pursuant to Sections 1060, 1085, and 1094.5 of the Code of Civil Procedure, and Section 66020 of the Government Code (the Mitigation Fee Act).

7. All of the actions or events described herein occurred in Marin County and this is an action against the County. Therefore, venue is proper in the Superior Court for the County of Marin. Code Civ. Proc. § 394(a).

GENERAL ALLEGATIONS

8. Dartmond Cherk is a resident of Marin County, where he has lived with his wife, Esther, in the same home since 1959.

9. In the year 2000, the Cherks applied to the County to subdivide a vacant lot on Upper Road in San Rafael, which they had inherited from Dartmond's family. Their plan was to divide the lot and sell a portion of it, to supplement their modest retirement income, and then to keep the remaining portion of the property in their family for future generations.

10. In 2000, the County's land-use laws did not require any affordable housing fee for a division of one lot into two.

11. In or about May, 2002, the Cherks were advised by a County official that the Marin County Code was being revised and that they should wait until the revisions were complete before pursuing a final decision on their land division permit application.

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12. The Cherks were surprised to learn, in or about August, 2003, that the new County Code included a provision requiring payment of a substantial affordable housing fee as a condition of subdividing their residential lot.

13. Under the 2003 Ordinance, applicants seeking to create new lots must either dedicate a portion of the property to "affordable" housing or pay a fee in lieu of such dedication. For a simple division of one lot into two, as in the Cherks' case, the only option is payment of a fee.

14. The Cherks and County officials met at various times between 2003 and 2007 to discuss possible plans for the property that might avoid payment of the fee, but no agreement was reached.

15. On December 13, 2007, the County approved the subdivision of the Cherks' property, subject to the demand for the \$39,960 affordable housing fee (Condition #7 of the permit). However, the Cherks did not finalize that permit or pay the fee at that time.

16. In or about August, 2009, the Cherks corresponded with the County and were informed that the affordable housing fee had been increased to more than \$92,000, according to a new formula adopted by the County. County officials further explained that they had exercised their discretion to reduce the fee to the original \$39,960, and offered a payment plan in light of the Cherks' financial hardship.

17. The Cherks' project stalled again, however, after they determined that the value of their property was impaired by the nationwide financial crisis, making it inopportune to divide the lot and sell a portion of it at that time.

18. The Cherks renewed their interest in finalizing the lot split in 2014 when deteriorating financial circumstances left them with few options but to maximize the value of the land through a division and sell it. Presumably because so much time had passed since the original application, the County instructed the Cherks to resubmit their plans for the property (and pay substantial review fees) for reconsideration of the lot split.

19. In or about August, 2014, the County reconsidered its original approval, together with updated plans and analysis, and issued a decision confirming approval of the lot split subject to the payment of a \$39,960 affordable housing fee.

20. On July 29, 2015, the Cherks' lot split was finalized and the affordable housing fee imposed, which the Cherks then paid under protest. A true and correct copy of the Cherks' protest letter is attached herein as Exhibit A. The Cherks subsequently recorded the division of their property in September, 2015, to create the lots known as 600 and 700 Upper Road, San Rafael.

21. The Cherks are informed and believe, and thereon allege, that the County has never established that its affordable housing fee applied to them is reasonably related to any public impact caused by the division of their land, as it is required to do under Government Code section 66020 (part of the Mitigation Fee Act).

22. Further, the Cherks are informed and believe, and thereon allege, that the County has never established that there is an essential nexus or rough proportionality between the exaction and any public impact caused by the division of their land, as required by the California and United States Constitutions.

23. Pursuant to the law of unconstitutional conditions established by *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013), governments may constitutionally exact money from property owners as a condition of the exercise of their property rights only if:

- a. The exaction directly mitigates a public impact arising from the property owners' exercise of their property rights.
- b. The exaction is roughly proportionate in both nature and extent to the public impact arising from the property owners' exercise of their property rights.

24. The Cherks' lot split does not cause any adverse impact on affordable housing in Marin County and the affordable housing fee charged to them by the County bears neither an essential nexus nor rough proportionality to any alleged adverse impact.

25. At no time during this long process did the Cherks receive a statutory notice of their right to judicially challenge the fee, along with the timeframes for doing so, which is required by the Mitigation Fee Act. *See* Gov't Code § 66020(d)(1).

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26. The Cherks are informed and believe, and thereon allege, that similarly situated property owners dividing single lots into two had their affordable housing fees waived by County officials during the period of 2010 to 2013. During the same period, the Cherks' requests for a waiver of the fee was denied.

27. The Cherks are informed and believe, and thereon allege, that the County has no rational basis for treating the Cherks and similarly situated property owners differently with respect to the waiver of the affordable housing fee.

28. On February 19, 2016, an attorney retained by the Cherks made a demand for a refund of the \$39,960 from the County, and inquired about any process to appeal the County's fee decision. The County's attorney acknowledged the communication, indicating that the matter would be addressed in March, 2016, but the County has offered no substantive response despite several attempts to communicate further by the Cherks' counsel. A true and correct copy of the February, 2016, letter is herein attached as Exhibit B.

29. The Cherks have no plain, speedy, or adequate remedy available for the County's unlawful actions other than declaratory and mandamus relief. The Cherks, therefore, seek relief as set forth below.

**FIRST CAUSE OF ACTION FOR DECLARATORY RELIEF
(Code Civ. Proc. § 1060 - Failure to Demonstrate
Reasonable Relationship Justifying Exaction)**

30. All of the preceding paragraphs are reincorporated as if set forth fully herein.

31. The County imposed the affordable housing fee on the Cherks' lot split pursuant to its affordable housing Ordinance, exercising its discretion to set the fee at \$39,960, rather than at a higher amount, or waiving the fee.

32. The Cherks contend that the County's action was unlawful because there is not a reasonable relationship between the fee imposed and any public impact on affordable housing of the Cherks' land division, as required by Government Code section 66001.

33. The Cherks are informed and believe, and thereon allege, that the County erroneously disputes and controverts that contention and asserts that its affordable housing fee is lawful.

34. Accordingly, an actual controversy exists among the parties concerning the legality of the fee. The Cherks are therefore entitled to a judicial declaration of the parties' rights and duties with respect to the fee. *See* Code Civ. Proc. § 1060.

SECOND CAUSE OF ACTION FOR DECLARATORY RELIEF
(Code Civ. Proc. § 1060; Cal. Const. art. 1 § 19 -
Unconstitutional Conditions)

35. All of the preceding paragraphs are reincorporated as if set forth fully herein.

36. The County imposed the affordable housing fee on the Cherks' lot split pursuant to its affordable housing Ordinance, exercising its discretion to set the fee at \$39,960, rather than at a higher amount, or waiving the fee.

37. The Cherks contend that the County's action was an unconstitutional condition on their lot split in violation of controlling state constitutional standards governing such exactions as set forth in *San Remo Hotel L.P. v. City & County of San Francisco*, 27 Cal. 4th 643 (2002), and its progeny.

38. The Cherks are informed and believe, and thereon allege, that the County erroneously disputes and controverts that contention and instead asserts that the exaction complies with California constitutional standards.

39. Accordingly, an actual controversy exists among the parties concerning the legality of the exaction. The Cherks are therefore entitled to a judicial declaration of the parties' rights and duties with respect to the fee. *See* Code Civ. Proc. § 1060.

THIRD CAUSE OF ACTION FOR DECLARATORY RELIEF
(Code Civ. Proc. § 1060; U.S. Const. amend. V & XIV -
Unconstitutional Conditions)

40. All of the preceding paragraphs are reincorporated as if set forth fully herein.

41. The County imposed the affordable housing fee on the Cherks' lot split pursuant to its affordable housing Ordinance, exercising its discretion to set the fee at \$39,960, rather than at a higher amount, or waiving the fee.

42. The Cherks contend that the County's action was an unconstitutional condition on their lot split in violation of controlling federal constitutional standards governing such exactions as set forth in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Dolan v. City of*

1 *Tigard*, 512 U.S. 374, 391 (1994); and *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct.
2 2586, 2603 (2013).

3 43. The Cherks are informed and believe, and thereon allege, that the County
4 erroneously disputes and controverts that contention and asserts that the exaction complies with
5 federal constitutional standards.

6 44. Accordingly, an actual controversy exists among the parties concerning the legality
7 of the exaction. The Cherks are therefore entitled to a judicial declaration of the parties' rights and
8 duties with respect to the fee. *See* Code Civ. Proc. § 1060.

9 **FOURTH CAUSE OF ACTION FOR DECLARATORY RELIEF**
10 **(Code Civ. Proc. § 1060; Cal. Const. art. 1, § 7 - Equal Protection)**

11 45. All of the preceding paragraphs are reincorporated as if set forth fully herein.

12 46. The County imposed an affordable housing fee as a condition on granting
13 permission to the Cherks to split their single residential lot into two lots, while waiving fees for
14 other nearby property owners who split single residential lots into two lots.

15 47. The Cherks requested that the County waive the fee for their lot split, using the same
16 discretion the County applied in similar circumstances for other property owners.

17 48. The Cherks contend that the County's differential treatment of them as compared
18 to similarly situated property owners is without rational basis and in violation of their right to equal
19 protection of the laws under the Article I, Section 7, of the California Constitution, which prohibits
20 the County from arbitrarily discriminating against persons subject to its jurisdiction.

21 49. The Cherks are informed and believe, and thereon allege, that the County
22 erroneously disputes and controverts that contention and asserts that the exaction complies with
23 its duty to treat similarly situated persons alike.

24 50. Accordingly, an actual controversy exists among the parties concerning the County's
25 differential treatment of similarly situated property owners. The Cherks are therefore entitled to
26 a judicial declaration of the parties' rights and duties with respect to the County's decision to waive
27 the fee for some property owners but not for the Cherks. *See* Code Civ. Proc. § 1060.

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FIFTH CAUSE OF ACTION FOR DECLARATORY RELIEF
(Code Civ. Proc. § 1060; U.S. Const. amend XIV - Equal Protection)

51. All of the preceding paragraphs are reincorporated as if set forth fully herein.

52. The County imposed an affordable housing fee as a condition on granting permission to the Cherks to split their single residential lot into two lots, while waiving the fee for other nearby property owners who split single residential lots into two lots.

53. The Cherks requested that the County waive the fee for their lot split, using the same discretion which the County applied in similar circumstances for other property owners.

54. The Cherks contend that the County's differential treatment of them as compared to similarly situated property owners is without rational basis and in violation of their right to equal protection of the laws under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which prohibits the County from arbitrarily discriminating against persons subject to its jurisdiction.

55. The Cherks are informed and believe, and thereon allege, that the County erroneously disputes and controverts that contention and asserts that the exaction complies with its duty to treat similarly situated persons alike.

56. Accordingly, an actual controversy exists among the parties concerning the County's differential treatment of similarly situated property owners. The Cherks are therefore entitled to a judicial declaration of the parties' rights and duties with respect to the County's decision to waive the fee for some property owners but not for the Cherks. *See* Code Civ. Proc. § 1060.

SIXTH CAUSE OF ACTION FOR PEREMPTORY WRIT OF MANDATE
(Code Civ. Proc. §§ 1085, 1094.5)

57. All of the preceding paragraphs are reincorporated as if set forth fully herein.

58. At all times herein mentioned, the County had a mandatory and ministerial duty to conform their actions to the standards and requirements of the law.

59. As set forth above, the County's imposition of the affordable housing fee violated controlling state statutes, as well as and the California and United States Constitutions. The County therefore exceeded its jurisdiction and authority in imposing the exaction on the Cherks.

60. The Cherks have no plain, speedy, or adequate remedy in the ordinary course of law. The Cherks are therefore entitled to a writ of mandate, pursuant to Code of Civil Procedure section 1085 and/or section 1094.5, directing and commanding the County to refund the unlawfully exacted fee to the Cherks.

REQUEST FOR RELIEF

WHEREFORE, the Cherks respectfully request relief as follows:

1. A declaration that the County has failed to demonstrate a reasonable relationship between its affordable housing fee and any adverse impact on affordable housing caused by the division of the Cherks' land, in violation of Government Code section 66001.

2. A declaration that the County's imposition of the affordable housing fee, as applied to the Cherks' land division, was an unconstitutional condition in violation of controlling state constitutional standards.

3. A declaration that the County's imposition of the affordable housing fee, as applied to the Cherks' land division, was an unconstitutional condition in violation of controlling federal constitutional standards.

4. A declaration that the County's imposition of the affordable housing fee on the Cherks' project, while waiving the fee for similarly situated property owners, violated the Cherks' Equal Protection rights guaranteed by Article I, Section 7, of the California Constitution.

4. A declaration that the County's imposition of the affordable housing fee on the Cherks' project, while waiving the fee for similarly situated property owners, violated the Cherks' Equal Protection rights guaranteed by Fourteenth Amendment to the United States Constitution.

5. Issuance of a peremptory writ of mandate, directing and commanding the County to refund to the Cherks the \$39,960 it unlawfully exacted from them.

6. For an award of attorney fees and costs pursuant to Code of Civil Procedure section 1021.5, or other authority as appropriate; and

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PACIFIC LEGAL FOUNDATION
930 G Street
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1 7. For any other relief that the Court determines to be warranted.

2 DATED: August 12, 2016.

3 Respectfully submitted,

4 DAMIEN M. SCHIFF
5 LAWRENCE G. SALZMAN

6 By 
7 DAMIEN M. SCHIFF


8 Attorneys for Petitioners and Plaintiffs
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DECLARATION

I, DARTMOND CHERK, am a resident of Marin County, as well as the trustee and a beneficiary of The Cherk Family Trust. I and the Trust are Petitioners and Plaintiffs in the above-entitled proceeding. I have the authority to sign this document on behalf of myself and The Cherk Family Trust. I have read the foregoing Verified Petition for Peremptory Writ of Mandate and Complaint for Declaratory Relief (Code Civ. Proc. §§ 1060, 1085, 1094.5; Gov't Code §§ 66001, 66020) and know the contents thereof. The same is true of my own knowledge except as to those matters which are therein alleged on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, dated this 10th day of August, 2016.


DARTMOND CHERK
Individually and as Trustee
of The Cherk Family Trust

PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento, CA 95814
(916) 419-7111 FAX (916) 419-7747

EXHIBIT A

7/29/15

TO: TOM LAI, MARIN COUNTY PLANNING DEPARTMENT

RE: EXTORTION PAYMENT

TOM: WHEN YOU RECEIVE THIS MONEY, BE IT UNDERSTOOD THAT:

1. IT IS WRONG FOR YOU TO ROB THE POOR.
2. YOU ARE VIOLATING THE LAW THAT REQUIRES IN-LIEU AFFORDABLE HOUSING FEE WHEN CREATING TWO (2) OR MORE NEW LOTS. WE ARE CREATING ONLY ONE NEW LOT.
3. YOU KNOW DAMN WELL OUR PROJECT WAS SUBSTANTIALLY COMPLETED WELL IN ADVANCE OF THE NEW HOUSING LAW. IT IS WRONG FOR YOU TO APPLY IT RETROACTIVELY.
4. OUR MONEY CAN BE REFUNDED TO US, IF A COUNTY SUPERVISOR WAIVES THE FEE.
5. FINALLY ISN'T IT ODD THAT YOU PREVENT A POOR PERSON FROM BUILDING AFFORDABLE HOUSING, YET IS GREEDY ENOUGH TO TAKE MONEY TO BUILD AFFORDABLE HOUSING?

FROM: JART CHERK, TRUSTEE CHERK FAMILY TRUST

ENCL: CHECK FOR \$20,000.
CHECK FOR \$19,960.

THE PLANNING DEPARTMENT DIDN'T EVEN LET US KNOW WHEN THEY ALLOWED A HOUSE TO BUILT OVER OUR WELL LOT OFF POINTE GALLINAS ROAD. CALLOUSLY, THEY PROBABLY THOUGHT WATER HAD NO VALUE!

AND NOW, HAVING DRIVEN US INTO POVERTY AND HAVING TAKEN AWAY OUR PURSUIT OF HAPPINESS, THE PLANNING DEPARTMENT HAS THE NERVE TO ASK US TO PAY YET ANOTHER FAT FEE. IN THE NAME OF FAIR PLAY, HAVEN'T WE BEEN DAMAGED ENOUGH?

WE DON'T ASK FOR DAMAGES; WE ONLY ASK THE COUNTY TO REFRAIN FROM DOING MORE HARM, BY TAKING MORE OF WHAT DOESN'T BELONG TO YOU, JUST BECAUSE YOU CAN.

SINCERELY,

Edwin Wong

CC: SUPERVISORS RICE, SEARS, KINSEY, ARNOLD

EMAN WAYNE 6/15/15

EXHIBIT B

ALSTON & BIRD L.L.P.

1115 11th Street
Sacramento, California 95814

916-498-3354
Fax: 213-576-2864
www.alston.com

Paul J. Beard II

Direct Dial: 916-498-3354

Email: paul.beard@alston.com

February 19, 2016

VIA UPS OVERNIGHT DELIVERY

Steven M. Woodside, Esq.
County Counsel, County of Marin
3501 Civic Center Dr. Suite 275
San Rafael, California 94903

Re: In-Lieu Fee Paid Under Protest for Land Division Approval
(Assessor's Parcels 180-171-06 and -25)

Dear Mr. Woodside,

I represent the Cherk Family Trust. On July 29, 2015, and under written protest, the Trust paid to Tom Lai, of the Community Development Agency, an in-lieu "affordable housing" fee of \$39,960, as a condition of dividing one lot. The Trust is entitled to an immediate refund of that amount with interest. The fee constitutes an unconstitutional exaction and violates the Trust's equal protection rights.

The Exaction Is Unconstitutional

The Takings Clause of the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V (Takings Clause); XIV; *see also Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226 (1987) (applying the Takings Clause to state and local governments). Beginning in 1987, the United States Court issued a series of decisions cabining the power of government agencies to exact things of value from applicants as the condition of permit approval.

Recognizing the potential for extortion in the land-use context, the United States Supreme Court decided two cases that substantially cabin the power of a permitting authority to exact a property interest from an applicant in need of a land-use permit. Those cases apply a well-known doctrine—the federal unconstitutional-conditions doctrine—to an applicant's Fifth Amendment right to be free from uncompensated takings of private property. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

In *Nollan*, a permitting agency—the California Coastal Commission—demanded that a landowner dedicate an easement for public access across his property, as the condition of obtaining a permit to remodel his home. *Nollan*, 483 U.S. at 827. The owner challenged the condition as an unconstitutional attempt to take his property (an easement) without paying just compensation. The Court agreed and struck down the condition. *Id.* The Court held that any permit condition must bear an “essential nexus” to the public impacts of the proposed project—in other words, a permit condition must *mitigate* for actual public harms caused by that project. *Id.* at 837. In *Nollan*, because the remodel project did not adversely affect existing public access on the property, the Commission had no constitutional reason to require him to dedicate the easement. *Id.* Without that “essential nexus,” the condition was, in the Court’s pointed words, an “an out-and-out plan of extortion.” *Nollan*, 483 U.S. at 837 (internal citation omitted).

Seven years later, the Supreme Court decided *Dolan*, holding that permit conditions must also be “roughly proportional” to the alleged public impacts of proposed projects and making clear that the permitting authority has the burden of proving compliance with *Nollan* and *Dolan*. *Dolan*, 512 U.S. at 391, 395. The *Dolan* Court struck down two easement conditions—including the condition of a “greenway” (i.e., “open space”) easement on her land. *Id.* at 394-95. *Nollan* and *Dolan* are meant to ensure that a permit authority exacts only those property interests necessary for mitigating a project’s public harms and does not use the permit process to obtain unlawful windfalls, like “free” easements.

Finally, in *Koontz v. St. Johns River Water Mngmt. Distr.*, 133 S.Ct. 2586, 2603 (2013), the Supreme Court held that monetary exactions are subject to *Nollan* and *Dolan*’s heightened scrutiny. Thus, if government conditions a land-use permit on the applicant’s agreement to pay a fee or finance a public project, that condition will be unlawful and unenforceable unless and until the government can establish the requisite nexus and rough proportionality to the project’s impacts.

Here, the County has never established (and cannot establish) that the in-lieu fee bears an essential nexus or rough proportionality to the public impacts caused by the Cherks’ division of their land. Certainly, the division caused no need for affordable housing. To the contrary, by dividing their residential parcel, the Cherks made possible the building of *more* residential units, thereby contributing to the affordability of housing, not undermining it. There is simply no connection between the fee and the Cherks’ division. As a consequence, the fee was—and remains—unconstitutional, and it should be refunded with interest.

Violation of Equal Protection

“Guarantees of equal protection embodied in the Fourteenth Amendment of the United States Constitution and article I, section 7 of the California Constitution prohibit the state [or a local government] from arbitrarily discriminating against persons subject to

its jurisdiction.” *People v. Rhodes*, 126 Cal. App. 4th 1374, 1382-83 (2005) (internal citation and quotation marks omitted). The question in equal protection challenges is whether “persons similarly situated with respect to the legitimate purpose of the law receive like treatment.” *Pederson v. Superior Court*, 105 Cal. App. 4th 931, 939 (2003) (internal citation and quotation marks omitted). Under the Equal Protection Clause of either the State or Federal Constitution, “[a] classification must be reasonable, not arbitrary, and must rest upon some grounds of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.” *Rhodes*, 126 Cal. App. 4th at 1383 (internal citation and quotation marks omitted).

It is our understanding that similarly situated persons—those with approved divisions creating no more than 2 lots—have been exempted from the requirement of paying the in-lieu “affordable housing” fee. There is no justification for the difference in treatment under the law. As a consequence, the Cherks’ federal Equal Protection rights have been violated.

Conclusion

For the reasons stated above, we request that the County refund the amount paid, with interest, as soon as possible. The Cherks wish to avoid litigation over this issue, if at all possible. I am sure the County does as well. On the other hand, if the County will not return the Cherks’ money, then they will have no choice but to consider litigation.

As you know, the Cherks are entitled to challenge the unlawful fee under the Mitigation Fee Act. *See* Gov’t Code § 66000, *et seq.* And, while the Act required the Community Development Agency to provide the Cherks with statutory notice of their right to administratively appeal and judicially challenge the fee, along with the timeframes for doing so, the Cherks received no such notice. *Id.* § 66020(d)(1). As a consequence, the time for them to sue over the exaction has not even begun to run. *See, e.g., Branciforte Heights, LLC v. City of Santa Cruz*, 138 Cal. App. 4th 914, 925 (2006) (“[T]he 180-day limitation period under section 66020 does not commence running until written notice of the 90-day protest period has been delivered to a party complying with the protest provisions.”).

If the County will not return the Cherks’ money, please let me know if there is an administrative appeal available to us. If there is none, and the County’s decision imposing the exaction is final, then please notify me at your earliest convenience so that I can advise the Cherks as to their legal options.

Steven M. Woodside, Esq.
February 19, 2016
Page 4

Sincerely,

ALSTON & BIRD LLP

A handwritten signature in dark ink, appearing to read "Paul J. Beard II", with a stylized, cursive script.

Paul J. Beard II
Counsel

PJB:ay

Copy: Ms. Esther Cherk (U.S. Mail)