IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

No. A153579

DARTMOND CHERK AND
THE CHARK FAMILY TRUST,

Plaintiffs and Appellants,

v.

COUNTY OF MARIN,

Defendant and Respondent.

On Appeal from the Superior Court of Marin County
(Case No. CIV 1602934, Honorable Roy O. Chernus, Judge)

REPLY BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: A153579 Division: One

Case Name: *Cherk, et al. v. County of Marin*

Please check the applicable box:

☑ There are no Interested entities or persons to list in this Certificate per California Rules of Court, Rule 8.208(d)(3).

☐ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	

Please attach additional sheets with Entity or Person information, if necessary.

/s/ Lawrence G. Salzman Date: June 25, 2018.
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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS 2

TABLE OF AUTHORITIES 4

I
NEITHER THE STATUTE OF
LIMITATIONS NOR ADMINISTRATIVE
EXHAUSTION PRINCIPLES BAR THE CHERKS' CLAIMS 7

A. The Case Was Filed Within
the Relevant Statute of Limitations 8

B. The Administrative Exhaustion Doctrine
Favors the Adjudication of the Cherks' Claims 10

1. Further Administrative
Proceedings Would Have Been Futile 11

2. The Cherks' Claim Raises
an Issue of Statewide Concern 13

II
THE FEE IMPOSED ON THE CHERKS
VIOLATED BOTH THE MITIGATION FEE ACT AND
THE UNCONSTITUTIONAL CONDITIONS DOCTRINE 15

A. As Applied, the County's Ordinance Was a "Bare
Demand for Money" Constituting a Monetary Exaction 15

B. Whether a Fee Is an Exaction Subject to the
Unconstitutional Conditions Doctrine Is Determined
by the Circumstances That Trigger the Obligation To Pay 19

CONCLUSION 20

CERTIFICATE OF COMPLIANCE 21

DECLARATION OF SERVICE 22

TABLE OF AUTHORITIES

Cases

Action Apartment Ass'n v. Santa Monica Rent Control Bd.,
94 Cal. App. 4th 587 (2001) 14

Branciforte Heights, LLC v. City of Santa Cruz,
138 Cal. App. 4th 914 (2006) 7-10

Cal. Bldg. Indus. Ass'n v. City of San Jose,
61 Cal. 4th 435 (2015) 14-15

Doster v. Cty. of San Diego, 203 Cal. App. 3d 257 (1988) 12-13

Green v. City of Oceanside, 194 Cal. App. 3d 212 (1987) 11

Hale v. Morgan, 22 Cal. 3d 388 (1978) 14

Hull v. Cason, 114 Cal. App. 3d 344 (1981) 15

Koontz v. St. Johns River Mgmt Dist., 570 U.S. 595 (2013) 19

Lacy v. Richmond Unified Sch. Dist., 13 Cal. 3d 469 (1975) 11

Lindeleaf v. Agric. Labor Relations Bd., 41 Cal. 3d 861 (1986) 13-14

Ogo Assocs. v. City of Torrance, 37 Cal. App. 3d 830 (1974) 11

Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) 18

Preserve Poway v. City of Poway, 245 Cal. App. 4th 560 (2016) 8

Union of Am. Physicians & Dentists v. Kizer,
223 Cal. App. 3d 490 (1990) 13

State Statutes

Gov't Code § 66020 9

Gov't Code § 66020(d)(1) 8-10

Gov't Code § 66023 .... 7, 10, 14

Miscellaneous

Eisenberg, *et al.*, *Cal. Practice Guide: Civil Appeals and Writs*
(Rutter Group 2015) 8

Plaintiffs-Appellants[1] sought a permit to divide their single, residential lot into two. The County approved a permit after years of process conditioned on a $39,960 fee. That fee is challenged here as a violation of the Mitigation Fee Act and the unconstitutional conditions doctrine because it is not reasonably related to any adverse public impact caused by the lot split. In response, the County attempts to avoid the merits with an argument that the case is brought too late or without exhausting administrative appeals. Further, it asserts that the Cherks' case is effectively controlled by past cases involving affordable housing regulations approved by the California Supreme Court or other courts of appeals. These arguments fail, for the reasons that follow.

Apart from the legal arguments, the Cherks correct here the impression left by the County's characterization of proceedings below, which repeatedly refers to the Cherks' "failures" as causes of the long progression of events leading up to today. *See* Respondent's Br. at 12-17. The Cherks are an elderly couple of quite modest means who tried to navigate the County's land use laws—without the aid of legal counsel in an effort to avoid needless expense—for a simple permit. They have lived in the same home in the small Marin community for about 60 years and felt comfortable dealing directly with local officials, many of whom they knew and looked on

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[1] Plaintiffs-Appellants Dartmond Cherk and the Cherk Family Trust are herein after referred to as "the Cherks."

with good will. At the time they applied for a permit, they had been meeting informally with planning department officials for a few years to understand how they could put their family's vacant land to productive use. *See* AR 001. A couple years after their initial application, County officials suggested the Cherks wait for revisions to the County code because, they were told, the revised code could allow for the creation of more lots and more value. *See* AR 134. They did wait, but the new ordinance was not at all helpful to the Cherks: it restricted development as the earlier version had, while it also authorized the County to impose the nearly $40,000 in new fees to the cost of permit approval. *See* AR 132. The Cherks then sought and later withdrew (out of fear it would add more expense and time) a proposal for a third lot, offering to dedicate it to affordable housing in lieu of paying the fee. *See* AR 137; AR 151. Perhaps a dozen informal meetings or communications with various officials occurred during the years this stretched on. Many officials were aware of the Cherks' frustration and objections, but none advised them at a meaningful time how to make a formal appeal.

It is also true that on a number of occasions the Cherks were warned that their application was incomplete for lack of some element—and at each turn they corrected those deficiencies within the time provided by law. Perhaps they could have streamlined the process with the early aid of legal counsel. But they did their earnest best as lay property owners to change the use of their land in a shifting legal environment relying to their detriment on

the recommendations or diligence of officials they believed were there to help. That this situation dragged on for nearly 20 years is surely a failure but not one fairly attributed to the Cherks.

I

NEITHER THE STATUTE OF LIMITATIONS NOR ADMINISTRATIVE EXHAUSTION PRINCIPLES BAR THE CHERKS' CLAIMS

The trial court determined that "the Mitigation Fee Act controls the protest of an affordable housing in-lieu fee." JA 151. Because the County "did not provide petitioners the 180-day notice required" by the Act to inform a property owner of the right to challenge the fee, the court concluded correctly that the "limitations period never started to run." *Id*. This ruling is consistent with the leading precedent concerning the statute of limitations under the Mitigation Fee Act, *Branciforte Heights, LLC v. City of Santa Cruz*, 138 Cal. App. 4th 914, 925 (2006).

Likewise, the trial court rejected the County's objection that the Cherks failed to exhaust their administrative remedies before suing. This ruling was correct, as the state legislature has "declare[d] that oversight of local agency fees is a matter of statewide interest and concern. It is, therefore, the intent of the Legislature that the [Mitigation Fee Act's procedures] shall supersede all conflicting local laws." Gov't Code § 66023.

Any contrary argument cannot be heard now because the County did not cross-appeal the judgment below. "As a general matter, 'a respondent

who has not appealed from the judgment may not urge error on appeal.' [citation omitted] 'To obtain affirmative relief by way of appeal, respondents must themselves file a notice of appeal and become cross-appellants.'" *Preserve Poway v. City of Poway*, 245 Cal. App. 4th 560, 585 (2016) (*citing* Eisenberg, *et al.*, *Cal. Practice Guide: Civil Appeals and Writs*, § 8:195 (Rutter Group 2015)).

Even if that were not the case, the Cherks' claims are properly excused from any administrative exhaustion requirement for two additional, independent reasons: (1) pursuing administrative relief would have been futile and (2) exhaustion is not necessary where the matter involves an important public policy of statewide concern.

A. The Case Was Filed Within the Relevant Statute of Limitations

Under the Mitigation Fee Act, the statute of limitations begins to run *only after* the government agency imposing a fee has provided notice of the 180-day period within which a party may file a judicial action to challenge a permit-fee. Gov't Code § 66020(d)(1). Because Marin County failed to provide this notice, the Cherks' action below was timely filed.

Branciforte Heights is on all fours with the Cherks' case. There, a developer filed a writ of mandate to obtain a refund of park fees exacted by the City of Santa Cruz as a permit condition. A major dispute in *Branciforte Heights* was whether the case was controlled by the 90-day statute of limitations pertaining to the Subdivision Map Act, or whether the case was

subject to the procedures and more generous limitations period of the Mitigation Fee Act (Gov't Code § 66020). The court held that when a party "avails itself of the fee protest procedures of section 66020 to challenge allegedly excess fees imposed . . . as a condition of obtaining governmental approval of a development," the Mitigation Fee Act's statute of limitations controls. 138 Cal. App. 4th at 928.

Here, it is undisputed that "on July 29, 2015 [the Cherks] paid the affordable housing fee [challenged herein] under protest" and subsequently sought a refund of the fee pursuant to the Mitigation Fee Act. Respondent's Br. at 16. The County complains that the refund request came seven months after the fee was paid, and elsewhere suggests that the clock began ticking on the Cherks' claim as early as 2007 (eight years before the fees were actually paid under protest). But it does not, and cannot, overcome the record evidence that the County failed to provide the Cherks with any notice—at any time, even up until today—that they had a right to challenge the permit fees or that they had 180 days after this notice to file a judicial action to do so. Gov't Code § 66020(d)(1).

The Mitigation Fee Act "requires each local agency to provide 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" of their right to protest those fees. And it is the delivery of this notice—not any action by challengers—that triggers the 180-day limitations period during which a judicial action to

"attack, review, set aside, void or annual the imposition of the fees" may be filed. Gov't Code § 66020(d)(1). *Branciforte Heights* thus held that the "180-day limitation period under section 66020 does not commence running until written notice" of the applicant's right to protest "has been delivered." 138 Cal. App. 4th at 925.

The County never issued such a notice—even ignoring a letter from an attorney retained by the Cherks that expressly invoked the Mitigation Fee Act and asked for a refund or the availability of administrative procedures to seek it. *See* Respondent's Br. at 16-17 (admitting that the County "never responded" to the letter). Therefore, the Cherks' petition for writ of administrative mandate was timely filed on August 15, 2016.

B. The Administrative Exhaustion Doctrine Favors the Adjudication of the Cherks' Claims

The County argues that the Cherks' claims are barred because they did not exhaust all administrative appeals before pursuing their writ of administrative mandate in the trial court. As noted above, Respondents forfeited this argument by not raising it as a cross-appeal. Nonetheless, the procedures of the Mitigation Fee Act—which "supersedes all conflicting local laws"—are the exclusive means to annul the imposition of unlawful permit fees. *See* Gov't Code § 66023. The Mitigation Fee Act also displaces procedures or remedies found in more general land-use laws, such as the Subdivision Map Act cited by the County as a potential avenue for relief. *See*

Respondent's Br. at 21. This is because it is "a settled rule of statutory construction that a special statute dealing expressly with a particular subject controls and takes priority over a general statute." *Lacy v. Richmond Unified Sch. Dist.*, 13 Cal. 3d 469, 472 (1975).

But even if the Mitigation Fee Act procedures did not obviate the need to administratively exhaust their claims, the Cherks' case is properly decided on the merits now. "[T]he doctrine of exhaustion of administrative remedies has not hardened into inflexible dogma." *Ogo Assocs. v. City of Torrance*, 37 Cal. App. 3d 830, 834 (1974). The Cherks' case falls into exceptions within the doctrine because (1) further administrative proceedings would have been futile and (2) the case raises an important issue of public policy of statewide concern.

1. Further Administrative Proceedings Would Have Been Futile

A petitioner need not resort to administrative appeals when it "would be futile because it is clear what the agency's decision would be." *Green v. City of Oceanside*, 194 Cal. App. 3d 212, 222 (1987). At the core of the Cherks' dispute is whether the affordable housing fee required by the County as a condition of their land use permit was a monetary exaction subject to scrutiny under the Mitigation Fee Act and the unconstitutional conditions doctrine.

The County's view on this matter is clear and unyielding, and there are no material factual disputes concerning the imposition of the fee. The County regards the fee to be a mandatory component of a "broad, legislative, and universally applicable approach to conditioning all subdivision approvals" that cannot be challenged under the Mitigation Fee Act or the unconstitutional conditions doctrine. Respondent's Br. at 26. No evidence the Cherks might have provided to any administrative appeals board to demonstrate the lack of nexus between their project and the County's affordable housing problem could possibly have made a difference in the outcome because the County's position is that all such evidence is irrelevant. The only thing that mattered to the County was whether the fee is "reasonably related to the general welfare." *Id.* at 11. Further, the Board of Supervisors' view on that matter is plain on the face of the County's affordable housing regulations. *See* Marin County Code Ch. 22.22.010 (the regulations "require new developments to contribute . . . housing units, land dedication, and/or fee" and are justified to "help attain local and state housing goals.").

Litigants are not required to engage in futile administrative processes to get relief from an unlawful municipal policy. *Doster v. Cty. of San Diego*, 203 Cal. App. 3d 257, 262 (1988) ("The law does not require a party to participate in futile acts.").

Indeed, seeking to correct a municipality's erroneous interpretation of a state statute or constitutional doctrine by appealing one of its agency's legal

determinations—to the municipality itself when the government's position is well known—is particularly futile. Therefore, courts have recognized that objecting to an administrative agency's legal interpretation is often futile because only the judiciary can resolve a disagreement over the correct interpretation of the law. *See Union of Am. Physicians & Dentists v. Kizer*, 223 Cal. App. 3d 490, 503 (1990) ("We concluded that because the Department at all times had maintained it had statutory authority to utilize sampling and extrapolation, such challenge by Grier at the administrative level would have been futile."); *Doster*, 203 Cal. App. 3d at 262 (recognizing that an administrative hearing would have been futile because "this is not a case where the review hearing officer would have been called upon to decide controverted facts or furnish expertise essential for later judicial review").

Accordingly, it would have been futile, and therefore unnecessary, for the Cherks to pursue additional administrative procedures in search of a reversal of the County Planning Division's final decision to impose the affordable housing fee.

2. The Cherks' Claim Raises an Issue of Statewide Concern

Courts also excuse administrative exhaustion requirements in cases that involve "important questions of public policy." *Lindeleaf v. Agric. Labor Relations Bd.*, 41 Cal. 3d 861, 871 (1986). The exception to the general principle of administrative exhaustion is particularly strong when, as here, a case "presents a straightforward legal issue that needs little in the way of

factual development." *Action Apartment Ass'n v. Santa Monica Rent Control Bd.*, 94 Cal. App. 4th 587, 615 (2001), *as modified* (Jan. 3, 2002). That is because a basic rationale for requiring administrative exhaustion is to ensure that the deciding court has a fully developed factual record. *Id.* at 611. Here, the questions at issue are whether the fee imposed on the Cherks was a development fee within the meaning of the Mitigation Fee Act and whether it was a monetary exaction in violation of the unconstitutional conditions doctrine. All of the questions to be decided are "within judicial, not administrative, competence." *Id.*; *see also Hale v. Morgan*, 22 Cal. 3d 388, 394 (1978) ("We have held that a litigant may raise for the first time on appeal a pure question of law which is presented by undisputed facts.").

As the County itself notes, "more than 170 California municipalities have adopted what are commonly referred to as 'inclusionary zoning' or 'inclusionary housing' programs." Respondent's Br. at 8 (quoting *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal. 4th 435, 441 (2015)). Deciding the questions presented by the Cherks' case would "affect not only the present parties," but is warranted without further administrative proceedings because this Court's decision will guide the County and other jurisdictions across the state in the proper application of such programs going forward. *See Lindeleaf*, 41 Cal. 3d at 870. The state legislature has declared that "oversight of local agency fees is a matter of statewide interest of concern." Gov't Code § 66023. A case is not barred by failure to exhaust administrative remedies

when its "prompt determination is . . . in the public interest" of resolving an important matter of statewide concern. *Hull v. Cason*, 114 Cal. App. 3d 344, 358 (1981).

II

THE FEE IMPOSED ON THE CHERKS VIOLATED BOTH THE MITIGATION FEE ACT AND THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

The County argues that the situation at hand is legally indistinguishable from other cases in which affordable housing regulations have been approved by courts. That claim rests on a false, hasty generalization to the effect that all "affordable housing regulations" are the same and ignores the fact that this case is an as-applied, rather than facial, challenge to the County's ordinance. The record in this case demonstrates that the County did make a bare demand for money as a condition of a permit.

A. As Applied, the County's Ordinance Was a "Bare Demand for Money" Constituting a Monetary Exaction

The County objects that its ordinance's requiring applicants for small lot splits to pay a fee is "not a 'bare demand for money' as a condition for a permit, but in reality an option or alternative for developers who do not wish to 'round up.'" Respondent's Brief at 29. This is an important point for the County because they hope to undermine the Cherks' demonstration that the key to the California Supreme Court and the Third District Court of Appeals decisions in *Cal. Bldg. Indus. Ass'n v. City of San Jose* and *616 Croft Ave.,*

LLC v. City of West Hollywood, respectively, is that the petitioners in those cases were provided various alternative means of satisfying affordable housing regulations other than by paying a monetary exaction. *See* Appellants' Opening Br. at 20-25. The regulations in those cities mandated that developers use their land in particular ways, such as setting aside a certain portion of built units as affordable housing, which the courts deemed to be akin to traditional land use regulation. Since the petitioners had an option to avoid any fee in those cases by complying with the land use regulation, the courts held that the ordinances at issue did not impose a monetary exaction subject to the Mitigation Fee Act or the unconstitutional conditions doctrine.

But this is not what actually happened in Marin, and what is relevant for this as-applied challenge is how the County actually applied its ordinance to the Cherks' project.

Under the County's post-hoc interpretation of its ordinance, it argues, in effect, that the Cherks could have avoided any fee by splitting their lot in half and using the newly created lot only for affordable housing. Had that option been presented by the County 15 years ago, perhaps the Cherks would have accepted it. In fact, one reason the Cherks delayed processing their permit after the new ordinance was adopted was to explore with the County the possibility of splitting the lot in thirds and dedicating one of the three proposed lots to affordable housing. *See* AR 137. They reverted to their two-

lot proposal after it became apparent to them that moving ahead with a three-lot subdivision, including the dedication of one lot for affordable housing, would likely incur substantial additional expenses and time. But the option of splitting the lot in half and using the second half to satisfy affordable housing requirements was not presented and is inconsistent with the actual language of the ordinance, as the County itself concedes. *See* Respondent's Br. at 29 ("Admittedly, the language of Marin County Code section 22.22.090 may have caused some confusion.").

In this as-applied challenge to the application of that ordinance, what matters is how the ordinance was actually applied not how it might have been applied if the County had adopted the self-serving interpretation of the ordinance it now advances. Regardless of what the County might do if it could apply the ordinance anew today, the actual fact is that the County demanded, and since 2015 has had in its possession, a lump sum of $39,960 that the Cherks paid as a condition of receiving their lot-split permit. As discussed in the Cherks' opening brief, the County applied its ordinance in violation of the Mitigation Fee Act and the unconstitutional conditions doctrine, and it should return the money.

The government also dismisses as legally irrelevant the Cherks' point that Marin County's affordable housing program differs from other inclusionary housing programs because it applies to small projects, including the division of a single lot into two, as in the Cherks' case, whereas other

judicially approved programs imposed obligations only at the point of housing development (rather than lot splits) and larger development. *See* Respondent's Br. at 26-27. But their hypothetical scenario, in which the Cherks could have dedicated one of their two lots to affordable housing, illustrates the relevance of the point and only raises more questions. There is a financial cost to any developer required to set aside a percentage of proposed housing as a condition of a permit, but the larger the project the smaller the burden. The extreme case involves small land owners, like the Cherks, engaged in the subdivision of a single lot and without proposing any simultaneous development at all.[2] The County's hypothetical application of its ordinance to a single lot division, in which that small land owner is required to use his or her one, newly created lot permanently and exclusively for affordable housing, imposes a very substantial hardship—one that may go "too far" and be subject to a regulatory takings challenge under the *Penn Central* Doctrine or could violate other state laws. *See, e.g., Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). The programs approved by courts in other cities avoid this dilemma because they apply to

[2] There is also a notable "double dipping" involved in the County's application of its ordinance. By applying it to simple lot splits absent any proposal to build, the County can collect a fee once when the lot is split and then again as a condition of receiving permits to actually develop the new lots.

larger developments thereby avoiding difficult questions of when a land use regulation goes so far as to effect a taking.

B. Whether a Fee Is an Exaction Subject to the Unconstitutional Conditions Doctrine Is Determined by the Circumstances That Trigger the Obligation To Pay

The County further argues that its affordable housing fee is not an exaction at all. Both the County and the trial court rest that conclusion on the assertion that the money collected is not *intended by the County* to defray any impact on housing caused by the Cherks' development. However, whether a fee is a monetary exaction or something else (such as a tax) is not determined by the fee's intended purpose but, rather, by the circumstances that trigger the property owner's obligation to pay. In this case, the County's demand for a fee was triggered by the Cherks' application to change the use of their land. That is the hallmark of a monetary exaction as explained by the U.S. Supreme Court in *Koontz v. St. Johns River Mgmt Dist*., 570 U.S. 595 (2013). In that case, "the monetary obligation burdened petitioner's ownership of a specific parcel of land." *Id.* at 613. A demand for a fee conditioning the use of a specific parcel of land "implicates the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue," thereby taking an otherwise protected property interest without compensation. *Id*.

Simply put, the Cherks wanted to change the use of their property; that change in use caused no public impact on housing supply warranting mitigation; yet the County leveraged its permitting power to take a large cash payment from the Cherks as a condition of allowing the change in use. The County was able to get away with it simply because it would have caused the Cherks even greater financial pain to be denied the ordinary and productive use of their property to which they should have been entitled.

CONCLUSION

For the reasons discussed above, and those in the Cherks' opening brief, this Court should reverse the trial court's denial of the Cherks' petition for writ of mandate and order a refund of the $39,960 fees unlawfully collected by the County with interest.

DATED: June 25, 2018.

Respectfully submitted,

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By /s/ Lawrence G. Salzman

Attorneys for Plaintiffs and Appellants
Dartmond Cherk and
The Cherk Family Trust

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing REPLY BRIEF is proportionately spaced, has a typeface of 13 points or more, and contains 3,903 words.

DATED: June 25, 2018.

/s/ Lawrence G. Salzman
LAWRENCE G. SALZMAN

DECLARATION OF SERVICE

I, Lawrence G. Salzman, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

On June 25, 2018, a true copy of REPLY BRIEF was electronically filed with the Court through truefiling.com. Notice of this filing will be sent to those below who are registered with the Court's efiling system. Those who are not registered will receive a hard copy via first-class U.S. Mail, postage thereon fully prepaid, and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 25th day of June, 2018, at Sacramento, California.

_____/s/ Lawrence G. Salzman_____
LAWRENCE G. SALZMAN