James B. Duncan | duncan associates | 360 Nueces Street Suite 2701 | Austin TX 78701 | p 512 258 7347 | f 512 258 9994

From: Bingham McCutchen [mailto:bingham@binghammccutchen.com]
Sent: Wednesday, July 07, 2010 3:48 PM
To: Jim Duncan
Subject: Alert: Court Upholds Development Impact Fees For Facilities That Had Not Yet Been Planned

BINGHAM

ALERT — Land Use and Development

July 2010

Court Upholds Development Impact Fees for Facilities That Had Not Yet Been Planned

A court of appeal upheld a wide range of sometimes novel development fees, including fees for police equipment, garbage trucks and a naval air museum, emphasizing the deference to be accorded an agency's choice of methodology in calculating the fees. *Homebuilders Association of Tulare/Kern County, Inc. v. City of Lemoore* (June 9, 2010).

The Homebuilders' Association challenged seven new fees adopted by the City of Lemoore (the "City") on several grounds, including violation of the Mitigation Fee Act (the "Act"). The court determined that a city's legislative act of adopting development fees should be invalidated only if arbitrary, capricious or entirely without evidentiary support. It also distinguished earlier cases requiring public agencies to prove fees were reasonable, concluding that the Act merely requires the agency to produce evidence supporting a fee, while the burden of proving the fees unreasonable remains on the challenger.

The court sustained the use of a so-called "standard-based" methodology for calculating fees, under which the cost of existing facilities is divided by the current population and the resulting figure multiplied by the number of projected future residents. The court found this approach reasonable, since the facilities at issue were intended for citywide use. The Act, it held, does not require identification of specific facilities; references to types or categories of public facilities is sufficient. The court noted that provisions of the Act requiring segregation and accounting for fees provided adequate protection against inappropriate expenditures. It would be unreasonable, the court

found, to “require local agencies to make a concrete showing of all projected construction when initially adopting a resolution that might be in effect for decades.”

The court also held that a fee for community and recreational facilities was not preempted by the Quimby Act, which addresses park and recreation fees. The latter statute, the court stated, was designed to maintain open space for residents of new subdivisions, not the City at large. The City’s fee, by contrast, was intended to fund “unique facilities intended to serve the entire population of the City,” such as an aquatic center. The court also noted that the Act expressly references fees for “[p]arks and recreation facilities.”

The court also upheld police impact fees, which were intended to maintain existing ratios of facilities, vehicles and officer safety equipment to calls for service. It observed that the Act defines “public facilities” as including capital costs related to public services. Vehicles and officer safety equipment costs were capital costs, not costs of operation or maintenance.

The court struck down only a fire protection fee for the east side of the City. Because existing east-side fire facilities were adequate to accommodate new development at the existing level of service, there was no nexus between new facilities and new development. The fire fee for the west side, in contrast, was upheld because a new fire station would be required to serve this area as it developed.

This alert was authored by Geoff Robinson. For more information on this alert, please contact:

Geoff Robinson, Partner
geoffrey.robinson@bingham.com, 415.393.2425

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