

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD
APPELLATE DISTRICT (Calaveras)

July 14, 2009

GUY B. MEYERS ET AL., PLAINTIFFS AND APPELLANTS,
v.
COUNTY OF CALAVERAS ET AL., DEFENDANTS AND RESPONDENTS.

(Super. Ct. No. CV30731).

The opinion of the court was delivered by: Sims, J.

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

Plaintiffs Guy B. Meyers and Roy Hifai own a 12-acre parcel of real property in Calaveras County that they intend to develop for residential and use. Plaintiffs appeal from a judgment entered after commercial the trial court rejected their challenge to the validity of Ordinance No. 2777, which was adopted by the Board of Supervisors of Calaveras County (County) in February 2004. Ordinance No. 2777 created a Road Impact Mitigation fee (RIM fee) program that imposes a fee on new developments. Plaintiffs argue that (1) the inclusion of Pool Station Road in the RIM fee program violated the Mitigation Fee Act (the Act) (Gov. Code, §§ 66000, et seq.) because traffic on the road is currently minimal and anticipated increases in usage due to new development are insufficiently demonstrated by the evidence presented to the Board of Supervisors, and (2) the procedure in Ordinance No. 2777 whereby a developer may apply for a waiver of the RIM fee violates section 66001 by making the developer shoulder the burden of proving the reasonableness of the fee.

We shall affirm. The trial court did not err in concluding that the County reasonably found Pool Station Road to meet all three prerequisites for inclusion in the RIM fee program. We also agree with the trial court that Ordinance No. 2777 does not impermissibly shift the burden of establishing a reasonable relationship between the projects to be funded by the program and the new developments from which the fee is collected. Requiring developers to bear the burden of proving entitlement to a fee waiver does not violate the Act.

BACKGROUND

A. Ordinance No. 2777

In 1996, the Calaveras County General Plan called for development of a RIM fee program in order to defray costs attributable to the expected increases in use of county-funded roads by traffic from new developments. In 1997, a technical advisory committee was formed in order to provide advice to the County Board of Supervisors regarding the adoption of a RIM fee ordinance. The County also hired a traffic consulting firm to gather data and conduct the

requisite technical analysis. In 1999, the firm produced a list of road improvements to be considered for inclusion in the RIM fee program.

The initial list presented to the technical advisory committee included Pool Station Road among proposed projects. As a whole, the list included more projects than could reasonably be funded by RIM fees. In January 2000, the consulting firm prepared several shorter, alternative project lists. Some of these alternative lists did not include Pool Station Road in the RIM fee program.

Sometime after January 2000, the Calaveras Council of Governments (the Council) assumed responsibility for planning the RIM fee program. The Council is a regional transportation planning agency that a county must have in order to secure state and federal transportation funds. The Council is a joint powers agency between the County and City of Angels. The technical advisory committee and traffic consulting firm continued to provide advice on formulating the RIM fee program. The Council also hired an economist to prepare an analysis of nexus between fees and capital improvement costs.

In 2001, the Council issued an update to its Calaveras County Regional Transportation Plan report. A regional transportation plan identifies deficiencies in roadways for which the County can apply for federal or state funding. The 2001 report issued by the Council did not affect efforts to establish a RIM fee program other than to exclude thoroughfares that could be improved by use of federal or state funds.

In 2003, the Council again hired the traffic consulting firm to update the data and model intended to support the RIM fee. Instead of relying on the 2001 Calaveras County Regional Transportation Plan report, the consulting firm conducted another traffic study using a new model.

On May 7, 2003, the consulting firm issued a technical memorandum with the preliminary analysis for the RIM fee program. This memorandum did not include analysis of Pool Station Road.

In August 2003, Robert Kawasaki, the County's Public Works Director at the time, sent a memorandum to the Council listing three criteria for determining which roads to include in the RIM fee program. The memorandum did not include Pool Station Road among those initially identified as local roads of regional significance. The term "local road of regional significance" was used to refer to roads meriting inclusion in the RIM fee program because of their importance to the transportation network of the region.

The prerequisites for inclusion of roads in the RIM fee program were determined to be: (1) sufficient traffic volume in 2025, (2) connectivity between Calaveras communities or parallel capacity to a state highway, and (3) the need to upgrade a road to current county standards.

As 2003 progressed, the list of roads proposed for inclusion in the RIM fee program evolved. During the summer of 2003, Kawasaki asked Timothy McSorley, then an employee of the County's Public Works Department, to prepare a cost estimate for Pool Station Road's potential inclusion in the RIM fee program. McSorley concluded that the portion of the cost for improving Pool Station Road attributable to new developments would total \$17,000,916.

In the October 2003 addendum to the technical memorandum prepared by the traffic consultants, Pool Station Road was listed for inclusion in the RIM fee program. In October and November

2003, the Board of Supervisors modified the list of roads for inclusion in the RIM fee program. Pool Station Road was added during this time when public hearings on the implementation of the RIM fee program were conducted. During the public hearing process, it is a frequent occurrence for a Board of Supervisors to make alterations in the list of projects to be included in a capital improvement program.

The Board of Supervisors implemented the RIM fee program by adopting Ordinance No. 2777 in February 2004. The actual fee was adopted by a separate resolution. The RIM fee program seeks to recover an average of 12 percent less from developers than it will cost the County to provide the upgrades to support the traffic from new developments. The nexus study supporting the RIM fee program concluded that the Calaveras fee was significantly lower than the fees imposed by similar programs in neighboring counties.

The RIM fee program does not assess fees for new development in order to make up for existing deficiencies of roads in the program. Instead, the fee is based only on the cost of making improvements to accommodate the traffic arising from new developments.

B. Pool Station Road

Pool Station Road is a 12.9 mile road that has played only a minor role in the regional transportation network. Even so, the road meets the three prerequisites established for the RIM fee program: sufficient anticipated future level of service, community connectivity or parallel capacity to a state highway, and the need to upgrade to current standards for a county road.

1. Level of Service

Based on traffic demand modeling, Pool Station Road is expected to carry as much traffic in 2025 as some state-funded roads in the region. The traffic demand model takes into account changes in the road network throughout the county and changes in the number of trips on the road originating from outside its immediate vicinity. The model also differentiates between traffic deriving from new developments in Calaveras County and tourist trips from outside the region. Whether Pool Station Road is classified as a major or minor collector road does not affect the model's analysis. New development on Pool Station Road itself is only partly relevant to forecasting the demand anticipated for 2025.

A selective link analysis for Pool Station Road was not conducted in formulating the RIM fee program. Selective link analysis is an analytic tool that isolates a particular road within a transportation network in order to identify where all of the trips using the road start and end. While it gives a more precise estimate of traffic composition for a specific road than the travel demand model, it also does not include all of the benefits provided by an improvement because it fails to account for the capacity regained by parallel and alternate roadways.

The traffic demand modeling conducted for the RIM fee program showed that traffic generated from new developments in the region would substantially increase the use of Pool Station Road. Although land use forecasts projected little residential development on Pool Station Road itself, the future traffic volume is expected to come in large part from new developments throughout the County. Pool Station Road is expected to have the second highest percentage of traffic increase due to new development among all Calaveras County roads.

The volume of traffic on Pool Station Road is anticipated to increase from 70 trips per afternoon hour in 2000 to 450 trips per afternoon hour in 2025. This volume exceeds that of most other roads in the RIM fee program. The RIM fee nexus study concluded that 84.4 percent of the increase in traffic on Pool Station Road in the year 2025 would be attributable to new development. The RIM fee program, however, seeks to recover only 74.6 percent of the cost for improvements from new developments.

2. Connection for Calaveras Communities

Pool Station Road provides parallel capacity to and emergency relief for State Highway 49. The road also connects the county seat of San Andreas with the town of Copperopolis.

3. Current Standards for County Roads

Pool Station Road requires improvement to meet the minimum standards for a county road.

C. Plaintiff's Request for Declaratory Relief

In October 2005, plaintiffs filed an amended complaint seeking a declaration of Ordinance No. 2777's invalidity under the Act. After a bench trial, the court issued a statement of decision concluding that (1) the County's decision to include Pool Station Road in the RIM fee program was based on substantial evidence, (2) the County complied with the Act in adopting Ordinance No. 2777, (3) the ordinance did not improperly shift the burden of proof to the developer to establish the reasonableness of the fee, and (4) the RIM fee for commercial development projects was determined according to a reasonable methodology incorporated in the RIM fee nexus study. Judgment was entered in favor of the County, and plaintiffs filed this appeal.

DISCUSSION

I. The Act (§§ 66000 et seq.)

The Act "sets forth procedures for protesting the imposition of fees and other monetary exactions imposed on a development by a local agency. As its legislative history evinces, the Act was passed by the Legislature in response to concerns among developers that local agencies were imposing development fees for purposes unrelated to development projects." (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 864 (*Ehrlich*), quoting *Centex Real Estate Corp. v. City of Vallejo* (1993) 19 Cal.App.4th 1358, 1361.) "Although for the most part procedural in nature, the Act also embodies a statutory standard against which monetary exactions by local governments subject to its provisions are measured." (*Id.* at p. 865.)

Subdivision (a) of section 66001 sets forth the standard under the Act for determining whether a fee for new residential or commercial development is reasonable. This subdivision "applies to an initial, quasi-legislative adoption of development fees." (*Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 336 (*Garrick*)). Subdivision (a) of section 66001 states: "In any action establishing, increasing, or imposing a fee as a condition of approval of a development project by a local agency, the local agency shall do all of the following: [¶] (1) Identify the purpose of the fee. [¶] (2) Identify the use to which the fee is to be put. If the use is

financing public facilities, the facilities shall be identified. That identification may, but need not, be made by reference to a capital improvement plan as specified in Section 65403 or 66002, may be made in applicable general or specific plan requirements, or may be made in other public documents that identify the public facilities for which the fee is charged. [¶¶] (3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed. [¶¶] (4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed."

The Act further specifies that "[a] fee shall not include the costs attributable to existing deficiencies in public facilities, but may include the costs attributable to the increased demand for public facilities reasonably related to the development project in order to (1) refurbish existing facilities to maintain the existing level of service or (2) achieve an adopted level of service that is consistent with the general plan." (§§ 66001, subd. (g).)

II. Standard of Review

When a public agency acts pursuant to its legislative authority, we "exercise very limited review `out of deference to the separation of powers between the Legislature and the judiciary, to the legislative delegation of administrative authority to the agency, and to the presumed expertise of the agency within its scope of authority.' (California Hotel & Motel Assn. v. Industrial Welfare Com. (1979) 25 Cal.3d 200, 212, fn. omitted.) The court may not weigh the evidence adduced before the administrative agency or substitute its judgment for that of the agency, for to do so would frustrate legislative mandate. (Pitts v. Perluss (1962) 58 Cal.2d 824, 833-835.) An agency acting in a quasi-legislative capacity is not required by law to make findings indicating the reasons for its action (City of Santa Cruz v. Local Agency Formation Com. (1978) 76 Cal.App.3d 381, 389, 390-391), and the court does not concern itself with the wisdom underlying the agency's action any more than it would were the challenge to a state or federal legislative enactment. (Stauffer Chemical Co. v. Air Resources Board (1982) 128 Cal.App.3d 789, 794-796; Faulkner v. Cal. Toll Bridge Authority (1953) 40 Cal.2d 317, 329; City of Santa Cruz v. Local Agency Formation Com., supra, 76 Cal.App.3d at p. 389.) In sum, the court confines itself to a determination whether the agency's action has been `""arbitrary, capricious, or entirely lacking in evidentiary support. . . ."' (Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28, 34, fn. 2 (Strumsky), quoting Pitts v. Perluss, supra, 58 Cal.2d at p. 833, and Brock v. Superior Court (1952) 109 Cal.App.2d 594, 605.)" (Shapell Industries, Inc. v. Governing Board (1991) 1 Cal.App.4th 218, 230 (Shapell).)

III. Pool Station Road's Inclusion in the RIM Fee Program

Plaintiffs do not challenge the County's prerogative to establish a RIM fee by ordinance. Plaintiffs also do not assign error to the County's determination that roads should be included in the RIM fee program according to the three criteria of sufficient anticipated traffic growth, connectivity between Calaveras communities, and need for improvement to county road standards. With respect to these criteria, plaintiffs do not deny that Pool Station Road will require physical improvements if it is to play a role as a main service road in the region. And, plaintiffs acknowledge that Pool Station Road offers both parallel capacity to State Highway 49 and connectivity between communities.

Plaintiffs contend only that Pool Station Road does not meet the criterion of sufficient future

traffic increase due to new developments. In arguing that the future level of service expected for Pool Station Road does not justify costly upgrade, plaintiffs advance a four-prong attack alleging: (1) failure to conduct a selective link analysis, (2) hasty adoption of the ordinance, (3) inability to identify the exact impetus for inclusion of the road in the RIM fee program in late 2003, and (4) insufficient development on the road itself to warrant improvement.

A.

Plaintiffs believe that Pool Station Road should not have been included in the RIM fee program without a selective link analysis. Although the Act does require a County to determine a reasonable relationship between the fee collected and the public project to be funded, the Government Code does not specify what methodology must be used to ascertain the nexus. (§§ 66001, subd. (a)(4).) Here, the County based its RIM fee ordinance on the updated 2003 traffic modeling methodology incorporated into the nexus study. Expert testimony credited by the trial court noted that the methodology and conclusion of the nexus study was "plausible and logical" in its inclusion of Pool Station Road in the RIM fee program.

Expert testimony further established that selective link analysis is not appropriate for regional impact fee programs because it fails adequately to account for the full benefit to the region deriving from a particular capital improvement. Plaintiffs' reliance on the availability of selective link analysis as an analytic tool does not support the conclusion that the RIM fee could not have been adopted without resort to this or any other particular analytic tool. All that the Act requires of a County is to use a reliable means for establishing a reasonable relationship between the fees and projects. (Shapell, *supra*, 1 Cal.App.4th at p. 232.) Here, the nexus fee study reasonably relied on a rational traffic modeling methodology which indicated that Pool Station Road qualified for project funding based on anticipated increases in traffic.

Plaintiffs point out that the 2001 regional transit report's estimate of future traffic for Pool Station Road was substantially lower than that in the 2003 nexus study. The 2001 regional report was largely irrelevant to the later RIM fee study because the regional report was based on methodology that was subsequently superseded. In addition to differing methodology, the two documents had different aims. The 2001 regional report focused on project eligibility for federal and state funds while the RIM fee study sought to ascertain the costs that should be recovered from new developments. The 2001 regional report does not render the later traffic study unreliable.

B.

Plaintiff's portrayal of the process leading to the adoption of Ordinance No. 2777 as hasty myopically focuses on Pool Station Road's addition to the RIM fee program in October 2003. This short-sighted view, however, ignores the several years of work supporting the adoption of a RIM fee program. As early as 1999, Pool Station Road was included in the list of proposed road projects submitted by the traffic consultants to the technical advisory committee charged with formulating the program. Even though some of the proposed alternative lists in the January 2000 amendment of the memorandum did not include Pool Station Road, one list did retain the road among those projects to be funded by the RIM fee.

The exclusion of Pool Station Road from the memorandum of Kawasaki in August 2003 does not undermine the legitimacy of the road's later inclusion in the fee program. Only a few months

later, Kawasaki specifically asked for a cost estimate of improvements required for upgrades to Pool Station Road. Shortly thereafter, Pool Station Road was included in the program. Ultimately, several witnesses testified that Pool Station Road met the criteria for inclusion in the RIM fee program based on geographic location and anticipated increases in use. The record does not show that the Board of Supervisors acted hastily in adopting Ordinance No. 2777. To the contrary, a public hearing process was conducted and worked as intended; it resulted in a deliberate evolution of projects to be funded by the RIM fee.

C.

That the exact impetus for the October 2003 inclusion of Pool Station Road in the RIM fee program can no longer be identified is irrelevant to the analysis of whether the RIM fee violates the Act. (See §§ 66001, subd. (a); Shapell, supra, 1 Cal.App.4th at p. 239.) Section 66001 does not require the County to keep records of the specific person responsible and exact time when a particular capital improvement project is included in a fee program. The Act only requires demonstration of a reasonable relationship between the public projects to be funded and the fees to be collected from developers. (Shapell, supra, 1 Cal.App.4th at p. 230.)

D.

Plaintiffs question the composition of the 4,500 trips per day on Pool Station Road anticipated to occur in 2025. Plaintiffs assert that the inability of any witness to identify the nature of all of these trips inexorably leads to the conclusion that the traffic modeling study is unreliable. The record shows that the sources of all trips expected to occur hourly in 2025 on Pool Station Road were not identified at trial. The County counters that plaintiffs mischaracterize the testimony regarding the traffic modeling study. The County's expert explained that the traffic model could be used to ascertain the origin of the predicted trips. Someone with access to the model could determine the percentage of traffic attributable to various types of traffic. Such reverse engineering was possible because the model forecasts "trips from all zones to all other zones and including any regional traffic that's coming from outside of the county into the county." However, the County's experts were unable to reverse engineer the study while on the witness stand during cross-examination by plaintiffs' counsel. That witnesses could not perform the requested analysis during their testimony, however, does not negate the validity of the traffic modeling study.

Plaintiffs emphasize the fact that Pool Station Road is a costly capital improvement project for a thoroughfare on which relatively little residential development is expected to occur. The small number of new houses on the road itself, however, belies its growing importance to regional traffic patterns. The RIM fee is a countywide program based on a regional approach to traffic planning. In the nexus analysis, the local traffic on Pool Station Road takes a backseat to the impact of new development throughout the county as the increase in commercial and residential trips leads to greater use of certain roads.

The traffic modeling study accounted for traffic originating beyond Pool Station Road to conclude that 84.4 percent of the increase in that road's usage would be attributable to new development. On this basis, the RIM fee reasonably seeks to recover 74.6 percent of the cost of upgrades to the road from new developments. (Shapell, supra, 1 Cal.App.4th at p. 230.)

In contrast to the evidence supporting the RIM fee ordinance, the trial court concluded, "Plaintiffs provided no evidence to refute the County's evidence. Plaintiffs provided no evidence to refute the testimony of the County's experts including Ron Milam, Richard Dowling and Timothy Youmans, all of whom testified that Ordinance No. 2777 complied with the [] Act." Our review of the record leads us to agree. "We determine only whether the action taken was arbitrary, capricious or entirely lacking in evidentiary support, or whether it failed to conform to procedures required by law." (Garrick, supra, 3 Cal.App.4th 320, 328.) The County rationally formulated the three prerequisites for roads to be included in the RIM fee program and used a credible methodology for deciding that Pool Station Road met the criteria.

IV.

Whether Ordinance No. 2777 Improperly Places the Burden on Developers to Establish the Reasonableness of RIM Fees As we have mentioned above, section 66001, subdivisions (a)(3) and (a)(4) provide:

(a) "In any action establishing, increasing, or imposing a fee as a condition of approval of a development project by a local agency, the local agency shall do all of the following:

"[¶¶] . . . [¶¶]

"(3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed.

"(4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed."

Plaintiffs contend that ordinance No. 2777 "improperly shifts the burden of establishing a reasonable relationship to an applicant rather than maintaining it on the agency." In so arguing, plaintiffs do not focus on the initial adoption of Ordinance No. 2777, but on a provision in the ordinance that allows developers to apply for fee waivers. We shall reject the argument. Allowing developers to apply for fee waivers does not shift the burden of proof regarding the reasonableness of the fee.

Ordinance No. 2777 added section 12.10.190 to the Calaveras County Code to give developers an opportunity to apply for a fee waiver. Plaintiffs misleadingly quote only the portion of the section 12.10.190 that places the burden of establishing the justification on the developer. Plaintiffs fail to note that the justification is necessary only to secure a waiver of the RIM fee. Subdivision (C)(1) of Calaveras County Code section 12.10.190 explains the purpose of the section when it provides: "The owner of a Development Project subject to the RIM FEE Program fee under this chapter may apply to the RIM FEE Program Administrator for an adjustment to that fee. The waiver of this fee shall be based on the absence of any reasonable relationship between the impact of the development on the Regional Transportation Network and the amount of the fee charged." (Italics added.)

We agree with the trial court when it explained, "The plain language of [] §§66001 states that subdivisions (a)(1) through (4) apply to any action `establishing' a new development impact fee. The County complied with these requirements when it legislatively established the fee by

Ordinance No. 2777. The adjustment language in Ordinance No. 2777 is the procedure an applicant would use to request adjustment of the fee without having to bring a protest action as Plaintiffs have. There is no language in §§66001 that prevents the County from including any type of adjustment procedure in an ordinance that establishes a fee. Because the County complied with the Mitigation Fee Act in establishing the fee, the County is not preempted from including an adjustment procedure within the Ordinance."

When adopting Ordinance No. 2777, the County had sufficient basis to conclude that there existed a reasonable relationship between the RIM fee and its use for road improvements. That a developer may apply for a fee waiver without having to file a protest action strengthens rather than weakens the ordinance's legitimacy under the Act. (Ehrlich, *supra*, 12 Cal.4th at p. 864.) The challenged provision permissibly eases the burden on a developer who wishes to secure a waiver of the RIM fee for a specific new development project.

V. Claim for Refund and Interest

Having rejected plaintiffs' challenges to the RIM fee imposed on new developments in Calaveras County by Ordinance No. 2777, we have no need to address their argument concerning the amount of refund or interest that they calculate should be returned to them.

DISPOSITION

The judgment is affirmed. The County shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

We concur: SCOTLAND, P. J., RAYE, J.