No. A165258

In the Court of Appeal, State of California

FIRST APPELLATE DISTRICT DIVISION FIVE

ADRIAN BARAJAS
Plaintiff and Appellant,

vs.

CITY OF PETALUMA
Defendant and Respondent.

Appeal From the Superior Court of the State of California,
County of Sonoma. Case No. SCV265770
Honorable Gary Nadler, Judge Presiding

BRIEF OF AMICI LOCAL GOVERNMENT ASSOCIATIONS

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

These entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate or (2) a financial or other interest in the outcome of the proceeding that the Justices should consider in determining whether to disqualify themselves:

Developers of real property in the City of Petaluma.

(Cal. Rules of Court, rule 8.208.)

DATED: January 17, 2024

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Amici California Special Districts Association, California State Association of Counties, and League of California Cities ("Amici"), concur with Respondent City of Petaluma on every point argued in its Respondent's Brief. This means Amici agree with the City that the Court need not decide the appropriate remedy, as the Court should affirm judgment for the City on the merits. If the Court does reach remedy, however, Amici respectfully ask the Court to entertain their further arguments on questions of law that raises, and that affect nearly every local government in California.

The Mitigation Fee Act (Gov. Code, § 66000 et seq.) does not dictate automatic refunds after a judicial finding an agency somehow failed to meet the accounting requirements of Government Code section 66001, subdivision (d) ("Section 66001, subdivision (d)"). Accordingly, this Court should not follow *Hamilton & High, LLC v. City of Palo Alto* (2023) 89 Cal.App.5th 528 (*Hamilton*) or *Walker v. City of San Clemente* (2015) 239 Cal.App.4th 1350 (*Walker*) to the extent they would require such a disruptive remedy. Especially on this record, where the City clearly made a good faith effort to comply with all of the Act's requirements, ordering refunds without allowing the City an opportunity to correct any noncompliance is

inconsistent with the Act's clear purpose, as explained in its legislative history, and with the separation of powers.

Instead, the proper remedy here — if the Court finds the need for any — is remand to the City for a legislative determination whether it can find all of the following:

- There is a purpose to which the disputed development impact fees will be put.
- There is a reasonable relationship between the fees[1] and that purpose.
- The City can identify the improvements the fees will fund and all other sources of funding for those improvements.
- The City can designate the approximate dates when it will obtain all required funding for those improvements.

(Gov. Code, § 66001, subd. (d)(1).) If — and only if — the City cannot make those findings on a sufficient record are refunds

[1] References to "fees" in this brief are to development impact fees subject to the Mitigation Fee Act.

appropriate under Section 66001, subdivision (d). For indeed, as *Hamilton* and *Walker* overlooked, Section 66001, subdivision (d) does not require refunds in the **absence** of any particular finding, but in the **presence** of an unavoidable conclusion that retaining fee revenue is unjustifiable under the statute.

Finally, Section 66001, subdivision (d)'s five-year findings do not apply to fee revenue an agency has held for less than five years. The City ably covers this point, but Amici briefly reinforce it with further reference to the legislative history.

II. STATEMENT OF THE CASE

Amici incorporate by reference the statement of facts and procedural history in the City's Respondent's Brief. (RB, pp. 11–21.)

III. ARGUMENT

A. Fundamental Principles of Statutory Construction Support the City

This Court interprets Section 66001, subdivision (d) under well established principles. Review is de novo, and the goal is to ascertain legislative intent. (*ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 188–189.) The Court begins "with the language of the statute, giving the words their usual and ordinary meaning." (*Smith*

v. Superior Court (2006) 39 Cal.4th 77, 83.) "If the statutory terms are ambiguous, [courts] may examine extrinsic sources, including the ostensible objects to be achieved and the legislative history." (*Ibid.*) The Court "must consider the consequences that might flow from a particular construction and should construe the statute so as to promote rather than defeat the statute's purpose and policy." (*People ex rel. Dept. of Conservation v. El Dorado County* (2005) 36 Cal.4th 971, 993.) It must seek to avoid "a construction that would lead to absurd consequences." (*Smith*, *supra*, 39 Cal.4th at p. 83.)

Finally, this Court is not bound by the decisions of its sister appellate courts, in particular the decisions in *Hamilton* and *Walker*. (*In re M.B.* (2020) 44 Cal.App.5th 281, 284.)

These rules lead to the conclusions Amici urge, as we now explain.

B. Section 66001, subdivision (d) Does Not Mandate Refunds

1. Section 66001, subdivision (d) is ambiguous as to the "requirements" that trigger a refund, justifying resort to legislative history

The City quoted and summarized the relevant provisions of the Act. (RB, pp. 21–26.) For clarity, Amici repeat the language in Section 66001, subdivision (d), which imposes accounting

requirements after an agency has imposed a development impact fee:

> (d)(1) For the fifth fiscal year following the first deposit into the account or fund, and every five years thereafter, the local agency shall make all of the following findings with respect to that portion of the account or fund remaining unexpended, whether committed or uncommitted:
>
> (A) Identify the purpose to which the fee is to be put.
>
> (B) Demonstrate a reasonable relationship between the fee and the purpose for which it is charged.
>
> (C) Identify all sources and amounts of funding anticipated to complete financing in incomplete improvements identified in paragraph (2) of subdivision (a) [i.e., when the agency established, increased, or imposed the fee at issue].
>
> (D) Designate the approximate dates on which the funding referred to in subparagraph (C) is expected to be deposited into the appropriate account or fund.

(2) When findings are required by this subdivision, they shall be made in connection with the public information required by subdivision (b) of Section 66006. The findings required by this subdivision need only be made for moneys in possession of the local agency, and need not be made with respect to letters of credit, bonds, or other instruments taken to secure payment of the fee at a future date. If the findings are not made as required by this subdivision, the local agency shall refund the moneys in the account or fund as provided in subdivision (e).

(Gov. Code, § 66001, subd. (d).)

The final sentence directs agencies to issue refunds "as provided in subdivision (e)," which provides:

> By means consistent with the intent of this section, a local agency may refund the unexpended revenues by direct payment, by providing a temporary suspension of fees, or by any other reasonable means. **The determination by the governing body of the local agency of the means by which those revenues are to be refunded is a legislative act.**

(Gov. Code, § 66001, subd. (e) [emphasis added].)

Thus, the Act does not entitle Plaintiff Barajas to any particular **kind** of refund following noncompliance with Section 66001, subdivision (d)'s accounting requirements. The manner and timing of refunds are left to the agency's legislative discretion. (Gov. Code, § 66001, subd. (e).)

More important, the Act is ambiguous as to what triggers the need to exercise this discretion. Section 66001, subdivision (d) provides for refunds if "findings are not made **as required by this subdivision**," but what does this subdivision require? (Gov. Code, § 66001, subd. (d) [emphasis added].) *Hamilton* found any noncompliance with any requirement of Section 66001, subdivision (d) necessarily requires a refund, but even it acknowledged its reading "might be viewed as severe where the error or omission in making the required findings could be perceived as slight or emendable." (*Hamilton*, *supra*, 89 Cal.App.5th at p. 571.) Other, less "severe" interpretations are thus at least as logical as *Hamilton*'s.

Indeed, Amici aver a more accurate interpretation is that an agency must issue refunds only if it cannot make the findings Section 66001, subdivision (d) requires. That is, if it cannot (on the basis of substantial evidence) identify a purpose for a fee or a reasonable relationship between a fee and that purpose, etc. (Gov.

Code, § 66001, subd. (d)(1).) This better respects the legislative discretion preserved by Government Code section 66001, subdivision (e), and avoids unnecessary disruption in public finance. It also acknowledges the Legislature's conclusion that these criteria are appropriate to serve the Act's purposes. (*Martinez v. Cot'n Wash, Inc.* (2022) 81 Cal.App.5th 1026, 1046 [*expressio unius* canon].) If an agency can make those findings on substantial evidence, it elevates form over substance to require refunds based on some other, less important noncompliance with Section 66001, subdivision (d) — like insignificantly late findings, or findings that simply require slightly more evidence to support them. (Civ. Code, § 3528 ["The law respects form less than substance"].)

At the very least, therefore, Section 66001, subdivision (d) is sufficiently ambiguous to warrant resort to legislative history. (*Smith*, *supra*, 39 Cal.4th at p. 83.) Indeed, both *Hamilton* and *Walker* found that necessary. (*Hamilton*, *supra*, 89 Cal.App.5th at p. 563, fn. 11 & p. 565, fn. 12; *Walker*, *supra*, 239 Cal.App.4th at p. 1368.) This Court should do the same although, of course, Amici contend it should lead this Court to different conclusions.

2. The Legislature only intended refunds if an agency could not justify retaining revenues

Section 66001, subdivision (d) was adopted in 1987, and amended in 1988, 1996, and 2006. *Hamilton* and *Walker*, however, discuss only the legislative history of its 1987 adoption (AB 1600) and 1996 amendment (SB 1693). (See *Hamilton*, *supra*, 89 Cal.App.5th at p. 549, fn. 4, p. 562, p. 563, fn. 11, p. 565 & fn. 12; *Walker*, *supra*, 239 Cal.App.4th at pp. 1364, 1367, 1368.) Amici concur that the AB 1600 and SB 1693 legislative histories are the most helpful to the issue before this Court. SB 1693 is already in the record. (AA5:67:1244–1383.)[2] Amici urge the Court to take judicial notice of AB 1600's legislative history reviewed in *Hamilton* and *Walker*.

This history reveals that the Legislature's intent in adopting the Act was to ensure agencies have (and state) a reason to retain fee revenues. Regular accounting requirements — like the five-year findings required by Section 66001, subdivision (d) — are a means by which agencies identify such a reason, but the Act's substance is and always has been to determine whether an agency needs this revenue to provide infrastructure to serve new development. If

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[2] Citations to the Appellant's Appendix are in the form "AA[volume]:[tab]:[Bates page(s)]."

those periodic accounting requirements show no need then, of course, the agency must refund remaining fee proceeds. But if the agency **does** need these revenues, refunds to property will come at the expense of the community, as development will have unmitigated impacts like the choking traffic that has transformed politics in Northern Virginia[3] and is beginning to do so in Tennessee.[4]

AB 1600 shows the Legislature only intended refunds when an agency "cannot" demonstrate the need to retain fee proceeds.

> This bill would, with certain exceptions, require specified local agencies establishing, increasing, or imposing fees (not including taxes or assessments) for specified public improvements, services, or community amenities to be collected from applicants for approval of development projects to make specified findings, segregate the fees in special accounts, reexamine the

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[3] https://northernvirginiamag.com/culture/news/2022/12/08/northern-virginia-road-construction-projects/ (as of Jan. 11, 2024).

[4] < https://www.wkrn.com/news/tennessee-politics/studies-show-traffic-in-tn-will-continue-to-grow-in-coming-years-officials-promise-action-to-address-it/ > (as of Jan. 11, 2024).

> necessity for the unexpended balance of the fee, as specified, every 5 years, and **refund to the then current owner or owners of the development project any unexpended portion of the fee for which need <u>cannot</u> be demonstrated at the time of this review**, together with any accrued interest.

(Amici Motion for Judicial Notice (Jan. 17, 2024) ("MJN"), Exh. A, pp. 24 [emphases added], 25 [§ 66001, subd. (e)], 30, 34, 37–38, 40, 42, 44–45, 47–48, 51, 54, 78, 80, 81, 83, 87, 89, 95, 97, 99, 101, 134.)[5]

This consistent use of the word "cannot" undermines an interpretation of Section 66001, subdivision (d) that mandates refunds for any noncompliance with its accounting requirements. Instead, it shows AB 1600's substantive focus on the end to be achieved by the means Section 66001, subdivision (d) imposes:

> AB 1600 would maintain the flexibility which the courts have given local governments relative to approving

[5] Amici move for notice as a convenient means to make these materials available to the Court. However, the Court may consider published material like legislative history documents without a formal request for judicial notice. (*Quelimane Company, Inc. v. Stewart Title Guar. Co.* (1998) 19 Cal.4th 26, 46 fn. 9.)

> developments subject to fees or exactions. However, it would require local agencies to show that there is a rational relationship between a fee and the use to which it will be put before the fee is levied, not after the fact when a developer has protested the fee.

(MJN, Exh. A, p. 31.)

Indeed, Amicus League of California Cities supported AB 1600 with the understanding the law would allow local governments to retain fee revenues to spend on appropriate purposes. It did not understand the proposal to imply that **any** noncompliance with Section 66001, subdivision (d) would result in an automatic refund of revenues — often in the millions of dollars. As the League wrote in support of the bill:

> Allegations have been made that developer fees are being improperly charged and spent. AB 1600 places a policing mechanism in law to enable cities to deal with the cumulative impacts of development, while protecting against improper charging of fees, to assure that the fees are invested and spent for the purposes for which they are collected, not diverted to other uses.

(MJN, Exh. A, p. 105.)

Further, among the several local governments and agencies that registered opposition to AB 1600, none expressed concerns about automatic refunds — as surely they would have done had those been under consideration.

- The Association of California Water Agencies opposed AB 1600's accounting requirements, but did not address refunds. (MJN, Exh. A, p. 103.)

- The California Association of Sanitation Agencies was "concerned with the provisions that appear to require a separate account for each project." (MJN, Exh. A, p. 104.)

- The Public Law Section of the State Bar wrote: "This bill would interfere with the power of a public entity to impose fees on new developments by establishing substantive and procedural requirements that go beyond the limitations contained in case law. In some cases, a closer nexus is required between the new development and the purpose to which the fee is put. In other instances, procedural requirements are added as a pre-requisite for adoption of these fees." (MJN, Exh. A, p. 106.)

- The City of Chula Vista opposed the requirement to deposit revenues in separate accounts, the administrative costs of refunds (but not what would trigger them), and "most importantly" authority AB 1600 granted regional planning agencies. (MJN, Exh. A, p. 131.)

- The Sacramento Municipal Utility District expressed concern about AB 1600's application to its line-extension charges. (MJN, Exh. A, p. 147.)

Silence as to automatic refunds presents the proverbial "dog that did not bark." (See *Elsner v. Uveges* (2004) 34 Cal.4th 915, 933.) That those with the keenest interest in this point showed no concern about it suggests the bill presented no reason for such concern.

When the Legislature amended Section 66001, subdivision (d) by adopting 1996's SB 1693, it confirmed that it intended AB 1600 only to require refunds "under certain circumstances" — not for **any** accounting violation. (AA5:67:1246, 1253, 1266, 1275, 1315, 1336, 1356, 1379.) There is no death penalty for driving five miles per hour over the speed limit. Specifically, the Legislature confirmed that AB 1600 required refunds only when an agency "cannot" — not did not — justify retaining fee revenues. (AA5:67:1263, 1284, 1287, 1310,

1313, 1365, 1367.)

Initially, SB 1693 mandated a refund if fee revenues were not spent within seven years of collection. (AA5:67:1248.) However, the language adopted instead:

- increased the five-year reporting requirements, and
- requires refunds if the agency does not identify a date to complete improvements when it has accumulated sufficient revenue to do so.

(AA5:67:1256 [amendment deleting mandatory refund after seven years], 1339–1341 [as amended Aug. 19, 1996], 1381 [bill as chaptered].) The point of this amendment was to address criticism that SB 1693 imposed an "unnecessary burden" on agencies and would "require" refunds. (AA5:67:1335.) The result was Section 66001, subdivision (d) as now enacted, requiring agencies to make findings every five years and requiring refunds in a manner of an agency's choosing if those findings "are not made." (AA5:67:1345.)

However, this change — from requiring refunds if the findings "cannot" be made to requiring them if the findings "are not made" — does not support the conclusion that SB 1693 anticipated automatic refunds for any noncompliance with Section 66001, subdivision (d). Instead, it shows only a compromise to maintain

SB 1693's core intent ("to ensure that designated public facilities that are paid for by developers, and ultimately by the consumers, receive the needed funds in a timely manner") while easing the accounting requirements that "would be cumbersome, expensive and produce little valuable information." (AA5:67:1314, 1322.) The intent was to increase reporting, not to mandate refunds unless necessary — when findings "cannot" be made.

Indeed, following these amendment to SB 1693, opposition to the bill evaporated. (AA5:67:1346 ["ARGUMENTS IN OPPOSITION: None"], 1355, 1363, 1369.)

> The Association of California Water Agencies (ACWA) and the League of California Cities were opposed to an earlier version of SB 1693, however, the offending language was deleted and the opposition was dropped.

(AA5:67:1375.) As with AB 1600, if SB 1693 was meant to impose automatic refunds, acquiescence is not easily explained.

3. Automatic refunds based on late findings violate the separation of powers

Plaintiffs Barajas' demand for a refund due only to allegedly late findings is error for another reason. *Hamilton* acknowledged these findings, and the decision to issue refunds (or not), are

legislative acts. (*Hamilton*, *supra*, 89 Cal.App.5th at p. 546.) Yet by ordering refunds due only to late five-year findings, *Hamilton* effectively found lateness compels the legislative finding that refunds are necessary. That is not, in fact, a legislative choice. If an agency has failed to exercise its discretion when the law requires it to do so, the appropriate remedy is a writ ordering the agency to exercise that discretion — not ordering it to do so in a particular way. (E.g., *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 916; *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, 1266.)

Accordingly, as to the claims that the City made late five-year findings under Section 66001, subdivision (d), the proper remedy here is to order the City to make those findings — not to presume it cannot do so, that refunds are necessary, and that they must be paid to fee payors as opposed to current residents or vice versa.

4. Automatic refunds undermine the policy behind impact fees

No one seriously disputes that development places additional burdens on public resources. The news stories from Virginia and Tennessee cited above powerfully suggest otherwise. Development impact fees are an appropriate way to fund a particular

development's proportional increase in those burdens, especially in light of our constitutional preference for "user pays" funding over taxes. (Cal. Const., art. XIII A, § 1 [Prop. 13]; art. XIII C, § 2 [Prop. 218]; art. XIII D, §§ 4, 6 [same]; Gov. Code, §§ 53722–53723 [Prop. 62].) The point is reflected in this record, too: "Since it is difficult for a single project to pay the total cost of community facilities, local officials often charge development fees to help pay the project's proportional share of the cost". (AA5:67:1263, 1283.)

If the Act is intended to mandate the remedy in *Hamilton* and *Walker* in **any** case of insufficient findings under Section 66001, subdivision (d), local agencies will have powerful incentives to avoid development impact fees in favor of ordinances compelling developers alone to bear their developments' impacts on public resources or build elsewhere. This is plainly not what the development-industry sponsors of these bills had in mind.

While these more stringent requirements may need to comply with the nexus and proportionality requirements of *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374,[6] the result will no doubt be increased

[6] Those cases apply to such mitigation measures imposed ad hoc, as by quasi-judicial conditions of a development approval. Current law makes their standards inapplicable to mitigations required by local

development costs as developers are compelled to construct their own infrastructure before development may begin rather than fund their proportionate share of the cost of works that may follow their developments.

The short-term effect of *Hamilton*, *Walker*, and this suit may benefit a few developers or property owners, therefore, but the broader effect will be higher, not lower, development costs.

C. Section 66001, Subdivision (d) Does Not Apply to Fees Collected Within the Last Five Years

As the City ably argues, Section 66001, subdivision (d)'s five-year findings are required only as to fee proceeds an agency has held for more than five years. (RB, pp. 49–53.) Amici agree and write here only to further show that Section 66001, subdivision (d)'s legislative history supports this interpretation.

When SB 1693 added Section 66001, subdivision (d)'s current language regarding five-year findings, the Legislature consistently

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legislation, although the Mitigation Fee Act requires them nevertheless. (*San Remo Hotel L.P. v. City and County of San Francisco* (2002) 27 Cal.4th 643, 666–670.) The U.S. Supreme Court just heard argument in *Sheetz v. County of El Dorado*, Case No. 22-1074, in which the petitioner seeks to alter that rule. Decision is expected by the end of this term.

described this provision as: "Requir[ing] local agencies to make specified findings every five years with respect to any portion of a fee remaining unspent five or more years after deposit." (AA5:67:1345, 1353, 1364, 1368.) The bill's sponsor, Senator Monteith, similarly described SB 1693 as "requiring local government to make specified findings every five years on any developer fees **that are unspent five or more years after they have been collected**." (AA5:67:1371 [emphasis added].)

The Legislature could not have been plainer. Section 66001, subdivision (d) is meant to ensure that governments do not hold onto fee revenues for more than five years without justification. It has no application to fees held for less than five years.

IV. CONCLUSION

For the reasons discussed above, Amici respectfully urge the Court to conclude that any remedy need not be the refunds *Hamilton* and *Walker* compelled, but remand to the City to exercise the legislative discretion the Legislature preserved for it.

DATED: January 17, 2024

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CERTIFICATE OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204

I certify that, under rule 8.204(c)(1) for the California Rules of Court, this Amicus Brief is produced using 13-point type and contains 3,684 words, including footnotes, but excluding the application for leave to file, tables, and this certificate. This is fewer than the 14,000 words permitted by the rule. In preparing this certificate, I relied on the word count generated by Microsoft Word for Office 365, included in Microsoft Office 365 Pro Plus.

DATED: January 17, 2024

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