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August 3, 2012

Via Messenger

The Honorable Conrad L. Rushing, Presiding Justice
The Honorable Eugene M. Premo, Associate Justice
The Honorable Franklin D. Elia, Associate Justice
The Court of Appeal, Sixth Appellate District
333 West Santa Clara Street, Suite 1060
San Jose, California 95113

Re: **REQUEST FOR PUBLICATION – *Sterling Park L.P. v. City of Palo Alto***
Court of Appeal Case No. H036663 (6th Dist., July 17, 2012)

Dear Presiding Justice Rushing and Associate Justices Premo and Elia:

The League of California Cities respectfully requests that the Court of Appeals opinion in *Sterling Park L.P. v. City of Palo Alto ("Sterling Park")* be certified for publication. The case warrants publication because it applies existing rules to facts significantly different from those stated in published opinions and involves issues of continuing public interest. *See* California Rules of Court, rule 8.1105(c). *Sterling Park* addresses and provides long-awaited guidance on an issue of continuing public interest: whether the protest procedures included in the Mitigation Fee Act are applicable to the payment of in-lieu fees for affordable housing.

THE INTERESTS OF THE LEAGUE OF CALIFORNIA CITIES

The League of California Cities is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which comprises 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as having such significance:

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THE OPINION APPLIES AN EXISTING RULE OF LAW TO A SET OF FACTS SIGNIFICANTLY DIFFERENT FROM THOSE STATED IN PUBLISHED OPINIONS (RULE 8.1105(c)(2))

Sterling Park warrants publication because it extends the existing rule of law established in *Trinity Park v. City of Sunnyvale* (2011) 193 Cal. App. 4th 1014 *("Trinity Park")* to the payment of in-lieu fees for affordable housing, a factual situation not considered in *Trinity Park.*

Trinity Park considered whether protest procedures allowed under the Mitigation Fee Act (Gov. Code §§66000—66025) could be used to challenge affordable housing requirements and evade the usually short 90-day limitations period to challenge planning, zoning and subdivision conditions (*see* Gov. Code §§65009(c), 66499.37). *Trinity Park* considered the application of the Mitigation Fee Act's protest procedures (§§66020, 66021) to a requirement that a developer sell homes in its development project as affordable housing (*see* 193 Cal.App.4th at 1020). The Court of Appeal determined that these protest procedures applied only where an exaction was "imposed . . . for the purpose of 'defraying all or a portion of the cost of public facilities related to the development project' " (*id.* at 1039). Since the privately owned affordable housing required in *Trinity Park* was not a *public* facility, the Court held that the MFA's protest procedures did not apply to this requirement.

Sterling Park considered whether the protest procedures allowed under the Mitigation Fee Act were applicable to the payment of *in-lieu fees* for affordable housing, a factual issue not considered in *Trinity Park.* The Court of Appeal held that the rule established in *Trinity Park* clearly applied to the in-lieu fees imposed by the City of Palo Alto because, as in *Trinity Park,* the fees were not to be used to pay for a *public* facility but rather for privately owned affordable housing (*see Sterling Park,* slip op. at 9). The Court rejected plaintiff's argument that the payment of *fees* for affordable housing could be distinguished from the required sale of affordable units (*see id.*).

While the outcome of *Sterling Park* may appear self-evident given the rule established in *Trinity Park,* the issue of whether *in-lieu fees* for affordable housing are subject to provisions of the Mitigation Fee Act has been raised in at least four cases in the last four years without resolution in a published case. In particular:

- In *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles* (2009) 175 Cal.App.4th 1396, 1404 n.12, 1412 n.15), plaintiffs alleged that affordable housing in-lieu fees were paid for a "public facility" and so were subject to the Mitigation Fee Act, but the issue was not reached by either the trial court or the Court of Appeals.

- In *Building Industry Assn. of Central California v. City of Patterson* (2009) 171 Cal.App.4th 886, 897 n.13, the Court of Appeal declined to express an opinion

on whether "affordable housing in-lieu fees" were "public facilities" subject to the Mitigation Fee Act in general.

- In *Mead v. City of Cotati*, 2008 U.S. Dist. LEXIS 94238, 34-43 (N.D. Cal. Nov. 19, 2008) the District Court for Northern California concluded that an affordable housing requirement with an in-lieu fee option was not subject to the Mitigation Fee Act (although it did not reach the issue of the applicability of the protest procedures), but the Court did not publish the case.

- In *Action Apartment Assn. v. City of Santa Monica* (2008) 166 Cal. App. 4th 456, 461-62), plaintiffs claimed that affordable housing in-lieu fees were used to pay for a "public facility" and so were subject to Government Code sections 66000 through 66022, but the claim was not discussed in the published opinion.

In light of the repeated litigation regarding the applicability of the Mitigation Fee Act to in-lieu fees, this Court of Appeal's determination that the in-lieu fees imposed in *Sterling Park* are not subject to the Mitigation Fee Act's protest procedures is an important extension of the holding in *Trinity Park*. The decision will clarify the applicability of the Mitigation Fee Act and avoid continued litigation over this unresolved issue.

THE OPINION INVOLVES A LEGAL ISSUE OF CONTINUING PUBLIC INTEREST (RULE 8.1105(c)(6))

Sterling Park is of particular importance to the many cities and counties in California that have adopted affordable housing requirements and imposed affordable housing in-lieu fees. A 2007 report found that 170 California cities and counties had imposed affordable housing requirements on new development, and that almost 90 percent of the communities allowed developers to pay in-lieu fees as an option to providing the housing on-site. (*See* Non-Profit Housing Association of Northern California, *Affordable by Choice: Trends in California Inclusionary Housing Programs* (2007) at 3, 17.) For these cities and counties, *Sterling Park* clarifies that affordable housing conditions must be challenged within 90 days after approval.

Sterling Park is also of particular importance to affordable housing advocates because it clarifies that the usual 90-day statutes of limitation imposed by the planning and zoning laws apply to *all* affordable housing conditions and cannot be challenged long after a project is approved pursuant to the protest procedures permitted by the Mitigation Fee Act. Similarly, it provides notice to the development community that affordable housing conditions must be challenged within 90 days after planning approval.

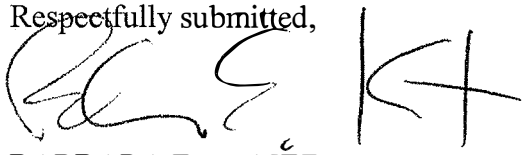
Finally, a decision by the Court of Appeals to publish *Sterling Park* would be in the interests of judicial economy, preventing the filing of repetitive lawsuits that require the courts to re-decide substantially the same issues.

CONCLUSION

By publishing *Sterling Park*, the Court of Appeal will establish that affordable housing conditions of approval may not be challenged through the protest procedures of the Mitigation Fee Act and must be challenged within 90 days of a local government's planning, zoning, or subdivision decision. All parties involved in the development process – cities, counties, builders, and advocates of affordable housing – will benefit from clear rules regarding affordable housing conditions and from the Court of Appeal's extension of *Trinity Park* to in-lieu affordable housing fees.

Accordingly, the League of California Cities respectfully requests that this Court certify *Sterling Park v. City of Palo Alto* for publication.

Respectfully submitted,



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Enclosures: Sterling Park L.P. v. City of Palo Alto Opinion; Proof of Service

Filed 7/17/12 Sterling Park v. City of Palo Alto CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

STERLING PARK, L.P. et al., Plaintiffs and Appellants, v. CITY OF PALO ALTO, Defendant and Respondent.	H036663 (Santa Clara County Super. Ct. No. 1-09-CV154134)

Defendant City of Palo Alto (City) conditions its approval of certain residential development applications upon the developer's compliance with City's below market rate (BMR) housing program. Plaintiffs Sterling Park, L.P. and Classic Communities, Inc., sued City, challenging the BMR housing exactions City required for approval of their development. The trial court granted summary judgment for City, finding that the complaint was time-barred. Plaintiffs had argued that the action was governed by a portion of the Mitigation Fee Act (Gov. Code, §§ 66020, 66021),[1] which allows a developer to obtain reimbursement of certain development fees paid under protest. Under those sections, the statute of limitations does not begin to run until City gives the developer notice of the amount of the fees and the right to file a protest. (§ 66060, subd. (d)(1).) Plaintiffs claimed that City never gave them the notice required to trigger the running of the statute and, therefore, their suit was filed timely.

[1] Hereafter all unspecified section references are to the Government Code.

The trial court rejected plaintiffs' position and accepted City's contention that the applicable statute of limitations is section 66499.37, which gives a plaintiff 90 days from the date of the "decision . . . concerning a subdivision" to challenge the decision. Since the decision conditioning plaintiffs' subdivision upon compliance with the BMR program occurred well over a year before suit was filed, the time to file suit had expired. The court allowed the defense even though City had not cited section 66499.37 in its answer. We shall affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs owned two lots totaling 6.5 acres on West Bayshore Road in Palo Alto. Plaintiffs planned to demolish existing commercial improvements and construct 96 residential condominiums on the site. The proposed development was subject to City's BMR housing program, which is set forth in the Palo Alto Municipal Code (PAMC). PAMC section 18.14.030, subdivision (a) provides, "Developers of projects with five or more units must comply with the requirements set forth in Program H-36 of the City of Palo Alto Comprehensive Plan." Program H-36 of City's Comprehensive Plan appears in the plan's Housing Element, Chapter 4 (hereafter, Program H-36). As pertinent here, Program H-36 requires that housing projects involving the development of five or more acres must provide at least 20 percent of all units as BMR units. "*For an application to be determined complete*, *the developer must agree to one or a combination* of the following requirements or equivalent alternatives that are acceptable to the City." (Program H-36, p. 26, italics added.) One of the requirements applicable to plaintiffs' project is that three fourths of the BMR units "be affordable to households in the 80 to 100 percent of median income range, and one-fourth may be in the higher price range of between 100 to 120 percent of the County's median income." (*Ibid.*) The developer may provide off-site units or vacant land if providing on-site units is not feasible. If no other alternative is feasible, "a cash payment to the City's Housing Development Fund, in lieu of providing BMR units or land, may be accepted." (*Id.* at p. 27.) The in-lieu payment

for projects of five acres or more is 10 percent of the greater of the actual sales price or fair market value of each unit. (*Ibid.*)

Plaintiffs submitted their initial application for approval of the project in 2005. City's planning staff found the project would not cause any significant adverse environment impact and recommended a negative declaration as allowed by the California Environmental Quality Act. (See Cal. Code Regs., tit. 14, § 15020.) City's Architectural Review Board (ARB) recommended approval of the design and site plan in March 2006.

In a letter dated June 16, 2006 (the BMR letter), City set forth the terms of an agreement between plaintiffs and City's planning staff pursuant to which plaintiffs agreed to provide 10 BMR units on the project site and pay in-lieu fees of 5.3488 percent of the actual selling price or fair market value of the market-rate units, whichever was higher. The BMR letter contains an estimate of the anticipated sales price for the BMR units and states that the price may increase or decrease depending upon the market at the time of the actual sale. The opening paragraph of the BMR letter states: "This letter summarizes the agreement between Classic Communities, Inc. . . . and the Director of the Department of Planning and Community Environment . . . regarding satisfaction of the provisions of the City of Palo Alto's [BMR] Program for the [ARB] application for the 96-unit residential condominium development . . . . [¶] . . . You and Planning Division staff have discussed and negotiated the terms of this agreement, and the signature of Classics corporate officers on this letter confirms that Classics agrees to these terms and conditions. On March 23, 2006 the Director issued a conditional approval letter of the ARB's approval of the Project, with execution of the BMR agreement listed as one of the Project's conditions. The Director's action was appealed and the appeals will be considered by the City Council in June 2006. You have also submitted an application for a vesting tentative subdivision map to allow the residential units to be sold separately as condominiums. The provisions of this BMR letter agreement must be referenced in the

subdivision map conditions and incorporated into a formal BMR agreement to be recorded concurrently with the final subdivision map agreement, if the Director's approval is upheld by Council." Scott Ward, vice president of plaintiff, Classic Communities, Inc., executed the BMR letter on June 19, 2006, the same day the city council upheld the ARB's approval of the project.

City approved plaintiffs' application for a tentative subdivision map on November 13, 2006. In recommending approval of the application for a final subdivision map City staff noted, "The map satisfies all approval conditions for the Tentative Map, including the preparation of a Subdivision Improvement Agreement and BMR Agreement." The application for a final subdivision map was approved September 10, 2007. A document entitled "Regulatory Agreement Between Sterling Park, LP and City of Palo Alto Regarding [BMR] Units" was executed on September 11, 2007 and recorded November 16, 2007. This document referred to and attached the 2006 BMR letter.

Over a year later, when the new units were being finished, City began requesting conveyance of the BMR designated homes. On July 13, 2009, plaintiffs submitted a "notice of protest" to City, claiming the prior agreements were signed under duress and arguing that the BMR housing requirements are invalid. When City failed to respond to the protest, plaintiffs filed this case on October 5, 2009. Plaintiffs sought an injunction and a judicial declaration that the BMR requirements are invalid and "that the City may not lawfully impose such BMR affordable housing fees or exactions as a condition of providing building permits or other approvals for the Project." Plaintiffs' third cause of action cited sections 66020 and 66021 and sought "restitution or equitable relief for the compelled conveyance of houses under restrictive terms."

City at first demurred to the complaint, arguing that the third cause of action was barred by the time limit found in section 66020 and that the entire action was barred by Code of Civil Procedure section 338, subdivision (a), which applies a three-year time limit to actions based upon "a liability created by statute." The trial court overruled the

demurrer. Thereafter, City filed an answer, including as its fifth affirmative defense, "the applicable statutes of limitation," again citing Code of Civil Procedure section 338 and section 66020. Later, City's answers to form interrogatories also cited these two code sections as bases for City's defense. City did not mention section 66499.37 in any of these documents.

Trial was set for September 27, 2010. At City's request, time was shortened for notice of cross motions for summary judgment. City moved for summary judgment on statute of limitations grounds, this time adding section 66499.37 to its argument that the case was filed too late. Plaintiffs' cross-motion for summary judgment argued that City's BMR housing program was invalid as a matter of law. Plaintiffs' opposition to City's motion maintained that section 66499.37 did not apply and that City was barred from relying upon that code section because it had not raised the defense in its answer.

The trial court granted City's summary judgment motion and denied plaintiffs' cross-motion. In a footnote, the trial court acknowledged that City had not raised section 66499.37 in its answer. Citing *Cruey v. Gannett Co.* (1998) 64 Cal.App.4th 356, 367 (*Cruey*) and *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 385, the trial court concluded that it would allow the defense because plaintiffs "will not suffer any prejudice thereby."

Plaintiffs moved for a new trial or for an order vacating the trial court's prior order arguing, in more detail than it had in its summary judgment papers, that City was barred from relying upon section 66499.37. The trial court denied the motions and entered judgment in favor of City. Plaintiffs have timely appealed from the judgment.

II. CONTENTIONS

The two statutes of limitations that we will consider, section 66020 and section 66499.37, are found, respectively, in the Mitigation Fee Act (§ 66000 et seq.) and the Subdivision Map Act (§ 66410 et seq.). Both impose short time periods for filing an action to challenge specified development fees. Section 66020 imposes a 180-day time

period and section 66499.37 is a 90-day statute. Given the differing procedural requirements of the two code sections, this action might be timely under section 66020 but not under section 66499.37. Not surprisingly, plaintiffs maintain that section 66020 is the applicable statute and that section 66499.37 is inapplicable. Plaintiffs also argue that even if section 66499.37 is the applicable statute of limitations, City was not entitled to rely upon it because it had failed to raise it at any time prior to filing its summary judgment motion.[2]

III. STANDARD OF REVIEW

"An appellate court reviewing a judgment of dismissal after an order granting summary judgment must review the record de novo to determine whether the moving party is entitled to summary judgment as a matter of law or whether there exist genuine issues of material facts. [Citation.] [¶] Code of Civil Procedure section 437c, subdivision (o)(2), mandates a burden-shifting which requires defendant to show a complete defense to the action or that one or more elements of the cause of action cannot be established. If defendant makes this showing, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or defense thereto." (*Cruey*, *supra*, 64 Cal.App.4th at p. 361.)

With regard to plaintiffs' claim that the trial court erred in considering the defense of section 66499.37, we view that decision as we would a grant of leave to amend the answer. The grant or denial of leave to amend is an exercise of discretion that should not be disturbed on appeal unless it has been clearly abused. (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 296-297.)

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[2] In its summary judgment motion City also cited the statute of limitations contained in section 65009, another code section it had not listed in its answer. City relies upon that section as well as section 66499.37 on appeal. Since we conclude that section 66499.37 applies, we do not consider the alternative argument.

IV. DISCUSSION

A. Applicability of sections 66020 and 66021

We begin with plaintiffs' argument that this case is subject to section 66020. Sections 66020 and 66021 allow a developer to protest the imposition of "a fee, tax, assessment, dedication, reservation, or other exaction . . . the payment or performance of which is required to obtain governmental approval of a development . . ." (§ 66021, subd. (a)) and to obtain a refund of any overpayments (§ 66020, subd. (e)). Protest is effected by paying the fees and serving a written notice of protest upon the local agency. (*Id.* subd. (a).) The local agency must provide the applicant written notice of the amount of the fees when imposing them and notice that the applicant has 90 days to file a protest. (*Id.* subd. (d)(1).) An applicant who has filed a protest then has 180 days to file an action "to attack, review, set aside, void, or annul the imposition of the fees, dedications, reservations, or *other exactions* imposed . . . ." (*Id.* subd. (d)(2), italics added.)

Plaintiffs argue that the phrase "other exactions" as used in these code sections applies to the BMR housing requirements imposed upon them here. The argument is identical to one raised in *Trinity Park, L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014 (*Trinity Park*), in which developers (including one of the plaintiffs in this case) challenged another city's BMR housing requirements. In *Trinity Park*, the City of Sunnyvale conditioned approval of a development permit and tentative subdivision map upon compliance with that city's BMR housing ordinance. (*Id.* at p. 1021.) The developers signed an agreement with the city, promising to sell five units at specified below market prices but about a year later the developers sent the city a notice protesting the requirements under sections 66020 and 66021. (*Trinity Park*, *supra*, at p. 1022.) The developers then sued the city seeking to invalidate the BMR agreement, which they maintained had been executed under duress. The trial court sustained the city's demurrer citing section 66499.37. (*Trinity Park*, *supra*, at pp. 1045-1046.)

On appeal, the developers argued that the BMR requirements fell within the meaning of sections 66020 and 66021. Since the city had never provided notice of the right to protest, their protest and subsequent civil suit were timely. This court rejected the argument, holding that these code sections did not apply. The phrase "other exactions" as used in sections 66020 and 66021 does not refer to the universe of exactions that may be imposed in connection with a development. Rather, "the statutory language of the relevant provisions of the Mitigation Fee Act and the legislative history of sections 66020 and 66021 demonstrate that the Legislature intended that the exactions that may be protested under the Mitigation Fee Act are those exactions imposed for the purpose of 'defraying all or a portion of the cost of public facilities related to the development project.' " (*Trinity Park*, *supra*, 193 Cal.App.4th at p. 1043, quoting § 66000, subd. (b) and citing *Barratt American, Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 696.) Because the Sunnyvale municipal code stated that the purpose of the BMR requirement was to " 'enhance the public welfare by ensuring that future housing development contributes to the attainment of the housing goals,' " and, because there was no suggestion in the material under review that the BMR requirements were designed to defray the cost of public facilities related to the development, this court concluded that sections 66020 and 66021 were inapplicable to the BMR housing concessions imposed in that case. (*Trinity Park*, *supra*, at pp. 1040-1041.)

The present case is almost identical to *Trinity Park*.[3] As explained in the preface to Program H-36, "[City's] BMR program is intended to increase the supply of for-sale housing and rental housing for individuals and families whose incomes are insufficient to afford market rate housing." (Program H-36, at p. 26.) PAMC section 18.14.020 states that the purposes of the BMR housing program are to "[e]ncourage the development and

[3] The parties did not have benefit of *Trinity Park* as the opinion was filed about a month after judgment was entered in this case.

availability of housing affordable to a broad range of households with varying income levels . . . . [¶] . . . [p]romote the city's goal to add affordable housing units to the city's housing stock . . . . [¶] . . . [o]ffset the demand on housing that is created by new development. . . . [¶] . . . [m]itigate environmental and other impacts that accompany new residential and commercial development . . . . [and] [¶] . . . increase the supply of for-sale and rental housing for families and individuals employed in Palo Alto whose incomes are insufficient to afford market rate housing. . . ." These listed purposes do not describe an attempt to defray the cost of public facilities necessitated in a development project. The purpose is to increase the number of residences in the City where people of modest means can afford to live. Under *Trinity Park*, sections 66020 and 66021 do not apply.

Plaintiffs argue that *Trinity Park* was wrongly decided and that demands for affordable housing units or in-lieu fees are "exactions" subject to sections 66020 and 66021. Plaintiffs repeat many of the same arguments raised in the *Trinity Park* case. We decline to revisit the issue. Plaintiffs also argue that even if *Trinity Park*'s interpretation of "other exaction" is correct, it is distinguishable because plaintiffs were required to pay in-lieu fees whereas the *Trinity Park* plaintiffs were not required to pay fees. The distinction makes no difference that we can see. The in-lieu fees are imposed if City determines that BMR designation of the required number of on-site units, off-site units, or vacant land is not feasible. Fees are payable to City's Housing Development Fund. There is no evidence that the fees go to defray the cost of public facilities necessitated by the new development.

Plaintiffs further argue that *Trinity Park* is distinguishable because PAMC section 18.14.020, subdivisions (c) and (d) indicate that City's BMR exactions are intended for the purposes *Trinity Park* described. We disagree. Subdivision (d) of PAMC section 18.14.020 describes one purpose of the ordinance, which is to "[m]itigate environmental and other impacts that accompany new residential and commercial development by protecting the economic diversity of the city's housing stock, with the goal of reducing

traffic, transit and related air quality impacts, promoting jobs/housing balance and reducing the demands placed on transportation infrastructure in the region." That is, one purpose of the BMR housing program is to improve air quality and reduce demand on regional transportation infrastructure by insuring that people of all economic levels can afford to live and work within the city limits rather than commute. This has nothing to do with defraying the cost of public facilities necessitated by the new development itself.

Subdivision (c) of PAMC section 18.14.020, states that another purpose of the BMR housing ordinance is to "[o]ffset the demand on housing that is created by new development." The only way a housing development could create a demand for housing would be if the new development eliminated existing housing. We need not decide whether an exaction imposed to offset lost housing could be subject to sections 66020 and 66021 because plaintiffs' project did not demolish existing housing; the BMR exactions imposed upon them had nothing to do with replacement housing.

Given the express purposes of City's BMR housing program, and for all the reasons set forth in *Trinity Park, supra*, 193 Cal.App.4th 1014, we conclude that sections 66020 and 66021 do not apply to the BMR housing concessions exacted from plaintiffs in this case.

B. Applicability of Section 66499.37

We now turn to section 66499.37, which provides, "Any action or proceeding to attack, review, set aside, void, or annul the decision of [a] . . . legislative body concerning a subdivision, or of any of the proceedings, acts, or determinations taken, done, or made prior to the decision, or to determine the reasonableness, legality, or validity of any condition attached thereto, including, but not limited to, the approval of a tentative map or final map, shall not be maintained by any person unless the action or proceeding is commenced and service of summons effected within 90 days after the date of the decision. . . ." As the court stated in *Timberidge Enterprises, Inc. v. City of Santa Rosa* (1978) 86 Cal.App.3d 873, 886, section 66499.37 "manifests a legislative purpose that a

decision such as that of the City, approving a subdivision map and attaching a *condition* thereto, shall be judicially attacked within 180 days [now 90 days] of that decision, or not at all." (See also, *Aiuto v. City & County of San Francisco* (2011) 201 Cal.App.4th 1347, 1357 [facial challenge to BMR ordinance subject to § 66499.37; time began to run when the ordinance was passed].)

In reviewing the trial court's conclusion that section 66499.37 applies to this action, we again turn to *Trinity Park*, *supra*, 193 Cal.App.4th at page 1044, where this court concluded that section 66499.37 applied to the BMR housing concession imposed in that case because the action challenged "a condition of subdivision approval . . . ." (*Trinity Park*, *supra*, at p. 1044.) Here, plaintiffs had to promise to comply with City's BMR housing program before City would even consider the project. Plaintiffs' project called for the merger of two lots into a 6.5 acre parcel and the subdivision of that parcel into 96 separate condominiums. It would be difficult to characterize the action as anything but a challenge to City's decision to make compliance with its BMR program a condition of subdivision approval.

Plaintiffs argue that because the conditions were part of an agreement or had something to do with ARB approval, there was no "decision . . . on a subdivision." Plaintiffs also maintain that compliance with the BMR housing program is "a gateway condition" for having any development application accepted for processing, whether or not it involved a subdivision. This, according to plaintiffs, means that BMR conditions are imposed independently of the Subdivision Map Act and, thus, section 66499.37 does not apply. But plaintiffs challenge the application of the BMR housing program *to them.* Plaintiffs' project involved the subdivision of the property and, therefore, required approval of a subdivision map pursuant to the Subdivision Map Act. City's approval of the final subdivision map was conditioned upon plaintiffs' agreement to the terms contained in the BMR letter. The case clearly challenges the "validity of any condition attached" to City's "decision . . . concerning a subdivision." The 90-day limitations

period of section 66499.37 runs from the date of the decision being challenged. Here, the decision being challenged is City's decision imposing the BMR exactions with which plaintiffs would have to comply for approval of their subdivision. Whether we consider the date of that decision to be June 2006, when City issued the BMR letter, November 2006, when City approved the tentative subdivision map, or September 2007, when the final subdivision map application was approved, plaintiffs' 2009 complaint was untimely.

C. City's Failure to Plead Section 66499.37

Having concluded that section 66499.37 applies to make this case time-barred, we now consider whether the trial court abused its discretion in considering it. The court acknowledged that City had not named that code section in its answer but concluded, citing *Cruey*, *supra*, 64 Cal.App.4th 356, that City could raise the defense on summary judgment because plaintiffs would not be prejudiced.

Cruey was a defamation case in which the defendant moved for summary judgment based upon the affirmative defense of privilege, which he had not raised in his answer. (*Cruey*, *supra*, 64 Cal.App.4th at pp. 366-367.) The Court of Appeal observed: "Although the general rule is that a privilege must be pled as an affirmative defense [citation], recent California authority suggests an exception where the complaint alleges facts indicating applicability of a defense or where the affirmative defense is raised during a summary judgment proceeding. [Citations.] . . . Given the long-standing California court policy of exercising liberality in permitting amendments to pleadings at any stage of the proceedings [citation] and of disregarding errors or defects in pleadings unless substantial rights are affected [citation], we believe that a party should be permitted to introduce the defense of privilege in a summary judgment procedure so long as the opposing party has adequate notice and opportunity to respond. Here, the defense of privilege was asserted in the opening brief in the motion for summary judgment. [The plaintiff] took the opportunity to respond by arguing the inapplicability of the privilege. He has not shown that he was prejudiced by the process." (*Id.* at p. 367; accord, *Nieto v.*

Blue Shield of California Life & Health Ins. Co. (2010) 181 Cal.App.4th 60, 75.) The same reasoning applies here.

It is true, as plaintiffs argue, that "the pleadings set the boundaries of the issues to be resolved at summary judgment." (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 648.) Thus, where the exclusive remedy of the Workers' Compensation statutes (Lab. Code, § 3600 et seq.) did not appear in the answer, the defendant could not rely upon it to support a motion for summary judgment. (*Dorado v. Knudsen Corp.* (1980) 103 Cal.App.3d 605, 611.) In such a case, the judgment must be reversed and the defendant "permitted to amend to raise this defense." (*Ibid.*) The *Dorado* court noted that the defendant would not necessarily be "entitled to a summary judgment on the basis of the showing already made." (*Ibid.*)

In this case, City raised the question of timeliness from its very first pleading. By citing *FPI Development, Inc. v. Nakashima, supra*, 231 Cal.App.3d at page 385, the trial court referred to that court's concern that "it would be unfair to ground a ruling on the inadequacy of the pleadings *if* the pleadings, read in the light of the facts adduced in the summary judgment proceeding, give notice to the plaintiffs of a potentially meritorious defense." Given City's persistent focus on timeliness, plaintiffs necessarily had notice of the potential defense. And, unlike the situation in *Dorado*, City would be entitled to judgment on the basis of the showing already made. Had the trial court denied the motion based upon City's failure to plead section 66499.37, given the courts' policy of liberality in allowing amendments to a pleading, City would have amended its answer and then succeeded, either by way of another summary judgment motion or at trial, on the statute of limitations defense. Indeed, the lack of prejudice to which the trial court referred here meant that plaintiffs' action would fail in the long run, even if the court rejected City's defense on summary judgment. Under the circumstances, the exception to the waiver rule described by *Cruey* applies. There was nothing to be gained by denying

the motion. Accordingly, the trial court did not abuse its discretion in allowing the defense.

Plaintiffs' reliance upon *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 912-913, and *Minton v. Cavaney* (1961) 56 Cal.2d 576, 581, is misplaced. Both cases concern a statute of limitations that was raised for the first time on appeal. That is not the case here; the issue was fully litigated below. *Mitchell v. County Sanitation Dist.* (1957) 150 Cal.App.2d 366, is equally unavailing because that case involved the public entity's express, intentional waiver of the statute and the appellate court's refusal to allow the defense on appeal. (*Id.* at p. 369.)

Plaintiffs also argue that due to its delay in raising section 66499.37, City is estopped from relying upon it altogether. We reject that argument as well. "The sine qua non of estoppel is that the party claiming it relied to its detriment on the conduct of the party to be estopped." (*Orange County Water Dist. v. Association of Cal. Water etc. Authority* (1997) 54 Cal.App.4th 772, 780.) Plaintiffs cannot show reliance, let alone detrimental reliance. The estoppel doctrine does not apply.

We conclude that the trial court did not abuse its discretion in allowing City the defense of section 66499.37 in its motion for summary judgment. Section 66499.37 bars the instant action as a matter of law.

V. DISPOSITION

The judgment is affirmed. Respondent is entitled to its costs on appeal.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.

PROOF OF SERVICE BY U.S. MAIL

Sterling Park v. City of Palo Alto

Sixth District Court of Appeal Case No.: H036663

I, Cristy L. Houchins, certify and declare as follows:

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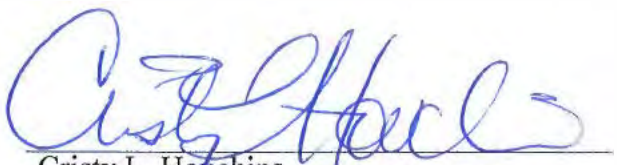

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