Opinion: Extortion under the color of law

By Larry Weitzman

In February, I wrote a column where I explained the failure of the county to follow the Mitigation Fee Act that was codified in the California Government Code as sections 66000-66008. It had two purposes, one of which was to restrain local agencies from imposing development fees that were unrelated to a development project and a second purpose was to give government a way around Proposition 13.

The act allows agencies to attach a fee to each parcel developed that could be used for public needs of the new development like fire stations, parks and other infrastructure necessary to the new development.

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“For all unexpended development fees, the agency must make findings every fifth year that identify how the fee will be used, demonstrate a reasonable relationship between the fee and the purpose for which it is charged, identify all sources and amounts of funding anticipated to complete financing for incomplete improvements that were identified when the fee was established, and designate the approximate dates for that funding to be deposited into a dedicated account. (§ 66001, subd. (d)(1). The public agency must make these findings ‘in connection with’ the annual report the act requires the agency

to provide. (§ 66001, subd. (d)(2). If these findings are not made, ‘the local agency shall refund the moneys in the account or fund’ to the then current owners of the affected properties on a prorated basis plus accrued interest. (§ 66001, subds. (d)(2) & (e); see Home Builders, supra, 185 Cal.App.4th at pp. 565-566.).” That language isn’t mine; it was copied from an opinion of the California Fourth District Court of Appeals in the case of Walker vs. the city of San Clemente filed on Aug. 28, 2015.

It is a case directly about the Mitigation Fee Act where San Clemente collected about $10 million for additional beach parking from developers. The need for parking didn’t materialize. But the city kept the money instead of refunding it and was sued. The court found that that the city didn’t file a sufficient five-year Nexus study as the city failed to make all the required findings and had other defects. The court went on to say that according to the language of Section 66001(d)(2) such a refund is required as the statute says, “If the findings are not made as required by this subdivision, the local agency shall refund the moneys in the account or fund. The court continued, “A statute’s clear and unambiguous language controls, and therefore we need not resort to extrinsic sources or rule of statutory interpretation.”

The court decision also bars the continuation of any noncompliant district to collect fees into the future. This decision creates serious problems for our county.

El Dorado County collects money for about a dozen districts from developers, homebuilders and families under the Mitigation Fee Act and most are out of compliance in not filing the necessary paperwork (a Nexus study) every five years with the Board of Supervisors. About 20 years ago the Board of Supervisors also adopted an annual Nexus study ordinance (13.020.20) modeled after the aforementioned state statute, but it doesn’t say that if there is a failure to comply, the unexpended fund balance must be returned and these

balances are in the millions of dollars. If EDC is required to refund that money, it goes to the current homeowner of record.

It was about 2½ years ago when the county auditor notified the then CAO that EDC was out of compliance with County Ordinance 13.020.20 and Mitigation Fee Act (Government Code Section 66000-66008) districts that collect money and the collection of those developers' fees needs to stop. Every supervisor, including Norma Santiago, county counsel and even Mike Applegarth was put on notice directly by email. Why Applegarth? It was his job to gather and review the required Nexus studies in the CAO's office. He didn't. I guess he was too busy complaining to the BOS that the auditor was a bully.

The issue finally rose up earlier this year about the time I wrote a column in March about county mischief. There was an issue with the El Dorado Water (Fire) District that wanted to be paid about $95,000 from the fees collected. Until they filed the proper paperwork pursuant to Section 66001(d)(2), they didn't get the money.

Bigger problems face the county now. EDC has collected $330,000 in developers' fees for the El Dorado Hills Public Safety Facility. Money has been collected for more than eight years; no Nexus studies have been filed. With this new Walker vs. San Clemente decision, if a homeowner files for a refund of the developers' fees, the county will have to return the entire fund balance to the respective homeowners of record. Even worse EDC has no plans to build this facility.

But that is small potatoes. The El Dorado Hills CSD Rec Fee has a cash balance of $4.9 million. According to my research, there has been no compliance with the Mitigation Fee Act five-year Nexus study since 2007 that has been filed with the BOS. If they are still collecting fees, that would also be a violation of the law. That could amount to several thousand dollars per homeowner.

Cameron Park CSD Fire fee has a cash balance of $1.2 million, and according to records no Mitigation Fee Act Nexus study has been filed since 2005. If refunds by homeowners of record within that district file for a refund, it’s another million plus dollars the county will have to refund. This same problem could cause the Lake Valley Fire Protection District to refund about $81,000.

Other districts appear to be out of compliance all subject to refunds. Minutes of the BOS and former Supervisor Norma Santiago appear to have determined that the Nexus study for half a dozen Fire Protection Districts Capital Improvement Plans were out of compliance in 2011. The minutes from Aug. 11, 2011, reflected the following language: “1) Deny the adoption of the resolution and maintain the fees at the current rates as previously approved by the board.”

In addition the minutes stated “direct staff to return in approximately 90 days with recommendations for changes in current policies and ordinances to incorporate consistent methodology among all districts.” Then CAO Terri Daly ignored the direction of the BOS. Perhaps a firing or two might have been a good object lesson at this point. Or perhaps Norma Santiago let the CAO slide because maybe Daly promised to find Santiago a job.

But the BOS even today shows a pattern of feckless behavior that could cost the taxpayers of this county. In early June, the CAO, BOS and Supervisor Sue Novasel received an email pointing out these clear violations of the Mitigation Fee Act. They have been well aware of this problem since then. By now they must have permanent body indentions from sitting on their hands.

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