1. AUSTIN v. COUNTY OF EL DORADO PC-20150633

(1) Defendant El Dorado Hills Community Services District's Demurrer to 1st Amended Complaint and Petition.

(2) Defendant County of El Dorado's Demurrer to 1st Amended Complaint and Petition.

Defendant El Dorado Hills Community Services District's Demurrer to 1st Amended Complaint and Petition.

Plaintiffs filed a 1st amended complaint asserting causes of action for declaratory relief and petitions for writ of mandate related to 11 categories of impact fees collected by defendants/respondents County of El Dorado (County), the El Dorado Hills County Water District, the County of El Dorado Community Development Agency, Development Services Division, and the El Dorado Hills Community Services District (CSD).

Defendant CSD demurs to the 1st amended complaint and petition on the following grounds: the 1st amended complaint and petition are barred by either the one year statute of limitations set forth in Code of Civil Procedure, § 340(a) for actions seeking a statutory penalty or forfeiture, or, in the alternative, the three year statute of limitations set forth in Code of Civil Procedure, § 338(a) for statutory liability actions; Government Code, § 65010 applies to actions under Government Code, § 66001(d)(1) seeking refund of local agency impact fees where the statutorily required five year nexus study and findings are allegedly not made and defendants have not alleged sufficient facts to establish the required prejudice, substantial injury resulting from the local agency's error, and probability of a different result absent the error; substantial compliance with the required five year nexus study and findings negates any basis for forcing a refund of the monies collected and held by defendant County for defendant CSD; and the 1st and 4th causes of action for declaratory relief are merely derivative of the 2nd and 3rd causes of action for writ of mandate, therefore, they should not be allowed to stand.

Plaintiffs oppose the demurrers on the following grounds: plaintiff has alleged sufficient facts to state the causes of action asserted in the 1st amended complaint and petition; Walker v. San Clemente (2015) 239 Cal.App.4th 1350 holds that the four year statute of limitation set forth in Code of Civil Procedure, § 343 applies to the Mitigation Fee Act; the mandatory refund is not a penalty or forfeiture and is instead remedial in nature; a new limitation period commences upon the collection of each new fee once defendants fail to make timely five year findings; Government Code, § 65010 does not apply, because the statute addresses errors, neglect, and omissions, while Section 66001(d) relates to the complete failure of a local agency to comply with the express terms of a statute; CSD's failure to timely file the mandated five year findings does not involve improper admission or rejection of evidence, it does not seek to invalidate of set aside anything, and the proceeding is not an evidentiary based requirement or failing on the part of defendants; defendant cites no case authority applying Section 65010 to the Mitigation Fee Act; defendant CSD has admitted that it did not comply with the Act by submission of defendant's Exhibit H; Exhibit H is the minutes of defendant County's Board of Supervisors meeting of June 28, 2016 wherein the Board made the five year findings and stated they supplemented findings made on June 23, 2013, which amounts to an attempt to retroactively make the required findings years after the time limitation and eight months after this action was filed; defendant CSD's Board of Directors five year findings on November 12, 2015 is of no force or effect and did not comply with the Act, because the County Board must make the findings; and the plaintiff have pled four distinct causes of action.

Defendant CSD replied to the opposition.

Statutes of Limitation

"'A demurrer on the ground of the bar of the statute of limitations will not lie where the action may be, but is not necessarily barred.' (*Moseley v. Abrams* (1985) 170 Cal.App.3d 355, 359,

216 Cal.Rptr. 40; *Liptak v. Diane Apartments, Inc.* (1980) 109 Cal.App.3d 762, 775, 167 Cal.Rptr. 440.) It must appear clearly and affirmatively that, upon the face of the complaint, the right of action is necessarily barred. (*Valvo v. University of Southern California* (1977) 67 Cal.App.3d 887, 895, 136 Cal.Rptr. 865; *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1155, 281 Cal.Rptr. 827.) This will not be the case unless the complaint alleges every fact which the defendant would be required to prove if he were to plead the bar of the applicable statute of limitation as an affirmative defense. (*Farris v. Merritt* (1883) 63 Cal. 118, 119.)" (Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort (2001) 91 Cal.App.4th 875, 881.)

"A general demurrer based on the statute of limitations is only permissible where the dates alleged in the complaint show that the action is barred by the statute of limitations. (See *Saliter v. Pierce Brothers Mortuaries* (1978) 81 Cal.App.3d 292, 300, 146 Cal.Rptr. 271.) The running of the statute must appear 'clearly and affirmatively' from the dates alleged. It is not sufficient that the complaint might be barred. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403, 44 Cal.Rptr.2d 339.) If the dates establishing the running of the statute of limitations do not clearly appear in the complaint, there is no ground for general demurrer. The proper remedy 'is to ascertain the factual basis of the contention through discovery and, if necessary, file a motion for summary judgment....' (*United Western Medical Centers v. Superior Court* (1996) 42 Cal.App.4th 500, 505, 49 Cal.Rptr.2d 682.)" (Roman v. County of Los Angeles (2000) 85 Cal.App.4th 316, 324-325.)

Plaintiffs allege: the required five year findings have not been made since February 28, 2006, which were untimely since they were due on December 27, 2013; the deadline for the last five year findings was December 27, 2013; the CSD Board allegedly adopted five year findings on November 12, 2015, however, the County Board made no findings and the County

Board actually rejected the CSD findings, thereby making the CSD findings invalid; CSD is nearly three years overdue in making the required findings and despite such failure CSD impact fees have continued to be collected, such fees have been retained, and the local agency has not refunded the fees in its custody; and as of April 30, 2016 defendants held $6,959,559 in CSD impact fees. (1st Amended Complaint and Petition, paragraphs 18-20.)

Referring to Defendant's Exhibit C in support of the demurrer, defendant CSD argues that while plaintiffs allege that the statutorily mandated findings were not made since February 28, 2006, the public record establishes that defendant CSD made such findings in a development impact mitigation fee report that was accepted by the County Board on June 25, 2013. (Defendant CSD's Memorandum of Points and Authorities in Support of Demurrer, page 11, lines 8-20.)

The court may disregard facts alleged in the complaint that are contrary to matters judicially noticed. "The courts, however, will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed. (*Alphonzo E. Bell Corp. v. Bell View Oil Syndicate* (1941) 46 Cal.App.2d 684 [116 P.2d 786]; *Chavez v. Times-Mirror Co.* (1921) 185 Cal. 20 [195 P. 666].) Thus, a pleading valid on its face may nevertheless be subject to demurrer when matters judicially noticed by the court render the complaint meritless." (Del E. Webb Corp. v. Structural Materials Co. (1981) 123 Cal.App.3d 593, 604.)

In order to determine whether not the CSD development impact mitigating fee report itself can be considered as setting forth the five year findings required in 2013, the court must first identify what "local agency" was required to make the findings.

"(c) "Local agency" means a county, city, whether general law or chartered, city and county, school district, special district, authority, agency, any other municipal public corporation or district, or other political subdivision of the state." (Government Code, § 66000(c).)

"(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: ¶ (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."(Government Code, § 66001(a).)

Therefore, the local agency is the governmental entity that takes the action to establish or impose a fee as a condition to approval of a development project by the local agency.

Defendant CSD admits that defendant County established the subject impact mitigation fee by enacting County Ordinance Code, Chapter 13.30 and that the subject fee was created by agreement with the County to collect the fee amount requested by defendant CSD. (See Defendant CSD's Memorandum of Points and Authorities in Support of Demurrer, page 5, lines 1-14 and Defendant CSD's Exhibit A.) Therefore, the "local agency" that must make the required five year findings is the defendant County Board of Supervisors.

The County Board minutes of the June 25, 2013 meeting does not include a County Board resolution making the required five year findings and, in fact, CSD's Development Impact

Mitigation Fee Report, which did not purport to be a Nexus Study, was only received and filed by the County Board without any further action as indicated in the Board's approval of the Consent Calendar, which included the CSD report as item number 2. (See Defendant CSD's Exhibit E.)

The allegation that the required findings were not made when due in 2013 is not contrary to the fact judicially noticed relating to the public record of the County Board meeting of June 25, 2013.

Citing Walker v. San Clemente (2015) 239 Cal.App.4th 1350, 1362 and 1370, plaintiffs argue that since the appellate court found the four year statute of limitation set forth in Section 343 applied to actions seeking refunds of impact fees where insufficient findings were made, that statute of limitation also applies where no findings were made.

The appellate court in Walker did not discuss Sections 340, or 338 and the issue of whether or not these statutes applied, rather than the catch all limitation set forth in Section 343. In fact, the appellate court did not even analyze or discuss why Section 343 applied. It merely noted that the trial court applied that statute of limitation and the plaintiff did not contest it. The appellate court stated: "Plaintiffs contend the trial court erred in finding the four-year limitations period in Code of Civil Procedure section 343 barred Plaintiffs' challenges to the City's 2004 Five-Year Report. Plaintiffs, however, do not contend the trial court applied the wrong limitations period or miscalculated when that period expired. Instead, Plaintiffs contend the trial court erred in failing to apply the equitable doctrines of estoppel and unjust enrichment to prevent the City from asserting the statute of limitations as a defense." (Walker v. City of San Clemente (2015) 239 Cal.App.4th 1350, 1370.)

The Walker opinion is not authority for the legal proposition that the Section 343 four year statute applies to the exclusion of the limitations set forth in Sections 340 and 338. "Cases do

not stand for propositions that were never considered by the court. (*Tosco Corp. v. General Ins. Co.* (2000) 85 Cal.App.4th 1016, 1021, 102 Cal.Rptr.2d 657.)" (Mares v. Baughman (2001) 92 Cal.App.4th 672, 679.) "An opinion is not authority for a point not raised, considered, or resolved therein. (E.g., *People v. Castellanos* (1999) 21 Cal.4th 785, 799, fn. 9, 88 Cal.Rptr.2d 346, 982 P.2d 211; *San Diego Gas & Elec. Co. v. Superior Court* (1996) 13 Cal.4th 893, 943, 55 Cal.Rptr.2d 724, 920 P.2d 669.)" (Styne v. Stevens (2001) 26 Cal.4th 42, 57-58.) The Walker opinion merely accepted the trial court's selection of the four year statute of limitation, because it was uncontested and not because it analyzed the issue of which statute of limitation applied and determined that only Section 343 applied.

"(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). ¶ (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." (Government Code, § 66001(d)(1).)

"(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)." (Emphasis added.) (Government Code, § 66001(d)(2).)

"…shall refund to the then current record owner or owners of the lots or units, as identified on the last equalized assessment roll, of the development project or projects on a prorated basis…" (Government Code, § 66001(e).)

Plaintiffs contend that every fee collected past the date defendants failed to make the mandated five year findings is a breach or violation of the statute from which a cause of action accrues, thereby making the instant action timely.

Defendant CSD argues that the fee can not be invalidated, voided or terminated merely because the findings are not made timely and that the opinion in Walker finding that an action on the allegedly flawed 2004 five year findings could not be maintained, because it was untimely contradicts plaintiffs' argument that the payment of each fee after the flawed findings or after the failure to timely make the findings would give rise to an action for refund.

The appellate court in Walker, supra, did not analyze or discuss any issue relating to the timeliness of an action for refund of fees collected after the allegedly flawed 2004 findings or the continuous accrual doctrine. The opinion merely addressed the issues of application of the equitable doctrines of estoppel and unjust enrichment to prevent the City from asserting the statute of limitations as a defense. The Walker opinion did not discuss or set forth a legal principle that fee collections after failure to comply with the five year findings requirement could be retained and did not create a cause of action for failure to refund fees collected while there were no timely findings. "Cases do not stand for propositions that were never considered by the court. (*Tosco Corp. v. General Ins. Co.* (2000) 85 Cal.App.4th 1016, 1021, 102 Cal.Rptr.2d 657.)" (Mares v. Baughman (2001) 92 Cal.App.4th 672, 679.) "An opinion is not authority for a point not raised, considered, or resolved therein. (E.g., *People v. Castellanos* (1999) 21 Cal.4th

785, 799, fn. 9, 88 Cal.Rptr.2d 346, 982 P.2d 211; *San Diego Gas & Elec. Co. v. Superior Court* (1996) 13 Cal.4th 893, 943, 55 Cal.Rptr.2d 724, 920 P.2d 669.)" (Styne v. Stevens (2001) 26 Cal.4th 42, 57-58.) Therefore, the Walker opinion is not legal precedent holding that the refund provision of the statute is strictly limited to a single breach that occurs when the local agency fails to make the mandated five year findings on the five year anniversary date. In addition, the parties have not cited any controlling legal precedent that construes the subject statute as only being violated on the five year anniversary date when findings are not made or, in the alternative, there can be multiple, continuing breaches/violations until such time as the required findings are made by the local agency. This leaves the court to construe the statute in light of its legislative intent.

Section 66001(d)(2) mandates the governmental agency to refund all funds held in an account or impact mitigation fund where the local agency fails to meet its mandatory duty to make findings every five years. That duty to refund is not limited to money on deposit in the account or fund as of the date of default in making the required five year findings. Therefore, it is reasonable to construe that statute as imposing a continuing requirement to refund all funds collected after that date until the required findings are made. Such a construction would provide the Local Agency with a continuing incentive to make the findings despite the passage of the date to make such findings and support the legislative intent to impose the five year findings requirement in order to prevent a local agency from collecting and holding a development fee for an extended period of time without a clear and demonstrable plan to use the fee for the purpose it was imposed. The appellate court in Walker, supra, touched on the issue in its discussion of the Legislature's intent relating to the refund requirement.

"The five-year findings requirement establishes "a mechanism ... to guard against unjustified fee retention" by a local agency (*Home Builders, supra,* 185 Cal.App.4th at p. 565,

112 Cal.Rptr.3d 7; see *Garrick, supra,* 3 Cal.App.4th at p. 332, 4 Cal.Rptr.2d 897), and it ensures the agency "refund[s] any portion of [a development] fee not expended within five years unless the local agency can demonstrate a reasonable relationship between the unexpended fee and its purpose" (*Centex, supra,* 19 Cal.App.4th at p. 1361, 24 Cal.Rptr.2d 48). The Legislative Counsel's Digest when the Act was initially enactment confirms the requisite five-year findings require a local agency to "reexamine the necessity for the unexpended balance of the fee, as specified, every 5 years, and refund to then current owner or owners of the development project any unexpended portion of the fee for which need cannot be demonstrated at the time of this review, together with any accrued interest." (Legis. Counsel's Dig., Assem. Bill No. 1600 (1987-1988 Reg. Sess.) 4 Stats. 1987, ch. 927, Summary Dig., p. 301.) [Footnote omitted.] This reexamination and refund requirement prevents a local agency from collecting and holding a development fee for an extended period of time without a clear and demonstrable plan to use the fee for the purpose it was imposed." (Emphasis added.) (Walker v. City of San Clemente (2015) 239 Cal.App.4th 1350, 1363–1364.)

Walker also held that it would be improper to remand the matter to the local agency to correct deficient findings in order to avoid having to refund the funds to the property owners. The appellate court stated: "The City contends the trial court should have remanded the matter to the City to make new findings correcting the "technical deficienc[ies]" in the City's five-year findings rather than requiring the City to forfeit the unexpended impact fees that the City properly had collected. The Act's plain language prohibits this remedy. ¶ Section 66001, subdivision (d)(2), unmistakably declares, "If the findings are not made as required by this subdivision, the local agency *shall refund the moneys* in the account or fund...." (Italics added.) A statute's clear and unambiguous language controls, and therefore we need not resort to extrinsic sources or rules of statutory interpretation to determine the statute's meaning.

(*Huntington Continental Townhouse Association, Inc. v. Miner* (2014) 230 Cal.App.4th 590, 598–599 [179 Cal.Rptr.3d 47]; *People v. Pellecer* (2013) 215 Cal.App.4th 508, 512 [155 Cal.Rptr.3d 477].) In any event, the Act's legislative history repeatedly confirms that in passing section 66001, subdivision (d), the Legislature intended that a local agency must refund unexpended development fees if the agency fails to make the required five-year findings. (See, e.g., Legis. Counsel's Dig., Assem. Bill No. 1600 (1987–1988 Reg. Sess.) 4 Stats. 1987, Summary Dig., p. 301; Legis. Counsel's Dig., Sen. Bill No. 1693 (1995–1996 Reg. Sess.) 6 Stats. 1996, Summary Dig., pp. 214–215.) ¶ The City does not claim section 66001, subdivision (d), is ambiguous, nor does the City cite to any other provision of the Act or its legislative history that allows any remedy other than a refund when a local agency fails to make the required five-year findings. Instead, the City claims a remand is ordinarily the remedy ordered when a local agency applies an incorrect legal standard (see *SN Sands, supra,* 167 Cal.App.4th at p. 194, 83 Cal.Rptr.3d 885) or fails to make "required legislative findings" (see *Manufactured Home Communities, Inc. v. County of San Luis Obispo* (2008) 167 Cal.App.4th 705, 715, 84 Cal.Rptr.3d 367 (*Manufactured Home*); *Respers v. University of Cal. Retirement System* (1985) 171 Cal.App.3d 864, 873, 217 Cal.Rptr. 594 (*Respers*); *Mountain Defense League v. Board of Supervisors* (1977) 65 Cal.App.3d 723, 731–732, 135 Cal.Rptr. 588 (*Mountain Defense*); *Hadley v. City of Ontario* (1974) 43 Cal.App.3d 121, 128–130 [117 Cal.Rptr. 513] (*Hadley*)). What may or may not be the ordinary remedy, however, is irrelevant when the Legislature unambiguously establishes the statutory remedy for a violation of its laws." (Walker v. City of San Clemente (2015) 239 Cal.App.4th 1350, 1367-1368.)

The appellate court also rejected an argument that remand was required to avoid the local agency being subjected to a forfeiture. "The City also argues the trial court should have remanded the matter for the City to correct its findings because the law abhors forfeitures and

therefore requires statutes imposing them to be strictly construed. (See *Enfantino v. Superior Court* (1984) 162 Cal.App.3d 1110, 1113, 208 Cal.Rptr. 829; *Hernandez v. Temple* (1983) 142 Cal.App.3d 286, 290, 190 Cal.Rptr. 853.) Although it is true forfeitures are disfavored, it does not logically follow that forfeitures are unenforceable. To the contrary, courts must enforce unambiguous statutory forfeitures and may not avoid them by rewriting the statute under the guise of statutory construction. (*People v. Indiana Lumbermens Mutual Ins. Co.* (2010) 190 Cal.App.4th 823, 829–830 [118 Cal.Rptr.3d 555].) Assuming section 66001, subdivision (d)'s refund provision constitutes a forfeiture, the City offers no strict or other construction of the provision that would allow the City to avoid refunding the unexpended Beach Parking Impact Fees based on its failure to make the required five-year findings." (Walker v. City of San Clemente (2015) 239 Cal.App.4th 1350, 1369.)

In other words, the legislative intent of the statute is readily apparent that the failure to comply can not be fixed retroactively by making belated findings. Therefore, each time a fee is collected after failing to make the required findings is an entirely new breach or violation of the statute, because the findings have not been made. Therefore, the amount collected and on deposit must be immediately refunded under the provisions of Section 66001(d)(2). To construe the statute otherwise would reward the local agency by allowing it to continue to collect and amass funds with impunity without having complied with the statutory requirements during the five year period of time after the findings were due where no one brought an action within the statutory limitation period calculated by the date that the agency was required to issue the mandated five year findings. That would be contrary to the Legislature's intent to prevent a local agency from collecting and holding a development fee for an extended period of time without a clear and demonstrable plan to use the fee for the purpose it was imposed. The continuous accrual doctrine appears to apply under the circumstances alleged in the 1st

amended complaint and petition. Plaintiffs allege that despite failure to make the required five year findings, CSD impact fees have continued to be collected, retained, and not refunded. (1st Amended Complaint and Petition, paragraph 20.)

Regardless of which statute of limitation applies, one year, three year or four year, it does not appear clearly and affirmatively that, upon the face of the 1st amended complaint and petition, the right of action is necessarily barred. There remains claims for refund of fees collected within the one year, three year and four year statutes. "A demurrer does not lie to a portion of a cause of action. (Citations Omitted.)" (PH II, Inc. v. Superior Court (1995) 33 Cal.App.4th 1680, 1682.) Where a portion of the cause of action is defective on the face of the complaint, the appropriate remedy is to bring a motion to strike that portion of the complaint. (PH II, Inc., supra at pages 1682-1683.)

The court need not and does not reach the issue regarding which statute of limitation applies.

The demurrer to the entire 1st amended complaint and petition on the ground that it is barred by the statute of limitations is overruled.

Applicability of Government Code, § 65010 to Causes of Action

Defendant CSD argues that Government Code, § 65010 imposes additional elements to actions for refund of impact mitigation fees for violating Section 66001(d)(1), which require allegations of fact that the failure to make the statutorily mandated five year findings was prejudicial, the party complaining suffered substantial injury from the failure, and a different result would have been probable if he failure had not occurred.

"(b) No action, inaction, or recommendation by any public agency or its legislative body or any of its administrative agencies or officials on any matter subject to this title shall be held invalid or set aside by any court on the ground of the improper admission or rejection of

evidence or by reason of any error, irregularity, informality, neglect, or omission (hereafter, error) as to any matter pertaining to petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals, or any matters of procedure subject to this title, unless the court finds that the error was prejudicial and that the party complaining or appealing suffered substantial injury from that error and that a different result would have been probable if the error had not occurred. There shall be no presumption that error is prejudicial or that injury was done if the error is shown." (Government Code, § 65010(b).)

"…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)." (Government Code, § 66001(d)(2).)

The statutory mandate to refund the moneys in the account or fund in order to prevent a local agency from collecting and holding a development fee for an extended period of time without a clear and demonstrable plan to use the fee for the purpose it was imposed does not mandate any finding of prejudice, substantial injury or a different result had the error not occurred. In fact, case law finds that the initial burden of production of evidence in Mitigation Fee Act challenge cases falls on the local agency and should the burden of production be met, the burden then falls on the party challenging the fee to establish a requisite degree of belief in the mind of the trier of fact or the court that the fee is invalid, because the fee's use and the need for the public facility are not reasonably related to the development project on which the fee is imposed or the amount of the fee bears no reasonable relationship to the cost of the public facility attributable to the development.

"If a fee subject to the Mitigation Fee Act "is challenged, the local agency has the burden of producing evidence in support of its determination. [Citation.] The local agency must show that a valid method was used for imposing the fee in question, one that established a reasonable

relationship between the fee charged and the burden posed by the development." (*Homebuilders Assn. of Tulare/Kings Counties, Inc. v. City of Lemoore* (2010) 185 Cal.App.4th 554, 561, 112 Cal.Rptr.3d 7.) The "burden of producing evidence is not equivalent to the burden of proof." (*Id.* at p. 562, 112 Cal.Rptr.3d 7.) Rather, while the "agency has the obligation to produce evidence sufficient to avoid a ruling against it on the issue" (*ibid.*), the party "challenging an impact fee has to show that the record before the local agency clearly did not support the underlying determinations regarding the reasonableness of the relationship between the fee and the development." (*Ibid.*) ¶ "Accordingly, the local agency has the initial burden of producing evidence sufficient to demonstrate that it used a valid method for imposing the fee in question, one that established a reasonable relationship between the fee charged and the burden posed by the development. If the local agency does not produce evidence sufficient to avoid a ruling against it on the validity of the fee, the [party] challenging the fee will prevail. However, if the local agency's evidence is sufficient, the [challenging party] must establish a requisite degree of belief in the mind of the trier of fact or the court that the fee is invalid, e.g., that the fee's use and the need for the public facility are not reasonably related to the development project on which the fee is imposed or the amount of the fee bears no reasonable relationship to the cost of the public facility attributable to the development." (*Homebuilders Assn. of Tulare/Kings Counties, Inc. v. City of Lemoore, supra,* 185 Cal.App.4th at p. 562, 112 Cal.Rptr.3d 7.)" (City of San Marcos v. Loma San Marcos, LLC (2015) 234 Cal.App.4th 1045, 1058–1059.)

The opinion in City of San Marcos, did not impose upon the complaining party any additional burdens to prove prejudice, substantial injury or that a different result would have been probable if the failure had not occurred. The failure to impose such elements on an action

to challenge the findings or for a refund in the event that no findings are made is to be expected, because Section 65010 only applies to technical procedural omissions.

"Section 65010, formerly section 65801, is a "curative statute" enacted by the Legislature for the purpose of "terminating recurrence of judicial decisions which had invalidated local zoning proceedings for technical procedural omissions. [Citations.]" (*City of Sausalito v. County of Marin* (1970) 12 Cal.App.3d 550, 557–558, 90 Cal.Rptr. 843.)" (Rialto Citizens for Responsible Growth v. City of Rialto (2012) 208 Cal.App.4th 899, 921.)

Violation of a statutory mandate by failure to make five year findings, which was designed to guard against unjustified fee retention by a local agency, can not be categorized as a technical procedural omission.

"If two seemingly inconsistent statutes conflict, the court's role is to harmonize the law. (*People v. Pieters* (1991) 52 Cal.3d 894, 899, 276 Cal.Rptr. 918, 802 P.2d 420 ["[w]e do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness' [Citation]"]; *Chatsky & Associates v. Superior Court* (2004) 117 Cal.App.4th 873, 876, 12 Cal.Rptr.3d 154 ["Where, as here, we are called upon to interpret two seemingly inconsistent statutes to determine which applies under a particular set of facts, our goal is to harmonize the law [citation] and avoid an interpretation that requires one statute to be ignored. [Citation]"].) We presume that the Legislature, when enacting a statute, was aware of existing related laws and intended to maintain a consistent body of rules. (*People v. Vessell* (1995) 36 Cal.App.4th 285, 289, 42 Cal.Rptr.2d 241.) If inconsistent statutes cannot otherwise be reconciled, "a particular or specific provision will take precedence over a conflicting general provision." (*Ibid.;* see also § 1859.)" (Manhattan Loft, LLC v. Mercury Liquors, Inc. (2009) 173 Cal.App.4th 1040, 1055–1056.)

"We construe statutes and regulations in a manner that carries out the legislative or regulatory intent. (*Trope v. Katz* (1995) 11 Cal.4th 274, 280, 45 Cal.Rptr.2d 241, 902 P.2d 259.) We must " 'ascertain the intent of the [drafters] so as to effectuate the purpose' " of the regulations. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230, 110 Cal.Rptr. 144, 514 P.2d 1224.) The words used are the primary source for identifying the drafter's intent. (Ibid.) We give those words their usual and ordinary meaning where possible. (Code Civ. Proc., § 1858; *Trope*, supra, 11 Cal.4th at p. 280, 45 Cal.Rptr.2d 241, 902 P.2d 259.) We give significance to every word, avoiding an interpretation that renders any word surplusage. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798-799, 268 Cal.Rptr. 753, 789 P.2d 934.) We also interpret the words of a regulation in context, harmonizing to the extent possible all provisions relating to the same subject matter. (*County of Alameda v. Pacific Gas & Electric Co.* (1997) 51 Cal.App.4th 1691, 1698, 60 Cal.Rptr.2d 187.)" (Simi Corp. v. Garamendi (2003) 109 Cal.App.4th 1496, 1505-1506.)

"Every statute should be construed and applied "with reference to the whole system of law of which it is a part so that all may be harmonized and have effect." (*Travelers Indemnity Co. v. Gillespie* (1990) 50 Cal.3d 82, 100, 266 Cal.Rptr. 117, 785 P.2d 500; *Select Base Materials v. Board of Equal.* (1959) 51 Cal.2d 640, 645, 335 P.2d 672.) In doing so, we should seek to avoid absurd or anomalous results. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1221, 275 Cal.Rptr. 729, 800 P.2d 1159.)' (Goodstein v. Superior Court (1996) 42 Cal.App.4th 1635, 1641.) "Finally, we do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citation.]" ' [Citations.]" (*Scripps Health*, supra, 72 Cal.App.4th at p. 332, 85 Cal.Rptr.2d 86.)" (Russell v. Douvan (2003) 112 Cal.App.4th 399, 403.)

Section 66001(d) imposes a strict requirement to make findings every five years with a mandated refund of fees should sufficient findings not be made. Failure to make such findings or making insufficient findings is not merely a technical procedural matter. Imposing additional burdens of proof would significantly interfere with the intent of the statute to guard against unjustified fee retention by a local agency. The court finds that Section 65010 does not apply to Section 66001(d)(2) proceedings.

The demurrer to the causes of action on the ground that the 1st amended complaint and petition failed to include allegations of fact that the failure to make the statutorily mandated five year findings was prejudicial, the party complaining suffered substantial injury from the failure, and a different result would have been probable if the failure had not occurred is overruled.

Pleading Distinct Causes of Action

Defendant CSD contends that it is improper to seek declaratory relief and a writ of mandate for violation of a single primary right related to alleged failure to make the five year findings and argues that the demurrers to the two declaratory relief causes of action must be sustained.

Code of Civil Procedure section 1060 permits an original action, and authorizes a claim for declaratory relief to be filed alone or with other relief and the court may make binding declarations as to the rights and duties of the parties whether or not further relief is or could have been claimed at that time. (Ball v. FleetBoston Financial Corp. (2008) 164 Cal.App.4th 794, 800; and 5 Witkin, California Procedure (5th ed.2008) Pleading, § 849, page 264.) However, where the declaratory relief cause of action is wholly derivative of a cause of action that the court has sustained a demurrer to, the declaratory relief cause of action is also fatally defective. (Ball v. FleetBoston Financial Corp. (2008) 164 Cal.App.4th 794, 800.)

"The remedy of declaratory relief is cumulative and does not restrict other remedies. (Code Civ. Proc., § 1062.) Moreover, the court's power to render declaratory relief is discretionary,

and it may refuse to exercise the power "in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." (*Id.,* § 1061.) The mere fact that another remedy is available will not suffice as sufficient grounds for a court to decline a declaration, because declaratory relief is not intended to be exclusive or extraordinary. Rather, it is alternative and optional. (*In re Claudia E., supra,* 163 Cal.App.4th at p. 634, 77 Cal.Rptr.3d 722.) A court is only justified in refusing a declaration because of the availability of another remedy when it concludes that more effective relief could and should be obtained by another procedure, and for that reason a declaration will not serve a useful purpose. (*Ibid.*)" (Kirkwood v. California State Auto. Assn. Inter-Insurance Bureau (2011) 193 Cal.App.4th 49, 59–60.)

""Declaratory relief is an equitable remedy, which is available to an interested person in a case 'of actual controversy relating to the legal rights and duties of the respective parties....' (Code Civ. Proc., § 1060....)" (*In re Claudia E.* (2008) 163 Cal.App.4th 627, 633, 77 Cal.Rptr.3d 722.) " 'The purpose of a declaratory judgment is to "serve some practical end in quieting or stabilizing an uncertain or disputed jural relation." ' [Citation.] 'Another purpose is to liquidate doubts with respect to uncertainties or controversies which might otherwise result in subsequent litigation [citation].' [Citation.] The proper interpretation of a statute is a particularly appropriate subject for judicial resolution. [Citations.] Additionally, judicial economy strongly supports the use of declaratory relief to avoid duplicative actions to challenge an agency's statutory interpretation or alleged policies. [Citation.] [¶] The remedy of declarative relief is cumulative and does not restrict any other remedy...." (*Ibid.*) Thus, the fact that "another remedy is available is an insufficient ground for refusing declaratory relief." (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 433, 121 Cal.Rptr.2d 844, 49 P.3d 194.) Moreover, declaratory relief is generally available to settle the parties' rights with respect to future actions,

and not to correct conduct that occurred in the past." (California School Boards Assn. v. State (2011) 192 Cal.App.4th 770, 790.)

The California Supreme Court has stated with regards to primary rights: "As we explained in *Crowley v. Katleman* (1994) 8 Cal.4th 666, 681-682, 34 Cal.Rptr.2d 386, 881 P.2d 1083: ¶ "The primary right theory is a theory of code pleading that has long been followed in California. It provides that a 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty. [Citation.] The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. [Citation.] ... ¶ "As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered. [Citation.] It must therefore be distinguished from the *legal theory* on which liability for that injury is premised: 'Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief.' [Citation.] The primary right must also be distinguished from the *remedy* sought: 'The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other.' [Citation.]" (Mycogen Corp. v. Monsanto Co. (2002) 28 Cal.4th 888, 904-905.)

Defendant has not cited any legal authority for the proposition that alternative theories and remedies can not be pled in the same pleading.

Furthermore, while the court recognizes that an action for declaratory relief is not appropriate to review an administrative decision or be joined with a writ of mandate reviewing an administrative determination (City of Pasadena v. Cohen (2014) 228 Cal.App.4th 1461, 1466–1467.), the instant action does not seek review of an administrative decision or

administrative determination. It seeks to enforce the statutory requirement to refund impact fees allegedly wrongfully held after a failure to make a decision/determination.

The demurrers to the two declaratory relief causes of action are overruled.

Defendant County of El Dorado's Demurrer to 1st Amended Complaint and Petition.

Plaintiffs filed a 1st amended complaint asserting causes of action for declaratory relief and a petition for writ of mandate related to 11 categories of impact fees collected by defendants/respondents County of El Dorado (County), the El Dorado Hills County Water District, the County of El Dorado Community Development Agency, Development Services Division, and the El Dorado Hills Community Services District (CSD).

Defendant County demurs to all causes of action on the following grounds: the entire action is barred by the applicable statutes of limitation; the 1st and 4th causes of action for declaratory relief are fatally defective, because declaratory relief is not appropriate to review an administrative decision and they merely restate the causes of action for writs of mandate; plaintiff has failed to state any cause of action against defendant County, because plaintiff failed to allege the requirements of Government Code, § 65010; and plaintiff failed to name as defendants private developers with traffic impact mitigation (TIM) fee reimbursement agreements with the County, who are necessary parties whose interests will be affected by the instant action seeking refund of those TIM fees.

Plaintiffs oppose the demurrers on various grounds.

Defendant County replied to the opposition and objected to plaintiffs' request for judicial notice.

Defendant County's Objection to Plaintiffs' Request for Judicial Notice in Opposition to the Demurrer

Plaintiffs request the court to take judicial notice of excerpts of the County's Annual Financial Report for the year ending June 30, 2016. Defendant County objects to the court taking judicial notice on the ground that the County is unable to find anywhere in the plaintiff's opposition where the report is cited and the court can not take judicial notice of the truth of the contents of the report.

While the court may take judicial notice of the fact that the County's Annual Financial Report is on file as a public record, the court can not take judicial notice of the truth of the facts stated therein. "While we may take judicial notice of the existence of the audit report, Web sites, and blogs, we may not accept their contents as true. (*Unruh–Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 364, 76 Cal.Rptr.3d 146.) "When judicial notice is taken of a document, however, the truthfulness and proper interpretation of the document are disputable. [Citation.]" (*StorMedia Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457, fn. 9, 84 Cal.Rptr.2d 843, 976 P.2d 214.) ¶ Although the audit report is a government document, we may not judicially notice the truth of its contents. In *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063, 31 Cal.Rptr.2d 358, 875 P.2d 73, overruled on another ground in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276, 63 Cal.Rptr.3d 418, 163 P.3d 106, the plaintiff sought judicial notice of a report of the United States Surgeon General and a report to the California Department of Health Services. The California Supreme Court denied the request: "While courts may notice official acts and public records, 'we do not take judicial notice of the truth of all matters stated therein.' [Citations.] '[T]he taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom, since in many instances what

is being noticed, and thereby established, is no more than the existence of such acts and not, without supporting evidence, what might factually be associated with or flow therefrom.' " (*Mangini v. R.J. Reynolds Tobacco Co., supra,* at pp. 1063–1064, 31 Cal.Rptr.2d 358, 875 P.2d 73.)" (Ragland v. U.S. Bank Nat. Assn. (2012) 209 Cal.App.4th 182, 193–194.)

The objection is sustained.

Statutes of Limitation

"'A demurrer on the ground of the bar of the statute of limitations will not lie where the action may be, but is not necessarily barred.' (*Moseley v. Abrams* (1985) 170 Cal.App.3d 355, 359, 216 Cal.Rptr. 40; *Liptak v. Diane Apartments, Inc.* (1980) 109 Cal.App.3d 762, 775, 167 Cal.Rptr. 440.) It must appear clearly and affirmatively that, upon the face of the complaint, the right of action is necessarily barred. (*Valvo v. University of Southern California* (1977) 67 Cal.App.3d 887, 895, 136 Cal.Rptr. 865; *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1155, 281 Cal.Rptr. 827.) This will not be the case unless the complaint alleges every fact which the defendant would be required to prove if he were to plead the bar of the applicable statute of limitation as an affirmative defense. (*Farris v. Merritt* (1883) 63 Cal. 118, 119.)" (Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort (2001) 91 Cal.App.4th 875, 881.)

"A general demurrer based on the statute of limitations is only permissible where the dates alleged in the complaint show that the action is barred by the statute of limitations. (See *Saliter v. Pierce Brothers Mortuaries* (1978) 81 Cal.App.3d 292, 300, 146 Cal.Rptr. 271.) The running of the statute must appear 'clearly and affirmatively' from the dates alleged. It is not sufficient that the complaint might be barred. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403, 44 Cal.Rptr.2d 339.) If the dates establishing the running of the statute of limitations do not clearly appear in the complaint, there is no ground for general

demurrer. The proper remedy 'is to ascertain the factual basis of the contention through discovery and, if necessary, file a motion for summary judgment....' (*United Western Medical Centers v. Superior Court* (1996) 42 Cal.App.4th 500, 505, 49 Cal.Rptr.2d 682.)" (Roman v. County of Los Angeles (2000) 85 Cal.App.4th 316, 324-325.)

Plaintiffs allege: there are 11 categories of impact fees; the mandated dates to make the five year findings for the various funds are December 27, 2013, June 30, 2011, June 30, 2012, and June 30, 2013; defendant County is the Local Agency that is required to make the findings; on August 2, 2011 the County Board rejected six fire districts' five year findings; defendant County's findings made after December 2, 2015, particularly those findings made after this action was refiled, did not nullify any party's obligations to issue refunds; and defendants failed to file nexus findings for any of the districts within the five year period, which requires refund of the money on deposit in the impact mitigation fee accounts. (1st Amended Complaint and Petition, paragraphs 15, 18-20, 23, 24, 28, 34, 38, 43, 56, 58-60, and 63.)

Defendant County contends that the one year statute of limitations set forth in Code of Civil Procedure, § 340(a) for actions seeking a statutory penalty or forfeiture and/or the three year statute of limitations set forth in Code of Civil Procedure, § 338(a) for statutory liability actions apply, thereby making the filing of the action on December 2, 2015 untimely.

Citing Walker v. San Clemente (2015) 239 Cal.App.4th 1350, 1362 and 1370, plaintiffs argue that since the appellate court found the four year statute of limitation set forth in Section 343 applied to actions seeking refunds of impact fees where insufficient findings were made, that statute of limitation also applies where no findings were made.

The appellate court in Walker did not discuss Sections 340, or 338 and the issue of whether or not these statutes applied, rather than the catch all limitation set forth in Section 343. In fact, the appellate court did not even analyze or discuss why Section 343 applied. It merely noted

that the trial court applied that statute of limitation and the plaintiff did not contest it. The appellate court stated: "Plaintiffs contend the trial court erred in finding the four-year limitations period in Code of Civil Procedure section 343 barred Plaintiffs' challenges to the City's 2004 Five-Year Report. Plaintiffs, however, do not contend the trial court applied the wrong limitations period or miscalculated when that period expired. Instead, Plaintiffs contend the trial court erred in failing to apply the equitable doctrines of estoppel and unjust enrichment to prevent the City from asserting the statute of limitations as a defense." (Walker v. City of San Clemente (2015) 239 Cal.App.4th 1350, 1370.)

The Walker opinion is not authority for the legal proposition that the Section 343 four year statute applies to the exclusion of the limitations set forth in Sections 340 and 338. "Cases do not stand for propositions that were never considered by the court. (*Tosco Corp. v. General Ins. Co.* (2000) 85 Cal.App.4th 1016, 1021, 102 Cal.Rptr.2d 657.)" (Mares v. Baughman (2001) 92 Cal.App.4th 672, 679.) "An opinion is not authority for a point not raised, considered, or resolved therein. (E.g., *People v. Castellanos* (1999) 21 Cal.4th 785, 799, fn. 9, 88 Cal.Rptr.2d 346, 982 P.2d 211; *San Diego Gas & Elec. Co. v. Superior Court* (1996) 13 Cal.4th 893, 943, 55 Cal.Rptr.2d 724, 920 P.2d 669.)" (Styne v. Stevens (2001) 26 Cal.4th 42, 57-58.) The Walker opinion merely accepted the trial court's selection of the four year statute of limitation, because it was uncontested and not because it analyzed the issue of which statute of limitation applied and determined that only Section 343 applied.

"(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). ¶ (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." (Government Code, § 66001(d)(1).)

"(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)." (Emphasis added.) (Government Code, § 66001(d)(2).)

"…shall refund to the then current record owner or owners of the lots or units, as identified on the last equalized assessment roll, of the development project or projects on a prorated basis…" (Government Code, § 66001(e).)

Plaintiffs contend that every fee collected past the date defendants failed to make the mandated five year findings is a breach or violation of the statute from which a cause of action accrues, thereby making the instant action timely.

Defendant County argues that the appellate court opinion in Walker did not find that there was a continuous accrual of the action for refund until appropriate findings are made by the local agency, the appellate court held in that opinion that a refund related to the 2004 findings was time barred (Walker, supra at page 1361.), and defendant essentially concludes that the local agency can continue to collect the fees with impunity without making findings until the next five year cycle expires and findings are required to be made. Defendant cites to no portion of the Walker opinion wherein the appellate court raised and discussed the issue of the local

agency's ability to collect and retain fees during the interim period where none of the required findings have been made and the action for the violation of the statute by failure to make the findings on the five year anniversary date was time barred, thereby leaving a ten year period prior to any findings being required. The appellate court in Walker did not set forth any such legal principle.

The appellate court in Walker, supra, did not analyze or discuss any issue relating to the timeliness of an action for refund of fees collected after the allegedly flawed 2004 findings or the continuous accrual doctrine. The opinion merely addressed the issues of application of the equitable doctrines of estoppel and unjust enrichment to prevent the City from asserting the statute of limitations as a defense. The Walker opinion did not discuss or set forth a legal principle that fee collections after failure to comply with the five year findings requirement could be retained and did not create a cause of action for failure to refund fees collected while there were no timely findings. "Cases do not stand for propositions that were never considered by the court. (*Tosco Corp. v. General Ins. Co.* (2000) 85 Cal.App.4th 1016, 1021, 102 Cal.Rptr.2d 657.)" (Mares v. Baughman (2001) 92 Cal.App.4th 672, 679.) "An opinion is not authority for a point not raised, considered, or resolved therein. (E.g., *People v. Castellanos* (1999) 21 Cal.4th 785, 799, fn. 9, 88 Cal.Rptr.2d 346, 982 P.2d 211; *San Diego Gas & Elec. Co. v. Superior Court* (1996) 13 Cal.4th 893, 943, 55 Cal.Rptr.2d 724, 920 P.2d 669.)" (Styne v. Stevens (2001) 26 Cal.4th 42, 57-58.) Therefore, the Walker opinion is not legal precedent holding that the refund provision of the statute is strictly limited to a single breach that occurs when the local agency fails to make the mandated five year findings on the five year anniversary date. In addition, the parties have not cited any controlling legal precedent that construes the subject statute as only being violated on the five year anniversary date when findings are not made or, in the alternative, there can be multiple, continuing breaches until such time as the required

findings are made by the local agency. This leaves the court to construe the statute in light of its legislative intent.

Section 66001(d)(2) mandates the governmental agency to refund all funds held in an account or impact mitigation fund where the local agency fails to meet its mandatory duty to make findings every five years. That duty to refund is not limited to money on deposit in the account or fund as of the date of default in making the required five year findings. Therefore, it is reasonable to construe that statute as imposing a continuing requirement to refund all funds collected after that date until the required findings are made. Such a construction would provide the Local Agency with a continuing incentive to make the findings despite the passage of the date to make such findings and support the legislative intent to impose the five year findings requirement in order to prevent a local agency from collecting and holding a development fee for an extended period of time without a clear and demonstrable plan to use the fee for the purpose it was imposed. The appellate court in Walker, supra, touched on the issue in its discussion of the Legislature's intent relating to the refund requirement.

"The five-year findings requirement establishes "a mechanism ... to guard against unjustified fee retention" by a local agency (*Home Builders, supra,* 185 Cal.App.4th at p. 565, 112 Cal.Rptr.3d 7; see *Garrick, supra,* 3 Cal.App.4th at p. 332, 4 Cal.Rptr.2d 897), and it ensures the agency "refund[s] any portion of [a development] fee not expended within five years unless the local agency can demonstrate a reasonable relationship between the unexpended fee and its purpose" (*Centex, supra,* 19 Cal.App.4th at p. 1361, 24 Cal.Rptr.2d 48). The Legislative Counsel's Digest when the Act was initially enactment confirms the requisite five-year findings require a local agency to "reexamine the necessity for the unexpended balance of the fee, as specified, every 5 years, and refund to then current owner or owners of the development project any unexpended portion of the fee for which need cannot

be demonstrated at the time of this review, together with any accrued interest." (Legis. Counsel's Dig., Assem. Bill No. 1600 (1987-1988 Reg. Sess.) 4 Stats. 1987, ch. 927, Summary Dig., p. 301.) [Footnote omitted.] This reexamination and refund requirement prevents a local agency from collecting and holding a development fee for an extended period of time without a clear and demonstrable plan to use the fee for the purpose it was imposed." (Emphasis added.) (Walker v. City of San Clemente (2015) 239 Cal.App.4th 1350, 1363–1364.)

Walker also held that it would be improper to remand the matter to the local agency to correct deficient findings in order to avoid having to refund the funds to the property owners. The appellate court stated: "The City contends the trial court should have remanded the matter to the City to make new findings correcting the "technical deficienc[ies]" in the City's five-year findings rather than requiring the City to forfeit the unexpended impact fees that the City properly had collected. The Act's plain language prohibits this remedy. ¶ Section 66001, subdivision (d)(2), unmistakably declares, "If the findings are not made as required by this subdivision, the local agency *shall refund the moneys* in the account or fund...." (Italics added.) A statute's clear and unambiguous language controls, and therefore we need not resort to extrinsic sources or rules of statutory interpretation to determine the statute's meaning. (*Huntington Continental Townhouse Association, Inc. v. Miner* (2014) 230 Cal.App.4th 590, 598–599 [179 Cal.Rptr.3d 47]; *People v. Pellecer* (2013) 215 Cal.App.4th 508, 512 [155 Cal.Rptr.3d 477].) In any event, the Act's legislative history repeatedly confirms that in passing section 66001, subdivision (d), the Legislature intended that a local agency must refund unexpended development fees if the agency fails to make the required five-year findings. (See, e.g., Legis. Counsel's Dig., Assem. Bill No. 1600 (1987–1988 Reg. Sess.) 4 Stats. 1987, Summary Dig., p. 301; Legis. Counsel's Dig., Sen. Bill No. 1693 (1995–1996 Reg. Sess.) 6 Stats. 1996, Summary Dig., pp. 214–215.) ¶ The City does not claim section 66001,

subdivision (d), is ambiguous, nor does the City cite to any other provision of the Act or its legislative history that allows any remedy other than a refund when a local agency fails to make the required five-year findings. Instead, the City claims a remand is ordinarily the remedy ordered when a local agency applies an incorrect legal standard (see *SN Sands, supra,* 167 Cal.App.4th at p. 194, 83 Cal.Rptr.3d 885) or fails to make "required legislative findings" (see *Manufactured Home Communities, Inc. v. County of San Luis Obispo* (2008) 167 Cal.App.4th 705, 715, 84 Cal.Rptr.3d 367 (*Manufactured Home*); *Respers v. University of Cal. Retirement System* (1985) 171 Cal.App.3d 864, 873, 217 Cal.Rptr. 594 (*Respers*); *Mountain Defense League v. Board of Supervisors* (1977) 65 Cal.App.3d 723, 731–732, 135 Cal.Rptr. 588 (*Mountain Defense*); *Hadley v. City of Ontario* (1974) 43 Cal.App.3d 121, 128–130 [117 Cal.Rptr. 513] (*Hadley*)). What may or may not be the ordinary remedy, however, is irrelevant when the Legislature unambiguously establishes the statutory remedy for a violation of its laws." (Walker v. City of San Clemente (2015) 239 Cal.App.4th 1350, 1367-1368.)

The appellate court also rejected an argument that remand was required to avoid the local agency being subject to a forfeiture. "The City also argues the trial court should have remanded the matter for the City to correct its findings because the law abhors forfeitures and therefore requires statutes imposing them to be strictly construed. (See *Enfantino v. Superior Court* (1984) 162 Cal.App.3d 1110, 1113, 208 Cal.Rptr. 829; *Hernandez v. Temple* (1983) 142 Cal.App.3d 286, 290, 190 Cal.Rptr. 853.) Although it is true forfeitures are disfavored, it does not logically follow that forfeitures are unenforceable. To the contrary, courts must enforce unambiguous statutory forfeitures and may not avoid them by rewriting the statute under the guise of statutory construction. (*People v. Indiana Lumbermens Mutual Ins. Co.* (2010) 190 Cal.App.4th 823, 829–830 [118 Cal.Rptr.3d 555].) Assuming section 66001, subdivision (d)'s refund provision constitutes a forfeiture, the City offers no strict or other construction of the

provision that would allow the City to avoid refunding the unexpended Beach Parking Impact Fees based on its failure to make the required five-year findings." (Walker v. City of San Clemente (2015) 239 Cal.App.4th 1350, 1369.)

In other words, the Legislative intent of the statute is readily apparent that the failure to comply can not be fixed retroactively by making belated findings. Therefore, each time a fee is collected after failing to make the required findings is an entirely new breach or violation of the statute, because the amount must be immediately refunded under the provisions of Section 66001(d)(2). To construe the statute otherwise would reward the local agency by allowing it to continue to collect and amass funds with impunity without having complied with the statutory requirements during the five year period of time after the findings were due where no one brought an action within the statutory limitation period calculated by the date that the agency was required to issue the mandated five year findings. That would be contrary to the Legislature's intent to prevent a local agency from collecting and holding a development fee for an extended period of time without a clear and demonstrable plan to use the fee for the purpose it was imposed. The continuous accrual doctrine appears to apply under the circumstances alleged in the 1st amended complaint and petition. Plaintiffs allege that despite failure to make the required five year findings, County impact fees have continued to be collected, retained, and not refunded. (1st Amended Complaint and Petition, paragraphs 20, 25, 29, 34, and 39.)

Regardless of which statute of limitation applies, one year, three year or four year, it does not appear clearly and affirmatively that, upon the face of the 1st amended complaint and petition, the right of action is necessarily barred. There remains claims for refund of fees collected within the one year, three year and four year statutes. "A demurrer does not lie to a portion of a cause of action. (Citations Omitted.)" (PH II, Inc. v. Superior Court (1995) 33

Cal.App.4th 1680, 1682.) Where a portion of the cause of action is defective on the face of the complaint, the appropriate remedy is to bring a motion to strike that portion of the complaint. (PH II, Inc., supra at pages 1682-1683.)

The court need not and does not reach the issue regarding which statute of limitation applies.

The demurrer to the entire 1st amended complaint and petition on the ground that it is barred by the statute of limitations is overruled.

Declaratory Relief Causes of Action

Defendant County contends that the 1st and 4th causes of action for declaratory relief are fatally defective, because declaratory relief is not appropriate to review an administrative decision and they merely restate the causes of action for writs of mandate.

Code of Civil Procedure section 1060 permits an original action, and authorizes a claim for declaratory relief to be filed alone or with other relief and the court may make binding declarations as to the rights and duties of the parties whether or not further relief is or could have been claimed at that time. (Ball v. FleetBoston Financial Corp. (2008) 164 Cal.App.4th 794, 800; and 5 Witkin, California Procedure (5th ed.2008) Pleading, § 849, page 264.) However, where the declaratory relief cause of action is wholly derivative of a cause of action that the court has sustained a demurrer to, the declaratory relief cause of action is also fatally defective. (Ball v. FleetBoston Financial Corp. (2008) 164 Cal.App.4th 794, 800.)

"The remedy of declaratory relief is cumulative and does not restrict other remedies. (Code Civ. Proc., § 1062.) Moreover, the court's power to render declaratory relief is discretionary, and it may refuse to exercise the power "in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." (*Id.,* § 1061.) The mere fact that another remedy is available will not suffice as sufficient grounds for a court to decline a

declaration, because declaratory relief is not intended to be exclusive or extraordinary. Rather, it is alternative and optional. (*In re Claudia E., supra,* 163 Cal.App.4th at p. 634, 77 Cal.Rptr.3d 722.) A court is only justified in refusing a declaration because of the availability of another remedy when it concludes that more effective relief could and should be obtained by another procedure, and for that reason a declaration will not serve a useful purpose. (*Ibid.*)" (Kirkwood v. California State Auto. Assn. Inter-Insurance Bureau (2011) 193 Cal.App.4th 49, 59–60.)

""Declaratory relief is an equitable remedy, which is available to an interested person in a case 'of actual controversy relating to the legal rights and duties of the respective parties....' (Code Civ. Proc., § 1060....)" (*In re Claudia E.* (2008) 163 Cal.App.4th 627, 633, 77 Cal.Rptr.3d 722.) " 'The purpose of a declaratory judgment is to "serve some practical end in quieting or stabilizing an uncertain or disputed jural relation." ' [Citation.] 'Another purpose is to liquidate doubts with respect to uncertainties or controversies which might otherwise result in subsequent litigation [citation].' [Citation.] The proper interpretation of a statute is a particularly appropriate subject for judicial resolution. [Citations.] Additionally, judicial economy strongly supports the use of declaratory relief to avoid duplicative actions to challenge an agency's statutory interpretation or alleged policies. [Citation.] [¶] The remedy of declarative relief is cumulative and does not restrict any other remedy...." (*Ibid.*) Thus, the fact that "another remedy is available is an insufficient ground for refusing declaratory relief." (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 433, 121 Cal.Rptr.2d 844, 49 P.3d 194.) Moreover, declaratory relief is generally available to settle the parties' rights with respect to future actions, and not to correct conduct that occurred in the past." (California School Boards Assn. v. State (2011) 192 Cal.App.4th 770, 790.)

The California Supreme Court has stated with regards to primary rights: "As we explained in *Crowley v. Katleman* (1994) 8 Cal.4th 666, 681-682, 34 Cal.Rptr.2d 386, 881 P.2d 1083: ¶

"The primary right theory is a theory of code pleading that has long been followed in California. It provides that a 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty. [Citation.] The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. [Citation.] ... ¶ "As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered. [Citation.] It must therefore be distinguished from the *legal theory* on which liability for that injury is premised: 'Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief.' [Citation.] The primary right must also be distinguished from the *remedy* sought: 'The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other.' [Citation.]" (Mycogen Corp. v. Monsanto Co. (2002) 28 Cal.4th 888, 904-905.)

Defendant has not cited any legal authority for the proposition that alternative theories and remedies can not be pled in the same pleading.

Furthermore, while the court recognizes that an action for declaratory relief is not appropriate to review an administrative decision or be joined with a writ of mandate reviewing an administrative determination (City of Pasadena v. Cohen (2014) 228 Cal.App.4th 1461, 1466–1467.), the instant action does not seeking review of an administrative decision or administrative determination. It seeks to enforce the statutory requirement to refund impact fees allegedly wrongfully held after a failure to make a decision/determination.

The demurrers to the two declaratory relief causes of action on the ground that they may not be maintained together with petitions for writs of mandate are overruled.

Applicability of Government Code, § 65010 to Causes of Action

Defendant County argues that Government Code, § 65010 imposes additional elements to actions for refund of impact fees for violating Section 66001(d)(1) that require allegations of fact that the failure to make the statutorily mandated five year findings was prejudicial, the party complaining suffered substantial injury from the failure, and a different result would have been probable if he failure had not occurred.

"(b) No action, inaction, or recommendation by any public agency or its legislative body or any of its administrative agencies or officials on any matter subject to this title shall be held invalid or set aside by any court on the ground of the improper admission or rejection of evidence or by reason of any error, irregularity, informality, neglect, or omission (hereafter, error) as to any matter pertaining to petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals, or any matters of procedure subject to this title, unless the court finds that the error was prejudicial and that the party complaining or appealing suffered substantial injury from that error and that a different result would have been probable if the error had not occurred. There shall be no presumption that error is prejudicial or that injury was done if the error is shown." (Government Code, § 65010(b).)

"…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)." (Government Code, § 66001(d)(2).)

The statutory mandate to refund the moneys in the account or fund in order to prevent a local agency from collecting and holding a development fee for an extended period of time without a clear and demonstrable plan to use the fee for the purpose it was imposed does not mandate any finding of prejudice, substantial injury or a different result had the error not occurred. In fact, case law finds that the initial burden of production of evidence in Mitigation

Fee Act challenge cases falls on the local agency and should the burden of production be met, the burden then falls on the party challenging the fee to establish a requisite degree of belief in the mind of the trier of fact or the court that the fee is invalid, because the fee's use and the need for the public facility are not reasonably related to the development project on which the fee is imposed or the amount of the fee bears no reasonable relationship to the cost of the public facility attributable to the development.

"If a fee subject to the Mitigation Fee Act "is challenged, the local agency has the burden of producing evidence in support of its determination. [Citation.] The local agency must show that a valid method was used for imposing the fee in question, one that established a reasonable relationship between the fee charged and the burden posed by the development." (*Homebuilders Assn. of Tulare/Kings Counties, Inc. v. City of Lemoore* (2010) 185 Cal.App.4th 554, 561, 112 Cal.Rptr.3d 7.) The "burden of producing evidence is not equivalent to the burden of proof." (*Id.* at p. 562, 112 Cal.Rptr.3d 7.) Rather, while the "agency has the obligation to produce evidence sufficient to avoid a ruling against it on the issue" (*ibid.*), the party "challenging an impact fee has to show that the record before the local agency clearly did not support the underlying determinations regarding the reasonableness of the relationship between the fee and the development." (*Ibid.*) ¶ "Accordingly, the local agency has the initial burden of producing evidence sufficient to demonstrate that it used a valid method for imposing the fee in question, one that established a reasonable relationship between the fee charged and the burden posed by the development. If the local agency does not produce evidence sufficient to avoid a ruling against it on the validity of the fee, the [party] challenging the fee will prevail. However, if the local agency's evidence is sufficient, the [challenging party] must establish a requisite degree of belief in the mind of the trier of fact or the court that the fee is invalid, e.g., that the fee's use and the need for the public facility are not reasonably related to

the development project on which the fee is imposed or the amount of the fee bears no reasonable relationship to the cost of the public facility attributable to the development." (*Homebuilders Assn. of Tulare/Kings Counties, Inc. v. City of Lemoore, supra,* 185 Cal.App.4th at p. 562, 112 Cal.Rptr.3d 7.)" (City of San Marcos v. Loma San Marcos, LLC (2015) 234 Cal.App.4th 1045, 1058–1059.)

The opinion in City of San Marcos, did not impose upon the complaining party any additional burdens to prove prejudice, substantial injury or that a different result would have been probable if the failure had not occurred. The failure to impose such elements on an action to challenge the findings or for a refund in the event that no findings are made is to be expected, because Section 65010 only applies to technical procedural omissions.

"Section 65010, formerly section 65801, is a "curative statute" enacted by the Legislature for the purpose of "terminating recurrence of judicial decisions which had invalidated local zoning proceedings for technical procedural omissions. [Citations.]" (*City of Sausalito v. County of Marin* (1970) 12 Cal.App.3d 550, 557–558, 90 Cal.Rptr. 843.)" (Rialto Citizens for Responsible Growth v. City of Rialto (2012) 208 Cal.App.4th 899, 921.)

Violation of a statutory mandate by failure to make five year findings, which was designed to guard against unjustified fee retention by a local agency, can not be categorized as a technical procedural omission.

"If two seemingly inconsistent statutes conflict, the court's role is to harmonize the law. (*People v. Pieters* (1991) 52 Cal.3d 894, 899, 276 Cal.Rptr. 918, 802 P.2d 420 ["[w]e do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness' [Citation]"]; *Chatsky & Associates v. Superior Court* (2004) 117 Cal.App.4th 873, 876, 12 Cal.Rptr.3d 154 ["Where, as here, we are called upon to interpret two seemingly inconsistent

statutes to determine which applies under a particular set of facts, our goal is to harmonize the law [citation] and avoid an interpretation that requires one statute to be ignored. [Citation]"].) We presume that the Legislature, when enacting a statute, was aware of existing related laws and intended to maintain a consistent body of rules. (*People v. Vessell* (1995) 36 Cal.App.4th 285, 289, 42 Cal.Rptr.2d 241.) If inconsistent statutes cannot otherwise be reconciled, "a particular or specific provision will take precedence over a conflicting general provision." (*Ibid.;* see also § 1859.)" (Manhattan Loft, LLC v. Mercury Liquors, Inc. (2009) 173 Cal.App.4th 1040, 1055–1056.)

"We construe statutes and regulations in a manner that carries out the legislative or regulatory intent. (*Trope v. Katz* (1995) 11 Cal.4th 274, 280, 45 Cal.Rptr.2d 241, 902 P.2d 259.) We must " 'ascertain the intent of the [drafters] so as to effectuate the purpose' " of the regulations. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230, 110 Cal.Rptr. 144, 514 P.2d 1224.) The words used are the primary source for identifying the drafter's intent. (Ibid.) We give those words their usual and ordinary meaning where possible. (Code Civ. Proc., § 1858; *Trope*, supra, 11 Cal.4th at p. 280, 45 Cal.Rptr.2d 241, 902 P.2d 259.) We give significance to every word, avoiding an interpretation that renders any word surplusage. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798-799, 268 Cal.Rptr. 753, 789 P.2d 934.) We also interpret the words of a regulation in context, harmonizing to the extent possible all provisions relating to the same subject matter. (*County of Alameda v. Pacific Gas & Electric Co.* (1997) 51 Cal.App.4th 1691, 1698, 60 Cal.Rptr.2d 187.)" (Simi Corp. v. Garamendi (2003) 109 Cal.App.4th 1496, 1505-1506.)

"Every statute should be construed and applied "with reference to the whole system of law of which it is a part so that all may be harmonized and have effect." (*Travelers Indemnity Co. v. Gillespie* (1990) 50 Cal.3d 82, 100, 266 Cal.Rptr. 117, 785 P.2d 500; *Select Base Materials v.*

Board of Equal. (1959) 51 Cal.2d 640, 645, 335 P.2d 672.) In doing so, we should seek to avoid absurd or anomalous results. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1221, 275 Cal.Rptr. 729, 800 P.2d 1159.)' (Goodstein v. Superior Court (1996) 42 Cal.App.4th 1635, 1641.) "Finally, we do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citation.]" ' [Citations.]" (*Scripps Health*, supra, 72 Cal.App.4th at p. 332, 85 Cal.Rptr.2d 86.)" (Russell v. Douvan (2003) 112 Cal.App.4th 399, 403.)

Section 66001(d) imposes a strict requirement to make findings every five years with a mandated refund of fees should sufficient findings not be made. Failure to make such findings or making insufficient findings is not merely a technical procedural matter. Imposing additional burdens of proof would significantly interfere with the intent of the statute to guard against unjustified fee retention by a local agency. The court finds that Section 65010 does not apply to Section 66001(d)(2) proceedings. The demurrer on the ground that plaintiff failed to plead the facts required by Section 65010 is overruled.

Failure to Join Parties to Claims Concerning 2 of the 11 Impact Fee Fund Accounts

Defendant County contends that developers with reimbursement agreements with the County for construction of improvements are necessary/indispensable parties who must be joined in the action in relation to two of the eleven funds.

Defendant County requests judicial notice of those agreements. (Defendant County's Exhibits I-W.)

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds: ¶ * * * (d) There is a defect or misjoinder of parties…." (Code of Civil Procedure, § 430.10(d).)

"Where the question of who are necessary parties defendant is raised by demurrer, it is to be determined ordinarily by reference to the allegations of the complaint." (Gill v. Johnson (1932) 125 Cal.App. 296, 300.) However, the court may disregard facts alleged in the complaint that are contrary to matters judicially noticed. "The courts, however, will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed. (*Alphonzo E. Bell Corp. v. Bell View Oil Syndicate* (1941) 46 Cal.App.2d 684 [116 P.2d 786]; *Chavez v. Times-Mirror Co.* (1921) 185 Cal. 20 [195 P. 666].) Thus, a pleading valid on its face may nevertheless be subject to demurrer when matters judicially noticed by the court render the complaint meritless." (Del E. Webb Corp. v. Structural Materials Co. (1981) 123 Cal.App.3d 593, 604.)

"A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party." (Code of Civil Procedure, § 389(a).)

"…"[a] person is an indispensable party [only] when the judgment to be rendered necessarily must affect his rights." *Hartman Ranch Co. v. Associated Oil Co.* (1937) 10 Cal.2d 232, 262, 73 P.2d 1163.)" (Olszewski v. Scripps Health (2003) 30 Cal.4th 798, 808-809.) and in determining if a party is an indispensible party due to the inability to provide complete relief

in the action, the focus is on whether complete relief can be afforded the parties named in the action. (Deltakeeper v. Oakdale Irrigation Dist. (2001) 94 Cal.App.4th 1092, 1101.)

The Third District Court of Appeal has stated: “The first clause, the "complete relief" clause, focuses not on whether complete relief can be afforded all possible parties to the action, but on whether complete relief can be afforded the parties named in the action. (*Countrywide Home Loans, Inc. v. Superior Court*, supra, 69 Cal.App.4th at pp. 793-794, 82 Cal.Rptr.2d 63.)” (Deltakeeper v. Oakdale Irrigation Dist. (2001) 94 Cal.App.4th 1092, 1101.)

The Third District also stated: “Under subdivision (b) of section 389 we must determine whether a necessary party to the action is indispensable. ¶ A party is indispensable only in the "conclusory sense that in [its] absence, the court has decided the action should be dismissed. Where the decision is to proceed the court has the power to make a legally binding adjudication between the parties properly before it." (Cal. Law Revision Com. com., 14 West's Ann.Code Civ. Proc. (1973 ed.) foll. § 389, p. 222.) The Supreme Court has warned that courts must " 'be careful to avoid converting [section 389 from] a discretionary power or a rule of fairness ... into an arbitrary and burdensome requirement which may thwart rather than accomplish justice.' [Citation.]" (*Countrywide Home Loans, Inc. v. Superior Court*, supra, 69 Cal.App.4th at p. 793, 82 Cal.Rptr.2d 63, quoting *Bank of California v. Superior Court* (1940) 16 Cal.2d 516, 521, 106 P.2d 879.)” (Deltakeeper v. Oakdale Irrigation Dist. (2001) 94 Cal.App.4th 1092, 1105.)

The Supreme Court has stated with regards to indispensable parties: “Thus, "[a] person is an indispensable party [only] when the judgment to be rendered necessarily must affect his rights." *Hartman Ranch Co. v. Associated Oil Co.* (1937) 10 Cal.2d 232, 262, 73 P.2d 1163.)” (Olszewski v. Scripps Health (2003) 30 Cal.4th 798, 808-809.)

The Third District Court of Appeal has recently stated: "The interests protected by Code of Civil Procedure section 389 are those personal interests that may be concretely prejudiced by a judgment rendered in the person's absence. (*Van Atta v. Scott* (1980) 27 Cal.3d 424, 451, 166 Cal.Rptr. 149, 613 P.2d 210, superseded by statute on another point as stated in *In re York* (1995) 9 Cal.4th 1133, 1143, 40 Cal.Rptr.2d 308, 892 P.2d 804.) " 'Typical [indispensable party situations] are the situations where a number of persons have undetermined interests in the same property, or in a particular trust fund, and one of them seeks, in an action, to recover the whole, to fix his share, or to recover a portion claimed by him. The other persons with similar interests are indispensable parties. The reason is that a judgment in favor of one claimant for part of the property or fund would necessarily determine the amount or extent which remains available to the others. Hence, any judgment in the action would inevitably affect their rights.' " (*Serrano v. Priest* (1976) 18 Cal.3d 728, 753, 135 Cal.Rptr. 345, 557 P.2d 929.)" (Emphasis added.) (Ramirez v. Workers' Compensation Appeals Board (2017) 10 Cal.App.5th 205, 218–219.)

The subject agreements between the third party developers and defendant County provide that the developers agreed to resort only to reimbursement from money deposited into certain impact mitigation fee accounts. However, the County and developers generally anticipated that should such funds be unavailable in the specified impact mitigation fee accounts that the parties agreed was the source of financing the reimbursements, the County remains liable to reimburse the developer as funds held in the impact mitigation fee account become available at a later time. (See Defendant County's Exhibits I-W.) Under such conditions, the plaintiffs and these developers would have competing claims to the same funds on deposit, with plaintiff claiming that all funds on deposit must be refunded to the detriment of the developers' reimbursement claims to those same funds. Any determination as to whether or not all assets

on deposit in those funds must be refunded would necessarily impact the developers' claims to those same funds, which is their sole source of reimbursement, and if the plaintiffs are successful in this litigation, it would result in the developers having to await replenishment of those funds in order to be able to claim any more reimbursement for money already paid by them to construct improvements. Therefore, any judgment in the action would inevitably affect their rights, making the developers indispensable parties who must be joined.

The plaintiffs not having joined as defendants the developers who have current claims to the funds plaintiffs seek to have refunded from the 2004 GP Zone 8 and 2004 GP Zones 1-7 accounts, the court sustains the demurrer with ten days leave to amend.

TENTATIVE RULING # 1: DEFENDANT EL DORADO HILLS COMMUNITY SERVICES DISTRICT'S DEMURRERS ARE OVERRULED. DEFENDANT COUNTY OF EL DORADO'S DEMURRERS ARE OVERRULED IN PART AND SUSTAINED IN PART AS STATED IN THE TEXT OF THE RULING. DEFENDANT COUNTY OF EL DORADO'S DEMURRER ON THE GROUND OF FAILURE TO JOIN INDISPENSABLE/NECESSARY PARTIES IS SUSTAINED WITH TEN DAYS LEAVE TO AMEND. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 10:00 A.M. ON FRIDAY, OCTOBER 20, 2017 IN

DEPARTMENT NINE UNLESS OTHERWISE NOTIFIED BY THE COURT. ALL OTHER LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ANOTHER DATE. (EL DORADO COUNTY SUPERIOR COURT LOCAL RULES, RULE 7.10.05, et seq.) SHOULD A LONG CAUSE HEARING BE REQUESTED, THE PARTIES ARE TO APPEAR AT 10:00 A.M. ON FRIDAY, OCTOBER 20, 2017 IN DEPARTMENT NINE WITH THREE MUTUALLY AGREEABLE DATES FALLING ON A FRIDAY MORNING AT 8:30 A.M.