

Filed 7/8/10

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

HOMEBUILDERS ASSOCIATION OF
TULARE/KINGS COUNTIES, INC.,

Plaintiff and Appellant,

v.

CITY OF LEMOORE et al.,

Defendants and Respondents.

F057671

(Super. Ct. No. 07C0185)

**ORDER MODIFYING OPINION AND
DENYING REHEARING
[NO CHANGE IN JUDGMENT]**

It is ordered that the published opinion filed herein on June 9, 2010, be modified as follows:

On page 4, delete the entire discussion under part 2, “*The standard of review and burden of proof,*” and replace with the following:

The City’s adoption of the development impact fees under the Mitigation Fee Act involved a quasi-legislative action. (Cf. *Warmington Old Town Associates v. Tustin Unified School Dist.* (2002) 101 Cal.App.4th

840, 849.) Thus, the City's action is reviewed under the narrower standards of ordinary mandate. (*Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 328.) Accordingly, judicial review is limited to an examination of the proceedings before the City to determine whether its action was arbitrary, capricious, or entirely lacking in evidentiary support. (*San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 667.) The action will be upheld if the City adequately considered all relevant factors and demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute. (*Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 232.) This issue is a question of law. (*Id.* at p. 233.)

As noted above, before imposing a fee under the Mitigation Fee Act, the local agency is charged with determining that the amount of the fee and the need for the public facility are reasonably related to the burden created by the development project. If such a fee is challenged, the local agency has the burden of producing evidence in support of its determination. (*Garrick Development Co. v. Hayward Unified School Dist.*, *supra*, 3 Cal.App.4th at p. 329.) 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. (*Shapell Industries, Inc. v. Governing Board*, *supra*, 1 Cal.App.4th at p. 235.)

However, this burden of producing evidence is not equivalent to the burden of proof. "Attorneys, judges, and commentators often have confused these terms and the concepts they represent. As the United States

Supreme Court observed, ‘For many years the term “burden of proof” was ambiguous because the term was used to describe two distinct concepts. Burden of proof was frequently used to refer to what we now call the burden of persuasion -- the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose. But it was also used to refer to what we now call the burden of production -- a party’s obligation to come forward with evidence to support its claim.’ [Citations.]” (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1666-1667.) Thus, the local agency has the obligation to produce evidence sufficient to avoid a ruling against it on the issue. (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 346.) However, this burden of producing evidence does not operate to shift the burden of proof. The plaintiff has the burden of proof with respect to all facts essential to its claim for relief and that burden remains. (*Ibid.*) Therefore, the plaintiff must present evidence sufficient to establish in the mind of the trier of fact or the court a requisite degree of belief. (*Sargent Fletcher, Inc. v. Able Corp., supra*, 110 Cal.App.4th at p. 1667.)

In general, the imposition of various monetary exactions, such as special assessments, user fees, and impact fees, is accorded substantial judicial deference. (*San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 671.) In the absence of a legislative shifting of the burden of proof, a plaintiff 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. (*Silicon Valley Taxpayers’ Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 444.)

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 plaintiff challenging the fee will prevail. However, if the local agency's evidence is sufficient, the plaintiff 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. (Cf. *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 881.)

There have been occasional comments from courts of appeal that the burden of proof in a fee case falls on the local agency. These cases cite *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1983) 165 Cal.App.3d 227 as support for this shift. However, in *Beaumont Investors*, the local agency failed to produce any evidence to support its calculation of the disputed fee. Thus, it was a failure to meet the burden of production, not the burden of proof. In ruling that the facilities fee was invalid because the local agency failed to develop a record from which costs reasonably related to the development could be determined, *Beaumont Investors* conflated the two concepts. In contrast here, the City produced a record to support the disputed fees. Thus, *Beaumont Investors* and its progeny are distinguishable.

Here, the standard applicable to ordinary mandate applies and there is no basis for shifting the parties' burdens. Thus, the City had the initial burden of producing evidence of the reasonableness of the relationship between the fee charged and the burden posed by the development. However, HBA had the burden of proving that the record before the City did not support the City's underlying determinations.

Except for the modification set forth, the opinion previously filed remains unchanged.

This modification does not effect a change in judgment.

The petitions for rehearing filed by appellant and respondents are denied.

Levy, Acting P.J.

I CONCUR:

Dawson, J.