



Public Comment # 24
 County of El Dorado Clerk of the Board <edc.cob@edcgov.us>
Bos Recd 9-27-21

Fwd: Austin v. County of El Dorado

David Livingston <david.livingston@edcgov.us>

Fri, Sep 24, 2021 at 4:46 PM

To: County of El Dorado Clerk of the Board <edc.cob@edcgov.us>

Cc: Kim Dawson <kim.dawson@edcgov.us>, Donald Ashton <don.ashton@edcgov.us>, Kathleen Markham <kathleen.markham@edcgov.us>

Kim,

As requested by Mr. Leonardo in the attached letter, can you please include the attached letter as part of the public comment for Item No. 24 (21-1386) on the 9/28/21 BOS meeting agenda?

Thanks,
 Dave

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From: **Mark Leonardo** <mleonardo@kuzyklaw.com>

Date: Fri, Sep 24, 2021 at 4:31 PM

Subject: Austin v. County of El Dorado

To: Glen Hansen <GHansen@aklandlaw.com>

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Mr. Hansen

Please see the attached letter regarding the upcoming Board of Supervisors meeting on September 28, 2021.

Mark J. Leonardo, *Of Counsel*

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September 24, 2021

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Glen C. Hansen, Esq.
ABBOTT & KINDERMANN, INC.
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Sent Via Email and U.S. Priority Mail

Re: **THOMAS AUSTIN, ET AL VS. THE COUNTY OF EL DORADO, ET AL**
Case No. : PC20150633
Our File No. : 22704

Dear Mr. Hansen,

It is my understanding that Board of Supervisors has on its September 28, 2021 Meeting Agenda issuance of a refund of impact fees in connection with the sheriff substation that is not going forward. As you may recall, the Board had previously decided to issue this refund back in 2016 after the initiation of our lawsuit, but after I wrote a letter to County Counsel, Michael Ciccozzi, indicating we are entitled to attorney's fees as we were the catalyst for this refund to take place, the matter was tabled indefinitely.

I am reminding you, as counsel for the County of El Dorado, that if and when this refund takes place, we will petition the Court for attorneys' fees and we request that 20% of the scheduled refund amount be held aside pending our fee motion.

Basis for the Attorney Fee Claim Under the Private Attorney General Theory

In 1977, the California Legislature enacted section 1021.5 to provide courts with the statutory authority to award attorney fees under a private attorney general theory. (*Woodland Hills Residents Assn., Inc. v. City Council of Los Angeles* (1979) 23 Cal.3d 917, 925.). The enactment occurred at nearly the same time the California Supreme Court held that courts may exercise their equitable authority to award attorney fees "under a 'private attorney general' rationale to litigants who successfully pursue 'public interest' litigation vindicating important constitutional rights..., where the litigation... has vindicated a public policy having a statutory... basis." [Citation.]" (*Ibid.*, quoting *Serrano v. Priest* (1977) 20 Cal.3d 25, 47, italics omitted.).

Code of Civil Procedure section 1021.5 authorizes a court to award attorney fees to a successful party "in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons; (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate; and (c) such fees should not in the interest of justice be paid out of the recovery, if any."

Section 1021.5 codified the "Private Attorney General doctrine" of attorney fees set forth in *Serrano, supra*, which held for the first time in California, that a trial court has inherent equitable powers to award attorney fees to plaintiffs who have vindicated and important public policy.

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The California Supreme Court in *Graham v. Daimler Chrysler Corp.* (2004) 34 Cal. 4th 553 explained: "(T]he private attorney general doctrine "rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible." Thus, the fundamental objective of the doctrine is to encourage suits enforcing important public policies by providing substantial attorney fees to successful litigants in such cases." (Citation omitted.)

Important Right Affecting the Public Interest

"The enforcement of an important right affecting the public interest implies that those on whom attorney fees are imposed have acted, or *failed to act*, in such a way as to violate or compromise that right, thereby requiring its enforcement through litigation." (*Adoption of Joshua S.* (2008) 42 Cal.4th 945). "(T]he proper application of statutory language ... is an important right. Furthermore, it has been said that 'the public always has a significant interest in seeing that legal strictures are properly enforced.'" (*Norberg v. California Coastal Commission* (2013) 221 Cal.App.4th 535; emphasis added).

"[M]erely because an appellate opinion is certified for publication does not mean it involves an important right affecting the public interest. The fact that litigation results in significant appellate precedent is only one factor to be considered in that regard." (*Serrano v. Stefan Merli Plastering Co. Inc.* (2011) 52 Cal.4th 1018.). Here, this case has already resulted in a published opinion setting forth the statute of limitations and the remedy to be applied under the continuing accrual doctrine. This is but one of the factors in support of applying the "Private Attorney General doctrine" in this case.

In *Stefan Merli*, the California Supreme Court explained the distinction between what constitutes an important right and the *Joshua S.* exception to recovery. The plaintiffs objected to paying an extra fee for an expedited transcript of a deposition notice by the defendant. The plaintiffs won an appeal establishing that trial courts have authority to determine the reasonableness of fees charged by deposition reporters to non-noticing parties. However, the trial court denied the plaintiffs' request for Section 1021.5 attorney fees, and the Court of Appeal, relying on *Joshua S.*, affirmed. The Supreme Court reversed, concluding the plaintiffs' litigation conferred a significant public interest, and plaintiffs were not required to show the court reporters had done anything adverse to the public interest. The court clarified the exception of *Joshua S.* applied only in cases in which all three factors for Section 1021.5 fees are satisfied but the party from whom fees are sought "is not the type of party on whom private attorney general fees were intended to be imposed." *Joshua S.* has no bearing on whether an action has resulted in the enforcement of an important right affecting the public interest.

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Here, the failure of El Dorado County to issue MFA refunds on its own necessitated this litigation and it clearly affects the public interest, particularly the current homeowners of record that will receive refunds.

Substantial Benefit

"[T]he public always derives a 'benefit' when illegal private or public conduct is rectified." (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917.).

It is not enough to merely advance the state of the law to recover attorney fees as a private attorney general under Code of Civil Procedure Section 1021.5. In *Azure Limited v. I-Flow Corp.* (2012) 207 Cal.App.4th 60.), the plaintiff, a shareholder of the defendant corporation, prevailed in a lawsuit that resulted in a Supreme Court opinion bearing on the rights of all property owners whose property had been wrongfully transferred to the state by another private party. But, the Supreme Court held, "merely advancing the state of the law does not transform a private dispute over substantial economic losses into a section 1021.5 case in which fees may be awarded to attorneys for serving the public interest as private attorneys general."

In *Norberg*, the appellate court reversed an order awarding fees under Section 1021.5 because the litigation did not confer a substantial benefit on the general public or on a large number of persons. The petitioner's litigation resulted in the invalidation of a permit affecting one parcel of real property on the ground the Coastal Commission's decision failed to track the statutory language. The Court of Appeal concluded the litigation conferred a benefit only on the petitioner and was not prosecuted in the public interest. The fact the lawsuit might cause the Coastal Commission to change its practices in the future is insufficient to satisfy the public benefit exception.

Unlike in *Norberg*, in this matter the Austin's are not the only ones to benefit by the refund. Thousands of current homeowners of record will receive refunds and the illegal conduct of the Board of Supervisors will be rectified.

Necessity and Financial Burden

The necessity and financial burden requirement encompasses two issues: (1) whether private enforcement was necessary, and (2) whether the financial burden of private enforcement warrants subsidizing the successful party's attorneys. (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1214.). Private enforcement is necessary only if public enforcement of the important right affecting the public interest at issue is inadequate.

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Importantly, a litigant's personal, nonpecuniary motives in pursuing litigation may not be used to disqualify the litigant from obtaining fees under Section 1021.5. (*Conservatorship of Whitley* at p. 1211.).

The financial burden of private enforcement concerns the costs of litigation and the financial benefits reasonably expected by the successful party. An attorney fee award under Section 1021.5 is proper unless the plaintiffs reasonably expected financial benefits exceeded by a substantial margin the plaintiff's actual litigation costs. (*Conservatorship of Whitley* at p. 1216.).

In this case, private enforcement is necessary because the Board was not taking action to refund the monies due to its failure to comply with Government Code Section 66001(d)(1) and was not conducting nexus studies despite numerous warnings that they were required. As for financial burden, the Austin's should not be burdened with the significant attorneys' fees generated as a result of the push-back by the County to this action. Moreover, the attorney's fees incurred to date in this matter far, far exceed the refund to which the Austin's or any individual homeowner are entitled. There could be no financial motivation for any individual homeowner to initiate and maintain this type of litigation for their sole benefit, and not the benefit of the entire community of homeowners.

"Catalyst" Theory

"[A]n award of attorney fees may be appropriate where plaintiffs' lawsuit was a catalyst motivating defendants to provide the primary relief sought." (*Graham v. Daimler Chrysler Corp.* (2004) 34 Cal.4th 553, 567.).

The decision in *Cates v. Chiang* (2013) 213 Cal.App.4th 791, provides a thorough discussion of recovery of attorney fees under the catalyst theory. *Cates* discusses the governing legal principles, requirements for recovery, mode and manner of proof, calculation of lodestar, pre-suit attempts at settlement, contingent risk factors, multipliers, and fees on fees. (*Id.*).

The Court in *Cates* said that, "[t]o satisfy the causation prong of the catalyst theory, the plaintiff need not show the 'litigation [was] the only cause of defendant's acquiescence. Rather, [the] litigation need only be a substantial factor contributing to defendant's action.'" "Put another way, courts check to see whether the lawsuit initiated by the plaintiff was 'demonstrably influential' in overturning, remedying, or prompting a change in the state of affairs challenged by the lawsuit." In conducting the causation analysis, the court considers (1) the situation immediately before the commencement of the suit, (2) the situation at present, and (3) the role, if any, the litigation played in causing any change between the two. The causation determination does not require complex, time-consuming litigation and may be resolved by "relatively economical, straightforward inquiries by trial judges close to and familiar with the litigation." (*Cates* at pp. 807-808.).

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In this case, there was no discussion of issuing a refund in any of the Board's minutes with respect to the sheriff substation prior to our filing of suit in December 2015. In fact, just two weeks before we filed suit the Board held a meeting on 11/17/15 (we filed suit on 12/02/15). At that meeting, item 48 legistar # 15-1022, the *Walker v. San Clemente* case was discussed and the applicability of the holding in that case to El Dorado County. This was a result of public comment by three individuals who brought to the attention of the Board their failure to comply with the MFA. Further, the County Controller, Joe Harn, had been raising the fact that the County was in violation of the MFA since March 2013. At the meeting, Assistant Chief Administrative Officer (CAO) and previously Assistant County Counsel at the time, Michael Ciccozzi, erroneously stated that the *Walker* case does not apply to El Dorado because the County is in the 3rd Appellate District and the *Walker* case came out of the 4th Appellate District. CAO Larry Combs agreed as did County Counsel, Robyn Drivon. Notwithstanding Mr. Ciccozzi's, Mr. Combs' and Ms. Drivon's misunderstanding of stare decisis and that fact that *Walker* applies to the entire state of California, the clear indication based on their representations and the Board's inaction was that *Walker* did not apply and there was no need to issue any refunds. Moreover, Mr. Ciccozzi indicated that the issue is not a refund of MFA fees but whether the Board should authorize a transfer of MFA fees to Diamond Springs Fire to pay for a fire truck purchased in the past year.

Thus, the obvious inference is that the County changed its position and agreed to refund MFA fees for the sheriff substation in 2016 based in substantial part on the filing of our lawsuit; i.e., the Austin lawsuit was the catalyst to issue the sheriff substation refund.

Withholding 20% for Attorney's Fees

Notwithstanding the language of the statute, as indicated in *Walker v. San Clemente* (2015) 239 Cal.App.4th 1350, the attorneys' fees come from the impact fee fund itself, not in addition to the refunded amount. Thus, before the funds are actually refunded, we request that 20% of the total refund amount be held back to possibly be awarded as attorneys' fees under the common fund theory. We would then petition the court to make an appropriate award. Please note that this percentage amount is with respect to this particular refund only, not as to the remaining funds from which we are seeking refunds in our lawsuit and we reserve the right to seek a higher fee amount if we prevail.

As the legal representative to the Board of Supervisors for the County of El Dorado, please advise the Board of our intentions as set forth in this letter.

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Should you have any comments or questions regarding this matter, please do not hesitate to contact the undersigned.

Very truly yours,
KUZYK LAW, LLP

/s/Mark J. Leonardo

MARK J. LEONARDO
Managing Director

MJL:lsd

cc: Thomas and Helen Austin
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