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PRIVATE ATTORNEY GENERAL FEE AWARDS FOR THE ENFORCEMENT OF PROCEDURAL REQUIREMENTS IN ENVIRONMENTAL LITIGATION

By Amy Minteer*

I. Introduction

Practitioners working to protect the environment have found much truth in the California Supreme Court's assessment of the need for private attorney general fee awards: "The 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." (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 933.)

Often times, environmental and community groups are unable to raise the funds required to bring litigation at a normal market rate, or sometimes at all. As a result, many environmental petitioners' attorneys regularly bring litigation on a partial or fully *pro bono* basis, with the expectation that, if they prevail, they will be able to recover their fees from the respondent or real party. Specifically,

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lawyers have been able to provide reduced rates or *pro bono* representation in environmental cases because of the award, or settlement of, private attorney general fees after successful litigation provided by Code of Civil Procedure section 1021.5. The award of attorney fees in environmental litigation is crucial to securing competent counsel to represent many community and environmental groups, particularly because no counsel can be assured that a court will reach the substantive application of a law rather than deciding a case based on procedural non-compliance by an agency.

This article gives an overview of Code of Civil Procedure section 1021.5, and compares the two most recent California Court of Appeal decisions on fee awards for environmental litigation under this section, which are at odds with each other. The article also discusses two other recent Court of Appeal cases where review was granted by the California Supreme Court. Review of the attorney fees issue was subsequently averted in each of the cases, but the issue of awarding private attorney general attorney fees for procedural victories is ripe for Supreme Court review to reaffirm the important purpose of these awards in environmental litigation.

II. Private Attorney General Fee Awards

Code of Civil Procedure section ("Section") 1021.5 states:

> Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties 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. . .

This section authorizes courts to award attorney fees when the criteria are met, unless special circumstances render an award unjust. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132; *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297, fn. 3.) It codifies the private attorney general doctrine, formulated and developed through judicial decisions. (*Woodland Hills, supra*, 23 Cal.3d at 933.) The purpose of this section is to encourage public interest litigation that might otherwise be too costly to pursue. (*Ibid.*, see also *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (2000) 79 Cal.App.4th 505, 511.) Litigation brought in an effort to protect the environment, and specifically litigation to enforce the California Environmental Quality Act ("CEQA"), has been found to confer significant benefits on the public. (*San Bernardino Valley Audubon Society, inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 754.)

III. *Bowman v. City of Berkeley*

The recent 1st District Court of Appeal decision *Bowman v. City of Berkeley* (2005) 31 Cal.Rptr.3d 447 ("*Bowman II*"), provides a good summary of the law

regarding the provision of section 1021.5 attorney fees in environmental litigation. It follows a long line of cases allowing for the liberal definition of a significant benefit for purposes of attorney fees awards.

In *Bowman I*, a neighborhood group ("Neighbors") sought to overturn a resolution by the City of Berkeley approving the construction of a mixed-use facility with retail space and senior housing. (*Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 576 ("*Bowman I*").) Prior to the City's approval, a use permit was approved and a mitigated negative declaration ("MND") was adopted for this project by the City's Zoning Administrative Board. (*Id*. at 578.) The Neighbors appealed the Zoning Administrative Board's approval of the project to the City Council, which in turn referred the appeal to mediation (*Id*. at 578-579.) At a May 21, 2002 meeting, the developer of the project and the Neighbors requested a continuance to allow further mediation to take place. (*Id.* at 579.) At the continued appeal hearing on May 28, the City Council voted in favor of approving the use permit and adopting the MND for this project, as well as denying the appeal of the project. (*Ibid*.)

The Neighbors did not attend the May 28 City Council meeting because they were under the mistaken belief that the hearing had again been put over for the purposes of continued mediation. (*Bowman I*, 122 Cal.App.4th at 579.) In July of 2002, Neighbors filed a petition for writ of mandate with six causes of action alleging: 1) a due process violation because they did not receive a fair hearing at the May 28 City Council meeting approving the project; 2) that an environmental

impact report ("EIR") was required for the project; 3) that the City's general plan was invalid; 4) that the project was inconsistent with the general plan; 5) that the project violated City planning and zoning ordinances; and 6) that the City did not follow the procedure specified in City ordinances when it approved the project. (*Bowman II*, 31 Cal.Rptr.3d at 451.)

The trial court found that Neighbors did not receive a fair hearing and that the City "improperly short-circuited the mediation before it had concluded." (*Bowman II*, 31 Cal.Rptr.3d at 454.) The trial court also found the City staff's efforts to alert Neighbors that the matter would be heard at the May 28 meeting "could not have been less energetic." (*Ibid*.) The City Council held a new hearing on the project in March of 2003 where "voluminous submissions were lodged against the [p]roject", "[t]he environmental initial study was updated to reflect the design changes to the [p]roject" and 38 speakers commented on the project. (*Bowman I*, 122 Cal.App.4th at 579.) However, the City Council once again voted to approve the project. The resolution adopted by the City Council found that all environmental concerns raised at the new hearing were addressed and mitigated to a level of insignificance in the MND and therefore an EIR was not required. (*Ibid*.)

The matter was then returned to the trial court, which denied relief on the petition's remaining five causes of action. (*Bowman I*, 122 Cal.App.4th at 580.) The Court of Appeal affirmed the trial court's decision in *Bowman I*. Neighbors then moved for attorney fees under section 1021.5. (*Bowman II*, 31 Cal.Rptr.3d at

450.) The trial court awarded Neighbors the "fees and costs incurred in connection with the due process issue litigated at the outset of the case . . ." (*Ibid*.)

In their appeal of the fee award, the City objected to the trial court's holding that Neighbors' litigation had conferred a significant benefit on the public. (*Bowman II*, 122 Cal.App.4th at 453.) The Court was not persuaded by the City's argument that Neighbors were the only ones that received any benefit from the new hearing and the only benefit Neighbors received was telephonic notice of the City Council hearing. (*Id*. at 454.) The Court noted that an enormous amount of new evidence and public testimony from opponents and proponents of the project was presented at the new hearing. (*Ibid*.)

The Court also found that even though Neighbors did not prevail on the remaining five causes of action and the project was ultimately approved, the level of success was to be factored into the amount of attorney fees awarded, not to serve as a prohibition on awarding any fees. (*Bowman II*, 122 Cal.App.4th at 452) The Court of Appeal upheld the award of attorney fees to Neighbors for the portion of the litigation relating to the due process violation. (*Id*. at 456.)

IV. *Concerned Citizens of La Habra v. City of La Habra*

In sharp contrast to *Bowman II*, the Court in *Concerned Citizens of La Habra v. City of La Habra*, 2005 WL 1485750 ("*Concerned Citizens*"), seems to place additional limits on environmental petitioners' ability to obtain attorney fees. In this 4th District Court of Appeal decision issued June 23, 2005, a community

group, Concerned Citizens of La Habra ("Citizens") filed a petition for writ of mandate challenging the City of La Habra's approval of project to construct a Costco retail warehouse facility. (*Id.*, *1.) The City approved the project after preparing a MND, and not an EIR as urged during the administrative process by Citizens. (*Ibid*.) Citizens' petition alleged six causes of action: 1) failure to comply with CEQA; 2) violation of redevelopment law; 3) prohibited gift of public funds; 4) waste of public property; 5) violation of state planning and zoning law; and 6) abuse of discretion for action in violation of all of those laws. (*Ibid*.)

The City successfully demurred to the causes of action for violation of redevelopment law, prohibited gift of public funds, and waste of public property. (*Concerned Citizens*, *1.) The trial court then denied relief on the causes of action for violation of state planning and zoning law, and abuse of discretion. (*Ibid*.) The remaining cause of action alleged violations of CEQA for failure to include evidence in the MND of significant unmitigated noise, traffic and land use impacts. (*Ibid*.)

The trial court found all impacts identified by Citizens had been adequately mitigated, except the issue of "cut-through" traffic. On this issue, the trial court found the City failed to provide the basis for its conclusion that the amount of traffic generated in adjacent neighborhoods would be insignificant and that Citizens had made a fair argument it would be a significant impact. (*Concerned Citizens*, *1.) The trial court initially ordered the City to prepare an EIR for the project based on this traffic impact, but upon rehearing found that even though the

MND was inadequate, preparation of an EIR was not required. (*Id*., *2.) The trial court then found that it might be possible that the impacts of the "cut-through" traffic could be mitigated but that there was not enough information in the record to inform the decision. (*Ibid.*) In an unprecedented action, the court stated that the lack of analysis in the MND was only a "tiny blemish that probably can be repaired" that should not require the preparation of an entire EIR. (*Ibid.*) The opinion gave the City full discretion to handle the issue.

The Citizens subsequently moved for attorney fees under section 1021.5. (*Concerned Citizens*, *2.) The trial court ruled "It would be unfair to impose an obligation to pay attorney fees on the Respondents. The Petitioners were only successful in one small regard and were unsuccessful on all significant issues." (*Id.*, *2.) This is in direct contrast to a long line of cases, including most recently the Court's finding in *Bowman II*, that the size of the win impacts the size of the attorney fees to be awarded, not whether they are awarded at all. (*Bowman II*, *supra*, 122 Cal.App.4th at 452.)

The trial court also found "There were no significant benefits derived by a large number or class of people and Petitioners did not obtain the outcome they desired." (*Concerned Citizens*, *2.) Citizens took issue with this finding, claiming all commuters in the vicinity of the project derived a significant benefit from the trial court requiring the City to comply with CEQA. (*Id.*, *3.) The Court of Appeal affirmed the trial court's finding, referencing the grounds Citizens were successful upon as "mere vindication of a statutory violation" that is not a

significant benefit by itself. (*Ibid*.)

The Court of Appeal held Citizens had only "successfully asserted a defect in CEQA's process, the correction of which was not likely to change the project." (*Concerned Citizens*, *4.) Again, this finding is in direct contrast to the decision of the Court in *Bowman II*. In *Bowman II*, the procedural victory of Neighbors did not change the project and only supplemented the information contained with the record for the project, similar to the impact of the Court's decision in *Concerned Citizens*. The Court in *Bowman II* found that the supplemental information put in the record at the City Council remand hearing had conferred a significant benefit by providing the City Council with additional evidence it used in making its decision regarding the project. (*Bowman II, supra* 122 Cal.App.4th at 454.) Likewise, in *Concerned Citizens*, the City was required to set aside its approval of the project pending supplementation of the record with information regarding mitigation of traffic impacts. (*Concerned Citizens*, *2.) Though not discussed in the decision, by setting aside the approval of the MND, the trial court was implicitly requiring additional City Council action on the project and reopening the record for any additional evidence put forward by opponents or proponents of the project. The benefits conferred in *Concerned Citizens* therefore seem to be very similar to that conferred in *Bowman II*.

V. Supreme Court Review

Unfortunately for those attempting to bring public interest litigation to

protect the environment, the Court in *Concerned Citizens* is not alone. Two other recent Court of Appeal decisions, which have been depublished due to the granting of review by the California Supreme Court, attempt to limit the ability of organizations from obtaining attorney fees in environmental litigation.

In *Vedanta Society of Southern California v. California Quartet, Ltd., previously published at*: 103 Cal.App.4th 1200 ("*Vedanta*"), a group of neighbors and environmentalists administratively appealed the certification of an EIR for a large mobilehome development in Trabuco Canyon by the planning commission to the Orange County Board of Supervisors. The Board of Supervisors' vote on the project was two-to-two. The tie vote was determined to affirm the planning commission's decision and the neighbors and environmentalists filed a petition for writ of mandate challenging the approval of the EIR. The trial court granted summary judgement to the petitioners, finding that the two-to-two vote was "no action", and thus a rejection of the project. The trial court awarded the petitioners attorney fees and costs under section 1021.5.

The developer and the County appealed the decision and the Court of Appeal affirmed the trial court's action setting aside the project approval, although on narrower grounds. The developer and the County also appealed the award of attorney fees. The 4th District Court of Appeal found that the decision on the two-to-two vote did not result in the enforcement of an important public right, making the award of attorney fees by the trial court an abuse of discretion. The Court of Appeal found that while the litigation clarified the law, this did not constitute the

enforcement of law. *Vedanta*, similarly to *Bowman II* and *Concerned Citizens*, was decided on the basis that the proper procedure was not followed in its approval of a project under CEQA. It is also is direct conflict with the ruling in *Bowman II*. The court's ruling required that a new hearing be held on the project so that a new EIR could be voted upon by the Board of Supervisors.

The Supreme Court granted petitioners' petition for review on the issue of attorney fees. (Supreme Court case, number S112816.) Before the Supreme Court could issue a decision, however, the parties settled the matter and filed a stipulated dismissal.

In another recent Court of Appeal case that was granted review by the Supreme Court, *Department of Conservation v. El Dorado County*, *previously published at*: 108 Cal.App.4th 672, the Director of the Department of Conservation filed a petition for a writ of mandate against the County for violations of the Surface Mining and Reclamation Act ("SMARA"), CEQA and local ordinances for the County's approval of two mining projects. The County, the mine owners and a group of intervenors argued that the Director did not have standing to bring the action. The trial court agreed with the County and others and found the Director did not have standing, awarding attorneys fees to them under section 1021.5, which allows for fee awards for "enforcement by one public entity against another public entity" as well as for private enforcement.

The 3rd District Court of Appeal agreed that the Director did not have standing to bring the action, but did not concur in the trial court's finding that

defining the Director's role under SMARA effectuated an important public policy. The Court of Appeal found that the County had only obtained a procedural victory on the issue of standing and therefore was not eligible for an award of attorney fees under section 1021.5.

The Court of Appeal decision included a sharply worded dissent, which found the decision to not award attorney fees to be "astoundingly wrong." The dissenting justice found the litigation "defined the role of the Director of a statewide department in an opinion with great precedential value." The dissent also claimed the majority opinion follows a line of cases that in recent years have wrongly attempted to emasculate awards under section 1021.5.

The Supreme Court granted the petition for review that was filed by all parties in the case. The proper application of section 1021.5 in awarding attorney fees seems to be of particular interest to the Supreme Court because it again took up the issue in the *Department of Conservation*. The Supreme Court ordered briefing deferred in *Department of Conservation* pending its decision in *Vedanta*. After *Vedanta* was dismissed, the Supreme Court in *Department of Conservation* included the issue of section 1021.5 attorney fees in its review.

The Supreme Court decision in *Department of Conservation* was issued on August 8, 2005. (2005 WL 1864182.) The issue of section 1021.5 attorney fees awards was however once again not decided because the Supreme Court issued its decision upholding the Director's standing, and therefore negating the County's ability to obtain attorney fees as a prevailing party. (*Id.*, *12.)

VI. Conclusion

Forbidding the recovery of attorney fees under section 1021.5 for enforcing CEQA's mandatory procedural requirements would not only go against years of established law, but would also severely inhibit attorneys from bringing actions to enforce CEQA and many other environmental laws with mandatory procedural requirements that further the statutes' purposes. Even when a challenged development is eventually approved, making sure that officials follow all necessary procedures to ensure adequate environmental review achieves much more than simply a delay in approval of a project. Often times the project is reevaluated and changes are made before the project is re-approved. Ensuring that these procedures are properly followed furthers an important public policy and those bringing such cases need to be compensated so necessary litigation can continue.

While *Bowman II* follows the previously established parameters for awarding attorney fees under section 1021.5, the apparent trend of some trial courts and Court of Appeals to limit these awards in environmental litigation may make a Supreme Court ruling reconfirming these parameters necessary to prevent seeming aberrations from becoming the norm. As shown by the Supreme Court's grant of review in two such cases in the past two years, the Court seems ready to review the issue. The Supreme Court's willingness to grant review, seen in conjunction with its broad pronouncements regarding the grant of section 1021.5 fees in the recent decisions of *Ketchum v. Moses* (2001) 24 Cal.4th 1122

[upholding an award of fees on fees] and *Graham v. DaimlerChrysler Corporation* (2004) 34 Cal.4th 553 [upholding an award of catalyst theory attorney fees] likely signifies the Supreme Court's desire to continue to apply the private attorney general doctrine to the enforcement of procedural requirements in environmental litigation.