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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

WILLIAM A. WINEBERG,
Plaintiff and Appellant,

v.

CITY AND COUNTY OF SAN
FRANCISCO et al.,
Defendants and Respondents.

A134143 & A134941

(San Francisco City & County
Super. Ct. No. CGC-10-498141)

I.

INTRODUCTION

In 2002, the City and County of San Francisco (the City) enacted the “Police Emergency Alarm Ordinance,” which is codified at San Francisco Police Code, Article 37, sections 3700 et seq. (the Ordinance). The Ordinance authorizes the City to collect license fees from persons operating burglar and fire alarms in the City, and to assess penalties if more than one false alarm occurs in a calendar year.¹ After attorney William A. Wineberg (Wineberg) was unsuccessful in convincing an administrative hearing officer that the false alarm penalties imposed against him were improperly assessed, he filed a lawsuit challenging certain aspects of the City’s administrative review

¹ The City’s Department of Emergency Management (DEM) administers the program established by the Ordinance. At all relevant times, the program’s daily operations were carried out by Joshua Jennings, the City’s alarm ordinance manager, who is also named as a defendant in this case. Jennings and the City will be collectively referred to as the City.

procedure. In response to Wineberg’s lawsuit, the City corrected many of the deficiencies identified by Wineberg in his lawsuit, voluntarily dismissed the penalties assessed against Wineberg, and refunded his money with interest—but the litigation did not end. Eventually, the trial court granted the City summary judgment after finding that the claims made in Wineberg’s lawsuit were either moot or failed as a matter of law. In Case No. A134143, we conclude the summary judgment was properly granted.

In post-summary judgment proceedings, Wineberg claims he was entitled to attorney fees and costs, primarily under Code of Civil Procedure section 1021.5, the so-called private attorney general statute, on the theory that his lawsuit had served as a “catalyst” to the City’s decision to take voluntary corrective actions while the action was pending. (See *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 560 (*Graham*)). In Case No. A134941 we affirm the postjudgment order denying Wineberg attorney fees because no abuse of discretion has been shown.

II.

FACTS AND PROCEDURAL HISTORY

In adopting the Ordinance, the San Francisco Board of Supervisors declared that “[t]he vast majority of emergency alarms to which law enforcement officials respond are false alarms;” and “[i]n the interest of using limited law enforcement resources most effectively and efficiently, the number of false alarms can and must be reduced.” (S.F. Police Code, Art. 37, § 3701, subds. (a), (b).) The stated purpose of the Ordinance is to “reduce the dangers and annoyances associated with the use of particular types of alarm systems and to encourage property owners to maintain their systems in good working condition and to use them properly.” (*Id.* at subd. (c).)

Under the Ordinance, each alarm user is allowed one false alarm each calendar year without penalty. A false alarm is defined in the Ordinance as “an alarm dispatch request to a law enforcement agency, when the responding law enforcement officer finds no evidence of a criminal offense or attempted criminal offense after having completed a timely investigation of the alarm site.” (S.F. Police Code, Art. 37, § 3702, subd. (o).) If the alarm user has more than one false alarm in a year, he or she is subject to a graduated

penalty scheme, with penalties ranging from \$100 to \$250 per false alarm depending on the number of previous false alarms. (*Id.* at § 3714, subd. (a).) According to a City memorandum, as of December 31, 2010, there were 35,558 alarm accounts in San Francisco. The City's office of the treasurer and tax collector issues about 50 to 60 alarm invoices a day for penalty fines for "false alarm occurrences."

The City assesses a false alarm penalty based on a police officer's determination that the alarm did not result from criminal activity, and thus was a false alarm. To notify alarm users of false alarm penalties, the City mails a "Notice of False Alarm Penalty" (penalty notice) to the alarm user's address. The penalty notice informs the alarm user that he or she may appeal their false alarm penalty by calling the phone number provided.

When alarm users contest false alarm penalties, the alarm ordinance manager considers the documentation collected by the City supporting the false alarm assessment, and any information presented by the alarm user. The alarm ordinance manager then determines whether to discharge or waive the penalty. In a typical month, the alarm ordinance manager receives between 30 to 60 requests for waivers, and over half of the challenged false alarm penalties are usually waived.

An alarm user who is not satisfied with the alarm ordinance manager's decision may file a written appeal after paying the false alarm penalty and appellate fees. (S.F. Police Code, Art. 37, § 3716, subd. (b)(1).) The alarm ordinance manager also reviews those written appeals to determine their merit.

If an appeal is not granted by the alarm ordinance manager, the DEM appoints a hearing officer to conduct a formal hearing. (S.F. Police Code, Art. 37, § 3716, subd. (b)(3).) Pursuant to the Ordinance, the hearing officer cannot be an employee whose regular duties include administration or enforcement of the Ordinance. (*Ibid.*) The hearing officer is required to conduct a hearing, and to make his or her decision affirming or reversing the penalties based on the preponderance of evidence presented at the hearing. (*Ibid.*) The hearing officer must render his or her decision within 30 days after the hearing date. (*Ibid.*) If the appeal is granted after penalties have been paid, the City refunds the full penalty and appellate fees. (*Id.* at subd. (b)(1).)

Wineberg is an attorney who has a burglar alarm at his residence. In 2009, Wineberg was assessed four false alarm penalties by the City—three for alarms at his residence over a weekend in March when he was out of state, and one for an alarm in November. On each occasion the police were dispatched to Wineberg’s house only to find no evidence of criminal activity. Because of these false alarms, the City’s office of the treasurer and tax collector issued a series of penalty notices to Wineberg.

Believing that the false alarm penalties were improperly assessed, Wineberg appealed the false alarm penalties through the above-described administrative review process.² The hearing officer ultimately granted in part and denied in part Wineberg’s administrative claims. The hearing officer determined that Wineberg’s first two false alarms should be treated as one alarm because the alarms occurred within a single 24-hour period. In all other respects, Wineberg’s appeal was denied. Wineberg was found liable for false alarm penalties and fees in the total amount of \$285.

On March 26, 2010, Wineberg filed a complaint in the San Francisco Superior Court challenging the procedures established by the City for reviewing false alarm penalties. In his first two causes of action, Wineberg alleged facial and as-applied due process challenges under the California and United States Constitutions (Cal. Const., Art. 1, § 7, subd. (a); 42 U.S.C. § 1983). His due process claims asserted that: (1) the penalty notices sent to him “failed to convey information necessary to enable him to prepare adequately” for his appeal; (2) the Ordinance was impermissibly vague because it failed to provide any standards for determining whether a response by a law enforcement officer to an alarm dispatch request was “timely” in order to make a determination that there had been a false alarm; (3) he was “required to pay the appeal fees and penalties assessed . . . without being afforded any pre-deprivation safeguards to minimize the risk of error in the initial assessment of the penalties”; and (4) the hearing officer who

² Because we conclude that Wineberg’s as-applied challenge to the review process was moot, there is no need to set out the facts of his particular situation, or what transpired during each step of the review process when he was challenging his false alarm penalties.

adjudicated his appeal decided his case based on evidence she gathered during a post-hearing investigation—namely *ex parte* contacts with an alarm company representative who speculated that it was weak batteries that set off Wineberg’s alarm system.

In his third cause of action Wineberg contended that the City failed to comply with the requirements of section 3712 of the Ordinance because the penalty notices sent to him failed to include the date and time of the police department’s response to the false alarm, the identification numbers of responding police officers, and a statement urging the alarm user to ensure that his or her alarm system is properly installed, inspected, and serviced.

In his prayer for relief, Wineberg sought “a declaration by the Court that the Ordinance, on its face and as applied,” violates the United States and California Constitutions, and “a permanent injunction enjoining defendants, and each of them, from enforcing the Ordinance.” He also sought “general damages,” prejudgment interest, attorney fees, and costs.

After settlement negotiations between the parties broke down, the City voluntarily implemented many of the procedural safeguards proposed by Wineberg during the parties’ settlement discussions. Specifically, before this lawsuit was brought, the City’s Web site only listed the telephone number for appeals and grounds on which an appeal would be denied. The City modified its Web site to make it clear that people who wish to challenge their false alarm penalties are entitled to seek a telephone review of false alarm penalties *before* having to make any payment, and it prominently lists the grounds for bringing an appeal. The City also posted on its Web site and publicly disclosed, for the first time, how it determines whether a police officer has responded to an alarm in a timely manner, which is generally considered any response time within 30 minutes. The City also changed its penalty notice to comply with the requirements of section 3712 of the Ordinance by disclosing, for the first time, the time the police officer responded to an alarm and the responding officer’s identification number. Finally, a letter dated February 28, 2011, was sent to hearing officers who conduct hearings pursuant to the Ordinance notifying them that they must refrain from considering extrajudicial evidence and engaging in *ex parte* discussions and that they must render their decisions based

solely on evidence admitted at the hearing. The City also dismissed all of the penalties assessed against Wineberg in 2009 and tendered to him all the amounts he had paid in penalties and fees (\$285.00), along with interest (\$48.64).³

On March 4, 2011, the City moved for summary judgment, or in the alternative, summary adjudication. With regard to Wineberg's facial constitutional challenge, the City argued that its program and the Ordinance passed constitutional muster. With regard to Wineberg's claim that he was subjected to illegal policies and practices during the review process that denied him due process, the City argued that Wineberg's as-applied constitutional claims were moot based on the City's dismissal of all the false alarm penalties assessed against him, the reimbursement of his penalties and fees, and the changes the City had voluntarily made to the false alarm penalty review process. Wineberg opposed the motion.⁴

On August 3, 2011, the Court granted the City's motion for summary judgment. Specifically, the court rejected Wineberg's facial challenges to the Ordinance. The court concluded "the Ordinance is not constitutionally vague"; and that the pre-deprivation review procedures provided by the City were adequate under existing constitutional standards. The court then held that because of the voluntary corrective actions taken by the City in response to this lawsuit, Wineberg's as-applied claims concerning "the notice and the penalties assessed against him are moot." Additionally, because Wineberg had failed to offer any evidence to suggest that the problems he experienced would reoccur, the court concluded that Wineberg's remaining claims for declaratory and injunctive relief were moot. The court entered judgment for the City on September 29, 2011.

On November 28, 2011, Wineberg filed a motion for attorney fees. On January 31, 2012, the trial court denied that motion because Wineberg did not satisfy any

³ Wineberg claims he has never endorsed or cashed the checks.

⁴ While Wineberg claims there were certain improprieties in the summary judgment proceeding below that denied him a fair hearing, he has waived any argument by failing to cite any authority or even to frame a legal argument with respect to these matters. (*Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99.)

of the requirements for attorney fees under Code of Civil Procedure section 1021.5. In addition, Wineberg could not obtain fees under title 42 United States Code section 1988 because he did not obtain “a judgment on the merits or a court decree that materially altered the relationship of the parties.” On March 2, 2012, the court granted the City’s motion to strike or tax costs because Wineberg was not the prevailing party within the meaning of Code of Civil Procedure section 1032, subdivision (a)(4).

Wineberg filed separate appeals from the trial court’s grant of summary judgment (Case No. A134143) and the denial of his request for attorney fees (Case No. A134941). On June 6, 2012, this court consolidated these cases for briefing, argument, and decision. (Order, Ruvolo, P. J.)

III. DISCUSSION

A. Standard of Review

Our review of a summary judgment is de novo. (*Scheidung v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 69.) Furthermore, “in moving for summary judgment, a ‘defendant . . . has met’ his ‘burden of showing that a cause of action has no merit if’ he ‘has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . . . may not rely upon the mere allegations or denials’ of his ‘pleadings to show that a triable issue of material fact exists but, instead,’ must ‘set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.’ . . .” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) Similarly, a party opposing a motion for summary judgment may not overcome the moving party’s prima facie showing by merely asserting that a fact is disputed without citation to evidence that actually controverts the moving party’s factual statement. (Cal. Rules of Court, rule 3.1350(f).)

We independently review the trial court’s decision to grant summary judgment, using the same three-step analysis as the trial court: (1) identifying the issues framed by the pleadings; (2) determining whether the defendant negated the plaintiff’s claims; and (3) deciding whether the plaintiff demonstrated the existence of a triable, material factual issue. (*Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261.)

B. Mootness

As noted above, by the time the court heard argument on the summary judgment motion and rendered its decision, the City’s hearing procedure, Web site, and penalty notice had been restructured and the alternate procedures were in place in an effort to resolve the questions raised in Wineberg’s lawsuit. Furthermore, hearing officers had been reminded of their obligation under the Ordinance to render their decisions based solely on the evidence presented at the hearing, and not to rely on facts gathered during their own personal investigations.⁵ Moreover, the false alarm penalties assessed against Wineberg had been dismissed and all of the money he had paid to the City in penalties and fees had been refunded, with interest. Consequently, the trial court determined that these recent actions by the City rendered Wineberg’s lawsuit moot, except for the facial constitutional challenges to the purported vagueness of key terminology and the purported absence of pre-deprivation procedures under the Ordinance. On appeal, Wineberg claims the court’s mootness determination was in error.

A controversy becomes moot when an event occurs that renders it impossible for a court to grant a plaintiff any effectual relief, even if it were to rule in the plaintiff’s favor. (*Friends of Cuyamaca Valley v. Lake Cuyamaca Recreation & Park Dist.* (1994) 28 Cal.App.4th 419, 424-425; *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1574.)

⁵ The Ordinance provides, in pertinent part: “The hearing officer shall make his or her decision affirming or reversing the decision of the Director on the basis of the preponderance of evidence *presented at the hearing . . .*” (S.F. Police Code, Art. 37, § 3716, subd. (b)(3), italics added.)

A consideration of the circumstances of this case, in light of this standard, leads to the inevitable conclusion that Wineberg's challenge to the false alarm penalty review procedures *as applied to his specific challenge to the false alarm penalties assessed against him* is, in fact, moot. Had the City not voluntarily made the changes to its procedures, the best result for Wineberg would have been the dismissal of the penalties assessed against him, the return of his money and fees, and an order instructing the City to implement procedures that would provide him a fair hearing.

However, because the City voluntarily made the changes to its procedures sought by this litigation, and has withdrawn all of the false alarm penalties assessed against Wineberg and refunded all of the money he paid in penalties and fees, neither the trial court nor this court could order the City to do something that it had already done. As to any appeal in such a case, there is no longer an actual controversy for the court to address, and any judicial adjudication on the matter would be an impermissible advisory opinion. (See *Bell v. Board of Supervisors* (1976) 55 Cal.App.3d 629, 636-637 [dismissing appeal as moot where challenged legislation had been repealed and replaced with materially different law]; *National Assn. of Wine Bottlers v. Paul* (1969) 268 Cal.App.2d 741, 746 [dismissing appeal as moot where challenged order of Director of Agriculture had been terminated].)⁶

C. Damages and Equitable Relief

Nevertheless, Wineberg claims there are important issues left unresolved in the underlying litigation that create material issues of disputed fact requiring a trial. He points out that his lawsuit included a claim for general damages on account of the City's improper conduct in subjecting him to a review procedure that failed to comport with due process and violated the terms of the Ordinance. He also sought injunctive and declaratory relief. He claims these unresolved remedy requests give him a concrete interest in having this matter go to trial, and prevent this case from being moot.

⁶ We separately address, *post*, the *facial* constitutional challenges to the Ordinance that are not mooted by the City's voluntary action.

Wineberg has failed to offer any evidence that he suffered any compensatory damages, beyond the money that has already been returned to him by the City, that require a trial. While he claims that the City “did not tender an amount to [him] for the loss of use of his residential alarm system,” he fails to explain how the City’s conduct deprived him of the use of his alarm system. (See *Lueter v. State of California* (2002) 94 Cal.App.4th 1285, 1302 [damages that are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery].) He also claims he is entitled “to seek damages for the loss of use of his money during the deprivation period.” However, he acknowledged in these proceedings that in May 2011, the City sent him a check for \$48.64 for interest on the money he had paid in false claim penalties and fees. He fails to explain why this did not adequately compensate him for the loss of use of his money. (*Surety Sav. & Loan Assn. v. National Automobile & Cas. Ins. Co.* (1970) 8 Cal.App.3d 752, 759 [“Interest on the money during the time of the delay is a measure of damage for the loss of its use”].)

Wineberg also claims that if he is unable to prove compensatory damages, he is nevertheless entitled to recover nominal damages for the denial of his procedural due process rights during the City’s false alarm penalty review process.⁷ Nominal damages are basically a symbolic remedy for past wrongs, and one dollar is the usual amount

⁷ Although there is a dearth of California authority on the subject, federal courts have dealt extensively with this issue. (See, e.g., *Murray v. Bd. of Trustees, University of Louisville* (6th Cir. 1981) 659 F.2d 77, 79 [remanding First Amendment case to district court for adjudication of plaintiff’s nominal-damages claim]; see also *Blau v. Fort Thomas Public School Dist.* (6th Cir. 2005) 401 F.3d 381, 387 [“[T]he existence of a damages claim ensures that this dispute is a live one”]; *Lynch v. Leis* (6th Cir. 2004) 382 F.3d 642, 646, fn. 2 [“[A] claim for nominal damages . . . is normally sufficient to establish standing, defeat mootness, and grant prevailing party status”]; *Utah Animal Rights v. Salt Lake City Corp.* (10th Cir. 2004) 371 F.3d 1248, 1257-1258 (*Utah Animal Rights*) [following Tenth Circuit precedent holding that claim for nominal damages is sufficient for justiciability]; *id.* at p. 1268 (McConnell, J., conc.) [noting that the Sixth Circuit as well as the Ninth Circuit holds that a nominal-damages claim precludes mootness, but disagreeing with the rule].)

ordered where only nominal damages are allowed. (*Price v. McComish* (1937) 22 Cal.App.2d 92, 100.)

We recognize that there may be some circumstances where the interests of justice require reversal for the failure to consider the question of nominal damages—but this case does not present such a situation. We note that Wineberg’s complaint did not include a request for nominal damages—a point which he has not disputed.⁸ He now requests reversal and remand to the trial court for a determination of whether or not he is entitled to nominal damages based on policies and procedures that are no longer in existence. Therefore, even if he was successful in obtaining nominal damages, they would have *no effect* on the parties’ legal rights. (See *Utah Animal Rights, supra*, 371 F.3d at p. 1268 (McConnell, J., conc.) [“Where . . . the challenged past conduct *did not give rise to a compensable injury* and there is no realistic possibility of a recurrence, nominal damages have no more legal effect than would injunctive or declaratory relief in the same case”], italics added.)

Consequently, Wineberg has not convinced us that the summary judgment should be reversed simply because nominal damages need to be decided. (Accord, *Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 333 [judgment not reversed for failure to award nominal damages because “public policy sustains dismissal where the public entity has accepted responsibility to pay compensatory damages”].) Not only do we conclude

⁸ Federal courts appear split on whether or not a claim for nominal damages need to be specifically plead. (Compare *Irish Lesbian and Gay Organization v. Giuliani* (2d Cir. 1998) 143 F.3d 638, 651 [“Although ILGO [Irish Lesbian and Gay Organization] did not specifically request nominal damages in its pleadings, we have not precluded the award of nominal damages in the past if the complaint explicitly sought compensatory damages”] with *Davis v. District of Columbia* (D.C.Cir. 1998) 158 F.3d 1342, 1349 [affirming district court’s sua sponte dismissal of the plaintiff’s complaint for damages despite the possibility that nominal damages could be awarded, because the complaint requested only statutorily unavailable compensatory and punitive damages, and lacked any specific request for nominal damages]; see also *Matthews v. District of Columbia* (D.C.Cir. 2009) 675 F.Supp.2d 180, 188 [“Although an alleged denial of procedural due process should be actionable for nominal damages, . . . the plaintiffs do not even request nominal damages in their complaint”].)

that Wineberg has no legal entitlement to nominal damages, but also returning this case to the trial court to determine the as-applied constitutionality of abandoned practices and procedures—in the hope of awarding Wineberg a single dollar—would further prolong this already protracted proceeding, and would be a waste of diminishing judicial resources.

Wineberg also claims he is entitled to “assurance through injunctive and declaratory relief that the Alarm Penalty Program will be conducted in a fair manner consistent with the due process clauses of the United States and California Constitutions.” He claims he is entitled to equitable relief because the City has “failed to admit to violating due process rights” and has shown “a lack of sincere institutional reform or remorse for its violations of fundamental rights of due process.”

While Wineberg clearly wishes to have the moral satisfaction of a judicial ruling that he was subjected to procedures that violated his constitutional rights, the relevant case law makes clear that declaratory and injunctive relief operate prospectively only and are not remedies to redress past wrongs. (*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1403.) “ ‘[D]eclaratory relief operates prospectively to declare future rights, rather than to redress past wrongs. [Citation.]’ [Citations.] A declaratory judgment ‘ “serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them.” [Citations.]’ [Citation.]” (*County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 607-608; see also *Canova v. Trustees of Imperial Irrigation Dist. Employee Pension Plan* (2007) 150 Cal.App.4th 1487, 1497; *Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 360.)

The law is the same with respect to injunctive relief. “ ‘[I]njunctive relief is available to prevent threatened injury and is not a remedy designed to right completed wrongs. [Citations.] “It should neither serve as punishment for past acts, nor be exercised in the absence of any evidence establishing the reasonable probability the acts will be repeated in the future. Indeed, a change in circumstances at the time of the

hearing, rendering injunctive relief moot or unnecessary, justifies denial of the request.” [Citation.] Unless there is a showing that the challenged action is being continued or repeated, an injunction should be denied. [Citation.]’ [Citation.]” (*Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440, 464-465; accord, *Scripps Health v. Marin* (1999) 72 Cal.App.4th 324, 332-333.)

Consequently, there exists no legal basis for ordering injunctive or declaratory relief where the defendant has in good faith discontinued the wrongful conduct, and there is no reason to believe that the acts at issue will be repeated. The undisputed evidence in the case before us establishes that the City has voluntarily and in good faith implemented changes in its false alarm penalty review process to address the concerns raised in Wineberg’s lawsuit. The City has offered assurances that these changes are permanent. Indeed there is nothing, beyond rank speculation, to believe that the City’s review procedures, as presently implemented, will be replaced with the superseded procedures once this litigation ends.⁹ (See, e.g., *Quincy Oil, Inc. v. Federal Energy Administration* (1980) 620 F.2d 890, 895 [holding that where agency issued ruling adopting plaintiff’s position and promised it would “vigorously defend” the new policy against attack, possibility of recurrence was speculative and case was moot].) Consequently, the record does not contain any material facts supporting the need for injunctive or declaratory relief.

D. Facial Constitutional Challenges to the Ordinance

Alternatively, Wineberg claims that, “issues of material fact exist with respect to Mr. Wineberg’s claims for due process violations based upon the absence of an effective

⁹ Wineberg argues that his claims for declaratory and injunctive relief are not moot because the City has failed to show that its belated, voluntary compliance with the law ensures that due process violations will not reoccur, citing alleged illegal practices in the way the City currently processes parking and towing violations. However, we are precluded from considering this argument because it is based on alleged facts that do not appear in the record before us. (See, e.g., *Colt v. Freedom Communications, Inc.* (2003) 109 Cal.App.4th 1551, 1560 [“[n]o [appellate] record reference is furnished for this statement, and we may thus ignore it”].)

pre-deprivation hearing under the Ordinance and the fact that portions of the Ordinance are defective under the void for vagueness doctrine.” As we have already held, a decision on Wineberg’s *as-applied* constitutional challenges would have no practical legal effect on the underlying controversy. Therefore, we decline to address Wineberg’s claims that the lack of adequate pre-deprivation procedures and vague terminology, as applied to his specific factual situation, violated his right to due process. However, because these due process claims, as alleged in his complaint, also involved *facial* constitutional challenges to the Ordinance, and the City has relied in the past and clearly intends to rely in the future on the challenged portions of the Ordinance, we address Wineberg’s facial constitutional challenges. (See, e.g., *Better Government Ass’n v. Department of State* (D.C.Cir. 1986) 780 F.2d 86, 90-92 [mootness of individual claim resulting from agencies reversal of position in response to litigation does not moot facial challenge to the validity of the regulations in question].)

1. Pre-deprivation Safeguards

Wineberg complains that the City does not provide alarm users with an opportunity for “pre-deprivation review,” i.e., an administrative review of the penalties assessed *before* the alarm user is required to pay them. However, as the trial court recognized, Wineberg’s arguments rest on a false factual premise because the City makes (and has always made) pre-deprivation review available to all individuals who receive false alarm penalty notices.

The City assesses false alarm penalties after the responding law enforcement officers investigate the scene and find no evidence of a criminal offense or an attempted criminal offense. (S.F. Police Code, Art. 37, § 3702, subd. (o).) The City then sends a penalty notice form to the alarm user. That notice form invites the recipient to call the phone number provided if the alarm user wishes to appeal the penalties. In response to those calls, the alarm ordinance manager considers the documentation collected by the City supporting the assessment of the false alarm, considers any evidence presented by the alarm user, and determines whether to discharge or waive the penalty. Hundreds of people each year take advantage of this telephonic review process, and the alarm

ordinance manager usually waives over half of the challenged false alarm penalties *before* the alarm user is required to pay any penalties or fees.¹⁰

We reject Wineberg’s argument that a formal, adversarial hearing is required before the City constitutionally can require payment of penalties and fees, and find instead that the City’s procedures easily satisfy due process requirements. The law provides that precisely what procedures are required in any given case to satisfy due process requirements must necessarily be flexible and must be judged in context. After all, “unlike some legal rules,” due process “is not a technical conception with a fixed content unrelated to time, place and circumstances.” (*Cafeteria Workers v. McElroy* (1961) 367 U.S. 886, 895.) Rather, it “ ‘is flexible and calls for such procedural protections as the particular situation demands.’ [Citation.]” (*Gilbert v. Homar* (1997) 520 U.S. 924, 930; *Civil Service Assn. v. City and County of San Francisco* (1978) 22 Cal.3d 552, 561; *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1276.) Furthermore, “ ‘[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.’ [Citations.]’ [Citation.]” (*Gilbert v. City of Sunnyvale*, at p. 1277.)

The Supreme Court has made clear that in circumstances in which a pre-deprivation hearing is required by due process, it “need not be elaborate” in order to pass constitutional muster. (*Cleveland Board of Education v. Loudermill* (1985) 470 U.S. 532, 545.) To that end, a claimant need only be accorded: (1) oral or written notice of the charges, (2) an explanation of the evidence, and (3) an opportunity to present his or her side of the story. (*Id.* at p. 546.)

It is undisputed the City gives alarm users an opportunity to challenge false alarm penalties before paying them. When the alarm user does so, the alarm user is able to

¹⁰ This pre-deprivation review procedure has always existed, and the City afforded Wineberg a pre-deprivation review during his telephone conversation with the City’s alarm ordinance manager. However, as a result of this litigation, the City’s Web site now clearly delineates the right of alarm users to a pre-deprivation telephonic review of the false alarm penalty.

present his or her reason for contesting the false alarm penalty to the alarm ordinance manager, who then reviews the evidence to determine if the penalty should be assessed. The risk of an erroneous decision by the alarm ordinance manager at the pre-deprivation stage is minimized by the availability of a full hearing before a hearing officer at the post-deprivation stage, where the alarm user's penalty and fees can conceivably be refunded if the penalty was improperly assessed. (See *Gilbert v. City of Sunnyvale*, *supra*, 130 Cal.App.4th at pp. 1277, 1281 [existence of post-deprivation procedures is relevant to necessary scope of pre-deprivation procedures].) Applying these relevant precedents, we hold that the pre-deprivation review provided by the City does not violate due process. (See *Tyler v. County of Alameda* (1995) 34 Cal.App.4th 777, 785-787 [statutory scheme for contesting parking tickets, pursuant to which the person contesting the ticket must deposit the full amount of the parking penalty before an administrative hearing is held, does not violate due process].)

2. *Vagueness*

Section 3702, subdivision (o) of the Ordinance defines a “false alarm” as “an alarm dispatch request to a law enforcement agency, when the responding law enforcement officer finds no evidence of a criminal offense or attempted criminal offense after having completed a *timely* investigation of the alarm site.” (Italics added.) Thus, the determination of whether there has been a “false alarm,” which triggers the assessment of penalties under the Ordinance, rests on a “timely” response by a law enforcement officer.

The language of the Ordinance, however, fails to define “timely” or provide any standards for determining whether a response by a law enforcement officer to an alarm dispatch request was “timely.” In his complaint, Wineberg alleged that “[t]he absence of such a definition renders the Ordinance vague and uncertain, vests standardless discretion in the City in determining whether there has been a ‘false alarm’ at an alarm site triggering the imposition of penalties, and vests standardless discretion in a hearing officer considering an appeal of a notice of false alarm penalty in determining whether the police officer response was completed in a timely fashion.”

Initially we note that there are no disputed material facts concerning whether the word “timely” is vague. The only disagreement between the parties is over questions of law. (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1179 [whether Ordinance is vague is a question of law and opinion from a lay person or purported expert about statute’s meaning is inadmissible].)

A law is considered unconstitutionally vague if a person of normal intelligence must guess at its meaning and differ as to its application. (*Connally v. General Const. Co.* (1926) 269 U.S. 385, 391; see also *United States v. Lanier* (1997) 520 U.S. 259; *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 629.) “The degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment.” (*Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 498 (*Hoffman Estates*).)

Of course, the Ordinance is not a “penal” or “criminal” statute, and most published opinions discussing “void-for-vagueness” challenges involve criminal statutes. (See, e.g., *Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 687-689.) Cases that discuss vagueness challenges to civil sanctions confirm the standard of constitutional vagueness is *less* demanding than when a criminal law is being challenged. (*Ford Dealers Assn. v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 366, fn. omitted (*Ford Dealers*) [“ ‘The standards of certainty in [criminal] statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement’ ”]; *Teichert Construction v. California Occupational Safety and Health Appeals Bd.* (2006) 140 Cal.App.4th 883, 890.)

The proper standard in considering whether the word “timely” renders the Ordinance unconstitutionally vague was set out in *Duffy v. State Bd. of Equalization* (1984) 152 Cal.App.3d 1156. “ ‘It is true that “[c]ivil as well as criminal statutes must be sufficiently clear as to give a fair warning of the conduct prohibited, and they must provide a standard or guide against which conduct can be uniformly judged by courts. . . .” [Citations.] However, “ ‘[r]easonable certainty is all that is required. A statute will not be held void for uncertainty if any reasonable and practical construction

can be given its language.’ [Citation.] It will be upheld if its terms may be made reasonably certain by reference to other definable sources.” [Citations.]’ [Citation.]” (*Id.* at p. 1173.) A statute is not rendered unconstitutionally vague merely because its meaning “must be refined through application.” (*Ford Dealers, supra*, 32 Cal.3d at p. 367; accord, *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1117.)

When considered in light of these standards, Wineberg’s void-for-vagueness challenge fails. First, although we are the first court to interpret the Ordinance, we note that courts have rejected vagueness challenges to similar language. (See *Ford Dealers, supra*, 32 Cal.3d at pp. 368-369 [use of generic terms like “sufficient period of time” do not in and of themselves render a statute unconstitutionally vague]; *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1325-1326 [“timely manner” not vague].)

Secondly, in this case, the City offered undisputed evidence that it has taken steps “that will sufficiently narrow potentially vague or arbitrary interpretations” of the word “timely” as used in the Ordinance. (*Hoffman Estates, supra*, 455 U.S. at p. 504 [noting that government may avoid vagueness concerns by adopting administrative policies “that will sufficiently narrow potentially vague or arbitrary interpretations of the ordinance”].) When considering whether police officers have performed a “timely” investigation of an activated alarm, DEM recognizes that the “timeliness” of an investigation might depend on many circumstances, including the alarm event’s location. DEM presumes, however, that officers have performed a “timely” investigation of the alarm site where the officers arrive at the scene within 30 minutes from the time the alarm company receives notification of the alarm. Conversely, DEM presumes that police officers have not performed a “timely” investigation of the alarm site where the officers do not arrive within 30 minutes from when the alarm company receives notification of the alarm.

These presumptions are just that—merely presumptions. An alarm user may be able to overcome them by submitting evidence showing that the responding officers in a particular case did not arrive in sufficient time to observe evidence of criminal activity.

But, absent any such evidence, DEM applies the above presumptions. That standard is objective and prevents arbitrary enforcement.

E. Attorney Fees and Costs

After summary judgment was entered for the City, Wineberg made a request in the trial court for an award of attorney fees and costs. He asserted two sources for an award of attorney fees: (1) Code of Civil Procedure section 1021.5 (section 1021.5), which authorizes an award of fees to a successful party “in any action which has resulted in the enforcement of an important right affecting the public interest;” and (2) title 42 United States Code section 1988(b), which authorizes an award of attorney fees to “the prevailing party” in civil rights cases. The trial court denied Wineberg’s motion to recover attorney fees and costs after finding that he had not satisfied any of the requirements for an award of attorney fees under section 1021.5, and that Wineberg’s entitlement to fees under title 42 United States Code section 1988(b) was precluded as a matter of law. Wineberg has filed an appeal from this determination.¹¹

1. Attorney Fees under Code of Civil Procedure section 1021.5

Wineberg claims an entitlement to attorney fees under section 1021.5, California’s private attorney general statute. “[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.]” (*Graham, supra*, 34 Cal.4th at p. 565.)

Under this section, the court may award attorney fees to a “successful party” in any action that “has resulted in the enforcement of an important right affecting the public

¹¹ The order denying the motion for attorney fees is appealable as a collateral matter. (*Henneberque v. City of Culver City* (1985) 172 Cal.App.3d 837, 841-842.)

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 . . . 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.” (§ 1021.5.) Because the statute states the criteria in the conjunctive, *each* criteria must be satisfied in order to justify a fee award. (*RiverWatch v. County of San Diego Dept. of Environmental Health* (2009) 175 Cal.App.4th 768, 775; *McGuigan v. City of San Diego* (2010) 183 Cal.App.4th 610, 623.)

A trial court’s decision whether or not to award attorney fees under section 1021.5 is reviewed for an abuse of discretion. (*Graham, supra*, 34 Cal.4th at p. 578.) “Whether the applicant for attorney fees has proved section 1021.5’s elements is a matter primarily vested in the trial court. [Citation.] ‘We review the entire record, attentive to the trial court’s stated reasons in denying the fees and to whether it applied the proper standards of law in reaching its decision. [Citation.] We will reverse the trial court’s decision only if there has been a prejudicial abuse of discretion, i.e., when there has been a manifest miscarriage of justice or “ ‘where no reasonable basis for the action is shown.’ [Citation.]” (*Wal-Mart Real Estate Business Trust v. City Council of San Marcos* (2005) 132 Cal.App.4th 614, 620.)

Because there was no settlement or court judgment entered in Wineberg’s favor, his fee claim is based on the “catalyst theory,” which allows for attorney fees under section 1021.5 “even when litigation does not result in a judicial resolution if the defendant changes its behavior substantially because of, and in the manner sought by, the litigation.” (*Graham, supra*, 34 Cal.4th at p. 560.) As our Supreme Court explained, “ ‘[i]n determining whether a plaintiff is a successful party for purposes of section 1021.5, “[t]he critical fact is the impact of the action, not the manner of its resolution.” [Citation.]’ ” (*Graham, supra*, at p. 566.) Accordingly, even if the plaintiff did not obtain judicial relief, “ ‘an award of attorney fees may be appropriate where “plaintiffs’ lawsuit was a *catalyst* motivating defendants to provide the primary relief sought” [Citation.]” (*Id.* at p. 567.)

The showing that a plaintiff must make in order to recover pursuant to a catalyst theory was summarized in *Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 608: “[A] plaintiff must establish that (1) the lawsuit was a catalyst motivating the defendants to provide the primary relief sought; (2) that the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense . . . ; and, (3) that the plaintiffs reasonably attempted to settle the litigation prior to filing the lawsuit.” (See also *Graham, supra*, 34 Cal.4th at p. 561.)

Wineberg contends the trial court abused its discretion in denying his request for attorney fees under section 1021.5, claiming the requisites for an attorney fees award under the catalyst theory were indisputably met in this case. In addition, he contends that an award of private attorney general fees is warranted because he has satisfied the more general requirements of section 1021.5, insisting that the necessity of private enforcement was clear, and his lawsuit conferred a substantial benefit on a significant number of people.

We need not address these points because *even if* Wineberg proved all of these prerequisites to an award of attorney fees under section 1021.5, we find there is a legitimate basis appearing of record—Wineberg’s unreasonable refusal to make a bona fide effort to resolve this case without litigation—that fully supports the trial court’s exercise of discretion in denying Wineberg’s attorney fee request under section 1021.5.

Section 1021.5 has a strong policy of encouraging resolution of disputed issues between the parties and discouraging litigation that continues for its own sake. Our Supreme Court has endorsed the proposition that “ ‘attorney fees under . . . section 1021.5, will not be awarded unless the plaintiff seeking such fees had reasonably endeavored to enforce the “important right affecting the public interest,” *without litigation and its attendant expense.*’ [Citation.]” (*Vasquez v. State of California* (2008) 45 Cal.4th 243, 256-257 (*Vasquez*), quoting *Grimsley v. Board of Supervisors* (1985) 169 Cal.App.3d 960, 966, original italics.)

As previously noted, in *Graham*, the court adopted several “sensible limitations on the catalyst theory. . . .” (*Graham, supra*, 34 Cal.4th at p. 575.) Not only must the

lawsuit have some merit but also “the plaintiff must have engaged in a reasonable attempt to settle its dispute with the defendant *prior* to litigation.” (*Id.* at p. 561, italics added.) Such a rule reflects an important policy rationale. As *Graham* noted, “[a]warding attorney fees for litigation when those rights could have been vindicated by reasonable efforts short of litigation does not advance that objective and encourages lawsuits that are more opportunistic than authentically for the public good.” (*Id.* at p. 577.) The *Graham* court made clear, however, that “[l]engthy prelitigation negotiations are not required, nor is it necessary that the settlement demand be made by counsel, but a plaintiff must at least notify the defendant of its grievances and proposed remedies and give the defendant the opportunity to meet its demands within a reasonable time. [Citations.]” (*Ibid.*)

In addition, in *all* section 1021.5 cases, even in non-catalyst cases, a court properly takes into consideration whether the party seeking fees attempted to resolve the matter without litigation. (*Vasquez, supra*, 45 Cal.4th at p. 258.) Thus, when a court seeks to determine whether an action was “necessary” within the meaning of the statute, “settlement efforts (or their absence) are relevant *in every case.*” (*Ibid.*) In assessing such information, “the trial court exercises its equitable discretion in light of all the relevant circumstances.” (*Id.* at pp. 258-259, fn. omitted.) The *Vasquez* court laid out a number of factors a court might consider in this regard, including, “[t]hat a plaintiff for tactical reasons might choose not to propose, or not to accept, a reasonable settlement offer is thus, in every case, a circumstance that potentially weighs against an award of fees.” (*Id.* at p. 259; see also *Environmental Protection Information Center v. California Department of Forestry & Fire Protection* (2010) 190 Cal.App.4th 217, 236-237 (*Environmental Protection*).)

The City contends Wineberg is not entitled to attorney fees under the catalyst theory because he failed to take reasonable measures to settle with the defendant *before* filing the lawsuit. (*Vasquez, supra*, 45 Cal.4th at p. 253; *Graham, supra*, 34 Cal.4th at p. 577.) Wineberg disagrees and claims that prior to bringing the underlying action, he attempted to resolve the controversy by doing the following: He wrote a letter to the City’s office of the treasurer and tax collector (and sent a copy to the city attorney’s

office), claiming that certain aspects of the alarm penalty program violated the Ordinance and due process rights. He submitted written appeal forms and attended an appeal hearing seeking to resolve his grievances. In September 2009, under the Government Claims Act, he submitted a claim against the City on behalf of himself and “all others similarly situated.” In his claim, he asserted a violation of due process rights in the City’s “assessment of alarm penalties and in the hearing process.”

Wineberg claims that his “administrative notices to the City satisfied the pre-litigation requirement under *Graham*” because it put the City on notice of its unlawful conduct, yet the City failed to bring its program into compliance with the law prior to Wineberg filing his lawsuit. The City disputes whether these actions can legitimately be characterized as a pre-litigation settlement demand. While Wineberg’s exhaustion of his administrative remedies notified the City of the basic gist of his grievances, the City emphasizes that he did “not propose any remedies or settlement options for the City to consider.” Although the matter is far from settled, this court will assume that exhausting administrative remedies fulfilled the requirement of a an adequate pre-litigation demand. (Cf., *Environmental Protection, supra*, 190 Cal.App.4th at p. 237 [“We disagree that a party’s exhaustion of its administrative remedies will necessarily satisfy prelitigation settlement requirements in every case”].)

However, it is Wineberg’s conduct *after* this litigation was filed that unnecessarily prolonged these proceedings and wasted legal and judicial resources. We summarize the chronology of the parties’ settlement negotiations: Wineberg filed his complaint on March 26, 2010. Shortly after the complaint was filed, the City initiated settlement discussions. On July 14, 2010, Wineberg sent a letter in response to the City’s initiation of settlement discussions. In that letter, Wineberg stated that he would settle if the City agreed to: (1) revise the penalty notice form to include information required by the Ordinance, (2) revise the City’s DEM Web site, (3) issue an appropriate directive to administrative law judges prohibiting them from considering extrajudicial evidence, (4) return the money he paid in false alarm penalties, (5) pay his attorney fees, (6) amend the Ordinance to define “timely,” and (7) amend the Ordinance to codify the City’s initial

review procedure that allows an alarm user to contest an assessment of false alarm penalties before the user is required to pay the penalties and appeal fee.

On August 5, 2010, the City responded and agreed to either comply with Wineberg's settlement demands or discuss with him the possibility of doing so. Wineberg's counsel never responded to that offer, except to say, without specificity, that counsel disagreed with "some of the positions" taken by the City.

The City again suggested that the parties resume settlement discussions in January 2011. Wineberg refused, informing the City that he was "not interested in discussing settlement at this time." Despite Wineberg's refusal to engage in settlement discussions, the City wrote him again on January 26, 2011, to attempt to find a mutually agreeable resolution to the case. In that letter, the City reiterated that: (1) it had already amended the penalty notice form, and that it was willing to (2) revise the City's DEM Web site, (3) issue an appropriate directive to administrative law judges, (4) return the money he paid in false alarm penalties, and (5) pay his reasonable attorney fees. The City also offered to enact rules and/or regulations to define "timely," and to codify in rules and/or regulations the City's initial review procedure that allows an alarm user to contest an assessment of false alarm penalties before paying them.

Although Wineberg acknowledged that the City's settlement proposal addressed all of his earlier conditions for settlement, he informed the City at a meeting in February 2011 that he refused to settle this action on the terms he had originally proposed. Reframing *his own settlement demand* as merely a "starting point for the discussions," Wineberg made additional demands. For instance, Wineberg demanded that the City agree to an injunction that would bind all hearing officers in the City, although his own complaint challenged only the conduct of false alarm hearing officers. He demanded that the City return *all* the false alarm penalties collected pursuant to the Ordinance over the past decade regardless of whether those penalties were assessed improperly. He demanded that the City amend the Ordinance or adopt a regulation requiring officers to respond to false alarms within 15 minutes for their responses to be considered "timely," even though he could not provide legal authority demonstrating that

the City was required to do so. Finally, Wineberg demanded that the City pay him “attorney[] fees” that would compensate him for the “public benefit” that had been conferred by this litigation.

On February 16, 2011, the City responded to Wineberg’s settlement demand, and explained why those demands were not acceptable to the City. Nonetheless, the City stated that it would like to find a reasonable and mutually agreeable resolution to this case, and suggested that the parties resume settlement discussions. Wineberg did not respond.

In mid-to-late February 2011, the City dismissed the penalties against Wineberg, sent him a check in reimbursement for the penalties and fees he had paid the City, and made most of the changes to the false alarm penalty review process that Wineberg himself had proposed during the parties’ settlement negotiations. The City claims it “made changes on its own” because “it became clear that [Wineberg] would not settle this action on reasonable terms.”

On April 8, 2011, Wineberg informed the City, before a scheduled meeting with the Bar Association of San Francisco’s Early Settlement Program, that he would settle this case if the City paid him \$945,000, and made certain other concessions. In pleadings filed below, Wineberg explained how he arrived at the \$945,000 figure: “This amount took into consideration the value of the time spent in this case by attorneys, the result achieved as of April 8, 2011, the additional results to be achieved at the settlement conference, and the benefit bestowed upon both the City and all alarm users by this litigation.”¹² The City declined that offer.

While Wineberg now offers justifications and explanations for his refusal to enter into bona fide settlement negotiations with the City and his decision to go on litigating

¹² Now Wineberg contends—for the first time on appeal—that the \$945,000 demanded from the City “could have been set aside to fund a program for persons to re-open and appeal false alarm penalties and for the City to refund some penalties.” That Wineberg has waited until now to make this proposal reveals it for the post hoc rationalization for asking for such an inflated sum that it so obviously is.

issues in this case after they had clearly become moot, these arguments just offer differences of opinion that can be drawn from this record. However, under an abuse of discretion standard of review, we afford considerable deference to the trial court; and when two or more inferences can reasonably be drawn from the record, we must defer to the inferences drawn by the trial court. (*In re Woodham* (2001) 95 Cal.App.4th 438, 443 [abuse of discretion not shown when party presents facts that merely afford an opportunity for a difference of opinion].)

Given the deferential standard of review, the record amply supports the trial court's exercise of discretion in denying Wineberg's attorney fees motion under section 1021.5. Rather than attempting to arrive at a solution that was optimal for everyone involved in this litigation, Wineberg simply shut down the process. He refused to work with the City in achieving a resolution to this case and stonewalled all of the City's efforts to negotiate—even when the City offered a settlement that provided all the relief Wineberg originally requested, including the payment of reasonable attorney fees.

Once the City gave up on a settlement, and voluntarily made the changes to its false alarm penalty program sought by Wineberg, it was unreasonable for Wineberg to continue litigating when the bulk of this case had clearly become moot. Doing so unnecessarily prolonged these proceedings and wasted the time of the trial court and counsel for the City, not to mention unreasonably running up Wineberg's legal bills. Since Wineberg could have obtained everything that he has sought to achieve in this litigation, including the payment of his attorney fees, if he had simply engaged in reasonable settlement negotiations with the City, no abuse of discretion has been shown in the trial court's denial of his request for attorney fees. (Accord, *Baxter v. Salutory Sportsclubs, Inc.* (2004) 122 Cal.App.4th 941, 946-947, fn. omitted [upholding denial of attorney fees under section 1021.5 when defendant voluntarily corrected deficiencies shortly after lawsuit was filed, and "the litigation and the consequent attorney fees were largely, if not entirely, unnecessary"].)

2. Attorney Fees under Title 42 United States Code section 1988

Alternatively, Wineberg contends he was entitled to an attorney fee award pursuant to title 42 United States Code section 1988 (section 1988). In civil rights cases, Congress has provided courts authorization to “allow the prevailing party . . . a reasonable attorney’s fee.” (§ 1988(b).) Parties are considered “prevailing parties” if “they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.” [Citation.]” (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 433, fn. omitted.) However, in *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources* (2001) 532 U.S. 598 (*Buckhannon*), the Supreme Court held that plaintiffs are not entitled to attorney fees under section 1988, even if their legal efforts induced the defendant to change its prior unconstitutional practices, unless the litigation resulted in some form of judicial relief. (*Buckhannon*, at p. 603.) Consequently, to “succeed” under this standard, a party must achieve a “court-ordered ‘chang[e] [in] the legal relationship between [the plaintiff] and the defendant.’ . . .” (*Id.* at p. 604, quoting *Texas State Teachers Assn. v. Garland Independent School Dist.* (1989) 489 U.S. 782, 792.)

Therefore, a plaintiff seeking fees under section 1988 does not become a “prevailing party” solely because his or her lawsuit causes a voluntary change in the defendant’s conduct. In that situation, the change in the parties’ legal relationship lacks the requisite “judicial imprimatur.” (*Buckhannon, supra*, 532 U.S. at p. 605, italics omitted.) Consequently, we agree with the trial court that because Wineberg’s lawsuit did not result in a judgment in Wineberg’s favor, he is not entitled to attorney fees under section 1988(b).

IV.

DISPOSITION

The judgment for the City is affirmed. The order denying Wineberg’s motion for attorney fees is affirmed. The City shall recover its costs on appeal.

RUVOLO, P. J.

We concur:

REARDON, J.

HUMES, J.