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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

CITY OF UPLAND,

Plaintiff and Respondent,

v.

THE INLAND OVERSIGHT  
COMMITTEE,

Defendant and Appellant.

E073768

(Super.Ct.No. CIVDS1812143)

OPINION

APPEAL from the Superior Court of San Bernardino County. David S. Cohn,  
Judge. Affirmed.

Briggs Law Corporation, Cory J. Briggs, and Anthony N. Kim for Defendant and  
Appellant.

Richards, Watson & Gershon and Ginetta L. Giovinco for Plaintiff and  
Respondent.

This appeal is from the denial of a motion for attorney fees, on a private attorney  
general theory (Code Civ. Proc., § 1021.5), in an unsuccessful validation action (Code  
Civ. Proc., § 860 et seq.).

The City of Upland (City) filed this validation action; it asked the trial court to validate its agreement to sell part of Memorial Park to San Antonio Regional Hospital (Hospital). The Inland Oversight Committee (Committee) opposed the validation action. It argued that the agreement was invalid for a number of reasons, including that the City could not dispose of park property without the approval of the voters in an election. However, it also argued that the agreement was not a proper subject of a validation action. The trial court agreed with the latter argument and dismissed the validation action.

The Committee then filed a motion for an award of attorney fees on a private attorney general theory. The trial court denied the motion, because it found that the Committee had not conferred a benefit on the general public. It explained that it had dismissed the action only because it lacked subject matter jurisdiction; it had not determined, one way or the other, whether the agreement was, in fact, valid.

The Committee appeals. It argues that it effectively scuppered the agreement, because one condition of the agreement was the successful completion of a validation action. It also argues that it provided a public benefit by preventing the City from proceeding by way of an illegitimate validation proceeding.

We will hold that the Committee failed to prove that the City and the Hospital could no longer consummate the agreement, or even that they could no longer do so without an election. We will also hold that defeating an illegitimate validation action

does not, as a matter of law, benefit the public, without regard to what else (if anything) the defeat has accomplished.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

#### A. *Factual Background.*

City staff and the Hospital negotiated an agreement that called for the City to sell a 4.631-acre baseball field area in Memorial Park to the Hospital for \$4.2 million. The agreement provided that one of the “Conditions to Closing” was “[c]ompletion of [a] Judicial Validation Action by the City . . . .” On March 26, 2018, the City Council approved the agreement.

#### B. *The Validation Action.*

On May 16, 2018, the City filed the present action. It was styled as a validation action pursuant to Code of Civil Procedure section 860 et seq. It sought a judgment that the agreement was valid. As an in rem action, it named “all persons interested” as defendants.

The Committee filed an answer. One Marjorie M. Mikels also filed an answer. The Hospital filed an answer, supporting the City’s position.

The trial court ordered the matter tried like a writ proceeding — on the administrative record, briefs, and oral argument, without live testimony.

In its brief, the Committee argued:

1. The agreement was not a proper subject of a validation action.

2. The City could not dispose of park property without first obtaining voter approval in an election. (See Gov. Code, § 38440 et seq.)

3. The City’s approval of the agreement violated the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) (CEQA).

4. The agreement violated the City’s general plan.

5. The City’s approval of the agreement violated public notice requirements.

On May 1, 2019, after hearing argument, the trial court ordered the validation action dismissed. It ruled: “Notwithstanding five grounds for objection, I’m only going to address one. I agree with the objectors that this contract is simply not subject to the validation statutes.”

It added: “I need to be very — very clear. . . . I’m not invalidating this contract. I’m simply dismissing the case. [¶] The City is free if it chooses to do so to go forward with this transaction. [The Committee is] free, if they object to that, to file some different kind of challenge . . . .”

On May 29, 2019, the trial court entered a judgment of dismissal.

C. *The Motion for Attorney Fees.*

On July 31, 2019, the Committee filed a motion for attorney fees under Code of Civil Procedure section 1021.5.

On September 10, 2019, after hearing argument, the trial court denied the motion. It explained: “I said that by dismissing the case I was not ruling that the transaction was invalid. The City could go forward with the transaction if it chose to do so. Interested

parties would be free to try to prevent it . . . . [¶] So I cannot say that there has been a substantial public benefit that has been achieved here in this litigation. I dismissed this case on subject matter jurisdictional grounds.”

D. *The Motion for Reconsideration.*

On September 16, 2019, the Committee filed a motion for reconsideration. It cited a City staff report, which stated that the agreement “is subject to voter approval of a ballot initiative scheduled for the March 2020 election.” It claimed that this showed that it had conferred a substantial benefit on the general public.

The City responded with evidence that the statement in the staff report was a mistake, and that it had not taken any action to set an election to approve the agreement.

On September 24, 2019, after hearing argument, the trial court denied the motion for reconsideration. It stated: “[I]t doesn’t matter whether an election is set or not set, going to be set, not going to be set. It’s all irrelevant because the Court did not have subject matter jurisdiction.”

## II

### DISCUSSION

Code of Civil Procedure section 1021.5 (section 1021.5) allows a prevailing party to recover attorney fees on a private attorney general theory. As relevant here, it provides:

“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 . . . 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.”

“The applicant bears the burden of establishing each criterion required for an attorney fee award under section 1021.5 . . . [citation] . . . .” (*Bui v. Nguyen* (2014) 230 Cal.App.4th 1357, 1375, fn. 9.)

“On appeal from an award of attorney fees under section 1021.5, “the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law.” [Citations.]” (*Serrano v. Stefan Merli Plastering Co., Inc.* (2011) 52 Cal.4th 1018, 1025-1026.)

The trial court found that the Committee had not conferred a significant benefit on the general public because the dismissal of the validation action had no effect on whether the City could move forward with the sale.

The Committee argues that the dismissal did have “the effect of blocking the sale because obtaining a validation judgment was a prerequisite to completion of the sale.”<sup>1</sup> The trial court, however, could reasonably find that the Committee did not meet its

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<sup>1</sup> Unhelpfully, the City does not respond to this argument.

burden of proof on this point. The parties to the agreement — the City and the Hospital — could waive this condition. And aside from the condition itself, there was no evidence that they were not going to proceed with the sale regardless. Indeed, in the trial court, counsel for the Committee conceded that the sale might yet go forward.<sup>2</sup>

The Committee also argues that defeating an improper validation action *always* confers a significant benefit on the general public. As it notes, a validation action is in rem, and hence the judgment is “forever binding and conclusive, as to all matters therein adjudicated or which at that time could have been adjudicated, against the agency and against all other persons . . . .” (Code Civ. Proc., § 870, subd. (a).) That is true even when, in retrospect, the matter validated was not properly the subject of a validation proceeding. (*Colonies Partners, L.P. v. Superior Court* (2015) 239 Cal.App.4th 689, 694-695.) The Committee concludes that it is a public service to prevent a local government from obtaining a judgment validating some act that is not properly subject to validation.

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<sup>2</sup> The trial court commented, “The City could go forward with the transaction if it chose to do so.” Counsel for the Committee then responded, “Now, it’s true you said they could go forward. . . . I think the disconnect . . . is that we’re somehow claiming that this project is dead forever. No. We don’t have to establish that. . . . [¶] The fact that . . . the City has to go back and do some other process, whether it amends the contract . . . , those are all things that remain to be seen. We don’t have to show that none of those work.”

He also said, “Now, if . . . the hospital wants to waive a requirement, they’ll do so, and the public will be apprised of it. And if the transaction goes forward on that basis, somebody may have something to say about it.”

The Committee did not raise this argument below. “““As a general rule a party is not permitted to change its position on appeal and raise new issues not presented in the trial court. [Citation.] . . . However, ‘a litigant may raise for the first time on appeal a pure question of law which is presented by undisputed facts.’ [Citation.] . . .””

(*Bocanegra v. Jakubowski* (2015) 241 Cal.App.4th 848, 857.) We consider this argument because it falls under this exception.

The Committee’s argument, however, sweeps with too broad a brush. “[T]he public always has a significant interest in seeing that legal strictures are properly enforced and thus, in a real sense, the public always derives a ‘benefit’ when illegal private or public conduct is rectified. . . . [H]owever, . . . the Legislature did not intend to authorize an award of attorney fees in every case involving a statutory violation.”

(*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 939-940.)

*Canyon Crest Conservancy v. County of Los Angeles* (2020) 46 Cal.App.5th 398 is virtually on point. There, a nonprofit organization sued to prevent the construction of a house, on grounds including that the approval of the project violated CEQA. (*Id.* at pp. 401, 406.) After the trial court stayed construction, the property owner asked the county to vacate its permit approvals, because he could not afford to litigate. The county did so; however, a representative of the planning commission indicated that the property owner could reinstate his application, and a member of the board of supervisors opined that the nonprofit had indeed abused CEQA. (*Id.* at p. 407.)

The trial court denied the nonprofit's motion for attorney fees. (*Canyon Crest Conservancy v. County of Los Angeles, supra*, 46 Cal.App.5th at pp. 407-408.) The appellate court affirmed. It accepted that, "as a general matter, litigation alleging CEQA violations can involve important rights affecting the public interest. [Citations.]" (*Id.* at p. 410.) However, the nonprofit had not brought about any additional environmental review. (*Ibid.*)

The nonprofit argued that "it was successful 'in ensuring that the project was not built without adequate CEQA review,' and that such success was 'sufficient to satisfy the "important" right requirement.'" (*Canyon Crest Conservancy v. County of Los Angeles, supra*, 46 Cal.App.5th at p. 410.) The appellate court disagreed: "The court was within its discretion to conclude otherwise, based on the lack of evidence that [the county] would conduct any additional review or change their approach should [the property owner] reapply for the project. In fact, all indications from [the county] during the underlying proceedings and ensuing litigation suggested that the county felt [the property owner] and [the county] had acted properly in proposing and assessing the project . . . . There was no evidence to suggest [the county] would make any changes in reviewing proposals for this project, or future similar projects." (*Id.* at pp. 410-411.)

The court also quoted *Woodland Hills Residents Assn., Inc. v. City, supra*, 23 Cal.3d at page 938: "[T]he fact that a plaintiff is able to win his case on a "preliminary" issue, thereby obviating the adjudication of a theoretically more "important" right, should not necessarily foreclose the plaintiff from obtaining attorney fees under a statutory

provision . . . . On the other hand, of course, the fact that a plaintiff prevails on a “technical” preliminary issue does not necessarily demonstrate that his additional claims have sufficient merit to warrant the conclusion that the action served to vindicate an important right.” (*Canyon Crest Conservancy v. County of Los Angeles, supra*, 46 Cal.App.5th at pp. 410-411.)

Here, similarly, the Committee won on a technical, preliminary issue. The mere fact of a statutory violation — in this case, of the validation statute, Code of Civil Procedure section 860 — is not sufficient to demonstrate a significant public benefit. Rather, the trial court was required to look at the underlying right being asserted. As in *Canyon Crest*, that right was never actually litigated or established. Like the property owner in *Canyon Crest*, the City could still move forward, as it proposed.

The Committee did establish that the City could not proceed by way of a validation action; but the agreement could yet be determined to be valid in another action, such as an action for declaratory relief. If so, the fact that the Committee successfully prevented an identical determination from being made in a validation action would be of little public benefit.

The Committee seeks to distinguish *Canyon Crest*, arguing essentially that the stakes there were petty — the proposed development was a single-family home on a small lot; the nonprofit had been formed by two of the property owner’s neighbors, who were concerned about the effect of the project on them; and the alleged CEQA violation

supposedly involved “the removal of a single protected oak tree.”<sup>3</sup> These factors, however, were not central to the appellate court’s reasoning. Regarding the size of the lot, it merely noted that this was a factor that *the trial court* had considered. (*Canyon Crest Conservancy v. County of Los Angeles, supra*, 46 Cal.App.5th at pp. 412-413.) It noted the self-interest of the neighbors as just one of several reasons why the action did not confer a significant benefit on the public. (*Ibid.*) And it did not consider the number of oak trees at all. (*Ibid.*)

Rather, as relevant here, the court stated: “Although [the nonprofit] raised a number of challenges to the environmental analysis of the project conducted by respondents, the lawsuit was dismissed without any agreement by [the county] that [it] would reconsider the project in a different manner, or any order requiring [it] to do so. [The county] maintained that [the property owner] could reapply for the project if he chose to and then [the county] would proceed as [it] believed proper. Nor did [the county] acknowledge any change in how [it] would approach similar projects in the future.” (*Canyon Crest Conservancy v. County of Los Angeles, supra*, 46 Cal.App.5th at p. 413.) This reasoning applies squarely here.

The Committee argues that, because a validation judgment is conclusive, the only way it could prevent the City from going through with the sale was to appear and defend

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<sup>3</sup> Actually, the project “would require removal of one oak tree, and would result in temporary or permanent encroachment into the protected zone of eight other oak trees.” (*Canyon Crest Conservancy v. County of Los Angeles, supra*, 46 Cal.App.5th at p. 402.) There was evidence that the “encroachments on three other trees might impact their health and ultimately require their removal.” (*Id.* at p. 404.)

this action: “[H]ad this case not been opposed and dismissed, the Agreement would have been validated; and even [though] it may be illegal for the City to sell Memorial Park to [the Hospital] without a vote of the electorate, it could have gone ahead and done so under cover of a validation judgment.” For purposes of attorney fees, however, the problem is that the Committee settled for a temporary fix — the dismissal of the validation action, which left the City free to move forward. It could have gone after a permanent fix, by filing a cross-complaint for a declaratory judgment that the agreement was invalid. Then, had it prevailed, it would have a more compelling case for fees.

We therefore conclude that the trial court did not abuse its discretion by denying the motion for attorney fees.

### III

#### DISPOSITION

The order appealed from is affirmed. The City is awarded costs against the Committee.

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RAMIREZ  
P. J.

We concur:

SLOUGH  
J.

MENETREZ  
J.