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November 1, 2002

TO: SUPERVISOR ZEV YAROSLAVSKY, Chairman
SUPERVISOR GLORIA MOLINA
SUPERVISOR YVONNE BRATHWAITE BURKE
SUPERVISOR DON KNABE
SUPERVISOR MICHAEL D. ANTONOVICH

FROM: LLOYD W. PELLMAN
County Counsel

RE: **Court's Denial of Los Angeles Times Request for Attorneys' Fees**

This is to advise you that Los Angeles Superior Court Judge Dzintra Janavs this morning denied the request of the Los Angeles Times for attorneys's fees and costs in the Brown Act lawsuit that it had filed against the County.

The Los Angeles Times had requested $64,380 in attorneys' fees and costs.

Judge Janavs noted that the lawsuit was filed after the Board had placed on its agenda various proposals for addressing the County's Brown Act and other procedures.

Attached in the judge's tentative decision which became her final decision.

The County was represented in this matter by Brown, Winfield and Canzoneri.

LWP::

Enclosure

c: David E. Janssen, Chief Administrative Officer
Violet Varona-Lukens, Executive Officer, Board of Supervisors

TENTATIVE DECISION

CASE: LA Times Communications LLC, et al. v. LA County Board of Supervisors

CASE No.: BS075075

DATE: Friday, November 1, 2002 **TIME:** 9:30 a.m.
JUDGE: Dzintra Janavs **DEPT.:** 85
EVENT: Motion for Attorneys' Fees and Costs

Petitioner LA Times brought a Petition against the Los Angeles County Board of Supervisors for writ of mandamus, injunctive relief, and declaratory relief on seven causes of action alleging Brown Act violations.

On 6/25/02, this court found that Petitioner failed to establish Brown Act violations in connection with the second, fifth, sixth, and seventh causes of action, but did so as to the first, third, and fourth causes of action with respect to the Board's meetings of 12/18/01, 1/4/02, and 1/8/02. The court denied Petitioner's request for writ of mandamus and for permanent injunctive relief on all causes of action. The court denied declaratory relief as to the second, fifth, sixth, and seventh causes of action but granted declaratory relief as to the first, third, and fourth causes of action (7/3/02 Judgment; Pet. Memo. Ex. I, p. 88-89).

Petitioners now seek $64,380.00 in attorneys' fees and costs ($57,610.50 in attorneys' fees, plus $244.50 in filing fees, plus $2,750.00 incurred preparing this motion, and $3775.00 to reply to Respondent's opposition to this motion) (Wickers ¶ 2; Seager Reply ¶ 4).

The motion for attorneys' fees and costs is denied.

Gov. Code section 54960.5 provides:

> A court may award court costs and reasonable attorney fees to the plaintiff in an action brought pursuant to Section 54960 or 54960.1 where it is found that a legislative body of the local agency has violated this chapter. . . .

In Common Cause v. Stirling (1981) 119 Cal. App. 3d 658, 663 (Common Cause I) and Common Cause v. Stirling (1983) 147 Cal. App. 3d 518, 524 (Common Cause II), at issue was a policy to circulate letter decisions among City Counsel members outside of the public hearing context. The Petitioner prevailed on its allegation that the use of such letters violated the Brown Act. As regards attorneys' fees, the court stated: "[t]he Brown Act provision permitting a discretionary award of attorney's fees without listing the special requirements for the award, is. . . analogous to federal statutes such as the Civil Rights Act which provide for payment of attorney's fees without special qualification, because in the absence of such provision there would be little incentive to bring such lawsuit." Common Cause I at 663.

The court observed at 665 (citations omitted):

> A court must still thoughtfully exercise its power under section 54960.5 examining all the circumstances of a given case to determine whether awarding fees under the statute would be unjust with the burden of showing such inequity resting on the defendant. For example, in Aho v. Clark (9th Cir. 1979) 608 F.2d 365, an order denying attorney's fees under the Civil Rights Act was affirmed because the award of fees might have altered the consequences of the settlement reached by the parties, defendants were already in the process of remedying the program at issue and attorney's fees were not essential to attract competent

counsel. Without limitation, some other considerations which the court should weigh in exercising its discretion include the necessity for the lawsuit, lack of injury to the public, the likelihood the problem would have been solved by other means and the likelihood of recurrence of the unlawful act in the absence of the lawsuit.

In this case, all the significant relevant factors make it unjust to impose the attorneys' fees on the taxpayers of LA County.

As regards the necessity for the lawsuit, the Board had committed itself to updating, clarifying, etc. its policies prior to Petitioner's filing of the lawsuit on 3/29/02. Thus, the Board began taking action to correct its errors as early as 12/19/01 when Pellman advised the Board that he provided the title and summary of the initiative, thus remedying the impact of activity that took place on 12/18/01 (Pellman Trial Dec ¶ 18). Starting on 1/4/02, the Board began a series of discussions regarding its Brown Act policies and practices, and prior to this lawsuit made various revisions to those policies (Trial Exs. 29, 30, 8, 9). The Board's Brown Act protocol had already undergone revision when Petitioners filed their lawsuit. The Board's 4/2/02 Agenda Packet noting these revisions was released to the public on 3/28/02.

That the Board disagreed with Petitioner's legal contentions before and during this litigation does not per se justify recovery of attorneys' fees. The Board successfully defended against most of Petitioner's Brown Act challenges, and as regards the three violations found, its legal position was not frivolous or in bad faith.

Unlike in Common Cause, no policy was at issue in the violations found here. Rather, Petitioner challenged specific closed session meetings involving unique factual circumstances (Board action in response to an attorney's specific advice regarding a ballot measure).

As regards injury to the public, the Common Cause I, Common Cause II, and International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc. (1999) 69 Cal. App. 4th 287 cases recognize that where Brown Act violations are present, there is likely injury to the public, because the Brown Act itself is designed to keep the public informed. In an abstract legal sense, every Brown Act violation violates the public's right to disclosure and in that sense is injury to the public. If such injury alone were to serve as a basis for recovery of attorneys' fees, such fees would be mandatory in every case where violation of the Act is found. Because section 54960.5 makes an award of fees discretionary, the court should consider also the extent and nature of such injury. For example, did the Brown Act violations result in improper action being taken, did they impact on property or other rights of the public, and so on.

Here, the public sustained no additional injury from the three violations beyond the violations themselves. The 12/18/01 actions were immediately corrected on 12/19/01, and ultimately led to the Board reviewing and revising its protocols and procedures. The two remaining violations were interrelated and, ironically, involved the Board's actions to revise and improve its Brown Act procedures.

Unlike Common Cause II, where at issue was an ongoing letter policy, here there was no recurring policy at issue. Rather, the Brown Act violations were based on a specific factual setting, and began to be remedied before the lawsuit was filed, and it is unlikely that the specific violations are likely to recur as they were factually isolated incidents. As noted *supra*, the Board's denial in this lawsuit that any violation had occurred was not based on policy, but on a bona-fide dispute with Petitioner. Significantly, injunctive relief was denied based on inadequate showing of likely recurrence.

Finally, the Aho factor (cited in Common Cause II) that attorneys' fees were needed to attract competent counsel, does not apply here. LA times had plenty of incentive, other than attorneys' fees, to bring this action.