CITY OF NORCO V. MUGAR: REINFORCING THE LEGAL RIGHTS OF CITIES IN CALIFORNIA AND BEYOND

by Rene L. Farjeat, Matthew Silver, and Nicolas Jaber

Rene Farjeat and Matthew Silver are Partners, and Nicolas Jaber is a Legal Intern, at Silver & Wright LLP, a law firm serving cities, counties, and other government agencies across the state of California.

Hiring outside counsel in complex, specialized matters and recovering enforcement costs is crucial for local jurisdictions across the nation, especially in the code enforcement and nuisance abatement context. Noticing the fact that "[a]t least 384 cities in the state of California employ outside counsel to perform special prosecution and/or city attorney services," the California Court of Appeal recently ruled in favor of the city of Norco in *City of Norco v. Mugar*.[1]

The *Mugar* decision forcefully signals to these cities and counties that access to outside legal counsel in the realm of code enforcement is squarely permissible and clearly necessary under California law. It also rejects any suggestion that cost recovery, as allowed by statute, is fundamentally violative of any federal constitutional right. As discussed below, *Mugar* means that California cities may rely with clear confidence on hired legal expertise to ensure that they can maximally enforce dangerous code violations and prioritize the health and safety of the public in a fiscally fair and sustainable manner; and it offers lessons for other jurisdictions nationwide.

I. The Problem

A. *National Importance of Effective Municipal Code Enforcement*

June 24, 2021. The 12-story Champlain Towers South condo building in Surfside, Miami-Dade, Florida, collapses in the middle of the night and kills dozens of people.

December 2, 2017. A concert is in full swing in an Oakland, California, warehouse. Although the warehouse was built and zoned only for industrial purposes, and residential and entertainment uses were illegal, numerous people lived there permanently. When a fire broke out and quickly spread, inadequate exits prevented everyone from escaping. Thirty-six people lost their lives.

In both cases, the families of the victims have demanded answers. Why did this happen? What could have been done to prevent this? Why were the known deteriorating conditions on the building not abated previously? Why did the city not enforce its housing and zoning laws? There is no easy answer to these questions.

Unfortunately, preventable tragedies in the context of housing and community health and safety occur in the United States with surprising and unacceptable frequency. Our housing stock is aging in many areas, and is otherwise not properly maintained or utilized. According to a report by the U.S. Census Bureau and the Department of Housing and Urban Development's report to the U.S. Congress, there are approximately six million substandard homes in the United States.[2] When we consider that there are, on average, 2.6 people per household, the number of our neighbors—the elderly, children, and so on—living in uninhabitable conditions climbs to a staggering 15.6 million people.[3]

These facts and the tragedies communities have witnessed leave no doubt that municipal code enforcement provides an essential service to communities throughout the nation, by helping abate substandard building conditions like those present in the Champlain Towers South condo building, and can prevent disasters like those in Miami-Dade, Oakland, and elsewhere.

Local jurisdictions throughout the nation require effective and specialized code enforcement tools to adequately protect the health, safety, and welfare of their citizens and community. The recent terrible tragedies underscore the importance of effective code enforcement in every local community of the United States. Miami-Dade officials had become aware of deteriorating conditions in the building for years but, unfortunately, those issues were not abated in time. The building collapsed and permanently changed the

1. City of Norco v. Mugar, 59 Cal. App. 5th 786 (Cal. Ct. App. 2020).

2. National Center for Healthy Housing, *Substandard Housing*, https://nchh.org/resources/policy/substandard-housing/ (last visited Sept. 25, 2021).

3. U.S. Census Bureau, *Persons Per Household, 2015-2019*, https://www.census.gov/quickfacts/fact/table/US/SEX255219 (last visited Sept. 8, 2021).

lives of dozens of families. The conditions in Miami-Dade[4] and Oakland are not unique to Florida or California; they represent an issue of national concern.

Without the ability to hire experts in the highly specialized field of code enforcement and nuisance abatement, including special outside counsel, and without adequate cost recovery mechanisms, local jurisdictions throughout the nation are handcuffed and often unable to adequately protect their communities' health and safety. Effective code enforcement requires the ability to hire outside counsel and seek to recover a portion or all of the agency's enforcement costs when authorized by law and where they elect to do so.

Simply put, cities cannot afford to receive, maintain, and rehabilitate all substandard or other law-violating properties in their communities, let alone in perpetuity. Nor would it be just or fair for the neighbors suffering from blighted properties to bear the costs of compelling compliance with generally applicable laws, or to lose other important city services due to reallocation of scarce city funds to abatement needs. Cities continually face mounting duties and associated costs, and their budgets can only be stretched so far. No community should face the "Sophie's Choice" of community safety or budget constraints.

City of Norco v. Mugar recognizes this reality, and confirms the power of California municipalities to utilize outside special counsel in code enforcement and nuisance abatement actions and to seek recovery of the agency's enforcement costs if it prevails in such actions. Municipalities outside of California should also take notice of the *Mugar* court's analysis, and consider whether their jurisdiction similarly empowers them to utilize the assistance of specialized outside counsel to assist in abatement actions that protect their communities.

B. Applications

To illustrate the legal issues, consider the following hypothetical:

> A concerned neighbor complains to code officials serving a large county about the house next door, which is unsightly, dilapidated, and a severe health and safety hazard due to its owner's long-standing refusal to render basic maintenance. The county—leveraging its extensive coterie of in-house code enforcement attorneys—promptly responds to the complaint by conducting an external inspection of the nuisance property and, after corroborating the neighbor's observations, issues to the owner a notice of violation pursuant to the local code of ordinances. The owner ignores this notice of violation, as he continues to disregard several subsequent notices and orders to abate the severe nuisances on his property over a six-month period.
>
> Unsure how best to proceed, county officials eventually retain an outside legal expert who advises the county to petition the court to appoint a receiver who could assume control of the nuisance property and abate the violations. The county implements this strategy, the court grants the petition, and the receiver brings the home into compliance; but not without significant litigation, opposition, and unsuccessful appeals by the owner, forcing the county, and thus taxpayers, to incur substantial costs and fees, some of which are attributable to the work of outside counsel. The county files a motion, the owner files his own briefings, and after a hearing the court declares the county the prevailing party in the action, and accordingly awards reimbursement to the county of its reasonable costs and fees that it was forced to incur due to the litigation that, ultimately, it won.

On these facts, did the county violate the landowner's due process rights by retaining an outside attorney to assist it, or by the county obtaining a court order awarding it reimbursement of its reasonable costs and fees? Most reasonable lawyers would probably say, "No."

Next consider the following slightly revised set of facts:

> Over a 10-year period, multiple concerned neighbors complain to code officials serving a small city of roughly 27,000 about a house that is unsightly, dilapidated, and a severe health and safety hazard due to its owner's long-standing refusal to render basic maintenance. The small city—which does not have an in-house city attorney and relies exclusively on private outside counsel—eventually responds to the complaint and issues to the property owner a notice of violation pursuant to the local municipal code. The property owner ignores this notice of violation, as he continues to disregard several subsequent notices and demands to abate the severe nuisances on his property for a decade.
>
> The city's outside counsel eventually petitions the court to appoint a receiver and the court grants the petition. However, before the receiver is seated, the property owner finally agrees to abate, the city agrees to suspend the receiver to allow the owner yet another opportunity, and he does abate the nuisance conditions on his own, but only after forcing the city to litigate. Having obtained the compliance it sought all along, the city petitions for, and the court approves, removal of the receiver, a declaration of prevailing status, and a court order reimbursing the attorney fees it was forced to incur in the litigation.
>
> The property owner objects and appeals the declaration of prevailing status and award of fees, arguing that (1) the city's use of outside counsel violated his due process rights; (2) outside counsel for nuisance abatement proceedings, in general, is inherently biased and violates due process; and (3) the owner's First Amendment rights were violated by virtue of the court ordering that he reimburse the city, as the prevailing party, its costs and attorney fees.

This latter scenario is a synopsis of *Mugar*, where, affirming the judgment of the lower court, the California Court of Appeal found that the city of Norco's reliance

4. Notably, on July, 2, 2021, a Miami-Dade Circuit Court judge appointed a court receiver over the collapsed Champlain Towers South condo building to help the rehabilitation and assist the surviving family members of the victims. Drezner v. Champlain Towers S. Condo. Ass'n, Inc., No. 2021-015089-CA-01 (Fla. Cir. Ct. July 16, 2021). Code enforcement, nuisance abatement, substandard building conditions, and receiverships are topics of concern all over the country.

on outside counsel and corresponding award of reasonable costs and fees presented no due process or First Amendment violations.[5]

Mugar presents to city leaders and city attorneys alike a valuable opportunity to review the ability of outside counsel to assist their agencies in public nuisance actions on behalf of a municipality and to consider the corresponding benefits of the arrangement. *Mugar* already is the law in California, but the same issues raised in *Mugar* affect municipalities across the nation.

II. The *Mugar* Decision

Following the latter set of facts presented above, the city of Norco filed a nuisance abatement and receivership action to abate "nearly 20 life-safety hazards" on the property of Ronald T. Mugar, and Mugar appealed the Superior Court of Riverside County's judgment declaring the city the prevailing party and awarding the city its cost recovery. The court of appeal affirmed the lower court's decision, maintaining that the city was the prevailing party and entitled to its cost recovery pursuant to the state Health and Safety Code (HSC), also known as the State Housing Law.[6]

A. Due Process and Outside Counsel

California's "Supreme Court has recognized that due process rights are potentially implicated when a government entity retains a private law firm or attorney as outside counsel to bring a lawsuit."[7] However, due process violations commonly occur "[w]hen a government attorney has a personal interest in the litigation,"[8] and "may arise where an attorney representing the government has a 'direct pecuniary interest in the outcome of a case.'"[9] According to the high court, an attorney has this type of direct pecuniary interest when, for instance, his or her fee arrangement is contingent.[10]

The *Mugar* court found that the city's counsel had neither a contingent fee arrangement with the city nor any other "direct financial interest in the outcome of the litigation."[11] Rather, "the firm charged a fixed hourly rate, regardless of the outcome of the case, and regardless of whether costs are recovered."[12] The court also considered Mugar's contention that the outside law firm had "discretion to decide how much work to give itself."[13] Finding no evidence of such discretion on the firm's part, the court understood that the opposite was true: "[T]he relationship between the City and its outside counsel [was] unremarkable, and consistent with hornbook principles regarding the authority of the client versus the authority of the attorney."[14] Thus, as *Mugar* makes abundantly clear, a municipality's mere use of outside counsel to assist it in bringing a civil public nuisance action on its behalf is not a due process violation.

B. First Amendment and Attorney Costs and Fees

The U.S. Supreme Court has recognized that "[a] prevailing party fee statute arguably may 'cause some incidental restriction on conduct protected by the First Amendment,'"[15] by burdening a party's right to access and petition the courts. To evaluate whether a particular fee statute passes constitutional muster such that its restriction on protected conduct is justified, courts apply the Court's four-prong *O'Brien* test. Pursuant to the *O'Brien* standard, there is sufficient justification for such incidental restriction as follows:

> [(1)] if it is within the constitutional power of the Government; [(2)] if it furthers an important or substantial governmental interest; [(3)] if the governmental interest is unrelated to the suppression of free expression; and [(4)] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[16]

Applying these factors, the *Mugar* court found that the cost recovery provision of HSC §17980.7(c) satisfies the four-prong standard set forth in *O'Brien*; the fee statute's incidental restriction on conduct protected by the First Amendment—if any—is sufficiently justified by the government's interest in enforcement.[17]

Because courts generally "regard any incidental restriction on an opposing party's right to petition as a result of the financial burden of an attorney fee award . . . as justifiable and narrowly tailored,"[18] it is unlikely that any fee provision within the HSC upon which cities rely to recover costs associated with abating public nuisances will fail to satisfy the *O'Brien* standard. Accordingly, the type of First Amendment argument promoted in *Mugar* equally should fail in other, non-receivership, public nuisance actions.

III. *Mugar's* Implications for Code Enforcement Actions

A. Fortifying Existing Authority

In a footnote to its opinion, the court of appeal granted judicial notice that "[a]t least 384 cities in the state of

5. *See Mugar*, 59 Cal. App. 5th at 789.
6. *See id.*
7. *See id.* at 793.
8. *See id.* at 794 (citing People ex rel. Clancy v. Superior Court, 39 Cal. 3d 740, 746 (Cal. 1985)).
9. *See id.* (citing County of Santa Clara v. Superior Court, 50 Cal. 4th 35, 51 (Cal. 2010)).
10. *See id.* (citing *Clancy*, 39 Cal. 3d at 750).
11. *See id.* at 802 n.3.
12. *See id.* at 795.
13. *See id.*
14. *See id.* at 796 (citing Robert Weil & Ira Brown, California Practice Guide: Professional Responsibility ¶ 3.132 (2019)).
15. *See id.* at 798 (citing United States v. O'Brien, 391 U.S. 367 (1968)).
16. *See id.* (citing *O'Brien*, 391 U.S. at 377).
17. *See id.* at 799.
18. *See id.* at 798 (citing Mejia v. City of Los Angeles, 156 Cal. App. 4th 151, 162 (Cal. Ct. App. 2007)).

California employ outside counsel to perform special prosecution and/or city attorney services."[19] Accordingly, given that the 2017 census counted 482 cities in California, some 80% of all cities—at minimum—already retain outside legal counsel.[20] Likewise, cities have long relied on the HSC, which sanctions the recovery of reasonable costs and fees resulting from public nuisance abatement actions where the city prevails in the action.[21]

Mugar's force is not so much novel as it is nourishing; it affirms that cities throughout California have relied on the work of outside legal counsel and statutorily sanctioned fee recovery for decades.[22]

B. National Importance of Outside, Special Legal Counsel

The benefits for municipal code enforcement of retaining outside counsel in a sustainable, affordable way are critical nationwide. Without these tools, local jurisdictions throughout the nation are handcuffed and unable to effectively implement their laws, policies, and goals generally, and unable to effectively enforce their codes and laws to help protect the health and safety of their citizens. Without these tools, more preventable tragedies like Miami-Dade's will continue to happen throughout the United States. There are many other examples of housing and other disasters that perhaps could have been prevented with better enforcement of existing laws. Decisions like *Mugar* and cost recovery statutes like California's HSC §§17980.7(c)(11) and 17980.7(d)(1) are absolutely necessary for local jurisdictions nationwide to effectively function and protect their citizens.

The fact that more than three-quarters of all California cities currently retain outside counsel leaves little to conjecture; local governments require specialized legal assistance beyond what the common city hall can provide. The burgeoning need for ultra-specialization in city attorneys' offices was noted as early as 1994, in an article in the League of California Cities' *City Attorney's Deskbook*: "In 1954, there were eight appellate court decisions affecting cities. In 1990, there were 820 cases!"[23] Some 30 years later, one can only imagine how that number has grown.

Access to specialized and esoteric legal knowledge aside, city attorneys are increasingly being called upon to address code enforcement issues "in the most cost efficient and cost recovering manner possible."[24] Fee recovery mechanisms enable cities to vigorously pursue violations of law: "The purpose of an award of fees against an unsuccessful opposing party is not to penalize petitioning activity by that party, but to encourage litigation by the successful party by making the litigation financially feasible."[25]

However, dollars and cents are only part of the picture. Not only would code enforcement efforts be frustrated if cities had to bear all of the legal fees incurred as a result of violators' perpetual nonconformity with state and local laws; noncompliance would also be incentivized. As the California Court of Appeal noted in *City of Santa Paula v. Narula*, fee recovery measures "induc[e] compliance with the City's regulatory authority."[26] Cities always will bear the costs of their outside attorneys; the question of sustainability, however, requires their ability to seek recovery of at least some of their costs when cities are forced to take action and prevail—often over significant objections and litigation efforts by defendants who could have instead spent resources abating their properties, or could have initially voluntarily complied.

IV. Conclusion

City of Norco v. Mugar does not merely reinforce the legal authority of cities to rely on outside counsel and seek reimbursement of their costs in their efforts to ensure the health and safety of the public; the decision also showcases how these are necessary goods in the complicated, cost-conscious world of municipal litigation. Cities continuously have unfunded state and other mandates placed upon them, face increased expenses across the board, and often struggle to keep up with those costs. Cities, and their taxpayers, simply cannot bear the costs of abating nuisances on private property, nor is it just and equitable to expect this of them, as public policy has made very clear.

With the continued plague of substandard housing, and other safety and health issues in communities all over the nation, cities must be able to sustain efforts to address the dangerous problems facing their communities. As most do not have the resources to employ and cover benefits for the number of specialized in-house attorneys necessary to tackle these dangerous nuisance and quality-of-life issues, their ability to utilize outside counsel is fundamentally vital to the function and health of their community.

Thanks to *Mugar*, city officials may more confidently do their jobs by accessing private-sector legal expertise and pursuing the agency's reimbursement where available. Meanwhile, code violators should exercise increased caution; with *Mugar*'s decisive warrant, city officials are well-equipped to effectively and sustainably seek compliance with state and local laws.

19. *See id.* at 795.
20. *See* U.S. Census Bureau, *2017 Census of Governments—Organization*, https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html (last revised Feb. 12, 2020).
21. *See* Cal. Health & Safety Code §§11570, 17980.7 (West, Westlaw through ch. 172 of 2021 Reg. Sess.).
22. *See* League of California Cities, The City Attorney's Deskbook II-21 (1994).
23. *See id.* at II-20.
24. *See* League of California Cities, The Future of California Code Enforcement—The Most Effective Enforcement Remedies Available for Public Agency Legal Counsel and Prosecutors in Tough Budget Times, Presentation for City Attorneys Department 2009 Annual Conference 1 (2009).
25. *See* City of Norco v. Mugar, 59 Cal. App. 5th 786, 798 (Cal. Ct. App. 2020) (citing Mejia v. City of Los Angeles, 156 Cal. App. 4th 151, 163 (Cal. Ct. App. 2007)).
26. *See* League of California Cities, *supra* note 24, at 1 (citing City of Santa Paula v. Narula, 114 Cal. App. 4th 485 (Cal. Ct. App. 2003)).