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COUNTY OF RIVERSIDE
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE

CITY OF NORCO, a charter city,

Petitioner,

vs.

RONALD T. MUGAR, an individual and DOES 1-50, inclusive,

Respondent.

Case No. RIC1709678

RESPONDENT RONALD MUGAR'S OPPOSITION TO PETITIONER'S MOTION TO DECLARE THE CITY A PREVAILING PARTY AND FOR AN AWARD OF ATTORNEYS' FEES

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Table of Contents

I. Introduction 1

II. Background 2

A. Ron Complies Without a Receiver Taking Control of His Property 2

B. Ron Successfully Fights the City's Refusal to Permit Repair of the Laundry Room Under Its Original 1969 Permit Standards 3

C. The Private Prosecutor Requests Attorneys' Fees Under the Prosecution-Fees Ordinance 4

III. Argument 5

A. Awarding Fees Would Violate Due Process Because the Critical Decisions in This Case Were Not Made by Neutral, Disinterested Government Attorneys 6

B. The Prosecution Fees Ordinance Unconstitutionally Burdens Ron's First Amendment Right to Petition and Access the Courts 8

C. The Prosecution Fees Ordinance Violates Due Process and Equal Protection Because It Arbitrarily Favors the City Over Defendants or Respondents 11

D. Under the City's Ordinance, the City Is Not Entitled to the Prosecution Fees It Seeks 13

IV. Conclusion 14

1 Table of Authorities

2 **Cases**

3 *Bankers Life & Cas. Co. v. Crenshaw* (1988) 486 U.S. 71 12

4 *Berger v. United States* (1935) 295 U.S. 78 6

5 *California Teachers Ass'n v. State of California* (1999) 20 Cal. 4th 327 ....9, 10

6 *County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35 7

7 *Harjo v. City of Albuquerque* (D.N.M. 2018) 326 F.Supp.3d 1145 6

8 *Jersey v. John Muir Medical Center* (2002) 97 Cal.App.4th 814....................9

9 *Kaura v. Stabilis Fund II, LLC* (2018) 24 Cal.App.5th 420 13

10 *Lindsey v. Normet* (1972) 405 U.S. 56....................12

11 *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238....................6

12 *Merck Sharp & Dohme Corp. v. Conway* (E.D. Ky. 2013) 947 F.Supp.2d 733....................6

13 *Payne v. Superior Court* (1976) 17 Cal.3d 90 9

14 *People ex rel. Clancy v. Super. Ct.* (1985) 39 Cal.3d 740....................6

15 *Reagan v. United States* (1895) 157 U.S. 301 11

16 *Rhode Island v. Lead Indus. Assoc.* (R.I. 2008) 951 A.2d 428....................8

17 *Schueler v. Roman Asphalt Corp.* (S.D.N.Y. 1993) 827 F. Supp. 247....................12

18 *United States v. Allen* (2d Cir. 1997) 127 F.3d 260....................11

19 *Village of Glenview v. Zwick* (Ill. App. Ct. 2005) 826 N.E.2d 1171 10

20 *Young v. U.S. ex rel. Vuitton et Fils S.A.* (1987) 481 U.S. 787....................6

21

22 **Codes & Statutes**

23 Cal. Pen. Code § 688.5....................5

24 Norco Municipal Code § 1.04.010.................... *passim*

25

26

27

28

I. INTRODUCTION

The private prosecutor hired by the City of Norco ("City") is seeking attorneys' fees for an action in which it did not prevail. Respondent Ronald Mugar ("Ron") successfully moved to vacate this Court's receivership order (granted against him while he was in the hospital) after he voluntarily brought his property into compliance. Yet the City's private prosecutor is still seeking fees against Ron. That is because its business model requires it to do so. The private prosecutor is a law firm that, in addition to prosecuting code violations, offers "cost recovery" services. The private law firm seeks to recover the hourly rates it spent to investigate and prosecute this case.

The cost recovery business model, applied to enforcement proceedings like this one, is unconstitutional. It creates a financial incentive for a prosecutor to run up costs in legal proceedings instead of seeking voluntary compliance or deciding to prosecute to protect the public. This violates the prosecutor's duty to neutrally enforce the law with the public's interest, not its own finances, in mind.

In addition, the City's prosecution-fees ordinance (Norco Mun. Code § 1.04.010(F)) is unconstitutional both facially and as-applied for two reasons. First, it violates Ron's First Amendment right to access the courts. Cost recovery in this case penalizes Ron for successfully defending himself and his property rights. Had Ron capitulated, he would not have racked up over sixty thousand dollars in fees to pay for his own prosecution. And second, the prosecution-fees ordinance is facially invalid because it arbitrarily gives the government the upper hand. The ordinance permits fee awards only in cases where the government elects that fees are in issue. Because this statute does nothing but bias the proceedings in favor of the government, it violates due process.

Finally, even if the City's ordinance were constitutional, the private prosecutor is not entitled to fees because it did not ultimately prevail on its cause of action and it unlawfully requests fees for things having nothing to do with the original receivership petition.

Because awarding fees to the private prosecutor would be unconstitutional, Ron respectfully requests that this Court deny the Motion to Declare the City a Prevailing Party and

for an Award of Attorneys' Fees.

II. BACKGROUND

A. Ron Complies Without a Receiver Taking Control of His Property

On May 30, 2017, the City filed its petition for receivership against Ron. The petition alleged approximately 20 nuisance code violations and argued that the only way to abate the nuisances was to put the property into receivership. (Decl. Joshua A. House ["House Decl."], Ex. 1 at 14 ["The City has no adequate remedy other than the relief sought herein."].) The City's petition turned out to be wrong: The property was brought into compliance without a receiver being necessary. No receiver ever took control of or performed work on the property. (Decl. Ronald T. Mugar ["Mugar Decl."] ¶ 15.) Indeed, Ron and his family had been working toward voluntary compliance weeks before the receivership petition was filed. (Decl. Ronald Mugar Jr., Ex 1 [email of May 19, 2017, to private prosecutor, stating "[p]lease don't take our home we are doing our best to do what needs to be done lawfully"].)

The City's petition was heard in Ron's absence. He had been taken to the hospital the night before and underwent an angioplasty. (Mugar Decl. ¶ 11.) He was therefore unable to argue that the receivership was unnecessary. The petition was granted and a receiver was appointed on July 25, 2017. (Markus Decl., Ex. F at 6–11, 14.)

After the hearing, Ron filed a motion for reconsideration and to vacate the order, on the ground that the receivership was unnecessary because he was bringing the property into compliance. (House Decl., Ex. 2.) But before Ron's motion was heard, and before the receiver took control of the property, the City agreed to a stipulated order. (Markus Decl., Ex. H.) The stipulation agreed to stay the receivership pending an inspection on August 15, 2017. The stipulation also required Ron to apply, by August 8, 2017, for a construction permit to demolish or repair the laundry room, in which the City had alleged there were multiple violations. (*Id.* at 2.) Ron's property passed the inspection but the City refused to grant his applications for a building permit. (Markus Decl., Ex. I at 4.)

B. Ron Successfully Fights the City's Refusal to Permit Repair of the Laundry Room Under Its Original 1969 Permit Standards.

The laundry room was constructed according to a 1969 construction permit. (Mugar Decl. ¶¶ 18, 24, Ex. 2 at 10–11.) Following his agreement with the City, Ron applied three times for a permit to repair the laundry room to the 1969 building code standards, based on the original construction permit issued in 1969. (*Id.* ¶ 18.) Each time Ron applied, the City refused to issue the permit. (*Id.*) In correspondence with the private prosecutor, Ron's counsel argued that Ron was only required to repair the room to the specifications of the 1969 construction permit. (Markus Decl., Ex. J.) The private prosecutor responded that the 1969 permit was not valid because the City did not finally approve the work done under the 1969 permit. (*Id.*, Ex. K at 2–3.) The private prosecutor further asserted that Ron had yet another violation on his property regarding an "accessory structure." (*Id.*, Ex. I at 5–6; *Id.*, Ex. K at 4–5.)

After months of correspondence with the City, during which Ron even considered demolishing the laundry room (Mugar Decl. ¶ 19), this Court held a hearing on the laundry room issue. The Court received clarification from the private prosecutor that Ron could in fact be issued a repair permit if he brought the building up to the building inspector's standards. (*Id.*, Ex. 1 at 6–7.) The Court also ruled that it lacked jurisdiction over any alleged new violations—like the accessory structure—that were not in the original petition. (*Id.* at 8.) In July 2018, Ron's argument was vindicated: The City issued Ron a permit to "complet[e] work originally permitted on 12/17/1969." (*Id.*, Ex. 2 at 1, 7.) On November 16, 2018, this Court found that the property was in compliance and vacated its order appointing a receiver. (House Decl., Ex. 3 at 2.) The City agrees that Ron's property is in compliance. (Pet'r's Mot. to Decl. the City the Prevailing Party, for an Award of Attorneys' Fees, to Dismiss the Action, to Discharge the Receiver, and Exonerate the Receiver's Bond ["Mot."] at 8.)

Throughout the proceedings against Ron, it was clear that the private prosecutor—a private law firm—made all the critical decisions in the case. The private prosecutor was the only person who engaged in settlement discussions with Ron. (Mugar Decl. ¶ 22; Markus Decl. ¶ 29.)

The private prosecutor was who determined that a receivership was necessary. (Markus Decl. ¶ 5 [stating private prosecutor "determined that the only practical way to abate the substandard and hazardous conditions at the Subject Property would be through the appointment of a receiver"].) The same private prosecutor even analyzed Ron's building permit requests and public records requests. (*Id.* ¶ 24 [stating 13.1 hours spent on "whether Respondent was permitted to re-open a permit"]); *id.* ¶ 41 [stating 7.3 hours spent on Ron's "Public Records Request to the City"].) The private prosecutor was doing all of these things with an eye toward collecting fees for them.

C. The Private Prosecutor Requests Attorneys' Fees Under the Prosecution-Fees Ordinance

On November 2, 2018, the private prosecutor moved for attorneys' fees under Norco Municipal Code § 1.04.010. Even though the receivership was only in effect for two weeks before being stayed, and even though the property was brought into compliance without a receiver ever taking control of the property or performing work, the private proscutor requests $60,798.94 in attorneys' fees. (Mot. at 2.)[1]

The private prosecutor is requesting these high fees because that is its business model. The "city prosecutor" is a private law firm called DaPeer, Rosenblit & Litvak LLP. (*See, e.g.*, Markus Decl., Ex. I at 7 [referring to itself as "City Prosecutor"].) The law firm offers "cost recovery" services to municipalities across California. (House Decl., Ex. 6 at 2.) Under this arrangement, the cities pay the law firm for prosecutorial services up front, with the expectation that "Dapeer Rosenblit & Litvak, LLC work with staff to maximize cost recovery." (House Decl., Ex. 4 at 2; *see also* Markus Decl. ¶¶ 52–54.) Nothing, however, limits the private prosecutor's recovery to simply those fees it charged to its employer cities. For example, in another case, the private prosecutor law "firm was awarded attorneys' fees at a blended hourly rate of $452.00 in connection with a civil municipal code enforcement action." (Markus Decl. ¶ 54). And in its

[1] Page 15 of the private prosecutor's Motion lists the total fees and costs requested at $91,830.29. Because this larger sum conflicts with the $60,798.94 figure mentioned earlier in the Motion, and because it conflicts with the Motion's supporting documentation (*see* Markus Decl. at ¶ 55), Respondent surmises that it is a typographical error.

agreement with another California city, the private prosecutor is "further authorized to seek reimbursement of such fees and costs at rates allowed by law, which may be higher than the rates set forth" in its agreement with the municipality. (House Decl., Ex. 4 at 15.) In this matter, the private prosecutor has charged the City $175 per hour. (Mot. at 13.)

This City has an agreement with the private prosecutor to provide "code enforcement services." (House Decl., Ex. 5 at 1.) But the agreement does not contain any provisions ensuring that (1) government attorneys (not the private prosecutor) make settlement decisions, (2) defendants have a right to directly confer with government-employed attorneys instead of through the private prosecutor, (3) the public-entity attorneys retain complete control over the case, (4) government attorneys may veto any decisions made by the private prosecutor, or (5) government attorneys with supervisory authority are personally overseeing the litigation. (*See id.*)

Following recent controversy over the use of this business model, California banned the recovery of prosecution fees for criminal code enforcement actions. (*See* Cal. Pen. Code § 688.5; *see also* Ari Shapiro, *California Bans Prosecution Fees In Most Cases Following Newspaper's Investigation*, NPR (Sept. 7, 2018), https://goo.gl/XjqRvA; Sam Metz, *Brown signs 'prosecution fee' bill sparked by Desert Sun investigation*, The Desert Sun (Sept. 6 2018), https://goo.gl/Q5Msvm.) But the new legislation applies only to "criminal case[s]," and not to civil enforcement actions like receiverships. (Cal. Pen. Code § 688.5.)

III. ARGUMENT

This Court should deny the request for attorneys' fees for four reasons. First, awarding fees would create a financial conflict of interest for private prosecutors, creating a system where they decide how many hours to spend prosecuting individuals and then seek fees from those they prosecute. Such a system violates due process. Second, the City's prosecution fees ordinance is invalid both facially and as-applied because it unconstitutionally burdens defendants' First-Amendment right to access and petition the courts. Third, the prosecution fees ordinance is invalid both facially and as-applied because it violates due process. By only permitting fees to be at issue when the City elects fees to be at issue, it shifts all risk of litigation away from the City

and to defendants, and therefore biases proceedings in favor of the City. Fourth, under the terms of the prosecution fees ordinance, the private prosecutor is not entitled to fees because it did not prevail and because it requests fees for things having nothing to do with its original petition.

A. Awarding Fees Would Violate Due Process Because the Critical Decisions in This Case Were Not Made by Neutral, Disinterested Government Attorneys.

Due Process requires not only a neutral adjudicator, but a neutral government prosecutor as well. *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 249–50 ("A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.").[2] Prosecutors, unlike other litigators, have a special duty of neutrality:

> The prosecutor is a public official vested with considerable discretionary power to decide what crimes are to be charged and how they are to be prosecuted. In all his activities, his duties are conditioned by the fact that he is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . ***When a government attorney has a personal interest in the litigation, the neutrality so essential to the system is violated.***

(*People ex rel. Clancy v. Super. Ct.* (1985) 39 Cal.3d 740, 746 [quoting *Berger v. United States* (1935) 295 U.S. 78, 88] [emphasis added]; *see also Young v. U.S. ex rel. Vuitton et Fils S.A.* (1987) 481 U.S. 787, 814 ["[W]e must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice."].)

The California Supreme Court has held that prosecutors may not have a financial interest in the cases they bring. In *Clancy*, the City of Corona had hired outside counsel on a contingency fee basis to act as city prosecutor in a nuisance abatement case. (39 Cal.3d at 746.) The Court disqualified the attorney because the contingency fee arrangement gave him a personal stake in the litigation that could distort his judgment.

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[2] *See also Harjo v. City of Albuquerque* (D.N.M. 2018) 326 F.Supp.3d 1145, 1193 [concluding that enforcement officials had unconstitutional financial incentive to prosecute forfeiture cases]; *Merck Sharp & Dohme Corp. v. Conway* (E.D. Ky. 2013) 947 F.Supp.2d 733, 739 [holding defendant "has a due process right to a neutral prosecution, free from any financial arrangement that would tempt the government attorney, or his outside counsel, to tip the scale" (internal quotations omitted)].

In this case it does not appear that the private prosecutor is paid on a contingency fee basis. Nevertheless, there are many financial arrangements that can lead to a conflict of interest. In this case, it is clear that the outside private prosecutor is who decides whether to seek a receivership (Markus Decl. ¶ 5) and whether to settle (Mugar Decl. ¶ 22; Markus Decl. ¶ 29). In a very real sense, the private prosecutor decides how much billable work to give itself. And even if cost recovery is technically paid to the City, that still distorts the private prosecutor's judgment because it is really just reimbursement for fees the City paid to the private prosecutor. The private prosecutor has an incentive to maximize fees collected to enable its client to keep writing checks. The effect of this conflict of interest is well illustrated in this case: The private prosecutor sought a receivership before Ron could physically appear in court and sought attorneys' fees in settlement talks even after Ron had brought everything but the laundry room into in compliance. (Markus Decl., Ex. K at 5.)

Although the constitutional requirement of prosecutorial neutrality is stricter in criminal and quasi-criminal cases than in ordinary civil cases (*see County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35, 52), that does not affect the result in this case, for two reasons:

First, this case ***is*** quasi-criminal. The receivership was a code ***enforcement*** action initiated by the government. A health-and-safety receivership is a unique and potent law-enforcement tool available only to the government, and the consequences for the property owner are severe. Even in the best-case scenario, he loses temporary possession of his home, and in the typical case he will end up losing it permanently. A receivership case is nothing like the adjudication of an ordinary civil claim.

Second, even if the less strict, but still "heightened," neutrality rules for civil prosecutors applied in this case (*see Cty. of Santa Clara*, 50 Cal.4th at 57), Norco could still not meet them. The California Supreme Court has held that, even in civil cases, the government can be represented by outside counsel who have a financial stake in the case ***only*** if certain stringent requirements are met. Outside counsel must be in a "subsidiary role," (*id.* at 58) and the government attorneys must "retain[] absolute and total control over all critical decision-making

in" the case (*id.* at 59 [quoting *Rhode Island v. Lead Indus. Assoc.* (R.I. 2008) 951 A.2d 428, 475] [emphasis omitted]). The Court held that all critical litigation decisions must be made by neutral, government attorneys, including all settlement decisions. Indeed, the Court even required that the retainer agreements explicitly state that:

> [1] decisions regarding settlement of the case are reserved exclusively to the discretion of the public entity's own attorneys . . . [2] that any defendant that is the subject of such litigation may contact the lead government attorneys directly, without having to confer with [outside] counsel . . . [3] that the public-entity attorneys will retain complete control over the course and conduct of the case; [4] that government attorneys retain a veto power over any decisions made by outside counsel; and [5] that a government attorney with supervisory authority must be personally involved in overseeing the litigation.

Id. at 63–64. No such terms exist anywhere in Norco's agreement. (*See* House Decl., Ex. 5.) Additionally, Ron was unable to conduct settlement negotiations with any neutral government attorneys, but was instead forced to deal solely with retained outside counsel with a financial interest in his case. (Mugar Decl. ¶ 22.) This does not come close to passing muster under *Santa Clara*.

"Fees or penalties that are contingent upon the outcome of the case . . . are examined closely to ensure that the parties are not deprived of a disinterested and impartial adjudicator." (*Cal. Teachers Ass'n v. State of California* (1999) 20 Cal.4th 327, 334.) Awarding fees in this case would create an unconstitutional conflict of interest and void the entire enforcement action. Accordingly, the private prosecutor cannot seek to recover the fees it charged the City.

B. The Prosecution Fees Ordinance Unconstitutionally Burdens Ron's First Amendment Right to Petition and Access the Courts

Applying the City's prosecution fees ordinance (Norco Mun. Code § 1.04.010) against Ron would effectively penalize him for robustly defending his property rights. Ron filed a motion to reconsider the receivership, after which no receiver took control of, or performed any work on, the property. (House Decl., Ex. 2.) Ron fought the City's refusal to issue him a permit to repair the laundry room, and he was eventually permitted to repair the room to the 1969 specifications he had proposed. (Mugar Decl., Ex. 2.) And Ron fought the private prosecutor's demand that he

correct an alleged violation that was not even listed in the receivership petition. (Mugar Decl., Ex. 1 at 8.) As a result of Ron's vigorous and successful defense, the private prosecutor now demands over sixty thousand dollars. This monetary penalty violates Ron's right to access and petition the courts.

Americans, and Californians in particular, enjoy a right to access and petition the courts. (*Jersey v. John Muir Medical Center* (2002) 97 Cal.App.4th 814, 821["Access to the courts is indeed a right guaranteed to all persons by the federal and state constitutions. It is regarded as arising from the First Amendment right to petition the government for redress of grievances."].) "Few liberties in America have been more zealously guarded than the right to protect one's property in a court of law." (*Cal. Teachers Ass'n*, 20 Cal.4th at 335 [quoting *Payne v. Superior Court* (1976) 17 Cal.3d 908, 911].) Although "[l]itigants may be required to pay fixed, incidental court fees that indirectly subsidize the cost of judges, such as filing fees" (*id.* at 334), such fees must neither deter defendants from exercising their constitutional rights (*id.* at 352), nor cause defendants to "limit their defense and forgo vigorous advocacy" (*id.* at 345–46). As will be shown, the prosecution fees ordinance in this case violates Ron's First and Fourteenth Amendment rights.

When considering an individual's right to access the courts, courts must subject statutes to especially "stringent requirements" where "the affected individual has no alternative." (*Id.* at 352.) For example, recoupment statutes, which require unsuccessful defendants to pay for their public defender, are only constitutional in certain circumstances, such as where defendants are given a waiver if they are indigent. (*See id.*) But here, Ron is not entitled to an "ability-to-pay" hearing and he had no alternative but to accept the City's choice of prosecutor. This court should therefore carefully scrutinize any fees infringing on Ron's access to the courts.

In *California Teachers Ass'n*, the California Supreme Court struck down a provision requiring public-school teachers who exercise their constitutional right to a pre-dismissal hearing, and who do not prevail at the hearing, to pay for one-half of the cost of the administrative law judge. (*Id.* at 331.) Applying a procedural-due-process analysis, the Court concluded that "there

can be little doubt that this provision generally chills the exercise of the right to a hearing and vigorous advocacy on behalf of the teacher." (*Id.* at 356–57.) It "conclude[d] that any legitimate interest the state may have in conserving resources or discouraging hearings that happen to result in an administrative or judicial decision against a teacher does not outweigh the teacher's strong interest in presenting his or her side of the case and in invoking the discretion of the adjudicator." (*Id.* at 357.)

Ron's case is like *California Teachers* in two key respects. First, the City, by bringing this case against him, is required by due process to provide a meaningful hearing. This aligns with the facts in *California Teachers*, where the government owed the teacher a hearing as a matter of due process: "In this context, the . . . right to uninhibited access to the state-provided forum is even stronger than in litigation involving disputes between private parties." (*Id.* at 336.) Second, Ron's defenses were meritorious, as demonstrated by the fact that the receivership order was vacated and that Ron was eventually granted a permit to repair the laundry room according to the standards in the original 1969 permit.

In *California Teachers* the California Supreme Court acknowledged that "[t]he state unquestionably may discourage and penalize frivolous tactics." (*Id.* at 340.) But it went on to say that "the courts carefully have limited the circumstances in which such penalties may be imposed" and "a party possessing a colorable claim must be allowed to assert it without fear of suffering a penalty more severe than that typically imposed on defeated parties." (*Id.* [emphasis omitted].) Thus, the court held that the right to access the court was violated where "a standard for imposing costs that deters all . . . is not rationally related to the goal of discouraging only patently meritless challenges." (*Id.* at 345.)

The Illinois Appellate Court struck down a similar cost recovery ordinance. In *Village of Glenview v. Zwick* (2005), the city tried to collect $36,079 in attorneys' fees and costs after prevailing in a code enforcement action. (826 N.E.2d 1171, 1173.) The court held that the cost recovery ordinance was an unconstitutional burden on the state court system. (*Id.* at 1180.) Among the factors considered was the effect on "a citizen's access to the courts." (*Id.*) The court

reasoned that "Glenview's fee-shifting ordinance represents a real and immediate danger to a citizen's right to challenge a Glenview ordinance he or she finds doubtful, as it discourages litigation concerning the validity of any of its ordinances." (*Id.*) "Glenview's fee-shifting ordinance discourages [those] who receive a citation[] from challenging that citation for fear that a loss in court will require not only a payment of the citation . . . but also the payment of Glenview's attorney fees." (*Id.* at 1179.)

Like the cost recovery ordinance in *Glenview*, Norco's ordinance creates a penalty on citizens who wish to defend their property rights in court. When Ron challenged whether a receivership was necessary, he incurred fees. When Ron challenged whether the laundry room actually required a new permit, he incurred fees. When Ron challenged whether he had ever been cited for the accessory structure the private prosecutor demanded he fix, he incurred fees. And had Ron ever wanted to challenge the constitutionality of the process against him, he would have incurred fees. Normal criminal defendants do not risk incurring thousands of dollars in fees for every defense they raise. Ron's access to the courts should not be burdened simply because a private prosecutor wants to get paid.

C. The Prosecution Fees Ordinance Violates Due Process and Equal Protection Because It Arbitrarily Favors the City Over Defendants or Respondents

The City's prosecution fees ordinance cannot be applied to Ron because it is unconstitutionally one-sided: The ordinance arbitrarily favors the City, permitting the prevailing party to seek fees ***only if*** the City elects to seek fees at the start of the action. (Norco Mun. Code § 1.04.010.) This permits the City to shift the risk of litigation when it is not confident it will prevail, but to impose the costs of litigation when it is confident it will. Such a one-sided and arbitrary preference for the City, at the expense of defendants, violates both due process and equal protection.

"The court should be impartial between the government and the defendant." (*Reagan v. United States* (1895) 157 U.S. 301, 310; *see also United States v. Allen* (2d Cir. 1997) 127 F.3d 260, 265 [reversing conviction where instruction "was unbalanced" and judge's comments "all

favor[ed] the prosecution's case"].) The Supreme Court has applied a rational basis analysis when faced with challenges to fee statutes under the Fourteenth Amendment: "The statute therefore offends the Equal Protection Clause only if the legislative means . . . are not rationally related to these legitimate interests." *Bankers Life & Cas. Co. v. Crenshaw* (1988) 486 U.S. 71, 82 [upholding 15% penalty for unsuccessful appeals from money judgments]).

In *Lindsey v. Normet*, the Supreme Court struck down a statute creating a one-sided appeal-fee system for wrongful detainer actions. A tenant who wished to appeal an unfavorable decision was required to pay "twice the rental value of the premises" and, "in the event the judgment [wa]s affirmed, the landlord [wa]s automatically entitled to twice the rents accruing during the appeal." *Lindsey v. Normet* (1972) 405 U.S. 56, 75–76. The Court struck down the unequally applied fee regime as "arbitrary and irrational" because it both discriminated against poor appellants, "no matter how meritorious their case may be," and because it created "a substantial barrier to appeal faced by no other civil litigant." *Id.* at 79.

Other courts have applied similar logic to one-sided attorneys' fees statutes that arbitrarily favor the government. The Illinois Appellate Court struck down a "one sided" attorneys' fees ordinance as an interference with the state court system. (*Vill. of Glenview v. Zwick* (Ill. App. Ct. 2005) 826 N.E.2d 1171, 1179). "If [the city] successfully prosecutes a violator of its ordinance, it is entitled to recover attorney fees . . . . Conversely, if Glenview is unsuccessful in prosecuting a violator of its ordinance, it in essence wants the American Rule to apply and each party to pay its own attorney fees." (*Id.*) The Southern District of New York has also questioned one-sided fees statutes: "Constitutional questions might be raised if a fee-shifting statute were interpreted in such a way as to have a chilling effect on the ability of a debtor to ask to discuss the debt without incurring additional costs payable to the creditor." (*Schueler v. Roman Asphalt Corp.* (S.D.N.Y. 1993) 827 F. Supp. 247, 257.)

The City's prosecution fees ordinance does not satisfy rational-basis scrutiny. By definition, the statute only benefits the government. It permits the government to shift the risk of litigation when it wants to, but provides no corresponding benefit to the defendant or respondent.

Although many fee-shifting statutes seek to discourage frivolous litigation, this statute does not. Under the ordinance, the government faces no penalty for bringing frivolous claims, because it can choose not to put fees at issue. But if the homeowner decides to defend himself—no matter how meritorious or frivolous his defense—he is penalized if the government decided to put fees in issue. Thus, no frivolous litigation is discouraged by this one-sided fee-shifting ordinance. Without furthering any legitimate government interest, the ordinance violates the Due Process Clauses of the Federal and State Constitutions.

D. Under the City's Ordinance, the Private Prosecutor Is Not Entitled to the Prosecution Fees It Seeks.

The private prosecutor seeks prosecution fees in the amount of $60,798.94, arguing that it prevailed because Ron would not have brought his property into compliance but for the receivership petition. (Mot. at 9.) This argument is wrong for three reasons.

First, under Norco's code, the City was not a prevailing party in this action. Under the Norco Municipal Code, the attorneys' fees are only available to "[t]he prevailing party in any action . . . to abate a public nuisance." This means that it is not enough that the City achieved some benefit from litigation, it must achieve that benefit through succeeding on its specific cause of action. (*See Kaura v. Stabilis Fund II, LLC* (2018) 24 Cal.App.5th 420, 434 [interpreting nearly identical statute and holding the City "had to be not only the prevailing party, but specifically the prevailing party in an 'action . . . to abate a public nuisance.' Obtaining some of the benefit that it sought on a different cause of action did not qualify it."].) Although the City ultimately benefited from Ron's compliance, the City's specific legal action was unsuccessful. Indeed, ***the order granting the City's petition was vacated***. The City's petition was initially granted by this Court on July 25, 2017. (Markus Decl. Ex. F.) But Ron moved to vacate that order on August 7, 2017, (House Decl., Ex. 2.) and this Court vacated it on November 16, 2018 (*id.*, Ex. 3 at 2). Thus, in the Court's final decision in this case, the City did not prevail on any cause of action. Instead, Ron prevailed by successfully vacating an order against him and getting the receivership petition dismissed.

Second, the City did not prevail, as it argues (Mot. at 10), on the laundry room matter. From the beginning, Ron sought to repair the laundry room up to the building standards of the original 1969 construction permit for the laundry room. Ron was ultimately successful, as the City granted his permit to "complet[e] work originally permitted on 12/17/1969." (Mugar Decl., Ex. 2 at 1, 7.) The private prosecutor's attempt to distinguish between Ron's attempt to "renew" the original permit (Mot. at 7) and his application for a "new" permit to "complet[e] work originally permitted" (Mugar Decl., Ex. 2 at 1, 7) is a distinction without a difference.

Third, the private prosecutor cannot receive attorneys' fees for work performed outside the contours of this action. The Norco Code only permits an award of fees for "reasonable attorneys' fees and actual costs incurred by the City ***in the action***." (Norco Mun. Code § 1.04.010(F).) Here, however, the City requests fees for work incurred outside the action. For example, the private prosecutor requests around $6,000 in fees for about 35 hours of reviewing building permit applications and related issues. (*See* Markus Decl. ¶¶ 21, 24, 26, 45.) And the private prosecutor requests about $1,225 for 7.3 hours spent reviewing a public records request. (*Id.* at ¶ 41.) While the same private law firm may serve as counsel for activities outside this action, the private prosecutor (assuming it prevailed) is only eligible for fees incurred "in th[is] action." (Norco Mun. Code § 1.04.010(F).)

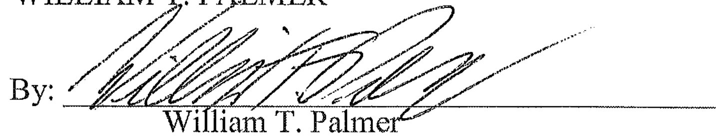
IV. CONCLUSION

For the foregoing reasons, Petitioner's Motion to Declare the City a Prevailing Party and for an Award of Attorneys' Fees Should Be Denied.

Dated: March 20, 2019.

JOSHUA A. HOUSE
JEFFREY H. REDFERN (*pro hac vice application pending*)
INSTITUTE FOR JUSTICE

PILLSBURY WINTHROP SHAW PITTMAN LLP
THOMAS V. LORAN III
WILLIAM T. PALMER



By: ______________________
William T. Palmer

Attorneys for Respondent Ronald T. Mugar

Case No. RIC1709678

PROOF OF SERVICE BY OVERNIGHT COURIER

I, Deirdre Campino, the undersigned, hereby declare as follows:

1. I am over the age of 18 years and am not a party to the within cause. I am employed by Pillsbury Winthrop Shaw Pittman LLP in the City of San Francisco, California.

2. My business address is Four Embarcadero Center, 22nd Floor, San Francisco, CA 94111-5998.

3. My mailing address is P.O. Box 2824, San Francisco, CA 94126-2824.

4. On March 20, 2019, in the city where I am employed, I served a true copy of the attached document(s) titled exactly **RESPONDENT RONALD MUGAR'S OPPOSITION TO PETITIONER'S MOTION TO DECLARE THE CITY A PREVAILING PARTY AND FOR AN AWARD OF ATTORNEYS' FEES** by placing it/them in a box or other facility regularly maintained by Federal Express, an express service carrier providing overnight delivery, or delivering it to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier, with overnight delivery fees paid or provided for, clearly labeled to identify the person being served at the address shown below:

[See Attached Service List]

I declare under penalty of perjury that the foregoing is true and correct. Executed this 20th day of March, 2019, at San Francisco, California.

Deirdre Campino

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