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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ROB ANDERSON, Plaintiff and Appellant, v. CITY AND COUNTY OF SAN FRANCISCO, Defendant and Respondent.	A143974 (San Francisco County Super. Ct. No. CPF-05-505509)
ROB ANDERSON, Appellant, v. CITY AND COUNTY OF SAN FRANCISCO, Appellant.	A147800, A148454

In 1997, the City of San Francisco (City) adopted a Bicycle Plan. It was a complex, far-reaching plan to alter streets in San Francisco to accommodate residents who ride bicycles, and it went through a lengthy review under the California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.). In the early 2000's, the City decided to upgrade the Plan, and in adopting the update, the City authorities determined that no further CEQA review was needed.

Appellant Rob Anderson, together with unincorporated associations Ninety-nine Percent and the Coalition for Adequate Review (when referred to collectively, petitioners), filed a petition for a writ of administrative mandate to overturn that decision. In November 2006, the superior court ordered issuance of the requested writ directing the City to comply with CEQA, which ruling resulted in years of further CEQA-related activity involving the Plan. Then, in 2010, the superior court overruled petitioners' objections and approved the upgraded Plan.

Anderson appealed, and in January 2013, we issued our opinion in that appeal, an 83-page opinion that spent the bulk of its discussion rejecting almost all of Anderson's numerous arguments. However, in the final few pages we held that the Board of Supervisors had erred in the process by which the environmental impact report (EIR) was certified, and we concluded our opinion with this disposition: "The 'Order Overruling Petitioners' Objections to Respondent City and County of San Francisco's Return to Writ of Mandate' is reversed, and the cause is remanded to the trial court with directions to modify the writ of mandate (or issue a new writ if necessary) requiring the San Francisco Board of Supervisors to comply with CEQA as stated in this opinion. The parties shall bear their respective costs of appeal." (*Anderson v. City and County of San Francisco* (Jan. 14, 2013, A129910) [nonpub. opn.].)

Following remand, petitioners and the City engaged in vigorous litigation, the upshot of which was ultimately adverse to petitioners. This has resulted in the three consolidated appeals before us here—the fourth, fifth, and sixth appeals filed by Anderson. These three appeals are from four orders that: (1) denied petitioners' motion for judgment; (2) granted the City's motion to strike $1,813 in claimed costs; (3) discharged a writ in favor

of the City; and (4) awarded petitioners attorney fees in the amount of $153,346, a substantial reduction from the amount sought. This last order generated a cross-appeal by the City contending that petitioners were not entitled to any fees because they were not a successful party under Code of Civil Procedure section 1021.5.

We conclude that none of Anderson's three appeals has merit, and neither does the City's cross-appeal. We thus affirm all four orders.

BACKGROUND[1]

The General Setting

In 1997, the City adopted a Bicycle Plan, described as "a comprehensive guide for efforts that will make San Francisco a more 'bicycle friendly' city." As one superior court judge described it years ago: "The Bicycle Plan originated in the City's Department of Parking and Traffic . . . as a complex, far-reaching plan to alter streets in San Francisco to accommodate San Francisco residents who ride bicycles. To achieve the Bicycle Plan's goal of increasing the number of city residents who ride bicycles, the Bicycle Plan mandates a number of actions, including: eliminating traffic lanes and street parking throughout the City to create bicycle lanes, requiring that cars, buses, and trucks 'share' lanes with bicyclists regardless of speed, allowing bicycles inside Muni and other public transit vehicles, eliminating parking in existing and newly constructed buildings, allowing bicycles in exclusive bus lanes, installing physical impediments to motorized traffic or 'traffic calming,' allowing bicycles on sidewalks, and closing streets to vehicles to create

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[1] Much of our background is taken from our earlier opinions in *Anderson v. City and County of San Francisco*, *supra*, A129910, and *Coalition for Adequate Review v. City and County of San Francisco* (Nov. 19, 2014, A135660 and A138856) [nonpub. opn.]

exclusive 'bicycle boulevards.' The Bicycle Plan also contemplated . . . requiring that CEQA review of any proposed project in the City must resolve any 'traffic impacts or conflicts of parking access' by giving 'full or partial priority for bicycles,' that any proposed Area Plan in the City must be 'consistent' with the Bicycle Plan, and that automatic amendments of the City's General Plan will roll in '[a]s changes to the network occur.' "

The Bicycle Plan was a conspicuous success, so much so that it was substantially amended in 2001; and in 2002, a mere five years after being adopted, the City started planning to upgrade and extend it. The City took the position that because the Bicycle Plan had already gone through CEQA review, the proposed upgrade was exempt from further environmental review because there was no possibility that it would have a significant effect on the environment. (Cal. Code Regs., tit. 14, §15061, subd. (b)(3).)

In July 2005, petitioners filed a petition (and shortly thereafter, an amended petition) for a writ of mandate to overturn that decision. Petitioners were represented by attorney Mary Miles, an attorney who had only recently been admitted to the Bar, in March 2004. Petitioners obtained a preliminary injunction, and after a hearing the superior court granted the petition and issued a peremptory writ of mandate, ordering the injunction to remain in effect "until the [City] has complied with CEQA." Final judgment was filed on June 18, 2007, with the injunction remaining in effect. In short, the court issued a peremptory writ of mandate ordering the City to set aside its legislation on the project and to conduct environmental review, with the court retaining jurisdiction until the City complied with CEQA.

Petitioners applied for costs and an award of attorney fees. In March 2008, the City and petitioners, represented by Ms. Miles and the recently associated Richard M. Pearl, negotiated a "Settlement Agreement and

General Release [of] Attorneys' Fees and Costs," whereby the City agreed to pay $406,278.55 as "all attorneys' fees and costs arising out of Ms. Miles' and Mr. Pearl's representation . . . up to and including January 31, 2008."

In May 2008, and again in February 2009, the superior court largely denied requests from the City to modify the injunction, but the City was given permission to modify one specified intersection and to add and enhance marking associated with existing bicycle lanes on specified streets.

In August 2009, and over petitioners' opposition, the City's Board of Supervisors certified a 2,052-page EIR. And in September, the City filed its return to the peremptory writ of mandate, claiming that by certifying the EIR it had complied with CEQA and the writ, to which petitioners filed objections. Again, the City asked the trial court to dissolve the injunction. The superior court rejected the City's argument that the injunction should, by reason of the certification alone, be dissolved. But in a carefully crafted, comprehensive order, the court modified the injunction for a third time, to permit work on certain specified features of the Bicycle Plan to proceed pending a final determination of the validity of the EIR. And because the parties were, in the words of the court, unable or unwilling to reach an agreement on a schedule to test the City's return to the writ of mandate expeditiously, the court established briefing deadlines and scheduled a hearing for June 2010.

In August 2010, the superior court filed its order overruling petitioners' objections to the return to the writ, from which Anderson filed his first appeal—No. A129910 (the primary appeal).

The Primary Appeal—No. A129910

Anderson's brief in the primary appeal contained four arguments that, with their numerous subparts, made no fewer than 25 specific arguments.

On January 14, 2013, we filed an 83-page opinion (*Anderson v. City and County of San Francisco*, *supra*, A129910), rejecting most all of Anderson's arguments, an opinion that early on included the observation that "Anderson advances a number of contentions aimed at perceived instances of reversible error. The final contention in his opening brief challenges the integrity and validity of the entire process undertaken by the City in response to the trial court's writ of mandate, and should be considered at the outset. We thus begin with it, and with the preliminary observation that considerable portions of this opinion will be comprised of lengthy quotation, with minor nonsubstantive editorial changes, from the trial court's order. This is done for two reasons. The first is to underscore the deep and exhaustive nature of the effort expended by the court on this matter, specifically, the Honorable Peter J. Busch . . . . The second is economy, because we will be using the trial court's analysis as the framework of our own."

Following our review of CEQA and the standards of judicial review, we went on with the first of our holdings, that the public was not denied the opportunity to participate in the CEQA process. Reaching that conclusion, we made two criticisms about Anderson's briefing. The first was that "Anderson is ignoring the two most elemental principles of appellate review: that the judgment under review is presumed correct, and it is appellant's burden to overcome that presumption. (*Sierra Club v. City of Orange* [(2008)] 163 Cal.App.4th 523, 530.) Simply rehashing or tweaking arguments rejected by the trial court neither rebuts that presumption nor carries that burden. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 102; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.) Once a trial court has produced a written decision that is obviously the result of considerable labor, it is only fitting that respectful attention be given to those

labors. (Cf. *Uriarte v. United States Pipe & Foundry Co.* (1996) 51 Cal.App.4th 780, 791 ['The fact that [we] review de novo . . . does not mean that the trial court is a potted plant in that process']; *Koster v. County of San Joaquin* (1996) 47 Cal.App.4th 29, 45 ['Although we often exercise de novo review in CEQA cases, in many such cases, trial courts provide us with a thorough written opinion which helps to clarify issues for appeal'].) Counsel is certainly at liberty to argue that the lower [court] committed an error of law, or determined an issue of fact that lacks the support of substantial evidence. But to totally ignore, as Anderson does here, the particulars of the trial court's lengthy opinion is hardly a promising stratagem."

The second criticism was this: "Given the huge record, it is most appropriate to remind Anderson of what should be an unnecessary admonition: ' "Instead of a fair and sincere effort to show the trial court was wrong, appellant's brief is a mere challenge to respondent[] to prove that the court was right. And it is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness in the arguments of the respondents. An appellant is not permitted to evade or shift his responsibility in this manner." ' (*Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 505 quoting *Estate of Palmer* (1956) 145 Cal.App.2d 428, 431.)"

Following that, we proceeded for the next 55 pages to reject, one by one, most of Anderson's arguments, concluding as follows: "In sum and in short, Anderson has shown no error in connection with the EIR itself. He does, however, demonstrate error in the process by which the EIR was certified." There followed the final section of the primary opinion—under the caption "**The Absence Of Infeasibility Findings Was A Prejudicial Abuse Of Discretion**"—where we held that the City's EIR was not compliant with

Public Resources Code section 21081, which requires a public agency not to approve a project if the EIR identifies "one or more significant effects on the environment" unless the public agency adopts "findings with respect to each significant effect," and which establishes a multi-track approach once it is determined in an EIR that a proposed project entails "significant effects on the environment." The public agency cannot approve the project unless the agency makes one—or two—findings: a finding that changes have been made "which mitigate or avoid the significant effects," or a finding that mitigation is "within the responsibility and jurisdiction of another public agency." Or the agency can decide that specified conditions "make infeasible the mitigation measures or alternatives" identified in the EIR. If it takes this latter option, the public agency must make an additional finding that "specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment."

We then addressed the findings adopted by the City, concluding that the EIR was sufficient in connection with most projects but, as we put it, "[N]ot all. What are identified as substantial impacts Nos. 39, 41, 42 (all dealing with project 2-6), 58, 68, 69 (all dealing with project 3-1), and 102 (dealing with project 6-6) are not addressed. At all." So we concluded: "This failure by the Board of Supervisors to proceed in the manner required by CEQA establishes a prejudicial abuse of discretion. [Citations.] The cause must therefore be returned to the trial court with directions to direct the Board of Supervisors to correct this omission." And thus our disposition: "The 'Order Overruling Petitioners' Objections to Respondent City and County of San Francisco's Return to Writ of Mandate' is reversed, and the cause is remanded to the trial court with directions to modify the writ of

mandate (or issue a new writ if necessary) requiring the San Francisco Board of Supervisors to comply with CEQA as stated in this opinion. . . ."

Our remittitur issued on April 22, 2013. Anderson sought review in the Supreme Court, which was denied.

The Second and Third Appeals—Nos. A135660 and A138856

The First Attorney Fee Award

On October 5, 2010, the day after Anderson filed his notice of appeal in the primary appeal, petitioners filed a "Motion for Award of Supplemental Attorney's Fees," seeking $497,160 plus fees "incurred subsequently on the motion," that is, fees on fees. The motion, apparently prepared by Mr. Pearl, sought fees for 828.6 hours of Ms. Miles's time at an hourly rate of $450, plus a 50 percent enhancement, i.e., a 1.5 multiplier. The motion also sought fees of $650 per hour for the work of Mr. Pearl.

Following the City's opposition, and Anderson's reply, the motion came on before the Honorable Harold Kahn, a most experienced jurist. Judge Kahn had issued a tentative ruling, both parties had objected, and a lengthy hearing ensued, where many issues were discussed, one of which Judge Kahn described as "the big issue that we need to address"—Ms. Miles's hourly rate. And as to this Judge Kahn began as follows: "I think that Ms. Miles has done a heroic thing here . . . taking on the City by herself, as a very new lawyer, with all the resources the City had and . . . she had to know that there was going to be a lot of people who like bicycles, [and] were not going to be happy with her. So that's what I mean by heroic; she's courageous. But she did it with relatively little knowledge and experience, and that's okay, but the result is she spent a lot of time that a more experienced, more knowledgeable—and I don't mean this to be critical—a more savvy lawyer wouldn't have spent, and it's . . . apparent from the papers." Then, after

discussing Ms. Miles's education and legal experience, Judge Kahn said, "I could do one of two things: I could reduce the hours or I can put an hourly rate that is more consistent with a younger lawyer. . . ."

In April 2012, Judge Kahn entered his written order awarding attorney fees of $161,991.50: $123,024 for the work of Ms. Miles, based on an hourly rate of $200 per hour, and $38,967.50 for the work of Mr. Pearl. Anderson appealed this award, his second appeal.

The Second Attorney Fee Award

In January 2013, Judge Kahn granted petitioners' motion to strike the City's cost bill from the administrative record. Two months later, petitioners filed another supplemental motion for attorney fees, for the work on the motion to strike, seeking slightly more than $68,000. The motion again sought an hourly rate of $450 for Ms. Miles, claiming she devoted 89.9 hours to the motion to strike (plus 35.2 hours spent on the fee motion). This fee motion again sought a 1.5 multiplier.

The City opposed this new fee request, arguing that because the EIR had been upheld, petitioners were not prevailing parties. The City further argued that the hourly rate requested by Ms. Miles was "inconsistent with a fee award to counsel in April of this year," and that the hours claimed are "excessive, and a multiplier is unsupportable." At best, the City argued, "[a]ny fee award should be less than $4,000."

With petitioners' reply, the fee request was increased to $78,860.

Judge Kahn issued this tentative ruling on this fee request: "[Petitioners] are awarded $16,000 as reasonable fees for their counsel's work in successfully moving to strike the City's costs memorandum and in bringing this fees motion. [Petitioners] are entitled to fees per CCP 1021.5 because they had been successful in their initial writ petition which met the statutory

criteria and the City's costs memorandum was related to that petition. There is no reason to depart from the $200 hourly rate for Ms. Miles that was determined on the . . . previous motion for fees heard and decided last year. The hours spent by Ms. Miles to defeat a $52,000 costs memorandum were excessive given that the motion to strike essentially raised two issues—whether the City was the prevailing party, such that it was entitled to a costs award and, if so, whether the costs it claimed were reasonably incurred—were fairly simple and did not require extensive legal research or analysis. 60 hours of time spent by a $200 per hour attorney is the most amount of time that is reasonable to have spent preparing the moving and reply papers (no hearing was held on the motion) and thus $12,000 is awarded for that work. The hours spent by Ms. Miles to seek fees for work on the motion to strike are also disproportionate and excessive. The issues on this motion are routine and not difficult. 20 hours of time spent by a $200 per hour attorney is the most amount of time that is reasonable to have spent in preparing the moving and reply papers and thus $4,000 is awarded for that work."

Both sides asked for oral argument, and both sides failed in their attempt to convince Judge Kahn to change his tentative ruling. As to petitioners' attempt to persuade him to change his mind on either the hourly rate or hours expended, Judge Kahn explained at length his reasons to reject the attempt, saying that after reading the transcript of the hearing on the previous fee request, "The views that I expressed at that hearing I still believe are correct. You are a sole practitioner with limited support. The nature of the work done by your office is, while I'm not criticizing it, in line with a $200 hour rate, which, frankly, is—that's not cheap. For the average American, $200 an hour seems sky high. [¶] I now work mostly in criminal court. I hear people every single day telling me that they can't afford $200 in

costs imposed against them. [¶] In my many years in civil court, I have seen rates around $200, and it seems to me that that is a fair rate for somebody in your position, which we have to gauge a rate. . . .

"And as to the compensable hours, . . . we're talking about very simple matters here. . . . [T]he principles are pretty well understood. . . . [¶] Every day in my position I hear from litigants how expensive litigation has become. It's become expensive because, in part, lawyers over-litigate. And I'm not saying you didn't work every one of those hours. I'm sure you did. . . . [¶] It's just that people over-litigate, and you're not the only one. This building is filled with over-litigation. Probably it's true up and down the state and . . . around the country, but that doesn't make it compensable under the reasonable standards.

"You know, one way to really look at this is to look at all of the cites that you have in your reply brief on this motion. . . . [W]e've got two full pages, mostly cases, where almost none of those cases have any bearing on the decision here. Sure, they have propositions of law that are germane, but that's not going to affect a decision maker. [¶] . . . [¶] Let me . . . be as blunt as I can here. I think you are seeking $70,000 or thereabouts in fees to avoid having your clients be stuck with having to pay $52,000. That's disproportionate. That's not the way litigation should be. . . . [¶] . . . [¶] A much, much smaller amount is warranted, particularly when we're talking about fairly simple procedural matters.

"There is no complexity and novelty. . . . And while the issue was clearly important to you and your clients, it is not important in any public benefit or public interest sense, save and except for that one public policy argument you made which, in my view, could be made in one o[r] two sentences, that seeking approximately $50,000 in costs against a prevailing

CEQA plaintiff could deter future meritorious CEQA claims. [¶] No other aspect of this had any public benefit. It was simply . . . to avoid . . . having your clients be burdened with a cost judgment against them."

Anderson appealed from the ensuing written order, his third appeal, and we ordered the two attorney fee appeals consolidated. In November 2014, we filed our unpublished opinion affirming both orders.

The Proceedings Following Remand

The Dueling Writs

As noted, our remittitur in the primary appeal issued on April 13, 2013, instructing the trial court "to modify the writ of mandate (or issue a new writ if necessary) requiring the San Francisco Board of Supervisors to comply with CEQA as stated in the opinion."

On July 24, the City noticed a motion for "Issuance of Peremptory Writ of Mandate," attached to which was a "[Proposed] Writ of Mandate" that looks to have been in the form of an order to show cause. The operative language commanded the City "to demonstrate that you have reconsidered the findings required under [CEQA] adopted in relation to the approval of the 2009 San Francisco Bicycle Transportation Plan, consistent with Court of Appeal's opinion in Anderson v. City and County of San Francisco, A129910, filed on January 14, 2013." The City would also be commanded to "make and file a return to this court upon taking action in compliance with this writ."

There was a bit of theater behind this: as petitioners pointed out in their opposition, and in Anderson's brief here, the City's Municipal Transportation Agency and Planning Commission had *already* proposed and adopted the findings that would supposedly comply with our opinion; and the Board of Supervisors had adopted these findings, all this being completed four days before the City filed its motion. Indeed, the actual resolutions by

the municipal agencies leave absolutely no room for doubting that they are responses to our decision, described as "modified CEQA findings, attached as Enclosure 2, . . . respond to the Court of Appeal's concerns," with the notation that "approval of this item will address the technical defects identified by the Court of Appeal." But Enclosure 2 is not merely a number of amendments to the specific points identified in the primary opinion. It is instead a completely redone and re-adopted "Revised California Environmental Quality Act Findings: Findings of Fact, Evaluation of Mitigation Measures and Alternatives, and Statement of Overriding Considerations." And it is easy to track the new additions because they are underscored or in **bold-face type**. In all, Enclosure 2 comprises approximately 180 pages.

On July 30, the Board of Supervisors adopted "as its own" the Planning Department's revised findings and re-adopted the 2009 legislation approving the project.

For reasons not disclosed by the record, no further action on the City's July 24 motion occurred before September 30, when petitioners filed their own motion for a writ of mandate followed by their opposition to the City's motion. The gist of petitioners' position was that the City's approach did not comply with our decision. In their view, proper compliance required a writ that commanded the City "to set aside and void its legislation adopting findings and approving the Project without legally adequate findings, prepare new findings to comply with the [primary] opinion and CEQA, and suspend Project activities that could result in significant [adverse environmental] impacts, *particularly the more than 90 significant impacts identified in the EIR* and the opinion that City has not mitigated." (Italics added.) In short, petitioners argued, the City could not comply with CEQA without restarting,

from square one, the process of certifying the EIR. Petitioners also submitted a proposed form of the writ they desired.

The City's opposition to petitioners' motion pulled no punches: "The City's Proposed Writ complies with the Court of Appeal's opinion, it complies with CEQA; and it allows the City to exercise the discretion legally vested in it. Petitioners' proposed writ, on the other hand, uses a sledgehammer to crack a peanut. Petitioners treat the City's relatively minor violation of CEQA as a back-door opportunity to attack every bicycle related decision the City has made over the last 8 ½ years, as well as an attack on the Court of Appeal's opinion."

Quoting the language of petitioners' proposed writ, the City noted that "Petitioners seek to 'set aside and void all legislation adopted by [the City] to approve the San Francisco Bicycle Plan Project or any part of it . . . and all legislative acts since June 7, 2005 to adopt, approve or implement any action [in the Bicycle Plan].' " This was "unworkable": "Voiding the approval of the last 8 ½ years of legislation related to bicycles would unnecessarily cause confusion regarding the status of dozens already implemented projects and would require the City to re-approve each one, a cumbersome and disruptive process. [¶] . . . [¶] Moreover, a writ that voided the adoption of and continued reliance on the 2009 Bicycle Plan would jeopardize the continued implementation of the important safety features inherent in the bicycle projects." Finally, the City argued, "Not all CEQA violations are created equal, . . . and CEQA allows the court the flexibility to determine an appropriate remedy," flexibility found in Public Resources Code section 21169.

The City and petitioners both filed reply briefs. In sum, a total of six briefs—over 430 pages of briefing— were filed on the dueling writs. And the

essential position of the parties were these: the City argued that petitioners' proposed writ imposed obligations beyond the scope of the opinion and was overly broad; petitioners argued that the City's proposed writ failed to comply with CEQA law and that the primary opinion required additional findings.

Both motions were scheduled to be heard on October 23, 2013, in the law and motion department. However, the City had requested that the case be reassigned to the Honorable Teri Jackson, the judge assigned to CEQA cases, a request Anderson opposed. When the motions came on for hearing on October 23, the trial court ordered the case reassigned to Judge Jackson, and the motions were continued.[2]

On October 29, petitioners filed a Code of Civil Procedure section 170.6 challenge to Judge Jackson, which was denied. Petitioners sought a writ in this court, which we denied, and their petition for review was denied by the Supreme Court. Months later, in March 2014, Anderson filed another challenge to Judge Jackson, a challenge for cause under Code of Civil Procedure section 170.3. This too was denied.

Meanwhile, along with the challenges to Judge Jackson, petitioners filed several requests for continuances and for new briefing schedules, the upshot of which was that hearing on the dueling writs was postponed. Then, in July 2014, petitioners requested reassignment and a stay, claiming they could not get a fair hearing before Judge Jackson. This too was denied, and the dueling writs finally came on for hearing on two days, July 17 and 18.[3]

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[2] Like her predecessors assigned to the case, Judge Jackson was also an experienced judge. In November 2019, she was appointed to this court.

[3] This is how Anderson describes the developments leading to the hearing: "After denying petitioners' requests for a more reasonable briefing and hearing schedule, the trial court then rescheduled the hearing on the City's writ motion, but not on petitioners' before Judge Jackson on July 17, 2014. Petitioners then filed an amended notice to also get their September

Five days later, Judge Jackson filed her order, an order she wrote on her own. As relevant here, it provided:

"The First District Court of Appeal, having rejected all challenges to the EIR itself, except for the following defects in the process of certification by the Board of Supervisors (the 'Board'):

"1. Failure to make specific findings of infeasibility as to each alternative identified in the EIR; and

"2. Failure to address Substantial Impacts Nos. 39, 41, 42, 58, 68, 69 and 102.

"The cause was remanded to the trial court with directions to modify the writ or issue a new writ to the Board to correct the omissions and to comply with CEQA as stated in the opinion.

"Therefore, pursuant to Anderson v. City and County of San Francisco, A129910 and Public Resources Code § 21168.9(a)(3):

"YOU ARE HEREBY COMMANDED on receipt of this writ to make specific findings of infeasibility as required by Public Resources Code § 21081 and CEQA Guidelines, 14 Cal. Code Regs. § 15091(a) for each alternative identified in the EIR of the 2009 San Francisco Bicycle Transportation Plans. These findings must be consistent with the Court of Appeal's opinion in Anderson v. City and County of San Francisco, A129910 filed on January 14, 2013.

"YOU ARE HEREBY COMMANDED on receipt of this writ to readopt the Statement of Overriding Considerations identified in the EIR as long as you make specific findings of infeasibility as required by Public Resources

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30, 2013 writ motion heard. [Citation.] On July 17, 2014, the court continued the hearing over petitioners' objections."

Code § 21081 and Guideline § 15091(a) for each alternative identified in the EIR of the 2009 San Francisco Bicycle Transportation Plans.

"YOU ARE HEREBY COMMANDED on receipt of this writ to address and make specific findings of Substantial Impacts Nos. 39, 41, 42 (all dealing with Project 2-6), 58, 68, 69 (all dealing with Project 3-1) and 102 (dealing with Project 6-6) in the CEQA Findings of the EIR. The findings must be consistent with the Court of Appeal's opinion in Anderson v. City and County of San Francisco, A129910 filed on January 14. 2013. [¶] . . . [¶]

"YOU ARE HEREBY COMMANDED to make and file a return to this court upon taking action in compliance with this writ, setting forth what you have done to comply. This court shall retain jurisdiction over this action to determine whether the City's actions have fully complied with the mandate of this peremptory writ."

In sum, Judge Jackson issued a peremptory writ of mandate (the writ) requiring the City to do three things: (1) make specific findings of infeasibility, as CEQA requires; (2) readopt the Statement of Overriding Considerations; and (3) address the seven impacts missing from the adopted findings.

At this point it appears that the parties' emphasis shifted to other issues, and it was not until April 2015 that the City filed its return to the writ, as discussed below.

The Motion for Judgment

On August 6, days after Judge Jackson issued the writ, Anderson filed a pleading styled "Motion for Judgment Granting Peremptory Writ of Mandate." The motion essentially argued that Judge Jackson was required to enter a judgment before entering the writ, and thus violated *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171 (*Palma*). The City filed

opposition, Anderson a reply, and on October 23, Judge Jackson entered an order denying it, in this succinct holding: "The Supreme Court of California held that California Courts of Appeal, prior to ordering issuance of a peremptory writ in the first instance, provide notice that such a writ may issue, and invite informal opposition, in orders routinely called '*Palma* notices.' [Citation.] A *Palma* notice is not required because this court did not grant accelerated writ relief in the form of a peremptory writ in the first instance. The procedural history of this matter involved the usual procedures associated with the issuance of an alternative writ or an order to show cause."

In December, Anderson filed an appeal from the October 23 order.

The Cost Bill

In August 2014, while their motion for judgment was pending, petitioners filed a memorandum for costs in the amount of $1,813. The City moved to strike or tax the costs. By order of November 5, Judge Jackson granted the City's motion, holding that petitioners were not the prevailing party and even if they were, she would deny costs in her discretion. In January 2015, Anderson appealed that order, and the two appeals were consolidated. This is the first of the three appeals before us now—No. A143974.

The Discharge of the Writ

On April 13, 2015, the City filed a return to writ, outlining the steps it had taken to comply with our opinion, and requesting that Judge Jackson discharge the writ. In explaining the "actions taken in compliance with the writ," the City recounted the same acts as were cited in its July 2014 motion for issuance of the writ.

On May 13, petitioners filed objections to, and a motion to strike, the return, again claiming the writ failed to address deficiencies identified in our opinion. Petitioners argued that the City was erroneously claiming that "actions taken *before* the 7/23/14 writ was issued could somehow comply with the as yet non-existent 7/23/14 writ." For petitioners, it was "false, absurd, and frivolous" to claim this was compliance "since the 7/23/14 writ did not yet exist when [the] City's decisionmakers approved its 'revised findings' in May and July, 2013." Hence, the purported return "must . . . be set aside." Petitioners also reiterated the *Palma* argument to assert that the 7/23/14 writ was "irrelevant," "invalid," and "void." And under the heading "Even if They were not Irrelevant, [the] City's Revised Findings do not Comply with CEQA" in that (a) the City's "Findings Fail to Explain *Why* Mitigation Measures and Alternatives are Infeasible," and (b) the City "fails to Make New Findings on Alternatives as Explicitly Ordered," petitioners further argued that the City "must make new findings for changed projects."

The City responded that "the timing of . . . compliance with the writ is immaterial": "[N]othing in CEQA or other case law requires the City to refrain from correcting actions as mandated by the Court of Appeal, or compels the City to sit on its hands where, like here, the time between the Court of Appeal's opinion and the issuance of a writ can be extensive."

As to the merits of petitioners' objections, the City argued they were baseless in that the revised findings (1) "Reject the Alternatives as Infeasible," (2) "Include Findings for the Seven Environmental Impacts noted by the Court of Appeal and the Writ," and (3) "Readopt the Statement of Overriding Considerations." And as for what petitioners called the two "changed projects," the City noted that one was approved "on August 18, 2015, well after the adoption of the Revised Findings," and the other "was

adopted [on] September 18, 2012, prior to the Court of Appeal opinion." Moreover, "The time in which to challenge the CEQA review of either project has expired. In any event, the July 23, 2014 writ declined to require the City to re-approve or revisit any other Bicycle Plan related approvals, despite the fact that petitioners' motion for peremptory writ of mandate argued that it should."

Noting that the trial court had discretion to decide whether the City had complied with the writ (*Summit Media LLC v. City of Los Angeles* (2015) 240 Cal.App.4th 171, 182), the City's major point was that petitioners' objections were "in essence, [asking for] a rehearing of the parties' competing motions for issuance of the writ," "asking this Court to re-visit these previously discarded arguments."

Hearing on the objections was held on December 16, and on December 24, Judge Jackson filed an order overruling petitioners' objections, denying the motion to strike, and discharging the peremptory writ of mandate. It was a comprehensive eight pages, concluding that the revised findings complied with CEQA, our primary opinion, and her own writ. Relevant portions of that order include the following:

"The Court finds that the Revised Findings specifically rejected each of the alternatives as infeasible. Thus, under *Section VI, Evaluation of Project Alternatives,* the City revised the findings to specifically note that that section set forth the reasons for 'finding the alternatives infeasible, and rejecting them, as required by Public Resources Code section 21081(a)(3) and CEQA Guidelines section 15091(a)(3).' The Revised Findings added language to state: 'The Alternatives listed below and rejected are rejected as infeasible based upon substantial evidence in the record, including evidence of economic, legal, social, technological, and other considerations described in

this Section, and for the reasons described in Section VII below [the Statement of Overriding Considerations], which is incorporated herein by reference.' [Citations.] Thus, the Revised Findings noted that each rejected alternative was rejected because it was infeasible for the various reasons stated, as required by CEQA.

"The Court finds that the Revised Findings adequately explain why the alternatives are rejected as infeasible. The Revised Findings not only incorporate by reference the Statement of Overriding Considerations setting forth the policy reasons for finding each of the alternatives as infeasible and rejecting them, but also the Revised Findings set forth other reasons why each of the alternatives was rejected as infeasible. [¶] . . . [¶]

"An agency may find an alternative infeasible if it conflicts with an agency's policy goals. [Citations.] The City outlined its policy goals related to bicycles—including fulfilling the mandate of the San Francisco Charter to 'make bicycling an attractive alternative to travel by private automobile,' policies to reduce greenhouse gas emissions such as the Climate Action Plan, and the Department of the Environment's Strategic Plan, as well as complying with regional plans such as the Metropolitan Transportation Commission's Regional Bicycle Plan—in its Statement of Overriding Considerations. Setting forth the conflicts with these goals fulfill the Court of Appeal's and writ's directive to make infeasibility findings for each alternative in the EIR.

"The court rejects petitioners' argument that the City merely substituted its 'Statement of Overriding Considerations' for its findings of infeasibility. Although an agency may not skip the step of finding that alternatives are infeasible, nothing in CEQA prevents an agency from having similar reasons for finding an alternative infeasible and finding that the

project's benefits override its environmental effects. CEQA uses similar language for both steps: an agency may find an alternative infeasible for 'economic, legal, social, technological, or other considerations,' including if the alternative conflicts with an agency's policy goals, whereas agency's statement of overriding considerations can consider a project's 'economic, legal, social, technological, or other benefits, including region-wide or statewide environmental benefits.' [Citations.]

"Petitioners dislike that the City incorporated the Statement of Overriding Considerations into its findings of infeasibility, and used the same reasons in the Statement as reasons for rejecting the alternatives as infeasible, but CEQA allows this practice. Indeed, in finding that the original findings did not adequately reject the alternatives as infeasible, the Court of Appeal noted that the original findings did 'not mention or incorporate by reference, the Statement of Overriding Considerations.' The Court later notes, approvingly, that in discussing the project's significant effects, 'there is an incorporation by reference of the entirety of Section VII's Statement of Overriding Considerations.' [¶] . . . [¶]

"The court finds that the Revised Findings specifically 'address and make specific findings of substantial impacts nos. 39, 41, 42 (all dealing with Project 2-6), 58, 68, 69 (all dealing with Project 3-1) and 102 (dealing with Project 6-6),' as the opinion found that discussions related to these impacts were missing from the original findings. The Revised Findings for those impacts are in a format consistent with the format for the City's original findings on the other significant environmental impacts, which the Court of Appeal found adequate. [Citations.] In its Revised Findings, the City noted which impacts were being discussed in each project description. . . .

"Specifically, for the seven impacts identified in the Court of Appeal opinion and the writ, the Revised Findings specify the seven identified impact numbers in the discussion of each project: 'Project 2-4: 17th Street Bicycle Lanes, Corbett Avenue to Kansas Street, Mod. Option 1; Project 2-6: Division Street Bicycle Lanes, 9th Street to 11th Street, Option 2' noted that 'the combined design modification of Project 2-4 and Project 2-6 result in a number of significant and unavoidable intersection and transit delay impacts, as further detailed in the section on significant and unavoidable impacts. (See Impact #38 through 44).' (See Exhibit C at p. 127.) The Revised findings then specify why the impacts are outweighed by the projects. Likewise, under 'Project 3-2: Masonic Avenue Bicycle Lanes, Fell Street to Geary Boulevard, Preferred Option not yet determined; Project 3-1 Fell Street and Masonic Avenue Intersection Improvements' the City noted that Project 3-2 by itself results in significant and unavoidable intersection and transit delay impacts as further detailed in the section on significant and unavoidable impacts. (See Impact #58-71.) (See Exh. C at p. 130.) Finally, under 'Project 6-5: Portola Drive Bicycle Lanes, Corbett Avenue to O'Shaughnessy Boulevard, Mod. Option 1; Project 6-6: Portola Drive Bicycle Lane, O'Shaughnessy Boulevard/Woodside Avenue to Sloat Boulevard/St. Francis Boulevard, Modified Option 2; Project 6-2: Clipper Street Bicycle Lanes, Douglass Street to Portola Drive, Option 1' the City noted that 'the combined design modifications of Project 6-5, Project 6-6, and Project 6-2 produces a significant and unavoidable transit delay impact in the cumulative condition, as further detailed in the section on significant and unavoidable impacts. (See Impact #101-102.) (See Exh. C at p. 132.)
[¶] . . . [¶]

"Finally, because the City found the alternatives infeasible and rejected them, the City re-adopted the Statement of Overriding Considerations in '*Section VII Statement of Overriding Considerations*' as required by the Writ. (See Exh. C at pp. 121–135.) The Court rejects Petitioners' argument that the Statement of Overriding Considerations is merely 'rhetoric,' and does not refer to any specific impact in the EIR, because CEQA does not require a separate Statement of Overriding Consideration for each specific impact. (Kostka and Zichke, Practice Under the Cal. Environmental Quality Act, § 17.33 [CEQA 'require[s] that an agency adopt only a single statement of overriding considerations and do[es] not require[] a separate statement for each significant impact'].) Moreover, the Court of Appeal concluded that the Statement of Overriding Considerations was adequate. A statement is required to express the larger, more general reasons for approving a project. Statements that are based on policy considerations and the agency's determination that a project's benefits outweigh significant effects that cannot be mitigated 'lies at the core of the lead agency's discretionary responsibility under CEQA.' [Citations.]"

Judge Jackson agreed with the City that petitioners' "changed projects" argument was "untimely" and "time-barred," and that "the timing of the City's compliance with the writ is immaterial." And her order ended: "The Petitioners' Objections to Respondent's Return are OVERRULED and [their] Motion to Strike the Return is DENIED. The July 23, 2015 Writ is DISCHARGED in its entirety."

On February 22, 2015, Anderson appealed the order. This is the second appeal here—No. A147800.

The Motion for Attorney Fees

Meanwhile, in February 2015, Anderson filed a supplemental motion for attorney fees, seeking $702,036.50 for work performed during the period from December 1, 2008 to July 18, 2014. The City opposed the motion, arguing that Anderson was not entitled to fees because he was not a "successful party" on the primary appeal or on remand, had not conferred a significant benefit on the public, and in any event the fees requested were excessive.

On December 3, petitioners filed their reply brief, along with a reply declaration and evidentiary objections to the City's opposition. Hearing on the motion was held on December 10, and on March 7, 2016, Judge Jackson issued her order awarding $153,346.00 in attorney fees. Anderson filed his appeal from this order and the City its cross-appeal. This is the third appeal here—No. A148454.

We ordered the three appeals consolidated.

DISCUSSION

Appeal No. A143974 Has No Merit: The Motion for Judgment Was Properly Denied, and the $1,813 in Costs Properly Disallowed

Appeal No. A143974 involves appeals from two orders by Judge Jackson: (1) the October 23, 2014 order denying Anderson's motion for judgment; and (2) the November 5, 2014 order granting the City's motion to strike Anderson's $1,813 cost bill.

The Motion for Judgment Was Properly Denied

To briefly recap, following remand both sides moved for writs, the City in July 2013, Anderson in September. Six separate briefs were filed on the matters, two hearings were held, and on July 23, 2014, Judge Jackson issued the peremptory writ. Days later, on August 6, Anderson filed the motion

(and then an amended motion) styled "motion for judgment granting peremptory writ of mandate," essentially arguing Judge Jackson was required to enter a judgment before entering the writ. The City filed opposition. Anderson a reply, and following a hearing, Judge Jackson denied petitioners' motion.

Anderson's appeal relies primarily on *Palma*, *supra*, 36 Cal.3d 171. There, the trial court denied defendant's motion for summary judgment. Defendant filed a petition for writ of mandate in the Court of Appeal, which issued a writ directing the trial court to grant summary judgment, doing so without giving plaintiff any notice or opportunity to be heard. The trial court complied with the writ, plaintiff appealed, and defendant argued that because plaintiff did not seek review in the Supreme Court, res judicata barred him from arguing the merits of the summary judgment. (*Id.* at pp. 176–177.) The Supreme Court rejected defendant's position because plaintiff had no notice that the Court of Appeal was going to issue the writ, holding, as the Court would later describe it, "at a minimum, a peremptory writ of mandate or prohibition may not issue in the first instance without *notice* that the issuance of such a writ in the first instance is being sought or considered." (*Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1238; *Palma*, at p. 180.)

More specifically, *Palma* held that the proper procedure is for the appellate court to "issue an *order* or *decision* calling for issuance of the writ, rather than the writ itself, so as to provide opportunity for review before the writ becomes operative." (*Palma*, *supra*, 36 Cal.3d at p. 176.) And the Court went on, " 'due notice' under [Code of Civil Procedure] section 1088 requires, at a minimum, that a peremptory writ of mandate . . . not issue in the first instance unless the parties adversely affected by the writ have received

notice, from the petitioner or from the court, that the issuance of such a writ in the first instance is being sought or considered. In addition, an appellate court, absent exceptional circumstances, should not issue a peremptory writ in the first instance without having received, or solicited, opposition from the party or parties adversely affected." (*Id.* at p. 180.)

Palma does not help Anderson here.

To begin with, Anderson has cited no case that applies *Palma* to a decision by a trial court.

Second, petitioners had notice and an opportunity to be heard before Judge Jackson issued the writ. As indicated, following our remand with direction to issue a new or modified writ, both sides moved for writs, filing six briefs between them, including proposed versions of the writ they sought. They then participated in hearings over two separate days. Only after all that did Judge Jackson issue the writ. Thus, and unlike *Palma*, the parties here were on notice that a writ would be forthcoming—just as they both expressly sought. Given that, no further warning is required. (*Banning Ranch Conservancy v. Superior Court* (2011) 193 Cal.App.4th 903, 919 [peremptory writ in the first instance appropriate when notice given].)

And if that does not defeat Anderson here, other language of *Palma* would. As quoted above, its holding was that it applied "absent exceptional circumstances." (*Palma*, *supra*, 36 Cal.3d at p. 180.) We would find these to be "exceptional circumstances."

Anderson also argues, however briefly, that CEQA, specifically Public Resources Code section 21168.9, required Judge Jackson to issue an order for peremptory writ of mandate. Public Resources Code section 21168.9, subdivision (a) states: "If a court finds, as a result of a trial, hearing, or remand from an appellate court, that any determination, finding, or decision

of a public agency has been made without compliance with this division, the court shall enter an order that includes one or more of the following . . . ." In short, the subdivision enumerates the options available only after a trial court "finds" a CEQA violation.

Here, Judge Jackson did not issue the writ pursuant to her own findings after an independent review of the record. To the contrary—and as she expressly acknowledged—she was following this court's directions on remand to issue a new writ consistent with the opinion or modify the prior writ. As she put it at one point: "I've been directed. I am following the Court of Appeal's order, and I'm issuing a new writ," or at another, "the court has been directed to issue a new writ or to modify or issue a writ. I am going to do that. That is granted."

Striking the Cost Memorandum Was Not an Abuse of Discretion

On August 6, 2014, petitioners filed a memorandum of costs in the amount of $1,813.66. The City filed a motion to strike or in the alternative tax. Petitioners filed vigorous opposition in support of their costs, and the City a brief reply.

The issue was simple and straightforward, involving Code of Civil Procedure section 1032, subdivision (a)(4), and its definition of "prevailing party," particularly where, as here, petitioners did not recover any monetary relief. Since they did not, the pertinent language of the subdivision is this: When "any party recovers other than monetary relief . . . , the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not . . . ."

As one Court of Appeal described this subdivision, "Where the prevailing party is one not specified, Code of Civil Procedure section 1032, subdivision (a)(4) permits the trial court to determine the prevailing party

and then allow costs or not, or to apportion costs, in its discretion. The statute requires the trial court to determine which party is prevailing and then exercise its discretion in awarding costs." (*Texas Commerce Bank v. Garamendi* (1994) 28 Cal.App.4th 1234, 1248–1249, fn. omitted.) Or as another said—there, in a case where the party seeking costs sought and obtained declaratory relief—"Essentially [Code of Civil Procedure section 1032, subdivision (a)(4)] provides that . . . when a party recovers other than monetary relief, the trial court may determine the prevailing party and in its discretion may choose to allow or not to allow costs." (*Lincoln v. Schurgin* (1995) 39 Cal.App.4th 100, 105.) And in exercising that discretion, the court compares "the relief sought with that obtained, along with the parties' litigation objectives as disclosed by their pleadings, briefs, and other such sources." (*On-Line Power, Inc. v. Mazur* (2007) 149 Cal.App.4th 1079, 1087.)

On November 14, Judge Jackson entered her order granting the City's motion, explaining her ruling in detail: "Although the Court of Appeal remanded this matter to this court for issuance of a peremptory writ of mandate, the petitioners did not succeed in the litigation, when the nature of the claims brought against the City's environmental impact report ('EIR') and the process by which it was adopted is taken into consideration. Petitioners brought no less than 25 separate arguments on appeal, and challenged virtually every aspect of the City's EIR, the process by which it was certified and the process by which the Bicycle Plan was adopted. . . . However, on appeal, petitioners prevailed (and even then, only partially) on only one issue: findings. Tellingly, the Court of Appeal found that each party should bear its own costs on appeal.

"Similarly, when compared to what the petitioners argued should be included in the peremptory writ, the petitioners were also unsuccessful.

Petitioners sought a writ that required the City to: (1) void the adoption of the Bicycle Plan and any bicycle-related legislation since 2005; (2) void the legislation adopting all of the projects analyzed in the Bicycle Plan EIR; (3) set aside the approval of the statement of overriding considerations; (4) amend the General Plan, Transportation Code and Planning Code; (5) adopt new findings for alternatives, unidentified mitigation measures and all of the significant environmental impacts identified in the EIR; (6) provide more than the legally required public notice prior to adopting any new findings; and (7) suspend all Bicycle Plan project activities until after a final determination by the Court. Instead, the writ followed the direction of the Court of Appeal, and required the City to make the handful of findings that the City failed to make. The writ did not void or suspend any Bicycle Plan approvals or activities, as requested by petitioners and as allowed by CEQA.

"Based on petitioners' limited success at the Court of Appeal and in securing a broad writ against the City, under the circumstances of this case, the Court finds that petitioners are not the prevailing party. [Citation.] Even if considered the prevailing party under Code of Civil Procedure section 1032, [subdivision] (a)(4), given petitioners' very limited success in this litigation . . . , the Court finds that each party should bear their own costs."

In sum, Judge Jackson held that petitioners had not prevailed in their challenges to the adequacy of the EIR, and, alternatively, even if they had, she was exercising her discretion to rule that each party should bear its own costs.

Such holding was expressly a discretionary one, a ruling, of course, we review for abuse of discretion. And to show such abuse, petitioners must show, in the words of our Supreme Court, that Judge Jackson's ruling was

" 'so irrational or arbitrary that no reasonable person could agree with it.' " (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.) That was hardly the case here.

As best we understand it, Anderson argues that petitioners' success, however partial it was, recovering "other than monetary relief" entitles them to costs. Period. Anderson is wrong, as is perhaps best shown by his acknowledgement five pages later, that "CCP section 1032(a)(4) gives the court discretion to determine whether a party receiving 'other than monetary relief' is the prevailing party."

East Bay Mun. Utility Dist. v. Department of Forestry & Fire Protection (1996) 43 Cal.App.4th 1113 (*EBMUD*), cited by Judge Jackson, is instructive. There, a public agency sought declaratory relief on four causes of action: claiming a pattern and practice on 39 timber harvest plans; claiming error in assessing cumulative watershed impacts; claiming error in denying injunctive relief; and attacking a regulation governing the range of related projects. Plaintiff lost on most of its claims, but the trial court found a portion of defendant's "Guidelines" on cumulative impacts to be defective. Plaintiff sought costs, which the trial court denied. (*Id.* at pp. 1123–1125, 1131–1133.) The Court of Appeal affirmed, in this language:

"EBMUD argues that it was the prevailing party in the declaratory relief action because the trial court found the Guidelines to be illegal, underground regulations. Judged against the broad scope of EBMUD's complaint its limited victory is just that. By its first cause of action it sought to establish that CDF had a pattern and practice of improperly assessing cumulative impacts, alleging that the agency had inadequate data on the effects of past harvesting, defined an insufficient watershed assessment area, and failed to include future projects. Its second cause of action challenged

the agency's cumulative impact rules. It sought declaratory relief on both causes of action and injunctive relief to halt approval of THP's in the Mokelumne River watershed.

"On only one portion of its first cause of action did EBMUD prevail—that is the court's finding that CDF's Guidelines were illegal regulations. Notwithstanding that ruling, however, the court declined to enjoin use of the Guidelines. . . .

"We cannot say the trial court abused its discretion in denying EBMUD costs as the prevailing party." (*EBMUD*, *supra*, 43 Cal.App.4th at p. 1134.)

Anderson attempts to distinguish *EBMUD* this way: "Unlike in *EBMUD*, petitioners here prevailed in the first instance with an order and judgment granting petition for a peremptory writ of mandate; a cost award; a preliminary and permanent injunction; and the August 1, 2007 peremptory writ of mandate compelling environmental review and compliance with CEQA . . . . Petitioners then succeeded on appeal with a reversal of the trial court's August 6, 2010 order overruling their objections to City's return to the August 1, 2007 writ. That appellate decision invalidated City's first return and directed the trial court to either modify the August 1, 2007 writ or issue a new writ." As Anderson would describe them, these are "substantial victories recovering 'other than monetary relief' throughout this litigation." We are not persuaded.

To begin with, all that happened before the primary appeal is irrelevant, as petitioners were compensated for their efforts in the March 2008 settlement, which included "costs," and in Judge Kahn's April 2012 award of $161,991.50. And as to the primary appeal, while it is true that we reversed, we did so after rejecting over 20 of Anderson's arguments, with only the last few pages addressing what Anderson "won." It was hardly a

resounding victory, as shown by our disposition that each side bear its own costs—or perhaps even better by the fact Anderson sought review in the Supreme Court.

Finally, we note that none of the cases Anderson relies on supports his position. *Michell v. Olick* (1996) 49 Cal.App.4th 1194 and *DeSaulles v. Community Hospital of the Monterey Peninsula* (2016) 62 Cal.4th 1140 both held that plaintiff was entitled to costs because plaintiff had obtained a net monetary recovery. *Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810 affirmed the trial court's discretion to award fees and costs to plaintiffs who had via a quiet title action established the public's right of access to a recreational trail. And the other three cases—*City of San Diego v. Board of Trustees of California State University* (2015) 61 Cal.4th 945; *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105; and *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022—did not involve Code of Civil Procedure section 1032 at all.

Appeal No. A147800 Has No Merit: The Writ Was Properly Discharged

Appeal No. A147800 is from Judge Jackson's order of December 24, 2015 discharging the writ, an appeal based on both procedural and substantive grounds. As to the procedural, Anderson asserts that his 2014 appeal of the order denying his motion for judgment automatically stayed all trial court proceedings, the effect of which was that Judge Jackson had no jurisdiction to discharge the writ, and thus her order was void.[4] The

[4] Anderson did not argue lack of jurisdiction below, and indeed sought affirmative relief himself, by objecting to the return and filing his motion to strike the return four months after he filed his appeal in No. A143974. In light of this, the City argues waiver and invited error.

Anderson responds that the issue is one of subject matter jurisdiction, and that such in nonwaivable. *Varian Medical Systems, Inc. v. Delfino* (2005)

substantive argument is that even if the December 24 order was not void, it was a prejudicial abuse of discretion, as the City's return does not comply with CEQA or our opinion. Neither contention has merit.

Code of Civil Procedure Section 916 Does Not Apply

Anderson's procedural argument is based on Code of Civil Procedure section 916, subdivision (a): "[T]he perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order." He argues this general rule applies here, that the trial court proceedings "embraced" in or "affected by" the appealed judgment or order are stayed, and thus "the trial court is *divested of power* to act."

The City's response is two-fold: (1) Code of Civil Procedure section 916 applies only to a duly perfected appeal, and Anderson's purported appeal from the order denying his motion for judgment was from a nonappealable order; and (2) even if it were an appealable order, Code of Civil Procedure section 916 does not apply.

The rule is that the automatic stay under Code of Civil Procedure section 916 applies only if the appeal is properly perfected. Put otherwise, an invalid appeal has no effect on a trial court's jurisdiction to proceed, as we held in *Hearn Pacific Corp. v. Second Generation Roofing, Inc.* (2016) 247 Cal.App.4th 117, 146–147, citing numerous cases: "The automatic stay, when it applies, arises upon a 'duly perfected' appeal. (*Sacks v. Superior Court* (1948) 31 Cal.2d 537, 540; see also § 916.) Since Hearn's appeal was invalid, it did not affect the trial court's jurisdiction to proceed. (See *Central*

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35 Cal.4th 180 has a lengthy discussion about the effect of a trial court's ruling after a properly taken appeal, and holds that rulings made while the appeal was pending were made when the court had no subject matter jurisdiction.

Sav. Bank v. Lake (1927) 201 Cal. 438, 442 [appeal from non-appealable order]; [Citations.].)"

Anderson asserts that his appeal of the October 23, 2014 order denying his motion for judgment is appealable, as it comes, in his words, within the "first provision" on the list of appealable orders in Code of Civil Procedure section 904.1, subdivision (a)(1): "(a) An appeal, other than in a limited civil case, . . . may be taken from any of the following: (1) From a judgment, except an interlocutory judgment, other than as provided in paragraphs (8), (9), and (11), or a judgment of contempt that is made final and conclusive by Section 1222." (Code Civ. Proc., § 904.1, subd. (a)(1).) Elaborating, Anderson continues that the order is not "interlocutory," and is appealable since, in his words, "it denies petitioners' motion for judgment granting peremptory writ of mandate. (*Save Mount Diablo v. Contra Costa County* (2015) 240 Cal.App.4th 1368, 1377, fn. 5 ['[A]n order granting or denying a petition for an extraordinary writ constitutes a final judgment for purposes of appeal'], quoting *Public Defenders' Organization v. County of Riverside* (2003) 106 Cal.App.4th 1403, 1409–1410.)" But the cited case dealt with an "order" granting or denying a writ. Anderson did not seek an order, but filed a "motion for judgment." And as Anderson admits, no direct appeal lies from a peremptory writ of mandate issued pursuant to judgment. (*Department of Transportation v. State Personnel Bd.* (2009) 178 Cal.App.4th 568, 573, fn. 3.)

But even assuming the order denying the motion for judgment was appealable, the appeal did not divest the trial court of jurisdiction to hear petitioners' motion to strike the return. As quoted, Code of Civil Procedure section 916 stays only matters "embraced" in the order appealed from or "affected thereby"; and, the statute goes on, the trial court "may proceed upon any other matter embraced in the action and not affected by the judgment or

order." (Code Civ. Proc., § 916, subd. (a).) In other words, trial court proceedings are stayed only to the extent they would undermine the "effectiveness" of the appeal.

In appeal No. A143974 Anderson himself admits that "these matters [i.e., the adequacy of the writ] are not before this court in this appeal." Nothing in petitioners' quest for an order prior to issuance of a writ affected their objections to the City's return. The adequacy of the City's compliance with the writ are not "embraced" by the appeal of the order denying judgment or are "affected thereby." The automatic stay provision of Code of Civil Procedure section 916 does not apply.

The Writ Followed the Directions as Set Forth in Our Opinion: There Was No Abuse of Discretion

Anderson's substantive argument is that Judge Jackson's December 24 order discharging the writ was a prejudicial abuse of discretion. Anderson claims the writ did not follow our directions, arguing that the primary opinion required the City to make 90 additional findings regarding significant impacts, and to address the feasibility of mitigation measures not identified in the EIR. Anderson is very wrong.

After determining that the EIR complied with CEQA in all respects, we identified two deficiencies with the City's approval of the Bicycle Plan itself: (1) the City did not make CEQA-required findings that project alternatives presented in the EIR were infeasible; and (2) the City did not adequately address seven significant impacts from three projects.

When an appellate court reverses a trial court order with directions requiring specific proceedings on remand, those directions are binding on the trial court and must be followed, which directions must be read "in conjunction with the opinion as a whole." (*Ayyad v. Sprint Spectrum, L.P.* (2012) 210 Cal.App.4th 851, 859.) Judge Jackson did just that.

As previously mentioned, Judge Jackson was vested with broad discretion to decide whether the City had complied with her directives in the writ. (*Summit Media, LLC v. City of Los Angeles*, *supra*, 240 Cal.App.4th at p. 182.) Moreover, that discretion was to be exercised in a context where the City's compliance was to be presumed unless petitioners demonstrated otherwise. " 'In the absence of contrary evidence, we presume regular performance of official duty. (Evid. Code, § 664.)' " (*Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4th 911, 919.) Every court "presumes a public agency's decision to certify the EIR is correct, thereby imposing on a party challenging it the burden of establishing otherwise." (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 530.)

And it should be remembered just how much was decided against Anderson on the initial appeal. He should not be allowed, however obliquely, to attack or question the City's Statement of Overriding Considerations because it was expressly upheld on the initial appeal, as was "the trial court's determination that the EIR adequately analyzed the project's impacts," and "the trial court's conclusion that the EIR's mitigation measures were adequate."

In any event, Anderson's challenges fail.

Anderson contends that the "City repeats its false claim that its findings do not have to address each of the 90 significant impacts identified in its EIR." We spoke to this in the primary opinion, and it is clear from the relevant discussion that we did not accept the argument that every one of the 90 identified impacts was inadequately discussed. To the contrary, we noted a section of the EIR "identified 15 'potentially significant impacts' that could be mitigated, but 90 impacts that 'cannot be avoided or reduced to a less than significant level.' " We were quite precise as to the exceptions: "What are

identified as substantial impacts Nos. 39, 41, 42 (all dealing with project 2-6), 58, 68, 69 (all dealing with project 3-1), and 102 (dealing with project 6-6) are not addressed." As these were the exact substantial impacts specified in the writ, it is not possible to accept that we ordered that all 90 be analyzed anew.

Anderson's brief asserts that the "City repeats its claim, already rejected by this court, that it need not make *findings* on *mitigation measures* for each of the impacts identified in the EIR." This argument leaves us slightly puzzled, for how can a public agency make findings on mitigation measures when we are talking about environmental impacts the agency decides *cannot* be mitigated? There is no problem if the public agency adopts a statement of overriding considerations for each impact.

The same is largely true for Anderson's contention that the "City's findings still fail to show *why* mitigation measures and alternatives are infeasible for each of the 90 significant impacts identified in the EIR." CEQA does not require that every why and wherefore of the public agency's reasoning be memorialized in formal findings in the EIR, as is apparent from the language and structure of Public Resources Code section 21081, which language goes no further than significant impacts that can be mitigated and those that cannot. If the latter, the statute only requires the public agency to make findings that mitigation is infeasible (*id*., § 21801, subd. (a)(3)), and even so, "specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment." (*Id*., § 21081, subd. (b).)

It requires little imagination that acceding to Anderson's argument would balloon EIRs with technical language of the pros and cons of whether mitigation was feasible. This would obviate—perhaps more accurately nullify—the utility of giving the public agency the mechanism to cut short a

technical discussion by saying, in effect, "Yes, there are adverse environmental consequences that cannot be mitigated but because of factor X the project is worthwhile and desirable." Moreover, Anderson's argument looks like a backdoor attempt to reargue a point rejected on the primary appeal, namely, our conclusion that "Substantial Evidence Supports The Trial Court's Conclusion That The EIR's Mitigation Measures Were Adequate." Finally, it must be recalled that Judge Jackson did not direct the City to make any original or additional findings on mitigation, only on infeasibility of the alternatives already identified in the EIR.

Next, Anderson asserts that the "City repeats its 'seven' impacts fiction, improperly conflating findings with its statement of overriding considerations." We believe it is Anderson who does the conflating. The plain language of our opinion leaves no doubt as to the omissions we determined to be prejudicial—"What are identified as substantial impacts Nos. 39, 41, 42 (all dealing with project 2-6), 58, 68, 69 (all dealing with project 3-1), and 102 (dealing with project 6-6) are not addressed. At all. [¶] . . . [¶] [*A*]s *to these impacts*, . . . there is nothing . . . in the record." (Italics added.) That is, by our count, seven numbers, not the 90 that Anderson repeatedly specified. Seven also accords with what the first page of the primary opinion describes as "the handful of findings required by CEQA" the Board of Supervisors had failed to make.

The next subheading in Anderson's brief—the "City's alternatives findings are still defective"—has three arguments: (1) "Simply adding the word 'infeasible' to its defective findings does not make them adequate"; (2) "This Court has already held City's 'Project Objectives' and 'Policy Goals' insufficient as a finding of infeasibility"; and (3) "City's claim is false that substantial evidence supports its findings."

The first of these arguments might give initial pause, particularly when read in conjunction with page 25 of the City's brief, which leaves the impression that the City invoked every one of the possible grounds for a statement of overriding considerations. After all, this is what was precisely condemned in the primary opinion, but with a crucial qualification: "But the boilerplate conclusion just quoted is inadequate to establish a valid finding of infeasibility. It does not mention, or *incorporate by reference, the statement of overriding considerations*. And the formulation 'economic, legal, social, technological, and other considerations set forth herein *and elsewhere in the record*' could hardly be more inclusive—or less precise." (First italics added.)

However, this negative impression is quickly dispelled by looking at the actual language of the Revised Findings. In addition to what Judge Jackson concluded in her order, in part IV of the Revised Findings (captioned "Significant Impacts That Cannot Be Avoided or Reduced to a Less Than Significant Level") the following was added: "Based on substantial evidence in the whole record, including the expert opinion of the Planning Department staff, the Planning Commission also finds that for some impacts identified in the EIR, as noted below in this Section IV, no feasible mitigation measure[s] were identified in the EIR, and those impacts remain significant and unavoidable." The next sentence was amended with the underscored language: "The [Planning] Commission determines that the following significant impacts on the environment, as reflected in the EIR, are unavoidable, <u>and</u> under Public Resources Code section 21081(a)(3) and (b), and CEQA Guidelines 15091(a)(3), 15092(b)(2)(B), and 15093, the Commission determines that the <u>alternatives are infeasible, as described in Section VI below, but that the</u> impacts are acceptable due to the overriding considerations, <u>which are</u> described in Section VII below."

In part VI of the Revised Findings (captioned "Evaluation of Project Alternatives"), the following underscored language was added: "This Section describes the EIR alternatives . . . and the reasons for finding the alternatives infeasible and rejecting them as required by Public Resources Code section 21081(a)(3) and CEQA Guidelines section 15091(a)(3). This section also outlines the Preferred Project's purposes and provides the rationale for selecting alternatives or rejecting alternatives *as infeasible*. . . . [¶] . . . [¶] Alternatives provide a basis of comparison to the Preferred Project in terms of beneficial, significant, and unavoidable impacts and ability to achieve project objectives. . . .

The Alternatives listed below and rejected are rejected as infeasible based upon substantial evidence in the record, including evidence of economic, legal, social, technological, and other considerations described in this Section, and for the reasons described in Section VII below, which is incorporated herein by reference."

A subheading was "Rejection as Infeasible of the No Project Alternative" "for the reasons set forth in this section." After three paragraphs detailing what "[t]he No Project Alternative" would *not* do, the section concludes: "For the foregoing reasons as well as the other economic, legal, social, technological, and other considerations set forth in Section VII (Statement of Overriding Considerations), which are incorporated as though fully set forth herein, the No-Project alternative is hereby rejected and found infeasible."

The next subheading was "Rejection of Project-Level Alternatives A and B and Program-Level Alternative B as Infeasible" which, apart from concluding language generally like that quoted above, has the following: "By limiting the options available in this way, Project-Level Alternatives A and B

do not improve bicycle network functioning and safety as would be accomplished by the Preferred Project, and do not allow the decision-makers to have the flexibility to respond to the individual, site specific public, stakeholder and City agency considerations incorporated into the Preferred Project. For these reasons, and for the reasons set forth below rejecting the individual alternative designs not chosen for the Preferred Project, project-Level Alternatives A and B are rejected as infeasible."

This is also the approach taken under the next subheading—"Near Term Improvements–Rejection of Options/Alternatives as Infeasible and Reasons for Selection of the Preferred Alternative Design Option."

Section VII—"Statement of Overriding Considerations"—was already five pages long, listing "considerations [that] outweigh the identified significant effects on the environment." The following was added:

"Project-level Significant and Unavoidable Impacts and Overriding Considerations.

"In addition to the reasons set forth above, the following specific overriding economic, legal, social, technological, or other considerations outweigh the identified significant, unavoidable effects (as referenced by their Impact Numbers noted in Section IV) on the environment due to the implementation of the specific projects contained in the Preferred Project."

Anderson's second argument is that "This Court has already held City's 'Project Objectives' and 'Policy Goals' insufficient as a finding of infeasibility." We did no such thing, for the transparently obvious reason that the purpose of Public Resources Code section 21081 is to permit public agencies to use "specific overriding economic, legal, social, technological, or other benefits of the project," which clearly allow for policy objectives favored by the public

agency to trump "significant effects on the environment" that cannot be mitigated.

Lastly, Anderson's argument that the "City's claim is false that substantial evidence supports its findings" is a complete inversion of principles of appellate review, namely, that as the appellant it is up to Anderson to demonstrate that substantial evidence does not support findings made either by the City or by Judge Jackson. Our standard response is apt: " 'Instead of a fair and sincere effort to show that the trial court was wrong, appellant's brief is a mere challenge to respondents to prove that the court was right. And it is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness in the arguments of the respondent. An appellant is not permitted to evade or shift his responsibility in this manner.' " (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 102.)

Subheading "D" in Anderson's brief reads: "The defects in City's findings remain uncorrected." There are two supporting arguments: (1) "City's return obviously could not comply with a writ that did not yet exist"; and (2) "City's claim is false that Petitioners did not object to City's revised findings below."

As to the first point, we think Anderson is making a fetish out of chronology. Our opinion clearly identified a "handful," i.e., seven, omitted findings. They were speedily provided. Even if they preceded Judge Jackson's formal directive, she did not seem to think this tainted or invalidated the findings. It would be hard to formulate—or justify—a doctrine precluding a party from voluntarily complying with a judicial decision until there is a formal order compelling compliance.

As to the second point, counsel for petitioners stated under penalty of perjury that "Petitioners objected in public comment" at each stage leading to formal adoption by the Board of Supervisors. We have no reason why this should not be taken at face value, and we thus proceed to the merits.

Subheading "E" is "Appellant's objections to City's findings on the Masonic Avenue and Second Street Project segments are not time-barred." It also has two supporting arguments: (1) the City's findings on the project's Masonic Avenue and Second Street segments "remain defective, and (2) petitioners' objections are not 'time-barred.' " Here again, the issue can be tackled on its merits. If the findings do not "remain defective" for the reasons already advanced by Anderson, they may be upheld without the necessity of considering whether Anderson is disabled for an additional reason.

Finally, there is subheading "F"—"City Continues to Substitute its SOC [Statement of Overriding Considerations] for findings." The City adopted the infeasibility findings per Public Resources Code section 21081, subdivision (a)(3), each of which made reference to the Statement of Overriding Considerations ("Section VII"), a practice we more or less approved in the primary opinion.

Appeal No. A148454 Has No Merit: The Fee Award is Supported

Anderson's third appeal here is from Judge Jackson's order awarding attorney fees in the amount of $153,346. This is the background:

On February 4, 2015, petitioners filed a supplemental motion for attorney fees seeking fees for the work of Ms. Miles and her paralegals. This fee motion was voluminous, almost 600 pages of material, and sought over $500,000, plus a 1.5 multiplier. The fees were for work from December 1, 2008 (the "City's EIR on the project") to July 18, 2014, when Judge Jackson heard what Anderson calls "the writ motions," a period, of course, that

includes work on the primary appeal. The fee motion was accompanied by four declarations, of: (1) Mr. Pearl, an expert on attorney fees, who testified on rates in the Bay Area and commended the work of Ms. Miles; (2) Alexander Henson, an experienced environmental attorney who worked with Ms. Miles; (3) Anderson; and (4) Ms. Miles, whose declaration had 13 exhibits, totaling almost 400 pages, and set forth in detail the hours she claimed were involved by her and her paralegal. The total sought was based on a claimed rate of $450 per hour for 1035.7 hours spent by Ms. Miles, and 356.1 hours for her paralegal.

The City filed opposition that included a relatively short memorandum, and also a request for judicial notice of our opinions in the two prior attorney fee appeals. The City argued that petitioners should not be awarded any fees, as they were not "a successful party," had vindicated "no important right," and did not achieve any of their litigation goals, relying in part on Judge Jackson's denial of costs. The City also argued that our opinion in the primary appeal rejected most of Anderson's arguments—his "25 unsuccessful theories" is how the City put it. And, the City claimed, Ms. Miles's lodestar was "inflated" and "excessive," that "the 1400 hours for which [the fee motion] seeks compensation are wildly excessive," and thus a "special circumstance" allowing Judge Jackson to deny fees altogether.

Following Anderson's reply, the fee motion came on for a hearing on December 10, 2015. At the conclusion of the hearing Judge Jackson directed the parties to submit proposed orders.[5] And on March 7, 2016, Judge

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[5] It would develop that the reporter's notes for the hearing were stolen, necessitating Anderson to move for a settled statement, which he did on August 11, 2017. And as to the settled statement that came about, Anderson complains it was inaccurate. In his words: "On February 8, 2018, the court granted Appellant's Motion for Settled Statement and scheduled a May 2018,

Jackson issued her order awarding Anderson $153,346, a comprehensive five-page, single-spaced order explaining in detail the basis of her award.

Anderson's briefing on this issue makes two arguments, the first of which has three subparts, with the second and third subparts each having six subarguments. Distilled to their essence, Anderson's arguments assert that Judge Jackson misapplied the lodestar "methodology," specifically that she abused her discretion in setting the hourly rate and the number of compensable hours. As Anderson describes the argument in his reply brief, Judge Jackson ignored "the essential requirements of the lodestar calculation: comparable market rates and verified hours, both supported here by [Anderson's] uncontradicted evidence." Anderson also contends Judge Jackson committed legal error in denying fees for post remand work.

We disagree on all counts. But before discussing why, we address first the City's cross-appeal of the fee order, because if the cross-appeal were meritorious, no fee award could stand.

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hearing to 'review and correct' Appellant's proposed statement." However, instead of reviewing Appellant's proposed statement, the trial court announced on May 3, 2018, that it would prepare its own settled statement without reviewing Appellant's statement. On May 10, 2018, the court issued its own "Modified Settled Statement," which significantly changed Appellant's Proposed Settled Statement with no justification or support in the record, deleting all of the court's own statements actually made at the December 10, 2015 hearing, and other changes prejudicing Appellant's right to an accurate record in Case Number A148454. Petitioners filed Objections, which the trial court ignored, and on May 31, 2018 certified its own statement."

Anderson sought mandate on the settled statement, which we denied.

The City's Cross-Appeal Has No Merit

The fee award was made pursuant to Code of Civil Procedure section 1021.5 (section 1021.5), which provides in pertinent part: "Upon motion, a court may award attorney's 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, or of enforcement by one public entity against another public entity, 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. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities."

We have noted that a trial court that "grants an application for attorney's fees under section 1021.5 has made a practical and realistic assessment of the litigation and determined that (1) the applicant was a successful party, (2) in an action that resulted in (a) enforcement of an important right affecting the public interest and (b) a significant benefit to the general public or a large class of persons, and (3) the necessity and financial burden of private enforcement of the important right to make an award of fees appropriate. ' "On review of an award of attorney fees . . . 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 . . . have been satisfied amounts to statutory construction and a question of law." ' " (*Karuk Tribe of Northern California v. California Regional Water Quality Bd., North Coast Region* (2010) 183 Cal.App.4th 330, 363, fn. omitted (*Karuk*).)

The City argues that Anderson has not satisfied the statutory criteria to support the fee award. It asserts that Anderson achieved only "a remand for the limited purpose of allowing [the City] to provide 'an augmented explanation' of seven infeasibility findings and overriding considerations"; and at another point the City refers to several cases that, it asserts, recognize that if a plaintiff "fails to achieve [his] primary litigation objective and achieves only minor procedural success," it is error for the trial court to award section 1021.5 fees.

Maybe so, but that does not fully—or accurately—describe the state of affairs here. Indeed, as the City acknowledges in its reply brief, "no one disputes that Anderson's 2013 appeal required [the City] to prepare and adopt additional findings."

The standard for determining whether a party is successful under section 1021.5 is if he or she succeeds on " ' " 'any significant issue in litigation which achieves some . . . benefit' " ' " sought in bringing the litigation. (*People v. Investco Management & Development, LLC* (2018) 22 Cal.App.5th 443, 457, citing *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1292; see also *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 153.) Thus, a successful party need not prevail on all his claims, or even achieve the "primary relief" sought. (*RiverWatch v. County of San Diego Dept. of Environmental Health* (2009) 175 Cal.App.4th 768, 783.)

We applied the governing principles in *Lyons v. Chinese Hospital Assn.* (2006) 136 Cal.App.4th 1331, where Lyons succeeded on only one of the six causes of action in his petition. The trial court denied him fees, Lyons appealed, and we reversed, concluding the trial court had abused its discretion in denying fees. We held as follows: " 'It is well settled that partially successful plaintiffs may recover attorney fees under section 1021.5.

(See 1 Manaster & Selmi, Cal. Environmental Law & Land Use Practice (2005) § 13.10(3)(b), pp. 13–18 and cases cited; Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar 2d ed. 2004) § 2.19, pp. 49–50 and cases cited.) " '[A] party need not prevail on every claim presented in an action in order to be considered a successful party within the meaning of the section. [Citations.]' (*Wallace v. Consumers Cooperative of Berkeley, Inc.* (1985) 170 Cal.App.3d 836, 846.) Rather, 'when a plaintiff is successful within the meaning of the section, the fact that he or she has prevailed on some claims but not on others is a factor to be considered in determining the *amount* of the fee awarded.' " (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1019.)' (*Bowman* [*v. City of Berkeley* (2005)] 131 Cal.App.4th [173,] 177–178, italics added.)

"The 'successful party' concept is not so narrow as the court's clarification suggests. (See *Bowman, supra,* 131 Cal.App.4th at p. 178.) 'In order to effectuate the purpose of section 1021.5, courts "have taken a broad, pragmatic view of what constitutes a 'successful party.' " (*Graham v. DaimlerChrysler Corp.* [(2004)] 34 Cal.4th [553,] 565.) A "successful" party means a "prevailing" party (*id*. at p. 570), and " ' "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on *any* significant issue in litigation which achieves *some* of the benefit the parties sought in bringing suit." ' " (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1292, italics added.)' (*Bowman,* at p. 178.)" (*Lyons v. Chinese Hospital Assn.*, *supra*, 136 Cal.App.4th at pp. 1345–1346.)

As quoted above, our disposition on the primary appeal read as follows: "The 'Order Overruling Petitioners' Objections to Respondent City and County of San Francisco's Return to Writ of Mandate' is reversed, and the cause is remanded to the trial court with directions to modify the writ of

mandate (or issue a new writ if necessary) requiring the San Francisco Board of Supervisors to comply with CEQA as stated in this opinion. . . ."

Numerous courts have recognized the significant public benefit of enforcing CEQA's mitigation and findings requirements, vindicating the law's legislative intent. (See, e.g., *Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 684 [vindicating legislative intent benefits citizenry as a whole]; *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 895 [public benefit flows from court decision compelling mitigation measure]; *RiverWatch v. County of San Diego Dept. of Environmental Health*, *supra*, 175 Cal.App.4th at p. 781 [assuring that impacts are properly mitigated "constitutes a significant benefit to the environment and thus to the public at large"]; *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors*, *supra*, 134 Cal.App.3d at p. 1035 [findings held essential to public understanding of impacts]; see also *City of San Diego v. Board of Trustees of California State University*, *supra*, 61 Cal.4th at p. 960 ["mitigation is the rule"], pp. 962–963 [mitigation is fundamental mandate].)

The two cases from this court on which the City primarily relies—*Center for Biological Diversity v. California Fish & Game Com.* (2011) 195 Cal.App.4th 128 (*CBD*), and *Karuk*, *supra*, 183 Cal.App.4th 330—are distinguishable. In *CBD*, plaintiff Center sued to require the Commission to list a small mammal, the American Pika, as an endangered or threatened species. The trial court issued a writ of mandamus requiring the Commission to set aside its notice of findings and reconsider its refusal to list the American Pika. In its return to the writ, the Commission advised the trial court it had set aside its decision, prepared and adopted new findings, and reaffirmed its prior decision to reject the Center's petition to list the

American Pika. (*CBD*, *supra*, 195 Cal.App.4th at pp.133–134.) The trial court awarded fees under section 1021.5. (*CBD*, at pp. 133–135.)

We reversed the fee award, because the Center had not achieved its "strategic objective" and failed to confer any "significant benefit" on the public. (*CBD*, *supra*, 195 Cal.App.4th at pp.139–140.) As we noted, "When the Commission reviewed the petition for the second time, it reached the same conclusion as it had before." (*Id.* at p. 140.) The practical impact of the action, in the end, was "nil: All the Center achieved was a limited 'do-over.' . . . The Center was after bigger game." (*Id.* at p. 141.)

CBD relied on our earlier opinion in *Karuk*, 183 Cal.App.4th 330, where we also reversed a section 1021.5 fee award, holding that "section 1021.5 would not support [a fee award when a plaintiff obtains] a remand to an administrative agency to reconsider a previously decided matter when the remand was for a perceived procedural defect and results in no demonstrable substantive change in the agency's position." (*CBD*, *supra*, 195 Cal.App.4th at p. 131.) That is not the situation here.

The City argues that Judge Jackson's order striking Anderson's cost bill supports its position, that the order "establishes Anderson's lack of success." As quoted above, in her order Judge Jackson noted that Anderson "*did not succeed in the litigation*, when the nature of the claims brought against the City's environmental impact report ('EIR') and the process by which it was adopted is taken into consideration," going on to note that while Anderson had "challenged virtually every aspect of the City's EIR," he "prevailed (and even then, only partially) on only one issue: findings." (Italics added.)

The City argues that the criteria for an award of fees under section 1021.5 is "more demanding" than those for an award of costs, an argument to

which Anderson objects.[6] But even assuming the City is correct, the criteria are different. Code of Civil Procedure section 1032, dealing with costs, addresses the issue of "prevailing party," with subdivision (a)(4) addressing the situation where no monetary relief is awarded—and the discretion afforded the court. Given that the City prevailed on numerous arguments in the primary appeal and Anderson on only one issue, Judge Jackson could have held, as she did, that neither party prevailed. In any event, the decision was in Judge Jackson's discretion.

Anderson did win on an issue before us in the primary appeal and under the law described above, vindicated a significant CEQA principle. Thus, the City's cross-appeal must fail.

Returning to Anderson's appeal as to the amount of fees awarded, we begin with some general principles regarding the calculation of attorney fees in public interest litigation, as set forth by our Supreme Court:

"As we recently explained, . . . 'a court assessing attorney fees begins with a touchstone or lodestar figure, based on the "careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case." [Citation.] We expressly approved the use of prevailing hourly rates as a basis for the lodestar, noting that anchoring the calculation of attorney fees to the lodestar adjustment method " 'is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.' " [Citation.] In referring to "*reasonable*" compensation, we indicated that trial courts must carefully review attorney documentation of hours expended; "padding" in the

[6] On the eve of oral argument, Anderson filed objections to the City's briefing, including most significantly to this argument on the basis it was not raised in the trial court.

form of inefficient or duplicative efforts is not subject to compensation. [Citation.]

"[T]he lodestar is the basic fee for comparable legal services in the community; it may be adjusted by the court based on factors including . . . (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award. [Citation.] The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services. The " 'experienced trial judge is the best judge of the value of professional services rendered in [her] court, and while [her] judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.' " ' " (*Graham v. DaimlerChrysler Corp.*, *supra*, 34 Cal.4th at p. 579, quoting *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131–1132.)

The key word is "reasonable," a concept that does not have a fixed meaning, but which, like any word, " 'may vary greatly in . . . content according to the circumstances and the time in which it is used.' " (*Watershed Enforcers v. Department of Water Resources* (2010) 185 Cal.App.4th 969, 979, fn. 7, quoting *Towne v. Eisner* (1918) 245 U.S. 418, 425; cf. *Meister v. Regents of University of California* (1998) 67 Cal.App.4th 437, 452 ["determining the amount of a reasonable attorney's fee . . . is necessarily ad hoc and must be resolved on the particular circumstances of each case"].) The word is doubly important because "the lodestar amount is the product of the number of

hours 'reasonably spent' and the reasonable rate" of attorney's hourly compensation. (*Meister*, *supra*, at p. 449; see *Pearl, supra*, § 9.1, at p. 9–7.)

Anderson asserts that "controlling law requires the trial court to use the lodestar method." The City responds that Judge Jackson "did exactly that." We agree. Judge Jackson expressly recognized that "[f]ee awards made pursuant to Code of Civil Procedure 1021.5 are based on careful compilation of the time spent and reasonable hourly compensation of the attorney involved in the presentation of the case." She then established an hourly rate of $200 "based upon the skills displayed by the attorney presenting the case before the trial court and the Court of Appeal," and applied a 1.1 multiplier, for an effective rate of $220 per hour. And she itemized 633 hours for Ms. Miles's time and 182 hours for her paralegal, explaining the downward adjustment of compensable hours "[b]ased on [Anderson's] limited success at the Court of Appeal."

Arguing to the contrary, Anderson cites to, and quotes from, numerous cases that set forth various boilerplate principles, going on to note that Ms. Miles's evidence as to the hours spent was "uncontradicted" and "undisputed," adding that "the verified time statements of attorneys . . . are entitled to credence in the absence of a clear indication the records are erroneous," citing *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 396. Anderson also asserts that generally the lodestar includes "all hours" expended, and that the "City provided no evidence that counsel's documented hours were inaccurate. [Citations.] Those hours are therefore *presumed* accurate."

But Judge Jackson did not conclude that the hours spent were "inaccurate." Nor do we. And we have no quarrel with any of Anderson's boilerplate principles, which, simply, have no applicability here.

A fundamental principle, quoted above, is that the fees awarded must be reasonable. And we conclude that the fees awarded by Judge Jackson here were, beginning with her determination that the appropriate hourly rate for Ms. Miles was $200 per hour, not the $450 claimed.

To begin with, there was no evidence from Ms. Miles that she ever charged that amount, let alone was paid it. There was evidence from Mr. Pearl that $450 per hour was reasonable, but this court has already upheld Judge Kahn's award of a $200 hourly rate for Ms. Miles for work performed between March 2008 and August 2010.

Judge Jackson was assigned to this case in October 2013. So, by March 2016, when she ruled on the fee motion, she had 2.5 years of experience with Ms. Miles's advocacy, ample time for evaluating her skill, sophistication, and judgment. As Judge Jackson expressly noted, she observed and evaluated "the skills displayed by the attorney presenting the case before the trial court and the Court of Appeal." Nothing in that experience required Judge Jackson to depart from the $200 hourly rate established by Judge Kahn, which included fees incurred during a period of time at issue here. In short, the hourly rate was supported. Likewise the reduction in the compensable hours allowed.

After remand, the City submitted a proposed writ to Judge Jackson, reflecting its view of our directions on remand. Petitioners filed their own motion for entry of a writ, seeking broad—and arguably punitive and legally unjustifiable—remedies against the City. Judge Jackson heard the dueling writ motions on two days, and issued a writ substantially in the form the City had proposed. Then, when the City demonstrated it had complied with the writ by re-doing its "handful of findings," Judge Jackson discharged the writ. And as apt here, Judge Jackson denied fees for this stage, with the following

findings in support of her conclusion that petitioners were not the "successful part[ies]" in post remand proceedings:

"After the matter was remanded back to the trial court to issue a writ, Petitioners were unsuccessful. Petitioners sought a peremptory writ that required the City to: (1) void the adoption of the Bicycle Plan and any bicycle-related legislation since 2005; (2) void the legislation adopting all projects analyzed in the Bicycle Plan EIR; (3) set aside approval of the statement of overriding considerations; (4) amend the General Plan, Transportation Code and Planning Code; (5) adopt new findings for alternatives[,] unidentified mitigation measures and all of the significant environmental impacts in the EIR; (6) provide more than the legally required public notice prior to adopting any new findings; and (7) suspend all Bicycle Plan project activities until after a final determination by the Court. Instead, the Court issued a writ to follow the direction of the Court of Appeal and required the City to make the handful [of] findings which the City failed to make. The writ did not void or suspend any Bicycle Plan approvals or activities, as requested by Petitioners."

Based on Anderson's limited success on appeal, Judge Jackson reduced compensable attorney and paralegal hours by 50 percent for work performed in connection with the primary appeal. As described above, she carefully compared results achieved with petitioners' litigation goals, and found that "the Petitioners did not succeed on the majority of the appeal." No, in Judge Jackson's words, they "prevailed (and even then, only partially) on only one issue: findings." In sum, Anderson achieved only minimal success on appeal, and the "findings" issue had zero impact on continued implementation of the bicycle plan. In light of all this, Judge Jackson's 50 percent reduction in compensable time based on limited success was within her discretion, as

numerous cases have held. (See e.g., *Save Our Uniquely Rural Community Environment v. County of San Bernardino* (2015) 235 Cal.App.4th 1179, 1185 [request for $221,198; award of $19,176]; *Bowman v. City of Berkeley* (2005) 131 Cal.App.4th 173, 176 [$96,592 attorney fees billed; $89,696 paid; $17,314 awarded]; *San Diego Police Officers Assn. v. San Diego Police Department* (1999) 76 Cal.App.4th 19, 24; *Californians for Responsible Toxics Management v. Kizer* (1989) 211 Cal.App.3d 961, 974–975 [65 percent reduction].) There was no abuse of discretion.

DISPOSITION

The orders of October 23, 2014, November 5, 2014, December 25, 2015, and March 7, 2016, are affirmed. Each side will bear its respective costs on appeal.

_____
Richman, J.

We concur:

_____
Kline, P.J.

_____
Pollak, J.*

Anderson v. City and County of San Francisco (A143974; A147800; A148454)

* Presiding Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.