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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SPM-FAIRFIELD, LLC,

Plaintiff and Appellant,

v.

CITY OF SAN JUAN CAPISTRANO,

Defendant and Respondent;

O PROPERTIES, INC.,

Real Party in Interest and Respondent.

G057482

(Super. Ct. No. 30-2016-00878881)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Peter J. Wilson, Judge. Affirmed.

Allen Matkins Leck Gamble Mallory & Natsis and K. Erik Friess for
Plaintiff and Appellant.

Best Best & Krieger, James B. Gilpin, Alisha M. Winterswyk and Jeffrey
S. Ballinger for Defendant and Respondent.

Larson O'Brien, Stephen G. Larson, Paul A. Rigali, Dana M. Howard and Christopher M. Lapinig for Real Party in Interest and Respondent.

* * *

INTRODUCTION

SPM-Fairfield, LLC (SPM) successfully challenged a decision by the City of San Juan Capistrano (the City) to approve a hotel development in its historic downtown. SPM alleged, and the trial court found, the proposed hotel was not in compliance with the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) (CEQA) and violated the City's general plan, a master plan governing the City's historic core, and the City municipal code. After issuance of a writ of mandate overturning the City's decision, SPM moved for attorney fees pursuant to Code of Civil Procedure section 1021.5 (section 1021.5) as a private attorney general. The motion was opposed by the City and by real party in interest O Properties, Inc. (OPI), which owns the property on which the proposed hotel would have been built.

The trial court denied the motion for attorney fees on the ground SPM, which was pursuing its own hotel project in the City, had "a significant financial stake in the litigation" that was "sufficient to warrant the decision to incur substantial attorney fees and costs in the vigorous prosecution of the lawsuit." The court impliedly found the declarations submitted by SPM were not credible and disbelieved assertions made in them. SPM appeals from the order denying its motion for attorney fees.

We affirm. The trial court applied the correct legal standard for denying attorney fees set forth in section 1021.5 and laid down by case law. It was within the court's prerogative to disbelieve declarations submitted by SPM and, as the court found, SPM failed to meet its burden of proving the costs outweighed any financial benefit it obtained through the litigation. Substantial evidence supported the trial court's finding

that SPM, which planned to build its own hotel in the City, had a sufficient financial incentive to pursue the litigation to make an award of attorney fees unwarranted.

FACTS AND PROCEDURAL HISTORY

I.

Background

The City is home to many historic structures, the most prominent of which is Mission San Juan Capistrano, founded in 1776. In 2012, the City's city council (the City Council) approved several resolutions and an ordinance to adopt a master plan for the City's 150-acre historic core. This master plan (the historic master plan) created a "framework for the redevelopment of the downtown" and included plans, policies, and restrictions on building and development.

From this point, two people dominate the story: William Griffith, the managing member of SPM (which is owned by Griffith and his family) and Steve Oedekerker, the chief executive officer and president of OPI. Both Griffith and Oedekerker are long-time residents of the City ("decades" for Griffith and 25 years for Oedekerker), both own commercial property in City, and both have aspired to build a boutique hotel in the City's historic core.

Griffith has been actively involved in historic preservation of the City's core area. He was a founding member of the City's Heritage Tourist Association and served on the committee that helped to create the historic master plan. Over the years, Griffith or SPM has acquired three of the City's most important historic properties: the Esslinger Building, the Judge Egan House, and the Constable Carl Stroschein House (also called the Little Yellow House). The Esslinger Building (which houses SPM's offices) and the Little Yellow House are on the National Register of Historic Places, and the Judge Egan House was added to the National Register of Historic places and its California equivalent in 2017. Griffith has spent millions of dollars acquiring and

restoring these buildings, and for his efforts he has received awards from the City and other organizations.

Oedekerk is a filmmaker by trade. He started OPI in 1999 as a vehicle for purchasing property located at 31878 Camino Capistrano (the Camino Capistrano property), the only commercial property in which Oedekerk (through OPI) has had an interest. Oedekerk used one of the buildings on the Camino Capistrano property for his production offices and leased the other two buildings. He also served on the committee that helped to create the historic master plan.

II.

Hotel Development Projects

In 2010, the City Council approved entitlements¹ for a hotel development on property across the street from Mission San Juan Capistrano. The development, to be called “Plaza Banderas,” included a three-star hotel. At that time, neither Griffith nor SPM owned the property or were involved in the Plaza Banderas development.

Griffith expressed interest in purchasing the Camino Capistrano property in order to rehabilitate and upgrade the existing buildings. Oedekerk declined to sell him the property. Instead, in early 2013, OPI entered into a developer’s purchase contract for the sale of the Camino Capistrano property to a development company, which had plans for a residential/hotel development to be called “Urban Village.” The development company soon began the process of seeking the necessary entitlements from the City.

In June 2014, Griffith again offered to buy the Camino Capistrano property. He told Oedekerk the City planning commission would never approve Urban Village and that the proposed development did not make economic sense. Oedekerk again declined

¹ The term “entitlements” generally refers to government approvals necessary for real property development, such as tentative tract maps, conditional use permits, general plan modifications, architectural control permits, grading plan modifications, and mitigated negative declarations under CEQA.

to sell Griffith the Camino Capistrano property. Griffith publicly stated he would be “the first in line” to purchase the Camino Capistrano property if the Urban Village development did not succeed.

The City Council initially refused to approve the Urban Village development. The development company sued, and the City Council reversed its decision. A lawsuit brought by a group of residents and a ballot referendum sought to overturn that approval. In response, the City Council, with two new members, voted to repeal the approval of Urban Village. The development company then sued the City to set aside the repeal of the approval. The trial court ruled in the residents’ lawsuit that Urban Village was inconsistent with the City’s general plan and ordered the City to set aside the approval.

Meanwhile, in 2015, SPM purchased the Judge Egan House, which is next to the Camino Capistrano property. Also in 2015, SPM purchased the property on which Plaza Banderas was to be built, along with the entitlements for the development. SPM decided to build a boutique hotel, upgraded from the one originally planned for the site, to be called the “Inn at the Mission.” Griffith applied to the City to revise the Plaza Banderas entitlements to include a subterranean parking garage and to upgrade the hotel to a four-star level. We refer to the original development plan for the site as the Plaza Banderas development and the upgraded hotel with subterranean parking garage as the Inn at the Mission development.

After the demise of Urban Village, OPI engaged a new developer, and together they pursued a boutique hotel development, called the “Hotel Capistrano,” to be built on the Camino Capistrano property. In October 2015, at the same time SPM was seeking the necessary entitlements for the Inn at the Mission development, OPI applied to the City for entitlements for the Hotel Capistrano development.

III.

Planning Commission Decisions

Planning commission hearings for the Inn at the Mission development and the Hotel Capistrano development were scheduled to be held at the same time. SPM faced opposition to its Inn at the Mission development. An attorney threatened a lawsuit to halt it (SPM asserts the attorney acted on behalf of OPI and the new developer; Oedekerker declared the attorney had no connection to the Hotel Capistrano development). Faced with the threat of a lawsuit, SPM withdrew the application for entitlements for the Inn at the Mission development. SPM still had the entitlements for the original Plaza Banderas development but did not go forward with it at that time.

The planning commission hearing went forward on the Hotel Capistrano development.² In July 2016, the City planning commission approved the Hotel Capistrano development. SPM appealed the planning commission's decision to the City Council but, in September 2016, the City Council denied the appeal.

IV.

Petition for Writ of Mandate Litigation

In October 2016, SPM filed a petition for writ of mandate against the City to challenge the approval of the Hotel Capistrano development. The petition asserted causes of action for violations of CEQA, the City general plan and historic master plan, the City municipal code, and due process. The petition alleged: "Because of these violations, the Hotel Capistrano [d]evelopment is illegal and will have negative impacts on the adjacent, historic Judge Egan House located at 31892 Camino Capistrano . . .

² Several days before the planning commission hearing, Griffith appeared at a hearing before the City's Cultural Heritage Commission and raised concerns that the Hotel Capistrano did not comply with the historic master plan and damaged the character of the City's historic core. Griffith asked whether the City intended to follow the City general plan, master plan, and CEQA in mitigating impacts on historic resources "or are we going to make something up as we go along?" He told the planning commission, "we don't want any impacts on the Egan House."

owned by SPM, on the nearby, historic Esslinger Building located at 31866 Camino Capistrano . . . and on other historic resources.”

In November 2017, SPM changed course on the Plaza Banderas development and decided to go forward with it after all.

In July 2018, the trial court granted SPM’s petition and found the Hotel Capistrano development was not in compliance with CEQA and violated the City’s general plan, historic master plan, and municipal code. The court found the City’s approval violated the City general plan because the Hotel Capistrano development eliminated a required street extension and violated the historic master plan’s 35-foot height limit and other height limits that protect the Judge Egan House and other historic buildings. A writ of mandate commanding the City to vacate its approval of the Hotel Capistrano development was issued.

The City and OPI appealed from the writ of mandate. That appeal (No. G056835) has been dismissed pursuant to the City’s and OPI’s requests for dismissal.

V.

SPM’s Motion for Attorney Fees

SPM brought a motion to recover the attorney fees it had expended in connection with the writ of mandate litigation under a private attorney general theory pursuant to section 1021.5. SPM asserted the private costs to it and Griffith “vastly outweighed” any benefit they obtained through the litigation and, by pursuing the litigation, “SPM . . . enforced the City’s General Plan and Historic Master Plan, the City’s zoning code, and CEQA” and “brought to light failures in the City’s implementation of its plans, failures that the City is now working to correct.” OPI opposed the motion and asserted that SPM brought the litigation out of “pure economic self-interest” and as a “potent opportunity to stop [OPI] from developing the property and thus resurrect Griffith’s bid to own the property himself.”

The trial court denied SPM's motion for attorney fees on the ground "SPM has failed to meet its burden of establishing its litigation costs transcend its personal pecuniary interests." The court found that SPM's ownership in the Plaza Banderas development, the entitlements for which had been approved by the City, gave SPM "a significant financial stake in the litigation sufficient to warrant the decision to incur substantial attorney fees and costs in the vigorous prosecution of the lawsuit challenging and blocking the subject Hotel Capistrano project." The court found that the Hotel Capistrano, as a competitor hotel, would have had a direct negative effect on the value of Plaza Banderas "regardless of whether [SPM] had an intent to actually develop the hotel at any given time, because the pertinent fact is [it] held such an interest at all relevant times and that interest stood to lose economic value by the development of the subject Hotel Capistrano."

DISCUSSION

I.

Standard of Review

An award of attorney fees under section 1021.5 is reviewed under the abuse of discretion standard. (*Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 378.) The abuse of discretion standard measures whether, in light of the evidence, the lower court's decision falls within the permissible range of options set by the legal criteria. (*Bank of America, N.A. v. Superior Court* (2013) 212 Cal.App.4th 1076, 1089.) The scope of the trial court's discretion is limited by law governing the subject of the action taken. (*Ibid.*) An action that transgresses the bounds of the applicable legal principles is deemed an abuse of discretion. (*Ibid.*) A trial court's decision is an abuse of discretion when it is based on an error of law (*ibid.*) or when the court's factual findings are not supported by substantial evidence (*Millview County Water Dist. v. State Water Resources Control Bd.* (2016) 4 Cal.App.5th 759, 769 (*Millview*)).

II.

The Trial Court Did Not Err by Denying Attorney Fees Under Section 1021.5.

A. Section 1021.5.

Section 1021.5 is a codification of the private attorney general attorney fees doctrine.³ (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1217-1218 (*Whitley*).)

The doctrine had been developed in judicial decisions to encourage lawsuits effectuating strong public policy by awarding attorney fees to successful litigants whose efforts benefit a broad class of people. (*Ibid.*) Section 1021.5 was designed to make public interest litigation affordable to those without financial means by “offering at least the prospect that the financial burden of the litigation could be shifted to the opposing party if the litigant prevailed.” (*Whitley, supra*, at p. 1220.)

A litigant is eligible for attorney fees under section 1021.5 if three requirements are met: (1) the litigant’s lawsuit resulted in the enforcement of an important right affecting the public interest; (2) the lawsuit conferred a significant benefit, either pecuniary or nonpecuniary, on the general public or on a large class of persons; and (3) the necessity and financial burden of private enforcement make an award of attorney fees appropriate. (*Whitley, supra*, 50 Cal.4th at p. 1214.) The party seeking attorney fees has the burden to prove each of these requirements. (*Heron Bay Homeowners Assn. v. City of San Leandro* (2018) 19 Cal.App.5th 376, 397 (*Heron Bay*); *Millview, supra*, 4 Cal.App.5th 759, 769.)

³ The first sentence of section 1021.5 reads: “Upon motion, a court may award attorneys’ fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, 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.”

Only the third requirement—the necessity and financial burden of private enforcement—is disputed in this appeal. That requirement encompasses two issues: (1) whether private enforcement was necessary and (2) whether private enforcement imposed a financial burden warranting an award of attorney fees. (*Whitley, supra*, 50 Cal.4th at p. 1214.) The first issue, the necessity of public enforcement, concerns the adequacy of public enforcement, and, when private enforcement is necessary, seeks to make representation economically equal. (*Id.* at p. 1215.)

Here, there is no dispute about the necessity of SPM pursuing litigation to enforce CEQA and the City’s general plan, historic master plan, and municipal code. The question is whether private enforcement imposed a financial burden on SPM that warranted an award of attorney fees. In assessing financial burden, the focus is on both the costs of the litigation and on any financial benefits obtained, or reasonably obtainable, by the successful party. (*Whitley, supra*, 50 Cal.4th at p. 1215.) An award of attorney fees under section 1021.5 is warranted when pursuing the litigation placed a financial burden on the plaintiff that was disproportionate to the plaintiff’s stake in the matter. (*Whitley, supra*, at p. 1215.) “‘This requirement focuses on the financial burdens and incentives involved in bringing the lawsuit.’” (*Ibid.*)

“The appropriate inquiry is whether the financial burden of the plaintiff’s legal victory outweighs the plaintiff’s financial interest. [Citations.] An attorney fee award under section 1021.5 is proper unless the plaintiff’s reasonably expected financial benefits exceed by a substantial margin the plaintiff’s actual litigation costs.” (*Collins v. City of Los Angeles* (2012) 205 Cal.App.4th 140, 154 (*Collins*).) The reasonably expected financial benefits are measured as of the time “‘vital litigation decisions’” were made. (*Whitley, supra*, 50 Cal.4th at pp. 1220-1221; see *Collins, supra*, 205 Cal.App.4th at p. 154 & fn. 10 [monetary value of benefits reasonably expected at the time vital litigation decisions are made]; *Notrica v. State Comp. Ins. Fund* (1999) 70 Cal.App.4th

911, 955 [“the court must look at the estimated value of the case when the critical litigation decisions were made, not the actual recovery after trial”].)

The lack of a monetary recovery is not in itself dispositive of the issue whether sufficient financial incentive justified pursuing the litigation. (*People v. Investco Management & Development LLC* (2018) 22 Cal.App.5th 443, 468 (*Investco*).) Actual or prospective financial gain does not automatically disqualify a litigant from recovering attorney fees under section 1021.5. (*Heron Bay, supra*, 19 Cal.App.5th at p. 390 [“The fact that a party had a pecuniary interest in initiating litigation does not automatically signify more altruistic concerns played no role in the decision”].) But attorney fees are not recoverable if the public benefit achieved was merely coincidental to the litigant’s expected monetary recovery. (*Bui v. Nguyen* (2014) 230 Cal.App.4th 1357, 1367.)

B. The Trial Court Used the Correct Legal Standard.

SPM argues the trial court used the wrong legal standard in denying its motion for attorney fees by finding SPM had a hotel project that competed with the Hotel Capistrano development and, therefore, had a significant economic interest in the litigation. SPM contends that, at the time it made the decision to file the writ of mandate litigation, it was not pursuing a competing hotel development and the proposed Hotel Capistrano would have enhanced rather than diminished the value of SPM’s property holdings in the City’s historic core.

The trial court used the correct legal standard. The court found that SPM’s financial stake in the litigation was sufficient to warrant the decision to incur attorney fees and costs in pursuing the writ of mandate litigation. This finding follows the correct legal standard and principles for denying attorney fees under section 1021.5. (See, e.g., *Whitley, supra*, 50 Cal.4th at p. 1215; *Collins, supra*, 205 Cal.App.4th at p. 154.) The trial court’s order and comments made at the hearing show “[the court] was well aware of

the legal standard applicable to the financial burden requirement.” (*Summit Media, LLC v. City of Los Angeles* (2015) 240 Cal.App.4th 171, 191 (*Summit Media*).)⁴

C. SPM Failed to Meet Its Burden of Proof.

SPM in effect is mounting a sufficiency of the evidence challenge to the trial court’s order denying attorney fees. But, as the trial court expressly found, SPM failed to meet its burden of proof. The party seeking attorney fees has the burden to prove each of the requirements of section 1021.5, including the financial burden requirement. (*Heron Bay, supra*, 19 Cal.App.5th at p. 397; *Millview, supra*, 4 Cal.App.5th at p. 769.)

In support of the motion for attorney fees, SPM submitted two declarations from Griffith. In the first declaration, he declared SPM filed the petition for writ of mandate to prevent harm to the Judge Egan House and the City’s historic center. In the second declaration, which was submitted in response to opposition to the attorney fees motion, he declared the proposal for developing the Camino Capistrano property would enhance rather than diminish the values of the Judge Egan House and the Esslinger

⁴ In *Whitley*, the California Supreme Court endorsed as “illustrative” a method for weighing costs and benefits described in *Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1 (*Police Protective League*). (*Whitley, supra*, 50 Cal.4th at p. 1215.) Under this method, the trial court must first fix or estimate the monetary value of the benefits the successful litigant reasonably expected at the time vital litigation decisions were made, and discount the value of those benefits by some estimate of the probability of success at that time. (*Ibid.*) The trial court next calculates the costs of the litigation to the successful litigant. (*Whitley, supra*, 50 Cal.4th at pp. 1215-1216.) Lastly, the court compares the estimated value of the case to the actual cost and makes the judgment “whether it is desirable to offer the bounty of a court-awarded fee in order to encourage litigation of the sort involved.” (*Id.* at p. 1216, quoting *Police Protective League, supra*, at p. 10.)

The trial court in this case did not conduct the test described in *Police Protective League*. SPM does not contend the court should have done so. The *Whitley* court described that test as illustrative, not mandatory, and it need not be applied in every case. (*Whitley, supra*, 50 Cal.4th at p. 1215; *Summit Media, supra*, 240 Cal.App.4th at pp. 191-192; see *Heron Bay, supra*, 19 Cal.App.5th at p. 391, fn. 11, and cases cited.)

Building. Griffith declared the writ of mandate litigation did not financially benefit the Plaza Banderas development. To the contrary, according to Griffith, construction of the Hotel Capistrano would have increased the value of the Plaza Banderas development by generating foot traffic and economic activity in the City's historic core and because hotels often do better when "clustered near each other." Griffith declared that SPM's objection to the Hotel Capistrano development began before SPM acquired Plaza Banderas and, when SPM decided to file the writ of mandate petition, it "was *not* developing the Plaza Banderas hotel, nor any other hotel" and Griffith "had serious doubts that a hotel development made financial sense."

However, it is apparent from the trial court's order that the trial court did not find Griffith to be credible regarding the financial burden and benefit of the writ of mandate litigation. Although the trial court did not make an express credibility finding, the court's finding that SPM did not meet its burden of proof implies the court did not believe Griffith's assertions that SPM did not benefit financially from the writ of mandate litigation, the Hotel Capistrano development would enhance the value of the Judge Egan House, and Griffith had doubts about the feasibility of a hotel development when SPM filed the petition for writ of mandate. We infer the trial court made all implied findings necessary to support its order. (*Rancho Mirage Country Club Homeowners Assn. v. Hazelbaker* (2016) 2 Cal.App.5th 252, 263; *Baugh v. Garl* (2006) 137 Cal.App.4th 737, 744.) We accept the trial court's determination of the credibility of witnesses presenting testimony by declaration. (*United Health Centers of San Joaquin Valley, Inc. v. Superior Court* (2014) 229 Cal.App.4th 63, 74; *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1450.) Having rejected the factual assertions made in Griffith's declarations regarding the financial burden and benefit of the litigation, the trial court was justified in denying SPM's attorney fees motion.

In addition, the evidence supported the trial court's finding that SPM had "a significant financial stake in the litigation sufficient to warrant the decision to incur

substantial attorney fees.” The court found the Hotel Capistrano, as a competitor hotel, would have had a direct negative effect on the value of Plaza Banderas, “regardless of whether [SPM] had an intent to actually develop the hotel at any given time.” The evidence showed that when SPM made the decision to pursue the writ of mandate litigation, it owned historic properties in the City, including the Plaza Banderas development. SPM’s petition for writ of mandate alleged the Hotel Capistrano development would have “negative impacts” on the SPM-owned Judge Egan House and Esslinger Building. The City had approved the entitlements for the Plaza Banderas development, which was to include a boutique hotel that would compete with the Hotel Capistrano. Griffith declared SPM “was *not* developing the Plaza Banderas hotel” at the time the decision was made to initiate the writ of mandate litigation, but the trial court impliedly found Griffith not to be credible in that regard.

The trial court also found that even if SPM was not developing the Plaza Banderas at that time, it “stood to lose economic value” if the Hotel Capistrano were built. That finding is borne out by the fact that just a little over a year after filing the petition for writ of mandate, SPM decided to go forward with the Plaza Banderas development. Although the decision to pursue the Plaza Banderas development was made (according to Griffith) after the vital litigation decision to initiate the writ of mandate litigation had been made, other vital litigation decisions, including the decision to continue pursuit of the litigation, were made afterwards. (See *Whitley, supra*, 50 Cal.4th at pp. 1220-1221.) The court commented at the hearing, “[SPM’s] timing that they withdraw it and now are again proceeding with it, far from being a helpful fact, is a harmful fact; precisely the sort of ongoing competition that defendants argue for exists in this market.”

D. *Relevant Case Law.*

SPM argues the writ of mandate litigation did not prevent the development of the Hotel Capistrano but only forced OPI to comply with CEQA, the City's master plan, and the historic master plan. Citing *Heron Bay, supra*, 19 Cal.App.5th 376 and *Investco, supra*, 22 Cal.App.5th 443, SPM contends that whatever financial benefit it might have obtained from the writ of mandate litigation was not direct or immediate but at least one step removed from the litigation. OPI argues SPM's financial benefit from the litigation was direct and immediate. In support of that argument, OPI relies on *Summit Media, supra*, 240 Cal.App.4th 171 and *Arnold v. California Exposition and State Fair* (2004) 125 Cal.App.4th 498 (*Arnold*).

In *Heron Bay*, real parties in interest proposed installing a 100-foot-tall wind turbine to generate renewable energy. (*Heron Bay, supra*, 19 Cal.App.5th at p. 380.) To do so, they sought a variance from zoning restrictions on height from the City of San Leandro (San Leandro). (*Ibid.*) The proposed project was about 500 feet from some of the homes included in the Heron Bay residential development. (*Ibid.*) Its homeowners association (Heron Bay HOA) and its individual homeowners demanded that San Leandro prepare an environmental impact report (EIR) and expressed concerns over the project's potential impact on wildlife, noise levels, and property values. (*Id.* at p. 381.) San Leandro nonetheless approved a mitigated negative declaration for the wind turbine project. (*Ibid.*)

Heron Bay HOA successfully challenged San Leandro's decision by petition for writ of mandate. (*Heron Bay, supra*, 19 Cal.App.5th at pp. 381-382.) The trial court found San Leandro had failed to comply with CEQA and ordered San Leandro to set aside its approval; real parties in interest did not proceed with the project. (*Id.* at pp. 281, 382.) The trial court granted, in part, Heron Bay HOA's motion for attorney fees under section 1021.5. (*Heron Bay, supra*, 19 Cal.App.5th at pp. 380, 382-383, 384.) The trial court concluded the lawsuit had conferred a significant public benefit, but Heron

Bay HOA had a financial incentive to initiate the litigation because the turbine project threatened to reduce home values. (*Id.* at p. 383.)

The primary issue on appeal was whether the trial court could apportion attorney fees and grant a partial fee award. (*Heron Bay, supra*, 19 Cal.App.5th at p. 387.) The Court of Appeal, affirming the attorney fees award, concluded the trial court did not err by apportioning fees. (*Id.* at pp. 380, 388.) As only the residences closer to the proposed turbine stood to suffer large declines in value, it was reasonable to question whether most homeowners would have sufficient financial incentive to pay the costs of litigation. (*Id.* at p. 388.) Thus, substantial evidence supported an implied finding that “Heron Bay HOA had a sufficient financial incentive to incur some, but not all, of the costs of the litigation.” (*Id.* at p. 389.)

The Court of Appeal also addressed the issue whether Heron Bay HOA’s financial benefit from the litigation was direct or indirect. (*Heron Bay, supra*, 19 Cal.App.5th at pp. 395-396.) The court concluded the writ of mandate did not directly produce any financial benefit because the trial court could not, and did not, withhold approval of the wind turbine project. (*Id.* at p. 396.) Any benefit the Heron Bay HOA and its members might receive was ““at least once removed from the results of the litigation”” because it was possible that San Leandro would prepare an EIR and the real parties in interest would build the wind turbine. (*Ibid.*)

In *Investco*, two investors specially appeared in a securities fraud lawsuit by the State of California against a real estate development company and its promoters. (*Investco, supra*, 22 Cal.App.5th at p. 448.) The investors, who were victims of the securities fraud, successfully opposed a motion that would have stayed individual lawsuits by them and other defrauded investors. (*Ibid.*) The investors also challenged several provisions of a settlement agreement and, as a result, substantive changes were made to a stipulated interlocutory judgment and a special master order in the securities fraud lawsuit. (*Ibid.*)

The trial court granted the investors' motion for attorney fees under section 1021.5. (*Investco, supra*, 22 Cal.App.5th at pp. 454, 468.) The Court of Appeal, affirming, rejected the argument that any benefit the investors achieved on behalf of other investors was coincidental to their expected monetary recovery in their individual lawsuits. (*Id.* at p. 468.) The court reasoned that the investors did not avoid any loss of money or value to their assets by specially appearing in the securities fraud action; that is, they received no direct and immediate economic benefit. (*Id.* at p. 470.)

Citing *Heron Bay*, the *Investco* court held, “[w]here personal benefits are a step removed from the results of the litigation, the potential financial benefit is indirect and speculative, and thus, a trial court does not abuse its discretion in concluding that the financial burden criterion is satisfied for purposes of section 1021.5.” (*Investco, supra*, 22 Cal.App.5th at p. 470.) The court concluded the investors, as the homeowners in *Heron Bay*, “neither expected nor received any direct pecuniary benefit from their special appearance, and any anticipated recovery in their individual actions is still at least once removed, because the trial court’s ruling on the motion to modify did not guarantee them any future recovery.” (*Id.* at p. 471.)

In *Summit Media*, the plaintiff was engaged in the “lucrative” billboard business in the City of Los Angeles (Los Angeles). (*Summit Media, supra*, 240 Cal.App.4th at p. 175.) In 2002, Los Angeles banned all new off-site billboards and any alterations to existing off-site billboards. Several billboard companies (the real parties in interest) sued Los Angeles over the billboard ban. (*Ibid.*) In 2006, Los Angeles and real parties in interest entered into a settlement agreement exempting real parties from the ban and other zoning and building laws regulating off-site billboards. (*Ibid.*) The plaintiff filed the underlying lawsuit challenging that agreement as illegal and void. (*Ibid.*) While that litigation was pending, Los Angeles enacted an ordinance banning off-site billboards with digital displays. (*Id.* at pp. 175-176.)

The trial court granted the plaintiff's petition for writ of mandate and ordered Los Angeles to set aside and cease implementing the settlement agreement. (*Summit Media, supra*, 240 Cal.App.4th at p. 176.) The Court of Appeal affirmed and concluded the settlement agreement was illegal and void. (*Ibid.*) After remittitur, there was more litigation over removal and demolition of digital sign faces (*id.* at pp. 176-179) which resulted in orders denying the plaintiff's request for removal or destruction of various sign faces and structures and granting the plaintiff's request to invalidate certain permits and re-permits (*id.* at p. 179).

The plaintiff moved for attorney fees under a private attorney general theory. (*Summit Media, supra*, 240 Cal.App.4th at p. 181.) In support of the motion, the plaintiff presented a declaration from its owner stating the plaintiff did not benefit financially from the litigation, the odds were against the plaintiff prevailing when it filed the lawsuit, and it was impossible to quantify the financial benefit to the plaintiff of “being treated equally under the law.” (*Id.* at p. 190.) The trial court denied the motion on the ground the litigation did not impose a financial burden out of proportion to the plaintiff's stake in the matter. (*Id.* at p. 181.)

The Court of Appeal concluded the record supported the trial court's finding that the plaintiff's financial stake in the litigation was sufficient to warrant its decision to incur the cost of litigation. (*Summit Media, supra*, 240 Cal.App.4th at pp. 193-194.) The court cited declarations made by the plaintiff's owner in 2007 and 2008, during the heat of the litigation, in which the owner stated the settlement agreement placed the plaintiff at a competitive disadvantage to the real parties in interest, would damage the plaintiff's goodwill with its customers, and, if enforced, would cause the plaintiff to suffer irreparable injury to its business. (*Id.* at pp. 188-189.) Other evidence, including a federal court complaint, a complaint in the underlying lawsuit, and the owner's deposition, demonstrated the plaintiff had a strong financial stake in the litigation. (*Id.* at p. 189.)

The plaintiff in *Summit Media* cited cases upholding awards of attorney fees because the recovering plaintiff's financial benefits were indirect, uncertain, or speculative. (*Summit Media, supra*, 240 Cal.App.4th at p. 193.) The Court of Appeal distinguished those cases on the ground each one depended on the facts before the trial court while, in the matter at hand, the evidence supported the trial court's finding that the plaintiff's financial interest was "enormous." (*Ibid.*)

In *Arnold*, the plaintiff, a former harness racing operator at the California Exposition and State Fair (Cal Expo) brought a petition for writ of mandate to compel Cal Expo to vacate operator extensions granted to another harness racing operator and to solicit competitive bids. (*Arnold, supra*, 125 Cal.App.4th at pp. 502-503, 505.) After the plaintiff filed the petition, Cal Expo concluded it had mistakenly granted the operator extensions and vacated them. (*Id.* at pp. 503, 505.) The plaintiff sought attorney fees as a private attorney general on the ground his litigation enforced Cal Expo's statutory obligations when contracting on behalf of the public with the result of \$1.6 million in additional public revenue. (*Id.* at p. 510.)

The trial court denied the motion for attorney fees, and the Court of Appeal affirmed. (*Arnold, supra*, 125 Cal.App.4th at pp. 503, 510.) The record showed that the plaintiff had run harness racing operations in the early 1990's at Cal Expo and wanted to do so again. (*Id.* at p. 511.) On several occasions, the plaintiff had told Cal Expo that, if awarded the harness racing contract, he would provide it with hundreds of thousands of dollars in additional revenue. (*Ibid.*) The court concluded, "[c]ontrary to [the plaintiff]'s view, the record discloses that his financial interest in the harness racing contract was specific, concrete and significant, and based on objective evidence." (*Ibid.*)

Conducting a comparison to these cases has limited utility because, as the court in *Summit Media* commented, each case depends on the facts before the trial court. (*Summit Media, supra*, 240 Cal.App.4th at p. 193.) Here, the trial court impliedly found Griffith not to be credible, with the consequence that SPM did not meet its burden of

proof. The facts before the trial court in this case supported the decision to deny SPM's motion for attorney fees.

To the extent a comparison is useful, comparing this case with *Heron Bay*, *Investco*, *Summit Media*, and *Arnold* leads us to conclude *Heron Bay* and *Investco* are distinguishable in a material way. It is true, as SPM contends, the writ of mandate litigation did not necessarily stop the Hotel Capistrano development from going forward. OPI, as the wind turbine company in *Heron Bay*, could have proceeded with the development by complying with the commands of the writ of mandate, though ultimately OPI chose not to do so. SPM, as the investors in *Investco*, did not obtain an immediate monetary recovery from the litigation.

But the similarities between this case, on the one hand, and *Heron Bay* and *Investco*, on the other, end there. This case is different from those two cases and more like *Summit Media* and *Arnold* because SPM and OPI were, or least potentially were, *competitors* in the boutique hotel business in the City. That meant SPM's victory in the writ of mandate litigation gave SPM an advantage—a leg up—in the boutique hotel business in the City. A reasonable inference could be drawn that it was not coincidental that SPM made the decision to go forward with the Plaza Banderas development after filing the petition for writ of mandate. Although the writ of mandate issued by the trial court did not eliminate the possibility of the Hotel Capistrano being built, the writ had the potential of delaying the project and making it more costly. OPI ultimately dropped the Hotel Capistrano—a result neither unforeseen nor, by reasonable implication, undesired by SPM. “Abandonment of a project is hardly a unique result in a CEQA action. There is very little doubt the permanent termination of the project was the result [the plaintiff] hoped for in this case.” (*Edna Valley Watch v. County of San Luis Obispo* (2011) 197 Cal.App.4th 1312, 1321.)

Even a delay and additional cost in building the Hotel Capistrano would redound to the benefit of SPM in building—and booking—its boutique hotel. In contrast,

the homeowners association and the homeowners in *Heron Bay* were not competitors of the wind turbine company and, to the extent they gained financially in the litigation, the trial court apportioned their fees. Likewise, the investors in *Investco* were not competitors of the defendants and would not obtain any recovery unless and until they proved their individual securities fraud claims.

For much of the same reasons, this case is more similar to *Summit Media* and *Arnold*. OPI points out that in both *Summit Media* and *Arnold* the plaintiff's litigation win did not lead directly to financial gain: The harness racing operator in *Arnold* still had to bid competitively for a contract with Cal Expo, and the billboard company in *Summit Media* still had to go out and compete for billboard business. The plaintiffs in those cases financially benefitted from the litigation nonetheless because the litigation enabled each to engage in that competition. In *Summit Media*, as here, the plaintiff's owner submitted a declaration in support of the motion for attorney fees stating the plaintiff did not benefit financially from the litigation. Yet in both *Summit Media* and *Arnold* the courts concluded the record supported the trial court's finding that the plaintiff had a financial stake in the litigation sufficient to warrant the decision to incur attorney fees and costs. (*Summit Media, supra*, 240 Cal.App.4th at pp. 193-194; *Arnold, supra*, 125 Cal.App.4th at p. 511.) We reach the same conclusion as to SPM.

DISPOSITION

The order denying SPM's motion for attorney fees is affirmed.
Respondents to recover costs on appeal.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.