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AN ATTORNEY'S ADVICE CAN BE EXPENSIVE

By Ronald A. Zumbrun*

An attorney can expose a client to financial expense far exceeding the cost of the attorney's representation. If an attorney makes arbitrary, capricious or irrational decisions causing financial damage to the opponent, costly litigation can be the result. Such was the case recently for Alameda County, California.

The Federal Civil Rights Act makes every person acting under the color of state law liable for depriving another of his or her constitutional rights. Thus, government officials and employees who violate this Act when performing their official duties are accountable for those actions.

Public attorneys are not exempt from this rule. However, the United States Supreme Court has held that Congress did not intend to abrogate the common law immunities existing at the time the Federal Civil Rights Act was enacted. Certain public officials, such as law enforcement officers, must be free to exercise their authority without fear of personal liability. Consequently, government attorneys often claim that they have absolute immunity from liability for their conduct. They must, however, show that their activities are fairly characterized as closely associated with the conduct of litigation or potential litigation. If not, they still may be entitled to qualified immunity but not if the official knew or should have

known that the action would violate the plaintiff's constitutional rights. Qualified immunity also is not available if the official acted unreasonably or with malicious intent.

Absolute immunity of a public attorney was a major issue in litigation brought by Lockaway Storage in early 2003 in Alameda County. L. Eric Chambliss, a civil service employee of the Alameda County Counsel's office, had risen to the position of Senior County Counsel. He was responsible for advising the Alameda County Board of Supervisors and its agencies on the legality and application of Measure D, approved by the voters of Alameda County on November 7, 2000. Measure D, an "open space" ballot initiative, prohibited development outside the urban growth line in Alameda County. Measure D substantially changed Alameda County's land use policy, particularly in rural areas, and reduced the scope of the County's urban growth boundary.

Lockaway Storage specializes in developing and improving self-storage facilities. In 2000, Lockaway purchased an eight-acre parcel of land in Castro Valley which came with an existing conditional use permit (CUP) for the construction of a storage facility. After Lockaway purchased the parcel, Measure D was adopted, thereby precluding all development outside the urban growth line.

Section 3 of Measure D states that the provisions of Measure D do not apply if they deprive any person of constitutional or statutory rights and privileges. Section 22 further states that Measure D only applies to proposed development which has not received all discretionary approvals and permits prior to the effective date of the ordinance. Lockaway Storage received the CUP – the last discretionary permit – prior to the effective date of Measure D. Nonetheless, on March 6, 2003, the Alameda County Board of Supervisors met and incorrectly ruled that Measure D was applicable to Lockaway's project, thus halting construction.

Between August 2000 and September 2002, Lockaway worked earnestly and in good faith to satisfy the County's myriad construction requirements and expended over \$400,000 in pursuit of obtaining the necessary grading and building permits in addition to its \$800,000 land cost. Although Measure D was adopted by the voters in late 2000, the County waited almost two years to inform Lockaway that it intended to apply Measure D to its project.

Meanwhile, Senior County Counsel Chambliss was actively advising the Board of Supervisors' staff and related county agencies that Measure D did apply to Lockaway and recommended that construction be stopped. Lockaway subsequently brought suit against the County and certain individual County employees.

Chambliss was the county counsel assigned to the defense of this matter from April 3, 2003 (the date Lockaway's complaint was filed) through March 31, 2005, on which date he retired from County employment. Chambliss had participated in hearings before the Castro Valley Municipal Advisory Council, the Zoning Board and the Board of Supervisors. At these hearings, Chambliss testified against Lockaway and espoused the unreasonable position that Measure D absolutely barred Lockaway's construction of a storage facility.

Dick Schneider, one of the drafters of Measure D and a member of the Sierra Club Conservation Committee, Bay Chapter, also testified against Lockaway at the hearings before the Board of Zoning Adjustments and the Board of Supervisors. Chambliss did not disclose to Schneider that Lockaway had a CUP for its project. Schneider testified in deposition that if he had known that Lockaway had a CUP, he would have considered the project grandfathered under Section 22 of Measure D.

On November 24, 2004, the trial court granted Lockaway's motion for summary adjudication on the issue of the CUP's (C-7479) validity. The court issued a writ of mandate on February 28, 2005 ordering the County of Alameda and its Board of Supervisors to "recognize C-7479 as a valid conditional use permit which is vested in petitioners Lockaway Storage, Michael Garrity, and Michael Shaw (Petitioners) and to allow construction to proceed on Petitioners' property pursuant to said conditional use permit or any other permits already approved by the County in connection with Petitioners' property or project."

On March 21, 2005, Lockaway sought the building, planning and grading permits necessary to continue development, pursuant to the writ. However, Chambliss issued an e-mail memorandum instructing planning staff not to cooperate with Lockaway. In the March 23, 2005 e-mail, Chambliss stated:

"This case is still in litigation. All that the judge did was rule that the existing CUP survived the passage of Measure D in 2000. The Court did not change the terms of the permit causing it to expire in 2002. Thus it cannot be implemented in its present state. Whether it ever can be will be determined later in the litigation. Thus do NOT issue any permits or in any other way implement the permit. Refer any further contacts from Lockaway Storage to County Counsel."

These instructions were contrary to the terms of the writ. Eventually, when the County Counsel's office refused to back down from this position and persisted in instructing planning staff not to issue any permits, Lockaway brought contempt

proceedings against the County. As a result of the contempt proceedings, the County finally issued the requisite permits in late August 2005, approximately six months after issuance of the writ. Lockaway claimed a loss of hundreds of thousands of dollars as a result of the delay.

Meanwhile, Chambliss retired from County employment eight days after transmitting his memorandum to planning staff, instructing it not to give Lockaway any permits. Even though he was no longer involved in the case or employed by the County, on April 6, 2005, Chambliss e-mailed Dick Schneider, mentioned earlier as one of the drafters of Measure D and member of the Sierra Club Conservation Committee, requesting a meeting with Schneider to "discuss" the *Lockaway* case. He wrote:

"Dick, this is not coming from the County Counsel. I retired 3/31, but I am concerned about this case. It could make inroads into Measure D. What triggered me sending this message today is while listening to NPR today I heard a report about a case pending before the California Supreme Court concerning the Coastal Commission and its appointment procedures. The attorney against the Coastal Commission, Ron Zumbrun, is the same attorney representing Lockaway. Anyway, if you want to discuss the case let me know. I would be willing to meet and go over it with you." Chambliss and Schneider met for lunch shortly after the transmission of this e-mail.

Chambliss was deposed by Lockaway's counsel on January 19, 2006. He did not disclose his meeting with Schneider, nor did he produce the e-mail correspondence from him to Schneider. When counsel for Lockaway questioned Chambliss along these lines, Chambliss could not recall communicating with Schneider concerning Lockaway's project and

denied having a record of any such conversations. He did add that he thinks he mentioned Lockaway with Schneider but did not recall what his communications were with him.

Lockaway deposed Schneider on March 31, 2006. At that deposition, Schneider produced the e-mail correspondence from Chambliss to him and disclosed the lunch meeting he had with Chambliss in the Spring of 2005. This was the first time Lockaway became aware of Chambliss' independent contacts with Schneider regarding Lockaway's case.

Recognizing the seriousness of Chambliss' conduct, Lockaway filed suit against him personally, seeking damages for his delay and willful disobedience to the writ. The suit was consolidated with the action against the County.

After considerable settlement negotiations, a settlement of that portion of the case dealing primarily with Chambliss' conduct was reached, and on July 22, 2008, the Alameda County Board of Supervisors agreed to a settlement of \$500,000, leaving the balance of the case against the County intact.

The settlement agreement expressly states that "for purpose of the settlement, the County of Alameda and L. Eric Chambliss acknowledge that the doctrine of absolute immunity does not apply to the events [involving Chambliss] described in Phase III of the complaint."

As a result, the taxpayers of Alameda County will foot a \$500,000 bill for the action of one overreaching civil service attorney pursuing his personal no-growth objectives rather than meeting his duties to his public agency client as well as to Lockaway Storage.

**Ronald A. Zumbrun is Managing Attorney of The Zumbrun Law Firm, a Sacramento-based public issues firm. Lockaway Storage is represented by The Zumbrun Law Firm in the subject action. Timothy V. Kassouni of this firm will be representing Lockaway at the January trial. Zumbrun's column appears in the Daily Recorder on the second Monday of each month. You can learn more about the Zumbrun Law Firm at www.zumbrunlaw.com.*