American Bankers Management Company, Inc. v. Heryford  E.D. CA  Civil Rights  2523

District attorney’s retention of private law firms to prosecute civil case does not violate defendants’ due process rights (Friedland, J.)

People v. Almanza  C.A. 2nd  Criminal Law  2528

Defendant not entitled to remand absent reasonable probability that trial court would exercise sentencing discretion in his favor (Gilbert, P.J.)

People v. Jordan  C.A. 3rd  Criminal Appeals  2529

Challenge to fines and penalty assessments waived on appeal if not raised concurrently with other issues on appeal (Robie, Acting P.J.)

Corley v. San Bernardino County Fire Protection District  C.A. 4th  Employment Litigation  2533

Provision of Firefighters’ Procedural Bill of Rights Act applicable to fire chiefs did not apply to division chief (Aaron, J.)

Don’t Cell Our Parks v. City of San Diego (Verizon Wireless)  C.A. 4th  Land Use and Planning  2538

Installation of wireless telecommunications facility in city park did not constitute “changed use” requiring voter approval (Nares, J.)

Petrolink, Inc. v. Lantel Enterprises  C.A. 4th  Contractual Disputes  2547

Prevailing party entitled to be restored to position in which it would have been had contract been timely performed (Aaron, J.)

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SUMMARIES

Civil Rights

District attorney’s retention of private law firms to prosecute civil case does not violate defendants’ due process rights (Friedland, J.)

American Bankers Management Company, Inc. v. Heryford

9th Cir.; March 15, 2018; 16-16103

The court of appeals affirmed a district court judgment. The court held that a county district attorney’s retention of private law firms to prosecute a case under California’s Unfair Competition Law (UCL) does not violate the defendants’ federal due process rights.

Trinity County District Attorney Eric Heryford filed suit against American Bankers Management Company, Inc. and others on behalf of the people of California under the UCL. Heryford alleged that defendants had engaged in deceptive marketing and sales practices in connection with services offered to California credit card holders. The complaint sought injunctive relief, restitution, attorney’s fees, and civil penalties. In order to relieve the county of the financial burden of investigating and prosecuting the case, Heryford retained various law firms to prosecute the case on the county’s behalf, under Heryford’s direction. Under the terms of their agreement with the county, the law firms would bear “all reasonable and necessary costs of litigation,” for which they would be reimbursed from any recovery in the action. They would also be entitled to 30 percent of any remaining funds. In the absence of any recovery, the law firms would not be reimbursed or compensated.

American Bankers filed a civil rights action against Heryford, challenging the contingency-fee agreement as a violation of its federal due process rights. The district court granted Heryford’s motion to dismiss.

The court of appeals affirmed, holding that the arrangement did not violate American Bankers’ due process rights. Heryford’s retention of private counsel to pursue civil penalties under state law was for all intents and purposes analogous to a private relator’s pursuit of civil penalties under the qui tam provisions of the False Claim Act, an arrangement which has already been held not to violate due process rights. In exchange for their efforts in prosecution the case, the law firms, like the private relator, receive a share of any recovery. And, like the private relator, they bear the burden of their litigation expenses in the event they do not prevail at trial. The law firms’ financial incentive is no different from that of the private relator in a qui tam action. And, just as the latter does not implicate the defendant’s due process rights, neither does the former.

Contractual Disputes

Prevailing party entitled to be restored to position in which it would have been had contract been timely performed (Aaron, J.)

Petrolink, Inc. v. Lantel Enterprises

C.A. 4th; March 15, 2018; D073012

The Fourth Appellate District reversed in part a judgment. The court held that a plaintiff awarded specific performance of a contract was entitled to be restored to the position in which it would have been had the contract been executed in a timely fashion.

Petrolink, Inc. entered into an agreement with Lantel Enterprises to lease a parcel of undeveloped property owned by Lantel. The parties’ agreement included a provision allowing Petrolink to purchase the property at fair market value according to an appraisal. Petrolink exercised the purchase option on August 25, 2011, but the parties were unable to reach an agreement as to price. Petrolink sued Lantel for specific performance. Petrolink continued to pay monthly rent to Lantel during the pendency of the litigation. The case went to trial before a judge in September 2015.

The trial court entered judgment in favor of Petrolink and ordered Lantel to sell the property to Petrolink for $889,854.00, the amount determined by the court to be the fair market value of the property. The court denied Petrolink’s request for an offset against the purchase price for the rent it had paid since exercising its purchase option.

The court of appeal reversed in part and remanded, holding that the trial court erred in denying Petrolink an offset for the rent it had paid. Once Petrolink exercised its purchase option, the lease was terminated, and a contract for purchase and sale came into existence. In denying Petrolink an offset for the rents that it paid during the pendency of the litigation, the court failed to account for the delayed performance of the purchase and sale contract. By failing to account for that four-year delay, the trial court failed to place the parties in the positions in which they would have been had the purchase and sale contract been performed when it should have been.
Criminal Appeals

Challenge to fines and penalty assessments waived on appeal if not raised concurrently with other issues on appeal (Robie, Acting P.J.)

People v. Jordan

C.A. 3rd; March 15, 2018; C084592

The court of appeal affirmed a judgment. The court held that the defendant waived his right to appeal a trial court order denying his motion to correct his sentence by failing to raise the issue in an earlier appeal.

After the trial court denied his motion to suppress, Kim Jordan pleaded no contest to two drug offenses. The trial court placed Jordan on probation and ordered him to pay various fines and fees, including criminal laboratory analysis and drug program fees, plus penalty assessments. Jordan appealed the denial of his motion to suppress. While his appeal was pending, he also filed a motion in the trial court to correct his sentence, arguing that the penalty assessment imposed on the criminal laboratory analysis fee was unauthorized. The trial court denied the motion.

Jordan thereafter filed a second appeal, challenging only the denial of his motion to correct his sentence.

The court of appeal affirmed, holding that Jordan waived his claim of error as to his sentence by failing to raise it in his first appeal. Although there is no time limit on a motion to correct an unauthorized sentence, the same cannot be said of an appeal from the denial of such a motion. Under Penal Code 1237.2, a defendant must first file a motion for correction in the trial court before appealing “the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs.” However, the statute is clear that this requirement applies only in cases “where the erroneous imposition or calculation of fines, penalty assessments, surcharges, fees, or costs are the sole issue on appeal.” Thus, when a defendant raises at least one other issue on appeal, he or she is not first required to file a motion in the trial court to correct the imposition or calculation of penalty assessments or fines. Instead, he or she can include those claims with the other contentions raised in the appeal. Here, Jordan could and should have raised the fee issue in his appeal from the denial of his motion to suppress. His failure to do so resulted in waiver.

Criminal Law

Defendant not entitled to remand absent reasonable probability that trial court would exercise sentencing discretion in his favor (Gilbert, P.J.)

People v. Almanza

C.A. 2nd; March 15, 2018; B270903

The Second Appellate District affirmed a judgment. The court held that a defendant was not entitled to remand where there was no reasonable probability that the trial court would exercise its sentencing discretion under a new law in favor of the defendant.

A jury convicted Christian Almanza of first degree murder and assault with a firearm, and found true gang and firearm allegations. Finding that Almanza had suffered two prior strike convictions within the meaning of the three strikes law, the trial court sentenced him to an aggregate term of 137 years to life, including 25 years to life for a firearm enhancement imposed pursuant to Penal Code §12022.53(d). The judgment was upheld on appeal.

Following the enactment of Senate Bill No. 620, the Supreme Court granted review and remanded to the court of appeal to vacate its judgment and to determine whether Almanza was entitled to remand to permit the trial court to exercise its discretion under SB 620 to strike or dismiss the firearm enhancement.

The court of appeal again affirmed the judgment, holding that Almanza would be entitled to remand only if there were a reasonable probability that the trial court would exercise its discretion to strike the enhancement. The court found no such probability. A jury convicted Almanza of a cold-blooded, premeditated murder committed for the benefit of a criminal street gang. His record includes two prior strikes and a prior prison term. Had the trial court wanted to show leniency, it could have imposed concurrent sentences for the crimes of murder and assault with a firearm. Instead, it imposed consecutive sentences. On this record, there was no reasonable probability the trial court would exercise its discretion under SB 620 in favor of Almanza.
Employment Litigation

Provision of Firefighters’ Procedural Bill of Rights Act applicable to fire chiefs did not apply to division chief (Aaron, J.)

**Corley v. San Bernardino County Fire Protection District**

C.A. 4th; March 15, 2018; D072852

The Fourth Appellate District affirmed a judgment. The published portion of its opinion, the court held that the trial court properly refused to give a requested instruction that pertained solely to the termination of fire chiefs, when the plaintiff in this case never held such a role.

George Corley worked as a division chief for the San Bernardino County Fire Protection District. After newly appointed district fire chief Mark Hartwig terminated Corley at age 58, Corley sued the district for age discrimination, alleging that he was terminated so that he could be replaced by someone younger and less experienced, at a lower rate of pay. At trial, Hartwig testified that Corley was terminated because he had an incompatible management style. The district requested that the jury be instructed with an excerpt from the Firefighters’ Procedural Bill of Rights Act, which excerpt stated: “A fire chief shall not be removed by a public agency or appointing authority without providing that person with written notice, the reason or reasons for removal, and an opportunity for administrative appeal…incompatibility of management styles…shall be sufficient to constitute ‘reason or reasons.’” Corley objected, arguing that the quoted passage, taken from Gov. Code §3254(c) pertains only to a district fire chief, and Corley was never employed as the district’s fire chief. The court denied the district’s request.

The jury rendered a verdict in favor of Corley, awarding him $597,629 in damages, plus fees and costs.

The court of appeal affirmed, holding that the trial court did not err in denying the requested instruction. The text of §3254(c) supported the conclusion that the provision applies solely to a jurisdiction’s lead “fire chief.” The statute refers to “a fire chief” without reference to “deputy chiefs,” “assistant chiefs,” “division chiefs” or the like. Moreover, the statute’s reference to “the job of fire chief” strongly suggests that the term “fire chief” refers to a single position only. Further, the text and legislative history of the Act unequivocally demonstrate that the Act was modeled on the Public Safety Officers Procedural Bill of Rights Act. The legislative history of the analogous provision in POBOR, §3304(c), makes clear that it applies solely to a jurisdiction’s “chief of police.” It was accordingly appropriate to interpret §3254(c) as similarly pertaining solely to a jurisdiction’s “fire chief.”

Land Use and Planning

Installation of wireless telecommunications facility in city park did not constitute “changed use” requiring voter approval (Nares, J.)

**Don’t Cell Our Parks v. City of San Diego (Verizon Wireless)**

C.A. 4th; March 15, 2018; D071863

The Fourth Appellate District affirmed a judgment. The court held that the installation of a wireless telecommunications facility in a dedicated park did not constitute a “changed use or purpose” requiring voter approval.

The City of San Diego approved Verizon Wireless’ proposal to construct a wireless telecommunications facility in one of the city’s dedicated parks. Don’t Cell Our Parks (DCOP) filed suit challenging the city’s approval of the project, arguing that the decision violated City Charter §55, which provides that real property formally dedicated in perpetuity “for park, recreation or cemetery purposes shall not be used for any but park, recreation or cemetery purposes without such changed use or purpose having been first authorized or later ratified by a vote of two-thirds of the qualified electors of the City voting at an election for such purpose.” DCOP argued that the proposed wireless installation constituted a change of use requiring voter approval.

The trial court disagreed and denied DCOP’s petition.

The court of appeal affirmed, holding that the project did not constitute a changed use or purpose that required voter approval. Although §55 provides that any “changed use or purpose” to a dedicated park requires voter approval, the determination as to whether or not an addition to a dedicated park constitutes a “changed use” necessarily falls within the city’s control and management authority. Were this not the case, any addition to a park would require voter approval. At issue was thus whether the city abused its discretion in finding that the proposed project would not constitute a “changed use or purpose.” The record here supported the city’s decision. The project consisted of a 35-foot-tall faux-eucalyptus and a 220-square-foot concrete enclosure. The faux tree was to be installed in an existing stand of trees of comparable height. The enclosure would be set back about 15 feet from the park’s sidewalk path, would be painted a neutral color, and would be surrounded by native shrubs. The total footprint of the project would comprise 0.14 percent of the total 8.53 acreage of the park. And the project would benefit park visitors by providing enhanced wireless communication coverage in a neighborhood where existing coverage was at best spotty. On this record, the city reasonably concluded that the project did not constitute a changed use.
COUNSEL


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Aileen M. McGrath, Deputy City Attorney; Dennis J. Herrera, City Attorney; Office of the City Attorney, San Francisco, California; Laura S. Trice, Deputy County Counsel; Danny Y. Chou, Assistant County Counsel; Greta S. Hansen, Chief Assistant County Counsel; James R. Williams, County Counsel; Office of the County Counsel, San Jose, California; for Amici Curiae City and County of San Francisco and County of Santa Clara.

OPINION

FRIEDLAND, Circuit Judge:

Plaintiff-Appellant American Bankers Management Company, Inc. filed this civil rights action seeking declaratory and injunctive relief to prevent Eric L. Heryford, the District Attorney of Trinity County, California, from retaining private counsel on a contingency-fee basis to litigate in Heryford's name an action against American Bankers under California's Unfair Competition Law. American Bankers argues that the arrangement violates federal due process principles. We disagree. Heryford's retention of private counsel to pursue civil penalties under state law cannot be meaningfully distinguished from a private relator's pursuit of civil penalties under the qui tam provisions of the False Claim Act, an arrangement that we have already held does not violate due process. We therefore affirm the district court's dismissal of American Bankers' civil rights action against Heryford.

I.

The story of this lawsuit starts with a different lawsuit, one that Heryford filed against American Bankers and several other companies on behalf of the people of California under California's Unfair Competition Law (“the UCL”), Cal. Bus. & Prof. Code § 17200 et seq. That lawsuit was filed by Heryford in Trinity County Superior Court on behalf of “the People of California, by and through the District Attorney for the County of Trinity.” Heryford alleged that the defendants had “engaged in deceptive marketing and sales practices in connection with” services offered to California holders of certain credit cards. For these alleged violations, the complaint sought injunctive relief, restitution, attorney’s fees, and—most relevant here—civil penalties. Although private parties may seek injunctive relief and restitution under the UCL, only a public prosecutor such as Heryford may pursue civil penalties. See California v. IntelliGender, LLC, 771 F.3d 1169, 1174 (9th Cir. 2014); see also Cal. Bus. & Prof. Code §§ 17200 et seq. That lawsuit was filed by Heryford in Trinity County Superior Court on behalf of “the People of California, by and through the District Attorney for the County of Trinity.”

Heryford alleged that the defendants had “engaged in deceptive marketing and sales practices in connection with” services offered to California holders of certain credit cards. For these alleged violations, the complaint sought injunctive relief, restitution, attorney’s fees, and—most relevant here—civil penalties. Although private parties may seek injunctive relief and restitution under the UCL, only a public prosecutor such as Heryford may pursue civil penalties. See California v. IntelliGender, LLC, 771 F.3d 1169, 1174 (9th Cir. 2014); see also Cal. Bus. & Prof. Code §§ 17204, 17206.

Attorneys from the district attorney’s office were not the only counsel listed on the complaint. Attorneys from Baron & Budd, P.C. and Carter Wolden Curtis, LLP were too. Heryford’s office had retained these law firms along with Golomb & Honik, P.C. (collectively, “the Law Firms”) under an agreement designating them as “Special Assistant District Attorneys.” Under the agreement, the Law Firms were charged with “assist[ing] in the investigation, research, filing and prosecution” of the UCL suit against American Bankers and its co-defendants. More specifically, the agreement
required the Law Firms to “provide all legal services that are reasonably necessary for such representation and assistance, including without limitation, the preparation and filing of all claims, pleadings, responses, motions, petitions, memoranda, brief[s], notices and other documents;” and to “conduct negotiations and provide representations at all hearings, depositions, trials, appeals, and other appearances as may be required.” The agreement gave the Law Firms “the authority and responsibility to control and direct the performance and details of” their work.

The agreement also stated, however, that the Law Firms would work “under the direction of the District Attorney,” and that his office did “not relinquish its constitutional or statutory authority or responsibility.” Heryford retained “sole and final authority to initiate and settle” the UCL suit, along with “final authority over all aspects of the litigation.” He also had “a general right to inspect work in progress to determine whether . . . the services [we]re being performed by the Law Firms in compliance with” the agreement.

Heryford retained the Law Firms on a contingency-fee basis. Under the terms of the agreement, the Law Firms would bear “[a]ll reasonable and necessary costs of litigation,” for which they would be reimbursed from any recovery in the action. They were also entitled to thirty percent of any remaining funds. If the UCL suit did not result in a recovery, the Law Firms would neither be reimbursed for their expenses nor compensated for their services. 1 Heryford told the Trinity County Board of Supervisors that this arrangement meant there was “a lot of upside with not a lot of downside for [his] office or the county.” The UCL suit, he contended, was “not going to be additional work for [Heryford’s] staff” because the Law Firms were “going to handle the litigation part of this.” He made similar statements to a local newspaper.

American Bankers filed a civil rights action against Heryford in the United States District Court for the Eastern District of California, challenging the contingency-fee agreement as a violation of its federal due process rights, which is the lawsuit now on appeal before us. 2 Days after that action was filed, Heryford and the Law Firms voluntarily dismissed the UCL suit pending in Trinity County Superior Court, only to refile it the next month in the Eastern District, where it apparently remains pending.

American Bankers alleged that the contingency-fee agreement between Heryford and the Law Firms gave the latter “a direct and substantial financial stake in the imposition of civil penalties and restitution,” which “compromise[d] the integrity and fairness of the prosecutorial motive and the public’s faith in the judicial process.” American Bankers sought a declaration that the arrangement violated due process and an injunction “allowing the UCL Suit to proceed . . . but prohibiting the District Attorney from employing the Law Firms to prosecute the UCL Suit under their existing contingency-fee agreement.”

Heryford moved to dismiss, and American Bankers moved for summary judgment. The district court considered the motions together, granting the former with leave to amend and denying the latter as moot. American Bankers opted not to amend and asked the district court to enter judgment, which it did. This appeal followed.

II.

As a threshold matter, Heryford asks us, under Brillhart v. Excess Insurance Co. of America, 316 U.S. 491 (1942), to exercise our “discretion in determining whether and when to entertain an action under the Declaratory Judgment Act,” Wilton v. Seven Falls Co., 515 U.S. 277, 282 (1995), and to decline to decide this case. In addition to declaratory relief, however, American Bankers seeks injunctive relief that is independent of, but related to, the requested declaratory relief. Brillhart does not apply in such circumstances. See Vasquez v. Rackauckas, 734 F.3d 1025, 1040 (9th Cir. 2013). We therefore exercise the jurisdiction given to us and proceed to the merits, consistent with our “virtually unflagging obligation” to do so. Id. at 1041 (quoting Gilbertson v. Albright, 381 F.3d 965, 982 n.17 (9th Cir. 2004) (en banc)); see also Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

III.

Although civil penalty provisions are common across federal and state enforcement regimes, we are the first circuit to consider whether government officials may, without violating federal due process, retain private counsel on a contingency-fee basis to litigate an action for civil penalties. 3 Despite the lack of federal precedent directly on point, our decision in United States ex rel. Kelly v. Boeing Co., 9 F.3d 743 (9th Cir. 1993), compels us to reject American Bankers’ due process claim.

A.

In Kelly, we rejected a due process challenge to contingent monetary awards for private plaintiffs bringing qui tam actions under the False Claims Act. See 9 F.3d at 759–60. Originally signed into law during the Civil War by President Abraham Lincoln, 4 the False Claims Act exposes those who

1. The Law Firms would be “entitled to reasonable payment for services rendered” if Heryford decided to terminate their representation.
2. In its original complaint, American Bankers alleged that the contingency-fee agreement “violates California’s Government Code” in addition to due process, but it later filed an amended complaint that asserted only a due process violation.
4. For this reason, the False Claims Act has been called Lincoln’s Law. See United States ex rel. Bennett v. Biotronik, Inc., 876 F.3d 1011,
commit fraud against the federal government to treble damages and civil penalties, both of which “are essentially punitive in nature.” Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 768–69, 784 (2000). The statute’s qui tam provisions allow private plaintiffs—often called “relators”—to bring a civil action to recover damages and civil penalties “for the person and for the United States Government,” though any such action is “brought in the name of the Government.” Kelly, 9 F.3d at 745–46 (quoting 31 U.S.C. § 3730(b)(1)). The Government may choose to take over the litigation, 31 U.S.C. § 3730(b)(2), but the relator otherwise “ha[s] the right to conduct the action” alone, id. § 3730(c)(3).

If successful, relators conducting actions themselves generally receive between twenty-five and thirty percent of any recovery in the action. See 31 U.S.C. § 3730(d)(2)–(3). This means that the dollar amount of qui tam relators’ compensation for independently litigating enforcement actions is not fixed by law. Rather, it depends on there being a recovery—and the compensation increases as the damages and civil penalties increase. If there is no recovery, relators come out worse than empty handed because they bear the costs they incurred during the litigation.

The defendant in Kelly argued that this “promise of a reward to relators for successful prosecution create[d] a conflict of interest between a relator’s desire for pecuniary gain and duty as a prosecutor performing ‘government functions’ to seek a just and fair result.” 9 F.3d at 759. We disagreed, explaining that prosecutors “need not be entirely neutral and detached.” Id. (quoting Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980)) (internal quotation marks omitted).

We further explained in Kelly that “the fact that relators sue in the name of the United States does not mean that they wield governmental powers and therefore owe the same type of duty to serve the public interest as government prosecutors.” Id. at 760. Instead, the False Claims Act “effectively assigns the government’s claims to qui tam plaintiffs . . . who then may sue based upon an injury to the federal treasury,” but who otherwise function in court like private civil litigants. Id. at 748, 760. Relators thus “do not have the ‘power to employ the full machinery of the state in scrutinizing any given individual.’” Id. at 760 (quoting Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 814 (1987)). Unlike government prosecutors, they cannot employ “police investigation and interrogation, warrants, immunized informers and agents, authorized wiretapping, civil investigatory demands, [or] enhanced subpoena power.” Id. (quoting Young, 481 U.S. at 811). Rather, they “pursue their claims essentially as private plaintiffs, except that the government may displace a relator as the party with primary authority for prosecuting an action.” Id.

For all these reasons, we held that “qui tam litigation does not implicate due process concerns.” Id.

B.

Kelly controls this case. It is true, as American Bankers argues, that under the contingency-fee agreement with Heryford, the Law Firms have a financial incentive to seek as much in civil penalties as possible. But the same is true of private relators bringing qui tam actions under the False Claims Act. See 31 U.S.C. § 3730(d)(1)–(2). It is also true that the UCL suit was brought “in the name of the people of the State of California,” Cal. Bus. & Prof. Code § 17206(a), so the Law Firms are in a sense appearing as representatives of the public, which might lend credibility to the plaintiff’s position in the eyes of a factfinder. But qui tam actions under the False Claims Act are similarly brought “in the name of the [United States] Government.” 31 U.S.C. § 3730(b). And it is further true that American Bankers faces civil penalties designed to punish and deter. Cal. Bus. & Prof. Code § 17206. But so too do defendants in qui tam actions under the False Claims Act. See Stevens, 529 U.S. at 784–85.

American Bankers contends that this case is nevertheless distinguishable from Kelly because the Law Firms are not acting in the UCL suit “essentially as private plaintiffs,” Kelly, 9 F.3d at 760, as would a relator going it alone under the False Claims Act. American Bankers argues that, as “Special Assistant District Attorneys,” the Law Firms have prosecutorial tools that qui tam plaintiffs lack. But the Law Firms do not have “the power to employ the full machinery of the state,” id. (quoting Young, 481 U.S. at 814), against American Bankers. To the contrary, the contingency-fee agreement makes clear that the Law Firms’ resources, not those of the state, will be brought to bear in the UCL suit. The Law Firms must themselves hire any personnel needed to litigate the UCL suit. They must also front the costs of the litigation.

And although Heryford has prosecutorial powers at his disposal, nothing suggests that the Law Firms may exercise such powers unilaterally. For example, American Bankers maintains that, unlike private litigants, Heryford could use administrative subpoenas under California Government Code § 11181 to gather evidence “[i]n connection with any investigation or action authorized by this article,” which under § 11180(a) includes “[a]ll matters relating to the business activities and subjects under the jurisdiction of the department.” But American Bankers has not alleged that the Law Firms can use Heryford’s administrative subpoena power without Heryford’s participation. Nor have they alleged that there would be any due process concern with Heryford’s issuing an administrative subpoena and then litigating the UCL suit on his own.

7. Moreover, the root of American Bankers’ concern about the administrative subpoena power is that it allows subpoenas to issue before any action is filed. But no subpoenas issued here before the UCL suit

1013 n.1 (9th Cir. 2017).

5. In Kelly, the government did not intervene in the litigation. 9 F.3d at 743.

6. Successful relators also receive reimbursement for expenses, as well as attorney’s fees and costs, which are “awarded against the defendant.” 31 U.S.C. § 3730(d)(2).
American Bankers also maintains that, unlike private litigants, Heryford could authorize wiretapping or other forms of electronic surveillance to obtain evidence in the UCL suit. This argument falls flat too. Federal law would prevent any such effort involving wiretapping. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2521, sets federal limits on wiretapping authorization, and states are not permitted to adopt less restrictive controls. Villa v. Maricopa Cty., 865 F.3d 1224, 1230 (9th Cir. 2017). For example, Title III establishes strict limits on who may apply for a wiretap. In a state proceeding, an application for “interception of wire, oral, or electronic communications” may be submitted to a state court judge only by the “principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State.” 18 U.S.C. § 2516(2). The principal prosecuting attorney must be “personally familiar with all of the facts and circumstances justifying his or her ‘belief that an order should be issued.’” Villa, 865 F.3d at 1234 (quoting 18 U.S.C. § 2518(1)(b)). The principal prosecuting attorney may not merely “state that he or she is generally aware of the criminal investigation, that he or she authorizes a deputy to seek wiretaps, and that his or her deputy has been authorized to review and present to the court the evidence in support of the wiretaps.” Id. Also, federal law allows wiretapping only in criminal investigations, and only in investigations of certain crimes at that. See 18 U.S.C. § 2516; see also, e.g., United States v. Garcia-Villalba, 585 F.3d 1223, 1227 (9th Cir. 2009) (“Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520, allows law enforcement agencies to conduct electronic surveillance of suspected criminal activities.”).

California law of course reflects the restrictions required by federal law, and in some ways it goes further. When it comes to wiretapping, as mandated by federal law California law requires a “specified law enforcement official[,] like a district attorney, to obtain a court order, which will issue only if, among other things, there is ‘probable cause to believe the target was involved’ in a statutorily enumerated crime. People v. Leon, 150 P.3d 207, 210 (Cal. 2007); see also Cal. Penal Code §§ 629.50, 629.52. California law additionally prohibits other forms of “electronic recording and eavesdropping,” unless done “‘in the course of criminal investigations.’” Rattray v. City of National City, 51 F.3d 793, 797 (9th Cir. 1994); see also Cal. Penal Code § 630 (“The Legislature recognizes that law enforcement agencies have a legitimate need to employ modern listening devices and techniques in the investigation of criminal conduct and the apprehension of lawbreakers.”) (emphasis added)). Whereas federal law allows a private person to record conversations surreptitiously if one party to the conversation consents, see 18 U.S.C. § 2511(2)(d), California requires the consent of all parties, unless law enforcement is involved, see Cal. Penal Code §§ 632, 633. In short, federal and California law together ensure that wiretapping or other forms of electronic surveillance will not be used—let alone abused—in the UCL suit at issue here.

In sum, nothing meaningfully distinguishes the Law Firms’ pursuit of civil penalties under the UCL from private relators’ pursuit of civil penalties under the qui tam provisions of the False Claims Act. Indeed, nothing meaningfully distinguishes the situation here from a hypothetical one in which California has amended the UCL to allow private plaintiffs to pursue civil penalties—and Kelly leaves no doubt that California could, consistent with federal due process, do just that. Because Kelly held that the qui tam provisions of the False Claims Act do not offend due process, and because the contingency-fee arrangement here is not meaningfully different from qui tam litigation in terms of the incentives it creates or the powers it confers, we hold that the contingency-fee arrangement at issue here does not offend due process either.

C.

Our conclusion accords with Supreme Court precedent. In Marshall v. Jerrico, Inc., 446 U.S. 238 (1980), the Court observed that prosecutors in an adversary system “are necessarily permitted to be zealous in their enforcement of the law.” Id. at 248. For this reason, the “constitutional interests in accurate finding of facts and application of law, and in preserving a fair and open process for decision, are not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for securing civil penalties.” Id. at 248–49. Thus, the “rigid requirements” against financial incentives recognized in cases such as Tumey v. Ohio, 273 U.S. 510 (1927), and Ward v. Village of Monroeville, 409 U.S. 57 (1972), apply only to public “officials performing judicial or quasi-judicial functions,” not to public officials “acting in a prosecutorial or plaintiff-like capacity.” Marshall, 446 U.S. at 248.

8. It might well be true that, if evidence obtained in a criminal investigation using some form of electronic recording or eavesdropping spawned a parallel civil action, government prosecutors could use such evidence in the parallel civil action. See, e.g., Telish v. Cal. State Pers. Bd., 184 Cal. Rptr. 3d 873, 883 (Ct. App. 2015). But American Bankers has not alleged that anything like that happened in the UCL suit at issue here, let alone that the Law Firms were involved in (or given free rein to conduct) any prior criminal investigation.

9. To the extent one could argue that the contingency-fee agreement between Heryford and the Law Firms thwarted California’s decision not to write the UCL like Congress did the False Claims Act, that state-law question does not affect American Bankers’ federal due process rights, which are the sole bases for the claims at issue here.

10. Heryford argues that because he supervises the Law Firms and maintains ultimate authority over the litigation, and because he is a government attorney with no personal financial stake in the outcome of the litigation, there is not even the potential for a due process problem here. Our holding does not turn on Heryford’s exercise of control, however, because Kelly dictates the result in this case regardless of how much actual day-to-day supervision Heryford exerts.

was filed. The Law Firms were retained to litigate a particular lawsuit that Heryford had already agreed to bring, and they signed the contingency-fee agreement a mere one day before that lawsuit was filed.
Granted, in *Marshall* the Supreme Court cautioned that it was not suggesting “the Due Process Clause imposes no limits on the partisanship of” prosecutors, for they “are also public officials” who “must serve the public interest,” and that a “scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.” *Id.* at 249–50. The Court nevertheless declined to “say with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function” because, on the facts at issue in *Marshall*, “the influence alleged to impose bias [was] exceptionally remote.” *Id.* at 250.

American Bankers argues that, by “giving the Law Firms a sizeable contingent stake in the UCL Suit’s outcome,” the contingency-fee agreement “directly injects the Law Firms’ financial interest into the enforcement process” to an extent that might have concerned the Court in *Marshall*. But the same was true in *Kelly*, where we rejected precisely this argument. We emphasized in *Kelly* that the “contention that the *Marshall* Court ‘strongly suggested’ that the Due Process Clause prohibits civil prosecutions by financially interested prosecutors is exaggerated, and does not support a finding of a due process violation.” *Id.*, 9 F.3d at 759.

*Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), is also of no help to American Bankers. In *Young*, the Supreme Court held that “counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a [criminal] contempt action alleging a violation of that order.” *Id.* at 809. Rather than a financial conflict, the problem in *Young* was that the appointed prosecutor was forced “to serve two masters”: his client on the one hand and a “public responsibility for the attainment of justice” in a criminal proceeding on the other. *Id.* at 814. Moreover, the decision was grounded in the Court’s “supervisory power,” not due process. *Id.*, 481 U.S. at 790. We distinguished *Young* on these same grounds in *Kelly*, dismissing as “misplaced” the argument that *Young* established a due process bar to financial incentives for pursuing civil penalties. See *Kelly*, 9 F.3d at 759–60. The argument is as misplaced now as it was then.

**IV.**

For the foregoing reasons, we **AFFIRM**.
California Courts of Appeal

Cite as 18 C.D.O.S. 2528

THE PEOPLE, Plaintiff and Respondent, v.
CHRISTIAN ALMANZA, Defendant and Appellant.

2d Crim. No. B270903
In The Court of Appeal of the State of California
Second Appellate District
Division Six
(Super. Ct. No. BA425421-02)
(Los Angeles County)
Filed March 15, 2018

COUNSEL
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OPINION

OPINION FOLLOWING ORDER VACATING PRIOR OPINION

When the retroactive application of a statute gives a trial court discretion to reconsider imposing a lower sentence than one previously imposed, it is customary for an appellate court to remand the case to the trial court. But not always.

A jury convicted Christian Almanza of first degree murder (Pen. Code, §§ 187, subd. (a), 189) and assault with a firearm (§ 245, subd. (b)). The jury found gang enhancement allegations true on both counts. (§ 186.22, subd. (b)(1)(C).) On the murder charge, the jury found a principal personally and intentionally discharged a firearm causing death. (§ 12022.53, subd. (d).) The trial court found Almanza suffered two prior strike convictions within the meaning of the three strikes law (§ 667, subs. (a)-(i)) and one prior prison term (§ 667.5, subd. (b)).

The trial court sentenced Almanza to an aggregate term of 137 years to life, including 25 years to life for the firearm enhancement imposed pursuant to section 12022.53, subdivision (d). The court stayed two other firearm enhancements (§ 12022.53, subd. (b) & (c)) pursuant to section 654. We affirmed. (People v. Almanza (Sept. 12, 2017, B270903) [non-pub. opn.].)

On October 11, 2017, the Governor signed Senate Bill No. 620 into law, effective January 1, 2018. The bill amends subdivision (h) of section 12022.53. The amended subdivision provides: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (§ 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, § 2.)

Our Supreme Court granted review and remanded the matter to us with directions to vacate our opinion and reconsider the cause in light of Senate Bill No. 620. (People v. Almanza (Nov. 29, 2017, S244789).)

The People concede that Senate Bill No. 620, as a statute that gives the trial court discretion to impose a lower sentence, applies retroactively. (People v. Francis (1969) 71 Cal.2d 66, 75-76.) The People argue, however, that remand to the trial court is not appropriate under the facts of this case because the record shows the trial court “would not . . . have exercised its discretion to lessen the sentence.” (People v. Gutierrez (1996) 48 Cal.App.4th 1894, 1896.)

The People point out that the trial court could have imposed concurrent sentences for murder and assault with a firearm. Instead, the court imposed consecutive sentences. Thus, the People conclude the court exhibited no desire to be lenient with Almanza.

Almanza argues that it would not be a per se abuse of discretion to strike the firearm enhancements. But the question is not whether it would be a per se abuse of discretion. Instead, the question is whether there is any reasonable probability the trial court would exercise its discretion to strike the enhancements so as to justify remanding the matter.

Almanza cites the concurring opinion of Mosk, J. in People v. Deloza (1998) 18 Cal.4th 585, 601. The concurring opinion states that a sentence of 111 years is shocking and absurd and serves no rational legislative purpose. Justice Mosk recommended the Legislature convert multicitycentury sentences to life or even life without the possibility of parole. (Id. at p. 602.)

Even if the trial court here were to strike all of the firearm enhancements, it would reduce Almanza’s minimum term from 137 years to 112 years. A 137-year minimum term is no more or less absurd than a 112-year minimum term. Justice Mosk makes a cogent point. (People v. Deloza (1998) 18 Cal.4th 585, 600-602.) Nevertheless, Deloza does not hold that century-plus sentences are unconstitutional.

We agree with the People. There is no reasonable probability the trial court would exercise its discretion in favor of Almanza. A jury convicted Almanza of a cold-blooded, premeditated murder committed for the benefit of a criminal street gang. His record includes two prior strikes and a prior prison term. If the trial court were inclined to be lenient, it

1. All statutory references are to the Penal Code.
would have made the sentence for assault concurrent with the sentence for murder. The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

GILBERT, P. J.

We concur: YEGAN, J., TANGEMAN, J.

Cite as 18 C.D.O.S. 2529

THE PEOPLE, Plaintiff and Respondent,

v.

KIM E. JORDAN, Defendant and Appellant.

No. C084592
In The Court of Appeal of the State of California
Third Appellate District
(Sacramento)
(Super. Ct. No. 15F00424)
APPEAL from a judgment of the Superior Court of Sacramento County, Michael G. Bowman, Judge. Affirmed. Filed March 15, 2018

COUNSEL

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Doris A. Calandra, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

This is defendant’s second appeal after he pled no contest to two drug offenses. In his first appeal, he challenged the trial court’s denial of his suppression motion. (See People v. Jordan (July 12, 2017, C083182) [nonpub. opn.].) In this appeal, he challenges the trial court’s imposition of penalty assessments on the criminal laboratory analysis fee and the drug program fee. Because defendant failed to raise these claims in his original appeal, he has waived the right to raise them now. Accordingly, we affirm the trial court’s order denying his motion to correct sentence.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2016, defendant pled no contest to unlawful possession of a controlled substance for sale and unlawful transportation of a controlled substance for sale. In October 2016, the trial court suspended imposition of sentence and placed him on probation for five years with various terms and conditions. The court also imposed various fines and fees, including a criminal laboratory analysis fee plus penalty assessments, and a drug program fee plus penalty assessments. At sentencing, defendant did not object to the imposition of these fees or the penalty assessments attached to them. Defendant filed his original appeal from this entry of judgment.

In February 2017, defendant admitted to violating the terms of his probation by testing positive for methamphetamine on two occasions. The trial court revoked and reinstated probation on the same terms and conditions but added
a 90-day county jail term with a recommendation to the sheriff’s work project program.

On March 20, 2017, defendant filed his opening brief in his original appeal. His sole contention was the trial court erred in denying his suppression motion. (See People v. Jordan, supra, C083182.)

On March 23, 2017, defendant filed a motion to correct sentence in the trial court pursuant to People v. Fares (1993) 16 Cal.App.4th 954 (Fares) and Penal Code section 1237.2. Relying on People v. Watts (2016) 2 Cal.App.5th 223 (Watts), he requested the court strike the penalty assessment imposed on the criminal laboratory analysis fee as unauthorized. After the trial court denied his motion, defendant filed the instant notice of appeal on May 3, 2017. At that time, his original appeal was still pending in this court.

In July 2017, we issued an opinion disposing of defendant’s first appeal. We affirmed the judgment after concluding the trial court did not err in denying defendant’s motion to suppress. (See People v. Jordan, supra, C083182.)

**DISCUSSION**

The People initially contend we must dismiss defendant’s appeal for lack of jurisdiction. We disagree because defendant appealed the denial of his motion to correct sentence, which is an appealable order.

On March 23, 2017, defendant filed a letter pursuant to Fares, alleging the court made a mistake of law by imposing penalty assessments on the criminal laboratory analysis fee. A Fares letter serves to request the court correct minor errors in the sentence. (Fares, supra, 16 Cal.App.4th at pp. 957-958.) “[T]here is no time limitation upon the right to make the motion to correct the sentence . . . . The court’s power to correct its judgment includes corrections required not only by errors of fact (as in the mathematical calculation) but also by errors of law.” (Id. at p. 958.) The denial of a motion to correct sentence is an appealable order because it is a postjudgment order affecting a defendant’s substantial rights. (See § 1237, subd. (b); Fares, supra, 16 Cal.App.4th at p. 957-959 [if the defendant is unable to obtain relief in the trial court, the postjudgment order denying modification of the sentence is an appealable order]; see also Teal v. Superior Court (2014) 60 Cal.4th 595, 600 [“A postjudgment order ‘affecting the substantial rights of the party’ [citation] does not turn on whether that party’s claim is meritorious, but instead on the nature of the claim and the court’s ruling thereto’”].)

Defendant’s motion to correct sentence was denied on April 24 and he filed a notice of appeal from that denial on May 3, 2017 — within the 60 days proscribed by law. (Cal. Rules of Court, rule 8.104.) Thus, we have jurisdiction to hear defendant’s instant appeal; however, we decline to do so because defendant failed to raise his penalty assessment claims in his original appeal, failing to comply with section 1237.2 and resulting in waiver of those claims. Section 1237.2 requires a defendant to first file a motion for correction in the trial court before appealing “the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs.” This section, however, applies only to cases where the issues of “fines, penalty assessments, surcharges, fees, or costs are the sole issue on appeal.” (§ 1237.2) Thus, when a defendant raises at least one other issue on appeal, he or she need not first file a motion in the trial court to correct the imposition or calculation of penalty assessments or fines. Instead, he or she can include those claims with the other contentions raised in the appeal.

In the opening brief in his original appeal, defendant challenged the denial of his suppression motion, an issue that could have accompanied his penalty assessment claims. (See People v. Jordan, supra, C083182.) Thus, under section 1237.2, defendant could have brought these issues together in his original appeal. Instead, defendant went back to the trial court to request correction of his penalty assessments. Now he appeals from the denial of that request and raises the same claims he could have raised alongside his suppression challenge in his original appeal. (See § 1237.2.) Because defendant did not raise the penalty assessment claims in his original appeal, we conclude he cannot raise them now. To fully explain our conclusion, it is necessary to review the history of section 1237.2 and the related statutory provision of section 1237.1.

In Fares, the defendant sought to correct the presentence custody credits the trial court awarded to him through the appellate process. The appellate court was “disturbed that this attempt at a minor correction of a sentence error has required the formal appellate process.” (Fares, supra, 16 Cal.App.4th at p. 957.) After wondering whether there was a better way of going about this sort of corrective jurisprudence than by including it in a formal appeal, especially when it is the only ground of appeal[,]” the court determined that “[t]here is!” (Id. at p. 958.) “The most expeditious and, we contend, the appropriate method of correction of errors of this kind is to move for correction in the trial court.” (Ibid.) In response to Fares, the Legislature enacted section 1237.1, requiring a defendant first request correction of his or her conduct credit award from the trial court before resorting to the appellate process. (People v. Acosta (1996) 48 Cal.App.4th 411, 422 (Acosta).)

After the enactment of section 1237.1, the court in Acosta narrowly construed the language of section 1237.1 to conform to legislative intent and held the statute does not bar a conduct credit claim raised for the first time on appeal if the appeal also raised other issues. (Acosta, supra, 48 Cal. App.4th at pp. 426-427.) The court examined legislative intent to resolve an ambiguity it read in the statute. It concluded that the legislative intent was to “promote judicial economy by avoiding the utilization of the formal appellate process for a minor ministerial act.” (Id. at pp. 422-423.) Based on the

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1. All further section references are to the Penal Code unless otherwise indicated.
legislative history and on Fares, the Acosta court concluded that the Legislature intended only to bar an appeal that raised an issue related solely to the miscalculation of credits, which resulted in the “utilization of the formal appellate process for a minor ministerial act.” (Acosta, at p. 423.)

“When the only issue to be raised on appeal involves a matter such as presentence credits, the Legislature’s determination that the issue should first be presented in the trial court makes sound economic sense” because the expenditure of public funds on preparation of an appellate record and appointment of appellate counsel may be avoided. (Acosta, supra, 48 Cal.App.4th at pp. 426–427.) “However, when there are other issues which are to be litigated on appeal, the economic good sense . . . no longer exists.” (Id. at p. 426.) “[I]f there are other appellate issues such as occurred in the present case, requiring a motion be made in the trial court in order to raise the question on appeal no longer is an economic expenditure of public moneys. Virtually all counsel on appeal are appointed by the court and their fees and costs are funded by the taxpayers. If there is a ministerial error in the calculation of credits as alluded to in Fares, it does not take the taxpayer-funded appointed appellate counsel long to insert that argument in an opening brief along with other contentions. Moreover, it is more cost efficient to have all of the contentions presented in one forum and brief.” (Id. at p. 427.) Thus, Acosta held that a conduct credit issue may be raised on appeal, without first presenting the issue to the trial court, when the conduct credit issue is accompanied by other issues. (Id. at pp. 427–428.)

With this in mind, we now turn to section 1237.2, which took effect January 1, 2016. Section 1237.2, reads nearly identical to section 1237.1, but pertains to penalty assessments and fines, and also includes explicit language codifying the holding of Acosta. (See § 1237.2 “This section only applies in cases where the erroneous imposition or calculation of fines, penalty assessments, surcharges, fees, or costs are the sole issue on appeal”.) Thus, the legislative intent of preserving judicial resources and avoiding appellate review of ministerial acts underpinning section 1237.1, also underpins section 1237.2.

Given this history, we conclude that failure to raise a penalty assessment claim in an appellate brief, which also includes at least one other claim, serves to waive that claim for the purposes of future appeals. Section 1237.2 and the legislative history behind it, mandate that a defendant timely raise his penalty assessment claims to conserve judicial resources and efficiently present claims in a single forum. (Acosta, supra, 48 Cal.App.4th at p. 427.) This means that defendant must either file a motion to correct sentence with the trial court when the sole issue he or she seeks to challenge is one proscribed in section 1237.2, or file an appellate brief including this issue when a defendant seeks to challenge issues in addition to the issues proscribed in section 1237.2. Pursuing an appeal, while also pursuing a motion to correct sentence, accomplishes the opposite goal the Legislature was trying to accomplish by enacting sections 1237.1 and 1237.2.

The doctrine of waiver further supports this point. Waiver precludes successive appeals based on issues ripe for consideration in the prior appeal and not brought in that proceeding. (People v. Rosas (2010) 191 Cal.App.4th 107, 116; People v. Senior (1995) 33 Cal.App.4th 531, 538 (Senior).) In Senior, the defendant raised sentencing issues relating to two counts in a multi-count information in two previous appeals. On both appeals, the appellate court found the claims meritorious and remanded for resentencing. On his third appeal, the defendant raised for the first time issues related to three other counts in the original information, challenging the lower court’s application of section 667.6, subdivision (d) to sentence him consecutively on these counts. (Senior, supra, 33 Cal.App.4th at pp. 533–534.) This time, the appellate panel held the doctrine of waiver barred the “belated claim of error on the ground that defendant had the opportunity to raise this issue in two prior appeals, but failed to do so.” (Id. at p. 534.)

The Senior court explained “that the California rule barring a direct attack upon a conviction after a limited remand is a corollary of the more expansive rule recognized under federal law requiring all available arguments to be raised in the initial appeal from the judgment.” (Senior, supra, 33 Cal.App.4th at p. 535.) Similar rules are “recognized and applied in various state jurisdictions.” (Id. at p. 536.) Also, California law prohibits a defendant from raising contentions in a piecemeal fashion by successive proceedings. When a defendant had an opportunity to challenge his or her sentence in an earlier appeal and failed to do so, he or she may not belatedly raise the same issue in a later appeal or a collateral attack on the judgment, absent good cause. (Id. at pp. 537-538.) These prohibitions are “justified by various policy considerations, including the state’s ‘powerful interest in the finality of its judgments’ [citation], the protection of ‘scarce judicial resources’ [citation], and the recognition that ‘piecemeal litigation prevents the positive values of deterrence, certainty, and public confidence from attaching to the judgment.’ ” (Id. at p. 538.)

The Senior court determined that the policy considerations supporting the waiver rule applied to the facts before it and held “that where a criminal defendant could have raised an issue in a prior appeal, the appellate court need not entertain the issue in a subsequent appeal absent a showing of justification for the delay.” (Senior, supra, 33 Cal.App.4th at p. 538.) This waiver rule applies even if the earlier appeal resulted in a remand for resentencing, provided the defect that the defendant is challenging in the subsequent appeal was also present in the original sentence. However, the court cautioned that this “decision should be narrowly applied only in cases where, as here, (1) the issue was ripe for decision by the appellate court at the time of the previous appeal; (2) there has been no significant change in the underlying facts
or applicable law; and (3) the defendant has offered no reasonable justification for the delay.” (Ibid.)

Defendant argues his penalty assessment claims were not ripe during his original appeal because he was required to first request the trial court strike the assessments pursuant to section 1237.2. Not so. Section 1237.2 only applies to “cases where the erroneous imposition or calculation of fines, penalty assessments, surcharges, fees, or costs are the sole issue on appeal.” (Italics added.) As described, defendant’s penalty assessment challenges would not have been the sole issue in the original appeal. Thus, the issue was ripe at the time defendant filed his original appeal.

Defendant does not contend, nor can he, that there has been a significant change in the facts or law underlying his penalty assessment claims. The only factual change the court made when reinstating probation was the addition of a 90-day county jail term; the imposed fines and penalty assessments remained the same. The law underlying defendant’s claim remained unchanged as well. Defendant’s entire argument that his penalty assessments were erroneously imposed rests on Watts, which was issued in August 2016. Defendant filed his original notice of appeal on October 7, 2016, and did not file his opening brief until March 20, 2017. Defendant was aware of Watts and its holding when he filed his opening brief in his original appeal because he simultaneously returned to the trial court to request it strike the penalty assessments pursuant to that authority.

Neither does defendant provide a justification for failing to raise his penalty assessment challenges in his original appeal. The record clearly establishes that defendant was aware of these issues and wanted them remedied at the time his original appeal was filed and during the time it was pending. Instead of including the claims in his original appeal, defendant expended scarce judicial resources by filing a motion in the trial court and then appealing the denial of that motion. Instead of appealing the denial of the motion, defendant could have properly presented his claims to this court by either requesting leave to file a supplemental brief in his original appeal (Cal. Rules of Court, rule 8.200(a)(4)) or by moving to consolidate his instant appeal with his original (Cal. Rules of Court, rule 8.54). Defendant did neither. The state’s interests in finality of judgments and protection of judicial resources prohibit this type of piecemeal litigation. (See Senior, supra, 33 Cal.App.4th at pp. 537-538.)

Defendant argues he did not waive his penalty assessment claims by failing to raise them in his original appeal because they constitute unauthorized sentences, which we have the power to correct at any time. An “‘unauthorized sentence’ concept constitutes a narrow exception to the general require-

2. Watts, supra, 2 Cal.App.5th at page 237, held that the criminal laboratory analysis fee is a fee on which penalty assessments cannot be imposed. This court disagreed with that holding in People v. Moore (2017) 12 Cal.App.5th 558, 569-570, review granted September 13, 2017, S243387, where we held that the criminal laboratory analysis fee is a fee subject to penalty assessments.
Cite as 18 C.D.O.S. 2533

GEORGE CORLEY, Plaintiff and Respondent, v. SAN BERNARDINO COUNTY FIRE PROTECTION DISTRICT, Defendant and Appellant.

No. D072852
In The Court of Appeal of the State of California Fourth Appellate District Division One (Super. Ct. No. CIVDS1206008) APPEAL from a judgment of the Superior Court of San Bernardino, John M. Pacheco, Judge. Affirmed.
Filed March 15, 2018

CERTIFIED FOR PARTIAL PUBLICATION*

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts III.B, C, and D.

COUNSEL
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OPINION

I. INTRODUCTION

George Corley filed this action against his former employer, the San Bernardino County Fire Protection District (the District).1 The trial court held a jury trial on a single cause of action for age discrimination under the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.).2 The jury rendered a special verdict in which it found that Corley’s age was a substantial motivating reason for the District’s termination of his employment and awarded damages for lost earnings. The trial court subsequently entered a judgment in favor of Corley against the District awarding Corley $597,629 in damages, $853,443 in attorney fees, and $40,733 in costs.

On appeal, the District contends that the trial court erred in denying its request to instruct the jury pursuant to a provision in the Firefighters’ Procedural Bill of Rights (§ 3254, subd. (c)). The District also claims that the trial court erred in instructing the jury that “the use of salary as the basis for differentiating between employees when terminating employment may be a factor used to constitute age discrimination” if the employer’s termination policy adversely affects older workers. The District further maintains that there is insufficient evidence to support the jury’s award of damages based on its implicit finding that Corley would have been promoted but for the District’s discrimination. Finally, the District claims that the trial court abused its discretion in applying a multiplier in awarding Corley statutory attorney fees. In the published portion of the discussion, we interpret section 3254, subdivision (c) and conclude that the trial court did not err in refusing to instruct the jury pursuant to this provision. In unpublished portions of the discussion, we conclude that the District fails to establish any reversible error with respect to its remaining claims. Accordingly, we affirm the judgment.

II. FACTUAL BACKGROUND

1. Corley’s career

In 2003, after a lengthy period of employment as a firefighter with the United States Forest Service, Corley accepted a position with the District as a battalion chief. Corley was promoted to the rank of division chief in 2005. While working for the District, Corley received numerous awards. A former District fire chief testified that Corley was “doing a very good job dealing with the communities” that he served. Corley’s employee file contained no evidence of discipline. In his 2010 performance evaluation, Corley received an “exceeds standards” overall rating.

2. Corley’s termination

In May 2011, the County of San Bernardino’s Chief Executive Officer, Greg Devereaux, appointed Mark Hartwig as Fire Chief for the District. Chief Hartwig terminated Corley’s employment with the District in February 2012. At the time of his discharge, Corley was 58 years old, and was the oldest of the District’s six division chiefs.

3. Evidence of age discrimination related to Corley’s termination

In July 2011, Chief Hartwig and his deputy chief reassigned Corley to a location far from where Corley had worked for his entire career, to a region with a firefighting landscape with which Corley had little experience. Corley presented evidence from which the jury could infer that Chief Hartwig ordered the reassignment to encourage Corley to retire.
Corley also presented extensive evidence that the District’s stated reason for his termination—compatibility of management style—was a pretext for age discrimination. For example, Chief Hartwig testified that among the reasons that led him to conclude that Corley’s management style was incompatible with his own was that Corley failed to prepare a contingency plan that Hartwig had asked all division chiefs to prepare. However, Chief Hartwig acknowledged that he had never asked for, nor received, a completed contingency plan from any of the division chiefs.3

Corley also testified that he did not learn of any of the reasons that Chief Hartwig offered for concluding that Corley lacked a compatible management style until after he was terminated and filed this action. Further, while it had been the practice of the District to use progressive discipline with its employees, Corley did not receive any progressive discipline before being terminated. While Corley’s direct supervisor, former deputy fire chief Dan Odom, testified that he had given Corley verbal warnings to improve his management style, Odom also acknowledged that he had never documented such warnings, as is required. Odom also acknowledged that he had not given Corley any written warnings or placed him on a work performance improvement plan.

Chief Hartwig promoted Donald Trapp to serve as Corley’s replacement. Trapp was 48 years old at the time of his promotion to division chief. Prior to promoting Trapp, Chief Hartwig altered the qualifications for division chief to remove a long-standing District requirement that an applicant for the position have a minimum of two years of battalion chief experience. Trapp could not have become a division chief but for the change because he lacked the necessary battalion chief experience.

Union representative and District firefighter Bret Henry recalled that Chief Hartwig was frustrated that Corley would not retire. When asked whether he had ever heard Trapp say that he “wanted to get rid of older workers,” Henry responded in the affirmative. At Devereaux’s request, Henry prepared a list of chief officers. The list included the names and corresponding ranks of all of the chief officers in the District. Trapp knew of the list and admitted that Corley’s name was on the list. Corley believed that the list was used to target chief officers for termination in order to replace them with younger chief officers.

According to a District employee, Corley’s salary and benefits were $11,372 more than Trapp’s when Trapp replaced him as division chief. In addition to these direct savings that resulted from Corley’s termination, Corley and another former District division chief testified that the District would achieve additional “cascading” savings as lower paid employees were promoted in the wake of Trapp’s promotion to division chief.

III.

DISCUSSION

A. The trial court did not err in denying the District’s request to instruct the jury pursuant to a special instruction modeled on a provision in the Firefighters’ Procedural Bill of Rights

The District claims that the trial court erred in denying its request to instruct the jury pursuant to a special instruction modeled on a provision contained in the Firefighters’ Procedural Bill of Rights (the Act).

We conclude that the trial court properly refused to instruct the jury pursuant to the proffered instruction. As discussed below, the provision of the Act on which the District based its proposed special instruction, section 3254, subdivision (c), pertains only to a jurisdiction’s “fire chief,” and it is undisputed that Corley was never the District’s fire chief.

1. Factual and procedural background

The District filed a written request that the court instruct the jury pursuant to the following special jury instruction:

“A fire chief shall not be removed by a public agency or appointing authority without providing that person with written notice, the reason or reasons for removal, and an opportunity for administrative appeal.

“The removal of a fire chief by a public agency or appointing authority, for the purpose of implementing the goals or policies, or both, of the public agency or appointing authority, or for reasons including, but not limited to, incompatibility of management styles or as a result of a change in administration, shall be sufficient to constitute ‘reason or reasons.’

During a hearing on jury instructions, the District argued that the trial court should provide the instruction because “Chief Corley was provided with all of these rights required by [section 3254, subdivision (c)] as it states in his termination letter . . . and it also shows that he was terminated for the reasons that are expressly permitted in [section 3254, subdivision (c)], specifically change in administration and incompatibility of management style.”

Corley’s counsel objected the instruction on several grounds, including that the provision on which the instruction was based, section 3254, subdivision (c), applies only to the “lead fire chief” of a jurisdiction. The court responded by asking Corley’s counsel whether it would be acceptable for

3. Much of the trial focused on Corley’s performance with respect to numerous matters upon which the District purportedly based its decision to terminate Corley, including: Corley’s skill in managing a budget, Corley’s response to a fire in January 2012, the satisfaction levels of representatives of two communities within the division that Corley managed, Corley’s managerial skills in overseeing battalion chiefs, Corley’s willingness to use “second alarms,” in responding to certain fire incidents, Corley’s response to a malfunctioning communication system, Corley’s approval of payment for certain nonstandard firefighting equipment, and Corley’s conversation with his supervisor about his girlfriend’s potential employment with the District.
the court to provide only the first sentence of the instruction to the jury. Corley’s counsel responded:

“[I]t would not be, your Honor, because again, the first sentence still says a fire chief and everything here in the [Act] regarding fire chief is implying the actual lead fire chief. And it’s not applicable in our case.”

After further discussion during which the court indicated its willingness to provide the first sentence of the proposed instruction if it were modified to refer to a “division chief,” the District’s counsel stated, “Well, I would prefer to not have it at all if it’s just going to be the first paragraph, the first sentence.”

The court responded, “We’ll just take it out.”

2. Governing law

a. Applicable law governing a party’s request for a jury instruction

“A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence. The trial court may not force the litigant to rely on abstract generalities, but must instruct in specific terms that relate the party’s theory to the particular case.” (Soule v. General Motors Corp. (1994) 8 Cal.4th 548, 572 (Soule)) “The trial court is not required to give instructions [that] are not correct statements of the law or are incomplete or misleading [citation].” (Norman v. Life Care Centers of America, Inc. (2003) 107 Cal. App.4th 1233, 1242.)

b. Relevant principles of statutory interpretation

In Yohner v. California Dept. of Justice (2015) 237 Cal. App.4th 1, 7 (Yohner), this court restated the following well-established rules of statutory interpretation:

‘ ‘ ‘In construing any statute, ‘well-established rules of statutory construction require us to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law.’ [Citation.] ‘We first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent. [Citation.] The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context.’ [Citation.] If the statutory language is unambiguous, ‘we presume the Legislature meant what it said, and the plain meaning of the statute governs.’ [Citation.]’”

‘ ‘ ‘If, however, the statutory language is ambiguous or reasonably susceptible to more than one interpretation, we will ‘examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes,’ and we can ‘look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.’ ‘ ‘ [Citation.]’”

‘ ‘ ‘We must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.’ ‘ ‘ ‘

c. The Act

1. The text of the Act

In 2007, the Legislature adopted the Act. (§ 3250 et seq.; see Stats. 2007, ch. 591, § 2 (A.B. 220).) The Act “provides firefighters with certain rights concerning their employment.” (Poole v. Orange County Fire Authority (2015) 61 Cal.4th 1378, 1384.) Section 3254 contains various restrictions on the taking of certain punitive actions against firefighters. Section 3254, subdivisions (a), (b), (d), (f), and (g), all expressly pertain to “firefighter[s].”

Section 3254, subdivision (c), the statute on which the District based its special instruction, pertains to a “fire chief.” Section 3254, subdivision (c) provides:

“(c) A fire chief shall not be removed by a public agency or appointing authority without providing that person with written notice, the reason or reasons for removal, and an opportunity for administrative appeal.

“For purposes of this subdivision, the removal of a fire chief by a public agency or appointing authority, for the purpose of implementing the goals or policies, or both, of the public agency or appointing authority, or for reasons including, but not limited to, incompatibility of management styles or as a result of a change in administration, shall be sufficient to constitute ‘reason or reasons.’

“Nothing in this subdivision shall be construed to create a property interest, if one does not otherwise exist by rule or law, in the job of fire chief.” (Italics added.)

Section 3251 of the Act contains a list of definitions and provides in relevant part:

“(a) ‘Firefighter’ means any firefighter employed by a public agency, including, but not limited to, any firefighter who is a paramedic or emergency medical technician, irrespective of rank. However, ‘firefighter’ does
The Act does not define the term “fire chief.”

2. Relevant legislative history of the Act


d. POBOR

1. The text of section 3304, subdivision (c) of the POBOR

Section 3304, subdivision (c) of the POBOR is nearly identical to section 3254, subdivision (c) of the Act. Section 3304, subdivision (c) provides:

“No chief of police may be removed by a public agency, or appointing authority, without providing the chief of police with written notice and the reason or reasons therefor and an opportunity for administrative appeal.

“For purposes of this subdivision, the removal of a chief of police by a public agency or appointing authority, for the purpose of implementing the goals or policies, or both, of the public agency or appointing authority, for reasons including, but not limited to, incompatibility of management styles or as a result of a change in administration, shall be sufficient to constitute ‘reason or reasons.’

“Nothing in this subdivision shall be construed to create a property interest, where one does not exist by rule or law, in the job of Chief of Police.”

2. The legislative history of section 3304, subdivision (c)

In Robinson v. City of Chowchilla (2011) 202 Cal.App.4th 368 (Robinson), the Court of Appeal reviewed the legislative history of section 3304, subdivision (c) as follows:

“‘According to the bill’s sponsor, “Senate Bill 2215 is a very simple bill. It provides that the Chief of Police may not be disciplined without just cause. Historically, Cali-

5. In its brief in support of a motion for new trial, the District argued that it did “not matter” whether section 3254, subdivision (c) applies solely to a jurisdiction’s lead fire chief. In support of this argument, the District contended that its proffered special instruction should have been provided in order to refute Corley’s evidence of pretext, even if the statute did not actually apply to a division chief such as Corley. The District did not raise this argument on appeal, and we therefore express no opinion on the issue.
as one might expect if the statute were meant to apply to any position with the word “chief” in it. Further, the final sentence of section 3254, subdivision (c) strongly suggests that the term “fire chief” refers to a single position, namely the “job of fire chief” of a jurisdiction. (See id., subd. (c) [“Nothing in this subdivision shall be construed to create a property interest, if one does not otherwise exist by rule or law, in the job of fire chief” (italics added)].)

As discussed above, the text and legislative history of the Act unequivocally demonstrate that the Act was modeled on the POBOR. Further, the text of section 3254, subdivision (c) of the Act and section 3304, subdivision (c) of the POBOR make clear that the former was modeled on the latter. The legislative history of section 3304, subdivision (c) in turn demonstrates that that statute was enacted to apply solely to a jurisdiction’s “Chief of Police.” (§ 3304, subd. (c); see Robinson, supra, 202 Cal.App.4th at pp. 379–380 [reviewing the legislative history of section 3304, subdivision (c) and noting that it was passed to protect “a Chief of Police, who has reached the apex of his or her law enforcement career”].)

Accordingly, interpreting section 3254, subdivision (c) as similarly pertaining solely to a jurisdiction’s “fire chief,” harmonizes the meaning of these two closely related statutes. (See Yohner, supra, 237 Cal.App.4th at p. 8 [in interpreting a statute a court is to “examine the context in which the language appears, adopting the construction that best harmonizes the statute . . . with related statutes’ “].)

The District’s sole statutory interpretation argument to the contrary is unconvincing.6 The District notes that the word, “a” is an indefinite article that signals a generic reference, while the word, “the” is a definite article that refers to a specific person. The District further notes that section 3254, subdivision (c) refers to “‘a fire chief,’ “ (italics added) and contends, “If the Legislature had meant to refer only to the head of a fire protection agency, it would have done so by using the definite article rather than the indefinite one.” However, the statute’s use of the indefinite article in referring to “a fire chief” (id., subd. (c)), may reasonably be interpreted to reflect an intent to have the provision apply generically to all fire chiefs in the state (i.e., the heads of each jurisdiction’s fire protection agency). Thus, the Legislature’s use of the indefinite article “a,” does not demonstrate its intent for section 3254, subdivision (c) to apply to persons other than a jurisdiction’s fire chief.

Accordingly, we conclude that the trial court did not err in refusing to instruct the jury pursuant to the District’s proffered special instruction premised on section 3254, subdivision (c).7

6. The District offered the statutory interpretation argument discussed in the text in its reply brief. In its opening brief, the District did not provide any argument in support of its contention that section 3254, subdivision (c) applies to a division chief such as Corley.

7. In light of our conclusion, we need not consider Corley’s argument that the trial court did not err in refusing to provide the special instruction because the instruction was “redundant and unnecessary.” In support of this contention, Corley notes that the trial court provided a “business judgment” instruction to the jury that stated in relevant part, “[A]n employer may discharge an employee for no reason, or for a good, bad, mistaken, unwise, or even unfair reason, as long as its action is not for a discriminatory reason.” Nor need we consider whether any error in failing to instruct the jury pursuant to the District’s special instruction was harmless given that the trial court provided a business judgment instruction to the jury.
Cite as 18 C.D.O.S. 2538

DON’T CELL OUR PARKS, Plaintiff and Appellant,
v.
CITY OF SAN DIEGO, Defendant and Respondent;
VERIZON WIRELESS, Real Party in Interest and Respondent.

No. D071863
In The Court of Appeal of the State of California
Fourth Appellate District
Division One
APPEAL from a judgment of the Superior Court of San Diego County, Judith F. Hayes, Judge. Affirmed.
Filed March 15, 2018

COUNSEL

Law Office of Craig A. Sherman and Craig A. Sherman for Plaintiff and Appellant.

Jan I. Goldsmith and Mara W. Elliott, City Attorneys, and Glenn T. Spitzer, Deputy City Attorney, for Defendant and Respondent City of San Diego.


OPINION

San Diego City Charter section 55 (Charter 55) provides that real property formally dedicated in perpetuity “for park, recreation or cemetery purposes shall not be used for any but park, recreation or cemetery purposes without such changed use or purpose having been first authorized or later ratified by a vote of two-thirds of the qualified electors of the City [of San Diego] voting at an election for such purpose.”

Verizon Wireless (Verizon) obtained approval from the City of San Diego (the City, together respondents) to construct a wireless telecommunications facility (WCF, the Project) in Ridgewood Neighborhood Park (the Park), a dedicated park. Don’t Cell Our Parks (DCOP), a not-for-profit entity, filed a petition for writ of mandate challenging the City’s determination. The trial court denied the petition, concluding that under Charter 55 the City had control and management of dedicated parks and the discretion to determine whether a particular park use would change the use or purpose of the Park and thus require a public vote. We conclude that the Project does not constitute a changed use or purpose that required voter approval. DCOP also asserts that the Project does not qualify under the California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.) for a categorical exemption under CEQA Guidelines section 15303 which pertains to the construction of new small facilities. We reject this argument. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 2000 the City adopted San Diego Ordinance No. 18771 (Ordinance No. 18771) which dedicated the Park in perpetuity for park and recreational purposes in accordance with Charter 55 and City Council Policy 700-17. Ordinance No. 18771 states that under Charter 55 the Park “shall not be used for any but park and recreation purposes without a changed use or purpose being authorized by a two-thirds vote of the people.” Ordinance No. 18771 provided an exception where-by the City “reserve[d] the right to establish underground public service easements through and across [the Park] so long as the construction and maintenance of the subject easements [did] not substantially negatively impact the availability of the property for use for park and recreational purposes.”

The Park is located in a residential zone in the community of Rancho Peñasquitos and adjacent to the Los Peñasquitos Canyon Preserve (the Preserve) to the south. In June 2014 Verizon filed an application with the City to build a WCF on the outskirts of the Park. The Project consists of a 35-foot-tall mono-eucalyptus and a 220-square-foot equipment enclosure with a trellis roof and a chain link lid.

A Verizon engineer explained that deficiencies exist in its wireless services in the area around the Park, including frequent connection drops and unreliable network access. Additionally, these poor coverage conditions “use up more time and spectrum resources in order to try and deliver the user content reliably. This uses up the limited physical resources quickly and can deprive other users connected to the site from gaining access to those resources impacting user experience for all customers in the area.” Color maps show that wireless communication coverage in the Park and surrounding areas is poor, but would be excellent after installation of the Project.

Before identifying the Park as the proposed Project site, Verizon provided a search ring outlining the area where a WCF needed to be located to meet coverage objectives. Verizon explained that the surrounding topography and limited locations to place a WCF made the area difficult to serve. Verizon concluded that properties located outside the search ring were not feasible and that the Park was the only property within the intended coverage area that was not an open space preserve or developed with single family residences. Additionally, under City location guidelines, the Park was a preferred location over surrounding properties. The Verizon engineer concluded that “[n]eighboring sites and projects [could not] provide adequate coverage due to terrain challenges in the area.”

1. All references to the “Guidelines” are to title 14 of the California Code of Regulations section 15000 et seq.
In February 2015\(^2\) the Rancho Peñasquitos Community Planning Board voted 11-7 to approve the Project. In April the City determined that the Project on the periphery of the developed Park qualified for an exemption from CEQA. DCOP appealed the CEQA exemption determination. In June, after a public hearing, the city council denied DCOP’s appeal, unanimously determining that the Project was exempt from environmental review under CEQA. In August a City hearing officer, after a public hearing, approved development and use permits for the Project. DCOP appealed the hearing officer’s decision and initiated this action. In October the City Planning Commission (Commission), after public hearing, unanimously approved the permits.

In November DCOP filed its operative first amended complaint requesting declaratory and injunctive relief, and a writ of mandamus. DCOP argued that placing a WCF in the Park was not a permissible park or recreational use under the plain language of Charter 55. DCOP sought to overturn a hearing officer’s decision approving the development and use permits for the Project. DCOP also asserted that the Project did not qualify under CEQA for a categorical exemption under Guidelines section 15303 which pertains to the construction of new small facilities. Accordingly, DCOP also sought to overturn the City’s resolution determining that the Project was exempt from CEQA.

The parties agreed that all claims were primarily legal and would be tried on the papers based on the administrative record. The court subsequently issued a tentative ruling in favor of respondents. After hearing argument, the court took the matter under submission and later issued a minute order and written decision in favor of respondents. After input from the parties, the court issued a final statement of decision.

In its statement of decision, the trial court stated that the Project entailed placing an unmanned cell tower disguised as a 35-foot-high faux eucalyptus tree and a 250-square-foot landscaped equipment structure on the outskirts of the 8.53 acre Park. The faux tree would be installed in an existing stand of tall trees, two of which are about 55 feet high. The court noted that the administrative record contained evidence showing that the Project would fill a substantial gap in Veri-zon’s cell service so that area customers will have improved cell service capabilities and 911 service, including within the Park and the nearby Preserve area, and that no feasible alternative locations for the Project existed. The City submitted evidence that it currently has 37 active leases for telecommunications facilities in dedicated parks within the City. After declining to reach the issue whether DCOP exhausted its administrative remedies, the trial court concluded that the Project would not cause significant environmental effects and that no unusual circumstances established an exception to the CEQA exemption.

DCOP timely appealed from the judgment in favor of respondents. While this appeal was pending, we sent a letter to counsel asking the City to provide any materials relevant to ascertaining the intent of the voters when enacting Charter 55 in 1931, and all subsequent amendments thereto. We also asked the parties to assume that we reject the interpretation of Charter 55 tendered by respondents and overturn approval of the Project. Based on this assumption the parties were requested to submit supplemental letter briefs addressing what impact, if any, this decision had on (1) similar projects that have been constructed after obtaining City approval and (2) DCOP’s CEQA arguments. We received and considered those submissions.\(^3\)

**DISCUSSION**

**I. CHARTER 55 DOES NOT PROHIBIT CONSTRUCTION OF THE PROJECT WITHIN THE PARK**

**A. Charter 55**

The current version of Charter 55, entitled “Park and Recreation,” provides in relevant part:

“The City Manager[\(^4\)] shall have the control and management of parks, parkways, plazas, beaches, cemeteries, street trees, landscaping of City-owned property, golf courses, playgrounds, recreation centers, recreation camps and recreation activities held on any City playgrounds, parks, beaches and piers, which may be owned, controlled or operated by the City. The City Council shall by ordinance adopt regulations for the proper use and protection of said park property, cemeteries, playgrounds and recreation facilities, and provide penalties for violations thereof. The Manager is charged with the enforcement of such regulations.

“All real property owned in fee by the City heretofore or hereafter formally dedicated in perpetuity by ordinance of the Council or by statute of the State Legislature for park, recreation or cemetery purposes shall not be used for any but park, recreation or cemetery purposes without such changed use or purpose having been first authorized or later ratified by a vote of two-thirds of the qualified electors of the City voting at an election for

\(^2\) All further unspecified date references are to 2015.

\(^3\) DCOP objected to the City’s supplemental brief noting that many of the WCF structures mentioned in the brief are not similar to the Project, that the brief contains speculative arguments, and arguments about structures that are not related to telecommunications. DCOP also objected to five exhibits attached to the City’s supplemental letter brief as not authenticated and incomplete. DCOP’s objection to exhibit No.’s 1-5 attached to the City’s supplemental letter brief is sustained.

\(^4\) In 2004 the citizens of San Diego added article XV to the Charter, adopting a strong mayor form of governance. (San Diego City Charter, art. XV, § 250.) Article XV transferred all executive authority, power and responsibilities conferred upon the city manager to the mayor. (Id. at § 260.) We take judicial notice of San Diego City Charter article XV, attached to the respondents’ brief at exhibit A. (Evid. Code, § 451, subd. (a); Cal. Rules of Court, rule 8.204(d).)
such purpose. However, real property which has been heretofore or which may hereafter be set aside without the formality of an ordinance or statute dedicating such lands for park, recreation or cemetery purposes may be used for any public purpose deemed necessary by the Council.

“Whenever the City Manager recommends it, and the City Council finds that the public interest demands it, the City Council may, without a vote of the people, authorize the opening and maintenance of streets and highways over, through and across City fee-owned land which has heretofore or hereafter been formally dedicated in perpetuity by ordinance or statute for park, recreation and cemetery purposes.” (Italics & boldface added.)

The voters enacted Charter 55 in April 1931 and it has been amended four times until enactment of the current version in December 1975. When enacted, and through each subsequent amendment, the italicized language ante has not materially changed. In 1953 the voters amended Charter 55 to add the bolded language ante and the paragraph pertaining to streets and highways through dedicated parks.

B. Statement of Decision and the Parties’ Contentions

DCOP requested a declaratory judgment and injunctive relief that San Diego Municipal Code (SDMC) section 141.0420, subdivisions (d)(4) and (i) are void because they impermissibly conflict with Charter 55 by allowing the installation of WCF’s in dedicated City parkland without the consent of two-thirds of the voters as required by Charter 55. The trial court denied DCOP’s requests, concluding that Charter 55 allowed the City to adopt regulations to manage City parks and enact ordinances not in conflict with Charter 55, such as the instant Project. In reaching this conclusion, the court determined that the express terms of Charter 55 gave the city manager and city council control and management of City parks, including adopting regulations for the use and protection of park property.

The court concluded that the Project would not interfere with or detract from park uses in the Park and was consistent with Charter 55. In reaching this conclusion, the court noted a “significant history of legal opinions and policies” applying the City’s interpretation of Charter 55 in allowing WCF’s in dedicated parks as long as the WCF did not detract from park uses or interfere with park purposes. The court gave “great weight and respect to the City’s interpretation” of Charter 55, noting that the City’s interpretation had not been challenged for many years and many transactions occurred in reliance on the City’s interpretation.

DCOP contends the trial court erred because Charter 55 unambiguously restricts the use of dedicated parks to only park, recreation, and cemetery uses. DCOP argues that the trial court erred by accepting the City’s interpretation and policies that conflict with the unambiguous and plain language use restrictions of Charter 55. DCOP asserts the court also erred by failing to determine the intent of the voters who enacted Charter 55 in 1931 and by relying on the City’s management authority set forth in the first paragraph of Charter 55 without addressing the use restrictions in the second paragraph of Charter 55. Assuming arguendo that statutory construction is necessary to reconcile or harmonize conflicting provisions of Charter 55, DCOP asserts any interpretation should not obviate specific and express provisions restricting land use in dedicated parks.

We start with general legal principles governing our review. We then interpret Charter 55.

C. General Legal Principles

The charter is “the supreme law of the City, subject only to conflicting provisions in the federal and state Constitutions and to preemptive state law.” (Domar Electric, Inc. v. City of Los Angeles (1994) 9 Cal.4th 161, 170 (Domar).) By adopting a charter, the City accepted the privilege of autonomous rule and “has all powers over municipal affairs, otherwise lawfully exercised, subject only to the clear and explicit limitations and restrictions contained in the charter.” (Id. at p. 171.)

The principles of construction that apply to statutes also apply to the interpretation of charter provisions. (Arntz v. Superior Court (2010) 187 Cal.App.4th 1082, 1092, fn. 5.) “In construing a provision adopted by the voters our task is to ascertain the intent of the voters.” (International Federation of Professional & Technical Engineers v. City and County of San Francisco (1999) 76 Cal.App.4th 213, 224 (International Federation).) “We look first to the language of the charter, giving effect to its plain meaning. [Citation.] Where the words of the charter are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the charter or from its legislative history.” (Domar, supra, 9 Cal.4th at p. 172.) “An interpretation that renders related provisions nugatory must be avoided . . . . [and] each sentence must be read . . . . in the light of the [charter’s overall] scheme . . . .” (International Federation, at p. 225.) “When statutory language is susceptible of more than one reasonable interpretation, courts should consider a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history including ballot.
pamphlets, public policy, contemporaneous administrative construction and the overall statutory scheme.” (Ibid.)

A “charter city may not act in conflict with its charter” (Domar, supra, 9 Cal.4th at p. 171) and “[a]ny act that is violative of or not in compliance with the charter is void.” (Ibid.) Construing a city charter is a legal issue we review de novo. (United Assn. of Journeymen v. City and County of San Francisco (1995) 32 Cal.App.4th 751, 759, fn. 6.) Nonetheless, “[a]dministrative interpretations [of City Charter provisions] of longstanding are entitled to great weight unless they are plainly wrong.” (Baird v. City of Los Angeles (1975) 54 Cal. App.3d 120, 123.) In reviewing an agency’s interpretation of law we exercise our “ ‘independent judgment . . . , giving deference to the determination of the agency appropriate to the circumstances of the agency action.’ “ (Yamaha Corp. of America v. State Bd. of Equalization (1998) 19 Cal.4th 1, 8 (Yamaha); see Stolman v. City of Los Angeles (2003) 114 Cal.App.4th 916, 928 (applying Yamaha in reviewing administrator’s interpretation of city charter and municipal code).) “[E]vidence that the agency ‘has consistently maintained the interpretation in question, especially if [it] is longstanding’ [citation], and indications that the agency’s interpretation was contemporaneous with legislative enactment of the statute being interpreted,” warrant increased deference. (Yamaha, at p. 13.) Finally, “ ‘we apply the substantial evidence test to the trial court’s factual findings.’ “ (Fry v. City of Los Angeles (2016) 245 Cal.App.4th 539, 549.)

D. Interpreting Charter 55

The parties differ as to the degree of deference, if any, owed to the City’s interpretation of Charter 55. As we shall discuss, the intent of the voters can be ascertained from the plain language of Charter 55, rendering it unnecessary for us to consider extrinsic aids or the City’s interpretation. (International Federation, supra, 76 Cal.App.4th at p. 225.) We start our analysis with the language of Charter 55, giving effect to its plain meaning. (Domar, supra, 9 Cal.4th at pp. 171-172.) The meaning of Charter 55 “may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible.” (Lungren v. Deukmejian (1988) 45 Cal.3d 727, 735.) Charter 55 must also “be given a reasonable and commonsense interpretation [that] ‘when applied, will result in wise policy rather than mischief or absurdity.’ “ (Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379, 1392.)

Here, the trial court agreed with respondents’ arguments that the City had the discretion to determine whether a particular park use would change the use or purpose of a park. Our review of Charter 55 supports this conclusion.

The first paragraph of Charter 55 gives the city manager “control and management of parks” and “recreation activities held on . . . parks.” It also allows the city council “by ordinance [to] adopt regulations for the proper use and protection of said park property.” In turn, the second paragraph of Charter 55 restricts the City’s control and management authority by providing that dedicated parks “shall not be used for any but park, recreation or cemetery purposes without such changed use or purpose having been first authorized or later ratified by a vote of two-thirds of the qualified electors of the City voting at an election for such purpose.”

The plain language of Charter 55 provides that any “changed use or purpose” to a dedicated park requires voter approval. Whether an addition to a dedicated park constitutes a “changed use” necessarily falls within the City’s control and management authority. This interpretation does not result in an absurdity and makes sense from a governance standpoint. Dedicated parks may often start as bare pieces of land. The City is then charged with exercising its management and control authority to determine whether a proposed addition to a dedicated park would change its use or purpose and thus require voter approval.

The 1953 amendment to Charter 55 also supports the conclusion that only a “changed use or purpose” to a dedicated park requires voter approval. When the voters enacted Charter 55 in 1931 the changed use restriction was not limited to “dedicated parks.” Rather, it broadly applied to all real property “designated or set aside for park, recreation or cemetery purposes.” By amendment in 1953 city voters relaxed the changed use restriction by limiting its application to parks “formally dedicated in perpetuity by ordinance” for park, recreation or cemetery purposes. The 1953 amendment highlighted the distinction between “designated” and “dedicated” parks by expressly providing that “real property which has been heretofore or which may hereafter be set aside without the formality of an ordinance or statute dedicating such lands for park, recreation or cemetery purposes may be used for . . .

5. We requested that the City provide any materials relevant to ascertaining the intent of the voters when enacting Charter 55 in 1931 and all subsequent amendments thereto. The City provided three volumes of materials, including: (1) the original Charter, (2) city clerk documents reflecting all the Charter section revisions, (3) all the ballot materials in the city clerk’s custody regarding amendments to Charter 55, and (4) publicly available city attorney documents interpreting Charter 55. DCOP objected to some of the material submitted by the City as beyond the scope of our request. Namely, DCOP objected to the City’s submission of: (1) another copy of Charter 55 (Tab 2); (2) a city clerk report dated January 8 regarding the history of updates to the Charter since 1931 (Tab 5); and legal memoranda by the city attorney addressing Charter 55 (Tabs 13-55). As to this latter category of materials counsel for DCOP states in a declaration that the City omitted at least eight city attorney memoranda regarding Charter 55 that were not favorable to respondents’ interpretation. DCOP’s objections to Tabs 2, 5, 13-55 are sustained as these materials are not relevant to ascertaining voter intent. (Hill v. National Collegiate Athletic Assn. (1994) 7 Cal.4th 1, 16 [Indicia of voter intent “ ‘include the analysis and arguments contained in the official ballot pamphlet.’ “].) Because we do not consider the City’s legal memoranda, we do not comment on DCOP’s claim that the City selectively omitted material from its submission.

6. For ease of reference, we refer to this provision requiring voter approval for a changed use or purpose to a dedicated park as the “changed use restriction.”
any public purpose deemed necessary by the Council.” (Italics added.)

This distinction between designated parks and dedicated parks remains in effect under the current version of Charter 55. Thus, Charter 55 granted the City authority to use designated parks “for any public purpose” it deemed necessary, without requiring voter approval for a changed use. The City does not have the same authority over dedicated parks. Rather, the plain language of Charter 55 provides that the use and purpose of dedicated parks cannot be changed without voter approval. In other words, the City is free to use designated parks for any public purpose deemed necessary by the city council, but it does not have this authority for dedicated parks. Rather, voter approval is necessary if a project changes the use or purpose of a dedicated park.

DCOP cites Mulvey v. Wangenheim (1913) 23 Cal.App. 268 (Mulvey) and Hall v. Fairchild-Gilmore-Wilton Co. (1924) 66 Cal.App. 615 (Hall) for the proposition that diversion of any portion of a dedicated park for nonpark use or nonrecreation is improper under Charter 55. Mulvey addressed a proposed road through a dedicated park that would have blocked ingress and egress to the park from two streets. (Mulvey, at pp. 268, 270.) Hall addressed a proposed road that would have taken over 60 percent of a dedicated park. (Hall, at pp. 619, 620.) Both cases were decided before enactment of Charter 55 in 1931 and pertain to earlier versions of the City Charter. (Mulvey, at p. 268; Hall, at p. 620.)

After its enactment in 1931, Charter 55 was amended in 1941 to allow the people, by a two-thirds vote, to modify the law “so as to designate boulevards, streets and highways in the parks and parkways as part of the public street and road system of the City and give to the Manager supervision over the construction, repair and maintenance thereof.” In 1953 voters amended Charter 55 to provide: “Whenever the City Manager recommends it, and the City Council finds that the public interest demands it, the City Council may, without a vote of the people, authorize the opening and maintenance of streets and highways over, through and across City fee-owned land which has heretofore or hereafter been formally dedicated in perpetuity by ordinance or statute for park, recreation and cemetery purposes.” Thus, the 1953 amendment to Charter 55 allowed the City to open streets through dedicated parks without a public vote, authority the City lacked when Mulvey and Hall were decided.

Having decided that voter approval is necessary only if a project changes the use or purpose of a dedicated park, we turn to the record to examine whether it supports a conclusion that the Project does not change the use or purpose of the Park. If the record supports the City’s conclusion that the Project does not change the use or purpose of the Park, the Project can be built without approval by two-thirds of qualified voters.

As relevant here, a “park” is defined as “an area of land, usually in a largely natural state, for the enjoyment of the public, having facilities for rest and recreation, often owned, set apart, and managed by a city, state, or nation.” (Random House Unabridged Dict. (2d ed. 1993) p. 1411.) “Recreation” is defined as “a pastime, diversion, exercise, or other resource affording relaxation and enjoyment.” (Id. at p. 1613.)

The Park is 8.53 acres in size, consisting of a large grass area bounded by a cement path, with two basketball courts surrounded by a 12-foot-high fence, circuit training equipment stations, a play structure, and picnic tables outside the cement path. The total footprint of the Project is 534 square feet or 0.14 percent of the total ground area of the Park. The Project will require relocating one piece of exercise equipment about 100 feet north of its current location. The 35-foot high faux tree will be installed in an existing stand of tall trees of varying heights, two of which are at least 50 feet high. An 11-foot by 20-foot concrete masonry unit (the unit) will contain equipment required for the Project. The unit will be located northeast of the faux tree and set back about 15 feet from the edge of the Park’s sidewalk path. The unit will have a stucco finish, be painted a tan/sandstone color, and be surrounded by native shrubs. This evidence supports the City’s determination that the Project will not change the use or purpose of the Park.

Moreover, the evidence in the record also supports a conclusion that the Project is consistent with park or recreation purposes as it will clearly benefit park visitors by providing enhanced wireless communication coverage. There is evidence in the record that, as of 2011, 70 percent of 911 calls originate from cellular telephones and that this percentage will continue to increase. At a Rancho Peñasquitos Planning Board Meeting, the president of the basketball association noted that not having cellular telephone service was an issue for coaches who practice at the Park if an emergency arises. Additionally, cellular telephone use is ubiquitous and growing. A FCC report noted that consumers are increasing their reliance on mobile broadband services and that the “volume of data crossing North American mobile networks will grow almost eight-fold [sic] between 2013 and 2018.” The Project changes “poor” coverage in the Park to “excellent” coverage, a fact DCOP does not dispute. This constitutes more than an incidental benefit to Park users and undoubtedly enhances the enjoyment of the Park for those Park visitors who use their wireless communication devices to read books, watch movies, listen to music or play games.

As additional support for the trial court’s order, respondents cite Harter v. San Jose (1904) 141 Cal. 659 (Harter), Slavich v. Hamilton (1927) 201 Cal. 299 (Slavich) and City and County of S. F. v. Linares (1940) 16 Cal.2d 441 (Linares) for the proposition that nonpark uses in dedicated parks will be upheld, despite restrictive charter language, provided that the nonpark uses do not interfere with, change, or impair park purposes. DCOP asserts that these cases do not alter the limitations in Charter 55 prohibiting nonpark or nonrecreation uses.

While not necessary to the resolution of this appeal, we briefly address these cases. Harter, Slavich and Linares per-
taint to the proposed construction of, within dedicated parks or land devoted to park use, a hotel, memorial building, and subsurface public parking garage. (Harter, supra, 141 Cal. at p. 660 [hotel]; Slavich, supra, 201 Cal. at p. 302 [memorial building]; Linares, supra, 16 Cal.2d at pp. 442, 443 [subsurface parking garage].) In Harter and Linares the respective city charters specifically allowed for the construction of the proposed hotel and subsurface parking garage if the respective projects did not interfere with use of the land as a public park. (Harter, at pp. 660-661; Linares, at p. 443; see also Humphreys v. San Francisco (1928) 92 Cal.App. 69, 71-72, 73, 77 [city charter allowed construction of proposed tunnel on, under or over any city land].) Similarly, in Slavich the city charter allowed for the construction of buildings and structures for park purposes, with the court noting that it has been long recognized that the proposed memorial building was a use consistent with park purposes. (Slavich, at pp. 307, 308-309.)

In summary, existing case law instructs that courts must first address the specific city charter or any language dedicating the park to determine whether a proposed use is permissible. If the proposed use is permissible, courts then address whether the proposed use would disrupt or interfere with park purposes. Here, Charter 55 provides that any changed use of a dedicated park must be approved or ratified by the voters. As we discussed, the record amply supports a conclusion that the Project does not change the Park’s use or purpose. Because the proposed use is permissible, we address whether the Project would disrupt or interfere with park or recreation uses or purposes.

Adopted in 1962, and last amended in 1999, City Council Policy 700-06 addresses encroachments on City property and establishes guidelines to evaluate requested encroachments including “telecommunication facilities on parkland and open space.” Policy 700-06 provides: “Dedicated or Designated Parkland and Open Space: The City may grant authorization for encroachment on dedicated or designated parkland and open space if it is determined by the responsible department that the requested action would not only meet criteria for General City property as stated above, but would also be consistent with City Charter Section 55; i.e., that it would not change or interfere with the use or purpose of the parkland or open space. Permission for encroachment on dedicated or designated parkland and open space that would benefit only a private party shall not be granted.”

Adopted in 1997, and last amended in 2005, City Council Policy 600-43 sets forth criteria for the City to evaluate applications for WCF’s in City parks, stating: “The City may grant authorization [for WCF’s] on dedicated or designated parkland and open space if it is first determined by the Park and Recreation Department that the requested action would not only meet the criteria of this Policy, but would also be consistent with City Charter Section 55.” This policy additionally states that proposed WCF’s in City parks “must be disguised such that they do not detract from the recreational or natural character of the parkland or open space. Further proposed WCF’s “must be integrated with existing park facilities and must not disturb the environmental integrity of the parkland or open space.”

Policy 600-43 provides that it is to be used in conjunction with SDMC section 141.0420. SDMC section 141.0420 addresses WCF’s and provides, in relevant part, that a proposed WCF in a dedicated park “shall be placed underground unless the Park and Recreation Director determines that an above-ground equipment enclosure would not violate Charter section 55.”

In compliance with these policies the director of the City’s Park and Recreation Department (the Park Director) “determined that the design and location of the facilities proposed for the . . . Park by Verizon . . . are such that those facilities will not detract from or interfere with the park or its uses. The features of the proposed mono-eucalyptus tree allow it to integrate with the other trees in the immediate vicinity. Also, the minimal footprint, height, location, and design features of the equipment housing allow [the] facility to integrate aesthetically. Because both facilities will be set back from the field, they will not interfere with park uses.” The evidence cited ante supports the City’s conclusion that the Project would not disrupt or interfere with the park or recreation purposes of the Park.

On this point, the City’s determination is entitled to some deference. “An agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts . . . .” (Yamaha, supra, 19 Cal.4th at p. 7.) Charter 55 gives the City “control and management of parks” with the caveat that any changed use or purpose of a dedicated park must be authorized or ratified by the voters. Here, the Park Director has a comparative interpretative advantage over the courts in evaluating how the Project will impact the Park because this issue is “entwined with issues of fact, policy, and discretion.” (Yamaha, at p. 12.) Thus, while we are ultimately responsible for interpreting Charter 55, we give “‘great weight and respect’ “ to the City’s construction. (Yamaha, at p. 12.)

It is undeniable that the placement of items within dedicated parks is entwined with issues of fact, policy and discre-

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7. Although not cited by respondents, we note that our high court Spires v. Los Angeles (1906) 150 Cal. 64 (Spires) followed this analysis. In Spires the dedication provided for use of the land “‘as a public place forever for the enjoyment of the community in general.’ “ (Id. at p. 66.) The Spires court concluded “that the establishment of a public library, to which the visitors to the park have access, is consistent with such public enjoyment, and tends to enlarge it, we have no doubt.” (Ibid.)

8. Verizon explored a subterranean equipment vault, but several negative factors existed. Construction of the vault would significantly impact the Park and adjacent Preserve as a large area would need to be excavated and then backfilled. Above ground exhaust vents required to vent the cabinets would generate noise. Finally, the location of the vault is within a 100-year flood plain, and underground vaults have been difficult to waterproof.
tion. The City’s conclusion that the Project does not interfere with the use or purpose of the Park touches upon policy issues within the purview of the Park Director and is not clearly erroneous. Additionally, the City complied with its policies regarding encroachments on dedicated parkland and the processing of applications for WCF’s in City parks. More importantly, the record does not support a contrary conclusion that the Project would disrupt or interfere with the park or recreation purposes of the Park.

E. Conclusion

Public comments reveal that local residents opposed the Project based on primarily aesthetic reasons, with health issues being a secondary concern. Regarding health concerns, the Act prevents local governments from impeding the siting and construction of cell towers that conform to the Federal Communication Commission’s (FCC) radio frequency emissions standards. (47 U.S.C. § 332(c)(7)(B)(iv).) Here, a registered professional electrical engineer concluded in a radio frequency site compliance report that the Project would comply with FCC rules and regulations. While many local residents oppose the Project as an unwelcome addition to the Park’s landscape based on aesthetic reasons, the Project satisfies the objective prerequisites established in advance by the City for the placement of a WCF within a dedicated park. On this record, the subjective preferences of local residents do not constitute substantial evidence upon which the City can properly deny Verizon’s application.

We conclude that the Project does not constitute a changed use or purpose that required voter approval under Charter 55 and that DCOP has not presented evidence showing that the City failed to follow the law in permitting the Project.

II. THE PROJECT IS EXEMPT FROM CEQA

A. CEQA Overview

“CEQA was enacted to advance four related purposes: to (1) inform the government and public about a proposed activity’s potential environmental impacts; (2) identify ways to reduce, or avoid, environmental damage; (3) prevent environmental damage by requiring project changes via alternatives or mitigation measures when feasible; and (4) disclose to the public the rationale for governmental approval of a project that may significantly impact the environment. [Citation.]” To further these goals, CEQA requires that agencies follow a three-step process when planning an activity that could fall within its scope.” (California Building Industry Assn. v. Bay Area Air Quality Management Dist. (2015) 62 Cal.4th 369, 382.)

The first tier requires an agency to determine whether the proposed activity is a project and, if so, whether the project is exempt from CEQA. (San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist. (2006) 139 Cal.App.4th 1356, 1372-1373 (San Lorenzo).) If an agency determines that a project is exempt, no further environmental review is necessary, and it may file a notice of CEQA exemption. (San Lorenzo, at p. 1373.) A project is exempt from CEQA if it is subject to a “categorical exemption” in sections 15301 to 15333 of the Guidelines (San Lorenzo, at p. 1381) and the application of the categorical exemption is not barred by an exception set forth in section 15300.2 of the Guidelines. (San Lorenzo, at pp. 1380-1381.) Exceptions to the categorical exemptions include, among other things, where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances. (Guidelines, § 15300.2, subd. (c).)

We analyze an agency determination that its decision is exempt from CEQA to “determine whether, as a matter of law, the [activity meets] the definition of a categorically exempt project.” (San Lorenzo, supra, 139 Cal.App.4th at p. 1386, italics omitted.) Categorical exemptions are narrowly construed, “to afford the fullest possible environmental protection.” (Save Our Carmel River v. Monterey Peninsula Water Management Dist. (2006) 141 Cal.App.4th 677, 697.) While our review is de novo, “in undertaking our independent analysis, we bear in mind the ‘highly deferential’ review standard that applies to the agency’s factual determinations.” (San Lorenzo, at p. 1387.)

B. Exhaustion of Administrative Remedies

Respondents argue that DCOP’s CEQA claims are barred based on its failure to exhaust administrative remedies. Specifically, they note that DCOP asserts on appeal that the Project does not qualify for an exemption under Guidelines section 15303 and that unusual circumstances prohibit application of the exemption, but that DCOP did not list these grounds in the administrative appeal or in any written materials submitted to the City. DCOP contends that the exhaustion of remedies affirmative defense is inapplicable because the appeal it took to the city council was based on a staff level determination that the Project was exempt under a “Class 3” exemption under Guidelines section 15303 with no public hearing held prior to the April 15 determination date. We agree with DCOP.

“ ‘The exhaustion of administrative remedies doctrine ‘. . . operates as a defense to litigation commenced by persons who have been aggrieved by action taken in an administrative proceeding which has in fact occurred but who have failed to ‘exhaust’ the remedy available to them in the course of the proceeding itself.’ “ (Defend Our Waterfront v. State Lands Com. (2015) 240 Cal.App.4th 570, 580-581.) CEQA’s exhaustion provision requires a party to inform an agency of an alleged CEQA violation orally or in writing before filing a CEQA action in court. (Pub. Resources Code, § 21177, subds. (a) & (b).) CEQA provides an exception to the exhaustion requirement if “there was no public hearing or other opportunity for members of the public to raise those objections orally or in writing prior to the approval of the project, or if
the public agency failed to give the notice required by law.” (Pub Resources Code, subd. 21177, subd. (e).)

Here, the City determined on April 15 that the Project was exempt from CEQA. It later prepared and distributed a “Notice of Right to Appeal.” DCOP filed an appeal later that month. There is nothing in the record, however, indicating that before the City determined that the Project was exempt it held a public hearing or otherwise provided members of the public the opportunity to raise oral or written objections. Rather, it appears that the City filed the notice of exemption before the Project had even been approved. Accordingly, the exception to the exhaustion requirement applies to DCOP’s CEQA arguments.

C. Analysis

DCOP claims that the City erroneously claimed a Class 3 exemption because the Project was excepted from a Class 3 exemption and is subject to CEQA review because: (1) the Project does not fit within the meaning or use of the Class 3 exemption as a matter of law, (2) the unusual circumstances exemption applies, and (3) placement of the Project in a dedicated park precludes use of a categorical exemption because such a location is of critical concern. We examine each argument in turn.

1. Class 3 exemption

DCOP contends that the Project does not qualify for a Class 3 exemption because it is a new stand-alone utility that is not an intended type of urban infill development encompassed by the Class 3 exemption. We disagree.

A Class 3 exemption under Guidelines section 15303 “consists of construction and location of [(1)] limited numbers of new, small facilities or structures; [(2)] installation of small new equipment and facilities in small structures; and [(3)] the conversion of existing small structures from one use to another where only minor modifications are made in the exterior of the structure.”9 There is a paucity of case law applying this exemption. Nonetheless, the exemption has been applied to the installation of 726 telecommunications equipment boxes on city property. (San Francisco Beautiful v. City and County of San Francisco (2014) 226 Cal.App.4th 1012, 1021-1022 (San Francisco Beautiful).) The exemption has also been applied to the installation of small new telecommunications equipment on numerous existing small structures in scattered locations. (Robinson v. City and County of San Francisco (2012) 208 Cal.App.4th 950, 956.)

Here, applying the plain language of Guidelines section 15303, the Project consists of the construction and location of a new small facility or structure, which qualifies for a Class 3 exemption. The Project is a new small facility that will be 534 square feet, including the above-ground branch diameter of the faux tree. While none of the examples of the exemption are directly applicable (ante, fn. 9), the Project is much smaller than a single-family residence, store, motel, office or restaurant. Accordingly, we hold that as a matter of law, the Project falls within the scope of the Class 3 categorical exemptions under the Guidelines.

2. Unusual circumstances exception

DCOP argues that, even if the Project falls within the Class 3 exemption, an environmental impact report is necessary because there is evidence the Project will have significant environmental impacts under the unusual circumstances exception.

Guidelines section 15300.2, subdivision (c) states that “[a] categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.” In Berkeley Hillside Preservation v. City of Berkeley (2015) 60 Cal.4th 1086 (Berkeley Hillside), our high court delineated two alternative analyses in assessing whether the unusual circumstances exception applies. (Id. at p. 1105.) Under the first alternative “a challenger must prove both unusual circumstances and a significant environmental effect that is due to those circumstances. In this method of proof, the unusual circumstances relate to some feature of the project that distinguishes the project from other features in the exempt class.” (Citizens for Environmental Responsibility v. State ex. rel. 14th Dist. Ag. Assn. (2015) 242 Cal.App.4th 555, 574.) Under the second alternative a challenger “may establish an unusual circumstance with evidence that the project will have a significant environmental effect.” (Berkeley Hillside, at p. 1105, italics added; Citizens for Environmental Responsibility, at p. 575.)

“Whether a particular project presents circumstances that are unusual for projects in an exempt class is an essentially factual inquiry,” which we review under the traditional substantial evidence standard. (Berkeley Hillside, supra, 60 Cal.4th at p. 1114.) “[A]n agency’s finding as to whether unusual circumstances give rise to ‘a reasonable possibility that

9. “Examples of this exemption include but are not limited to: [¶] (a) One single-family residence, or a second dwelling unit in a residential zone. In urbanized areas, up to three single-family residences may be constructed or converted under this exemption. [¶] b) A duplex or similar multi-family residential structure totaling no more than four dwelling units. In urbanized areas, this exemption applies to apartments, duplexes, and similar structures designed for not more than six dwelling units. [¶] c) A store, motel, office, restaurant or similar structure not involving the use of significant amounts of hazardous substances, and not exceeding 2,500 square feet in floor area. In urbanized areas, the exemption also applies to up to four such commercial buildings not exceeding 10,000 square feet in floor area on sites zoned for such use if not involving the use of significant amounts of hazardous substances where all necessary public services and facilities are available and the surrounding area is not environmentally sensitive. [¶] d) Water main, sewage, electrical, gas, and other utility extensions, including street improvements, of reasonable length to serve such construction. [¶] e) Accessory (appurtenant) structures including garages, carports, patios, swimming pools, and fences. [¶] f) An accessory steam sterilization unit for the treatment of medical waste at a facility occupied by a medical waste generator, provided that the unit is installed and operated in accordance with the Medical Waste Management Act (Section 117600 et seq., of the Health and Safety Code) and accepts no offsite waste.” (Guidelines, § 15303.)
the activity will have a significant effect on the environment’ (Guidelines, § 15300.2, subd. (c)) is reviewed to determine whether the agency, in applying the fair argument standard, ‘proceeded in [the] manner required by law.’ “ (Ibid.)

a. First alternative

“`The Guidelines do not define ‘unusual circumstances.’ That requirement was presumably adopted to enable agencies to determine which specific activities—within a class of activities that does not normally threaten the environment—should be given further environmental evaluation and hence excepted from the exemption.” “ (San Francisco Beautiful, supra, 226 Cal.App.4th at p. 1023.) DCOP contends that the Project’s location within a dedicated park is an unusual circumstance. The City, however, presented evidence that at least 37 similar facilities exist in dedicated parks. This evidence suggests that construction of the Project within the Park is not unusual. Even assuming arguendo that the Project is unusual, for this exception to apply DCOP must also show a reasonable possibility that the unusual circumstances (i.e., construction of the Project in the Park) will cause a significant environmental effect. (Berkeley Hillside, supra, 60 Cal.4th at p. 1105.)

Here, the Commission found that the faux tree and equipment enclosure are located so as not to interfere with Park uses. It found that the Project would result in minimum disturbance to environmentally sensitive lands because minimal grading would be required to accommodate the caisson and footings for the faux tree, and trenching for the conduits between the faux tree and the equipment enclosure as well as the conduit for power would occur immediately adjacent to the main walking path from the street through the Park. Additionally, the Project site consists of mostly disturbed habitat and does not contain environmentally sensitive lands. The Project is approximately 95 feet east of a multi-habitat planning area (MHPA) boundary. However, any impact was considered insignificant and not requiring mitigation consistent with the City’s Land Development Manual - Biology Guidelines. Any noise generated after completion of the Project from the cooling systems was also found to be insignificant.

The City had a biological resource report created for the Project. This report documented “the existing biological conditions within the project study area; identified potential impacts to biological resources that could result from implementation of the proposed project; and recommend[ed] measures to avoid, minimize, and/or mitigate significant impacts consistent with federal, state, and local rules and regulations . . . .” The report concluded that while there would be minor direct impacts to certain habitats, no mitigation was required. No special status species were identified on-site, but because the coastal California gnatcatcher is within the study area, the report recommended that construction of the Project not occur during certain time periods to avoid construction noise impacting the breeding season of these birds. After construction, it was determined that any noise generated from the Project would not impact potentially present special status species.

This evidence shows the City proceeded in the manner required by law when it determined that a reasonable possibility did not exist that the Project would have a significant effect on the environment. DCOP does not challenge the evidence showing that the Project will not significantly adversely impact the environment. Rather, DCOP asserts that the Project has an adverse environmental impact on aesthetics, and the park and recreational uses of the Park. The evidence in the record does not support a conclusion that the Project will cause a “significant” adverse change to aesthetics or park and recreation uses. The record contains before-and-after views; i.e., a photograph of the Park without the Project and the Project as built. This evidence shows the Project will not significantly impede views from the Park or result in any other significant aesthetics impacts. Additionally, placement of the faux tree will require moving a single piece of exercise equipment about 100 feet north from its current location. DCOP presented no evidence showing how moving this single piece of exercise equipment will impact the Park and its recreational use.

b. Second alternative

We next examine whether DCOP established unusual circumstances under the alternative method of showing that the Project will have a significant environmental effect. (Berkeley Hillside, supra, 60 Cal.4th at p. 1105.) “A significant effect on the environment” is “a substantial adverse change in the physical conditions which exist in the area affected by the proposed project.” (Guidelines, § 15002, subd. (g).) As discussed ante in connection with the first alternative, the evidence shows that the Project will not cause a “significant” adverse change to the Park. (Ante, pt. C.2.a.)

3. Location exception

DCOP contends that the placement of the Project in a sensitive and protected resource area, a dedicated park, precludes use of a categorical exemption under subdivision (a) of Guidelines section 15300.2. Respondents assert that DCOP forfeited this argument by not raising this issue during the administrative proceedings or before the trial court. DCOP disputes this contention, arguing that it raised this issue before the trial court. For purposes of analysis, we will assume, without deciding that DCOP did not forfeit this argument.

The location exception is restricted to projects that “may impact on an environmental resource of hazardous or critical concern where designated, precisely mapped, and officially adopted pursuant to law by federal, state, or local agencies.” (Guidelines, § 15300.2, subd. (a).) DCOP presented no evidence that the Park is a location “designated” as an “environmental resource of hazardous or critical concern” by any federal, state or local agency. The lack of such a designation defeats application of this exception.
DCOP’s reliance on *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098 is misplaced. In *Salmon Protection*, a county determined that the proposed construction of a home was categorically exempt from CEQA under an exemption for single-family homes, even though the home was adjacent to a protected anadromous fish stream and within a stream conservation area which the county conceded was of “ ‘critical concern.’ “ (*Salmon Protection*, at p. 1106.) The *Salmon Protection* court held that the project was not exempt because the county relied upon proposed mitigation measures to grant a categorical exemption and that the “process of assessing those mitigation measures and weighing them against potential environmental impacts” must be conducted under established CEQA standards. (*Salmon Protection*, at p. 1108.) Here, unlike *Salmon Protection*, DCOP failed to identify any mitigation measures requiring assessment under CEQA.

In summary, we conclude that the City properly determined that the Project is categorically exempt under the CEQA Guidelines.

**DISPOSITION**

The judgment is affirmed. In the interests of justice, the parties are to bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

NARES, J.

WE CONCUR: HUFFMAN, Acting P. J., HALLER, J.

Cite as 18 C.D.O.S. 2547

**PETROLINK, INC.,** Plaintiff and Appellant, v. **LANTEL ENTERPRISES,** Defendant and Respondent.

No. D073012

In The Court of Appeal of the State of California

Fourth Appellate District

Division One

(Super. Ct. No. CIVVS1200383)

APPEAL from a judgment of the Superior Court of San Bernardino County, Brian S. McCarville, Judge. Reversed in part.

Filed March 15, 2018

**COUNSEL**

Bleau Fox, Martin R. Fox and Megan A. Childress for Plaintiff and Appellant.

Fullerton, Lemann, Schaefer & Dominick, Wilfrid C. Lemann and David P. Colella for Defendant and Respondent.

**OPINION**

I.

**INTRODUCTION**

In this appeal, plaintiff Petrolink, Inc. (Petrolink) seeks a modification of a judgment entered in its favor on its cause of action for specific performance. Petrolink leased a parcel of undeveloped property from defendant Lantel Enterprises (Lantel), pursuant to a lease agreement that included a provision allowing the lessee to purchase the property at the fair market value of the property according to an appraisal. Petrolink notified Lantel of its desire to exercise the purchase option, but the parties obtained appraisals that were far apart in their valuation of the property. The parties ultimately could not agree on the fair market value of the property.

The parties sued each other, each asserting various causes of action, including specific performance, claiming that the other party had refused to complete the sale and purchase transaction, and essentially seeking a judicial determination as to the fair market value of the property. During the pendency of the litigation, Petrolink continued to pay Lantel monthly rent on the property.

The case went to trial before a judge. At trial, Lantel did not dispute that Petrolink had exercised the purchase option. Instead, Lantel’s main contentions at trial were that (1) the option in the lease could not be enforced because it was insufficiently certain since it did not contain a purchase price, and (2) if the option was enforceable, Lantel should be the
party to obtain the appraisal and set the sale price. The main factual issue at trial concerned what the fair market value of the property was at the time Petrolink notified Lantel of its desire to purchase the property. The judge appointed an expert and obtained an independent appraisal of the property, which, not surprisingly, was between the values in the appraisals that the parties had obtained. The trial court ultimately entered judgment in favor of Petrolink on its specific performance cause of action and made a finding that the date on which Petrolink exercised the purchase option was August 25, 2011, the date of its letter notifying Lantel of its desire to exercise the purchase option. The court ordered Lantel to sell the property to Petrolink for $889,854.00, which is what the court determined the fair market value of the property was as of August 25, 2011. Although Petrolink had requested an offset against the purchase price for the value of the rents it had paid after exercising the purchase option, the court did not grant Petrolink an offset for any of the rent that it had paid to Lantel during the pendency of the litigation.

On appeal, Petrolink contends that the trial court erred in failing to offset the rent paid to Lantel through the pendency of this litigation against the purchase price. According to Petrolink, once it validly exercised the option to purchase the property, a contract for purchase and sale was created, and the lease between the parties was extinguished, such that no further rents were due or owing to Lantel. In response, Lantel asserts that Petrolink never provided an unconditional acceptance of the terms of the purchase option a position that it did not take in the trial court and therefore, did not validly exercise the purchase option. Lantel also argues that the fact that Petrolink continued to pay rent reflects the parties’ understanding that rent would remain due during the pendency of any litigation, and further argues that the trial court did not provide Petrolink with an offset because the court weighed the equities and determined that Petrolink was not entitled to an offset for the rent paid to Lantel.

Given the court’s finding that Petrolink validly exercised the purchase option on August 25, 2011, and given that Lantel has not challenged this determination, which underpins the entire judgment of specific performance in favor of Petrolink, through a cross-appeal, that portion of the court’s judgment is established. We therefore agree with Petrolink that once it exercised the purchase option, the lease was terminated and a contract for purchase and sale came into existence. To the extent that the trial court denied Petrolink an offset for the rents that it paid during the pendency of the litigation, the court failed to account for the delayed performance of the contract for purchase and sale. Specifically, the court failed to place the parties in the positions in which they would have been at the time the sale and purchase contract should have been performed.

We therefore reverse the judgment to permit the trial court to undertake an accounting between the parties, in a manner consistent with the discussion that follows. The accounting shall take into account the delay in performance of the contract and must place both parties in the positions in which they would have been if the contract had been timely performed.¹

II.

FACTUAL AND PROCEDURAL BACKGROUND

The parties were signatories to a lease that was originally entered into by Lantel and Tosco Corporation in 1998. The lease pertained to a parcel of land near an interchange between Interstate 15 and Highway 138 in San Bernardino County. Petrolink eventually obtained a leasehold interest through various assignments to different entities.

The lease contained a provision granting the tenant the right to purchase the property at any time, for fair market value, after an initial 10-year term had elapsed. The specific language of the purchase option provision is as follows:

“21. RIGHT TO PURCHASE. As long as the Tenant is not in default of this Agreement, Tenant will have an option to purchase the property at any time after the first Ten (10) years of the lease term at a price equal to the fair market value of the property based on an appraisal.”

On August 25, 2011, Petrolink mailed a letter to Lantel indicating its desire to exercise the purchase option in the lease, and asking Lantel to provide it with an appraisal regarding what Lantel believed to be the fair market value of the property.² According to the trial testimony of one of Lantel’s principals, Lantel understood Petrolink’s August 25, 2011 letter to be an exercise of its option to purchase the subject property.

Lantel hired an appraiser to determine the fair market value of the property. Lantel’s appraiser concluded that the fair market value of the property was $1,615,000. Based on the appraisal, Lantel offered to sell Petrolink the property for $1,615,000.

In response, Petrolink offered to purchase the property for $320,000, based on an appraisal that Petrolink had separately commissioned. Lantel did not respond to Petrolink’s offer of $320,000. Petrolink sent another letter to Lantel, this time offering to purchase the property for “roughly” $486,000.

In a letter dated October 25, 2011, Petrolink proposed that the parties obtain a third appraisal of the property in order to determine the fair market value. Lantel did not respond to Petrolink’s proposal that the parties share the cost of obtaining a third appraisal.

¹. We also direct the court to determine when, after Petrolink validly exercised the purchase option in the lease, the resulting contract for purchase and sale reasonably should have been performed.
². The lease provided that “[a]ny notice required or permitted to be given to any party shall be in writing and shall be delivered . . . by first class mail.”
On January 24, 2012, Petrolink sued Lantel for, among other things, specific performance, asserting that it had exercised its option to purchase the property and had agreed to purchase it at a price equal to the fair market value of the property based on an appraisal, and that it had offered to tender the value established by its own appraisal—i.e., $320,000.00. Lantel filed a cross-complaint, alleging breach of contract and breach of the covenant of good faith and fair dealing with respect to the lease, and a claim for specific performance, arguing that Petrolink was the breaching party or the party that wrongfully refused to consummate the sales transaction for the property. Lantel alleged that Petrolink had “provided notice to [Lantel] that it was exercising its right to purchase Parcel 1 pursuant to Section 21 of the Lease,” and that Lantel was “willing, ready, and able to perform all conditions, covenants, obligations and promises required of it under the Lease, including selling” the property to Petrolink for the value established by Lantel’s appraisal—i.e., $1,615,000.00.

A bench trial began on September 14, 2015. At trial, both of the appraisers that had been hired by the parties testified, as did an independent appraiser whom the trial court had appointed as a court expert pursuant to Evidence Code section 730. The court’s expert was asked to provide his conclusion regarding the fair market value of the property as of August 25, 2011. The court’s expert estimated that the value of the property as of August 25, 2011 was $789,000.00. He also testified that if a third party, rather than the tenant, was seeking to purchase the property, there would be “bonus rent,” which he considered to be the difference between fair market rent and the rent due under the lease, of $3,735.00 per month. Petrolink’s appraiser testified regarding his appraisal and analysis of the value of the property, which he had determined as of March 29, 2011. Lantel’s appraiser provided his appraisal and analysis of the value of the property as of October 8, 2011.

At the close of evidence and pursuant to the court’s suggestion, the parties agreed to a closing argument briefing schedule and submission of “proposed statements of intended decision.”

In closing argument, Petrolink argued that it was entitled to a judgment that included an offset for the rents it had paid to Lantel, such that whatever purchase price the court ultimately determined was the fair market value “should be reduced by what Petrolink has paid in rent from 30 days following the exercise of the purchase price[4] up until today.”

Lantel argued in closing that the “right to purchase” option in the lease was ambiguous, and that extrinsic evidence was therefore admissible to establish that the intent of the provision was that Lantel’s appraisal be determinative as to fair market value. Lantel also argued that if its appraisal was not determinative of fair market value, at a minimum, the court must consider the value of the lease between Lantel and Petrolink in determining the fair market value—an item that Petrolink’s appraiser had not included in his analysis. In addition, Lantel contended that if the court were to rely on the court’s appointed expert’s appraisal, the value of the property should be $789,000 for the base value of the property, plus an additional $100,845.00 in “‘bonus rent,’ “ for a total value of $889,845.00 as of August 25, 2011. Lantel did not contend that Petrolink had not validly exercised the purchase option under the lease.

After considering the parties’ closing argument briefs and hearing argument from counsel, the trial court issued a “Statement of Intended Decision” (some capitalization omitted). The court indicated that it intended to find in favor of Petrolink on its specific performance cause of action, and that it found the fair market value of the property “as of August 25, 2011 to be $889,854.00.” The court further concluded that “no offsets for any rents paid will be allowed.” The court stated, “Petrolink’s request for an offset as to rents paid is without merit. Petrolink was required to continue to pay rent until all the provisions of (§21) had been met. Since the parties could not agree on the fair market value it was for the court to decide. Hence the final requirement for (¶21) is this court’s order fixing the fair market value at $889,854.00.”

In the judgment, the court found that “[o]n August 25, 2011, Petrolink timely exercised its option to purchase the Property agreeing to pay the fair market value of the property based upon appraisal.” The court also found that Petrolink had never been in default under the Lease. The court determined that Petrolink was entitled to recover against Lantel on its specific performance cause of action, but denied relief as to its claims for breach of contract and breach of the implied covenant of good faith and fair dealing. The court further

3. It would appear that counsel intended to refer to the exercise of the purchase “option” not “price.”
4. The suggestion of a 30-day period after the exercise of the purchase option appears to represent what would be a reasonable escrow period to allow the parties to effectuate the sale transaction and transfer title to Petrolink. According to Petrolink’s closing argument brief, Petrolink was entitled to all rent that it had paid to Lantel after September 24, 2011. In other words, Petrolink argued that the purchase and sale contract should have been performed as of September 24, 2011, and that it was therefore entitled to specific performance as of that date.
5. As these arguments demonstrate, at this point, Lantel was not disputing either the validity of the August 25, 2011 letter that Petrolink submitted as evidence of its exercise of the purchase option, or whether the letter was sufficient to constitute a valid exercise of the purchase option.
6. In concluding that $889,854.00 was the fair market value of the property in August 2011, the trial court was persuaded by Lantel’s argument that the fair market value would be the value of the property to the market—i.e., to third parties, and not simply to the lessee—and that therefore, the fair market value should include the value of the “‘bonus rent’ “ that the court’s expert appraiser discussed.

However, it appears that there was a computational error in the court’s determination that the fair market value was $889,854.00. The court’s “Statement of Intended Decision” states that the appraisal value was $789,000.00, and that the “‘bonus rent’ “ was $100,845.00. Those two values added together result in a total of $889,845.00, however, the court’s “Statement of Intended Decision” sets the total value at $889,854.00. This computational error was repeated in the judgment.
concluded that “Petrolink is not entitled to a set-off of any of these [$396,750.00 in rent] payments against the purchase price.”

The court determined that Lantel was to convey the property to Petrolink by grant deed, free and clear of all encumbrances, upon the receipt of $889,854.00.

Petrolink filed a timely notice of appeal. Lantel did not appeal from the judgment.

III.
DISCUSSION

On appeal, Petrolink contends that it was entitled to an offset for the rents that it paid to Lantel after it exercised its purchase option under the lease and during the pendency of this litigation. According to Petrolink, upon its valid exercise of the purchase option, the lease was transformed into a contract of sale, thereby extinguishing any landlord-tenant relationship, as well as any right the landlord had to further rent.

Lantel contends on appeal that Petrolink’s August 25, 2011 notice was not an unconditional acceptance of the terms of the purchase option, and therefore, does not constitute a valid exercise of the option. Lantel also argues that by continuing to pay rent, Petrolink was simply acting according to the understanding of the parties that rent would remain owing as long as Petrolink continued to possess the property during the pendency of any lawsuit. Finally, Lantel contends that “equity does not support [Petrolink’s] claim [for an offset to the purchase price].”

We conclude that Petrolink has the better position.

“An option may be viewed as a continuing, irrevocable offer to sell property to an optionee within the time constraints of the option contract and at the price set forth therein. It is, in other words, a unilateral contract under which the optionee, for consideration he has given, receives from the optionor the right and the power to create a contract of purchase during the life of the option. ‘An irrevocable option is a contract, made for consideration, to keep an offer open for a prescribed period.’ (1 Witkin, Summary of Cal. Law (8th ed. 1973) Contracts, § 126). An option is transformed into a contract of purchase and sale when there is an unconditional, unqualified acceptance by the optionee of the offer in harmony with the terms of the option and within the time span of the option contract. [Citation,]” (Erich v. Granoff (1980) 109 Cal. App.3d 920, 927–928 (Erich).) “‘The ‘exercise’ of an option is merely the election of the optionee to purchase the property.”’ (Peebler v. Seawell (1954) 122 Cal.App.2d 503, 506 (Peebler), citations omitted.) Importantly, “the exercise of an option . . . results in a contract of purchase and sale.” (Erich, supra, 109 Cal.App.3d at p. 927.)

Where an option to purchase exists within a lease agreement, the exercise of the option to purchase causes the lease and its incorporated option agreement to cease to exist, and, instead, “‘a binding contract of purchase and sale[.]’ into existence between the parties. [Citations.]” (Peebler, supra, 122 Cal.App.2d at p. 506; see also Sacks v. Hayes (1956) 146 Cal.App.2d Supp. 885, 887 (Sacks) [“W]hen defendant exercised the option granted her to purchase the property by making the first payment of $500 thereunder, the lease and option agreement no longer existed and a binding contract of purchase and sale came into existence between the parties”].) Further, a consequence of the termination of the lease agreement is that the former lessee’s obligation to pay rent under the lease also terminates, unless there is an express stipulation that requires continued rent payments after the exercise of the purchase option. (Sacks, supra, at pp. 887–888, citations omitted; Erich, supra, 109 Cal.App.3d 920 [purchase option provision in lease did not require tender of purchase price for exercise of the purchase option, and notification of exercise was sufficient to terminate obligation to pay rent as of the date that the sale would have closed, but for the lessor’s lack of cooperation].) “Where the relation of landlord and tenant exists under the terms of a written lease, containing an option to purchase which the lessee exercises, he is no longer in possession as a tenant, but his possession is that of a vendee.” (Sacks, at pp. 887–888; see also 52A C.J.S. Landlord & Tenant, § 1134 [“The tenant may be relieved of liability for rent where he or she has exercised an option granted in the lease to purchase the land. [Footnote omitted.] The landlord ordinarily is not entitled to recover for rent from the date when the tenant sought to exercise an option to purchase where the landlord prevented effective exercise of the option”].)

As is clear from the judgment, the trial court found that Petrolink validly exercised its option to purchase the property as of its notice, which was dated August 25, 2011. Although Lantel argues on appeal that Petrolink’s letter of August 25, 2011 did not constitute a valid exercise of the option, a Lantel owner essentially conceded at trial that Petrolink validly exercised its purchase option under the lease. In fact, the entire trial revolved around a determination of the fair market value of the property as of August 2011, the date of Petrolink’s letter providing notice of its intent to exercise the purchase option.

Lantel’s trial strategy was to challenge the enforceability of the purchase option provision that it had drafted, or, in the alternative, seek to have the court determine that the value of the property as of August 25, 2011 was the $1.6 million that Lantel’s appraiser had determined was the fair market value as of the time of Petrolink’s exercise of the purchase option. Again, Lantel stated in its cross-complaint that “Petrolink exercised the Option to Purchase Parcel 1 pursuant to Section 21 of the Lease on or about August 25, 2011,” and its position in the cross-complaint was that it was entitled to specific performance requiring that Petrolink purchase the property from it, at the value identified by Lantel’s appraiser. In addition, a witness for Lantel essentially admitted that Lantel viewed the August 25, 2011 letter as a valid exercise of the purchase option, and Lantel did not argue at trial that Petrolink never exercised the purchase option. To have argued otherwise would have undermined Lantel’s claim that it was entitled to either
breach of contract damages or specific performance of the contract for purchase and sale on the ground that Petrolink failed to purchase the property for the $1,615,000.00 that Lantel asserted was the fair market value. Lantel is therefore precluded from arguing on appeal, in conflict with its theory of the case in the trial court, that Petrolink’s August 25, 2011 letter notifying Lantel of its intent to exercise the purchase option was not a valid exercise of the option under the terms of the parties’ lease agreement. (See Richmond v. Dart Industries, Inc. (1987) 196 Cal.App.3d 869, 874 [“The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.”].)

Further, to the extent that Lantel argues that Petrolink’s letter of August 25, 2011 did not constitute a valid exercise of the option because it was not an “unconditional acceptance of the terms of the purchase option” (capitalization omitted), such an argument is not one in support of affirmance of the judgment, but rather, is an attack on the entire premise of the judgment.7 The judgment that the court entered is based on the fact that Petrolink’s valid exercise of the purchase option caused a contract for purchase and sale to come into existence, and it is this contract for purchase and sale that the court ordered Lantel to specifically perform in the judgment. Lantel’s argument that the notice was insufficient to constitute a valid exercise of the purchase argument is not, therefore, an argument in support of affirmance of the judgment; rather, it is an argument that would require reversal of the judgment. If Lantel wanted to challenge the validity of the court’s finding that Petrolink validly exercised the purchase option a finding that is a prerequisite to the court’s ultimate determination that Petrolink was entitled to specific performance, it would have had to appeal from the judgment and contend that the trial court erred in making that finding. It did not do so.

7. At oral argument, counsel for Lantel indicated that he was not arguing that Petrolink never validly exercised the purchase option. Rather, he indicated that Lantel’s position was that Petrolink was required to continue paying rents until such time as Petrolink could “perform” (i.e., purchase the property), and that performance could not occur until the fair market value of the property was determined by the court. However, Lantel argued in its briefing on appeal that Petrolink provided only “‘notice’ “ of its intention to exercise the purchase option, and that this “‘notice’ did not . . . alter the relationship of Lantel and Petrolink to that of vendor and vendee as argued by Petrolink.” Lantel also contended in briefing that “Petrolink’s August 25th letter conditioned its ‘exercise’ and willingness to enter into an agreement with Lantel [on] the parties reaching[an] agreement on the ‘fair market value’ of the Property . . . ,” and that therefore, “exercise of the option] was not complete until the fair market value was determined.” (Italics added.) Despite counsel’s suggestion at oral argument that Lantel was not taking the position that Petrolink had not validly exercised the purchase option, the contentions in Lantel’s briefing comprise, fundamentally, an argument that Petrolink did not effectively exercise the purchase option, that the rental agreement was therefore not extinguished (and no purchase and sale contract was formed) and as a result, rents under the rental agreement continued to be due. We also reject Lantel’s contention that in continuing to pay rent, Petrolink was acting according to the understanding of the parties that rent would remain owing so long as Petrolink continued to possess the property during the pendency of any lawsuit. As Petrolink explains in briefing, it had a logical reason for continuing to pay rents, a reason that had nothing to do with believing that such rents continued to be due. Petrolink states that it continued to pay rents in order to ensure that it would not be found to be in default of the lease in the event that the court later determined that it had not validly exercised the purchase option. Ultimately, the trial court determined that Petrolink validly exercised the purchase option, and, again, the exercise of the purchase option caused the lease to cease to exist, and in its place was formed a contract for purchase and sale, which meant that Petrolink possessed the property as a vendee, rather than as a lessee. (See Peebler, supra, 122 Cal.App.2d at p. 506, see also Sacks, supra, 146 Cal.App.2d at pp. 887–888.) Unless there was an express agreement in the lease that required the lessee to continue to make rent payments after the exercise of the purchase option, no further rents were due. (Sacks, supra, at pp. 887–888.) Lantel has not identified any provision in the lease that indicates that continuing rent payments would be due after the exercise of the purchase option. The fact that Petrolink continued to pay rents in order to ensure that it would not be found in default in the event that it was later determined that it had not validly exercised the purchase option does not suggest that the parties had an agreement that rents would be due after the valid exercise of the purchase option.

Finally, we are unconvinced by Lantel’s contention that the trial court made an equitable determination that Petrolink was not entitled to an offset of the rents that it paid after the exercise of its purchase option and through the pendency of the litigation. Rather, based on the court’s explanation in its “Statement of Intended Decision” (some capitalization omitted), it appears that the court erroneously believed that Petrolink was not entitled to an offset of the rents, as a matter of contract law. In explaining its intention to deny Petrolink an offset for the rents that it paid after exercising the purchase option, the court stated, “[S]ince the parties could not agree on the fair market value it was for the court to decide [the fair market value]. Hence the final requirement for [Paragraph 21 of the Lease] is this court’s order fixing the fair market value at $889,854.00.” The court’s analysis indicates that it viewed the purchase and sale contract as not being enforceable until the court determined the fair market value of the property. The court believed that Petrolink was not entitled to an offset in rents until that condition was met. But, as we have already explained, the court’s finding, expressed in the judgment that has been entered in this case, establishes that Petrolink validly exercised its option to purchase the property. The exercise of the purchase option extinguished the lease. No further rents could be due, even if the new contract that came into existence—a contract of purchase and sale—required a court to determine what the fair market value of the property was at
the relevant time in the event that the parties could not reach an agreement on that issue.8

Although we agree with Petrolink that it was entitled to an offset for the rents that it paid during the pendency of this litigation, it is fundamental that both the seller and the buyer are entitled to receive full performance of the contract where specific performance has been granted. (Kassir v. Zahabi (2008) 164 Cal.App.4th 1352, 1358, citing Stratton v. Tejani (1982) 139 Cal.App.3d 204, 212 (Stratton).) “[B]ecause execution of the judgment on a specific performance cause of action] will occur at a date substantially after the date of performance provided by the contract [or the reasonable date of performance if no set date is provided], financial adjustments must be made to relate their performance back to the contract date. [Citation.] First, when a buyer is deprived of possession of the property pending resolution of the dispute and the seller receives rents and profits, the buyer is entitled to a credit against the purchase price for the rents and profits from the time the property should have been conveyed to him. [Citations.] . . . Second, a seller also must be treated as if he had performed in a timely fashion and is entitled to receive the value of his lost use of the purchase money during the period performance was delayed. [Citations.]” (Stratton, supra, at p. 212.)

Certain limitations on these general rules are necessary, however, and should be considered by the trial court on remand. “First, the buyer may not receive both the profits and a reasonable rental value of the property [or a credit for rents paid by the buyer himself] and the value derived from his use of purchase funds which were not irrevocably allocated toward the purchase price. The buyer must reduce his credit for rents and profits by a sum equivalent to the value of his use of the retained purchase funds. [Citation.] Second, if any part of the purchase price has been set aside by the buyer with notice to the seller, the buyer may not receive credit for his lost use of those funds. [Citation.]” (Stratton, supra, 139 Cal. App.3d at p. 213, italics added.) In other words, although

Petrolink is entitled to a credit to offset of the rents that it paid to Lantel during the period of time between when the transaction reasonably should have been completed and when the judgment was entered, Lantel is entitled to some amount of compensation to account for the fact that it did not have use of the purchase funds that it would have had in its possession from the time the purchase and sale contract reasonably should have been performed to the entry of judgment.

Granting a buyer the value of the profits and rents from the property from the time a transaction should have been consummated and adjusting this amount by the value of the seller’s lost use of the purchase money “‘is designed to relate the performance back to the contract date of performance and to adjust the equities between the parties because of the delayed performance . . . .’” [Citation.] (Stratton, supra, 139 Cal.App.3d at p. 212.) “These adjustments are ‘more like an accounting between the parties than like an assessment of damages.’” (Id. at p. 213.)

Therefore, on remand, the trial court should consider how to account for the delayed performance of the contract for purchase and sale that was created when Petrolink exercised the purchase option, and should do so with respect to both parties, according to the authorities cited above. In doing so, the court will also have to make a determination as to when, after Petrolink validly exercised the purchase option in the lease, the resulting contract for purchase and sale reasonably should have been performed.

IV.

DISPOSITION

The judgment of the trial court is reversed. The trial court is directed to determine the reasonable date on which the contract for purchase and sale should have been performed, and is further directed to consider what financial adjustments must be made in order to relate the parties’ performance back to the date that the contract should have been performed. The trial court may undertake whatever further proceedings may be necessary to address these matters.

The parties are to bear their own costs on appeal.

AARON, J.

WE CONCUR: HUFFMAN, Acting P. J., GUERRERO, J.