Opinion: Daly’s ghost haunts El Dorado County

By Larry Weitzman

Before Terri Daly got the job as El Dorado County assistant chief administrative officer and then CAO, she was the CAO of Amador County working her way up from assistant CAO to CAO. She cost Amador County about $20 million in a bad lease deal which I wrote about four years ago. When Daly was terminated by EDC as CAO, she received a severance package worth about $200,000 of which $153,000 was cash.

During her failed tenure, besides hiring her friends and giving out budget busting 15 percent raises, she was advised by the auditor controller that “Nexus” studies were required for all of EDC’s Mitigation Fee Act districts and that a failure to do so could create a huge county liability. Both ACAO Kim Kerr and principal analyst Mike Applegarth failed to follow through on these studies, which were clearly within their task purview. Daly didn’t cause them to happen either. That’s where the buck stops.

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Later CAOs, Pam Knorr and Larry Combs, who also knew of the county’s failure to file these Nexus studies, didn’t take care of business, either, ignoring repeated requests from the county auditor to comply with the MFA. Combs on Nov. 17, 2015, told the board it was not a problem.

In March 2015, I wrote the first column stating EDC was out of compliance with all of the MFA districts and needed to refund all fees collected. But it wasn't going to happen. Even after the Walker v. San Clemente decision, which said no five-year Nexus study, refunding the unexpended money is mandatory, did nothing to light a fire under CAO Combs or the Board of Supervisors. At that same Nov. 17, 2015, meeting, County Counsel Robyn Drivon told the Board that the case didn't apply to EDC and EDC had nothing to worry about. Then ACAO and now County Counsel Mike Ciccozzi echoed her sentiments and wrote a long memo of double talk that the MFA requirements and Walker wouldn't apply to EDC.

By Nov. 17, 2015, Walker was the law in all of California as the Supreme Court had chosen not to hear the case.

A month or so later, the Austin v. EDC, et al case was filed against the county for a refund of most MFA fees totaling $32 million. Now County Counsel Mike Ciccozzi told the board not to worry, effectively saying I got this handled. EDC will win this case. EDC hires Abbott and Kindermann, a big Sacramento law firm, for its defense. El Dorado Hills CSD hires its own counsel. Guess who is making all the money, that's right, the lawyers and Ciccozzi doesn't have to pay the bills. You, the taxpayers do, and they are now estimated to be well more than $300,000.

While EDC has openly admitted that it has violated the MFA in several official documents, Abbott and Kinderman base their entire defense on the statute of limitations (SOL). The SOL is a legal principle that says in this case if you wait too long after your claim arises, you lose your right to sue. The Austin case was filed in December 2015, while most of the Nexus studies were due in 2013, so it was two years or so after the claimed Nexus reports were supposed to be filed as required under the MFA. The county and El Dorado Hills CSD through their lawyers claimed the law was a one-year SOL or at best a three-year SOL bases on certain code sections Code of

Civil Procedure (CCP) 338 and CCP 340. The plaintiffs said if there is a statute, it is a four-year SOL as the Walker case said.

But because the county keeps collecting fees and dispersing funds under the MFA, that the SOL keeps getting "tolled" or restarted each time the county collects a new fee. If not, then why ever file a Nexus study, wait a year and if no one notices – which was the case here. The County doesn't ever have to file one and can operate with impunity. Such an idea would violate the filing requirements and would flaunt the intent and protections specifically provided by the MFA for the public.

While the ruling isn't final, the El Dorado County Superior Court has rendered a well-reasoned 44-page tentative ruling on the issue and it doesn't look good for the defendants, EDHCSD and EDC. The court's tentative decision at page 28 summarizes its reasoning for the decision and makes several statements as will be quoted below throughout the entire decision: "Section 66001(d)(2) mandates the governmental agency to refund all funds held in an account or impact mitigation fund where the local agency fails to meet its mandatory duty to make findings every five years. That duty to refund is not limited to money on deposit in the account or fund as of the date of default in making the required five-year findings. Therefore, it is reasonable to construe that statute as imposing a continuing requirement to refund all funds collected after that date until the required findings are made. Such a construction would provide the Local Agency with a continuing incentive to make the findings despite the passage of the date to make such findings and support the legislative intent to impose the five-year findings requirement in order to prevent a local agency from collecting and holding a development fee for an extended period of time without a clear and demonstrable plan to use the fee for the purpose it was imposed."

In other words, the SOL doesn't run as long as the MFA

accounts remain active. It is similar to contract law where while there is a four-year SOL on a written contract, if there is ongoing activity under the contract, the SOL runs from the last activity under the contract. So, if you take out a 120-month loan and pay monthly for 72 months, and no other activity occurs like a statement from the lender, then the SOL would run from four years hence or the 48 months after the payments stopped (not four years from the date the contract was signed). In tax law, both federal and state, the statute for audit never runs until the return is filed, not three years from the date it was due (four years for a state income tax return). In the case of being defrauded, the statute doesn't start until the date the fraud is discovered, not from the date of the actual fraud.

The ruling is tentative and there will be oral argument scheduled for Dec. 1, but tentative rulings are hard to overcome, maybe harder in this case. Interestingly the defendants' right to appeal doesn't come until after the merits of the case are fully adjudicated. After reading several government documents, EDC has already admitted to its MFA violations. If the plaintiffs were to lose this demurrer, however, they would have an immediate right of appeal.

Terri Daly and her minions have left EDC facing perhaps a liability in excess of $50 million as the collection of MFA fees and spending therefrom continued after the filing of the Austin case.

County Counsel Ciccozzi keeps telling the board not to worry. He has been telling the board since the Austin case, not to worry, the Austin case has no merit and the Walker case does not apply to EDC.

Ciccozzi's four-year county counsel contract is up for renewal in a few months and he is desperately trying for the gravity of the Austin case to not become apparent to the board. To rehire this guy considering his track record for giving advice

and his legal acumen based just on the Austin case would be a travesty. His ability as a janitor is good as he has been great at sweeping things under the rug.

And for Daly, she’s got a fat cat job with the Yuba Water Agency. Daly also needs to be sued for her violation of her severance agreement and the return of at least $153,000. Pam Knorr is up in Butte County pulling down a big paycheck. Robyn Drivon is now county counsel for Sacramento County and earned a gross of $276,000 in 2016 and Larry Combs is or was a part time city manager for Auburn, still making about $100,000 a year while pulling down over $200,000 in pension payments.

Ah, the rewards for incompetence.

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