

# A Second Wind

With an argument centered on weather conditions and swamp coolers, Kevin Patrick McVerry reduced a \$3.1 million federal court verdict to a single dollar.

BY BOBBI MURRAY

**T**he first day it was 10 or so boxes, the next day more than 15, and the rest arrived at Thousand Oaks' Graves, Roberson & Bourassa on the third day.

Nothing quite says lengthy litigation like 40-plus boxes of discovery, exhibits, depositions and photos being trucked through a law firm's front door — all shipped by Riverside's Best, Best & Krieger, the previous defense counsel.

But it wasn't just what was in the boxes, accumulated since 1990, that enabled defense attorney Kevin Patrick McVerry to reduce a \$3.1 million damage award to a single dollar. It was the seemingly bullet-proof argument he constructed, which convinced a Los Angeles federal jury that a Desert Hot Springs mobile home park would never have been profitable, due to the area's location and weather conditions.

In an earlier trial, Silver Sage's attorney, Newport Beach sole practitioner William Davis, argued that the city council blocked the project because of bias against the families expected to occupy the development. In 1994, a Los Angeles federal jury found that the city council's actions violated the Federal Fair Housing Act and allegedly caused Silver Sage, a housing developer, to lose millions. The jury awarded Silver



Kevin Patrick McVerry, a partner at Thousand Oaks' Graves, Roberson & Bourassa, describes *Silver Sage Partners v. City of Desert Hot Springs* as his first "bet-the-city" case.

## SIDEBAR

**Type:** Discrimination, Federal Fair Housing Act

**Verdict:** \$1

**Disbursement:** \$57,000 in attorney fees

**Case/Number:** Silver Sage v. City of Desert Hot Springs, CV91-6804-CBM(Sx)

**Court/Date:** United States District Court, Los Angeles/April 20

**Judge:** Consuelo B. Marshall

**Attorneys:** Plaintiff - William Davis, Newport Beach, sole practitioner. Defense - Kevin Patrick McVerry, Thousand Oaks' Graves, Roberson & Bourassa

**Technical Experts:** Plaintiff - Christopher Leisner, BDO Seidman, accountants

Defendant - Dr. Alfred Gobar, economist; Dr. Dowell Meyers, urban planning

Sage \$3.1 million in damages.

But after the first verdict, U.S. District Judge Consuelo B. Marshall ruled that the award should be reduced to \$400,000, or else the case could be retried on the issue of damages. The plaintiffs chose a retrial.

With the city already having been found in violation of the Federal Fair Housing Act, McVerry's foremost task in the retrial was to convince the jury that the Silver Sage development never would have been profitable, because no one would want to live in an remote area subject to flash floods and heavy humidity. His argument turned on issues of wind, rain and swamp coolers.

"What do you think of when you think of Palm Springs?" McVerry asks rhetorically. "Dry desert heat, right?"

Wrong.

Those familiar with Los Angeles weather reports predicting thunderstorms over the mountains and deserts know there's often humid heat in Desert Hot Springs, which is why, McVerry argued, it would be tough to keep the occupancy rate high enough to make a profit. The developers planned to use evaporative coolers on the mobile homes, which work fine in dry heat but only serve to churn moist, muggy air without cooling it.

"The plaintiffs would testify that it was largely a dry heat area," McVerry explained. "Then I'd put on people who used the word 'monsoonal' to describe the weather. So the air-conditioning issue was key. No air conditioning made the housing much less desirable."

This argument gets a derisive response from Silver Sage lawyer Davis, who describes the defense's arguments as "a bunch of crap they made up later." He cites a previously issued city finding that objected to the housing because it would involve too many residents for the town's infrastructure.

"This was malarkey. Look at the finding: It says that it will be filled with families — but when it came to damages, they said that no one would rent," Davis says. "Believe me, they didn't turn this deal down because we had the wrong air conditioning. It was because we had the wrong people — people of color."

McVerry went beyond air conditioning to highlight other livability issues, including the lack of sidewalks and street lights on the road outside the development, and a play area set partially in the Morongo Wash, which is

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most often dry, although occasionally subject to flash floods.

There was also the development's remote location, almost two miles outside of town. That was one of the reasons, testified John Cristi, the Desert Hot Springs city planner, the council had second thoughts about the project.

Then there's the wind.

"You ever see those windmills out there in Morongo Pass near Palm Springs? The reason they're out there is that there's a lot of wind. Forty miles per hour, 50 miles per hour, even 70 miles per hour is not unusual," McVerry says, moving an index finger along the pass on an aerial photo of the Coachella Valley. "100 miles per hour is unusual, but that occurs."

The developers' profit projections were based on a 95 percent occupancy rate over 55 years, a rate they would never maintain, McVerry asserted. To demonstrate that to the jury, one of his expert witnesses led them through the math. The witness estimated how many families would be available to move into the project, then broke out

the number of families who would meet the income criteria. He concluded that the park would never be full enough to turn a profit.

One of Davis' witnesses was Christopher J. Leisner, an accountant with BDO Seidman, who testified about the development's potential profits. In his cross examination, McVerry asked Leisner what the development's profits would be if the occupancy rate was 85 percent. Leisner testified that he had not made that computation.

Then McVerry asked Leisner if he had ever seen a 55-year-old mobile home. McVerry says he wanted the jurors to think about how the homes would hold up, especially with the amount the plaintiffs budgeted for maintenance.

Davis dismisses McVerry's contention. "The idea that they would lose money for 55 years is ridiculous," he says, pointing to the long lists of families waiting for low-income housing. "It would have been full the first day and it would have been full after that," he continued.

McVerry's other challenge lay in defusing potential racial issues that the first verdict raised. The matter was further fueled by testimony about alleged remarks of former city council member Cole Eyraud, now deceased.

At both trials Glen Crowson, Desert

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Hot Springs' former city manager, testified that he overheard Eyraud say that if the project went forward, "There's going to be nothing but high density, and we're going to have a lot of little Mexican kids and black kids running around out there."

"That was a big chunk of the plaintiff's case," says McVerry, adding that he found at least five witnesses who knew Eyraud, and testified that they never heard him say anything remotely like Crowson's testimony. According to Davis, none of McVerry's witnesses were at the closed hearing where Eyraud allegedly made the remark.

McVerry tried to further defuse the racial issues by telling the jury that Desert Hot Springs has at least nine low-income housing projects.

"That's like saying we've got all the black people we need," Davis returns. "It's not something you can argue in fairness or the law."

But Dowell Meyers, a University of Southern California professor of urban planning and demography, testified that Desert Hot Springs — a blue-collar town whose residents supply its wealthier neighbors in Palm Springs and Rancho Mirage with housekeepers, gardeners and hotel workers — has a higher proportion of low-income housing than all of Riverside County.

The jury, which included two African American men and one Asian woman, was apparently satisfied that

there was no malicious intent on the part of Desert Hot Springs. After deliberating for less than a day, the jury returned with a verdict reducing the original \$3.1 million award to \$1 — the city had violated the Federal Fair Housing Act, so at least nominal damages were due. The judge ruled that Desert Hot Springs owed Davis \$57,000 in attorney fees.

"Maybe she figures that if you've waited eight years to get paid, you're entitled to something," Davis guesses, adding that he estimates his costs for the case are approximately \$2 million. He added that the \$57,000 attorney-fee award will cover copying costs.

A motion for another retrial was heard on July 19, although no decision has yet come down; both counsel are fairly certain it will go their way.

"I'm again hopeful and confident that she'll deny the motion," says McVerry.

According to Davis, "the judge indicated that she was leaning toward a retrial."

If a retrial is granted, Davis will again argue on behalf of the plaintiffs. He says his firm is committed to fighting housing discrimination cases, "as a deterrent to keep cities from disservice against minorities."

McVerry, whose firm got the case after Desert Hot Springs conducted a "beauty contest" search, feels that he proved the city is not operating with discriminatory malice. He calls the action his first "bet-the-city case."

"Three million dollars to the city of Desert Hot Springs is an incredible amount of money," McVerry says. "The city of L.A. could lose that kind of money — they wouldn't like it, they wouldn't enjoy it — but Desert Hot Springs was looking at municipal insolvency."