

1 **Final agency action regarding decision below:**

2  
3 **REQHRG Date hearing requested**

4  
5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6  
7 IN THE MATTER OF THE APPLICATION  
8 TO PURCHASE STATE LAND NO. 53-  
9 107108 FOR THE STATE LAND  
10 DESCRIBED AS:

No. 03F-005-LAN

**ADMINISTRATIVE LAW JUDGE'S  
ORDER DENYING EVANGELICAL  
FREE CHURCH'S APPLICATION FOR  
AWARD OF ATTORNEYS' FEES AND  
COSTS**

11 M&B IN N2, LOT 2, SECTION 21, T18S,  
12 R13E, 5.09 ACRES, PIMA COUNTY,  
13 ARIZONA.

14 APPELLANT: EVANGELICAL FREE  
15 CHURCH OF GREEN VALLEY, INC.

16 Appellant Evangelical Free Church of Green Valley, Inc. ("EFC") has filed an  
17 Application for Attorneys' Fees and Costs, which the Arizona State Land Department  
18 ("ASLD") has opposed. For the reasons set forth below, the Administrative Law Judge  
19 denies the application.

20 **BACKGROUND**

21 **The Recommendation and the Land Commissioner's Final Order**

22 After hearing, the Administrative Law Judge recommended that ASLD continue  
23 processing EFC's application to purchase certain state trust land. In making this  
24 recommendation, she (1) rejected EFC's argument that the ASLD's former employee's  
25 conduct estopped it from denying the application; (2) declined to address EFC's  
26 argument that the ASLD's application of A.R.S. § 37-281.02(G) violated its constitutional  
27 rights to avoid constitutional separation-of-powers prohibitions; but (3) accepted EFC's  
28 argument that ASLD had abused its discretion by denying EFC's application based on  
29 an informal policy only to dispose of state trust land that had been classified as  
30 commercial by entry into long-term leases with amortization clauses, rather than sale.  
On January 9, 2003, ASLD's Commissioner accepted the Administrative Law Judge's

1 recommendation.

2 EFC claimed it was willing to pay an appraised value for the property based on a  
3 stream-of-income analysis as well as current value. But no appraisal had been made  
4 due to the stage of the application process when ASLD denied the application. The  
5 record therefore does not contain any information about whether an appraisal of a  
6 property could or should consider long-range development potential.

7 The Administrative Law Judge's recommended decision noted that ASLD's  
8 "stated preference for long-term leases of commercial land . . . preserves trust assets  
9 and avoids potentially improvident sales of state trust land." ASLD's denial in this case  
10 was based on the common-sense notion, borne out in many areas of the state that had  
11 experienced explosive growth, that once an area started to become urbanized and  
12 develop, the process would continue, resulting in exponential appreciation of property  
13 values.

14 Certain witnesses testified at the hearing that the area where the parcel of state  
15 trust land was located was experiencing development, possibly in part because EFC  
16 had built its church facility there. Therefore, the record did contain evidence that the  
17 area where the parcel was located was starting to be developed and to be transformed  
18 from a rural and mining area to a commercial and residential area and that property  
19 values were appreciating. But the Administrative Law Judge recommended  
20 nonetheless that ASLD continue processing the sale application because the record did  
21 not contain any explicit analysis by ASLD of the development potential of the area and,  
22 specifically, the property over the term of a 50-year lease. In the Administrative Law  
23 Judge's opinion, this absence did not allow ASLD to compare the benefits to the trust of,  
24 respectively, a long-term lease and an immediate sale. Hence, ASLD abused its  
25 discretion in denying the sale application out of hand, without further analysis, not  
26 because it did not possess substantial evidence to support its position. ASLD just  
27 needed more and better evidence.

### 28 **The Application**

29 EFC claims \$20,309.35 in attorneys' fees, based on times spent by four  
30 attorneys, whose hourly rates ranged from \$65 to \$210, which hourly rates "are

1 reasonable for attorneys, law clerks, legal assistants, and research assistants of  
2 comparable skill and experience in the community.”

3 EFC also incurred costs of \$1,769.88 for service of subpoenae, computer  
4 research, witness fees, postage, photocopying, and other expenses.

### 5 **CONCLUSIONS OF LAW**

6 1. The Administrative Law Judge has the authority to determine the merits of an  
7 application for attorney's fees and costs.<sup>1</sup>

8 2. To “ensure fair and open regulation by state agencies, a person. . . is eligible  
9 for reimbursement of the person's costs and fees if the person prevails against any  
10 agency in an administrative hearing as provided in section 41-1007.”<sup>2</sup>

11 3. EFC is entitled to its fees and costs if it both prevailed as to the most significant  
12 issue or set of issues and ASLD's position was “not substantially justified.”<sup>3</sup> Both requisites  
13 must be present before an application for attorney's fees and costs can be approved in an  
14 administrative proceeding.<sup>4</sup>

15 4. No Arizona cases address the meaning of the phrase “not substantially justified”  
16 in A.R.S. § 41-1007(A)(1). In its response to EFC's application, ASLD cited authorities that  
17 addressed applications for attorney's fees under the federal Equal Access to Justice Act,<sup>5</sup>  
18 which requires courts to award fees and costs to parties prevailing against federal agencies  
19 “unless the court finds that the position of the United States was substantially justified . . . .”

20  
21 5. The leading United States Supreme Court opinion on that statute is the 1988  
22 case of *Pierce, Secretary of Housing and Urban Development v. Underwood*.<sup>6</sup> There  
23 the Supreme Court discussed at length the meaning of “substantially justified”:

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<sup>1</sup> A.R.S. § 41-1007(A).

25 <sup>2</sup> A.R.S. § 41-1001(A)(2).

26 <sup>3</sup> A.R.S. § 41-1007(A).

27 <sup>4</sup> Administrative proceedings differ from civil actions in the recovery of attorneys' fees and costs.  
28 *Compare* A.R.S. § 41-1007 *with* A.R.S. §§ 12-341, 12-341.01, and 12-349.

29 <sup>5</sup> 28 U. S. C. § 2412; *see* 28 U. S. C. § 2412(d)(1)(A).

30 <sup>6</sup> 487 U.S. 552, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988) (Scalia, J.).

1 Before proceeding to consider whether the trial court abused its discretion in  
2 this case, we have one more abstract legal issue to resolve: the meaning of  
3 the phrase 'substantially justified' in 28 U. S. C. § 2412(d)(1)(A). The Court of  
4 Appeals, following Ninth Circuit precedent, held that the Government's  
5 position was 'substantially justified' if it 'had a reasonable basis both in law  
6 and in fact.' [Citation omitted.] The source of that formulation is a Committee  
7 Report prepared at the time of the original enactment of the [Equal Access to  
8 Justice Act], which commented that '[t]he test of whether the Government  
9 position is substantially justified is essentially one of reasonableness in law  
10 and fact.' [Citation omitted.] In this petition, the Government urges us to hold  
11 that 'substantially justified' means that its litigating position must have had  
12 'some substance and a fair possibility of success.' [Citation omitted.]  
13 Respondents, on the other hand, contend that the phrase imports something  
14 more than 'a simple reasonableness standard,' [citation omitted] - though  
15 they are somewhat vague as to precisely *what* more, other than 'a high  
16 standard,' and 'a strong showing,' [citation omitted].

17 In addressing this issue, we make clear at the outset that we do not  
18 think it appropriate to substitute for the formula that Congress has adopted  
19 any judicially crafted revision of it - whether that be 'reasonable basis in both  
20 law and fact' or anything else. 'Substantially justified' is the test the statute  
21 prescribes, and the issue should be framed in those terms. That being said,  
22 there is nevertheless an obvious need to elaborate upon the meaning of the  
23 phrase. The broad range of interpretations described above is attributable to  
24 the fact that the word 'substantial' can have two quite different - indeed,  
25 almost contrary - connotations. On the one hand, it can mean '[c]onsiderable  
26 in amount, value, or the like; large,' Webster's New International Dictionary  
27 2514 (2d ed. 1945) - as, for example, in the statement, 'He won the election  
28 by a substantial majority.' On the other hand, it can mean '[t]hat is such in  
29 substance or in the main,' *ibid.* - as, for example, in the statement, 'What he  
30 said was substantially true.' Depending upon which connotation one selects,  
'substantially justified' is susceptible of interpretations ranging from the  
Government's to the respondents'.

We are not, however, dealing with a field of law that provides no  
guidance in this matter. Judicial review of agency action...regularly proceeds  
under the rubric of 'substantial evidence' set forth in the Administrative  
Procedure Act, 5 U. S. C. § 706(2)(E). That phrase does not mean a large or  
considerable amount of evidence, but rather 'such relevant evidence as a  
reasonable mind might accept as adequate to support a conclusion.' [Citation  
omitted.] In an area related to the present case in another way, the test for  
avoiding the imposition of attorney's fees for resisting discovery in district  
court is whether the resistance was 'substantially justified,' Fed. Rules Civ.  
Proc. 37(a)(4) and (b)(2)(E). To our knowledge, that has never been  
described as meaning 'justified to a high degree,' but rather has been said to  
be satisfied if there is a 'genuine dispute,' [citations omitted], or 'if reasonable

people could differ as to [the appropriateness of the contested action],'  
[citations omitted].

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1 We are of the view, therefore, that as between the two commonly  
2 used connotations of the word 'substantially,' the one most naturally  
3 conveyed by the phrase before us here is not 'justified to a high degree,' but  
4 rather 'justified in substance or in the main' - that is, justified to a degree that  
5 could satisfy a reasonable person. That is no different from the 'reasonable  
6 basis both in law and fact' formulation adopted by the Ninth Circuit and the  
7 vast majority of other Courts of Appeals that have addressed this issue.  
8 [Citations omitted.]”<sup>7</sup>

6 6. EFC argues that the Administrative Law Judge's finding that ASLD abused its  
7 discretion in denying and refusing to process further the application for sale requires a  
8 concomitant legal conclusion that ASLD's position was not substantially justified. But  
9 the Arizona legislature did not include both terms in A.R.S. § 41-1007. Moreover, the  
10 United States Supreme Court has expressly held that the government's position,  
11 although ultimately rejected, can have a reasonable basis in law and fact and, therefore,  
12 be substantially justified.<sup>8</sup> The question of substantial justification at the attorneys' fees  
13 application of a proceeding is distinct from the question of whether an agency's decision  
14 is supported by substantial evidence at the merits stage of a proceeding.<sup>9</sup>

15 7. In this case, ASLD presented some evidence that the parcel of land was in an  
16 area where values were appreciating. But ASLD's evidence was not sufficient to  
17 overcome EFC's evidence that an immediate sale potentially would benefit the trust  
18 more than holding the property for future appreciation because ASLD had not done any  
19 principled analysis of the long-term development potential of the property or area.  
20 ASLD's position was not without substantial justification, it simply lacked sufficient  
21 justification to overcome the evidence that EFC presented at the hearing. ASLD's  
22 position was “justified in substance or in the main.”<sup>10</sup>

25  
26 <sup>7</sup> *Pierce*, 487 U.S. at 563-565 (Brennan, Marshall and Blackmun, JJ., concurred separately in this part of  
27 the opinion). See also BLACK'S LAW DICTIONARY at 1429 (“*substantially justified*”) (6th ed. 1990).

28 <sup>8</sup> *Pierce*, 487 U.S. at 565.

29 <sup>9</sup> See *Cummings v. Sullivan*, 950 F.2d 492, 498 (7<sup>th</sup> Cir. 2000).

30 <sup>10</sup> *Pierce*, 487 U.S. at 565.

1 8. As EFC's motion can be determined based on ASLD's position having been  
2 "substantially justified," it is not necessary to address A.R.S. § 41-1007(A)'s second  
3 requirement ("prevailing on the most significant issue or set of issues").

4 9. Due to her determination that ASLD's position was substantially justified, the  
5 Administrative Law Judge also does not address the reasonableness of EFC's claimed  
6 attorneys' fees and costs. She notes that EFC's attorneys showed a high level of legal and  
7 professional competence, were ably prepared, and were gentlemen in all their dealings  
8 with the Administrative Law Judge, both parties' witnesses, and ASLD's counsel. These  
9 attributes were greatly appreciated.

10 10. A decision of an administrative law judge under A.R.S. § 41-1007 "is subject to  
11 judicial review. If fees and other costs were denied by the . . . administrative law judge  
12 because the party was not the prevailing party but the party prevails on appeal, the court  
13 may award fees and other costs for the proceedings before the . . . administrative law  
14 judge if the court finds that fees and other costs should have been awarded under" A.R.S.  
15 § 41-1007(A).<sup>11</sup>

16 **ORDER**

17 For the foregoing reasons, EFC's Application for Attorney's Fees and Costs is  
18 denied.

19 Done this day, February 12, 2003.

20  
21 \_\_\_\_\_  
22 Diane Mihalsky  
23 Administrative Law Judge

24 Copy mailed this \_\_\_\_ day of  
25 February, 2003 to:

26 Mark Winkleman, Commissioner  
27 Arizona State Land Department  
28 ATTN: Roz Sedillo  
29 1616 West Adams  
30 Phoenix, AZ 85007

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<sup>11</sup> A.R.S. § 41-1007(E).

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