

## **An Attorney Fee Award Is Not Available To A Project Proponent That Successfully Defends A Challenge To Project Approvals Unless The Lawsuit Was Detrimental To The Public Interest.**

A project sponsor can successfully defend an action brought to challenge a permit for its project, and satisfy the standards in Code of Civil Procedure section 1021.5 for an award of attorneys' fees, but still have its fee claim rejected, if the court concludes the aim of the lawsuit was to protect, rather than curtail, important public rights, according to the decision in *Save Our Heritage Organisation v. City of San Diego*, 11 Cal.App.5th 154 (4th Dist. Div. 1, 2017). **Background.** The City of San Diego approved a site development permit for a revitalization project in Balboa Park and Save Our Heritage Organisation filed suit to challenge the permit. The superior court ruled the permit was invalid, and the city did not appeal. The project sponsor, Plaza de Panama Committee, did appeal however, and succeed in having the superior court judgment reversed. After the case was sent back to the superior court, the Committee requested an award of attorney fees against Save Our Heritage for its time spent on the appeal and in bringing the motion for fees. The superior court denied the fee motion and the Committee again appealed.



**A Project Proponent May Be Entitled to a Fee Award If It Successfully Defends a Permit Challenge and Satisfies the Statutory Requirements for an Award.** Code of Civil Procedure section 1021.5 codifies the so-called private attorney general doctrine, which seeks to promote lawsuits that vindicate public rights but that might not be otherwise brought because of the cost of litigation. On appeal, Save Our Heritage asserted that fees may never be awarded to a project sponsor that successfully defends a challenge to its project, because such an award would have a chilling effect on litigation brought to protect the public interest. The court rejected this argument. The statute allows a court to award attorney fees to "a successful party," and does not draw a distinction between prevailing plaintiffs and prevailing defendants. Accordingly, the court held that *any* successful party in litigation involving public rights that otherwise satisfies the statute's requirements may claim a fee award, not just the party that filed suit. **The Committee Satisfied the Three-Part Test for Obtaining an Attorney Fee Award Under Section 1021.5.** A party seeking a fee award under the statute must show that: (1) the litigation resulted in enforcement of an important right that affects the public interest; (2) a significant benefit was conferred on the public or a large class of persons; and (3) an award would be appropriate given the need for private enforcement and the financial burden of enforcement. Save Our Heritage did not dispute the Committee's showing that it had met this three-part test for obtaining a fee award. **Fees Could Not Be Awarded Against Save Our Heritage Because It Did Nothing to Compromise Public Rights.** The main issue before the court was whether, under an exception recognized by the California Supreme Court, Save Our Heritage was the "type of party upon whom private attorney general fees were intended to be imposed." Under this exception, "a section 1021.5 fee award may not be imposed on a litigant who did nothing to adversely affect the public interest." A party adversely affects the public interest when it seeks to curtail or compromise important public rights or seeks to exonerate itself from the violation of such rights. The court held that the suit brought by Save Our Heritage did not adversely affect the public interest, but rather sought to correct what it believed to be significant violations of environmental, historic preservation, and land use laws by the city. Although the suit was unsuccessful, it involved the type of public interest claims section 1021.5 was enacted to encourage and was not detrimental to the public interest. A fee award against Save Our Heritage would, therefore, not be appropriate.

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