

## **Attorneys' Fees Can Be Awarded to CEQA Litigants Hoping to Preserve Their Home Values**

Successful petitioners under CEQA who are motivated to file suit, in part, by their private financial interests are not necessarily ineligible for an award of attorneys' fees under the public interest fee statute. *Heron Bay Homeowners Association v. City of San Leandro*, 19 Cal. App. 5th 376 (2018). Halus Power Systems sought approval from the City of San Leandro for a zoning variance to construct a 100-foot-tall wind turbine on a five-acre industrial parcel. The property is located in the San Francisco Bay Estuary, where many species of waterfowl and shorebirds, including four threatened or endangered species, reside. The property is also roughly 500 feet from the 629-unit Heron Bay residential development. The city approved the construction of the turbine based on a mitigated negative declaration, finding that the significant environmental effects of the project could be reduced to insignificance through eleven mitigation measures. The Heron Bay Home Owners Association filed suit under CEQA, asserting that the city needed to prepare an EIR for the project. The trial court rejected the mitigated negative declaration, finding a fair argument that the project as mitigated would still have a significant effect on biological and aesthetic resources and noise. It entered judgment in favor of the HOA and directed the city to set aside its approvals and halt any further action on the project until an EIR was certified. Halus Power and the city did not appeal the decision, and Halus Power ultimately abandoned the project. Heron Bay HOA then requested an award of attorney's fees under California Code of Civil Procedure section 1021.5, which authorizes an award of attorney's fees to the prevailing party in a case that enforces an important right affecting the public interest. The trial court awarded the HOA only part of the fees it sought finding that the HOA "had a significant financial incentive to initiate the litigation." The court found that the HOA members had brought the suit in part because they feared the turbine would cause their property values to decrease. But it also found that they were also motivated by "non-pecuniary" concerns for the project's impact on wildlife, aesthetics, health and noise levels. As a result, the court apportioned financial responsibility for their attorney's fees during the administrative proceedings entirely to the HOA, but because of the "different risks and much larger financial commitment" of CEQA litigation, it divided equally the responsibility for the fees the HOA incurred for the litigation between the HOA on one side, and the city and Halus Power on the other. Halus Power and the city appealed the award of attorney's fees, arguing that a fee award was not appropriate because the value of the benefit to the members of the HOA (i.e., maintenance of their property values) far exceeded the financial burden of litigation. The court of appeal disagreed. It found that any financial benefit to the home owners was speculative since the litigation was not certain to prevent construction of the turbine or even change the project, and preservation of property values was not immediately or certainly "bankable." And while the exact amount of personal benefit to the HOA members was uncertain, the fees could nevertheless be apportioned because the record supported an implied finding that the HOA's motivations to litigate were not purely financially self-interested. Thus, the court of appeal ruled, the trial court's apportionment and partial award of attorney's fees was not an abuse of discretion. The court of appeal affirmed the trial court's award to Heron Bay HOA for a little over \$181,000 in attorney's fees for the CEQA litigation, which was less than half the amount that the HOA had requested. The court also awarded the HOA its attorneys' fees for successfully defending the appeal. This decision exemplifies the rule that trial courts have considerable discretion in awarding and apportioning attorneys' fees under section 1021.5 based on the particular facts of each case. More importantly, it makes it crystal clear that CEQA plaintiffs that might avoid a decrease in their property values by successfully challenging a project are not cut off from recovering section 1021.5 attorneys' fees.

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