

**PROPERTY LAW**  
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**Proponents of Ballot Referendum Defeating City Council Action**  
**Entitled to Attorneys' Fees**

**by Theresa M. Brehl, Column Editor**

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The Fourth District Court of Appeal, Division One, ruled that the successful proponents of a ballot referendum opposing the building of a second Wal-Mart store in the City of San Marcos were entitled to recover attorney's fees incurred in a related court proceeding under California Code of Civil Procedure ("C.C.P.") §1021.5 in *Wal-Mart Real Estate Business Trust v. City of San Marcos*, 2005 W.L. 2142930 (September 7, 2005).

**California Code of Civil Procedure §1021.5**

Under California law, litigants are generally required to bear their own attorney's fees. However, attorney's fees may be awarded to a prevailing party under the "Private Attorney General Doctrine," which is codified in C.C.P. §1021.5. That section provides, in part:

**Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if:**

- (a) A significant benefit, whether pecuniary or non-pecuniary, has been conferred on the general public or a large class of persons,**
- (b) The necessity and financial burden of private enforcement . . . are such as to make the award appropriate, and**
- (c) Such fees should not in the interests of justice be paid out of the recovery, if any.**

In *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal. 4th 553, 565, the California Supreme Court noted that "the fundamental objective of the [private attorney general] doctrine is to encourage suits enforcing important public policies by providing substantial attorneys' fees to successful litigants in such cases." *Id.*

**Facts in *Wal-mart v. San Marcos***

In August 2003, the City of San Marcos ("San Marcos") approved amendments to its general plan to change the use of a 20-acre parcel of land from residential to commercial use to permit the development of a second Wal-Mart store in San Marcos. It had been requested to

make this change by a property owner who had entered into an agreement to sell the subject property to Wal-Mart Real Estate Business Trust ("Wal-Mart"). The next month, Lori A. Drake and Randall R. Walton ("Drake/Walton"), who are residents of San Marcos, submitted a ballot referendum to San Marcos challenging its action and seeking to put the matter to a vote of the citizens. A referendum permits voters to approve or reject measures passed by a legislative body.

Wal-Mart then sought a preliminary writ of mandate from the San Diego Superior Court requesting that the court stop the referendum from being put on the ballot. San Marcos did not oppose the motion, but Drake/Walton did oppose it, arguing that a "pre-ballot challenge to a referendum is a disruption of the electoral process the court should not permit absent a compelling showing the substantive provisions of the referendum are invalid." *Wal-Mart, supra*, 2005 W.L. 2142930, \*2.

The superior court denied Wal-Mart's motion to keep the referendum off the ballot, citing the grounds raised by Drake/Walton and ruling: "it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise in the absence of some clear showing of invalidity." *Id.* Wal-Mart's petition was therefore dismissed by the trial court, without prejudice. The referendum went before the voters on March 2, 2004 as Proposition G. The Proposition passed with 61% of the electorate voting against the proposed Wal-Mart store. Wal-Mart did not challenge the referendum after the election.

Drake/Walton sought the attorney's fees they had incurred (approximately \$106,000) against Wal-Mart, the seller of the property and San Marcos pursuant to C.C.P. §1021.5. The superior court denied the motion as to all parties against whom fees were sought "on the ground the judge who denied Wal-Mart's petition for lack of ripeness 'did not make any substantive rulings in this case' and 'it would be a stretch to then . . . conclude that something that was not adjudicated . . . leads to a significant benefit.'" *Id.*

### **Appellate Court Ruling**

The Fourth District Court of Appeal disagreed and determined that the trial court had abused its discretion by denying Drake/Walton's request for attorney's fees against Wal-Mart. The court affirmed as to the other parties against whom fees had been sought.

In granting attorney's fees against Wal-Mart, the court of appeal rejected Wal-Mart's arguments that Drake/Walton were not "prevailing parties" and that only "plaintiffs" could recover fees under C.C.P. §1021.5. Indeed, citing the Supreme Court in *Graham v. DaimlerChrysler Corp.*, *supra*, 34 Cal. 4th at 571, the court of appeal acknowledged that "a successful party" is the party who has achieved its objectives. Because the purpose of the lawsuit by Wal-Mart was to preclude or delay the referendum going before the voters, and because Drake/Walton achieved their goal of having the referendum go before the voters by opposing Wal-Mart's action, Drake/Walton were the successful parties under C.C.P. §1021.5. *Wal-Mart, supra*, at \*4; *see also Graham, supra*, 34 Cal. 4th at 571 ("a lawsuit's ultimate

purpose is to achieve actual relief from an opponent . . . on this common understanding, if a party reaches the 'sought-after destination' then the party 'prevails' regardless of the 'route taken'.")

The court also found that Drake/Walton's opposition to Wal-Mart's petition "resulted in the enforcement of an important right affecting the public interest" and conferred a "significant benefit" to the public as required under C.C.P. §1021.5. *Wal-Mart, supra*, at \*5. In so ruling, the court noted:

**The electorate's constitutional right to a referendum vote is also an important right under section 1021.5, and Drake and Walton's opposition to Wal-Mart's petition to thwart the vote, or at least delay it, protected the rights of thousands of registered voters to proceed in accordance with state law.**

*Id.*

Finally, the court found that private enforcement of the public's rights was a "necessity". The court explained that the public entities did not seek to enforce these rights, but instead filed only a "response" to Wal-Mart's motion without opposing it and the trial court relied upon Drake/Walton's arguments in dismissing Wal-Mart's petition for a writ of mandate. In determining that the private enforcement was necessary, the Fourth District Court of Appeal explained:

**An important question in determining whether the services of the private party were necessary is, "did the private party advance significant factual or legal theories adopted by the court, thereby providing a material *non de minimis* contribution to its judgment, which were nonduplicative of those advanced by the governmental entity."**

*Id.* at \*5, citing *Committee to Defend Reproductive Rights v. A Free Pregnancy Center* (1991) 229 Cal. App. 3d 633, 642-643.

## CONCLUSION

The Fourth Appellate District, Division One, in *Wal-Mart v. City of San Marcos, supra*, ruled that an award of attorney's fees under the Private Attorney General doctrine was appropriate when citizens put a referendum on the ballot challenging an action by the City Council and successfully defended keeping it on the ballot. The appellate court ruled that keeping the referendum on the ballot resulted in enforcement of an important right affecting the public interest and conferred a significant benefit on the City's voters. Accordingly, having determined that the elements for obtaining an award of attorneys' fees under C.C.P. §1021.5 had been met with respect to Drake/Walton's motion seeking attorneys' fees from Wal-Mart, the court of appeal concluded that the trial court had abused its discretion by denying the motion for attorney's fees. The case was remanded to the trial court for a hearing on the proper amount of the award with instructions that the amount of the award should include attorney's fees incurred on appeal.

