

1 **Elder Law and Disability Rights Center**
2 Brooke Weitzman (SBN 301037);
3 bweitzman@eldrcenter.org
4 William Wise Jr. (SBN 109468)
5 bwise@eldrcenter.org
6 1535 E. 17th Street, Suite 110
7 Santa Ana, California 92705
8 Phone: 714.617.5353

9 **Western Center on Law & Poverty**
10 Alexander Prieto (SBN 270864)
11 aprieto@wclp.org
12 Navneet K. Grewal (SBN 251930)
13 ngrewal@wclp.org
14 Richard A. Rothschild (SBN 67356)
15 rrothschild@wclp.org
16 Matthew Warren (SBN 305422)
17 mwarren@wclp.org
18 3701 Wilshire Blvd., Suite 208
19 Los Angeles, California 90010
20 Phone: (213) 235-2614
21 Fax: (213) 487-0242

22 **Crowell & Moring LLP**
23 Richard J. McNeil (SBN 116438)
24 rmcneil@crowell.com
25 Akhil Sheth (SBN 294721)
26 asheth@crowell.com
27 3 Park Plaza, 20th Floor
28 Irvine, California 92614
Phone: (949) 263-8400
Fax: (949) 263-8414

Attorneys for Petitioner
Emergency Shelter Coalition

THE SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF ORANGE

Emergency Shelter Coalition,
a non-profit organization,

Petitioner,

v.

**City of San Clemente; City Council of
San Clemente; and Planning
Commission of City of San Clemente,**

Respondents.

Case No. 30-2019-01080355-CU-WM-CXC
Hon. Randall J. Sherman

**Petitioner Emergency Shelter Coalition's *Ex
Parte* Application for an Order Confirming
CEQA Hearing Date**

[Filed Concurrently with the Declaration of
Richard J. McNeil, the Declaration of Brooke
Weitzman, and a [Proposed] Order]

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Date: September 20, 2019
Time: 1:30 p.m.
Dept.: CX105
Action Filed: June 28, 2019

1 This ex parte application asks the Court to issue an order confirming the briefing schedule
2 and hearing date set forth in the Application for CEQA Hearing Date filed by Petitioner
3 Emergency Shelter Coalition (“ESC”) on September 18, 2019.

4 On July 28, 2019, ESC filed a Petition for Writ of Mandate (the “Petition”) based in
5 relevant part on violations of the California Environmental Quality Act (“CEQA”) by Respondent
6 City of San Clemente, Respondent City Council of San Clemente, and Respondent Planning
7 Commission of City of San Clemente (collectively, the “City”). CEQA establishes its own
8 procedural scheme—a scheme designed “to ensure extremely prompt resolution of lawsuits
9 claiming noncompliance with the Act.” *Stockton Citizens for Sensible Planning v. City of*
10 *Stockton*, 48 Cal. 4th 481, 500 (2010). Portions of that procedural scheme are relevant here.

11 First, “the petitioner shall request a hearing within 90 days from the date of filing the
12 petition.” Cal. Pub. Res. Code § 21167.4(a). Consistent with this statutory requirement, ESC filed
13 a request for hearing with this Court on September 12, 2019. There is, however, some authority
14 for the proposition that filing a request for hearing, by itself, does not satisfy this CEQA
15 requirement. In *McCormick v. Board of Supervisors*, the California Court of Appeal, First
16 District, held that a petitioner must take

17 affirmative steps sufficient to place the matter on the court’s docket for a hearing,
18 either by filing and serving a notice of hearing or utilizing some other method
19 authorized by the local rules of the court in which the matter is pending. A mere
20 advisory pleading stating that the petitioner requests a hearing is inadequate.

21 *McCormick v. Bd. of Supervisors*, 198 Cal. App. 3d 352, 358 (1988), *opinion modified on*
22 *denial of reh’g* (Mar. 1, 1988).

23 *McCormick* appears to be completely discredited on this point. In *Leavitt v. County of*
24 *Madera*, the California Court of Appeal, Fifth District, discussed *McCormick* extensively, noted
25 intervening changes in the relevant statutory language that rendered *McCormick*’s reasoning
26 inapplicable, and held “that a ‘request for a hearing’ under section 21167.4 need not include the
27 setting of a hearing date.” *Leavitt v. Cty. of Madera*, 123 Cal. App. 4th 1502, 1523 (2004), *as*
28 *modified on denial of reh’g* (Nov. 30, 2004). Similarly, in *Association for Sensible Development*

1 at *Northstar, Inc. v. Placer County*, the California Court of Appeal, Third District, held that
2 “subdivision (a) of section 21167.4 requires only the filing of a request” and that “*McCormick*’s
3 requirement that the petitioner do something more than this is no longer good law” in light of
4 amendments to the statutory language. *Ass’n for Sensible Dev. at Northstar, Inc. v. Placer Cty.*,
5 122 Cal. App. 4th 1289, 1295 (2004).

6 Nonetheless, given that the California Supreme Court has not explicitly overruled
7 *McCormick*, and given the potentially dire consequences to this Petition stemming from a
8 procedural violation of the relevant CEQA provision, ESC seeks to secure within the 90 day
9 period a hearing date. Under CEQA, following the filing of the request for hearing, “the court
10 shall establish a briefing schedule and hearing date” for the adjudication of the dispute “upon
11 application by any party.” Cal. Pub. Res. Code § 21167.4(c). ESC accordingly applied for a
12 hearing date with this Court on September 18, 2019.

13 CEQA then sets forth default deadlines for the briefing schedule and hearing date.
14 Specifically, “[i]n the absence of good cause, briefing shall be completed within 90 days from the
15 date that the request for a hearing is filed, and the hearing, to the extent feasible, shall be held
16 within 30 days thereafter.” *Id.* Despite ESC’s repeated efforts to secure a stipulation from the City
17 agreeing to a briefing schedule and hearing dates, the City has refused to stipulate to any briefing
18 schedule or hearing date despite this statutory language and the underlying policy favoring
19 prompt resolution of CEQA cases. ESC accordingly secured a reservation with this Court for a
20 hearing on the merits of ESC’s CEQA claim for December 13, 2019, at 10:00 a.m. This hearing
21 date and a briefing schedule consistent with the California Code of Civil Procedure satisfy
22 CEQA’s statutory deadlines.

23 Now, ESC respectfully seeks an order from this Court confirming this hearing date and
24 accompanying briefing schedule for the adjudication of ESC’s CEQA claim, or alternatively,
25 setting another hearing date and briefing schedule that is convenient for the Court and consistent
26 with the CEQA deadlines set forth above. If the Court sets dates past the CEQA deadlines, ESC
27 further asks the Court to make a finding that there is good cause to alter the briefing schedule and
28 that it is not feasible to have the hearing date within the statutorily prescribed period.

1 *Ex parte* relief is justified because this motion could not be heard on a regularly noticed
2 basis in time to secure a hearing date before the expiration of the 90-day window. Absent efforts
3 to secure a hearing date, ESC risks suffering irreparable harm should this Court or an appellate
4 court hold that *McCormick*'s requirements do apply. Failure to satisfy these requirements could
5 be fatal to ESC's Petition. *See McCormick*, 195 Cal. App. 3d at 358 ("Since appellants' 'Request
6 For Hearing' did not comply with section 21167.4 as we have construed it, the trial court properly
7 dismissed the action pursuant to that section.") Dismissal of ESC's Petition would "deprive[] not
8 only [ESC], but all citizens, of judicial resolution of the controversy concerning the project and its
9 effects on those who live and work in the community.'" *Leavitt*, 123 Cal. App. 4th at 1524
10 (quoting *McCormick*, 198 Cal. App. 3d at 362).

11 ESC has provided notice of this *ex parte* application consistent with the California Rules
12 of Court and this Court's local rules to counsel for the City. The name, address, email address,
13 and telephone number of counsel for the City is stated below. ESC has not previously filed any *ex*
14 *parte* application of the same character or seeking the same relief.

15 **Counsel for the City:**

16 Alisha M. Winterswyk
17 Best Best & Krieger LLP
18 18101 Von Karman Avenue, Suite 1000
19 Irvine, California 92612
20 Phone: (949) 263-6565
21 Email alisha.winterswyk@bbklaw.com

22 Dated: September 19, 2019

23 **Crowell & Moring LLP**

24 

25 Richard J. McNeil

26 Akhil Sheth

27 Attorneys for Petitioner

28 **Emergency Shelter Coalition**