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EXEMPT FROM FEES PER GOV.
CODE § 6103

6 Attorneys for Respondents
CITY OF SAN CLEMENTE; CITY COUNCIL OF
7 SAN CLEMENTE; and PLANNING
COMMISSION OF CITY OF SAN CLEMENTE
8

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ORANGE – CIVIL COMPLEX CENTER
11

12 EMERGENCY SHELTER COALITION, a
non-profit organization,

13 Petitioner,

14 v.
15

16 CITY OF SAN CLEMENTE; CITY
COUNCIL OF SAN CLEMENTE; and
17 PLANNING COMMISSION OF CITY OF
SAN CLEMENTE,

18 Respondents.
19

Case No. 30-2019-01080355-CU-WM-CXC
(CEQA)

Assigned to:
Judge Randall J. Sherman, Dept. CX105

**DECLARATION OF ALISHA M.
WINTERSWYK IN SUPPORT OF
RESPONDENTS’ MOTION FOR AN
ORDER REQUIRING PETITIONER TO
PAY THE COSTS THAT THE CITY OF
SAN CLEMENTE INCURRED IN
PREPARING THE ADMINISTRATIVE
RECORD**

Date: November 22, 2019
Time: 10:00 a.m.
Dept: CX105

*[Filed concurrently with Motion for an Order
Requiring Petitioner to Pay the Costs that the
City of San Clemente Incurred in Preparing the
Administrative Record; [Proposed] Order]*

Petition for Writ of Mandate Filed
June 28, 2019

1 provide ESC with a copy of the certified administrative record
2 upon receipt of payment for the same.

3 A true and correct copy of my September 11, 2019 email is attached hereto as **Exhibit 2**.

4 4. In a September 17, 2019 email, Mr. Sheth responded that my proposed stipulation
5 language providing that the City would serve Petitioner with a copy of the certified Record only
6 after the City’s receipt of payment for the Record “does not reflect California law.” Mr. Sheth
7 did not support this assertion with any legal authority. A true and correct copy of Mr. Sheth’s
8 September 17, 2019 email is attached hereto as **Exhibit 3**.

9 5. I responded to Mr. Sheth’s September 17, 2019 email later that same day. In my
10 response email, I provided Mr. Sheth with a string of statutory authority and case law supporting
11 the City’s assertion that Petitioner must bear the financial cost of preparing the Record. A true
12 and correct copy of my September 17, 2019 email is attached hereto as **Exhibit 4**.

13 6. Faced with such authority, Petitioner still did not agree to bear the financial cost of
14 preparing the Record. Instead, in a September 19, 2019 email, Mr. Sheth suggested that the City
15 file “a costs-related motion with the Court and ask the Court to issue an order requiring ESC to
16 pay costs in the near future.” In response, I wrote Mr. Sheth that the “City definitely will bring a
17 noticed motion for an order for Petitioner to pay the cost for administrative record preparation
18 before the City releases a copy of the certified record to Petitioner.” A true and correct copy of
19 Mr. Sheth’s September 19, 2019 email and my September 19, 2019 response is attached hereto as
20 **Exhibit 5**.

21 7. Petitioner has not, at any point, cited any law to the City in support of its position
22 that it need not bear the costs of preparing the Record. While the City has provided statutory and
23 decisional authority in support of its position, Petitioner has responded with unsupported legal
24 conclusions. On September 20, 2019, another of Petitioner’s co-counsel, Brooke Weitzman,
25 wrote—without citing any law whatsoever—that “[g]iven the well established law,” Petitioner
26 would not stipulate to pay the cost of preparing the administrative record. A true and correct
27 copy of Ms. Weitzman’s September 20, 2019 email is attached hereto as **Exhibit 6**.

28

1 record circulated by the City on September 20, 2019. As a result, the City incurred \$1,624.70 in
2 additional costs responding to Petitioner’s request, searching for relevant documents, adding and
3 omitting certain documents from the Record, and re-indexing the Record accordingly. These
4 costs are included in the breakdown set forth in the following paragraphs.

5 **The City Reasonably And Necessarily Incurred \$10,516.85 In Preparing The Record**

6 12. The City has incurred at least \$10,516.85 in costs and fees to prepare the Record,
7 which consists of 41 documents and 1,379 pages. In particular, the City incurred these costs as
8 follows:

9 13. City Staff costs. The City incurred \$1,361.95 in City Staff costs, reflecting time
10 City Staff spent collecting documents and compiling the Record. In particular, City Staff spent
11 21 hours collecting documents and compiling the Record, and City Staff hourly rates range
12 between \$43.63 and \$105.00.

13 14. Paralegal costs. To prepare the Record, the City heavily relied on Tammy Ingram,
14 a paralegal with Best Best & Krieger LLP. Ms. Ingram has over seven (7) years of experience
15 preparing administrative records in CEQA actions. Ms. Ingram assisted the City by collecting
16 and organizing relevant documents, reviewing documents for privilege and completeness,
17 communicating with City staff regarding the contents of the Record, indexing the Record, and
18 Bates stamping the Record. Ms. Ingram’s hourly rate is \$166.00, and she spent 26.7 hours
19 compiling the Record, for a subtotal of \$4,432.20.

20 15. Attorney costs. The City incurred at least \$2,681.40 in costs relating to attorney
21 review and supervision of the compiling of the Record. The attorney rate for work on the Record
22 is \$327.00 per hour, and the City’s counsel—me and my associate, Ali Tehrani—spent 8.2 hours
23 preparing, reviewing, and supervising the preparation of the Record. Notably, the \$2,681.40 in
24 costs that the City seeks to recover represents only the time that the City’s counsel spent
25 supervising the compiling of the Record and reviewing it to ensure completeness. These costs do
26 not account for the vast majority of time that Mr. Tehrani and I spent on the Record—including
27 time spent substantively analyzing the contents of the Record, time spent researching issues
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relating to the Record, time spent meeting and conferring regarding the Record, and time spent preparing this Motion.

16. Transcription of audio recordings of public meetings. The City incurred \$2,041.30 in costs transcribing two San Clemente City Council meetings (May 21, 2019 and June 4, 2019), the transcripts of which the City has included in the Record.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed October 30, 2019, in the County of Orange.


By: 
ALISHA WINTERSWYK
Attorney for Respondents
City of San Clemente; City Council of San Clemente; and Planning Commission of City of San Clemente

EXHIBIT 1

1 Brooke Weitzman (SBN 301037)
bweitzman@eldrcenter.org
2 William Wise Jr. (SBN 109468)
bwise@eldrcenter.org
3 Sarah Dawley (SBN 325897)
sdawley@eldrcenter.org
4 ELDER LAW AND DISABILITY RIGHTS CENTER
1535 E 17th Street, Suite 110
5 Santa Ana, CA 92705
Telephone: (714) 617-5353
6

Navneet K. Grewal (SBN 251930)
7 ngrewal@wclp.org
Alexander Prieto (SBN 270864)
8 aprieto@wclp.org
Richard A. Rothschild (SBN 67356)
9 rrothschild@wclp.org
Matthew Warren (SBN 305422)
10 mwarren@wclp.org
WESTERN CENTER ON LAW AND POVERTY
11 3710 Wilshire Blvd, Suite 208
Los Angeles, CA 90010-2826
12 Telephone: (213) 487-7211
Facsimile: (213) 487-0242
13

Attorneys for Petitioner

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **COUNTY OF ORANGE**
16

17 EMERGENCY SHELTER COALITION, a
non-profit organization,

18 Petitioner,

19 v.
20

21 CITY OF SAN CLEMENTE, a California
municipal corporation; CITY COUNCIL OF
22 CITY OF SAN CLEMENTE, the duly-elected
legislative body of the City; PLANNING
23 COMMISSION OF CITY OF SAN
24 CLEMENTE, the duly-appointed subagency
of the City Council; and DOES 1 through 25,
25 inclusive,

26 Respondents.
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ELECTRONICALLY FILED
Superior Court of California,
County of Orange

06/28/2019 at 07:18:05 PM

Clerk of the Superior Court
By Sarah Loose, Deputy Clerk

CASE NO. 30-2019-01080355-CU-WM-CXC

**PETITIONER EMERGENCY SHELTER
COALITION'S REQUEST THAT
RESPONDENTS PREPARE
ADMINISTRATIVE RECORD PURSUANT
TO PUBLIC RESOURCES CODE
SECTION 21167.6(a)**

Judge Randall J. Sherman

1 **TO THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA:**

2 **PLEASE TAKE NOTICE** that, petitioner Emergency Shelter Coalition (“Petitioner”)
3 hereby requests that respondents City of San Clemente, City Council of City of San Clemente,
4 and Planning Commission of City of San Clemente as respondents (collectively,
5 “Respondents”) prepare the record of proceedings (the “Record”) in the above-captioned action
6 (the “Action”) pursuant to Public Resources Code Section 21167.6(a).

7 Petitioner further requests that Respondents include in the Record each of the following
8 categories of documents, as required under Public Resources Code Section 21167.6(e):

9 (1) All project application materials.

10 (2) All staff reports and related documents prepared by the respondent public agency
11 with respect to its compliance with the substantive and procedural requirements of this division
12 and with respect to the action on the project.

13 (3) All staff reports and related documents prepared by the respondent public agency
14 and written testimony or documents submitted by any person relevant to any findings or
15 statement of overriding considerations adopted by the respondent agency pursuant to this
16 division.

17 (4) Any transcript or minutes of the proceedings at which the decisionmaking body
18 of the respondent public agency heard testimony on, or considered any environmental document
19 on, the project, and any transcript or minutes of proceedings before any advisory body to the
20 respondent public agency that were presented to the decisionmaking body prior to action on the
21 environmental documents or on the project.

22 (5) All notices issued by the respondent public agency to comply with this division
23 or with any other law governing the processing and approval of the project.

24 (6) All written comments received in response to, or in connection with,
25 environmental documents prepared for the project, including responses to the notice of
26 preparation.

1 (7) All written evidence or correspondence submitted to, or transferred from, the
2 respondent public agency with respect to compliance with this division or with respect to the
3 project.

4 (8) Any proposed decisions or findings submitted to the decisionmaking body of the
5 respondent public agency by its staff, or the project proponent, project opponents, or other
6 persons.

7 (9) The documentation of the final public agency decision, including the final
8 environmental impact report, mitigated negative declaration, or negative declaration, and all
9 documents, in addition to those referenced in paragraph (3), cited or relied on in the findings or
10 in a statement of overriding considerations adopted pursuant to this division.

11 (10) Any other written materials relevant to the respondent public agency's
12 compliance with this division or to its decision on the merits of the project, including the initial
13 study, any drafts of any environmental document, or portions thereof, that have been released
14 for public review, and copies of studies or other documents relied upon in any environmental
15 document prepared for the project and either made available to the public during the public
16 review period or included in the respondent public agency's files on the project, and all internal
17 agency communications, including staff notes and memoranda related to the project or to
18 compliance with this division.

19 (11) The full written record before any inferior administrative decisionmaking body
20 whose decision was appealed to a superior administrative decisionmaking body prior to the
21 filing of litigation.

22 Petitioner further requests that Respondents include in the Record an electronic
23 recording of any videotaped proceedings relevant to the Action, including, but not limited to the
24 May 21, 2019, June 4, 2019, and June 18, 2019 City Council Meeting.

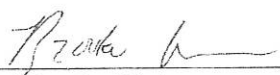
25 Petitioner further requests that Respondents include in the Record any internal written,
26 electronic or other communications between or among the City, City staff, City Council or
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Planning Commission or any of their respective members or representatives, regarding the implementation of ordinances related to the homeless camp site created at 380 Avenida Pico and implementation of Ordinances Nos. 1673 and 1674 and the 2019 amendment to Ordinance No. 1671.

DATED: June 28, 2019

ELDER LAW AND DISABILITY RIGHTS CENTER

By: 

Brooke Weitzman
Attorneys for Petitioner
Emergency Shelter Coalition

EXHIBIT 2

Ali Tehrani

From: Alisha Winterswyk
Sent: Wednesday, September 11, 2019 10:18 AM
To: 'Sheth, Akhil'; Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer
Cc: 'Brooke Weitzman'; 'Alex Prieto'; 'Richard Rothschild'; 'Matt Warren'; 'Navneet Grewal'; 'McNeil, Richard'
Subject: RE: ESC - Stipulation and [Proposed] Order re Briefing Schedule
Attachments: Stipulation and [Proposed] Order re Briefing Schedule-c1.DOCX

Hi Akhil,

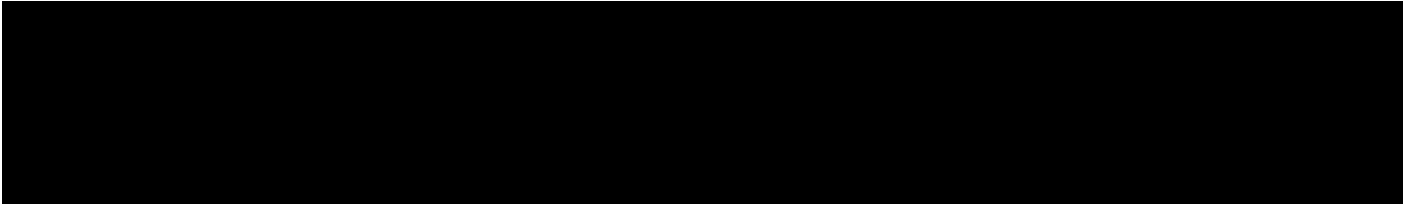
Thank you for preparing the stipulation. Our edits are attached. A couple of notes regarding our edits:

- **City Preparing the Record** – As you know, Petitioner ESC elected to have the City prepare the administrative record in this case. In accordance with Public Resource Code, section 21167.6, the City is preparing the record at ESC's cost and will strive to do so at reasonable cost in light of the scope of the record. The City will provide ESC with a copy of the certified administrative record upon receipt of payment for the same.
- **Time for Preparation of the Record** – The dates that you included in the first draft of the stipulation were unworkable. The dates had the City's deadline for circulating a draft administrative record only three days after the City received the stipulation. While the City has been working diligently on pulling together the record of proceedings, the record is incomplete. Thus, I have revised the dates to reflect the soonest date by which the City will be able to get draft documents to your client for review. Relatedly, I updated all other dates based on the three week turn-around time that we initially discussed at our settlement meeting. If you believe that ESC will need more time to review the record, please let us know. We are happy to change those dates if needed.
- **Amended Petition** – Your co-counsel has indicated that ESC will likely seek to amend its Petition in this case. As a result, the City reserves the right to augment the record once it is served with the amended Petition. You'll see my edits to that effect in the attached.
- **Lodging Record with Court** – In accordance with the Local Civil Complex rules, we would expect Judge Sherman to issue a case management order directing the City how and when to lodge the administrative record. Each judge in the Civil Complex courthouse approaches this a little differently. So, I made edits to reflect that the City will lodge in accordance with the Court's order.
- **Briefing Schedule and Hearing Date** – As I have previously mentioned, it is premature to agree to a briefing schedule. We do not yet have a certified administrative record and we have not yet had our first Case Management Conference. The City does not agree to those terms in the stipulation and has deleted them. With respect to the request for hearing date, as I have previously mentioned to Rick and to your co-counsel, the requirement in Public Resources Code, section 21167.4 is for Petitioner to request a hearing date. This can be done by filing a request for hearing date on pleading paper with the court.

Two other related items:

- **Case Management Conference** – Our first case management conference is set for December 6, 2019. The Local Civil Complex rules require that the parties file with the court a case management conference statement at least five court days before the hearing. The court strongly prefers these statements be joint. I have personally heard Judge Sherman reprimand attorneys for failing to file their Case Management Statements jointly – he will ask for good cause if we do not file jointly. As such, I would propose that we accommodate the court's preference and

file our Case Management Statement jointly. To that end, would your office like to take the laboring oar on preparing the first draft of the case management statement or would you like our office to do so? Whichever office takes the first stab at the case management statement should aim to get a draft to the other offices by at least 5 business days before the deadline to file with the Court so that everyone has a chance to review and edit.



Please let me know if you have questions.

Thank you,
Alisha

 **BBK**
BEST BEST & KRIEGERE
ATTORNEYS AT LAW

Alisha Winterswyk
Partner
alisha.winterswyk@bbklaw.com
T: (949) 263-6565 C: (562) 762-8114
www.BBKlaw.com  

From: Alisha Winterswyk
Sent: Monday, September 09, 2019 3:20 PM
To: 'Sheth, Akhil'; Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer
Cc: 'Brooke Weitzman'; Alex Prieto; Richard Rothschild; Matt Warren; Navneet Grewal; McNeil, Richard
Subject: RE: ESC - Stipulation and [Proposed] Order re Briefing Schedule

Hi Akhil,

We will take a look and be in touch.

Thank you,
Alisha

 **BBK**
BEST BEST & KRIEGERE
ATTORNEYS AT LAW

Alisha Winterswyk
Partner
alisha.winterswyk@bbklaw.com
T: (949) 263-6565 C: (562) 762-8114
www.BBKlaw.com  

From: Sheth, Akhil [mailto:ASheth@crowell.com]
Sent: Saturday, September 07, 2019 6:25 PM
To: Alisha Winterswyk; Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer
Cc: 'Brooke Weitzman'; Alex Prieto; Richard Rothschild; Matt Warren; Navneet Grewal; McNeil, Richard
Subject: ESC - Stipulation and [Proposed] Order re Briefing Schedule

CAUTION - EXTERNAL SENDER.

Hi Alisha,

As promised, here is a draft stipulation and proposed order. Please let us know by Wednesday whether the City will stipulate to the provided schedule.

Thanks,

Akhil

Akhil Sheth

asheth@crowell.com | (949) 798-1363

Crowell & Moring LLP | www.crowell.com

3 Park Plaza, 20th Floor, Irvine, CA 92614

EXHIBIT 3

Ali Tehrani

From: Sheth, Akhil <ASheth@crowell.com>
Sent: Tuesday, September 17, 2019 12:08 PM
To: Alisha Winterswyk
Cc: Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer; Brooke Weitzman; Alex Prieto; Richard Rothschild; Matt Warren; Navneet Grewal; McNeil, Richard
Subject: RE: ESC - Stipulation and [Proposed] Order re Briefing Schedule
Attachments: Stipulation and [Proposed] Order re Briefing Schedule.docx

CAUTION - EXTERNAL SENDER.

Hi Alisha,

Thank you for your email. ESC agrees to give the City an extension until this Friday, September 20 to provide the administrative record, contingent on the parties agreeing on a suitable stipulation in the next day or two. I've attached a revised draft, and included some explanatory comments below.

- **Meet-and-confer period:** ESC has included the October 17 date to guarantee a meet-and confer window.
- **Costs:** The proposed cost language does not reflect California law. Perhaps more importantly, it is not necessary—the statute speaks for itself.
- **Amendment:** The administrative record pertains to the CEQA claim, so it is unclear why any amendment to other claims would impact the administrative record. ESC does not concede that the City can amend the administrative record in response to any proposed amendment or amendment to the Petition. I have included language reflecting this, that at the same time should assuage any concerns the City has.
- **Lodging:** Again, the statute speaks for itself regarding lodging.
- **Proposed order:** There is no need to repeat the dates in the proposed order, especially since doing so risks create some distinction between what is in the stipulation and what is in the order. We can effect the agreed-to dates by incorporating the stipulation into the proposed order.

Finally, ESC reserves its right to pursue any relief it believes is appropriate regarding a briefing schedule and the hearing date (and of course, the administrative record, to the extent the parties cannot reach agreement on a stipulation).

Thanks,

Akhil

Akhil Sheth
asheth@crowell.com | (949) 798-1363

From: Alisha Winterswyk [mailto:Alisha.Winterswyk@bbklaw.com]
Sent: Saturday, September 14, 2019 8:24 AM
To: Sheth, Akhil
Cc: Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer; Brooke Weitzman; Alex Prieto; Richard Rothschild; Matt Warren; Navneet Grewal; McNeil, Richard
Subject: Re: ESC - Stipulation and [Proposed] Order re Briefing Schedule

External Email

Good morning, Akhil,

You actually have a choice on whether to burden the court with an ex parte request on administrative record dates. Instead of wasting the court's time, you could respond to the city's revised dates, as reflected in the city's edits to the stipulation. You have not responded to those at all. If you believe the counter-proposal is inadequate, suggest dates that you believe are more workable.

The city has been working on assembling the record. The city has not waited. You, your co-counsel, and your client led the city to believe we were working together to establish a mutually agreeable schedule for bringing the administrative record to a point of certification. Your last minute change of course has thrown off that effort.

Notwithstanding the foregoing, the city is in a position to send you, your co-counsel and your client the administrative record documents and a draft index by next Friday, September 20. Please let us know how long you need to review the documents and index. Your co-counsel previously stated three weeks.

As for the briefing schedule, the city's position is the same. It will not agree by stipulation to a briefing schedule at this time. It is premature.

Alisha



[Alisha Winterswyk](#)

Partner

alisha.winterswyk@bbklaw.com

T: (949) 263-6565 C: (562) 762-8114

www.BBKlaw.com

On Sep 13, 2019, at 10:33 PM, Sheth, Akhil <ASheth@crowell.com> wrote:

CAUTION - EXTERNAL SENDER.

Hi Alisha,

The City's actions are forcing ESC to seek ex parte relief on two issues, (1) preparation of the administrative record and (2) setting of a briefing schedule and hearing date.

First, given the City's failure to prepare the administrative record, the City is inarguably in violation of California law. The record was due by August 27, 2019. As of today, the City is thus two weeks and three days past its legal deadline and counting. This is not a minor violation—the California legislature deemed the requirement serious enough that it created a provision specifically authorizing sanctions if this particular requirement was not satisfied.

Further, the City's recent statements and actions add to ESC's growing concern that the City is not acting in good faith and diligently trying to meet its obligations, but is instead using ESC's efforts to reach reasonable solutions as opportunities to engage in dilatory tactics. In its proposed stipulation, ESC—in the spirit of cooperation and good faith—gave the City the September 12 deadline that the City itself proposed for its preparation of the administrative record. The City now states that this deadline “gave the City only three days to assemble all documents and an index.” The City has now had 77 days to assemble the administrative record, 17 more than the law provides. The only way the proposed stipulation gave the City three days is if the City has not yet begun to prepare the administrative record.

The City's statement is thus concerning. The City's counter-proposal to further push out the September 12 deadline it proposed by another 21 days further supports the growing concern that the City is attempting to unduly delay the resolution of this case. The administrative record in this case is not substantial in volume or complexity.

Second, the City has repeatedly stated that it will not agree to any briefing schedule whatsoever. ESC has previously explained why it believes it is appropriate to set a briefing schedule and hearing date now. The City's intransigence in face of California law on this issue alone forces ESC to seek ex parte relief, unless the City has changed its mind.

ESC has tried, and tried again, to be reasonable and cooperative. Those efforts have only been met with delay. Nonetheless, ESC will give the City until the close of business on Monday to provide the administrative record and to notify us if the City will agree to a briefing and hearing schedule that complies with Section 21167.4. Otherwise, ESC will unfortunately be forced to seek ex parte relief. ESC also reserves the right to seek sanctions. For the purposes of getting an agreed-upon stipulation, ESC will forego filing an amended complaint at this time.

Akhil

Akhil Sheth
asheth@crowell.com | (949) 798-1363

From: Alisha Winterswyk [<mailto:Alisha.Winterswyk@bbklaw.com>]

Sent: Thursday, September 12, 2019 10:11 PM

To: Sheth, Akhil

Cc: Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer; Brooke Weitzman; Alex Prieto; Richard Rothschild; Matt Warren; Navneet Grewal; McNeil, Richard

Subject: Re: ESC - Stipulation and [Proposed] Order re Briefing Schedule

External Email

Akhil,

The dates that I proposed on August 22 for preparation of the administrative record were rough / estimated dates. The proposed dates were not agreed upon and were not solidified. Your colleague, Rick McNeill, was supposed to call me to discuss dates and figure out schedule that would be workable in light of fact the that your client intends to amend its petition. The City did not receive a proposed stipulation or feedback on dates until Monday, September 9, 18 days after our meeting on August 22. And then, your proposed schedule gave the City only three days

to assemble all documents and an index. That was unreasonable. We proposed alternative dates in our edits to the stipulation and invited discussion on those. I did not receive any feedback from you on the dates, just a threat that you were going to go into court on an *ex parte* basis to ask the court to resolve the issue. I would suggest that is not necessary and this is a topic that the parties should be able to resolve, starting with a response from you on the dates we suggested in response. To that end, the City is willing to meet and confer with you about dates for the administrative record. Please let me know times that you are available to discuss dates. Or, if you prefer (based on your co-counsel's prior direction), we can email about dates.

As for the briefing schedule, the City is not in a position to agree to a briefing schedule at this time. The City believes setting a briefing schedule at this time is premature in the litigation.

Alisha



[Alisha Winterswyk](#)
Partner
alisha.winterswyk@bbklaw.com
T: (949) 263-6565 C: (562) 762-8114
www.BBKlaw.com

On Sep 12, 2019, at 4:01 PM, Sheth, Akhil <ASheth@crowell.com> wrote:

CAUTION - EXTERNAL SENDER.

Thanks Alisha. I won't address each assertion in your emails, but in sum, we disagree with your characterization of much of the relevant law and facts. The City is currently in violation of CEQA's 60-day deadline for preparation of the administrative record. We note that the code provides for sanctions for this delay but we would prefer not to take that route. But we would like to meet and confer with you and reserve our right to seek such relief. Given the foregoing and given the City's decision to not accept dates that the City itself initially suggested, ESC will be moving ex parte for an order asking the Court to set dates.

Akhil

Akhil Sheth
asheth@crowell.com | (949) 798-1363

From: Alisha Winterswyk [<mailto:Alisha.Winterswyk@bbklaw.com>]
Sent: Wednesday, September 11, 2019 10:25 AM
To: Sheth, Akhil; Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer
Cc: 'Brooke Weitzman'; 'Alex Prieto'; 'Richard Rothschild'; 'Matt Warren'; 'Navneet Grewal'; McNeil, Richard
Subject: RE: ESC - Stipulation and [Proposed] Order re Briefing Schedule

External Email

Akhil,

One more administrative item to consider. We've been sending courtesy copies of filings by email. Should we consider adding a line item to the stipulation to agree to eService using OneLegal?

Alisha

Alisha Winterswyk
Partner

<image001.jpg>

alisha.winterswyk@bbklaw.com

T: (949) 263-6565 C: (562) 762-8114

www.BBKlaw.com

<image002.jpg>

<image002.jpg>

From: Alisha Winterswyk
Sent: Wednesday, September 11, 2019 10:18 AM
To: 'Sheth, Akhil'; Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer
Cc: 'Brooke Weitzman'; 'Alex Prieto'; 'Richard Rothschild'; 'Matt Warren'; 'Navneet Grewal'; 'McNeil, Richard'
Subject: RE: ESC - Stipulation and [Proposed] Order re Briefing Schedule

Hi Akhil,

Thank you for preparing the stipulation. Our edits are attached. A couple of notes regarding our edits:

- ? **City Preparing the Record** – As you know, Petitioner ESC elected to have the City prepare the administrative record in this case. In accordance with Public Resource Code, section 21167.6, the City is preparing the record at ESC’s cost and will strive to do so at reasonable cost in light of the scope of the record. The City will provide ESC with a copy of the certified administrative record upon receipt of payment for the same.

- ? **Time for Preparation of the Record** – The dates that you included in the first draft of the stipulation were unworkable. The dates had the City’s deadline for circulating a draft administrative record only three days after the City received the stipulation. While the City has been working diligently on pulling together the record of proceedings, the record is incomplete. Thus, I have revised the dates to reflect the soonest date by which the City will be able to get draft documents to your client for review. Relatedly, I updated all other dates based on the three week turn-around time that we initially discussed at our settlement meeting. If you believe that ESC will need more time to review the record, please let us know. We are happy to change those dates if needed.

- ? **Amended Petition** – Your co-counsel has indicated that ESC will likely seek to amend its Petition in this case. As a result, the City reserves the right to augment the record once it is served with the amended Petition. You’ll see my edits to that effect in the attached.

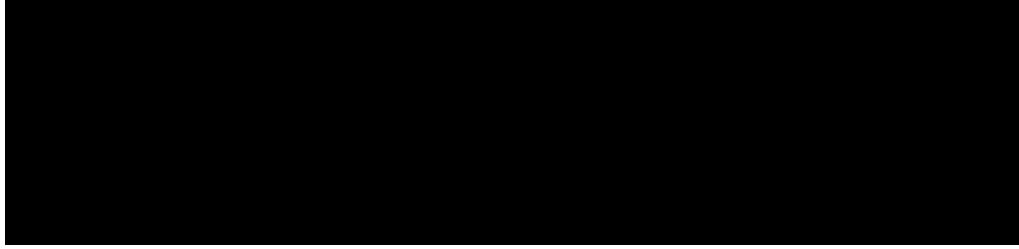
- ? **Lodging Record with Court** – In accordance with the Local Civil Complex rules, we would expect Judge Sherman to issue a case management order directing the City how and when to lodge the administrative record. Each judge in the Civil Complex courthouse approaches this a little differently. So, I made edits to reflect that the City will lodge in accordance with the Court’s order.

- ? **Briefing Schedule and Hearing Date** – As I have previously mentioned, it is premature to agree to a briefing schedule. We do not yet have a certified administrative record and we have not yet had our first Case Management Conference. The City does not agree to those terms in the stipulation and has deleted them. With respect to the request for hearing date, as I have previously mentioned to Rick and to your co-counsel, the requirement in Public Resources Code, section 21167.4 is for Petitioner to request a hearing date. This can be done by filing a request for hearing date on pleading paper with the court.

Two other related items:

- ? **Case Management Conference** – Our first case management conference is set for December 6, 2019. The Local Civil Complex rules require that the parties file with the court a case management conference statement at least five court days before the hearing. The court strongly prefers these statements be joint. I have personally heard Judge Sherman reprimand attorneys for failing to file their Case Management Statements jointly – he will ask for good cause if we do not file jointly. As such, I would propose that we accommodate the court’s preference and file our Case Management Statement jointly. To that end, would your office like to take the laboring oar on preparing the first draft of the case management statement or would you like our office to do so? Whichever office takes the first stab at the case management statement should aim to get

a draft to the other offices by at least 5 business days before the deadline to file with the Court so that everyone has a chance to review and edit.



Please let me know if you have questions.

Thank you,
Alisha

Alisha Winterswyk

Partner



alisha.winterswyk@bbklaw.com

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www.BBKlaw.com



From: Alisha Winterswyk
Sent: Monday, September 09, 2019 3:20 PM
To: 'Sheth, Akhil'; Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer
Cc: 'Brooke Weitzman'; Alex Prieto; Richard Rothschild; Matt Warren; Navneet Grewal; McNeil, Richard
Subject: RE: ESC - Stipulation and [Proposed] Order re Briefing Schedule

Hi Akhil,

We will take a look and be in touch.

Thank you,
Alisha

Alisha Winterswyk

Partner



alisha.winterswyk@bbklaw.com

T: (949) 263-6565 C: (562) 762-8114

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From: Sheth, Akhil [<mailto:ASheth@crowell.com>]
Sent: Saturday, September 07, 2019 6:25 PM
To: Alisha Winterswyk; Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer
Cc: 'Brooke Weitzman'; Alex Prieto; Richard Rothschild; Matt Warren; Navneet Grewal; McNeil, Richard
Subject: ESC - Stipulation and [Proposed] Order re Briefing Schedule

CAUTION - EXTERNAL SENDER.

Hi Alisha,

As promised, here is a draft stipulation and proposed order. Please let us know by Wednesday whether the City will stipulate to the provided schedule.

Thanks,

Akhil

Akhil Sheth

asheth@crowell.com | (949) 798-1363

Crowell & Moring LLP | www.crowell.com

3 Park Plaza, 20th Floor, Irvine, CA 92614

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EXHIBIT 4

Ali Tehrani

From: Alisha Winterswyk
Sent: Tuesday, September 17, 2019 10:10 PM
To: 'Sheth, Akhil'
Cc: Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer; Brooke Weitzman; Alex Prieto; Richard Rothschild; Matt Warren; Navneet Grewal; McNeil, Richard
Subject: RE: ESC - Stipulation and [Proposed] Order re Briefing Schedule
Attachments: Stipulation and [Proposed] Order re Briefing Schedule 091719-c1.DOCX

Akhil,

Thank you, again, for the revisions to the stipulation. The City's responses to your notes are interlineated in **bold underlined text below**. Related edits are incorporated in the attached version of the stipulation. Please let me know if you have any questions or if you would like to discuss any of this.

Thank you,
Alisha



Alisha Winterswyk
Partner
alisha.winterswyk@bbklaw.com
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www.BBKlaw.com [in](#) [t](#)

From: Sheth, Akhil [mailto:ASheth@crowell.com]
Sent: Tuesday, September 17, 2019 12:08 PM
To: Alisha Winterswyk
Cc: Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer; Brooke Weitzman; Alex Prieto; Richard Rothschild; Matt Warren; Navneet Grewal; McNeil, Richard
Subject: RE: ESC - Stipulation and [Proposed] Order re Briefing Schedule

CAUTION - EXTERNAL SENDER.

Hi Alisha,

Thank you for your email. ESC agrees to give the City an extension until this Friday, September 20 to provide the administrative record, contingent on the parties agreeing on a suitable stipulation in the next day or two. I've attached a revised draft, and included some explanatory comments below.

- **Meet-and-confer period:** ESC has included the October 17 date to guarantee a meet-and confer window. **This looks good. We associated the October 17 date with the meet and confer paragraph so that is clearer.**
- **Costs:** The proposed cost language does not reflect California law. Perhaps more importantly, it is not necessary—the statute speaks for itself. **The cost language is consistent with California law and the City will require advance payment before release of the administrative record. Please see Code Civ. Proc., §§ 1094.5, subd. (a), 1094.6, subd. (c); Pub. Resources Code, § 21167.6, subd. (b)(1); River Valley Preservation Project v. Metropolitan Transit Dev. Bd. (1995) 37 Cal.App.4th 154, 182, 43 Cal.Rptr.2d 501 [“taxpayers ... should not have to bear the cost of preparing the administrative record in a lawsuit brought by a private individual or entity”]; See also Black Historical Society v. City of San Diego (2005) 134 Cal.App.4th 670, 677-678; see also**

Coalition for Adequate Review v. City and County of San Francisco (2014) 229 Cal.App.4th 1043, 1053, citing *Black Historical Society v. City of San Diego*, [“Indeed, a public agency can refuse to release a record it has been asked to prepare until the petitioner making the request has paid the agency’s preparation costs.”]. The City added edits to the stipulation to make this clear.

- **Amendment:** The administrative record pertains to the CEQA claim, so it is unclear why any amendment to other claims would impact the administrative record. The administrative record pertains to claims brought ESC’s Petition pursuant to 1094.5, which includes the CEQA claim but is not limited to it. ESC does not concede that the City can amend the administrative record in response to any proposed amendment or amendment to the Petition. I have included language reflecting this, that at the same time should assuage any concerns the City has. The City retains ultimate discretion over the scope of the administrative record and thus can augment the record in the event circumstances warrant. The City need not request leave of court to do so.
- **Lodging:** Again, the statute speaks for itself regarding lodging. The edits you made regarding lodging the record with the court are fine. The City does not agree, however, to the edits on serving the certified record with ESC. The City will not serve a copy of the certified record on ESC until it receives payment for the record.
- **Proposed order:** There is no need to repeat the dates in the proposed order, especially since doing so risks create some distinction between what is in the stipulation and what is in the order. We can effect the agreed-to dates by incorporating the stipulation into the proposed order. This edit is fine with the City.

Finally, ESC reserves its right to pursue any relief it believes is appropriate regarding a briefing schedule and the hearing date (and of course, the administrative record, to the extent the parties cannot reach agreement on a stipulation).

Thanks,

Akhil

Akhil Sheth

asheth@crowell.com | (949) 798-1363

From: Alisha Winterswyk [mailto:Alisha.Winterswyk@bbklaw.com]

Sent: Saturday, September 14, 2019 8:24 AM

To: Sheth, Akhil

Cc: Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer; Brooke Weitzman; Alex Prieto; Richard Rothschild; Matt Warren; Navneet Grewal; McNeil, Richard

Subject: Re: ESC - Stipulation and [Proposed] Order re Briefing Schedule

External Email

Good morning, Akhil,

You actually have a choice on whether to burden the court with an ex parte request on administrative record dates. Instead of wasting the court’s time, you could respond to the city’s revised dates, as reflected in the city’s edits to the stipulation. You have not responded to those at all. If you believe the counter-proposal is inadequate, suggest dates that you believe are more workable.

The city has been working on assembling the record. The city has not waited. You, your co-counsel, and your client led the city to believe we were working together to establish a mutually agreeable schedule for bringing the administrative record to a point of certification. Your last minute change of course has thrown off that effort.

Notwithstanding the foregoing, the city is in a position to send you, your co-counsel and your client the administrative record documents and a draft index by next Friday, September 20. Please let us know how long you need to review the documents and index. Your co-counsel previously stated three weeks.

As for the briefing schedule, the city's position is the same. It will not agree by stipulation to a briefing schedule at this time. It is premature.

Alisha



[Alisha Winterswyk](#)
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On Sep 13, 2019, at 10:33 PM, Sheth, Akhil <ASheth@crowell.com> wrote:

CAUTION - EXTERNAL SENDER.

Hi Alisha,

The City's actions are forcing ESC to seek ex parte relief on two issues, (1) preparation of the administrative record and (2) setting of a briefing schedule and hearing date.

First, given the City's failure to prepare the administrative record, the City is inarguably in violation of California law. The record was due by August 27, 2019. As of today, the City is thus two weeks and three days past its legal deadline and counting. This is not a minor violation—the California legislature deemed the requirement serious enough that it created a provision specifically authorizing sanctions if this particular requirement was not satisfied.

Further, the City's recent statements and actions add to ESC's growing concern that the City is not acting in good faith and diligently trying to meet its obligations, but is instead using ESC's efforts to reach reasonable solutions as opportunities to engage in dilatory tactics. In its proposed stipulation, ESC—in the spirit of cooperation and good faith—gave the City the September 12 deadline that the City itself proposed for its preparation of the administrative record. The City now states that this deadline “gave the City only three days to assemble all documents and an index.” The City has now had 77 days to assemble the administrative record, 17 more than the law provides. The only way the proposed stipulation gave the City three days is if the City has not yet begun to prepare the administrative record. The City's statement is thus concerning. The City's counter-proposal to further push out the September 12 deadline it proposed by another 21 days further supports the growing concern that the City is attempting to unduly delay the resolution of this case. The administrative record in this case is not substantial in volume or complexity.

Second, the City has repeatedly stated that it will not agree to any briefing schedule whatsoever. ESC has previously explained why it believes it is appropriate to set a briefing schedule and hearing date now. The City's intransigence in face of California law on this issue alone forces ESC to seek ex parte relief, unless the City has changed its mind.

ESC has tried, and tried again, to be reasonable and cooperative. Those efforts have only been met with delay. Nonetheless, ESC will give the City until the close of business on Monday to provide the administrative record and to notify us if the City will agree to a briefing and hearing schedule that

complies with Section 21167.4. Otherwise, ESC will unfortunately be forced to seek ex parte relief. ESC also reserves the right to seek sanctions. For the purposes of getting an agreed-upon stipulation, ESC will forego filing an amended complaint at this time.

Akhil

Akhil Sheth

asheth@crowell.com | (949) 798-1363

From: Alisha Winterswyk [<mailto:Alisha.Winterswyk@bbklaw.com>]

Sent: Thursday, September 12, 2019 10:11 PM

To: Sheth, Akhil

Cc: Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer; Brooke Weitzman; Alex Prieto; Richard Rothschild; Matt Warren; Navneet Grewal; McNeil, Richard

Subject: Re: ESC - Stipulation and [Proposed] Order re Briefing Schedule

External Email

Akhil,

The dates that I proposed on August 22 for preparation of the administrative record were rough / estimated dates. The proposed dates were not agreed upon and were not solidified. Your colleague, Rick McNeill, was supposed to call me to discuss dates and figure out schedule that would be workable in light of fact the that your client intends to amend its petition. The City did not receive a proposed stipulation or feedback on dates until Monday, September 9, 18 days after our meeting on August 22. And then, your proposed schedule gave the City only three days to assemble all documents and an index. That was unreasonable. We proposed alternative dates in our edits to the stipulation and invited discussion on those. I did not receive any feedback from you on the dates, just a threat that you were going to go into court on an *ex parte* basis to ask the court to resolve the issue. I would suggest that is not necessary and this is a topic that the parties should be able to resolve, starting with a response from you on the dates we

suggested in response. To that end, the City is willing to meet and confer with you about dates for the administrative record. Please let me know times that you are available to discuss dates. Or, if you prefer (based on your co-counsel's prior direction), we can email about dates.

As for the briefing schedule, the City is not in a position to agree to a briefing schedule at this time. The City believes setting a briefing schedule at this time is premature in the litigation.

Alisha



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www.BBKlaw.com

On Sep 12, 2019, at 4:01 PM, Sheth, Akhil <ASheth@crowell.com> wrote:

CAUTION - EXTERNAL SENDER.

Thanks Alisha. I won't address each assertion in your emails, but in sum, we disagree with your characterization of much of the relevant law and facts. The City is currently in violation of CEQA's 60-day deadline for preparation of the administrative record. We note that the code provides for sanctions for this delay but we would prefer not to take that route. But we would like to meet and confer with you and reserve our right to seek such relief. Given the foregoing and given the City's decision to not accept dates that the City itself initially suggested, ESC will be moving ex parte for an order asking the Court to set dates.

Akhil

Akhil Sheth
asheth@crowell.com | (949) 798-1363

From: Alisha Winterswyk [<mailto:Alisha.Winterswyk@bbklaw.com>]
Sent: Wednesday, September 11, 2019 10:25 AM
To: Sheth, Akhil; Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer
Cc: 'Brooke Weitzman'; 'Alex Prieto'; 'Richard Rothschild'; 'Matt Warren'; 'Navneet Grewal'; McNeil, Richard
Subject: RE: ESC - Stipulation and [Proposed] Order re Briefing Schedule

External Email

Akhil,

One more administrative item to consider. We've been sending courtesy copies of filings by email. Should we consider adding a line item to the stipulation to agree to eService using OneLegal?

Alisha

Alisha Winterswyk

Partner



alisha.winterswyk@bbklaw.com

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www.BBKlaw.com





From: Alisha Winterswyk
Sent: Wednesday, September 11, 2019 10:18 AM
To: 'Sheth, Akhil'; Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer
Cc: 'Brooke Weitzman'; 'Alex Prieto'; 'Richard Rothschild'; 'Matt Warren'; 'Navneet Grewal'; 'McNeil, Richard'
Subject: RE: ESC - Stipulation and [Proposed] Order re Briefing Schedule

Hi Akhil,

Thank you for preparing the stipulation. Our edits are attached. A couple of notes regarding our edits:

- ? **City Preparing the Record** – As you know, Petitioner ESC elected to have the City prepare the administrative record in this case. In accordance with Public Resource Code, section 21167.6, the City is preparing the record at ESC's cost and will strive to do so at reasonable cost in light of the scope of the record. The City will provide ESC with a copy of the certified administrative record upon receipt of payment for the same.
- ? **Time for Preparation of the Record** – The dates that you included in the first draft of the stipulation were unworkable. The dates had the City's deadline for circulating a draft administrative record only three days after the City received the stipulation. While the City has been working diligently on pulling together the record of proceedings, the record is incomplete. Thus, I have revised the dates to reflect the soonest date by which the City will be able to get draft documents to your client for review. Relatedly, I updated all other dates based on the three week turn-around time that we initially discussed at our settlement

meeting. If you believe that ESC will need more time to review the record, please let us know. We are happy to change those dates if needed.

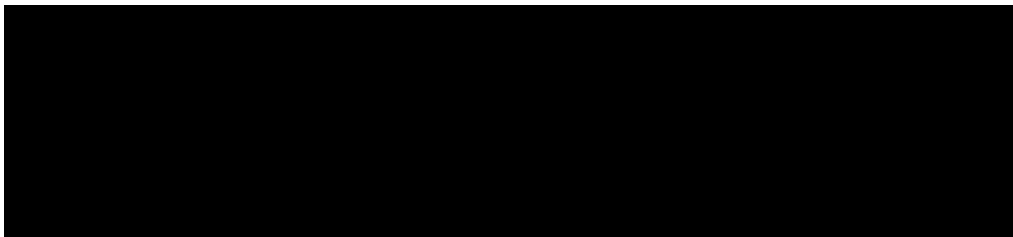
- ? **Amended Petition** – Your co-counsel has indicated that ESC will likely seek to amend its Petition in this case. As a result, the City reserves the right to augment the record once it is served with the amended Petition. You'll see my edits to that effect in the attached.

- ? **Lodging Record with Court** – In accordance with the Local Civil Complex rules, we would expect Judge Sherman to issue a case management order directing the City how and when to lodge the administrative record. Each judge in the Civil Complex courthouse approaches this a little differently. So, I made edits to reflect that the City will lodge in accordance with the Court's order.

- ? **Briefing Schedule and Hearing Date** – As I have previously mentioned, it is premature to agree to a briefing schedule. We do not yet have a certified administrative record and we have not yet had our first Case Management Conference. The City does not agree to those terms in the stipulation and has deleted them. With respect to the request for hearing date, as I have previously mentioned to Rick and to your co-counsel, the requirement in Public Resources Code, section 21167.4 is for Petitioner to request a hearing date. This can be done by filing a request for hearing date on pleading paper with the court.

Two other related items:

- ? **Case Management Conference** – Our first case management conference is set for December 6, 2019. The Local Civil Complex rules require that the parties file with the court a case management conference statement at least five court days before the hearing. The court strongly prefers these statements be joint. I have personally heard Judge Sherman reprimand attorneys for failing to file their Case Management Statements jointly – he will ask for good cause if we do not file jointly. As such, I would propose that we accommodate the court's preference and file our Case Management Statement jointly. To that end, would your office like to take the laboring oar on preparing the first draft of the case management statement or would you like our office to do so? Whichever office takes the first stab at the case management statement should aim to get a draft to the other offices by at least 5 business days before the deadline to file with the Court so that everyone has a chance to review and edit.



Please let me know if you have questions.

Thank you,
Alisha

 Alisha Winterswyk

Partner

alisha.winterswyk@bbklaw.com

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From: Alisha Winterswyk

Sent: Monday, September 09, 2019 3:20 PM

To: 'Sheth, Akhil'; Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer

Cc: 'Brooke Weitzman'; Alex Prieto; Richard Rothschild; Matt Warren; Navneet Grewal; McNeil, Richard

Subject: RE: ESC - Stipulation and [Proposed] Order re Briefing Schedule

Hi Akhil,

We will take a look and be in touch.

Thank you,

Alisha

Alisha Winterswyk

Partner



alisha.winterswyk@bbklaw.com

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www.BBKlaw.com  

From: Sheth, Akhil [<mailto:ASheth@crowell.com>]

Sent: Saturday, September 07, 2019 6:25 PM

To: Alisha Winterswyk; Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer

Cc: 'Brooke Weitzman'; Alex Prieto; Richard Rothschild; Matt Warren; Navneet Grewal; McNeil, Richard

Subject: ESC - Stipulation and [Proposed] Order re Briefing Schedule

CAUTION - EXTERNAL SENDER.

Hi Alisha,

As promised, here is a draft stipulation and proposed order. Please let us know by Wednesday whether the City will stipulate to the provided schedule.

Thanks,

Akhil

Akhil Sheth

asheth@crowell.com | (949) 798-1363

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EXHIBIT 5

Ali Tehrani

From: Alisha Winterswyk
Sent: Thursday, September 19, 2019 3:25 PM
To: 'Sheth, Akhil'
Cc: Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer; Brooke Weitzman; Alex Prieto; Richard Rothschild; Matt Warren; Navneet Grewal; McNeil, Richard
Subject: RE: ESC - Stipulation and [Proposed] Order re Briefing Schedule
Attachments: Stipulation and [Proposed] Order re Briefing Schedule - 9.19.19-c1.DOCX

Akhil,

Thank you! I think we are nearly there. See my responses in **green below** and one more edit in Paragraph 3 in the attached. If this meets your approval, please send a clean version and I will sign and send back to you.

Thank you,
Alisha



Alisha Winterswyk
Partner
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From: Sheth, Akhil [mailto:ASheth@crowell.com]
Sent: Thursday, September 19, 2019 2:45 PM
To: Alisha Winterswyk
Cc: Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer; Brooke Weitzman; Alex Prieto; Richard Rothschild; Matt Warren; Navneet Grewal; McNeil, Richard
Subject: RE: ESC - Stipulation and [Proposed] Order re Briefing Schedule

CAUTION - EXTERNAL SENDER.

Alisha,

Here are comments responding to your comments, along with an again-revised draft.

- **Meet-and-confer period:** ESC has included the October 17 date to guarantee a meet-and confer window. **This looks good. We associated the October 17 date with the meet and confer paragraph so that is clearer.** The issue with the City's proposed edit is that it does not guarantee a meet-and-confer window. With the City's proposed language, the City could theoretically certify the administrative record the day after ESC serves the City with the items listed in paragraph 2, by asserting that a meet-and-confer was not needed or that it had taken place. By requiring the City to wait until at least October 17 to certify the record, the stipulation guarantees that the parties will have at least two weeks to meet-and-confer as both sides see necessary. **As a preliminary matter, the City had pure intent with regard to the edits on the meet and confer date. It has no desire to "sneak in" a certification or to hamper your client in the way suggested by your concerns above. Nonetheless, I understand your point. The City would prefer, however, that we have a very clear deadline for the meet and confer. Thus, in paragraph 3, I added a date range for the meet and confer (after October 3, 2019 and on or before October 17, 2019). I left the range in Paragraph 4 so that it is clear what deadlines apply to what steps of the process.**

- Costs:** The proposed cost language does not reflect California law. Perhaps more importantly, it is not necessary—the statute speaks for itself. The cost language is consistent with California law and the City will require advance payment before release of the administrative record. Please see Code Civ. Proc., §§ 1094.5, subd. (a), 1094.6, subd. (c); Pub. Resources Code, § 21167.6, subd. (b)(1); *River Valley Preservation Project v. Metropolitan Transit Dev. Bd.* (1995) 37 Cal.App.4th 154, 182, 43 Cal.Rptr.2d 501 [“taxpayers ... should not have to bear the cost of preparing the administrative record in a lawsuit brought by a private individual or entity”]; See also *Black Historical Society v. City of San Diego* (2005) 134 Cal.App.4th 670, 677-678; see also *Coalition for Adequate Review v. City and County of San Francisco* (2014) 229 Cal.App.4th 1043, 1053, citing *Black Historical Society v. City of San Diego*, [“Indeed, a public agency can refuse to release a record it has been asked to prepare until the petitioner making the request has paid the agency’s preparation costs.”]. The City added edits to the stipulation to make this clear. This is an oversimplification of California law on this issue, which is reflected in some of the practical problems the City’s proposed language would create (for example, what cost amount is ESC agreeing to pay? Or, if the City presents ESC with a costs figure that ESC sees as unreasonable, does that mean the case will not move forward and the administrative record will not be lodged until the parties file and resolve all costs-related motions, despite the clear statutory language dictating that CEQA actions should be quickly heard?). We can agree to disagree for now—this stipulation is fundamentally about preparation and certification of the administrative record, and lodging of that record with the Court. I likely do not need to remind you that the City has substantially missed its deadline to complete this step and is subject to potential sanctions. **The only reason that the record was not certified by the statutory deadline was that your team led the City to believe we were working on a stipulation to extend dates. Your team has engaged in protracted, hostile, and at times discourteous negotiations about a topic that we should have been able to resolve on August 22.** Once the City has completed its obligations, it is free to file a costs-related motion with the Court and ask the Court to issue an order requiring ESC to pay costs in the near future. Such an order was present in every case you cited. The City definitely will bring a noticed motion for an order for Petitioner to pay the cost for administrative record preparation before the City releases a copy of the certified record to Petitioner. This is yet another reason why setting a briefing schedule and hearing date tomorrow is premature and inappropriate.
- Amendment:** The administrative record pertains to the CEQA claim, so it is unclear why any amendment to other claims would impact the administrative record. The administrative record pertains to claims brought ESC’s Petition pursuant to 1094.5, which includes the CEQA claim but is not limited to it. ESC does not concede that the City can amend the administrative record in response to any proposed amendment or amendment to the Petition. I have included language reflecting this, that at the same time should assuage any concerns the City has. The City retains ultimate discretion over the scope of the administrative record and thus can augment the record in the event circumstances warrant. The City need not request leave of court to do so. Again, ESC disagrees. Indeed, one of the cases cited by the City above illustrates the Court’s role in approving augmentation of the administrative record. *See Coal. for Adequate Review v. City & Cty. of S.F.*, 229 Cal. App. 4th 1043, 1049 (2014), *as modified on denial of reh’g* (Oct. 15, 2014) (“On May 12, 2009, the trial court (Judge Feinstein) granted the City’s motion to supplement the record, **finding petitioners had omitted materials statutorily required to be in the record under section 21167.6, subdivision (e). It disallowed, however, the 10 concededly duplicative documents (approximately 250 pages of the 4,809-page proposed supplement.)** To the extent the City disagrees, we can again agree to disagree for now. I have removed all language regarding amending the administrative record—the parties can address it if and when it comes up. I think that this conversation is falling out of context. My point here was that if you amend your petition to include a Brown Act claim, the City wanted to set up a procedure where we could meet and confer about what goes into the record for the Brown Act claim. Assuming (perhaps too optimistically) that we would be able to agree on what additional documents, if any, would be needed to litigate your Brown Act claim, there would be no need to seek leave from the court to augment the record. The only time that a noticed motion to augment the record is necessary is if there is a dispute between the parties about the contents of the record. (See, e.g., *Mejia v City of Los Angeles* (2005) 130 Cal.App.4th 322, 336 n5 [emphasis added] [“Once the administrative record has been filed, any disputes about its accuracy or scope should be resolved by appropriate notice[d] motion.”].) I was not expecting a dispute out the gate. I was expecting we would be able to work together to figure out what else needed to be added to the Record so that we could avoid the burden of another

motion for the court to resolve in this case. But, if you would like to start from the position that you will oppose any augment of the record whatsoever, then the City will simply be forced to bring a noticed motion to augment and that will (again) make setting a hearing date on the merits of this case tomorrow premature.

- **Lodging:** Again, the statute speaks for itself regarding lodging. The edits you made regarding lodging the record with the court are fine. The City does not agree, however, to the edits on serving the certified record with ESC. The City will not serve a copy of the certified record on ESC until it receives payment for the record. See above. I see that the paragraph about the City serving a copy of the record on ESC has been removed so that takes care of the City's concern on this point.

Thanks,

Akhil

Akhil Sheth

asheth@crowell.com | (949) 798-1363

From: Alisha Winterswyk [mailto:Alisha.Winterswyk@bbklaw.com]

Sent: Tuesday, September 17, 2019 10:10 PM

To: Sheth, Akhil

Cc: Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer; Brooke Weitzman; Alex Prieto; Richard Rothschild; Matt Warren; Navneet Grewal; McNeil, Richard

Subject: RE: ESC - Stipulation and [Proposed] Order re Briefing Schedule

External Email

Akhil,

Thank you, again, for the revisions to the stipulation. The City's responses to your notes are interlineated in **bold underlined text below**. Related edits are incorporated in the attached version of the stipulation. Please let me know if you have any questions or if you would like to discuss any of this.

Thank you,

Alisha



Alisha Winterswyk

Partner

alisha.winterswyk@bbklaw.com

T: (949) 263-6565 C: (562) 762-8114

www.BBKlaw.com

From: Sheth, Akhil [mailto:ASheth@crowell.com]

Sent: Tuesday, September 17, 2019 12:08 PM

To: Alisha Winterswyk

Cc: Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer; Brooke Weitzman; Alex Prieto; Richard Rothschild; Matt Warren; Navneet Grewal; McNeil, Richard

Subject: RE: ESC - Stipulation and [Proposed] Order re Briefing Schedule

CAUTION - EXTERNAL SENDER.

Hi Alisha,

Thank you for your email. ESC agrees to give the City an extension until this Friday, September 20 to provide the administrative record, contingent on the parties agreeing on a suitable stipulation in the next day or two. I've attached a revised draft, and included some explanatory comments below.

- **Meet-and-confer period:** ESC has included the October 17 date to guarantee a meet-and confer window. This looks good. We associated the October 17 date with the meet and confer paragraph so that is clearer.
- **Costs:** The proposed cost language does not reflect California law. Perhaps more importantly, it is not necessary—the statute speaks for itself. The cost language is consistent with California law and the City will require advance payment before release of the administrative record. Please see Code Civ. Proc., §§ 1094.5, subd. (a), 1094.6, subd. (c); Pub. Resources Code, § 21167.6, subd. (b)(1); *River Valley Preservation Project v. Metropolitan Transit Dev. Bd.* (1995) 37 Cal.App.4th 154, 182, 43 Cal.Rptr.2d 501 [“taxpayers ... should not have to bear the cost of preparing the administrative record in a lawsuit brought by a private individual or entity”]; See also *Black Historical Society v. City of San Diego* (2005) 134 Cal.App.4th 670, 677-678; see also *Coalition for Adequate Review v. City and County of San Francisco* (2014) 229 Cal.App.4th 1043, 1053, citing *Black Historical Society v. City of San Diego*, [“Indeed, a public agency can refuse to release a record it has been asked to prepare until the petitioner making the request has paid the agency’s preparation costs.”]. The City added edits to the stipulation to make this clear.
- **Amendment:** The administrative record pertains to the CEQA claim, so it is unclear why any amendment to other claims would impact the administrative record. The administrative record pertains to claims brought ESC’s Petition pursuant to 1094.5, which includes the CEQA claim but is not limited to it. ESC does not concede that the City can amend the administrative record in response to any proposed amendment or amendment to the Petition. I have included language reflecting this, that at the same time should assuage any concerns the City has. The City retains ultimate discretion over the scope of the administrative record and thus can augment the record in the event circumstances warrant. The City need not request leave of court to do so.
- **Lodging:** Again, the statute speaks for itself regarding lodging. The edits you made regarding lodging the record with the court are fine. The City does not agree, however, to the edits on serving the certified record with ESC. The City will not serve a copy of the certified record on ESC until it receives payment for the record.
- **Proposed order:** There is no need to repeat the dates in the proposed order, especially since doing so risks create some distinction between what is in the stipulation and what is in the order. We can effect the agreed-to dates by incorporating the stipulation into the proposed order. This edit is fine with the City.

Finally, ESC reserves its right to pursue any relief it believes is appropriate regarding a briefing schedule and the hearing date (and of course, the administrative record, to the extent the parties cannot reach agreement on a stipulation).

Thanks,

Akhil

Akhil Sheth

asheth@crowell.com | (949) 798-1363

From: Alisha Winterswyk [mailto:Alisha.Winterswyk@bbkllaw.com]

Sent: Saturday, September 14, 2019 8:24 AM

To: Sheth, Akhil

Cc: Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer; Brooke Weitzman; Alex Prieto; Richard Rothschild; Matt Warren; Navneet Grewal; McNeil, Richard

Subject: Re: ESC - Stipulation and [Proposed] Order re Briefing Schedule

External Email

Good morning, Akhil,

You actually have a choice on whether to burden the court with an ex parte request on administrative record dates. Instead of wasting the court's time, you could respond to the city's revised dates, as reflected in the city's edits to the stipulation. You have not responded to those at all. If you believe the counter-proposal is inadequate, suggest dates that you believe are more workable.

The city has been working on assembling the record. The city has not waited. You, your co-counsel, and your client led the city to believe we were working together to establish a mutually agreeable schedule for bringing the administrative record to a point of certification. Your last minute change of course has thrown off that effort.

Notwithstanding the foregoing, the city is in a position to send you, your co-counsel and your client the administrative record documents and a draft index by next Friday, September 20. Please let us know how long you need to review the documents and index. Your co-counsel previously stated three weeks.

As for the briefing schedule, the city's position is the same. It will not agree by stipulation to a briefing schedule at this time. It is premature.

Alisha



[Alisha Winterswyk](#)
Partner
alisha.winterswyk@bbklaw.com
T: (949) 263-6565 C: (562) 762-8114
[www.BBKlaw.com](#)

On Sep 13, 2019, at 10:33 PM, Sheth, Akhil <ASheth@crowell.com> wrote:

CAUTION - EXTERNAL SENDER.

Hi Alisha,

The City's actions are forcing ESC to seek ex parte relief on two issues, (1) preparation of the administrative record and (2) setting of a briefing schedule and hearing date.

First, given the City's failure to prepare the administrative record, the City is inarguably in violation of California law. The record was due by August 27, 2019. As of today, the City is thus two weeks and three days past its legal deadline and counting. This is not a minor violation—the California legislature deemed the requirement serious enough that it created a provision specifically authorizing sanctions if this particular requirement was not satisfied.

Further, the City's recent statements and actions add to ESC's growing concern that the City is not acting in good faith and diligently trying to meet its obligations, but is instead using ESC's efforts to reach reasonable solutions as opportunities to engage in dilatory tactics. In its proposed stipulation, ESC—in the spirit of cooperation and good faith—gave the City the September 12 deadline that the City itself proposed for its preparation of the administrative record. The City now states that this deadline “gave the City only three days to assemble all documents and an index.” The City has now had 77 days to assemble the administrative record, 17 more than the law provides. The only way the proposed stipulation gave the City three days is if the City has not yet begun to prepare the administrative record. The City's statement is thus concerning. The City's counter-proposal to further push out the September

12 deadline it proposed by another 21 days further supports the growing concern that the City is attempting to unduly delay the resolution of this case. The administrative record in this case is not substantial in volume or complexity.

Second, the City has repeatedly stated that it will not agree to any briefing schedule whatsoever. ESC has previously explained why it believes it is appropriate to set a briefing schedule and hearing date now. The City's intransigence in face of California law on this issue alone forces ESC to seek ex parte relief, unless the City has changed its mind.

ESC has tried, and tried again, to be reasonable and cooperative. Those efforts have only been met with delay. Nonetheless, ESC will give the City until the close of business on Monday to provide the administrative record and to notify us if the City will agree to a briefing and hearing schedule that complies with Section 21167.4. Otherwise, ESC will unfortunately be forced to seek ex parte relief. ESC also reserves the right to seek sanctions. For the purposes of getting an agreed-upon stipulation, ESC will forego filing an amended complaint at this time.

Akhil

Akhil Sheth
asheth@crowell.com | (949) 798-1363

From: Alisha Winterswyk [<mailto:Alisha.Winterswyk@bbklaw.com>]
Sent: Thursday, September 12, 2019 10:11 PM
To: Sheth, Akhil
Cc: Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer; Brooke Weitzman; Alex Prieto; Richard Rothschild; Matt Warren; Navneet Grewal; McNeil, Richard
Subject: Re: ESC - Stipulation and [Proposed] Order re Briefing Schedule

External Email

Akhil,

The dates that I proposed on August 22 for preparation of the administrative record were rough / estimated dates. The proposed dates were not agreed upon and were not solidified. Your colleague, Rick McNeill, was supposed to call me to discuss dates and figure out schedule that would be workable in light of fact the that your client intends to amend its petition. The City did not receive a proposed stipulation or feedback on dates until Monday, September 9, 18 days after our meeting on August 22. And then, your proposed schedule gave the City only three days to assemble all documents and an index. That

was unreasonable. We proposed alternative dates in our edits to the stipulation and invited discussion on those. I did not receive any feedback from you on the dates, just a threat that you were going to go into court on an *ex parte* basis to ask the court to resolve the issue. I would suggest that is not necessary and this is a topic that the parties should be able to resolve, starting with a response from you on the dates we suggested in response. To that end, the City is willing to meet and confer with you about dates for the administrative record. Please let me know times that you are available to discuss dates. Or, if you prefer (based on your co-counsel's prior direction), we can email about dates.

As for the briefing schedule, the City is not in a position to agree to a briefing schedule at this time. The City believes setting a briefing schedule at this time is premature in the litigation.

Alisha



[Alisha Winterswyk](mailto:alisha.winterswyk@bbklaw.com)
Partner
alisha.winterswyk@bbklaw.com
T: (949) 263-6565 C: (562) 762-8114
www.BBKlaw.com

On Sep 12, 2019, at 4:01 PM, Sheth, Akhil <ASheth@crowell.com> wrote:

CAUTION - EXTERNAL SENDER.

Thanks Alisha. I won't address each assertion in your emails, but in sum, we disagree with your characterization of much of the relevant law and facts. The City is currently in violation of CEQA's 60-day deadline for preparation of the administrative record. We note that the code provides for sanctions for this delay but we would prefer not to take that route. But we would like to meet and confer with you and reserve our right to seek such relief. Given the foregoing and given the City's decision to not accept dates that the City itself initially suggested, ESC will be moving ex parte for an order asking the Court to set dates.

Akhil

Akhil Sheth
asheth@crowell.com | (949) 798-1363

From: Alisha Winterswyk [<mailto:Alisha.Winterswyk@bbklaw.com>]
Sent: Wednesday, September 11, 2019 10:25 AM
To: Sheth, Akhil; Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer
Cc: 'Brooke Weitzman'; 'Alex Prieto'; 'Richard Rothschild'; 'Matt Warren'; 'Navneet Grewal'; McNeil, Richard
Subject: RE: ESC - Stipulation and [Proposed] Order re Briefing Schedule

External Email

Akhil,

One more administrative item to consider. We've been sending courtesy copies of filings by email. Should we consider adding a line item to the stipulation to agree to eService using OneLegal?

Alisha

Alisha Winterswyk
Partner
alisha.winterswyk@bbklaw.com
T: (949) 263-6565 C: (562) 762-8114
www.BBKlaw.com

<image001.jpg>

<image002.jpg>

<image002.jpg>

From: Alisha Winterswyk
Sent: Wednesday, September 11, 2019 10:18 AM
To: 'Sheth, Akhil'; Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer
Cc: 'Brooke Weitzman'; 'Alex Prieto'; 'Richard Rothschild'; 'Matt Warren'; 'Navneet Grewal'; 'McNeil, Richard'
Subject: RE: ESC - Stipulation and [Proposed] Order re Briefing Schedule

Hi Akhil,

Thank you for preparing the stipulation. Our edits are attached. A couple of notes regarding our edits:

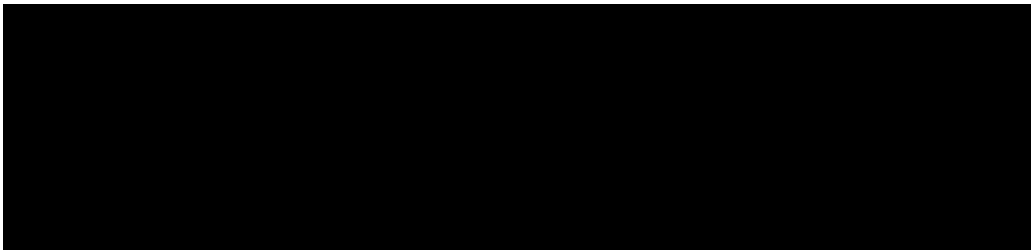
- ? **City Preparing the Record** – As you know, Petitioner ESC elected to have the City prepare the administrative record in this case. In accordance with Public Resource Code, section 21167.6, the City is preparing the record at ESC's cost

and will strive to do so at reasonable cost in light of the scope of the record. The City will provide ESC with a copy of the certified administrative record upon receipt of payment for the same.

- ? **Time for Preparation of the Record** – The dates that you included in the first draft of the stipulation were unworkable. The dates had the City’s deadline for circulating a draft administrative record only three days after the City received the stipulation. While the City has been working diligently on pulling together the record of proceedings, the record is incomplete. Thus, I have revised the dates to reflect the soonest date by which the City will be able to get draft documents to your client for review. Relatedly, I updated all other dates based on the three week turn-around time that we initially discussed at our settlement meeting. If you believe that ESC will need more time to review the record, please let us know. We are happy to change those dates if needed.
- ? **Amended Petition** – Your co-counsel has indicated that ESC will likely seek to amend its Petition in this case. As a result, the City reserves the right to augment the record once it is served with the amended Petition. You’ll see my edits to that effect in the attached.
- ? **Lodging Record with Court** – In accordance with the Local Civil Complex rules, we would expect Judge Sherman to issue a case management order directing the City how and when to lodge the administrative record. Each judge in the Civil Complex courthouse approaches this a little differently. So, I made edits to reflect that the City will lodge in accordance with the Court’s order.
- ? **Briefing Schedule and Hearing Date** – As I have previously mentioned, it is premature to agree to a briefing schedule. We do not yet have a certified administrative record and we have not yet had our first Case Management Conference. The City does not agree to those terms in the stipulation and has deleted them. With respect to the request for hearing date, as I have previously mentioned to Rick and to your co-counsel, the requirement in Public Resources Code, section 21167.4 is for Petitioner to request a hearing date. This can be done by filing a request for hearing date on pleading paper with the court.

Two other related items:

- ? **Case Management Conference** – Our first case management conference is set for December 6, 2019. The Local Civil Complex rules require that the parties file with the court a case management conference statement at least five court days before the hearing. The court strongly prefers these statements be joint. I have personally heard Judge Sherman reprimand attorneys for failing to file their Case Management Statements jointly – he will ask for good cause if we do not file jointly. As such, I would propose that we accommodate the court’s preference and file our Case Management Statement jointly. To that end, would your office like to take the laboring oar on preparing the first draft of the case management statement or would you like our office to do so? Whichever office takes the first stab at the case management statement should aim to get a draft to the other offices by at least 5 business days before the deadline to file with the Court so that everyone has a chance to review and edit.



Please let me know if you have questions.

Thank you,
Alisha

Alisha Winterswyk
Partner



alisha.winterswyk@bbklaw.com

T: (949) 263-6565 C: (562) 762-8114

www.BBKlaw.com



From: Alisha Winterswyk

Sent: Monday, September 09, 2019 3:20 PM

To: 'Sheth, Akhil'; Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer

Cc: 'Brooke Weitzman'; Alex Prieto; Richard Rothschild; Matt Warren; Navneet Grewal; McNeil, Richard

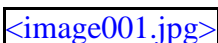
Subject: RE: ESC - Stipulation and [Proposed] Order re Briefing Schedule

Hi Akhil,

We will take a look and be in touch.

Thank you,
Alisha

Alisha Winterswyk
Partner



alisha.winterswyk@bbklaw.com

T: (949) 263-6565 C: (562) 762-8114

www.BBKlaw.com



From: Sheth, Akhil [<mailto:ASheth@crowell.com>]

Sent: Saturday, September 07, 2019 6:25 PM

To: Alisha Winterswyk; Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer

Cc: 'Brooke Weitzman'; Alex Prieto; Richard Rothschild; Matt Warren; Navneet Grewal; McNeil, Richard

Subject: ESC - Stipulation and [Proposed] Order re Briefing Schedule

CAUTION - EXTERNAL SENDER.

Hi Alisha,

As promised, here is a draft stipulation and proposed order. Please let us know by Wednesday whether the City will stipulate to the provided schedule.

Thanks,

Akhil

Akhil Sheth

asheth@crowell.com | (949) 798-1363

Crowell & Moring LLP | www.crowell.com

3 Park Plaza, 20th Floor, Irvine, CA 92614

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EXHIBIT 6

Ali Tehrani

From: Brooke Weitzman <bweitzman@eldrcenter.org>
Sent: Friday, September 20, 2019 12:20 PM
To: Ali Tehrani; Scott Smith; Michelle Ouellette; Laura Palmer; Alisha Winterswyk; Mr. Akhil Sheth; Richard (RMcNeil@crowell.com) McNeil; Alex Prieto; Navneet K. Grewal
Subject: Stipulation
Attachments: Stipulation and [Proposed] Order re Briefing Schedule - 9.19.19-c1.DOCX

CAUTION - EXTERNAL SENDER.

Good Morning Alisha,

While the allegation in your email are clearly incorrect, I believe we are in agreement about the stipulation. My only edit is to clarify that ESC will also serve the documents in digital format for consistency. Please see the clean copy attached. If this works I can sign it. I am still in Court but suspect I can get access to print if needed since we are in a settlement meeting.

At the time we asked you to stipulate to a schedule, and you proposed dates we agreed to, it was already nearly the 60 day point. We did not hear any further objection from the City until we drafted that stipulation for signing. And in our early conversation about timeline, you told me you would need the full 60 days. You never asked for addition time. We proposed that for your convenience. So, to make allegations about Petitioner somehow delaying the City preparing a first draft to collaborate on for the record is simply untrue.

Additionally, the position that sometimes litigation involves litigation so we should not set the statutory timeline for briefing and hearing, or even propose an alternative to give the city more time, does not seem to be in line with our obligation to keep the case moving forward.

Finally, as we have mentioned before, it is premature to even talk about costs (something that is typically court ordered at the end of a case) when the City has not so much as turned over an estimate. Are you prepared to do that yet? Given the well established law, this is again something that our client is not required to pay at this time and we cannot stipulate to. But, we could have a more informed conversation if the City provides any information about the costs.

Regards,
Brooke

Brooke Weitzman

Directing Attorney and Co-Founder

Bweitzman@eldrcenter.org

714-617-5353

1535 E 17th Street, Suite 110

Santa Ana, CA 92705



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EXHIBIT 7

1 SCOTT C. SMITH, Bar No. 120736
scott.smith@bbklaw.com
2 ALISHA WINTERSWYK, Bar No. 240969
alisha.winterswyk@bbklaw.com
3 BEST BEST & KRIEGER LLP
18101 Von Karman Avenue, Suite 1000
4 Irvine, California 92612
Telephone: (949) 263-2600
5 Facsimile: (949) 260-0972

EXEMPT FROM FEES PER GOV'T
CODE § 6103

6 Attorneys for Respondents
CITY OF SAN CLEMENTE; CITY COUNCIL OF
7 SAN CLEMENTE; and PLANNING
COMMISSION OF CITY OF SAN CLEMENTE
8

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ORANGE – CIVIL COMPLEX CENTER
11

12 EMERGENCY SHELTER COALITION, a
non-profit organization,

13 Petitioner,

14 v.
15

16 CITY OF SAN CLEMENTE; CITY
COUNCIL OF SAN CLEMENTE; and
17 PLANNING COMMISSION OF CITY OF
SAN CLEMENTE,

18 Respondents.
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Case No. 30-2019-01080355-CU-WM-CXC

Assigned to:
Judge Randall J. Sherman, Dept. CX105

**NOTICE OF RULING RE *EX PARTE*
APPLICATION FOR AN ORDER
CONFIRMING CEQA HEARING DATE**

Petition for Writ of Mandate Filed
June 28, 2019

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:**

2 **PLEASE TAKE NOTICE THAT** on September 20, 2019, at approximately 1:30 p.m.,
3 the Emergency Shelter Coalition’s (“Petitioner”) *Ex Parte* Application for an Order Confirming
4 CEQA Hearing Date (“*Ex Parte* Application”) came on for hearing as noticed in Department
5 CX105 of the Orange County Superior Court, Civil Complex Center, located at 751 West Santa
6 Ana Blvd., Santa Ana, CA 92701. Brooke Weitzman of the Elder Law and Disability Rights
7 Center appeared for Petitioner. Alisha M. Winterswyk of Best Best & Krieger LLP appeared for
8 the City of San Clemente, the City Council of San Clemente, and the Planning Commission of the
9 City of San Clemente (collectively, the “City”).

10 After argument on the *Ex Parte* Application, the Court granted the application but with the
11 Court setting specific dates pertaining to the litigation as follows:

12 **A. With Respect to the Administrative Record** – As of the date of the hearing on the
13 *Ex Parte* Application, the parties had been negotiating a stipulation on administrative record
14 dates. For the sake of efficiency, when entering its Ruling on the *Ex Parte* Application, the Court
15 included the following dates, which were previously agreed to by the Parties:

16 1. **September 20, 2019** – On September 20, 2019, the City shall serve on ESC, in
17 digital format, the documents that constitute the record of proceedings in the above-referenced
18 action and an index of such documents.

19 2. **October 3, 2019** – On or before October 3, 2019, Petitioner shall serve the
20 City, in digital format, with any proposed additions, deletions, corrections, or other modifications
21 on (a) the documents that constitute the record of proceedings in the above-referenced action
22 and/or (b) the draft index.

23 3. **October 17, 2019** - After October 3, 2019 and on or before October 17, 2019,
24 counsel for the City and counsel for Petitioner shall meet and confer, as needed, regarding the
25 scope and contents of the documents that constitute the record of proceedings in the above-
26 referenced action and/or the draft index to discuss any additions, deletions, corrections, or other
27 modifications proposed by Petitioner before the City certifies the administrative record as being
28 complete.

1 4. **October 24, 2019** - After October 17, 2019 and on or before October 24, 2019,
2 the City shall certify the administrative record in the above-referenced.

3 **B. With Respect to Motion for Order to Pay Cost of Administrative Record**

4 **Preparation** – Petitioner refused to stipulate to pay the administrative record preparation costs.
5 Petitioner indicated that it would only pay the administrative record preparation costs if ordered
6 to do so by the Court after hearing a noticed motion, or at the end of the case if the City is the
7 prevailing party. The City believes the law clearly requires Petitioner to pay the administrative
8 record preparation costs. In its opposition papers on the *Ex Parte* Application and during oral
9 argument, the City pointed the Court’s attention to Code of Civ. Proc., section 1094.5, subd. (a)
10 and Public Resources Code, section 21167.6(b). Furthermore, the City pointed to case law that
11 supports the City withholding the certified administrative record until such time that Petitioner
12 pays the cost of preparing the record. (*Black Historical Society v. City of San Diego* (2005) 134
13 Cal.App.4th 670, 677-678.) To that end, the City will bring a motion for an order that Petitioner
14 pay the administrative record preparation cost before the City releases the certified administrative
15 record. The dates associated with this motion are as follows:

16 1. **On or before October 31, 2019** – The City will file its motion for an order for
17 Petitioner to pay administrative record costs in the above-captioned case.

18 2. **On or before November 12, 2019** – Petitioner will file its opposition to the
19 motion for an order for Petitioner to pay administrative record costs in the above-captioned case.

20 3. **On or before November 15, 2019** – The City will file its reply to the
21 opposition to the motion for an order for Petitioner to pay administrative record costs in the
22 above-captioned case.

23 4. **November 22, 2019** – The Court will hold a hearing on the motion for an order
24 for Petitioner to pay administrative record costs in the above-captioned case.

25 **C. Merits Briefing Schedule and Merits Hearing Date** – The Parties agreed, and
26 thereon the Court entered its order, that the dates for merits briefing and hearing will depend on
27 the outcome of the hearing on the City’s motion for an order for Petitioner to pay administrative
28 record costs in the above-captioned case.

1 **1. If the Court Orders Petitioner to Pay Costs:** If the Court orders Petitioner to
2 pay administrative record costs in the above-captioned case before the City releases a copy of the
3 certified administrative record to Petitioner, then the following dates control:

4 a. **November 27, 2019** – On or before November 27, 2019, Petitioner shall
5 pay the administrative record costs requested by the City. The City shall serve, in digital format,
6 a copy of the certified administrative record and index on Petitioner on the day that the City
7 receives payment from Petitioner for the administrative record costs in the above-captioned case.

8 b. **December 27, 2019** - Petitioner’s opening brief on the merits of the
9 case shall be filed.

10 c. **January 27, 2020** - City’s opposition brief on the merits of the case
11 shall be filed.

12 d. **February 11, 2020** – Petitioner’s reply brief on the merits of the case
13 shall be filed. The City shall lodge an electronic copy of the administrative record with the Court.
14 The administrative record shall be lodged on a flash drive with a USB port. PDFs shall be saved
15 according to the administrative record index and shall be labeled in a fashion that makes the PDFs
16 easily identifiable to the Court. For example, the name of a PDF shall include a short name and
17 bates range.

18 e. **February 28, 2020 @ 10:00 a.m.** - The hearing on the merits of the
19 case shall occur on February 28, 2020 at 10:00 a.m. in Department CX-105 of the above-
20 captioned court.

21 **2. If the Court Does Not Order Petitioner to Pay Costs:** If the Court does not
22 order Petitioner to pay administrative record costs in the above-captioned case before the City
23 releases a copy of the certified administrative record to Petitioner, then the following dates
24 control:

25 a. **November 22, 2019** – The City shall serve, in digital format, a copy of
26 the certified administrative record and index on Petitioner on the day that the Court enters its
27 order that Petitioner does not have to pay administrative record costs in the above-captioned case
28 before the City releases a copy of the administrative record to Petitioner.

1 b. **December 20, 2019** - Petitioner’s opening brief on the merits of the
2 case shall be filed.

3 c. **January 21, 2020** - City’s opposition brief on the merits of the case
4 shall be filed.

5 d. **February 3, 2020** – Petitioner’s reply brief on the merits of the case
6 shall be filed. The City shall lodge an electronic copy of the administrative record with the Court.
7 The administrative record shall be lodged on a flash drive with a USB port. PDFs shall be saved
8 according to the administrative record index and shall be labeled in a fashion that makes the PDFs
9 easily identifiable to the Court. For example, the name of a PDF shall include a short name and
10 bates range.

11 e. **February 28, 2020 @ 10:00 a.m.** - The hearing on the merits of the
12 case shall occur on February 28, 2020 at 10:00 a.m. in Department CX-105 of the above-
13 captioned court.

14 The foregoing dates and schedule assume that Petitioner will neither (a) amend its Petition
15 in the above-captioned case to add a Brown Act cause of action based on the City Council’s
16 actions taken on May 21, 2019 in connection with Ordinances 1673 and 1674, nor (b) bring a
17 separate case to allege a Brown Act cause of action based on the City Council’s actions taken on
18 May 21, 2019 in connection with Ordinances 1673 and 1674. In the event that Petitioner either
19 (a) amends its Petition or (b) brings a new case to allege a Brown Act cause of action based on
20 the City Council’s actions taken on May 21, 2019 in connection with Ordinances 1673 and 1674,
21 the parties may adjust the foregoing schedule based on a stipulation and proposed order filed with
22 the Court.

23 **D. Case Management Conference** – The Court vacated the Case Management
24 Conference that was previously scheduled for December 6, 2019.

25 **E. Electronic Service** – The Parties have agreed to electronic service of documents
26 in the above-referenced case consistent with California Code of Civil Procedure section 1010.6.

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LAW OFFICES OF
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F. Statement of Issues - The parties agree to waive preparation of Statements of Issues required by Public Resources Code section 21167.8(f).

Dated: September 24, 2019

BEST BEST & KRIEGER LLP

By: /s/ Alisha Winterswyk
SCOTT C. SMITH
ALISHA WINTERSWYK
Attorneys for Respondents
City of San Clemente; City Council of San
Clemente; and Planning Commission of
City of San Clemente

EXHIBIT 8



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File No. 55452.02144

October 8, 2019

VIA U.S. MAIL AND EMAIL

Elder Law and Disability Rights Center
Brooke Weitzman
William Wise Jr.
1535 E. 17th Street, Suite 110
Santa Ana, CA 92705
bweitzman@eldrcenter.org

Re: *Emergency Shelter Coalition v. City of San Clemente, et al.*
Orange County Superior Court Case No. 30-2019-01080355-CU-WM-CXC
Preliminary Notification of Costs for Preparation of Administrative Record

Dear Ms. Weitzman:

This letter serves as an attempt to meet and confer regarding the statutory obligation of your client, Emergency Shelter Coalition (“Petitioner”), to bear the cost of preparing the administrative record (“Record”) in the above-referenced action.

As we have discussed, California law requires Petitioner to bear the cost of preparing the Record. (Code Civ. Proc., § 1094.5, subd. (a) [“the cost of preparing the record shall be borne by the petitioner”]; Pub. Resources Code, § 21167.6, subd. (b)(1); *River Valley Preservation Project v. Metropolitan Transit Dev. Bd.* (1995) 37 Cal.App.4th 154, 182 [“taxpayers ... should not have to bear the cost of preparing the administrative record in a lawsuit brought by a private individual or entity”]; *Black Historical Society v. City of San Diego* (2005) 134 Cal.App.4th 670, 677-678 [“statutory law generally requires a petitioner for writ of mandate to bear the costs of preparing the record”]; *Coalition for Adequate Review v. City and County of San Francisco* (2014) 229 Cal.App.4th 1043, 1053, citing *Black Historical Society v. City of San Diego* [“Indeed, a public agency can refuse to release a record it has been asked to prepare until the petitioner making the request has paid the agency’s preparation costs”].)



BEST BEST & KRIEGER
ATTORNEYS AT LAW

Brooke Weitzman
October 8, 2019
Page 2

The City hopes that Petitioner will agree to fulfill its statutory obligation to bear the cost of preparing the Record without the City having to file a noticed motion on the issue. In that spirit, the City is providing you with a preliminary estimate of costs it has incurred in preparing the Record. The City incurred these costs in preparing and compiling the draft, approximately 1,128-page Record provided to Petitioner on September 20, 2019.

Please note that the following only represents the costs that the City incurred in preparing the draft Record provided to Petitioner on September 20, 2019. The City is in receipt of your letter, dated October 3, 2019, requesting various additions and modifications to the Record. The City is working to accommodate the requests made in your October 3rd letter. After the Record is finalized, the City will provide you with another letter, in which the City will request that Petitioner pay the final costs the City will have incurred in finalizing and certifying the Record.

The City has thus far incurred \$8,845.71 in costs associated with preparing the Record. These costs are broken down below.

Staff, Paralegal, and Attorney Time

(1) Staff costs. The City has incurred \$1,222.61 in City Staff costs, reflecting time City Staff spent collecting documents and compiling the Record. In particular, City Staff spent 18 hours collecting documents and compiling the Record, and City Staff hourly rates range between \$43.63 and \$105.00, for a subtotal of \$1,222.61.

(2) Paralegal costs. The City has incurred \$3,685.20 in costs relating to a paralegal's work to collect/organize documents, review emails for privilege, review documents for completeness, communicate with City staff regarding the contents of the Record, and index the Record. In particular, the paralegal's hourly rate is \$166.00, and the paralegal spent 22.2 hours compiling the Record, for a subtotal of \$3,685.20.

(3) Attorney costs. The City has incurred \$1,896.60. in costs relating to attorney review and supervision of the compiling of the Record. The attorney rate for work on the Record is \$327.00 per hour, and the estimated time for attorney review of the Record is 5.8 hours, for a subtotal of \$1,896.60.

Transcription of Audio Recordings of Public Meetings

(4) Transcripts of two San Clemente City Council meetings (May 21, 2019 and June 4, 2019) will be included in the Record. The cost the City incurred for transcribing these meetings is \$2,041.30.



BEST BEST & KRIEGER
ATTORNEYS AT LAW

Brooke Weitzman
October 8, 2019
Page 3

Based on the preliminary notification of the costs for preparing the Record, we request that Petitioner send the City a check in the amount of \$8,845.71, payable to the City of San Clemente, as a deposit for the initial preparation of the Record. This does not include (1) costs that will be incurred as a result of your client requesting that additional documents be added to the Record; (2) costs to finalize the Record (e.g., Bates stamping the Record); or (3) printing costs if the Court requires a hard copy. The City will provide supplemental cost notification(s) from time to time to recover any such costs that the City incurs in preparing the Record.

Once the Record is prepared and certified, the City will provide Petitioner with a final accounting and request any additional outstanding amount due be paid before a copy of the Record is provided to Petitioner.

We hope that Petitioner will agree to voluntarily comply with its statutory obligation to bear the cost of preparing the Record. Otherwise, the City will move the Court for an order requiring Petitioner to pay the cost of preparing the Record before a copy of the certified Record is provided to Petitioner.

Please let us know if you have any questions or if we can provide additional information to facilitate Petitioner's payment of the administrative record costs.

Sincerely,

A handwritten signature in blue ink that reads 'Alisha Winterswyk'.

Alisha M. Winterswyk
of BEST BEST & KRIEGER LLP

cc: James Makshanoff, City Manager, City of San Clemente
Scott Smith, City Attorney, City of San Clemente
Alexander Prieto, Western Center on Law and Poverty
Richard McNeil, Crowell & Moring LLP
Akhil Sheth, Crowell & Moring LLP

PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is 18101 Von Karman Avenue, Suite 1000, Irvine, California 92612. On September 24, 2019, I served the following document(s):

NOTICE OF RULING RE *EX PARTE* APPLICATION FOR AN ORDER CONFIRMING CEQA HEARING DATE

- By fax transmission.** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.
- By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed below (specify one):
 - Deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
 - Placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Irvine, California.

- By personal service.** At ____ a.m./p.m., I personally delivered the documents to the persons at the addresses listed below. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an Individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening.
- By messenger service.** I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed below and providing them to a professional messenger service for service. A Declaration of Messenger is attached.
- By e-mail or electronic transmission.** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is 18101 Von Karman Avenue, Suite 1000, Irvine, California 92612. On October 30, 2019, I served the following document(s):

DECLARATION OF ALISHA M. WINTERSWYK IN SUPPORT OF RESPONDENTS' MOTION FOR AN ORDER REQUIRING PETITIONER TO PAY THE COSTS THAT THE CITY OF SAN CLEMENTE INCURRED IN PREPARING THE ADMINISTRATIVE RECORD

By fax transmission. Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

By United States mail. I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed below (specify one):

Deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.

Placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Irvine, California.

By personal service. At ____ a.m./p.m., I personally delivered the documents to the persons at the addresses listed below. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an Individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening.

By messenger service. I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed below and providing them to a professional messenger service for service. A Declaration of Messenger is attached.

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By overnight delivery. I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

By e-mail or electronic transmission. Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Brooke Weitzman
William Wise Jr.
Sarah Dawley
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