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THE SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF ORANGE

Emergency Shelter Coalition,
a non-profit organization,

Petitioner,

v.

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

Respondents.

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

Petitioner Emergency Shelter Coalition's Opposition to Motion of Respondents 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

Action Filed: June 28, 2019

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I. Introduction

With a hearing on the merits of this case only three months away, the City of San Clemente (the "City") seeks immediate payment of more than $10,000 in costs for the preparation of a minimal administrative record. The costs would be paid by Petitioner Emergency Shelter Coalition, a non-profit organization which seeks to establish a year-round emergency shelter and resource center in San Clemente. To pay this now would require re-directing the scarce funds that Petitioner committed to that future resource center. Further, the entire motion is mistakenly based on the premise that this case is based on Code of Civil Procedure § 1094.5 when in fact it is based on § 1085.

California statutes do not require the Court to force such a payment. The California Environmental Quality Act (CEQA) specifies in relevant part that "[t]he *parties* shall pay any reasonable costs or fees imposed for the preparation of the record." Pub. Res. Code § 21167.6 (emphasis added). The statute does not single out petitioners or require a court to order payment in advance of a hearing on the merits.

Neither does the case law. The City relies entirely on a few instances in which petitioners who had been already ordered to pay the costs of the record failed to pay, and then failed to file opening briefs, or had their writ denied on the merits. While the decisions do little to illuminate the full procedural posture, they appear to be cases where (1) the city incurred significant costs; (2) the petitioners took no action to move case forward (indicating potentially frivolous cases); or the petitioners' writ was denied on the merits. The cases do not directly address the question of pre-judgment cost shifting. Further, those cases seem to be dependent on claims under Code of Civil Procedure § 1094.5 and not the types of claims brought here. This action is brought under Code of Civil Procedure § 1085. Despite the City's arguments, there is no court order to pay fees here. In fact, the parties stipulated to build time into the briefing schedule to determine this issue.

The City's motion serves no purpose other than an apparent attempt to deny Petitioner access to the Court to litigate a potentially meritorious lawsuit, and to deter any other potential litigant from daring to sue San Clemente. The issue of who should pay costs for the administrative record prepared should be resolved when the prevailing party is determined.

II. The plain language of the relevant statutes dictates that costs shall be paid after determining the prevailing party

Here, Petitioner brings a traditional mandate action under Code of Civil Procedure § 1085. That is not changed by the pleading in the alternative of § 1094.5. The enactment of a zoning ordinance is a quasi-legislative decision. *Corona-Norco Unified School Dist. v. City of Corona*, 17 Cal. App. 4th 985, 992 (1993). Review of a local entity's legislative determination is through ordinary *mandamus* under § 1085. Similarly, review for consistency with a general plan is an ordinary *mandamus* action. *Endangered Habitats League, Inc. v. County of Orange*, 131 Cal. App. 4th 777, 782 (2005).

The City errs when it bases its motion on Code of Civil Procedure § 1094.5(a). However, § 1094.5(a) states: "*[e]xcept when otherwise prescribed by statute*, the costs of preparing the record shall be borne by the petitioner." (emphasis added). And the statute also states that if "the expense of preparing all or any part of the record was borne by the prevailing party, the expense shall be taxable as costs." *Id.* Here, payment is "otherwise prescribed by statute." The administrative record was prepared pursuant to Public Resource Code § 21167.6. That statute states that costs should be paid by "parties" except where prescribed by law. This statutory language indicates that both parties shall pay their own costs. The statute goes on to say that the parties shall pay "in conformance with any law or rule of court." There is no law or rule of court requiring pre-payment of costs related to the administrative record.

III. Even if this case were an action under § 1984.5, the case law does not require a court to order costs be paid before a prevailing party is determined

The City relies almost exclusively on *Black Historical Society v. City of San Diego*, 134 Cal. App. 4th 670 (2006). In that case, the petitioner waited months after filing its petition to request the record; indicated it would apply for a fee waiver but apparently failed to do so; was ordered to file briefing including whether it was a CEQA case; and was ordered to comply with a briefing schedule. After repeatedly failing to take action and ignoring court orders, the Society petitioner ultimately did not file an opening brief and did not appeal the original order to pay the costs, and instead, appealed dismissal of the case. The Court of Appeal court stated: "despite the court order and despite the clear notification that the City would not release the record without

prepayment, [petitioner] never sought a court order requiring the City to release the record without prepayment." *Id.* at 678. The court further noted that the Society petitioner failed "to seek modification of the court's order to permit a waiver of costs or delayed payment." *Id.* The court's statements that the *Society* petitioners did not ask for a waiver of costs indicate that courts indeed have the power to waive such costs. Based on that the *Black Historical Society* court found "no good faith intention to obtain the record, file an opening brief, or pursue the litigation." *Id.* In contrast, here Petitioner asks that all costs be resolved after the prevailing party is determined. The hearing in this case is already set, as is the briefing schedule. Therefore, having the City wait three months for potential reimbursement is hardly a burden on the taxpayer.

The City also relies on *The Otay Ranch, L.P. vs. County of San Diego*, 230 Cal. App. 4th 60 (2014), in which the court ordered reasonable costs be paid after dismissal of the case. The Court of Appeal did not address when costs should be ordered, but focused on what could be included in those costs. There, the City was ordered to prepare a record that spanned over ten years. In cases like *Otay*, where courts ordered payment during or after litigation citing to concerns about burden on taxpayers, the administrative record costs at issue were often over $50,000. These costs included consideration of the environmental impact after many years of investigation and debate. In contrast, even assuming all of the City's sought costs are appropriate (which Petitioner does not concede), the costs at issue are under $11,000 and the case has not been dismissed.

Petitioner agrees that the total administrative record costs are appropriately determined through a memorandum of costs after the case is decided on the merits, as in *Otay*, not before. Like the other cases addressing the issue of cost shifting, *Otay* supports Petitioner's position that appropriate cost should be paid to the prevailing party after determination on the merits.

Finally, the City relies on *Coalition for Adequate Review v. City of San Francisco*, 229 Cal. App. 4th 1043 (2014). Despite the City's arguments, the Coalition court did not directly address whether fees should be taxed just a few months before a hearing on the merits. Rather, the Court of Appeal merely reversed an order refusing to assess costs against a petitioner that had lost its case on the merits. While the Court of Appeal stated that a petitioner can be ordered to pay

interim costs, *id.* at 1053, the court did not suggest that such an order is mandatory. Nor did the Court of Appeal address the appropriateness of issuing such an order just three months before a hearing on the merits.

None of the cases the City cites holds that a court must order immediate payment before the merits of CEQA litigation are resolved, much less a short time before that resolution. All involve costs much greater than are involved here and concern post-litigation fee shifting or dismissal of frivolous cases. Petitioner thus asks the Court to shift these costs based on who is the prevailing party after the hearing on the merits in February.

IV. The Court should defer ruling on the City's motion until after the merits are resolved

Even if the Court does not deny the City's motion outright, the Court should postpone ruling until after resolution of the merits. There can be little doubt that that the Court has the power to defer ruling, as illustrated in *Salehi v. Surfside III Condominium Owners' Assn.*, 200 Cal. App. 4th 1146 (2011). There, when the plaintiff in a suit to enforce condominium covenants dismissed all but two of her causes of action, the defendant moved for attorneys' fees under a statute which provided that in such litigation the "'prevailing party shall be awarded attorney's fees and costs'." *Id.* at 1152. The *Salehi* Court of Appeal held that the defendant was entitled to a fee award, but the court then stated:

> We make one further observation. At no time has [the plaintiff] claimed that the trial court should have awaited outcome of the two remaining causes of action before deciding who was the prevailing party "[i]n [the] action. . . ." We only point out that prudence may dictate that the trial court postpone ruling on an attorney fees request until all causes of action have been resolved.

Id. at 1156.

Prudence dictates a similar course of action here. As in Salehi, Petitioner has multiple causes of action, only one of which (the CEQA claim) is based on an administrative record. Who should be held responsible for which costs should await not just resolution of the CEQA claims

on their merits, but the resolution of all claims.

V. Over $10,000 in preparation for an CEQA exemption case is not reasonable

"'Whether a particular cost to prepare an administrative record was necessary and reasonable is an issue for the sound discretion of the trial court.'" *No Toxic Air, Inc. v. Lehigh Sw. Cement Co.*, 1 Cal. App. 5th 1136, 1140, (2016) (internal citations omitted). And under CEQA, the party preparing the record shall "strive to do so at reasonable cost in light of the scope of the record." Pub. Res. Code § 21167.6(f). Here, the record is minimal. The City did not undertake either an environmental analysis or provide for a public comment period. Instead, the City deemed itself exempt before even telling the public about its planned actions. *See* Petition, ¶¶ 21, 22, and 39. The City deemed itself exempt without applying for a permit or waiver with the Coastal Commission.

Because the City provided no meaningful opportunity for public comment, the record is minimal, consisting primarily of emails and City Council minutes. The City claims it required over 20 hours to compile 41 documents, followed by an additional 25+ hours of compiling those 41 documents. These documents were largely posted on the City website and simply required downloading. Given the minimal record, charging over $10,000 is shockingly excessive. In fact, the request made to Petitioner was for nearly $2,000 less than the request submitted to the Court. *See* Exhibit 8 to Declaration of Alisha Winterswyk in support of motion. The City's claimed costs are unreasonable.

VI. Conclusion

The City errs in asking the Court to act under § 1094.5. However, if the Court found this action did fall under § 1094.5(a), the Court is not required to issue an order for petitioner to pay costs now. Any such order is unnecessary given the speed with which this case is moving forward on the already set briefing schedule. There is no indication that Petitioner's claims are without merit, or that there will be any delays. The Court should award costs after the litigation rather than permit costs to serve as a barrier to the litigation itself. The City's motion should be denied.

Dated: November 12, 2019

Elder Law and Disability Rights Center

Brooke Weitzman
William Wise Jr.
Attorneys for Petitioner
Emergency Shelter Coalition

PROOF OF SERVICE

I, Enia A. Castillo, state:

My business address is 3 Park Plaza, 20th Floor, Irvine, CA 92614-8505. I am over the age of eighteen years and not a party to this action.

On the date set forth below, I served the foregoing document(s) described as:

Petitioner Emergency Shelter Coalition's Opposition to Motion of Respondents for an Order Requiring Petitioner to Pay the Costs that the City of San Clemente Incurred in Preparing the Administrative Record

on the following person(s) in this action:

Please see attached Service List

☐ BY FIRST CLASS MAIL: I am employed in the County of Orange County where the mailing occurred. I enclosed the document(s) identified above in a sealed envelope or package addressed to the person(s) listed above, with postage fully paid. I placed the envelope or package for collection and mailing, following our ordinary business practice. I am readily familiar with this firm'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.

☐ BY MESSENGER SERVICE: I served the document(s) identified above by placing them in an envelope or package addressed to the person(s) listed above and providing them to a professional messenger service for service. A declaration of personal service by the messenger is attached.

☐ BY OVERNIGHT DELIVERY: I enclosed the document(s) identified above in a sealed envelope or package addressed to the person(s) listed above, in an envelope or package designated by the overnight delivery carrier with delivery fees paid or provided for. 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, or by delivering to a courier or driver authorized by the overnight delivery carrier to receive documents.

☐ BY FACSIMILE: Based on an agreement of the parties to accept service by facsimile transmission, I faxed the document(s) identified above to the person(s) at the fax number(s) listed above. The transmission was reported complete and without error. I have attached a copy of the transmission report that was issued by the facsimile machine.

☒ BY ELECTRONIC MAIL: Based on a court order or an agreement of the parties to accept service by electronic mail, I caused the document(s) identified above to be transmitted electronically to the person(s) at the e-mail address(es) listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed on **November 12, 2019**, at Irvine, California.

Enia A. Castillo

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